Turkish v. Japan (Minister of Justice)
–Nagoya District Court (15 April 2004)

Country of jurisdiction	Japan
Court	Nagoya District Court
Division	Civil: 9th Division
Judge	Yukio KATOH(Presiding Judge) Kyoko FUNABASHI Kaori HIRAYAMA
Date of decision/judgment	15 April 2004
Citation	Heisei 14 (2002) Gyo-U (Administrative Case) No.49
Case	Lawsuit for Revocation of Decision to Reject Application for Refugee Status
Summary	The Court revoked the decision not to recognize the plaintiff as a refugee and affirmed the nullity of the written deportation order issued to him

Judgment

Conclusions

1. The disposition of 2 October 2001 taken by the Minister of Justice (defendant) not to recognize the plaintiff as a refugee shall be revoked.
2. The decision of 7 January 2000 taken by the Minister of Justice on the plaintiff, stating that the latter's objection under Article 49, para.1 of the Immigration Control and Refugee Recognition Act has no basis, shall be confirmed as invalid.
3. The issuance of the written deportation order of 27 January 2000 against the plaintiff, undertaken by the Supervising Immigration Inspector of the Nagoya Immigration Bureau (defendant), shall be confirmed as invalid.
4. The legal costs shall be reimbursed by the defendants.

Findings and Reasoning

Section 1: Claims

See Conclusions.

Section 2: Summary of the case

The plaintiff, who is of Turkish nationality, filed an objection to the decision of a special inquiry officer, who found that there was no error in the finding of a subordinate immigration inspector to the effect that the plaintiff has the grounds to be deported. The Minister of Justice (hereinafter referred to as "the Minister) decided that the objection had no basis, in accordance with which the Supervising Immigration Inspector (defendant) of the Nagoya Immigration Bureau (hereinafter referred to as "the NIB") issued a written deportation order against the plaintiff. In the present appeal litigation, the plaintiff asks for confirmation that the decision and the deportation order are invalid as well as for revocation of the Minister's decision not to recognize the plaintiff as

a refugee in his second application for refugee status.

1. Relevant Facts (Facts that are not disputed by the parties and that are easily confirmed by evidence)

(1) Entry into and stay in Japan by the plaintiff

(i) The plaintiff is an alien of Turkish nationality, who was born on 18 December 1973 in Adiyaman, Turkey.

(ii) On 30 January 1997, the plaintiff left Istanbul on the Turkish Air with his own passport, issued by the government of Turkey, and arrived at the New Tokyo International Airport. He applied for landing to an immigration inspector of the Narita Airport Branch of the Tokyo Immigration Bureau (hereinafter referred to as "the TIB") by submitting an alien entry card, which indicated that his purpose of visit was "for business" and his period of stay "One Week". He was permitted by the immigration inspector to enter into Japan with a residency status of "temporary visitor", valid for "90 days".

The plaintiff has continued to stay in Japan after 30 April 1997, after the initially permitted period of stay has passed, without applying for the extension of the period of stay or for the change of status of residence.

(iii) On 19 August 1997, the plaintiff applied for alien registration as a resident in Ichinomiya City, Aichi Prefecture, and was issued a certificate of alien registration on 5 September of the same year. Thereafter he registered his new places of residence in Kameyama City, Mie Prefecture, on 14 August 1998 and 30 June 2000 respectively.

By September 2003 at the latest, the plaintiff had moved to the present place of residence in Kawaguchi City, Saitama Prefecture.

(2) Applications for refugee status by the plaintiff

(i) On 3 October 1997, the plaintiff submitted the first application for refugee status to the Minister through the TIB, in accordance with Article 61-2, para.1 of the Immigration Control and Refugee Recognition Act (hereinafter referred to as "the Immigration Act"), on the ground that he is at risk of being persecuted due to his Kurdish origin.

(ii) On 7 October 1997, an officer of the TIB sent the plaintiff a notification requesting him to report to the TIB, to the address written in the application. Since the notification was returned due to "removal" of the plaintiff, the officer called the resident of the address and asked him to tell the plaintiff to report, but in vain. Although the officer sent the notification again to the plaintiff's address in the aliens' registry on 22 July 1998, it was returned due to "unknown building/room number" and the plaintiff did not appear before the TIB.

(iii) On 27 October 1998, the Minister decided not to recognize the plaintiff as a refugee on the ground that the first application had been submitted after the deadline prescribed under Article 61-2, para.2 and that the proviso of the same article did not apply to this case. The plaintiff was notified of the decision on 17 December 1998.

(iv) On 17 December 1998, the plaintiff filed an objection to the Minister's decision not to recognize him as a refugee. Accordingly a refugee inquirer of the NIB inquired into the facts, including by hearing the plaintiff, on 31 March and 8 April 1999.

(v) On 17 December 1999, the Minister decided that the plaintiff's objection had no basis because the application had been submitted after the deadline prescribed under Article 61-2, para.2 and that the proviso of the same article did not apply to this case. The plaintiff was notified of the decision on 6 January 2000.

(vi) On 18 February 2000, the plaintiff applied for refugee status again (hereinafter referred to as "the second application") to the Minister, adding another ground that he had fear

after having heard that a Kurdish who had returned to Turkey had been killed.

(vii) After the inquiries by the refugee inquirer of the NIB on 1 and 3 August 2001, the Minister decided, on 2 October 2001, not to recognize the plaintiff as a refugee on the ground that he was not at risk of being persecuted. The plaintiff was notified of the decision on 7 November 2001.

(viii) On 9 November 2001, the plaintiff filed an objection to the Minister's decision. After the inquiries of the refugee inquirer of the NIB, the Minister decided, on 31 May 2002, that there was no error in the original decision in not recognizing the plaintiff as a refugee, that he could not found any other materials which would led him to grant refugee status to the plaintiff and that the objection by the plaintiff had therefore no basis. The plaintiff was notified of the decision on 14 June 2002.

(3) Deportation procedures against the plaintiff

(i) On 4 September 1997, an immigration control officer of the NIB charged the plaintiff as a suspect in violation of Article 24 (4)(b) (unlawful stay) and, as a result of the investigation of violations conducted on 13 January 1999, found reasonable grounds to suspect that the plaintiff had violated the provision. Accordingly, the officer obtained a written detention order from a supervising immigration inspector of the NIB on 23 February 1999 and enforced it on 25 February by detaining the plaintiff in the detention center of the NIB. On the same day, he delivered the plaintiff to an immigration inspector as the suspect in violation of the said provision.

(ii) The immigration inspector of the NIB conducted two investigations of violations on 25 February 1999, found that the plaintiff had indeed violated Article 24 (4)(b) and notified the plaintiff of the finding. On the same day, the plaintiff was accorded provisional release by the immigration inspector of the NIB.

(iii) On 25 February 1999, the plaintiff requested a special inquiry officer of the NIB to hold a hearing concerning his objection to the immigration inspector's finding. The special inquiry officer held a hearing on 8 April 1999, found that there was no error in the original finding and notified the plaintiff of this result.

(iv) The plaintiff filed an objection to this finding with the Minister on 8 April 1999. On 7 January 2000, the Minister decided that the objection had no basis. Having been notified of the decision, the Supervising Immigration Inspector issued a written deportation order on 27 January 2000, indicating Turkey as the destination, and notified the plaintiff of the Minister's decision and detained him in the NIB on the next day.

(v) The plaintiff was accorded provisional release by the Supervising Immigration Inspector on 28 January 2000. On 17 June 2000, however, the plaintiff was detained in the detention center of the NIB, not being permitted to extend the period of the provisional release and to be accorded another provisional release upon application.

The plaintiff's further application for provisional release, submitted on 4 July 2000, was accepted.

(4) General situation of the Kurdish in Turkey

(i) It is estimated that more than 10 million Kurds live in Turkey and the south-eastern part of the country, where many Kurds live, is allegedly underdeveloped. Among the pro-Kurds political parties in Turkey, the People's Labour Party (HEP), the Democracy Party (DEP) and the People's Democratic Party (HADEP), the latter two were dissolved in 2003. The Kurdish Workers' Party (PKK), seeking for Kurdistan's separation and independence from Turkey, is treated as an illegal organization.

(ii) The UN Committee against Torture (CAT) and the European Committee for the Prevention of Torture (CPT) recommended the government of Turkey to eradicate torture in a

report or communiqué respectively in November 1993 and December 1996. The UN Special Rapporteur on extrajudicial, summary or arbitrary execution and the UN Working Group on Enforced or Involuntary Disappearances have requested the government of Turkey to permit field visits in the country. In June 1996, Amnesty International published a report on the situation of Turkey, acknowledging a variety of cases of torture and extrajudicial execution by the government and making recommendations for redress.

(5) Definition of the term "refugee"

The term "refugee" is defined under the Immigration Act as "a refugee who falls within the provisions of Article 1 of the Convention Relating to the Status of Refugees (hereinafter referred to as "Refugee Convention") or the provisions of Article 1 of the Protocol Relating to the Status of Refugees (hereinafter referred to as "the Protocol")" (Article 2, clause 3-2). A refugee under this provision (hereinafter referred to as a "Convention refugee") is defined as a person "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (Article 1, A (2) of the Refugee Convention and Article 1, para.2 of the Protocol).

In order to regard someone as having "well-founded fear of being persecuted", there should be, not only subjective elements that the person fears that he will be persecuted, but also objective elements that would make a reasonable person have fear of being persecuted when he was placed in the position of the former.

2. Issues

(1) Whether the non-recognition of the plaintiff as a refugee was unlawful / whether the plaintiff is a Convention refugee

- (i) Where the burden of proof lies and whether the plaintiff's statements are credible
- (ii) The situation of Kurds in Turkey
- (iii) Specific circumstances of the plaintiff
- (iv) Whether the plaintiff qualifies as a refugee

(2) Whether the Minister's decision is invalid

(3) Whether the issuance of the deportation order against the plaintiff is invalid

3. Summary of the Parties' Arguments on Each Issue

(1) Issue (1) (Whether the non-recognition of the plaintiff as a refugee was unlawful / whether the plaintiff is a Convention refugee)

(The plaintiff)

As will be argued in (i) or (iv) below, the plaintiff is a Convention refugee. Nevertheless the Minister decided that there were not materials adequate enough to recognize as such, which is misinterpretation of the facts or misapplication of the law, thus unlawful.

(The defendants)

As will be argued in (i) or (iv) below, since there is no consistency and coherence in the plaintiff's arguments or statements concerning alleged persecution against him by the government of Turkey, it is impossible to acknowledge the existence of the persecution or to recognize that the plaintiff has well-founded fear of being persecuted. Since it has not been proved that the plaintiff is a Convention refugee, the Minister's decision not to recognize him as a refugee was lawful.

(i) Issue (1)(i) (Where the burden of proof lies and whether the plaintiff's statements are credible)

(The plaintiff)

(a) Where the burden of proof lies

The burden of proof in the process of refugee status determination generally lies on the part of the applicants. Since the applicants have fled the country of origin, however, they often have little space for evidential materials, carrying only the minimum necessities, frequently without identity documents; it is difficult to obtain these materials after having arrived at another country. In addition, they would suffer from very serious consequences if they were denied refugee status erroneously. Given the possibility of such serious consequences on the applicants as well their difficulties in obtaining objective evidence, the applicants should be given "the benefit of the doubt", unless there are adequate grounds to the contrary, when they have made statements that could not be substantiated but could be regarded as credible.

The principle is adopted in the practice of Canada, New Zealand, Australia and other countries. It is also confirmed in the Handbook on Procedures and Criteria for Determining Refugee Status, published by the Office of the High Commissioner for Refugees (hereinafter referred to as "UNHCR"), which is mandated under Article 35 of the Refugee Convention to supervise the implementation of the Convention. Since the Handbook can be regarded as "supplementary means of interpretation" in terms of Article 32 of the Vienna Convention on the Law of Treaties, what is written there should be duly respected.

(b) Whether the plaintiff's statements are credible

Recognition of a refugee is not a discretionary act; it is an act of confirmation, which should be undertaken as an obligation, when an applicant has met the criteria as a refugee. Whether the applicant's statements are regarded as credible can be a crucial factor in this process, partly because it is exceptional for an applicant to be able to produce objective evidence. Therefore careful examination should be undertaken to make judgment in this regard, paying attention to unique psychological factors of applicants for refugee status (such as post-traumatic stress disorder, distrust in officers of the authorities and considerations for relatives they left in the country of origin), cultural factors (such as culture and language) and the non-adversarial nature of the refugee status determination procedures (which leads to the concentration of powers on the authorities).

Therefore the general principles of the evidential rules cannot be directly applied to the refugee status determination procedures. When the applicant's statements are consistent, credible and made in good faith, objective evidence should not be required to substantiate them; and even when some parts of the evidence are contradictory, inconsistent, have been changed or are not credible, they should not be regarded as absolute and result in immediate rejection of the applicant's refugee status. The whole evidence should be examined with a view to see whether the whole application contains crucial contradictions or inconsistencies and, in order to deny the credibility of the statements, there should be adequate theoretical grounds and effective counterevidence. Further the authorities in charge of refugee status determination should be actively involved in the collection of information concerning the applicant's country of origin.

In addition, Articles 13 and 31 of the Constitution enshrine the principle of due process of law, which should be applied, according to a judgment of the Supreme Court, to administrative procedures. Given the grave consequences of erroneous denial of refugee status, the principle should be guaranteed even stronger in the refugee status determination procedures. Thus it should be emphasized that the principle of fairness is a necessary and important one in the refugee status determination procedures; when an inquirer has doubt in the credibility of evidence produced by the applicant, he should reveal it to the applicant and grant the applicant opportunities to explain themselves on the issues concerned.

(The defendants)

The defendants dispute the plaintiff's arguments.

The Refugee Convention and the Protocol do not have any provisions concerning what the refugee status determination should be, leaving it to legislative discretion of the Contracting States. This is also obvious from the fact that the right to be granted asylum for those who are being persecuted is not established under international law; the Refugee Convention and the Protocol do not guarantee such a right, leaving it to sovereign decisions of the Contracting States whether or not to admit and protect refugees in their territory, as is clear in the preamble of the Convention. Thus the plaintiff's arguments, trying to reduce the criteria of refugee status determination into nothing but interpretations of the Refugee Convention and the Protocol, are unreasonable in themselves.

