OUTER HOUSE, COURT OF SESSION

[2008] CSOH 15

OPINION OF C J MacAULAY, QC
Sitting as a Temporary Judge

in the Petition of

ANDREI IVANOV

Petitioner:

against

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent:

For

JUDICIAL REVIEW

Petitioner: Devlin; Drummond Miller, W.S.
Respondent: Lindsay; C Mullin

31 January 2008

Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Tribunal ("IAT") dated 12th March 2003 refusing the petitioner leave to appeal against the determination of an adjudicator dismissing the petitioner's appeal against the respondent's decision in refusing the petitioner's application for asylum. The petitioner seeks reduction of the IAT's decision.

[2] The petitioner (DOB 9.11.83) is a national of Moldova. He entered the United Kingdom illegally in the back of a lorry with his younger sister who is to be treated as his dependant in his application for asylum. He claimed asylum on 16 July 2002. The respondent refused that application for asylum and gave reasons for that refusal in a letter dated 1 September 2002. The petitioner appealed to the adjudicator arguing that he had a well founded fear of persecution under the 1951 UN Convention Relating to the Status of Refugees ("the Refugee Convention") and that removal would breach his rights under Articles 3 and 8 of the European Convention on Human Rights ("ECHR"). The Adjudicator refused the petitioner's appeal.

[3] In refusing the petitioner's application for leave to appeal, the IAT concluded that there was nothing in the grounds of appeal presented to it to indicate a real prospect of success for an appeal.

[4] Parties were agreed that, if the petitioner's challenge against the decision of the IAT was well founded, I should pronounce an order reducing that decision. It would follow from such an order that the decision of the IAT would by rendered void *ab initio* and the petitioner's appeal would be deemed to be a pending appeal and fall to be reconsidered by another tribunal.

Background

[5] The basis upon which the petitioner sought asylum can be shortly stated.

[6] Before leaving Moldova the petitioner lived in the area of Balti with his sister and grandmother. His grandmother died in June 2002 shortly before he left Moldova. Both his parents had been killed in a car accident in 1987. He worked the family farm.

[7] The petitioner is a homosexual. He kept his homosexuality secret until the spring of 2002 when he formed a relationship with another man called Vladimir who

also lived in Balti. On one occasion he and Vladimir went into a shop holding hands having decided that they were tired of keeping their sexual orientation secret. The shop assistant, having seen that the petitioner was holding hands with Vladimir, telephoned the police. On seeing the police coming the petitioner ran away.

[8] The petitioner was traced by the police. Three policemen came to his home and took him to a police station accusing him of having a sexual relationship with a man. He was assaulted by the police and told to leave the town otherwise he would be killed and his house would be burnt down. Thereafter the police arrested the petitioner at his house on several occasions and on each occasion detained him for a period of time and assaulted him. It seems also that the local people in the area turned against the petitioner once they realised that he was a homosexual.

[9] The petitioner's application for asylum was refused by the respondent on two main grounds. Firstly, the respondent took the view that being homosexual did not engage the United Kingdom's obligations under the Refugee Convention. That being so it followed that the petitioner's claim for asylum was not based on a fear of persecution in Moldova because of race, religion, nationality, membership of a particular social group or particular political opinion. Secondly, the petitioner's application was refused because the respondent did not find his account credible, and, in particular did not believe that the homosexual relationship that the petitioner claimed had led to his departure ever took place.

[10] In relation to those two broad grounds of refusal the adjudicator took a different view. He was of the view the respondent's decision that being a homosexual did not engage the United Kingdom's obligations under the Refugee Convention was wrong and that a fear of persecution because of sexual orientation was a fear of persecution as a result of membership of a particular social group. Counsel for the

respondent did not seek to resurrect that issue. In relation to the respondent's second ground of refusal, the adjudicator accepted the petitioner's account that he had been persecuted because of his homosexuality and was able to make a number of findings in fact (paragraphs 7-21 of his determination) based upon the evidence given by the appellant and his sister.

[11] The adjudicator described the background material in the following way:

> "26. I shall now deal with the objective background material. The objective background material before me in this case is made up of the Country Information and Policy Unit Bulletin on Moldova, a lengthy report from the Moldovan Helsinki Committee for Human Rights, a report from Amnesty, various news reports covering the activities and comments of GenderDoc-M, Moldova's only gay and lesbian organisation, a document drawn from the internet and an article taken from Monthly Review. I give the greatest weight to the documents from the Country Information and Policy Unit, the Moldovan Helsinki Committee for Human Rights, and Amnesty. Reports from Amnesty and the Country Information Policy Unit are recognised as objective and well sourced. The report from the Moldovan Helsinki Committee for Human Rights seems to me to be extremely comprehensive and again strikes me as objective and well sourced. The articles dealing with the comments and views of GenderDoc-M in my view have to be treated with greater caution. GenderDoc-M is clearly a campaigning organisation working towards the improvement of the position of homosexuals in Moldova. That is of course a laudable aim but does mean in my view that there is a danger of much of what that organisation says being partisan and more in the line of advocacy than truly objective. The document drawn from the internet contains a number of

comments by homosexuals in Moldova, posted on the internet. While these are useful it seems to me that not much weight can be placed on them. They can hardly be described as objective. Mr McGlashan sought to rely on the article from the monthly review to establish that the former Communist Party has returned to power in Moldova. I am happy to accept that document vouches that."

