IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

BETWEEN:

(1) HAMID
(2) GAAFAR
(3) MOHAMMED

Appellants

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

CASE FOR THE INTERVENER

PETITION OF INTERVENTION

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1. INTRODUCTION

1.1. The Intervener is the Office of the United Nations High Commissioner for Refugees (hereinafter 'UNHCR' or 'the High Commissioner').

1.2. The Intervener has neither sought nor been granted leave to intervene on the merits of the present appeal, but solely in respect of the important issues of principle it raises as to the proper interpretation and application of the Convention Relating to the Status of Refugees 1951, as amended by the 1967 Protocol ('the 1951 Convention'), and in respect of the potential impact of these issues on the Intervener in carrying out its statutory functions both in the United Kingdom and globally. The Intervener has been mandated by the General Assembly to provide international protection to refugees under the auspices of the United Nations and, more specifically, is recognised by the High Contracting Parties to the 1951 Convention as having been charged with supervising the operation of the Convention. Reference is made in this connection to the final paragraph of the Preamble to the 1951 Convention, (attached at Tab 1 of the Authorities bundle), to Article 35 of the same Convention, which places an obligation upon Contracting Parties to cooperate with UNHCR in the exercise of its functions – in particular by facilitating the Office's duty to supervise the application of the provisions of the 1951 Convention – and to the Intervener's Statute (attached at Tab 2 of the Authorities bundle). The United Kingdom of Great Britain and Northern Ireland is an original Party to the 1951 Convention.

1.3. In view of its mandate, the Intervener does not presume to comment generally upon the United Kingdom's responsibilities under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. It is also understood by the Intervener that the present appeal does not concern these latter issues.

2. RELEVANT FACTS IN THE CASE

2.1 The Appellants are all Sudanese nationals who have requested permission to remain in this country due to their status as refugees. In each case, the respective adjudicators found that the Appellants faced a risk of persecution in their home area, if they were to be returned to Darfur. In the case of Hamid, the adjudicator found that he 'had suffered persecution by reason of his ethnicity and that he would be at risk of further persecution'; in that of Mohammed, the adjudicator 'accepted that it was too dangerous for [him] to return to Darfur by reason of his race and that if he were returned there he would be persecuted on grounds of ethnicity'; in that of Gaafar, the immigration judge had concerns regarding his credibility, but considering the situation in Darfur, went on to examine the question of internal flight for someone of his ethnicity. In each case, the adjudicator or immigration judge concerned concluded that 'there was not a significant risk of persecution on return to the Khartoum area and it would not be unduly harsh for the respective appellants to relocate there'. (See paragraphs 7–12 and 29 of the Court of Appeal judgment.)

2.2 The Administrative Court recognised that 'the evidence suggests that the State is either involved in or complicit in … persecution' (see the written reasoning of Mr Justice Elias, set out at paragraph 4 of the Court of Appeal judgment) and so referred the case to the Court of Appeal. The Court of Appeal did not question this assessment of the situation in Darfur and found no legal error in the assessment that had been made of each case. Indeed, this finding that the State is either involved or complicit in persecution is supported by the investigations of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur set up by the United Nations Secretary-General, into the situation in Darfur. The most recent monthly report of the UN Secretary-General on Darfur reaffirms this

analysis, referring to the 'Government's continuing failure to protect its own population', to disarm the vast majority of the armed militia or take any 'major steps … to bring justice or even identify any of the militia leaders or perpetrators of attacks' and to its involvement in attacks in Darfur.[1] While the Intervener is aware that Your Lordships will not review the assessment of the situation there, this may nevertheless inform the understanding of the context of their ruling.

2.3 As outlined in greater detail below, the critical question before Your Lordships is twofold, namely

(i) whether internal flight or relocation is relevant; and,

(ii) if found to be so, under which conditions there may be room to question the well-foundedness of the fear of persecution;

in cases where an 'applicant faces a risk of persecution in his home area' in which the State is either involved or complicit, including more specifically, at least in the case of Hamid, in a situation where the applicant has previously experienced persecution himself.

2.4 It is, however, necessary first to examine the key issues of the interpretation of the 1951 Convention and of the definition of the term 'refugee' contained in the Convention. The submission will then go on to set out the Intervener's position on the appropriate approach to assessing situations where the question of internal flight or relocation arises, including in particular the key sets of sequential analyses required as to the relevance and reasonableness of any proposed place of internal relocation.

[1] 'Monthly report of the Secretary-General on Darfur', S/2005/825, 23 December 2005, especially paragraphs 5, 8, 10, 40 (attached at Tab 3 of the Authorities bundle).

