Observations on Refugee Status Determination in Japan, and some New Zealand, United Kingdom, and European Union comparisons

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Table of Contents

Introduction

The Human Securities Program (HSP) at the University of Tokyo commenced in 2004. Refugee protection was quickly seen a core issue in the HSP by Professor Yasunobu Sato and the other professorial directors of the program. Hence a priority was given to the appointment of a person with international experience in the field as a visiting "Professor". The aim was for the visiting Professor to give assistance to the program, by conducting a number of seminars for, not only students on the HSP, but other post graduate students with interest in the field, practitioners (*bengosi)* practicing refugee law, academics, Ministry of Justice (MoJ) RSD officials, Refugee Examination Counsellors (RECs) and, if possible, the some members of the Judiciary. In addition, the visiting Professor would carry out some observations and international comparative research with the Japanese refugee status determination (RSD) system. The writer was approached when Professor Sato was in London in 2005 and, after the President of the Asylum and Immigration Tribunal very co-operatively agreed to allow 12 weeks unpaid leave the project was undertaken, in the spring semester program over the period April to July 2006[1].

Human security can only be properly ensured, by surrogate protection in the refugee context, through the domestic application of law and procedures that follow due process, abide by the Rule of Law, and that endeavour to apply consistent, harmonised international norms and jurisprudence. In this regard the aims of the HSP must be seen as fully compatible in that regard with the objectives of the International Association of Refugee Law Judges (IARLJ).

These provide*: "The International Association of Refugee Law Judges seeks to foster recognition that protection from persecution on account of race, religion, nationality, membership of a particular social group, or political opinion is an individual right established under international law, and that the determination of refugee status and its cessation should be the subject to the Rule of Law.*

The legal and procedural issues, in the Japanese RSD and practice, were examined, as far as was practicable, in the light of global standards, by comparative studies with New Zealand, the United Kingdom and the European Union. (The EU situation has been looked in a prospective manner, particularly insofar as European Human Rights law and the newly,implemented or agreed European Council Qualifications and Procedures Directives will impact on the 24 countries involved, and then possibly beyond the EU.)

It is hoped that the results of this research can contribute to better judicial, academic,and administrative understanding and co-operation. It may assist not only domestically in Japan, but also more widely as a contribution towards international and Asia/Pacific development in refugee protection, for a more secure world.

I wish to express my thanks to: the staff and students of the HSP at the University of Tokyo, (especially Professor Yasunobu Sato, Satoshi Yamamoto and Rika Yamada), the UNHCR, Tokyo, (Natalie Karsenty, and Mai Kaneko), and my Japan based family, for their patient understanding and unstinting assistance to an often confused *gaijin*. Also my thanks to the assistance and cooperation given by the many people I interviewed including members of the Japan Lawyers Network for Refugees (JLNR), the Japan Association for Refugees (JAR), Tokyo District Court, Ministry of Justice officials and several RECs in particular.

[1] The writer is a Senior Immigration Judge in the Asylum and Immigration Tribunal, UK (AIT-UK), former Chairperson of the Refugee and Residence Appeal Authorities in New Zealand (RSAA and RAA-NZ) and immediate Past President of the International Association of Refugee Law Judges (IARLJ). Any views or opinions expressed in this paper are entirely my own and do not in any way reflect the views or opinions of the AIT-UK, the RSAA-NZ, nor any other British or New Zealand court or tribunal, or the IARLJ

Limitations

Limitations on the research must be disclosed at the outset. Owing to my regrettable lack of skills in the Japanese language, my research into Japanese court decisions has been necessarily quite limited to a few full cases (6), or extracts from cases (10 not professionally translated), that have been translated into English. In this regard, I am indebted to excellent work done by the UNHCR ,Tokyo office, and also to the Doctorial thesis of Associate Professor Osamu Arakaki[2]. According to a paper, recently prepared by Associate Professor Arakaki[3], there were some 48 court cases on refugee status issues between 1981-1999, (with only one case being found in favour of the claimant), and just over 100 cases 2002-2006, (in which, to date, 25 of the administrative decisions (dispositions) were overturned , mainly by District Court decisions). Given the total number of decisions of the Japanese courts is in the vicinity of 150-160 since 1981, and my sample was such a very limited one, I have necessarily concentrated firstly on the procedural comparisons and largely avoided detailed jurisprudential comparisons, confining myself, of necessity, to observations based on the few cases available, and comments from experienced judges,academics and practitioners

[2] Arakaki: "Refugee Law in Japan: Towards International Co-operation for Human Rights", Victoria University of Wellington, NZ-2002

[3] Arakaki: "Japan's Practice in Determining refugee Status: Internal Change and International Influence in the Democratic State" - (submitted at a conference on "International law and Democratic Theory" in Wellington, NZ, 27-28 June 2006)

1. The present legal framework

1.1 Japan

Brief background

Japan acceded to the 1951 Convention relating to the Status of Refugees (RC51) on 3 October 1981 and to the 1967 Protocol on 1 January 1982. The Convention and Protocol were implemented through amendment of the Immigration Control Order, 1951. Japan formed the statutory basis for refugee protection in the Immigration Control and Refugee Recognition Act 2004 (ICRRA), by way of an amendment to the Immigration Control Order 1951[4].

The legitimacy of Japan's refugee protection system had been challenged over a prolonged period. The most critical attack was a report published in 1993 by Amnesty International. The report strongly criticised the Japanese practices in refugee protection. This eventually lead to controversy between Amnesty International and the Ministry of Justice in Japan. However, no statutory change was made at the time.

In May 2002, the treatment of North Korean asylum seekers at the Japanese consulate in Shenyang, PRC, was sensationally reported around the world. This, combined with the past calls, made by NGOs, experts, practitioners and academics, over Japan's need to amend the strict law and policy applied toward refugees, appears to have triggered the recent amendment to the Act. In May 2004, the amendment was approved by the Japanese Diet. On 16 May 2005, the amended Act (ICRRA) came into force. Significant changes were made by the amendment.

Firstly, the somewhat notorious, 60 day rule, which had blocked, even genuine applications proceeding, was abolished.

Secondly, a system of temporary residence permission for refugee applicants was introduced. In the past, there was no statutory provision to protect applicants against deportation and detention. According to the amendment to the Act an application for refugee status now has a suspensory effect and the deportation procedure is suspended during the RSD process. However, the system sets up exemptions which have already become controversial. For example, an alien, who applies for refugee status, six months or more, after their arrival in Japan, may be excluded by the new system. Also an asylum seeker who passed through a third country to reach Japan may similarly be excluded. The period of temporary residence provided is three months, and a new application is required to extend each time. Temporary residence does not provide an asylum seeker the right to work.

Thirdly, stabilization of legal status of refugees is now provided in the ICRRA. Prior to the amendment, there was no nexus between recognition as a refugee and the provision of a residence permit. Following the amendment a decision providing a residence permit is made when the applicant's refugee status is determined so that their legal status may now be stabilized.

Fourthly, a major purpose of the amendment, to improve the RSD procedures, was introduced. While the amended ICRRA does not fundamentally change the previous framework, it does include important new developments. For example, in the review or "Objection Procedure" stage, still within the Ministry of Justice, legal and international affairs experts are now involved in the procedure, as Refugee Examination or

[4] For an excellent coverage on Japan's legal framework, including the Constitutional basis, structure, operation of its courts, and Human Rights and International law application in Japan, see "Japan: Refugees and Asylum Seekers" - a Writenet report, commissioned by the UNHCR (DIP) and made by Professor Meryll Dean, Oxford Brookes University, UK (February 2006). I am much indebted to the research and commentary in this report, which has allowed me to concentrate my report more on comparative procedures, and to the limited extent disclosed, case law, rather than repeat the well presented analysis of the full background material, set out comprehensively in Professor Dean's report.)

Adjudication Counsellors (RECs). It stipulates that the Minister must hear their views when making his or her decision. Nineteen RECs have been appointed by the Minister in May 2005 and operate in six teams. The effectiveness of the RECs, who are now involved in the administrative level, internal review decision-making, has been questioned by representatives because they do not have formal decision-making power. Their qualifications and skills have also been criticised in some circles. However, balanced against this, recent media reports appear to place high value on the role of the RECs, particularly given the substantial changes in administrative practice that may follow from their introduction in the process. It is of course very early days since their introduction and, as noted later in this paper, there is a great opportunity before them to bring into effect a new level of quality and domestic and international consistency, in Japanese RSD, which it is hoped will be grasped by them. I was privileged to give a training seminar to a number of RECs, their Counsel and administrators, shortly before my departure, and to have a number of the RECs attend several of the seminars I conducted while in Tokyo.

Current legal situation

The law relating to refugee and asylum matters is to be found in the Immigration Control and Refugee Recognition Act 1981 (ICRRA). This Act was passed in June 2004 and came into effect in May 2005. An Immigration Control Law had been in effect since 1951.

The intial determination of refugee status is undertaken by Refugee Inquirers (RIs) within the Ministry of Justice (MoJ). Asylum seekers make applications to the MoJ pursuant to either Articles 18-2 (temporary refuge)and/ or 61-2 (refugee status) of the ICRRA. If a claim under 61-2 is rejected by the MoJ an "Objection Procedure", also lodged with the MoJ, is available pursuant to Article 61-2-9 (This internal administrative review is taken with advice/opinions from the RECs). There is no objection procedure for 18-2 only applications. Beyond the "Objection Procedure" a claimant who is dissatisfied with the MoJ decision, may seek a type of Judicial Review. In fact this could be of the first instance MoJ decision to refuse asylum and/or the Objection Procedure decision, (also made by the MoJ) under the provisions of the Administrative Case Litigation Law (Law 139 of 1962, as amended) (ACLL).

Japan does not have specialist Immigration, Asylum or Administrative courts and thus these Judicial Reviews are heard before the general Courts. The Judicial Review (JR) application is made to the District Court, with appeal rights to the High Court, and ultimately to the Supreme Court. The procedure for "Revocation Litigation" (or JR), must be commenced within six months from the date of notification of the refusal by the MoJ. This procedure provides a Judicial re-examination of both facts, and law, and can include consideration of new evidence. The decision however is that of a Judicial Review seeking revocation of the decision of the MoJ to reject an application for refugee status, and declare that decision as unlawful. The JR assesses the situation as at the date of the MoJ decisions, not the date of the Court decision, so in this way it is not to be seen as a full "merits" appeal. Decisions of the District Court are appealable, by either party, to the High Court and ultimately to the Supreme Court.

While Japan is a party to most of the international human-rights law instruments[5], the Courts appear to refer to these international human-rights instruments very rarely, in their decisions, and the concentrate on the review of the administrative decision, or disposition as it is termed, analysing possible unlawfulness in the

[5] Japan is a party to the following International Instruments: RC51 and the Protocol, the International Covenant on Civil and Political Rights 1966 (ICCPR); the International Covenant on Economic Social and Cultural Rights 1966 (ICESCR); the Convention on the Elimination of Racial Discrimination 1966 (CERD); and the Convention on the Elimination of All Forms of Discrimination Against Women 1979(CEDAW). Japan is not a party to either the Convention relating to the Status of Stateless Persons 1954, or the Convention on the Reduction of Statelessness 1961. In addition Japan has not signed the Optional Protocols to the ICCPR, ICESCR, CAT and CEDAW but did sign on the Protocols to UNCROC in 2002. It has also signed, the Convention Against Transnational Organised Crime 2000 (CATOC) and its three Protocols relating to trafficking, smuggling of persons and control of firearms.

decision, by a full investigation into all aspects of the case, both fact and law, based on the adversarial arguments and submissions put before them. There is little sign of additional evidence being called.

1.2 New Zealand

The primary source of law relating to the determination of refugee status in New Zealand is to be found in Part 6A of the Immigration Act 1987. It was not until 1999 that provisions relating to the determination of refugee status were formally incorporated into New Zealand domestic law. New Zealand became a party to RC51, and the Protocol, in 1971. From that time, until the commencement of Part 6A in 1999, the determination of refugee status was undertaken pursuant the prerogative powers of the Executive (Cabinet). In the 1980s, this was delegated by Cabinet to an interdepartmental government committee (ICOR). ICOR was established to hear and determine claims for refugee status. Applicants could be represented before that committee which was assisted by a designated UNHCR officer. There was no right of appeal, but judicial review to the High Court was available against decisions of ICOR[6]. With an upsurge in applications in the late 1980s (mainly Sikhs from the Punjab in India, and later, Chinese students following the Tiananmen Square incident)the ICOR system became unmanageable. The combination of the volume of claims, plus the criticism and comments set out in *Benipal,* and elsewhere, led the government, in 1991, to establish a determination system which involved the use of Immigration officers, making the first instance decision (within a Refugee Status Section of the Immigration Service), with an appeal right to a newly established tribunal -the Refugee Status Appeals Authority (RSAA). This was not done by statute, however, but pursuant to Terms of Reference (ToR) given by the Cabinet. The international obligations under RC51 were thus not directly incorporated into domestic law. (New Zealand operates a dualist approach to international law.)

The new system operated, pursuant to ToR, with various amendments, from 1991 until 1999. Criticism from the judiciary (particularly in the leading determination of the Court of Appeal in *Butler v RSAA* [1999] NZAR 205), and in a government review of the Immigration Act in 1997-1998, led to legislation introducing a formally legislated determination system for refugees. Part 6A was incorporated into the 1987 Immigration Act, pursuant to the Immigration Amendment Act 1999.

Significantly the terms of Part 6A (Sections 129A-129ZB of the Act) set out, not only a full determination and appeal system, but also contains express provisions on *non-refoulement* in Section 129X which provides:

> "**129X Prohibition on removal or deportation of refugees or refugee status claimant-**
>
> (1) No person who has been recognised as a refugee in New Zealand or is a refugee status claimant may be removed or deported from New Zealand under this Act, unless the provisions of Article 32.1 or Article 33.2 of the Refugee Convention allow removal or deportation.
>
> (2) In carrying out their functions under this act in relation to a refugee or refugee status claimant, immigration officers must have regard to the provisions of this part and of the Refugee Convention ... ."

Other important provisions within Part 6A include Section 129D, which provides that the Refugee Status Officers (RSOs), and the RSAA, must act in a manner consistent with the Refugee Convention. Section 129E, sets out that the Department of Labour shall specifically designate, with the RSOs, the task of refugee status recognition and that no person designated shall also be involved in considering applications for permits under the Immigration Act, nor in the administration of removals, under the Act. Section 129N formally establishes the RSAA to hear appeals against decisions of the RSOs. Also section 129T provides that the

[6] Benipal v Ministers of Foreign Affairs and Immigration (29 November 1985) High Court, Auckland A993/83, resulted in an extremely comprehensive assessment of refugee law and the requirements of fairness by Chilwell J (pages 277-278). This judgement exposed the problems with the ICOR system then operating.

confidentiality of every claimant must be respected and not disclosed except within certain necessary provisions in the Act.

The Act provides for regulations to be made for the administration and procedures in the refugee status determination system and Practice notes to be issued by the Chairperson of the RSAA. The appointment of members of the RSAA is made by the Governor General, on the recommendation of Cabinet. At present the Department of Labour is required to service and fund the RSAA and provides the administration staff. (There are however currently recommendations, in a current full review of Immigration and Protection law issues in New Zealand, for the administration of the RSAA to be taken over by the Ministry of Justice, who administer all the civil and criminal courts in New Zealand.)

There is no formal right of appeal provided against decisions of the RSAA, however decisions can be judicially reviewed by the High Court. There are then rights of appeal from a High Court decision to the Court of Appeal and then, to the Supreme Court of New Zealand, against decisions made on judicial review by the High Court. As discussed later in this paper there have been a limited number of JRs of RSAA decisions, but a number of RSAA decisions and a few significant High Court and Court of Appeal decisions, have notably influenced the development of both New Zealand and international refugee law.

New Zealand is a common-law country and thus decisions of significance, by both the RSAA, and the higher courts, have given precedent value and assist in the development of refugee jurisprudence. A considerable body of internationally recognised jurisprudence has been published by the RSAA since it was established in 1991. In addition there are a small number of High Court and Court of Appeal decisions.

New Zealand is a signatory to the major Human Rights conventions and instruments. . Domestically most of the significant provisions of the ICCPR are incorporated into the New Zealand Bill of Rights Act 1990 (NZBORA).

1.3 United Kingdom

Brief Background

The legal provisions relating to refugee status in United Kingdom, and relevant matters related to asylum seekers and refugees, are to be found in number of Immigration and related Acts going back to the Immigration Act 1971. Provisions within the Immigration Act 1971, Asylum and Immigration Appeals Act 1993, Human Rights Act 1998, Immigration and Asylum Act 1999, Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of claimants, etc) Act 2004, and Regulations, Immigration Rules and orders, made pursuant to those Acts govern the complexity of legal provisions applicable to RSD and other asylum and subsidiary protection matters. The core provisions, relating to the status of the Refugee Convention, in UK law, are to be found in Sections 1 and 2 of the Asylum and Immigration Appeals Act 1993. Section 1 relevantly provides a "Claim for Asylum" means:

> "1. A claim made by a person (whether before or after the coming into force of this section) that it would be contrary to the United Kingdom's obligations under the Convention for him to be removed from, or required to leave, the United Kingdom; and the Convention means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to that Convention.
>
> 2. Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention."

In one of the early leading determinations on refugee law in the United Kingdom - *R v Secretary of State Department, ex p Sivakumaran [1998] 1 AC 958* at 990 Lord Keith stated:

> "The United Kingdom has acceded to the Convention and Protocol, their provisions have for all practical purposes, been incorporated into United Kingdom law."

More recently in *European Roma Rights Centre [2003] EWCA Civ 666,* Laws LJ stated:

> "It is commonplace to suppose the 1951 Convention has been "incorporated" into domestic law. But this is, in context, a loose expression. The exact position is given, first, by section 2 of the Asylum and Immigration Appeals Act 1993."

Current situation

The Immigration Rules provide the ability of asylum seekers, who are advised that they are to be removed from the country as illegal immigrants, to apply to Immigration officers, of the Home Department, to be determined as refugees, within the meaning of the Convention. Also, since October 2000, they may claim that the United Kingdom would be in breach of its obligations under the Human Rights Act 1998(and thereby provisions of the European Convention on Human Rights (ECHR)), if returned to their home country.

The provisions providing a right of appeal against the decision the Home Office are now to be found in the Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of claimants, etc) Act 2004 and the Procedure Rules issued pursuant to those Acts, in particular the Asylum and Immigration Tribunal (Procedure) Rules 2005 and the Asylum and Immigration Tribunal (Fast track procedure) Rules 2005. The appeal right is to an Immigration Judge, in the new single tier, Asylum and Immigration Tribunal (AIT). There are reconsideration, and further appeal rights beyond this first appeal, which are set out in more detail in the next section of this paper.

The AIT is serviced and funded by the Department for Constitutional Affairs (DCA), which reports to a Secretary of State for the DCA, who is also the Lord Chancellor. The AIT is a part of the British judiciary, with jurisdiction in England, Wales, Scotland and Northern Ireland .

The appeal tribunals in UK were originally set up under the 1971 Act and were until the late 1980s funded and administered by the Home Office (who made trhe first instance administrative decisions on asylum applications. The move to administration and funding by the Lord Chancellor's Department (later termed DCA), was seen as a measure to ensure judicial independence.

The UK is a signatory to most of the major Human rights conventions, with the exception of the Statelessness conventions. It is of course significantly a party to the ECHR and the main European Union Conventions, European Union Council Directives and obligations relating to Human Rights, Immigration and asylum contained within these. By the passing of the Human Rights Act 1998 the British government incorporated the provisions of the ECHR into UK law, and this came into domestic law, as from 2 October 2000.

