IN THE COURT OF APPEAL **Appeal Ref: 2018/1968**

B E T W E E N : -

AS (AFGHANISTAN)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

-and-

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Intervener

WRITTEN SUBMISSIONS OF THE INTERVENER

Introduction

1. UNHCR intervenes with kind permission, as it did in the related cases of *AH (Sudan) v SSHD* [2007] UKHL 49 [2008] 1 AC 678 and *Januzi v SSHD* [2006] UKHL 5 [2006] 2 AC 426. As the Court may know, UNHCR has supervisory responsibility in respect of the Refugee Convention[1] and State Parties have obligations[2] to cooperate with UNHCR in the exercise of its functions and to facilitate its duty of supervision. UNHCR is entrusted with the responsibility for providing international protection to refugees and other persons of concern and, together with governments, for seeking permanent solutions for the problem of refugees.[3] It fulfils its mandate, *inter alia,* by, "*supervising [the] application*" of the "*international conventions for the protection of refugees*".[4] Its supervisory responsibility, recognised also in the EU instruments[5], is exercised in part through [AB/3] [AB/5]

[1] The 1951 Convention relating to the Status of Refugees and its 1967 Protocol. [AB/1]
[2] Article 35 of the 1951 Convention and Article II of the 1967 Protocol. [SAB/1]
[3] 1950 Statute of the Office of UNHCR, annexed to UN General Assembly Resolution 428(V) 14.12.50.
[4] 1950 Statute §8(a).
[5] See e.g. recital 22 *Qualification Directive* 83/2004 and Article 29(3) *Procedures Directive* 2005/85. [AB/2] [SAB/2]

the issuing of interpretative guidelines, including the *UNHCR Handbook*.[6] UNHCR does not make submissions on the facts and the merits of individual cases, but is concerned with the interpretation and application of the Refugee Convention as a matter of law. In the present case UNHCR will in particular invite the Court's attention to the following materials which it has promulgated: (1) the *UNHCR Handbook* (§91); (2) the *2003 Guidelines*[7]*;* (3) the *2018 Eligibility Guidelines*[8]. [SAB/4] [SAB/4] [AB/18] [SAB/6]

2. UNHCR's core submission is as follows. The correct approach when assessing the reasonableness of a proposed internal relocation, flight or protection alternative ("**IFA**") is to carry out a single, holistic assessment which focuses upon the circumstances of the individual. That assessment:

   2.1 may, as one factor, consider what is 'a relatively normal life' in the context of the country concerned; but

   2.2 must consider the conditions in the place of relocation against certain objective 'baseline standards'; and

   2.3 must consider the impact of the proposed relocation on the particular individual, having regard to that individual's characteristics, personal circumstances and past experiences.

IFA

3. Article 1A(2) of the Refugee Convention defines a refugee as a person who: [AB/1/14]

> ***owing to well-founded fear of being persecuted for reasons of race, religions, nationality, membership of a particular social group or political opinion, is outside the country of [their] nationality and is unable or, owing to such fear, is unwilling to avail [themselves] of the protection of that country, or who, not having a nationality and being outside the country of [their] former habitual residence is unable or, owing to such fear, is unwilling to return to it…***

4. The UNHCR Handbook[9] explains at §91 that: [SAB/4/19]

> ***The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus…persecutions of a specific…group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely***

[6] *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*. [SAB/4]
[7] *Guidelines on International Protection (No. 4): Internal Flight or Relocation Alternative* (23.7.03). [AB/18]
[8] *Eligibility Guidelines for assessing the international protection needs of asylum-seekers from Afghanistan* (30.8.18). [SAB/6]
[9] Recognised in *R v SSHD ex p Adan and Aitseguer* [2001] 2 AC 477 HL, 520B as "*high persuasive authority*".