3. INTERPRETATION OF THE REFUGE DEFINITION CONTAINED IN THE 1951 CONVENTION

3.1 The issue raised by the appeal is the proper interpretation of the 1951 Convention in circumstances in which it is established that an applicant has a well-founded fear of being persecuted within the meaning of, and for one or more of the reasons specified in, Article 1A(2) of the 1951 Convention, but in which it is nevertheless alleged that that fear relates only to the applicant's place of origin in his or her home country and that there is another specific area of the country where there is no risk of persecution and consequently no well-founded fear of persecution. In the Intervener's submission, the case also raises the issue whether, given the particular circumstances of the case, the individual could reasonably be expected to establish him- or herself in that area and live a normal life.[2]

3.2 This situation is referred to variously in the academic literature and international documents as the 'Internal Flight Alternative', 'Internal Relocation Alternative' or 'Internal Protection Alternative'. For simplicity, the Intervener will adopt the terms 'Internal Flight Alternative' or 'Internal Relocation Alternative' for the purposes of this application as these terms most accurately reflect the Intervener's understanding of the requirements of Article 1A(2) of the 1951 Convention in situations where the persecution claimed arises only in one area of the country of origin.

3.3 Article 1A(2) of the 1951 Convention, as amended by the 1967 Protocol to the Convention, defines a 'refugee' as:

> *'[any person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear,*

[2] See in this respect, UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04, 23 July 2003, paragraph 6 (attached at Tab 10 of the Authorities bundle).

is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it …' (hereinafter 'the Refugee Definition').

3.4 While it is well established that the Refugee Definition must always be taken as a whole and subject to a 'holistic approach',[3] a large volume of jurisprudence revolves around the perceived twin elements of the requirements of a well-founded fear of persecution and the availability or absence of adequate national protection. Such jurisprudence purports to identify difficulties in the application of the Refugee Definition, finding that the relationship between the requirement of the 'two elements' of fear of persecution and the availability of adequate protection is unclear.

3.5 It is respectfully submitted that, in following this line, the need for a 'holistic approach' to the Refugee Definition has been neglected. In particular, rather than first establishing the existence of a well-founded fear of persecution and then separately going on to determine the availability or absence of adequate national protection (in effect, the applicant's inability to avail him- or herself of the protection of his or her country of origin), the analysis should consider the totality of Article 1A(2), which expressly also includes an assessment of the applicant's unwillingness, owing to such fear, to avail him- or herself of the protection of his or her country of origin.

3.6 It follows that the issue as stated above is one of treaty interpretation. In the present case, it entails the identification of the treaty obligations of the United Kingdom. As has been held (correctly, in the Intervener's submission) in *R. v Secretary of State for the Home Department ex parte Adan and Aitseguer* [2001] 2 AC 477 (attached at Tab 15 of the Authorities bundle), this is not a matter of identifying a range of possible meanings that might be given to the 1951 Convention, but rather one of ascertaining

[3] See, UNHCR, ''Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees', April 2001, paragraphs 7–9 (attached at Tab 9 of the Authorities bundle).

its true meaning. It is well established that the decisions of the Courts (notably, in the present case, of the House of Lords as the highest court of appeal in the United Kingdom) will engage the international responsibility of the State (in this case the United Kingdom) in respect of its treaty obligations towards the other Contracting Parties.

4. INTERPRETATION OF THE REFUGEE DEFINITION UNDER INTERNATIONAL LAW

4.1 The Refugee Definition of the 1951 Convention has been incorporated into United Kingdom legislation through section 84(1)(g) of the Nationality, Immigration and Asylum Act 2002, sections 1 and 2 of the Asylum and Immigration Appeals Act 1993 and paragraphs 327, 328 and 334 of the Immigration Rules (HC 395).

4.2 Nevertheless, interpretation of the Refugee Definition is nevertheless governed by international law. It is therefore respectfully submitted that the proper approach towards the question of interpretation is that laid down in Articles 31–33 (attached at Tab 4 of the Authorities bundle) of the Vienna Convention on the Law of Treaties 1969 ('the Vienna Convention'). These require, in essence, that the interpreter look primarily at the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose [Article 31(1)]. The context is to be widely understood [Article 31(2)], and the interpreter will also take into account various other elements, notably for present purposes any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, or any subsequent practice in the application of the treaty which establishes such agreement [Article 31(3)]. It has been held (see notably *R. v Secretary of State for the Home Department ex parte Adan and Aitseguer* [2001] 2

AC 477 (attached at Tab 15 of the Authorities bundle)), that this is the correct approach to be taken by an English Court to the interpretation of the Refugee Definition.

4.3 A particular problem, in the present circumstances, arises from the fact that the Refugee Definition, on its face, does not differentiate between different parts of the territory of the refugee's country of origin, but would appear to regard such territory as an undivided whole. The supposition is therefore that the question of an Internal Flight or Relocation Alternative was not present in the minds either of the negotiators of the original 1951 Convention or of the amendment to Article 1 effected by the 1967 Protocol. The Intervener's parent body (the United Nations) is the repository of the negotiating records of both the original Convention and the Protocol, and the Intervener is able to confirm, after an examination of its archives, that questions of this kind were indeed neither raised nor discussed in the course of either negotiation.