1.4 The European Union

To understand the legal position, as it effects all members of the European Union, with the exception of Denmark, from 10 October 2006, when the European Union Refugee Qualifications Directive comes into force, it is necessary to set out some background.

The so-called *European acquis* for asylum is the sum of regulations which the EU member states regard as an essential and integral part of the achievement of the objectives of the European Union. The concept refers to specific international instruments, binding all member states, though not exclusively, and includes the RC51, and the ECHR, as well as the European instruments adopted within the European Union itself.

The Single European Act of 1986 identified the free movement of persons as one of the four main elements of the single market. This implied the dismantling of internal borders between the member States and agreement on how to control the external borders of the community(Union). Then, in 1992, the Maastricht Treaty defined these subjects as matters of common interest to member States and created a limited role for the institutions of the Union in creating policy and legislation. At that time the European Council set up a high-level working group on asylum and migration which produced action plans for various migrant and refugee producing regions of the world. This tended to emphasise the need to contain refugees in their region of origin by addressing the causes of flight and providing aid locally.

Next came the Charter of Fundamental Rights of the European Union. This was proclaimed in Nice on 7 December 2000. It contains a few provisions relating to asylum or protection matters, in particular Articles 18 and 19, and, indirectly Article 47. These provisions guaranteed a full observance of RC51, in accordance with the Treaty establishing the European Community (Article 18), as well as the protection against deportation to a country where there is a serious risk of being exposed to the death penalty, torture or inhuman or degrading treatment (Article 19). Article 47 provides general safeguards in relation to obtaining an effective remedy and fair trial. The Charter has no precise legal status.

The Treaty establishing the European Community (TEC), which was originally signed in 1957, was given an important change with the Treaty of Maastricht in 1992. It involved the creation of the European Union with the concepts of the so-called "Pillars" - the First Pillar, which relates to European Community matters requires unanimous approvals, The Second Pillar relates to common foreign and security policy, and the Third Pillar to Justice and Home Affairs. The next significant move was achieved with the Treaty of Amsterdam, Title IV, of which, among other things, transferred the asylum and immigration policies, from the Third Pillar to the First one. Thus, for the first time it was possible to talk meaningfully of a "Common European Asylum Policy". It also meant that the European Union institutions could pass and develop legislation on immigration and asylum matters.

At a meeting in Tampere, Finland in October 1999 the EU leaders stated the importance of the right to seek asylum. At Tampere it was also acknowledged that the Common European Asylum system would be based on "a full and inclusive application of the Geneva Convention". The principle of *non refoulement* would also be respected, as would be the need to develop fair and efficient asylum procedures and minimum reception standards, as well as subsidiary forms of protection.

The European Commission has since developed a number of Directives directly relevant to asylum issues, and subsidiary protection determination. Of particular importance in this study is the European Council Refugee Qualifications Directive 2004/83/EC (ECQD) (annex 4). This European wide legislation will come into force on 10 October 2006.The ECQD was adopted by unanimity in accordance with Article 67 of the TEC, on 29 April 2004. The next relevant Directive to come into force will be the European Council Procedures Directive (ECPD)(annex 5) which has now been approved and will come into force in late 2007. The impact of these two Directives is discussed in a Part 2 of this
paper.

2. The procedural frameworks for refugee status (RSD) and subsidiary protection (SPD) determination

2.1 Japan

Japan - RSD - Refugee Status Determination Procedures
Chart 1

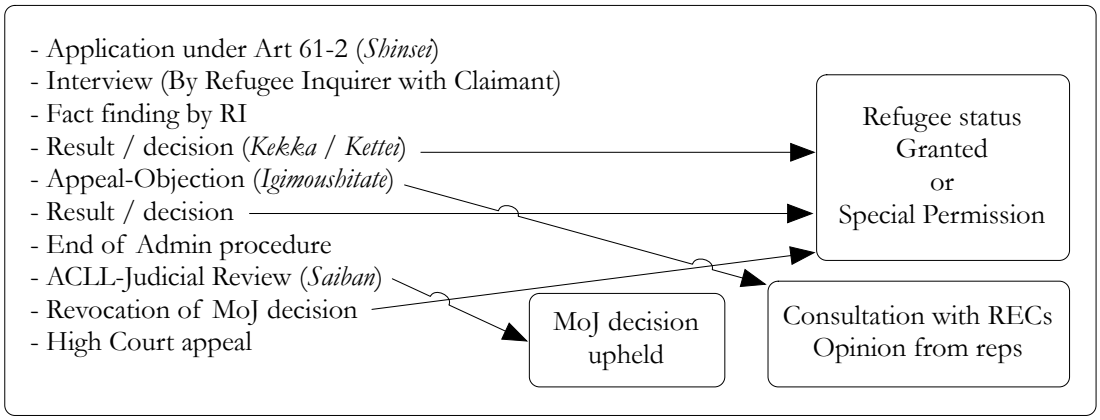

Chart 1, above, for which I am indebted to the Japan Association for Refugees (JAR), conveniently sets out an overview of the application and appeal systems available in Japan, under the ICRRA, and on Judicial Rreview through the ACLL.

The application is made to the Immigration Bureau (IB) of the Ministry of Justice (MoJ), which has the responsibility for RSD procedures. There are four methods in which an application can be made.

- At the port of entry an application applying for permission as a temporary refugee under Article 18-2. An applicant can also make a separate application under Article 61-2 for refugee status,
- At the port of entry after applying to landing permission in accordance with Article 6 ICRRA. Such an application is made in accordance with Article 61-2 ICRRA.
- A person in a deportation procedure, under Article 24 ICRRA, may claim to be a refugee in accordance with Article 61-2 ICRRA, either at the port of entry or in-land.
- An asylum seeker, who has entered on a valid residency visa, may apply in Japan, under Article 61-2 ICRRA.

Apparently they have only been a few asylum claims made at port of entry in Japan, although it was reported by some representatives that a figure in excess of 30 asylum seekers had applied at airports in the last year. It appears no official figures are published of the numbers who claim at the port of entry under Article 61-2. There are "Landing prevention facilities" within the airport boundaries and so-called "Airport Rest Houses" where people may be detained. There are no official figures of the number of people claimimg asylum whilst in such detention, nor, significantly, what type of consideration to such claims , if made. Those representing asylum seekers in Japan express concerns that asylum seekers are left without adequate legal, medical or interpretation services, and could be subject to deportation without a proper consideration of their claim, or ability to make an appeal.

Under previous provisions of the Immigration law it stated that an application for asylum had to be made within 60 days of the applicant's arrival. These provisions were seriously contested for many years and officially complained about by UNHCR. They were removed by provisions in the ICRRA of 2004.

A person claiming asylum is required to submit a refugee status application form (nine pages) together with an optional statement, other materials that could prove the applicant to be a refugee, and two photographs. Passports, certificate of a registration, and all the additional immigration papers are also to be submitted. The application forms are available at the Refugee Enquiry Department in any Immigration Bureau. Applicants are required to supply translations of any documents they provide. If the applicant is without legal status of residence within Japan, and has applied for refugee recognition they may be granted permission for provisional stay, provided there are: no reasonable grounds to suspect they fall under any specific grounds for deportation, they have filed their application within six months from the date of landing, they have come directly to Japan from the territory where they have well founded fear of persecution, they have not been sentenced after entering Japan to imprisonment on charges of crime set forth in the Penal code, there is no written deportation order against them, and no reasonable grounds to suspect they were likely to escape.

The interview with the Refugee Inquirer (RI) is reportedly usually quite lengthy and can involve a number of day-long interviews, where many questions will be asked, so the claim can be understood. Interpreters are provided. If that interpreter is not competent, reliable, or bias is claimed, a request can be made for a change. At the end of the interview the Inquirer's notes are translated and will be read back to the applicant for confirmation and signing. Third-parties, such as lawyers or acquaintances, are not allowed to attend the interview at first instance, although in the internal appeal (Objection Procedure) instance, they may attend, but not ask questions.

It appears that on average the asylum procedure can take anything from six months to two years. Representatives state that the more complex the case the longer the decision appears to take to issue from the Immigration Bureau. There do not appear to be any Ministry of Justice guidelines or regulations, publicly available, to show the basis upon which determinations are made by the MoJ. Reasoning and decision making is stated to be very brief, although, in recent times, the reasons given have been expanding a liitle but, according to practitioners, were still seriously deficient in reasoning, fairness and disclsoure.

Objections/Appeals

If there is a refusal by the RI a claimant may ask for an administrative appeal against the refusal (the Objection Procedure). It appears 60 to 70% of applicants make such objections. Consideration is then given by another section of the Immigration Bureau (the Adjudication division). A fresh consideration of the case is given, including, it now appears, the assessment of new evidence and additional interviews. Since the ICRRA came into force last year the 19 Refugee Examination or Adjudication Counsellors (RECs) have been appointed. The RECs can be requested at this Objection Procedure stage, to give their opinions on a claimant's case to the MoJ. The opinions of the REC's however are not binding. Although their opinions must, by law, be considered by the MoJ, the final decision will be made by the Immigration Bureau. Lawyers have no access to the RECs' conclusions, which remain strictly internal. (Although it does appear these reasons and conclusions are made available to the Courts on Judicial Review.) Again there are complaints by practitioners about a lack of reasoning in the determinations. It is claimed that usually the reasons provided will merely be a statement to the effect there had been no error found in the original decision, and no evidence provided to show the applicant is a refugee within the meaning of the Convention.

In addition to the lack of reasoning practitioners complain that the MoJ often appears to rely, in rejecting credibility, or well-foundedness, on Country of Origin (COI) material, and other information, that they consider adverse to the applicant's claim. However that material is not disclosed to the applicant or their representative, prior to the decision, nor is there the opportunity for comment or rebuttal of such information afforded. This apparently fundamental lack of procedural fairness is stated as being very difficult

to challenge both in the initial (RI) and Objection (RECs) procedures. This could have with possible flow on implications on JR because the information used could be fundamentally flawed and remain unchallenged. A reason suggested by practitioners for this approach was that in the Japanese Administrative Procedure Act 1993 (APA) contains provisions that, immigration **and refugee recognition** are exempt from this ability to complain and get review. The APA is a law allowing for complaints against first instance "administrative dispositions" to be investigated internally, within the same department of state, in accordance with due process. This therefore applies to RI and RECs/Objection Procedure decisions. It must be noted however that the "due process" provisions of the ACIL 1962, which covers appeal and /or JR instances of the procedure do require procedural fairness and "equality of arms" (at Chapter 2-4). (I was informed that the English word "Investigation" as used in ACIL, while generally and obviously used as the official translation, might be better translated or understood , as a correct reflection of the original Japanese as "appeal" or " review".) These fundamental fairness and equality of arms issues are covered in more depth below.

Judicial Review

Following refusal an applicant can then make an application for judicial review by the District Court, under the provisions of the ACLL. The statistics show that the number of such cases has risen over the past 6/7 years, and that there has been a growing number of successful cases at District Court level. These JR cases are usually handled by the Japan Lawyers Network for Refugees (JLNR) and other pro bono lawyers working for refugees. A claim under ACLL must be lodged within six months of the original decision. There are application fees of Yen 14600 plus hourly rate interpretation fees, and the applicant must pay for his or her lawyer. There are appeal rights from the District Court to the High Court. It appears very few such appeals have been the successful for claimants at the High Court stage. While several cases have gone on to the Supreme Court[7], it appears they have been largely unsuccessful. Detailed statistics are set out in Annex 7.

The Administrative Procedure Act 1993 and Administrative Complaint Investigation Law 1962

Before leaving the administrative Objection Review procedures, involving the RECs, (and still within the MoJ), and possible Judicial review proceedings before the courts, subsequent to MoJ decisions, it is important to give some consideration to impacts of the actual provisions of the Administrative Procedure Act 1993 (Act 88 of 1993) (APA), and the Administrative Complaint Investigation Law (number 160, of September 15, 1962) (ACIL). Also brief note should be taken of the tradition of deference to administrative or executive authority (*gyosei shido),* together with the historic conservatism of the Japanese judiciary.

The provisions of the APA, set out legislation governing fairness and due process within Administrative bodies, such as the MoJ. It states:

> Article 1 – "Purpose etc"
>
> "The purpose of this Act is, by providing for common rules concerning procedures for dispositions, and administrative guidance and notifications and procedure for establishing "administrative orders etc" to seek to advance a guarantee of fairness and progress towards transparency, here meaning that there be clarity in the public understanding of the contents and processes of administrative determinations; ... in administrative operations, and thereby to promote the protection of the rights and interests of citizens."

[7] eg -SMA and 3 others v Ministry of Justice in 1994 - (No 35 of 1990)

The term "Dispositions" is defined in Article 2 as:

> "Dispositions and other acts involving the exercise of public authority by administrative agencies."

The term "Applications" is defined as:

> "Requests, made pursuant to laws and regulations, for permission, approval, license or some other Disposition by an administrative agency granting some benefit to the applicant ... and to which requests the administrative agencies should respond in the affirmative or negative.

The term "Administrative guidance" is defined as:

> "guidance, recommendations, advice or other acts by which any administrative organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realise administrative aims, where such acts are not Dispositions."

The Act, however, goes on in Article 3 to state:

> "1. The provisions of chapters 2 to 4 inclusive shall not apply to Dispositions and the Administrative Guidance specifically listed as follows:
>
> (i) ... Etc …
>
> (x) Dispositions and Administrative guidance concerning departure and immigration of foreign nationals, **recognition of refugees**, and naturalisation."
>
> (emphasis added)

Chapters 2 to 4 set out a number of "due process" and good governance principles such as: Review standards, requirements for standard times in processing, review and response to applications, the necessity for grounds to be shown in decisions, the provision of information to applicants, and the holding of public hearings.

Article 1("Purport of this law") of the ACIL 1962 provides:

> "With respect to an illegal or unwarrantable disposition of administrative agencies and such actions as falling under the exercise of public power, the purpose of this law is to provide relief of rights and interest of people through a simple and prompt procedure by publicly opening the way of motion for complaint against administrative agencies to people and, at the same time, to secure proper operation of the administration."

Article 4 provides:

> "Any person aggrieved by a disposition of administrative agencies may make an investigation demand or motion for objection in accordance with the following Article and Article 6; provided, that this shall not apply to such disposition as mentioned in the following:
>
> ....
>
> (10) a disposition relating to entrance and departure or naturalisation of foreigners."

This Act does not exclude Refugee Status applicants.

Before considering the implications of these statutory provisions it is also necessary to consider the judiciary and administrative traditions. The results of the JR applications, in refugee cases up to 2000 (one positive result only), appear to indicate, the generally agreed, innate conservatism of the judiciary and a possible reluctance to exercise review over administrative actions. One commentator notes[8]:

> "There is little doubt that the courts, or at least the Supreme Court – have themselves been reluctant to deal with challenged governmental actions on the merits."

Professor Akakaki notes that this reluctance to get involved may stem from a sense of harmony with government or the desire to avoid tensions that could jeopardise the status and prestige of the judiciary[9].

While formally entrenched judicial autonomy is secured by the Constitution[10] the reality is much more complicated. It appears that the origins of Judicial conservatism are in Japanese history, going back to the Meiji Constitution, and before, and the concept of deferral to administrative or executive authority(*Okami)*. Coupled with this is the academic concept of 'administrative guidance' (*gyosei shido)* explaining the informal means of government persuasion through public officers to ensure the implementation of government policies. While this was an administrative practice, without legal effect, it has long excluded such "administrative guidance" from the sphere of law. Although it has been used as a preferred regulatory technique, and it is estimated that "administrative guidance" comprises over 80% of Japanese bureaucratic activity[11].

Professor Sato notes that the Law on Administrative Procedure, defined *gyosei shido* as "informal (generally oral) advice, which is not legally binding and seeks persuasion for voluntary compliance". He comments that because of this non-legal character it is convenient to the authorities to rely on and thus avoid legislative and judicial control. The terms of Article 3 of the ACLL, which governs the judicial review of bureaucratic action in Japan, sets out that the plaintiff must show the alleged unlawful action is an "administrative disposition or other exercise of public power". The Supreme Court has narrowly interpreted this as: "official conduct which forms rights and duties in citizens or confirms their scope". A rejection of a refugee status application is treated as an "administrative disposition " and not as an "adminstative guidance",

The immigration and naturalisation provisions in these two Acts may be understandable, on the basis that these relate to foreigners, who are applying to come within Japan's domestic legal provisions or policies, relating to immigration, and therefore seek to obtain privileges or licences granted by the Japanese government, in the interests of its own citizens. However, applying the most basic concepts of international law, to exclude also the recognition of refugees, even in an administrative review proceeding, does appear to be out of step with international practice, and a possible indirect, or maybe unintentional, breach of the fundamental duty of any State, which enters into a treaty, to observe good faith (*pacta sunt servanda)* in the application of the Treaty, as is reinforced by provisions within the "Vienna" Convention on the Law of Treaties, 1969.

Article 18 of the Vienna Convention obliges States to refrain from acts which would defeat the object and purpose of the treaty by which it is bound.

Article 26 "Pacta sunt servanda"(*Pacts must be observed*) states:

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[8] John O'Haley "Japanese Administrative Law" in Kenneth L Port (ed) - "Comparative Law: Law and the legal process in Japan (Carolina Academic Press, North Carolina, 1996, 635, 645)

[9] See "Japan's Practice in Determining Refugee Status" Osamu Arakaki, op.cit

[10] See Constitution of Japan, Article 76

[11] See "Commercial Dispute Processing and Japan" - Yasunobu Sato, Kluwer Law International, 2001 at 106

> "Every treaty in force is binding upon the parties do it and must be performed by the in good faith."

Article 27 "Internal law and observation of treaties" states:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

The Refugee Convention, while not providing a comprehensive formal procedure for determination of status, implicitly contains the good faith obligation. This is reinforced in the guarantee of the Right of access to courts (Article 16, RC51) that procedures will maximise the opportunity for a refugee claimant to establish that he or she is a refugee, which in turn maximises the State observance of the *non refoulement* obligations under Article 33[12].

The formal exclusion from the observance of due process, natural justice and fairness principles built into the Japanese administrative review process of refugee recognition, has, of necessity, flow-on into the Judicial review procedures that might follow. Judicial review cases, in the asylum field, may be possibly tainted by the failure to reach valid and sustainable decisions, that comply with the Rule of Law, through lack of observance of fundamental, internationally accepted , standards of fairness, at both levels, within the MoJ, caused by their reliance on the provisions of the APA and ACIL "exclusions". The access to the courts is therefore, on the face of it, potentially undermined by a lack of due process in the administrative procedure stage. When this is combined with the judicial conservatism, and traditional deference to administrative or executive decision-making, discussed above, it could well be argued that there is a potential for a lack of good faith, as required in international law, inherent the Japanese refugee determination system. Whether this will happen in the practices of the RECs, is too soon to tell probably and was not researchable, given my limitations discussed. However it would be clearly beneficial to a manifestly fair RSD if the provisions of Art 3(x) of the APA, relating to recognition of refugees, were removed, to make it clear there is no suggestion of fundamental unfairness both in law and in practice.