[12] The adjudicator then discusses the information contained in the background material referred to in the preceding paragraph. He concludes that arbitrary detention and ill-treatment by the police are matters which continue to be reported in Moldova and that the Amnesty Report in particular reported that many criminal suspects were ill-treated and in some cases tortured. Furthermore, he concludes that relatively few complaints are lodged because people feared reprisals or that grievances would not be addressed effectively. He also concludes that the Moldovan Helsinki Committee for Human Rights makes reference to a large number of cases where the Police had abused the detainees with very little being done to deal with those police officers who had abused their power even although complaints had been made.

[13] Notwithstanding his reservations about the GenderDoc-M material he does extract the following information from it:

"29. The views and experiences of GenderDoc-M outlined in the reports produced include the following. Although in 1995 the article of the Penal Code which provided for imprisonment for homosexual intercourse was abandoned sexual minorities still live in fear. Homosexuals keep their sexual orientation secret. There have been cases where the Moldovan police have blackmailed gay people. The Moldovan police have been known to beat up and rob homosexuals. One event being organised by GenderDoc-M was

broken up by about 12 policemen accompanied by the local commissioner of police, a Mr Covali who was reported as saying after this that homosexuals are outside the law, are criminals and should not be allowed to have meetings and assemblies. Homophobia is deeply routed in Moldovan society in general and among public authorities, politicians and the law enforcement authorities. The Moldovan Orthodox Church is very influential and has promised to excommunicate all homosexuals."

[14] It was in that context that the adjudicator considered the petitioner's credibility. In relation to that he had this to say:

"32. The Appellant has given a consistent account. He has given an account which, when considered in the context of the background material, could be true. For all that homosexuality is legal in Moldova there appears to me to be deep routed feelings against homosexuality in large sections of the Moldovan population. There have been instances of the police beating homosexuals. All of this renders the Appellant's claim that Vladimir did not reveal his full name, occupation or home address to him more likely than might otherwise have been the case. The Appellant was cross examined about his account and maintained his consistency in cross examination. His account was supported by his sister. While she might well be seen to have an interest in the outcome of this appeal, her account was consistent with that of her brother and she maintained that consistency under cross examination."

[15] It was against that whole background that the adjudicator was able to make the findings in fact he made at paragraph 7-21 of his determination. One of his numbered findings in fact is in the following terms:

"8. Neither he nor his sister have been to school. He worked the family farm. He was persecuted because of his homosexuality. In Moldova homosexuals are beaten by the police and people generally insult homosexuals."

[16] It is to be noted that the last sentence in that numbered finding is in general terms and consistent with the information he obtained, in particular, from the GenderDoc-M material.

[17] Against that background, the adjudicator went on to say:

"34. The appellant has established that he was beaten by the police on 7 or 8 occasions over a period of a few months. Regular beatings of the sort described by the appellant amount to persecution and a breach of Article 3 of the Human Rights Convention. This past ill-treatment is in my view probative of there being a real risk of the appellant again being ill-treated in this way by the police in his home area. It is therefore necessary to look to see whether there is a sufficiency of protection for the appellant and whether internal flight might provide an answer ...

36. The Country Information and Policy Unit document tells me that no pattern of discrimination has emerged in the judicial system and the law on Parliamentary Advocates of October 1997 created 3 positions of Parliamentary Advocates (Ombudsmen) who were empowered to examine claims of human rights violations and advise Parliament on human right issues. The report however does not tell me what powers these advocates may have.

37. Homosexuality is now legal in Moldova. The police officers who were engaged in beating the appellant were therefore not engaged in any official action. They are however state agents for all they were not involved in

persecuting the appellant on behalf of the state. In examining whether there is a sufficiency of protection in place in such a case it is necessary to see what mechanisms the state has in place to counter such an abuse of power and whether the state is able to respond quickly to complaints of such an abuse of power.

38. Several factors have led me to the conclusion that in the context of the ill-treatment the appellant risks suffering at the hands of the police in his home area it cannot be said that there is a sufficiency of protection in place for the appellant. The first of these is an apparent delay on the part of the authorities in dealing with complaints about police brutality highlighted by the cases referred to in the report of the Moldovan Helsinki Committee for Human Rights at pages 16-19. That report also refers to a case (which is also referred to in the Amnesty Report) where one police officer who had been complained against was in a position to re-arrest the person who had complained about him and detain him for a period. The second point is that the background material does support the general proposition that homophobic views are held by senior police officers and judges. The comments of the Supreme Court of Justice and the actions of the Commissioner of Police who stopped a meeting of homosexuals taking place and his comments thereafter all strongly indicate that. On this evidence it does not seem to me that the protection on offer to the appellant against the police who abused him in the past can be said to be sufficient."

