

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
AS/02164/2005 et al

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/04/2007

Before :

Lord Justice Buxton
Lord Justice Moore-Bick
and
Lord Justice Moses

Between :

AH(Sudan)
IG(Sudan)
NM(Sudan)
- and -

Appellants

**THE SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

Respondent

Mr Manjit Gill QC, Mr Abid Mahmood, Mr Christopher Jacobs and Mr Basharat Ali
(instructed by **Aman Solicitor Advocates, Blakemores and White Ryland**) for the **Appellants**
Miss Lisa Giovannetti and Mr Robert Kellar (instructed by **The Solicitor to Her Majesty's**
Treasury) for the **Respondent**

Hearing dates : 20-21 March 2007

Judgment

Lord Justice Buxton:

This is the judgment of the court

Background

1. All three appellants are black Africans formerly living in Darfur in western Sudan. All three have been, or if they return to Darfur will be, victims of persecution by marauding Arab bands known as the Janjaweed, persecution which the government of Sudan has connived in or at the very least not restrained. It is not necessary to repeat further the now well-known facts about the desperate situation of black Africans in Darfur, because it is fully accepted that by reason of those conditions all of the appellants are prima facie entitled to international protection. The Secretary of State's case is, however, that they can safely return to Sudan provided that they return not to Darfur but to Khartoum. The appellants' case in that respect is two fold. First, that they will still be in danger of Refugee Convention persecution in whatever part of Sudan they are returned to. Second, that even if the appellants are not in danger of persecution if returned to Khartoum, it would be unduly harsh under the rules applying to internal relocation to require them to return there. The appellants failed before the AIT on all of these points.
2. The Secretary of State originally refused applications for asylum on various dates in December 2004 and January 2005. Since then, the appellants' cases have been considered not only by various adjudicators, but also by the Asylum and Immigration Tribunal; by the Administrative Court; by this court, [2005] EWCA Civ 1219; and once by the House of Lords, in *Januzi and others v Secretary of State for the Home Department* [2006] 2 AC 426. The judicial apparatus of this country does not need to apologise for the length of that consideration, which has been dictated by the need for anxious scrutiny of the international obligations of the United Kingdom in the face of one of the most serious and extensive examples of racial persecution to have occurred in recent years.
3. We deal first with the various claims made in respect of danger of persecution on return, and explain why we consider that the AIT was justified in rejecting that part of the appellants' case. We then deal with the issue of internal relocation. In that respect we consider that the AIT misstated the law, so as to reach a conclusion that on the facts was not justified as a matter of law. In that respect we allow the appeals, and applying the law as stated by this court and the House of Lords to the facts as found by the AIT quash the Secretary of State's refusals of asylum in all three of the cases before us.

Risk on Return

Risk to persons of non-Arab Darfuri origin

4. The appellants contended that as non-Arab Darfuris, if they returned involuntarily in consequence of their failed applications for refugee status, they would be at risk of persecution. The AIT concluded that there was no such risk. The appellants challenge that conclusion on the grounds that it is perverse and stems from an incorrect approach to expert evidence when measured against other objective material.

5. There was no shortage of material to suggest a real risk of ill-treatment to non-Arab Darfuris who had been returned as failed asylum-seekers. The appellants' starting point was the undisputed attitude of the Government of Sudan to non-Arab Darfuris, as demonstrated by their persecution of such people in Darfur. Such behaviour made it all the more likely that they would ill treat returned asylum seekers from Darfur. The Government's conduct had led to allegations of war crimes, crimes against humanity and genocide. Further, the risk of persecution on return was exacerbated by the Government's fears that returnees would provide evidence of such international crimes.
6. The United Nations Secretary-General's March 2006 monthly report said (as cited by the COIS April 2006 report):-

“Millions living close to rebel territory and who share the same ethnicity of the rebels are particularly vulnerable to human rights violations by the Sudanese armed forces.”

H and M are from the Zaghawa tribe which has been particularly targeted. G is from the Black African Moslem Al Berget tribe. The AIT accepted that all three appellants came from an ethnic background which would make them susceptible to ethnic persecution in Darfur.

7. The material on which the appellants relied to establish a risk of ill-treatment on return, apart from that background, rested on the reports of Peter Verney and Sarah Maguire. We leave out of account the evidence of a third expert, Mr Nourain. The Tribunal took the view that his evidence was “substantially unreliable”. There is no appeal in relation to his evidence. Both Mr Verney and Sarah Maguire, whose evidence was set out at substantial length towards the beginning of the AIT's decision, spoke of the risk of ill-treatment to returning asylum-seekers, amplifying the written reports they had proffered. The Tribunal rejected both the evidence of Mr Verney and Sarah Maguire in part on the basis that neither had taken into account the 10th ACCORD Country of Origin Seminar Report (Budapest December 2005) which recorded the opinions of Dr Schodder and Dr Alizadeh. Those two experts had made no specific reference to risk of ill-treatment on the return of non-Arab Darfuris. But they took the view that there was no risk of ill-treatment to failed asylum-seekers, generally, as long as they were not recognised as a threat to the state. Dr Schodder accepted that those returning could be arrested, questioned and detained but, provided they did not engage in political activities, he did not identify any risk.
8. The AIT placed considerable reliance upon the ACCORD report. It described the contrast between the evidence of Dr Alizadeh and Dr Schodder, as contained in the ACCORD report, and the evidence of Mr Verney and Sarah Maguire, as striking. Although the AIT acknowledged that the report had not specifically dealt with returnees of Darfuri origin, it concluded:-

“There is simply no reason to suppose that somehow they omitted persons of Darfuri origin from consideration.”