Subsidiary or complementary protection

Professor Dean, in her paper, helpfully sets out a section on humanitarian status (Special Permission to remain on humanitarian grounds-SPR)[13]. She notes that in Japan there is no distinction made between the various degrees of "humanitarian status". That is, those who made a claim under RC51, those with complementary forms of protection claims, and those allowed to remain on compassionate grounds. Instead, Article 61-2-2 of the ICRRA permits the Minister of Justice to exercise discretionary powers and grant a failed asylum seeker "SPR" in Japan. She notes that SPR has been used infrequently and was granted in only 284 cases, over 10 years, 1994 to 2004. The figure however is higher than those granted refugee status, which was 109 over a similar time span. SPR is not itself a type of residence permit but a one time act of regularisation. It is granted to illegal aliens fro several reasons , including when a person is recognised as a refugee, or is rejected , but is found to have other grounds to remain (Humanitarian status).Thus there is no renewal of SPR per se, but only renewal of a residency permit. The Adjudication division of the MoJ is responsible for considering requests for humanitarian status. This is the same division that deals with the "Objection Procedure" against refugee status refusals. Thus, potentially, the requests are considered by the same officials who determine the initial refugee status claim. The SPR normally enables a residence status for a period of one year, renewable. The renewal is discretionary, but will usually be granted, according to her

[12] "Judicial or Administrative Protection of Asylum seekers - Content or Form?" see paragraphs 7-11 -RPG Haines QC, a paper presented to the IARLJ, World Conference, April 2005 (www.refugee.org.nz accessed on 20 June 2006). (This paper gives a concise and logical explanation of these issues.)

[13] At paragraph 3.2.6

research. Professor Deans also observes that is the does not provide protection against *refoulement* and accordingly it gives less protection than the grant of refugee status.

While Japan is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT), there is no procedural legislation or regulations provided, as there is with refugee claims. Japan has opted out of the provisions, within the CAT, that allow the ability of complainants to take cases to the Committee on Torture in Geneva. Thus, apart a possible emergency approach to a Special Rapporteur on Torture, for very substantive or extreme cases, it appears that the CAT provisions and obligations could only be used as a defence in a Deportation case, not as an application procedure. Given that detention for the purpose of deportation is not subject to mandatory administrative or Judicial Review, this is perhaps unsurprising. There would however appear to be no restriction or reason why a CAT claim should not be made, along with most refugee claims , noting any apparent international obligations claimed, and the lack of a claim procedure. Such a claim could give an indication of the bona fides of the applicant's situation, that may be raised again, if the refugee claim does not succeed. It appears a type of "one stop" assessment now takes place including RSD , subsidiary protection, and CAT , if claimed. A CAT claim for a failed asylum seeker is no longer made in the deportation procedure.

Legal aid

There appears virtually no government supplied legal aid available to asylum seekers at any stage of the proceedings. There is however some private legal aid and counselling services available. A legal consultation service for foreigners is available in Tokyo, at a fee, but it provides free services on a restricted, one day a week, basis. There is also a legal aid service available on a very restricted basis for those who have very restricted means available to them. This is done either in conjunction with the UNHCR or Japan Legal Aid Association. Other assistance is provided from Japanese NGOs such as the JAR, JLNR, and Refugee Assistance Headquarters (RHQ).

Imminent Procedural changes

No imminent changes were noted, logically as the revised ICRRA is only in its first year of operational use. The work of the RECs is as noted, in its developmental stages as well.

2.2 New Zealand

Chart 2, below, sets out an overview of the application, appeal and Judicial Review procedures available in the New Zealand refugee determination system.

Chart 2
New Zealand - RSD
Immigration Act 1987 - Part 6A

- Application to Government official #
- Form completion, interview and fact-finding with Refugee status officer (RSO)* - Dept of Labour staff - NOT Immigration officer
- If Refugee Status refused apepal to independent Refugee Status Appeals Authority (RSAA)* - all lawyers, investigative procedure, full merits review
- If refused by RSAA, Judicial Review by High Court* on points of law only if available

* Legal representation, limited legal aid available at all stages of the procedure
\# Successful applicants usually get PR

The provisions of section 129G of the Immigration Act 1987 provide that claims to be recognised as a refugee made in New Zealand are made as soon as a person signifies his or her intention to seek to be recognised as a refugee to a representative of the Department of Labour, or to a member of the Police. Once a claim is made a claimant must, on request by Refugee Status Officer (RSO), confirm the application in writing in a prescribed manner. This will include a statement of their grounds, an indication of whether any other family members of the claimant's family are in New Zealand and also seek recognition, and, if so, on different grounds. The claimant must provide a current address and it is the responsibility of the claimant to establish the claim and ensure that all information, evidence and submissions he or she wishes to have considered are provided to the RSO before the officer makes a decision on the claim (Section 129(3), (4) and (5)). Operationally a claimant completes a very detailed application form, either on his own behalf or with the assistance of a representative and interpreter. The RSO may seek information from any source but is not obliged to seek such information etc, beyond that that provided by the claimant. The RSO may determine the claim on the basis of the information provided by the claimant. Subject to the provisions of the Act, and Regulations made under it, and to the requirements of fairness, an officer may determine his or her own procedures on a claim.

Every person in New Zealand who seeks to be recognised as a refugee is to have their claim determined under Part 6A of the Act, and every question as to whether a person in New Zealand should continue to be recognised as refugee is also to be determined under this Part of the Act (Section 129E).

Each claim is to be determined by an RSO who is designated by the Chief Executive of the Department of Labour (Section 129F). The RSOs have wide powers to require claimants to supply information and documentation and may require the consent by claimants to the release of any other documentation they consider relevant, including an ability to require a claimant to give fingerprints or photographs for the purposes of ascertaining or confirming identity or nationality, and to require them to attend an interview. If a claimant fails to attend an interview an officer can determine the manner without conducting an interview (Section 129H).

The decision of the RSO, on the claim, is final, except in so far as it may be overturned by the RSAA on appeal made under section 129O. The RSO must notify the claimant of a decision on the claim, including reasons for that decision, and the right of appeal to the RSAA. Once a decision has been made the officer may not reopen the claim for further consideration (Section 129I).

The New Zealand Act provides a limitation on subsequent claims by a persons who have already made a claim which has already been finally determined. An additional claim can only be made if "since that determination, circumstances in the claimant's home country have changed to such an extent that the further claim is based on significantly different grounds to the previous claim". In any subsequent claim a challenge to previous credibility findings cannot be made, and an RSO can rely on those previous findings (Section 129J).

An RSO also has additional functions: to consider cessation of status and applications for the revocation of status on the basis that status may have been procured by fraud, forgery, false or misleading information, or concealment of relevant information. Additionally, an RSO can determine whether a person recognised as refugee should subsequently be "excluded" for any reason, including fraud etc. If refugee status has been granted by the RSAA an officer may also apply to the RSAA for cessation, revocation or exclusion (Sections 129L and M).

Appellate procedures

The RSAA is set up as a continuing body under section 129N of the Act and can hear appeals, brought under Section 129O, from determinations by an RSO not to recognise a claimant as a refugee and other determinations on applications made under Section 129L.

Section 129(5) provides that appeals of the RSAA are normally to be considered by one member. The chairperson however, in exceptional circumstances, can decide if a case should be heard by more than one member, and who will be the chairperson for such a hearing. The UNHCR retains ex officio membership of the RSAA, but it appears, in practice, that UNHCR representatives have not sat on the RSAA from about the time when Part 6A came into force.

Other procedural requirements and powers of the RSAA are set out in Schedule 3C. Schedule 3C(7) provides that the RSAA is to have the powers of a Commission of Inquiry as are set out in the Commission of Inquiries Act 1908. This gives the Authority wide powers to conduct its hearings in a manner similar to that of the court, including the power to summon witnesses. Paragraph 11 of Schedule 3C sets out that the RSAA is to produce an Annual Report giving full details of its activities, on an annual basis, to Parliament. Significantly, paragraph 12 of Schedule3C, sets out that any publication, for research purposes, made by the RSAA, other than publication to persons involved, must be edited in a manner so as to remove the name of the appellant, or other affected person, from any publication which is likely to lead to the identification of the appellant or affected person.

A claimant who is dissatisfied with the decision of an RSO may appeal to the RSAA against the decision. The appeal must be lodged within five days of notification (with a power to extend "in special circumstances" by the RSAA).

Procedures by the RSAA are set out in section 129P. These include provisions that it is the responsibility of the appellant to establish their claim and they must ensure that all information, and submissions they wish to present, are provided to the Authority. The RSAA may seek information from any source, and like RSOs, is not obliged to seek information etc further than that provided by the appellant. The RSAA may request the Department of Labour to seek and provide relevant information. The RSAA may also dispense with an interview the appellant, but only if the appellant has been interviewed by an RSO and the Authority considers the appeal, or other claims, are, prima facie, manifestly unfounded or clearly abusive. In addition the Authority may dispense with the interview if the Appellant, without reasonable excuse, fails to attend. Again, like the RSOs, in any appeal involving a subsequent claim, there can not be a challenge to any finding of credibility or fact, made by the Authority, in relation to a previous claim, and the Authority can rely on such a finding (Section 129(9)).

The decisions of the RSAA are to be made by majority when there is more than one member, and if the members are evenly divided the matter is to be determined in favour of the appellant. The decision must be given in writing and include reasons and any minority view. The decision must be notified to the appellant and is final once notified. It appears from the published decisions very few minority or split decisions have been reached.

Also of significance, in the New Zealand legislation, at Section 129T, is the requirement to maintain confidentiality of the identity of the claimant at all stages. This provides that compliance may, in appropriate cases, require confidentiality as to the very fact or existence of the claim where that disclosure would tend to identify the person concerned or endanger any person. Provisions are provided to state that this does not prevent disclosure to persons involved in the claim the government departments involved, the UNHCR, the research decisions, referred to above ,nor the particulars in relation to a claimant, where expressly or impliedly, by their words or actions, they may have waived their right to confidentiality. Section 129T(5) provides that a person who, without reasonable excuse contravenes the purpose of this section, commits an offence.

The RSAA has since it commenced operations published research copies of all its determinations. However, to ensure compliance with Section 129T, the practice of the RSAA has been to refer to cases merely by the case number, the year and date of promulgation. This, of course, as with many other jurisdictions where confidentiality is rightly insisted upon, means that cases are not readily identifiable by the appellant's name, or at least some initials. While this practice of merely using numbers, or perhaps with some initials as well, protects the confidentiality it has the disadvantage of making well known and often referenced cases lack memorability to lawyers and judges, as is the case with other parts of the common law. No simple solution to this problem in New Zealand (or elsewhere) appears to have been found as yet, although the UK "Country Guidance" identification system does seem to be some reasonable compromise.

The case law of the RSAA, and higher courts in New Zealand, on refugee issues, can be found on two excellent web sites. The RSAA website www.nzrefugeeappeals.govt.nz and that of Mr Rodger Haines QC, (Deputy Chairperson of the RSAA) *RefNZ* which is www.refugee.org.nz.

Practice Notes

The Authority's Practice Note 1/04 of 23 February 2004, consolidates all previous practice notes. It gives good indication of the operational practices of the RSAA.

It reiterates the requirement of appellants to establish their claims to status and the need to provide all information, evidence and submissions they wish to have considered (in the English language) before the RSAA makes its decision. It is noted that hearings are to be conducted by way of a fresh (*de novo)* hearing, either by interview or on the papers, and all issues of law, a fact and credibility are at large. The RSAA makes its decision on the facts as they stated at the date of determination, not the date of the hearing before the RSO. The requirement for confidentiality is also stressed. No one other than the appellant or their representatives and authorised persons will be entitled to be present at the hearing, apart from those given express permission by the chairperson presiding at the hearing. The Authority's hearings are recorded on computer and a copy of the electronic tape can be obtained at an appropriate charge.

Hearings are noted as informal, however the witnesses and the interpreters are required to give their evidence, under affirmation or oath. The hearing before the Authority, unless otherwise directed by the chairperson, is conducted in an investigative or inquisitorial manner. The exceptions to this appear to be when there is a high quality of representation for the parties and the Authority concludes that a more adverserial approach could give a fairer, and possibly more expeditious outcome. It appears a very flexible and pragmatic approach, that is not overly legalistic and puts appellants in less stressful situation than a more formal court-like situation.

Independent interpreters are provided at the cost of the Authority and it is the responsibility of the appellant or representatives to ensure interpreting needs and also those relating to gender or age, are requested, so that the Secretariat of the Authority can endeavour to meet those needs. The interpreters used by the Authority are required (in all but exceptional situations) to have passed a training course in the skills required for Court or Tribunal interpretation work.

The Secretariat of the Authority releases a copy of the Immigration Service's Refugee Status Branch file to the appellant at least five days before the hearing. The Practice Note helpfully sets out a general note on the order of hearing. This explains that after introduction and opening submissions by representatives or the appellant, the appellant will then be heard and questioned by members of the Authority. The appellant's representative is then given the opportunity to re-examine. This is followed by witnesses being heard and questioned and the opportunity for representatives to make final submissions. The decision of the Authority is reserved for delivery in writing at a later date.

As stated the Authority makes provisions for specific gender factors and where possible, will endeavour to ensure that women appellants are heard by a panel comprising at least one woman member. Likewise, attempts are made to assist where there are family issues involved. In the family situations the Authority endeavours to hear all appeals from one family at the same time, particularly if they are on substantially similar grounds. Where there is a minor (under the age of 17 years of age) who is an appellant then, pursuant to section 141B of the Immigration Act it will be required that the interests of that minor be represented by a responsible parent or, alternatively, the Authority will nominate a responsible adult, in accordance with the provisions of section 141B.Special provisions relating to adjournments, applications to file an appeal out of time, withdrawals and special provisions for appeals against determination in involving the loss of refugee status, legal aid, complaints and other matters are also provided in the Practice Note.

Judicial Review

The provisions of section 129Q(5) of the Immigration Act provide that a decision of the Authority is final once notified to the appellant. Accordingly there is no right of appeal beyond the decision of the RSAA. In this situation if the appellant, or the Immigration Service, is dissatisfied with the decision of the RSAA ,they can seek a Judicial Review by the High Court, of that decision, on the usual administrative law principles, that the Authority has made a substantive error of law in the determination.

An analysis of the annual reports of the RSAA shows that the level of Judicial Review of RSAA decisions, has been low and the very few are quashed on the basis of there being a serious error of law in the decision. Issues of fairness, and procedure, are the major basis for review, with very few being based on substantial issues of refugee law. Detailed statistics are set out in Annex 8.

Subsidiary protection

At the present time New Zealand does not have provisions for the consideration of subsidiary protection for those applicants who consider themselves at risk on return but do not meet, or are not found after application and appeal to meet the requirements of the Refugee Convention. As will be seen below recommendations have been made, in the current review of the Immigration Act, to rectify the situation. A failed asylum seeker ,is thus in the same situation as any other unlawful overstayer, and can make an application, provided it is made within 42 days from the date of the expiry of the valid permit, to the Removal Review Authority (RRA). Pursuant to section 47 of the Immigration Act the RRA (an independent review authority with members, who must be legally qualified, appointed in a similar fashion to those on the RSAA) will make a decision, on the papers, as to whether it is considered the appellant "has exceptional humanitarian circumstances of a humanitarian nature that would make it unjust or unduly harsh for the

person to be removed from New Zealand, and that it would not in all the circumstances be contrary to the public interest to allow the person to remain in New Zealand"[14]. Significantly, a number of classes of persons cannot appeal under this section, including those who are unlawfully in New Zealand following revocation of their residence permit by the Deportation Review Tribunal, and persons unlawfully in New Zealand, to whom Section 114K(4)(b) applies (which relates to a person in respect of whom a security risk certificate has been confirmed).

It is noted from the Annual Report of 2005, for the RRA, that some 6500 appeals have been lodged over the period 1994 to 2004, and 1230 have been successful[15]. The situation therefore, in respect of persons claiming subsidiary protection, under the CAT or other international instrument, is that they can raise that issue before the RRA, or Deportation Review Tribunal (DRT), if applicable, and both tribunals would be obliged to give it weight[16].

Legal aid

Legal aid is available to asylum seekers in New Zealand through the Legal Services Agency (LSA)[17]. It is available to claimants both at the first instance, RSB, and appellate, RSAA levels and on Judicial Review, if the criteria for aid is met. The LSA will assign a lawyer who meets their criteria to a claimant, if they do not have a lawyer of their own. The lawyer may assist in the preparation of the claim, at the RSB interview, where they may attend and make submissions. They may also arrange necessary medical information and reports. At the appeal level their role is similar, including the right make submissions and to conduct re-examination, and cross examination of witnesses, if the RSB, or other government parties wish to call evidence .

Imminent procedural changes

The New Zealand government has released, in April 2006, a discussion paper which results from a review of all aspects of the immigration in New Zealand. This includes a review of RSD and the operation of the Appeal Authorities in New Zealand for residence, deportation, removal, and refugee status. The discussion paper calls for comment by June 2006. It is planned to introduce the necessary amendments to the Immigration Act in 2007.

The principal recommendations relating to refugee matters, to be included in the new legislation, are designed to:

- ensure that applicants are given potentially prejudicial information and reasons for decisions when appropriate
- appropriate access to review and appeal
- establish a single Immigration and Refugee Tribunal with a single right of appeal that is serviced by the Ministry of Justice
- clearly set out in New Zealand international obligations under the Refugee Convention, Convention against Torture, and the International Covenant on Civil and Political Rights

[14] Section 47(3) Immigration Act 1987

[15] See www.removalreviewauthority.govt.nz, accessed 20 May 2006

[16] See Tavita v Minister of Immigration [1992] NZLR (CA)

[17] The LSA is a Crown Entity in NZ

- enable immigration officers to require, use and store certain types of biometric information (such as photographs) to assist in immigration and refugee decision-making and to request other types of information such as DNA in a more limited range of circumstances
- ensure the expulsion system is streamlined with an automatic liability for expulsion, streamlined review and appeal rights and a single humanitarian test, including exceptional circumstances and the public interest
- ensure there are provisions to expel protected people, who have committed serious offences, or a risk to New Zealand (where this is consistent with the relevant international obligations)
- adjust the detention system to ensure a maximum period of detention without warrant, review period for detention warrants, and ability to detain when a person is at the border and in New Zealand.

This comprehensive review of immigration and asylum legislation, stated to be the most comprehensive in the last 20 years, certainly provides the opportunity for a grassroots, or zero-based, reassessment of all issues relating to immigration and asylum, rather than the piecemeal approach that appears to be taken, unfortunately, in so many other jurisdictions. The piecemeal approach of building on past, often failed, policies and legislation, not only creates confusion for applicants and the public, but also for the judiciary. Beyond this there is a risk that by such an approach governments will not deliver the policies they had actually aimed for. The New Zealand approach does appear to indicate that a regular and complete review can be highly beneficial, and certainly provides the opportunity for all interested parties to make comments and thus hopefully improve the final legislation that results from the review.

2.3 United Kingdom

Chart 3 below sets out an overview of the United Kingdom systems related to asylum applications, appeals and judicial and statutory review.

Annex 3

Chart 3
UK-RSD-Immigration Acts 1971-2004

Application - in response to notice of intent to issue Removal Directions (ie a defence to Immigration procedure)*.

- Form completion, interview, fact-finding by Home Office staff - in Immigration Dept (IND) - Refugee, Human rights and Immigration claims considered (*one stop procedure*).
- If refused, appeal to independent Asylum and Immigration Tribunal (AIT)*, membership predominately legal (but some lay membership, now sitting, with legal chair on mainly on deportation cases), one stop appeals, adversarial, full merits review, decision in 10 days.
- Both parties may seek reconsideration from High Court/Senior Immigration Judge (SIJ) of AIT (so called *filter process* for the High Court), on material error of law only (on the papers).

- If reconsideration granted by SIJ, reconsideration hearing by AIT, single IJ or panel, as directed.
- Decision in 10 days.
- Both parties may then seek permission to appeal to Court of Appeal on material errors of law only.
- House of Lords - by permission - errors of law only.*
- *Legal reps/limited legal aid available at all stages.

