HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AFFAIRS APPELLANT

AND

HUSSEIN MOHAMED HAJI IBRAHIM RESPONDENT

Minister for Immigration and Multicultural Affairs v Haji Ibrahim
[2000] HCA 55
26 October 2000
S157/1999

ORDER

1. *Appeal allowed.*

2. *Orders 1 and 2 of the Full Court of the Federal Court of Australia made on 9 April 1999 be set aside.*

3. *In lieu thereof, order that the appeal to the Full Court of the Federal Court of Australia be dismissed.*

4. *Appellant to pay respondent's costs of this appeal.*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with N J Williams for the appellant (instructed by Australian Government Solicitor)

T A Game SC with S J Gageler for the respondent (instructed by Legal Aid Commission of New South Wales)

CATCHWORDS

Minister for Immigration and Multicultural Affairs v Haji Ibrahim

Immigration – Refugees – Protection visa – Clan-based conflict in Somalia – Whether persecution on Convention grounds – Use of terms "civil war", "civil conflict" and "systematic persecution" – Whether Convention definition permits or requires examination of the "motivation" for or "objects of" a "civil war" or "civil conflict" or demonstration of a "differential operation" upon an applicant's social group.

Words and phrases – "persecution" – "for reasons of race, religion, nationality, membership of a particular social group or political opinion".

Migration Act 1958 (Cth), ss 36(2), 476(i)(e).
Migration Regulations 1994 (Cth), Sched 2, Subclass 866.
Convention relating to the Status of Refugees (1951), Art 1A(2).

1 GLEESON CJ. I have had the benefit of reading in draft form the reasons for judgment of Gummow J. I agree with the orders proposed by his Honour, and with his reasons for those orders.

2 The decision of the Full Court of the Federal Court in this case reflected the earlier decision of the Full Court, constituted by the same members, in *Minister for Immigration and Multicultural Affairs v Abdi*[1]. In the present case the Full Court said[2]:

> "As *Abdi* indicates, it is necessary to consider the motivation of the civil war giving rise to the 'ordinary risks of clan warfare'. It may well be that the motivation of particular clan warfare is to persecute members of a clan by reason of that membership, as distinct for example from establishing control over land or resources."

3 In *Abdi*[3], the Full Court had considered the possibility that one of the objectives of clan warfare may be "wiping out an opposing clan."

4 The Refugee Review Tribunal was criticised for failing to pursue this line of investigation in the present case.

5 As Gummow J has observed, the expression "civil war" may be a misleading description of the situation in Somalia as described in the evidence. A better description may be anarchy. Depending upon the factual issues raised for examination, it may be helpful to consider whether conduct of a certain kind is "systematic", or whether treatment of a certain kind is discriminatory, or "differential". In the end, however, it is the language of the Convention which has to be applied.

6 Katz J held that there was nothing in the reasoning of the Tribunal which revealed any error of principle in the approach taken to the facts of the present case. Much of the reasoning is explained by the way the respondent's case was argued, and by the nature of the evidence before the Tribunal. The Tribunal considered and rejected the respondent's claim that the maltreatment he and members of his family suffered was the consequence of a genocidal policy directed towards his clan. It was concluded, in relation to one instance, for example, that the perpetrators "came to steal livestock, and tied up and killed those who were taking care of the livestock". This involves an invasion of

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1 (1999) 87 FCR 280.

2 (1999) 94 FCR 259 at 264.

3 (1999) 87 FCR 280 at 291.

human rights, but, without more, it does not amount to persecution for a relevant reason.

7 Persecution and disorder are not mutually exclusive. The existence of disorder may provide the occasion of, and perhaps the opportunity for, persecution of an individual or a group. In such a case, the ground of the persecution may or may not be a Convention ground. Nothing in the reasoning of the Tribunal was inconsistent with that. As the clans and subclans in Somalia struggle for power and resources, it is inevitable that from time to time, and from place to place, some will be in the ascendancy and others will be vulnerable. In such a situation, an inquiry as to whether the motivation of those temporarily in the ascendancy is to harm their enemies rather than to secure the benefits of domination is unlikely to be fruitful. The distinction, in a context of the kind revealed by the evidence in the present case, lacks practical content.

8 Katz J was right to conclude that there was no error in the approach taken by the Tribunal.

9 GAUDRON J. The facts and the history of these proceedings are set out in other judgments. I shall repeat them only to the extent necessary to make clear my reasons for concluding that the appeal in this matter should be dismissed.

10 The sole question raised in this appeal is whether, in allowing an appeal from Katz J, the Full Court of the Federal Court erred in finding reviewable error on the part of the Refugee Review Tribunal ("the Tribunal"). The Tribunal affirmed a decision by the Delegate of the Minister for Immigration and Multicultural Affairs that the respondent, Mr Haji Ibrahim, who is a Somali citizen, is not a refugee to whom Australia has protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (together referred to as "the Convention") and, thus, is not entitled to a protection visa pursuant to s 36 of the *Migration Act* 1958 (Cth) ("the Act")[4].

Somalia: background facts

11 Somalia has had no central government since 1991. Various regions have, at various times, come under the control of different clan-based militias and different war lords supported, from time to time, by different clans and sub-clans. Clan allegiances are continuously shifting and, seemingly, this is a persistent feature of Somali life[5]. The clan which is central to this appeal is the Rahanwein which, according to information before the Tribunal, is numerically strong but militarily weak[6]. There was other information before the Tribunal to the effect that, traditionally, the Rahanwein had never been fighters and that some of its members, at least, are "sedentary peasants"[7].

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4 The criterion for a protection visa is set out in sub-s (2). For a protection visa to be issued:

> "the applicant for the visa [must be] a non-citizen in Australia to whom Australia has protection obligations under [the Convention]."

5 See Samatar, *Somalia: a Nation in Turmoil*, (1991) at 25-26.

6 Prunier, "Somalia: Civil War, Intervention and Withdrawal (1990-1995)", (1996) 15 *Refugee Survey Quarterly* 35 at 48-49.

7 Prunier, "Somalia: Civil War, Intervention and Withdrawal (1990-1995)", (1996) 15 *Refugee Survey Quarterly* 35 at 48-49.

12 The shifting clan allegiances and the political anarchy in Somalia have resulted in "the killing, dislocation, and starvation of thousands of Somalis"[8]. The general situation was described by the Tribunal as one of "civil unrest" or "civil war" and the struggle between the various groups in Somalia as "clan warfare". Although the Tribunal's use of these terms is entirely understandable, they, perhaps, fail to convey an entirely accurate picture of the widespread chaos in Somalia or of the tragic consequences for its people.

The Convention: persecution

13 Until comparatively recent times, the Convention has fallen for application in relation to people who fled persecution that was authorised or condoned by the government of the country concerned[9]. The application of the Convention to persons who have fled a country, such as Somalia, which has no central government and in which it is difficult, if not impossible, to identify any dominant person or group involves the challenge of the unfamiliar.

14 The Convention defines a "refugee", in Art 1A(2), as any 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".

The difficulty in applying the Convention definition of "refugee" in circumstances such as those in Somalia lies in recognising what, in those circumstances, is involved in the notion of "persecution".

15 It should at once be noted that a person who claims to be a refugee, as defined in Art 1A(2) of the Convention, has only to establish a "well-founded fear of being persecuted". That is usually established by evidence of conduct

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8 United States, Department of State, *Somalia Country Report on Human Rights Practices for 1997*, published at http://www.state.gov/www/global/human_rights/1997_hrp_report/somalia.html.

9 Hathaway, *The Law of Refugee Status*, (1991) at 101-105; Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435; cf von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status", (1997) 9 *International Journal of Refugee Law* 169; Okoth-Obbo, "Coping with a Complex Refugee Crisis in Africa: Issues, Problems and Constraints for Refugee and International Law", in Gowlland-Debbas (ed), *The Problem of Refugees in the Light of Contemporary International Law Issues*, (1996) 7 at 7-17.

amounting to persecution of the individual concerned or by evidence of discriminatory conduct, amounting to persecution, of others belonging to the same racial, religious, national or social group or having the same political opinion. And to establish that the conduct in question is "for reasons of" race, religion, nationality, etc, the individual concerned may seek to establish that that conduct is systematic, in the sense that there is a pattern of discriminatory conduct towards, for example, persons who belong to a particular religious group.

16 The Convention does not require that the individual who claims to be a refugee should have been the victim of persecution. The Convention test is simply whether the individual concerned has a "well-founded fear of persecution". Nor does the Convention require that the individual establish a systematic course of conduct directed against a particular group of persons of which he or she is a member. On the contrary, a well-founded fear of persecution may be based on isolated incidents which are intended to, or are likely to, cause fear on the part of persons of a particular race, religion, nationality, social group or political opinion.

17 A second matter should be noted with respect to the Convention definition of "refugee", namely, that, as a matter of ordinary usage, the notion of "persecution" is not confined to conduct authorised by the State or, even, conduct condoned by the State, although, as already pointed out, the Convention has, until recently, usually fallen for application in relation to conduct of that kind[10]. Nor, as a matter of ordinary usage, does "persecution" necessarily involve conduct by members of a particular group against a less powerful group.

18 As a matter of ordinary usage, the notion of "persecution" includes sustained discriminatory conduct or a pattern of discriminatory conduct against individuals or a group of individuals who, as a matter of fact, are unable to protect themselves by resort to law or by other means. That being so, conduct of that kind, if it is engaged in for a Convention reason, is, in my view, persecution for the purposes of the Convention. And that is so whether or not the conduct occurs in the course of a civil war, during general civil unrest or, as here, in a situation in which it may not be possible to identify any particular person or group of persons responsible for the conduct said to constitute persecution.

The decision of the Tribunal

19 So far as is relevant to this appeal, the Tribunal found that Mr Haji Ibrahim is a member of the Rahanwein clan and, also, a member of the Dabarre sub-clan and that each is a social group for the purpose of the Convention. It also

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10 See footnote 9.

accepted that his wife had been raped after she and Mr Haji Ibrahim were taken into captivity by members of another clan, the Marehan, when they identified themselves as Rahanwein. And it is implicit in the findings of the Tribunal that there is a real risk that Mr Haji Ibrahim will come to harm at the hands of members of other clans or sub-clans if he is returned to Somalia.

20 The Tribunal accepted that there might be persecution in the context of a civil war, including the civil war in Somalia. However, it held that there was nothing "in the experiences of [Mr Haji Ibrahim], or his clan, the Rahanwein, or his sub-clan, the Dabarre, which could be regarded as part of a course of systematic conduct aimed at members of either group ... for reasons of their membership of the group." The Tribunal concluded that Mr Haji Ibrahim was "not differentially at risk for a Convention reason and that the harm he fears is by reason of the civil unrest in Somalia and not persecution for reasons of his clan membership ... over and above the ordinary risks of clan warfare."

Subsequent proceedings: the decision of the Full Court

21 So far as is presently relevant, Mr Haji Ibrahim sought review of the Tribunal's decision on the ground that it involved an error of law. The error, it was argued, was in holding that there must be a systematic course of conduct to constitute persecution. The application was dismissed and Mr Haji Ibrahim then appealed to the Full Court. The Full Court allowed his appeal.

22 In the view of the Full Court, the Tribunal erred in the present case "in finding it 'difficult to identify any particular clan or subclan' which could be regarded as the victims of systematic persecution by any other group or groups, or as being subject to a differential impact which is over and above the ordinary risks of clan warfare, [and thus failing] to consider whether, if [Mr Haji Ibrahim] were to return to Somalia, he might be exposed to a real chance of persecution by reason of his membership of the Rahanwein clan."[11] Additionally, the Full Court held that the Tribunal was in error in looking for "systematic conduct"[12], and, thus, impliedly holding that "persecution will not be shown to exist if there is only an isolated incident."[13]

23 The Full Court set aside the decision of the Tribunal and remitted the matter to it to investigate, in accordance with its decision in *Minister for*

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11 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 265 [22].

12 (1999) 94 FCR 259 at 267 [28].

13 (1999) 94 FCR 259 at 266 [25].

Immigration and Multicultural Affairs v Abdi "the reasons underlying the [civil] war and the way it is conducted"[14].

Error of law: discrimination and differential impact

24 In a number of cases, this Court has emphasised that, for the purposes of the Convention, "[persecution] ... for reasons of race, religion, nationality, membership of a particular social group or political opinion" is conduct which is discriminatory on one or other of those grounds[15] and which is sufficiently serious to constitute persecution. In cases where, for example, conduct is aimed at a particular religious group, its discriminatory nature may be so obvious that there is no necessity to characterise it as such or to analyse what is involved in the notion of "discrimination". In a context of shifting clan allegiances and clan warfare, however, discrimination may be difficult to perceive unless the elements of what is involved in that notion are kept in mind.

25 Before turning to an analysis of discrimination, it should be noted that it is difficult to escape the conclusion that, in a clan war, the actions of one clan against the members of another are actions which are taken, in the words of Art 1A(2) of the Convention, "for reasons of ... [their] membership of a particular social group", being the group constituted by that other clan. Even so, action of that kind, even if it involves killing and torture, is not persecution for the purposes of the Convention, unless it discriminates in some way against the members of that other clan.

26 It was recently held by the House of Lords, in *Adan v Secretary of State for the Home Department*[16], that "a state of civil war whose incidents are widespread clan and sub-clan based killing and torture" does not give rise to a well-founded fear of persecution for the purposes of the Convention if the "individual claimant is at no greater risk ... than others who are at risk ... for reasons of their clan and sub-clan membership"[17]. Although there is no reference in *Adan* to discrimination, as such, that notion clearly provides the rationale for

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14 (1999) 87 FCR 280 at 290 [38].

15 See *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJR 775; 170 ALR 553. See also *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225; *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

16 [1999] AC 293.

17 [1999] AC 293 at 308, 311.

the decision in that case. And to the extent that the decision in that case gives expression to a negative test of persecution, I respectfully adopt it.

27 In *Adan*, the House of Lords also stated a positive test with respect to persecution. Lord Slynn of Hadley said that, to establish refugee status, an individual who is caught up in a civil war must "show a well-founded fear of persecution over and above the risk to life and liberty inherent in the civil war."[18] Similarly, Lord Lloyd of Berwick observed that a person claiming to be a refugee "must be able to show ... a differential impact ... he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare."[19] And, of course, that was the criterion by which the Tribunal assessed Mr Haji Ibrahim's claim in this case. That criterion is, in my view, deficient, albeit not for the reasons given in *Abdi* and applied by the Full Court in this case.

28 In *Abdi*, the Federal Court took a different approach from that taken in *Adan*. In *Abdi*, the Federal Court said:

> "[W]e do not accept that a clan or race based war cannot, without some further and differential degree of risk, amount to persecution in the sense that an individual is selected out for persecution treatment because he is a member of a particular clan. If evidence establishes, for example, that the objective of a war is to harm the opposing party for one or more Convention reasons, then 'persecution' will be made out ... The task of the decision-maker ... must be to investigate the reasons underlying the war and the way it is conducted in order to ascertain whether it is based on a Convention ground or has an objective which is covered by the Convention"[20].

And, as earlier indicated, it was on the basis of what had been said in *Abdi* that the Full Court found error on the part of the Tribunal in this case.

29 It is convenient now to turn to the concept of discrimination which, as has been pointed out, is an essential feature of persecution for the purposes of the Convention. Discrimination is not simply the different treatment of individuals or of classes of individuals. There are two distinct aspects to discrimination. The first, which needs no elaboration, is the different treatment of people who are not relevantly different[21]; the second is the treatment of people who are

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18 [1999] AC 293 at 302.

19 [1999] AC 293 at 311.

20 (1999) 87 FCR 280 at 290 [38].

21 See, for example, the discussion by Gaudron J in *Street v Queensland Bar Association* (1989) 168 CLR 461 at 571-572.

relevantly different in a manner that is not appropriate and adapted to that difference[22]. Treatment of the latter kind is usually, albeit inaccurately, referred to as indirect discrimination. And it is usually identified on the basis of its different impact on different groups within the population.

30 For constitutional purposes, it has been accepted that conduct which does not properly take account of relevant differences constitutes discrimination[23]. The same view should be taken with respect to the Convention in its application in conditions of clan warfare. And on that basis, if an individual can establish that conduct to which all are subject has significantly greater consequences for the group of which he or she is a member, then he or she may well establish a well-founded fear of persecution. And in the case of clan warfare, where war is waged against members of a particular social group, namely a particular clan because they are members of that clan, he or she may well establish a well-founded fear of persecution for a Convention reason.

31 Where, as here, it is necessary to apply the Convention in relation to a country riven by clan wars, it is not sufficient, in my view, to ask whether the person claiming refugee status faces risks "over and above the ordinary risks of clan warfare". That can be illustrated by this case. As already pointed out, there was material before the Tribunal to the effect that the Rahanwein are militarily weak. As I will shortly explain, that may constitute a relevant difference between them and other clans caught up in the struggle in Somalia.

32 It may be that, because the Rahanwein are militarily weak, the consequences of clan warfare are so much greater for them that their plight is properly to be identified as persecution. Or to put the matter another way, the "ordinary risks of clan warfare" for them may be so much greater than for others caught up in the clan-based conflict that they are at risk of persecution for reason of their membership of a particular social group, namely, the militarily weak Rahanwein. However, it does not necessarily follow that, if the Rahanwein are militarily weak, their members are at greater risk than are members of other clans or sub-clans. For example, it may be that the Rahanwein or the Dabarre are able to forge alliances with other clans or sub-clans so that they are at no greater risk than anyone else. These matters should have been but were not investigated by the Tribunal.

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22 See *Street v Queensland Bar Association* (1989) 168 CLR 461 at 570-574 per Gaudron J; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478 per Gaudron and McHugh JJ.

23 See *Street v Queensland Bar Association* (1989) 168 CLR 461 at 572-574 per Gaudron J; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 478-480 per Gaudron and McHugh JJ.

33 In addition to asking itself whether the Rahanwein and the Dabarre were the victims of "systematic conduct aimed at [their] members" and whether they were "differentially at risk ... over and above the ordinary risks of clan warfare", the Tribunal should have considered whether clan warfare posed special problems for members of the Rahanwein and the Dabarre over and above those of the other clans caught up in the conflict, such that they are properly to be regarded as being at risk of persecution by reason of their membership of that clan or sub-clan. Only if that further exercise is undertaken, can it be determined whether Mr Haji Ibrahim has a well-founded fear of persecution for a Convention reason.

Conclusion

34 Although for reasons which differ from those adopted by the Full Court, that Court was correct in identifying an error of law on the part of the Tribunal. The error is not that identified by the Full Court but it is, nonetheless, an error as to the meaning of the expression "well-founded fear of persecution" in Art 1A(2) of the Convention. The error was in failing to recognise that undifferentiating conduct may constitute discrimination against persons who are different or who are differently circumstanced and, that, if that discrimination is sufficiently serious, it may constitute persecution for the purposes of the Convention.

35 The appeal should be dismissed.

36 McHUGH J. The Minister for Immigration and Multicultural Affairs appeals against an order of the Full Court of the Federal Court. That Court reversed the judgment of the primary judge, Katz J, who had held that the Refugee Review Tribunal had not erred in law in dismissing an application for a protection visa under the *Migration Act* 1958 (Cth) ("the Act"). The application had been brought by Hussein Mohamed Haji Ibrahim ("the applicant"). His entitlement to that visa depended upon whether he was a refugee for the purposes of the Convention relating to the Status of Refugees (done at Geneva on 28 July 1951) as amended by the Protocol relating to the Status of Refugees (done at New York on 31 January 1967)[24]. Relevantly, the Convention defines a refugee as 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 ..."

37 Since 1991, Somalia has been in a state of civil unrest as a result of fighting between tribal clans. The applicant is a Somali national who is a member of the Rahanwein clan. After leaving Somalia in 1995, he reached Australia in late 1997 and applied for a protection visa, claiming that he was a refugee because he feared that other Somali clans including sub-clans of the Rahanwein would persecute him because of his membership of the Dabarre sub-clan of the Rahanwein clan.

38 Four issues arise in the appeal:

- **The differential impact principle.** Where an applicant for refugee status has fled from a country where a state of civil war or unrest exists, does fear of persecution require a risk of harm above that inherent in the ordinary risks of civil war or unrest?

- **Application of the differential impact principle.** Was the applicant's claim for refugee status rejected because the Tribunal erroneously applied the differential impact principle?

- **Motivation.** Did the Tribunal fail to make a finding as to the motivation for the detention in 1991 of the applicant and his family by members of a rival clan? If so, did the Tribunal err in law in failing to do so?

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24 Section 36(2) of the Act and Subclass 866 of Sched 2 to the Migration Regulations 1994.

- **Systematic conduct.** Did the Tribunal misdirect itself in law by holding that persecution for the purpose of the Convention required "a course of conduct demonstrating over time a systematic or methodical attack upon members of the [applicant's] clan"[25]?

