HCAL 126/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 126 OF 2010

BETWEEN

TK	Applicant
and	
MICHAEL C JENKINS, ESQ	Respondent
DIRECTOR OF IMMIGRATION	Interested Party

Before: Hon Lam J in Court
Dates of Hearing: 14 and 15 September 2011
Date of Judgment: 21 October 2011

J U D G M E N T

The Applicant

1. The Applicant is a Pakistan national. He is a torture claimant who came to Hong Kong in November 2009. His claim under the United

Nations Convention against Torture ["CAT"] was rejected by the Director of Immigration on 7 June 2010. He further petitioned to the Chief Executive. The Petition was heard by an adjudicator. On 19 July 2010, the Adjudicator refused his petition for the reasons set out in a written decision ["the Decision"]. In these proceedings, the Applicant sought to challenge the Decision by way of judicial review.

2. At the request of his counsel Mr Dykes SC, bearing in mind the nature of this case, and for the sake of preserving his anonymity, I shall substitute the names of the relevant places and individuals with anonyms. Parties and their lawyers should be able to tell from the context who or where I am referring to. In case of doubts, parties can write to this court to seek clarifications regarding the anonyms.

3. The Applicant used to live in A in Pakistan. He is unmarried and his close relatives are two brothers and a sister. His elder brother had left them and the Applicant did not have contacts with him. Before he came to Hong Kong, he lived with his younger brother. His sister was married and lived in another city B in Pakistan.

4. In 2009, the Applicant and a friend called C decided to purchase a piece of land in A for building a small workshop for their business. Through the introduction of another person, they entered into an agreement with D to purchase a plot of land at the price of 300,000 rupees which was only about half of the market price. D was a local gangster and he had a brother who was a member of the ruling party in Pakistan. After payment was made, D refused to complete and when the Applicant and C went to discuss the matter at his office, D told them he would not give the

land to them. Things turned nasty and D and his gangsters acted violently towards the Applicant and C. The Applicant had to run away but his friend did not manage to escape. The Applicant heard a gunshot when he escaped.

5. That evening the Applicant learnt from his neighbour E (who was a school teacher and was regarded by the Applicant as an elder in the neighbourhood) that C had been killed. E advised him to flee because his life was in danger. E also told him that the police was connected to D and his gangsters and it would be dangerous for the Applicant to seek help from the police.

6. The Applicant fled from A on that night and went to stay with a friend of E at city F, which was about 221 km away from A. He stayed there for one and a half month before he left Pakistan. During that time, he received a phone call from E warning him not to return to A as D and his gangsters were looking for him.

7. Before the Applicant left Pakistan, he also visited his sister who lived at city B which was about 58 km away from A. His younger brother also went to live with his sister there.

8. The Applicant left Pakistan for China on 1 November 2009. He travelled by plane to Urumqi and arrived eventually at Shenzhen on 5 November. He entered Hong Kong illegally and he was arrested by the police on 19 December 2009.

The CAT claim

9. On 22 December 2009, the Applicant lodged a CAT claim with the Immigration Department. The Applicant was provided with the necessary assistance in terms of interpreter's service and counsel assigned by the Duty Lawyer scheme in the preparation and processing of his claim. In the present proceedings, the challenge of the Applicant to the Decision focused on its merits. Though the question of translation of the Decision was raised in the Form 86, Mr Dykes properly accepted that in the present case it is unlikely for relief to be granted in that respect given that the Applicant had all along been represented by lawyers with proper interpretation services funded by the Duty Lawyer scheme[1]. I shall therefore be brief in reciting the procedural history.

10. In support of his application, the Applicant had to complete a Questionnaire. He did so with the assistance of counsel. The completed Questionnaire contained personal particulars of the Applicant and matters he relied upon to advance his CAT claim. The Applicant attached a statement to the completed Questionnaire. In a nutshell, the Applicant's CAT claim was advanced on the basis that in view of the events leading to his flee from Pakistan, he feared that he would be killed by D or his gangsters. He stated that he did not seek assistance from Pakistani authority because of the advice from E.

11. On 5 May 2010, a Senior Immigration Officer conducted an interview with the Applicant in the presence of his counsel. A

[1] I was also told by Mr Shieh SC on behalf of the Director that in unrepresented cases translations of decisions are invariably provided to the claimants.

simultaneous record of the interview was kept and it was read back to him at the end of the interview with an opportunity given to him to make alteration, addition or deletion. A copy of the record was supplied to the Applicant.

12. The application was considered by a Senior Immigration Officer. As mentioned, the claim was rejected by a letter from the Director on 7 June 2010. The Director was of the view that the Applicant's case did not come within the scope of "torture" as defined in Article 1 of the CAT because there was no evidence of official involvement and the Applicant did not suffer severe pain and suffering. The Director also did not find the Applicant's story to be credible. The Director found that there was no real risk of torture if the Applicant were to return to Pakistan and there was nothing to indicate that the Pakistan authority would not afford the necessary protection against D's unlawful behaviour. Lastly, the Director considered the problems of the Applicant to be localized and, even if the threats were real, it would not be "unduly harsh for [him] to internally relocate to an area other than [his] home village in Pakistan".

13. The Applicant petitioned to the Chief Executive by a notice dated 15 June 2010. The petition was heard before the Adjudicator on 6 July 2010. He was represented by counsel and assisted by an interpreter at the hearing. Amongst other documents, the Applicant was served a skeleton submission of the Director (of 30 June 2010) before the hearing. In the skeleton submission, at para.18, counsel identified F and B as examples of places where the Applicant could safely relocate to within Pakistan.

14. Counsel for the Applicant (Mr Bedford) also filed a skeleton submissions for the hearing before the Adjudicator. Apart from other points which have no significance for present purposes and submissions on credibility, counsel contended once it was accepted that there was a consistent pattern of gross, flagrant and mass violations of human rights in Pakistan, the burden shifted to the Director to show that the Applicant would not be subject to torture[2]. As regards internal relocation, counsel contended that internal relocation was no answer to a torture claim by reason of Article 3(1) of CAT[3].