- If no order by SIJ - "Opt in" for "Statutory Review" by High Court Judge (papers).
- If refused, matter is at an end.
- If granted, matter proceeds to reconsideration as in other column.
- NB - There are also fast track appeal systems and a separate court for "Terrorist suspects" - SIAC.
- Refugee, HP and HR grants lead to 5 year visas (renewable)^.

^HP = Humanitarian protection (or Subsidiary protection) under Qualifications Regulations (SI 206/2525) and Immigration Rules (Cm 6918) effective from 09/10/2006
^HR = Human rights (ECHR .1950)

The UK has a long history of affording asylum before the 1951 Convention and 1967 Protocol came into effect. With the introduction of the Asylum and Immigration Appeals Act 1993, Section 1, (which is still in force), for the first time, the term, "asylum" was defined as meaning "refugee status within the meaning of the Refugee Convention and Protocol". Until that time, the body of jurisprudence in the UK was that refugee status was not a matter for the Courts, but only the Secretary of State for the Home Department (SSHD). Only Judicial Review proceedings were open to challenge the decisions of the Secretary of State. Since 1993 there have been four major Acts dealing with asylum[18].

[18] See paragraph 12.17 "Macdonald's Immigration Law and Practice" Ian A Macdonald QC and Frances Webber - 6th edition, LexisNexis Butterworths - Details of the introduction of "white lists", "safe countries of origin" and the other major changes made by the Act are set out therein.)

A "claim for asylum" is, in general terms, defined, from the 1993 Act, as meaning "a claim that it would be contrary to the UK's obligations under the Refugee Convention for claimant to be removed from, or required to leave, the United Kingdom ...". (For all practical purposes, since the introduction of the European Human Rights Convention into UK law, from 10 October 2000, a "claim for asylum" not only provides that it would be contrary to the UK's obligations under RC51, but also under Article 3 of ECHR for the claimant to be removed. The Nationality,Immigration and Asylum 2002 (NIA Act) set out that a claim for asylum has to be made in person, at a place designated by the SSHD. The claim need not be made in explicit terms as long as it is sufficient to indicate an unwillingness to return on the grounds of the danger perceived[19].

Unlike the ECHR, the Refugee Convention is not directly incorporated into UK law, although as noted in this regard, pursuant to Sections 1 and 2 of the 1993 Act, nothing in the Immigration Rules shall lay down any practice which is contrary to the Convention. The responsibility for determining asylum claims lies with the SSHD as part of the overall responsibility for immigration control. There are four situations, in immigration terms, where a person can apply for and be granted asylum as a refugee in the UK. These are:

- on arrival at a port of entry-including airports;
- after having been granted leave to enter in another capacity and while that leave is still current-a so-called "in country" application;
- where a claimant's deportation is deemed by the SSHD to be conducive to the public good or where the claimant has been recommended to deportation by a criminal court - "deportation cases";
- where the claimant has overstayed leave previously given, or has breached the conditions of current leave, or where the claimant has entered the country illegally, and is therefore an illegal entrant, and thereby, in any case, faces administrative removal.

The "approved" way of seeking asylum in UK is to apply in person to an immigration officer on arrival at a Port. The officer is then obliged to refer all asylum claims to the SSHD for determination. Until a decision is made the applicant, and any dependants, cannot be removed. The applicant is not given leave to enter during this period but can be either detained or given temporary admission. If the applicant does not apply for asylum immediately on arrival, but tries to enter under some other manner, and the immigration officer refuses leave to enter, he or she can still make an asylum claim. Removal directions may be set against the applicant whilst the claim is being considered, but the directions do not have effect during this period[20]. The power to detain is provided in the Immigration Act 1971 and can be exercised by the SSHD or immigration officer in cases where a person has claimed asylum.

For "in country" asylum applications, in immigration terms, they are treated as an application for variation of the leave to enter or remain and an applicant can be treated on the same basis as those granted temporary admission following a port application. It is also possible for a person who has been granted leave to enter and remain, in the form of humanitarian or discretionary leave, to apply for a variation of that leave to the SSHD. This is a so-called "up-grading application". The original immigration leave, or an extension of it, will continue until the date of decision on the asylum application and, if a negative decision is made, for the period during which an appeal, against the refusal to vary leave is being determined.

Liability for deportation is limited to persons, inherently non British citizens, who the SSHD deems that it will be conducive to the public good for them to be deported, and/or who have been convicted of an offence punishable by imprisonment and recommended for deportation by a criminal Court. A deportation order can be made against a person even if s/he has indefinite, as opposed to limited, leave to enter and remain. Such persons can claim that it would be contrary to the UK's obligations under either or both the Refugee and the Human Rights Conventions for them to be deported and the SSHD will also consider the

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[19] For general comments on asylum claims within the Immigration law in UK see paragraphs 11.1 to 11.6 "Asylum law and Practice" Mark Symes and Peter Jorro - LexisNexis Butterworths, 2003

[20] Nationality, Immigration and Asylum Act 2002, s77(4)(a)

claim and not remove the claimant from the UK, while doing so. Theoretically, the SSHD can go on to make a deportation order while considering the claim unless the person has also appealed against the decision on non asylum grounds. Also where the SSHD certifies that a person, who is not a citizen, is a "suspected international terrorist" pursuant to the terms of the Anti-terrorism, Crime and Security Act 2001 issue a deportation order, even though it might be accepted that his actual removal from the UK would be unlawful as being in breach of Article 3 of the ECHR and s/he can then be detained indefinitely[21]. A person can make a claim for asylum after a deportation order has been made against him and the SSHD will treat the asylum claim as an application to revoke the deportation order and consider it in the usual way. The applicant can be detained pending consideration of the claim but cannot lawfully be removed, until and unless the asylum claim is refused.

Where an illegal entrant is subject to administrative removal, because they had entered without leave, entered in breach of a deportation order, or entered by deception, they will be declared an illegal entrant by an immigration officer and may have removal directions set against them. There is a right of appeal against the decision and a person can apply for asylum before or after being notified of their liability for removal as illegal entrant. In immigration terms this amounts to an application for leave to remain in UK and they cannot be removed while the application is being considered, but maybe detained or granted temporary admission.

Appellate procedures.

The Asylum and Immigration Tribunal (AIT) was established under section 81 of the NIA Act 2002 and came into force on 4 April 2005. The tribunal is set up to hear appeals both on immigration and asylum matters. Pursuant to section 82 of the NIA Act, where an immigration decision is made in respect of a person he may appeal to the AIT.

An immigration decision includes:

- refusal to enter the United Kingdom,
- refusal entry clearance,
- refusal of a certificate of entitlement,
- refusal to vary a person's leave to enter or remain,
- revocation of indefinite leave to enter or remain,
- a decision that a person is to be removed by way of directions,
- a decision that an illegal entrant is to be removed by way of directions,
- a decision to make a deportation order,
- a refusal to revoke a deportation order.

Section 83 applies to asylum claims and provides that a person may appeal to the tribunal against the rejection of his of his asylum claim, where the claim has been rejected but only if s/he has been not been granted leave to enter or remain for a period exceeding one year. (Thus a person who is given humanitarian or discretionary leave for less than one year, even though an asylum claim is refused, will have no right of appeal to the AIT at that time and not until removal directions are made).

The seven grounds of appeal are provided in section 84. These are:

- the decision was not made in accordance with the Immigration Rules,

[21] Anti-terrorism, Crime and Security Act 2001, ss 21-23

- decision is unlawful by virtue provisions in the Race Relations Act (discrimination by public authorities),
- the decision is unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to the Human Rights Convention) as being incompatible with the appellant's Convention rights,
- that the appellant is an EEA national etc,
- that the decision is otherwise not in accordance with the law,
- that the person making the decision should have exercised differently a discretion conferred by the Immigration Rules,
- that removal from United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998, as being incompatible with the appellant's Convention rights.

Appeals under section 83 must be brought on the grounds that removal of the appellant would breach the United Kingdom's obligations under the Refugee Convention.

Section 85 then sets out matters to be considered by the AIT and provides that it may consider evidence about any matter which it thinks relevant to the substance of the decision, including evidence which arises after the date of decision. The AIT must determine any matter raised in the grounds of appeal and matters it is required to consider under s85. It must allow the appeal in so far as it thinks that a decision against which the appeal is brought, was not in accordance with the law, or a discretion exercised in making a decision against which the appeal is brought, should have been exercised differently. In other situations and the Tribunal shall dismiss the appeal. In accordance with principles laid down in a Court of Appeal decision in *Robinson [1997] EWCA Civ 2089* it is now established, as legally correct for the Tribunal, to introduce, or adopt, obvious points of Convention law that may involve the possibility of the UK breaching its protection obligations under either the Refugee and (by later case law), the Human Rights) Conventions. Accordingly, if it appears to the Judge that there is an obvious asylum point favourable to the Appellant's case, and that point may not have been pleaded by the Appellant (which is for example at times the situation for unrepresented Appellants) the Judge may validly take that point into account in his or her consideration of the case, subject of course to the normal rules of fairness and opportunity for comment, where necessary, by the SSHD.

Appeal rights cannot be brought in situations the SSHD certifies as clearly unfounded or the claimant is entitled to reside in States listed in s94(4). Those "safe" States include, at present, Albania, Bulgaria, Serbia, Jamaica, Macedonia, Moldova, Romania, Bangladesh, Bolivia, Brazil, Ecuador, Sri Lanka, South Africa and Ukraine. There are also provisions that set out that the other 24 EU countries are safe and no applications can be considered from these so called "super safe" countries.

An appeal under section 82 or 83 may be bought, or continued, if the Secretary of State certifies that the person's exclusion or removal from United Kingdom is in the interests of national security, or in the interests of the relationship between United Kingdom and another country. Also an appeal against the decision may not be brought or continued if the Secretary of State certifies that in his opinion it has been made on information that should not be made public in the interests of national security or the interests of the relationship between the UK and another country or otherwise against the public interest. (Such appeals are then covered, in the main by the Special Immigration Appeals Commission (SIAC)).

The AIT was established on the basis that it would be a single tier appellate tribunal to replace the former system whereby appeals were made initially to an Immigration Adjudicator, from whom there was an appeal right to the Immigration Appeal Tribunal (primarily on points of law only). After much contentious debate in the UK Parliament, and beyond, when it was initially proposed by the government that they will be no judicial overview/review of Adjudicators' determinations, and that their decisions would be final, a compromise was reached, whereby there would be an internal review in the AIT, subsequent upon a "papers application" to a High Court judge to establish an apparent error of law in the AIT decision. This scheme is

provided by section 103A of the NIA Act. This states that a party to an appeal under sections 82 or 83 may apply to "the appropriate court" on the grounds that the AIT made an error of law, for an order requiring the Tribunal to reconsider its decision on the appeal. "The appropriate court" may make an order only if it thinks the Tribunal may have made an error of law, and only once in relation to an appeal. An application under the section must be made within five days of receiving notice of the Tribunal's decision in asylum cases. The decision of the appropriate court shall be final. An application for review is not available where the Tribunal exercises its jurisdiction by three or more legally qualified members. The appropriate court in England or Wales means the High Court and in Scotland the Court of Session.

In view of the substantial workload that this provision was likely to bring to the High Court Judges, transitional provisions were introduced by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (2004 Act). This provided a so-called "filter process". The applications for reconsideration are determined, on the papers, by Senior Immigration Judges (SIJs), a senior tier of some 30 judges, within the AIT. Following this decision, if a party is dissatisfied with that SIJ's determination, they can then take the next step and "opt in" for consideration of their application by a High Court Judge. This a process whereby the application is then passed on to a High Court judge who considers the determination of the SIJ, and the original Tribunal decision, on the papers, in a form of Statutory Review, and then decides whether or not the determination was a valid one or otherwise. If the High Court decision is favourable to the applicant the case is then referred back to the AIT for reconsideration, in the same manner as would be the case when the SIJ makes such a decision. Otherwise the matter is then at an end.

If the order for reconsideration is made the matter is then to be reconsidered either by a single Immigration Judge (IJ) or a panel of SIJs and IJs, as appropriate. The determination on reconsideration can then be appealed to the Court of Appeal (England and Wales) or Court of Session in Scotland, but only after application for permission to appeal has been granted, either by an SIJ, or subsequently on application by a member of the Court of Appeal. Beyond this, by leave only, a further appeal right is available to the House of Lords. In matters where ECHR law is involved there are direct appeal rights to the European Court of Human Rights (ECtHR) in Strasbourg.

Subsidiary Protection determination

The implementation of the Human Rights Act 1998, into UK law, on 2 October 2000, brought into effect a complementary or subsidiary protection regime, by making the terms of the ECHR directly applicable in the UK. Of particular relevance are the provisions which provide rights applicable to non British citizens in the UK. As discussed above the provisions of Articles 3 and 8 of the ECHR. clearly are the most relevant to aliens in UK. By virtue of the "one-stop" determination system for immigration and asylum matters, in the UK, issues of subsidiary protection are automatically considered in every case.

Under the visa regime, recently introduced, those applicants who are granted refugee status in the UK are given a five-year residence visa. The UK opted out of the EU Family Reunification Directive (Doc 6912/03-Feb 28, 2003). However, in accordance with a UK Immigration policy announced in Parliament (18 January 1995):

> "Persons who have been recognised as refugees in UK are eligible to be joined immediately by their spouses and minor children under the family reunion concession. Applications are considered under the Immigration Rules [paragraphs 352A-F of HC395], but maintenance and accommodation requirements are waived ... ."

They will also have the right to work. However, they will have to apply for renewal before the expiry of that visa. Those asylum applicants however, who are found to be in need of subsidiary protection only (under Articles 3 and 8 ECHR), were given humanitarian or discretionary visas for shorter periods of time, usually for 3 years. (This is now to be harmonised with refugee protection visas.) Their rights to reunification with

family members are far more limited, however, as they must satisfy normal Immigration Rules (including maintenance and accommodation), but the right to work is usually provided.

Legal aid

Legal aid is available for all asylum and human rights appeals (subject to means and merits test). However, there are now concerns that severe legal aid cutbacks are seriously affecting the rights of asylum seekers before the AIT and the Courts. There are two major publicly funded organisations, the Refugee Legal Centre (RLC) and the Immigration Advisory Service (IAS). They are becoming the primary source of legal advice and assistance to asylum seekers as more and more law firms and Counsel withdraw from providing such advice on the basis they consider it uneconomic.

Recent and imminent changes

The most significant changes in protection law in UK are those which follow from the implementation of the ECQD before 10 October 2006, following domestic implementation legislation in the UK (see: *The Refugee or Person in Need of International Protection(Qualification) Regulations 2006(SI 2006/2525)* and a *Statement of cxhanges in Immigration Rules (Cm 6918))* . The ECQD, and later ECPD, will have major impact on the operation of asylum and human rights law not only in UK but throughout the EU, and no doubt the approaches taken under this new European law will be influential on interpretation and operation of protection law throughout the world. The details of these changes are set out under the following section of this paper.

2.4 European Union

Introduction

In any comparative study, relating to asylum and human rights protection claims in the UK, and indeed in the rest of the European Union, it is necessary to consider the position of the European Court of Human Rights (ECtHR) and the position it occupies, in the interpretation and application, of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). Following an overview of the role of ECtHR, it is then appropriate to consider the position within the European Union itself, and in particular, the imminent operation of the so-called Qualifications Directive (ECQD).

The ECHR was signed in Rome in November 1950 by the 10 states that then constituted the Council of Europe. Since then another 34 states have signed. The Convention was substantially revised by Protocol 11, which came into force 1 November 1998. The first section of the Convention sets out the protected rights and fundamental freedoms. The second section (Articles 19–51) is entitled "European Court of Human Rights" and provides for the establishment and the powers and functions of a permanent Court that is now a unified system replacing the previous dual system. Notable also is Protocol 13, abolished the death penalty absolutely, which came into force on 1 July 2003. All of the protected rights and fundamental freedoms are recognised as "inherent, inalienable, and universal".

The permanent Court carries out its function in Strasbourg, "to ensure observance and engagements undertaken by the High Contracting Parties in the Convection and the Protocols". The number of judges equals the number of State parties. The Court sits in Committees of 3, in Chambers of seven judges, and in a Grand Chamber of 17 judges. The Court's jurisdiction extends to all matters concerning the interpretation application of the Convention (ECHR) in the Protocols. Article 33 of the Convention provides any state may refer to the court "any alleged breach of the provisions of the Convention and the Protocols thereto by

another High Contracting Party". Importantly, Article 34 provides for individual applications and states "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right." This individual right is of course what gives the Court and the ECHR its "teeth", across the whole of Europe.

If an application is declared admissible there will be an attempt, by the Court, to reach a "friendly settlement" of the case between the applicant and the State party concerned. If there is no settlement a full hearing on the merits of the case will proceed before a Chamber, or in some exceptional cases, by referral to the Grand Chamber. If the Court finds there has been a violation of the Convention or the Protocols, it may order the State party concerned to afford just satisfaction to the injured party. This can include financial recompense for the harm suffered. Judgements are published. Reasons for judgement are given along with dissenting or partially dissenting opinions. Judgements of the Court, whether by the Chamber or the Grand Chamber, are not binding on itself. The Court's jurisdiction also extends to giving advisory opinions on legal questions concerning interpretation of the Convention and Protocols, as may be requested by the Committee of Ministers.

Unlike most member States of the Council of Europe, who incorporated the provisions of the ECHR into their domestic law at an early stage, the UK resisted their incorporation. However, as noted, the Human Rights Act 1998 has now been incorporated the ECHR into domestic UK law.

From 10 October 2006, 24 of the 25 States[22] within the European Union will introduce a completely new system for the determination of international surrogate protection, with the commencement of the European Council Qualifications Directive (2004/83/EC) (ECQD) and the two new statuses that will be assessed under the new Directive[23].

The ECQD is a remarkable development in the field of international law. It is the first supranational instrument to cover those in need of international protection, who might fall both within, and outside, the provisions of the RC51. Previously different EU countries dealt in various ways with people who did not come within RC51, and according to a number of different definitions, or terms, such as category B status, exceptional leave to remain, humanitarian leave etc. It thus fills the gap that has long been noted in respect of the ECHR, particularly in the UK, in that, while all the ECHR had guaranteed was non removal or *non refoulement,* it had not provided any form of status or obligation to provide a visa/permit as evidence of a status. The ECQD is also the first supranational instrument that deals with refugee protection and subsidiary protection in the same document. The ECQD defines "international protection" as encompassing both refugee and subsidiary protection status. It is to be noted that the ECQD is not a replacement or a substitute for RC51 nor the ECHR. The ECQD however does effectively add extra legal layers. The Directive has been dubbed by some as the "EU Refugee Convention" which may suggest it will be a regional replacement. But this is not the case as the Directive leaves RC51, and indeed the ECHR, intact, as the two cornerstones of asylum and human-rights law. This is unsurprising since the obligations of the UK and other EU members, under the Refugee and Human Rights Conventions, remain and have not been revoked. Indeed the ECQD itself sets out that member States must comply with existing international obligations. The personal scope of the Directive is however confined to "third country nationals or stateless persons". Thus a claim for asylum cannot be brought by national of an EU member State. The Directive is also noticeably further restrictive in that it does not attempt to cover the full range of refugee rights set out between Articles 3 and 34 of RC51[24].