It described the evidence of Drs Alizadeh and Schodder as weighty and said there was no reason to adopt a different view (see paragraph 208).

9. The AIT's reliance upon the ACCORD report in support of the conclusion that there is no real risk on return to those of Darfuri origin led to a last-minute application to adduce evidence of a fuller version of the ACCORD report than that which was placed before the AIT. Contrary to the supposition of the AIT, the authors of the report on the Seminar recorded Dr Alizadeh as recommending a paper issued by UNHCR on Darfur and Internal Flight Alternative. He asked that that paper should be read when it was officially issued. That suggests, contrary to the supposition of the AIT, that Drs. Alizadeh and Schodder were not intending to include returnees from Darfur in their general description of risk. The respondent objects to the production of this passage so soon before the hearing of this appeal, when the appellants were given ample opportunity to adduce fresh evidence months ago. This is not the occasion to determine the consequences of this late application. It is sufficient to note that since the AIT considered the UNHCR paper, the very paper to which Dr Alizadeh referred, there is little profit to be gained by focussing upon the AIT's understandable, if erroneous, supposition.
10. We should emphasise, at this stage, that the ACCORD report was by no means the only basis which led the AIT to reject Mr Verney and Miss Maguire's evidence about risk to returnees. Mr Verney's evidence was criticised on two bases, independently of the ACCORD report. Firstly, although he relied upon the profiles of "twenty-six genocide survivors" he did so uncritically. No evidence, either in the form of written statements or of oral evidence, was adduced from any of the twenty-six persons to whom he made reference, (see AIT paragraph 163). Secondly, he exaggerated his evidence as to crimes against humanity carried out against Darfuris outside the Darfur region (see paragraph 164). The AIT was entitled to reach that conclusion about his evidence.
11. Similarly, the AIT's criticism of Miss Maguire's evidence did not rest solely on her failure to consider the ACCORD report. She too was found to have a tendency to exaggerate.
12. The AIT's criticism of opinions relating to risk to returnees does not stop at the expert evidence advanced on behalf of the appellants. As we have noted, the fuller version of the December 2005 ACCORD Seminar Report referred to the UNHCR Position Paper on Sudanese asylum-seekers from Darfur dated 10 February 2006. That paper described the risk to certain categories of Sudanese who had been forced to return to return to Sudan, regardless of their place of origin, "including Darfurians". The UNHCR's Position Paper in relation to conditions in and around Khartoum are relevant to the different issue of quality of life in squatter areas and IDP [Internally Displaced Persons] camps, which we address in §§ 42-44 below. But for the purposes of examining the AIT's conclusions in relation to the UNHCR Position Paper so far as it concerned risk to returnees, we should note that the UNHCR took the view that the threats to physical safety and personal security:-

 "...are so widespread that it cannot be said that there is an internal flight alternative anywhere in Sudan for asylum-seekers from Darfur, including for those who resided in Khartoum before the Darfur crisis. Sudanese of 'non-Arab' Darfuri background face a heightened risk of scrutiny by the security apparatus." (see paragraph 8 of the Position Paper recorded at § 134 of the AIT's determination)

13. The AIT disagreed with that conclusion on the basis of the sentence which follows, which reads:-

“Furthermore, where internal displacement is a result of ‘ethnic cleansing’ policies, denying refugee status on the basis of the internal flight or relocation concept could be interpreted as condoning the resulting situation on the ground, and therefore raises additional concerns.”

The AIT asserted that UNHCR’s views were “predicated” on that sentence and that sentence did not represent the law in the United Kingdom (see paragraphs 197-198). The conclusion that the UNHCR’s views were predicated on the danger of appearing to condone events in Darfur is unfounded. Reading the passage we have cited, as a whole, it is plain to us that the paper’s comment about condoning ethnic cleansing policies is an additional point and not a point upon which the UNHCR’s views as to risk is on return were founded, let alone “predicated”. The AIT has misread the Position Paper.