The Decision

15. In the Decision, after referring to Articles 1 and 3 of CAT, the Adjudicator highlighted the burden on the Applicant in making good his claim. He said, at para.6,

> "The burden is on the Petitioner to establish his claim but the standard is relatively low. He does not have to show that it is highly probable or even probable that he will be tortured. He will succeed if he can present an arguable case, but the risk of torture must be assessed on grounds that go beyond mere theory and suspicion. This risk of torture must be no more than 'foreseeable, real and personal'. [He then cited General Comment No.1 adopted by the Committee for Torture of the UNHCR and *X v Australia* (UN Committee against Torture Communication No.324/2007) as authorities for this test]"

16. Later, at para.28, the Adjudicator returned to question of burden of proof when he dealt with the submission of counsel for the Applicant as to shift of burden. Citing the relevant passage from *AS v*

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[2] Paras.11 and 12 of the submissions.

[3] Paras.15 and 16 of the submissions.

Sweden UN Committee against Torture Communication No.149/99, the Adjudicator rejected the submission. In that case, it was held at para.8.3,

> "The Committee must decide, pursuant to article 3 para.1, of the Convention whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Iran. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3 para.2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. …"

17. On credibility, the Adjudicator (unlike the Director) found the Applicant's story credible[4]. At the same time, he made the following observations,

> "But I note also that the Petitioner does not claim that he has been directly threatened with death or serious injury. And it does not follow that because C was killed in the heat of an argument during the dispute that the Petitioner is at similar risk himself. He only feared for his life following his visit to E. Apart from that, there has been no threat."[5]

18. Para.30 of the Decision is relied upon by the Applicant in the present proceedings and I shall set it out,

> "Essentially, this was a private dispute over land. It was a dispute which resulted in tragic consequences for C and a financial loss for the Petitioner. D would seem to be a person of influence, with

[4] See paras.24 to 26 and 29 of the Decision.

[5] Para.29 of the Decision

> a brother in the [ruling party], and his behaviour, even being a party to murder, may well not attract any adverse consequences for himself. There is little or no point in the Petitioner reporting the fraud or even the killing to the authorities. In all probability they will do nothing. But does all or any of this, mean that there is any risk to the petitioner of the sort contemplated in the Convention?"

19. The Adjudicator appeared to give his answer to the last question at para.32,

> "I do not find any grounds that would prevent the Petitioner's return to Pakistan. He was the innocent victim of a fraud. During an argument over this fraud his friend was killed. Nobody has made any direct threat of death or physical injury to him. He was told that his life was in danger. There is no suggestion that any official of the Pakistan state was in any way concerned in, connected with, consented to or acquiesced in this statement or the apparent risk contained in it. D, the perpetrator of the fraud and whom the Petitioner is in fear of, may well regard himself as above the law but even taking into account the conditions in Pakistan, there is nothing to suggest that he enjoys his status with the consent or acquiescence of the State. I have not overlooked D's brother but I am not persuaded that his membership in the [ruling party], or even his possible seat in the National Assembly can lead to an inference that the State or a State official is in some way behind the threat that the Petitioner fears."

20. In the earlier parts of the Decision[6], the Adjudicator referred to the human rights situation in Pakistan and concluded that corruption was notorious in Pakistan. He also commented about D's influence at para.25,

> "D may well be a person of influence in his own district in the way that the Petitioner claims but that does not mean that he has power throughout the whole of Pakistan or is able to exercise influence over the Pakistan Immigration service."

21. The Adjudicator further said at para.26,

[6] Paras.17 to 20

> "Neither do I find it unusual that the Petitioner refrained from seeking any official help in Pakistan. Firstly, as I have said earlier there is widespread corruption within the police and government. Secondly, assuming that what the Petitioner says [is] correct he would not wish to draw himself to the attention of the authorities."

22. On the internal relocation argument, the Adjudicator referred to the argument of the Director at para.31 and his conclusion was set out at para.33,

> "… I am of the view that the Petitioner would not be at risk if he was to live away from the area of A where D has influence. As I noted earlier, I do not believe that D is in a position to influence events throughout the whole of Pakistan and I am satisfied that any risk to the Petitioner would dissipate if he were to relocate himself away from A."

23. He concluded that there was no substantial ground for believing that the Applicant would be in danger of being subject to torture if he was returned to Pakistan. He refused his claim accordingly.

The role of the court in a judicial review of the decision of the Adjudicator

24. The challenge of the Applicant in the present proceedings can broadly be summarized into the following heads,

(a) shift of burden of proof;

(b) state acquiescence;

(c) internal relocation.

25. The Applicant also attacked the finding of the Adjudicator at para.32 of the Decision as being inconsistent with his earlier finding at

para.30[7]. He also attacked the finding at para.33 as being inconsistent with the earlier finding at paras.17 to 20[8].

26. The role of the court in a judicial review application in respect of the decisions of the Secretary for Security under CAT was considered by the Court of Final Appeal in *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187. In my judgment, the same approach is apposite in a case where the claimant petitioned to the Chief Executive and a decision was made by an adjudicator in respect of CAT claim. At para.45, Chief Justice Li said,

> "It is for the Secretary to make such a determination. The courts should not usurp that official's responsibility. But having regard to the gravity of what is at stake, the courts will on judicial review subject the Secretary's determination to rigorous examination and anxious scrutiny to ensure that the required standards of fairness have been met. *R v Home Secretary, ex p Bugdaycay* [1987] 1 AC 514 at p.531E-G. If the courts decide that they have not been met, the determination will be held to have been made unlawfully."