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[22] Denmark opted out of this Directive

[23] The full, if rather cumbersome, title is "COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted." (For the full text of the ECQD and EPQD see Annexed 1 and 2 of this paper)

[24] For a comprehensive introduction to the Qualification Directive I am much indebted to a paper by Dr Hugo Storey, Senior Immigration Judge AIT, UK, "The Refugee Qualification Directive: An Introduction" - February 2006

The first point to note is that the provisions of the Directive are mandatory, within the 24 EU countries that have adopted it. They lay down "Minimum standards - to guide the competent national bodies of member states in the application of the Geneva Convention". Member states may however, as provided in Article 3 ECQD, "Introduce or retain more favourable standards determining who qualifies as a refugee or a person eligible for subsidiary protection (strangely termed "*Humanitarian protection"* by the UK implementing regulations and Rules), in so far as those standards are compatible with this Directive". The UNHCR, and others argue, that this essentially permits member states to retain or introduce more favourable standards at their discretion.

The ECQD does appear to provide, what Dr Storey terms as " a new Conceptual Tool-kit", and sets out its own definition of refugees and of the cessation and exclusion. The text of the Directive contains a set of definitions and interpretative guidelines, some mandatory, for the basic elements of recognition which are set out in RC51. In the future this means the European administrative decision-makers, and Courts, will stop making direct reference to the Refugee Convention 1951 itself, and also to past case law that has interpreted RC51. Thus, while RC51 will remain in the primary and parent legal instrument, the ECQD will occupy much of "it's legal space" and govern almost everything to do with refugee eligibility. The first four chapters of the Directive combine Articles which broadly replicate the provisions of RC51: Articles 1A(2), 32 and 33 in particular. They use, in fact, virtually identical words. Articles 6 and 7 of the ECQD set out interpretative provisions in respect of Actors of Persecution and Actors of Protection. Other provisions, in these four chapters, mix some of the RC51 definitions with additional criteria for their application and interpretation. For example Article 12 ECQD repeats the wording from Article 1F (b) of RC51 but then adds "which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an alleged political objective, may be classified as serious non-political crimes".

The Directive also appears to contain a number of mandatory provisions. These include Definitions (Article 2), Actors of persecution (Article 6), Acts of persecution (Article 9), cessation and exclusion (articles 11 and 12), the granting of refugee status (Article 13), serious harm (Article 15) and more on exclusion (Article 17). The interaction of mandatory features in the Directive has given concern to the UNHCR, who consider there is no legal basis, in the context of minimum standards, to provide any legal definition concerning refugee eligibility. Accordingly, the implementing legislation of the 24 EU governments will be interesting to follow to see if they help decide whether the Directive is to be treated as containing mandatory language or not. It is likely this will become a question of dispute at an early stage and may only come to be resolved when the issue comes before the European Court of Justice (ECJ) by reference being made to that Court. In this regard much will hinge on the wording of Article 3 and Recital 8 of the ECQD which provide that member States "may introduce or retain more favourable standards for determining who qualifies as a refugee or person eligible for subsidiary protection, insofar as though standards are compatible with the Directive".

The ECJ will of course be the Court of reference, and final interpretation for disputes over the ECQD will take place there. Reference can be made to the ECJ, after the exhausting of domestic remedies, or by the highest relevant Court in the member state.

From a UK perspective the substantive changes brought about by the Directive will be very limited, as in most situations the current UK law either meets, or is at a more favourable standard, than the terms of the Directive. In other European countries, such as Germany, the situation is not the same, and changes to at least the more favourable (minimum) standards, set out on the Directive have either been implemented, or are in the process of implementation. In France, prior to the introduction of the Directive, French domestic law was changed to a situation whereby the Directive is virtually taken across in full into domestic law and is applicable, as the French standard and interpretation at this time. Accordingly the French Courts are now in effect becoming the first to give legal guidance on issues of interpretation of the Directive.

Dr Storey, in his paper, suggests that application the ECQD reference will require a new three step process to be followed in the 24 countries. At "Step one", it will need to be ascertained whether the person qualifies as a

refugee, by the application of the Directive standards. At "Step two" if not a refugee under Step one, there will need to be an assessment of whether the applicant qualifies for subsidiary protection, and finally, at "Step three" whether they can show there would be a violation of Articles of the ECHR, which still remains as an obligation on each state, if they were to be returned to their home country.

This three-step approach will of course become extremely important as the basket of rights and social benefits available at each step differs. The Directive sets these out and the defines these benefits differentially, firstly for refugee status, and then, at a lower level of benefits, for subsidiary protection. (For example, the residence permit to be provided on the minimum ECQD for a refugee is at least 3 years, renewable, whereas for subsidiary status it is 1 year, renewable, only.) If, in rare circumstances, an applicant is found to be ineligible for the two new European statuses but that there would be a real risk of breach of Article 3 of the ECHR, if they were returned to their home country, then the type of status or visa, if any, they will receive will revert to a domestic provision. It is to be noted that under the ECQD qualifying for "refugee status" or for "subsidiary protection status" are mutually exclusive. As Dr Storey states "The rationale behind this is that the Refugee Convention is to be given full and inclusive interpretation and that subsidiary protection is just that: *subsidiary"*. A person can only qualify for subsidiary protection if he fails to qualify as a refugee[25].

Procedures Directive

The final piece of EU program to establish a "Common European Policy for the determination of refugee and subsidiary status" will be completed with the implementation of the "European Council Directive on minimum standards of procedures in member states for granting and withdrawing of refugee status (30 April 2004)" (ECPD). This has now been approved by the European Council and European Parliament. It will come into force throughout the EU on 1 December 2007. It will introduce "one stop assessment system" of minimum standards of procedure to be applied for determinations which will follow the ECQD[26].

3. Observations on limited Japanese case material available

3.1 Introduction

As has been noted, the serious limitations on the availability of case law, in English, has meant that it has only been possible to give general observations on the Japanese jurisprudence in refugee determination cases, rather than a properly researched and detailed comparison. The comparative work done by Professor Arakaki, in his thesis noted above, covered in the period from 1981 until approximately 2001. There have been far more Judicial Review cases taken to the District Court and, on appeal, to the High Court, over the past five years, than was the situation in the first 20 years since Japan signed the Convention in 1981. More than 100 additional cases had been considered on Judicial Review, since 2001. Unfortunately, full or partial, English translations of only about 12 of those cases are available. The Practitioners interviewed report that

[25] For additional background reference should be made to the papers by Dr Storey, Dr Robert Thomas (University of Manchester), Dr Helene Lambert (University of Exeter), Professor Elspeth Guild (University of Nijmegen), Anna Klug (UNHCR), and Menno Verheij (European Commission - Brussels), on the likely impact of the ECQD. These excellent papers were presented at the IARLJ European chapter conferences in, Edinburgh (November 2004), and Budapest (November 2005). They have been of great assistance to me in the preparation of this paper. Some of these papers are available at www.iarlj.nl otherwise by email request through info@iarlj.nl

[26] For a full text of the EPQD see Annex 2. Also for a detailed introduction to the ECPD and its likely impact, see the excellent paper of Cathryn Costello "The Asylum Procedures Directive" presented at the Budapest conference of the IARLJ (November 2005) (www.iarlj.nl or email request to cathryn.costello@law.ox.ac.uk)

there has been some progress in the development of jurisprudence by the Courts over the last five years. However, in their view, there is not as yet, any significant reference to international case law, made by the Japanese judiciary, nor is there any notable consistency of interpretation, either with international or domestic jurisprudence, on similar legal issues. The Courts have not used their decisions to give any structured guidelines, to the MoJ, as to the detailed procedural and jurisprudential approaches to the core issues involved in RSD, they consider should be adopted, even when overturning or agreeing with MoJ determinations.

Professor Arakaki reported that he is working on updating his analysis of the reported cases, subsequent to his thesis, (from the original Japanese reported determinations) and that should be available late 2007. At that time a more substantive comparative study of the jurisprudence could more realistically be carried out.

Even noting the limitations above it is clear that, with limited exceptions, referred to later, a structured approach, to the essential elements of refugee status determination, with to any international jurisprudence, or major academic commentaries, is not yet evident in the Japanese jurisprudence. There is however some reference to UNHCR guidance , mainly from the Handbook, in a few cases. This is not to say that a number of these essential elements, now widely adopted in international jurisprudence, are totally overlooked, but that the approach taken by each Court is a far more pramatic,case-by-case, fact driven, assessment, as part of a Judicial Review task, to ascertain whether the decisions of the MoJ contain errors of law rendering them invalid. There is no apparent attempt to look for international consistency, guidance or harmony with any other jurisprudence/juridictions.

MoJ comments or guidelines of its own internal procedures are not publicly available.

For these reason I have given general observations only from the few Japanese cases available and then gone on to give an overview of a few of the structured elements within refugee status determination, from the jurisprudence of New Zealand, United Kingdom that may been seen as helpful in the development of Japanese RSD. (Similar approaches to these are also generally to be found in the jurisprudence in many other common law and European jurisdictions).

The core elements of RSD I have endeavoured to seek out and comment upon, in the Japanese law and (limited) jurisprudence, are the core elements of burden and standard of proof, credibility assessment, fairness, persecution, convention reasons, use of objective information, exclusion, subsidiary protection and some specific issues within these "essentials", such as *sur place* and gender related claims.

3.2 Burden/Onus of proof

There is no specific obligation set out in the ICRRA, although it could be seen as implicit from the terms of Article 61-2-14. This states:

> "1. The Minister of Justice may have a Refugee Inquirer inquire into the facts, if necessary for the recognition of refugee status ...
> 2. The Refugee Inquirer may request the persons concerned to make and appearance, may ask questions, or request the presentation of documents if necessary for the inquiry as stipulated in the preceding paragraph.
> 3. The Minister of Justice or the Refugee Inquirer may make inquiries to public offices or to public or private organisations and request submission of reports on necessary facts in relation to the inquiry in paragraph 1."

Pursuant to Article 61-2-9, "The Objection Procedure", the RECs may request the MoJ to give the appellant opportunities to present their opinions orally and may question the appellant. No other procedural aspects relating to the determination process to be carried out are set out in the legislation.

In the two most comprehensive determinations available in English - *Nagoya District Court cases 19 and 49 of 2002*[27] - the Court set out the burden of proof in terms generally consistent with international jurisprudence. In the *Myanmarese case* (*19/2002*), they state:

> "The burden of proof on status as a refugee.
>
> Generally speaking, it is appropriate to establish the burden of proof in different ways in accordance with the nature of the disposition at issue in an appeal trial. As a rule, when what is called an "intrusive disposition", which restricts someone's freedom or imposes duties on someone, is concerned, an administrative authority, which has made the disposition. should bear the burden of its legality. On the other hand, when what is called a "beneficial disposition", in which someone is to gain privileges or special rights or to be freed from legal duties, the plaintiff should prove that he/she meets the requirements under the concerned legislation (that the dismissal of his/application is illegal); the decision should be made after comprehensive consideration of the relevant provisions and to what degree the requirements thereof are met.
>
> Special permission to stay and the Article 50 of the Immigration Act is in itself, permission to stay in Japan, granted by the exercise of the special discretion of the Minister of Justice, to an alien who does not have the inherent right to do so (see the Supreme Court judgement of 4 October 1988) and who have the grounds for deportation under Article 24 of the Immigration Act. In addition, the incidents on the basis of which someone is regarded as a refugee usually happen within his/her living area. Thus it is reasonable to understand that the alleged refugee has the burden of proof as far as his/status as a refugee is concerned."

In the *Turkish case* (*49/2002*) the same court stated:

> "In response to the Refugee Convention Japan created the refugee status determination procedures...grants certain benefits to those who had been recognised as refugees (Articles 61-2-5,61-2-6 and 61-2-8). Refugee recognition is thus a disposition to grant special benefits and rights. In addition, the incidents on the basis of which someone is regarded as a refugee usually happened within his/are the living area. Thus it is reasonable to understand that the alleged refugee has the burden of proof as far as his/status as a refugee is concerned."

In a case before the Hiroshima High Court - *Afghan v Japan*[28] - the Court implicitly accepted that the burden of proof was on the applicant.

3.3 Standard of proof

There appears to be no consistency in the standard of proof applied in the Court decisions available. Professor Arakaki in his thesis[29], concludes that there is no uniform standard applied in respect of the standard of proof. His research points to the application of six or seven differing standards in the various cases he cites Practitioners advised that, in their view, Courts appeared to apply a Japanese civil standard which was actually above that of the balance of probabilities. The two Nagoya District Court cases (*14/2002*

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[27] Nagoya District Court-Civil, 9th Division-Administrative cases, 19 and 49 of 2002, Myanmarese v Japan (Minister of Justice), 25 September 2003, and Turkish v Japan (Minister of Justice), 15 April 2004. Both heard before the same panel of three judges namely Kato (presiding), Funabashi and Hirayama JJ

[28] Case number 129/2002

[29] Arakaki - supra Chapter 4-2

and 49/2002) referred to above, did however appear to set out a standard of "substantial grounds". In *19/2002* the Court stated:

> "However, the procedures are established with a view to contributing to the proper determination as to the existence of **substantial grounds.** Therefore, if the refugee recognition procedures imposed virtually impossible conditions and, under the veil of the procedures requirements, unreasonably exclude those who have **substantial grounds** to be recognised as refugees, they would in fact disregard the object of the Convention and the Protocol, which define **substantial grounds** to be recognised as refugees and provide appropriate protection to those who have been recognised as such. Such legislation is clearly not permitted." (*emphasis added)*

These comments were made by the Court as part of its examination of the former "60 days rule" and whether it was constitutional or not. The Court found that as the 60 day rule could not be regarded as "imposing virtually impossible conditions on an asylum seeker" it was not unconstitutional. They consider that the appellant was validly refused an (Immigration) visa permitting him to stay when he failed to meet the 60 day rule. Importantly however they went on to find that there was still an obligation, on the MoJ, to determine the refugee status application of the appellant and that whilst he had no "immigration status", he could not be *refouled* until his refugee application was determined. Effectively therefore the decision ensured the application caused suspensory effect on deportation proceedings, until the RC51 application was determined. This approach is in accordance with the correct internationally accepted approach, to this type of issue and, in this case, ensured compliance with the Japan's obligations under Article 33, RC51. It appears, however, that this decision of the Nagoya Court is still pending appeal determination by the High Court. Whether the approach taken by the Nayoga District Court will be accepted by the High Court, on the standard of proof and/or *non refoulement* issues by the Court cannot be ascertained at this time. It is be hoped that an opportunity to examine the international approach, to the Standard of proof, discussed below, and Article 33 obligations will be taken .The 60 day rule has of course be removed in the ICRRA 2004.

The Inclusion clause, Article 1A(2) of RC51 ,does not "define substantial grounds to be recognised" but rather speaks of a "well founded fear". Thus possibly "well-foundedness" has been equated with "substantial grounds" in this case. The wording "substantial grounds" is however part of the so called "lower standard" of proof, used in EctHR cases, and now in ECQD and ECPD, for the standard of proof in "subsidiary protection" cases . This is shown in Article 2 (e) of ECQD:

> "… in respect of whom **substantial grounds** have been shown for believing that the person concerned ,if returned to his or her country of origin ... would face a real risk of suffering serious harm ... ."

This definition brings in the widely accepted "real risk" test to the assessment. Again it is simply not possible to ascertain whether the two Nagoya cases were followed in later cases, or are alone in their depth of consideration given to the core elements of RSD.

3.4 Credibility assessment, fairness, "equality of arms"

Practitioners interviewed stated that refusal decisions of the MoJ, until recently, had been delivered almost completely devoid of reasoning. They had noticed however, an improvement in recent times, with a lot more reference to COI in the reasoning Although some such reasoning was currently being provided, credibility assessment and lack of reasoning and natural justice/fairness on possibly prejudicial material or evidence was still seen as a major problem, at both RI and RECs levels. They stated that often, where there was a reliance on COI, or other material by the MoJ, this material was not disclosed to the claimant, nor were they given the opportunity to comment upon such information, that was potentially adverse to their claim, prior to the decision on being given. It was reported that the recent determinations of the MoJ, following the Objection

Procedure, involving the RECs, did give some reasoning, but again this was still limited and did not disclose the opinion of the RECs. In this situation, the representatives stated it was difficult to give advice, on whether a Judicial Review might be successfully pursued, or indeed the issues that should be raised, to indicate any potential error of law in the administrative decision/disposition, as the details were simply unknown.

References to credibility assessment, in the limited jurisprudence available, appear to show some judges are prepared to dispute, and even over-rule, negative credibility assessments made by the MoJ. In this regard they go further than would be the situation in a UK, error of law assessment, or New Zealand Judicial Review, where error is found, in a credibility assessment, by the Court, for example, that the conclusions were perverse and no reasonable assessment would have reached the same conclusion. In such cases the UK, or New Zealand, Courts would, in all but the most obvious cases, refer the case back to take first instance decision maker for complete or partial, reassessment of the facts, possibly giving some legal directions at that time on the errors in the credibility assessment approach taken and/or need to adopt the highest standards of fairness. The UK and NZ Courts would not reach a decision on the facts, because, firstly, the parties would not be in a position to give oral evidence, and/or, in the Judicial review situation, it was not the role of the reviewing Court to "find the facts".

Thus it is of interest to note the decisions of the Hiroshima District and High Court in the case of: *Afghan v Japan*[30]. At the District Court it was stated:

> "While at the prosecutor casts doubt on the credibility of the defendant's statements above, the court finds the defendant's account is detailed and concrete, and consistent in most part, without any account found particularly implausible. Further, the defendant also seems to possess a special identification card which may indicate his membership to the Islamic Unity Party. The defendant's statements are found credible."

On appeal, in the same case before the High Court, the Court responded to the Prosecutor's argument, that the Judge at first instance incorrectly assessed credibility, and stated:

> "On the basis of the relevant evidence, the Court finds the defendant had indeed made some false statements and that they are some inconsistencies in his statements, as is pointed out by the prosecutor. However, it should be noted that even if one qualifies as a refugee in a true sense, due to the unique nature of the issue at stake, it is extremely difficult for him/are to submit evidential documents to substantiate the elements making him/qualify as a refugee. Thus, it is reasonable to assume that even a refugee in a true sense may well submit forged papers or may make exaggerated or false statements in the application for refugee status, due to the fear that his or her accounts may not be found credible only on the basis of his oral statements while wishing so strongly to be granted refugee status, needless to say come out when refugee status is to be granted primarily on the basis of the applicants oral statements, the authorities should carefully discern between truth and falsehood contained in the statements. However, even when there are some falsehood and inconsistencies in that the applicant's statements, the credibility of the entire statements cannot be denied immediately only on that basis; it is necessary to undertake adequate examinations on such matters as why he/she had made such false statements, how the inconsistencies have happened, how the falsehood had been revealed and what he/she had said after the revelation."

The High Court went on to conclude, after considering all other issues pointed out by the Prosecutor, that the defendant's statements were sufficiently credible. The Court then accepted that :

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[30] Afghan v Japan, District Court, 20 June 2002, Konishi J, and High Court, 20 September 2002, Kubo, Ashitaka, Shimada JJ

> "... there had been not only subjective elements but also objective elements to substantiate the defendant's fear of being persecuted. Therefore the original judgement is reasonable in that it found the defendant is someone who has a well founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion."

This High Court decision not only confirms the lower Court findings and reasoning, on the credibility of the appellant, but also sets out some of the fundamental concepts of credibility assessment that are well-established in the international refugee law jurisprudence., in particular in UK and New Zealand. Whether such statements reoccur in other Court decisions, or are noted by the MoJ, and adopted into their procedures and training of Refugee Inquirers, could not be ascertained. The same decision also appears to address fundamental issues of fairness, including the need to undertake adequate examinations, to inquire into how inconsistencies may have happened and to give the chance for comment or explanation. In this regard the determination of the High Court in Hiroshima, in this case, would appear to be setting the widely recognised international standard and does set out the need for "equality of arms". The reports by practitioners, relating to the actual decisions of the MoJ, however appear to indicate that these standards of fairness, firmly indicated in this decision, may not be followed in practice, at first instance. Again a lack of sufficient ability to research means no definitive conclusion can be given on this issue at this time, nor whether the RECs will adopt this guidance from the Hiroshima Court.