[18] Having arrived at that conclusion the adjudicator then went on to consider the issue of internal flight. It is apparent from what the adjudicator says that that was an issue which had not been addressed in the submissions made to him.

[19] The relevant paragraphs of the adjudicator's determination on the issue of internal flight are as follows:

> "41. Although there are reports of police committing human rights abuses against homosexuals I do not read the background material as indicating that this is so widespread a problem that homosexuals cannot live anywhere in Moldova in safety. GenderDoc-M for example exists and is operating openly. It seems to me on this evidence that the appellant became the victim of a group of misguided police officers in his local area. While I am not satisfied on the evidence before me that the Moldovan state would offer appropriate protection to the appellant were these officers to repeat their conduct it seems to me that were the appellant to relocate to another area of Moldova the risk of the appellant again having to endure conduct of this sort would be avoided.
>
> 42. The next point to consider therefore is whether it might be unduly harsh to expect the appellant to relocate in Moldova. Unemployment is certainly high in Moldova. He is however a young man and would not be disadvantaged on the labour market. While he would not be able to return to his home area to resume his relationship with Vladimir, Vladimir has not accompanied the appellant to the United Kingdom and the appellant has not had any contact with him since he arrived here. His relationship with Vladimir therefore terminated when he came to the United Kingdom. While in my view the evidence does not show that the appellant would be at risk of again encountering treatment amounting to persecution in areas of Moldova outwith his home area the evidence does establish in my view that he would be subject to discrimination and criticism, at times trenchent, because of his homosexuality elsewhere in Moldova. The evidence does establish in my

judgement that there is a strong anti-homosexual current in Moldova. The discrimination and criticism which the appellant risks facing would not however in my view amount to persecution or a breach of Article 3. Nor in my view bearing in mind the United Kingdom's right to exercise immigration control, would it amount to a breach of any other article of the Human Rights Convention.

43. In the whole circumstances I do not consider that it can be said to be unduly harsh to expect the appellant to relocate within Moldova. Were he to do so there would be no real risk of his again being ill-treated in a way amounting to a breach of the Refugee Convention or Article 3 or 8 of the Human Rights Convention. Internal flight therefore provides the answer to the appellant's claim under the Refugee Convention and Articles 3 and 8 of the Human Rights Convention."

The Relevant Law

[20] Apart from one issue which in large measure resolved itself over the course of the hearing and to which I shall return later, there was very little disagreement between the parties as to the law applicable to a case of this kind. It was agreed that the normal guidance for the legal challenge of an administrative decision as set out in *Associate Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1 KB 223 was to be applied but that, having regard to the decision in *R* v *Home Secretary ex parte Bugdaycay* [1987] 1 AC 514 when an administrative decision under challenge is one which may put the applicant's life at risk "the basis of the decision must surely call for the most anxious scrutiny" (*per* Lord Bridge of Harwich at page 531G). The standard of proof in deciding whether an applicant for asylum had a

reasonable fear of persecution for a Convention reason was agreed as being whether there was a reasonable degree of likelihood of such a well-founded fear. Also, it was agreed that when fundamental human rights are threatened the Court should not be inclined to "overlook some perhaps minor flaw in the decision making process, or adopt a particularly benevolent view of the minister's evidence, or exercise its discretion to withhold relief" (*R* v *Ministry of Defence ex p. Smith* [1996] QB 517 *per* Simon Brown LJ at pages 537H-538A). The issue of internal flight to another location is one of the issues raised in this case and in relation to that issue there was no dispute that the onus of proving that it was unsafe to expect the petitioner to relocate within Moldova was on the petitioner. Counsel for the Respondent stressed that the adjudicator acts as a specialist tribunal and a court must exercise caution in interfering with his decision. Counsel for the petitioner did not disagree with that proposition.

Submissions for the petitioner

[21] Counsel for the petitioner advanced three arguments. Firstly, he submitted that no reasonable adjudicator, having before him the background information in this case relating to the difficulties facing homosexuals in Moldova, would have made a finding that homosexuals could live throughout Moldova in safety. Secondly, he submitted that the adjudicator erred in law in that he equated the question whether it would be unduly harsh to expect the petitioner to relocate in another part of Moldova with the question whether there were substantial grounds for believing that there was a real risk that the petitioner, if returned to any part of Moldova, would be subjected to cruel, inhuman and degrading treatment or punishment contrary to Article 3 of ECHR. Thirdly he argued that no reasonable adjudicator, properly directing himself in the

relevant law, could have found that it would not have been unduly harsh to have expected the petitioner to relocate within another part of Moldova.