27. Further guidance can be found in the judgment of Laws LJ in *R v Home Secretary ex p Adan* [2001] 2 AC 477 at p.497 to 498. In particular, at p.497B to E,

> "In our judgment a distinction of principle falls to be drawn between the *interpretation* of the Convention and its *application*. The duty of the Secretary of State, in performance of his function … is to examine the practice in the third country in question in order to decide (a) whether it is consistent with the Convention's true interpretation, and (b) whether, even if so consistent, it nevertheless imposes such practical obstacles in the way of the claimant as to give rise to a real risk that he might be sent to another country otherwise than in accordance with the

[7] Para.38 of the Form 86

[8] Paras.43 and 44 of the Form 86

> Convention. (a) is a matter of law; and if the Secretary of State mistakes the law, he is reviewable on illegality grounds as surely as if he erred in the construction of municipal statute. (b) is a matter of fact; and the Secretary of State's decision upon it therefore falls to be reviewed only upon *Wednesbury* grounds … although the test is modified by the need for 'anxious scrutiny' in asylum cases …"

28. In the present context, as shall be examined below, points of law or interpretation of the CAT are involved in the three broad grounds of challenge and this court has to determine whether the Adjudicator made any error of law in those regards. On the other hand, insofar as the challenges based on inconsistency of findings are, upon analysis, matter of facts, this court must consider them by reference to the enhanced *Wednesbury* approach.

29. A recent application of this approach can be found in the judgment of the House of Lords in *RB (Algeria) v Secretary of State* [2010] 2 AC 110. At para.72 Lord Phillips, after referring to the *Bugdaycay* test, said

> "Lord Bridge [in *Bugdaycay*] went on to hold, however, at p.532, that it was for the Secretary of State to decide as a matter of degree whether the danger posed to an asylum seeker, if returned, was sufficiently substantial to involve a potential breach of article 33 of the Refugee Convention. … It does, however, underline the fact that the assessment of whether a danger is sufficient to involve an infringement of a Convention right, albeit that the Convention was there the Refugee Convention, is a question of fact."

And he continued at para.73,

> "The significance of this conclusion in the context of these appeals is considerable. The Court of Appeal had no general power to review SIAC's conclusions that the facts that they had found did not amount to a real risk of a flagrant breach of the relevant Convention rights. SIAC's conclusions could only be

> attacked on the ground that they failed to pay due regard to some rule of law, had regard to irrelevant matters, failed to have regard to relevant matters, or were otherwise irrational. Their decisions could also be attacked on the ground that their procedures had failed to meet requirements imposed by law…."

Burden of proof

30. Although Mr Dykes and Mr Shieh referred this court extensively to passages in the leading textbook in this field (*Nowak & McArthur, The United Nations Convention against Torture*) and some of the cases cited in the textbook on the question of burden of proof, in the end there is little difference between them in terms of law. In his submissions in reply, Mr Dykes informed the court that he did not argue that there was a formalistic shifting of burden of proof. His contention is that, on the evidence from the Applicant, the Director (and the Adjudicator) ought to have concluded that a substantial ground in terms of Article 3 is established unless this provisional conclusion is displaced by some evidence from the Director. It also appears that both counsel accept that the nature of CAT proceedings is not adversarial litigation. Rather the proceedings should be regarded as inquisitorial in nature.

31. The inquisitorial nature of the CAT proceedings was highlighted by the Court of Final Appeal in *Prabakar* at para.54,

> "… it would not be appropriate for the Secretary to adopt an attitude of sitting back and putting the person concerned to strict proof of his claim. It may be appropriate for the Secretary to draw attention to matters that obviously require clarification or elaboration so that they can be addressed by the person concerned…."

32. Para.55 is also relevant,

> "… an understanding of country conditions at the time of the alleged torture in the past as well as at the present time is usually relevant to the assessment of the claim. This is recognized by the policy. UNHCR may be able to supply relevant information. And published materials available from various sources including well-respected non-governmental organizations. ***The Secretary should obtain any such information and materials*** and take them into account." (My emphasis)

33. An important point to note is that the Chief Justice placed the obligation on the Secretary to obtain the relevant information instead of a claimant. Even with the assistance of lawyers (as provided by the publicly funded Duty Lawyer scheme), the relevant materials on the conditions of a particular receiving country may not be readily accessible to a claimant. Thus, the inquisitorial nature of CAT proceedings requires the Secretary to obtain the materials. In the context of a petition, the Adjudicator should consider giving directions for such necessary materials to be obtained by the Director.

34. This flows from the obligation upon a State Party to take into account all relevant consideration in order to fulfill its duty of non-refoulement under Article 3 of the CAT. Article 3 para.2 specifically provides,

> "For the purpose of determining whether there are [substantial grounds under para.1], the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

35. Whilst the nature of CAT proceedings is inquisitorial, the ultimate burden still rests upon a claimant. This is clear from the CAT General Comment No.1 adopted by the Committee against Torture on

21 November 1997. Paragraphs 5 to 8 of the General Comment are relevant,

"**Merits**

5. With respect to the application of article 3 of the Convention to the merits of a case, the burden is upon the author to present an arguable case. This means that there must be a factual basis for the author's position sufficient to require a response from the State party.

6. Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.

7. The author must establish that he/she would be in danger of being tortured and that the grounds for so believing are substantial in the way described, and that such danger is personal and present. All pertinent information may be introduced by either party to bear on this matter.

8. The following information, while not exhaustive, would be pertinent:

(a) Is the State concerned one in which there is evidence of a consistent pattern of gross, flagrant or mass violations of human rights (see article 3, paragraph 2)?

(b) Has the author been tortured or maltreated by or at the instigation of or with the consent of acquiescence of a public official or other person acting in an official capacity in the past? If so, was this the recent past?

(c) Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after-effects?

(d) Has the situation referred to in (a) above changed? Has the internal situation in respect of human rights altered?

(e) Has the author engaged in political or other activity within or outside the State concerned which would appear to make him/her particularly vulnerable to the risk of being placed in danger of torture were he/she to be expelled, returned or extradited to the State in question?

(f) Is there any evidence as to the credibility of the author?

(g) Are there factual inconsistencies in the claim of the author? If so, are they relevant?"

36. I also agree with the Adjudicator that the judgment in *AS v Sweden* cited at para.28 of the Decision shows that a claimant could not establish a substantial ground for believing that he would be in danger of being subjected to torture simply by reference to a pattern of gross, flagrant or mass violations of human rights irrespective of the relevance of such situation to his personal concern.