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[10]

5. Article 8(1) of the Qualification Directive provides that: [AB/2/16]

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

Article 8(2) of the Qualification Directive provides that Member States shall, at the time of deciding the application "*have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of applicant*." [AB/2/16]

6. Lord Bingham summarised the approach of the English Courts to IFA as follows (at §21 of *Januzi*, repeated at §5 of *AH Sudan*): [AB/5/449] [AB/3/683]

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

The 2003 Guidelines

7. UNHCR issued the *2003 Guidelines*[11] as "*interpretative legal guidance*" for governments, legal practitioners, decision-makers and the judiciary, and UNHCR staff carrying out refugee status determinations, as an enhanced "*structured approach*" (*2003 Guidelines* §1). Lord Bingham (for the House of Lords) in *Januzi* endorsed the *2003 Guidelines* as "*valuable guidance*" (at §20), expressly citing §§28 to 30 and 7(I)(b) and summarising the test in §6 above. As the *2003 Guidelines* explain: [AB/18] [AB/18/2] [AB/5/448] [AB/18/2]

   7.1 The concept of an IFA is "*not a stand-alone principle of refugee law, nor is it an independent test in the determination of refugee status*". The refugee criteria set out in Article 1A(2) of the Refugee Convention "*are to be interpreted in a liberal and humanitarian spirit, in accordance with their ordinary meaning*" and "*in light of the object and purpose*" of the Refugee Convention (at §2).

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[10] Underlining in quotations connotes emphasis added.

[11] Issued pursuant to UNHCR's mandate under the 1950 Statute and Refugee Convention Art 35; resulting (inter alia) from a September 2001 San Remo meeting of international legal experts (cf. *Januzi* §§11, 20; *K v SSHD* [2007] 1 AC 412 at §§57-58, 84, 99-100 and 107). [SAB/1] [AB/5/442, 448] [AB/4/449, 458, 463 and 465]

7.2 The concept of an IFA should "*not be invoked in a manner that would undermine important human rights tenets underlying the international protection regime*", namely "*the right to leave one's country, the right to seek asylum and protection against refoulement*". International law "*does not require threatened individuals to exhaust all options within their own country first before seeking asylum*", and does not consider asylum "*to be the last resort*" (at §4).

8. The *2003 Guidelines* then explain (at §7) that the assessment of an IFA requires: [AB/18/3]

8.1 First, an analysis of whether the proposed area of relocation is "relevant"[12]. This includes consideration of the identity of the persecutor, whether a well-founded fear of persecution would persist (or arise by reference to new factors) in that area, and whether the area is practically and legally accessible.

8.2 Secondly, the "reasonableness" analysis, which asks (in respect of any "relevant" relocation options) whether the applicant "*in the context of the country concerned*" can (in the proposed location) "*lead a relatively normal life without facing undue hardship*", on the basis that "*if not, it would not be reasonable to expect the person to move there.*"

9. The *2003 Guidelines* address "reasonableness" at §§22 to 30, explaining that: [AB/18/5]

9.1 The question does not entail an analysis based on what a "*hypothetical 'reasonable person' should be expected to do.*" Rather, the question is what is reasonable "*both subjectively and objectively, given the individual claimant and the conditions in the proposed internal flight or relocation alternative*" (at §23).

9.2 The personal circumstances of an individual should "*always be given due weight*" as part of the assessment. The relevant factors include the individual's "*age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work* [AB/18/6]

[12] Summarised at §§7(I)(a) to (d) of the *2003 Guidelines*.

background and opportunities" and "*any past persecution and its psychological effects*" (at §25). Those factors must be considered individually and cumulatively (§25).

9.3 The individual "*must be able to find safety and security and be free from danger and risk of injury."* This must *"be durable, not illusory or unpredictable"* (§27). [AB/18/6]

9.4 So far as the relevance of human rights is concerned, where respect for "*basic human rights standards, including in particular non-derogable rights, is clearly problematic"* the proposed area "*cannot be considered a reasonable alternative*". This does not mean that the deprivation of <u>any</u> civil, political or socio-economic human right in the proposed area will disqualify it. The question is, rather, whether the rights infringed are "*fundamental to the individual, such that the deprivation of those rights would be sufficiently harmful to render the area an unreasonable alternative*" (§28). [AB/18/6]

9.5 The socio-economic conditions in the proposed area are relevant to the analysis. If the applicant: [AB/18/6]

> ***will be unable to earn a living or to access accommodation, or where medical care cannot be provided or is clearly inadequate, the area may not be a reasonable alternative. It would be unreasonable, including from a human rights perspective, to expect a person to relocate to face economic destitution or existence below at least an adequate level of subsistence***

9.6 Similarly, an applicant "*should also not be required to relocate to areas, such as the slums of an urban area, where they would be required to live in conditions of severe hardship*"[13].