3.5 Persecution and actors of persecution

The Refugee Convention does not contain a definition of the word "persecution" or the term "being persecuted". It must be remembered however that the Refugee Convention came into effect as part of a plethora of Human Rights Conventions and Declarations, promoted and agreed on after World War II, and following the establishment of the United Nations. RC51 is but one of a number of Human Rights conventions ,that commenced with the Universal Declaration of Human Rights 1948 (UDHR), and that have internationally, and regionally in many similar treaties, been adopted and applied over the past 60 years. Seen in this light, it is unsurprising that the highest Courts, in most common law jurisdictions, and throughout Europe, (as now shown in the ECQD) have agreed with the UNHCR, and all of the leading academics in the field of refugee law, and concluded that the interpretation of the term "being persecuted" is to be carried out by reference to these Human Rights instruments, and other provisions of International law. It is further agreed that the Refugee Convention is a "living instrument" and accordingly the definition should adapt to changing times and situations. Internationally any suggestion that "persecution" should be defined by some form of narrow or static dictionary reference has been widely rejected.

In Japan, the term "persecution" or "being persecuted" is not defined or interpreted within the ICRRA. Interpretation of the term therefore falls back (rightly) to the provisions of RC51 itself. Article 2(3) of the ICRRA does define the term "refugee" however, and states:

> "The term "refugee" means a refugee who falls within the provisions of Article 1 of the Convention relating to the Status of Refugees (hereinafter referred to as the "Refugee Convention") or the provisions of Article 1 of the Protocol relating to the Status of Refugees."

Logically therefore interpretation of "being persecuted" should commence by looking at the terms of the Convention itself, and, in the interests of consistency internationally, with conclusions of the highest level of jurisprudence around the world adopt a "Human Rights" based approach.

There appears however to be few attempts, by the courts in Japan, in the limited jurisprudence available, to define, or will give guidance, on the Article 1A(2) requirement of "being persecuted". Three cases, all from the Tokyo High Court, do appear to make some reference to Human Rights violations but do not go to

specific Human rights treaties to illustrate, or categorise, the breach, nor do they go on to note that "persecution" is defined in terms of "sustained or systemic violations of basic human rights".

In *Afghanistan v Japan,* Tokyo High Court, 26 February 2004 (Fujiyama, Shintani, and Kato JJ) stated:

> "Persecution means a violation of liberty and recession to life or physical freedom and stress which makes intolerant pain and suffering to a person. And as above, it needs the subjective situation ... as well as the objective situation where a person has well founded fear of being persecuted".[31]

A similar statement is made, by different bench of the Tokyo High Court, in *Afghanistan v Japan*, later in 2004.[32]

Yet another bench of the same Court, also in an Afghani case of *Afghanistan v Japan*,[33] stated:

> "The term "persecution" can be considered to mean violation of and repression of life or physical liberty, as well as serious violation of other human rights. In order to establish that one has a well founded fear of being persecuted, there should be both a subjective situation that he has a well founded fear of being persecuted and an objective situation that a reasonable man, in the applicant's position, would fear persecution."

This most recent case is one of very few that appears to include reference to serious violations of human rights, but it also appears to introduce the assessment from the viewpoint of a "*reasonable man"* which is not seen in other jurisdictions. The two Nagoya District Court cases referred to above, (*Cases 19 and 49 of 2002*), involving the same panel of judges, also should be noted on this issue. In the *Turkish case* the Court stated, at Issue 1 (iv):

> "Generally speaking, States essentially attempt to prevent moves to weaken themselves by mobilising military and security organs as much as possible. It is not appropriate to define such state action of a self-defensive nature immediately as persecution in terms of the Refugee Convention; in particular, carefulness is required for outsiders who are not familiar with the realities. However, as long as the importance of historically formulated democracy and the protection of human rights has gotten widely recognised by the international community, which is why the Refugee Convention was concluded, Human Rights violations by way of means or methods that would obviously undermine the philosophy to a great degree can only be regarded as going beyond the limits which can be affirmed as the exercise of a state's right to self defence....even if the government itself does not tolerate human rights violations, it is reasonable to affirm the existence of persecution when some persons belonging to governmental institutions do not respect the standards established by national legislation and promote such violations, provided that the government has not taken effective measures to prevent it ... . It is thus not reasonable to conclude, as long as the plaintiff had supported the PKK in Turkey and publicly expressed about it in Japan, that he has no objective grounds to worry about being subjected to human rights violations by the security authorities, which are deeply concerned about what support is provided to the PKK in other countries."

As can be seen from the above quotes not only is there some acceptance of the need to establish a future risk of a serious violation of human rights, in order to establish the applicant is at risk of "being persecuted" but

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[31] In this and the next two cases, I have reservations that the translation may not be of the highest standard, meaning that I can not be too conclusive, of the Court's actual findings

[32] Tokyo High Court, 31 August 2004 (Ohushi, Ogawa, Ohno JJ)

[33] Tokyo High Court, 31 May 2005 (Nishida, Koike JJ)

also, it appears, the Court, in the last case, acknowledges that "non-state actors" can also give rise to the recognition of status provided "the government has not taken effective measures to prevent it".Thus there appears to be a recognition of the now well established principle that "being persecuted" in terms of Article 1A(2) of RC51, requires both the real risk of "serious harm" AND "the failure of State protection".[34]

It will be noted however that the internationally adopted test of- "reasonable likelihood" or "real chance" or "real risk" (which have been widely agreed to amount to the same "lower standard of proof") of being persecuted, as the test for well-foundedness, are not evidently engaged with. The Courts appear to adopt tests that "it is not reasonable to conclude" the applicant has "no objective grounds to worry", or, in one Tokyo case, the perspective of a "reasonable man". It is apparent, (possibly understandably, as I discuss later in the Conclusions) that exposure to international jurisprudence, the guidelines and material published by the UNHCR, and reference to core Human Rights instruments themselves, may have greatly assisted the Courts in Japan, to obtain a wider understanding, and then possibly to have given guidance to the MoJ, on the essential issue of defining what constitutes "being persecuted", for the purposes of the Refugee Convention. It can be seen however that some of the Courts have seriously tried, using a first principles approach, to engage with the issues and have reached conclusions that constructively move towards harmony with the international path.

3.6 Convention reasons, gender and sexual orientation issues

From the determinations available in English there is, unfortunately, very little discussion or development of jurisprudence in relation to Convention reasons, or gender and sexual orientation. It appears there has been one claim, before the Courts based on homosexuality, by an Iranian claimant. In this case[35], the District Court found that:

> "Homosexuality in Iran does not pose any objective risk of persecution within the meaning of Article 1A (2) of the Convention" and "the fact of that a particular sexual orientation is unaccepted in the country does not constitute "persecution" within the meaning of 1A(2) under the Convention".

As can be seen unfortunately the Court did not engage with the issue of whether, homosexuals in Iran constituted a particular social group, but rather has considered only the issue of risk on return, so, on the face of it, this case can not be taken as an authority, from the Japanese Court, that homosexuals, whether in Iran or generally, do not form a particular social group (PSG).The decision that the risks on return are not well-founded may, on the facts, be correct and it is often wise in PSG cases to establish the well-foundedness issue first, as clearly, if there is no well founded fear of being persecuted, regardless of the claimant establishing membership of a PSG or not, then it is pointless exercise to go on and determine the PSG issue[36], except, as in a case like this, where it would give valuable *obiter dictum* or guidance, for future first instance or other cases. The detailed facts of this case are unavailable and thus a comparison with leading country guidance determinations, in the UK, on this issue of homosexuality/and gender in Iran, and elsewhere, where there is a clear acceptance that homosexuals, lesbians and women in certain specific situations, can constitute a particular social group, cannot be made[37].

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[34] Hence the well-known formula set out in Shah and Islam [1999] 2 AC 629, by the House of Lords that P=SH+FSP or Persecution=serious harm+failure of state protection.

[35] Iranian v Japan, Tokyo District Court, 25 February 2004, upheld by the Tokyo High Court, 20 January 2005

[36] See a discussion on this issue in TB (PSG - women) Iran [2005] UKIAT 00065 - paras 65-59

[37] See, for example, RM and BB (HOmosexuals) Iran CG [2005] UKIAT 00117 and Shah and Islam [1999] 2 AC 629 HL, and very recently SSHD v K and Fornah [2006] UKHL 46.

Practitioners also reported that one Iranian woman, who had claimed on both religious and gender grounds (complaining that she had been a beaten by her husband because of her beliefs and behaviour) was granted refugee status but no reasoning was given in the MoJ decision. They also reported one approval in relation to a Ugandan Christian claim, which appeared to have been lodged on religious grounds, again no reasoning was available. The representatives explained that the vast majority of cases in Japan were Burmese/Myanmarese, which were predominantly political in nature, with some occasional reference to race or religion. While there were growing number of African claimants, it was reported, by support organisations for refugees, that lawyers had been reluctant to take on such cases.

Practitioners claimed that while there appeared to be a reasonable understanding of political opinion, religion, and race as grounds within the Inclusion clause, the concept of imputed grounds or opinions did not appear to have been explored by the Courts. It is, of course, a well-established principle in international refugee law that the grounds, which are found as the nexus to the persecution, can be held either directly or can be imputed to the claimant.

3.7 *Sur place* claims

The Japanese jurisprudence appears to accept the concept of a person not having a well founded fear of being persecuted on their departure from their home country but that circumstances arising after their departure can give rise to a valid claim for refugee status. The so-called *sur place* claim.

The idea was accepted in the Osaka District Court in *OFE v Immigration Control office, Chief Inspector (1993)* where they stated:

> "To begin with, the phrase in the Refugee convention, "[a person] owing to well founded fear of being persecuted...is outside the state of his nationality" is understood to include not only the situation at time of the departure from the state due to fear of persecution but also that of sur place fear of persecution which emerged after the departure."

In later decisions this has been indirectly accepted. For example in *Afghanistan v Japan*[38], a reasonably generous approach to a *sur place* claim was made in respect of an applicant who had entered Japan on eight previous occasions and returned to his home country of Afghanistan ,even when the Taliban, whom he feared, remained in power. The activities of asylum seekers in Japan have also been recognised as a basis for valid claims. For example in *Myanmarese v Japan*[39], where the court stated:

> "The court finds that the plaintiff participated in the activities of the NLD in Japan after his provisional release, that he was recognised as a mandate refugee by UNHCR in April 2003, the newspapers covered reports of his case and his anti-governmental activities in Myanmar, and that he became a member of NLD branch in Japan in May 2004. From such evidence, there is a possibility that the plaintiff is presently known to the Myanmarese government as an anti-governmental activist. However, these factors arose after the respective disposition [decision of MoJ] and we cannot find the plaintiff qualified as a refugee at the time of the disposition. Thus these findings do not affect the legality of the respective dispositions."

Also in the case of *Iranian v Japan*[40], the Court noted:

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[38] Hiroshima District Court, 20 September 2002

[39] Osaka District Court, 15 July 2004

[40] Tokyo District Court, 25 February 2004

> "The plaintiff concealed the fact that he had homosexual orientation while he was in Iran. However, he argues that he now faces a threat of persecution because he has come out publicly stating that he has homosexual orientation and Iranian authorities may know of this. However there is no evidence to support this argument."

Thus, while there may not have been evidence of successful *sur place* claims, the concept does appear to be well understood and applied by the Japanese courts.

3.8 Exclusion and Expulsion

There is no reference to recent consideration of exclusion or expulsion in any of the cases available in English. Professor Arakaki[41] refers to one case of a Chinese applicant[42] which arose in an extradition case, following the arrival in Fukuoka of the Chinese applicant, in a hijacked plane. The applicant claimed his escape was related to his participation in the demonstrations at Tiananmen Square. The Chinese government requested his extradition. The applicant claimed he was a refugee. The Tokyo High Court referred to Article 1F(b) and considered that the applicant had committed a serious non-political crime.

3.9 Use of objective material-COI, expert evidence

The case law available indicates some reference to the use of objective country of origin (COI) material. There is reference to US Department of State reports and UNHCR papers. The practitioners reported that there was also a growing use of the UK, COIS Reports from the Home Office Country of Origin information Service unit, (formerly called CIPU reports). The UK material, as noted elsewhere is improving in its objectivity. The complaint from practitioners was however that, on occasions, the MoJ while referring to more COI of late, still appears to rely on COI which is prejudicial to the applicant's claim, in its decision-making, without first giving the applicant the opportunity to comment on that information. This, fairly fundamental, fairness requirement is commented upon elsewhere.

The case law does not reflect the use of experts witnesses or medical reports or psychiatric expertise being provided, either in the MoJ decision-making processes, or before the Courts. As noted there is little reference to substantive international jurisprudence, which is often an excellent source of objective country of origin material, and importantly judicial guidance on that COI material[43].

3.10 Subsidiary or complementary protection

There is little reference, in the available material, to the issues that can arise pursuant to obligations under other Conventions beyond RC51, such as the Convention against Torture (CAT) or ICCPR. It appears that the CAT has been raised as a defence in deportation trials. Practitioners reported that the MoJ in many cases provides humanitarian visas to refugee claimants. The substantive numbers shown in the MoJ Statistics

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[41] Arakaki - at Chapter 4-G of his thesis - supra

[42] Case of CSK - 1990

[43] See, for example, UKAIT, CG (country guidance) cases and IARLJ paper: Storey and Mackey "Guidelines on Assessment of COI for Judges" - presented at Budapest IARLJ European Judges Conference, November 2005, available at www.iarlj.nl)

reflects the use humanitarian status visas[44]. While such visas, provided under domestic immigration law, give a short-term assurance that an applicant will not be returned to his home country, they do not provide the guarantee of *non refoulement* as required under Article 33 RC51 (nor the other rights under the Refugee Convention).

4. Comparative "structured approaches" to some core issues in Refugee determination jurisprudence of New Zealand, UK and EU

4.1 The concept and interpretation of "well-founded fear"

The opening words in Article 1(A)2 in RC51 "*owing to a well-founded fear*" have required Courts and administrators, around the world, to put this wording into application. To do so they have applied well known and tested, concepts of where the burden or onus of proof lies, what standard of proof should be applied, and the necessary separation of subjective and objective factors, in an applicant's claim.

As an essential starting point to this comparative exercise the approaches, that have been developed in the various countries, to these concepts, are set out below, beginning with the burden or onus of proof.

4.2 Burden or onus of proof

To begin it is helpful to look at the logic behind the generally accepted principles adopted internationally on the burden of proof, and secondly to the approach recommended by the UNHCR in the Handbook.

The general legal principle is that the burden of proof lies on the person who makes the claim and not on the person who seeks to refute that claim[45]. When the situation of an asylum seeker is considered there is no logical reason why the general legal principle should not be adopted, however, perhaps with some modifications to take into account the unique predicament of the asylum seeker, who is genuinely in-flight from a fear of being persecuted. Obviously the asylum seeker is the only person with the full knowledge of his or her background and the reasons for their flight from their country of origin. Thus, it follows they should make and present their own case. However, set against this, is the reality that each applicant will only have the limited knowledge of their own particular circumstances, in the context of the time, place, educational and other skills, or disadvantages, that the applicant may have. They are unlikely, for example, to have detailed knowledge of the full, political and human rights situation in their home country. And, if genuinely in-flight, they will be unlikely to have had the opportunity to obtain full supporting or corroborative documentation on all aspects of their personal life. Thus, in many receiving countries, perhaps following the lead from the UNHCR, despite it being a general principle that the onus of proof, is on the applicant, often extensive objective country of origin information is made available to all parties so that the applicant's claim can be rightly and properly assessed from, not only the applicant's subjective viewpoint, which they must present, but also, objectively, so as to ascertain whether their claimed fear is a "well founded" one.

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[44] Note 25% of claims in 2005, as opposed to 12% granted Refugee status. For further Statistics see annex 3

[45] See the detailed international overview on the this topic, referred to also in the New Zealand context below, in Refugee Appeal No 72668/2001 (5 April 2002, paras 19-29)

The UNHCR Handbook, at paragraphs 37-50 and at 195-197, goes further than most countries statute law or jurisprudence and sets out what has been termed a "shared responsibility". Thus at paragraph 38 it states "… the term well founded fear therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration". In paragraph 42, in discussing the objective element, the Handbook states:

> "As regards the objective element, it is necessary to evaluate the statements made by the applicant. The competent authorities that are called upon to determine refugee status are not required to pass judgements on the conditions in the applicant's country of origin. The applicant statements cannot, however, be considered in the abstract, and must be viewed in the context of the relevant background situation. A knowledge of conditions in the applicant's country of origin – while not a primary objective- is an important element in assessing the applicant's credibility 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 that definition, or would, for the same reasons be intolerable if he returned there."

Paragraphs 195 –197 explain the UNHCR approach succinctly, and should be fully considered on this issue.

4.2.1 New Zealand - Onus of Proof

The Immigration Act 1987 provides at s. 129G(5):

> "129G(5)It is the responsibility of the claimant to establish the claim, and the claimant must ensure that all information evidence, and submissions that the claimant wishes to have considered in support of the claim are provided to the Refugee status officer before the officer makes determination on the claim."

The same Section of the Act it is also provided however that the officer may seek information from any source, although not obliged to seek such information that is not provided by the claimant.

Similarly, pursuant to s129P it is the responsibility of the appellant, before the Refugee Status Appeals Authority, to establish their claim and ensure that all evidence, information and submissions they would have considered, in support of their appeal, are provided to the Authority before it makes its decision. The RSAA also may seek information from any source and is not obliged to seek information beyond that provided by the appellant.

Accordingly, the New Zealand legislation clearly puts the onus of proof on to the applicant throughout the process.

The New Zealand government however provide a comprehensively equipped Refugee status library ("The Nicholson library"). This library is staffed by professional librarians and, as well as being available to use by Refugee status officers (RSOs), and members of the RSAA, research can be undertaken by appointment, by applicants and their representatives, as well as students and members of the public. In addition to this service, on appeal, the procedure of the RSAA has been to provide the appellant, not only with a full copy of the Refugee status branch file, including all objective and other material on that file, but also, in the interests of the highest standards of fairness, a full copy of any research that has independently been undertaken by the RSAA, as part of its inquisitorial function. In this regard RSAA, has, for many years, employed graduate researchers (Legal Associates) who undertake, along with members, often detailed, objective country of origin, and legal research, into the background of many appeals. Again all this information is provided to the appellant and representatives prior to the hearing.

Thus it can be seen that the formal requirements of legislation are balanced against the practical situation which shows a sharing of information takes place on a fairly extensive basis, even if the burden of proof clearly remains on the applicant.

The jurisprudence of the RSAA also gives guidance and explanation for the approach taken in respect of the onus of proof. The first major decision on this issue was in *Refugee Appeal No 523/92 Re: RS (17 March 1995)*. However, some aspects of that decision were challenged, in a judicial review of another RSAA decision and this lead to a very comprehensive revisiting of the issues in *Refugee Appeal No 72668/2001 (m2) (5 April 2002)* [46]. The opportunity was taken to address the onus, and related issues, very extensively (and helpfully for this study, as the decision gives and international overview as well as addressing the issue in the New Zealand context.