4.4 The Courts are thus faced with the task of giving meaning to the treaty on an issue which the Convention does not explicitly regulate and on which no direct assistance as to the presumed intention of the Parties can be derived from the negotiating history (*travaux préparatoires*). In these circumstances, the correct approach to the interpretation of the relevant provisions of the 1951 Convention becomes a matter of primary significance and one of particular importance to the Intervener in view of the Office's global supervisory role. The decision on this appeal, emanating as it does from the highest appellate instance of one of the founding Parties of the 1951 Convention, on an issue which remains as yet unsettled in international practice, is likely to carry substantial weight as an item of 'subsequent practice' under Article 31(3) of the Vienna Convention (see also Article 38(1)(d) of the Statute of the

International Court of Justice, attached at Tab 5 of the Authorities bundle). The decision is, moreover, likely to have persuasive effect in other jurisdictions, thus magnifying at the same time its practical impact and its influence on the interpretation of the 1951 Convention as a matter of international law.

4.5 It is respectfully submitted that, in undertaking this task, it is important to remember the humanitarian object and purpose of the 1951 Convention. This finds expression, *inter alia*, in the first two recitals of the Preamble to the 1951 Convention[4] and Recommendation E of the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, which adopted the 1951 Convention.[5] It is clear from the terms of the Preamble that the 1951 Convention was envisaged as a human rights instrument directed at a specific and identifiable group of victims of human rights violations and designed to ensure that they obtain the fullest possible enjoyment of their human rights and, most specifically, their right to seek and enjoy asylum (as envisaged by Article 14 of the Universal Declaration of Human Rights – attached at Tab 6 of the Authorities bundle) and their right to non-discrimination (as inherent in Articles 1 and 2 of the Universal Declaration of Human Rights – also attached at Tab 6 of the Authorities Bundle).

4.6 It is further submitted, as a preliminary issue, that a determination by the authorities of a High Contracting Party of an application under the 1951 Convention is not a

[4] These read:

> 'Considering *that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedom without discrimination,*
> Considering *that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms'*.

[5] This reads:

> *'*The Conference, *expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which provides.'*

grant of refugee status. Rather, as paragraph 28 of the UNHCR Handbook[6] affirms: '*Recognition of [someone's] refugee status does not … make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee*.' Such recognition then clarifies vis-à-vis all authorities that the individual concerned is entitled to the status and rights provided in the 1951 Convention, including most particularly protection against *refoulement* as set out in Article 33.

4.7 Confirmation of this proposition can be gained from the recent European Union Council Directive of 29 April 2004 (Council Directive 2004/83/EC *on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (attached at Tab 7 of the Authorities bundle)) notably its preambular paragraph (14), which states that '[t]he recognition of refugee status is a declaratory act'. The Intervener would welcome the reaffirmation of this principle by Your Lordships' House.

4.8 The position set out in the following sections is based in UNHCR position papers and statements in the public domain, as developed in line with the Office's supervisory responsibility under the 1951 Convention (and its 1950 Statute) and deriving from relevant jurisprudence, bearing in mind the object and purpose of the Convention. In order to assist the House in its analysis, the Intervener respectfully tenders, as supplementary materials, three key documents prepared and published by UNHCR headquarters in Geneva:

[6] See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Doc. no. HCR/IP/4/Eng/REV.1, 1979, re-edited January 1992 ('the Handbook') (attached at Tab 8 of the Authorities bundle);

(i) the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,* Doc. no. HCR/IP/4/Eng/REV.1, 1979, re-edited January 1992 ('the Handbook') (attached at Tab 8 of the Authorities bundle);

(ii) a Note entitled *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees* issued by UNHCR's Department of International Protection in April 2001 (attached at Tab 9 of the Authorities bundle); and

(iii) the *Guidelines on International Protection: 'Internal flight or Relocation Alternative' within the Context of Article 1A(2) of the 1951Convention and/or 1967 Protocol relating to the Status of Refugees,* Doc. no. HCR/GIP/03/04 of July 2003 ('the Guidelines') (attached at Tab 10 of the Authorities bundle).

4.9 It is acknowledged that these documents have no special status as elements of treaty interpretation. They are not in themselves, for example, evidence of a subsequent agreement between the High Contracting Parties for the purposes of either limb of Article 31(3) of the Vienna Convention. Their modest pretensions are set out in the concluding paragraphs of the Handbook (paragraphs 220–223) and in the Guidelines (concluding paragraph on the cover page). These documents nonetheless set forth guidance and interpretation compiled by UNHCR, in keeping with its responsibility set out in Article 35 of the 1951 Convention to supervise the application of the provision of the Convention, and from its unique vantage point and experience of the history and practice under the 1951 Convention. They are intended to provide guidance for the desirable development of practice in the area, which the High Commissioner hopes will be treated as authoritative guidance by national authorities and commentators. Such should not only assist in the accurate interpretation of the 1951 Convention but also promote its consistent application worldwide.

4.10 With regard specifically to the Handbook, it is worth noting that this was drafted at the request of the Member States of the Executive Committee of the High Commissioner's Programme, the Office's governing body comprising States including the United Kingdom.[7] The Handbook's authority has been widely recognised. Indeed, the House of Lords itself has described the Handbook as having 'high persuasive authority' in *R. v Secretary of State for the Home Department ex parte Adan and Aitseguer* [2001] 2 AC 477 (attached at Tab 15 of the Authorities bundle).