(a) Where the burden of proof lies

Article 61-2, para.1 of the Immigration Act provides that the Minister of Justice may recognize a person as a refugee based on the data furnished by the applicant. Article 61-2-3, para.1 of the same Act provides that the Minister of Justice may have a refugee inquirer inquire into the facts if there is a possibility of not being able to make a proper recognition of refugee status with only the data furnished or if it is deemed necessary in dealing with the recognition of refugee status or withdrawal. In the light of these provisions, the burden of proof concerning refugee status should lie on the part of the applicant. This is obvious from the nature of refugee recognition, which is a disposition of granting benefits to the applicant. Practically speaking, since the events giving rise to refugee status often occur outside the country and in a covert way, the applicant is in the best position to argue and prove, through their own experiences, what had happened in what way.

In this regard, the plaintiff invokes Article 32 of the Vienna Convention on the Law of Treaties. Article 31, para.1 of the Convention, however, provides that the principal means of interpretation should be the terms and context of a treaty itself; supplementary means of interpretation can only be used (a) to confirm the meaning resulting from the application of Article 31 (Article 32), (b) to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure (Article 32 (a)) or (c) to determine the meaning when the interpretation according to article 31 leads to a result which is manifestly absurd or unreasonable (Article 32 (b)). Since the Refugee Convention and the Protocol have no provisions concerning refugee status determination procedures, which means that no interpretation can be made through these documents with regard to principles of such procedures, there is no scope for discussing the application of Articles 31 and 32 of the Vienna Convention. The Handbook does not provide for refugee status determination procedures, either, standing on the premise that different procedures are adopted in different countries.

Therefore an applicant for refugee status should prove that he is a refugee beyond reasonable doubt, as is the case in general civil suit. It is a misinterpretation of Article 61-2, para.1 of the Immigration Act to oblige the Minister to conduct investigation concerning refugee status determination and to find non-fulfillment of the obligation with regard to issues that have not been investigated, virtually resulting in the shift of the burden of proof.

(b) Whether the plaintiff's statements are credible

The plaintiff's arguments on the principles in evaluating the credibility of an applicant's statements put too much emphasis on the alleged unique legal nature of refugee status determination. The Handbook and other evidence quoted are no more than the expression of basic philosophies and cannot be regarded as absolute guidelines.

For example, when parts of the applicant's statements contain exaggeration, some distortion of the facts or contradiction to objective facts, it is unreasonable to ignore these parts in determining the credibility of other parts of the statements, which would lead to denial of the process itself of determining the credibility of the statements; the whole statements should be

subjected to the examination. In addition, it is obvious that consistency of the statements is an important element in determining their credibility. Even in the light of the special nature of refugee status determination, it is unreasonable to exclude this element from the determination process, which is pointed out in the Handbook as well. Further, it is also unreasonable to require solid evidence of falsehood in order to doubt the credibility of the statements; if this is the case, any statements must be considered credible when they only refer to the matters that are difficult to be substantiated.

The plaintiff invokes the principle of "the benefits of the doubt" in this regard. However, this principle is not applied to the determination of the credibility of the applicant's statements; it only reduces the applicant's burden of proof on the premise that his/her statements can be considered credible.

(ii) Issue (1)(ii) (The situation of Kurds in Turkey)

(The plaintiff)

As will be shown below, the plaintiff has well-grounded fear of being persecuted for reasons of being a Kurd and political opinion.

The government of Turkey calls Kurds "Mountain Turks" and denies their identity as an ethnic group. Suppression against Kurds who oppose this policy has been so harsh and extensive that the international community has denounced it. Although persecution against Kurds has been conducted by state agencies, the government of Turkey has neglected to take action without undertaking thorough investigation. As a result, there has been little change in the situation of persecution against Kurds and those who advocate for their identity as well as against Kurds who returned to the country without being granted refugee status in Japan.

(a) Historical aspects

a. Kurds

Kurds are an ethnic group who live in Kurdistan (the mountainous areas on the borders of Turkey, Iran, Iraq and Syria), being Indo-European racially and linguistically. Kurds are the largest ethnic group without their own nation-state, occupying the fourth place in the Middle East in terms of the population, and more than 10 million Kurds are estimated to live in Turkey. Although they are largely Sunni Muslims, a third of them (along with some Turks) are minority Alevi Muslims, who do not observe religious requirements under the Sunni sect and who pray in their own rooms for worship.

On the other hand, Turks are Asian who speaks Turkish, which has no commonalities with the Kurdish language.

b. After the World War I

The Treaty of Sevres, concluded in 1920 to deal with the collapse of Ottoman Turk after the World War I, recognized Kurds as a nation who is eligible to have their own state. The Treaty did not entered into force, however, because of the opposition from Mustafa Kemal who built the Republic of Turkey (and who was called Ataturk later; hereinafter referred to as "Kemal") and of the changes of British policies on the Middle East. The independent nature of Kurds nation was thus completely ignored by the international community.

Kemal and his comrades fought the great powers of Europe that had attempted to divide Turkey, defining the fight as a liberation movement for their motherland, and professed themselves Turkish nationalists as a driving force for the movement. As a result, the government of Turkey denied the very existence of other ethnic groups, including Kurds who constituted a fourth of the population, and suppressed all kinds of advocacy for ethnic identity of the minorities. This policy is reflected in the Constitutions of 1924 as well as 1982. The preamble of the latter states, "no protection shall be accorded to any thought or opinion contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Ataturk". And

Article 14 of the 1982 Constitution provides, "None of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, of destroying fundamental rights and freedoms, ... or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas". In addition, the use of the Kurdish language was officially banned in 1924 and, in 1930s, the Sun-Language Theory was promoted with the Turkish language defined as the supreme language.

Kurds had attempted to oppose these policies through a number of rebellions, including the one by Sheikh Said in February 1925, the one by a tribal group in 1929 and the Dersim rebellion in 1937, all of which were subjected to indiscriminate massacres and other forms of harsh suppression by the government of Turkey. Consequently Kurds' tribal society collapsed and they were deprived of their ethnic identity.

c. After the World War II

After the World War II, Turkey entered into the era of the multiparty system. The regimes implemented policies within the military's tolerance, however. When the regimes went outside the framework permitted by the military, the latter forced changes of the regimes through three coups d'etat in 1960, 1971 and 1980 and other means. Meanwhile, the government of Turkey had continued to pursue policies against Kurds almost all the time, through the imposition of silence on those who argued for the existence of Kurds or their separation from the country by arresting and sentencing them on the ground of the very arguments. South-eastern Turkey, where many Kurds lived, was left in the situation of underdevelopment without the accumulation of social capital.

In response to the situation, Kurds denounced the oppression against them by way of speech through such organizations as the Kurdistan Democratic Party (KDP) as well as the Revolutionary Cultural Centers of the East (DDKO) of the Workers' Party of Turkey (TIP). However, the leaders were subjected to suppression, including through assassination, arrest and prosecution. In this context, when the PKK was established in 1978 by Abdullah Ocalan (hereinafter referred to as "Ocalan"), who had been involved in political activities for the unique nature of Kurdistan, support for the party among Kurds had become widespread in spite of its illegal nature.

d. After the coup d'etat in 1980

On 12 September 1980, the three forces of the military and the military police (Jandarma) staged a coup d'etat (hereinafter referred to as "the 1980 coup d'etat") and the National Security Council, its headquarters, declared the state of emergency in the whole territory of Turkey. The state of emergency had been lifted gradually and the powers were delegated to civil government in 1984. The lifting took more time in south-eastern Turkey, however, where the inhabitants' rights continued to be deprived at the discretion of the military commander. The framework of the subsequent regimes in Turkey was established by this coup d'etat.

During the 1980 coup d'etat, the government of Turkey arrested 1,790 persons on the charge of membership of the PKK, many of whom were sentenced to imprisonment or detained for a long time. Therefore the PKK adopted the policy of armed struggle. The PKK had gained increased support in the 1990s; during the Ozal presidency, it reduced their demands from independence to autonomy, declaring unilateral ceasefire and calling on the government for negotiations. While President Ozal appeared to be willing to accept the offer at a time, the government forces began to attack the PKK after the death of President Ozal, which has led to ongoing conflicts.

Meanwhile, one of the political parties that had advocated the rights of Kurds, the People's Labour Party (HEP) established in 1989, was subjected to the scrutiny of its constitutionality by the Constitutional Court in 1992, because of their attempted use of the Kurdish language at the oath in the Parliament and of their remarks in their meetings; the Party was forced into virtual dissolution. The Democratic Party (DEP), established in 1993 as a successor of the HEP, was also ordered by the

Constitutional Court to disband, after the arrest of its leader as well as assassinations of its parliamentarians and members. The People's Democratic Party (HADEP), established in July 1993, was also ordered to disband.

(b) Turkish legislation concerning Kurds

a. Prohibition of the use of the Kurdish language under the Constitution of Turkey

Article 26, para.3 of the 1982 Constitution provides that "any language prohibited by law shall not be used in expression and dissemination of thought"; Article 28, para.2 states that "publication shall not be made in any language prohibited by law"; and Article 42, para.9 provides that "No language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education". The Law on Publication in Languages Other Than Turkish (Law No.2932 of 19 October 1983), based on these constitutional provisions, also provides that the mother tongue of Turkish citizens shall be Turkish and that any other language shall not be used in expression or dissemination of thought in Articles 1 and 3; Articles 4 & 6 provides for penalties for violation of these provisions.

b. Enactment of the Anti-Terror Law

The Law No.2932 was revoked when the Law to Fight Terrorism (hereinafter referred to as "the Anti-Terror Law") was enacted on 12 April 1991. The latter is intended to exclude not only Kurdish movements for independence but also any relevant activities, including advocacy for its identity and other speech on the existence of the Kurd issues. By adopting a wide definition of "terrorism", the Law applies to advocacy for Kurds' identity itself (Article 1) and provides for all kinds of measures to contain such activities thoroughly. For example, penalties shall be increased by one half for those committing the crimes defined as terrorism (Article 5); those who criticize the Anti-Terror Law, who disclose the identity of officials on anti-terrorist duties or who print or publish leaflets and declarations of terrorist organizations shall be punished with a heavy fine (Article 6); those who found terrorist organizations shall be punished with imprisonment and with a heavy fine (Article 7); propaganda, assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation are forbidden (Article 8); offences within the scope of the Law are to be tried in state security courts (Article 9); and where officers of police and intelligence or other officials engaged in fighting terrorism are prosecuted for crimes allegedly committed during the course of their duty, they shall not be subjected to imprisonment and shall be represented by a maximum of three lawyers whose fees shall be paid by the institution to which they were attached (Article 15). In addition, it has been possible to charge any person on the ground of violations of the Law in practice. Consequently, when a person is accused of breaching the provisions of the Law, he is deprived of all kinds of protection under Turkish legislation. While many amendments were made to the Anti-Terror Law in response to criticism of the international community (relatively major ones were made on 25 October 1995), they have not led to substantial improvement, going no more than reducing the upper limits of prescribed penalties.

(c) Persecution against Kurds

Generally, Kurds are not persecuted if they do not advocate their ethnic identity publicly or politically; they are at risk of being persecuted, however, if they are involved in such advocacy or support the use of the Kurdish language in public. While it is difficult to have a clear picture of persecution against Kurds, because many journalists have been abducted or disappeared, there are numerous examples of persecution against them for reasons of political opinion or being Kurdish. The primary agents of persecution are the military, the police and the Jandarma; acts of suppression against Kurds are sometimes undertaken by the MIT (Milli Istihbarat Teskilati), whose members disguise themselves as civilians but, in fact, work as intelligence or assassination agents on the government's orders.

Specific examples of persecution against Kurds have been reported even in a

government-sided newspaper, Turkish Daily News. It is said that more than 1,000 Kurdish activists have been assassinated since late 1980s; as many as 2 million villagers are estimated to have become victims of setting fire to their villages; and more than 1,000 villagers have been shot to death during the fires in the south-eastern part of Turkey by 1996. In addition, the military, the police and the Jandarma have repeated violent interrogation, arrest, detention and torture. At least 93 persons have died during the five-year period from 1991 to 1996; and more than 1,000 cases of disappearances during detention have been reported by 1995.

These situations have also been identified by the report of the UN Working Group on Enforced or Involuntary Disappearances (1994), Human Rights Country Report by the US Department of State (1999) and Country Assessment by the UK Immigration and Nationality Directorate (2000).

These situations of persecution have not improved. Indeed, when a Kurd named A, who had been detained for a few years and tried in Turkey and had applied for refugee status in Japan, returned to the country because he was not likely to be recognized as a refugee, he was killed at home around July 1999. The Turkish security authorities had regarded him as a person responsible for the operation of the PKK in Japan. Given the unnatural nature of the killing, he might have been killed by the conspiracy of the government of Turkey.

In addition, Alevi Muslims, who have traditionally supported leftist parties because of their strong preference for the secularism, have been discriminated by the authorities. For example, they cannot receive financial assistance from the agency in charge of religious issues; and religious textbooks used in secondary schools only refer to Sunni Muslims. In particular, Kurds who are Alevi Muslims are more likely to be suspected as a member of anti-establishment organizations.

(d) International denunciation

In the light of these situations in Turkey, the UN Committee against Torture (CAT) and the European Committee for the Prevention of Torture (CPT) recommended the government of Turkey to eradicate torture in a report or communiqué respectively in 1993 and 1996. On 18 January 1996, the European Parliament noted with appreciation the proposals by the PKK for a ceasefire on 11 December 1995, calling on the government of Turkey to reinforce policies for democratic reforms and to respect human rights. Since the government of Turkey only resisted to this move, calling it a political interference, the European Parliament excluded Turkey from the list of candidates for joining the European Union (hereinafter referred to as "EU) in December 1997, primarily because of suppression of Kurds.

In protest, Germany suspended its export of weapons to Turkey temporarily in 1992, 1994 and 1995. In 1993, Switzerland protested about the fact that the staff of the Embassy of Turkey fired at Kurdish demonstrators in the capital.

(The defendants)

The defendants dispute the plaintiff's arguments.

As will be shown below, Turkey accepts the democratic Kurdish culture; Kurds cannot be regarded as being at risk of persecution only on the basis of their ethnic origin.

(a) Historical aspects

The defendants agree with the plaintiff in that Kurds primarily live in the areas stretching over Turkey, Iran and Iraq; that they speak the Kurdish language; that more than 10 million Kurds are estimated to live in Turkey; the state of emergency was declared in Turkey after the 1980 coup d'etat, which was not lifted in the eleven provinces of south-eastern Turkey by the 1990s; and that legal action has been taken to dissolve the pro-Kurds People's Democratic Party.

However, the state of emergency was lifted in the whole territory of Turkey by 2002; in the province of Adiyaman, where the plaintiff was born, it had already been lifted in 1986. While legal action has been taken to dissolve the People's Democratic Party, the Constitutional Court guaranteed its lawful activities by permitting it to take part in the general election in April 1999.

