HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 5

on appeal from [2003] EWCA Civ 1188 and [2005] EWCA Civ 1219

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Januzi (FC) (Appellant) *v.* Secretary of State for the Home Department (Respondent)

Hamid (FC) (Appellant) *v.* Secretary of State for the Home Department (Respondent)
Gaafar (FC) (Appellant) *v.* Secretary of State for the Home Department (Respondent)
Mohammed (FC) (Appellant) *v.* Secretary of State for the Home Department (Respondent) (Consolidated Appeals)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hope of Craighead
Lord Carswell
Lord Mance

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Hamid, Gaafar and Mohammed
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Respondents:
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LORD BINGHAM OF CORNHILL

My Lords,

1. In each of the four appeals before the House the appellant is a foreign national who suffered or would suffer persecution for Convention reasons at the place where he lived in the country of his nationality. Each appellant came to the United Kingdom and here claimed asylum as a refugee. In each case recognition as a refugee has been denied on the ground that there is another place ("the place of relocation"), within the country of the appellant's nationality, where he would have no well-founded fear of persecution, where the protection of that country would be available to him and where, in all the circumstances, he could reasonably and without undue harshness be expected to live. The common issue in the appeals is whether, in judging reasonableness and undue harshness in this context, account should be taken of any disparity between the civil, political and socio-economic human rights which the appellant would enjoy under the leading international human rights conventions and covenants and those which he would enjoy at the place of relocation. In the appeals of Messrs Hamid, Gaafar and Mohammed a further issue arises, on the approach to be followed where the persecution suffered or to be suffered was or would be sanctioned or connived at by the authorities of the country of the appellants' nationality. The answer to those questions must be found in the 1951 United Nations Convention relating to the

Status of Refugees, as amended by the 1967 Protocol, and in such exegesis of the Convention as commands clear international acceptance.

2. I am indebted to my noble and learned friend Lord Hope of Craighead, whose comprehensive summary of the facts of the four cases enables me to be very brief on that aspect. Mr Januzi, an Albanian Kosovar, was the victim of ethnic cleansing at Serb hands at his home in Mitrovica in Kosovo. He fled to this country and claimed asylum. This claim was refused on the ground that he could reasonably be expected to relocate to Pristina. He claims, largely for medical reasons associated with his experience of persecution, that it would be unduly harsh to expect him to do so. Messrs Hamid, Gaafar and Mohammed were black Africans living in Darfur in western Sudan. Hamid and Gaafar were the victims of persecution by marauding Arab bands, which the Government encouraged or connived at and did not restrain. Mohammed, it has been found, would suffer such persecution were he to return to Darfur, whence (like Hamid and Gaafar) he fled. They all claimed asylum on arriving here. In each case, recognition as a refugee has been denied on the ground that the appellant could reasonably (and without undue harshness) be expected to relocate to Khartoum. They all fear that they might be the victims of adverse discriminatory treatment, even persecution, in Khartoum, and they contend that relocation there would be unreasonable and unduly harsh.

3. As in so many other cases the crux of the argument is found in the amended definition of a "refugee" in article 1A(2) of the Refugee Convention 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, 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."

The closing words of the definition, applicable to stateless persons, have no immediate application to the appellants, all of whom have a nationality. In each of their cases the relevant persecution is for reasons of ethnicity, which is a reason falling within the Convention.

4. This definition must be read as a whole, in the context of the Convention as a whole, taking account of the Convention's historical setting and its objects and purposes, to be derived from its articles, and also from the recitals of its preamble which are quoted *in extenso* in *R (European Roma Rights Centre and Others) v Immigration Officer at Prague Airport and Another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55, [2005] 2 AC 1, para 6. The Convention must be interpreted as an international instrument, not a domestic statute, in accordance with the rules prescribed in the Vienna Convention on the Law of Treaties. As a human rights instrument the Convention should not be given a narrow or restricted interpretation. Nonetheless, the starting point of the construction exercise must be the text of the Convention itself *(Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305; *Roma Rights* case, above, para 18), because it expresses what the parties to it have agreed. The parties to an international convention are not to be treated as having agreed something they did not agree, unless it is clear by necessary implication from the text or from uniform acceptance by states that they would have agreed or have subsequently done so. The court has "no warrant to give effect to what [states parties] might, or in an ideal world would, have agreed": *Roma Rights* case, above, para 18.

5. The definition of "refugee" quoted above, as it applies to nationals, has three qualifying conditions. The first is, clearly in my opinion, a causative condition which governs all that follows: "owing to well-founded fear of being persecuted for reasons of race … political opinion". The second, indispensable, condition, satisfied by all these appellants, is that the person should be "outside the country of his nationality". The third condition contains an alternative: the person must either be "unable … to avail himself of the protection" of the country of his nationality, or he must be "unwilling", owing to fear of being persecuted for a Convention reason, "to avail himself of the protection" of the country of his nationality.

6. This definition must be read in the light of three familiar and uncontentious but fundamental principles. First, the power to admit, exclude and expel aliens was among the earliest and most widely recognised powers of the sovereign state: see *Roma Rights* case, paras 11-12. Secondly, a person has no right to live elsewhere than in his country of nationality, and has no right to claim asylum: *ibid*. Thirdly, a state has an obligation to protect its nationals within its borders against persecution. The Refugee Convention, the latest in a series of similar instruments, adopted at a time when many people had been driven by persecution to leave their home countries, accepted the need for some

limited relaxation of these principles to recognise the plight of those fleeing from intolerable oppression. But like any international convention it was the product of negotiation and compromise: *Adan v Secretary of State for the Home Department*, above, p 305; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 247-248, 274; *Rodriguez v United States* (1987) 480 US 522, 525-526; *Roma Rights* case, above, para 15.

7. The Refugee Convention does not expressly address the situation at issue in these appeals where, within the country of his nationality, a person has a well-founded fear of persecution at place A, where he lived, but not at place B, where (it is said) he could reasonably be expected to relocate. But the situation may fairly be said to be covered by the causative condition to which reference has been made: for if a person is outside the country of his nationality because he has chosen to leave that country and seek asylum in a foreign country, rather than move to a place of relocation within his own country where he would have no well-founded fear of persecution, where the protection of his country would be available to him and where he could reasonably be expected to relocate, it can properly be said that he is not outside the country of his nationality owing to a well-founded fear of being persecuted for a Convention reason. Although described by a number of different names this relocation alternative has now been recognised for a number of years, at any rate since publication of paragraph 91 of the United Nations *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* in 1979:

> "91. 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."

The corollary of this proposition, as is accepted, is that a person will be excluded from refugee status if under all the circumstances it would be reasonable to expect him to seek refuge in another part of the same country.

8. This reasonableness test of internal relocation was readily and widely accepted. It was applied by the Federal Court of Appeal in Canada in *Rasaratnam v Canada* (*Minister of Employment and Immigration*) [1992] 1 FC 706, 711 and again in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4^{th}) 682. It has been applied in Australia and New Zealand (see paras 9-10 below). It is reflected in rule 343 of the *Statement of Changes in Immigration Rules* (1994) (HC 395), which provides:

> "If there is a part of the country from which the applicant claims to be a refugee in which he would not have a well-founded fear of persecution, and to which it would be reasonable to expect him to go, the application may be refused."

The ground of refusal would be that the person is not, within the Convention definition, a refugee. It is not in contention between the parties that reasonableness is the test to be applied when deciding whether a relocation alternative is open to an applicant for asylum. But the parties are sharply divided on how the test should be applied, and in particular on whether a person can reasonably be expected to relocate when the level of civil, political and socio-economic human rights in the place of relocation is poor. The appellants submit that he cannot.