[22] In developing his first submission, Counsel for the petitioner argued that the evidence before the adjudicator did provide a clear basis for the conclusion that homosexuals living anywhere in Moldova were at risk from police brutality. He relied, in particular, on the GenderDoc-M material. He pointed to the adjudicator's conclusion in paragraph 26 of his determination that there was a danger that much of what GenderDoc-M might say was partisan and submitted that notwithstanding that conclusion the adjudicator ought to have tested that material against the other background material before him. Had he done so he would have seen that there was no contradiction in the material in relation to the manner in which homosexuals were treated in Moldova. The objective evidence did not suggest that the police brutality towards homosexuals was confined to any location and Counsel submitted that the statement made by the adjudicator in paragraph 41 to the effect that "it seems to me on this evidence that the appellant became the victim of a group of misguided police officers in his local area" did not mean that the problem was not widespread.

[23] In developing his second submission counsel for the petitioner focussed in particular on paragraphs 42 and 43 of the adjudicator's determination. The essence of his point was that the adjudicator limited his consideration of whether or not it would be unduly harsh to expect the appellant to relocate within Moldova to whether there was a risk of persecution under the Geneva Convention or a violation of Article 3. Counsel submitted that in so doing he erred in law because something could be unduly harsh without being contrary to Article 3 of ECHR. In this part of his submission Counsel for the petitioner made detailed reference to the decision in *E and Another* v *Secretary of State for the Home Department* [2004] 2 B 531. He argued that

the test put forward in that case by the Court of Appeal on the issue of internal flight was too narrow and inconsistent with the broader test seen in other authorities. In his analysis of what was said in *E* v *Secretary of State for the Home Department* counsel submitted that the Court of Appeal effectively concluded that it would not be unduly harsh for a person to relocate unless the conditions in the place of relocation amounted to persecution or were incompatible with ECHR. He accepted that on that basis the adjudicator did not err in what he said at paragraph 42 of his determination but counsel for the petitioner's position was that the views expressed in other cases envisaging a broader test were to be preferred.

[24] The third submission advanced by counsel for the petitioner also depended upon his analysis of the position in *E* v *Secretary of State for the Home Department*. He submitted that on the facts the adjudicator ought to have concluded that it would have been unduly harsh to expect the petitioner to relocate in Moldova. To expect him to do so would be to have him to return to a regime where discrimination against homosexuals was widespread and where the police engaged in such discrimination and did so with apparent impunity.

[25] In developing his submissions counsel for the petitioner, in addition to the cases already referred to, also referred to the following cases and sources: *R* v *Secretary of State for the Home Department ex parte Bugdaycay* [1987] 1 AC 514, *R* v *Ministry of Defence ex parte Smith* [1996] QB 517, *R* v *Secretary of State for the Home Department ex parte Sivakumaran* [1988] 1 AC 958, *Hariri* v *Secretary of State for the Home Department* [2003] EWCA Civ. 807, *Lahori* v *Secretary of State for the Home Department (IAT) Appeal No. G0062* (1998), *Dumitru* v *Secretary of State for the Home Department (IAT) Appeal No. 00TH00945,* 2000, *Gashi & Nikshiqu* v *Secretary of State for the Home Department* (1997) INLR 96, *Jain* v

Secretary of State for the Home Department (2000) IMM AR 76, *R* v *Secretary of State for the Home Department ex parte Robinson* 1998 QB 929, *R* v *Secretary of State for the Home Department ex parte Salim* [2000] IMM AR 6, *R* v *Chief Constable of South Yorkshire Police* [2002] 1 WLR 3223, *R* v *Broadcasting Standards Commission ex parte British Broadcasting Corporation* [2001] QB 885, *Karanakaran* v *Secretary of State for the Home Department* [2000] 3 All ER 449, Asylum Law and Practice, Symes and Jorro paras. 2.9, 5.6-5.10 and pages 207-225, Immigration Law and Practice in the United Kingdom (5th edition), Macdonald and Webber para. 12.44, UNHCR Guidelines on International Protection, Joint Position (4th March 1996) of the Council of the European Union on the definition of the term "refugee" and note from the European Council on Refugees in Exiles dated June 1995 and outcome of proceedings from the Asylum Working Party of the Council of the European Union dated 24th April 2002.

[26] Counsel for the petitioner invited me to sustain his second plea-in-law and to grant decree of reduction.

Submissions for the respondent

[27] Counsel for the respondent emphasised the need for caution in interfering with the decision of an adjudicator because of the special competence that he has in the area of immigration. In particular, matters relating to the assessment of the background evidence and the application of the unduly harsh test fell within that particular special competence. He also emphasised that the unreasonableness test represented a very high standard.

[28] On the issue of onus of proof there was no dispute that the onus is on the petitioner to establish that the internal flight alternative was not available to him. If

there is no evidence then the issue goes against him. He submitted that it is not necessary for the respondent to lead any positive evidence that it is safe elsewhere.

[29] In assessing the potential risks to the petitioner he submitted that it was important to differentiate between different lifestyles and that differences in lifestyle might give rise to different risks. For example, a homosexual who engaged in "cruising" or frequented gay bars exposed himself to a greater risk of physical abuse than might be said about the petitioner in this case.