4.11 With regard to the Guidelines on International Protection, these are issued in the Context of the Agenda for Protection, which was endorsed by the Executive Committee in October 2002 at the end of UNHCR's 2000–2002 Global Consultations on International Protection.[8] The Guidelines are issued pursuant to UNHCR's mandate as contained in the Statute of the Office of the United Nations High Commissioner for Refugees and Article 35 of the 1951 Convention and, as noted on their cover page, 'are intended to provide interpretative legal guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field'.[9]

[7] See Executive Committee Conclusion No. 8 (XXVII), 1977, Determination of Refugee Status, paragraph (g) (attached at Tab 11 of the Authorities bundle).
[8] See Agenda for Protection, UN Doc. A/AC.96/965/Add.I, 26 June 2002, Goal 1, Objective 6 (attached at Tab 12 of the Authorities bundle); Executive Committee Conclusion No. 92 (LIII), 2002, paragraph (a) (attached at Tab 13 of the Authorities bundle).
[9] The Guidelines on International Protection on the question of the Internal Flight or Relocation Alternative resulted, *inter alia*, from a meeting of international legal experts which examined the subject in San Remo, Italy, in September 2001. For further information regarding their status see V. Türk, 'Introductory Note to UNHCR Guidelines on International Protection', *International Journal of Refugee Law*, vol. 15, no. 2, 2003, pp. 303–06 (attached at Tab 14 of the Authorities bundle).

5. RELEVANCE AND REASONABLENESS OF INTERNAL FLIGHT OR RELOCATION

5.1 Turning specifically to the question of Internal Flight or Relocation, the Intervener recognises that jurisprudence in some countries, including that of the United Kingdom, has developed to recognise that an asylum applicant who otherwise fulfils the refugee definition may in certain circumstances have an alternative location within the country of origin where he or she does not face persecution. In other jurisdictions, the concept has not been used, as for instance in Africa.[10] In developing the concept of Internal Flight or Relocation, courts in various jurisdictions have drawn on paragraph 91 of the Handbook, which reads:

> '*The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so*.'

5.2 While courts in various jurisdictions have cited this paragraph as being the origin of the concept of internal flight or relocation, the Intervener respectfully points out that the Office of the High Commissioner had, in issuing the Handbook, no intention of purporting to modify or replace the Refugee Definition itself. Paragraph 91 appears in the Chapter dealing with 'Inclusion Clauses' and follows paragraph 90 which concerns the interpretation of the word 'country' in the Refugee Definition. The Intervener submits that it is plain from this context, and in particular from the placing of paragraph 91, that the intention of the Office was to suggest that, in circumstances such as those described above, the burden on the applicant for asylum of establishing his or her fear of persecution and its well-foundedness does not require him or her to show that this fear would apply equally in all parts of the country of origin. In other

[10] See the Guidelines, paragraph 3.

words, the purpose was to clarify, and indeed constrain, the requirements that would be laid upon applicants for refugee status, not to expand them.

5.3 Before setting out the Intervener's position as regards the analysis in cases where internal relocation is proposed, however, it is necessary to refer to one particular paragraph in the judgment of the Court of Appeal, which appears to misunderstand the issues involved or to mis-state the position in international refugee law. The relevant part of this paragraph reads:

> *'… In most cases where persecution is carried out by state agents it will not be limited to a particular part of the country in question. However, the Guidelines do not specifically address what is in issue in the present case, namely displacement from one part of the country to another. An applicant for asylum has to show a well-founded fear of persecution upon return. However badly he may have been treated in his home area, if there is not a real risk of persecution in the area to which he would be returned, he will not be able to establish a right to refugee status. If the evidence is to the effect that persecution that had occurred in the original home area is not being and will not be continued in the area to which the person would be returned, his claim for refugee status will fail. As we read the UNHCR Guidelines, they focus on the "normal" case in which persecution which emanates from or is condoned or tolerated by state agents is not subject to geographical restriction within the country.' (paragraph 27)*

5.4 It is respectfully submitted that this paragraph appears both to misrepresent the Guidelines and to put forward an interpretation of the 1951 Convention neither supported by its object and purpose nor the jurisprudence. In particular, the phrase 'however badly he may have been treated in his home area' (i) ignores the practice of an increasing number of States to recognise that psychological trauma arising out of past persecution may be a relevant consideration in the context of establishing a well-founded fear of persecution (and the assessment of whether internal relocation is reasonable); (ii) appears to rule out humanitarian considerations which may arise and (iii) appears to dispense with any assessment of reasonableness or even of the more rigorous test of 'undue harshness' of any proposed area of relocation.