9. The appellants found their submission on a passage in Professor Hathaway's respected work *The Law of Refugee Status* (1991), p 134, where he speaks, as many authorities do, of "internal protection" to describe what I am calling "internal relocation":

> "The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."

This passage was quoted by Keith J for the New Zealand Court of Appeal in *Butler v Attorney-General* [1999] NZAR 205, para 32, who went on to hold in para 50 that

> "*meaningful* national state protection which can be *genuinely accessed* requires provision of basic norms of civil, political and socio-economic rights".

In *Refugee Appeal No 71684/99* [2000] INLR 165, the Refugee Status Appeals Authority of New Zealand, while acknowledging in para 57 "that no uniform and ascertainable standard of rights for refugees has emerged on which States parties to the Refugee Convention are agreed", carried the Court of Appeal's approach a further step. Having made reference to some of the rights which member states bind themselves to extend to those accepted as refugees, they continued in paras 60-61:

> "[60] …The view we have taken is that the appropriate minimal standard of effective protection for the purposes of Art 1A(2) of the Refugee Convention is the standard of human rights set by the Refugee Convention itself, ie, the rights owed by State parties to persons who are refugees.
>
> [61] In essence, our reasoning is as follows. Because under New Zealand law the issue of internal protection does not arise unless and until a determination is made that the refugee claimant holds a well-founded fear of persecution for a Convention reason, the inquiry into internal protection is really an inquiry into whether a person who satisfies the Refugee Convention and who is prima facie a refugee – at least in relation to an identified part of the country of origin – should lose that status by the application of the internal protection principle. There is considerable force to the logic that that putative refugee status should only be lost if the individual can access in his or her own country of origin the same level of protection that he or she would be entitled to under the Refugee Convention in one of the State parties to the Convention. Clearly some State parties will accord to refugees a greater range of human rights and freedoms than the minimal standards prescribed by the Refugee Convention. Other States will barely be able to satisfy the Convention standards. But the Refugee Convention itself sets the minimum standard of human rights which the international community has agreed should be accorded to individuals

> who meet the Refugee Convention. The 'loss' of refugee status by the application of the internal protection principle should only occur where, in the site of the internal protection, this minimum standard is met."

10. This New Zealand authority is perhaps the high water mark of the appellants' case. But they gain assistance from a similar line of authority in Australia. In *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 the Federal Court of Australia cited Professor Hathaway's observations quoted above with approval: see Black CJ, p 442; Beaumont J, pp 450 - 451. The passage was also cited by Moore J in the same court in *Perampalam v Minister for Immigration & Multicultural Affairs* [1999] FCA 165; (1999) 84 FCR 274, 288. In *Al-Amidi v Minister for Immigration & Multicultural Affairs* [2000] FCA 1081; (2000) 177 ALR 506, 510, it was stressed, citing Professor Hathaway, that "there must be satisfaction of the basic norms of civil, political and socio-economic human rights in that relocation".

11. The appellants place particular reliance on a passage in the judgment of the Court of Appeal of England and Wales in *R v Secretary of State for the Home Department, Ex p Robinson* [1998] QB 929, 939-940, where the court said:

> "In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination. In the *Thirunavukkarasu* case, 109 D.L.R.

(4th) 682, 687, Linden J A, giving the judgment of the Federal Court of Canada, said:

> 'Stated another way for clarity … would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?'

He went on to observe that while claimants should not be compelled to cross battle lines or hide out in an isolated region of their country, like a cave in the mountains, a desert or jungle, it will not be enough for them to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there."

The court's approach to test (d) has not been found to be wholly clear (see H Storey, "The Internal Flight Alternative Test: The Jurisprudence Re-examined," (1998) 10 International Journal of Refugee Law, 499, 529), and when one of the authors of the *Robinson* judgment came to summarise its effect in *Karanakaran v Secretary of State for the Home Department* [2000] 3 All ER 449, 470 he made no reference to the level of civil, political and socio-economic human rights in the place of relocation. But on its face *Robinson* appears to lend support to the appellants' argument. Support is also derived from the conclusions of the expert roundtable organised by the UN High Commissioner for Refugees and the International Institute of Humanitarian Law in San Remo in September 2001: the level of respect for human rights in the proposed place of relocation was in their opinion relevant to an assessment of its availability.

12. Canadian authority reveals a somewhat different approach. In *Thirunavukkarasu v Minister of Employment and Immigration*, above, Professor Hathaway's observations already quoted were cited and described as helpful, but were held not quite to achieve "the appropriate balance between the purposes of international protection for refugees and the availability of an internal [relocation] alternative": p 687. In a passage of Linden JA's judgment which has been much quoted (as, briefly, by the Court of Appeal in *Robinson*), it was held at pp 687-688, using the expression "IFA" to mean what I have called the "relocation alternative":

> "Thus, IFA must be sought, if it is not unreasonable to do so, in the circumstances of the individual claimant. This

test is a flexible one, that takes into account the particular situation of the claimant and the particular country involved. This is an objective test and the onus of proof rests on the claimant on this issue, just as it does with all the other aspects of a refugee claim. Consequently, if there is a safe haven for claimants in their own country, where they would be free of persecution, they are expected to avail themselves of it unless they can show that it is objectively unreasonable for them to do so.

Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?

An IFA cannot be speculative or theoretical only, it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.

> In conclusion, it is not a matter of a claimant's convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around the world to seek a safe haven in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of 'Convention refugee'. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country."

In *Ranganathan v Canada* (*Minister of Citizenship and Immigration*) [2001] 2 FC 164, the Federal Court of Appeal (per Létourneau JA, with the assent of his colleagues) said, with reference to *Thirunavukkarasu*:

> "We read the decision of Linden JA for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.
>
> There are at least two reasons why it is important not to lower that threshold. First, as this Court said in *Thirunavukkarasu*, the definition of refugee under the Convention 'requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country'. Put another way, what makes a person a refugee under the Convention is his fear of persecution by his home country in any part of that country. To expand and lower the standard for assessing reasonableness of the IFA is to fundamentally denature the definition of refugee: one

> becomes a refugee who has no fear of persecution and who would be better off in Canada physically, economically and emotionally than in a safe place in his own country.
>
> Second, it creates confusion by blurring the distinction between refugee claims and humanitarian and compassionate applications. These are two procedures governed by different objectives and considerations…"

13. In England and Wales, the Court of Appeal in *E and another v Secretary of State for the Home Department* [2003] EWCA 1032, [2004] QB 531 declined to adopt what may, without disrespect, be called the Hathaway/New Zealand rule. It was argued for the appellants in that case (see para 16 of the judgment of the court given by Lord Phillips of Worth Matravers MR) that

> "the 'unduly harsh' test is the means of determining whether an asylum seeker is '*unable to avail himself of the protection of*' the country of his nationality. The *protection* in question is not simply protection against persecution. It is a level of protection that secures, for the person relocating, those benefits which member states have agreed to secure for refugees under articles 2 to 30 of the Refugee Convention."

In paragraphs 23-24 of its judgment the court said

> "23. Relocation in a safe haven will not provide an alternative to seeking refuge outside the country of nationality if, albeit that there is no risk of persecution in the safe haven, other factors exist which make it unreasonable to expect the person fearing persecution to take refuge there. Living conditions in the safe haven may be attendant with dangers or vicissitudes which pose a threat which is as great or greater than the risk of persecution in the place of habitual residence. One cannot reasonably expect a city dweller to go to live in a desert in order to escape the risk of persecution. Where the safe haven is not a viable or realistic alternative to the place where persecution is feared, one can properly say that a refugee who has fled to another country is 'outside the

country of his nationality by reason of a well-founded fear of persecution'.

24. If this approach is adopted to the possibility of internal relocation, the 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."