14. That does not, however, mean that the AIT was bound to accept UNHCR’s views as to risk on return. The AIT recorded a lack of identified sources, which it contrasted with the references in the paper to sources in relation to the situation in Darfur and Eastern Chad (see paragraph 199). The AIT was entitled to criticise the UNHCR Position Paper on that basis, (at paragraph 199 of its decision). The AIT continued, in the same paragraph, to place reliance upon a report from the American University of Cairo of June 2006 which did not record the UNHCR as accepting that asylum-seekers from Darfur would qualify as refugees because of risk on return to Khartoum.
15. Whatever defects there may be in the AIT’s treatment of the UNHCR Position Paper, there was, however, a substantial basis upon which the AIT was entitled to reject the submissions as to risk on return. The foundation of its rejection of those contentions was the absence of any substantiated evidence of ill-treatment to returnees in the few years since 2003, during which those who had fled Darfur had been returned to Khartoum. In relation both to asylum-seekers generally and returnees of Darfuri origin, the AIT recorded that in the three years since the outbreak of persecution in Darfur, there was “virtually no specific evidence” of non-Arabs of Darfuri origin facing difficulties (see paragraph 205). Two specific cases out of 26, claiming to have been returned to Khartoum, referred to in the Aegis Trust’s 2005 report, on which both experts relied, failed to provide credible support. The absence of any substantiated evidence, still less any practice or pattern of mistreatment was, so the Tribunal thought, particularly striking since it could reasonably be expected that those being sent back would contact their family or friends, so that it would become apparent if contact had been lost after the due date for arrival. The allegation of risk:-

“...asks us to assume that that there are never contacts in Khartoum who have been asked to check whether such persons have arrived safely and who have alerted family and/or friends in the United Kingdom etc. they have not.” (see paragraph 210)

16. Furthermore, there are organisations which those anxious about being forced to return could reasonably be expected to have contacted before departure, such as the Sudan Organisation against Torture or other Sudanese NGOs (see paragraph 214).
17. The AIT acknowledged that there had been few removals from the United Kingdom since 2003, possibly some 40, and that it was not known how many of those were of Darfuri origin (see paragraph 204). It also acknowledged that those returning would face screening and their ethnic origin would be obvious (see paragraph 203). But the absence of substantiated evidence of ill-treatment led to their conclusion that there was no such risk as asserted.
18. This essential conclusion is challenged by the appellants who contend that it is not surprising there is no such substantiated evidence, having regard to the small number of returnees and to the sophisticated and secret methods of the Government of Sudan's intelligence network. These are, no doubt, substantial arguments. But they are arguments which go to findings of fact and the weight to be given to the evidence or its absence. They come nowhere near establishing that the approach of the AIT, based upon the lack of evidence of ill-treatment to those returning, is not one which the AIT was entitled to reach. Had the AIT's decision rested solely upon its criticism of either the experts or the UNHCR Position Paper, based upon the December 2005 ACCORD report, we would have had to consider whether that foundation falsified the AIT's conclusion. But the AIT's conclusion did not rest upon that narrow ground. In those circumstances the appellants' challenge to the AIT's conclusion as to risk on return fails.

Persons Eligible for Military Service

19. The opinion of Miss Maguire, based on the UNHCR Position paper, was that on the authority of a decree passed in 2003 all those who had been away from Sudan for over twelve months could be detained and young men of conscript age were particularly vulnerable. The AIT rejected that evidence on the basis of an earlier Tribunal decision (*BA (Military Service – No Risk) Sudan CG* [2006] UKAIT 0006), which itself was based upon a 2001 Danish fact-finding report. The appellants rightly point out that that report is likely to be out of date but it is clear that the AIT did not wholly rely upon that decision, still less that earlier report. It based its decision, at least in part, on Dr Schodder's views recorded in the December 2005 ACCORD report, which noted that the practice of forced recruitment had stopped, and that draft evaders were often coerced into certain contingents of active service (see paragraph 193). The AIT again criticised the references to young men of fighting age in the UNHCR Position Paper on the basis that in contrast to other parts of the paper, no sources were given for those assertions (see paragraph 194).
20. The AIT recorded evidence of a UNHCR statement dated 8 March 2006, post-dating the UNHCR Position Paper of February 2006, which noted that the Government of Sudan had ceased to round up young men in cities to conscript them some three years before (recorded at paragraph 192 of the AIT Determination). It was entitled to rely upon that evidence and the evidence of Dr Schodder as recorded in the ACCORD report rather than the evidence of the experts adduced by the appellants and the UNHCR Position Paper of February 2006. In those circumstances it made no error of law in rejecting the assertion that those eligible for military service were at risk on return to Khartoum.

Special categories, and refugees sur place

21. The AIT dealt in some detail with various particular categories of returnees, and also with claims to refugee status *sur place*. Much of these conclusions was not germane to these appellants, and in the event we were not asked to scrutinise the AIT's conclusions. We do not think it appropriate to pursue those issues further in this judgment.