5.5 The Intervener would respectfully refer the House to paragraphs 31 and 32 of the Guidelines, which concern relocation and internal displacement. They read:

> 'The presence of internally displaced persons who are receiving international assistance in one part of the country is not in itself conclusive evidence that it is reasonable for the claimant to relocate there. For example, the standard and quality of life of the internally displaced are often insufficient to support a finding that living in the area would be a reasonable alternative to flight. Moreover, where internal displacement is a result of "ethnic cleansing" policies, denying refugee status on the basis of the internal flight or relocation concept could be interpreted as condoning the resulting situation on the ground and therefore raises additional concerns.
>
> The reality is that many thousands of internally displaced persons do not enjoy basic rights and have no opportunity to exercise the right to seek asylum outside their country. Thus, although standards largely agreed by the international community now exist, their implementation is by no means assured in practice. Moreover, the *Guiding Principles on Internal Displacement* specifically affirm in Principle 2(2) that they are not to be interpreted as "restricting, modifying or impairing the provisions of any international human rights or international humanitarian law instrument or rights granted to persons under domestic law" and in particular, they are "without prejudice to the right to seek and enjoy asylum in other countries".'

This has been UNHCR's consistent position, including in current debates with regard to international responsibility for protection of and assistance to internally displaced persons.

5.6 Contrary to the indications by the Court of Appeal, the key issues that arise in this respect are therefore (i) whether and to what extent being subjected to 'ethnic cleansing' amounts to persecution in itself, (ii) whether such intentional displacement constitutes continuing persecution for as long as the victim cannot return to his or her home area, and (iii) to what extent immigration judges may have an obligation to investigate facts and to analyse whether an asylum-seeker has been subjected to 'ethnic cleansing'.

5.7 More generally, the sections which follow seek to clarify the question at issue in order to promote a clearer and more consistent and harmonised application of the Convention, in keeping with the Intervener's supervisory responsibility and the humanitarian object and purpose of the Convention. These sections outline the two-

fold analysis recommended to assess a claim to refugee status, in which a well-founded fear of persecution for a Convention reason has been established in some localised part of the country of origin. As indicated in the Guidelines, this involves first an assessment of the relevance of any proposed internal relocation and, only if this is established, a further assessment of reasonableness of relocation.

Relevance of internal flight or relocation

5.8 As already indicated in paragraph 2.2 above, the assessment that the State was 'either involved in or complicit in ... persecution' in essence raises the critical question of the relevance of internal flight or relocation. As the Court of Appeal noted, citing Mr Justice Elias, who considered the case in the Administrative Court: 'The issue therefore arises whether a relocated person in those circumstances can be required to rely upon the protection from the State that is party to the persecution.' (See Paragraph 4 of the Court of Appeal judgment). It is respectfully submitted that either State involvement or complicity in persecution are sufficient to attribute responsibility to the State.

5.9 It is the Intervener's submission that, while the underlying assessment of refugee status is indeed whether the applicant has a well-founded fear of persecution for a Convention reason, when the issue of an Internal Flight or Relocation Alternative arises, a distinction needs to be made between a situation where the agent of persecution is the State and one where it is a non-State agent. Where a well-founded fear of persecution by the State has been established in a specific part of the country, there is a presumption that the agent of persecution is able to operate country-wide and therefore that the person has a well-founded fear of persecution throughout the country. This rebuttable presumption arises necessarily out of the definition of a

'State' in international law as an entity which, *inter alia*, has an effective government with control over its territory.

5.10 There is nothing in the 1951 Convention that requires an applicant to show a well-founded fear of persecution in <u>all</u> areas of the country. An exception arises <u>only</u> if it is clearly established that the power of the State is limited to a specific geographical area or where the State itself only has control over certain parts of the country so that the area of proposed relocation is beyond reach of the agent of persecution, as is also indicated in paragraph 13 of the Guidelines quoted at paragraph 5.13 below.

5.11 Thus, where the persecution feared emanates from, or is condoned or tolerated by, State agents and where the State authority exercises control over the whole country, internal flight or relocation is normally neither relevant nor applicable. When a well-founded fear of persecution has already been established, it is not negated by delivering the applicant into the hands of the persecutor in another part of the country, and at the same time requiring the applicant to show a well-founded fear of persecution in that area as well. As Lord Hope of Craighead ruled in *Horvath v. Secretary of State for the Home Department,* [2001] AC 489 (attached at Tab 16 of the Authorities bundle) at p 497: 'In a case where the allegation is of persecution by the state or its own agents … [t]here is a clear case for surrogate protection by the international community'.

5.12 Paragraphs 13 and 14 of the Guidelines are particularly relevant in this context:

> *'The need for an analysis of internal relocation only arises where the fear of being persecuted is limited to a specific part of the country, outside of which the feared harm cannot materialise. In practical terms, this normally excludes cases where the feared persecution emanates from or is condoned or tolerated by State agents, including the official party in one-party States, as these are presumed to exercise authority in all parts of the country. Under such circumstances the person is threatened with persecution countrywide unless exceptionally it is clearly established that the risk of persecution stems from an authority of the State whose power is*

clearly limited to a specific geographical area or where the State itself only has control over certain parts of the country.
Where the risk of being persecuted emanates from local or regional bodies, organs or administrations within a State, it will rarely be necessary to consider potential relocation, as it can generally be presumed that such local or regional bodies derive their authority from the State. The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government's failure to counteract the localised harm.' (footnotes omitted)

Reasonableness of internal flight or relocation

5.13 Should a proposed area of internal relocation be found to be relevant, it must also be reasonable in all the circumstances for the applicant to relocate there. It is submitted that the various elements of the 'reasonableness test' outlined in the Guidelines are intended to provide a 'touchstone' by which the reasonableness of any relocation should be assessed.