(b) Turkish legislation concerning Kurds

a. Democratization and the amendments to the Constitution in Turkey

Enacted in the aftermath of the 1980 coup d'etat, the 1982 Constitution emphasized the maintenance of national security. With the stability of law and order since the early 1990s, frequent amendments have been made to the Constitution in 1987, 1993, 1995, twice in 1999 and 2001, transforming the entire society of Turkey into a democratic one which accepts Kurds and the Kurdish language.

The amended Constitution of 3 October 2001 (hereinafter referred to as "the 2001 Constitution") provides for explicit constitutional guarantee of freedoms of thought, belief and expression, including by removing the provisions against the use of languages prohibited by law. On 3 August 2002, the Turkish Parliament passed a package of 14 reform bills, including the one to permit education or broadcasting in the Kurdish language. While the 2001 Constitution still prohibits activities aimed at separation or independence from Turkey, it is inevitable to do so in the context of the social circumstances that force the government to give priority to the maintenance of national security, in the light of the threats faced by Turkish society through acts of terror by the PKK and other many illegal organizations pursuing separation and independence. In addition, the provision concerned is no more than the prohibition of such acts of terror and other forms of anti-social action, obviously not tolerating restrictions on human rights of Kurds. This is also clear from the fact that the 2001 Constitution guarantees the republican system, secularism and democracy as well as a diversity of fundamental rights and freedoms; that it is confirmed that the Constitution only prohibits specific acts which would destroy the fundamental aspects of the state and its political system, not leading to violation of freedoms of thought or belief; and that there are many Kurdish parliamentarians in the Turkish parliament.

While the 2001 Constitution was passed immediately after the Minister's decision at issue in the present case was made, changes of social circumstances that had led to the amendments had continued since the 1990s.

b. Use of the Kurdish language

Legislation prohibiting the use of the Kurdish language in Turkey was revoked in the spring of 1991, resulting in lawful dissemination of publications and music in the Kurdish language as well as virtual authorization of broadcasting in the language to a certain extent. In March 2001, before the amendments to the Constitution in 2001, the government of Turkey published a national programme for joining the EU, planning major amendments to the Constitution and other relevant legislation with a view to harmonizing them with the political provisions of the EU. Further, the Turkish Parliament passed a package of 14 reform bills in August 2002, including the one to permit education or broadcasting in the Kurdish language. The restrictions on publications under the Anti-Terror Act are intended to limit the expression of thought that would encourage acts of terror and seriously undermine social order, not leading to restrictions on publications in the Kurdish language that have nothing to do with acts of terror.

c. Anti-Terror Law

The plaintiff argues that the Anti-Terror Law itself is a grave violation of human rights. As will be shown in the defendants' arguments in (vi)(c) below, however, the containment of terrorism is an important responsibility of the state. The Law does not provide for particularly harsh penalties, compared to similar legislation in other countries, and there are procedural guarantees under the Law.

In addition, as a result of the amendments of 27 October 1995 to the Law, only the acts with specific subversive activities are to be punished; Article 15, which provided for the exemption of imprisonment when officers engaged in fighting terrorism are prosecuted, was repealed. Thanks to these amendments, many prisoners were commuted or released.

Further, the Amnesty Law adopted in December 2000 provides that sentences based on

penal provisions against acts of expression shall be suspended, resulting in release of many persons who had been convicted or in pre-trial detention. Even when supporters of terrorist organizations are concerned, emphasis shall be placed on whether they had deliberately supported such organizations on their explicit will; motivations and degrees of the supportive activities shall be considered in the application of penalties, thus excluding the possibility of punishing them when they provided food only once even if it was deliberate.

(c) Persecution against Kurds

a. Discrimination on the ground of ethnic origin

Kurds in Turkey are not at risk of being persecuted only on the ground of their ethnic origin. This conclusion is supported by the reports of the UK Immigration and Nationality Directorate and the US Department of State as well as of the UNHCR.

The UK Immigration and Nationality Directorate, for example, reports that Kurds do not usually suffer persecution or discrimination outside south-eastern Turkey, provided that they do not publicly or politically assert their Kurdish ethnic identity; that Kurds in urban areas do not generally support separatism; and that there are a significant number of Kurds who married with Turks and who are in a high position in society. The UNHCR also states that it is not possible to support the argument that Kurds are being persecuted solely because they are Kurds.

b. Torture

The Turkish Constitution prohibits torture. The government of Turkey has made efforts to establish human rights in the country by appointing a Minister of State for Human Rights and by establishing a Commission on Human Rights (IHD). In addition, the government has issued instructions to the police that torture is not acceptable; in March 1997, it introduced reforms by shortening the period of detention and further facilitating visits by lawyers to detainees, with a view to preventing torture. Indeed, the situation in Turkey has been improved; it is reported that the degree of severity in methods of torture has been reduced and that torture cannot be regarded any longer as being accepted or permitted by the government of Turkey.

c. Geographical particularities

Eleven provinces of south-eastern Turkey (Elazig, Mardin, Bitlis, Bingol, Batman, Siirt, Van, Hakkari, Diyarbakir, Tunceli and Sirnak), bordering on Iran, Iraq and Syria, are areas where the PKK has been involved in most active operations and where security situations have been most disturbing. Adiyaman Province, where the plaintiff was born, is closer to the center of the country and the state of emergency was lifted there by the mid-1980s. Thus the whole situation of south-eastern Turkey, referred to by the plaintiff, cannot be invoked as the relevant national circumstances in refugee recognition.

d. Situation of the returnees

Although the plaintiff argues that those who withdrew their applications for refugee status and returned to Turkey have been persecuted, many persons who applied for refugee status in Japan because of their Kurdish origin have withdrawn their applications voluntarily because they could not find job or because they are not at risk of being persecuted. This means either that, among the applicants, there were many disguised refugees who had wished to be employed unlawfully or that social circumstances in Turkey had been changed so much that persecution had been eliminated.

Indeed, courts in the majority of the European countries, including the UK, have ruled that deportation of Kurds to Turkey is not incompatible with Article 33 of the Refugee Convention or other relevant provisions.

(d) International denunciation

The defendants agree with the plaintiff in that the UN Committee against Torture (CAT) and the European Committee for the Prevention of Torture (CPT) recommended the government of Turkey to eradicate torture and to permit them to undertake field visits to the country; that

Germany has temporarily suspended its export of weapons; and that Switzerland requested the government of Turkey, in order to investigate the incident in which the staff of the Embassy of Turkey fired at Kurdish demonstrators in the capital, to exempt the staff from diplomatic immunity. The defendants are unaware of other facts mentioned by the plaintiff.

Lack of persecution against Kurdish Turks on the ground of their ethnic origin is recognized in a variety of reports as well as the opinions of the persons working for the UNHCR, thus representing international consensus. The report of the UK Immigration and Nationality Directorate, for example, states on one hand that "anyone asserting their Kurdish identity or ethnic rights makes him or herself liable to harassment, abuse and prosecution" but, on the other hand, that "outside south-eastern Turkey, Kurds do not usually suffer persecution, or even bureaucratic discrimination, provided that they do not publicly or politically assert their Kurdish ethnic identity". It also states, "They are in many cases assimilated in urban areas and are hardly subjected to ethnic discrimination. Among a number of high-ranking Kurds who do not deny their ethnic origin, there is even a former vice-prime minister; it is estimated that 25% of parliamentarians and other government officials are ethnically of Kurdish background". The background report of October 1997, prepared by the UNHCR, does not categorize Kurds as a group being persecuted.

(iii) Issue 1(iii) (specific circumstances of the plaintiff)

(The plaintiff)

(a) The plaintiff was born on 18 December 1973 to B (father) and C (mother), both of whom are Kurds, as their third child among five sisters and brothers and as their eldest son. He was born in a Kurds' village in Adiyaman Province in the south-eastern part of Turkey, located in the north of the border with Syria. His father has run boutiques in the province and is an Alevi Muslim

Having dropped out of secondary school, the plaintiff began to help his father in the boutiques. Since his father and relatives were known as being rich in the town, the plaintiff had never been pinched for money before coming to Japan.

(b) One of the plaintiff's uncles, who had lived in his father's parents' home, was ordered by the Turkish army, which had come to the village, to fight (Kurdish) guerrillas. Since the uncle did not obey the order, saying that he did not want guns, the family was expelled from the village and forced to run to the town. The home was left without care and ruined.

Before the plaintiff was enrolled in primary school, he found burns in the back of his uncle D and asked why. The uncle answered that, when he was eighteen years old, he was taken to the mountain without warrant under the supervision of the Jandarma officers, who interrogated him and stuck plastics on fire into the back of his neck.

(c) Since the plaintiff's family and other Kurds use the Kurdish language, the plaintiff was mocked in the primary school in town, being called "Kuro" (donkey), because he could not understand Turkish. He was absent from school because of this. When he served the army from 30 August 1993 to 28 January 1995, his colleague also mocked or sworn him, saying "Which cave of the guerrillas did you come from?" or calling him "Kuro" (donkey).

(d) Through these experiences, the plaintiff gradually started to think that he wanted to preserve his own language and culture. Together with his friends in secondary school, he studied about the PKK after school and, identifying himself with them, decided to support them.

Thus, when the plaintiff began to help his father's boutiques, he started to provide money and supplies to the PKK. He supported the guerrillas by giving out money every two month, which amounted to 15,000 or 16,000 dollars in total, and providing clothes, foods and medicines twice a month. When he was eighteen years old, he also took part in a march of Kurdish citizens, held in the center of Adiyaman Province; although he only displayed a placard criticizing the government in the march, he was later wanted by the police on the charge of displaying a placard with a bomb. Thereinafter he had posted bills, which called for elimination of abuse against Kurds, five or six times a year before he served the army. He also posted similar bills a few times while on duty.

Meanwhile, officers of the Jandarma came to the plaintiff's home when he was seventeen years old, accusing him, "Why do you support the PKK? Don't tell a lie!" and beating him close to the eye by the helmet. Since they could find evidence at that time, the situation did not get worse. However, the officers continued to come to his home, approximately every two month, until he started to serve the army.

(e) Having completed the military duties, the plaintiff came back home. He was shocked to hear that his close friend, who had dropped out of a university in Ankara and joined a guerrilla group, had been killed in the mountains and that the friend's brother had also disappeared.

The plaintiff continued to support the PKK secretly by providing money and posting bills. In October 1995, policemen came to the boutiques and took him away with force. During the interrogation, two policemen beat him on the stomach, head and face, telling him, "You are working for the PKK, aren't you? We know you're posting bills here and there". The plaintiff denied all the charge and, without further evidence, was allowed to go home. Since he was afraid to do so, however, he stayed in a relative's house and stopped working in the boutiques. When he called home in 1996 after a long time, he was told that a warrant of arrest had been issued for him and started to have realistic fear. In December 1996, he finally decided to flee the country and, in January 1997 when he could obtain a passport from a broker on bribe, he put the decision into action.

(f) Although the plaintiff had not been involved in activities to support the PKK, he took part in a traditional festival of Kurds, the Newroz festival (21 March), and in an event commemorating the day when Kurds first fought the government (25 August); he also made an appeal to Japanese people concerning the situation of Kurds on May Day. The staff of the Embassy of Turkey has gathered information, for example, by taking pictures of the participants in such activities.

After his first application for refugee status was dismissed, the plaintiff came to know that Kurdish returnees were being persecuted, starting to have stronger fear about returning to the country due to the increased risk involved.

(g) The Adiyaman First-Trial Criminal Court made an extra-jurisdictional decision and issued a warrant of arrest against the plaintiff on the charges of "assisting the members of the PKK in rural areas, carrying foods and clothes for them and distributing brochures in the city" as well as "putting a placard with a bomb on a mosque … in Adiyaman Province". The latter charge was a frame-up, however; the issuance of such a warrant itself supports the existence of threats to the plaintiff. The resident registration card, which the plaintiff sent for from his relative in Turkey, also contains a description "Wanted by the police", which corresponds to the one in the warrant of arrest.

In this regard, the defendants argue that this is a forged warrant, referring to disordered typing, lack of complete entries and the way the plaintiff left the country. However, the relative obtained the warrant of arrest from the authorities. Disordered typing may naturally occur depending on the condition of a typewriter used; lack of complete entries can also be explained by the fact that the authorities issued the warrant on political intentions without factual basis. The plaintiff should not be blamed for such slipshod acts of the authorities. The defendants further argue that the resident registration card was also forged, stating that such a card cannot contain descriptions concerning criminal procedures. However, this card is the one which E, a supporter of the plaintiff, had sent for with a view to adopting the plaintiff, independent of the application for refugee status; thus its authenticity is highly likely.

(The defendants)

The defendants dispute the plaintiff's arguments. As will be shown below, the plaintiff's statements concerned are not credible.

(a) Among the plaintiff's arguments (a), the defendants agree with him in that he was born on 18 December 1973 in Adiyaman Province, Turkey. The defendants are unaware of other facts.

(b) The defendants are unaware of the facts referred to in the plaintiff's arguments (b).

(c) Among the plaintiff's arguments (c), the defendants agree with him in that Kurds use the

Kurdish language. The defendants are unaware of other facts.

(d) The defendants are unaware of the facts referred to in the plaintiff's arguments (d).

The plaintiff's statements have been changed with regard to an important point, which is whether he is a member of the PKK or not. In spite of his argument that he is a member or supporter of the PKK, his family members have not been persecuted and he could spend a peaceful year in his relative's house, which is unnatural.

(e) The defendants are unaware of the facts referred to in the plaintiff's arguments (e).

The plaintiff's statements have been changed with regard to when he came to know that he was going to Japan in the process of leaving Turkey.

(f) The defendants are unaware of the facts referred to in the plaintiff's arguments (f).

The plaintiff has stated that he would feel at risk if he was involved in support activities for the PKK, because the Turkish authorities would be aware of his address and other information. At the same time, he argues that he had taken part in demonstrations and other activities, which casts doubt on his statements. Further, the plaintiff has no longer provided financial assistance to the PKK after his entry into Japan.

In addition, the plaintiff first stated that he wanted to go anywhere if he could leave Turkey; then, during the inquiry of the facts conducted in 2001, he stated that he did not want to go to countries other than Japan. His statements are inconsistent in this regard.

