meeting Germany's request for a general assurance of non-repetition.

The Court held, nevertheless, that an apology would not suffice in cases where the individuals concerned had been subjected to prolonged detention or sentenced to severe penalties; in such cases it would be incumbent upon the US to allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Vienna Convention.

XIAODONG YANG

REFUGEES AND INTERNAL ARMED CONFLICTS

MOST people forced to flee across national borders do so to escape the consequences of internal armed conflicts. But the extension of protection to such people by the countries from which they seek asylum has proved to be uncertain. Most of these countries have undertaken protection obligations towards persons claiming refugee status in accordance with the 1951 Convention for the Protection of Refugees ("the Convention"). For the purposes of the Convention, a "refugee" is defined as any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" (Article 1A(2)). Although that definition is contained in an international instrument, national immigration laws incorporate or refer to it and its construction and application generally fall to national administrators and judges. It is, therefore, not altogether surprising that decision-makers in different countries reach different conclusions as to its scope and meaning. Such is the case with *Minister for Immigration and Multicultural Affairs* v. *Haji Ibrahim* (2000) 175 A.L.R. 585, in which the High Court of Australia rejected the approach of the House of Lords in *Adan* v. *Secretary of State for the Home Department* [1999] 1 A.C. 293. At issue in both cases were claims for refugee status made by persons having fled Somalia, a country riddled by internecine clan conflict and lacking any recognisable governmental authority. Although the ultimate decision in each case turned on the appreciation of the specific findings of fact made by the initial adjudicators, a significant difference of approach in the application of the Convention definition may be identified.

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In *Adan*, the House of Lords held that in a civil war consisting of clan conflict it is not enough for a claimant to show that he or she is at risk because of his or her membership of one of the warring clans, even though these were accepted as constituting "particular social groups" for the purposes of the Convention. Such a claimant must be able to show "a differential impact" or "fear of persecution for Convention reasons over and above the ordinary risks of clan warfare": [1999] 1 A.C. 293, 311 *per* Lord Lloyd of Berwick. A claimant might achieve this by establishing that he or she is at greater risk of adverse treatment than others or is being targeted for one of the other reasons enumerated in the Convention definition. But it is not sufficient that the civil war is being fought on racial or religious grounds.

The House of Lords was prompted to apply this gloss to the definition because of the concern that in a civil war where members of one group were attacking members of another group, the members of both sides would be eligible for protection and the only persons not entitled to protection would be those who were not active participants in the fighting. This concern would abate, however, when one side emerged as victorious, at which time the additional criteria would no longer be necessary.

The High Court in *Haji Ibrahim* rejected this approach. Gummow J., who delivered the leading judgment of the majority, recognised that the Convention was not intended to encompass those fleeing generalised violence or internal turmoil, but held that this exclusion is not to be effected by reliance on notions such as civil war, differential impact or risk of harm over and above that of others. These are, he observed, "distractions from applying the text of the Convention definition". The task of the decision-maker, his Honour continued, is to determine whether the particular experiences of the claimant (or of his or her particular social group) fall within the terms of the Convention definition, and there is nothing to be gained by asking whether the claimant is to be differentiated from other members of the general population who are all at risk from the conflict. McHugh J., although in the minority as to the result of the appeal, similarly rejected the use of such additional concepts. He noted that, as a practical matter, it might be difficult to determine in a context such as Somalia whether the feared persecution is for one or more of the Convention reasons or, alternatively, for military or economic reasons, but that this is different from a rule that a claimant must prove that he or she is exposed to a greater risk of harm than others.

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The Convention definition is problematic in many respects and there are increasing calls for its revision. However, its terms are at least tolerably clear on the point at issue in these two cases. The Convention was not intended as a panacea for all those forced to leave their country of nationality for whatever reason. As the definition clearly provides, protection is limited to those people who can establish a well-founded fear of persecution for reasons of their race, religion, nationality, membership of a particular social group or political opinions. Consequently, flight motivated by fear of economic hardship, of the effects of natural disasters, or even of the ordinary incidents of civil conflict such as increased exposure to injury, death or deprivation, is not enough, by itself, to attract Convention protection.

The converse, however, is that if the harm is feared on account of one of the enumerated grounds, then, provided the other requirements of the definition are met, no further limitations should be placed on the entitlement to recognition as a refugee. The terms of the definition, and the Convention itself, do not justify imposing additional requirements, notwithstanding concerns that too many people involved in a particular civil war situation may be entitled to refugee status. If a refugee claimant from Somalia can establish that the harm he or she fears is causally related to his or her membership of a particular clan, rather than a fear of harm held by all Somalis irrespective of their clan membership due to the military or strategic imperatives of other clans, then it should not matter whether the claimant can show a differential impact or risk of harm over and above the ordinary risks inherent in the conflict.

A further issue considered by the High Court but on which, given the way in which the claimant's case was presented, it was not required to come to a decision, was the relevance of "state responsibility" for the persecution feared by a claimant. It is generally accepted that persecution carried out by state authorities or in which such authorities are complicit will come within the definition. It is not clear, however, whether the definition extends to persecution that is merely tolerated by the state or persecution occurring within a country where there is no effective state authority, such as Somalia. In *Haji Ibrahim*, Gummow J. indicated his opinion that the Convention offered protection only where there is a government from which a claimant is unable to obtain protection. McHugh J. took the opposing view. He held that where a state has disintegrated to the extent that there is no government to prevent the persecution of a person by private individuals or groups, the terms of the Convention definition will be satisfied. By way of comparison, in *R.* v. *Secretary of State for the Home*

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Department, ex p. Adan [1999] 3 W.L.R. 1274, the Court of Appeal had held that the protection of the Convention does extend to situations where a recognisable government has ceased to exist.

BEN OLBOURNE

ARTICLE 6(1) OF THE EUROPEAN CONVENTION AND THE CURATIVE POWERS OF JUDICIAL REVIEW

THE European Convention on Human Rights and Fundamental Freedoms makes no mention of any right to procedural justice in the making of administrative decisions. Any protection for such rights must be found in Article 6(1) which provides that in the determination of their "civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". But Article 6(1) was originally intended to apply to the determination of private law rights only and not to public law matters (see *Le Compte, Van Leuven and De Meyere* v. *Belgium* (1981) 4 E.H.R.R. 1, 36 (Sir Vincent Evans, dissenting); *Konig* v. *Germany* (1978) 2 E.H.R.R. 170 (Matscher J., dissenting)). The article plainly envisages judicial proceedings, and there are obvious difficulties in applying it straightforwardly to administrative proceedings.

Given the modern far-reaching duty of procedural fairness applicable to administrative decision-makers, it would not matter much if there were no protection of administrative justice under the Human Rights Act 1998. And the easy way to decide *R. (Alconbury Developments Ltd.)* v. *Secretary of State for the Environment, Transport and the Regions* [2001] 2 W.L.R. 1389 (where it was argued that the Secretary of State would be in breach of Article 6(1) if he, rather than an independent inspector, decided a planning appeal) would have been to hold that Article 6(1) was not applicable. However, the House of Lords followed the European jurisprudence (*Ringeisen* v. *Austria (No. 1)* (1971) 1 E.H.R.R. 455; *Fredin* v. *Sweden* (1991) 13 E.H.R.R. 784 and other cases) and accepted that Article 6(1) applied in planning matters.

Stripped of unnecessary detail, what had happened was that Alconbury Developments Ltd. had agreed with the Ministry of Defence that, if planning permission were granted, it would develop a disused airfield owned by the Ministry into a national distribution centre. The company made an application for planning permission to the Huntingdonshire District Council but this was refused; and an appeal was launched.

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