Neutral Citation Number: [2019] EWCA Civ 873

Case No: C5/2018/1968

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Upper Tribunal (Immigration and Asylum Chamber)
UTJ Allen & UTJ Jackson

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2019

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LADY JUSTICE KING
and
LORD JUSTICE SINGH

- -

Between :

AS (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
- and -	
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES	**Intervener**

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Ms Sonali Naik QC, **Mr Ronan Toal** and **Mr Ben Bundock** (instructed by **JD Spicer Zeb**) for the **Appellant**
Mr Sarabjit Singh QC (instructed by **the Treasury Solicitor**) for the **Respondent**
Mr Michael Fordham QC, **Mr Ali Bandegani** and **Mr Shane Sibbel** (instructed by **Baker & McKenzie LLP**) for the **Intervener**

Hearing dates: 12th & 13th March 2019

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Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. On 23 March 2018 the Upper Tribunal (Immigration and Asylum Chamber), comprising Upper Tribunal Judges Allen and Jackson, promulgated a Country Guidance decision about the suitability of Kabul for "internal relocation" for Afghan asylum-seekers. Its decision was, in bare outline, that it would not in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he had no specific connections or support network there; and in accordance with that decision the appeal of the particular Appellant, AS, a young man originally from Laghman province, against his removal to Afghanistan was dismissed. The decision followed five days of hearings spread over the period from 25 September to 11 December 2017, at which evidence was heard from three experts and a mass of documentary evidence was considered.

2. Following refusal of permission to appeal by the Tribunal, AS applied to this Court on the basis of five grounds. Ground 1 alleged a serious error in the Tribunal's finding as to the scale of the risk of injury to which residents of Kabul were exposed from "security incidents". Ground 2 concerned the principle established by the case-law that the conditions that a returned refugee will face in the place to which they are relocated should be considered in the context of conditions prevailing generally in the country in question: the Tribunal was said to have misunderstood and misapplied that principle. Grounds 3-5 challenged various aspects of the Tribunal's reasoning on, broadly, the living conditions that returned asylum-seekers could expect to enjoy in Kabul. On 18 December 2018, following an oral hearing, I gave permission on grounds 1 and 2 only.

3. On the appeal AS is represented by Ms Sonali Naik QC, leading Mr Ronan Toal and Mr Ben Bundock. The Secretary of State is represented by Mr Sarabjit Singh QC. All counsel save Mr Toal also appeared in the Upper Tribunal.

4. The United Nations High Commissioner for Refugees ("UNHCR")[1] has been granted permission to intervene. He is represented by Mr Michael Fordham QC, Mr Ali Bandegani and Mr Shane Sibbel, all of whom (with their solicitors, Baker & McKenzie LLP) acted pro bono. I am grateful for their helpful written and oral submissions.

5. The nature of the issues is such that I need give only very brief introductions to the background law and to the decision of the Upper Tribunal before I turn to the grounds themselves.

THE BACKGROUND LAW

6. The principles governing eligibility for international protection in the UK – which includes but is wider than refugee status under the 1951 Refugee Convention – are now set out in EU Council Directive 2004/83/EC ("the Qualification Directive"). Chapter III of the Directive defines "Qualification for being a Refugee" by reference

[1] In accordance with usual practice I will in this judgment refer to UNCHR as an institution rather than an individual.

to the risk of persecution within the meaning of the Convention. Chapter V defines "Qualification for Subsidiary Protection". The relevant criterion under chapter V is "serious harm" other than persecution. This is defined in article 15 as:

> "(a) the death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
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> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

Head (a) is self-explanatory, and head (b) reproduces the familiar language of article 3 of the European Convention on Human Rights ("the ECHR"). The scope of head (c) – for short, "indiscriminate violence from armed conflict" – is expounded in the decision of the CJEU in *Elgafaji v Staatssecretaris van Justitie* (C-465/07) [2009] 1 WLR 2100.

7. Article 8 of the Directive excludes from the ambit of international protection cases where the person at risk has the opportunity of moving to a location within his or her country of origin where the relevant risk does not apply, often referred to as a "safe haven". It reads (so far as material):

> "*Internal protection*
>
> 1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and *the applicant can reasonably be expected to stay in that part of the country* [emphasis supplied].
>
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 3. …"

The opportunity for such "internal protection" is more commonly referred to as the "internal relocation [or flight] alternative" – "IRA" (or "IFA") for short. The phrase which I have italicised – that is, whether the applicant can "reasonably be expected to stay" in the safe haven – represents the essential principle underlying the issues in this case.

8. The Qualification Directive was implemented in this country by the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, which came into force on 9 October 2006; but the principles incorporated in article 8 reflect the pre-existing law relating to the Refugee Convention and it was common ground before us that earlier decisions regarding internal relocation remain authoritative. The

effect of article 8 is substantially reproduced in paragraph 339O (i) of the Immigration Rules.

9. The two principal domestic authorities concerning internal relocation are the decisions of the House of Lords in *Januzi v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, and *AH (Sudan) v Secretary of State for the Home Department* [2006] UKHL 49, [2008] 1 AC 678.[2] I need not attempt a comprehensive summary of the decisions in those cases. I need only say at this stage that at paras. 7-19 of his opinion in *Januzi* (pp. 440-450) Lord Bingham explained the development of the criterion, now enshrined in article 8.1 of the Directive, of whether the applicant for protection "can reasonably be expected to stay" in the proposed safe haven and discussed its meaning and effect. At para. 20 he said (p. 448 C-D):

> "Valuable guidance is found in the UNHCR *Guidelines on International Protection* of 23 July 2003. In paragraph 7 II(a) the reasonableness analysis is approached by asking 'Can the claimant, in the context of the country concerned, lead a relatively normal life without facing undue hardship?' and the comment is made: 'If not, it would not be reasonable to expect the person to move there'."

10. In his opinion in *AH (Sudan)* Lord Bingham quoted and glossed a further passage from his opinion in *Januzi*, saying at para. 5 (p. 683 E-G):

> "In paragraph 21 of my opinion in *Januzi* I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:
>
>> '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 … There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department*, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls .... All must depend on a fair assessment of the relevant facts.'
>
> Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for

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[2] In *Januzi* the House was considering four appeals, three of which concerned returns of Darfuri refugees to Sudan on the basis that they could relocate to Khartoum; the fourth concerned returns to Kosovo. As a result of its decision the appeals in the Darfuri cases were remitted to the Asylum and Immigration Tribunal, and *AH (Sudan)* was an appeal from the AIT's decision on remittal.

> excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is."

11. I shall have to return in due course to some aspects of the speeches in *Januzi* and *AH (Sudan)*. At this stage it is sufficient to note that one of the circumstances that is plainly relevant to the assessment of reasonableness is the level of security in the proposed safe haven. Although there will, *ex hypothesi*, be no risk in such a haven of persecution or serious harm (including harm from indiscriminate violence from armed conflict falling within article 15 (c)), there may nevertheless in principle be a sufficient risk of injury from other forms of violence to render it, generally or in combination with other factors, unduly harsh for the applicant to be expected to relocate there. This particular factor is not in fact explicitly mentioned in *Januzi* or *AH (Sudan)* because it did not arise in the circumstances of those cases, but it is specifically identified in the UNHCR 2003 Guidelines to which Lord Bingham referred in the passage from *Januzi* quoted above. They discuss, at paras. 25-30, a number of factors which should form part of the reasonableness analysis. Para. 27 is headed "Safety and Security" and reads:

> "The claimant 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. In most cases, countries in the grip of armed conflict would not be safe for relocation, especially in light of shifting armed fronts which could suddenly bring insecurity to an area hitherto considered safe. In situations where the proposed internal flight or relocation alternative is under the control of an armed group and/or State-like entity, careful examination must be made of the durability of the situation there and the ability of the controlling entity to provide protection and stability."

THE DECISION OF THE UPPER TRIBUNAL

12. The Upper Tribunal's reasons are clear, thorough and well-organised and a great deal of work evidently went into them. I shall have to return to particular passages in due course, but at this stage I need only explain their structure.