[30] Counsel for the respondent went on to analyse the approach taken by the adjudicator and submitted that there was no confusion in his approach and no irrationality. He argued that the adjudicator had not misunderstood the evidence and had not taken into account any irrelevant considerations. At the continued hearing, counsel for the respondent was able to refer to the decision in *Januzi* v *Secretary of State for the Home Department* [2006] 2 WLR 397, a decision of the House of Lords that was not available at the time counsel for the petitioner made his submissions. Counsel for the respondent pointed out that in *Januzi* v *Secretary of State for the Home Department* the decision of the Court of Appeal in *E* v *Secretary of State for the Home Department* was approved and that showed that the attack made by counsel for the petitioner on that decision was misconceived. He submitted that in relation to the internal flight alternative, the adjudicator had correctly applied the law as set out in those cases. The fact that western economic and social rights were not available in the home country did not mean that it would be unduly harsh to require an asylum seeker to relocate in another part of that country.

[31] Counsel for the respondent invited me to sustain the second plea-in-law for the respondents, repel the petitioner's pleas-in-law, and dismiss the petition.

Reply on behalf of the petitioner

[32] Counsel for the petitioner made a short reply essentially to deal with the decision in *Januzi* v *Secretary of State for the Home Department*. He submitted that the observations made by their Lordships in that case were not unhelpful to the position he was adopting in particular in relation to the unduly harshness test. He repeated his submission that in the circumstances no reasonable adjudicator could have come to the view that there was a place of safety where the petitioner could relocate. He referred to *Svazas* v *Secretary of State for the Home Department* [2002] 1 WLR 1891.

Response on behalf of the respondent

[33] In a short response counsel for the respondent reiterated his point that it was necessary to look at the particular circumstances of the case in order to assess the level of risk. In assessing risk there was a difference between the active homosexual scene and a participant in a less active scene.

Discussion

[34] In my view there are two questions to be addressed in this application for judicial review. Firstly, did the adjudicator err in concluding that the appellant could avoid persecution if he relocated to another area of Moldova? Secondly, did he err in his approach to the question of internal flight?

Safe relocation

[35] It is clear the adjudicator was satisfied that in his home area the petitioner was at a real risk of being persecuted because of his homosexuality. As he sets out in

paragraphs 34-38 of his determination (see paragraph [17]) he accepted that the petitioner had been subjected to regular beatings by the police and that there did not exist a sufficiency of protection for him. In coming to that latter conclusion, as disclosed in paragraph 38 of his determination, he relies on material that relates to the country as a whole and not just Balti. I have set out at paragraph [13] the material from the GenderDoc-M source that the adjudicator accepted when considering the risk to the petitioner. Again that material is not limited to the petitioner's home area and discloses the real risk that homosexuals as a group face generally and more particularly at the hands of the police. Not only did the adjudicator have regard to that material but he also had before him the written and oral evidence of the petitioner. It was the totality of that material that prompted him to make the clear finding in fact that I have set out at paragraph [15] namely that "... *in Moldova homosexuals are beaten by the police and people generally insult homosexuals*". That finding is not limited in any way to the petitioner's local area and plainly applies to Moldova generally. In light of that finding the adjudicator's reasoning in paragraph 41 of his determination makes surprising reading. I have set that paragraph out in full at paragraph [19]. He says that he did "*not read the background material as indicating that this is so widespread a problem that homosexuals cannot live anywhere in Moldova in safety"* and he goes on to conclude *"on this evidence that the appellant became the victim of a group of misguided police officers in his local area*". There is an apparent contradiction between that reasoning and the clear finding in fact he makes to which I have already referred. In particular his finding in fact does not limit the attitude of the police to homosexuals to any particular area and, on the face of it, applies to Moldova as a whole.

[36] In giving the adjudicator's determination the anxious scrutiny that I am enjoined to give it, I am of the view that the adjudicator, in an unreasonable way, failed to follow through the logic of his own finding in fact, based as it was on background material that he was prepared to accept and the evidence of the petitioner and his sister as to general attitudes in Moldova. Having made such a clear and unqualified finding in fact, it seems to me that it was incumbent upon the adjudicator if, notwithstanding that finding, he was going to conclude that the petitioner could relocate safely, to have given clear and cogent reasons for such a conclusion. In my judgement he has failed to do so.

[37] Counsel for the respondent, as I have already indicated, sought to differentiate the level of risk that might attach to active homosexuals as against the level of risk that might have attached to the petitioner. That approach did not form part of the adjudicator's reasoning but, in any event, as at the time of his detention and maltreatment, the petitioner had decided no longer to keep his sexual orientation secret. Indeed it was the fact that he was seen holding hands with another man that triggered the police response.

[38] Accordingly, so far as this particular issue is concerned, I consider that the approach adopted by the adjudicator was one which a reasonable adjudicator would not have adopted.

Internal flight

[39] Although the petitioner succeeds in his application for judicial review standing my decision on the first question, should I be wrong in relation to that issue, then it is also necessary that I set out my view on the issue of internal flight.