5.14 The Intervener shares the view that 'reasonableness' is not capable of being judged in the abstract, but requires evaluation on a case by case basis. As paragraph 23 of the Guidelines notes: '… The question is what is reasonable, both subjectively and objectively, given [the circumstances of] the individual claimant and the conditions in the proposed internal flight or relocation alternative.' As both the Guidelines and the United Kingdom courts have recognised, this is a forward-looking assessment, which must necessarily take account of the individual's current personal circumstances, as well as those in the country of origin. The Guidelines go on to identify in paragraphs 24–30 a number of different issues which need to be assessed. These include the applicant's personal circumstances, whether he or she has suffered psychological trauma arising out of past persecution, whether he or she is able to find safety and security and be free from danger or risk of injury, whether respect for basic human rights standards including in particular non-derogable rights is problematic, whether the individual concerned will be able to earn a living or access accommodation or

whether medical care can be provided or is clearly inadequate or whether a relatively normal life can be led in the context of the country concerned.

5.15 Such an assessment involves more than a simple comparison between the circumstances ordinarily prevailing in the area of the country of origin where Appellant has a well-founded fear of persecution and those in the proposed area of relocation. The Intervener agrees with the Court of Appeal in *AE and FE v Secretary of State for the Home Department* [2003] EWCA Civ 1032 (attached at Tab 18 of the Authorities bundle) when it concluded in paragraph 67 that, in as far as the assessment of 'the right to refugee status under the Refugee Convention' is concerned, 'consideration of the reasonableness of internal relocation should focus on the consequences to the asylum seekers of settling in the place of relocation instead of his previous home'. These consequences should, however, be assessed broadly and not simply in relation to a risk of return to persecution. Very seriously, but by no means solely, this involves assessing whether relocation would put the individual at risk of return to the original location in which he or she feared persecution, as could arise in a situation where there is already a significant population of internally displaced persons in the suggested area of relocation.

5.16 In this context it is, once again, important to bear in mind that the interpretation of the 1951 Convention is informed by, and the Convention itself is embedded in, the wider international human rights protection regime as it develops, as well as by humanitarian concerns, which may also be relevant to the grant of humanitarian protection or discretionary leave to remain.

5.17 For these reasons, the Intervener respectfully submits that the Court of Appeal incorrectly formulated the test of reasonableness in this case, *Hamid Gaafar and*

Mohammed v Secretary of State for the Home Department [2005] EWCA CIV 1219 (attached at Tab 17 of the Authorities bundle, see paragraph 34), and also in *AE and FE v Secretary of State for the Home Department* [2003] EWCA Civ 1032 (attached at Tab 18 of the Authorities bundle, see paragraph 64) in viewing the 'unduly harsh' (or reasonableness) test as having been 'extended in practice to have regard to factors which are not relevant to refugee status'. The question was more accurately identified in *R. v Secretary of State for the Home Department ex parte Robinson,* [1998] QB 929 (attached at Tab 19 of the Authorities bundle) at page 940B as being whether the claimant's 'basic civil, political and socio-economic human rights', as expressed in the 1951 Convention and other major human rights instruments, would be protected in the proposed area of relocation.

5.18 This assessment of respect for basic human rights is undertaken in the context of an evaluation of the availability of an alternative area of relocation where a well-founded fear of persecution has already been shown in another part of the country. The human rights element is just one element of the reasonableness test. It does not mean that the deprivation of any civil, political or socio-economic human rights in the proposed area will rule out Internal Flight or Relocation. As the Guidelines note: 'Rather, it requires, from a practical perspective, an assessment of whether the rights that will not be respected or protected are fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative.'

5.19 Indeed, the Intervener respectfully submits that by necessity the assessment of reasonableness includes considerations of respect for the individuals' human rights – just as the courts have confirmed to be the case in the context of the assessment of the

well-founded fear of persecution. The 1951 Convention itself affirms in its preamble that the refugee protection regime is about the 'widest possible exercise' of refugees' 'fundamental rights and freedoms'. The framework of international refugee protection set out in the Convention does not support an approach which would place an individual who had a fear of persecution in one area of the country in another area of that country where his or her fundamental human rights would be violated.

5.20 An asylum claim should not fail only because a claim could also be made for international protection under human rights law; it has to be assessed in its own merits. It is not a claim in respect of a general violation or violations of human rights, but in respect of a specific and well-founded fear of persecution. Removing the human rights element from an assessment of an internal flight or relocation alternative would deprive the concept of a vital component bearing on the reasonableness analysis of such an alternative.