13. After some introductory material, paras. 14-44 deal with the legal framework. At paras. 27-40 the Tribunal addresses a particular issue which is the subject of ground 2: I set out the relevant passages at paras. 58-59 below.

14. Paras. 45-171 summarise the evidence which the Tribunal heard. After a preliminary section which comments on the expert witnesses it organises the evidence under two headings as follows.

15. (1) *"Evidence on risk"* (paras. 67-97). This deals with the evidence about the risk of persecution in Kabul, focusing in particular on the risk that the Taliban could target returned asylum-seekers there: it was AS's case that his father and brother had been killed in his home village, which is why he had originally fled, and that those responsible would try to track him down. No case was advanced based on Chapter V of the Qualification Directive: in particular the Appellant specifically disavowed any claim of risk from indiscriminate violence from armed conflict falling within article 15 (c) (see para. 11 of the decision).

16. (2) "*Evidence relevant to assessing the option of internal relocation*" (paras. 98-171). This section summarises the evidence relevant to the assessment of reasonableness required by article 8 of the Directive. It starts by referring at para. 98 to the then current UNHCR Guidelines (issued in 2016) for assessing the international protection needs of asylum-seekers from Afghanistan, and specifically those relating to internal relocation; and at para. 99 it refers to a recent report from Human Rights Watch. It then summarises the evidence under several headings. It starts with "the security situation", covering both Afghanistan generally and in Kabul: see paras. 100-115. At paras. 116-128 it gives an overview of conditions in Afghanistan and Kabul. It then reviews the evidence relating to

    - housing and associated amenities (paras. 129-139);
    - healthcare (paras. 140-143);
    - employment/socio-economic conditions (paras. 144-154);
    - "returns procedure and available assistance on return" (paras. 155-163); and
    - evidence of the experience of returnees to Afghanistan (paras. 164-171).

17. The Tribunal gives its general "Findings and Reasons" at paras. 172-241. Its primary findings are under two heads, "risk" and "reasonableness"; these correspond to sections (1) and (2) as identified above.

18. As regards risk, the Tribunal found no real risk of persecution of any of the kinds alleged by the Appellant. The grounds of appeal are not concerned with this aspect and I say no more about it.

19. As regards reasonableness, the Tribunal starts at para. 189 by reminding itself of the importance both of the UNHCR's 2003 Guidelines and of its 2016 Guidelines on returns to Afghanistan to which I have referred. In the following paragraphs it reviews in turn each of the elements bearing on the reasonableness of relocation, as identified under the various headings noted at para. 16 above. It starts, at paras. 190-201, with the security situation both in Afghanistan generally and in Kabul and the risk of death or injury from "security incidents". It then says, at para. 202, which introduces its Tribunal's consideration of the factors other than security:

    > "We return here as a starting point to the views of the UNHCR in determining the reasonableness of a place of internal relocation taking

> into account the security, human rights and humanitarian environment in Kabul, which provides an appropriate structure for the relevant factors to be considered about the proposed place of relocation. As set out above, the UNCHR considers that internal relocation is reasonable only where an individual has access to (i) shelter, (ii) essential services such as sanitation, healthcare and education; and (iii) livelihood opportunities."

It goes on to recite UNHCR's views about the need for a support network, which I need not set out; but in the paragraphs that follow it takes in turn the headings identified by UNHCR.

20. At para. 230 the Tribunal concludes:

> "Our findings above show that it is not generally unsafe or unreasonable for a single healthy man to internally relocate to Kabul. However, we emphasise that a case-by-case consideration of whether internal relocation is reasonable for a particular person is required by Article 8 of the Qualification Directive and domestic authorities including Januzi and AH (Sudan). When doing so, we consider that there are a number of specific factors which may be relevant to bear in mind. These include, individually as well as cumulatively (including consideration that the strength of one factor may counteract and balance the weakness of another factor):
>
> (i) Age, including the age at which a person left Afghanistan.
>
> (ii) Nature and quality of connections to Kabul and/or Afghanistan.
>
> (iii) Physical and mental health.
>
> (iv) Language, education and vocational and skills."

At paras. 231-235 it adds some further observations about factors (i)-(iv).

21. The Tribunal summarises its conclusions in "country guidance" format at para. 241. Heads (ii)-(v) concern internal relocation to Kabul and read as follows:

> "(ii) Having regard to the security and humanitarian situation in Kabul as well as the difficulties faced by the population living there (primarily the urban poor but also IDPs and other returnees, which are not dissimilar to the conditions faced throughout many other parts of Afghanistan), it will not, in general be unreasonable or unduly harsh for a single adult male in good health to relocate to Kabul even if he does not have any specific connections or support network in Kabul.
>
> (iii) However, the particular circumstances of an individual applicant must be taken into account in the context of conditions in the place of relocation, including a person's age, nature and quality of support network/connections with Kabul/Afghanistan, their physical and mental health, and their language, education and vocational skills

> when determining whether a person falls within the general position set out above.
>
> (iv) A person with a support network or specific connections in Kabul is likely to be in a more advantageous position on return, which may counter a particular vulnerability of an individual on return.
>
> (v) Although Kabul suffered the highest number of civilian casualties (in the latest UNAMA figures from 2017) and the number of security incidents is increasing, the proportion of the population directly affected by the security situation is tiny. The current security situation in Kabul is not at such a level as to render internal relocation unreasonable or unduly harsh."

("UNAMA" refers to the United Nations Assistance Mission in Afghanistan.)

22. The Tribunal sets out its conclusion on AS's own claim at paras. 242-250. It deals with the issue of risk of persecution at paras. 242-248. At para. 249 it says:

> "The next issue is then whether it is reasonable for the Appellant to internally relocate to Kabul. The Appellant is a healthy adult male who has spent the majority of his life in Afghanistan, going to school there and arriving in the United Kingdom at the age of 22. He speaks Pashto and has no specific or identified vulnerabilities. He has been out of Afghanistan now for nine and a half years but left when he was an adult. The Appellant states that he has no contact with his family in Afghanistan (mother, brother or uncle) and it is unknown as to whether he would be able to re-establish contact with them on return if he chose to do so. In these circumstances, based on our general conclusions set out above, we do not find that it would be unreasonable or unduly harsh for the Appellant to internally relocate to Kabul. He would be returning to living and humanitarian conditions in Kabul which affect the majority of the population and where he could live a relatively normal life without undue hardship. Whilst we accept that conditions and prospects in Kabul, and also in Afghanistan generally, are very poor, there is no reason that this Appellant would be any less able than any other to bear those conditions, even taking into account past treatment in his home area. The current security situation in Kabul is not such as to render internal relocation there unreasonably or unduly harsh."

GROUND 1

23. We asked to hear first from Mr Singh on this ground. Having considered his submissions, we informed the parties that we did not need to hear from Ms Naik and that the appeal would be allowed. These are my reasons for that conclusion.

24. In its account of the evidence relating to the security situation, at paras. 100-115 of its Reasons, the Tribunal, as we have seen, draws in particular on statistics compiled by UNAMA for death and injury as a result of armed conflict. This ground arises out of the Tribunal's findings and conclusion on the effect of those statistics. In the

speaking note which he gave to the Tribunal in support of his closing submissions Mr Singh sought to summarise the effect of that evidence as follows:

> "Based on the UNAMA 2017 Mid-Year Report, there may be 2,100 civilian casualties in Kabul province this year (as the mid-year figure is 1,048 …). Even if the 'real' figure is more like 5,000 casualties, that is still only about 0.1% of the population of Kabul province (if the population is 4.5m). That means that 99.9% of the population of Kabul will not be casualties of indiscriminate violence in Kabul this year. Security situation should be viewed in that context."