37. Some passages in *Nowak & McArthur* did suggest that in certain circumstances there was a shift of the burden (e.g. paras.158, 164 and 196). In cases heard by the United Nations Committee on Torture, the basic approach is set out in what comes to be known as the *Mutombo* formula [9], which was repeated in most decisions of the Committee afterwards, including *AS v Sweden* cited by the Adjudicator.

38. Mr Shieh has taken this court through the cases cited by *Nowak & McArthur* in these passages and submitted that in none of the cases did the Committee laid down a general rule of law as to the shift of burden of proof. Having read those cases, I agree with this submission.

[9] Originated from the decision of the Committee in *Mutombo v Switzerland* No.13/1993

Whilst the cases show that the Committee did take into account the evidence as to a pattern of gross, flagrant or mass violations of human rights in the country concerned, the Committee did not rule that as a matter of law there would be a shift of burden of proof to the State party upon such pattern being shown.

39. I do not regard it as helpful to recite all these cases in this judgment. Basically they provide illustrations as to how the Committee applied the *Mutombo* formula on the special facts of the cases. I can only find a reference to shift of burden in one of the cases, *AS v Sweden*, Communication No.149/1999. That was a case about an author who claimed risk of torture and execution upon return to Iran because she refused to remarry as a martyr's widow in accordance with the practice of a sighe or mutah marriage forced upon her by a powerful authority in Iran. Instead she had a relationship with a Christian man. After that relationship had been discovered the man confessed to adultery under torture and was sentenced to death by stoning. She said she was similarly sentenced in her absence and she applied for asylum in Sweden. Her claim was rejected by the Swedish Immigration Board and the Appeal Board. She made a complaint to the UN Committee that her forced return to Iran by Sweden would be a violation of Article 3 of the CAT.

40. The decision of the Committee addressed the submissions of the parties raised on the facts of the case. One of the contentions of Sweden in the case was that the author was not credible because of her failure to submit verifiable information. In respect of that, the Committee

said at para.8.6, after referring to General Comment 1 adopted on 21 November 1997[10],

> "The Committee notes the State party's position that the author has not fulfilled her obligation to submit the verifiable information that would enable her to enjoy the benefit of the doubt. However, the Committee is of the view that the author has submitted sufficient details regarding her sighe or mutah marriage and alleged arrest, such as names of persons, their positions, dates, addresses, name of police station etc. that could have, and to a certain extent have been, verified by the Swedish immigration authorities, to shift the burden of proof. In this context the Committee is of the view that the State party has not made sufficient efforts to determine whether there are substantial grounds for believing that the author would be in danger of being subjected to torture."

41. In that paragraph, the Committee was only rebutting the State party's submission on the credibility of the author. Though the expression "shift of burden of proof" was used, it clearly was not used in a manner which a lawyer from a common law jurisdiction would understand as a shift of legal burden of proof. It is also noteworthy that the Committee made no reference to the gross, flagrant or mass violations of human rights in Iran in that paragraph. Instead, the Committee referred to that at para.8.7 without any suggestion that such condition led to any shift of burden of proof.

42. In my judgment, with great respect to the learned authors of *Nowak & McArthur*, one cannot extrapolate from this decision (or any other decisions of the Committee) any rule of law as to a shift of burden of proof in the manner suggested on behalf of the Applicant by Mr Bedford at the hearing before the Adjudicator. Further, the role of the Committee in

[10] Cited at para.35 above.

handling a complaint is to examine the merits of a torture claim. On the other hand, as explained above, the role of this court in hearing a judicial review of the decision of an adjudicator is different. In this connection, the observations of Lord Hoffmann in *RB (Algeria)* at paras.188 to 190 are apposite. This court must not confuse its role with that of the Committee. For present purposes, it suffices for me to state my conclusion that none of the cases decided by the Committee laid down a rule of law as to shift of burden of proof. I do not think the Adjudicator made any error as to the burden of proof in the Decision.

43. The extent to which the inquisitorial nature of the process enjoins mandates the Director to conduct investigation or to obtain the relevant information must depend on the facts and issues raised in a case. It is not fruitful to discuss this in abstract. Instead, I will consider this aspect in conjunction with the substantive issues arising from the Applicant's CAT claim.

44. Likewise, I shall discuss Mr Dykes' submission as to the findings open to the Adjudicator in the absence of rebutting evidence from the Director when I deal with the substantive issues. For the reasons given above, this court should approach any challenge to the Adjudicator's finding of facts (including an assessment as to whether substantial grounds existed in light of the primary facts as found) by the enhanced *Wednesbury* test.

State acquiescence

45. Article 1 of the CAT defines torture as follows,

> "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted *by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*" (my emphasis)

46. Thus the non-refoulement obligation under Article 3 does not extend to a person who might risk pain or suffering inflicted by a non-governmental entity without the consent or acquiescence of the government. The Committee had rejected a complaint on this basis in *GRB v Sweden* Communication No.83 of 1997.

47. In the present case, the Adjudicator found that no official of Pakistan was in any way concerned in, connected with, consented to or acquiesced in the threat exerted upon the Applicant and D did not enjoy any status above the law with the consent or acquiescence of the State. The Applicant challenged this finding on two different bases,

(a) The Adjudicator failed to consider the inadequacy of State protection as acquiescence on the part of the State;

(b) The Adjudicator erred in coming to such a conclusion in the wake of the evidence as to the general corrupted condition of Pakistan and his acceptance of the evidence of the Applicant as to the futility of reporting to the police.

48. Contention (a) depends on the interpretation of "acquiescence" in Article 1. It is a question of law. Mr Dykes relied on *R*

(Bagdanvicius) v Secretary of State [2005] 2 AC 668 at p.677 (a case on Article 3 of the European Convention on Human Rights) and argued by analogy that risk emanated from non-state bodies could constitute torture if the state failed to provide reasonable protection.

49. Article 3 of the European Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. By means of case law, an implied obligation of non-refoulement (the *Soering* principle[11]) was established where substantial grounds are shown for believing that upon expulsion a person will face a real risk of being subjected to treatment contrary to Article 3. Subsequently, it was held that article 3 may also apply where the danger emanates from persons who are not public officials when the State authorities are not able to obviate the risk by providing appropriate protection[12].