5.21 It is finally submitted that the correctness of this approach to the requirements imposed by the 1951 Convention itself (rather than any domestic statutory formulation of the Refugee Definition), adopted by the Court of Appeal and followed by the courts of numerous Contracting Parties to the 1951 Convention, cannot be dependent upon whether the United Kingdom's obligations under the European Convention on Human Rights had been incorporated into domestic law or not. After all, as the House of Lords confirmed in *R. v Secretary of State for the Home Department ex parte Adan and Aitseguer* [2001] 2 AC 477 (attached at Tab 15 of the Authorities bundle), the role of the Court of Appeal in *Robinson* was not that of identifying a range of possible meanings that might be given to the 1951 Convention, but rather that of ascertaining its true meaning. The conclusion reached by the Court

of Appeal in *Robinson* merely gave effect to the humanitarian object and purpose of the 1951 Convention described at paragraph 5.17 above.

Complementary considerations regarding burden and standard of proof

5.22 The Intervener regards it as well established that the Refugee Definition does not import a rigid system of burden of proof. While it is widely accepted that, in accordance with the broad general principle that he who asserts a fact must demonstrate it, the refugee is expected to show how he falls within the Refugee Definition. Nevertheless the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner (see paragraph 196 of the Handbook). In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Even the examiner's independent research may not always be successful and there may also be statements that are not susceptible of proof. In such cases, the Handbook indicates that, if the applicant's account appears credible, he should be given the benefit of the doubt unless there are good reasons to the contrary.[11] In the Intervener's submission, this is no more than the reflection of the proposition discussed at paragraph 4.6 above, that the determination by the State of refuge is not a grant of status, but the recognition of a pre-existing legal condition.

5.23 The standard of proof for establishing a well-founded fear of persecution has been developed in the jurisprudence of common law jurisdictions. While various formulations have been used, it is clear that the standard required is less than the balance of probabilities required for civil litigation matters. The Handbook indicates at paragraph 45 that an applicant's fear should be considered well-founded if he or she can establish, to a 'reasonable degree', that his or her continued stay in his or her

[11] See also, the Guidelines, paragraph 34.

country of origin has become intolerable to him or her for the reasons stated in the Refugee Definition, or would for the same reasons be intolerable if he or she returned there.

6. SUMMARY OF CONCLUSIONS

6.1 To conclude, the Intervener recalls that the question of the proper application of the Refugee Definition in cases like the present is a question of treaty interpretation and more particularly of the obligations owed by each High Contracting Party to the other High Contracting Parties in the treatment of applications for the recognition of refugee status. The principles applicable to the question of treaty interpretation have been sketched out above and the conclusion put forward that it is imperative that the Refugee Definition be interpreted in such a manner as to take all of its terms together as a whole, taking full account of the circumstances of each individual refugee.

6.2 It has been the consistent position of the Intervener that the Refugee Definition should be interpreted in a holistic manner. The Intervener submits that this is in accordance both with the general rules of treaty interpretation and with the particular object and purpose of the 1951 Convention itself. This is sometimes referred to in the judicial decisions as the 'holistic approach'. The Intervener would welcome a reaffirmation by the House that this constitutes the correct approach to the interpretation of the Refugee Definition. The consequences that follow, in the Intervener's submission, are first, that the Definition must be looked at as a unity and in the context of the terms of the 1951 Convention more generally; and second, that the application of the Definition must always be looked at in the light of the particular circumstances of the individual applicant. The combination of these two elements militates decisively against any mechanistic application of the Refugee Definition to individual cases.

6.3 The Refugee Definition is admittedly a complex text. It is thus only natural to wish to break it down into its constituent elements in the attempt to apply it consistently to the circumstances of particular cases. This process is, however, not without its dangers. It is prone to turn a 'complex text' into a 'compound test'. This risk was recognised by Lord Clyde in *Horvath v. Secretary of State for the Home Department*, [2001] AC 489 (attached at Tab 16 of the Authorities bundle), when he warned against 'detailed analysis of its [the Refugee Definition's] component elements' which 'may distract and divert attention from the essential purpose of what is sought to be achieved' (at page 508D). The Intervener respectfully submits that the House should endorse this view and apply the holistic approach to its interpretation of the Refugee Definition.

6.4 Bringing these elements together, the Intervener submits as follows:-

(1) In situations in which a well-founded fear of persecution for a Convention reason has been established in some localised part of the country of origin, the concept of the Internal Flight or Relocation Alternative can only be considered in the light of, and must be applied in consistency with, the wording as well as with the object and purpose of the 1951 Convention. Any such application must take into account in a holistic manner all elements of the Refugee Definition and in particular the elements of a 'well-founded fear of persecution' and the applicant's being 'unable or owing to such fear ... unwilling to avail himself of the protection' of the country of origin.

(2) As a result, a two-stage, sequential analysis is required when assessing any proposed Internal Flight or Relocation Alternative. This involves first an assessment of the relevance of any proposed Internal Relocation (Sections II A.7.I & II B of the

Guidelines) and, only if this is established, a further assessment of the reasonableness of relocation.