Internal relocation

The relevant jurisprudence

22. The nature of the “internal relocation” alternative can be stated quite shortly. A person qualifies as a refugee entitled to international protection if he is outside the country of his nationality owing to a well-founded fear of being persecuted on a Refugee Convention ground, and is unable or, owing to such fear unwilling, to avail himself of the protection of that country. As this court pointed out in §19 of its judgment in *E and anor v SSHD* [2004] QB 531 [E], it was not originally envisaged that a well-founded fear of persecution might exist in relation to one part of a state but not in relation to another part. Eventually, however, refugee law had to address the situation where a person has a relevant fear in his place of habitual residence, but would not have such a fear if he moved to another part of the same country.
23. If such a person simply refused to relocate, but instead went to another country, it could be said that he was not outside the country of nationality because of his fear of persecution, because there were parts of that country to which he could go without being persecuted. But an absolute obligation to move could not be placed on someone who, after all, would be moving to avoid persecution. Accordingly, §91 of the *UNHCR Handbook* (1979) provided:

The fear of being persecuted need not always extend to the *whole* of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.

This test of reasonableness of relocation has been described, as least in the English jurisprudence, in terms of whether it would be unduly harsh to expect the persecuted person to relocate. That formulation underlines the stringency of the test that the persecuted person has to overcome; but that should not be permitted to conceal that the issue is the reasonableness of requiring relocation by this persecuted person from the area where he is persecuted to another part of his country of nationality. As Lord Woolf MR said in *R v SSHD ex p Robinson* [1998] QB 929 at 943D:

The use of the words “unduly harsh” fairly reflects that what is in issue is whether a person claiming asylum can reasonably be expected to move to a particular part of the country.

24. It is therefore not surprising that in *E* the basic issue as to internal relocation was stated in terms of a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the “safe haven”, having regard to the impact that they will have on a person with the characteristics of the asylum seeker. Much of *E* was taken up with the issue of whether the mere absence in the area of relocation of access to basic norms of civil, political and socio-economic human rights deprived that area of relevant safe haven status; a proposition that this court rejected. But the court gave plenty of indications of what the general approach to internal relocation should be. Thus in §§ 23-24 Lord Phillips of Worth Matravers MR said:

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

24. If this approach is adopted to the possibility of internal relocation, the nature of the test of whether an asylum seeker could reasonably have been expected to have moved to a safe haven is clear. It involves a comparison between the conditions prevailing in the place of habitual residence and those which prevail in the safe haven, having regard to the impact that they will have on a person with the characteristics of the asylum seeker. What the test will not involve is a comparison between the conditions prevailing in the safe haven and those prevailing in the country in which asylum is sought.

Lord Phillips returned to the point in two further parts of his judgment. At §64 he said:

So far as refugee status is concerned, a comparison must be made between the asylum seeker's conditions and circumstances in the place where he has reason to fear persecution and those that he would be faced with in the suggested place of internal location. If that comparison suggests that it would be unreasonable or unduly harsh, to expect him to relocate in order to escape the risk of persecution, his refugee status is established.

And having stressed the need to distinguish between refugee status under the Refugee Convention; the requirements of the Human Rights Convention; and the dictates of common humanity; he said, at §67, in respect of the first of those:

we consider that consideration of the reasonableness of internal relocation should focus on the consequences to the asylum

seeker of settling in the place of relocation instead of his previous home.

25. Permission to appeal to the House of Lords was granted in *E*, but the appeal was not pursued because the issues that it would have raised were taken up in the appeals in the case known as *Januzi v SSHD* [2006] 2 AC 426.
26. There were two separate appeals before the House in *Januzi*. The first, an appeal from this court's decision at [2003] EWCA Civ 1188, concerned a claim that it would be unduly harsh to return J to another part of his country of origin, Kosovo, because of the absence of human rights protection in the proposed safe haven. This court adopted the guidance in *E*, §24 above, in rejecting that claim, and its decision was upheld by the House, albeit that the House preferred to express its conclusion in somewhat different language from that adopted in this court. The other case before the House was that of the present appellants.
27. Before this court, [2005] EWCA Civ 1219, the argument for the appellants was based on two points of principle. First, that internal relocation could not be appropriate when the agent of persecution was the state, because the subject would not then be assured of safety from persecution in the safe haven. This court rejected that argument, the House agreed with that view, and the point is therefore no longer live. The second proposition raised again the issue of absence of civil rights in the safe haven, that had failed before this court both in *E* and in *Januzi*. That proposition also failed in the House and, again, is not live before us.
28. In view of the terms in which this case was argued on its first appearance in this court it is hardly surprising that that appeal failed. However, before the House the appellants complained that, quite apart from the two issues of principle, there had been no adequate analysis of the actual conditions to be faced by those returned to camps in Khartoum. The House agreed that that was so. It did not identify in detail the facts that should be addressed, but simply remitted the case to the AIT. Hence the present proceedings.
29. In order to reach the conclusion that the treatment of internal relocation in this court had been inadequate the House had to analyse the general law relating to that subject. Three substantial speeches were delivered. Lord Carswell, at §§65 and 67, specifically adopted the analysis of this court in *E*, and the exposition in §§ 23-24 of that judgment that is set out in §24 above. Lord Hope, at §47, adopted the approach of Linden JA in the Canadian case of *Thirunavukkarasu*, which was the basis of the analysis of Lord Woolf in the passage set out in §23 above. The question, said Lord Hope, was whether in the safe haven 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.
30. Some difficulty has been seen in Lord Hope's further observation at his §54 that the issue as to internal relocation would be whether

the conditions in [the country of habitual residence] generally as regards the most basic of human rights that are universally recognised—the right to life, and the right not to be subjected to cruel or inhuman treatment—are so bad that it would be unduly harsh for the claimant to have to seek a place of relocation there.