In the international overview in *Refugee Appeal No 72668/2001*, between paragraphs 19 and 29, Mr Haines notes the position of the UNHCR (addressed above), academic commentaries and relevant judicial decisions. He notes, in particular, that in some countries the onus of proof has been placed on the refugee by statute and others by case law. In Australia, Canada and United Kingdom (since *Sivakumaran [1988] AC 958 (HL))* it is established by case law, whereas in the USA the burden is a statutory one. Quoting a European survey Mr Haines notes that most western European countries recognise the onus of proof is on the claimant. Conclusions from the international survey are then set out in the following terms:

> "[26] That there is widespread acceptance across a range of jurisdictions of the principle that the burden of proof lies on the refugee claimant. It is significant that major refugee receiving countries fall into this category, namely France, Germany, United Kingdom, Canada, the USA and Australia. Significantly also, the legal principle is acknowledged and accepted by the Office of the UNHCR and by leading academics (Weis, Goodwin-Gill, Kalin).
>
> [27] Acceptance of the principle is a different issue to the question as to how the principle is to operate in practice. As the passages from the books of Weis and Goodwin-Gill demonstrate the very nature of refugee determination requires a contextual understanding of how the principle is to be applied. As Professor Kalin pointed out in *"Well founded fear of persecution: a European perspective"* in Bhabha & Coll eds, *Asylum Law and Practice in Europe and North America: A Comparative Analysis (*Federal Publications*, 1992) 21* at 21-23 the danger is not in the burden of proof, but in imposing too strict a **standard** of proof.
>
> [28] It is sufficient for present purposes to note from the international survey that there is nothing inherently objectionable to a burden of proof in the refugee context. Nor do the common law cases discussed at paragraph [15] and [16] above condemn a burden of proof as being necessarily inconsistent with administrative decision-making."

The decision in *72668/01* then considers the New Zealand situation from an historical perspective and gives a sorry recital of the abuse that the New Zealand determination system at times has been put through, over its first 10 years in operation. The decision refers to *Refugee Appeal No. 523/92,* and the conclusions reached (see paragraph 47) in that case:

> "a. The Authority took the view then (and remains of the view) that any person who claims that New Zealand owes him or her international protection obligations under Refugee Convention must act honestly and cooperatively in the refugee determination process;
>
> b. The requirement that a refugee claimant proves his or her claim to New Zealand's international obligation to provide surrogate protection is not to place him or her an unreasonable obligation. Otherwise the door will be open to abuse, with claimants doing no more than lodging an application for refugee status unsupported by any account of the

[46] A decision written by the RSAA Deputy Chairperson, Mr RPG Haines QC

facts, and expecting the decision maker to carry out an investigation without the claimant's assistance;

c. Resting the burden of proof on a claimant does not impose an unreasonable requirement as it is mitigated by three factors, mainly the low standard of proof, the liberal application of the benefit doubt principle and finally by the fact that the non-adversarial nature of the proceedings means the enquiry is shared between a claimant and the decision maker."

The determination then refers, at [50], to the Court of Appeal determination from New Zealand in *Butler* v *Attorney General [1999] NZAR 205(CA)* where it was held (at 213-215):

"(a) The burden of establishing the elements of the refugee claim rests with the claimant:

> *' A person claiming refugee status has the burden of establishing the elements of the claim. That rule should however not be applied mechanically. Those making a decision which may put an individual's right to life at risk and Courts reviewing any such decision, have a special responsibility to see that the law is complied with, for example Budaycay v Secretary of State for the Home Department [1987] AC 514, 531, 537.'*

(b) While the Authority may be required on its own motion to investigate an issue, it is not an error of law to fail to rule on a matter not referred to by a claimant and if it does not stand out as requiring a decision."

Mr Haines refers to ss129G and P of the Immigration Act, which have been noted above, and firmly concludes that the words "to establish the claim" in the Act are entirely consistent with the decisions in *Butler* and *523/92*. He concludes, at paragraph 109, that the statutory obligation simply restates the law as was set out in the above two cases.

4.2.2 United Kingdom - Onus of Proof

As is noted in the international review in the New Zealand RSAA decision *72668/01*, referred to above, there is no specific legislative provision in the UK imposing the burden of proof in asylum cases on the applicant. However, the terms of the UK legislation and Immigration Rules make it clear that the onus of proof is impliedly on the applicant, or appellant in the appeal situation. For example, the definition of an asylum applicant set out in Rule 327 states that an "asylum applicant is a person who claims it would be contrary to United Kingdom's obligations under the United Nations Convention and Protocol relating to the Status of Refugees for him to be removed from or required to leave the United Kingdom". Similarly in the Asylum and Immigration (Treatment of Claimants etc) Act 2004 the somewhat controversial section 8, discussed later under the section of the paper on credibility) states:

"(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or human rights claim, a deciding authority shall take account, as damaging to the claimant's credibility, of any behaviour to which this section applies."

Among the various behaviours mentioned in the remainder of this section many refer to information and documentation submitted with a claim, or related to opportunities to make an asylum claim.

The case law however is quite clear, going back to the House of Lords decisions in *Budaycay*[47] and *Sivakumaran*[48]. At 996, in *Sivakumaran* ,Lord Keith stated:

> "In general the applicant's fear should be considered well founded if he can establish, to a reasonable degree, that his continued to 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."

In that decision was held that well-foundedness was an objective test, to be ascertained independently of the appellant's state of mind. They noted it was sufficient for there to be a well founded fear occurring in the future, and past persecution would not always be of great significance. The later decision of the House of Lords in *Adan*[49] however sets out that the refugee must establish a current risk, as well as a current fear of persecution.

4.3 Standard of Proof

4.3.1 New Zealand

In the extensive and helpful determination of the RSAA in *72668/01,* referred to above, After clarifying the burden of proof issue the Authority went on to note that, having established that the burden was on the applicant, the next logical next step was to determine the standard of proof the applicant was required to meet. The opportunity was then taken to explain and repeat the New Zealand jurisprudence, on the standard of proof required, in refugee cases. Haines notes, at paragraph 115, that only a small number of cases in the High Court in New Zealand have touched on the "well-foundedness" requirement of the refugee definition and, unfortunately, none have taken notice of the jurisprudence from the RSAA. In this situation, it is explained, the Authority has followed an extensive line of High Court of Australia decisions "in understanding the 'well-founded' element as requiring no more than a real chance of persecution". The decision explains that:

> "This is the most 'liberal' interpretation of well-foundedness which has been accepted in the common law jurisdictions. Clarity, simplicity and faithfulness to the language, object and purpose of the Refugee Convention are the strength of the real chance approach."

A review of the jurisprudence in New Zealand, Australia, USA and United Kingdom, along with relevant academic commentaries (including Atle Grahl-Madsen and Professor James Hathaway), on this issue, is then sent out, between paragraphs 116 and 141 of the determination. It is noted that the jurisprudence in all of these countries rejects a "balance of probabilities" standard for ascertaining the well foundedness of a fear of persecution. At paragraph 128 Hames notes:

> "[128] in New Zealand, the real chance formulation has been adopted by this Authority because, in its experience, it is a test which is more readily comprehended and applied (a point made by Toohey J in *Chan*) and because of its clarity in conveying the notion of a substantial, as distinct from a remote chance, of persecution occurring (the point made by Mason C J in *Chan).* While it may be true in one sense to say that the "reasonable possibility" (USA), the "reasonable degree of likelihood" (UK), and the "real chance" (Australia, New Zealand) test amount to the same thing, we remain on the view that

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[47] Budaycay v Secretary of State for the Home Department [1987] AC 514

[48] Sivakumaran v Secretary of State for the Home Department [1988] AC 958

[49] Adan v Secretary of State for the Home Department [1999] 1 AC 293

the real chance test is to be preferred. The danger inherent in a test formulated in terms of "possibilities" and "likelihood is" is that these terms mean different things to different persons and often shed more confusion than light, as illustrated by the following passage taken from *R v Gough [1993] AC 646 (HL)* in which the administrative law test for bias was considered. Lord Goff (with whom Lords Ackner, Slynn, Mustill and Woolf agreed) stated at 670E:

> 'I prefer to state that test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias.'

At paragraph 130 Mr Haines sets out the helpful reminder that:

> "It must be remembered ,however, that the words used in Article 1A(2) of the Refugee Convention are "well founded" and that to use the real chance test as a substitute for the Convention term is to invite error. This is the point made in *Minister for Immigration and Ethnic Affairs v Guo(1997) 191 CLR 559,57*2. In that case the High Court of Australia ... made helpful observations as to when the fear of persecution is well founded. The point stressed was that conjecture or surmise has no part to play in determining whether at fear is well founded. The majority stated that:
>
> > 'No doubt in most, perhaps all, cases ... the application of the real chance test, properly understood as the clarification of the phrase "well founded", leads to the same result as the direct application of that phrase ... nevertheless, it is always dangerous to treat a particular word or phrase as synonymous with a statutory term, no matter how helpful the use of that word or phrase may be in understanding the statutory term. In the present case, for example, Enfield J. thought that the "real chance" test invited speculation and the tribunal had erred because it "has shunned speculation". If, by speculation, His Honour meant making a finding as to whether or not an event might or might not occur in the future, no criticism can be made of his use of the term. But, it seems likely, having regard to the context and His Honour's conclusions concerning the tribunal's reasoning process, that he was using the term in its primary dictionary meaning of conjecture or surmise. If he was, he fell into error. Conjecture or surmise has no part to play in determining whether a fear is well founded. A fear is "well founded" when there is a real substantial basis for it. As *Chan* shows, a substantial basis for fear may exist even though there is far less than a 50% chance that the object of the fear will eventuate. But no fear can be well founded for the purpose of the Convention unless the evidence indicates a real ground for believing that the applicant for refugee status is at risk of persecution. The fear of persecution is not well founded if it is merely assumed or if it is mere speculation. In this and other cases, the tribunal and the Federal Court have used the term "real chance" not as epexegetic of "well founded", but as a replacement or substitution for it. Those tribunals will be on safer ground, however, and less likely to fall into error, if in future they apply the language of the Convention while bearing in mind that a fear of persecution may be well founded even though the evidence does not show that the persecution is more likely than not to eventuate."

4.3.2 United Kingdom

As has been noted the standard of proof applied in asylum cases in United Kingdom was established by the leading House of Lords determination in *Sivakumaran*[50]. In their speeches, their Lordships held that for a fear to be well founded the question was whether there was "a reasonable degree of likelihood" or "a real and substantial risk"of persecution for one of the Refugee Convention reasons. As noted in *McDonald's Immigration Law and Practice (Sixth edition)* at 12.25:

> "It is clear that showing a real likelihood of persecution is a lesser standard than proving that persecution will occur on the balance of probabilities, and the House of Lords approved the words of Lord Diplock in *Fernandez v Government of Singapore [1971] 2 All ER 691* to this effect. Lord Diplock had suggested that the requisite degree of likelihood could be indicated by words such as "a reasonable chance", substantial grounds for thinking", or "a serious possibility". In his speech in *Sivakumaran* Lord Keith appeared to approve Stevens J's dictum in the US case of *Immigration and Naturalisation Service v Cardozo Fonseca* that a 1 in 10 chance of being persecuted could amount to a reasonable possibility of persecution. In those circumstances the addition of the word "substantial" to "real" ("a real and substantial possibility of persecution") can only be intended to eliminate a minimal or mere possibilities rather than to indicate something in the nature of a probability or a prediction."

As noted, from 2 October 2000 the Human Rights Act 1998 came into application in United Kingdom. This required that, not only issues of refugee status to be determined by the Home Office, with appeals to the independent tribunals and then the Courts, but also there was a requirement to ascertain whether the return of an applicant to their home country, would place the United Kingdom in breach of its obligations under the European Convention on Human Rights. In particular to ascertain whether they would be breach of Articles 3 or 8 of the ECHR. The leading European Court of Human Rights (Strasbourg) decisions, such as *Soering*[51], had ruled that the appropriate standard of proof in ECHR cases, involving Article 3, was whether there were "substantial reasons for believing there would be a real risk" of breaching the provisions of the ECHR.

Thus when the Human Rights Act came into operation it then became vitally, and practically, important to establish whether the same standard of proof would be applicable for Refugee and Human rights claims from the same applicant/appellant, that were being heard together, under the "one-stop" approach to determinations, that was introduced at the same time. The matter was quickly resolved in a pragmatic and logical manner. In *Kacaj v Secretary of State the Home Department*[52], Collins J (who was then the President of the Immigration Appeal Tribunal (IAT)) held that it would now be better in both refugee asylum and human rights cases, for the phrase **"real risk**" to be adopted in preference to those of a "serious possibility" or a "reasonable degree of likelihood"all of which in any case convey the same meaning and to be distinguished from "beyond reasonable doubt" or "on the balance of probabilities". Soon after that decision the IAT, in *Ahmed (Hussein)*[53], warned that the "real risk" test should not be taken as amounting to more than a "serious possibility" and the phrase "substantial grounds for believing" did not import another standard.

In the UK in particular, the "real risk", "reasonable likelihood" or "reasonable chance" test used in conjunction with the establishment of a "well founded fear" is now commonly referred to as the "lower standard". This usage is made to emphasise the difference between the civil standard of proof at the "balance of probabilities" standard and the criminal "beyond reasonable doubt" test.

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[50] Sivakumaran v Secretary of State for the Home Department [1988] AC 958 HL

[51] Soering v United Kingdom

[52] Kacaj v Secretary of State for the Home Department [2001] INLR 354

[53] Ahmed (Hussein) v Secretary of State for the Home Department [2002] UKIAT 00841

It is also interesting to note that the situation in the UK is that almost equated with that of New Zealand, with the preference in the UK now being for the standard of proof (for refugee and human rights claims) to be set at the level of a "real risk" and in New Zealand (and Australia) at the level of a "real chance". In addition the "real risk" test is of course one that is very familiar across the whole of the European Union, because of its derivation from the ECtHR.

4.3.3 European Union

As has been noted in the section of this paper relating to the Qualifications Directive (ECQD), that is soon to come into operation in October 2006, the standard of proof adopted for subsidiary protection is clearly that of the "real risk". The test for refugee claims is not so formally recorded. It is however extremely likely, particularly given that the procedural approach will be a "one-stop assessment", that that same standard of proof will be adopted, as now happens in the UK.

4.4 Good faith, fairness, "equality of arms"

4.4.1 The duty of good faith observation of the Refugee Convention

The issues of fairness and credibility assessment were stated by practitioners and others involved in refugee determination and support in Japan. While these issues were difficult to comparatively assess, without access to actual MoJ decisions and the limited number of Court decisions noted, It is I think helpful to do back to first principles that are essential in RSD.To do this I have looked at the obligations of every State which enters into the Refugee Convention. A paper "Judicial or Administrative Protection of Asylum Seekers - Content or Form?" presented by Rodger Haines QC, at the World Conference of the IARLJ, Stockholm, April 2005 sets out the requirements of this obligation to be met by States, between paragraphs 6 and 19 as follows:

> 6. "First it is important to note of the nature of the fundamental duty of any State party which enters into treaty obligations. It is the duty of good faith observance of the Treaty.
>
> **The duty of good faith**
>
> 7. The obligations assumed by a State party under the Refugee Convention are mandatory and of immediate binding effect. Each Articles 3 to 34 employs the mandatory "shall". These are duties of result. See particularly the all-important Articles 16 and 33:
>
> **Article 16 – Access to courts**
>
> 1. A refugee shall have free access to the courts of law on the territory of all contracting states.
> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatium solvi*.
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Article 33 – Prohibition of expulsion or return ("refoulement")

1. No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by final judgement of the particularly serious crime, constitutes a danger to the community of that country.
3. The Convention, however, is of course silent as to how these mandatory obligations of a State party are to be interpreted at domestic level. Few legal systems are the same and the assumption is that each State party will observe the principle *pacta sunt servanda*. Domestic law cannot justify failure to perform a treaty. Principles of customary international law codified in the Vienna Convention on the Law of Treaties, 1969 are clear:

Article 26 - Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by the in good faith.

Article 27 Internal law and observations of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

9. Article 18 of the Vienna Convention on the Law of Treaties further obliges a State to refrain from acts which would defeat the object and purpose of a treaty by which it is bound.
10. Similarly the Refugee Convention, while providing a comprehensive definition of the term "refugee", does not prescribe any particular form of procedure for determining refugee status. It is implicit in the good faith obligation and in the guarantee of the right of access to courts that the procedures will maximise the opportunity for a refugee claimant to establish that he or she is a refugee which in turn maximises State observation and the non-refoulement obligation. Fairness is an indispensable aspect of such procedures, as is the need for the procedures to be both prescribed by law and subject to the scrutiny of the courts of law on the territory of the State party."

Haines in this paper goes on to set out that the obligation is equally one that applies in countries applying monist or dualist approach to international law. He concludes that there is a direct connection between the good faith discharge of the obligations (of result) under the Refugee Convention, and procedural due process. Giving a refugee claimant a fair hearing is thus a necessary precondition to the accurate determination of whether there is a *non-refoulement* obligation on State in relation to a claimant. "In this context procedural rules perform an instrumental role in the sense of helping to obtain accurate decisions on the substance of the case. Furthermore justice and the rule of law are enhanced in the sense that the principles of natural justice and fairness help to guarantee objectivity and impartiality."

He further notes that similar requirements are included in regional provisions such as Article 6 of the ECHR, the ECQD and ECPD. The paper then refers to an address by Sir Stephen Sedley (UK) at a previous IARLJ conference (Wellington, October 2002), where he was addressing the difficulties of credibility evaluation, which he called the "darker hinterland which judges...have to do their unaided best to decide whether an

account is credible or not." Haines notes from Sir Stephen's remarks that they highlight the necessity to afford a claimant a fair hearing and that the rule of law requires nothing less as:

> "it enforces minimum standards of fairness, both substantive and procedural. It maximises the opportunity for the "voice" of the claimant to be heard above the decision-maker's own prejudices, conditioned reactions, doubts and subconscious influence of public opinion and hostile comment. Above all it ensures that the decision-makers mind is concentrated on the single composite issue posed by Articles 1 A (2) and 33 of the Refugee Convention: Is **this** individual at real risk of being persecuted for a Convention reason if returned to the country of origin?"

The paper relevantly notes that because much of the practical implementation and application of the Refugee Convention is done by government or executive actions or policy and also the process and conditions for applying is controlled by the executive, there must be a means of effective challenge to a higher authority with a power to review both on the merits and the law. Haines notes that most systems allow appeal and/or judicial review, but the tendency is to restrict, rather than expand these. This is on the basis of the perception that the system is over-generous to declined asylum seekers the system may be being abused. He argues that, while these are legitimate concerns, they can be managed. In particular: (emphasis added)

> **"A standard of excellence at the primary decision-making level is a much under-appreciated means of increasing the overall speed of the decision-making process, reducing appeals or review, reducing costs and engendering confidence in the refugee determination system."**

This conclusion rightly confirms that the well known business maxim : **"Get it right first time"** should be an essential part of any determination system. A factor that should logically be very much appreciated and pursued by government executives wishing for a quicker, less costly and more efficient system.

Haines concludes that neither judicial nor administrative systems have innate superiority in refugee determination and:

> "They are false opposites. The most relevant inquiry is how well the particular asylum process accurately and fairly identifies individuals who satisfy the definition of "refugee" in the Refugee Convention ... . Content must prevail over form".

5. Challenges and Opportunities for the Japanese Refugee Determination System

5.1 Primary observation and challenge, Standard of Proof

One of the most striking comparative observations I noted in my research relates to the so called "Standard of Proof" that should be applied in RSD. There does not appear, apart from a few indirect comments in the admittedly limited number of Judicial review cases translated in English, any substantive discussion or agreement, at any level, on the appropriate level of proof at which the claimants should establish their case. An agreed "standard of proof" from my own experience, and the international jurisprudence, is an essential starting point in any RSD assessment in the establishment of the first core issue in the Inclusion clause - Article 1A(2) of the 1951 Convention. What few references there are in the cases, and from comments by practitioners, appears, in the main, to be the application of a civil standard of proof. This, I understand, to be perhaps somewhat above the balance of probabilities, used in most civil and common law jurisdictions. Such a standard is not in harmony with international refugee and protection jurisprudence, and the UNHCR approach. To set a standard, hopefully consistent and harmonious to international jurisprudence, does appear to be perhaps the biggest present challenge to the Japanese RSD system.

