

differences were not unreasonable except some allowances.

In addition, the art. 20 of LCA was to be deleted and the content of the article was integrated into the art. 8 of the new Part-time Workers and Fixed-term Workers Act by the reform adopted in 2018 (effective on April 1<sup>st</sup>, 2020). This judgment will be referred to under the new act as a judicial precedent.

## 7. International Law and Organizations

### **Claim for revocation of administrative disposition regarding non-recognition of refugee status**

Tokyo District Court, July 5, 2018,

Case no. (*gyo u*) 524 of 2015

#### **Summary:**

The case deals with the refugee status recognition of a Sri Lankan man (the “Plaintiff”). Prior to this case, the Plaintiff applied to the Minister of Justice (the “MOJ”) for formal refugee status recognition, which was rejected by the MOJ through an administrative disposition. Following such rejection, the Plaintiff filed an action requesting the revocation of the administrative disposition to the Osaka District Court. Then the Osaka District Court rendered its judgment where it revoked the MOJ’s administrative disposition as it recognized the Plaintiff’s refugee status, due to his relationship with the Liberation Tigers of Tamil Eelam (the “LTTE”). However, despite such recognition, the MOJ issued another administrative disposition not recognizing the Plaintiff’s status because it views the situation in Sri Lanka as having improved since May 2009. The Plaintiff formally objected, but the MOJ denied it. Consequently, the Plaintiff filed another action to the Tokyo District Court (the “Court”) to request for revocation of the second administrative disposition, among others.

In rendering its judgment, the Court reasoned as follows. Since the Plaintiff’s refugee status had been recognized by the Osaka District Court, the question then becomes whether at the time when the second

administrative disposition was issued his refugee status had ceased to apply in light of Art. 1 C (5) of the 1951 Convention Relating to the Status of Refugees as modified by the 1967 Protocol Relating to the Status of Refugees (the “Protocol”) (collectively, the “Refugee Convention”). Having considered various reports of third-parties on the situations in Sri Lanka after the civil war ended on May 2009, the Court concluded that the refugee status has not ceased. The Court revoked the second administrative disposition and obliged the MOJ to recognize the Plaintiff as a refugee.

**Reference:**

Art. 3 & 37-3 of the Administrative Case Litigation Act

Art. 61-2 of the Immigration Control and Refugee Recognition Act

Art. 1 of the Refugee Convention

**Facts:**

The Plaintiff was born in Sri Lanka and is a Tamil. His hometown is Jaffna, a city located in the northern part of Sri Lanka. He established a company in 1992, and in 2004 moved his residence to close to Colombo. Due to the civil war that was raging in Sri Lanka, the Plaintiff illegally immigrated to Japan on September 17, 2006. He was then found to be in violation of the Immigration Control and Refugee Recognition Act and was put into detention. On April 19, 2007, the Plaintiff received Provisional Release from detention. On October 2, 2006, in detention, the Plaintiff made an application to the MOJ to formally recognize his refugee status based on Art. 61-2 (1) of the Immigration Control and Refugee Recognition Act. This was rejected by the MOJ through an administrative disposition on November 9, 2006. Additionally, a written deportation order was also issued to the Plaintiff. He then filed an action for revocation of the administrative disposition and declaration of nullity of the written deportation order to the Osaka District Court on August 3, 2007.

On March 30, 2011, the Osaka District Court recognized the Plaintiff’s refugee status at the time when the administrative disposition was issued. The court took note that many Tamils, particularly those from the northern part of Sri Lanka were threatened, arrested, confined, tortured, abducted and murdered by the armed forces, the LTTE and other