(3) In assessing the relevance/applicability of any proposed internal relocation, a distinction needs to be made between a situation where the agent of persecution is the State and one where it is a non-State agent. Where a well-founded fear of persecution by the State has been established in a specific part of the country, it is submitted that there must be a presumption that the agent of persecution is able to operate country-wide and therefore that the person has a well-founded fear of persecution throughout the country.

(4) This initial relevance test must also include an analysis, as to whether persecution continues, for example, if the consequences of 'ethnic cleansing' measures remain in effect or if harm is perpetuated due to the secondary effects of displacement or psychological trauma.

(5) Only if relevance has been established at the general level, is a 'reasonableness' standard, properly understood, a suitable shorthand description for the proper test of the application of the Internal Flight or Relocation Alternative in individual cases (Sections II A.7.II & II C of the Guidelines). It is, however, no more than a shorthand description and care must be taken in its application. In particular, stated baldly, a 'reasonableness standard' does not identify a simple touchstone against which what is 'reasonable' is to be judged. To put the matter another way, the search should be for what it would <u>now</u> be reasonable to expect the applicant to return to.

(6) In applying both the relevance and reasonableness tests, it is important to bear in mind the humanitarian object and purpose of the 1951 Convention.

(7) In relation to the 'burden of proof' it must be recalled that the need for a holistic understanding of the Refugee Definition does not permit the Refugee Definition to be disaggregated into separate 'well-founded fear of persecution' and 'availability of adequate protection' tests. Consequently, it is incorrect to place upon the applicant a dual burden of proof in respect of both tests, that is, of proving the one and disproving the other. If, in a particular case, the State of refuge is seeking to rely on 'availability of adequate protection' in order to displace 'well-founded fear of persecution', then under normal principles the burden of demonstrating it would lie on that State. The Intervener therefore submits that this is an issue on which a substantial share of the burden of proof rests on the authorities of the State of refuge.

6.5 In conclusion, and, in light of the likely impact of Your Lordships' ruling in this case on the interpretation of the 1951 Convention, not only in the United Kingdom but also in a large number of contracting Parties, the Intervener would welcome Your Lordships' clarification and confirmation that:

(1) the recognition of refugee status is declaratory in nature and the Refugee Definition should be interpreted in a holistic manner;

(2) the Refugee Definition contained in Article 1A(2) of the 1951 Convention is informed by the dynamic development of international law including international human rights law;

(3) a two-stage, sequential analysis (relevance, then reasonableness) is required in cases where the possibility of an Internal Flight or Relocation Alternative is being considered;

(4) there is a presumption where a well-founded fear of persecution by the State has been established, that the agent of persecution is able to operate country-wide, and therefore that the Internal Flight or Relocation Alternative is not normally relevant and thus not applicable;

(5) if the Internal Flight or Relocation analysis is determined to be relevant and applicable, an assessment of the reasonableness of relocation should bear in mind that a well-founded fear of persecution has been determined in the individual case, so that the reasonableness test does not simply involve assessment of human rights considerations but needs to view the latter in the context of the well-founded fear of persecution already determined to exist; and

(6) consideration of the reasonableness of internal relocation should focus on the consequences to the individual asylum-seeker, bearing in mind all of his or her personal circumstances (including past persecution, safety and security concerns), of settling in the place of relocation.

TIM EICKE

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Signed:-

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Dated December 2005

We, Baker & McKenzie LLP of 100 New Bridge Street London EC4V 6JA, agents for the petitioner within-named, hereby certify that on 12 January 2006 we served Messrs White Ryland of 54 Goldhawk Road London W12 2BA, agents for Mohammed, Messrs Noden & Company of 326 Kensal Road London W10 5BZ, agents for Gaafar, Messrs Blakemores of Great Charles Street Queensway Birmingham B3 2AT, agents for Hamid, the within-named appellants and the Treasury Solicitor of One Kemble Street London WC2B 4TS, agent for the Secretary of State for the Home Department, the within-named respondent with a correct copy of the aforegoing petition of intervention and with notice that the petition would be presented to the House of Lords on behalf of the petitioner as soon as conveniently may be.

Signature of agent for petitioner:

Judgment petitioned against: *Hamid, Gaafar and Mohammed v Secretary of State for the Home Department* [2005] EWCA Civ 1219 (CA)
Reported: [2005] EWCA Civ 1219; 2005 WL 2673845
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Headnote: *Immigration - Asylum - Internal relocation - Claimant fleeing persecution in home state and seeking asylum in United Kingdom - Safe haven available in home state - Whether unreasonable or unduly harsh to expect claimant to relocate there - Correct approach to determining reasonableness - Whether denial of human rights in safe haven relevant - Whether refugee status established - Convention and Protocol relating to the Status of Refugees (1951) (Cmd 9171) and (1967) (Cmnd 3906), art 1A(2)*

IN THE HOUSE OF LORDS

ON APPEAL FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

B E T W E E N :

(1) HAMID
(2) GAAFAR
(3) MOHAMMED

Appellants

- v -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
Intervener

CASE FOR THE INTERVENER

PETITION OF INTERVENTION

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