That analysis might be read, and the AIT in §§ 234-235 of its determination may have read it, as requiring for “undue harshness” nothing less than breaches of articles 2 and 3 of the Human Rights Convention. That however cannot be so, for three reasons. First, it is plain and not doubted that there is a difference between the tests applied in relation to the Refugee Convention on the one hand and the Human Rights Convention on the other: see the analysis of Lord Phillips in §§ 64-67 of *E*, referred to in §24 above. Second, Lord Hope cited in support of the point that he was making submissions by counsel for the Secretary of State that a conclusion as to “undue harshness” could be reached without reliance on the Human Rights Convention. Thus, Lord Hope had in mind a case where conditions throughout the country were unacceptable in *Refugee Convention*, and not just in Human Rights Convention, terms. Third, it was clearly not the view of Lord Bingham in *Januzi* that the approach to internal relocation was circumscribed by the standards of articles 2 and 3 of the Human Rights Convention. That Lord Hope’s analysis did not differ in the result from that of Lord Bingham is demonstrated by Lord Mance having been able to agree with both speeches without qualification or addition. It is therefore to the speech of Lord Bingham that we must turn, it having been agreed in full by all of Lords Nicholls, Carswell and Mance.

31. It must be recalled that Lord Bingham was principally addressing himself to the points of principle that formed the main focus of the appeal. However, in so doing he necessarily reviewed the general approach to internal relocation that had been adopted in *E*. In his §13 Lord Bingham quoted with approval §§ 23-24 of *E* that have already been set out. That approach was underlined when, in his §20, Lord Bingham quoted with equal approval the guidance given in the UNHCR Guidelines of 2003, and in particular the requirement that “Conditions in the area must be such that a relatively normal life can be led in the context of the country concerned...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.”

32. Lord Bingham also quoted with approval an observation by Dr Storey:

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)

The indicia given by Dr Storey show that the possibility to survive *economically* is an aspect of living a relatively normal life as an economic operator, rather than as a recipient of charity.

33. An analysis of the judgment of Lord Phillips in *E* and of the speech of Lord Bingham in *Januzi* therefore yields the following propositions as to the approach to whether internal relocation is available in a particular case; bearing in mind always that the standard for rejecting the availability of internal flight is rigorous (per Brooke LJ in

Karanakaran v SSHD [2000] 3 All ER 449 at p 456, and Lord Carswell in *Januzi* [2006] 2 AC 426[67]):

- i) The starting-point must be conditions prevailing in the place of habitual residence
- ii) Those conditions must be compared with the conditions prevailing in the safe haven
- iii) The latter conditions must be assessed according to the impact that they will have on a person with the characteristics of the asylum-seeker
- iv) If under those conditions the asylum-seeker cannot live a relatively normal life according to the standards of his country it will be unduly harsh to expect him to go to the safe haven
- v) Traumatic changes of life-style, for instance from a city to a desert, or into slum conditions, should not be forced on the asylum-seeker.

The approach of the AIT

34. Quite apart from the basic issue of internal relocation, the AIT had to deal with a range of claims as to dangers of persecution in Sudan to failed asylum seekers; returnees generally; journalists and activists and other particular categories; and persons eligible for military service; as well as a claim by one of the appellants as a refugee *sur place*. As we have seen, the AIT rejected all of those claims, and for the reasons set out in §§ 4-21 above the whole of the appeal against those rejections fails. The AIT also heard a mass of evidence about conditions in Sudan, and in particular in Khartoum, some of that evidence, as we have already set out, being regarded as not at all satisfactory. The tribunal's task was therefore a daunting one. That said, however, the AIT was not assisted by its analysis of the previous jurisprudence.
35. The AIT set out extensive passages from the speeches in *Januzi*, but did not thoroughly address, in particular, the speech of Lord Bingham. Relevantly to the issues now before us, the AIT made two general observations about the law. First, at its §150 it quoted from §54 of Lord Hope, and concluded from that that in the safe haven "at most all that can be expected is that basic human rights standards, in particular non-derogable rights, are not breached". The AIT repeated that analysis, with somewhat greater emphasis on the article 3 standard as being the sole test, when addressing the evidence as to conditions in Khartoum in its §234. But, as explained in §29 above, it cannot be deduced from Lord Hope's formulation that the test under the Refugee Convention is limited to the criteria of the non-derogable rights in the Human Rights Convention, or something very like them.
36. Second, the AIT said at its §152 that

integral to the assessment which must be made is a comparison between the conditions in the country as a whole and those which prevail in the place of intended alternative relocation ([*Januzi*] paragraphs 19 and 54).