In Japan, there have been not a few cases where Turks who had applied for refugee status on the ground of being Kurds withdraw their applications voluntarily and returned to the country. Some of them admitted the falsehood of their statements concerning persecution against them; some others left Turkey through formal procedures, by obtaining a new passport, after they had been denied refugee status and returned to the country. These cases illustrate that many persons who disguise themselves as refugees are coming to Japan in order to be employed unlawfully.

(g) The defendants are unaware of the facts referred to in the plaintiff's arguments (g).

The plaintiff's statements have been changed with regard to an important point, which is when he came to know that the warrant of arrest had been issued. Further, the warrant has a lot of deficiencies in its form, including significantly disordered typing and an error in the plaintiff's date of birth as well as lack of reference to charges against him, to specific dates and months of commission (it only refers to years) and specific places of commission (it only refers to cities).

In addition, the resident registration card was also forged, because such a card cannot contain descriptions concerning criminal procedures.

(iv) Issue (1)(vi) (whether the plaintiff is a refugee or not)

(The plaintiff)

As will be shown below, the plaintiff is a Convention refugee.

(a) The meaning of having "well-founded fear of being persecuted"

The concept of having "well-founded fear of being persecuted" contains both subjective and objective elements. In order to make decisions in this regard, comprehensive examination should be undertaken with regard to (1) specific circumstances of the applicant, (2) the human rights situation of the country of origin, (3) the situation of persecution in the past, (4) circumstances of persons who are in a similar position and (5) the general situation as well as specific cases of persecution.

In this regard, persecution does not always occur on an individual basis; a generalized situation of suppression may lead to persecution in a generalized way. Concluded on the basis of the historical background in Europe of persecution in a generalized way, the Refugee Convention also link collective characteristics, such as "race", "religion", "nationality" and "membership of a particular social group", to "well-founded fear" as reasons for persecution. In the light of these, it is unjust to demand the applicant to prove that he is placed in a worse position by being singled out from others, virtually requiring him to prove beyond the criteria of "reasonable likelihood". (Only

the persecutor knows that the applicant would be an actual victim of persecution among the persecuted group.) Therefore, when the general circumstances of collective persecution in the country of origin support well-founded fear of the applicant being persecuted, the applicant should be regarded as having "well-founded fear of being persecuted", not requiring further specific circumstances.

(b) Whether the plaintiff's experiences prove the existence of persecution

a. The plaintiff's history of life and early experiences are those of a Kurd, which has reinforced his fear, combined with his later experiences, and thus supports his fear of being persecuted upon return. In this regard, the defendants ignore their relevance simply by referring to them as "old stories", which is not correct evaluation.

The defendants further argue that the plaintiff is not at risk of persecution because he could have left Turkey. However, acts of torture by civil servants have continuously been put to practice in the country, where, according to the defendants, human rights legislation and systems are already in place. In the light of this, it is not strange that the plaintiff could have left the country on bribe, even if the computerized system had been introduced in the airport. Thus the plaintiff's fear of being persecuted cannot be denied on this basis.

b. While the government of Turkey recognized the Newroz festival as a national festival, it prohibited it in Istanbul, which had been planned by the People's Democratic Party, in March 2001. The intention of the government was to hold the festival under its government control, with a view to removing its ethnic significance for Kurds. The plaintiff's participation in the festival as a Kurd thus supports the existence of risk of persecution.

In addition, the staff of the Embassy of Turkey continues to keep an eye on Kurdish in Japan, including by taking photographs of Kurdish participants in these events or identifying Kurds' groups involved in information activities to make their situation known in Japan as terrorist organizations.

(c) Exclusion of the application of Article 1, F (b) of the Refugee Convention / Persecution for reasons of political opinion

a. The Refugee Convention defines a Convention refugee as a person falling under Article 1, A and B (however, the Protocol exclude the application of some terms of the provision in A (2)) and to whom the cessation clause (Article 1, C) and the exclusion clause (Article 1, D, E and F) do not apply. Meanwhile, Article 1, F (b) excludes the application of the Convention to any person who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee".

The term "political crime" is categorized into "absolute political crime" (in which political order is exclusively violated) and "relative political crime" (in which ordinary crime of a morally or socially reproachable nature is committed in relation to the violation of political order). The former shall not be the ground of excluding the application of the Convention unless it involves civil strife and other punishable acts. In the latter case, an applicant would not be recognized as a refugee solely because he is likely to be prosecuted, provided that prosecution is limited to punishable acts motivated by political reasons and that foreseeable penalties are compatible with the general legislation of the country concerned. It is regarded as political persecution, however, if it can be assumed on the basis of objective circumstances that the person concerned has been subjected to harsher treatment than usual for reasons of his political opinion through prosecution.

Security measures against terrorism are not regarded as political persecution when they target terrorists in action, participants in or supporters of acts of terror. However, when the degree of prosecution is stronger, including by imposing harsher penalties than usual, it is political persecution because it can be objectively assumed that prosecution is politically motivated. Even if a person has had some relationship with a terrorist organization, it is not ordinary crime simply to join it, to provide a small amount of money or foods to it at an individual level or to be involved in

political propaganda for the organization. If any person is prosecuted for reasons of these acts, he would be criminalized and punished for exclusively political reasons. Therefore these acts should be regarded as "absolute political crime", prosecution of which is regarded as persecution for reasons of political opinion.

Even if there may be different interpretations with regard to security measures against terrorism, what have been adopted in Turkey and particularly in south-east are responses with disproportionately harsh penalties against Kurds living in this area who feel empathy for or provide support to the activities of the PKK. Thus the measures go beyond permissible limits of security measures against terrorism, being regarded as persecution for reasons of political opinion or race.

b. The defendants argue, citing the 2001 Constitution, that there is no risk of persecution in Turkey. However, the Minister's decisions on the plaintiff had been made and the deportation order issued before the amendments were made to the Constitution. Neither had there been the application and administration of laws reflecting the amended provisions prior to the amendments. In addition, the defendants argue that there is no risk of persecution, assuming that the law enforcement authorities in Turkey act in complete conformity with the Constitution and legislation. There are few countries, however, that have no provisions in the Constitution or other legislation guaranteeing nominal freedoms; even if there are such constitutional guarantee, it is often the case that law enforcement authorities or courts restrict freedoms in practice or are involved in torture.

Further, Article 1 of the Anti-Terror Law defines terrorism as "any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, …weakening or destroying or seizing the authority of the State, …or damaging …public order… by means of … force and violence …". This provides for a far more comprehensive and limitless concept than the concept of general acts of terror, which involve immediate harm to the life and person of others for political purposes. In other words, the authorities can punish any citizen under this law. In practice, it is clear from its administration that the law virtually prohibits and punishes any kind of act by Kurds that involves public assertion of their ethnicity, language or cultural identity. When Kurds publicly assert their ethnicity, the law regards it as a threat to the regime of Turkey and allows suppression of even an ordinary act as an act of terror. Article 7 of the Law also provides that those who only "assist members of organizations [defined in Article 1] or make propaganda in connection with such organizations" shall be punished with heavy penalties. Given the disproportion between the acts and the penalties, it can only be regarded as persecution for reasons of political opinion.

In this regard, the defendants argue that the Law does not provide for particularly harsh penalties, compared to similar legislation in other countries, and that there are procedural guarantees under the Law. The penalties under the Law are harsh, however; in procedural terms, too, it has provisions that virtually allow forced confession through torture or other means. The nature of the Law is also completely different from anti-terror laws in other countries, in that it prohibits speech and movement of an ethnic nature. The defendants further argue that distinction should be made between penalties because of "political opinion" and those because of specific "act". It is obvious, however, that detention and torture of Kurds under the Anti-Terror Law is based on their "political opinion".

c. The plaintiff is not a member of the PKK; neither had he taken part in their armed struggles. He only agreed with the cause of the PKK, who advocate for Kurds' identity, providing financial assistance to them and posting bills which called for the dignity of Kurds and for harmonious existence with Turks; he had never been involved in acts of terror that would harm the life and person of others. Even so, it is easy to arrest him by applying the Anti-Terror Law with the intention of excluding nationalistic activities of Kurds. Therefore the exclusion clause of the Refugee Convention does not apply to the plaintiff.

As has been stated, the plaintiff came to Japan with a view to fleeing from persecution against Kurds. However, he has shown sympathy for the nationalistic movement of Kurds in Japan; the government of Turkey must be aware of his activities. Considering the destiny of the Kurds who had returned to Turkey, the plaintiff is obviously at risk of being persecuted when he returns, being detained, tortured and prosecuted on charges of being involved in advocacy for Kurds in Japan.

The plaintiff is thus a Convention refugee.

(The defendants)

The defendants dispute the plaintiff's arguments. As will be shown below, the plaintiff is not a Convention refugee.

(a) The meaning of having "well-founded fear of being persecuted"

In order to regard someone as having "well-founded fear of being persecuted", there should be, not only subjective elements that the person fears that he will be persecuted, but also objective elements that would make a reasonable person have fear of being persecuted when he was placed in the position of the former. Apart from a case in which the government of a country is obviously attempting ethnic cleansing, an applicant should have not only an abstract possibility of being persecuted but also specific and concrete circumstances that would make him have such fear. Even if some members of a religious group are being arrested and prosecuted in a country, for example, an applicant cannot be regarded as being at risk of being persecuted unless he has specific and concrete circumstances, provided that the government of the country tolerate the existence of the religious group and that penal provisions against certain religious activities are not strictly applied. Such specific and concrete circumstances include cases where the applicant has already been prosecuted on the charge that he had (allegedly) committed religious acts falling under crime in the country of nationality or where he is likely to be prosecuted in the future because, for example, the warrant of arrest has already been issued.

This is also clear from the fact that the Refugee Convention and the Protocol do not adopt an approach by which an entire group of persons would be recognized as refugees. The Handbook also indicates that individual circumstances must be evaluated on a case-by-case basis and that the mere fact of belonging to a certain racial group will normally not be enough to substantiate a claim to refugee status.

(b) Whether the plaintiff's experiences prove the existence of persecution

a. As far as the plaintiff's history of life is concerned, his uncles' stories are the ones he had heard in his childhood, which makes them not credible enough. Given the changes of the situation in Turkey, they are too old stories to be relied upon.

b. The plaintiff argues that he was interrogated by the police in October 1995. Even if it is true, it was intended as a precaution against the activities of the PKK; and he was released after two hours or so due to lack of evidence. This cannot embody risk of persecution.

Further, even if the warrant of arrest had been truly issued, it was part of the regular criminal procedures if it was based on charges of being a member of the PKK and setting a bomb. This cannot be regarded as persecution in terms of the Refugee Convention.

c. The border control in Turkey is efficiently administered through the computerized network which covers almost all the borders in the country. Police clearance is also required for the issuance of passports. If the plaintiff had been persecuted, it is hardly conceivable that the plaintiff could obtain a legitimate passport, even on bribe, and leave the country by air. Since the plaintiff obtained a passport of Turkey in his own name and left the country without trouble, he should be regarded as being under protection of the government of Turkey.

d. Even if the plaintiff is an Alevi Muslim, his family members are not subjected to religious persecution. The government of Turkey does not tolerate persecution against Alevi Muslims, either.

e. Although the Newroz festival was not a festival unique to Kurds in its origin, it has been celebrated also among Kurds for a long time. The government of Turkey declared it a holiday for all

Turkish citizens in 1994 and proclaimed it as a national festival in 1996; as a result, it is celebrated in all parts of the country on a large scale. Therefore the plaintiff would not be persecuted if he had taken part in the festival in Japan.

Further, it is inconceivable that the government of Turkey singles out the plaintiff, who had only taken part in demonstrations and other activities, as a supporter of the PKK from tens or hundreds of participants. Even if this is the case, it is part of the regular criminal procedures and thus not persecution.

(c) Application of Article 1, F (b) of the Refugee Convention / Lack of persecution for reasons of political opinion

a. As regards prosecution or penalties under the Anti-Terror Act, distinction should be made between prosecution or penalties because of "political opinion" and those because of specific "act" motivated by political reasons. If prosecution is limited to punishable acts motivated by political reasons and if foreseeable penalties are compatible with the general legislation of the country concerned, an applicant does not become a refugee solely because he may be prosecuted. Since refugees are victims of injustice, not fugitives from justice, offenders who have fled from prosecution or penalties are usually not recognized as refugees.

What kind of act is defined as crime and what penalties are provided should be determined in the context of historical and cultural background of each state. Such decisions primarily fall under the sovereign power of the state, which should not be subjected to facile judgments of a receiving country. At the same time, it is incompatible with the object of the Refugee Convention to leave lawlessness or abuse of law by a state under the name of state sovereignty without any intervention. In order to strike a balance between the two approaches, persecution can exceptionally acknowledged when penalties are disproportionately harsh, compared to the nature of the concerned crime, weighing the justice harmed by the alleged crime with the justice restored by punishing it; when there were irretrievable deficiencies in the drafting process of the legislation concerned; or when the rule of law is completely lost in the country.

While the definition of terrorism varies, acts of internationally recognized terrorism and groups involved in the acts are obviously punishable to a stronger degree than ordinary crime. Further, in order to eradicate terrorism, it is necessary to punish not only terrorists who are directly involved in subversion but also those support them by financial assistance or other means. Therefore, even if penalties are apparently heavier and legal proceedings stricter in cases of terror crime than in cases of ordinary crime, it should be regarded as the exercise of legitimate penal powers rather than as too harsh responses.

b. The Anti-Terror Law pays sufficient attention to due process of law and the rights of the accused, illustrated by the fact that it allows the defendant to be represented by a maximum of three lawyers and to communicate with them; it also permits temporary release. In addition, Article 8 of the Law was amended on 25 October 1995, only forbidding expression of thought aimed at inducing act of terror defined in Article 1 and seriously damaging social order. As a result, it punishes the methods of expression of thought or opinion only when they create clear and immediate threat to society, state, the Republic and social order and instigate people to act in violation of law. (Precisely, even if Turkey has legal provisions against expression justifying act of terror by the PKK, it does not mean that the state violates freedom expression in an unjustified manner; Article 20 of the International Covenant on Civil and Political Rights provides that any propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.)

In addition, more appropriate procedures can be expected under the 2001 Constitution, which provides for the right to fair trial, including by providing that the accused should be transferred to court within 48 hours (or four days in case of collective offences) after having been taken into custody. Further, the Anti-Terror Law of Turkey does not provide for particularly harsh

penalties, compared to similar legislation in other countries, and there are procedural guarantees under the Law. Sentences for terrorists who had not been involved in hostilities are to be commuted under the Confession Law of 1999; under the Amnesty Law Concerning Offences Prior to 23 April 1999, enacted in December 2000, many persons who had been convicted or in pre-trial detention have been released. Meanwhile, Article 15 of the Anti-Terror Act does not provide, as the plaintiff argues, that acts committed during the course of the duty to fight terrorism shall not be subjected to imprisonment even if they have been prosecuted.

