REFUGEE DETERMINATION

influence of international law

In deciding whether to confer or deny refugee status, international law and legal information are primary considerations. This means that those who make this determination are directly affected by international influences in a way that is fundamentally different from other judicial and administrative decision makers writes **Michael Bliss**.

Michael Bliss is a Legal Research Officer with the Refugee Review Tribunal. The views reflected in this article are those of the author and do not bind the Refugee Review Tribunal

Case 1: A Serbian man claims refugee status on the basis that he will be persecuted as a deserter from the Yugoslavian army. He states that he is a conscientious objector, and is particularly opposed to killing fellow Yugoslavs.

Case 2: An applicant for refugee status left her then country of nationality, the USSR, in 1991. She lived in a town that is now part of Ukraine. She claims that, since the dissolution of the USSR, she is no longer a national of any country.

Case 3: A woman from Sri Lanka states that she has refused to marry the man chosen to be her spouse. She fears that as a result she will be seriously assaulted and abused by her family if she were to return to Sri Lanka.

Case 4: A Lebanese man claims that he faces persecution by the Syrian forces in Lebanon for his role as a soldier in the civil war. However he admits that, as an officer in a commando unit in the civil war, he took part in a military operation where, under orders, he killed a large number of civilians in a particular town.

All these cases have been considered by Members of the Refugee Review Tribunal (the Tribunal), who were required to decide whether the applicant came within the definition of refugee set out in the *Convention relating to the Status of Refugees 1951* (the Refugees Convention), as amended by the *1967 Protocol relating to the Status of Refugees*. In each case, consideration and application of the relevant international law was essential to the decision. The determinations are set out later in the article.

Australia ratified the Refugees Convention in 1973. Since that time Australia has provided protection to persons who come within the definition of refugee set out in Article 1A(2) which provides that a refugee is a person:

> *who, owing to 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; or who, not having a nationality and being outside their country of former habitual residence is unable or, owing to such fear, is unwilling to return to it.*

As a signatory, Australia is acting as a member of the international community, extending international protection to persons who cannot rely on effective domestic protection from their state or country of former habitual residence. However, the fact that Australia is a signatory to an international convention does not incorporate the provisions of that convention into Australian law (*Bradley v Commonwealth* (1973) 128 CLR 557). There must be some express enactment in domestic law.

Since 1 September 1994, domestic law has required that a person seeking refugee status in Australia make an application for a protection visa. A criterion of this visa is that the person is 'a person to whom Australia has protection obligations under the Refugees Convention' (s 36 of the *Migration* Act 1958). This

phrase effectively means that an applicant must satisfy the definition of refugee set out in Article 1 of the Convention.

The primary decision on an application for a protection visa is made by an officer of the Department of Immigration and Multicultural Affairs acting as a delegate of the Minister. Members of the Tribunal provide merits review of decisions to refuse protection visas. Both are required to make a decision on this substantive criterion set out in the Refugees Convention.

Refugee decision makers are required, under the domestic legislation which sets out the basis for the administrative decision, to interpret and apply an international convention. The domestic statutory regime takes the administrative decision maker directly into the sphere of international law. This means that the manner in which the Tribunal applies and uses international law is fundamentally different from practically all other administrative and judicial bodies in Australia.

While there has been an increasing awareness of and reference to international law in judicial decisions in Australia in recent years, the emphasis has been on the role that international law can play in the interpretation of domestic law.

It has been recognised by Australian courts that reference to international law is appropriate in order to assist in the interpretation of a statute where ambiguity exists.(*Dietrich v The Queen* (1992) 67 ALJR 1, per Toohey at p 37). In *Mabo v Queensland (No 2)* 107 ALR 1 Brennan J (as he then was) acknowledged that 'international law is a legitimate and important influence on the development of the common law, especially where international law declares the existence of international human rights'. (at p 29). Recently the High Court has held that the fact that Australia has signed an international convention may ground a legitimate expectation by a person that an administrative decision maker will act in accordance with the provisions of that convention when exercising a discretion (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 69 ALJR 423).

In each of these cases reference has been made to Australia's obligations under international human rights conventions, particularly the International Covenant on Civil and Political Rights (ICCPR). However all of this jurisprudence focuses on the use of international law in the interpretation and application of domestic law. International law is playing an ancillary role, being brought in for support in the domestic sphere where domestic law is not conclusive.

In the area of refugee determination, however, international law provides the primary tools for decision makers. Of course there has been judicial interpretation of the Refugees Convention definition by Australian courts, and this precedent is binding on the Tribunal in the same way that any judicial precedent is binding on an administrative decision maker. However in many cases there is no judicial interpretation of relevant international law, and the Tribunal is required to venture into the international sphere itself.

Determination of refugee status is amongst the most difficult of administrative decisions, a fact that has long been acknowledged by commentators and the courts. The refugee definition requires that the applicant's fear of persecution be well founded; in Australia that phrase has been interpreted to mean that there must be a 'real chance' that the persecution will occur: *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 413 (Chan). Rather than make findings on past facts on the balance of probabilities, the Tribunal must attempt to predict the future and assess whether there is a 'real chance' that the applicant would face 'persecution' for a Refugees Convention reason in the foreseeable future.