The factual background

39 The applicant was born in Somalia in 1960. Somalia's population is divided into clans and sub-clans. The applicant is a member of the Waqbare sub-clan, a sub-clan of the Dabarre which is itself a sub-clan of the Rahanwein clan. The Rahanwein clan is subdivided into two major sub-clans known as the Digil and the Mirifle. The latter is the numerically larger sub-clan. The Rahanwein, which is based in southern Somalia, is one of a number of clans in Somalia. Another is the Darod clan. Among the Darod sub-clans are the Ogaden and the Marehan. Until 1991, Somalia was controlled by a dictator, Siad Barre, a member of the Darod clan. Another clan is the Hawiye clan which has a sub-clan, Habir Gidir. That is the sub-clan of the militia warlord, Hussein Aideed, whose activities are involved in this appeal.

40 After the overthrow of Siad Barre in 1991, civil unrest, if not civil war, broke out in Somalia. Many clans formed armed militia groups and attacked other clan groups. The applicant claimed that his sub-clan did not support any of these militia groups. Although numerically larger, the Rahanwein clan appears to have been weaker militarily than some other clans. At all events, the Dabarre sub-clan appears to have been militarily weak. In the course of the clan fighting, thousands of Somalis were killed, dislocated or starved. As a result in 1992, the United Nations intervened in Somalia with military forces.

41 Among the militia groups of the sub-clans were:

- the Somali National Alliance led by Hussein Aideed based on the Habir Gidir sub-clan of the Hawiye clan;
- the United Somali Congress led by Ali Mahdi based on the Abgal faction of the Hawiye clan;
- the Somali Patriotic Movement led by Omar Jess based on the Ogaden sub-clan of the Darod clan;
- the Somali National Front led by Omer Hagi Masale based on the Marehan sub-clan of the Darod clan;

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25 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 267 [28].

- the Somali Democratic Movement based on the Rahanwein which later split into two factions, one of which supported Aideed and the other which supported the United Nations forces;

- the Rahanwein Resistance Army formed around 1995 also based on the Rahanwein.

42 When the civil unrest commenced, the applicant and his family lived in Baidoa, a city mainly populated by the Rahanwein, but controlled by Siad Barre's brother-in-law, a member of the Marehan sub-clan of the Darod clan. He and his soldiers fled when a group led by Omar Jess of the Ogaden sub-clan of the Darod clan entered Baidoa, "destroyed everything and killed many people". According to the applicant, Rahanwein forces later ousted Omar Jess. But Marehan forces then returned to Baidoa and "took everything that was left". The applicant's house was destroyed. In May or June 1991, he and his wife left for Safarnooleys in another area.

43 On their walk to Safarnooleys, they met an armed group from the Marehan sub-clan. After learning that the applicant was from the Rahanwein clan, the Marehan group took him and his family to a farm, telling him that he would be killed if he tried to escape. He and others were forced to work on sorghum farms in the area. Male prisoners were tied up at night; female prisoners, including the applicant's wife, were raped; other females were made to cook for their captors. The Marehans killed some women. The applicant and his family escaped in April 1992 when the Marehans were attacked by another group. The applicant claimed that the Marehans shot many people who attempted to escape.

44 The applicant and his family reached Safarnooleys two days later to find that Hussein Aideed's forces were attacking the Marehans in that area and stealing livestock. The applicant claimed that Aideed engaged in genocide against the Rahanwein, but the Tribunal did not accept his evidence on this point. After the applicant's brother was killed, the applicant left for Dinsor, in the Baay region where some of his sub-clan, the Dabarre, lived. He left his family with his sister-in-law. An uncle advised him to leave because the Aideed forces had killed many of his relatives and their tribe had suffered "from the fighting between the other clans".

45 After leaving Dinsor, the applicant took a route to avoid the Marehan. He eventually reached Dolo near the borders of Kenya, Ethiopia and Somalia in November 1992. While in Dolo, he heard news that the Dabarre had been attacked by members of Mirifle sub-clans of the Rahanwein. He said that his sub-clan and these sub-clans had been involved in disputes for a long time.

46 He left Dolo in 1995 and, with money given to him by his brother, he reached Thailand and, eventually, Sydney. On arrival, he told immigration officials that he was a refugee. He said:

> "If I am sent back to Somalia my life will be at risk. Aideed's forces are in control of Baidoa. My family's house was destroyed in Baidoa. My brother was killed by Aideed's forces. I was taken prisoner by the Marehan and my wife was raped by them. The other Rahanwein tribes are against my tribe. There is no safe place for me in Somalia."

47 The Tribunal found the applicant to be credible and accepted his account "of his and his clan's and sub-clan's experiences." Upon these facts, the applicant made out a strong case for refugee status. He was a member of a particular social group – either the Rahanwein clan or the Dabarre sub-clan. The human rights of members of that clan or sub-clan have been and are likely to be interfered with to an extent that constitutes persecution for the purpose of the Convention. Arguably it was and is membership of the clan or sub-clan that provided and provides the dominant reason for the potential persecution of the applicant.

48 The other view of these facts is that the Rahanwein and the Dabarre are seen by groups such as the Marehan and the Ogaden as rivals in the struggle for land and resources. These groups attack anyone who opposes or is perceived to oppose their claims to the land and resources of Somalia. It is opposition to their claims, not clan membership as such, which is the motivating force for any harm inflicted on the Rahanwein and the Dabarre. On this view, the dominant reason for the killings, the imprisonments and the destruction of property of members of the Rahanwein clan and Dabarre sub-clan has been the need to ensure that the rival clans and sub-clans succeed in their struggle for the land and resources. It is also a possible view of the facts that the Rahanwein women were raped for reasons of sexual gratification rather than their membership of the Rahanwein clan.

49 Accepting that the facts showed hypotheses inconsistent with persecution for a Convention reason, it was still open to the Tribunal to be satisfied that there was a real chance that the killings, the rapes, the imprisonments and destruction of the property of the Rahanwein and the Dabarre have been and will be inflicted, not because of military or economic necessity but because of the desire to terrify, punish or exact revenge on members of the Rahanwein clan or Dabarre sub-clan. But after examining the facts, the Tribunal – which is the body charged with determining the merits of each application – was not so satisfied. It held that, if returned to Somalia, the applicant would not face a real chance of persecution for Convention reasons. The Tribunal concluded that the harm that the applicant fears arises from struggles for land and power and not because of his membership of any particular social group. The Tribunal said:

"The totality of the material before me, including the [a]pplicant's evidence and the independent evidence referred to in this decision, leads me to conclude that the harm the [a]pplicant fears is not persecution for reasons of his membership of the Rahanwein clan or his subclan of themselves but rather unsystematic warfare *because of 'the instability, anarchy and murderous shiftings witnessed today in the Somali scene'. These shifting allegiances are the consequence of power struggles between clans and subclans*, including the [a]pplicant's own Rahanwein clan and the Digil subclan to which his further subclan the Dabarre belong. ...

In this context of shifting allegiances it is difficult to identify any particular clan or sub-clan which can be regarded as being the victims of systematic persecution by any other group or groups, or as being subject to a *differential impact which is over and above the ordinary risks of clan warfare*. Members of the Hawiye subclans, the Marehan and Ogaden subclans of the Darod and *members of any other clan or subclan in that area are equally potential victims of the civil unrest in a pattern of shifting allegiances in the southern area of Somalia.*

What emerges from all the evidence is a picture of the ordinary risks of clan warfare, largely involving struggles for power and resources, in a context of instability and anarchy. Members of all clans and subclans in this tragic turmoil are at risk and, while some may be more vulnerable than others, none of the material before me points to circumstances which would convert the conflict into persecution. I am unable to discern anything in the experiences of the [a]pplicant, or his clan, the Rahanwein, or his sub-clan, the Dabarre, which could be regarded as part of a course of systematic conduct aimed at members of either group, including the [a]pplicant, for reasons of their membership of the group." (emphasis added)

Later the Tribunal concluded that:

"I find that the Rahanwein, including the [a]pplicant's subclan, the Digil, have at different times been in alliance with and in conflict with different groups in a civil war in which interest groups shift according to the stakes at hand. *I therefore accept that the [a]pplicant may be at risk of harm* in the pattern of shifting allegiances both inter and intra clan but, for reasons discussed above, find that this is because of the unstable situation in his country as a consequence of the civil unrest since 1991.

I am not suggesting that persecution for a Convention reason never occurs, or could never occur, in the context of the civil war in Somalia. However the [a]pplicant's circumstances lead me to find that *he is not differentially at risk for a Convention reason* and that the harm he fears is by reason of the civil unrest in Somalia and not persecution for reasons of

> his clan membership, or any other Convention reason, *over and above the ordinary risks of clan warfare*." (emphasis added)

50 In finding that the applicant "is not differentially at risk for a Convention reason" and that the harm that he fears is merely "the ordinary risks of clan warfare", the Tribunal applied a principle formulated by the House of Lords in *Adan v Secretary of State for the Home Department*[26], a case which also concerned Somalia.

51 In *Adan*, Lord Lloyd of Berwick[27] said[28]:

> "[W]here a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what [counsel for the Secretary of State for the Home Department] calls a *differential impact*. In other words, he must be able to show fear of persecution for Convention reasons *over and above the ordinary risks of clan warfare*." (emphasis added)

52 Lord Lloyd appears to have been driven to this conclusion by the following concern[29]:

> "[I]f [counsel for the Secretary of State for the Home Department] is right, it involves drawing a line between the persecution of individuals and groups, including very large groups, on the one hand, and the existence of a state of civil war on the other. [Counsel for the Secretary of State for the Home Department] accepts that protection under the Convention is not confined to individuals. He accepts further that the persecution of individuals and groups, however large, because of their membership of a particular clan is very likely to be persecution for a Convention reason. But he says that where there is a state of civil war between clans, the picture changes. Otherwise the participants on both sides of the civil war would be entitled to protection under the Convention. Indeed, as Simon Brown LJ pointed out, the only persons who would *not* be entitled to protection, on that view, would be those who were *not* the active participants on either side but were, as Simon Brown LJ [1997] 1 WLR 1107, 1120 put it, 'lucklessly endangered on the sidelines.' Simon

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26 [1999] 1 AC 293.

27 With whom Lord Goff of Chieveley, Lord Nolan, and Lord Hope of Craighead agreed.

28 [1999] 1 AC 293 at 311.

29 [1999] 1 AC 293 at 308.

> Brown LJ found this unappealing. So do I. It drives me to the conclusion that fighting between clans engaged in civil war is not what the framers of the Convention had in mind by the word persecution.
>
> What then is the critical factor which distinguishes persecution from the ordinary incidents of civil war?" (my emphasis underlined; original emphasis in italics)

The answer which his Lordship gave to this question was a "differential impact"[30].

Grounds of appeal before the Full Court

53 At no stage before the proceedings reached this Court does the applicant appear to have argued that, in rejecting the applicant's claim, the Tribunal was wrongly influenced by the *Adan* test of "differential impact". Before the Tribunal, the applicant appears to have accepted that *Adan* represented the law that the Tribunal had to apply. It was its application rather than its formulation which was in issue. Nor was the correctness of the *Adan* approach in issue before Katz J. Furthermore, the Notice of Appeal to the Full Court contained only one ground:

> "His Honour erred in finding that the Tribunal's reference to a 'course of systematic conduct' in its statement of findings and reasons did not demonstrate that its decision involved an error of law, being an error involving an *incorrect interpretation* of the meaning of 'persecution' in Article 1A(2) [of] the Refugees Convention." (emphasis added)

54 Moreover, in this Court, the applicant did not file a Notice of Contention seeking to uphold the Full Court's order on the ground that the Tribunal had erred in law in applying *Adan.* Despite the absence of a Notice of Contention, however, counsel for the applicant argued "that if *Adan* stands for any other proposition [than] that the differential impact means that you look for persecution feared by an applicant ... then it must be wrong." Later, counsel said "that this whole notion of distinguishing persecution from ordinary risks of clan war and so forth sends the whole inquiry in the wrong place". In his written submissions, the applicant had also contended "that the Tribunal required establishment of 'differential impact' in the (erroneous) sense ... that the applicant had to show that he was more at risk than others in the 'clan warfare'". The Minister did not claim that these arguments or contentions were outside the issues raised by the appeal. Nor did he contend that the applicant should have filed a Notice of Contention. That being so, this Court must examine whether *Adan* correctly states the law concerning persecution in the context of civil unrest or war as is the case in

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30 [1999] 1 AC 293 at 311.

Somalia. It must also examine whether rejection of the applicant's claim for refugee status was based wholly or partly on an erroneous application of the *Adan* principle.

Well-founded fear of persecution

55 Persecution involves discrimination that results in harm to an individual. But not all discrimination amounts to persecution. With the express or tacit approval of the government, for example, some employers may refuse to employ persons on grounds of race, religion or nationality. But discriminatory though such conduct may be, it may not amount to persecution. Other employment may be readily available. The Convention protects persons from persecution, not discrimination. Nor does the infliction of harm for a Convention reason always involve persecution. Much will depend on the form and extent of the harm. Torture, beatings or unjustifiable imprisonment, if carried out for a Convention reason, will invariably constitute persecution for the purpose of the Convention. But the infliction of many forms of economic harm and the interference with many civil rights may not reach the standard of persecution. Similarly, while persecution always involves the notion of selective harassment or pursuit, selective harassment or pursuit may not be so intensive, repetitive or prolonged that it can be described as persecution.

56 This Court has discussed the meaning of persecution on a number of occasions. Most recently, in *Chen Shi Hai v Minister for Immigration and Multicultural Affairs*, a majority of this Court said[31]:

> "[T]here is a common thread linking the expressions 'persecuted', 'for reasons of' and 'membership of a particular social group' in the Convention definition of 'refugee'. In a sense, that is to oversimplify the position. The thread links 'persecuted', 'for reasons of' and the several grounds specified in the definition, namely, 'race, religion, nationality, membership of a particular social group or political opinion'[32].
>
> As was pointed out in *Applicant A*[33], not every form of discriminatory or persecutory behaviour is covered by the Convention definition of 'refugee'. *It covers only conduct undertaken for reasons*

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31 (2000) 74 ALJR 775 at 779-780 [24]-[25]; 170 ALR 553 at 559-560.

32 Article 1A(2).

33 (1997) 190 CLR 225 at 232-233 per Brennan CJ, 257-258 per McHugh J, 284 per Gummow J. See also *Ram v Minister for Immigration and Ethnic Affairs* (1995) 57 FCR 565 at 568 per Burchett J, with whom O'Loughlin and RD Nicholson JJ agreed.

specified in the Convention. And the question whether it is undertaken for a Convention reason cannot be entirely isolated from the question whether that conduct amounts to persecution." (emphasis added)

57 In *Applicant A v Minister for Immigration and Ethnic Affairs*[34], I said:

"When the definition of refugee is read as a whole, it is plain that it is directed to the protection of individuals who have been or who are likely to be the victims of intentional discrimination of a particular kind. The discrimination must constitute a form of persecution, and it must be discrimination that occurs because the person concerned has a particular race, religion, nationality, political opinion or membership of a particular social group."

58 In *Applicant A*[35], Gummow J approved the discussion of persecution by Burchett J (with whom O'Loughlin and RD Nicholson JJ agreed) in *Ram v Minister for Immigration and Ethnic Affairs*[36]:

"Persecution involves the infliction of harm, but it implies something more: an element of an attitude on the part of those who persecute which leads to the infliction of harm, or an element of motivation (however twisted) for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. Not every isolated act of harm to a person is an act of persecution."

59 Gummow J said[37]:

"In par (2) of s A the notion of 'fear of being persecuted' is confined by the use of the phrase 'for reasons of'. This serves to identify the motivation for the infliction of the persecution and the objectives sought to be attained by it. The reason for the persecution must be found in the singling out of one or more of five attributes, namely race, religion, nationality, the holding of political opinion, or membership of a particular social group."

60 All these statements are descriptive rather than definitive of what constitutes persecution for the purpose of the Convention. In particular, they do

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34 (1997) 190 CLR 225 at 257.

35 (1997) 190 CLR 225 at 284.

36 (1995) 57 FCR 565 at 568.

37 (1997) 190 CLR 225 at 284.

not attempt to define when the infliction or threat of harm passes beyond harassment, discrimination or tortious or unlawful conduct and becomes persecution for Convention purposes. A passage in my judgment in *Chan v Minister for Immigration and Ethnic Affairs*[38] suggests that a person is persecuted within the meaning of the Convention whenever the harm or threat of harm "can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class". Read literally, this statement goes too far. It would cover many forms of selective harassment or discrimination that fall short of persecution for the purpose of the Convention. Moreover, it does not go far enough, if it were to be read as implying that there can be no persecution unless systematic conduct is established.

61 Given the objects of the Convention, the harm or threat of harm will ordinarily be persecution only when it is done for a Convention reason and when it is so oppressive or recurrent that a person cannot be expected to tolerate it. This accords with the discussion of what constitutes a "well-founded fear of persecution" in par 42 of the *Handbook On Procedures And Criteria For Determining Refugee Status*[39] issued by the Office of the United Nations High Commissioner for Refugees:

> "In general, the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin *has become intolerable* to him for the reasons stated in the definition, or would for the same reasons *be intolerable* if he returned there." (emphasis added)

62 Dr Hathaway in his book *The Law of Refugee Status*[40] thought that the Canadian Immigration Appeal Board had "succinctly stated the core of the test" of persecution when it said that "[t]he criteri[on] to establish persecution is harassment, harassment that is so constant and unrelenting that the victims feel deprived of all hope of recourse, short of flight, from government by oppression."

63 A written submission to the Tribunal by the applicant's solicitor accepted that refugee status is granted only "as a last resort where national protection is not available."

64 The emphasis on the tolerability of the applicant's situation gives effect to the principal rationale for the Convention. It was persecution on grounds such as

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38 (1989) 169 CLR 379 at 430.

39 1979; re-edited 1992.

40 (1991) at 102.

race, religion, nationality and political opinion that led to the involuntary migration of large numbers of persons before and after the Second World War and which brought about the Convention. The Convention should be interpreted against that background. Given that background, the parties to the Convention should be understood as agreeing to give refuge to a person when, but *only when*, he or she "is outside the country of his [or her] nationality and is unable or, owing to such [well-founded] fear, is unwilling to avail himself [or herself] of the protection of that country".

65 Framing an exhaustive definition of persecution for the purpose of the Convention is probably impossible. Ordinarily, however, given the rationale of the Convention, persecution for that purpose is:

- unjustifiable and discriminatory conduct directed at an individual or group for a Convention reason
- which constitutes an interference with the basic human rights or dignity of that person or the persons in the group
- which the country of nationality authorises or does not stop, and
- which is so oppressive or likely to be repeated or maintained that the person threatened cannot be expected to tolerate it, so that flight from, or refusal to return to, that country is the understandable choice of the individual concerned.

66 Neither the text, rationale nor purpose of the Convention or any decision of this Court entitles a decision-maker to reject a claim for refugee status merely because the applicant has failed to prove that, in a conflict such as that in Somalia, he or she is exposed to a risk of harm different from that of others caught up in that conflict. No doubt, as a practical matter in such situations, the Tribunal will often find it difficult to determine whether the feared persecution is "for reasons" specified in the Convention or for military or economic reasons or other reasons. But that is very different from holding that an applicant for refugee status must prove that he or she is exposed to a greater risk of harm than others caught up in the war or unrest.

67 It is also true, as the Minister argued, that not all harm inflicted by the government of a country in the course of a civil war or unrest is necessarily persecution for the purpose of the Convention. That is because the harm may be justifiable as a measure carried out to achieve a legitimate object of the country. In *Applicant A*[41], I discussed the kinds of discriminatory conduct that may be justifiable and not amount to persecution even when done for a Convention

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41 (1997) 190 CLR 225 at 258-259.

reason. It is of course true that, even when the conduct is that of the legitimate government of the country, it may be difficult to determine whether the conduct is persecution or is justifiable action because it is appropriate and adapted to achieving some legitimate object of the country of the refugee, such as its defence. When General Sherman marched through Georgia in his swing to the sea during the United States Civil War, for example, he fed his army off the land and farms as it crossed the State and, when locals burned bridges to impede his progress, he ordered the burning of nearby houses[42]. He did this "to demonstrate the vulnerability of the South and make its inhabitants feel that war and individual ruin are synonymous terms" so that the South would quit and rejoin the Union[43]. If those circumstances arose today, it would be a nice question whether he had persecuted the people of Georgia for a Convention reason, despite his object of reuniting the North and South.

68 Although issues of justification can be relevant in civil war contexts, it is difficult to see how they can have any relevance in the Somali context where there has been no legitimate or indeed any national government. The object of the Convention is to provide refuge for those groups who, having lost the de jure or de facto protection of their governments, are unwilling to return to the countries of their nationality[44]. Whatever legitimacy the actions of the various groups in Somalia may have, it is not grounded in the authority of a government. In the type of conflict that has existed in Somalia, many of the groups may have felt that they were attempting to achieve objectives which, from their perspective, were legitimate. But even so, it is unlikely that any group's actions were directed entirely towards legitimate objectives in an appropriate and adapted manner. Legitimacy or justification are not concepts that seem to have had any relevance in the Somali context.