The court cited Professor Hathaway's observations quoted above, and also a passage in Professor Goodwin-Gill's work on *The Refugee in International Law*, 2nd ed (1996), p 74, and continued in paragraph 38:

"38 We make the following observation on these passages. The failure to provide (as opposed to a discriminatory denial of) the 'basic norms of civil, political, and socio-economic human rights' does not constitute persecution under the Refugee Convention. An asylum seeker who has no well-founded fear of persecution but has left his home country because he does not there enjoy those rights, will not be entitled to refugee status. When considering whether it is reasonable for an asylum seeker to relocate in a safe haven, in the sole context of considering whether he enjoys refugee status, we cannot see how the fact that he will not there enjoy the basic norms of civil, political and socio-economic human rights will normally be relevant. If that is the position in the safe haven, it is likely to be the position throughout the country. In such circumstances it will be a neutral factor when considering whether it is reasonable for him to move from the place where persecution is feared to the safe haven. States may choose to permit to remain, rather than to send home, those whose countries do not afford these rights. If they do so, it seems to us that the reason should be recognised as humanity or, if it be the case, the obligations of the Human Rights Convention and not the obligations of the Refugee Convention."

The court considered the leading authorities in Canada, New Zealand and this country (including *Robinson*, which it declined to follow on somewhat questionable grounds: para 66), but was not persuaded to a different view. It concluded, in paragraph 67:

> "67. It seems to us important that the consideration of immigration applications and appeals should distinguish clearly between (1) the right to refugee status under the Refugee Convention, (2) the right to remain by reason of rights under the Human Rights Convention and (3) considerations which may be relevant to the grant of leave to remain for humanitarian reasons. So far as the first is concerned, we consider that consideration of the reasonableness of internal relocation should focus on the consequences to the asylum seeker of settling in the place of relocation instead of his previous home. The comparison between the asylum seeker's situation in this country and what it will be in the place of relocation is not relevant for this purpose, though it may be very relevant when considering the impact of the Human Rights Convention or the requirements of humanity."

14. The Court of Appeal's approach in *E* does not reflect, but nor does it contradict, a consensus of expert international opinion. The Michigan Guidelines treat the condition of compliance with widely recognised international human rights in the place of relocation as one for which "Good reasons may be advanced": Hathaway, "International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative", 1999, para 21. In a paper prepared in 2001 for the San Remo roundtable, Hathaway and Foster ("Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination", p 43) point out that "The minimum acceptable level of legal rights inherent in the notion of 'protection' is certainly open to debate". The contributors to *Refugee Protection in International Law*, ed Feller, Türk and Nicholson, (2003) acknowledge that there are differing approaches to this matter: see, for example, pp 23-28, 405-411.

15. There are, in my opinion, a number of reasons why the broad approach of the Court of Appeal in *E* must be preferred to the Hathaway/New Zealand rule. First, there is nothing in any article of the Convention from which that rule may by any process of interpretation be derived. The Convention is addressed to the rights in the country of asylum of those recognised as refugees. It is not explicitly directed to

defining the rights in the country of their nationality of claimants for asylum who may be able to relocate within that country in a place where they will have no well-founded fear of persecution.

16. Secondly, acceptance of that rule cannot properly be implied into the Convention. It is of course true, as the appellants emphasise, that the preamble to the Convention invokes the Charter of the United Nations and the Universal Declaration of Human Rights, and seeks to assure refugees the widest possible exercise of the fundamental rights and freedoms affirmed in those documents. But the thrust of the Convention is to ensure the fair and equal treatment of refugees in countries of asylum, so as to provide effective protection against persecution for Convention reasons. It was not directed (persecution apart) to the level of rights prevailing in the country of nationality. The article on refugees in the Universal Declaration was authoritatively criticised in 1948 as "artificial to the point of flippancy" (see *Roma Rights* case, above, para 14), and influential though the Declaration has been it lacked any means of enforcement. The International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966, compendiously referred to as "the International Bill of Rights", are in truth not such, and had yet to be adopted when the Convention was made.

17. Thirdly, this rule is not expressed in Council Directive 2004/83/EC of 29 April 2004 (OJ L 304.12) 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". This is an important instrument, because it is binding on member states of the European Union who could not, consistently with their obligations under the Convention, have bound themselves to observe a standard lower than it required. Article 8 provides in paragraphs 1 and 2:

> "*Internal protection*
>
> 1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
>
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at

> the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant."

This imposes a standard significantly lower than the rule would require.

18. Fourthly, as appears from the sources cited above, the rule is not, currently, supported by such uniformity of international practice based on legal obligation and such consensus of professional and academic opinion as would be necessary to establish a rule of customary international law: *Roma Rights* case, above, para 23.

19. Fifthly, adoption of the rule would give the Convention an effect which is not only unintended but also anomalous in its consequences. Suppose a person is subject to persecution for Convention reasons in the country of his nationality. It is a poor country. Standards of social provision are low. There is a high level of deprivation and want. Respect for human rights is scant. He escapes to a rich country where, if recognised as a refugee, he would enjoy all the rights guaranteed to refugees in that country. He could, with no fear of persecution, live elsewhere in his country of nationality, but would there suffer all the drawbacks of living in a poor and backward country. It would be strange if the accident of persecution were to entitle him to escape, not only from that persecution, but from the deprivation to which his home country is subject. It would, of course, be different if the lack of respect for human rights posed threats to his life or exposed him to the risk of inhuman or degrading treatment or punishment.

20. I would accordingly reject the appellants' challenge to the authority of *E* and dismiss all four appeals so far as they rest on that ground. It is, however, important, given the immense significance of the decisions they have to make, that decision-makers should have some guidance on the approach to reasonableness and undue harshness in this context. Valuable guidance is found in the UNHCR *Guidelines on International Protection* of 23 July 2003. In paragraph 7 II(a) the reasonableness analysis is approached by asking "Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?" and the comment is made: "If not, it would not be reasonable to expect the person to move there". In development of this analysis the guidelines address respect for human rights in paragraph 28:

"*Respect for human rights*

Where respect for basic human rights standards, including in particular non-derogable rights, is clearly problematic, the proposed area cannot be considered a reasonable alternative. This does not mean that the deprivation of any civil, political or socio-economic human right in the proposed area will disqualify it from being an internal flight or relocation alternative. 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."

They then address economic survival in paragraphs 29-30:

"*Economic survival*

The socio-economic conditions in the proposed area will be relevant in this part of the analysis. If the situation is such that the claimant will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence. At the other end of the spectrum, a simple lowering of living standards or worsening of economic status may not be sufficient to reject a proposed area as unreasonable. Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned. If, for instance, an individual would be without family links and unable to benefit from an informal social safety net, relocation may not be reasonable, unless the person would otherwise be able to sustain a relatively normal life at more than just a minimum subsistence level.

If the person would be denied access to land, resources and protection in the proposed area because he or she does not belong to the dominant clan, tribe, ethnic, religious and/or cultural group, relocation there would not be reasonable. For example, in many parts of Africa, Asia and elsewhere, common ethnic, tribal, religious and/or

> cultural factors enable access to land, resources and protection. In such situations, it would not be reasonable to expect someone who does not belong to the dominant group, to take up residence there. A person should also not be required to relocate to areas, such as the slums of an urban area, where they would be required to live in conditions of severe hardship."

These guidelines are, I think, helpful, concentrating attention as they do on the standards prevailing generally in the country of nationality. Helpful also is a passage on socio-economic factors in Storey, *op cit*, p 516 (footnotes omitted):

> "Bearing in mind the frequency with which decision-makers suspect certain asylum seekers to be simply economic migrants, it is useful to examine the relevance to IFA claims of socio-economic factors. Again, terminology differs widely, but there seems to be broad agreement that if life for the individual claimant in an IFA would involve economic annihilation, utter destitution or existence below a bare subsistence level (*Existenzminimum*) or deny 'decent means of subsistence' that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not. What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth). Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance from abroad, whether from relatives, friends or even governmental or non-governmental sources, cannot be excluded."