This is in no way intended to be critical of the Japanese RSD, at any level, which must be seen, in comparison to many other countries, and by force of circumstances, as still in a developmental stage. Comparatively, the number of claims in Japan has been very small, and there is thus logically not been a depth of experience or close legal/judicial examination of all the concepts and issues of refugee law that sheer weight of numbers alone has caused in many jurisdictions. The ICRRA only came into force one year ago and is thus also largely untested. The role and work of the RECs, in their new appeal function, of providing guidance in Japanese RSD, gives an exciting opportunity to address the vital need for good, high quality RSD, consistency and, in particular, the standard of proof. I am also advised that Japanese lawyers and judges are trained, obviously, in their own language and domestic law, and to date, in most cases, without substantive reference to international law.

Refugee law/jurisprudence is itself a very new field of international law. It has expanded vastly over the past 15 years, to be clearly the largest field of international law practised daily, in thousands of cases, around the world. That expansion has been not only from the UNHCR itself but also primarily in the countries where large numbers of asylum seekers have made their applications. These countries include: all the Europe States, United States, Canada, Australia, New Zealand and South Africa. Beyond this the huge numbers of refugee claimants in Africa the Middle East and Southeast Asia have been determined by the UNHCR, under its mandate. This mandate work however does not result in reported cases or significant jurisprudential comment, although it has clearlty contributed, along with significant judicial and academic imput, to a series of published guidelines from the UNHCR, following the Global consultations 2001-2003 . Additionally the jurisprudence, that has been published, and is now being applied, with a considerable amount of consistency, in the above countries, and that is generally comparable to the approaches taken by the UNHCR, is in English, or to a much lesser degree, in the languages within the EU. It is thus unsurprising that lawyers and judges, and even academics, in Japan have not had the chance to readily attain a detailed knowledge of current refugee and protection law jurisprudence. The language barrier is a very significant one. In such situations, it is again logical that the lawyers and judges in Japan, would turn to their domestic legal training on the laws of evidence, and burdens and standards of proof, and seek to apply those to refugee cases, which they may consider as "civil" or even possibly, in deportation cases, "criminal" cases.

Refugee and protection law however, from experience of the many countries who have had to confront the issues involved in that the interpretation of the Refugee Convention and other regional Human Rights Conventions, in the thousands of cases that have been determined over the past 15 to 20 years, requires a significant, and sometimes difficult,mind shift for those formally trained as lawyers or judges (whether in civil or, common law systems). After deep and considerable examination of the totality of the issues involved, and particularly the predicament of refugees, the Courts in the above countries, often with the guidance from the

UNHCR, and respected academics, have reached very similar and compatible conclusions on the meaning of the term "well founded fear of being persecuted". They have concluded that, in the context of any claim, the term must be assessed as meaning the "reality" or "reasonable likelihood" of the risk of being persecuted on return. Thus the terms, in English: "real chance", "real risk", reasonable chance", reasonable likelihood", "serious reasons", and "substantive reasons for concluding there is a real risk" all point to this very similar standard. Alternatively, put in the reverse, (which is often very helpful to decision makers for confirmation of their assessment), "on the totality of the evidence, viewed in the round, is the risk to this claimant a remote, or speculative, or fanciful one rather than a real one?"

When the predicament of the refugee is examined closely the logic behind applying this standard of "reality of risk", as opposed to "remoteness of risk", is compelling. This is because a claimant genuinely in-flight, in fear of persecution, will not be able to obtain, or even remember, in full detail, with documentation in support, their whole personal and country situation. Often also, when documentation is presented, to an assessing officer by a claimant, in an attempt to bolster their claim, or misguided attempt to authenticate and coroborate their story, it is found that the document has come from a bogus or fabricated source, sometimes supplied by relatives or others, and amy actually undermine an otherwise truthful story. Thus it is often said, by experienced judges or assessing officers of RSD, that the less documentation, or other potentially corroborative evidence, presented by a claimant, the more credible their story is likely to be. In other words the whole "domestic" Law of Evidence needs to be substantively turned on its head for refugee and protection assessment, as it is logically a flawed approach in this unique jurisdiction.

Next the assessment of a "well-founded fear" is a prospective one, looking to the immediate future on the return of the claimant to their home country. That assessment must be made on the basis of the best information available only. This usually comprises at most: the claimant's own story ,that of other applicants in similar predicaments, and/or family members, as presented and tested, COI, which is sometimes of variable quality, or simply unavailable on the specific issue, plus possibly some medical or other expert evidence.

In addition there is then, in virtually every case, the language issue. This may include inappropriate or ill trained interpreters, use of the wrong dialect, faulty translations of documents and illiterate claimants. To this we now add the often real issues of claimants who are suffering from trauma, a fear of authority figures, different gender, cultural and educational backgrounds, and the unfortunate influence of human traffickers or others the claimants may be controlled by or indebted to.

When this mix is all put together it can quickly be seen that applying overly strict domestic rules of evidence or standards of proof are inappropriate, particularly when the risk of a wrong decision and *refoulement* of a claimant to persecution, torture or death is thrown into the equation.

The international jurisprudence in this area has thus not been arrived at by accident and has a compelling and inherent logic to it. The UNHCR, and most courts, have also agreed that to ensure that the "balance" is correctly struck, taking into account the tragic consequences of a wrongful assessment, when the decision maker is left with a residual doubt, as to whether the risk is a remote, rather than real one, or there is some remaining gap in the evidence, they would really like to have known before making the decision, then, if the claimant is otherwise credible, the benefit of the doubt should be exercised in favour of the claimant.

For lawyers and judges, whose forensic skills are so often well-suited to the assessment and balancing of many issues, in a multi faceted case, it is essential to grasp and understand this unique, so-called, "lower" conceptual standard at the outset of refugee status determination. For the non-lawyer, often the assessment of the notion of a "real" as compared to a "remote" risk is not such a difficulty, as they do not come to the assessment with the years of domestic legal training in the law of evidence and appropriate standards or burdens of proof. (It is also perhaps a reason why in countries where mixed legal/non-legal panels of assessors or judges are used, as in UK, it has proved to be a successful , if possibly more expensive, review system.)

For the Japanese RSD therefore, at all levels, it will be a (perhaps "the") most significant step forward if the above logic, as expanded upon by international jurisprudence, is seriously considered, and this leads to an agreed and consistent "real chance/risk", or similar test, being applied in all RSD assessments. This will greatly assist with consistency and "getting it right first time".

5.2 A Structured Approach

The next most striking observation, by comparison with "older" RSD systems, appeared to be the lack of any agreed structural approach in Japan to the core issues of determining refugee status and the "layout" of decisions. While this is understandable in the judicial reviews of the Japanese Courts , who are making a case by case investigation to find possible errors of law, it would appear that MoJ decisions, both at the RI and RECs levels, would be greatly enhanced in their consistency, and understanding, if they adopted a logical structure. The consensus of well tested international jurisprudence, and academic opinion, leads to a structured approach, which can be adopted in each case. This structure, which addresses the core issues, is to establish whether a claimant has a "well founded fear(real risk) of being persecuted". It requires the assessing officer, or judge, to begin, after reviewing the evidence and reaching necessary credibility conclusions, to answer the first basic issue or question:

> "Objectively, (and to a very limited extent only subjectively), on the facts as found, after fair, balanced and reasoned credibility assessment, is there a real chance/risk of the claimant being persecuted on return to their home country?"

(If the answer is "No" the matter is at an end and the claimant is not a refugee.)

Secondly, if the answer is "Yes", the next issue must be to conclude:

> "Is his/her 'well-founded fear of being persecuted' for reasons of one, or more of the five Refugee Convention reasons?

Thirdly, if that also is established, then possible internal relocation assessment and exclusion issues should be determined, to complete the process of whether the claimant should be declared a refugee or otherwise.

If "subsidiary protection" is also to be assessed then, after the first issue is concluded, in the positive, but second issue, of nexus, is not found to exist, then the assessment of whether the international obligations of the receiving State, under the CAT, Article 7 ICCPR, Article 3 ECHR etc would be breached, if the claimant were *refouled,* must be determined.

5.3 The Japanese business model of "Total Quality"?

After making the comparisons and observations with the other RSD systems, discussed in this report, I was led, mainly on the basis of my former experience working for two large companies within the Japanese motor industry, to ask the question whether the comparisons with other RSD systems were the right, or only, comparisons that should be made. The current Japanese RSD system, as stated, is relatively new and comparatively a small number of cases have been considered until quite recently. Statistics over the past few years however do indicate growing numbers of applications, and possibly increasing problems, over the past few years. When this is coupled with the recent establishment of an administrative appeal system, with the appointment of the RECs, it is clear that the MoJ is now seriously committed to the establishment of a good and workable RSD system.

However, the realism of the situation does not appear to indicate, at this time, that a coordinated plan for high-quality and efficient RSD is yet in place. It is reported that most determinations by the in MoJ take between 6 to 18 months, sometimes longer. in processing. There appears to be a lack of comparative quality, consistency, adherence or attempts to be harmonised with international norms or jurisprudence, and, in some cases apparently a lack of fundamental fairness in the decisions. As stated it is probably too early to determine whether the recent MoJ decisions, following the RECs opinions, will increase or provide quality and consistency. Beyond this it appears that Judicial Review applications to the Courts are growing (over 12%) and determinations from Courts also take a lengthy period before they are completed. It is apparent that many cases drag on in the Courts for several years.

For this to happen in a country where the level of applications is relatively so low does not demonstrate an efficient and quality determination system, and ceratinly assists no one. The question therefore is why does this happen in a country with such a deserved reputation for excellence in so many other fields of activity, particularly in the business world? It does not appear, from my observations, the world renowned Japanese business principles (as I was able to observe first-hand in the Japanese motor industry) are applied. Such concepts as: "get it right first time", "total quality management", "*kaizen", "muda elimination",* "comprehensive first-class international research", "overseas training for local staff" and "bottom-up not top-down management" were not readily apparent, and are certainly not borne out by the performance statistics, or the content of the few determinations that I was able to access.

For this reason it does seem that many answers, to the challenges for Japanese RSD,can be "home grown" and are to be found in the Japanese models of business excellence. On the face of it, if the examples of management excellence pursued by such companies as Toyota, Sony, Toshiba, Honda, etc were to be applied, including the international research to find best practices and jurisprudence, from other jurisdictions, that could be adapted for application in Japan, significant steps forward would be achieved.

The comparison with other RSD systems, carried out in this paper, does appear to show that there are many positive factors in the New Zealand RSD (plus a few from UK and the EU as well) that would make a good starting point for study and adaptation in Japan. This is particularly so with New Zealand given the comparative numbers of applications are not that far apart. Significant efforts have been made in New Zealand, over the past 10 years, to get the decision making correct at the first instance level and to ensure that the highest-quality, internationally consistent and well reasoned determinations are published by the RSAA. These RSAA decisions not only mean that sound jurisprudence is established but also the first instance RSOs are quickly guided and trained on how to reach valid decisions with hence less successful appeals and prompter removals of failed asylum seekers. The statistics from New Zealand, particularly those relating to Judicial review, indicate that New Zealand has moved a long way towards an efficient and high-quality RSD that enjoys a first-class world reputation. Indeed its decisions are noted with approval in the highest Courts in UK, Australia, Canada, USA, in Europe and by the UNHCR.

At this time therefore there is an opportunity, in all levels of the Japanese RSD to establish what I would term a " cost and efficiency triangle". That is to say a dedicated and planned approach could be applied from the bottom (RI) level up. Firstly to appoint and train RI officers, who perhaps following directions and guidance from the RECs, and on occasions the Courts, will make prompt and correct high-quality decisions, after fair assessment. At the next level there is an exciting chance for the RECs to do the same, and perhaps in addition, undertake good comparative international research and professional development, so that their decisions can give a leadership and guidance to the first instance decision-makers. If such good, internationally consistent determinations, are promulgated the likelihood of Judicial Review by the Japanese Courts will drop, and whole system will thus benefit in better protection of genuine claimants, efficiency of process, lower cost and public acceptance. There is no reason why a similar situation should not be reached in Japan, as in New Zealand, where the level of Judicial Review is very low, and only on the rarest occasions have RSAA decisions been found incorrect in law. The benefits of such an "efficient triangle" flow not only to the refugees themselves (as they get quick , safe decisions and can quickly become productive well adjusted people in Japanese society) but also to the MoJ/Japanese government (as they get an efficient, low cost, safe determination system which is unlikely to be challenged before the courts and is also respected by the

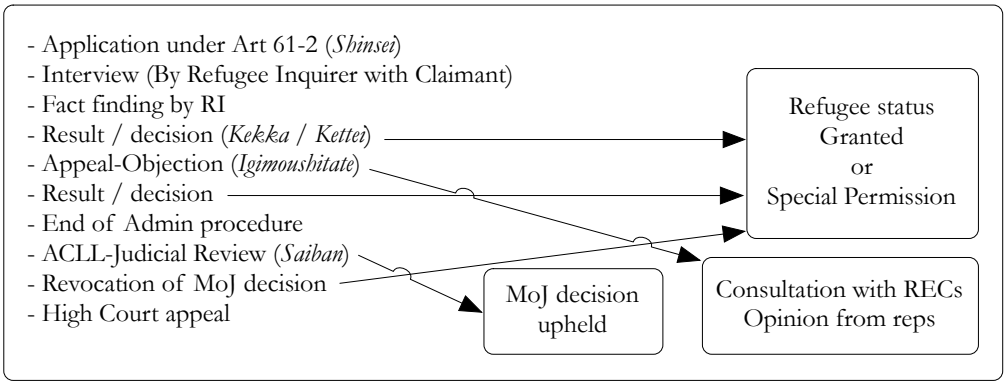
Japanese public and international community). Additionally, and significantly, failed or abusive asylum seekers can have their determinations promptly and correctly determined. They can be removed to their home countries, based on such decisions, at an early date. This, in the long term, can be seen to be their own benefit, when balanced against the stress and trauma to claimants that can result in from an inefficient RSD that inavertantly encourages them to pursue a misguided dream. Logically the aim therefore should be a system, that provides quick, fair, balanced and internationally consistent decision-making followed by effective settlement and surrogate protection or prompt removal of failed claimants.

Members of International Association of Refugee Law Judges (IARLJ), and their Courts and Tribunals, in many of the countries, who have substantial experince in refugee applications, would be only too happy to assist Japan. This could be in the form of professional development, exchange of decision-makers, databases of decsions and country of origin materials, and procedural experience. All this would assist in a rapid programme to achieve a high standard of excellence in the Japanese RSD. There is also the opportunity for Japan to give leadership, in this field, in the Asian region.

Annexures

Annex 1

Chart 1
Japan - RSD - Refugee Status Deformation Procedures



Annex 2

Chart 2
New Zealand - RSD
Immigration Act 1987 - Part 6A

- Application to Government official #
- Form completion, interview and fact-finding with Refugee status officer (RSO)* - Dept of Labour staff - NOT Immigration officer
- If Refugee Status refused apepal to independent Refugee Status Appeals Authority (RSAA)* - all lawyers, investigative procedure, full merits review
- If refused by RSAA, Judicial Review by High Court* on points of law only if available

* Legal representation, limited legal aid available at all stages of the procedure
\# Successful applicants usually get PR

Annex 3

Chart 3
UK-RSD-Immigration Acts 1971-2004

Application - in response to notice of intent to issue Removal Directions (ie a defence to Immigration procedure)*.

- Form completion, interview, fact-finding by Home Office staff - in Immigration Dept (IND) - Refugee, Human rights and Immigration claims considered (*one stop procedure*).
- If refused, appeal to independent Asylum and Immigration Tribunal (AIT)*, membership predominately legal (but some lay membership, now sitting, with legal chair on mainly on deportation cases), one stop appeals, adversarial, full merits review, decision in 10 days.
- Both parties may seek reconsideration from High Court/Senior Immigration Judge (SIJ) of AIT (so called *filter process* for the High Court), on material error of law only (on the papers).

- If reconsideration granted by SIJ, reconsideration hearing by AIT, single IJ or panel, as directed.
- Decision in 10 days.
- Both parties may then seek permission to appeal to Court of Appeal on material errors of law only.
- House of Lords - by permission - errors of law only.*
- *Legal reps/limited legal aid available at all stages.

- If no order by SIJ - "Opt in" for "Statutory Review" by High Court Judge (papers).
- If refused, matter is at an end.
- If granted, matter proceeds to reconsideration as in other column.
- NB - There are also fast track appeal systems and a separate court for "Terrorist suspects" - SIAC.
- Refugee, HP and HR grants lead to 5 year visas (renewable)^.

^HP = Humanitarian protection (or Subsidiary protection) under Qualifications Regulations (SI 206/2525) and Immigration Rules (Cm 6918) effective from 09/10/2006
^HR = Human rights (ECHR .1950)

Annex 4

Chart 4
European Union/Council Directives - Common Asylum Policy

- The ECQD (10 October 2006)
- The ECPD (1 December 2007)
- Two common statuses - (EU) Refugee status and (EU) Subsidiary protection
- Minimum standards across 24 countries and 350m people
- Very closely following the RC51 adn ECHR
- Clarifies issues like declaratory nature, persecution (HR standards), PSG, Non-state actors, min visa periods, IPA, exclusion
- The decisions across the judiciary of 24 states, and then ECJ, will become a major source of international law.

Annex 5
European Union Qualifications Directive
website access see –http.www://ec.europa.eu/justice_home_doccentre/asylum/doc_asylum_intro_en.htm

Annex 6
European Union Procedures Directive
website access see –
http.www://ec.europa.eu/justice_home/doc_centre/asylum/common/doc_asylum_common_en.htm

Annex 7

Japanese RSD Statistics
2000 - 2005

Applications to MoJ

2000	216
2001	353
2002	250
2003	336
2004	426
2005	384
Total last 6 years	1965

=1st/Ap/%/HS

2000	22/0/8.5/36
2001	24/2/7.3/67
2002	14/0/5.6/40
2003	6/4/2.9/16
2004	9/6/3.5/9
2005	31/15/12.0/97
Total	

149RS/265HS=414

Recognised by MoJ

Total RS + HS recognition
414 from 1965 claims = 21%

Judicial Reviews

2000	46
2001	8
2002	52
2003	53
2004	25
2005	52

Total = 236 - 12% of total claims

1st = first stage MoJ decision
Ap = appeal stage
HS = humanitarian status
RS = refugee status

Annex 8

New Zealand Statistics
1999 - 2005

Applications to RSOs/Govt	
1999	1595
2000	1955
2001	2348
2002	2608
2003	1267
2004	802
2005	499
Total last 6 years	9479

Refugee status granted RSOs - %	
1999	14.7
2000	15.9
2001	13.2
2002	24.2
2003	19.5
2004	14.4
2005	16.2

Appeals to RSAA	
1999	574
2000	640
2001	1277
2002	670
2003	550
2004	360
2005	183
Total last 6 years	3680

Granted by RSAA

Average figure across these 7 years is 16.9%
*The stats do not equate to same years

Judicial Reviews by High Court

57 reviews resulted in 3 RSAA decisions (0.09%) being found unlawful.
OR 0.006% of total claims.
Total recognitions - 21.5%

RSO = Refugee status officer
RSAA = Refugee Status Appeals Authority