However, the comparison envisaged by *E* and by Lord Bingham in *Januzi* is between conditions *in the place of habitual residence* and those in the safe haven, as the latter

affect the asylum-seeker: see §31 above. The AIT's analysis entirely excludes from the equation the original condition of the asylum-seeker and the effect on him of the new conditions. The reformulation is important, because it led the AIT to place weight on comparisons (however sparse the evidence was to support them) between conditions in Khartoum and conditions elsewhere in Sudan (other than in Darfur), or even elsewhere in the world. In particular, at its §236 the AIT referred to, and thereafter relied on, a statement elicited in cross-examination from the appellants' experts that

in general terms, albeit the living conditions in Khartoum IDP camps compared unfavourably with those in Darfur currently, conditions in the squatter areas and IDP camps in Khartoum were no worse than the living conditions found in other slum-settlements elsewhere in Sudan or much of the rest of African or other third world countries.

Not only does this formulation specifically exclude from consideration the first point of reference, conditions in the place of habitual reference, but it also introduces a test for the safe haven, by reference to other parts of the country, or the world, in which the asylum-seeker did not live. That test, as a binding test, is to be found nowhere else in the jurisprudence. When reviewing the state of conditions in the safe haven it might be illuminating to compare them with conditions elsewhere; but it is hardly to be thought that when Lord Phillips, Lord Bingham and Lord Carswell took the example of the city dweller forced to go and live in a desert they would have held that the case changed once it was established that there are other deserts in his country, or in the world, apart from the one to which he was expelled.

37. Nor is the test to be found in the two paragraphs of *Januzi* on which the AIT relied. In § 19 of his speech Lord Bingham indeed spoke of conditions in the country of origin as a whole. But it is quite clear from the context that he was indeed speaking of conditions in the country *as a whole*, which thus encompassed conditions in the place of habitual residence. The asylum-seeker could not reject the safe haven because of a characteristic that, because it affected the whole country, was present in that place of habitual residence. That is far different from the argument put to us, on the basis of the AIT's analysis, that the disqualification of a safe haven because it shared "conditions in the country as a whole" could be achieved by showing that there were *some* other parts of the country (but not the place of habitual residence) that shared the characteristics of the safe haven. And in §54 Lord Hope was addressing the other side of the coin from that of Lord Bingham, where conditions in every part of the country were such that it would be unreasonable in Refugee Convention terms to relocate anyone anywhere in that country.
38. As a result, the characteristics of the asylum-seeker and the nature of his life in the place of habitual residence were only mentioned incidentally, and certainly not in the terms required by *E* and *Januzi*. Although setting out the detailed factual description of the three appellants that is to be found in the speech of Lord Hope in *Januzi*, the AIT's only reference to it in the course of its analysis was to say at its § 239:

[the experts'] view was that returnee non-Arab Darfuris were ill-equipped for city dwelling slum life, having come in the main from rural 'sedentary' backgrounds as farmers. However, once again that is a feature shared by

many other non-Darfuri IDPs in Khartoum and many other slum dwellers elsewhere in Sudan and other parts of the world.

But it is no more relevant to our enquiry that other people with the same personal characteristics have been displaced for reasons unconnected with Convention persecution than it is that the place where they are being sent is no worse than some other places in Sudan. The enquiry has to be about these asylum-seekers and the effect of the displacement on them.

39. The AIT summarised its conclusion on the present point in its § 309(6):

even if such a person shows that it is reasonably likely he or she will end up in such a camp or area, conditions there, though poor, are not significantly worse than the subsistence level existence in which people in Sudan generally live. Applying the principles set out in *Januzi*, the conditions in such camps or areas are not generally such as to amount to unduly harsh conditions.

A conclusion in those terms was not open to the AIT. First, it pays no attention to the characteristics of the asylum-seeker or to a comparison with conditions in his place of habitual residence and those in the safe haven. Second, for the reasons set out in §24 above it is an error of law to hold that internal relocation is available just because conditions in the safe haven are no worse than those in some other parts of Sudan. And when the AIT here refers to “Sudan generally” it cannot on the evidence or on its observations earlier in the judgment be speaking of the whole of Sudan, rather than of some other parts of Sudan.

Conclusions on the issue of internal relocation

40. The AIT not having properly applied the law, it falls to this court to perform that duty, if there are sufficient findings of fact on which the court can properly proceed. We will follow the analysis set out in §33 above.

41. First, the asylum-seekers in their place of habitual residence, Darfur. The AIT did not challenge, but merely wrongly thought to be irrelevant, the evidence that the asylum-seekers were farmers from a rural, sedentary background, ill-equipped for city slum life: see §38 above. Indeed, it did not seem to be seriously questioned that although the appellants were “subsistence” farmers, they were not in a condition of destitution such as was at least threatened in Khartoum. And in all three individual cases the evidence was that they were village-dwellers, able to survive in economic terms before the arrival of the Janjaweed.