50. Mr Dykes argued that similar extension should be built into the obligations under the CAT and apart from Article 3 of the CAT, he also referred to Articles 13 and 14.

51. With respect, I cannot accept this submission. The structure and the overall statutory scheme for the CAT are different from the European Convention on Human Rights. First, there is a specific provision defining torture in the CAT which excludes pain or suffering inflicted by a non-governmental entity without the consent or acquiescence of the government from its scope. The European Convention does not have the

[11] *Soering v United Kingdom* (1989) 11 EHRR 439

[12] *HLR v France* (1997) 26 EHRR 29; *D v United Kingdom* (1997) 24 EHRR 423

same restriction. Second, the non-refoulement obligation is provided for under Article 3 of the CAT by reference to the concept of torture as defined in Article 1. In contrast, the non-refoulement obligation under the European Convention was developed by case law.

52. In respect of non-governmental acts, the CAT jurisprudence has developed in a different direction. As mentioned, in *GRB v Sweden* Communication No.83 of 1997, the Committee held that the CAT did not cover risk emanating from non-governmental entity without the consent or acquiescence of the government. Though an exception was provided for in situation where State authority was wholly lacking and the acts were committed by quasi-governmental authority (*Elmi v Australia* Communication No.120 of 1998), the primary rule remains the one as laid down in *GRB v Sweden*. Thus in the later case of *HMHI v Australia* Communication No.177 of 2001, the Committee stated the CAT obligation under Article 3 as follows,

> "The Committee recalls its jurisprudence that the State party's obligation under article 3 to refrain from forcibly returning a person to another State where there are substantial grounds of a risk of torture, as defined in article 1 of the Convention, which requires actions by 'a public official or other person acting in an official capacity'. Accordingly, in *GRB v Sweden*, the Committee considered that allegations of a risk of torture at the hands of Sendeero Luminoso, a non-State entity controlling significant portions of Peru, fell outside the scope of article 3 of the Convention. In *Elmi v Australia*, the Committee considered that, in the exceptional circumstance of State authority that was wholly lacking, acts by groups exercising quasi-governmental authority could fall within the definition of article 1, and thus call for the application of article 3. The Committee considers that, with three years having elapsed since the *Elmi* decision, Somalia currently possesses a State authority in the form of the Transitional national Government, which has relations with the international community in its capacity as central Government, though some doubts may exist as to the reach of its territorial authority and its permanence. Accordingly, the Committee does

> not consider this case to fall within the exceptional situation in *Elmi*, and takes the view that acts of such entities as are now in Somalia commonly fall outside the scope of article 3 of the Convention."

53. Hence, the *Elmi* exception only applies in situations where there is a complete absence of central State authority and the risk of torture emanates from some quasi-governmental authority. This is a wholly different concept from an exception based on the lack of reasonable State protection.

54. It is also noteworthy that in *HMHI*, despite the existence of a consistent pattern of gross, flagrant or mass violations in human rights in Somalia, the Committee held that the complainant has failed to show that there are substantial grounds for believing that he is personally at risk, see para.6.5 of the Communication. The Committee did not consider whether the State authority provided reasonable protection to the complainant against such general condition in Somalia.

55. The more restrictive nature of the scope of the CAT is highlighted by *Nowak & McArthur* at p.78 para.117 when a comparison was made with the jurisprudence under Article 7 of the ICCPR.

> "But it would be difficult for the Committee against Torture to interpret the State obligations deriving from the [CAT] in the same broad manner in which the Human Rights Committee interprets the obligations of States deriving from Article 7 CCPR. In its General Comment of 1992, the Human Rights Committee had already stressed the duty of States parties to 'afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether

> inflicted by people acting in their official capacity, outside their official capacity or in a private capacity'."[13]

56. Immediately before this passage, *Nowak & McArthur* suggested that a due diligence test may be applied in the context of State acquiescence. Reference was made to the case of *Velasquez Rodriguez v Honduras* decided by the Inter-American Court of Human Rights under the American Convention of Human Rights. The court there was concerned with the State's responsibility to ensure all persons subject to their jurisdiction the free and full exercise of the rights and freedoms recognized in the Convention. It was not dealing with the matter in a refoulement context. The due diligence test applied in that case was set out at paras.174 to 177 of the judgment. For present purposes, it suffices to quote from the last sentence of para.177,

> "Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."

57. In this connection, I find para.18 of General Comment No.2 (24 Jan 2008) by the Committee against Torture in considering the duty of the State parties under Article 2 of the CAT to be of greater relevance.

> "The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by a non-State officials or private actors and they fail to exercise due diligence to prevent, investigate prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for

[13] See also the discussion by *Nowak & McArthur* at p.165-166 at para.118 in the context of Article 3.

> consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to State parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking."

58. I have not been referred to any authority as to how this General Comment would affect the obligation of non-refoulement under Article 3. Mr Shieh argued the matter on the basis that it could provide guidance on the concept of State acquiescence generally. I shall proceed on the same basis.

59. As acknowledged by *Nowak & McArthur*, this duty of due diligence is not the same as the duty of reasonable protection. Mr Shieh submitted that this duty only arises upon the State authority having knowledge or ought to have grounds to believe that acts of torture or ill-treatment are being committed. Since the Applicant did not make a report to the police, counsel submitted there is no basis for suggesting that Pakistan had acquiesced based on the duty of due diligence.

60. In respect of the finding of the Adjudicator at para.30 of the Decision on the futility of reporting the fraud and the killing of C, Mr Shieh submitted that this should not be interpreted as a finding that the Pakistan police would do nothing if the Applicant made a report as to the threat as to his personal safety.

61. I accept there is no basis for holding that the Pakistan police had actual knowledge as to the fraud or the killing of C. But I am not so sure on the issue whether the local police (viz. those in A) ought to have grounds to believe that D had been habitually involved in gangster activities. Would that be sufficient to give rise to a case of State acquiescence for the conducts of D by reason of the breach of duty of due diligence? This is a question which should have been considered by the Adjudicator and if he had done so, this court could only intervene on the enhanced *Wednesbury* grounds. Has the question been considered by the Adjudicator in the present case?