69 Because Somalia has had no government in any relevant sense, persons such as the applicant have had no protection from their country of nationality. Where the State has disintegrated, as appears to have been the case in Somalia, so that there is no State to prevent the persecution of a person by private individuals or groups, that persecution will fall within the definition of refugee just as it would if an existing government had failed to protect that person from the persecution. Given the objects of the Convention, I can see no reason for reading down the definition of refugee so that it applies only when the country of nationality has a government. A person who otherwise satisfies the definition is

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42 Marszalek, *Sherman: A Soldier's Passion For Order* (1993) at 301-303.

43 Marszalek, *Sherman: A Soldier's Passion For Order* (1993) at 296.

44 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 258.

a refugee when that person cannot avail him or herself "of the protection of [his or her] country", not its government.

70 The difficulties of determining whether harm inflicted in the course of a civil war amounts to persecution or has been done for a Convention reason are very great. But despite these difficulties, I see no basis in the text of the Convention or otherwise for holding that, in conditions of civil war or unrest, a person can prove persecution only when he or she can establish a risk of harm over and above that of others caught up in those conditions. There is nothing in the Convention definition of a refugee, nor any reason in principle or policy, that prevents members of various groups, each of which are involved in a conflict, from being refugees in the Convention sense. The test of "differential impact", as propounded in *Adan*[45], finds no support in the text of the Convention and it should not be followed in Australia. It is not the degree or differentiation of risk that determines whether a person caught in a civil war is a refugee under the Convention definition. It is a complex of factors that is determinative – the motivation of the oppressor; the degree and repetition of harm to the rights, interests or dignity of the individual; the justification, if any, for the infliction of that harm and the proportionality of the means used to achieve the justification. Even if the passage in Lord Lloyd's speech be read as no more than an emphatic statement that the applicant must prove more than harm resulting from the civil war – and I do not think that it was intended to be so limited – it departs from the language of the Convention and invites error.

71 Furthermore, contrary to what Lord Lloyd appears to have thought, not all participants on both sides of the civil war would be entitled to protection under the Convention if the differential impact test is rejected. Article 1F of the Convention provides:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

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45 [1999] 1 AC 293 at 311.

72 Article 1F allows the Tribunal to refuse refugee status to applicants who, because of their conduct, ought not to have the benefit of the protection of the Convention.

73 In determining questions of refugee status in a civil war or civil unrest context, therefore, Australian courts and tribunals should avoid determining whether the "differential impact" of that war or unrest is greater for the applicant than for others. They should also avoid asking whether the applicant has shown a "fear of persecution for Convention reasons over and above the ordinary risks of clan warfare".

74 Before determining whether the Tribunal erroneously applied the differential impact principle, it is necessary to deal with the grounds that form the basis of the Minister's appeal.

The grounds upon which the Full Court held that the Tribunal had erred in law

75 The applicant's contentions before the Full Court were not limited to the one ground contained in his Notice of Appeal. The Full Court concluded that the Tribunal had erred for two reasons. First, the Full Court said that the Tribunal had correctly identified the need to identify the motivation behind the "clan based warfare" to determine if there had been, or might have been, persecution for a Convention reason[46]. But the Full Court said that the Tribunal had erred because it had failed to address "specifically whether the capture and retention of the [applicant] and his family were (as he asserted) driven by the intent to repress his particular clan"[47]. The Full Court also said that that error of the Tribunal had arisen because it had required "systematic persecution" of the members of the Rahanwein clan if the applicant were to succeed in his application[48].

76 Second, the Full Court said that the Tribunal had erred because it had concluded that "unsystematic warfare without more is not *persecution*"[49]. The Full Court said that the Tribunal had "used the expression 'systematic conduct' as requiring a course of conduct demonstrating over time a systematic or methodical

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46 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 264 [18].

47 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 264 [19].

48 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 264 [19].

49 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 266 [26] (original emphasis).

attack upon members of the Rahanwein clan for reasons of that clan membership before it would be satisfied that the [applicant's] claim would be made out."[50] It "should have determined whether the particular experiences of the [applicant] were caused by persecution for Convention reasons"[51].

The detention of the applicant and his family

77 In dealing with the detention of the applicant, the Full Court said that it was unclear whether the Tribunal found that the applicant and his wife were captured and restrained on the farm because they were Rahanwein or for some other reason[52]. The Full Court said that the Tribunal had to address the question why they were targeted. This point was not raised before Katz J. Nor was it raised by the Notice of Appeal to the Full Court. Nevertheless, it was debated before and decided by the Full Court.

78 The Minister submits that the Tribunal did consider the motivation behind the particular incident. The Minister relies on the following passage, which appeared in the Tribunal's reasons under the heading "The Applicant's Circumstances as a Member of a Clan":

> "The circumstances of the capture when the [a]pplicant and his wife identified themselves as Rahanwein therefore would have been the same if they had identified themselves as Abgal or Habr Gedir [sic] depending on the affiliations of the time."

79 The Minister asserts that:

> "[I]t is tolerably clear that the Tribunal concluded that the [applicant] and his wife were taken captive because they were in Marehan territory and they belonged to a clan that was at that time opposed to the Marehans in the conflict."

80 The mere fact that members of the Marehan sub-clan would have detained members of two other clans "depending on the affiliations of the time" does not, of itself, mean that the incident did not constitute persecution for reason of the applicant's membership of a particular social group. It is a possible view of this

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50 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 267 [28].

51 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 267 [28].

52 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 264 [20].

passage that the Tribunal was simply making the point that any person who belonged to or supported any clan, opposed to the Marehan, would be treated similarly to the way the applicant was treated. On that view, the Tribunal was saying that the Marehan group perceived the applicant and his family as supporters of their enemy and that they were detained for that reason, just as any other person from an opposing clan would have been detained. In other words, the Tribunal was saying no more than that the applicant's membership of his clan was not the reason that he and his family were detained.

81 Although it is possible that the Tribunal meant the passage to be understood in the sense set out above, the better view is that it was a direct product of applying the erroneous *Adan* principle. Because the applicant's position could not be distinguished from that of a member of the Abgal or Habir Gidir sub-clans, the Tribunal impliedly found that he was not differentially at risk and that his detention did not constitute persecution. In that respect, the Tribunal erred because it made a finding by applying an erroneous legal precept.

82 But was it necessary for the Tribunal to make any finding concerning the motivation for this incident? The Minister submits that, contrary to the conclusion of the Full Court, the Tribunal was not required by law "to address specifically whether the capture and retention of the [applicant] and his family were (as he asserted) driven by the intent to repress his particular clan". If this is so, and if the error did not otherwise affect its decision, this submission should be upheld.

83 In most cases, it is necessary for a Tribunal considering a claim for refugee status to make findings about past events that are alleged to constitute persecution. That is because what has occurred in the past is ordinarily a reliable indicator of what is likely to occur in the future[53]. Past acts of persecution are usually strong evidence that the applicant will again be persecuted if returned to the country of his or her nationality. But the relevance of past acts of persecution depends upon the degree of likelihood that they or similar acts will occur in the future.

84 The applicant was detained from May or June 1991 until April 1992. He lodged his application for a protection visa in January 1998. Whether or not he had a well-founded fear of persecution for a Convention reason had to be determined no later than the date of the Tribunal's decision[54] and not as at the

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53 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 575.

54 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 386-387 per Mason CJ, 398-399 per Dawson J, 405-406 per Toohey J, 413-415 per Gaudron J, 432 per McHugh J.

date of the 1991 incident. Detention by an armed group of members of the Marehan sub-clan in May or June 1991 throws no real light on whether he would be likely to be persecuted by the Marehan or any other clan or sub-clan if he was returned to Somalia in 1998. Indeed, the Tribunal had material before it that three of the militia group leaders, including Hussein Aideed, had signed an agreement to "plot the structure of a future Somali state and the transitional government that will create that state" and that a meeting of 26 Somali factions had agreed to hold a National Reconciliation Conference in June 1997. However, this Conference apparently did not have the support of Hussein Aideed and there were "continuing armed clashes between rival militia groupings". Leaving aside the possibility that the clan warfare would have ended if and when the applicant was returned to Somalia in 1998, the motivation of a group of Marehans then located near Safarnooleys in May or June 1991 throws no light on what they or other Marehan or other clans or sub-clans would be likely to do to the applicant in 1998. If the political positions of the various clans had been stable, the motivation of this relatively small group of Marehans might arguably throw some light on what Marehans generally might do to the applicant seven years later, although I doubt that it would. But given the shifting alliances, I do not think that a finding as to the motivation for this incident was so necessary that, by failing to find that motivation, the Tribunal erred in law.

85 This conclusion is strengthened by the way that the applicant conducted his case before the Tribunal. It was not conducted on the basis that the incident at Safarnooleys was critical in determining whether he would be persecuted if returned to Somalia. His case was put on a more general basis. Although his evidence referred to the incident, neither the oral submissions on behalf of the applicant before the Tribunal nor the 13-page written submission filed by his solicitor after the oral hearing had concluded mentioned the incident. The written submission asserted that the applicant:

> "... on the basis of his clan membership, may be imputed to hold political opinions by other rival clans and which are considered hostile by those clans. A hostile political opinion may also be imputed to him due to his family's close association with the former government of Said [sic] Barre."

86 In conclusion, the solicitor submitted "that his political and civil status puts him differentially at risk should he be forced to return to Somalia and that there is no effective State protection available to him."

87 Given the conduct of the case, the evidence concerning the detention was not seen as so decisive or central to his claim that it required a finding as to its motivation. It was part of the description – albeit a graphic one – of the consequences for individuals who were caught up in the unrest. It is not even clear that the applicant relied on the risks inherent in the civil unrest as the persecution that he feared. His case seems rather to have been one of being differentially at risk by reason of the military weakness of his clan or sub-clan

and his family's association with the deposed dictator, Siad Barre. Because that is so, the failure of the Tribunal to find the motivation for his detention was not a relevant error of law. The Full Court erred, therefore, in finding that the Tribunal had erred in law in not finding the motivation for the Safarnooleys incident.

Systematic conduct

88 The Full Court also held that Katz J erred in not finding that the Tribunal had erred in law by holding that "systematic persecution" is necessary to establish refugee status.

89 The Full Court said that[55]:

> "In the light of the observations in *Guo*[56], it is important to note that the expression 'systematic' may be used in alternative senses. One sense is that of deliberate or premeditated or intended conduct, of acting or carrying out actions with a premeditated intent. The other sense is that of habitual behaviour according to a system, regular or methodical. Where those words have been used to indicate the former sense, there will be no error of law. Where those words have been used to indicate a requirement that it is necessary to show a series of incidents or a course of conduct over time involving persecution, so that persecution will not be shown to exist if there is only an isolated incident, it will demonstrate an error of law on the part of the Tribunal. *Hamad* is one case where such an error was demonstrated."

90 An identically constituted Full Court[57] decided *Minister for Immigration and Multicultural Affairs v Hamad*[58] approximately two weeks prior to the decision in this case. In *Hamad*, the Full Court said that "systematic" can be used in two senses[59]:

> "The phrase 'systematic conduct' can be, and often is, used in two senses – either to refer to the motive, or evidence revealing the motive for

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55 (1999) 94 FCR 259 at 266 [25].

56 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

57 O'Connor, Tamberlin and Mansfield JJ.

58 (1999) 87 FCR 294.

59 (1999) 87 FCR 294 at 297 [17]. Their Honours said that I used the expression "systematic conduct" in the first sense in *Chan*.

the acts of the perpetrator or alternatively to refer to a number of acts or the volume of acts which are necessary before persecution is established."

91 Despite the Tribunal stating that, in an appropriate case, persecution includes "single acts of oppression", the Full Court held in this case[60] that the Tribunal had committed an error of law of the kind committed by the Tribunal in *Hamad*. The Full Court said[61]:

> "The Tribunal's reasons show it regarded the civil war in Somalia as unsystematic, characterised by 'instability, anarchy and murderous shiftings' in clan alliances. It is from that characterisation that the Tribunal proceeded to conclude that the members of the Rahanwein clan were not victims of 'systematic persecution' by any other group or groups. The potential clan victims, it concluded, will vary from time to time as the alliances shift. Consequently, it concluded in the passage in its reasons quoted above that neither the applicant personally or as a member of the Rahanwein clan had suffered 'a course of systematic conduct' aimed at them.
>
> Those reasons indicate, in our judgment, that *the Tribunal used the expression 'systematic conduct' as requiring a course of conduct demonstrating over time a systematic or methodical attack upon members of the Rahanwein clan for reasons of that clan membership before it would be satisfied that the [applicant's] claim would be made out. In the light of the decision in Hamad, we find that approach is erroneous.* The Tribunal should have determined whether the particular experiences of the [applicant] were caused by persecution for Convention reasons, and in the light of those findings it should have considered whether at the time of the determination of the application there was a real chance (as that term has been explained in *Chan*) of the [applicant] being persecuted by reason of his membership of the Rahanwein clan if he were to return to Somalia." (emphasis added)

92 The phrase "systematic conduct" has its origins[62] in the ex tempore judgment of Wilcox J in *Periannan Murugasu v Minister for Immigration and Ethnic Affairs*[63]. In the course of considering a submission by the applicant for judicial review that the decision of the decision-maker was unreasonable in the

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60 (1999) 94 FCR 259 at 266 [25]-[26].

61 (1999) 94 FCR 259 at 266-267 [27]-[28].

62 See *Mohamed v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 234 at 240.

63 Unreported, Federal Court of Australia, 28 July 1987.

sense in which that word is used in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), Wilcox J said[64]:

> "[T]he fear must be one of being 'persecuted', for a particular reason. The word 'persecuted' suggests a course of systematic conduct aimed at an individual or at a group of people. It is not enough that there be fear of being involved in incidental violence as a result of civil or communal disturbances."

93 His Honour noted[65]:

> "[I]t is not essential to the notion of persecution that the persecution be directed against the applicant as an individual. In a case where a community is being systematically harassed to such a degree that the word persecution is apt, then I see no reason why an individual member of that community may not have a well-founded fear of being persecuted."

These comments were made in a context in which there was "no question" that "there had been incidents of violence in Colombo affecting members of the Tamil community" of which the applicant was a member[66]. The decision-maker had found that the applicant was not a refugee in the Convention sense. Wilcox J said that the evidence did not justify a conclusion that the decision-maker's decision was unreasonable[67].

94 I also referred to the notion of "systematic conduct" in *Chan v Minister for Immigration and Ethnic Affairs*[68]. In the course of explaining that it is not necessary that the conduct complained of be against a person as an individual, I said that a person "may be 'persecuted' because he or she is a member of a group which is the subject of systematic harassment"[69]. I supported this proposition by reference to *Murugasu*. In the course of explaining that it is not a necessary element of "persecution" that an individual be the victim of a series of acts, I said[70]:

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64 Unreported, Federal Court of Australia, 28 July 1987 at 13.

65 Unreported, Federal Court of Australia, 28 July 1987 at 13.

66 Unreported, Federal Court of Australia, 28 July 1987 at 1, 12.

67 Unreported, Federal Court of Australia, 28 July 1987 at 14.

68 (1989) 169 CLR 379.

69 (1989) 169 CLR 379 at 429.

70 (1989) 169 CLR 379 at 430.

> "A single act of oppression may suffice. As long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention."

95 The use of the term "systematic conduct" has proved unfortunate. Tribunals[71] have read it as meaning that there can be no persecution for the purpose of the Convention unless there was a systematic course of conduct by the oppressor. That was not what I meant by using that expression in *Chan*. I used it as a synonym for non-random, and I think that in *Murugasu* Wilcox J intended to use it in the same way.

Recent consideration of "systematic conduct"

96 Several cases have subsequently referred to these statements of Wilcox J and myself. In *Mohamed v Minister for Immigration and Multicultural Affairs*[72], Hill J said[73]:

> "As will be seen, the word 'systematic' has found its way into case law on refugee status. The present case displays the difficulty of taking language used in the context of a particular case by a judge and treating that language as itself a test and as a substitute for the statutory test."

97 In relation to my comments in *Chan*, Hill J said[74]:

> "It is evident from the passage above cited that his Honour was not suggesting that there needed to be a series of systematic acts against an individual before it could be said that that individual had a 'well founded fear' of persecution. So much appears from the observation made by McHugh J at 430 that a single act of oppression may suffice to show persecution and that it is not necessary that there be a series of acts. Where the fear of persecution is in respect of an applicant's membership of a group, acts of systematic harassment against the group will show the

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71 See eg *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11 at 20; *Minister for Immigration and Multicultural Affairs v Hamad* (1999) 87 FCR 294.

72 (1998) 83 FCR 234.

73 (1998) 83 FCR 234 at 239.

74 (1998) 83 FCR 234 at 241.

> fear to be well founded. There need not be any particular act in fact perpetrated against the individual. Where the fear of persecution is in respect of an individual's political or religious beliefs the resolution of the question whether the fear is well founded will be assisted if it is shown that a course of systematic conduct has been actuated against that individual. But it is not a necessary prerequisite for success in an application. Evidence that individuals with a similar belief suffered discrimination amounting to persecution would likewise justify the conclusion that the individual's fear was well founded even if the individual himself or herself suffers only an isolated act of persecution or none at all. There is no requirement in law that, for an application for refugee status to succeed, the applicant must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic."

98 In *Abdalla v Minister for Immigration and Multicultural Affairs*[75], the Full Court of the Federal Court held that the Tribunal in that case had erred in holding that "the recurring pattern of communal violence, which it found to exist in Somalia, did not amount to persecution because there was *no systematic course of conduct*."[76] Their Honours held that this requirement was "too widely expressed."[77] In their Honours' view[78]:

> "Where there is a recurring pattern of violence towards a person on a Convention ground, there is no reason why such conduct may not constitute 'persecution'. Clearly 'persecution' involves more than a random act. To amount to 'persecution' there must be a form of *selective* harassment of an individual or of a group of which the individual is a member. One act of *selective* harassment may be sufficient. The fact that a recurring pattern can be loosely described as communal violence or even civil war does not mean that it cannot amount to 'persecution'. It is necessary to examine the situation further in an attempt to determine the purpose which gives rise to the violence or danger." (original emphasis)

Meaning and legal status of "systematic conduct"

99 It is an error to suggest that the use of the expression "systematic conduct" in either *Murugasu* or *Chan* was intended to require, as a matter of law, that an

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75 (1998) 51 ALD 11.

76 (1998) 51 ALD 11 at 20 (original emphasis).

77 (1998) 51 ALD 11 at 20.

78 (1998) 51 ALD 11 at 20.

applicant had to fear organised or methodical conduct, akin to the atrocities committed by the Nazis in the Second World War. Selective harassment, which discriminates against a person for a Convention reason, is inherent in the notion of persecution. Unsystematic or random acts are non-selective. It is therefore not a prerequisite to obtaining refugee status that a person fears being persecuted on a number of occasions or "must show a series of coordinated acts directed at him or her which can be said to be not isolated but systematic."[79] The fear of a single act of harm done for a Convention reason will satisfy the Convention definition of persecution[80] if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person.

100 Given the misunderstanding that has arisen from using the term "systematic conduct", it is probably better to refrain from using it in a Convention context. But if it is to be used, those who use it should make it clear that they are referring to "non-random" acts; otherwise, they run the risk of making a legal error.

How did the Tribunal use the expressions "systematic conduct" and "unsystematic conduct"?

101 The Tribunal did not use the term "systematic conduct" to refer to a number of acts. Nor did it use the term to mean a series of coordinated acts directed at the applicant or his clan or sub-clan. As I have said, the Tribunal stated that, in an appropriate case, persecution may "include single acts of oppression". The Tribunal appears to have been of the view that the "instability, anarchy and murderous shiftings" meant that the harm that the applicant feared was random, and so "unsystematic" in the sense of not being selective. There was no error of law in this approach. Accordingly, the Full Court erred when it held otherwise.

Motivation of the conduct, not the conflict, is important

102 In the present case, the Full Court also held that it was necessary to consider "the purpose and nature of the war, the way it is conducted, and the objectives sought to be achieved by the war"[81] to determine whether an applicant

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79 *Mohamed v Minister for Immigration and Multicultural Affairs* (1998) 83 FCR 234 at 242.

80 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 430.

81 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 261 [7], quoting from *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 87 FCR 280 at 290 [37].

for refugee status meets the Convention definition. I agree with other members of the Court in this case that the Tribunal should not search for the "motivation" of war. Nevertheless, the Convention requires the Tribunal to ascertain the motivation for the allegedly persecutory conduct which an applicant for refugee status fears. In this case, among the questions which the Tribunal should have asked were (a) what harm does the applicant fear on his return to Somalia? (b) is that fear well-founded? (c) *why* will the applicant be subjected to that harm? and (d) if the answer to (c) is "because of his membership of a particular social group", would the harm constitute persecution for the purpose of the Convention?