42. The argument of the Secretary of State now is that the United Kingdom will discharge its international obligations to these undoubtedly persecuted people by arranging a return to Sudan to live in squatter areas or the IDP refugee camps in Khartoum (and on that being the effect of return see AIT §229). There was a good deal of evidence before the AIT, most of it not disputed, with regard to conditions in Khartoum for IDPs generally, and in relation to the situation in the camps. In its §126 the AIT recorded that “The living and health conditions of IDPs are said by some observers to be appalling. According to the UN assessment conducted in 2005, the housing and nutritional situation of IDPs in Khartoum is worse than in Darfur”. In this context,

“some observers” include the experts (acknowledged as such by the AIT in its §93) who reported to the UNHCR ACCORD seminar in Budapest in December 2005; and a report by Dr Walter Kalin, the representative of the Secretary-General of the United Nations for internally displaced persons, in April 2006. Neither of these documents received detailed treatment from the AIT. Miss Giovannetti said that we should respect the assurance of the AIT that it had taken account of all the material before it, and we proceed on that basis.

43. Both documents make frightening reading. To quote briefly, the experts who wrote the ACCORD report say, on p20:

The living and health conditions of IDPs are appalling...Since 2003, the demolition of IDP camps and squatters' settlements in Khartoum has progressed and about 250,000 IDPs have been made homeless by the government. Protests of the United Nations against this demolition policy did not help. IDPs have been sent to new sites far away from the city into the desert with no water or other services.

And taking up the latter theme, Dr Kalin wrote of one camp where there had been forcible displacement:

In the Al-Fatah camp where the victims of forced relocation were living at the time of my visit, I was struck with their most desperate situation and appalling conditions of extreme poverty. They had scarcely been able to erect makeshift huts from plastic sheets and cardboard as they had been left without any building material. While there was a water bladder no food or other life-sustaining goods had been provided.....The camp is situated some 50km outside of Khartoum in the desert, where without water agricultural activities are impossible.

That is just one camp, but there is no guarantee that someone sent to Khartoum will not end up there. The AIT at its §127 said that there had not been any forced relocations since 2005; but Professor Kalin's report was that there was still a serious risk of such relocations, and in its §244 the AIT recognised that relocations, sometimes involving force and human rights violations, did (it would seem, currently) occur.

44. The Secretary of State sought to lessen the impact of this material by relying on an “Interagency Rapid Assessment Report” produced by eight respected charities in November 2004. This report, said by its authors to raise more questions and concerns than it answers, can be read as painting a less desperate picture, but it still shows that the position is very grave indeed. We need only quote its § 2.1, Living Conditions and impact on health:

At the beginning of November 2004 it has been observed and discussed by the IDP communities that over 80% of the families are living in temporary shelters. These makeshift shelters consist of paper, card box, textile and plastic pieces and do not provide sufficient protection from rainy or cold weather. It is feared that the health status of the inhabitants and especially of children and the elderly will be negatively affected during the coming

cold season. The health condition of the IDPs is a concern due to reportedly increasing incidents of diarrhoea, pneumonia, malnutrition, etc.

45. However, it is not only unedifying but also irrelevant to attempt to nuance accounts of life in the camps, or to argue (on what was, at best, fragmentary evidence) that conditions are the same or similar elsewhere in Sudan. If the law as set out in *E* and *Januzi* is properly applied, two things become clear. First, if an asylum-seeker who was a subsistence farmer in Darfur ends up in a camp in Khartoum he will not be living a relatively normal life, either compared with the life from which he has been expelled, or compared with the general standards of his country. That is not just because of the oppressive conditions themselves, but also because he lacks all or most of the resources necessary for economic survival in the way that he survived previously: see §32 above. Second, the change from his old to his new life may not quite be on the level of a city-dweller sent to the desert, but it comes near to it for a rural village-dweller to be shifted to an urban slum or to a camp where (it is part of the Secretary of State's positive case: see §42 above) conditions are comparable to those in slum-settlements elsewhere in Sudan.
46. There is a further and important aspect of these cases. In almost all other cases in which internal relocation has been considered, the relocation proposed has been between parts of a country that shared broadly similar patterns of living and society, and where the basic structure of the refugee's life would be the same in the safe haven as it was in his area of habitual residence: for instance, relocation between different areas in Sri Lanka in *E* and in *R v SSHD ex p Robinson* [1998] QB 929, or between different areas in Kosovo in the lead appeal in *Januzi*. The present case is different. The relocation proposed is from stable rural village life to a refugee or squatter camp, a structure of life completely different from that from which the refugee has come. Had that factor been taken into account, as it would have been if the correct comparison had been made, the total alteration in the kind and structure of the refugee's life would have been a further powerful factor indicating that the change would be unduly harsh.
47. We remind ourselves of the approach to the issue of internal relocation that was formulated by this court in §64 of its judgment in *E* and not in any way repudiated by the House of Lords in *Januzi*. That formulation is set out for ease of reference in § 24 above. If that, the correct, test had been applied to the facts found in the present case there could have been only one answer to the question of whether it would be unduly harsh to expect a subsistence farmer from Darfur to relocate to a camp or squatter settlement in Khartoum.