21. In arguing, on behalf of Messrs Hamid, Gaafar and Mohammed, that internal relocation is never an available option where persecution is by the authorities of the country of nationality, Mr Gill QC gains support from the conclusions of the San Remo experts in 2001. They considered that where the risk of being persecuted emanates from the State (including the national government and its agents) internal

relocation "is not normally a relevant consideration as it can be presumed that the State is entitled to act throughout the country of origin". The UNHCR Guidelines of July 2003 similarly observe (para 7 I(b)):

> "National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available."

There can, however, be no absolute rule and it is, in my opinion, preferable to avoid the language of presumption. 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. The source of the persecution giving rise to the claimant's well-founded fear in his place of ordinary domicile may be agents of the state authorised or directed by the state to persecute; or they may be agents of the state whose persecution is connived at or tolerated by the state, or not restrained by the state; or the persecution may be by those who are not agents of the state, but whom the state does not or cannot control. These sources of persecution may, of course, overlap, and it may on the facts be hard to identify the source of the persecution complained of or feared. There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department* [2002] EWCA Civ 74 [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. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly vulnerable in another place within the state. The converse may also be true. All must depend on a fair assessment of the relevant facts.

Disposal

22. Applying the principles outlined in this opinion, and for reasons more fully given by Lord Hope, I would dismiss Mr Januzi's appeal. I would allow the appeals of Messrs Hamid, Gaafar and Mohammed, and remit their cases to the Asylum and Immigration Tribunal. I would

invite written submissions on the costs of these proceedings within 14 days.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

23. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons he gives, with which I fully agree, I too would make the order he proposes.

LORD HOPE OF CRAIGHEAD

My Lords,

24. The question in these appeals arises under article 1A(2) of the 1951 Geneva Convention Relating to the Status of Refugees as amended by the 1967 Protocol ("the Refugee Convention"). It relates to the approach that is to be taken to the claim to refugee status by an applicant who has a well-founded fear of persecution for a Convention reason in one part of the country to which it is proposed to return him and there is another part of the country ("the place of relocation", as my noble and learned friend Lord Bingham of Cornhill has described it) where there is no such well-founded fear. The question in each case is whether it is unreasonable, in the sense that it would be unduly harsh, for the applicant to be expected to relocate internally within that country. That in its turn raises the question as to the tests that are to be applied in order to determine whether in the appellants' cases that alternative is available.

25. The appellant Mr Januzi is an ethnic Albanian from Kosovo. The appellants Messrs Hamid, Gaafa and Mohammed are all black Africans from the Darfur region in Sudan. One issue is common to all these appeals, as Lord Bingham has explained. This is whether the quality of life in the place of relocation must meet the basic norms of civil, political and socio-economic rights before relocation there can be said to be reasonable. The appeals of Messrs Hamid, Gaafar and Mohammed

raise an additional question about the approach that is to be taken to this issue where the persecution of which the person has a well-founded fear for a Convention reason in the country of his nationality has been sanctioned or connived in by the State or by its agents.

26. During the course of the hearing before your Lordships the Secretary of State indicated that he was willing to agree to the cases of Mr Hamid and Mr Gaafar being remitted to the Asylum and Immigration Tribunal on the ground that the determinations in these cases were inadequately reasoned. He did not agree to Mr Mohammed's case being remitted, and the facts in the cases of Mr Hamid and Mr Gaafar form part of the broader picture in the light of which the questions of law raised by all these cases must be considered. So I shall give a brief account of the facts of each of them before dealing with the points of law which they have raised.

Mr Januzi's case

27. Gzim Januzi is an ethnic Albanian from the Kosovo province of the Federal Republic of Yugoslavia. He was born in the village of Mazhiq, near Mitrovica, on 6 May 1977. This is an area of Kosovo in which persons of Albanian extraction are in the minority. He is the eldest of five children. His family had land and livestock, from which they earned a livelihood. In the late 1980s and throughout the 1990s the Serbian government in Belgrade instituted a systematic policy of Serb domination of Serbia and Montenegro and Serbianisation of the ethnic Albanian enclave of Kosovo. In *Gashi and Nikshiqi v Secretary of State for the Home Department* [1997] INLR 96 the Immigration Appeal Tribunal held that there was in place within the Federal Republic of Yugoslavia a policy of ethnic cleansing against Albanians by Serbs. For a period from July 1996 it was accepted by the Secretary of State that asylum seekers who were accepted as being ethnic Albanians from that country were entitled to refugee status. In March 1999 international peace-keeping forces intervened in Kosovo. By June of that year the province had been brought under control. Thereafter large numbers of ethnic Albanian refugees returned to Kosovo.

28. Mr Januzi's family, like most Albanian families in the area, experienced the severe effects of the ethnic cleansing policy. His father was a member of the Democratic League of Kosovo ("the LDK"), a political party seeking to advance the rights of the ethnic Albanian population in Kosovo. He himself was a supporter, but not a member,

of that party and attended demonstrations in Pristina and Mitrovica. His father was imprisoned by the Serbian authorities for his activities in support of the LDK, and he himself was detained by them on three occasions during the 1990s. He claimed in his asylum statement that on each of these occasions he was ill-treated by the Serbian police when he was in their custody. He was sent abroad for safety during a period of intensive and increasing persecution in 1998 of the Albanian minority. He reached the United Kingdom and applied for asylum on his arrival here on 17 May 1998.

29. The Secretary of State accepted in his decision letter that Mr Januzi came from a majority Serb area of Kosovo and that, as an ethnic Albanian, he was at risk of being exposed to persecution there from which he would not be protected by the authorities. His position however was that Mr Januzi would not be at risk from Serbs in many other parts of the province, as 95% of the population of Kosovo was Albanian. About 90% of the ethnic Albanians who had fled Kosovo in 1998 and 1999 had already returned to the province voluntarily. His argument was that Mr Januzi would be safe if he went, for instance, to Pristina, which is about 35 km from his home town of Mitrovica and in an area of Kosovo where ethnic Albanians are in the majority. He said in his decision letter that he considered that, as Mr Januzi was a single man in good health, it would not be unduly harsh to expect him to relocate to one of the many municipalities where very few Serbs were present. Mr Januzi's appeal to the adjudicator was allowed. In the Secretary of State's appeal to the Immigration Appeal Tribunal ("the tribunal") Mr Januzi claimed that relocation would not be a reasonable alternative in his case and that he should be accorded refugee status in this country.

30. Mr Januzi's case before the tribunal, as it had been before the adjudicator, was based on a medical report prepared by Dr James Barrett, a consultant psychiatrist with West London Mental Health NHS Trust and an honorary clinical senior lecturer at the Imperial College of Science and Medicine. He described the effect on Mr Januzi's mental health were he to be returned to Kosovo. He had examined him in November 2001 at Charing Cross Hospital. In his opinion Mr Januzi was currently suffering from a moderate depressive episode with somatic symptoms for which he required treatment, the causes of which in his opinion were psychological. He said that returning to Kosovo would be a negative step, as he had had the symptoms for more than a year. They were liable to become chronic and to worsen by a return to the precipitating environment. In a supplementary report he said that there would be a strong risk of his developing more symptoms of

depression which in due course would become severe, with a strong risk of death by self-neglect or suicide. In a letter which he wrote after the hearing he made it clear that these comments had been written on the assumption that Mr Januzi might be returned to anywhere in Kosovo, as he knew of no reason why Mitrovica should be particularly different from anywhere else in Kosovo.