The PKK is an armed rebel group, which has been involved in guerrilla and terror activities in Turkey. It has been criticized in reports of Amnesty International that it has been involved in indiscriminate or arbitrary killing. In Turkey, some thirty thousand people, including civilians, have allegedly been victims of hostilities between the security forces and the PKK or acts of terror by the latter since 1984, when the PKK started armed struggle. For example, when Ocalan, leader of the PKK, was arrested in February 1999, incidents of arson and indiscriminate bombing occurred sporadically in Istanbul and south-eastern Turkey; excessive protests happened in other countries as well. In the light of these activities by the PKK, it is the duty of the Turkish security authorities to keep guard on and investigate about them within and outside the country. Such investigation cannot be regarded as persecution in terms of the Refugee Convention.

c. The plaintiff argues that he had supported the PKK and that he had been arrested by the police because of this. Given the short period of detention, however, it is inconceivable that he was taken into custody on charges of his support for the PKK. Further, in the light of lack of accurate knowledge about the term "Kurdistan" or Kurds' history on the part of the plaintiff, it is very suspicious that he has strong identity and awareness as a Kurd.

Even if the plaintiff had truly been arrested, he states that he had supported the PKK, a terrorist organization, on his explicit will; in this context, legal action against the plaintiff is not more than the invocation of criminal procedures against punishable acts, thus not falling under persecution in terms of the Refugee Convention.

(2) Issue (2) (Whether the Minister's decision is invalid)

(The plaintiff)

(i) Special permission to stay

In deciding whether or not to grant a Convention refugee special permission to stay, Article 61-2-8 of the Immigration Act, instead of Article 50, para.1, should be the legal basis. Compared to the latter, which provides that the Minister of Justice may grant such permission if he "finds grounds for granting special permission to stay, other than the previous two subparagraphs" (clause (3)), the former provides that the Minister may, "if a person … has been recognized as a refugee, grant special permission to stay in Japan to such a person, in addition to the cases provided for in Article 50, Paragraph 1". Thus the latter provision is interpreted as providing special rules on special permission to stay for Convention refugees.

Even with regard to a Convention refugee unlawfully staying in Japan, Article 53, para.3 of the Immigration Act prohibits deportation to a country listed in Article 53, para.1 and para.2 (1) and (5), if the country includes "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" in terms of Article 33, para.1 of the Refugee Convention and if the refugee does not wish to leave for any other country. In addition, Article 34 of the Refugee Convention requires the Contracting States to facilitate the assimilation and naturalization of refugees as far as possible, even if they unlawfully reside in the country. In the light of these provisions, the Minister of Justice is obliged under the Refugee Convention and the Immigration Act to grant a Convention refugee special permission to stay.

(ii) Validity of the Minister's decision

In the light of the human rights situation of Kurds in Turkey as well as his specific circumstances, the plaintiff is likely to be arrested, tortured and punished as an advocate for the existence and rights of Kurds, if he returns to the country. Since he has well-grounded fear of being persecuted for reasons of political opinion, he is a Convention refugee. In addition, he has never been in conflict with law in Japan except for illegal stay (which was motivated by fear of persecution upon return) and has sustained himself independently. Thus he deserves to be granted special permission to stay. Since the Minister made the decision at issue on the basis of grave factual misperception, the decision should be considered invalid.

(The defendants)

The defendants dispute the plaintiff's arguments.

(i) Special permission to stay

Although the Immigration Act lists the grounds of deportation in Article 24 and the procedures for deportation in Article 27 and subsequent articles, it does not state anything about the relationship between the refugee status determination procedures and the deportation procedures. Rather, the provisions in Article 61-2-8 can be interpreted as being based on the assumption that those who had been recognized as refugees should also be subjected to the deportation procedures when they fall under any of the grounds for deportation in Article 24, para.1. Thus an application for refugee status or recognition as a refugee does not have the automatic effect to suspend the deportation procedures. It is rather a factor which is to be considered in deciding whether or not to grant special permission to stay (under Article 61-2-8 with regard to those who had been recognized as refugees or under Article 50 with regard to others).

Under international customary law, a state is not obliged to admit aliens in its territory. In the absence of special treaties or agreements, the state can freely decide whether or not to admit them in its territory and on what conditions. Under the Constitution of Japan, too, aliens are not guaranteed freedom to enter Japan; neither do they have the rights to reside or to continue to stay in the country. Therefore, although landing is to be permitted on less strict conditions in legislation, reflecting respect for international customs in this regard, aliens are required to go through strict scrutiny when they wish to extend their period of stay. More specifically, while the Immigration Act guarantees the right of aliens lawfully residing in Japan to apply for the extension of their period of stay (Article 21, para.2), it provides that the Minister of Justice may grant permission "only when there are reasonable grounds to grant the extension of the period of stay" (Article 21, para.3), leaving it to the Minister's discretion to determine whether or not there are such grounds.

On the other hand, special permission to stay is a privilege in nature, which is given to those who obviously fall under any of the grounds for deportation and are to be deported. Therefore aliens do not have the right to apply for special permission to stay; it is only granted as a special measure when "the Minister of Justice finds grounds for granting special permission to stay, other than the previous two subparagraphs" (Article 50, para.1 (3)). The Act does not provide for specific requirements for granting such permission, leaving the matter to the Minister's discretion of effect. Thus it is obvious that the Minister's discretion with regard to special permission to stay is much broader in qualitative terms than the one with regard to the extension of the period of stay. Further, in order to make decisions in this regard, it is necessary to undertake comprehensive examination of not only personal circumstances of the alien concerned but also of other issues, such as the present political, economic and social situation in Japan, diplomatic policies and diplomatic relations with the alien's country of origin. This also justifies the very wide discretion involved in granting special permission to stay.

In determining whether or not the Minister's decision in the present case is unlawful, therefore, attention should be paid that it was made in the exercise of such wide discretion of the Minister. The decision should be judged unlawful, by going beyond the limit of the discretion or involving abuse of the discretion, only when extremely special circumstances exist, including

complete lack of factual foundations due to erroneous findings with regard to important facts, on the basis of which the decision was made, or obvious lack of reasonableness in the evaluation of the relevant facts, thus making the decision obviously incompatible with the object of the Immigration Act, which provides for the system of special permission to stay.

(ii) Validity of the Minister's decision

The Minister's decision is obviously lawful in the light of the fact (i) that the plaintiff has overstayed his visa, valid until 30 April 1997, and falls under Article 24 (4)(b); (ii) that he has had no relation to Japan until he came here, having been born and grown up in Turkey and without a dependant spouse or children in Japan; (iii) that the plaintiff is not a Convention refugee, as has been stated, lacking well-founded fear of being persecuted upon return; (iv) and that there are no circumstances on the part of the plaintiff which justifies the granting of special permission to stay.

While the plaintiff argues that the Minister's decision is invalid, administrative dispositions are to be invalid only when there have been grave and clear deficiencies in them. In order to find clear deficiencies, objective errors should easily be identified in the formality of the disposition concerned. As far as the Minister's decision in the present case is concerned, there were no special circumstances that would lead to the finding of deviation from or abuse of the discretion; grave and clear deficiencies cannot be objectively identified in its formality, either. Thus there is no scope to find the decision invalid.

(3) Issue (3) (Whether the issuance of the deportation order against the plaintiff is invalid)

(The plaintiff)

(i) Validity of the deportation order

Although the Minister should have granted the plaintiff special permission to stay, as has been stated, he made the decision at issue, deviating from the discretion. The deportation order issued on the basis of the decision is gravely and clearly unlawful, thus invalid.

(ii) Incompatibility with the Refugee Convention

Article 33, para.1 of the Refugee Convention as well as the Protocol Relating to the Status of Refugees prohibits expelling or returning a refugee to territories where he is likely to be persecuted (what is called the principle of non-refoulement). The deportation order, however, designates Turkey, the plaintiff's country of origin, as the destination in spite of his status as a Convention refugee. Thus the order is incompatible with the Refugee Convention.

(iii) Incompatibility with the Convention against Torture

Article 3, para.1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as "the Convention against Torture") provides, "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". As has been stated, the plaintiff is at a substantial risk of being tortured if he is returned to the country of origin. Thus the deportation order, which designates Turkey as the destination, is incompatible with the Convention.

(The defendant)

(i) Validity of the deportation order

When an alien suspected of falling under any of the grounds prescribed in Article 24 has been found as such by an immigration inspector or a special inquiry officer, to which the alien has not filed an objection, or when the Minister of Justice has found that the objection has no basis, the Supervising Immigration Inspector shall, upon notification, issue a written deportation order against the suspect. The Supervising Immigration Inspector has no discretion with regard to the issuance of a written deportation order.

Since there are no illegal elements in the Minister's decision, the deportation order is also lawful.

(ii) Incompatibility with the Refugee Convention

The plaintiff argues that, even if he is not to be recognized as a Convention refugee, he is at risk of being persecuted upon return and will face threats to his life. However, when an alien filed an objection during the deportation procedures in accordance with Article 49, para1 of the Immigration Act, arguing that he is at risk of being persecuted, the Minister of Justice determines whether or not to grant him special permission to stay after having considered whether or not the deportation conflicts with the principle of non-refoulement, which prohibits expulsion or return of 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 (see Article 33 of the Refugee Convention). Thus the deportation order is fully compatible with Article 33, para.1 of the Refugee Convention.

(iii) Incompatibility with the Convention against Torture

The plaintiff argues that the deportation order is incompatible with the Convention against Torture. The term "torture" is defined under the Convention as any act by which severe pain or suffering is intentionally inflicted on a person for such purposes as (i) obtaining from him or a third person information or a confession; (ii) punishing him for an act he or a third person has committed or is suspected of having committed; (iii) intimidating or coercing him or a third person; (iv) for any other similar purposes; or (v) for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

AS has been stated, there is no likelihood that the plaintiff would be subjected to torture in this sense when he returns. Thus the deportation order is not incompatible with the Convention.

Section 3: Rulings of the Court

(1) Issue (1)(i) (where the burden of proof lies and whether the plaintiff's statements are credible)

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 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/her application is illegal); the decision should be made after comprehensive consideration of the relevant provisions and to what degree the requirements thereof are met.

Meanwhile, a state is not obliged under international customary law to admit aliens in its territory; the state can freely decide whether or not to admit them in its territory and on what conditions (Supreme Court judgment of 4 October 1978). In response to the Refugee Convention, a special treaty, Japan created the refugee status determination procedures (Chapter 7-2 of the Immigration Act) and grants certain benefits to those who have been recognized 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 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/her status as a refugee is concerned.

However, when refugees have left their country because of persecution or fear of persecution, it is empirically impossible to expect them to have sufficient objective evidence; they will often have difficulty in obtaining cooperation for the collection of such materials after having left their country. Even if the alleged refugee does not have such evidence therefore, his/her status as a refugee should not be denied immediately. Instead, the examination should be conducted

primarily on the basis of his/her statements, paying adequate attention to the possibility that his/her memory might have been changed or become subtle due to his/her experience of fear or the passage of time. The ultimate decision should be made on the basis of the credibility of his/her core arguments, also in the light of their consistency and reasonableness.

(2) Issue (1)(ii) (the situation of Kurds in Turkey)

(i) On the basis of the Relevant Facts referred to above as well as the relevant evidence, the following findings can be made.

(a) Kurds

The origin of Kurds goes back to Kurdistan ((the mountainous areas on the borders of Turkey, Iran, Iraq and Syria) in the second or first millennium B.C., when indigenous Getae were mixed with Iranian-speaking Medians who migrated to the area. They had been further mixed with Armenians, Assyrians, Arabs, Turks, Mongolians and others, forming the basic features of the present Indo-European Kurds. They primarily live in Kurdistan and speak the Kurdish language, which is also Indo-European in linguistic terms. On the other hand, Turks are Asian who speaks Turkish, which has no commonalities with the Kurdish language. More than 10 million (12 or 15 million) Kurds are estimated to live in Turkey, where the total population is sixty and some millions. Being the largest ethnic minority, they concentrate in poor areas in the eastern and south-eastern parts of the country.

Generally, Kurds form traditional tribal societies, being weak in the concept of mutual support among tribes. Within each tribe, the elders, primarily the propertied classes, have strong authorities.

(b) Outline of the political history with regard to Kurds in Turkey

a. Before the World War I

After the collapse of the Abbasid dynasty in the latter half of the 10th century, local regime of Kurds was established in Kurdistan, which was put to an end by the aggression of Seljuk Turk. Thereinafter, west Kurdistan was incorporated into Osman Turk and east Kurdistan into the Safavid dynasty, respectively treated as semi-autonomous territories. In the middle of the 19th century, however, centralization was reinforced and the semi-autonomous situation disappeared.

b. After the World War I

i. The Treaty of Sevres, concluded in 1920 to deal with the collapse of Ottoman Turk after the World War I, provided that Kurds will be given autonomy in part of eastern Anatolia, where they were the majority of the population, and that Turk agreed to abandon the rights and entitlements with regard to the area if certain conditions were met within a year after the entry into force of the treaty. The Treaty did not entered into force, however, because of the opposition from Kemal and of the changes of British policies on the Middle East. The Treaty of Lausanne, concluded thereinafter in 1923, divided Kurdistan into Turkey, Iran, Iraq and Syria.

ii. The Republic of Turkey was built under the leadership of Kemal in 1923, after the World War I. Kemal and his comrades fought the great powers of Europe that had attempted to divide Turkey, defining the fight as a liberation movement for their motherland, and professed themselves Turkish nationalists and secularists as a driving force for the movement (what is called "Kemalism"). As part of the policy, the government of Turkey excluded Kurdish candidates from the 1923 election of the Grand National Assembly, replaced all the senior officers and half of the lower officers in Kurdistan and changed Kurdish place-names into Turkish ones. In 1924, it continued the assimilation policy by prohibiting official use of the Kurdish language as well as its use in school. It further adopted the policy of denying both the existence of Kurds and the uniqueness of their culture, including by calling them "Mountain Turks".