9.7 In the context of considering internally displaced persons, the *2003 Guidelines* make clear (at §31) that: [AB/18/7]

> ***The presence of internally displaced persons who are receiving international assistance in one part of the country is not in itself conclusive evidence that it is reasonable for the claimant to relocate there. For example, the standard and quality of life of the internally***

[13] *2003 Guidelines* at §30; <u>*Gonzalez & Ors v Minister of Citizenship and Immigration*</u> [2015] FC 502 at §§49-54. [AB/18/7] [SAB/3/21]

displaced are often insufficient to support a finding that living in the area would be a reasonable alternative to flight…

10. UNHCR emphasises, by reference to the principles above, that the assessment of reasonableness must (1) include a consideration of objective, "baseline" standards, and the extent to which conditions in the proposed place of relocation meet such standards; and (2) focus on the personal circumstances of the particular individual, and how conditions in the proposed place of relocation may impact upon that particular individual.

The 2018 Guidelines on Afghanistan

11. UNHCR's *2018 Guidelines* address how the principled approach to IFA applies to Afghanistan. In particular: [SAB/6]

    11.1 Within the analysis of whether an IFA will be reasonable (at pp107-109), the *2018 Guidelines* explain (at p.109) that the applicant "*must be able to exercise his or her basic human rights in the area of relocation*" and that there must be the possibility of "*economic survival in dignified conditions*." To that end, an assessment "*must give particular attention*" to: [SAB/6/107]

    (i) access to shelter in the proposed area of relocation;
    (ii) the availability of basic infrastructure and access to essential services in the proposed area of relocation, such as potable water and sanitation, health care and education;
    (iii) the presence of livelihood opportunities, including access to land for Afghans originating from rural areas; or in the case of applicants who cannot be expected to provide for their own livelihood…proven and sustainable support to enable access to an adequate standard of living[14]

    11.2 The guidelines also refer "*in the specific context of Afghanistan*", to the importance of "*access to social networks*" consisting of "*the applicant's extended family or members of his or her ethnic group*", and explain that even where such networks exist:

    …an assessment should be made whether the members of this network are willing and able to provide genuine support to the applicant in practice, against the background of Afghanistan's precarious humanitarian situation, the low developmental indicators, and the wider economic constraints affecting large segments of the population… the extent to which applicants are able to rely upon family networks in the proposed area of

[14] Equivalent wording appeared at pp.83-84 of the predecessor UNHCR *Eligibility Guidelines for Assessing the International Protection needs of asylum-seekers from Afghanistan* 19.4.16 ("*the 2016 Guidelines*"). [SAB/5/83]

relocation also has to be considered in light of the reported stigma and discrimination against those who return to Afghanistan after spending time abroad[15]

11.3 In the section on the reasonableness of IFA in Afghanistan (at p.110), [SAB/6/110] UNHCR reiterates the matters set out above, and states that the availability of external support is always (in Afghanistan) a "*requirement*" of any reasonable IFA, save in the case "*single able-bodied men and married couples of working age without identified specific vulnerabilities*." As regards those applicants, "*in certain circumstances*" they "*may*" be able "*to subsist…in urban and semi-urban areas*" that have "*the necessary infrastructure and livelihood opportunities to meet the basic necessities of life*."[16]

11.4 At pp.112-114 there is a specific analysis regarding Kabul: [SAB/6/112]

(a) The Guidelines explain that UNAMA[17] documented 1,831 civilian casualties in Kabul province in 2017, of which '*88 per cent resulted from suicide and complex attacks carried out by Anti-Government Elements in Kabul city*", and that "*civilians who partake in day to day economic and social activities in Kabul are exposed to a risk of falling victim to the generalised violence that affects the city*" (p.112).