25. In reciting the evidence on this aspect of its Reasons the Tribunal said, at para. 106:

> "… Population estimates for Kabul city range between 3.5 and 7 million people. The Respondent, assuming that the total civilian casualties for 2017 based on figures from the UNAMA mid-year report are 2,100, submits that that shows a very low percentage of the population affected. Even if there were 5000 civilian casualties in a year, based on a population of 4.5 million, that still equates to less than 0.01% of the population affected."

And in its conclusions it said, at para. 196:

> "However, despite the number and impact of security incidents in and around Kabul city, we find that these are not at such a high level so as to make internal relocation to Kabul unsafe. In particular, although not necessary to reach the threshold in Article 15(c) of the Qualification Directive, we note that the evidence before us shows that the level of indiscriminate violence falls very far short of that sort of threshold and directly affects (by way of death or injury) only a tiny proportion of the population of Kabul city - less than 0.01% even if there were 5000 incidents in a year (more than double the numbers recorded by UNAMA in the first half of 2017 plus the same again assuming the same numbers in the second half of 2017) with a population of 4.5 million. The calculations vary depending on the population estimates but even on conservative calculations with high casualty figures and low population estimates, the percentages of people affected are incredibly small. This remains the case even with significant underreporting of casualty figures by UNAMA based on their strict methodology for casualties to be included."

26. It is evident that the Tribunal was relying on the same material as used on by Mr Singh in his closing submissions, but it will be seen that it expressed the risk on that basis as being not 0.1% (1 in 1,000), as he had put it, but as 0.**0**1% (1 in 10,000). It is common ground before us that that is simply wrong – or, to put it more formally, that a conclusion that the percentage risk was 0.01% was not reasonably available to the Tribunal on the evidence before it. It was initially the Secretary of State's position that the Tribunal must have based its conclusion on the correct figure and simply made a slip in expressing itself; and accordingly that an application could and should be made to it under the slip rule to correct the Reasons by substituting the figure of 0.1% to which it must have intended to refer. But at a preliminary hearing this Court

held that that would not be a proper course in this particular case – see [2019] EWCA Civ 208. The appeal must accordingly proceed on the basis that the Reasons as promulgated represent the Tribunal's actual reasoning.

27. On that basis it is evident, and Mr Singh did not dispute, that the Tribunal made an error of law: it is of course an error of law for a tribunal to reach a factual conclusion for which there is no evidential support.

28. *Prima facie* it follows from that conclusion that the case must be remitted to the Upper Tribunal for it to reconsider its decision on the reasonableness of Kabul as an internal relocation alternative on the basis of the correct figure as regards the risk of death or injury from security incidents. Ms Naik accepted that that was the right course: that is, she did not seek to contend that if the correct figure were taken this Court could or should itself conclude that Kabul was not a reasonable internal relocation alternative. Mr Singh, however, submitted that remittal was unnecessary because, even if the Tribunal had used the correct percentage, it would have been bound to come to the same conclusion.

29. I cannot accept that submission. The Upper Tribunal is the specialist tribunal and it had before it contextual material, to which we were not taken, relevant to both the assessment of the risk of death or injury from security incidents and to the overall question of reasonableness. I do not feel able to regard the result on remittal as a foregone conclusion. I do not think it would be right for this Court to say anything more on the question. I emphasise that by taking this course we should not be regarded as even implicitly suggesting what the outcome of the Tribunal's reconsideration should be.

30. I will return to the question of the basis on which the case should be remitted after I have considered ground 2.

GROUND 2

31. As already noted, in *Januzi* Lord Bingham referred to UNHCR's statement that the assessment, for the purpose of what is now article 8.1, of whether it is reasonable for a putative refugee to be expected to relocate to a safe haven requires consideration of whether they can lead "a relatively normal life" there: see para. 9 above. This ground raises an issue about what is meant by "relatively normal", and in particular normal for whom. The Appellant claims that the Tribunal erred by proceeding on the basis simply that the conditions that he would experience in Kabul would be normal for very many people, even though (he says) they were worse than for the majority of people in Afghanistan. The question of what the correct approach should be depends primarily on the effect of a passage in the speech of Lord Brown in *AH (Sudan)*, but it is necessary also to consider *Januzi* and two later authorities. In the light of the submissions before us I will have to quote fairly extensively from those cases. I take them in chronological order.

THE AUTHORITIES

Januzi

32. The issue in *Januzi* was identified by Lord Bingham in para. 1 of his opinion (p. 438 C-D) as being:

> "… whether, in judging reasonableness and undue harshness in this context, account should be taken of any disparity between the civil, political and socio-economic human rights which the appellant would enjoy under the leading international human rights conventions and covenants and those which he would enjoy at the place of relocation."

The unanimous conclusion of the House was that any such comparison between conditions in the country of refuge and in the safe haven was irrelevant. It approved the decisions to that effect of the Court of Appeal in *E v Secretary of State for the Home Department* [2003] EWCA Civ 1032, [2004] QB 531, and of the Federal Court of Appeal of Canada in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682 and *Ranganathan v Canada (Minister of Citizenship and Immigration)* [2001] 2 FC 164; and it declined to follow the contrary view of Professor Hathaway and courts in New Zealand and Australia (referred to as "the Hathaway/New Zealand rule"). The principal speeches were given by Lord Bingham and Lord Hope, though there was also a concurring opinion by Lord Carswell.

33. That issue and the House's conclusion on it do not directly bear on the issue raised by ground 2, but, as will appear, Lord Bingham and Lord Hope did offer some more general guidance.

34. First, we were referred to para. 12 of Lord Bingham's opinion (pp. 444-5), where he quotes with approval a passage from the judgment of the Federal Court of Appeal in *Ranganathan*, as follows:

> "15. We read the decision of Linden JA for this Court [in *Thirunavukkarasu*] as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.
>
> 16. There are at least two reasons why it is important not to lower that threshold. First, as this Court said in *Thirunavukkarasu*, the definition of refugee under the Convention 'requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of

> their home country in any part of that country'. Put another way, what makes a person a refugee under the Convention is his fear of persecution by his home country in any part of that country. To expand and lower the standard for assessing reasonableness of the IFA is to fundamentally denature the definition of refugee: one becomes a refugee who has no fear of persecution and who would be better off in Canada physically, economically and emotionally than in a safe place in his own country.
>
> 17. Second, it creates confusion by blurring the distinction between refugee claims and humanitarian and compassionate applications. These are two procedures governed by different objectives and considerations …"

35. Secondly, we were referred to one of the reasons given by Lord Bingham for rejecting the Hathaway/New Zealand rule. At para. 19 of his opinion he said (pp. 447-8):

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

36. Third, Mr Singh referred us to the observation of Lord Carswell, at para. 67 of his opinion (p. 464 C-D), that:

> "It is necessary to stress the rigorous nature of the test for unreasonableness or undue harshness, as to which see the judgment of the Canadian Federal Court of Appeal ... quoted by Lord Bingham …."

37. After dealing with the actual issue raised by *Januzi* Lord Bingham went on to observe that decision-makers needed some guidance on how to assess the reasonableness of an internal relocation alternative. It was in that context that he referred to the 2003 UNHCR Guidelines as noted at para. 11 above. After stating the basic principle which I have there quoted he goes on to set out some passages from the Guidelines developing what is meant by "a relatively normal life without facing undue hardship". Ms Naik drew attention to one of those passages in particular, which reads:

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

After quoting that passage, Lord Bingham observes, clearly picking up on the phrase "in the context of the country concerned":

> "These guidelines are, I think, helpful, concentrating attention as they do on the standards prevailing generally in the country of nationality."