In 1925, rebellions occurred against such policies, including the ones by Asadi or Sheikh Said. In response, the government enacted the Security Law in the same year and tried to suppress

the rebellions by military force. As a result, the government arrested Sheikh Said as well as more than 7,500 rebels and executed some 700 of them. In order to prevent the reoccurrence of such rebellions, the government destroyed Kurds' villages, identified as being resistant, and relocated the inhabitants with force. It enacted the Impunity Law (Law No.1850) in 1930, which provided that no one involved in suppression of Kurds would be prosecuted, and, in June 1934, banned any organizations in which the majority of the members spoke languages other than Turkish.

c. After the World War II

After Kemal died in 1938 and the Republican People's Party (CHP), which had governed the country as the only political party recognized by Kemal, split in January 1946, Turkey entered into the era of the multiparty system with a lot of parties. The military, however, staged coups d'etat in May 1960 and 1971 on charges that the government had not observed Kemal's secularism and proclaimed martial law, undertaking severe suppression of leftist activities, including by executing leaders of radical student movements. Meanwhile, the government had imposed silence on those who argued for the existence of Kurds or their separation from the country by arresting and sentencing them on the ground of the very arguments.

On the other hand, a significant number of Kurds, particularly those in urban areas, had assimilated themselves into Turkish society and acquired a privileged position there; some of them went into politics and rose to high-ranking posts in the government. Many of them tended not to identify themselves as Kurds. Thus the Kurds issues had not become serious problems in Turkish society until the 1950s.

Thereinafter, however, advocacy for Kurdish identity had become active primarily among young Kurds in the middle class. In the 1970s, such movement started to be linked with the leftist revolutionism and to choose armed struggle against the rightist forces. This shift was led by the group of Ocalan, who had studied politics in the University of Ankara, which established its first political organization in 1974 and officially called itself the PKK in 1978. The PKK did not necessarily gain strong support from the entire Kurdish community, because of their policies of the leftist revolutionism and armed struggle. In particular, not a few Kurds were critical of their antagonistic attitude against the propertied classes, who had strong authority in Kurdish society with a strong tradition of tribalism. The PKK, however, gradually gained power mainly among the poor in south-eastern Turkey.

d. After the 1980 coup d'etat

i. On 12 September 1980, the military and the Jandarma staged a coup d'etat and the National Security Council, its headquarters, declared the state of emergency in the whole territory of Turkey. The government arrested 1,790 persons on the charge of membership of the PKK, many of whom were convicted and put to prison or detained for a long time. High-ranking officials of the PKK, however, fled to Syria and went under its protection.

Although powers were delegated from the military regime to civil government after a while, the National Security Council had kept strong influence over civil government. Even at present, when there are less military personnel among its members, it still keeps a certain degree of influence.

ii. The PKK established a military wing in 1984 with Syria's support. Not only did they assault and kill the pro-government propertied classes and their family members as well as rural civil servants and teachers, suspected to have reported their activities to the government, they started to challenge the government and the military through guerrilla warfare and other means. The Turkish security forces responded with intensive attacks and reprisals, repeatedly attempting to sweep the PKK together with the police, the Jandarma and the modernized regular army. During the process, those who were identified as the organization's combatants and members were naturally killed or executed; in addition, those who were identified as its supporters or sympathizers were also subjected to extrajudicial arrest, detention or torture. Responding to the

intensive attacks by the security forces, the PKK turned to even more extreme struggle, increasing the seriousness of the warfare between the two parties.

According to the announcement of President Demirel towards the end of 1999, the warfare between the government and the PKK has resulted in casualties of 25,139 members of the PKK, 5,882 members of the security forces and 5,424 civilians since 1984.

iii. With a view to undermine the logistics (provision of combatants or supplies) for the PKK, the government enacted the Village Law in April 1985 and created paramilitary village guard forces, whose duties were to identify those who violated villagers' rights and notify the chief of the village and the military police, to arrest those who were in conflict with the Law and to inform the chief of the village and the military police of what the villagers with criminal record did. The participation in the village guard forces was voluntary; although the members were relatively well-paid, there were not necessarily many volunteers. In order to force villagers on duty, many villagers were frequently called and coerced into the forces; when they stubbornly refused to do so, they were often tortured and executed or their villages destroyed on the suspicion of support for the PKK. However, since village guard forces only had five or six members in each unit, vulnerable to attacks by the PKK, the number of volunteers reduced substantially from 20,000 to 6,000 in 1987. Thus the government granted special emergency powers to the military and relocated villagers who had refused to participate in village guard forces, which was supposed to be voluntary. Consequently, according to the report submitted to the parliament by the Minister for Human Rights in 1994, two million villagers had lost their home. The number of the villages subjected to relocation has continued to rise, amounting to 2,664 by July 1995 and 3,500 by 1999. Apart from twenty-five or thirty million villagers who had lost their home, it is reported that more than 1,000 villagers have been shot to death by 1996 during the process.

iv. In July 1987, the government of Turkey proclaimed emergency governance over ten provinces of south-eastern Turkey (including Van, Bitlis, Tunceli, Diyarbakir, Siirt, Bingol, Batman, Hakkari and Mardin) and appointed area governors in eight of them, who were senior to the governors and had strong powers, including the power to relocate villagers by force. (Emergency governance was gradually lifted along with the recovery of law and order. Four provinces were still under emergency governance in July 2000; it was lifted in the last two provinces in November 2002.)

As has been stated, Kurds were not necessarily sympathetic toward the PKK's policies. Partly because of antipathy toward the security repeatedly involved in major human rights violations, there emerged wider support among Kurds to the PKK. Consequently, it further gained power from the mid-1980s to the 1990s.

As the Kurds issues got more serious, part of the political circles began to move toward appeasement. President Ozal, who was part Kurdish, amended laws against the use of the Kurdish language in April 1991 (although the Anti-Terror Law, which will be referred to below, was enacted around the same time) and indicated a positive attitude on the creation of autonomous areas. In response, the PKK announced unilateral ceasefire and called on the government of Turkey to negotiate about the creation of the federal system, indicating possible progress toward reconciliation. When President Ozal died in 1993 and was succeeded by conservative President Demirel, however, the security forces reinforced attacks on the PKK and the warfare continued.

In this context, 54 Kurdish politicians and activists were murdered from 1991 to 1998; at least 15 journalists, who had taken up the issues of human rights and Kurds, were also murdered in the same period. The security authorities were allegedly responsible for most of the cases. Meanwhile, the PKK admitted in 1991 that the previous policy to kill teachers and other civilians were wrong and announced its abandonment.

v. Although Iraq had not appeared to be in close association with Turkey, the two countries allegedly had secret agreements that the former recognize the latter's right to purse the

PKK guerrillas beyond the border in emergency, because both of them have had the problem of Kurds' demands for separation and independence. Indeed, in 1995 after the Gulf War, the Turkish army went beyond the border and attacked the PKK troops in Iraq.

Syria, on the other hand, was willing to support the PKK. In October, however, it stopped permitting the PKK's activities in the country due to the increased tension in military terms with Turkey. Ocalan, leader of the PKK, was therefore expelled from Syria and, after having wandered around some countries, was arrested in Kenya in February 1999. Having been deported to Turkey, he was tried by the national security court on the charge of treason and sentenced to death. The supporters of Ocalan protested it throughout Europe as well as in Turkey, some of which involved violence. In the commemoration of the New Year (Newroz festival) in Istanbul, many people displayed banners and shouted slogans against the sentence, which led to interference by the police. Four police officers and one demonstrator were shot and 725 participants were taken into custody.

vi. In March 1999, the political wing of the PKK announced that they would act within the framework of democracy; on the other hand, the military wing called for increased military action, which led to conflict within the organization. On 30 April 1999, however, Ocalan called for a ceasefire while being on trial. Further, after he had been sentenced to death on 29 June, he issued a statement through his lawyer on 2 August, calling on the PKK to "put an end to armed struggle as of 1 September 1999 and withdraw their forces outside the border for peace". The military wing supported the policy and withdrew their combatants from Turkey's territory. As a result, the warfare between the government and the PKK virtually came to an end, with only a small number of reports of fights between the Turkish army and radical factions of the PKK.

The PKK suspended virtually all of its activities in 2000. In 2001, the military reported that there were only 45 cases of fights; in 2002, virtually none. On 12 January 2000, the government of Turkey agreed to respect the order of the European Court of Human Rights, which had requested to suspend the execution of Ocalan until the appeal court would make its decision. Further, after the final decision had been made, the government commuted the death penalty to life imprisonment on 3 October 2002.

Considering that the improvement of economic conditions in the south-east is required to strengthen security in the area significantly, the government of Turkey has developed and implemented the South-eastern Anatolian Project (GAP). It aims to increase the productivity by building a significant number of dams with hydraulic power plants in the Tigris ad the Euphrates to cover the entire territory and by building water supply facilities along the rivers for intensive agriculture. On calculation, per capita income of the inhabitants is expected to rise by some 5.5 %.

On the other hand, some have expressed pessimistic views that the target cannot be achieved without comprehensive land reforms, in the context of the present form of land properties in which a small number of absentee landlords own more than 50 % of the lands in the area.

e. Political parties related to Kurds in Turkey

One of the opposition parties in Turkey, the Social Democratic Party (SHP), issued a communiqué in 1986, expressing concern about human rights violations in south-eastern Turkey. In 1988, however, it expelled Kurdish members who had objected to the state's suppression policy against Kurds; consequently, other Kurdish members left the party in protest.

Under the leadership of seven parliamentarians who left, the People's Labour Party was created in 1989 with the platform for advocating Kurds' rights. In the general election held in 1991, it cooperated with the Social Democratic Party in south-eastern Turkey and gained numerous votes, winning the election of some twenty candidates. The party, however, was regarded as supporters of the PKK; it was subjected to the scrutiny of its constitutionality by the Constitutional Court in 1992, because of their attempted use of the Kurdish language at the oath in the Parliament and of their remarks in their meetings. Consequently it was forced into virtual dissolution.

The Democratic Party, established in 1993 as a successor of the HEP, had also faced

bombing of the headquarters, arrest of the leader as well as assassinations of its parliamentarians and members because of a statement by the leader. It was ordered by the Constitutional Court to disband in 1994. While the People's Democratic Party was established in May 1994, two founders were assassinated within twenty days after the establishment and ten members were killed within eight months, allegedly with the involvement of the security authorities. Although the party could not win more than 10 % of the votes in the general election held in 1999 and could not send its candidates to the parliament, it won 4.75 % of the votes. In addition, it succeeded in winning the majority of the votes in some municipalities, primarily in south-eastern Turkey, in the local election held at the same time; the police and other security authorities are reported to have harassed and obstructed electioneers frequently. Legal action was taken against the party, too, and it was ordered to dissolve in May 2003.

In the general election held in 2002, the People's Democratic Party, the Party of Labour (EMEP) and the Social Democrat People's Party (SDP) decided to be united under the Democratic People's Party (DEHAP). Although they could no win seats in the parliament, they won 6.2 % of the votes, getting the sixth place among the participating parties.

f. Recognition of the PKK as a terrorist organization

In 1993, Germany illegalized the PKK and associated organizations within the country. The United States Department of State recognized the PKK as a foreign terrorist organization in 1999, indicating that its representatives or specified members might be expelled from the country. The United Kingdom and the EU recognized the PKK as a terrorist organization respectively in 2001 and 2002. In May 2002, the UN Security Council included the PKK in the list of groups involved in terror activities.

(c) Legislation related to Kurds in Turkey

a. The Constitution

i. The 1982 Constitution (partly amended in 1987) was deliberated and enacted by the Constitutional Assembly under the leadership of the National Security Council, which had taken over control in the 1980 coup d'etat. It has 177 articles (with 16 provisional articles), preserving the principles of modern states, such as the preservation of the republic, people's sovereign power, the separation of powers and secularism, and being characterized by the enlargement and reinforcement of presidential powers and the strengthened provisions concerning the maintenance of national security.

Specifically, the preamble states, "no protection shall be accorded to any thought or opinion contrary to Turkish national interests, the principle of the indivisibility of the existence of Turkey with its state and territory, Turkish historical and moral values or the nationalism, principles, reforms and modernism of Ataturk". The Constitution further provides that "none of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the State with its territory and nation, of endangering the existence of the Turkish State and Republic, … or creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas" (Article 14); that "any language prohibited by law shall not be used in expression and dissemination of thought" (Article 26, para.3); that "publication shall not be made in any language prohibited by law" (Article 28, para.2); that "the authorities prescribed by law may prohibit specific meetings and demonstration marches under the circumstances where incidents that may gravely disturb public order are likely to occur, where national security may be violated or where action is to be taken to destroy the fundamental nature of the Republic" (Article 34, para.3); and that "no language other than Turkish shall be taught as a mother tongue to Turkish citizens at any institutions of training or education" (Article 42, para.9).

ii. On the other hand, the 2001 Constitution was adopted immediately after the Minister's decision at issue in the present case, with a view to facilitate the joining of Turkey into

the EU. Under the new Constitution, (a) the terms "any thought and opinion" in the preamble of the former Constitution was changed to "any activity"; (b) the provisions of Article 14 was amended as "[n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights" (para.1); (c) Article 26, para.3 was replaced by the provision which states, "The formalities, conditions and procedures to be applied in exercising the right to expression and dissemination of thought shall be prescribed by law"; and (d) with regard to freedom of the press, the terms "publication shall not be made in any language prohibited by law" (Article 28) were deleted.

As a result, a step was taken to promote the protection of human rights, which is a purpose of modern constitutions, indicated by, for example, the fact that advocacy for Kurdish identity can be protected by the Constitution, provided that it is limited to thought and belief, and that publication in the Kurdish language has been decriminalized.

b. Security legislation

i. Anti-Terror Law

The Law to Fight Terrorism (Law No.3713 of 12 April 1991), before the amendments in 1995, and the amended law have the following characteristics respectively (hereinafter referred to as "the old Anti-Terror Law" and "the new Anti-Terror Law".

(a) With regard to the concept of terrorism, Article 1 of the old Terror Law provided, "Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat", covering any act done by members of such an organization. On the other hand, Article 1 of the new Anti-Terror Law provides, "Terrorism is any kind of act done by one person or more persons belonging to an organization or a number of persons by means of pressure, violence, terror, threat, suppression or coercion, with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health", limiting the application of the law to acts involving subversion such as pressure, violence, terror, threat, suppression or coercion.

(b) With regard to terrorism offences, Article 4 of the old Terror Act defined them as the offences prescribed in Articles 145, 150, 169 (support for illegal organizations) and Article 499, para.2 of the Turkish Penal Code committed for terrorist purposes as described in Article 1. Article 4 of the new Anti-Terror Law broadened the coverage by adding Articles 151 or 154, 157 and 384 as well as Article 9 of the Law on the Foundation and Criminal Procedure at State Security Courts.