(b) The Guidelines explain that in January 2017 it was reported by the Asia [SAB/6/113] Foundation that "*55 per cent of households in Kabul informal settlements were severely food insecure*" and that by January 2018 (according to the International Growth Centre) population growth is "*outpacing the city's capacity to provide necessary infrastructure, services and jobs to citizens*", with the result that 70% of the city's population is now housed in informal settlements (p.113).

(c) The 2018 Guidelines conclude that (p.114): [SAB/6/114]

…given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city

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[15] Equivalent wording appeared at p.84 of the *2016 Guidelines*. [SAB/5/84]
[16] Equivalent wording appeared at p.86 of the *2016 Guidelines*. [SAB/5/86]
[17] United Nations Assistance Mission in Afghanistan.

AH (Sudan)

12. The House of Lords in *AH (Sudan)* considered further the manner in which "reasonableness" was to be assessed, under the approach explained in *Januzi* (§6 above). Lord Bingham gave the leading judgment, with whom all other members of the Court agreed. UNHCR invites particular attention to the following passages: [AB/3] [AB/5]

12.1 The inquiry "*must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant*" (Lord Bingham at §5). [AB/3/683]

12.2 There is "*no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution*" (Lord Bingham at §5).

12.3 There is, likewise, "*no warrant for excluding, or giving priority to, consideration of considerations generally prevailing in the home country*" (Lord Bingham at §5).

12.4 It would "*plainly*" be wrong to hold that conditions in the place of intended relocation "*could not be unreasonable or unduly harsh*" unless they were liable to infringe the applicants' rights under Article 3 ECHR. Such an infringement was sufficient to establish unreasonableness, but plainly not necessary (Lord Bingham at §9). [AB/3/686]

12.5 The test is one of "*great generality, excluding from consideration very little other than the standard of rights protection which an applicant would enjoy in the country where refuge is sought*" (Lord Bingham at §13). [AB/3/687]

13. In a concurring judgment, Lady Hale said (at §20) that she did not understand there to be any difference between the test espoused by Lord Bingham (at §5) and the approach outlined by UNHCR in its intervention in *AH (Sudan)*, which (she recorded at §20): (1) focused on the need to assess "*all the circumstances of the* [AB/3/688]

individual's case holistically and with specific reference to the individual's personal circumstances"; and (2) affirmed that the assessment must be made "*in the context of the conditions in the place of relocation*", including "*basic human rights, security conditions, socio-economic conditions, accommodation*" and "*access to health care facilities*", so as to determine "*the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship*."

14. Lady Hale continued as follows: [AB/3/690]

14.1 At §27 Lady Hale emphasised that while "*the standard of comparison is not the lives which the returning claimants are living here*" (citing *Januzi*); and while "[i]*f people can return to live a life which is normal*", considered in the context of "*standards prevailing generally in the country of nationality*", then "*they cannot take advantage of past persecution to achieve a better life in the country to which they have fled*"; this did not mean that "*the holistic consideration of all the relevant factors, looked at cumulatively, can be replaced by a consideration of whether their circumstances will be worse than the circumstances of anyone else in that country*." (original emphasis)

14.2 At §28, Lady Hale criticised the approach of the AIT in *AH (Sudan)* as follows: [AB/3/690]

> ***Yet the tribunal concluded that because the conditions faced by returning Darfuris, however appalling, would be no worse than those faced by other Sudanese [internally displaced persons] it would not be "unduly harsh" to expect them to return. The standard of comparison was, not with their lives in Darfur before their persecution, not with the general run of ordinary lives in Sudan, not even with the lives of poor people in Sudan, but with the lives of the poorest of the poor, internally displaced victims of the civil war in the south, living in camps or squatter slums, and "subject from time to time to relocations, sometimes involving force and human rights violations"… They too had been subsistence farmers, ill equipped to survive in the city slums… they too had suffered the psychological horrors of civil war… the [applicants] would be no worse off, unless particular individuals attracted the adverse interest of the authorities…***
>
> ***With respect, this is not the individualised, holistic assessment which the question requires …***