31. The tribunal had before it a paper issued by the United Nations High Commissioner for Refugees (UNHCR) in March 2001 stating her position on the continued protection needs of individuals from Kosovo. In this paper it is stated that UNHCR considers that some vulnerable people may deserve exemption from forced return on humanitarian grounds (not, it should be noted, on the ground that this would be a breach of the Refugee Convention) until special and co-ordinated arrangements could be made to facilitate this. Among these groups are chronically ill persons whose condition requires specialised medical intervention of the type not yet available in Kosovo. Access to medical treatment by internally displaced persons is limited for anything beyond basic or emergency medical services by the fact that payment is required at the time of treatment. In a United Nations briefing note on the repatriation of Kosovar Albanians issued in April 2001 it was stated that psychiatric services in Kosovo are very limited. There is an almost total lack of community services, the ratio of psychiatrists is one for every 100,000 inhabitants, clinical psychologists are almost non-existent and few psychiatrists have been trained in psychotherapy. The province does not possess any facilities for treating either acute mental health cases or persons who need to be detained or forcibly medicated for mental health reasons.

32. On the other hand in a municipal profile of the municipality of Pristina prepared by the Organisation for Security and Co-operation in Europe's Mission in Kosovo (OSCE) in July 2000 it is stated that Pristina hosts the largest hospital in Kosovo which is currently under international management, and that the neuro-psychiatry department of the clinical centre of the University of Pristina has 144 employees. An assessment of the situation of ethnic minorities in Kosovo during the period from October 2000 to February 2001 which was prepared jointly by UNHCR and OSCE and issued in March 2001 refers to intensive efforts on the part of the international community to service the needs of Kosovo Albanians. It appears from this report that it is Kosovo Serbs who continue to experience the most acute problems in accessing health care at all levels.

33. On 12 July 2002 the tribunal issued their determination. In para 16 of the determination they said that, while it would be difficult for Mr Januzi to readjust to life in Kosovo, they were not satisfied that it would be unduly harsh for him to be returned to Pristina. They found that there were facilities available for treatment there which were adequate for him, and they were not satisfied on the evidence that his return to Kosovo would precipitate a deterioration in his condition. They took into account the fact that many thousands of Kosovans had returned and that GPs in the area would be familiar with dealing with problems of returnees who would have faced ill-treatment at the hands of the Serbs. They were not satisfied that he could not receive appropriate counselling or that adequate medication would not be available for him. Although he might be isolated in Pristina, there would be many individuals there in circumstances like his. The Secretary of State's appeal against the determination of the adjudicator was allowed.

34. On 24 July 2003 the Court of Appeal (Aldous, Buxton and May LJJ) held, in agreement with the tribunal, that there were no grounds for relief under the Refugee Convention: [2003] EWCA Civ 1188, para 30. But they remitted the case to the Tribunal for further consideration of the question whether Mr Januzi's rights under article 8 of the European Convention on Human Rights would be violated by his return to Kosovo.

The cases of Messrs Hamid, Gaafar and Mohammed

(a) Mr Hamid

35. Abdoulazaz Hamid is a citizen of Sudan. He was born on 1 July 1972. He seeks asylum on the ground that he has a well-founded fear for reasons of race. He claims that he is a member of the Zaghawa tribe from the village of Oro in west Darfur. He says that in November 2003 his village was attacked by the Janjaweed militia. His father and brother were killed in this attack. He and his mother went to stay with his uncle in the village of Taweela. But in October 2004 this village too was attacked by the Janjaweed and his mother was killed. He then went to the village of Al Shyria where he met an agent who arranged for him to leave the country, which he did in October 2004. He reached the United Kingdom and claimed asylum on his arrival here on 22 November 2004.

36. The Secretary of State resisted Mr Hamid's claim by letter dated 19 January 2005 on the ground that the responses he gave to questions when he was interviewed indicated to the asylum caseworker that his account of his place of origin was not genuine. The caseworker did not believe that Mr Hamid was from Darfur. So she did not accept that he would be at risk of being killed or subjected to any other ill-treatment if he returned to Sudan. She held that he did not have a well-founded fear of persecution in Sudan on the grounds of his race.

37. Mr Hamid's case was reconsidered by an adjudicator on 16 March 2005. She accepted his account of his origins and background and of what had happened to him in Sudan. She concluded that he had established that he had suffered persecution because of his ethnicity and that he would be at risk if he were to return to his home area. But she said that if he were to be returned to Sudan he would arrive at Khartoum. In her opinion he could remain there, as this was an area of his country where he would not have a well-founded fear of persecution. In reaching this decision she followed the reasoning of the Immigration Appeal Tribunal in *MM (Zaghawa - Risk on Return – internal Flight) (Sudan)* [2005] UKIAT 00069. She relied on the fact that he had no history of political involvement and was not a student. She said that, given the numbers of displaced people in Khartoum and their diverse ethnicity, there was no reason to think that he would be treated with suspicion and prejudice by the local security forces and there was no real likelihood of a risk of persecution or of treatment contrary to article 3 of the European Convention on Human Rights. She accepted that he had lost his family in Darfur and had had to flee the Janjaweed. But there was no evidence that he faced any health issues and, as he was aged 32, he was neither very young nor old. So, while it might well be difficult and even harsh for him to relocate in Sudan, it would not be unduly harsh for him to do so in the circumstances. His appeal to the Asylum and Immigration Tribunal was rejected by the immigration judge.

(b) Mr Gaafar

38. Ibrahim Mohammed Gaafar too is a citizen of Sudan. He was born on 13 January 1973 and is a member of the black African muslim Al Berget tribe. He seeks asylum on the ground that he has a well-founded fear on grounds of race and because of his family's links with the Sudanese Liberation Movement ("the SLM"). His home village of Tawila is in north Darfur. On 7 March 2004 it was attacked during the night by the Janjaweed militia. Three people in his village were killed

and many were injured. Crops and property were destroyed or stolen, some of the dwellings were burned down and his own home was looted. His village was attacked again by the Janjaweed militia during the night of 22 November 2004. They began looting property and killing people at random, so he fled from the village with other members of his family. On 27 November he heard that security agents had arrested his father and brother from their home in Sawar near Al Fashir in north Darfur to which they had moved after the attack on 22 November 2004. He was told that the security agents believed that they and the appellant had links with and were supplying weapons to the SLM. His uncle warned him that the security agents were looking for him too. He went into hiding, and was taken to the city of Al Kofra from where he travelled to the United Kingdom. He arrived here on 9 December 2004 and claimed asylum the next day.

39. The Secretary of State refused Mr Gaafar's claim by letter dated 27 January 2005. But there was no challenge in the refusal letter to the account that he had given of his ethnicity and tribal membership. His case was reconsidered by an immigration judge on 13 April 2005. She found that he was a displaced black African who had fled internally within north Darfur. But she rejected his account of what had taken place with regard to his father and brother, and she did not accept his claimed fear of return on the basis of political or imputed belief associated with his family. This left his fear of return on the basis of the treatment by the State of members of a black sedentary tribal minority, assuming that he was someone who had no political profile.

40. Having reviewed the Secretary of State's decision in the light of *AB (return of Southern Sudanese) Sudan CG* [2004] UKIAT 00260, the immigration judge concluded that, as a minority African tribe member, Mr Gaafar could be returned as an internally displaced person to live in a camp in or near Khartoum without any real risk of treatment of a severity that would breach article 3 of the European Convention. She accepted that Sudanese of non-Arab Darfurian background faced a heightened risk of scrutiny by security agents on their return to the country and that internally displaced persons often face forced relocation and return to their home areas. But she found that the treatment of black African Sudanese was the result of land reclamation and tribal warfare, not because there was a policy or desire to eradicate the black African tribal groups on the part of the Sudanese government. She said that it would not be unduly harsh for him to move into a camp for internally displaced persons on his arrival at Khartoum airport as he would be one of thousands of such persons who are members of a black African tribe, and he was an adult male who was able to fend for himself

and had no political profile. His appeal to the Asylum and Immigration Tribunal was rejected.