62. Even though the Adjudicator did make a finding at para.32 that D's regard of himself as above the law was not enjoyed with the consent or acquiescence of the State, apparently he did not address his mind to the extended meaning of acquiescence arising from a breach of the duty of due diligence. As indicated by the last sentence of para.32, the Adjudicator only considered the matter on the basis of the traditional meaning of acquiescence, viz. the State or its official being in some way behind the threat of D.

63. This is not surprising because, as shown in his written submissions placed before the Adjudicator, counsel for the Applicant did not advance any argument based on an extended meaning for acquiescence. No reference was made to para.18 of General Comment No.2 or the European jurisprudence on reasonable State protection.

64. Be that as it may, given the need to subject a decision of this nature to anxious scrutiny, it would not be right for this court to gloss over

this point simply because it had not been taken before the Adjudicator. Given the evidence as to the general condition of Pakistan and the doubt cast on the due diligence of the police authority at A by the specific findings at para.30 as regards the futility of reporting the fraud and killing and the lack of adverse consequences for D in respect of his behaviour, and having regard to the inquisitorial nature of the proceedings, the Adjudicator should at least direct the Director to seek information from his counterpart in Pakistan as to the security in A in respect of the activities of D. I understand the inquiry may not be fruitful. But it should be undertaken in order to fulfill the high standard of fairness prescribed by *Prabakar* in the processing of a CAT claim.

65. Mr Shieh also made a submission that the Adjudicator had made an antecedent finding at para.32 that there was no substantial ground for believing that D would take steps to harm the Applicant upon his return to A. The Adjudicator did not say so expressly. Mr Shieh advanced his submission on the basis of the following observations of the Adjudicator,

(a) That the dispute between the Applicant and D was a private dispute which resulted in financial loss for the Applicant (and no loss was suffered by D);

(b) That nobody had made any direct threat of death or physical injury to the Applicant;

(c) That the killing of C happened in the heat of an argument.

66. However, the Adjudicator also accepted the Applicant's evidence as to the circumstances under which he fled the country and that included his evidence as to the kind of person D was. At para.14 of the

Decision, the Adjudicator recited the evidence of the Applicant that D would not hesitate to carry out a threat to kill and regarded himself as above the law. Though the initial fled from A was at the advice of E, the Applicant also gave evidence that E had advised him over phone whilst he was at F that D and his gangsters were looking for him. The Adjudicator did not cast any doubt as to the bona fide of E.

67. If the Adjudicator were of the view that E's perception of threat from D was unreal and the Applicant would be safe to return to A irrespective of the position of the State, he would not need to consider the question of State acquiescence at para.32.

68. Therefore, I cannot accept the submission of Mr Shieh that para.32 was a rolled-up finding embodying an antecedent finding of absence of threat from D in any event.

69. For these reasons, I do not feel able to uphold the Decision on account of the finding of the Adjudicator at para.32. I shall now turn to consider the alternative ground for the Decision at para.33 based on internal relocation.

Internal relocation

70. Though it was contended in the Form 86 that internal relocation was not an answer to a CAT claim, at the hearing Mr Dykes placed more emphasis on the contention based on the facts of the present case. Due to the widespread corruption and human right violations in Pakistan, it was submitted that internal relocation is not an option. Counsel

further submitted that the burden is on the Director to show that it would be safe for the Applicant to be returned to a particular area in Pakistan. On the evidence before the Adjudicator, it was submitted, he could not assume that the Applicant could be safely return to another area in Pakistan.

71. The Adjudicator was criticized for not following the approach set out in the UNHCR Guidelines on Internal Flight or Relocation Alternative ["the IFR Guidelines"] published on 23 July 2003. Although the IFR Guidelines were issued in the context of the 1951 Refugee Convention, counsel submitted that they should be applied in considering the same issue in the context of a CAT claim as well. Mr Dykes referred to the Court of Final Appeal's endorsement of the guidance from the UNHCR at para.53 of the judgment in *Prabakar*.

72. In his skeleton submissions, Mr Dykes complained at para.47 that the Adjudicator failed to identify specific IFR options; failed to require the Director to file evidence as to the IFO options being suitable and appropriate; failed to afford the Applicant an opportunity to respond; and failed to carry out an analysis that took into account of all relevant factors viewed historically in the light of the up-to-date information of Pakistan.

73. In my view, Mr Dykes was correct in not pressing the argument that as a matter of law internal relocation cannot provide an answer to a CAT claim. In *BSS v Canada* Complaint No.183 of 2001, the Committee had rejected complaints on the ground that the complainant failed to substantiate that he would be unable to lead a life free of torture in another part of India despite the risk of him being subjected to torture in

Punjab. In *HMHI v Australia* Communication No.177 of 2001, the Committee took into account of the author being returned to an area of Somalia other than where he faced the risk of being subjected to torture. Though it was a case decided in the context of the Refugee Convention, I find the rationale for internal relocation as explained in the judgment of the House of Lords in *Januzi v Home Secretary* [2006] 2 AC 426 to be equally applicable in the context of the CAT. I do not see how the absolute nature of the obligation under Article 3 of the CAT should make any material difference to the applicability of the concept. The rationale was summarized concisely by Lord Bingham at para.7 of the judgment,

> "… 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."

74. I agree with Mr Dykes that reference can be made to the IFR Guidelines for guidance in respect of the criteria for internal relocation. But they should not be treated as statutes and have to be applied with flexibility in the light of the facts of each case. Paragraph 7 of the IFR Guidelines set out a two-pronged test,

> "I. <u>The Relevance Analysis</u>
>
> a) Is the area of relocation practically, safely, and legally accessible to the individual? If any these conditions is not met, consideration of an alternative location within the country would not be relevant.
>
> b) Is the agent of persecution the State? 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.

c) Is the agent of persecution a non-State agent? Where there is a risk that the non-State actor will persecute the claimant in the proposed area, then the area will not be an internal flight or relocation alternative. This finding will depend on a determination of whether the persecutor is likely to pursue the claimant to the area and whether State protection from the harm feared is available there.

d) Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation? This would include the original or any new form of persecution or other serious harm in the area of relocation.