14.3 At §29, Lady Hale included, among her concerns, that an approach was wrong if it "*subordinates all considerations to a comparison with the very worst lives led by other Sudanese*." [AB/3/691]

15. Lord Brown[18] agreed with the judgment of Lord Bingham in strong terms: "*there is not a word of it with which I disagree*" (at §35), before repeating the test in Januzi. He then endorsed Lady Hale's comments (at §43): [AB/3/692]

> ***Lady Hale's concerns, I would respectfully suggest, valuably illuminate the correct approach to the question of undue harshness by focusing on a series of what plainly would have been errors of approach – such as to have asked whether the claimant's "circumstances will be worse than the circumstances of anyone else in that country": para 27*** (original emphasis)

16. Then at §42 Lord Brown said this: [AB/3/694]

> ***As mentioned, one touchstone of whether relocation would involve undue hardship, identified in the UNHCR guidelines and referred to in the passage already cited from para 47 of Lord Hope's speech in Januzi, is whether "in the context of the country concerned" the claimant can live "a relatively normal life". The respondents are fiercely critical of the tribunal's approach to this question in the present case. In particular they criticise the tribunal's conclusion as to the "subsistence level existence in which people in Sudan generally live".***
>
> ***To my mind, however, this criticism is misplaced. It is not necessary to establish that a majority of the population live at subsistence level for that to be regarded as a "relatively normal" existence in the country as a whole. If a significant minority suffer equivalent hardship to that likely to be suffered by a claimant on relocation and if the claimant is as well able to bear it as most, it may well be appropriate to refuse him international protection.***
>
> ***Hard hearted as this may sound, and sympathetic although inevitably one feels towards those who have suffered as have these respondents (and the tens of thousands like them), the Refugee Convention, as I have sought to explain, is really intended only to protect those threatened with specific forms of persecution. It is not a general humanitarian measure. For these respondents, persecution is no longer a risk. Given that they can now safely be returned home, only proof that their lives would be quite simply intolerable compared even to the problems and deprivations of so many of their fellow countrymen would entitle them to refugee status. Compassion alone cannot justify the grant of asylum.***

17. UNHCR makes the following observations in relation to Lord Brown's §42:

17.1 As the UT observed in AAH (Iraq) v SSHD CG UKUT 00212 (IAC) (at §85) it is "*plain*" that Lord Brown did not dissent from the view of the majority, and his comments must be "*read and understood in the context in which they were* [AB/16/30]

[18] Lord Hope agreed with both Lord Bingham and Lord Brown. No other member of the committee expressly endorsed Lord Brown's judgment.

made" (at §86). Accordingly: (1) Lord Brown was not purporting to lay down an alternative test to the test set down by Lord Bingham in *Januzi* and repeated in *AH (Sudan)* at §7. (2) So far as the application of that test is concerned, Lord Brown was not departing from any of the principles outlined in the speeches of Lord Bingham and Baroness Hale, both of which he expressly endorsed. [AB/3/684]

17.2 The comparison with a "*significant minority*" outlined by Lord Brown in §42 was concerned with, and based on, the assessment of whether the applicant would, if returned, be able to lead "*a relatively normal life*" in the proposed place of relocation. That was "*one touchstone*" of reasonableness. The "*relatively normal life*" concept derives from the *2003 Guidelines* (as Lord Brown expressly recognises at §42). It must accordingly be read and applied in a manner consistent with those guidelines, as must any comparisons based on, or concerned with, that concept (see §§9.4 above and 17.8-9 below). [AB/3/694]

17.3 The comparative exercise outlined at §42 was not, and was not said by Lord Brown to be, determinative. Rather, in his words, if there is no comparative hardship "*it may well be appropriate*" to refuse the applicant international protection. [AB/3/694]

17.4 Lord Brown was not giving the comparative exercise priority over any other relevant factor to be considered as part of the assessment. To read Lord Brown's comments in that way would be flatly inconsistent with §5 of Lord Bingham's judgment, where his lordship stated that "[t]*here is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country*." [AB/3/683]