[40] Whatever prior controversy may have existed on the issue of the internal flight alternative, in *Januzi* v *Secretary of State for the Home Department* the House of Lords has provided clear guidance as to how that issue is to be addressed. In so doing, the House of Lords approved the decision in *E* v *Secretary of State for the Home Department* and it is to that case that I shall first turn.

[41] The claimants in *E* were a Tamil couple who, with their children, left Sri Lanka to seek asylum as refugees in the United Kingdom. The Secretary of State refused their claims but a special adjudicator allowed their appeal holding that the husband had a current well-founded fear of persecution in the North of Sri Lanka, and that if they were removed to Colombo, although neither claimant was reasonably likely to be persecuted, the post traumatic stress disorder from which the wife was suffering would be aggravated. The special adjudicator concluded that in such circumstances it would be unduly harsh to expect the family to relocate to Colombo. The adjudicator made no finding that the wife had a well-founded fear of persecution in any part of Sri Lanka. The Immigration Appeal Tribunal allowed the Secretary of State's appeal against that decision.

[42] In the Court of Appeal the essential focus was on the correct approach to internal relocation. In approaching that issue Lord Phillips of Worth Matravers MR says at page 540:

> "The Issue
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> 12. Article 1 of the Convention relating to the Status of Refugees (1951) (CMND9171), as amended by the 1967 Protocol (CMND3906), (the "Refugee Convention") provides:
>
> > 'A. For the purposes of the present Convention, the term "refugee" shall apply to any person who ... (ii) ... 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 a 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 as a result of such events, is unable or owing to such fear, is unwilling to return to it"

13. The issue is the manner in which this definition falls to be applied where an asylum seeker has a well-founded fear of persecution in the part of his country where he habitually resides, but where there is another part of the country where he would not have such fear. This is an issue which arises quite frequently in the case of Tamils who live in the north of Sri Lanka. In that part of the country government troops are in conflict with the LTTE and treat brutally Tamils suspected of assisting that rebel government, which in some circumstances gives rise, in the case of such suspects, to a well founded fear of persecution. Tamils who live in, or who move to, Colombo are not, in general, subject to such danger or such fear."

[43] Having defined the issue that required to be addressed Lord Phillips goes on to consider the historical background to the issue and says at page 542:

"19. There is no reason to believe that those who agreed the refugee convention in 1951 gave any thought to the possibility that a well-founded fear of persecution might exist in relation to one part of a state but not to another part. In *Canaj* v *Secretary of State for the Home Department* [2001] INLR 342, 349, Simon Brown LJ suggested that the concept of 'internal flight alternative', which we prefer to describe as '"internal relocation', appears to

have originated in para. 91 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which was first published in 1979. This read:

> 'The fear of being persecuted need not always extend to the whole territory of the refugees 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 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'."

[44] Lord Phillips sets out how the issue of internal relocation is to be approached at page 543:

> "23. Relocation in a safe haven will not provide an alternative to seeking refugee status outside a country of nationality if, albeit 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 viscisitides 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 a safe haven and those prevailing in the country in which asylum is sought."

[45] Having set out the general principles in that way Lord Phillips embarked upon a detailed analysis of case law in this country, Canada and New Zealand. He goes on at page 555 to say:

"64. ... So far as refugee status is concerned, the comparison must be made between the asylum seeker's conditions and circumstances in the place where he has reason to fear persecution and those that he would be faced with in the suggested place of internal relocation. If that comparison suggests that it would be unreasonable, or unduly harsh, to expect him to relocate in order to escape the risk of persecution his refugee status is established. The "unduly harsh" test has, however, been extended in practice to have regard to factors which are not relevant to refugee status, but which are very relevant to whether exceptional leave to remain should be granted having regard to human rights or other humanitarian considerations."

[46] Having defined the test in that way Lord Phillips goes on to say:

"67. It seems to us important that the consideration of immigration applications and appeals should distinguish clearly between (i) the right to refugee status under the Refugee Convention, (ii) the right to remain by reason

of rights under the Human Rights Convention and (iii) considerations which may be relevant to the grant and 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 Human Rights Convention or the requirements of humanity."

[47] In *E*, the applicants did not invoke the Human Rights Act 1998, the appeals being limited to the contention that the husband should be granted refugee status because it would be unduly harsh to expect him to relocate in Colombo having regard to the effect that this would have on his wife's psychiatric condition. The wife's psychiatric condition was not attributable to persecution or a well-founded fear of persecution on her part, nor did it relate to her husband's well-founded fear of persecution. Accordingly, when considering the question as to whether it would be reasonable to expect the husband to live in Colombo, his wife's condition was no more than a neutral factor. What the husband's case came to was that if he and his wife were permitted to remain in the United Kingdom then that would be likely to be beneficial to her psychiatric condition, whereas being returned to Sri Lanka was likely to be detrimental to it. That being so, it did not constitute a reason to find that he had refugee status under the Refugee Convention.