The Tribunal erred in law by applying *Adan*

103 The Tribunal found that the harm that the applicant feared was not for reasons of his membership of a particular social group. But its reasons show that that finding was influenced, if not determined, by its view that the applicant had to show that the civil unrest had a "differential impact" on him. It took the view that the harm that he faced was merely the ordinary risks of clan warfare. It is true that in one passage the Tribunal might be taken to have distinguished systematic persecution from the notion of differential impact and held that the applicant could succeed if he could prove either of them. But the key to its finding of no persecution is to be found in two passages:

> "What emerges from all the evidence is a picture of the ordinary risks of clan warfare, largely involving struggles for power and resources, in a context of instability and anarchy. Members of *all* clans and subclans in this tragic turmoil *are at risk* and, while some may be more vulnerable than others, none of the material before me points to circumstances which would convert the conflict into persecution." (emphasis added)

> "I am not suggesting that persecution for a Convention reason never occurs, or could never occur, in the context of the civil war in Somalia. However the [a]pplicant's circumstances lead me to find that *he is not differentially at risk for a Convention reason* and that the harm he fears is by reason of the civil unrest in Somalia and not persecution for reasons of his clan membership, or any other Convention reason, *over and above the ordinary risks of clan warfare*." (emphasis added)

104 By concluding that the applicant was not persecuted *because* he could not show a differential impact or *because* the harm that he faced was merely the ordinary risks of clan warfare, the Tribunal erred in law. Failure to prove a differential impact on him or to show that he was exposed to risks greater than those of other persons exposed to clan warfare did not mean that he had failed to prove persecution by reason of his clan membership.

Conclusion

105 For reasons different from those given by the Full Court, the Tribunal's decision was vitiated by an error of law. That error affected the Tribunal's overall approach to its decision. It follows that the appeal should be dismissed and that the matter should be remitted to the Tribunal for further consideration according to law.

GUMMOW J.

The course of the litigation

106 The respondent applied to the Federal Court of Australia under s 476 of the *Migration Act* 1958 (Cth) ("the Act") for review of a decision of the Refugee Review Tribunal ("the Tribunal") which affirmed the decision on 15 January 1998 of a delegate of the appellant to refuse to grant the respondent a protection visa. The Federal Court (Katz J) dismissed the application. However, an appeal by the respondent to the Full Court was successful. The Full Court (O'Connor, Tamberlin and Mansfield JJ) ordered that the matter be remitted to the Tribunal for rehearing[82]. The appellant appeals to this Court against the orders made by the Full Court.

107 Section 36 of the Act provides for a class of visas to be known as "protection visas" and stipulates that a criterion for a protection visa is that the applicant be "a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol". Section 65 of the Act requires the appellant to grant a visa sought by a valid application "if satisfied" of various matters, including that any criteria for the visa prescribed by the Act are satisfied. Item 221 of Subclass 866 of Sched 2 to the Migration Regulations[83] specifies as a criterion to be satisfied at the time of decision:

> "The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention."

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82 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 at 267.

83 SR No 268 of 1994. The term "Refugees Convention" is defined in Item 111 of Subclass 866 so as to include the Refugees Protocol. Section 5(1) of the Act defines "Refugees Convention" as used in the relevant legislation to mean "the Convention relating to the Status of Refugees done at Geneva on 28 July 1951" ("the Convention") and the "Refugees Protocol" to mean "the Protocol relating to the Status of Refugees done at New York on 31 January 1967" ("the Protocol"). The Convention entered into force for Australia on 22 April 1954: *Treaty Series* 1954, No 5. The Protocol entered into force for Australia on 13 December 1973: *Treaty Series* 1973, No 37. Australia's last reservation to the Convention (to Art 28, dealing with the issue of travel documents to refugees) was withdrawn by it on 10 March 1971: *Treaty Series* 1971, No 1 at 225.

The satisfaction that is required of the Minister is "a component of the condition precedent to the discharge of [the] obligation" imposed by s 65[84].

108 The principal ground of the application for review made to the Federal Court was that specified in s 476(1)(e) of the Act. This provides as a ground for review:

> "that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision".

109 The appellant seeks from this Court a result which would restore the order of Katz J dismissing the application to review the decision of the Tribunal. The Tribunal had affirmed the decision of the delegate because it was unsatisfied that the respondent possessed a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" if he should return to Somalia, the country of his nationality. The quoted words are part of the definition of "refugee" in Art 1A(2) of the Convention which, by the steps indicated above, is drawn into the operation of the Australian legislation.

110 The respondent was born in Somalia in 1960 and left that country in June 1995. He married in 1990, while in Somalia, and his wife bore two children. The respondent last saw his wife and children in 1992. He has a brother living in Japan. After he left Somalia, the respondent lived in Thailand and visited Malaysia and Laos to renew his Thai visa. He arrived in Australia on 25 December 1997 on a flight from Bangkok via Jakarta and his application for a protection visa was dated 7 January 1998.

Somalia

111 The issues which arise in this appeal require an appreciation of the social and political situation in Somalia. This illustrates that caution is required in unconsciously transferring to such a situation preconceptions derived from the structures of the European nation state and its derivatives. Thus, "civil war" in such a nation state has denotations which do not readily translate to Somalia. The phrase "civil war" has a meaning in modern times derived from the issues in and significance of such struggles for the control of the government of a nation state or a federated state as those in England between 1642 and 1649, in the United States between 1861 and 1865, and in Spain between 1936 and 1939.

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84 *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJR 775 at 782 [41]; 170 ALR 553 at 563.

112 The materials before the Tribunal included a publication dated November 1995 by Amnesty International entitled *SOMALIA Building human rights in the disintegrated state*. The notes to that document state:

> "The state of Somalia (named the Somali Republic at Independence in 1960[85], renamed the Somali Democratic Republic in 1969) disintegrated and collapsed in early 1991 in the anarchy and civil war following the overthrow of President Mohamed Siad Barre's government. Somalia has no recognized government but it is still a member-state of the United Nations, the Organization of African Unity, the League of Arab States and other international organizations. It has no official representatives, and its seats at inter-governmental bodies are unfilled.
>
> In May 1991 the breakaway Somaliland Republic was declared in the northwest within the pre-independence borders of the former British Somaliland. It is separately administered by a provisional government but it is not internationally recognized.
>
> In the former state capital of Mogadishu, two rival political groups headed by General Mohamed Farah Aideed and Ali Mahdi both claim governmental authority for all Somalia, although neither has international recognition. In other regions of the former Somali Republic … there are different controlling clan-based political groups (see Clan Diagram and notes in Appendix III)."

In Appendix III it is stated:

> "1. Particular clans or sub-clans are associated with certain political organizations … but the identification is not always complete. They are not all territorially distinct. There have been changing alliances between groups as well as internal conflicts."

113 In 1996, the Report to the United Nations Commission on Human Rights by its Independent Expert[86] stated that the hostilities which broke out in Somalia in 1991 forced hundreds of thousands of civilians to flee their homes and estimated that 300,000 people had died since November 1991 while 1.5 million lives were at immediate risk. Before then, under the regime of President Barre

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85 The former colonial powers were Italy and Britain: *The New Encyclopaedia Britannica*, 15th ed, vol 17 at 792-793.

86 *Report of the Independent Expert, Mr Mohamed Charfi, on the situation of human rights in Somalia, submitted in accordance with Commission resolution 1995/56*, 22 February 1996.

there had been a persistent pattern of political repression and gross human rights violations.

114 The respondent provided the Tribunal with portions of a work by Dr Said S Samatar, Professor of African History at Rutgers University, New Jersey, published in August 1991 and entitled *Somalia: a Nation in Turmoil*. The author referred to "the interminable shifting coalition of Somali pastoral clan politics". He added:

> "In the interminable search for the ever elusive pasturelands and water-holes for the herds, the clans traditionally continuously segmented into component units or amalgamated into larger ones, depending on the prevailing conditions of war and peace among blood-related lineages. Clan coalitions instantaneously formed to face a certain emergency only to disband just as instantaneously when the emergency subsided. There was no permanent administrative hierarchy, no durable structure, and no centralized state with a central authority that had monopoly on the exclusive use of violence to impose its will on the society as a whole. …
>
> Therefore, the instability, anarchy and murderous shiftings witnessed today in the Somali scene are inherently endemic, deeply embedded as they are in the very warp and woof of the Somali world, both as individuals and as corporate socio-political units. …
>
> The colonizers created something called an administrative bureaucracy headed by a central authority (governor in colonial times, President after independence) with an exclusive monopoly on an enormously powerful coercive institution – the military and related security services. Though lip service has been given in contemporary Somali political parlance to the need for the establishment of a 'just state', Somalis have failed to develop a political culture capable of running the new state, or of articulating the method and means by which that state should relate to the society of clans at large."

115 By 1998 some regions had established local courts that depended for their authority on the predominant local clan and associated faction; there was no national judicial system.

The English decisions

116 The issues that arise in the present appeal are to be understood against that background. They also involve consideration of the approach taken to similar questions which arose before the English Court of Appeal in *R v Secretary of*

State for the Home Department; Ex parte Adan[87] and in the previous year before the House of Lords in *Adan v Secretary of State for the Home Department*[88]. As in Australia and other countries[89], the United Kingdom legislation draws into municipal law the operation of the Convention definition of "refugee"[90].

117 The Court of Appeal rejected what it identified as the "accountability" theory of interpretation of the Convention, in favour of what it called the "protection" theory. Their Lordships said[91]:

> "Put shortly the 'accountability' theory limits the classes of case in which a claimant might obtain refugee status under the [Convention] to situations where the persecution alleged can be attributed to the state. German law requires an asylum seeker to show that he fears persecution (on a Convention ground) by the state, or by a quasi-state authority. If he relies on persecution by non-state agents, it must be shown to be tolerated or encouraged by the state, or at least that the state is unwilling to offer protection against it. The German courts hold that the Convention has no application in cases where there is no effective state authority, as in a situation of civil war."

It appears that this doctrine was developed in Germany by the Federal Constitutional Court when interpreting the constitutional right to asylum conferred by Art 16a of the Fundamental Law, and then adopted by the Federal Administrative Court for the application of the Convention[92].

118 The Court of Appeal held that under the "protection" theory the definition of "refugee" in Art 1A(2) of the Convention extends to persons who fear persecution by non-State agents where the State is not complicit in the

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87 [1999] 3 WLR 1274; [1999] 4 All ER 774.

88 [1999] 1 AC 293.

89 They include Canada, Denmark, France, Germany, Norway, Sweden and the United States. See *Bolanos-Hernandez v Immigration & Naturalization Service* 767 F 2d 1277 (1984); *Darwich v Minister of Manpower and Immigration* [1979] 1 FC 365; Plender, "Admission of Refugees: Draft Convention on Territorial Asylum", (1977) 15 *San Diego Law Review* 45 at 47-48.

90 Jackson, *Immigration: Law and Practice*, 2nd ed (1999) at 422-423.

91 [1999] 3 WLR 1274 at 1288; [1999] 4 All ER 774 at 787.

92 Judge Joachim Henkel, "Who is a Refugee?", in *Asylum Law*, (1995) 17 at 20-21.

persecution but is unwilling or unable to afford protection, including situations where effective State authorities do not exist[93].

119 The litigation in the House of Lords case concerned a Somali national who had fled from that country in 1988 owing to a well-founded fear of persecution at the hands of what was then the regime of President Mohamed Siad Barre. Mr Adan arrived in the United Kingdom in 1990 and was refused asylum. However, he was granted "exceptional leave" to remain so that there was no question of his being returned to Somalia. What was at stake was the provision of certain benefits under English law which, in accordance with the Convention, would be accorded to those with refugee status but were unavailable to those enjoying no more than "exceptional leave" to remain. The Secretary of State contended that, President Barre having fallen from power, Mr Adan was not entitled to refugee status because he no longer had any fear of persecution. The House of Lords held that an "historic fear" was not sufficient and that an applicant had to show at the time of the making of the determination a current well-founded fear of persecution for a Convention reason. Accordingly, it decided this issue in favour of the Secretary of State. This outcome was consistent with the reasoning of this Court in *Chan v Minister for Immigration and Ethnic Affairs*[94].

120 The House of Lords dealt with a second issue which it identified as follows[95]:

> "'Can a state of civil war whose incidents are widespread clan and sub-clan based killing and torture give rise to well-founded fear of persecution for the purposes of the [Convention] and the [Protocol], notwithstanding that the individual claimant is at no greater risk of such adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership?'"

Thus, the decision of their Lordships proceeded on the footing that the state of affairs in Somalia could be described as "a state of civil war" having particular incidents. However, the materials before the Tribunal in the present case concerning the situation in Somalia, particularly after the overthrow of President Barre's regime in 1991, suggest that it is misleading to begin any inquiry respecting the operation of the Convention in relation to Somalia by use of the term "civil war".

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93 [1999] 3 WLR 1274 at 1289; [1999] 4 All ER 774 at 788.

94 (1989) 169 CLR 379.

95 [1999] 1 AC 293 at 308.

121 The leading speech in *Adan* was given by Lord Lloyd of Berwick. His Lordship said that he concluded from the authorities there considered and from his understanding of what the framers of the Convention had in mind[96]:

> "that where a state of civil war exists, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show what [counsel for the Secretary of State] calls a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.
>
> What I have said so far applies only so long as the state of civil war continues. Once the civil war is over, and the victors have restored order, then the picture changes back again. There is no longer any question of both sides claiming refugee status. If the vanquished are oppressed or ill-treated by the victors, they may well be able to establish a present fear of persecution for a Convention reason, and in most cases they would be unable to avail themselves of their country's protection."

His Lordship agreed that refugee status ought not to depend on "casting around for the current underdog" but held that, even if "the civil war is being fought on religious or racial grounds", the position was "those engaged in civil war are not, as such, entitled to the protection of the Convention so long as the civil war continues"[97]. There had been a finding that there was no evidence that Mr Adan would suffer persecution on account of membership of his particular sub-clan from members of the armed groups of other clans or sub-clans. Although fighting and disturbances were indiscriminate and individuals from all sections of society were at risk of being caught up therein, the situation was no worse for members of Mr Adan's clan and sub-clan than for the general population and the members of any other clan or sub-clan[98]. Their Lordships determined the second issue adversely to Mr Adan on the basis that all sections of society in northern Somalia were equally at risk so long as the "civil war" continued and that there was "no ground for differentiating between Mr Adan and the members of his own or any other clan"[99].

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96 [1999] 1 AC 293 at 311.

97 [1999] 1 AC 293 at 311.

98 [1999] 1 AC 293 at 312.

99 [1999] 1 AC 293 at 312.

The decisions of the Tribunal and the Federal Court

122 The Tribunal began its reasons with references to various decisions of this Court and the Federal Court which construed the Convention definition. In so doing, the Tribunal said:

> "Harm or threat of harm as part of a course of selective harassment of a person, whether individually or as a member of a group which is subjected to systematic harassment, amounts to persecution if done for a Convention reason. In appropriate cases it may include single acts of oppression, serious violations of human rights, and measures 'in disregard' of human dignity. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality."

123 The Tribunal proceeded on the basis that it was "clearly not enough to be caught up in [a] civil war" and that "the authorities make it clear that questions of fact and degree are involved, and that one must look at the circumstances". The materials before the Tribunal indicated that, while Somali society largely was ethnically homogenous, there were at least some 30 clans, sub-clans and sub-sub-clans. The Tribunal took oral evidence from the respondent. It found the respondent to be credible despite some minor anomalies in his account. The Tribunal accepted that the Rahanwein clan, to which the respondent belongs, constitutes a particular social group for the purposes of the Convention definition and that his sub-clan, the Dabarre, constitutes a particular social group within the Rahanwein. The question the Tribunal posed was whether the "harm [the respondent] faces amounts to persecution for reasons of membership of either of these groups". The Tribunal concluded:

> "What emerges from all the evidence is a picture of the ordinary risks of clan warfare, largely involving struggles for power and resources, in a context of instability and anarchy. Members of all clans and subclans in this tragic turmoil are at risk and, while some may be more vulnerable than others, none of the material before me points to circumstances which would convert the conflict into persecution. I am unable to discern anything in the experiences of the [respondent], or his clan, the Rahanwein, or his sub-clan, the Dabarre, *which could be regarded as part of a course of systematic conduct aimed at members of either group*, including the [respondent], for reasons of their membership of the group." (emphasis added)

124 Before Katz J, the application proceeded on the footing that there was no dispute that between 1992 and 1995, when the respondent left Somalia, that country was "in a state of civil war". However, the respondent criticised the above passage in the Tribunal's reasons. It was said that the reference to "a

course of systematic conduct" demonstrated that the Tribunal had erred in law in its interpretation of the term "persecution" in the Convention definition. His Honour rejected that submission, saying that there could be no quarrel with the use of the word "systematic" where, as in this case, the issue had been framed in terms as to whether the acts referred to were part of a systematic attack against the group to which the respondent belonged. As will later appear, in my view, Katz J was correct in looking at the matter in this way.

125 The Full Court took a different position. It referred to the expression "systematic" saying[100]:

> "One sense is that of deliberate or premeditated or intended conduct, of acting or carrying out actions with a premeditated intent. The other sense is that of habitual behaviour according to a system, regular or methodical. Where those words have been used to indicate the former sense, there will be no error of law. Where those words have been used to indicate a requirement that it is necessary to show a series of incidents or a course of conduct over time involving persecution, so that persecution will not be shown to exist if there is only an isolated incident, it will demonstrate an error of law on the part of the Tribunal."

The Full Court concluded that the Tribunal had fallen into an error of law of the kind thus identified by it.

126 The Full Court held that the Tribunal had erred in law in another respect. The Tribunal had concluded that the capture and detention of the respondent and his wife on an occasion when they had been fleeing Baidoa and when they had identified themselves as Rahanwein did not illustrate persecution for a Convention reason because the circumstances would have been the same if they had identified themselves as from other clans "depending on the affiliations of the time"[101]. The Full Court said[102]:

> "It may well be that the motivation of particular clan warfare is to persecute members of a clan by reason of that membership, as distinct for example from establishing control over land or resources. The mere fact that a civil conflict is 'clan based' does not make its victims the victims of persecution. The Tribunal correctly identified the need to identify the motivation behind the 'clan based warfare' to determine if there has been, or may be, persecution for a Convention reason.

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100 (1999) 94 FCR 259 at 266 [25].

101 (1999) 94 FCR 259 at 264 [17].

102 (1999) 94 FCR 259 at 264 [18]-[19].

> It is in applying that test that the Tribunal, in our view, has fallen into error. *That error involves the failure to address specifically whether the capture and retention of the [respondent] and his family were (as he asserted) driven by the intent to repress his particular clan, and also arises because the Tribunal required there to be 'systematic persecution' of the members of the Rahanwein clan if the [respondent] were to succeed in his application.*" (emphasis added)

127 It appears that the first of the two errors referred to in this passage had not been in contention before Katz J. Indeed, the only ground of appeal to the Full Court had been that Katz J had erred in his treatment of the Tribunal's reference to "course of systematic conduct".

128 The Full Court introduced the passage set out above in which it dealt with "the motivation" of a "civil conflict" by saying that such consideration was indicated as a necessity by its decision in *Minister for Immigration and Multicultural Affairs v Abdi*[103]. That judgment was given shortly before that in the present case and by a Full Court bench of the same composition.

129 In *Abdi*, extensive reference was made to the decision of the House of Lords in *Adan* and to what the Full Court saw as "the need for differential risk"[104]. What the Full Court intended by the reference to "motivation" of a civil war appears from the following passage in *Abdi*[105]:

> "In order to appreciate what is covered by such civil or clan warfare, it is essential for a decision-maker to look beyond the existence of a state of war and to determine whether the war is directed to objectives such as securing power, property and access to resources, or whether in reality it is directed against persons or groups because of race, religion or group membership. Unless attention is focused on the reasons for the war, it is difficult, if not impossible to determine whether the antagonism is based on Convention grounds. It is not enough to dismiss an application simply on the basis that there is a war without looking at the motivations or purposes involved. Civil wars vary greatly in character and objectives."

Their Honours then added[106]:

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103 (1999) 87 FCR 280.

104 (1999) 87 FCR 280 at 287.

105 (1999) 87 FCR 280 at 287.

106 (1999) 87 FCR 280 at 287.