II. The Reasonableness Analysis

a) Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship? If not, it would not be reasonable to expect the person to move there."

75. In the context of the CAT, references to persecution or persecutor should be read as references to torture or torturer.

76. The application of the reasonableness test was considered by the House of Lords in *Januzi v Home Secretary* [2006] 2 AC 426. The court compared two different approaches: (1) the *Hathaway/New Zealand* approach which examined whether the conditions of the home country meet basic norms of civil, political, and socio-human rights; and (2) the Canadian[14] / *E*[15] approach which placed a higher threshold for a claimant and focused on the consequences to the asylum seeker of settling in the

[14] *Thirunavukkarasu v Canada* (1993) 109 DLR (4th) 682 and *Ranganathan v Canada* [2001] 2 FC 164

[15] *E v Secretary of State for the Home Department* [2004] QB 531

place of relocation instead of his previous home. The House of Lords adopted the latter approach for the reasons set out at paras.15 to 19 in the judgment. I respectfully agree that the same approach should be adopted in Hong Kong in dealing with the issue of internal relocation in the CAT context.

77. The fundamental reason for rejecting the *Hathaway/New Zealand* approach can be found at para.38 of the judgment in *E v Secretary of State for the Home Department*,

> "… 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."

Pausing here, the same can be said in respect of torture under the CAT.

> "An asylum seeker who has no well-founded fear of persecution [or torture in the context of CAT] 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 those rights. If they do so, it seems to us that the reason should be recognized as humanity or, if it be the case, the obligations of the Human Rights Convention and not the obligations of the Refugee Convention."

78. This distinction between the protection afforded by the Refugee Convention (and by analogy the CAT) on the one hand and humanitarian considerations on the other was also highlighted in the

judgment of the Canadian Federal Court of Appeal in *Ranganathan v Canada* [2001] 2 FC 164 at paras.16 and 17.

79. In *Januzi*, Lord Bingham made an important observation at para.4 as to the proper approach to construction of an international convention.

> "None the less, the starting point of the construction exercise must be the text of the Convention itself … 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 [state parties] might, or in an ideal world would, have agreed."

80. Lord Bingham drew support from paras.28 to 30 of the IFR Guidelines. At the end of his judgment, His Lordship summed up the position succinctly at para.21 in a few sentences. Though that was said in respect of the presumption against internal relocation when national authorities are the feared persecutors, I think it can be adopted for the overall approach in assessing the option internal relocation generally. Lord Bingham said,

> "There is … 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."

81. It follows that there cannot be any rule of law pre-empting the possibility of internal relocation in a country simply because there is a consistent pattern of gross, flagrant or mass violations of human rights. On the other hand, as a matter of common sense and assessment of a CAT claim on its merits, insofar as a claimant is able to show that his ground(s) for believing that he would be in danger of being subjected to torture has a connection with such state of affairs, it would not be difficult for an adjudicator to conclude that it is unreasonable to expect him to relocate.

82. As regards burden of proof, I do not see why as a matter of principle there should be a separate rule of law for dealing with the internal relocation issue. Though para.34 of the IFR Guidelines suggested that the burden of proof in establishing the relevance of internal relocation and the reasonableness of a proposed area of relocation is on the decision-maker, this has not been universally accepted. In *Thirunavukkarasu v Canada* (1993) 109 DLR (4th) 682, Linden JA said,

> "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."

83. To the same effect is the decision of the United Kingdom Immigration Appeal Tribunal in *GH Iraq* [2004] UKIAT 00248 (10 September 2004) at para.115.

> "Whilst we agree that the consideration of internal flight may be a part of the holistic process of consideration of whether there is

> a well-founded fear of persecution for a Refugee Convention reason, that question does not arise if there is no such fear in the home area. What we do not accept is that the principle expounded in paragraph A.6 of the paper that for internal flight a particular area must be identified and the claimant provided with an adequate opportunity to respond, insofar as that may be construed as an attempt to shift the burden of proof on to the host country. Under United Kingdom law the burden of proof remains throughout on the asylum claimant. Whilst it may be helpful for the Secretary of State to raise the issue (which he customarily does in the reasons for refusal letter) we do not consider that in all cases an area for relocation needs to be identified before the appellant can fairly deal with the issue. For example, in cases where the fear of persecution in the home area is of a localized non-State actor or in vast countries such as India, it is axiomatic that the asylum claimant will need to deal with why internal relocation is not open to him as an issue obvious on the face of the claim. Whether or not it is raised by the Secretary of State directly or is obviously an issue to be addressed on the face of the claim, what is quite clear is that the burden of proof remains on the claimant."

84. In my judgment, the United Kingdom and Canadian approach is conceptually more consistent with internal relocation as part of the holistic assessment as to whether a claimant has made out a case of substantial grounds for believing that he would be in danger of being subjected to torture upon return to his home country. This also appears to be the approach of the Committee in *BSS v Canada* Complaint No.183 of 2001 at para.11.5,

> "… The Committee considers that the complainant has failed to substantiate that he would be unable to lead a life free of torture in another part of India. Although resettlement outside Punjab would constitute a considerable hardship for the complainant, the mere fact that he may not be able to return to his family and his home village does not as such amount to torture within the meaning of article 3, read in conjunction with article 1, of the Convention."

The Committee did not deem it necessary to identify specific areas for relocation in that case nor did it undergo a point-by-point analysis of the relevant factors set out in the IFR Guideline.

85. At the same time, what I said above as regards the inquisitorial nature of the proceedings and the attendant duty on the part of the Director to obtain the necessary information as to the general condition of the home country equally apply to issues that may arise in dealing with the question of internal relocation.