A final point of contrast with other administrative decisions is that, in refugee determination, a wrong decision can literally be life threatening.

High Court's use of international law in the case of *Chan*

The leading Australian decision on the Refugees Convention is that of the High Court in *Chan*. It is useful to look at the manner in which the Court approached the interpretation of the Refugees Convention, as it illustrates the manner in which domestic decision makers, whether judicial or administrative, should approach the interpretation of international law.

Clearly the first step in interpreting a provision of an international convention is to refer to the remainder of the text of the convention itself. In attempting to ascertain the meaning of the term 'persecution' in Article 1, the Court in *Chan* referred to Article 33 of the Refugees Convention, which suggests that

persecution is, at least, a threat to life or freedom (per Dawson J, p 399). Reference to the context of the making of the Refugees Convention was made, including the 'travaux preparatoires', the document detailing the deliberations of the Committee that negotiated and drafted the Refugees Convention (per McHugh J, p 428).

The *Vienna Convention on the Law of Treaties 1969* codified the previous rules of customary international law on treaty interpretation and is effectively an Acts Interpretation Act for the international community. It permits the use of each of these methods in the interpretation of an international convention (See Article 31).

The United Nations High Commission for Refugees (UNHCR) is the international organisation charged with responsibility for the operation and implementation of the provisions of the Refugees Convention. The High Court in *Chan* also referred to material provided by the UNHCR to assist State parties to implement the Refugees Convention. Mason CJ cautioned against reliance on the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* as a document purporting to interpret the relevant parts of the Refugees Convention (per Mason CJ, p 392).

Foreign jurisprudence was also relied upon. McHugh J made reference to Canadian, US and UK case law in reaching his decision as to the meaning of the term 'well founded fear' (p 426). Gaudron J accepted that an international convention should not be interpreted by technical rules of domestic law or precedent, but on 'broad principles of general acceptation' (p 413).

Finally, it is clear from the High Court's decision that, in the interpretation of international law, academic commentators enjoy a status in the interpretation of international law that they are not accorded in interpretation of domestic law (See McHugh J at p 427).

Use of international law by the Refugee Review Tribunal

The Tribunal has followed a similar approach to that of the High Court in *Chan* in applying international law to determine refugee claims such as those listed at the beginning of this article.

The Court in Chan stated that the term 'persecution' in the refugee definition meant an infringement of fundamental human rights (per Mason CJ at p 388, per McHugh J at p 430). Accordingly the Tribunal, in giving meaning to the term in a particular case, frequently refers to the main human rights instruments such as the *Universal Declaration of Human Rights 1948*, the *International Convention on Civil and Political Rights 1966* and the *International Convention on Economic, Social and Cultural Rights 1966*. Other instruments used include the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984*, the *Convention on the Elimination of All Forms of Discrimination against Women 1979*, and the *Convention on the Rights of the Child 1989*.

These instruments set out the human rights accepted by the international community as 'universal' (although there is some dissension on how truly 'universal' they are). Therefore they are the appropriate standards by which to assess the claims of an individual applicant, whether he or she is from Afghanistan or Zimbabwe.

The Tribunal has also made reference to the decisions of international bodies charged with determining complaints made under the human rights conventions. For instance, in considering claims based on the applicant's homosexuality, the Tribunal has been assisted by the decision of the United Nations Human Rights Committee in the case of *Toonen v Australia*. In this case, brought by Mr Toonen under the First Optional Protocol of the ICCPR, the Commission found that the Tasmanian law, which outlawed homosexual activity between consenting adults in private, violated his right to privacy under the ICCPR. Therefore decisions of international decision making bodies such as the Human Rights Committee provide guidance to the application of relevant international instruments.

The Tribunal has given weight to the views of foreign judicial authorities in some cases. The use of foreign judicial authority in the interpretation of international law was approved in *Somaghi v MILGEA* (1991) 102 ALR 339. Canadian law in particular has provided assistance, as courts in that country appear to have dealt with some issues before Australian courts.

However the Tribunal, in referring to foreign case law, has had to be conscious of the fact that in some countries, the refugee definition has been incorporated completely into domestic legislation, and altered in the process of doing so. This is the case in Canada and the United States. Also, where there is Australian precedent on point, foreign

Application of international law in particular cases

The cases put forward at the beginning of the article were decided in the following ways by the Refugee Review Tribunal.

Case 1

The Tribunal has considered a number of cases where a claim has based on either total conscientious objection to military service, or objection to taking part in a particular conflict. In deciding that conscientious objection may be a basis for refugee status, the Tribunal has considered resolutions of the UN Human Rights Commission on the issue, as well as other international instruments, commentators and case law. In matters where an Applicant's objection is to serving in a particular conflict, a crucial factor will be whether that conflict has been condemned by the international community, and whether the Applicant would be required to commit human rights violations in the course of military service. Resolutions of the Security Council and the General Assembly of the United Nations provide a relevant reference point. In Case 1, the fact that the conflict had been condemned by the international community was a factor in the decision that the applicant was a refugee.

