THE
CAMBRIDGE LAW JOURNAL

VOLUME 60, PART 3 NOVEMBER 2001

CASE AND COMMENT

APPEALS

APPEALS in cases noted in earlier numbers of the *Journal* have now been disposed of as shown:

B.C.C.I. v. *Ali*, noted [1999] C.L.J. 473. Appeal allowed: [2000] I.C.R. 1410 (C.A.); appeal dismissed: [2001] 2 W.L.R. 735 (H.L.).

Raiffeisen Zentralbank Osterreich AG v. *Five Star General Trading LLC*, noted [2001] C.L.J. 14. Appeal dismissed: [2001] 2 W.L.R. 1344 (C.A.).

THOU SHALT NOT VIOLATE PROVISIONAL MEASURES

IN its judgment in the *LaGrand* case (*Germany* v. *United States of America*), delivered on 27 June 2001, the International Court of Justice found, for the first time in its history, that its orders indicating provisional measures were legally binding. This has long been the subject of extensive controversy, but the Court has traditionally refrained from stating its views on this point, even though such orders are frequently disregarded (*e.g.*, in *Anglo-Iranian Oil Co.* (1951), *Fisheries Jurisdiction* (1972), *Diplomatic Staff in Tehran* (1979) and *Genocide Convention* (1993)). In *LaGrand* the Court adopted a positive stand on provisional measures and displayed full readiness to draw serious consequences from non-compliance therewith. One can expect that the important ruling in this case will have a far-reaching impact on future attitudes toward the Court's provisional measures.

The brothers Karl and Walter LaGrand were German nationals but permanently resident in the US since childhood. They were arrested in 1982 in Arizona on suspicion of armed robbery and murder and were later convicted and sentenced to death. Since they

https://doi.org/10.1017/S0008197301211192 Published online by Cambridge University Press

were German nationals, the Vienna Convention on Consular Relations 1963, to which both Germany and the US were parties, required the US authorities to inform them without delay of their rights to communicate with the German consulate; but they were not so informed. When the consulate eventually became aware of the case in 1992, the LaGrands were precluded by a "procedural default rule" in US law from challenging their conviction and sentence in federal courts by raising the issue of the lack of consular notification, because of their failure to have done so earlier in the state proceedings. Karl LaGrand was executed on 24 February 1999. On 2 March 1999, the day before the scheduled date of execution of Walter LaGrand, Germany brought the case to the Court. On 3 March 1999, upon Germany's request, the Court issued an Order indicating provisional measures, stating that the US should take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the Court, but he was executed later that day.

At the jurisdictional stage, the Court rejected a US contention that Germany's claim based on the individual rights of the LaGrands was beyond the Court's jurisdiction under the Vienna Convention because diplomatic protection was a concept of customary international law. According to the Court, a State party to a treaty, which created individual rights, could take up the case of one of its nationals and institute international judicial proceedings on his behalf, on the basis of a general jurisdictional clause in such a treaty.

In objecting to the admissibility of Germany's submissions, the US argued that Germany was improperly asking the Court to play the role of ultimate court of appeal in national criminal proceedings, a role the Court was not empowered to perform. The Court observed that Germany only requested the Court to apply the relevant rules of international law to the issues in dispute between the parties, which function did not convert the Court into a court of appeal. The US also contended that the LaGrands had failed to exhaust local remedies by not raising the issue of consular notification in a timely fashion. The Court responded that the US could not rely on this fact, which was precisely the result of its own failure to fulfil its obligation under the Vienna Convention.

The Court then considered the merits of Germany's four submissions.

1. Article 36(1) of the Vienna Convention

Germany's first submission was that the US, by not informing the LaGrands of their rights under Article 36(1)(*b*) of the Vienna

https://doi.org/10.1017/S0008197301211192 Published online by Cambridge University Press

Convention without delay, and by depriving Germany of the possibility of rendering consular assistance, had violated Article 36(1) of the Vienna Convention; that is, in violating Article 36(1)(*b*) (consular notification) the US had also violated Article 36(1)(*a*) (consular communication and access) and (*c*) (consular visit and assistance). The US admitted a violation of Article 36(1)(*b*) but denied that any other provision had been violated.

The Court observed that the breach of Article 36(1)(*b*) had indeed also violated Article 36(1)(*a*) and (*c*). Article 36(1), the Court held, "establishes an interrelated régime designed to facilitate the implementation of the system of consular protection". When the sending State was unaware of the detention of its nationals owing to the failure of the receiving State to provide the requisite consular notification, the sending State was prevented for all practical purposes from exercising its right under Article 36(1).