38. Lord Bingham continued, in another passage to which Ms Naik referred us:

> "Helpful also is a passage on socio-economic factors in Storey [*The Internal Flight Alternative Test: The Jurisprudence Re-examined* (1998) 10 International Journal of Refugee Law, 499] p 516 (footnotes omitted):
>
>> 'Bearing in mind the frequency with which decision-makers suspect certain asylum seekers to be simply economic migrants, it is useful to examine the relevance to IFA claims of socio-economic factors. Again, terminology differs widely, but there seems to be broad agreement that if life for the individual claimant in an IFA would involve economic annihilation, utter destitution or existence below a bare subsistence level (*Existenzminimum*) or deny 'decent means of subsistence' that would be unreasonable. On the other end of the spectrum a simple lowering of living standards or worsening of economic status would not. What must be shown to be lacking is the real possibility to survive economically, given the particular circumstances of the individual concerned (language, knowledge, education, skills, previous stay or employment there, local ties, sex, civil status, age and life experience, family responsibilities, health; available or realisable assets, and so forth). Moreover, in the context of return, the possibility of avoidance of destitution by means of financial assistance

> from abroad, whether from relatives, friends or even governmental or non-governmental sources, cannot be excluded.'"

39. I should add that the passage from para. 21 of his opinion quoted by Lord Bingham in *AH (Sudan)* (see para. 10 above) occurs in the context of a different point (relating to whether, in the context of the risk of persecution by the state authorities, it should be presumed that the agents of the state will be able to operate throughout the country); but, as we have seen, Lord Bingham says that it has a wider application.

40. Lord Hope likewise sought, having addressed the particular issue on the appeal, to give more general guidance. At para. 47 of his speech (p. 457 G-H) he says:

> "The question where the issue of internal relocation is raised can … be defined quite simply. As Linden JA put it in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682, 687, it is whether it would be unduly harsh to expect a claimant who is being persecuted for a Convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad. The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there."

AH (Sudan)

41. As already noted, the applicants in *AH (Sudan)* had fled persecution in rural Darfur. The Secretary of State rejected their applications for asylum on the basis that they could reasonably be expected to relocate to Khartoum, where they could be accommodated in refugee camps or squatter settlements. The AIT upheld that decision. Their appeal to the Court of Appeal was successful, but the decision of the AIT was reinstated by the House of Lords.

42. The leading opinion is that of Lord Bingham, with which all the other members of the House agreed. There were also, however, substantial speeches from Lady Hale and Lord Brown. Lord Hope expressly agreed with Lord Brown as well as Lord Bingham (and with a particular passage in Lady Hale's speech); but Lord Hoffmann agreed only with Lord Bingham.

43. Lord Bingham started his opinion by recapitulating the effect of *Januzi*. I have already set out what he says at para. 5: see para. 10 above. He then summarised the decisions of the AIT and the Court of Appeal. One of the bases on which the Court of Appeal had overturned the decision of the AIT was that it "wrongly made a comparison between conditions in the country as a whole and those prevailing in the place of intended alternative relocation and not, as envisaged by *Januzi* and other authority, between conditions in the place of habitual residence and those in the safe haven". In other words, its criticism was that the AIT should have proceeded on the basis only of a comparison of conditions in Khartoum with the respondents' previous stable rural village life in Darfur. Lord Bingham's reason for rejecting that criticism

of the AIT's reasoning, and his conclusion on the nature of the necessary comparison appear at paras. 12-14, which read (pp. 686-7):

> "12. … [T]he AIT described as integral to its assessment a comparison between conditions in an applicant's home country as a whole and those prevailing in the place of intended alternative relocation. The Court of Appeal … ruled that the starting point must be conditions in the place of habitual residence. In each case the conclusion was said to derive from the opinions of the House in *Januzi*.
>
> 13. Those opinions support both these bases of comparison: … But there was no contest between the two bases in *Januzi* and nothing was said to suggest that one basis is to be preferred, or is to be the starting point. Both are relevant, and the weight to be given to each is a matter to be judged by the decision-maker in the context of a claim for asylum by a particular applicant in a particular case. As already indicated (para 5 above) the test propounded by the House in *Januzi* was 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.
>
> 14. Had the AIT excluded from consideration the conditions in which the [applicants] had lived in Darfur, it would have been wrong to do so. But this is not in my opinion a justified criticism. It acknowledged the home area in Darfur to be the natural habitat of those living there … and recognised that many non-Arab Darfuris were ill-equipped for city dwelling slum life, having come in the main from settled rural backgrounds as farmers … . It is not, I think, suggested that there was evidence on this point which the AIT ignored. …"

44. I turn to the speech of Lady Hale. She starts by saying, at para. 20 (p. 688 B-F):

> "We are all agreed that the correct approach to the question of internal relocation under the Refugee Convention is that set out so clearly by my noble and learned friend, Lord Bingham of Cornhill, in *Januzi and others v Secretary of State for the Home Department* [2006] UKHL 5, [2006] 2 AC 426, at para 21:
>
>> '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.'
>
> As the UNHCR put it in their very helpful intervention in this case,
>
>> '… the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual's case holistically and with specific reference to the individual's

> > personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order 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.'
>
> I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion. Very little, apart from the conditions in the country to which the claimant has fled, is ruled out."

(The various factors specified by UNHCR in the passage quoted all derive from the 2003 Guidelines.)

45. After addressing a separate point about the (ir)relevance of article 3 of the ECHR, Lady Hale at paras. 27-29 identified a particular concern that she had about the AIT's approach. She said (pp. 690-1):

> "27. … We know that the standard of comparison is not the lives which the returning claimants are living here: that is what *Januzi* was all about. We know that the lives they led before the persecution are a relevant factor but not, as the Court of Appeal thought, the starting point. We know that the lives they will face on return have to be considered in the context of 'standards prevailing generally in the country of nationality': Lord Bingham in *Januzi*, para 20. If people can return to live a life which is normal in that context, and free from the well-founded fear of persecution, they cannot take advantage of past persecution to achieve a better life in the country to which they have fled: see Lord Bingham in para 5 of his opinion. But this does 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.
>
> 28. Yet the Tribunal concluded that because the conditions faced by returning Darfuris, however appalling, would be no worse than those faced by other Sudanese IDPs it would not be not '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…, if

> not of government-backed genocide; the Darfuris 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.
>
> 29. My concern, therefore, is that, although the determination does refer to many relevant considerations, it … subordinates all considerations to a comparison with the very worst lives led by other Sudanese …"

Notwithstanding those concerns Lady Hale concluded that no legal error in the AIT's decision had been established.

46. As for Lord Brown, at para. 35 he says that there is not a word in the opinion of Lord Bingham with which he disagrees and he goes on to refer to the encapsulation of the relevant test at para. 5 of that opinion. At para. 37 he says (p. 693):

> "Despite the apparent clarity and simplicity of the test, however, the arguments before your Lordships suggest that doubts and misconceptions still exist about its proper application, and not least the relevance of the conditions prevailing in the place of habitual residence (the place of persecution from which the claimant fled and to which he cannot safely return.) The ultimate decision to be made is, as stated, whether it is on the one hand 'reasonable' or on the other hand 'unduly harsh' to require the claimant to relocate. Clearly the conditions and circumstances of his previous way of life may inform that decision, bearing for example upon his ability to adapt to whatever changes and challenges are involved in relocation. But it is wrong to suggest, as the Court of Appeal do, that the critical contrast to be struck is between the circumstances in which the claimant lived when persecuted and those he would face in the proposed safe haven—so that if, for example, he had been rich and lived well but now, if relocated, would face comparative poverty, he would for that reason be entitled to asylum."

After referring to the decision in *E* he continues, at para. 39 (pp. 693-4):

> "Taken as a whole the speeches in *Januzi* are really quite irreconcilable with the respondents' submission to your Lordships that the comparison between conditions in the place of persecution and those in the safe haven is the all important one. Rather, as *Januzi*—and, indeed, the 2003 UNHCR guidelines—make clear, in determining the reasonableness of the proposed relocation regard must be had to conditions generally in the country of origin."

47. Lord Brown returns to the issue at para. 42, where he says (pp. 694-5):

> "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 [original emphasis]. *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* [emphasis supplied]. 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 on return 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."

It is the effect of that passage and in particular of the reference to a "significant minority" which I have italicised, which is at the heart of the issue raised by ground 2.