[48] On the basis of what was said in *E* v Se*cretary of State for the Home Department* the test as to whether an asylum seeker could reasonably have been expected to relocate in his home country involves a comparison between the

conditions prevailing in the place of his habitual residence and the conditions prevailing in the place of relocation having regard to the impact that the relocation conditions on the asylum seeker. It is also clear from the passage quoted in paragraph [46] from what was said by Lord Phillips that in dealing with an immigration application it is important to distinguish between the right to refugee status under the Refugee Convention from the right to remain by reasons of rights under the Human Rights Convention. The internal flight analysis is only of relevance to the issue of refugee status under the Refugee Convention.

[49] Although permission to appeal to the House of Lords was granted in *E* that appeal was not pursued because the issues that it would have raised were raised in *Januzi* v *Secretary of State for the Home Department*. That appeal consisted of two appeals. In the first appeal the claimant was an ethnic Albanian from a Serb dominated area of Kosovo. Having claimed asylum as a refugee under the Refugee Convention, the Secretary of State, having accepted that the claimant's home was in an area where the Serb population was in the majority, concluded that it would not be unduly harsh for him to relocate in one of a number of other areas of Kosovo where the Albanian population predominated. On appeal the adjudicator allowed his appeal on the basis that the claimant's psychiatric condition resulting from his experiences in Kosovo would be exacerbated by his return and the general lack of health care facilities meant that it would be unreasonable to expect him to do so. The Immigration Appeal Tribunal allowed the Secretary of State's appeal against that decision, and on appeal to the Court of Appeal, the Court of Appeal upheld the Secretary of State's refusal of his claim. In the other appeal, the three claimants were Black Africans who had fled from their homes in the Darfur region of Sudan to Khartoum before arriving in the United Kingdom. Their asylum claims that they had a well-founded fear of

racial persecution which had been sanctioned or connived in by the State authorities were refused by the Secretary of State. It was considered that Khartoum would be a safe area and that it was reasonable to expect them to relocate there. The asylum and Immigration Tribunal refused their applications for reconsideration. The Court of Appeal dismissed their appeals. In the House of Lords the Secretary of State conceded that the cases of two of the claimants required to be remitted for reconsideration.

[50] The issue that arose in both of the appeals was whether, in judging reasonableness and undue harshness in the context of relocation, account should be taken of any disparity between the civil, political and socio-economic human rights which the claimants would enjoy under the leading international Human Rights Conventions and Covenants, and those which they would enjoy at the places of relocation. Lord Bingham of Cornhill having referred to the passages I have already quoted in paragraph [42] - [44] goes on to set out reasons why the approach of the Court of Appeal in *E* had to be preferred to the different approach that had been taken in New Zealand. He says at pages 411-412:

> "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 23rd July 2003. In para. 7II(a) the reasonableness analysis is approached by asking "Can the claimant, in the context of the country concerned, relead 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 para. 28:

> *'Respect for Human Rights*
>
> Where respect for 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-economical 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 paras. 29-30:

> *'Economic survival*
>
> 29. 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. ...
>
> 30. 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 plan tribe ethnic religious and/or cultural group, relocation there would not be reasonable'."

[51] Agreeing with Lord Bingham, Lord Hope of Craighead also held 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 was not to be judged by considering whether the quality of life in the place of relocation met the basic norms of civil, political and socio-economic human rights. At page 420 he says:

> "46. There is, as Lord Bingham points out, no basis for such a test in the wording of Article 1A(ii) 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 2-34 of the Convention without discrimination as to race, religion or country of origin: see Article 3. But to become entitled to those benefits a claimant must first show that he is entitled to the status of a 'refugee' as defined in Article 1A(ii). 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* v *Secretary of State for the Home Department* [2004] QB 531, para. 67, the comparison

> between the asylum - seekers 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."

Lord Nicholls of Birkenhead agreed with Lord Bingham and Lords Carswell and Mance agreed with Lords Bingham and Hope.

[52] On the facts the appeal against the Court of Appeal's decision in relation to the claimant who asserted it would be unreasonable for him to relocate in Kosovo was dismissed and in relation to the outstanding appeal in the other case the Court decided to remit that case along with the other cases where a remit had been conceded for reconsideration by the asylum and Immigration Tribunal.

[53] The decisions in *E* and *Januzi* have clarified the law as to how the test of reasonableness is to be addressed when internal relocation is being considered as an option when deciding whether an applicant is to be granted refugee status. The conditions prevailing in the place of habitual residence must be compared with the conditions prevailing in the place of relocation. Furthermore, the conditions in the proposed place of relocation must be assessed to establish what impact they will have on the particular asylum seeker, and if under those conditions he cannot live a relatively normal life according to the standards of his own country it would be unreasonable and unduly harsh to expect him to go to live in the place of relocation.