(c) Mr Mohammed

41. Noureldeain Zakaria Mohammed is a citizen of Sudan also. He was born on 1 January 1970 and is a member of the Zaghawa tribe. He seeks asylum on the ground that he has a well-founded fear for reasons of race and because of his political opinion in that he is a member or at least a supporter of the Sudanese Liberation Army ("the SLA"). His home is in the village of Abogamra in Darfur. He claims that in March 2003 his village was attacked by armed Arab militia. He helped to defend the village, but eight people from his village were killed and many people were injured. In April 2003 he relocated to the city of Nyala where his sister lived. He remained there for about a year. He claimed that during his time there he became involved with a group of Zaghawans who were engaged in raising money and recruiting members for the SLA. In March 2004 he was told that three of his colleagues had been arrested and had informed on him. Fearing arrest, he fled first to Omdurman and then to Khartoum. He stayed in Khartoum for six months with a relative and continued with his SLA activities. On 10 September 2004 an SLA meeting which he was attending was raided. He escaped by jumping over a wall and went into hiding. On 29 September 2004 he left Sudan. He claimed asylum on his arrival in the United Kingdom on 1 October 2004.

42. The Secretary of State refused Mr Mohammed's claim by letter dated 1 December 2004. His case was reconsidered by an adjudicator who on 9 March 2005 dismissed the appeal. The adjudicator was invited by the Secretary of State to make adverse findings on Mr Mohammed's credibility, and he did so. He said that he did not find Mr Mohammed's evidence that he had been involved with the SLA or in political activities to be credible. He accepted that he had left Darfur in some way because of the conflict, but much of his evidence was in his judgment implausible, inconsistent and vague. He gave some examples of this, among which was the fact that his knowledge of the SLA's policies was particularly vague and limited. He declined to find that he was ever involved in politics either in Darfur or in Khartoum or that the authorities ever targeted him or were ever interested in him because of SLA activities. But he was prepared to find that if he were to return to Darfur he would, like many others of his tribe, be persecuted there because of his ethnicity.

43. Turning to the situation in Khartoum, the adjudicator said he was not satisfied that Mr Mohammed had had any problems there. He found that when Mr Mohammed was living in Khartoum he was able to stay with a relative there. He was on the face of it a fit and healthy young man. He acknowledged that it might be difficult for many people from Darfur to settle in Khartoum and that Mr Mohammed might find it necessary to go to a camp. But he was not satisfied that it would be unduly harsh for him to do so. He noted that Darfurians suspected of political activities did appear to be targeted by the authorities, but he was not satisfied that Mr Mohammed had a profile that would make him in any sense the target of the authorities. In his opinion there was a viable internal relocation option for him in Sudan. He added, with regard to his human rights appeal, that it had not been proved to the necessary standard that he would have to stay in a refugee camp were he to return to Khartoum, or that even if he were to have to stay in one that this would lead to treatment which would breach his rights under article 3 of the European Convention. His appeal to the Asylum and Immigration Tribunal was refused.

(d) The cases of Messrs Hamid, Gaafar and Mohammed in the Court of Appeal

44. On 10 June 2005 Elias J referred all these cases to the Court of Appeal pursuant to section 103C of the Nationality, Immigration and Asylum Act 2002. On 25 October 2005 the Court of Appeal (Lord Phillips of Worth Matravers CJ, Maurice Kay LJ and Sir Christopher Staughton) held that no error of law had been identified in the determinations and dismissed the appeals: [2005] EWCA Civ 1219. In para 42 of the court's judgment Maurice Kay LJ said, on the issue of asylum, that there was no general principle or presumption that persecution by or on behalf of the state is incompatible with acceptable internal relocation. The court held that on both asylum and human rights grounds the decisions were entirely compatible with the country guidance contained in *AE (Relocation - Darfur – Khartoum an option) Sudan CG* [2005] UKIAT 00101.

The issues of law

45. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons that he has given, with which I am in full agreement, I too would hold that the question whether it would be unduly harsh for a claimant to be

expected to live in a place of relocation within the country of his nationality is not to be judged by considering whether the quality of life in the place of relocation meets the basic norms of civil, political and socio-economic human rights.

46. There is, as Lord Bingham points out, no basis for such a test in the wording of article 1A(2) of the Refugee Convention. The principal objection to it is that it invites a comparison between the conditions which prevail in the place of relocation and those which prevail in the country in which asylum is sought. The conditions that prevail in the country in which asylum is sought have no part to play, as a matter of legal obligation binding on all states parties to the Convention, in deciding whether the claimant is entitled to seek asylum in that country. The extent of the agreement to which the states committed themselves is to be found in the language which they chose to give formal expression to their agreement. The language itself is the starting point: see *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305D-E, per Lord Lloyd of Berwick. A successful claimant will, of course, be entitled to all the benefits that are set out in articles 2 to 34 of the Convention without discrimination as to race, religion or country of origin: see article 3. But to become entitled to those benefits the claimant must first show that he is entitled to the status of a "refugee" as defined in article 1A(2). At this stage, if the possibility of internal relocation is raised, the relevant comparisons are between those in the place of relocation and those that prevail elsewhere in the country of his nationality. As the Court of Appeal said in *E and another v Secretary of State for the Home Department* [2004] QB 531, para 67, the comparison between the asylum-seeker's situation in this country and what it will be in the place of relocation is not relevant for this purpose, though it may be very relevant when considering the impact of the European Convention on Human Rights or the requirements of humanity.

47. The question where the issue of internal relocation is raised can, then, be defined quite simply. As Linden JA put it in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682, 687, it 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, and if he can reach the less hostile part without

undue hardship or undue difficulty, it will not be unreasonable to expect him to move there.

48. Care must, of course, be taken not to allow the argument that there is an internal relocation option to defeat the basic purposes of the Convention. That is why there is a further question that must be considered where the claimant has a well-founded fear of persecution for a Convention reason which is due to action taken, or threatened to be taken, against him by the state or by state agents within the country of his nationality and it is suggested that he could reasonably be expected to live in a place of relocation there. The dangers of a return to a country where the state is in full control of events and its agents of persecution are active everywhere within its borders are obvious. It hardly needs to be said that in such a case internal relocation is not an option that is available. Remoteness of the suggested place of relocation from the place of origin will provide no answer to the claimant's assertion that he has a well-founded fear of persecution throughout the country of his nationality.

49. On the other hand control of events by the state may be so fragmented, or its activities may be being conducted in such a way, that it will be possible to identify places within its territory where there are no grounds for thinking that persecution by the state or its agents of the claimant for a Convention reason will be resorted to. A civil war may take that pattern where the extent of it is localised. So too may the process of ethnic cleansing affecting people of the claimant's ethnicity which is in progress in one area but not in others. The state may be ruthless in its attempts to move people of a given ethnicity out of one area. But it may be benign in its treatment of them when they reach an area which it regards as appropriate for people of that ethnicity. Of course, one kind of brutality may lead to another. Those who object to the state's policy may be treated differently from those who do not, wherever they happen to be for the time being. And those who move to a safe area may be at risk of being forced to move back again. The situation in the country of the claimant's nationality may be so unstable, or the persecution which the state condones in one place may be so difficult to limit to a given area, that it would be quite unreasonable to expect the claimant to relocate anywhere within its territory.