17.5 So far as the selection of a "*significant minority*" is concerned: (1) It is clear, from Lord Brown's words, that the "*significant minority*" selected must be representative of what is "*normal*" in "*the country as a whole*". That is what the [AB/3/690]

comparison is concerned with. (2) The "*significant minority*" cannot be selected so as to result in a comparison between (i) the relocated applicant and (ii) the "*poorest of the poor*" and/or "*internally displaced persons*", given the express rejection of such an approach by Lady Hale at §27. [AB/3/690]

17.6 The "*significance*" of the minority, and the weight (<u>if any</u>) to be attached to any comparison with it, must be evaluated having regard to its relevance to the circumstances of the individual and the conditions in the proposed place of relocation.

17.7 The comparative exercise at §42 includes, within that exercise, comparative consideration of the circumstances of the individual: "*<u>and</u> if the claimant is as well able to bear [the conditions in the proposed place of relocation] as most [of the significant minority].*" That comparison is not, however, in itself sufficient for, or exhaustive of, the individualised assessment required under <u>*AH (Sudan)*</u> and the *2003 Guidelines.* [AB/3/695]

17.8 The requirement that an IFA be reasonable, including by reference to <u>objective, baseline standards</u>, does not convert the Refugee Convention into a "*general humanitarian measure*". Rather, the requirement is concerned with the fair and proper determination of asylum applications, by <u>particular individuals</u>: (1) who are (at the time of the decision) outside of their country of origin; (2) who (on the relevant premise) have a well-founded fear of persecution in (at least) the area of their country which was their home; and (3) who are now seeking refuge in a Convention state.

17.9 The relevant 'baseline' standards include all of the matters referred to in the *2003 Guidelines* (see in particular §§9.4 to 9.7 above) as expressly endorsed by Lady Hale at §20 of her judgment. Lord Brown's use of the phrase "*quite simply intolerable*" must be approached in context and with caution. Neither the majority in <u>*AH (Sudan)*</u>, nor the *2003* Guidelines, adopt those words. [AB/3/688]

Misunderstood or misapplied they have the potential wrongly to confine or reduce the objective element in the assessment of reasonableness. Lord Brown was not departing from Lord Bingham or disagreeing with Lady Hale. He was not disagreeing with the Guidelines. As the UT observed in AAH (Iraq) (at §90), the phrase "*can mean no more than 'unreasonable' or 'unduly harsh'*" once read in its proper context. [AB/16/32]

Insofar as any of this is wrong, Lord Brown's was a minority view.

AA (Uganda)

18. In AA (Uganda) v SSHD [2008] EWCA Civ 579 the Court of Appeal considered the principles in AH (Sudan) (see in particular §§7, 16-17, 22 and 38). In the present appeal the Respondent submits, by reference to this case[19], that: (1) the comparative exercise outlined by Lord Brown at §42 of AH (Sudan) will be determinative of what is a "relatively normal life", and thereafter of reasonableness; unless (2) the individual will be subject to "*some abominable condition*" akin to enforced prostitution, or which may be "*so outrageous in its defiance of accepted moral standards that it could not lawfully be upheld*." [AB/11] [AB/3] [AB/3/694]

19. Neither proposition is supported by the decision in AA (Uganda). Rather, the decision supports the formulation at §3 above. UNHCR makes the following observations: [AB/11]

    19.1 The Court of Appeal in AA (Uganda) restated the test under AH (Sudan): see §7 (per Buxton LJ) and §38 (per Carnwath LJ). It did not depart from that test. [AB/11/3 and 15]

    19.2 In observing (at §17) that "*there must be some conditions in the place of relocation that are unacceptable to the extent that it would be unduly harsh to return the applicant to them even if the conditions are widespread in the place of relocation*", the Court of Appeal recognised the relevance of objective, 'baseline' standards to the assessment of reasonableness. [AB/11/8]