> "When considering the claimed refugee status of an applicant who has fled from a country in a state of civil war in a clan-based society, complex considerations will arise in deciding whether the risk of persecution is for a Convention reason. This is especially so in those instances where the civil war or state of anarchic violence involves clan, subclan, or subtribal disputes as is clearly the case in Somalia. On the one hand if too broad an approach is taken, all members of each warring group may be able to claim that they are being persecuted on racial or other Convention grounds simply because they belong to a warring group. Decision-makers on refugee applications have sometimes taken the view that civil wars, which result in a general state of *indiscriminate* violence or general danger and insecurity, may preclude the existence of persecution for a Convention reason. Such an exclusionary approach can result in the application of an erroneous general principle which is to the effect that because a state of civil war or violent anarchy prevails in a country no Convention based reason can exist. This view, on the authorities, is too simplistic." (original emphasis)

130 The Full Court took the view that statements made by the House of Lords in *Adan* imposed additional or differential requirements, beyond those of the Convention, where "the civil war in question is based on racial or clan grounds and not grounds such as a struggle for power or dominance, the acquisition of territory, the appropriation of property or the acquisition of access to strategic resources or facilities"[107]. The Full Court continued[108]:

> "In the latter examples, where the civil war is not directed to racial persecution, it is necessary, of course, to establish the existence of selective harassment on a Convention ground, whereas in the former example such a ground is already present because the civil war is properly characterised as race based."

131 Where there was what the Full Court identified as "a clan or race based war", then "persecution" would be made out if, for example, "evidence establishes … that the objective of a war is to harm the opposing party for one or more Convention reasons"[109]. The task of the decision-maker[110]:

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107 (1999) 87 FCR 280 at 291.

108 (1999) 87 FCR 280 at 291.

109 (1999) 87 FCR 280 at 290.

110 (1999) 87 FCR 280 at 290.

> "must be to investigate the reasons underlying the war and the way it is conducted in order to ascertain whether it is based on a Convention ground or has an objective which is covered by the Convention, namely: race, religion or other stated reason. This responsibility cannot be curtailed by a conclusion that there is a state of war."

The issues

132 The following issues arise. First, whether the notion of "civil war" has any normative force when construing and applying the Convention definition; secondly, whether the notions of "differential operation" propounded by the House of Lords in *Adan* should be adopted; thirdly, whether the gloss or qualification respecting "motivation" which the Full Court applied involves an error of law; fourthly, whether the Convention is premised upon State responsibility and the definition of "refugee" has to be understood in that light so that what might be called the Somali cases do not answer that definition; and, fifthly, whether Katz J or the Full Court was correct in their treatment of what was the second of the two errors of law found by the Full Court in the Tribunal's reasons.

"Systematic conduct"

133 I begin with the last of the matters just listed. The Tribunal was well aware that, while systematic harassment of a group to which the applicant for a protection visa belonged could amount to "persecution" if done for a Convention reason, the applicant might still make out a case by showing single acts of oppression. It said so in the passage which I set out earlier in these reasons and its reasoning proceeded on that footing. However, as Katz J pointed out, the case made by the respondent, as to one branch, was framed on the basis of such systematic conduct and this was rejected by the Tribunal.

134 The other branch of the respondent's case to which the Tribunal had then turned was that the respondent was at risk of "differential harm", that is to say, at risk of particular acts of oppression directed at him. The risk was said to arise because of the respondent's education (he had been a high school teacher in Somalia) and the position of one of his father's cousins in three ministries during the regime of President Barre.

135 The Tribunal rejected this part of the respondent's case. It was not pressed in the Full Court and thus not in this Court. However, an understanding of the way the matter as a whole had been put to the Tribunal is essential for an evaluation of its reasoning on the part of the case which has remained a live issue. Once so appreciated, the conclusion reached by Katz J will be seen to be correct.

The scope of the Convention

136 The remaining issues also turn on the meaning to be given to the Convention definition, but they involve more fundamental considerations respecting the scope and purpose of the Convention itself. The provisions of the Convention "assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in[111] the territory of the contracting State"[112]. The Convention definition of "refugee", as imported into Australian statute law, is to be construed by first giving the terms thereof their ordinary meaning but bearing in mind the Convention as a whole, including its context, object and purpose[113]. That in turn requires some appreciation of the place taken by the Convention in the body of international law respecting refugees and territorial asylum.

137 First, it has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national[114]. The proposition that every State has competence to regulate the admission of aliens at will was applied in Australian municipal law from the earliest days of this Court[115]. However, from that proposition, two principles of customary international law have followed. One is that a State is free to admit anyone it chooses to admit, even at the risk of inviting the displeasure of another State; and the other is that, because no State is entitled to exercise corporeal control over its nationals on the territory of another State, such individuals are safe from further persecution unless the asylum State is prepared to surrender them[116]. A corollary is that, in

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111 *Sale v Haitian Centers Council, Inc* 509 US 155 at 179-183 (1993).

112 Fitzpatrick, "Revitalizing the 1951 Refugee Convention", (1996) 9 *Harvard Human Rights Journal* 229 at 245.

113 See the discussion of the principles and the authorities by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256.

114 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 272-275; *T v Secretary of State for the Home Department* [1996] AC 742 at 754; Weis, "Legal Aspects of the Convention of 25 July 1951 relating to the Status of Refugees", (1953) 30 *The British Year Book of International Law* 478 at 481; O'Connell, *International Law*, (1970), vol 2 at 695-696, 740.

115 *Robtelmes v Brenan* (1906) 4 CLR (Pt 1) 395.

116 Morgenstern, "The Right of Asylum", (1949) 26 *The British Year Book of International Law* 327 at 327.

the absence of an extradition treaty, the asylum State has no international obligation to surrender fugitives to the State from which they have fled[117] and the fugitives are protected against the exercise of jurisdiction by that State.

138 Secondly, as Professor Sir Hersch Lauterpacht pointed out at the time[118], the Universal Declaration of Human Rights adopted in 1948, that is to say, shortly before the formation of the Convention, was accompanied by a general repudiation by member States of the idea that the Declaration imposed upon them a legal obligation to respect the human rights and fundamental freedoms which it proclaimed. Article 14 declared that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution". But this right "to seek" asylum was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals[119]. Over the last 50 years, other provisions of the Declaration have, as Professor Brownlie puts it, come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice[120]. But it is not suggested that Art 14 goes beyond its calculated limitation[121]. Nor was the matter taken any further by the International Covenant on Civil and Political Rights ("the ICCPR"). This entered into force for Australia on 13 November 1980[122]. Article 12 of the ICCPR stipulates freedom to leave any

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117 *Factor v Laubenheimer* 290 US 276 at 286-287 (1933); Shearer, *Extradition in International Law*, (1971) at 24.

118 Lauterpacht, "The Universal Declaration of Human Rights", (1948) 25 *The British Year Book of International Law* 354.

119 Lauterpacht, "The Universal Declaration of Human Rights", (1948) 25 *The British Year Book of International Law* 354 at 373-374; see also Greig, *International Law*, 2nd ed (1976) at 442; Fitzpatrick, "Revitalizing the 1951 Refugee Convention", (1996) 9 *Harvard Human Rights Journal* 229 at 245-246; Zieck, *UNHCR and Voluntary Repatriation of Refugees*, (1997) at 27-28.

120 Brownlie, *Principles of Public International Law*, 5th ed (1998) at 575. The learned author cites the statements by the European Court in the *Golder Case* (1975) 57 International Law Reports 201 at 216-217 with respect to Art 8 (access to the courts) and the International Court of Justice in *Case Concerning United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Reports 3 at 42 (physical constraint in circumstances of hardship).

121 van Selm-Thorburn, *Refugee Protection in Europe*, (1998) at 130-132.

122 *Treaty Series* 1980, No 23.

country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate[123].

139 Thirdly, the Convention was negotiated and agreed between States so that, as Lord Clyde observed, "it is at a state level that it has to be understood"[124]. The drafting of the Convention reflected the concerns of the Cold War. The participating States did not include the Soviet Union and its allies, which had objected to a notion of comprehensive protection for refugees. The States which did participate nevertheless had no commitment to basing the Convention in the international promotion of human rights[125]. The Convention built upon the work begun under various inter-war international instruments[126] and continued by the United Nations Relief and Rehabilitation Administration, established in 1943[127], and by the International Refugee Organization[128]. The result has been described by Professor Hathaway[129]:

> "The rejection of comprehensive humanitarian or human rights coverage is explained by the conviction of most Western states that their limited resettlement capacity should be reserved for those whose flight was motivated by pro-Western political values. As anxious as the Soviets had been to refuse international protection to social and ideological emigrants for fear of exposing their weak flank, so were the Western states anxious to underscore the plight of dissidents from Communist

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123 Fitzpatrick, "Revitalizing the 1951 Refugee Convention", (1996) 9 *Harvard Human Rights Journal* 229 at 246.

124 *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 at 396; [2000] 3 All ER 577 at 594.

125 van Selm-Thorburn, *Refugee Protection in Europe*, (1998) at 29-31.

126 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 277-280.

127 The Agreement of 9 November 1943 establishing the Administration is the Schedule to the *United Nations Relief and Rehabilitation Administration Act* 1944 (Cth).

128 The Constitution of the International Refugee Organization was signed by Australia on 13 May 1947 and entered into force on 20 August 1948: *Treaty Series* 1948, No 16.

129 Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129 at 148-149.

> regimes by bringing them within the scope of an internationally recognized refugee regime. In the end, it was agreed to restrict the scope of protection in much the same way as [the United Nations Relief and Rehabilitation Administration] had done: only persons who feared 'persecution' in the sense of being denied basic civil and political rights would fall within the international mandate." (footnotes omitted)

The significance of that restriction is identified by the writer as follows[130]:

> "This phraseology was clearly adequate to comprise the traditional preoccupations of racial and religious minorities and would moreover bolster the condemnation of Soviet bloc politics through international law in two ways. First, the persecution standard was a known quantity, having already been employed to embrace Soviet bloc dissidents under the [International Refugee Organization] regime. It was understood that the concept of 'fear of persecution' was sufficiently open-ended to allow the West to continue to admit ideological dissidents to international protection. Moreover, the new Refugee Convention added significantly to the scope for ideologically influenced interpretations by allowing each contracting state to make its own eligibility determinations. Thus, for example, the United States and others have routinely assumed that all persons in Communist states are by definition in fear of persecution.
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> Second, the precise formulation of the persecution standard meant that refugee law could not readily be turned to the political advantage of the Soviet bloc. The refugee definition embraces only persons who have been disfranchised by their state on the basis of race, religion, nationality, membership of a particular social group, or political opinion, areas where East Bloc practice has historically been problematic. … By mandating protection for those whose civil and political rights are jeopardized, without at the same time protecting persons whose socioeconomic rights are at risk, the Convention continued the lopsided and politically biased human rights rationale for refugee law of the immediate post-war years.
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> In sum, the first main feature of modern international refugee law is its rejection of comprehensive humanitarian or human rights based assistance in favor of a more narrowly conceived focus." (footnotes omitted)

The learned author then refers to the limited significance of the Protocol[131]:

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130 Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129 at 149-150.

131 Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law", (1990) 31 *Harvard International Law Journal* 129 at 162.

> "Although a Protocol was adopted in 1967 which updated the Convention by removing the temporal and geographical limitations, the Protocol failed to review the substantive content of the definitions it embraced. Specifically, even after the 'universalization' effected by the 1967 Protocol, only persons whose migration is prompted by a fear of persecution in relation to civil and political rights come within the scope of Convention-based refugee protection. This means that most Third World refugees remain de facto excluded, as their flight is more often prompted by natural disaster, war, or broadly-based political and economic turmoil than by 'persecution,' at least as that term is understood in the European context." (footnotes omitted)

140 Fourthly, while Art 31(3)(b) of the Vienna Convention on the Law of Treaties recognises the significance of "subsequent practice in the application of the treaty", there must be at least a tacit or implicit agreement of the parties regarding its interpretation; yet in the case of the Convention definition "such an agreement is manifestly lacking"[132].

141 Fifthly, nevertheless it is generally accepted that the Convention definition, based on individual persecution, limits the humanitarian scope of the Convention. The definition does not encompass those fleeing generalised violence or internal turmoil and mass movements of persons fleeing civil war or other armed conflicts, military occupation, natural disasters and bad economic conditions are outside the Convention[133]. For example, it appears that in 1986 the number of civilians fleeing their countries of origin by reason of internal armed conflict exceeded the number of Convention refugees[134]. In *Applicant A v Minister for Immigration and Ethnic Affairs*, Dawson J observed[135]:

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132 Sztucki, "Who is a refugee? The Convention definition: universal or obsolete?", in Nicholson and Twomey (eds), *Refugee Rights and Realities*, (1999) 55 at 75.

133 Hailbronner, "*Non-Refoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?", (1986) 26 *Virginia Journal of International Law* 857 at 857-859.

134 Perluss and Hartman, "Temporary Refuge: Emergence of a Customary Norm", (1986) 26 *Virginia Journal of International Law* 551 at 558.

135 (1997) 190 CLR 225 at 248. These passages were adopted by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 at 385-386; [2000] 3 All ER 577 at 583-584.

> "No matter how devastating may be epidemic, natural disaster or famine, a person fleeing them is not a refugee within the terms of the Convention. …
>
> It would therefore be wrong to depart from the demands of language and context by invoking the humanitarian objectives of the Convention without appreciating the limits which the Convention itself places on the achievement of them."

142 Finally, the limited scope of the Convention (and thus of the imperative requirements imposed by s 36 and s 65 of the Act upon the appellant) has provoked a threefold response. First, the Office of the United Nations High Commissioner for Refugees has exercised a broader mandate than that drawn from the Convention, by the provision of protection and assistance to persons who are in "need of international protection" but who could not, on a case by case basis, be shown to have a well-founded fear of persecution on Convention grounds[136]. Secondly, there have been attempts which it is unnecessary to recount here to broaden the scope of the Convention itself by a Draft United Nations Convention on Territorial Asylum but these collapsed more than 20 years ago[137]. Thirdly, and perhaps most significantly, countries including Australia have admitted "refugees" under arrangements, not involving the issue of protection visas, but on special humanitarian grounds[138]. The Act authorises the taking of such steps. For example, s 37A and ss 91H-91L provide for temporary safe haven visas.

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136 Goodwin-Gill, "*Non-Refoulement* and the New Asylum Seekers", (1986) 26 *Virginia Journal of International Law* 897 at 899-901, 912-913; Hailbronner, "*Non-Refoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?", (1986) 26 *Virginia Journal of International Law* 857 at 868-870; Zieck, *UNHCR and Voluntary Repatriation of Refugees*, (1997) at 69-100, 452-454; Türk, "The role of UNHCR in the development of international refugee law", in Nicholson and Twomey (eds), *Refugee Rights and Realities*, (1999) 153 at 154-159.

137 Lentini, "The Definition of Refugee in International Law: Proposals for the Future", (1985) 5 *Boston College Third World Law Journal* 183 at 190-194; Weis, "The Draft United Nations Convention on Territorial Asylum", (1979) 50 *The British Year Book of International Law* 151; Türk, "The role of UNHCR in the development of international refugee law", in Nicholson and Twomey (eds), *Refugee Rights and Realities*, (1999) 153 at 163-164.

138 See Hailbronner, "*Non-Refoulement* and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking?", (1986) 26 *Virginia Journal of International Law* 857 at 886-887; van Selm-Thorburn, *Refugee Protection in Europe*, (1998) at 36-38.

143 The provisions in the Act respecting protection visas have to be construed in the context of the legislation as a whole. This shows that the provisions in question are not the only mechanism for giving effect to the calls of international humanitarianism. Further, the Convention was adopted against a particular background of customary international law concerning the consequences of delinquency in the exercise of State responsibility for the welfare of its own nationals and the acceptance by asylum States of responsibilities under their municipal laws towards those they accepted as refugees. The Convention was not designed to confer any general right of asylum upon classes or groups of persons suffering hardship and was deliberately confined in its scope. Whether there is a need for revision of the Convention and whether this should be promoted by the other branches of government is not a matter that arises for this Court. Its mandate is to construe and apply the Act. The interpretation of the protection visa provisions in the Act should not be strained to meet a judicially perceived mischief in the delayed development of customary or other international law.

"Civil war", "differential operation" and "motivation"

144 The criteria accepted and applied by the Full Court of "differential operation" and "motivation" stem from the reasoning of the House of Lords in *Adan*. In turn, that reasoning reflected the terms of the "issue" which had been framed for their Lordships in the terms which I have repeated earlier in these reasons. It asked whether a "state of civil war" could, in certain circumstances, "give rise to [a] well-founded fear of persecution" in the sense of the Convention definition. This assumed that conditions in Somalia answered the description of a state of civil war. The particular legal issue which on that assumption was posed to the House of Lords was the application of the Convention definition to an "individual claimant" who was "at no greater risk of such adverse treatment than others who are at risk in the civil war for reasons of their clan and sub-clan membership".

145 The result, with respect, was to invite the House of Lords to proceed upon an hypothesis flawed in several respects and thereby to diminish the strength and utility of conclusions reached on the journey for which this had been the point of departure. Certainly the material before the Tribunal in this matter and referred to earlier in these reasons indicated endemic deficiencies in Somali civil society which in recent years have been reflected by the absence of the functioning apparatus of a nation state. The widespread disorder which this has entailed is not aptly described as a "civil war" in the sense of that term described earlier in these reasons. To proceed as was done in *Adan* involves a risk that there will be

a blurring of the distinction between the persecutory acts which the asylum seeker must show and the broader circumstances leading to those acts[139].

146 It does not advance the inquiry called for by the Convention definition to ask of a particular individual whether that person was to be differentiated from other members of the general population who were all at risk so long as the "civil war" continued. Nor does it assist to require the administrative decision-maker (here, the Tribunal) to determine the "objectives", as a matter of "reality", of "the war". The objectives of the various States which were combatants in the First World War were the subject of propaganda at the time and remain a subject for debate between historians with varying degrees of access to primary sources. To oblige the appellant, his delegates and then the Tribunal to embark upon such issues during or shortly after the immediate currency of the events in question, presumably to reach conclusions of fact upon them, is a task not readily to be inferred as required by reason of the adoption by the Act of the Convention definition. The dynamics of communal violence, civil conflict and disorder may obscure the boundaries between combat, crime and persecution. The reasons for a particular conflict may be virtually unfathomable.

147 The notions of "civil war", "differential operation" and "object" or "motivation" of that "civil war" are distractions from applying the text of the Convention definition. In so far as *Adan* and the decision of the Full Court in *Abdi* and the present case expound or apply them, those decisions should not be followed.

148 As it happens, the Full Court went on to state the issue which, these distractions aside, had arisen for the decision of the Tribunal. The task of the Tribunal had been to determine[140]:

> "whether the particular experiences of the [respondent] were caused by persecution for Convention reasons, and in the light of those findings [to consider] whether at the time of the determination of the application there was a real chance (as that term has been explained in *Chan*) of the [respondent] being persecuted by reason of his membership of the Rahanwein clan if he were to return to Somalia".

The respondent had presented his case for an affirmative answer to that question on two bases. Only the first remained a live issue in the Full Court. This involved the complaint that the experiences of the respondent indicated a course of systematic conduct aimed at members of his clan or sub-clan for reasons of

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139 See Jackson, *Immigration: Law and Practice*, 2nd ed (1999) at 432.

140 (1999) 94 FCR 259 at 267 [28].

their membership thereof. The conclusion reached by the Tribunal was well restated by Katz J when his Honour said:

> "The Tribunal did accept that the Rahanwein clan and its Dabarre subclan were each a '*particular social group*' for relevant purposes. However, contrary to [the respondent's] case, the Tribunal concluded that it was not satisfied that the particular events to which he had referred had amounted to persecution of persons, including himself, for reasons of their membership of either the Rahanwein clan or its Dabarre subclan. It followed that the Tribunal was not, as a result of those particular events, satisfied that [the respondent] possessed a well-founded fear of being persecuted for reasons of membership of either of those particular social groups if he should then return to Somalia."

149 Other decision-makers may have viewed differently the significance of the particular events to which the respondent had referred, but that is not presently to the point. The application for judicial review alleged errors of law, being incorrect interpretations of the Convention definition or an incorrect application of it to the facts as found by the Tribunal. Those errors subsequently located by the Full Court in the Tribunal's reasons were not errors of law. The decision of Katz J should not have been disturbed.

150 In addition, it should be noted that the Tribunal was neither preoccupied with nor misled by the use of the terms "civil war" or "civil conflict". At its highest, it used those terms to denote the events in Somalia which formed the background to the present application – that "Somalia has been in a state of civil conflict since 1991". However, nothing legally was said to flow from this, nor did the Tribunal's use of the term distract it from what it immediately afterwards correctly set out to be its legal goal:

> "The most crucial questions before me in this decision are whether or not the [respondent's] fear *is a fear of persecution for a Convention reason* – for reasons of his membership of a particular clan or subclan, or his membership of a particular social group of well-educated persons, or membership of a family which was allied to and benefited under the former regime of President Siad Barre – *or whether any harm he faces is the consequence of civil unrest and not Convention based*." (emphasis added)

The references to "civil war" or "civil conflict" which followed in the Tribunal's reasoning were only to state, correctly in my opinion, that "the fact that a civil conflict is clan-based does not of itself make its victims the victims of persecution for reasons of membership of a particular social group". That is, they show a cognisance that such terms raise tangential issues and reinforce the conclusion that the Tribunal did not allow them to distract it from the task of applying the Convention definition. Once this is appreciated, it will be seen, as I

have observed above, that references to a "course of systematic conduct" arose only because of the manner in which the issue was framed by the respondent for the Tribunal's consideration and not because of some misunderstanding on the Tribunal's part imported by the terms "civil war" or "civil conflict".