AA (Uganda)

48. In *AA (Uganda)* [2008] EWCA Civ 579 the claimant was a young woman from northern Uganda who had fled from abuse there and who was at risk of serious harm, within the meaning of Part V of the Qualification Directive, if she returned to the part of the country from which she originated. But the Secretary of State decided, and the AIT accepted, that she would be safe if she relocated to Kampala. At the time of the AIT's decision *AH (Sudan)* had not been decided.

49. This Court allowed her appeal on the basis that if she were returned to Kampala it was likely that the only way that she could survive was by prostitution. The leading judgment was given by Buxton LJ. In his summary of the relevant law he referred, at para. 7, to the opinion of Lord Bingham in *AH (Sudan)*. He also referred to Lord Brown's speech as having "valuably explained some further aspects of the jurisprudence of undue harshness" and quoted the second part (beginning with "if a significant minority …") of the passage from para. 42 of his speech which I have set out above. At para. 16 he says:

> "16. Whilst [the Immigration Judge] … did not have the benefit of the House of Lords in *AH (Sudan)* she clearly had the jurisprudence that their Lordships confirmed in mind when she said, at the end of her §38, that the situation facing AA was the same as that of many other young women living in Kampala, and quoted Lord Hope of Craighead [sc. in *Januzi*], who asked whether the claimant could live a relatively

> normal life judged by the standards that prevail in his country of nationality generally: those standards, or the relevant hardship, being as Lord Brown of Eaton-under-Haywood explained in *AH (Sudan)* that of a significant minority in the country. The evidence before the AIT in this case did not reveal how widespread in the context of Uganda as a whole are the conditions reported by [the expert witness], and did not suggest that they affect anyone other than young women. The factual case is therefore significantly different from that in *AH (Sudan)* where slum conditions were widespread in Sudan, and affected everyone, men women and children alike, and of all ages. [The Judge] should therefore have considered whether it was appropriate to apply the test formulated by Lord Hope of Craighead to a case where the comparator or constituency in the place of relocation is limited to persons who suffer from the same specific characteristics that expose the applicant to danger and hardship in the place of relocation.
>
> 17. There is, however, a further and more fundamental reason why it is difficult or impossible to apply the jurisprudence of *AH (Sudan)* to the present case. There, the conditions in the place of relocation involved poverty, disease and the living of a life that was structured quite differently from that from which the appellants had come in Darfur. It had been open to the AIT to hold that exposure to those conditions, shared by many of the refugees' fellow-countrymen, did not amount to undue harshness. But the present case is different. On the evidence accepted by the AIT, AA is faced not merely with poverty and lack of any sort of accommodation, but with being driven into prostitution. Even if that is the likely fate of many of her fellow countrywomen, I cannot think that either the AIT or the House of Lords that decided *AH (Sudan)* would have felt able to regard enforced prostitution as coming within the category of normal country conditions that the refugee must be expected to put up with. Quite simply, 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.
>
> 18. This was a case that called for an enquiry as to whether conditions in Kampala fell into that category. In not addressing that enquiry the AIT acted irrationally and its determination cannot stand. …"

<u>AAH</u>

50. *AAH (Iraqi Kurds – internal relocation) Iraq* CG UKUT 00212 (IAC) is, as the title suggests, a country guidance case concerned with the issue of whether it is reasonable to expect Iraqi Kurds to relocate to the Iraqi Kurdish Region ("the IKR"). It was decided in June 2018, but it had been heard in February, and the UT (UTJJ O'Connor and Bruce) does not refer to the decision in the present case.

51. Mr Singh appeared for the Secretary of State in *AAH*. He relied on para. 42 of Lord Brown's speech in *AH (Sudan)*. He submitted (see para. 76 of the UT's Reasons) that

a proposed returnee to the IKR could not show that such internal relocation was unreasonable, or unduly harsh, simply by demonstrating that the lives of significant number of people in the IKR (or in Iraq as a whole) were hard and that he would face equivalent hardship on return; he needed to show that his life on return to the IKR would be (quoting Lord Brown) "quite simply intolerable". Counsel for the appellant responded by inviting the UT to find that Lord Brown's "significant minority" formulation was simply wrong and was inconsistent with the *ratio* of the majority in *AH (Sudan)* and with the observations of Lord Bingham in *Januzi*.

52. The UT considered those submissions with care at paras. 79-90 of its Reasons. It began by referring to, in substance, the same passages from *Januzi* and *AH (Sudan)* as I have quoted above. It then turned to an analysis of the relevant parts of Lord Brown's speech. It says, at paras. 84-85:

> "84. And then there is the speech of Lord Brown upon which Mr Singh relies. As we have set out above, it gives rise to two points of contention between the parties. First, whether it is appropriate to use, as a benchmark of reasonableness, the conditions of a 'significant minority' of the population:
>
> > '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* [emphasis added].'
>
> And second, to what standard must conditions have sunk before they will become 'unreasonable':
>
> > '*Given that they can now safely be returned home, only proof that their lives on return 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 [emphasis added].'
>
> 85. In our view it is quite plain that in respect of the first matter Lord Brown was not dissenting from the view of the majority: he expressly endorses it, repeats it himself [at §35], and approves [at §39-40] the UNHCR guidelines cited by Lord Bingham (and Lady Hale). How then can his opinion be squared with that majority view, with its emphasis on the 'conditions generally prevailing' in the home country?"

53. The UT then refers to *AA (Uganda)*, observing that Buxton LJ did not regard Lord Brown's speech as inconsistent with Lord Hope's statement in *Januzi* that the issue was whether the claimant could "live a relatively normal life [in the safe haven]

judged by the standards that prevail in the country of his nationality generally". It continues:

> "87. We agree that the propositions are not mutually exclusive. Lord Brown was doing no more than pointing out that there will never be a situation where everyone in the country enjoys a parity of conditions. The 'conditions generally prevailing' in any given state must entail a diversity of experience. He was not, as Mr Singh appeared to submit, suggesting that the existence of a comparator group would *necessarily* render relocation 'reasonable'. He was simply underlining that where a significant part of the population live in such conditions, it *may* be reasonable to expect this individual to do so too. The question remains whether, for that individual, and taking all relevant factors into account, there is the reasonable likelihood of a 'relatively normal life', to be judged against the standards generally prevailing in that country. We are not therefore prepared to find, as [counsel for the appellant] invites us to do, that Lord Brown was wrong. His comments must however be read and understood in the context in which they are made. They should not be read in isolation; the significant minority 'test' will rarely, if ever, be determinative."

54. At para. 88 the UT referred to the error made by the AIT in *AA (Uganda)* as illustrating the dangers of treating "the significant minority test" as determinative. It also referred to *EB (Lone Women - PSG - internal relocation – AA (Uganda) considered) Sierra Leone* [2008] UKAIT 00090. It continued:

> "89. As the decisions in AA (Uganda) and EB (Sierra Leone) make clear, there is no reasonable internal relocation alternative if that alternative involves a real risk of inhuman and degrading treatment, persecution or serious harm. In such a situation it matters not whether the size of the group facing that degradation is one individual, a significant minority or indeed a significant majority of the population. Once conditions fall below that baseline internal flight is no longer an issue, since removal would be prevented by the real risk of serious harm. That much is accepted by the Respondent. We find however that the same logic must apply to conditions which would, if endured by the putative refugee, be 'unreasonable' or 'unduly harsh': that is the effect of Lady Hale's speech in AH, which we have set out above. For that reason we are satisfied that Lord Brown was not inviting identification of a comparator group to the exclusion of all other considerations. The fact that an applicant may endure the same living conditions as a 'significant minority' of his countrymen cannot *of itself* render his internal relocation 'reasonable'. The test is, and remains, whether those living conditions are, for the individual concerned, 'unduly harsh': that is an assessment to be made taking account of 'all relevant circumstances pertaining to the claimant and his country of origin'.
>
> 90. That brings us to the second matter in contention: Mr Singh's submission that 'in order for any harshness to be "undue" [the

> Appellant] would have to show that, in comparison to the "significant minority" his likely life on return to the IKR "would be quite simply intolerable", i.e. significantly worse that the lives of the "significant minority"'. On this matter we can be brief. It is accepted that in the spectrum of suffering there is a difference between Article 3 ill-treatment and what might be considered 'unduly harsh'. This is made clear in Lord Bingham's speech in AH (Sudan) at [9]. One involves serious harm or inhuman and degrading treatment; the other a life that cannot be considered 'reasonable'. Given his express agreement with the other judgments in both Januzi and AH we do not accept that Lord Brown was here seeking to conflate the two, or to elevate one to the other. Whilst the words 'quite simply intolerable' could be given their literal meaning, 'unable to be endured', we can only read the phrase in context, and doing so we find that that it can mean no more than 'unreasonable' or 'unduly harsh'. We do not think that any further gloss on the concept is required. As Lord Bingham puts it: 'the difficulty lies in applying the test, not in expressing it'."