50. In practice the tribunal tries to provide guidance as to how cases that originate from areas of particular difficulty should be dealt with. The country guidance cases that have already been mentioned seek to achieve this result: see *AB (return of Southern Sudanese) Sudan CG*

[2004] UKIAT 00260; *MM (Zaghawa - Risk on Return – internal Flight) (Sudan)* [2005] UKIAT 00069; *AE (Relocation - Darfur – Khartoum an option) Sudan CG* [2005] UKIAT 00101. Where this is done, that guidance should be followed by immigration judges. It is desirable that they should do so in the interests of fairness and consistency. But in the end of the day each case, whether or not such guidance is available, must depend on an objective and fair assessment of its own facts.

51. The question that remains is how these principles are to be applied to these appeals.

Disposal in Mr Januzi's case

52. The situation in Kosovo is sufficiently stable for internal relocation to be regarded as a realistic alternative for an ethnic Albanian who is exposed to persecution in a part of the province where people of his ethnicity are in the minority. Mr Blake QC for Mr Januzi did not challenge this proposition in its application to ethnic Albanians in general. He raised a problem that is particular to Mr Januzi's own case, in view of the prospect that his already fragile mental health would deteriorate if he were to return to Kosovo. He submitted that the evidence showed that conditions for the medical treatment that he would need in the place of relocation are below the standards for the provision of basic norms of civil, political and socio-economic rights that are regarded as acceptable internationally. His case is that it would be unduly harsh, in the context of an untreated severe psychological distress, for Mr Januzi to be required to live in a place where he has no family or friends or community ties, no independent means of subsistence and no prospect of gainful employment. The submission that account should be taken of the extent to which conditions in Pristina fall below those which are regarded internationally as acceptable was an essential step in that argument.

53. The Court of Appeal followed the guidance that was to be found in *E and another v Secretary of State for the Home Department* [2004] QB 531, para 67. They confined their attention to the situation in the country of Mr Januzi's nationality. The evidence showed that the difficulties, both in terms of their likely effect on him and also of the availability of treatment for his mental condition should it deteriorate, extended throughout Kosovo. There was nothing to show that the problems that he would face in obtaining accommodation and enjoying

other civil, political or socio-economic rights were not a pan-Kosovo problem also. In a judgment with which the other members of the court agreed, Buxton LJ noted that in *Karanakaran (Nalliah) v Secretary of State for the Home Department* [2000] 3 All ER 449, 456 Brooke LJ described the test of undue harshness as a very rigorous one. But in his judgment it was clear that, applying any sort of rigorous test, relocation was an option that was available to Mr Januzi.

54. Once it is accepted, as in my opinion it must be, that a comparison between the basic norms of civil, political and socio-economic rights that are regarded as acceptable internationally and the situation in Kosovo is not relevant, the argument that there was a defect in the Court of Appeal's reasoning in Mr Januzi's case falls away. I would wish to sound a note of caution on one point only. In para 28 of his judgment Buxton LJ said that conditions which extend throughout Kosovo are irrelevant because they apply in both places and cannot be taken into account in the balance. I would prefer to put the point that he was making differently. It is the fact that there is a difference between the standards that apply throughout the country of the claimant's nationality and those that are regarded as acceptable internationally, and this fact only, that is irrelevant. The fact that the same conditions apply throughout the country of the claimant's nationality is not irrelevant to the question whether the conditions in that country generally as regards 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 – are so bad that it would be unduly harsh for the claimant to have to seek a place of relocation there. As Mr Rabinder Singh QC for the Secretary of State observed, one does not need to rely on the European Convention on Human Rights to conclude that if conditions are that bad relocation there would be unduly harsh. But the evidence about the conditions in Kosovo on which Mr Blake relies does not begin to approach that standard. I would dismiss Mr Januzi's appeal.

Disposal in the cases of Messrs Hamid, Gaafar and Mohammed

55. As already mentioned, the Secretary of State has agreed that the cases of Mr Hamid and Mr Gaafar should be remitted to the tribunal for reconsideration on the ground that the adjudicators' determinations in these cases were inadequately reasoned, even applying the test for internal relocation set out in *E and another v Secretary of State for the Home Department* [2004] QB 531. The determination in Mr Mohammed's case, in regard to which the Secretary of State has not made the same concession, was more carefully reasoned. It turned to a

large extent on the adjudicator's assessment of his credibility. Mr Gill QC rightly did not seek to rely on those parts of Mr Mohammed's evidence that the adjudicator did not accept as credible.

56. Mr Gill directed his argument instead to the situation which Mr Mohammed would face if, as the adjudicator had accepted was a possibility, he had to go to a camp on his return to Khartoum. He said that the consequences of this had not been properly analysed. He challenged the tribunal's conclusion in *AE (Relocation - Darfur – Khartoum an option) Sudan CG* [2005] UKIAT 00101, para 35, following its review of various background papers, that there was no evidence to suggest that any individual member of an African tribe from Darfur would automatically be at risk on return to Khartoum or as an internally displaced person in or around Khartoum. He pointed out that the case of *AB (return of Southern Sudanese) Sudan CG* [2004] UKIAT 00260 to which the tribunal had referred in para 19 of its judgment in *AE* provided country guidance for people from Southern Sudan, not people from Darfur, and that the tribunal in that case had relied on documentation which was significantly out of date such as the US Department of State Report of 2003. He submitted that it was clear from more up to date material that internally displaced persons are discriminated against in Khartoum, that asylum-seekers who return there are subjected to questioning and risk detention and ill-treatment at numerous points thereafter and that conditions of life for those who have to live in the camps are so bad that there is a real risk of their being forced back to Darfur.

57. These submissions were supported by reference to extracts from a substantial amount of material which demonstrate the risks that internally displaced persons who have to live in camps are exposed to. I take this passage from the US Department of State Country Report on Sudan of 2004, released on 28 February 2005, as an example:

> "Tens of thousands of persons, largely southerners and westerners displaced by famine and civil war, continued to live in squatter slums ringing Khartoum. Refugee international researchers estimated that more than 300,000 refugees and displaced persons returned home during the year.
>
> There were frequent reports of abuses committed against IDPs, including rapes, beatings, and attempts by the Government to forcibly return persons to their homes. The Government forcibly emptied some IDP camps; for

> example, on November 2, the Government closed two camps (Al Jeer and Otash), using tear gas to drive IDPs out. The Government stated that it merely was moving IDPs to newer, better camps. There also were numerous credible reports that government troops harassed IDPs or denied person access to camps. On August 3, police reportedly moved 50 newly arrived men from Kalma camp. On August 5, 48 students who attempted to enter Kalma camp were arrested, detained, and then released. There were credible reports that the Government arrested Darfurian IDPs who spoke with foreign observers. In December, the Government publicly committed itself to the principle of voluntary relocation of IDPs in cooperation with the UN and NGOs, and the International Organization for Migration reported a few voluntary returns. The UN reported that IDPS lived in a climate of fear.
>
> The Government pressurised IDPs to return home against their wishes. In one instance, foreign observers, visiting an IDP return site in Sani Deleiba set up by the Government, discovered that IDPs who had been forced home and promised assistance to rebuild their homes received two small bowls of sorghum and a piece of plastic sheeting."

58. It would be unreasonable to expect adjudicators to have to analyse such a quantity of material in every case, and the adjudicator in Mr Mohammed's case was not asked to do so. Much of the argument before him was taken up with an assessment of Mr Mohammed's claim that he was at risk of persecution because of his involvement with the SLA. But I think that there are sound reasons for doubting whether the risks to which Mr Mohammed would be exposed in any event if he were to be expected to return to live in a camp in Khartoum were properly explored and analysed.