insurgents. Those suspected to be related to the LTTE were likely to be abducted and/or murdered by the state-sponsored “white vans”. During a visit to his hometown in around September 2004, the Plaintiff received a visit from the LTTE who asked for his cooperation. Around 2006, the white vans abducted and/or murdered his colleagues and relatives, and visited his residence and company multiple times. The visits continued even after the Plaintiff immigrated to Japan. Considering all the above, the Osaka District Court recognizes him as a refugee under both the Refugee Convention and the Immigration Control and Refugee Recognition Act. Accordingly, the Osaka District Court revoked the MOJ’s administrative disposition and nullified the written deportation order. After that, the Plaintiff was permitted to have a provisional stay. On May 30, 2011, the Refugee Inquirer of the Tokyo Regional Immigration Bureau conducted a hearing in relation to the Plaintiff’s refugee status application. Such an application was again rejected through an administrative disposition dated December 5, 2011. The Plaintiff filed an objection to the MOJ for the re-rejection on December 12, 2011, which was denied on April 17, 2015. Following this, on June 30, 2015, the Plaintiff filed the action to the Court for revocation of the second administrative disposition, nullification of MOJ’s denial towards his objection, and a mandamus obliging the MOJ to formally recognize his refugee status.

## **Opinions:**

### **1. The burden of proof in relation to the Plaintiff’s status**

In determining whether or not the Court should revoke the MOJ’s administrative disposition dated December 5, 2011, the Court must focus on whether the refugee status has ceased to apply under Art. 1 C (5) of the Refugee Convention. Different from cases involving someone who has not been recognized as a refugee, the burden is on the state to prove that the refugee status has ceased.

### **2. The Plaintiff’s status as a refugee**

Under Art. 1 C (5) of the Refugee Convention, the Court needs to assess whether the circumstances in connection with the ground for the Plaintiff’s status recognition has ceased to exist at the time that the administrative disposition was issued. The answer to this question

requires the consideration of facts. The Court relied on reports prepared by the United Nations High Commissioner for Refugees (the “UNHCR”), NGOs, and other governments. Having considered these reports, the Court found that it is true that after the civil war between Sri Lanka’s government and the LTTE in May 2009, the security condition in Sri Lanka generally and for those Tamils who are not suspected to be related to the LTTE has been improving. However, the situation is different for the Plaintiff. From the reports, it can be concluded that Tamils who are suspected to be related with the LTTE during the civil war are in danger of being detained and tortured by Sri Lanka’s government. The Japanese government objected to such a conclusion by arguing that only those who are deeply related to the LTTE (such as ex-members, direct supporters, etc.) are at risk of such danger. This argument was rejected by the Court who concluded that the reports suggest that Sri Lanka’s government is likely to detain and torture even those who barely had any relationship with the LTTE. Further, the risk of detention and torture is higher for those who fled abroad and then returned to Sri Lanka. Considering all of the above, the Court concluded that the Plaintiff’s refugee status has not yet ceased to apply.

### **3. Decisions on the Plaintiff’s requests**

Since the Plaintiff is a refugee and remains one at the time the administrative disposition dated December 5, 2011, was issued, the administrative disposition is deemed illegal and is revoked. Further, since the requirements stipulated under Art. 37-3 of the Administrative Case Litigation Act are met, the Court obliges the Defendant to formally recognize the Plaintiff’s status as a refugee.

#### **Editorial Note:**

The case summarized above exhibits the difficulties inherent in the determination of refugee status and when such a status can be said to have ceased to apply. To qualify as a refugee, one must meet the definition of a refugee under Art. 1 A (2) of the Refugee Convention. There are three requirements, namely: (1) there must be a well-founded fear of being persecuted (for reasons of race, religion, nationality, membership of a particular social group or political opinion), (2) he or she is outside the

country of his or her nationality, and (3) he or she is unable or unwilling to avail himself or herself of the protection of the state of origin. While the latter two requirements are relatively easily satisfied, the main difficulty lies with the first requirement. The Refugee Convention does not define or explain the meaning (Takane Sugihara, *Lectures on International Law* 444-447 (2<sup>nd</sup> ed., 2013)).

It is helpful to divide the first requirement and discuss “well-founded fear” and “being persecuted” separately. As to the former, to the element of “fear” there is the qualification of “well-founded”. This means that not only that the state of mind (subjective condition) of the person concerned must be considered, but it must be supported by the objective situation (UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 38, HCR/1P/4/ENG/REV. 4 (February 2019)). The degree of importance put on the elements in relation to each other may be different between states. The courts in Japan put more weight on the objective element, which is more restrictive (Sugihara, *supra*, 445-446). This affects refugee status determination status in practice.