86. Though the IFR Guidelines can provide useful guidance, they must not be treated as subsidiary statutory provisions which must be followed in all cases. Thus, a decision cannot be challenged simply on the basis that no reference was made to the Guidelines by the Adjudicator. In the present case, apparently neither counsel for the Applicant nor counsel for the Director made any reference to the IFR Guidelines at the hearing before the Adjudicator.

87. In the context of a judicial review of a decision of an adjudicator, the crucial issues are: whether the adjudicator committed any error of law in his interpretation of the CAT; whether the procedures adopted at the hearing of the petition satisfied the high standard of fairness; whether the substantive decision satisfied the enhanced *Wednesbury* test.

88. Whilst the Adjudicator's determination on internal relocation was set out tersely at para.33 of the Decision, that has to be read in the context of the arguments run before him. I have already alluded to the stance taken on behalf of the Applicant before the Adjudicator on internal

relocation. It is quite plain that the Adjudicator did not accept the submission that internal relocation is not an answer as a matter of law. For the reasons I have given, the Adjudicator was correct in that respect.

89. In *Prabakar*, Chief Justice Li said at para.51,

> "Where the claim is rejected, reasons should be given by the Secretary. The reasons need not be elaborate but must be sufficient to enable the potential deportee to consider the possibilities of administrative review and judicial review."

90. In the present case, in respect of the rejection of the Applicant based on the possibility of internal relocation, the Director stated in the letter of 7 June 2010 that the alleged risk from D is localized and avoidable by leaving A. Reasons were also given as to why it would not be unduly harsh for the Applicant to relocate to other areas in Pakistan. Even though no specific area had been identified, it was subsequently remedied by the skeleton submissions of the Director and the oral submission advanced at the hearing (see para.31 of the Decision). Counsel for the Applicant did not challenge these propositions in front of the Adjudicator. Against such background and the facts of the present case, what the Adjudicator said in the Decision should be read together with the reasons given in the letter of refusal. In my view they satisfy the *Prabakar* standard in terms of reasons given for rejecting the Applicant's claim.

91. Even taking into account of other points of law advanced by Mr Dykes which have not been canvassed before the Adjudicator, I do not see any errors of law in the Adjudicator's Decision on internal relocation. Reading the Decision as a whole, the Adjudicator found that D did not have influence over the whole of Pakistan. He specifically found at para.33

that any risk to the Applicant would dissipate if he relocated himself away from A. Given that the Applicant did not suggest at the hearing that he would suffer any hardship, not to mention undue hardship, if he had to relocate to other cities in Pakistan, and he had safely stayed in F and visited his younger brother at B before he left Pakistan, I cannot see how it can be suggested that this part of the Decision is wrong in terms of the law on internal relocation or being *Wednesbury* unreasonable.

92. Neither do I see any merits in Mr Dykes' complaints as to procedural unfairness. Given the nature of the Applicant's claim, it was plain that the risk of torture comes from a localized non-State agent. Further, the underlying cause of the dispute was a private transaction in which the Applicant was a victim rather than a wrongdoer. Against such background, as the UKIAT observed in *GH* Iraq, internal relocation is obviously an issue that has to be dealt with. The Director gave adequate notice that this was an issue, first in the letter of refusal of 7 June 2010 and second in the skeleton submissions of 30 June 2010. The Applicant was represented throughout by lawyers and his counsel did not suggest at the hearing before the Adjudicator that he needed more time to make preparation on this issue.

93. I do not accept the suggestion that the Applicant was not given adequate notice of the case of the Director on the issue or that he was not given adequate opportunity to deal with the same. As regards the evidence on the issue, the Director has supplied general information regarding B and F to the Applicant on 25 June 2010 and placed them before the Adjudicator. The materials showed that these are large cities with population in terms of millions.

94. The Applicant did not put forward any evidence either at the hearing before the Adjudicator or in the present proceedings as to any personal hardship he would suffer if he had to relocate to other parts of Pakistan. He chose to rely on the general evidence as to the widespread corruption and violations of human rights in Pakistan. For reasons already given in my discussion of *Januzi*, I do not think such evidence established that relocation to other parts of Pakistan would be unsafe or that the Applicant would suffer undue hardship upon relocation. Further, the Adjudicator had taken such evidence into account (and the up-dated material placed before me did not present a picture that is materially different in this respect) and his assessment cannot be said to be *Wednesbury* unreasonable.

95. Further, I do not consider the general evidence relied upon by the Applicant as sufficiently connected with the Applicant's personal concern to trigger a duty on the part of Adjudicator to direct further inquiry by the Director on the issue of internal relocation. Mr Dykes submitted that because of the endemic corruption in the police force, the Applicant would not be safe no matter which city he relocated to. Counsel also drew the court's attention to the distances between A and the two proposed cities of relocation. But this must be considered in conjunction with other factors relevant to the risk of the Applicant being located by D in the other cities: the population in the other cities, the unlikelihood of D pursuing the Applicant outside A given the nature of dispute between them, the localized influence of D.

96. Mr Dykes contended that the Adjudicator should have asked for information to verify that the influence of D was only restricted to A. I

do not agree. The only evidence as to the gang activities of D was confined to events at A. Though D was associated with a student religious organization called ATI, there was no suggestion that the dispute between the Applicant and D would led to a hunt of him by the ATI. The Applicant did not produce any concrete evidence to support his assertion that D would look for him if he stay at F or B.

97. In the circumstances, I do not see any ground for setting aside the Decision of the Adjudicator on internal relocation by way of judicial review. Therefore, the conclusion of the Adjudicator that there is no substantial ground for believing that the Applicant would be in danger of being subjected to torture if he was returned to Pakistan cannot be set aside.

Result

98. The application for judicial review is dismissed. I also make an order nisi that the Applicant shall pay the costs of the Director, such costs to be taxed if not agreed.

(M H Lam)
Judge of the Court of First Instance
High Court

Mr Philip Dykes, SC and Mr Nigel Bedford instructed by Messrs Barnes & Daly (D.L.A.), for the Applicant

Mr Paul Shieh, SC and Ms Grace Chow, instructed by Department of Justice, for the Interested Party