55. To anticipate, I have set out the reasoning of the UT in *AAH* at such length – including some passages which go beyond the particular issue before us – because I entirely agree with it.

THE APPROACH OF THE UPPER TRIBUNAL

56. I have already summarised the overall structure of the Upper Tribunal's reasoning and set out its essential conclusions. But I need to give more detail about its analysis of the authorities discussed above.

57. At paras. 18-26 of its Reasons the Tribunal quotes most of the passages from *Januzi* and *AH (Sudan)* which I have set out above. At para. 27 it notes that Mr Singh relied on the use in para. 42 of Lord Brown's speech in *AH (Sudan)* of the phrase "a significant minority"; that Ms Naik challenged that reliance, on grounds which it summarises at paras. 27-33 (and which include the submission that what Lord Brown said was *obiter* and inconsistent with the *ratio* of the majority); and, at paras. 34-35, that Mr Singh made two points in response. (The Tribunal does not in fact identify the specific submission for the purpose of which Mr Singh relied on the passage in question, nor does its summary of Ms Naik's response make the position clear.)

58. The Tribunal sets out its view of the effect of para. 42 of Lord Brown's speech at paras. 36-37, as follows:

> "36. We do not consider that Lord Brown's judgment in AH (Sudan) is either strictly *obiter dicta* or a minority judgment such that it is not binding on the Upper Tribunal. This is because first, it was expressly approved by Lord Hope; secondly, it is not inconsistent with the speeches of Lord Bingham or Baroness Hale in AH (Sudan); and thirdly, in any event it was expressly approved by Buxton LJ in AA (Uganda) which is itself binding on us.
>
> 37. When assessing the reasonableness of internal relocation, the language used in Januzi and AH (Sudan) is of standards or conditions

> generally prevailing in the home country and of whether a person can live a relatively normal life. There is of course no single standard or set of conditions which apply throughout a country, but a range of examples of 'normal' or conditions which are experienced either in particular parts of the country, or throughout it by groups of people. One can envisage for example, that there will almost inevitably in any country in the world be differences between standards generally prevailing in urban as opposed to rural areas, and between the capital or large cities and other areas. That is not to say that because the majority of the population live in, for example a rural area, the conditions in urban areas could not said to be normal or include conditions generally prevailing in the home country. We consider that Lord Brown's reference to a significant minority of the population is expanding on what is contained in the speeches of Lord Bingham and Baroness Hale, and is simply a way of expressing what is, in practice, required to identify standards or conditions generally prevailing in the home country, reflecting that there is not a single standard or set of conditions which apply to a simple numerical majority of the population throughout the entire geographical territory of a country."

At para. 38 it draws support for that conclusion from *AA (Uganda).*

59. The Tribunal concludes, at paras. 39-40:

> "39. The test, or comparator for the purposes of assessing reasonableness, is as set out in AH (Sudan), including as expressly set out by Lord Brown, with the caveat that there are some conditions that are unacceptable even if widely suffered in the place of relocation. That particular point was confirmed and expanded upon by the Upper Tribunal in FB (Lone women – PSG – internal relocation – AA (Uganda) considered) Sierra Leone [2008] UKAIT 00090, which held at [39] that '*[AA (Uganda)] is affirmation, in line with AH (Sudan) that [internal] relocation must be reasonable, in other words, that it must not have such consequences upon the individual as to be unduly harsh for her. Inevitably, it will be unduly harsh if an appellant is unable for all practical purposes to survive with sufficient dignity to reflect her humanity. That is no more than saying that if survival comes at a cost of destitution, beggary, crime or prostitution, then that is a price too high.*'
>
> 40. The final principle that therefore flows from AH (Sudan) is that 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. If interpreted this way, there is no central inconsistency with Baroness Hale's speech in AH (Sudan) which highlighted, inter alia, the concern that the comparator should not be with the poorest of the poor in a particular country."

THE APPEAL

60. Ground 2 was pleaded under two heads. In my judgment giving permission, having had the issues clarified in oral submissions, I identified the substance as follows:

> "Head (a) is that the Upper Tribunal's interpretation at paragraphs 37-40 of the determination of what Lord Brown said at paragraph 42 of his speech in *AH (Sudan)* is inconsistent with the interpretation placed on the same passage in another decision of the Upper Tribunal, *AAH*, promulgated shortly after the decision in this case – see paragraphs 87-89 – and that the interpretation in *AAH* is to be preferred. Ms Naik says that that self-direction led the Upper Tribunal into the error of comparing the condition of returnees to Kabul with 'the poorest of the poor', contrary to Lady Hale's injunction in *AH (Sudan)*. She made it clear that she was not contending that what Lord Brown says was positively wrong, only that it was liable to misinterpretation and had been misinterpreted by the Tribunal in this case. …
>
> As to head (b), the point is that the Tribunal made no explicit allusion to the consideration, said in terms in *AH (Sudan)* to be relevant albeit in no way decisive, that the experience of the appellant and others like him as a returnee in Kabul would be very different from his experience of rural life in his home province of Laghman."

DISCUSSION AND CONCLUSION

Head (a)

61. I start by summarising the essential points, so far as relevant to this appeal, established by the authorities about the nature of the exercise required by article 8 of the Directive. I emphasise that this is not intended as a comprehensive analysis of all the issues raised by the authorities to which I have referred.

(1) By way of preliminary, internal relocation is obviously not an alternative where there is a real risk that the applicant for asylum will suffer persecution, or serious harm within the meaning of article 15 of the Directive (which includes treatment which would be contrary to article 3 of the ECHR), in the putative safe haven. We are concerned with cases where there is no such risk.

(2) The ultimate question is whether in such a case "taking account of all relevant circumstances pertaining to the claimant and his country of origin, … it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so". That is the formulation of Lord Bingham in *Januzi*, repeated in *AH (Sudan).* It pre-dates the Directive and is not identically worded: in particular, the reference to whether relocation would be "unduly harsh" is not present in article 8 but derives from the UNHCR 2003 Guidelines (see *Januzi*, para. 20). But it was common ground before us that it states the test required by article 8. When in doubt it is to that question that tribunals should return.

(3) The test so stated is one of great generality (save only that it excludes any comparison of the conditions, including the degree of respect for human rights, between those obtaining in the safe haven and those of the country of refuge – this being the ratio of *Januzi*). It requires consideration of all matters relevant to the reasonableness of relocation, none having inherent priority over the others (*AH (Sudan)*, para. 13). This is the same as Lady Hale's description of the necessary assessment as "holistic" (*AH (Sudan)* paras. 27-28).

(4) One way of approaching that assessment is to ask whether in the safe haven the applicant can lead "a relatively normal life without facing undue hardship … in the context of the country concerned". That language derives from the UNHCR Guidelines and is quoted by Lord Bingham with approval in *Januzi* (para. 20) and also used by Lord Hope (para. 47); but it does not appear in the Directive or in Lord Bingham's formulation of the test, and it should not be treated as a substitute for the latter. Rather, it is a valuable way of approaching the reasonableness analysis – "one touchstone", as Lord Brown puts it (*AH (Sudan)* para. 42). Its value is because if a person is able to lead in the safe haven a life which is relatively normal for people in the context of his or her own country, it will be reasonable to expect them to stay there (*AH (Sudan)*, para. 47).