(c) Both laws have similar provisions concerning aggravated sentences, providing, "Penalties of imprisonment and fines imposed according to the respective laws for those committing crimes … shall be increased by one half. …However, in the case of rigorous imprisonment the penalty may not exceed 36 years', in case of imprisonment 25 years', and in case of light imprisonment 10 years' imprisonment".

(d) With regard to the ban on publishing the identity of officials, Article 6 of the old Anti-Terror Law provided, "Those who disclose the identity of officials on anti-terrorist duties or who criticize them, whether or not such officials are named, shall be punished with a fine of

between 5 and 10 million Turkish liras". On the other hand, Article 6 of the new Anti-Terror Law provides, "Those who announce that the crimes of a terrorist organization are aimed at certain persons by naming and identifying such persons or by any other means which makes it possible to identify them, who disclose or announce the identity of officials on anti-terrorist duties, who identify such persons as targets, or who print or publish leaflets and declarations of terrorist organizations shall be punished with a fine of between 5 and 10 million Turkish liras", describing what are prohibited in more detail.

(e) With regard to propaganda against the indivisible unity of the State, Article 8 of the old Anti-Terror Act provided, "Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic and its territory are forbidden, regardless of the methods, intentions and ideas behind such activities. Those conducting such activities shall be punished with a sentence of between 2 and 5 years' imprisonment and with a fine of between 50 million and 100 million Turkish liras". On the other hand, Article 8 of the new Anti-Terror Act provides, "Written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with its territory and nation shall not be conducted. Those conducting such activities shall be punished with a sentence of between 1 and 3 years' imprisonment and with a fine of between 100 million and 300 million Turkish liras" (para.1); it then goes on to provide, "If the offence of the propaganda as mentioned in the foregoing paragraph is committed by a periodical …, the fine imposed on its publisher shall not be less than 100 million Turkish liras …".

Article 8 had frequently been invoked to detain authors, journalists, pro-Kurds politicians and intellectuals who had expressed their views in peaceful means. The amendments made it possible to commute or suspend sentences and to convert imprisonment to a fine (see (g)), which has led to release of some 270 prisoners by November 1996. In addition, the prosecutor now must prove that the accused has had positive will and intention to subvert the indivisible unity of the State in order to convict them.

(f) With regard to jurisdictions, both laws provide that the offences within the scope of the law are to be tried in state security courts, rather than ordinary courts, and that the provisions of the Anti-Terror Law and the Law 2845 on the Foundation and Criminal Procedures at State Security Courts shall be applied to the procedures (Article 9).

Although state security courts had included military judges in their composition by 1999, they have been replaced by civilian judges in accordance with the amendments to the latter law in June 1999.

(g) Both laws provide that sentences of imprisonment imposed under the law cannot be commuted to a fine, converted to other measures or suspended (Article 13). The new Anti-Terror Law, however, exclude the application of this provision to the sentenced imposed in accordance with Article 8.

(h) With regard to offences committed by law enforcement bodies, Article 15 of the old Anti-Terror Law provided, "Where officers of police and intelligence or other officials engaged in fighting terrorism are prosecuted for crimes allegedly committed during the course of their duty, they shall not be subjected to imprisonment and shall be represented by a maximum of three lawyers whose fees shall be paid by the institution to which they were attached (Article 15). On the other hand, Article 15 of the new Anti-Terror Law provides, "Where officers engaged in fighting terrorism are prosecuted for crimes allegedly committed during the course of their duty, they shall be represented by a maximum of three lawyers whose fees shall be paid by the institution to which they were attached", abolishing the exemption from imprisonment.

ii. Confession Law and the Amnesty Law

In August 1999, the Turkish parliament passed the Confession Law, under which only the rebels who had not participated in hostilities are granted amnesty. Others may benefit from a

commutation by furnishing information on the rebel movement. The Law does not apply to the founders and high-ranking officials of the PKK. Penalties against the members of the PKK who are sentenced to death but benefit from the Law shall be no less than 9 years of imprisonment; a sentence of life imprisonment may be commuted to 6 years of imprisonment.

In December 2000, the Amnesty Law was passed. It provides that the perpetrators of certain offences committed before 23 April 1999 are to have their sentences reduced by ten years and that those who have less than ten years left to serve are to be released immediately. The scope of the Law also includes the offences concerning the provision of assistance and support to an illegal organization, which has led to the release of 1,660 people convicted on charges of support to the PKK. Infringements of the Anti-Terror Law are not covered by the Law, however, because the Constitution lays down that no amnesty is possible for such offences. As a result of the proposal and adoption of the amendments by the Parliament, which expanded the scope of the Law to include the offences committed after the above date, more than 40,000 prisoners have been granted amnesty by September 2002.

c. Legislation concerning treatment of the Kurdish language

On the basis of the provisions of the 1982 Constitution, prohibiting publication in languages other than Turkish, the Law on Publication in Languages Other Than Turkish (Law No.2932 of 19 October 1983) provided that the mother tongue of Turkish citizens shall be Turkish and that any other language shall not be used in expression or dissemination of thought. In April 1991, however, it was amended to authorize the use of other languages except in broadcasting, publication and education.

As of the year 2000 and March 2001, Turkish is to be used in television and radio programmes and the use of the Kurdish language is prohibited in broadcasting news, review and discussion. The use of the Kurdish language is tolerated in broadcasting to a certain degree, however, and the legalization of broadcasting in the Kurdish language is under discussion In fact, in February 2002, the Kurdish Culture and Research Foundation was prosecuted on charges of funding a scholarship programme for Kurdish-speaking students but was acquitted. In April 2002, the authorities investigated and prosecuted a doctor who had refused to see a patient who did not speak Turkish. The use of the Kurdish language is thus being accepted steadily in Turkish society.

Further, on 3 August 2002, a bill to permit education and broadcasting in the Kurdish language was passed by the Turkish parliament along with other 13 bills to promote democratization. Consequently, publications and music tapes in the Kurdish language started to appear on the market in town. The law still prohibits, however, the use of the Kurdish language in political activities, election campaigns and other forms of speech which is the fundamental pillar of democracy.

(d) Responses to torture within and outside the country

a. Reports and recommendations by international bodies

i. On the basis of the provisions against torture in Article 17 of the 1982 Constitution, Turkey ratified the Convention against Torture on 2 August 1988. In 1990, the Committee against Torture, established under Article 20 of the Convention, obtained information from international human rights organizations about the widespread practice of Torture in Turkey and invited the Turkish government to cooperate in the examination of that information and to transmit its observations to it before 31 August 1990. Although the government rejected the invitation at first, ultimately it accepted the visit by the Special Rapporteur for 6 to 18 June 1992.

On the basis of the information received by the members in charge of the inquiry from 19 November 1001 to 16 October 1992 as well as the field visit by the Special Rapporteur to Turkey, the Committee against Torture decided on 9 November 1993 to publish a "summary account" of the results of the inquiry concerning Turkey in the addendum to the Committee's sixth annual report.

According to the summary account, the government of Turkey argued that the testimony of

torture was derived essentially from persons presumed to be terrorists who claimed that they had been tortured in line with their strategy of conspiracy against Turkey. The Committee considered, however, that, even though only a small number of torture cases could have been proved with absolute certainty, the copious testimony gathered was so consistent in its description of torture techniques and the places and circumstances in which torture was perpetrated that the existence of systematic torture in Turkey could not be denied. The Committee further indicated that torture is practiced systematically when it is apparent that the torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question; or, even if it has not resulted from direct intention of a Government, when inadequate legislation allows room for the use of torture. Emphasizing that no emergencies may be invoked as a justification of torture, the Committee recommended the government of Turkey to take forcible and effective measures to put an end to this practice immediately.

ii. In 1988, Turkey acceded to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT). The European Committee for the Prevention of Torture has frequently visited the country and published reports since 1990.

In the report on its visit in 1990, the Committee found that torture and other forms of grave ill-treatment is a marked feature of the places of detention in Turkey. Specifically, there had been a very large number of allegations of torture in the forms of suspension by the arms; suspension by the wrists, which were fastened behind the victim; electric shocks to sensitive parts of the body (including the genitals); squeezing of the testicles; beating of the soles of the feet; hosing with pressurized cold water; incarceration for lengthy periods in very small, dark and unventilated cells; and severe psychological humiliation. The Committee concluded that there was nothing to reassure the Committee's delegation about the fate of persons taken into custody and that the delegation was subjected to a series of delays and diversions (and on several occasions given false information), recommending the government to take a series of measures, including shortening of the maximum periods of custody and access to a lawyer, to combat the problem of torture and other forms of ill-treatment. In the report on its visit in 1991, the Committee concluded, on the basis of the examination of medical reports and other materials, that no progress had been made in eliminating torture and ill-treatment by the police and reiterated the above recommendations. In the report on its visit in 1992, the Committee pointed out that, while some progress had begun to be achieved with regard to the problem in prisons, no concrete progress had been made in the implementation of the recommendations concerning torture and other forms of ill-treatment in police facilities and that the Turkish Human Rights Commission does not have necessary powers and the capacity to conduct thorough investigation.

The European Committee further issued a "Public statement on Turkey" on 6 December 1996 on the basis of the three visits. In the statement, the Committee reported that, while the Turkish authorities have issued a multitude of instructions and circulars and training programmes and human rights education strategies have been devised, the translation of words into deeds is proving to be a highly protracted process. A considerable number of persons were ill-treated by the police recently, it reported. Seven persons at Sakarya Prison were subjected prolonged suspension by the arms; consequently, motor function and/or sensation in the upper limbs of all seven persons were found to be impaired with irreversible effect for many of them. The Committee recommended to reinforce legal protection against torture and other forms of ill-treatment; to encourage measures to undertake continuous study of police techniques; to ensure that public prosecutors react expeditiously and effectively when confronted by complaints of torture and ill-treatment; and to encourage the improvement of the criminal procedures.

iii. Further, the delegation of the EU Commission on Law and Human rights stated, in its report of July 1991, "Torture is very deeply entrenched in Turkey emotionally and

traditionally. It is used as a method to coerce and punish detainees and as a method to interrogate them. It constitutes part of the mentality among the civil servants concerning the ways to respect their fellow citizens. In many families in Turkey, the husband beats his wife and the father his child as a routine. How can one say that the police should not treat the offenders in the same way?"

According to the field visit undertaken by the European Committee for the Prevention of Torture in October 1997, while the police authorities in Turkey observe the maximum period of detention prescribed by the amended legislation, they have released detainees and arrest them again in some cases involving collective offences; in some cases, police officers were present during visits by lawyers or requests for such visits were ignored.

iv. In November 1997, the Special Rapporteur of the UN ECOSOC Commission on Human Rights confirmed that, while problems remain, there had been substantial improvement in the situation of torture and concluded that no cases of torture are approved of and tolerated by the government of Turkey.

The UN Special Rapporteur also admitted, after his visit to Turkey in November 1998, that torture is not practiced "systematically" in the sense that it is approved of and tolerated at the highest political level. He pointed out, however, that cases of torture practiced in numerous places around the country may well deserve the categorization as "systematic" in the sense that it is a pervasive technique of law enforcement agencies for the purpose of investigation, securing confessions and intimidation. While the incidence of the use of beating on the soles of the feet, "Palestinian hanging", electric shocks and rape have abated substantially in some parts of the country, notably Ankara and Diyarbakir, blindfolding, the use of hosing with cold water, "straight hanging" sexual abuses and threats of rape, the use of grossly insulting language and the making of threats to the life and physical integrity of detainees or their families still seemed rife in many parts of the country.

v. The US Department of State prepares and publishes annual reports on human rights practice in other countries. In the relevant part of the 2002 report, it pointed out that a climate of official impunity still encourages the abuse of detainees, because members of the police and security forces are rarely convicted for being involved in killing or torture and that, if they were convicted, the penalties are light. It also identified the period of detention during which detainees may not be visited by lawyers as a contributing factor of torture or ill-treatment.

b. Responses of the government of Turkey

i. Responding to the repeated criticism and recommendations from the international bodies, the government of Turkey took legislative measures to improve the criminal procedures, by providing that a person arrested on charges of ordinary offences committed by one or two persons must be arraigned before a competent judge within 24 hours, excluding the time required for the arraignment before the nearest judge, with a view to preventing torture during detention. When the offences come under the jurisdiction of state security courts, however, the period is 48 hours and can be extended, by a written order by the prosecutor, for no more than four days in total in relation to the offences that come under the jurisdiction of state security courts; when the investigation has not been completed within four days, the prosecutor may further request the judge to extend the period for not more than seven days. The special measures also include the extension of the period to ten days in total, with a request by the prosecutor and a corresponding decision by the judge, when the offences have been committed in emergency areas and come under the jurisdiction of state security courts. In addition, the new legislation provides that a detainee accused of ordinary offences can meet his lawyers at any time; detainees accused of offences that come under the jurisdiction of state security courts, however, can only meet their lawyers after the period of detention extended by an order of the judge, which is four days.

ii. In June 1997, the government of Turkey set up a Human Rights Council, composed of under-secretaries of the Ministries of Foreign Affairs, Internal Affairs, Justice,

Education and Health as well as representatives of the security forces, with a view to initiating reforms for the protection of human rights. In 1999, it developed a programme for the improvement of the protection of human rights, including by excluding military judges from state security courts, providing for heavier penalties for forging medical reports on cases of torture or concealment of torture, increasing the number of unannounced inspection by prosecutors at detention facilities and providing human rights education for the police and the military police. In the same year, the Parliament set up a Parliamentary Human Rights Commission.

The Parliamentary Human Rights Commission conducted inspections in six provinces and, in May 2000, published a report on the inspections of judicial institutions in Istanbul, Erzurum, Tunceli and other places. The report pointed out that tools for torture were found in many interrogation rooms and that many detainees from whom the Commission had heard indicated victimization by torture; that many cases of torture had not been brought to justice, to which provincial governors and prosecutors were responsible; and that, nevertheless, significant progress had been achieved in Tunceli Province.

It also reported that 124 police officers in 2001 and 87 in 2002 had been subjected to short-term suspension or other administrative sanctions because of the involvement in ill-treatment or torture. For the period of January to November 2002, the prosecution authorities received 980 allegations of torture by the police and the Jandarma and dealt with 456 cases among them, resulting in convictions in 32 % of the cases; 524 cases were still under investigation.

iii. Nevertheless, the Turkish Human Rights Association reports that 114 persons died in detention, including those killed by torture, in 1997; 366 persons filed complaints about torture to the Association; 27,308 persons were taken into custody because of their thought; and 298 journalists were taken into custody. The number of victims of torture or other forms of ill-treatment was, according to the Association, 594 in 1999, 594 in 2000, 862 in 2001 and 876 in 2002.