State responsibility

151 The appellant, in oral argument in this Court, eschewed, or at least shrank from an embrace of, the proposition accepted in the German jurisprudence but rejected by the English Court of Appeal in *Adan*.

152 This is that the references in the Convention definition to "persecution" and to the "protection" of "the country of … nationality" of the refugee posit persecution by the State, organs or instrumentalities of the State, or by non-State agents whose activities are tolerated, encouraged or acquiesced in by the State; where there is no functioning State apparatus at all, as the material before the Tribunal indicated was the case in Somalia, the Convention definition has no operation.

153 In its substantive provisions, the Convention identifies the High Contracting Parties as "Contracting States", and (in Art 41) speaks of a "Federal State Party". However, in the Convention definition, the term "country" rather than "State" is used in respect of the nationality of refugees. The term "country" may have been employed to allow for the range of juridical entities including those found particularly in systems of imperial administration which were operating 50 years ago[141]. However that may be, the Convention definition speaks of "the protection" of the country of nationality; the general rule of customary international law is that matters of nationality are for States[142]. The protection spoken of in the Convention definition is not that of a "country" in an abstracted sense, divorced from the notion of a government with administrative organs[143]. Therefore, I would disagree with a proposition that the "protection of [the] country" of a refugee excludes the notion of protection by its government.

154 It should be noted that, in *Applicant A v Minister for Immigration and Ethnic Affairs*, Brennan CJ said[144]:

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141 cf *Attorney-General (Cth) v Tse Chu-Fai* (1998) 193 CLR 128 at 145 [38]-[39].

142 Brownlie, *Principles of Public International Law*, 5th ed (1998) at 385-386.

143 cf Brownlie, *Principles of Public International Law*, 5th ed (1998) at 70-77.

144 (1997) 190 CLR 225 at 233. See, for a contemporary analysis which appears to accept an "accountability" theory, Robinson, *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation*, (1953), published by the

(Footnote continues on next page)

> "The feared 'persecution' of which Art 1A(2) speaks exhibits certain qualities. The first of these qualities relates to the source of the persecution. A person ordinarily looks to 'the country of his nationality' for protection of his fundamental rights and freedoms but, if 'a well-founded fear of being persecuted' makes a person 'unwilling to avail himself of the protection of [the country of his nationality]', *that fear must be a fear of persecution by the country of the putative refugee's nationality or persecution which that country is unable or unwilling to prevent*." (emphasis added)

In *Adan*, the English Court of Appeal, when rejecting what it called the "accountability" theory adopted in Germany, treated this as opposed to the "protection" theory, adherence to which it attributed to Australia[145]. The Court then identified the "protection" theory as follows[146]:

> "Our courts recognise persecution by non-state agents for the purposes of the Convention in any case where the state is unwilling or unable to provide protection against it, *and indeed whether or not there exist competent or effective governmental or state authorities in the country in question*." (emphasis added)

It is not, with respect, immediately apparent that the theories of "protection" or "accountability" are necessarily in opposition. Nor, in any event, is it clear that the "protection" theory as stated in the opening portion of the above passage necessarily leads to acceptance of the proposition in the concluding portion.

155 Given the stand taken by the appellant in the present case, these questions of law are not to be resolved on this appeal. They invite full argument on a suitable occasion. However, it is appropriate to observe that the treatment of the situation in Somalia as a "civil war", where there are "differential" risks of harm and a need in applying the Convention definition to discern the "motive" or "object" of that struggle, is to be understood in a particular light. It may be seen

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Institute of Jewish Affairs for the World Jewish Congress, at 44-54, esp at 45. See also *Martinez-Romero v Immigration and Naturalization Service* 692 F 2d 595 (1982); *Darwich v Minister of Manpower and Immigration* [1979] 1 FC 365; van Selm-Thorburn, *Refugee Protection in Europe*, (1998) at 33-36; Hathaway, *The Law of Refugee Status*, (1991) at 101-105.

145 [1999] 3 WLR 1274 at 1288; [1999] 4 All ER 774 at 787.

146 [1999] 3 WLR 1274 at 1289; [1999] 4 All ER 774 at 788. See also the observations by Lord Hope of Craighead in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 at 383-384; [2000] 3 All ER 577 at 581-582.

as a consequence of the failure in the submissions presented in this and earlier cases to grapple with the first task, that of construing the terms "persecution" and "protection" in the Convention definition.

Conclusion

156 The appeal should be allowed, the orders of the Full Court set aside, and the orders made by Katz J restored. It was a term of the grant of special leave that the appellant pay the reasonable costs of the respondent in this Court and that there be no disturbance of the costs orders made in the Full Court of the Federal Court.

157 KIRBY J. Another appeal concerning refugee status is before this Court. Its chief point of importance concerns the entitlement to refugee status of a person fleeing a country involved in "civil war" or "civil conflict". For some time, in decisions of courts[147] and in academic literature[148], the operation of refugee law in such cases has been the subject of debate.

158 The legal issue in this appeal is whether the Full Court of the Federal Court of Australia[149] ("the Full Court") erred in detecting an error of law on the part of the Refugee Review Tribunal[150] ("the Tribunal") and therefore on the part of the primary judge (Katz J)[151], in failing to discern and correct such error. The suggested error lay in the test applied in determining the claim to refugee status. Specifically, was the Full Court wrong to hold that the Tribunal's decision was affected by error of law because the Tribunal had applied a test of "systematic persecution" as a requirement to establish the "persecution" which qualifies for protection? Did the Tribunal err in law in requiring Hussein Mohamed Haji Ibrahim ("Mr Haji Ibrahim"), an applicant for refugee status in Australia, to demonstrate a "differential impact" upon him of the persecution alleged, over and

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147 *Rajudeen v Minister of Employment and Immigration* (1984) 55 NR 129; *Salibian v Canada (Minister of Employment and Immigration)* [1990] 3 FC 250; *Vilvarajah v United Kingdom* (1991) 14 EHRR 248; *Immigration and Naturalization Service v Elias-Zacarias* 502 US 478 (1992); *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107; [1997] 2 All ER 723; *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11; *Adan v Secretary of State for the Home Department* [1999] 1 AC 293.

148 Hathaway, *The Law of Refugee Status* (1991) at 186-188; Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435; Henkel, "Who is a Refugee?", in *Asylum Law* (1995) 17; Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 75-76; von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status", (1997) 9 *International Journal of Refugee Law* 169.

149 *Ibrahim v Minister for Immigration and Multicultural Affairs* (1999) 94 FCR 259 ("the Full Court judgment").

150 *Ibrahim and Minister for Immigration and Multicultural Affairs* unreported, Refugee Review Tribunal, 8 July 1998 ("the Tribunal's decision").

151 *Ibrahim v Minister for Immigration and Multicultural Affairs* unreported, Federal Court of Australia, 15 October 1998, reasons of Katz J.

above the general risks of "clan warfare"[152] endemic to the conditions of civil war in Somalia, the "country of [Mr Haji Ibrahim's] former habitual residence"[153]?

The facts

159 Somalia is a country on the Horn of Africa facing the Indian Ocean and the Gulf of Aden. The northern portion of Somalia was formerly part of the British Empire and the southern portion of the Italian Empire. A united Somalia secured independence from colonial rule in 1960. The evidence in these proceedings shows that there was no relevant ethnic distinction between the various peoples of Somalia.

160 Before the relatively brief period of colonial rule, which commenced in the 1880s, Somalia had no permanent administrative hierarchy and no central governmental authority. Its nomadic pastoral economy was dominated by clans traditionally "segmented into component units or amalgamated into larger ones, depending on the prevailing conditions of war and peace amongst blood-related lineages"[154]. Coalitions between clans were regularly formed and disbanded. This was a feature of everyday life. The structures of clan authority were partly suppressed, but never extinguished, by the military forces of the colonial powers and their Somali successors.

161 In 1991 the President, Siad Barre, was overthrown and subsequently fled the country amidst increasing anarchy. This left Somalia to disintegrate into its clan and sub-clan units. Such was the country from which Mr Haji Ibrahim fled in 1995. He travelled to Australia on a false passport on 25 December 1997 and immediately claimed refugee status.

162 The delegate of the Minister for Immigration and Multicultural Affairs ("the Minister") refused Mr Haji Ibrahim a protection visa to which persons who are refugees within the Convention definition are entitled[155]. Mr Haji Ibrahim appealed to the Tribunal. In its decision, the Tribunal found him to be articulate

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152 For a brief history of clan warfare in East Africa see "Eastern Africa", in *The New Encyclopaedia Britannica*, 15th ed, vol 17 at 790-795.

153 Art 1A(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Convention"). The Convention is found in *Australia Treaty Series* (1954), No 5.

154 Samatar, *Somalia: A Nation in Turmoil* (1991) at 26. This document was an exhibit in the proceedings before the Tribunal.

155 See *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 250 where the applicable law is described.

and credible. Specifically, it accepted his account "of his and his clan's and sub-clan's experiences"[156]. On the basis of Mr Haji Ibrahim's evidence and independent testimony, the Tribunal found that Somalia "has been in a state of civil conflict since 1991"[157]. Based on a wealth of material placed before it, to the effect described above, the Tribunal concluded that Somalia was "without any centralised government or authority and ... the conflict [was] a result of power struggles between clans and subclans in a series of shifting allegiances"[158].

163 Mr Haji Ibrahim gave evidence before the Tribunal that he was a member of a clan group called Waqbare within the sub-clan Dabarre within the clan Rahanwein. One of his father's cousins had served as a minister in the Barre government. Mr Haji Ibrahim had been educated and trained as a high school teacher. His brother had also studied and had been sent to China under a scholarship arranged by the Minister for Education. Subsequently, the brother moved to Japan. According to Mr Haji Ibrahim, when the Barre government was overthrown, Somalia "degenerated into a situation where many clans formed armed militias and waged attacks on other clan groups"[159]. At that time Mr Haji Ibrahim and his wife had been living in Baidoa, a town west of the capital Mogadishu.

164 According to Mr Haji Ibrahim, in 1992 a group from a rival clan, opposed to the former government, entered Baidoa, destroying much property and killing many people. When this attack occurred, members of President Barre's family fled the town. Soon afterwards, Mr Haji Ibrahim's wife gave birth to a son. In search of safety, the family travelled south towards an area called Safarnooleys. On the way they were met by members of the Marehan clan. These persons took them prisoner and held them under guard in the area of a sorghum farm. The women, including Mr Haji Ibrahim's wife, were raped. Mr Haji Ibrahim suggested that a second child, later born to his wife, was a result of rape. Mr Haji Ibrahim, his wife and their son escaped from the farm under fire to continue their odyssey towards Safarnooleys where Mr Haji Ibrahim's brother was believed to be living.

165 According to independent information that appears to have been accepted both by the Tribunal and by Mr Haji Ibrahim, the Rahanwein clan (within which Mr Haji Ibrahim's family was positioned) were basically "sedentary peasants", living in southern Somalia. They were no match for "the violent depradations of

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156 Tribunal's decision at 14.

157 Tribunal's decision at 14.

158 Tribunal's decision at 14.

159 Tribunal's decision at 6.

the warring factions"[160]. They were "militarily weak" and subject to the "massive destruction", "looting of the grain reserves" and other violent conduct. These misfortunes were aggravated by conditions of famine and complicated for a short time by an ill-fated United Nations intervention which eventually withdrew, having failed to bring peace or order to Somalia[161].

166 When Mr Haji Ibrahim and his family eventually reached Safarnooleys they found that the area had been attacked by forces of another clan led by a rebel commander "General" Hussein Aideed. Aideed's soldiers had killed many of Mr Haji Ibrahim's clan, including his brother. Mr Haji Ibrahim contended that this had been done for reasons of genocide. However, that was one assertion made by Mr Haji Ibrahim which the Tribunal did not accept[162]. It is not now in contention.

167 Mr Haji Ibrahim stated that he had left his wife and children at Safarnooleys to travel to Dinsor in a region native to his sub-clan, the Dabarre. There an uncle cautioned him to leave the area urgently and to seek safety because many of his relatives had been killed by Aideed's forces. Mr Haji Ibrahim took this advice. Alone, he made his way further south. His journey was expedited by news that the Dabarre had been attacked by members of a sub-clan who were themselves, apparently, part of the Rahanwein. In December 1994, on the Somali Service of the BBC, Mr Haji Ibrahim heard that another uncle, Sultan Abdulmajid Sheik Hussein, had been killed by Aideed's forces. Having failed in efforts to contact his wife, Mr Haji Ibrahim travelled to Addis Ababa in Ethiopia in June 1995. There he communicated with his brother in Japan. The latter provided him with an airline ticket to travel to Thailand. It was from Thailand that Mr Haji Ibrahim eventually travelled to Australia.

The decisions of the Tribunal and Federal Court

168 The appeal before this Court comes from the Full Court[163]. It does not come from the primary judge or from the Tribunal. Being an appeal, it is

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160 Prunier, "Somalia: Civil War, Intervention and Withdrawal (1990-1995)", (1996) 15 *Refugee Survey Quarterly* 35 at 48-49.

161 This was the United Nations Operation in Somalia (UNOSOM) intervention. See Chopra, "Achilles' Heel in Somalia: Learning from a Conceptual Failure", (1996) 31 *Texas International Law Journal* 495; Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond", (1994) 15 *Michigan Journal of International Law* 519.

162 Tribunal's decision at 19.

163 Full Court judgment (1999) 94 FCR 259.

necessary that an error affecting the Full Court's orders should be demonstrated in the decision of that Court before this Court has the authority to disturb the Full Court's orders[164].

169 I am relieved of the need to set out, at any length, the reasons of the Tribunal or of the judges in the Federal Court. Most of the important passages are contained in the reasons of McHugh J[165] and of Gummow J[166]. However, in order to understand my point of departure from the majority in this Court, it is essential to appreciate the precise error which the Full Court considered amounted to a mistake of law on the part of the Tribunal which the primary judge had failed to discern. That error lay in the approach which the Tribunal felt it was constrained to take to a case, such as the present, involving a "civil conflict"[167], "civil unrest"[168] or "civil war"[169].

170 That this was the way the Tribunal reasoned appears clearly enough from its repeated use of those expressions, its references to pertinent authority about refugee status and civil wars and its obvious concern (shared by many earlier decisions of tribunals and courts) to differentiate amongst the victims of such misfortunes, that is between those who fall within the protected class and those who do not. That search led the Tribunal to say that "unsystematic warfare without more is not persecution"[170]. It also led to the description of the "reasons of" Mr Haji Ibrahim's fears as being "unsystematic warfare" resulting from the "instability, anarchy and murderous shiftings witnessed today in the Somali scene"[171].

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164 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 290-295.

165 Reasons of McHugh J at [49] where the reasons of the Tribunal are extracted.

166 Reasons of Gummow J at [122]-[128] and at [129] by reference to *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 87 FCR 280 at 287, 291.

167 Tribunal's decision at 16 referred to in (1999) 94 FCR 259 at 263 [14].

168 Tribunal's decision at 15.

169 Tribunal's decision at 16.

170 Tribunal's decision at 16 referred to in (1999) 94 FCR 259 at 263 [14].

171 Tribunal's decision at 18 referred to in (1999) 94 FCR 259 at 263 [15].

171 The Tribunal was led by this approach to its concluding comment that in Somalia "today's friend is tomorrow's enemy"[172]. It was in such a context that the Tribunal found it[173]:

> "difficult to identify any particular clan or sub-clan which can be regarded as being the victims of systematic persecution by any other group or groups, or as being subject to a differential impact which is over and above the ordinary risks of clan warfare. ...
>
> Members of all clans and subclans in this tragic turmoil are at risk and, while some may be more vulnerable than others, none of the material before me points to circumstances which would convert the conflict into persecution. I am unable to discern anything in the experiences of the Applicant, or his clan, the Rahanwein, or his sub-clan, the Dabarre, which could be regarded as part of a course of systematic conduct aimed at members of either group, including the Applicant, for reasons of their membership of the group."

172 If this conclusion were simply a finding of fact, it would be immune from judicial review in the Federal Court. That Court is limited to affording review upon grounds specified by s 476 of the *Migration Act* 1958 (Cth) ("the Act")[174]. The Full Court recognised this[175]. It confined its analysis to suggested errors of law. Relevantly, these concerned the alleged misinterpretation by the Tribunal of the applicable law by which to determine entitlement to refugee protection on the part of a person in the position of Mr Haji Ibrahim[176].

173 The basic misinterpretation which the Full Court found was the failure of the Tribunal to consider "the motivation of the civil war giving rise to the 'ordinary risks of clan warfare'"[177]. This phrase has been criticised by other members of this Court. However, it is important to read it (as we must also read the reasons of the Tribunal) in context. That context was the consideration which led the Full Court to identify the "reason" for the "fear" on the part of Mr Haji Ibrahim. In the context, I do not take the Full Court to have been suggesting that

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172 Tribunal's decision at 18.

173 Tribunal's decision at 18-19.

174 Set out in the reasons of Callinan J at [216].

175 (1999) 94 FCR 259 at 264 [16].

176 The Act, s 476(1)(e).

177 (1999) 94 FCR 259 at 264 [18].

the Tribunal was obliged to undertake an authoritative historical or political analysis of the Somali civil war. But where the Tribunal had before it an applicant who contended a "well-founded fear of being persecuted for reasons of ... membership of a particular social group" the critical point to be decided was the "reasons of" the applicant's fear and whether those reasons were "well-founded" and grounded in persecution.

174 That Mr Haji Ibrahim was a member of a "particular social group" was accepted by the Tribunal[178]. That he had a subjective "fear" was not disputed[179]. In these circumstances, it was correct for the Full Court to concentrate its attention on the Tribunal's treatment of the "reasons of" such fear. If it were merely "fear" of being returned to a country in the midst of civil war, that would not be sufficient to attract the Convention definition to Mr Haji Ibrahim's case. In this way it became essential to analyse the conduct said to amount to "persecution" and then to consider whether, if such conduct might constitute "persecution", it was "for reasons of" Mr Haji Ibrahim's membership of a particular social group. In referring to the "motivation behind the 'clan based warfare'", the Full Court was, in my view, doing no more than paraphrasing the definitional reference to the "reasons of" the alleged "persecution".

175 In essence, the error of law which the Full Court discerned was the adoption by the Tribunal of an over-broad exclusion from potential coverage as "refugees" of persons, like the present respondent, caught up in "civil war", "civil conflict" or "civil unrest", as the Tribunal successively described the conditions in Somalia at the time Mr Haji Ibrahim left that country and up to the time of its decision. Correctly, in my view, the Full Court concluded that the facts should be reassessed by the Tribunal, excluding from its evaluation this barrier erected because of the existence of "civil unrest" reflected in the requirement, imposed on Mr Haji Ibrahim, to show "systematic persecution" of members of his clan, the Rahanwein.

176 In order to make this point clear, it is necessary to understand the background to the decision of the Tribunal concerning the treatment of applicants for refugee status who have fled from civil war or civil conflict. Only when this background is appreciated, as reflected in the reasons of the Tribunal, can the error of law identified by the Full Court be fully understood and evaluated by this Court.

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178 Tribunal's decision at 14.

179 Tribunal's decision at 14.

Refugees and civil war

177 There is no mention, either in the applicable international law[180] or in Australian municipal law giving it effect[181], justifying differential treatment of persons claiming refugee status who may be viewed as having fled from a civil war or civil conflict. Generically, a "refugee" may be thought of, in lay terms, "as a person compelled to flee his [or her] State of origin or residence due to political troubles, persecution, famine or natural disaster"[182]. A "refugee" is thus commonly "perceived as an involuntary migrant, a victim of circumstances which force him [or her] to seek sanctuary in a foreign country"[183]. From ancient times, nations have opened their doors to persons who would now be described as "refugees". However, the provision of legal protection to refugees by international law, and thereafter by municipal law, is a development of the twentieth century. The applicable law arose "[o]ut of the struggle to reconcile traditional liberal principles and concern for genuine human suffering with dramatically altered political and economic situations"[184] within the context of national immigration policies[185].

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180 The Convention referred to previously. The Convention was amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 ("the Protocol"). This is found in *Australia Treaty Series* (1973), No 37.

181 The Act, s 4(1) inserted by *Migration Reform Act* 1992 (Cth). See also the Act, ss 36, 65 and the Migration Regulations (SR No 268 of 1994), Sched 2, Subclass 866, Items 111 and 221 described in the reasons of Gummow J at [106]-[107].

182 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 348; cf Hathaway, *The Law of Refugee Status* (1991) at 94.