Case 2

Ascertaining an applicant's nationality is the first step in determining refugee status. While in most cases this is straight forward, in some cases this requires detailed consideration of international law. Nationality must be conferred by a State — as geo-political realities change, decisions on whether a territory is in fact a state in international law become difficult. For instance, at what point did the Federal Republic of Yugoslavia (or rump Yugoslavia) become a state? How are applicants from Hong Kong or Taiwan to be assessed? The *Hague Convention on Certain Questions Relating to Conflict of Nationality Laws* is the starting point in this area. Certain decisions of the International Court of Justice are of some assistance; resolutions of the Security Council and the General Assembly of the United Nations are also instructive. Consideration of the rules of customary international law has also been necessary. Once statehood has been established, nationality becomes a matter of looking to the domestic law of the state concerned, and then considering whether the nationality conferred under the domestic law is contrary to the principles of international law in any way. In this scenario, the applicant was found to be stateless, as she had not taken the necessary steps under Ukrainian law to become a citizen of that country.

Case 3

In this matter the Tribunal referred to the *Universal Declaration of Human Rights*, the ICCPR and the *Convention on the Elimination of all Forms of Discrimination Against Women*, and found that the right to freely choose who to marry was a fundamental human right. The applicant was found to be a refugee.

Case 4

Article 1 of the Refugees Convention has a number of clauses within it which exclude a person from the protection of the international community, despite the fact that they may come within the definition of refugee under Article 1A(2). One such clause is Article 1F which provides that, where there are serious reasons for believing that a person has committed war crimes or crimes against humanity, that person is excluded from the Refugees Convention regime of protection. To establish what constitutes a war crime or a crime against humanity, the Tribunal has had to refer to the complex international law on the issue. The statute of the International War Crimes Tribunal (the Nuremberg Tribunal) is a starting point; the *Draft Code of Offences against Peace and Security of Mankind* indicates current international thinking on the issue. In this case the applicant was found to be excluded from the Refugees Convention as there were serious reasons for believing that he had committed crimes against humanity.

jurisprudence is of lesser importance. One example is the interpretation of the phrase 'particular social group', where there has been a significant divergence between Australian and Canadian law in recent years.

In recognition of the importance of foreign refugee decision making, a Pacific Rim Countries Network of asylum adjudicating bodies has recently been established. This initiative will facilitate exchange of information and discussion of different approaches to interpreting the Refugees Convention.

Country conditions

As stated above, refugee determination requires an assessment of the risk of persecution that the applicant faces in the country of reference in the foreseeable future. This obviously requires a comprehensive knowledge and understanding of the situation in the country being considered.

At the time of writing the Talibaan are attempting to hold Kabul; the situation in Bosnia Herzegovina after the elections held under the Dayton Accords is being monitored by a nervous West; Mr Wang Xizhe, a high profile dissident in China, has just been imprisoned by Chinese authorities; the State Law and Order Restoration Council in Burma have prohibited Aung San Suu Kyi's weekly public addresses; a number of churches have been burnt down by Muslim rioters in Indonesia; and the Liberation Tigers of Tamil Elaam are losing territory in the north of Sri Lanka.

The Tribunal's Country Research Team provides research support to members, researching on conditions in a vast number of countries; applicants from over 100 countries have been considered by the Tribunal. Often the information required to make a decision is very specific — information may be required about the activities of a small political group in Peru, exit procedures in a particular city in Iraq, the situation for Jehovah's Witnesses in a particular region of China, or the aftermath of a particular demonstration in Indonesia.

The Tribunal receives newspapers, press clippings and reports from around the world. Information from international non government organisations such as Amnesty International and Human Rights Watch is also of great assistance. Researchers often contact experts, both in academia and non-government organisations, in Australia and the country concerned, for information. Occasionally experts attend the Tribunal to talk to researchers and members about developments in particular countries. The Tribunal also uses the Country Information Service database maintained by the Department of Immigration and Multicultural affairs, and cables and reports from the Department of Foreign Affairs and Trade. The Internet increasingly is becoming another valuable source of information and contacts.

With this country information the Tribunal is then in a position to make an assessment of the nature of the risk for the particular applicant in the foreseeable future in the particular country.

Conclusion

One consistent criticism of international law is that it is actually applied all too infrequently. Drafters draft, signatories sign, commentators commentate, but rarely do decision makers actually apply the international law and make decisions under it.

Refugee determination is a clear exception. The Refugees Convention is undoubtedly the most frequently considered and applied of international conventions; and as part of the process of determining refugee status, decision makers are required to venture beyond the terms of the Convention and into the field of international law generally. In Australia, the Refugee Review Tribunal has, in determining refugee claims, created a significant jurisprudence in the field of international law, and specifically in international human rights law.

Those interested in Tribunal decisions on particular areas or issues may wish to look them up on the Tribunal's Website at: http://www.austlii.edu.au/au/other/rrt/.