The Court noted, in particular, that Article 36(1)(*b*) ended with the following words: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph" (emphasis added). Moreover, under Article 36(1)(*c*), the sending State's right to provide consular assistance to the detained person may not be exercised "if he expressly opposes such action". Thus the Court concluded that Article 36(1), in addition to the rights accorded to the sending State, "creates individual rights, which ... may be invoked in this Court by the national State of the detained person".

Besides bearing significantly on diplomatic protection, this holding was important in *LaGrand*. If, as the US contended, the rights of consular notification and access under the Vienna Convention were rights of States but not of individuals, then the gravity of the US violation of its various legal obligations would be considerably discounted, and the scope of the remedies greatly reduced.

2. Article 36(2) of the Vienna Convention

Germany's next submission was that the US, by applying rules of its domestic law, in particular the procedural default rule, had violated Article 36(2) of the Vienna Convention, which required that the laws and regulations of the receiving State "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".

The Court emphasised that a distinction must be drawn between the procedural default rule as such and its specific application in the present case. In itself, the rule did not violate Article 36. The problem arose when the rule did not allow the detained individual

https://doi.org/10.1017/S0008197301211192 Published online by Cambridge University Press

to challenge a conviction and sentence by invoking his right to consular information under Article 36(1), thus preventing the person from seeking and obtaining, and the sending State from rendering, consular assistance. Under these circumstances, the rule violated Article 36(2).

3. The Order on Provisional Measures

The Court dealt at length with Germany's third submission that the US had violated its international legal obligation to comply with the Order of 3 March 1999 indicating provisional measures. The US replied that it had already complied with the Order by immediately transmitting the Order to the Governor of Arizona, and further stated that two factors had constrained its ability to act: the extraordinarily short time available and the character of the US as a federal republic of divided powers. Moreover, the US alleged that the Order did not create legally binding obligations.

The Court first compared the equally authentic English and French texts of Article 41(1) of the Court's Statute, under which the Court had "the power to indicate ... any provisional measures which ought to be taken to preserve the respective rights of either party" (*le pouvoir d'indiquer ... quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire*). Finding the two texts not in total harmony, the Court resorted to the object and purpose of the Statute together with the context of Article 41. According to the Court, the object and purpose of the Statute was to enable the Court to fulfil the basic function of judicial settlement of international disputes by binding decisions, while the context of Article 41 was to prevent the Court from being hampered in the exercise of its functions. "It follows", the Court said, "that the power to indicate provisional measures entails that such measures should be binding".

The Court then considered Article 94 of the United Nations Charter, which provides that

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.
2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

https://doi.org/10.1017/S0008197301211192 Published online by Cambridge University Press

The word "decision" in paragraph 1 could be understood either as referring to any decision rendered by the Court, thus including orders indicating provisional measures, or as meaning only judgments rendered by the Court as provided in paragraph 2. In the former case the binding nature of provisional measures could be confirmed, but in the latter the effect of provisional measures would be in serious doubt, since States might not have an obligation to comply with them. Here the Court cleverly circumnavigated the difficulty by holding that the second interpretation would not "preclude" provisional measures from "being accorded binding force under Article 41". Therefore, "Article 94 ... does not prevent orders made under Article 41 from having a binding character". Thus the Court reached the conclusion that "orders on provisional measures under Article 41 have binding effect". Accordingly, the Order of 3 March 1999 "was not a mere exhortation ... [but] was ... binding in character and created a legal obligation for the United States".

The Court then observed that the mere transmission of the Order to the Governor of Arizona without any comment was "certainly less than could have been done even in the short time available". The Court took further notice of the US Solicitor General's statement that an order indicating provisional measures was not binding, the Governor of Arizona's refusal to implement the Order, and the US Supreme Court's rejection of an application for a stay of execution, despite the possibility of a preliminary stay. In the Court's view, all these indicated that the various competent US authorities had failed to take all the steps at their disposal to give effect to the Court's Order. Thus the Court concluded that the US had not complied with the Order of 3 March 1999.

4. Assurance of non-repetition

Germany's final submission was that the US should provide Germany with an assurance that it would not repeat its unlawful acts.

The Court noted that the US had acknowledged its failure to comply with its obligations to give consular notification and had presented an apology to Germany. The Court considered however that an apology was not sufficient in this case. But the Court also noted that the US had repeatedly stated in all phases of these proceedings that it was carrying out a vast and detailed programme in order to ensure compliance with Article 36. The Court considered that this commitment to ensure implementation of the specific measures concerning Article 36 must be regarded as

https://doi.org/10.1017/S0008197301211192 Published online by Cambridge University Press

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.

https://doi.org/10.1017/S0008197301211192 Published online by Cambridge University Press