183 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 348, citing *The Shorter Oxford English Dictionary*, 3rd ed (rev) (1977); cf *Macquarie Encyclopedic Dictionary* (1990) at 798 which defines refugee as "one who flees for refuge or safety, esp to a foreign country, as in time of political upheaval, war, etc".

184 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 348-349.

185 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 348.

178 Amongst the early international responses to the problem of refugees was the creation, in 1938, of the Intergovernmental Committee on Refugees[186]. To a large extent, that body responded to involuntary emigration from Germany and Austria of persons suffering Nazi persecution[187]. An enlargement, in 1943, of the definition of those qualifying for refugee status afforded protection to Spanish republican refugees who had fled the violent conclusion of the Spanish civil war. That civil war was fresh in mind when the present international regime was negotiated and adopted. It therefore seems unlikely that it was intended that such regime would exclude refugees from national civil wars and civil conflicts who otherwise qualified as "refugees" for the purposes of the Convention definition. Had such an exclusion been intended it would have been stated.

179 After an interregnum during which the United Nations Relief and Rehabilitation Administration assumed increasing responsibility for the plight of "post-war political refugees"[188], the International Refugee Organisation was established in 1946 to bring the protection of refugees under the aegis of the United Nations. Eventually, in July 1951, the Convention relating to the Status of Refugees was signed at Geneva. In its terms, the Convention covered only those persons who had become refugees "[a]s a result of events occurring before 1 January 1951". However, on 31 January 1967 the Protocol relating to the Status of Refugees omitted this limitation[189]. Moreover, whereas the Convention in its original form had permitted contracting states to extend the ambit of the Convention to events occurring beyond Europe, following the Protocol the Convention was to be applied "without any geographic limitation"[190]. What had begun, substantially, as a response to the European refugee crisis following the Second World War thus became an instrument of general international application.

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186 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 370-372. The first High Commissioner for Refugees was appointed in 1921: Goodwin-Gill, "The International Protection of Refugees: What Future?", (2000) 12 *International Journal of Refugee Law* 1 at 1.

187 Resolution of the Intergovernmental Committee on Refugees (14 July 1938) cited in Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 370.

188 United Nations Relief and Rehabilitation Administration, Outgoing Cable No 1675 (9 February 1946) cited in Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 373.

189 The Protocol, Art 1.2.

190 The Protocol, Art 1.3.

180 While resolving to expand the geographic application of refugee protection, the international community confined the ambit of international law to some only of the persons who might in general parlance be described as "refugees". Two concepts in the Convention were used to stem what was otherwise seen as potentially amounting to an uncontrollable flood of economic migration from disadvantaged countries dislocated by civil war and civil conflict. The two control mechanisms were, first, the requirement of proof of a "well-founded fear of being persecuted" and, secondly, the requirement of proof that such persecution was "for reasons of" identified, specific and limited personal and group *stigmata* ("race, religion, nationality, membership of a particular social group or political opinion"). Although the temporal and geographical ambit of the applicable international law provisions was expanded by the Protocol, the control mechanisms have remained unchanged[191].

181 It follows that it is necessary, but insufficient, to qualify as a "refugee" within the Convention definition, to show that a "well-founded fear" lies behind an applicant's flight from the country of his or her nationality. That fear must be of a particular kind and for particular reasons. It is not sufficient to show a fear of being discriminated against or of suffering loss of basic human rights if the applicant were returned to the country of his or her nationality. Nor is it sufficient, as such, to show a fear of being killed or maimed in a civil war or civil conflict in that country. Neither is it sufficient to show fear for other reasons outside the Convention definition, such as that caused by economic disasters or natural catastrophes[192]. People who flee in the face of such misfortunes may think of themselves as "refugees". They may be so described by many of those who attempt to cater to their needs. They may occasionally even enjoy limited rights of protection afforded by municipal law[193]. But such cases fall outside the

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191 cf reasons of Gummow J at [143].

192 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 348.

193 *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 303, 312; cf the Act, ss 37A and 91H-91L and the provision of protection on special humanitarian grounds explained in the reasons of Gummow J at [142]. Refugees may sometimes enjoy rights to protection under other international instruments, eg the Geneva Conventions for the Protection of War Victims (1949): see *Australia Treaty Series* (1958), No 21. See United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), par 164.

special and particular protection given by the applicable international law about refugees which, in Australia, is given domestic effect by municipal law[194].

182 As the republican refugees who fled Spain after the civil war found, flight from conditions of civil war is not, as such, regarded as a disqualification from protection under international law. Nevertheless, the large number of civil wars and civil conflicts which have occasioned mass emigration of persons claiming refugee status has led to attempts to confine the protection of the Convention, as amended by the Protocol, so as to exclude most such persons. By 1995 such persons reportedly constituted the majority of asylum seekers claiming refugee status in Europe[195]. A desire to confine the legal obligations, assumed pursuant to the Convention, led to various attempts to persuade courts to confine the broad language used in the Convention so as to remove from its protection most victims of civil war and internal armed conflict.

183 The Handbook issued by the United Nations High Commissioner for Refugees lent a measure of support to this endeavour. It states[196]:

> "Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol".

184 This view was picked up in the decisions of the German and French courts[197]. It has occasionally found reflection in decisions in England[198]. It has

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194 The Act, s 4(1). The operation of the Act is explained in the reasons of Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231.

195 Henkel, "Who is a Refugee?", in *Asylum Law* (1995) 17 at 17.

196 United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status* (1992), par 164; cf Shah, "Rewriting the Refugee Convention: The *Adan* Case in the House of Lords", (1998) 12 *Immigration and Nationality Law and Practice* 100 at 103.

197 For German decisions see Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435 at 439-441; reasons of Gummow J at [117], explained by reference to the discussion of those decisions in the English Court of Appeal in *R v Secretary of State for the Home Department; Ex parte Adan* [1999] 3 WLR 1274 at 1288; [1999] 4 All ER 774 at 787. For French decisions, which appear to be similar to those in Germany, see Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 76.

198 *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107 at 1118 per Simon Brown LJ; [1997] 2 All ER 723 at 733; cf Shah, "Rewriting the Refugee

(Footnote continues on next page)

attracted a special sub-classification in guidelines adopted under statutory powers in Canada[199]. The reasons for concern on the part of such decision-makers were clear enough. The history of the Convention and of the Protocol certainly suggests a general intention to confine protection to limited categories of persons and to limited numbers[200]. Civil wars typically involve large numbers of conflicting parties who oppress each other. Were those who flee such conflicts automatically entitled to legal protection and "refugee" status, it was feared that such protection might extend, potentially, to all persons in every faction who flee a civil war or civil conflict in order to escape the violence. Such an approach might potentially expand the protection under the Convention and the Protocol far beyond the confined classes and numbers originally intended. These considerations, and the social realities in which courts and refugee tribunals function, made it understandable that attempts would be made to place those fleeing from civil wars and civil conflicts into a separate category, substantially beyond the pale of protection under the Convention as amended by the Protocol.

185 Although the foregoing legal developments were probably inevitable, they cannot be sustained by proper legal analysis. Moreover, they were unnecessary. The control mechanisms already provided by the Convention afforded ample protection from such Domesday fears[201]. Because there is no special exclusion from protection of persons fleeing civil war or civil conflict, commentators and courts in other countries gradually came to realise that attention to the existing control mechanisms would not only be more legitimate in terms of legal analysis but would also prove sufficiently protective against inadmissible demands of persons falling outside the ambit of the Convention.

186 This point was made in Canada by the Federal Court of Appeal in its influential decision in *Salibian v Canada (Minister of Employment and*

Convention: The *Adan* Case in the House of Lords", (1998) 12 *Immigration and Nationality Law and Practice* 100 at 102.

199 Canada, Immigration and Refugee Board, *Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations* (1996) II.1.

200 cf Grahl-Madsen, *The Status of Refugees in International Law* (1966), vol 1 at 213; cf Hathaway, *The Law of Refugee Status* (1991) at 97.

201 Henkel, "Who is a Refugee?", in *Asylum Law* (1995) 17 at 19.

Immigration)[202]. There, Décary JA, giving the reasons of that Court, concluded[203]:

> "a situation of civil war in a given country is not an obstacle to a claim provided the fear felt is not that felt indiscriminately by all citizens as a consequence of the civil war, but that felt by the applicant himself, by a group with which he is associated, or, even, by all citizens on account of a risk of persecution based on one of the reasons stated in the definition".

187 In the House of Lords in *Adan v Secretary of State for the Home Department*[204], Lord Lloyd of Berwick approved this passage. The fact of involvement in, or flight from, a civil war or civil conflict is no reason to deprive those concerned of any entitlements they may have to refugee status by international and municipal law. Involvement in a civil war or civil conflict is neither qualification nor disqualification. It may constitute part of the background facts. But it does not relieve the decision-maker of the duty to consider the elements of the Convention definition, as those words apply to the particular case.

188 It is the Convention definition itself that obliges the decision-maker, when faced with a background of civil war or civil conflict, to address the "reasons of" the fear deposed to by the applicant for refugee status. This necessity takes the decision-maker beyond the threshold fact that the claimant for such status was caught up in a civil war or civil conflict. The decision-maker must scrutinise the "reasons of" the fear in the particular case. This must be done against the criteria of the two control mechanisms as I have described them: first, are those reasons capable of being classified as "persecution"? Secondly, are they for "reasons of" one of the specified grounds, or are they no more than fear of return to the dangers of a civil war or civil conflict as such?

189 It is this differentiation that necessitates consideration of the "reasons" or "motivation" for the conduct suffered by an applicant for refugee status in the context of a civil war or civil conflict. Such "motivation" is not examined (nor do I take the Full Court to have suggested that it should be) in order to write an abridged history of the causes and course of the civil war or civil conflict in

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202 [1990] 3 FC 250. For earlier decisions in Canada and elsewhere excluding refugee status for persons in flight from civil wars in the Lebanon, Ethiopia and Chile, see Hathaway, *The Law of Refugee Status* (1991) at 186-188; cf von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status", (1997) 9 *International Journal of Refugee Law* 169 at 180.

203 [1990] 3 FC 250 at 258.

204 [1999] 1 AC 293 at 309.

question. Instead, the examination is performed to prevent the mind of the decision-maker from being diverted by an illegitimate conviction that, somehow, involvement in a civil war or like situation acts as a disqualification, taking a claimant for refugee status outside the scope of the protection of refugee law.

The approach of the Full Court was correct

190 On this point therefore, with respect to those of a different view, I believe that the Full Court was correct. In reaching this conclusion I do not take into account the first of the considerations which the Full Court mentioned for concluding that the Tribunal had failed to address its attention of the law required to the reasons for the capture of Mr Haji Ibrahim and his family[205]. Although I agree with the Full Court's analysis, it is possible that, procedurally, the point was not open because it had not been placed in contention by a ground of appeal that was before the primary judge[206].

191 I can safely adopt this course because the second ground of error relied upon by the Full Court was certainly argued before the primary judge. It is sufficient to sustain that Court's orders. The second ground concerns the Tribunal's reference to the need to see the experiences inflicted on Mr Haji Ibrahim as "part of a course of systematic conduct" before it could be classified by reference to his "membership of a particular social group"[207]. In their context, the repeated references to "systematic conduct" and "systematic persecution" were obviously meant by the Tribunal to be read in contrast to the "unsystematic warfare" and "civil unrest" involved in the civil war of the Somali clans and sub-clans described elsewhere in the Tribunal's reasons. But just as there is no reference in the Convention definition to "civil war" or "civil conflict", nor is there any reference to a "systematic" course of conduct.

192 The notion of systematic conduct could only be incorporated in the Convention definition if it is taken, in some way, to be inherent in one of the words of that definition. The suggestion is that it is somehow involved in the idea of "persecution". A measure of support for that suggestion may be found in

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205 Full Court judgment (1999) 94 FCR 259 at 264 [19].

206 Referred to in the reasons of Gummow J at [127].

207 Tribunal's decision at 16 referred to in (1999) 94 FCR 259 at 263 [14].

the reasons of McHugh J in *Chan v Minister for Immigration and Ethnic Affairs*[208]. There, his Honour said[209]:

> "The notion of persecution involves selective harassment. … As long as the person is threatened with harm and that harm can be seen as part of a course of *systematic* conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is 'being persecuted' for the purposes of the Convention."

His Honour went on in terms that indicate that the degree of "system" in the conduct envisaged might be highly attenuated[210]:

> "The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution".

In his reasons in this appeal, McHugh J has qualified these statements, when read literally[211].

193 A random, isolated act of violence suffered by Mr Haji Ibrahim, or a group of which he was a member, would not, alone, qualify as "persecution". On the other hand, it would be a mistake to import into the notion of "persecution", as an essential ingredient of that term, the order and system that has frequently been present in modern examples of "persecution" in Europe. Correctly, the Full Court differentiated between the ways in which the word "systematic" is used as a matter of ordinary English expression[212]. At least so far as it implies regular or methodical oppression of the victim, the notion of "systematic" conduct is a possible, but not a necessary, element in the idea of "persecution". In effect, to impose that criterion as an element of "persecution" in the context of Somalia would be to impose upon the whole world a Eurocentric view about

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208 (1989) 169 CLR 379.

209 (1989) 169 CLR 379 at 429-430 (emphasis added). This was pointed out in *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11 at 19-20.

210 (1989) 169 CLR 379 at 430.

211 Reasons of McHugh J at [60], [95].

212 Full Court judgment (1999) 94 FCR 259 at 266 [25]. One sense involves methodical application of premeditated intent. The other sense involves no more than habitual conduct.

"persecution" as that notion is used in the Convention, which is now of universal application[213].

194 The adoption of Eurocentric ideas of persecution might have been an arguable stance to take in 1951. However, following the coming into force of the Protocol of 1967 such an approach is, in my view, no longer legally tenable. The Convention must be interpreted having regard to its universal operation. It is intended to apply to the large variety of situations which, anywhere in the world, respond to its provisions. The controls lie in those provisions. They do not lie in supposed additional rules excluding the victims of civil wars and civil conflict or those classified as having been subjected to "unsystematic" oppression. Conduct may be "unsystematic" when compared to the generally methodical persecution and elimination of Jews and others in Nazi Germany. Yet it may still amount to "persecution" in the context of the lives of the victims in a country such as Somalia.

195 Clearly, the Tribunal considered that the unsystematic features of the "civil war", "civil conflict" and "civil unrest" in Somalia, as such, made it impossible to categorise what happened there to Mr Haji Ibrahim and his family as "persecution" for Convention reasons. The Full Court regarded the Tribunal's approach, in that regard, as involving an error of law. So do I. It diverted the attention of the Tribunal from precisely what had happened to Mr Haji Ibrahim (and his family) and whether, in the Somali context, that constituted "persecution" for reasons of Mr Haji Ibrahim's membership of a particular social group, namely his clan and sub-clan. Because the Tribunal was diverted from the real question that it was obliged as a matter of law to decide, the conclusion at which it arrived was flawed by error of law. This was an unsurprising result. If one takes a flawed approach one must normally expect to arrive at an incorrect conclusion[214]. In my opinion the Full Court was correct when it decided[215]:

> "The Tribunal should have determined whether the particular experiences of [Mr Haji Ibrahim] were caused by persecution for Convention reasons, and in the light of those findings it should have considered whether at the time of the determination of the application there was a real chance ... of [Mr Haji Ibrahim] being persecuted by reason of his membership of the Rahanwein clan if he were to return to Somalia."

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213 Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435.

214 cf *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348 at 1366 [77], 1368 [87].

215 Full Court judgment (1999) 94 FCR 259 at 267 [28].

"Persecution" and "reasons" construed in a Somali context

196 Each case of the present kind must be determined by the primary decision-maker and the Tribunal on its own facts[216]. The task of the Federal Court in reviewing the Tribunal is a limited one. It is not concerned with reviewing the decision on the merits[217]. Its only concern, relevantly, is to correct an error of law. Neither the Federal Court nor this Court would be warranted to comb through the Tribunal's reasons in a pernickety way, unduly vigilant to discover some legal error[218]. On the other hand, the Tribunal's reasons represent the only clue which the applicant for refugee status, the Minister and the Australian public have for the making of a decision on a point of considerable importance. A wrong decision may, in some cases, have serious or even fatal consequences[219].

197 The Convention, which is rendered part of Australian law, must be construed according to its language but taking into account its international application to the wide variety of refugee situations that can arise throughout the world[220]. Only a proportion of "refugees", generically described, fall within the protection of the Convention as amended by the Protocol. The language of those instruments falls short of affording protection to every victim of discrimination and abuse of human rights[221]. By the same token discrimination or abuse of human rights can often shade into persecution[222].

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216 cf reasons of Callinan J at [227].

217 *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341, 356; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

218 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 291.

219 *Immigration and Naturalization Service v Cardoza-Fonseca* 480 US 421 at 449-450 (1987); *Immigration and Naturalization Service v Elias-Zacarias* 502 US 478 at 488 (1992) per Stevens J.

220 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 251-256, 292-296.

221 *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 660 per Lord Millett.

222 Informed observers have noted that this interpretation is in line with modern views on international law, whereas the restrictive interpretation, with its focus on the original intent of the drafters, reflects doctrines that have been largely superseded

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198 I do not agree that, because of the historical context in which it was originally drafted, the Convention should be narrowly interpreted to meet only refugee problems of the kind and number envisaged at the time the Convention was adopted in 1951[223]. The ambit of the Convention has been significantly expanded by the Protocol. The Preamble to the Convention makes specific reference to the Charter of the United Nations and the Universal Declaration of Human Rights, each of which "have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination"[224]. This Court should not narrowly confine the operation of the Convention language. That language, unusually for its time, focussed attention on personalised criteria concerning individuals[225]. These criteria enlisted international attention precisely because the personal safety and basic human rights of individuals were seriously jeopardised. Deliberately, refugee status under the Convention, as amended by the Protocol, is "an extremely malleable legal concept which can take on different meanings as required by the nature and scope of the dilemma prompting involuntary migration"[226]. It is a serious mistake to confine the operation of the Convention definition of "refugee" by reference to supposed exclusions of those who flee from civil war or civil conflict[227]. It is an even more serious mistake to

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by other developments in international law: see Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435 at 448, 451. In this respect the interpretation of international treaties follows a course similar to that observed in many countries in the interpretation of national constitutions. See also *Eastman v The Queen* (2000) 74 ALJR 915 at 957-959 [240]-[245]; 172 ALR 39 at 96-98; cf (2000) 74 ALJR 915 at 938-941 [145]-[158] per McHugh J; 172 ALR 39 at 69-74.

223 Goodwin-Gill, "Judicial Reasoning and 'Social Group' after *Islam* and *Shah*", (1999) 11 *International Journal of Refugee Law* 537 at 541-542; Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435 at 447.

224 This point was made by Brennan CJ in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 231. See also *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* (2000) 74 ALJR 775 at 782-783 [46]; 170 ALR 553 at 563-564 referring to *R v Immigration Appeal Tribunal; Ex parte Shah* [1997] Imm AR 145 at 153 and [1999] 2 AC 629 at 646.

225 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 379.

226 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 380.

227 Toal, "Applications for Political Asylum by Somali Nationals and the 1951 Convention relating to the Status of Refugees: The Decision of the House of Lords

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impose upon the Convention definition of "refugee" Eurocentric ideas which are not, and never have been, a necessary part of the operation of the Convention[228].

199 Given its contemporary ambit, the Convention is not limited to providing protection to persons similar to the republican refugees in the aftermath of the Spanish civil war. The civil conflict in Somalia may in some ways be more confusing and apparently more irrational to the Western mind, have even more ancient origins and be less "systematic" in its execution than the Spanish conflict and others in Europe before and since. But this does not matter if, in the particular case, the applicant for refugee status establishes "persecution" affecting him or her, or a group of which he or she is a member, for Convention reasons.

200 The Tribunal, in all material respects, accepted that Mr Haji Ibrahim was a credible witness. It was accepted that his clan and sub-clan were, for the purposes of the Convention definition, a "particular social group"[229]. That group preceded and existed independently of the suggested persecution of its members of which Mr Haji Ibrahim complained[230]. The kind of conduct directed at Mr Haji Ibrahim was such that it might qualify as "persecution". But it still had to run the gauntlet of the two control mechanisms which limited the protection afforded by the Convention and the Australian law which gives it local operation. These control mechanisms were not applied to the facts of Mr Haji Ibrahim's application as the law requires. This was because the Tribunal became diverted by the supposed category of civil war and civil conflict and by the supposed necessity of "systematic conduct" as a prerequisite to "persecution". Such a category does not exist, as such, as a class excluded from the protection of the Convention and the Act. Such "systematic conduct" is not a requirement of the Act. It was a mistake of law to apply these two supposed qualifications to shackle the operation of the Convention in Australian law.

201 The Tribunal was therefore rightly required by the Full Court to reconsider the application to the facts, as found, of the Convention definition; but

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in *SSHD v Adan*", (1998) 12 *Immigration and Nationality Law and Practice* 94 at 94-95.