As to the concept of “being Persecuted”, the modern understanding of persecution is that there must be serious harm and failure of state protection. The examples of serious harm are the risks to physical security, encompassing risks to life; torture; cruel, inhuman, or degrading treatment or punishment; slavery; or other forms of physical violence. The risk of arrest, detention or prosecution requires further qualifications to be regarded as serious harm. Moreover because the international protection offered by The Refugee Convention is *substitute protection*, the notion of “being persecuted” requires an assessment of whether the state is unwilling or unable to protect the individual. The State’s unwillingness to protect clearly manifests when the state itself is responsible for the infliction of serious harm, or in the case where it tolerates or encourages non-state actors where it stands by despite being able to intervene. On the other hand, the most straightforward example of a state being unable to protect is where the state has failed or ceased to function (James C. Hathaway & Michelle Foster, *The Law of Refugee Status* 288-323 (2<sup>nd</sup> ed.,

2014)).

The formal recognition of refugee status by the state of refuge is merely declaratory in nature. Once the refugee status has been recognized by the state of refuge, the status persists until it ceases, under one of the various situations defined under Art. 1 C. Cessation under Art. 1 C can be grounded either on the voluntary or individual acts of the refugee, or also on the existence of a change of circumstances in the state of origin (Joan Fitzpatrick & Rafael Bonoan, *Cessation of Refugee Protection*, in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 492-530 (Erike Feller, et al. eds., 2003)). For our purpose, we will focus on the latter as covered under Art. 1 C (5). The state of refuge has the prerogative to declare cessation under Art. 1 C (5) if it found that the circumstances upon which the refugee status was recognized have ceased to exist, and that national protection is once more available in the state of origin. To do so there are five considerations that must be taken into account by the state of refuge, namely that the change of circumstances (1) must be a change in the "objective situation" in the home country, (2) must be "fundamental" or of substantial political significance, (3) must have actually occurred, (4) must have taken place on a durable basis, and (5) must impact the refugee himself (Hathaway & Foster, *supra*, 481-485). The burden of proof on the application of the cessation clause lies on the state of refuge (Guy. S. Goodwin-Gill, *The Refugee in International Law* 87 (2<sup>nd</sup> ed., 1996)).

In our view, the Court's assessment is in line with the generally agreed understanding on refugee status determination and cessation summarized above. Considering the facts summarized below, it is hard to conclude that Art. 1 C (5) applies in the Plaintiff's case. While it is true that the civil war in Sri Lanka has ended as of May 2009 and the overall conditions have improved, this alone is insufficient to conclude the Plaintiff's well-founded fear of being persecuted has ceased to exist. Based on the reports by NGOs and other governments, Tamils who have a similar personal background to the Plaintiff and are suspected to be related to the LTTE, even if they are only remotely related, have found themselves arrested, detained, and tortured even after the civil war ended. There is a high likelihood of the Plaintiff being subjected to such risks if he returns to Sri Lanka considering that he has been targeted even before he left for Japan

for his known relationship with the LTTE. Further, until today the Prevention of Terrorism Act (the “PTA”) is still applicable in Sri Lanka. Under the PTA, arrests for unspecified “unlawful activities” without a warrant is allowed, and detention for up to 18 months without the authorities producing the suspect before a court is permitted. Recently, Amnesty International stated that widespread incidents of violence against detainees, including torture and other ill-treatment, practiced throughout the country mainly by the police can still be routinely found (Amnesty Int’l, *Amnesty International Annual Report 2017/18: The State of the World’s Human Rights*, at. 342-344 (February 22, 2018)). This is further supported by the statement made by the former UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism in 2017 that “the use of torture has been, and remains today, endemic and routine, for those arrested and detained on national security grounds” (Human Rights Watch, *Locked Up Without Evidence: Abuses under Sri Lanka’s Prevention of Terrorism Act* (Apr. 25, 2019, 20:05 AM), <https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act>). Considering all the above, objectively it is difficult to claim that Plaintiff’s well-founded fear of being persecuted has ceased to exist.