[19] At §§39 to 42 of his skeleton

19.3 The Court of Appeal did not define or limit those objective standards (at §17 or elsewhere). Rather, it held (on the facts) that return to Kampala would be unduly harsh (at §§18 and 41). [AB/11/8, 15]

19.4 The Court of Appeal stated at §22 that even if "*it would not be unduly harsh to return young women generally to Kampala*" it was "*still necessary*" to consider whether the individual applicant "*has characteristics that would render remission unduly harsh in her particular case*". It was for that particular proposition that both Lord Bingham and Lord Brown's judgments in <u>*AH (Sudan)*</u> were cited and said to be authoritative at §22. [AB/11/9]

<u>The decision of the Upper Tribunal in the present case</u>

20. At §40 of its decision in the present case, the UT relied upon §42 of Lord Brown's judgment in <u>*AH (Sudan)*</u> to formulate the following proposition: [CDB/3/15]

> ***…when considering the standards or conditions prevailing generally in the country of nationality, it is not necessary to establish that a majority of the population live in those particular conditions, but only that a significant minority suffer equivalent hardship to that likely to be suffered by the applicant on relocation. What follows is then a personalised assessment of whether the applicant would be as well able to bear it as most or whether those conditions are in any event unreasonable, for example because they involve crime, destitution, prostitution and the like.***
>
> ***There is no requirement for a specific numerical, geographical or other qualification on what is a significant minority of the population. That phrase carries its ordinary and natural meaning of something of a sufficiently great number to be worthy of attention in the context of the population of the home country and not insignificant and its application should be self-evident on an assessment of the factual evidence in the majority if not all cases.***

21. UNHCR respectfully submits that there are the following difficulties with that formulation

21.1 The UT has erroneously treated Lord Brown's comments at §42 of <u>*AH (Sudan)*</u> as laying down (1) a *test to be met* when considering the reasonableness of an IFA; and (2) a test *determinative of the reasonableness of an IFA*; rather than describing a factor in the assessment. In so doing, the UT has elevated the "*significant minority*" comparison outlined at §42 of <u>*AH (Sudan)*</u>

from (i) (at most) a relevant factor[20], to (ii) a priority factor, and indeed the starting point, in every assessment of reasonableness.

21.2 There is no stipulation, in the UT's formulation, that the "*significant minority*" have any necessary or relevant connection either to (i) the circumstances of the individual or (ii) the conditions in the proposed place of relocation[21]. In UNHCR's view, the absence of each connection undermines the weight to be given (if any) to the comparison.

21.3 The "*significant minority*" need only, under the UT's problematic formulation above, be "*worthy of attention*" in the context of the population of the home country. The UT has imposed no requirement that it be representative (or even informative) of the standards and conditions in the country generally.

21.4 The consideration of the circumstances of the individual under the UT's formulation is limited to a comparison of whether that individual is "*as well able*" as "*most*" of the "*significant minority*" to bear the relevant conditions "and equivalent hardship" upon relocation.

21.5 Although the formulation (rightly) recognises the need to consider objective standards when assessing reasonableness, those standards are only recognised by the UT to cover "*crime, prostitution, destitution and the like*". There is no recognition by the UT of the relevance of fundamental human rights, or of safety, or of access to accommodation, or of access to medical care, or of the relevance of subsistence levels (as opposed to destitution): see §§9 to 11 & 13 above.

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[20] Subject to, and insofar as, there is, in the proposed place of relocation, "respect for basic human rights standards, including in particular non-derogable rights": see §9.4 above and §28 of the *2003 Guidelines*, expressly cited by Lord Bingham in *Januzi* at §20

* These submissions do not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognised principles of international law. UN General Assembly (UNGA), *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946: http://www.refworld.org/docid/3ae6b3902.html

[21] Indeed, the formulation appears to allow the selection of a "*significant minority*" living in one or more areas where it has been established that the individual would have a well-founded fear of persecution.

MICHAEL FORDHAM QC
ALI BANDEGANI
SHANE SIBBEL
acting pro bono

BAKER & MCKENZIE LLP
*acting pro bono for UNHCR**

7 March 2019