(5) It may be reasonable, and not unduly harsh, to expect a refugee to relocate even if conditions in the safe haven are, by the standards of the country of refuge, very bad. That is part of what is decided by *Januzi* itself, and the passages quoted at paras. 34 and 35 above reinforce it. It is also vividly illustrated by the outcome of *AH (Sudan)*, where the House of Lords upheld the decision of the AIT that it was reasonable for Darfuri refugees to be expected to relocate to the camps or squatter slums of Khartoum. That may seem inconsistent with the suggested approach of asking whether the applicant would be able lead a "relatively normal life" in the safe haven; but the reconciliation lies in the qualification "in the context of the country concerned".

(6) Point (5) does not mean that it will be reasonable for a person to relocate to a safe haven, however bad the conditions they will face there, as long as such conditions are normal in their country. Conditions may be normal but nevertheless unduly harsh: this is the point emphasised by Lady Hale in *AH (Sudan)* and is exemplified by *AA (Uganda)*.

(7) The UNHCR Guidelines contain a full discussion of factors relevant to the reasonableness analysis. These are described by Lord Bingham as "valuable" and partly quoted by him (*Januzi* para. 20); and at para. 20 of her opinion in *AH*

(Sudan) Lady Hale endorses a submission made in that case by UNHCR which summarises the factors in question. A decision-maker must consider those factors, so far as material, in each case (though it does not follow that everything said in the detailed discussion in the Guidelines is authoritative).

(8) The assessment must in each case be conducted by reference to the reasonableness of relocation for the particular individual.

62. In his written submissions Mr Fordham identified "UNHCR's core submission". He said:

> "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."

63. Although I have ranged wider, it will be seen that my summary is essentially consistent with that submission. I would, however, sound a note of caution about the reference to "certain objective 'baseline' standards". I would accept that the point made at para. 61 (6) above requires an objective judgment by the decision-maker, and also that it does imply some concept of a threshold below which it will not be reasonable to expect the individual to stay in the safe haven – that indeed is the burden of the passage from Dr Storey's article approved by Lord Bingham in *Januzi* (see para. 38 above). But the particular terminology of "objective baseline standards"[3] is to my mind rather too suggestive of the Hathaway/New Zealand approach which the House of Lords has disapproved.

64. It is convenient to deal here with one central theme of Ms Naik's submissions. She contended that, because the exercise required by article 8 of the Directive required the application of objective norms applicable to the conditions which a returnee would experience in the safe haven, comparison with the conditions experienced by others was irrelevant. That goes too far. Any assessment of reasonableness must be, in one sense, objective; but that does not preclude the comparison of the conditions which a returnee would enjoy in the safe haven with those that apply generally in the country in question, and the authorities positively require that such a comparison form part of the assessment.

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[3] The term "baseline" does in fact appear in *AAH*: see para. 89. But it is used there to refer to conditions which would give rise to a breach of article 3 of the ECHR.

65. Against that background, I turn to the effect of para. 42 in the speech of Lord Brown in *AH (Sudan)*. As already indicated, I agree entirely with the passages which I have quoted from the decision of the UT in *AAH*: see paras. 52-55 above. In particular, I agree that Lord Brown cannot have been intending to enunciate a "significant minority test" in the sense which Mr Singh was understood to have been advancing in that case[4]: that is, he was not saying that if it was established that a significant minority of people in the country in question lived in conditions of great hardship it necessarily followed that it was reasonable to expect a returnee to live in those conditions. Such a conclusion would have been contrary not only to what Lady Hale said in *AH (Sudan)*, as argued by Ms Naik, but to the basic approach enunciated by Lord Bingham in both that case and *Januzi* and accepted by the other members of the House in both cases. As we have seen, Lord Brown said in terms that he endorsed every word of Lord Bingham's opinion.

66. It seems to me clear, rather, that, instead of veering so inexplicably off-piste, Lord Brown was making a more limited point. The subject of para. 42 is, avowedly, a challenge by the applicants to a finding by the AIT that "people in Sudan generally live [at subsistence level]". He does not in fact spell out what the challenge was, but it appears to have been that the evidence did not support the finding that a majority of people in Sudan lived at subsistence level. His point was that, even if that was so, it did not mean that living at subsistence level could not be regarded as relatively normal[5] in the context of Sudan. All that he was doing was to elaborate a little on what "relatively normal" – or its cognate, "prevailing generally" – entailed: conditions can be normal/general even if they apply to less than half the population.

67. So understood, what Lord Brown says in para. 42 of his speech seems to me, with respect, right; and my conclusion is reinforced by the fact that the speech as a whole was agreed with by Lord Hope and that this particular passage was endorsed by Buxton LJ in *AA (Uganda)*[6]. As the UT puts it in *AAH*, the lived lives of the population of any country will "entail a diversity of experience". Or, as the Tribunal put in the present case:

> "There is no single standard or set of conditions which apply throughout a country, but a range of examples of 'normal' or conditions which are experienced either in particular parts of the country, or throughout it by groups of people."

It would be arbitrary and unworkable – and, more to the point, contrary to the whole nature of the required exercise – if the question of what was "relatively normal" in the context of a given country depended on having to show that the conditions in question were experienced by 50%+1 of the population.

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4 I should record that Mr Singh told us that the UT in *AAH* had misunderstood his submission in this respect.

5 Though in fact that phrase is not used by Lord Bingham in *AH (Sudan)* (save incidentally as part of a quotation from the judgment of the Court of Appeal).

6 For what it is worth, however, I do not think that it is formally binding on us, given that only Lord Hope expressly agreed with Lord Brown's speech and that Buxton LJ's approval is not *ratio*. To this extent I differ from what the Upper Tribunal says at para. 36 of its Reasons.

68. I wish to make one other point before leaving this part of the discussion. In my view it is contrary to the message of *Januzi*, as repeated in *AH (Sudan)*, to pick on particular statements or phrases in any of the speeches in either case – or indeed in the UNHCR Guidelines, valuable though they are – and subject them to minute examination as if they had quasi-statutory effect, still less to treat them as giving rise to distinct "tests". Lord Bingham went out of his way in *AH (Sudan)* to emphasise that the assessment of reasonableness was "one of great generality": see para. 13 of his opinion. What is essential is that the decision-maker should conduct the kind of holistic assessment, encompassing all relevant considerations, which is required.

69. The question then is whether the Upper Tribunal in the present case did carry out the assessment required.

70. I start with its treatment of the law: see paras. 58-59 above. I can see no substantial difference between the analysis of the relevant parts of Lord Brown's speech in *AH (Sudan)* at para. 37 of the Reasons and the analysis in *AAH* which I have said that I believe to be correct. Paras. 38-39 do not go much beyond that. Para. 40, in which the Tribunal states what it calls "the final principle that … flows from *AH (Sudan)*", is rather more problematic. Mr Fordham contended that that paragraph erroneously treats Lord Brown's observations "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" and that it made it "the starting-point in every assessment of reasonableness". Ms Naik made submissions to essentially the same effect. Mr Fordham also contended that the examples given of conditions which might render relocation unreasonable – "crime, destitution, prostitution and the like" – were unduly specific and limiting and did not cover the range of matters which the Guidelines specified as relevant to the reasonableness assessment.

71. I see some force in those criticisms. I do not think that para. 40 of the Reasons falls into the crude error of treating as determinative the fact that the conditions which an applicant would experience in the safe haven are experienced by (at least) a significant minority of other people in the country: on the contrary, the Tribunal expressly acknowledges that even if that is the case there are the further questions to be considered which it identifies in the second part of the paragraph. But I do agree that its formulation could be understood to be prescribing a step-by-step analysis, in which the "significant minority" question comes first. That way of approaching the question will not necessarily lead to an error of law, but I think that it is unhelpful because it puts the focus on a particular element in the exercise and risks distorting its essentially holistic nature. I also agree that the range of relevant matters goes beyond the particular examples mentioned by the Tribunal. Having said that, it is necessary to read para. 40 in context. Despite some of the language used, I am not convinced that it was intended by the Tribunal as a definitive summary of the relevant law. It was directed very much to resolving the dispute between the parties as to the effect of Lord Brown's speech in *AH (Sudan)*, particularly in the light of *AA (Uganda)*, and the structure and language reflects that focus. The real question must be what exercise the Tribunal in fact performed when it came to its dispositive reasoning, to which I now turn.