59. Any assessment of the current situation in Sudan is, of course, beset with uncertainty. Assurances provided by the Sudanese Government about conditions in the camps and voluntary returns of IDPs to their home areas are patently unreliable. The situation is unstable and it is unpredictable. The almost total absence of civil, political and socio-economic rights which those in the camps experience is not in itself, for the reasons already given, a ground for holding that it would be unduly harsh for Mr Mohammed to move to a place of relocation in Khartoum. It is the risk to his most basic human rights that

being required to live there would expose him that requires to be evaluated, as does the risk that sooner or later he will be forced by the state or those acting with its connivance or under its authority to return to Darfur where on the grounds of his ethnicity he would almost certainly be persecuted. An evaluation of those risks may also give rise to other reasons why on humanitarian grounds he should not be required to return to Khartoum.

60. In my opinion a reassessment of the internal relocation alternative and of the humanitarian considerations under article 3 of the European Convention on Human Rights that these risks give rise to is needed in his case, as it is in the cases of Mr Hamid and Mr Gaafar which appear in these respects to be indistinguishable from that of Mr Mohammed. I would allow the appeals of Messrs Hamid, Gaafar and Mohammed and remit all three cases for reconsideration by the Asylum and Immigration Tribunal.

LORD CARSWELL

My Lords,

61. I have had the advantage of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hope of Craighead. I agree with their reasons and conclusions and wish to add only a few observations.

62. The persecution of minorities and the migration of people seeking refuge from persecution have been unhappily enduring features, which did not end with the conclusion of the Second World War. In recent years the governments of a number of states have become understandably concerned about the increasing flood of people claiming asylum on the ground of persecution in their own countries and seeking to remain within the borders of the host states. They have attempted to balance their international obligations and a proper humanitarian approach against their concern that the numbers seeking asylum could not readily be absorbed and that the fears expressed by some at least of the asylum seekers were not sufficiently well founded. The vehicle for doing so has been the 1951 Geneva Convention relating to the Status of Refugees, as amended ("the Convention"), which was the subject of agreement between states over 50 years ago, when the problems of the

time inevitably differed in many respects from those prevailing today. That a means of reaching an accommodation suitable to cater for modern conditions has been achieved is a tribute to the wisdom and humanity of those who have had to construe the terms of the Convention and apply them to multifarious individual cases.

63. The issue arising in these appeals, as posed by Lord Bingham and Lord Hope, is how to deal with cases where the asylum seeker has a well-founded fear of persecution for a Convention reason in one part of the country from which he has fled but could be returned to another part, the place of relocation, in which the circumstances are such that he would not have a well-founded fear of being so persecuted. The proposition that he can properly be returned to a place of relocation is now generally accepted, as my noble and learned friends have set out. Another proposition qualifying that has been developed in recent years, that he should not be returned if it would be unduly harsh *sive* unreasonable to expect him to relocate in that particular place.

64. It is necessary to relate these propositions to the terms of the Convention, both to give them a principled basis and to define the limits of their operation. As Lord Lloyd of Berwick said in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 305, the language itself is the starting point. The material portion of article 1A(2) of the Convention (as amended) 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, is unwilling to avail himself of the protection of that country …"

It may be seen, as Lord Bingham has pointed out (para 7 above) that the text of the Convention does not directly address the issue of return to safe relocation areas. That persons seeking asylum may be so returned has, however, been recognised for a number of years, as appears from the sources cited by Lord Bingham at paras 7 and 8 of his opinion. Nor is there any explicit reference to the qualification, whose validity is also generally accepted, that they are not to be returned if to do so would be unduly harsh.

65. Accommodation of these principles has been attempted by two avenues, the choice of which may be critical, for it may lead to different results in individual cases. The first is by focusing on the well-founded nature of the fear of the applicant for asylum, the approach of the Court of Appeal at paras 23-24 of its judgment in *E and another v Secretary of State for the Home Department* [2003] EWCA 1032, [2004] QB 531, which your Lordships have approved. On this basis, where there is a safe place of relocation in the applicant's country, he does not have a well-founded fear of persecution if he returns to that part of his country and therefore does not satisfy the definition of a refugee. Lord Phillips of Worth Matravers MR, giving the judgment of the court, so expressed it in para 23:

> "23. Relocation in a safe haven will not provide an alternative to seeking refuge outside the country of nationality if, albeit that there is no risk of persecution in the safe haven, other factors exist which make it unreasonable to expect the person fearing persecution to take refuge there. Living conditions in the safe haven may be attendant with dangers or vicissitudes which pose a threat which is as great or greater than the risk of persecution in the place of habitual residence. One cannot reasonably expect a city dweller to go to live in a desert in order to escape the risk of persecution. Where the safe haven is not a viable or realistic alternative to the place where persecution is feared, one can properly say that a refugee who has fled to another country is 'outside the country of his nationality by reason of a well-founded fear of persecution'."

66. The other approach, relied upon by the appellants, is to focus on the words "is unable … to avail himself of the protection of that country." There is some reason to suppose that when the Convention was originally drafted the protection intended in this provision was that furnished in another country by diplomatic or consular authorities: see Fortin, "The Meaning of 'Protection' in the Refugee Definition," (2001) 12 International Journal of Refugee Law 548. Since the temporal provision in article 1A(2) was removed in 1967 it has not been so interpreted and it may be said that ongoing interpretation of the Convention as a living instrument and adaptation to modern conditions have brought about a shift in meaning. It is argued on this basis that, whether or not the applicant can be said to have a well-founded fear of persecution if he can return to a place of relocation, he is unable to avail himself of the protection of his country if that country fails to provide

him with a meaningful degree of protection. The origin of this approach appears to be the work of Professor Hathaway, *The Law of Refugee Status* (1991), in which he says, at p 134:

> "The logic of the internal protection principle must, however, be recognized to flow from the absence of a need for asylum abroad. It should be restricted in its application to persons who can *genuinely access* domestic protection, and for whom the reality of protection is *meaningful*. In situations where, for example, financial, logistical, or other barriers prevent the claimant from reaching internal safety; where the quality of internal protection fails to meet basic norms of civil, political, and socio-economic human rights; or where internal safety is otherwise illusory or unpredictable, state accountability for the harm is established and refugee status is appropriately recognized."

It has received some support from courts in New Zealand and Australia: see the authorities cited in paras 9 and 10 of Lord Bingham's opinion.

67. For the reasons set out in paras 15 to 19 of Lord Bingham's opinion I agree that the approach of the Court of Appeal in *E's* case is to be preferred to the Hathaway rule accepted in New Zealand. It should be determined by having regard to the part of the definition of a refugee in article 1A(2) of the Convention rather than to the ambit of a country's "protection". This approach gives a principled and workable basis for the return of a person seeking asylum to a place of relocation, if operated on the lines set out in the UNHCR *Guidelines on International Protection* of 23 July 2003, set out in para 20 of Lord Bingham's opinion. It is necessary to stress the rigorous nature of the test for unreasonableness or undue harshness, as to which see the judgment of the Canadian Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration)* [2001] 2 FC 164, quoted by Lord Bingham at para 12 above.

68. Applying this test and adopting the reasons given by Lord Hope I would dismiss Mr Januzi's appeal. I agree that relocation is an option open to him and that it would not be unduly harsh to require him to resettle in the Pristina area of Kosovo.

69. The appeals of Messrs Hamid, Gaafar and Mohammed pose rather different questions. Again, applying the test which I have accepted as correct and adopting the reasons given by Lord Hope in paras 55 to 60 above, I would allow the appeals in their cases and remit all three cases for reconsideration by the Asylum and Immigration Tribunal.

LORD MANCE

My Lords,

70. I have had the benefit of reading in draft the opinions prepared by my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead. I agree with their reasoning and conclusions and there is nothing that I would wish to add.