228 Kälin, "Refugees and Civil Wars: Only a Matter of Interpretation?", (1991) 3 *International Journal of Refugee Law* 435 at 445-446.

229 A similar conclusion was accepted by Katz J.

230 Hathaway, "The Evolution of Refugee Status in International Law: 1920-1950", (1984) 33 *International and Comparative Law Quarterly* 348 at 380; Hathaway, *The Law of Refugee Status* (1991) at 92; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 242 per Dawson J cited in *R v Immigration Appeal Tribunal; Ex parte Shah* [1999] 2 AC 629 at 662.

freed from the erroneous presuppositions. The outcome in the Tribunal might eventually be the same. But it would then be a decision freed from a significant legal error in the understanding of the Convention as it applies to refugees who happen to be fleeing from a civil war or civil conflict. As Professor Goodwin-Gill observes[231]:

> "Too often, the existence of civil conflict is perceived by decision-makers as giving rise to situations of general insecurity that somehow exclude the possibility of persecution. A closer look at the background to the conflict, however, and the ways in which it is fought, will often establish a link to the Convention."

Order

202 The appeal should be dismissed[232].

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231 Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996) at 75 (footnotes omitted). This approach is not only that now adopted in relation to refugees from civil war and civil conflict in Canada following *Salibian v Canada (Minister of Employment and Immigration)* [1990] 3 FC 250. It also appears to be the approach of the United States agency charged with such decisions: see von Sternberg, "The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status", (1997) 9 *International Journal of Refugee Law* 169 at 178-180 citing *Matter of H*, Interim Decision 3276 (United States Board of Immigration Appeals, 1996).

232 It was a term of the grant of special leave that the Minister pay the respondent's costs in this Court. See the reasons of Gummow J at [156].

203 HAYNE J. I agree with Gummow J that, for the reasons he gives, the appeal to this Court should be allowed and the consequential orders which he proposes should be made.

204 The question for the Refugee Review Tribunal was whether the decision of a delegate to the Minister to refuse to grant a protection visa should be affirmed, varied or set aside[233]. Because that question depended upon whether the "applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"[234] its answer depended upon the text of the Convention and the Protocol. Judicial and academic discussion of the effect of the text of the Convention and the Protocol, either generally or in its application to particular cases, may be very informative. It may illuminate what may otherwise have been obscure about how it should apply in the instant case. Of course, judicial decisions in this area must be given their proper precedential status and effect. But in the end, it is the text of the Convention and the Protocol which must be applied, and (subject to the requirements of precedent) commentaries upon that text must not be accorded a status which denies the primacy of the instruments themselves. Especially is that so given that prior judicial decisions or other discussions about the operation of the Convention and the Protocol must be understood in their proper context. Particular decisions necessarily focus upon the application to the case at hand of the criteria adopted in the instruments to define those to whom Australia has protection obligations.

205 Expressions like "civil war" or "differential operation" are not used in the Convention or the Protocol. It would obviously be wrong to attempt to supplant the Convention criteria with criteria derived from some conception of civil war as an apt description of events in the country of nationality of the applicant for a protection visa. And although the expression "differential operation" may evoke some elements of the concept of "persecution", it too cannot supplant the criteria adopted in the Convention. Terms like "civil war" and "differential operation" may be useful in explaining why, in a particular set of circumstances, a conclusion is reached about whether a person has a well-founded fear of persecution for a Convention reason but such expressions cannot, and must not, be taken to state any general principle the content of which differs from what is to be found in the Convention and the Protocol.

206 Not only may the use of such terms serve to distract attention from the relevant questions, their use will often carry with them unintended and inapposite shades of meaning. Thus, in the present case, the use of the expression "civil

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233 *Migration Act* 1958 (Cth), s 415.

234 *Migration Act*, s 36(2).

war" to describe the course of events in Somalia may suggest a degree of coherent organisation of groups, each of which was unified in pursuit of some identified political objective relating to the government of a nation state ordinarily organised along lines similar to those of other long-established nation states. But, as the reasons of Gummow J reveal, that is an inaccurate and incomplete description of events in Somalia.

207 The use of a term like "civil war" in the present context is, for the reasons just stated, either inaccurate or apt to mislead. But there is another, equally fundamental, objection to introducing such a concept into the debate in the present case. Its use presupposes that the Refugee Review Tribunal can, and should, conduct some analysis of political and social history of the country from which the applicant for protection has come for the purpose of classifying those events in some way and then deriving conclusions from that classification. No satisfactory analysis of that kind can be made by a tribunal in the position of the Refugee Review Tribunal. Its making would require information which the Tribunal does not have and cannot obtain. And even if all the relevant information were available, that information would require analysis taking time and skills which the Tribunal does not have. Further, it must be recognised that the analysis of social and political behaviour is necessarily imperfect, its results inevitably are open to reasonable dispute, and all too often, because of the nature of the subject matter being examined, an analysis will reveal little or no objective fact, but much about the subjective views of the analyst.

208 The Tribunal was not persuaded that the respondent in this matter had a well-founded fear of persecution. At first instance, Katz J rightly rejected the contention that the Tribunal's conclusion was attended by relevant error. It is, then, as Gummow J points out, not necessary to consider in this case the more general questions presented by the analysis referred to by the English Court of Appeal in *R v Secretary of State for the Home Department; Ex parte Adan*[235], which seeks to distinguish between an "accountability" and a "protection" theory of interpretation of the Convention[236].

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235 [1999] 3 WLR 1274; [1999] 4 All ER 774.

236 [1999] 3 WLR 1274 at 1288-1289; [1999] 4 All ER 774 at 787-788.

209 CALLINAN J. This is another case in which the Court has to determine whether an application for a protection visa was within Art 1A(2) of the Convention relating to the Status of Refugees[237] which applies in this country pursuant to s 36(2)[238] of the *Migration Act* 1958 (Cth) ("the Act") and Subclass 866 of Sched 2[239] of the Migration Regulations 1994 (Cth). The article relevantly provides that a person is a refugee 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".

Facts and Previous Proceedings

210 The respondent is a Somali national born on 1 July 1960. He is a member of the Rahanwein clan and the Dabarre subclan. He left Somalia in 1995 and travelled to Thailand where he lived until coming to Australia on 25 December 1997. Other matters relevant to his personal circumstances are set out in the judgment of Gummow J. He applied for a protection visa on 7 January 1998.

211 After rejection of that application by a delegate of the appellant, the respondent sought a review of the delegate's decision in the Refugee Review Tribunal. The Tribunal affirmed the delegate's decision on 8 July 1998.

212 The respondent then sought to have the Tribunal's decision reviewed by the Federal Court. Katz J who heard the respondent's application dismissed it on

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237 Geneva, 28 July 1951. As amended by the Protocol relating to the Status of Refugees, New York, 31 January 1967.

238 "**36 Protection visas**

(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol."

239 "**Subclass 866 Protection**

…

866.22 Criteria to be satisfied at time of decision

866.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention."

15 October 1998. The respondent then appealed to the Full Court of the Federal Court (O'Connor, Tamberlin and Mansfield JJ) which upheld the appeal on 9 April 1999. It is against this decision that the appellant appeals to this Court on the following grounds:

"1. The Full Court of the Federal Court erred –

(a) in holding that a person could invoke Australia's protection obligations under the Refugees Convention in circumstances where the serious harm feared in his country of nationality arose from a civil war where 'the reasons for the war are to harm on the basis of race or clan';

(b) in formulating the test as depending on 'whether the reasons for the war are to harm on the basis of race or clan or whether the struggle is in substance directed to control of resources or to the assertion of dominance over territory', because –

(i) a clan-based civil war inevitably places individuals at risk of persecution on a Convention ground, namely race or membership of a particular social group; and

(ii) it is not necessary that the Convention reason be the sole reason for the persecution.

2. The Full Court erred in holding that the Tribunal had failed 'to address specifically whether the capture and retention of the appellant and his family were (as he asserted) driven by the intent to repress his particular clan' because:

(i) the very question identified was addressed by the Tribunal in a passage referred to by the Full Court in its judgment; and

(ii) the Tribunal was not required by law to address that question.

3. The Full Court erred –

(a) in holding that the Tribunal had erred in using the words 'systematic persecution' not in the sense of 'deliberate or premeditated or intended conduct' but in the sense of 'habitual behaviour according to a system';

(b) in inferring that the Tribunal had used the phrase in this way, so as to preclude a finding of persecution where there

was only an isolated incident, despite the fact that the Tribunal had expressly stated a contrary (and correct) understanding of the meaning of persecution; and

(c) in failing to hold that –

(i) the search for a course of conduct demonstrating that persecution was inflicted on a Convention ground was a legitimate, if not a necessary, approach to the Tribunal's task; and

(ii) on any reasonable reading of the Tribunal's decision, it had 'determined whether the particular experiences of the appellant were caused by persecution for Convention reasons'."

213 In this Court the appellant advanced three main arguments: that the Full Court erred in ascribing to Katz J a holding that in the circumstances the respondent's application must fail unless systematic persecution were established; that the Full Court erred in regarding the events in Somalia of which the respondent claimed to be a victim, namely conflict between clans and subclans over the control and exploitation of resources, as involving persecution for a Convention reason; and that the Full Court fell into further error in holding that Katz J should have decided whether the capture and detention of the respondent and his family by the Marehan clan were motivated by a desire to repress the Rahanwein clan of which the respondent was a member.

214 The lawless state of affairs in Somalia was hardly in dispute. The Tribunal's description of them as being of "splits and shifting allegiances" of "instability, anarchy, and murderous shiftings" of "tragic turmoil" and as involving "[a] pattern of shifting allegiances both inter and intra clan" is apt, particularly so in light of the writings of an expert in these matters, Dr Said S Samatar, in his book *Somalia: a Nation in Turmoil*[240] which was referred to by the Tribunal:

> "The law of lineage segmentation requires that political interest groups *should* be in a state of constant motion, expanding or contracting according to the stakes at hand. The stakes may involve competition over grazing grounds for the herds, conflict over water-holes or, alternatively, struggle for the resources of the central state. …
>
> Therefore the instability, anarchy and murderous shiftings [allegiances] witnessed today in the Somali scene are inherently endemic,

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240 (1991) at 25-26 (emphasis adopted).

deeply embedded as they are in the very warp and woof of the Somali world, both as individuals and as corporate socio-political units. The splintering of the opposition movements to General Barre's rule into bewildering fragments – Somali National Movement, Somali Salvation Democratic Front, Somali Patriotic Front, United Somali Congress, Somali Democratic Alliance and a host of other Somali Somethings – reflect the schismatic nature of Somali society."

215 It is against that background that the respondent's application, which was based substantially on his fear that the Marehan clan who, he said, had detained his family and him, had to be considered. He also said that the Somali Patriotic Movement controlled by Omar Jess were bent on genocide of the Rahanwein clan to which the respondent belonged.

216 The role of the Federal Court in reviewing the decision of the Tribunal under s 476 of the Act[241] was a confined one and did not entitle the Court to

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241 "**Application for review**

(1) Subject to subsection (2), application may be made for review by the Federal Court of a judicially-reviewable decision on any one or more of the following grounds:

(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;

(b) that the person who purported to make the decision did not have jurisdiction to make the decision;

(c) that the decision was not authorised by this Act or the regulations;

(d) that the decision was an improper exercise of the power conferred by this Act or the regulations;

(e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision;

(f) that the decision was induced or affected by fraud or by actual bias;

(g) that there was no evidence or other material to justify the making of the decision.

(2) The following are not grounds upon which an application may be made under subsection (1):

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undertake a review of the merits of the Tribunal's decision[242]. This is relevant to the third contention of the appellant with which it is now convenient to deal.

(a) that a breach of the rules of natural justice occurred in connection with the making of the decision;

(b) that the decision involved an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.

(3) The reference in paragraph (1)(d) to an improper exercise of a power is to be construed as being a reference to:

(a) an exercise of a power for a purpose other than a purpose for which the power is conferred; and

(b) an exercise of a personal discretionary power at the direction or behest of another person; and

(c) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case;

but not as including a reference to:

(d) taking an irrelevant consideration into account in the exercise of a power; or

(e) failing to take a relevant consideration into account in the exercise of a power; or

(f) an exercise of a discretionary power in bad faith; or

(g) any other exercise of the power in such a way that represents an abuse of the power that is not covered by paragraphs (a) to (c).

(4) The ground specified in paragraph (1)(g) is not to be taken to have been made out unless:

(a) the person who made the decision was required by law to reach that decision only if a particular matter was established, and there was no evidence or other material (including facts of which the person was entitled to take notice) from which the person could reasonably be satisfied that the matter was established; or

(b) the person who made the decision based the decision on the existence of a particular fact, and that fact did not exist."

242 See *Abebe v The Commonwealth* (1999) 197 CLR 510 at 522 [18] per Gleeson CJ and McHugh J, 554 [114] per Gaudron J, 568-569 [157]-[160] per Gummow and Hayne JJ, 606 [284] per Callinan J.

217 The Full Court said that the Tribunal erred in failing to make an explicit finding why the Marehan had taken the respondent and his wife captive in 1991. It was not sufficient, the Court said, for the Tribunal to find that members of other clans opposed to the Marehan at that time would also have been captured (if identified) while crossing Marehan territory: if the respondent's clan was at that time "the subject of a persecutory focus"[243] then the fact that clan affiliations have changed between 1991, and the hearing and are constantly changing, did "not of itself exclude the motivation for that focus from being a Convention reason"[244]. If the motivation for mistreating the respondent and his wife in 1991 was a "Convention motivation" then that finding [245]:

> "would inform the Tribunal's consideration of the question whether at the time of the determination there was a real chance of the [respondent] being persecuted by reason of his membership of the Rahanwein clan if he were to return to Somalia."

To fail to make a finding in this regard therefore, constituted, the Full Court held, an error of law[246].

218 That reasoning involves a misconception about the findings of the Tribunal. In particular, the Tribunal found, in terms, that the harm that the respondent feared was not persecution by reason of his membership of either the Rahanwein clan, or of his subclan, of itself, but rather, unsystematic "warfare" because of "the instability, anarchy and murderous shiftings witnessed today in the Somali scene".

219 The Tribunal held that it was difficult to identify any clan which could be regarded as being the victim of targeted persecution by any other group or groups, or as being subject to a differential impact over and above the ordinary risks of clan warfare, or, as I would prefer, for reasons which will appear, *clan conflict*.

220 It is true that the Tribunal did say that the capture of the respondent and his wife and their subsequent maltreatment by the forces of another clan would have been the same if they had identified themselves as members of other clans, again, depending upon the affiliations at the time. But that is not to say that the

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243 (1999) 94 FCR 259 at 265.

244 (1999) 94 FCR 259 at 265.

245 (1999) 94 FCR 259 at 266.

246 (1999) 94 FCR 259 at 266.

Tribunal did not have regard to the respondent's membership of the Rahanwein clan and the possibility of persecution on that account. The Tribunal's affirmative finding was that the respondent was the victim of unsystematic warfare resulting from instability, anarchy and murderous shiftings. That finding was not a finding of a Convention reason.

221 The Full Court also held that the Tribunal erred in construing the word "persecution" and by the inappropriate importation of "systematic" to qualify it. The Full Court referred to some earlier decisions in the Federal Court[247] which had considered the significance of the words "systematic persecution". It was said that the expression could be used in either of two senses: of deliberate, premeditated, or intended conduct, of acting or carrying out actions with a premeditated intent; or of habitual behaviour according to a regular or methodical system. The Full Court held it was impermissible, and an error of law, to apply the expression as if it had the second of the two meanings. This was their Honours' foundation for a conclusion that the Tribunal fell into error in holding that "unsystematic warfare without more is not persecution"[248].

222 In my opinion the Tribunal did not fall into error in this regard. What the Tribunal did was to make a finding of fact that the turbulent and violent conditions which were prevailing in Somalia stemmed from instability, anarchy and murderous shiftings in clan allegiances, and not "Convention" persecution whether of a systematic kind or otherwise.

223 The Tribunal did pay careful regard to the claims that were made by the respondent and the situation in Somalia. Katz J held that it was not inappropriate for the Tribunal to introduce the word "systematic" as a qualifier of the word "persecution" if the former is used, as his Honour thought it was here, to distinguish between isolated instances of oppressive conduct and systematic attacks against the respondent or his social or other group. Neither the Tribunal nor Katz J, in so holding, said or meant that persecution which was not systematic could not be persecution for a Convention reason.

224 In *Adan v Secretary of State for the Home Department*[249] the House of Lords considered the meaning of persecution for a Convention reason in the context of evidence before them of clan conflict in Somalia. Lord Slynn of

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247 *Abdalla v Minister for Immigration and Multicultural Affairs* (1998) 51 ALD 11; *Minister for Immigration and Multicultural Affairs v Hamad* (1999) 87 FCR 294; *Minister for Immigration and Multicultural Affairs v Abdi* (1999) 87 FCR 280.

248 (1999) 94 FCR 259 at 266.

249 [1999] 1 AC 293.

Hadley and Lord Lloyd of Berwick (with whom Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead agreed) both made speeches in which they referred to a state of civil war in Somalia in circumstances in which law and order had broken down. The same or similar expressions were used by the Tribunal and the Federal Court in this case.

225 Throughout the judgment of the Full Court in this case, their Honours referred to conditions in Somalia as conditions of "civil war"[250]. The use of these expressions in my respectful opinion involves a misdescription of what is occurring in Somalia. Maraudings by clan chiefs in pursuit of territory and resources, ready to make and break allegiances at will, as frightening and dangerous as their conduct might be, does not have the character of a civil war which would usually have a clearly defined object and clearly defined sides. However, I do not suggest that the case should be decided on any narrow, semantic basis. There is a real distinction between, on the one hand, the situation in Somalia, and, on the other, the circumstances which gave rise to the Convention, and the language which came to be used in it which was designed to deal with those circumstances, of which the Office of the United Nations High Commissioner for Human Rights has written[251]:

> "At its second session in the latter part of 1946, the General Assembly established the International Refugee Organization (IRO). The Organization took over the tasks of the United Nations Relief and Rehabilitation Agency (UNRRA). It received a temporary mandate to register, protect, resettle, and repatriate refugees.
>
> The refugees came from some 30 countries – mainly Eastern European. From July 1947 to January 1952, the IRO helped to resettle over 1 million refugees in third countries, repatriated 73,000, and made arrangements for 410,000 who remained displaced in their home countries."

226 The authors of the Convention were conscious of what had become common knowledge throughout the world: that, in the course of two totalitarian regimes and wars between those and others, numerous nation states had become absorbed in centralist hegemonies in which any form of political dissent was met with vicious reprisals. Unlike in Somalia where law and order appear to have broken down, there had been, and was, in much of Europe, too much *order* and almost all of it oppressive.

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250 (1999) 94 FCR 259 at 260, 264, 265, 266.

251 Office of the United Nations High Commissioner for Human Rights, Fact Sheet No 20, *Human Rights and Refugees*, (1993) at 4.

227 It does not necessarily follow that in no circumstances of a breakdown in law and order, or of an absence of any clear definition of sides and objectives, persecution for a Convention reason, could not be found to have occurred. Nor should it be assumed that even if there are defined sides and objectives such that events could aptly be described as involving a civil war, a person or persons fleeing from the country in which it is being fought, would or would not necessarily attract status as a refugee under the Convention. These cases will fall to be decided on their facts as and when they arise for determination. However, here, the Tribunal made findings based on the facts of the case which excluded the existence of such a reason, and because the Tribunal made those findings the second submission of the appellant must be accepted, that the Full Court erred in treating the events in Somalia as events of persecution of the respondent for a Convention reason. In short, the findings the Tribunal made on this matter excluded the existence of a Convention-based reason based on the capture of the respondent and his family:

> "The circumstances of the capture when the [respondent] and his wife had identified themselves as Rahanwein therefore would have been the same if they had identified themselves as Abgal or Habr Gedir depending on the affiliations of the time.
>
> …
>
> I am unable to discern anything in the experiences of the [respondent], or his clan, the Rahanwein, or his sub-clan, the Dabarre, which could be regarded as part of a course of systematic conduct aimed at members of either group, including the [respondent], for reasons of their membership of the group."

228 This case does not raise a question of the kind considered by the Court of Appeal in *R v Secretary of State for the Home Department; Ex parte Adan*[252]: whether the classes of cases in which a claimant might obtain refugee status under the Convention are confined to cases in which the persecution alleged can be attributed to the State, or to a quasi-State authority as German law requires[253]. Nor is it necessary here to decide whether refugee status will be available if the State in question is unable to provide protection against factions tolerated or encouraged within the State.

229 I would allow the appeal and join in the orders proposed by Gummow J.

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252 [1999] 3 WLR 1274; [1999] 4 All ER 774.

253 Henkel, "Who is a Refugee? – refugees from civil war and other internal armed conflicts", in *Asylum Law: First International Judicial Conference*, (1995) 17 at 20-21.