[54] In paragraphs [46] and [51] I have set out what was said by Lord Phillips in *E* and Lord Hope in *Januzi* about the interplay between the right to refugee status under the Refugee Convention and the right to remain by reason of rights under the Human Rights Convention. Although there may be an overlap, in particular between the circumstances that might engage Article 3 of the Human Rights Convention and the

Refugee Convention, nevertheless in approaching an asylum seeker's claim under the Human Rights Convention and the Refugee Convention it may be important to distinguish the two processes. That that may be so is clear particularly from what is said by Lord Hope in that part of his speech I have set out at paragraph [51]. He plainly envisages that so far as the Refugee Convention is concerned, it is in assessing whether the claimant is entitled to the status of a refugee that the possibility of internal relocation is relevant. It is at that part of the analysis that the appropriate comparison involves comparing the circumstances in the claimant's place of habitual residence with the circumstances in the proposed place of relocation. But the comparison between the asylum seeker's situation in the United Kingdom and the proposed place of relocation, in the language of Lord Hope, "*may be very relevant when considering the impact of the European Convention on Human Rights or the requirements of humanity*".

[55] The adjudicator addresses the issue of internal relocation in paragraphs 42 and 43 of his determination (see paragraph [19] of this Opinion). In paragraph 40 of his determination he confirms that he was not specifically addressed in evidence or in oral submissions on this whole issue of internal flight. He does say in that paragraph that he considered that internal flight was "impliedly addressed" by the respondent in his refusal letter at paragraph 11. In that section of the refusal letter the respondent, as part of his reasoning, concludes that the problems encountered by the petitioner were of "a localised nature". The adjudicator suggests that this was addressed by the petitioner in his skeleton argument - I have not seen that document.

[56] I consider it to be highly unfortunate that this whole issue was not properly ventilated before the adjudicator. The appeal to the adjudicator seemed to proceed on the basis that if the petitioner was found to be credible, contrary to the view taken by

the respondent, and satisfied the adjudicator that he was the victim of persecution with insufficient protection that he would succeed. As I think is apparent from the decisions in *E* and *Januzi* the issue of internal relocation is not an easy one and I would have thought one that demanded far greater attention. Although the onus is on the petitioner in such circumstances to prove that there is no safe haven in his home country, that does not mean that he has to focus on individual parts of his own country and deal with them one by one to show that it would be unsafe for him to go there. In this particular case, as I have concluded when dealing with the first issue that I have focussed upon, the petitioner led evidence which contributed to the finding of fact made by the adjudicator that generally in Moldova homosexuals are beaten by the police and people generally insult homosexuals. As a practical matter, if the Secretary of State considers that there is a city, town, or specific place in the country which would satisfy the tests required for the existence of a safe haven, then he should give notice of that to the applicant. The applicant would then have the task of proving at the requisite standard that the proposed place of relocation was in fact unsafe. In *E* the Secretary of State focussed on Colombo as a safe haven, and in *Januzi* Pristina in Kosovo and Khartoum in Sudan were pointed to by the Secretary of State as possible safe havens. The onus was then on the applicants to prove that the proposed safe havens did not satisfy the internal flight requirements. The manner in which this matter was addressed before the adjudicator (with whom I have some sympathy when he came to address it) was wholly unsatisfactory.

[57] Be that as it may, I am quite satisfied that the adjudicator erred in his approach to the issue of internal relocation in a number of respects. In paragraph 42 he appears to conflate the unduly harsh test with the risk of persecution *per se*. Having decided that the petitioner would be subjected to *"discrimination and criticism"*, at times

"trenchant", because of his homosexuality elsewhere in Moldova he goes on to say that *"The discrimination and criticism which the appellant risks facing would not however in my view amount to persecution or a breach of Article 3"*. Plainly, the risk of persecution would satisfy the unduly harsh test and indeed render it redundant. It is clear from what was said in *E* and *Januzi* that the unduly harsh test is not circumscribed by the risk of persecution or for that matter Article 3 of the Human Rights Convention. For the adjudicator to judge the unduly harsh test under reference to the risk of persecution *per se* was an error of law.

[58] Furthermore, although the adjudicator concludes that the discrimination and criticism which the petitioner risked facing if he were to relocate to another part of Moldova would not amount to a breach of Article 3 of ECHR, there is no analysis of the petitioner's application under Article 8 of ECHR. Also, there is evident confusion in his final remarks when he says "*Internal flight therefore provides the answer to the appellant's claims under the Refugee Convention and Articles 3 and 8 of the Human Rights Convention*". As I have already discussed under reference to the decisions in *E* and *Januzi*, the internal flight alternative is a doctrine that has developed under reference to the Refugee Convention in order to determine whether any asylum seeker is entitled to the surrogate protection of the international community. When ECHR is engaged, the analysis takes on a different form requiring, as pointed out by Lord Hope in *Januzi*, a comparison between the asylum seeker's situation in this country and his situation in the home country. In this case the correct comparison might have had an important impact, particularly in relation to Article 8 of ECHR.

[59] In the circumstances I am satisfied that the IAT erred in law in rejecting as not arguable the petitioner's challenge to the adjudicator's determination. Accordingly I

shall uphold the petitioner's second plea-in-law to the extent of granting decree of reduction of the IAT's determination dated 12 March 2003.