The individual appellants

48. The above findings assume a return to live in either refugee camps or squatter settlements in Khartoum.
49. At its § 325 the AIT said of AH:

the Tribunal does not consider that an adult male in the position of appellant H, even if he were to find himself in a squatter area or a camp for internally displaced persons in Khartoum, would

thereby either suffer Article 3 ill-treatment or lack the real possibility of surviving economically

For reasons already set out at length, absence of article 3 ill-treatment is not conclusive as to the reasonableness of internal relocation. Nor is “the real possibility of surviving economically”. But even if that were the only issue to be considered, the evidence relied on by the AIT, the Rapid Assessment Report (as to which see § 44 above) is decidedly unencouraging. The section extracted by the AIT in its §124 shows low levels of employment, sometimes very low levels, in the various refugee camps surveyed. Much better evidence was in our view required before a sensible chance of surviving economically could be assumed.

50. As to NM, the AIT said at its “§347”

M is a relatively young man with no known health problems who has experience of working in what appears to be an entrepreneurial capacity. He is not at real risk of Article 3 ill-treatment or of falling below subsistence level, were he to live in a camp or squatter area

The point about article 3 has already been made. Not falling below subsistence level is certainly a requirement if relocation to a camp or squatter area is to count as reasonable relocation, but more needed to be shown before it can be said with the required degree of confidence that NM would avoid the other characteristics of the camps or squatter areas that disqualified them as safe havens.

51. In respect of IG, the AIT said at its §336 that he could live without undue hardship in Khartoum even if compelled to live in a squatter area or IDP camp. IG’s counsel had made submissions comparing standards in Darfur with what awaited IG in a camp in Khartoum, but as to that the AIT said:

In fact, we have very little evidence from the appellant G (or appellant H) as to what standard of living was enjoyed in Darfur but, in any event, as the opinions in *Januzi* make plain, the comparison to be drawn is not between the lifestyle enjoyed by the individual concerned before leaving his home, as compared with what awaits him in the place of relocation but, rather, between conditions in that place and conditions in the country generally

In so saying, the AIT repeated the error to which we have drawn attention in §§ 35-39 above. That reinforces the conclusion that it is necessary to draw that in all three individual cases the AIT applied an analysis that in law was not open to it.

Disposal

52. We set aside the AIT’s conclusions on the internal relocation issue and substitute for them our own judgment that in all three cases it would be unduly harsh to require internal relocation to Khartoum. In all three cases we therefore allow the appeals and quash the decisions of the Secretary of State to refuse the applicants’ asylum appeals.

Postscript on “Country Guidance” cases

53. We think that we need to say something on this subject, even though it was not directly in issue before us.
54. As we understand it, the judgment of the AIT was intended to be a Country Guidance case, although the version of the judgment that was before us was not so noted. We raise the point first to explain the limits of our present decision; and second to make some observations about the nature of the evidence in such a case.
55. Country Guidance cases are important, even in a system in which appeals are on issues of law only, because failure to take account of a Country Guidance case, even though it is a decision on fact only, will entail an error of law in that a material consideration will have been ignored: see the judgment of this court in *R(Iran) v SSHD* [2005] EWCA Civ 982[27]. However, the case from which the guidance emerges remains a case between the particular appellant and the Secretary of State, and on the evidence of our present case is contested as being simply an inter partes dispute. That seems to be why the Secretary of State called no live evidence and offered no expert of his own, contenting himself with cross-examining on the basis of documents the experts called by the applicants. That is of course a perfectly proper course in a system where the burden at least of adducing evidence rests on the applicant, but it does mean that the content of the primary evidence going towards the wider situation in the country in question depends on what experts are known to, and ready to give evidence on behalf of, the applicants. But it is the Secretary of State who is likely to have the most comprehensive knowledge of conditions in foreign countries, not least through diplomatic and consular channels, and if decisions with the enhanced status of Country Guidance cases are to be made about those countries it might seem appropriate for the Secretary of State directly to contribute that knowledge.
56. Concern has been expressed by this court in the past about the special demands of a Country Guidance case. In particular, this court said in *S and others v SSHD* [2002] INLR 416[29] that

when [the IAT] determines to produce an authoritative ruling upon the state of affairs in any given territory, it must in our view take special care to see that its decision is effectively comprehensive.

We are of course aware that in *R(Iran)*, *supra*, this court pointed out that *S and others* was decided at a time when the jurisdiction of the IAT was not limited to appeals on points of law. However, that Country Guidance cases now can contribute to decisions on issues of law as well as merely of fact would seem to be more, rather than less, reason for care in their compilation.

57. None of this was debated before us, the appeals concentrating on the position of the three appellants, and we have therefore come to no conclusion as to whether those parts of the decision of the AIT that we have upheld do suffice as Country Guidance. It will be for others to decide that question should it become an issue in another case.