72. As to that, I have explained the structure of the Reasons at paras. 13-21 above. As there noted, in addressing what I have called issue (2), the Tribunal carefully

reviewed the relevant evidence under the various heads relevant to the reasonableness issue, as identified in the UNHCR Guidelines; and it proceeded to make findings under each head before proceeding to the overall conclusion in paras. 230 and 241 (ii)-(v), and the conclusion in the Appellant's own case in paras. 242-250. I have looked carefully at the whole section (which is too long to reproduce here) in order to ascertain the nature of the exercise which it performed. At several points it does indeed make findings that the conditions under which returnees would live were shared by most of the urban poor in Kabul; but that was a question that needed to be considered because it related to the "relatively normal life" issue. The crucial question is whether it treated its finding as decisive, or in any event gave it inappropriate priority, and overlooked the need to apply an objective minimum standard of acceptability.

73. I am not persuaded that the Tribunal fell into those errors. As regards the security risk, the passages quoted in connection with ground 1 clearly show that it applied an objective standard (notwithstanding its factual error) and did not proceed on the basis simply that the risk to returnees was no worse than for other inhabitants of Kabul. As regards the other factors, it would be surprising if it had taken a different approach, not least because the UNHCR Guidelines by reference to which it structured its reasoning are themselves couched in terms of objective standards; and although I have found no explicit statement to this effect my clear overall impression is that here too its finding was that the conditions under which the returnees would live in Kabul were, objectively, not unduly harsh. Ms Naik referred us in particular to para. 249 (para. 22 above), but I do not believe that that supports her case. Although it does indeed find that the Appellant would be "returning to living and humanitarian conditions in Kabul which affect the majority of the population" it goes on to make a distinct finding that "he could live a relatively normal life [there] without undue hardship", and its overall finding was that it would not "be unreasonable or unduly harsh for [him] to internally relocate to Kabul". Overall, I do not believe that the Appellant has demonstrated any error of law in the exercise performed.

74. I should also say that on the Tribunal's actual findings the particular issue based on Lord Brown's "significant minority" observations did not really arise. In the case of most at least of the elements which it considered it found that the situation in Kabul was no worse, or in some respects better, than in many other parts of Afghanistan. For example, at para. 199, having referred to maps showing the worst affected provinces by number of security incidents both absolutely and by reference to population, it found:

> "On neither measure is Kabul the worst or even one of the worst affected areas. We find that the security situation is one which affects the majority of the population of Afghanistan and extends throughout the majority of the territory."

Likewise, at para. 229 it found that

> "… if anything, the economic conditions in Kabul, the capital city in which there are greater employment opportunities than other, particularly rural areas, are better than other parts of Afghanistan".

(This is probably not decisive, however, because, as I understand it, in principle Ms Naik's submission would stand even if the conditions in question were common to a majority of the Afghan population: she would say that it was still necessary in such a case to assess whether it was objectively reasonable to expect returnees to live under those conditions.)

75. In support of her submission that the Tribunal had misdirected itself Ms Naik relied in part on the fact that the conditions which it had found that returnees to Kabul would encounter were in fact those of the poorest of the poor in Afghanistan, and she submitted that Lady Hale had said at para. 28 of her speech in *AH (Sudan)* that that was unacceptable. That is a misreading of the passage in question (and also an example of the approach which I deprecate at para. 68 above). Lady Hale's reference to "the poorest of the poor" was made as part of her rejection of the idea that as long as there were other people living in the same conditions as the returnees would encounter it would be reasonable to expect them to endure those conditions, however bad (at any rate if they were above the article 3 threshold). That is (with respect) plainly right; but it is not the same as saying that it will be automatically unreasonable for returnees to live at the level of the poorest part of the population.

76. Ms Naik also criticised the Tribunal for rolling up what she said were the distinct questions of reasonableness and undue harshness. I do not accept that criticism. These concepts are two sides of the same coin. As Lord Hope put it in *Januzi*, "the words 'unduly harsh' set the standard that must be met for [relocation] to be regarded as unreasonable" (see para. 47 of his speech).

Head (b)

77. Neither in her skeleton argument nor in her very brief oral submissions on the point did Ms Naik develop head (b) any further than my summary at para. 60 above. Mr Singh in his skeleton argument acknowledged that there was no express reference in the Reasons to the difference between the Appellant's life in Laghman and his life as it would be in Kabul, but he submitted that it was not a factor of sufficient weight to require specific mention. He said that "the conditions in Laghman as disclosed by the documentary evidence were uncontroversial" and noted that there was no suggestion "that there was any evidence about the Appellant's home area or his life there that was ignored by the UT".

78. Given the sparse nature of those submissions I can only deal with this point shortly. It is hard to think that there would not be a real difference between the Appellant's life in Laghman, which is a largely rural province (though close to Kabul), and the life which he would lead in Kabul; and in principle that is a relevant consideration in assessing the reasonableness of relocation. I think it extremely unlikely that the Tribunal simply ignored this aspect (which is of course expressly referred to in *AH (Sudan)*); and it would have been better if it adverted to it in some way. But it certainly cannot be assumed that life was, or would be, better for the Appellant in Laghman (even leaving aside the risk of persecution to which he was subject there) than it would be in Kabul, whether in terms of security risk or living conditions: indeed, as already noted, the Tribunal's general findings were that in most respects Kabul was no worse, if not better, than the rest of the country. In the absence of a particularised case as to the impact on the Appellant of the change, I do not think it

can be treated as an error of law for the Tribunal not to have dealt with the point explicitly.

CONCLUSION AND DISPOSAL

79. For the reasons given I would allow the appeal on ground 1 but dismiss it on ground 2.

80. In those circumstances it seems to me that the remittal to the Upper Tribunal can and should be on the basis that it need reconsider its conclusions only on the question of the extent of the risk to returned asylum-seekers from security incidents of the kind considered at paras. 190-9 of its Reasons. Although of course the relevance of that risk is to the overall issue of whether it is reasonable for asylum-seekers to be expected to relocate to Kabul, it is in practice a self-contained element within that assessment, and since I would hold that there was no error of law in the Tribunal's approach to the other elements I see no reason why those elements require to be reconsidered.

81. The fact that the remitted issue is self-contained means that there would be no difficulty in it being heard by a differently-constituted Tribunal; and I think that in the circumstances of the present case, given the nature of the error on ground 1, that would be the correct course. A fresh Tribunal would of course not be privy to the evidence called on the previous occasion, or the submissions made; and that would mean that the evidence as to security risk adduced at the previous hearing would have to be adduced again (unless agreed), together with any updating evidence that might now be available, and further submissions made. But the scope of the remitted hearing would still be far more limited than first time round.

82. Those limits on the scope of the remittal are subject to one important qualification. We were told that last year, after the decision of the Upper Tribunal, UNHCR produced further Guidelines on returns to Afghanistan, which, unlike the 2016 version, unequivocally recommend that "given the current security, human rights and humanitarian situation in Kabul, an IFA/IRA is generally not available in the city". It will be for the Tribunal, no doubt after hearing submissions, to consider whether that assessment requires a reconsideration of its country guidance on a more extensive basis than is required by the remittal of this appeal. If it decides that it does, it is likely to make sense either for the scope of hearing to be increased or (which may be procedurally more correct) for the remittal in this case to be heard along with whatever appeal is the vehicle for that wider consideration.

Lord Justice Singh:

83. I agree.

Lady Justice King:

84. I also agree.