Credit :
UTokyo Online Education, Refugees and Migrants - International and Japanese Comparisons 2019 Allan Mackey

東京大学
THE UNIVERSITY OF TOKYO

Shall we now look recent judgements –

Firstly-- From Korean courts

Then at number from Japanese Courts,

On a positive note it is that recently some reflect that judges are giving reasoning and conclusions closer to the international jurisprudence. From experience, we hope this continues so that sound, internationally consistent, human rights based, refugee law is applied here…

To us and on shared experience with fellow IARMJ members such approaches do result in a more productive, efficient and fair RSD system to the benefit of all parties: claimants, the state and the taxpayer!

Now The Korean cases

Martin and Soojin

A closer look at some Japanese cases :

1. *X v Japan (a Nepali)* Nagoya High Court, 7 September 2016, (see Judicial Decisions Public International Law Vol 61 p374)
2. *The State v X (a Sri Lankan)* Tokyo High Court, 5 December 2018 (We will term it: ***BCD Sri Lanka)***

(And Administrative Direction by MOJ – January 2019)

3. *X v Japan (an Iranian*) Tokyo District Court 17 Sept 2019

A closer look at some Japanese cases :

4.*X v Japan (Ethiopia* I)Tokyo D Ct ,31 May 2018 . AND (*Ethiopia II*) Tokyo H Ct , 21 November 2018.

5.*X v Japan (P3 & 4 Syria)* Tokyo D Ct, 20 March 2018.

*6.X v Japan(UD Myanmar)*Tokyo D Ct,23 Feb 2018)

7. *X v Japan (RFT Sri Lanka)* Nagoya D Court . 30 July 2019. (And summary by Attorney Ogawa)

Case 1 “a Nepali”

This case has important conclusions that place some of it in line with International refugee law jurisprudence:

a. In looking to interpret “ persecution” in Art 2(ii)-2 ICRRA (Art1A(2) CSR) it still follows the unfortunate *“life and freedom”* misunderstanding **but agrees it is an objective test.**

b. AND on burden of proof the judges are totally in line with international norms. They state:

University of Tokyo, Graduate Program on Human Security. The International Refugee, Complementary Protection, Migration - *Course 2 - November 201*

Case 1 “a Nepali”

“ It shall not be so strictly applied that persons who should be protected will not be..”

“ Protection …is not a mere favour but an obligation incumbent on states parties considering the Charter of the UN and the UDHR that has affirmed that the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, as in the Preamble CSR…In addition applicants are usually in a disadvantageous situation”.. They then follow the UNHCR Handbook guidance including that it is a” shared burden” of proof.

Case 1 “a Nepali”

Later the Court finds the Nepali was eligible “as it was reasonable he believed he would be at risk of being persecuted on return” They also agreed there could be non state(the Maoists) actors of persecution in certain situations.

He was thus found a person who is unable to avail himself of protection in his home country and qualified for refugee status and , “shall be recognised”.

However this was a 2016 case, on 2011 facts, while this was a good result for him, under an international comparison RSD should only be made prospectively as at 2016.

University of Tokyo, Graduate Program on Human Security. The International Refugee, Complementary Protection, Migration - *Course 2 - November 2019*

Case 2 "BCD Sri Lanka Summary

As you see from the handout summary of this case it addresses many issues. We found, in no way being critical, the probably literally correct terminology used in the translations is complex. However after several readings we think best approach for us to take is one where, rather than us try to go through "quote by quote" it is best for us to say:

" This is as we understand what the High Court is saying approach"

PS. Can you encourage your judges to take a KISS not KICK approach please!

BCD Sri Lanka --Using this hopefully KISS approach it appears to us the Court has ruled, usefully and comparatively well:

a. The Court decisions are binding on the MOJ and they cannot merely use their own "prescribed procedures" to make their own legal assessments.(i.e. As do other member countries- "Procedures only" not core legalities already in the CSR!)

b. Correct legal Cessation decisions can only be made by following the applicable international law as set out in Art 1 and thus 1C(5) of the CSR and not internal MOJ rules.

c. And from that logically Art 1A(2) is declaratory and is the only applicable refugee definition in RSD NOT domestic rules…

University of Tokyo, Graduate Program on Human Security. The International Refugee, Complementary Protection, Migration - *Course 2 - November 201*

Case 2 "BCD Sri Lanka Summary

…**The court in rejecting the MOJ submissions on this makes it clear:** " However, even if it is left to the legislative discretion of each country *on how the parties establish* refugee recognition*"(i.e. Procedural practices NOT legal definitions in the CSR itself)* if the CSR is intended to limit its application *to those who have received recognition in the parties(i.e. by domestic rules)* …there is no reason to limit it in anyway as the Cessation clause *does not require each country to recognise them as refugees"*

NB, The italics are mine.

University of Tokyo, Graduate Program on Human Security. The International Refugee, Complementary Protection, Migration - *Course 2 - November 2019*

Case 3 “an Iranian”

In this very recent case on an Iranian Christian convert the Court does not see itself as bound by the usual retrospective assessment approach but takes into account sound COI (from 2013 and 2015) and appellant’s growing Christian involvement in Japan that ***post dates*** the 2012 MOJ rejection. The Court thus finds he will have a wff (‘*high probability*’) of “persecution”.

However while far more looking towards the current situation, and thus not purely retrospective, it is unfortunate, that under the shared burden, the court did not call for up to date 2019 COI to confirm their findings and be more internationally consistent.

Case 3 “an Iranian”

Other comments are:

1. Why did it take 7 years to get to the Court? This is surely a sign of a dysfunctional RSD.
2. In international assessments of Iranian converts there would be considerably more emphasis on credibility throughout and the nexus of the appellant’s objective profile (facts as found) to COI and then risk.
3. The emphasis should be on “being persecuted” i.e. the objective risk to someone with his characteristics ,not just generalised “persecution”, is such cases. …

Case 3 “an Iranian”

4. There are several confusingly different risk (wwf) levels used: “*highly probable*”, “*real risk*” (in UK report), “*highly likely*” (the MOJ denial) “*high probability*” and then *“an objective circumstance that a reasonable person will have fear of being persecuted if the person was in the position”*! WOW! This is what happens when judges don’t decide, up front, what are the issues they should answer! SO…

Case 3 “an Iranian”

Surely it would be so much better, productive and consistent to simply set the issues as:

1. ‘Objectively, on the facts as found, does the appellant have a real chance (well founded fear) of being persecuted on return to Iran?
2. If yes. Is it for one or more of the 5 convention reasons?’ *Again KISS not KICK*