(e) Extrajudicial killings and enforced or involuntary disappearances

In Turkey, the number of disappearances without identifiable reasons has risen in proportion to the increased intensiveness of the warfare with the PKK; some of them were found dead. Most of the disappearance cases have taken the pattern in which the person was arrested at home on suspicion of membership of the PKK and taken to the police station, after which the police authorities deny the detention. According to some human rights organization in Turkey, some law enforcement officers in Turkey deliberately refrain from registering suspects when they were taken into custody and, when they died during interrogation by any chance, report that detention records do not exist.

In September 1998, the Turkish Human Rights Association reported that 90 % of the enforced or involuntary disappearances had been related the Kurds issues and that the victims of 13 cases of disappearances that had occurred in the year were members of political opposition forces, journalist of anti-government newspapers, labour union members and villagers who were identified as supporters of the PKK.

Most of the enforced or involuntary disappearances in Turkey are thus considered to have been carried out by the security forces; the low standards of police recording as well as systematic avoidance by the security police of notifications to the family members are allegedly contributing factors to this phenomenon. The government has not taken sufficient measures to deal with it, concluded the report, as is indicated by the fact that its realities are hardly exposed and that the perpetrators and those in charge are rarely tried or prosecuted.

In recent years, however, the warfare with the PKK has been settled down and the incidence of such cases reduced significantly. The US Department of State reports that no cases of disappearance of political activists were reported in 2000, compared to 36 in 1999.

The PKK also had abducted young men or intimidate their family members in order to recruit their combatants. Such cases have virtually been eliminated, however, because its capacity

has been weakened in south-eastern part of the country and because Ocalan, its leader, had called for its withdrawal from the country while in prison.

(f) The relationship with the EU

Turkey has been an associate member of the then European Commission (EC) since 1964 and made a formal application to join the EU in April 1998. The application was rejected by the EU until 1993 on the grounds of unsatisfactory human rights record and other factors. In December 1997, when the EU excluded Turkey from the list of candidates for enlargement at its Summit, Turkey expressed its intention to boycott EU goods if it was not included in the next list of candidates by June 1998. In June 1998, while the EU pointed to Turkey's human rights record as its primary concern, it also decided to issue regular reports on Turkey's progress in meeting EU general standards for admission. Finally, in 1999, the EU declared Turkey a candidate for EU Accession at its Helsinki Summit.

In November 1999, the EU produced a report on Turkey and made comments on persistent violations of human rights, the great failings in the way of minorities are treated and the lack of real civilian control over the army. In April 2000, the EU stated that, as it had unfortunately noted, not much progress has been made since the Helsinki Summit. With regard to the national programme developed by the government of Turkey with a view to improving human rights situations, the EU observed that, although it meets the conditions set by the EU on paper, it was expressed in vague terms and it was not clear how Turkey would deal with the abolishment of death penalty, the reform of the National Security Council as well as the legalization of broadcasting and education in the Kurdish language. Thus the EU postponed the admission of Turkey on the ground that it was doubtful whether the reforms would actually be implemented.

(g) The situation of Kurds who had returned to the country

According to the UK Immigration and Nationality Directorate, there is no organization or authority which monitors the treatment of those deported to Turkey on a continuous and official basis. In principle, those deported to Turkey are to be interviewed upon arrival and, if they are known by the police for whatever reasons, he may be detained for interrogation; however, most of the asylum-seekers are released after formal interrogations. Thus, concludes the report, there is no evidence to demonstrate that they are persecuted solely because they had applied for asylum in other countries. On the other hand, there are increasing cases where they are taken away by unidentified persons and beaten, arrested and detained by police officers, which makes it impossible to deny the possibility of ill-treatment against those who are suspected as separatists or have taken part in political demonstration marches. For the decade until 1999, there were 6,416 asylum-seekers who had been deported to Turkey; 70 cases of ill-treatment were reported among them, most notably in 1997. Since there is no organization which monitors the treatment of those deported to Turkey, however, it is likely that more persons have been subjected to ill-treatment than reported.

(ii) On the basis of the above findings, it can be found that, in Turkey, there have been persistent forces who have antipathy or hatred to advocacy of Kurdish identity, reflecting Turkey's founding philosophies professing the integrity of the country. Not only under the military regimes, such tendencies have been strong in particular among the military and security authorities, who have a strong political voice even under civil government. In this context, the left revolutionist PKK challenged them by way of armed struggles for separation and independence with emphasis on the Kurdish nationalism, which has led to the abhorrent warfare. Partly because the PKK has conducted terror activities against civil servants or civilians who allegedly cooperated the government, the security forces was involved in large-scale violations of human rights, including extrajudicial arrest, detention, torture, execution and expulsion, of not only members of the PKK but also suspected sympathizers and human rights activists. Thus, when a person is suspected as such by the security authorities, he is objectively at risk of unbearable physical and mental

sufferings by violations of their human rights.

(iii) In this regard, the defendants argue that, in the light of the progress made in Turkey in terms of democratization, Kurds are not at risk of being subjected to grave violations of their human rights because of their ethnic origin. Indeed, as far as they refrain from advocating Kurdish identity as well as separation and independence from Turkey, assimilating themselves into Turkish society, Kurds are not likely to be subjected to human rights violations; not a few of them are in an influential position in Turkish society, including the political community, primarily in urban areas. In addition, in parallel with the marked decrease in cases of hostilities between the PKK and the security forces since around 1999, there has been significant improvement with regard to human rights violations by the security authorities. Without doubt, the government of Turkey itself has made efforts to improve the human rights situation, including through the constitutional reform and amendments to the Anti-Terror Act; this is substantiated by reports that extrajudicial human rights violations by the police have been subjected to prosecution in recent years and by the implementation of a development plan in south-eastern Turkey, where the majority of the population are Kurds, even with the security purposes.

It has been pointed out, however, that such prosecution is limited to cases involving objective and clear human rights violations, that the rate of acquittal is high and that only light sentences are imposed even when the perpetrators are convicted. In addition, the warfare has been settled down thanks to such factors as the arrest of Ocalan, his call for the abandonment of the armed struggle policy, the weakening of the PKK because of the cut of assistance from Syria and military suppression by the Turkish security forces; the efforts for democratization by the Turkish government may also be primarily due to external pressures from the United Nations or the EU, to which Turkey wishes to join. Further, it has not been reported that the military and other security organizations, which is supposed to be largely responsible for the large-scale violations of human rights, were subjected to comprehensive reforms and restructured into democratic institutions. (At the national level, the influence of the National Security Council, which includes military members, still remains, albeit to a lesser degree.) In the light of these, it is difficult to recognize that respect for human rights is embedded in Turkish social institution and in particular security institutions. Also taking into consideration the fact that torture or extrajudicial killing had not been authorized under Turkish legislation even before the progress in democratization, it is very doubtful that persons suspected as supporters or sympathizers to the PKK are treated fairly in accordance with law. In fact, it is reported that, at the time of the decisions and the order at issue in the present case, there still remained, even to a lesser degree, human rights violations against members of the pro-Kurd political parties as well as human rights activists and journalists who were disturbing to the security authorities. The international community largely shares the view that the reform efforts are inadequate.

Therefore, while democratization in Turkey have progressed to a certain degree and can be expected to go further in the future, it cannot be concluded that, at the time of the decisions and the order at issue in the present case, a Kurd who advocates for Kurdish identity or who expresses sympathy to the PKK's case did not have objective risk of being subjected to human rights violations by the security authorities for reasons of race or political opinion. Thus the defendants' arguments cannot be sustained.

(3) Issue (1)(iii) (specific circumstances of the plaintiff)

(i) On the basis of the Relevant Facts above as well as other facts and evidence undisputed by both parties, the following findings can be drawn.

(a) The plaintiff is the eldest son (third child), born on 18 December 1973 to B (father) and C (mother), both of whom are Kurds. He was born in a village in Adiyaman Province in south-eastern Turkey, located in the north of the border with Syria (the province is closer to the central part of the

country, however, than other provinces in the area); more than 90 % of the inhabitants in the village are Kurds. His father has run two boutiques in the urban area of the province with his relatives and the plaintiff's family was known as being rich in financial terms.

The plaintiff was enrolled in a five-year primary school at the age of seven; after a gap of two years, he was allowed to be enrolled in the third grade of secondary school. In 1989, he dropped out of secondary school at the age of fifteen and, thereinafter, began to help his father in the boutiques, being in charge of the sales.

(b) When the plaintiff was young child, one of the plaintiff's uncles, who had lived in his father's parents' home, was ordered by the Turkish army, which had come to the village, to fight (Kurdish) guerrillas. Since the uncle did not obey the order, saying that he did not want guns, the family was expelled from the village and forced to run to the town. The home was left without care and became deserted.

Before the plaintiff was enrolled in primary school, he found burns in the back of his uncle D and asked why. The uncle answered that, when he was eighteen years old, he was taken to the mountain without warrant by the Jandarma officers, because he had provided foods to guerrillas; the officers interrogated him and stuck plastics on fire into the back of his neck.

Since the plaintiff was forced to refrain from using the Kurdish language at school and to use Turkish, which he could not understand, he often suffered discriminatory treatment, including "Kuro" (donkey) and other forms of swearing by Turkish teachers and students.

(c) Through these experiences, the plaintiff gradually started to think that he wanted to preserve his own language and culture. Together with his friends in secondary school, he studied about the PKK after school and began to feel sympathy to them. When he began to help his father's boutiques, he started to support his friend and his brother who had joined a guerrilla group, with a view to supporting the PKK, by giving out money every two month, which amounted to 15,000 or 16,000 dollars in total, and providing clothes, foods and medicines twice a month.

Meanwhile, officers of the Jandarma came to the plaintiff's home when he was seventeen years old, accusing him, "Why do you support the PKK? Don't tell a lie!" and beating him close to the eye by the helmet. Since they could find evidence at that time, the situation did not get worse.

When the plaintiff was eighteen years old, he also took part in a march of Kurdish citizens, held in the center of Adiyaman Province, displaying a placard criticizing the government. Thereinafter he had posted bills five or six times a year, blaming suppression against Kurds or admiring Ocalan's ideology.

When the plaintiff served the army from 30 August 1993 to 28 January 1995, his colleague also mocked or sworn him, saying "Which cave of the guerrillas did you come from?" or calling him "Kuro" (donkey). Having completed the military duties, he was shocked to hear that his friend, who had joined a guerrilla group, had been killed in the mountains and that the friend's brother had also disappeared.

(d) Since then, the plaintiff continued to support the PKK at times. In October 1995, policemen came to him and took him away with force. During the interrogation, two policemen beat him on the stomach, head and face, telling him, "You are working for the PKK, aren't you? We know you're posting bills here and there". The plaintiff denied all the charge and, without further evidence, was allowed to go home.

Since he was afraid to go home, however, he started to stay in a relative's house. When he called home in 1996, he was told that a warrant of arrest had been issued for him. He decided to flee the country with the financial assistance from his family and asked a broker for arrangements for the purpose by paying a large amount of money. In January 1997, when the arrangements were made, he left the country at the Istanbul Airport by the Turkish Air.

(e) Although the plaintiff had not provided financial and other support to the PKK after the entry into Japan, he took part in a traditional festival of Kurds, the Newroz festival (21 March), and

in an event commemorating the day when Kurds first fought the government (25 August). He also took part in a demonstration march and appealed to Japanese people concerning the situation of Kurds.

Meanwhile, when a Japanese parliamentarian visited Turkey in September 2003, the Vice Chairman of the National Grand Assembly expressed regret about the representative office of the Kurdish National Assembly, which had been established in Saitama Prefecture in Japan, telling him that it had become a terrorists' stronghold. This illustrates that the Turkish authorities have had deep concern about what support is provided to the PKK in other countries.

(f) A Kurd named A, who had withdrawn an application for refugee status in Japan and went back to Turkey in October 1998 because he was not likely to be recognized as a refugee, was reported to have been killed by his son at home in July 1999, allegedly as a result of arguments between the two. Some Kurds suspect, however, that the anti-terror security authorities had been involved in this incident, in the light of the circumstances of the killing and subsequent investigation.

On the other hand, there had been a significant number of Kurds who had applied for refugee status in Japan but withdrawn their applications and returned to the country on their will. Pretty many of them admitted the falsehood of their statements concerning persecution against them, stating that, in fact, they came to Japan to be employed and earn money.

(ii) On the basis of the above findings, it can be concluded that the plaintiff has had sympathy for the PKK's case and supported them secretly and that, having entered Japan, started to publicly express his support for the PKK.

(iii) In this regard, the defendants argue that the statements and other evidence, which form the basis of the above findings, are not credible. Thus the Court provides some supplementary explanations to the findings.

(a) First of all, the defendants argue that the plaintiff's statements are not credible because they have been changed on important points, including whether he was aware of the warrant of arrest issued against him and whether he is or is not a supporter or member of the PKK. When one considers the statements in letter, indeed, there are such changes as are indicated by the defendants.

According to the relevant evidence, however, the core parts of the plaintiff's statements, which form the basis of his refugee status, are almost consistent in effect. The core parts include: (1) that the plaintiff had heard, in his early years, about the injuries of his relative because of suspicion that he was a supporter of the PKK; (2) that he had heard that his uncle's family had been forced to leave home by the security forces; (3) that he began to have sympathy to the PKK, which sought for autonomy and independence of Kurds, through his own experiences of humiliation at school and the military because of his ethnic origin; (4) that he had assisted the PKK financially or taken part in demonstration marches after he had begun to help his father's business; (5) that he had been taken away and beaten by the police, being suspected as a supporter of the PKK; and (6) that, although he has not supported the PKK after his entry into Japan, he had taken part in Kurds' traditional festivals or commemoration events. In addition, the changes pointed by the defendants may be explained by such factors as: unique psychology of applicants for refugee status reflected in their statements (it is often the case for them to exaggerate facts of persecution in order to take refuge, to attempt to conceal some facts because of their distrust in authorities or to make inconsistent statements because of post-traumatic stress disorder or other causes); technical problems in oral interpretation; or methods used by inquiry officers to summarize the statements. Thus it is unreasonable to deny the credibility of the plaintiff's statements in its entirety.

(b) The defendants next argue that the warrant of arrest and the resident registration card had obviously been forged.

According to the relevant evidence, indeed, the warrant has such deficiencies as disordered

typing in some parts, an error in the plaintiff's date of birth, lack of reference to specific charges against him and lack of clear reference to specific dates and months and places of commission. In addition, when the chief officer in charge of hearings of the Ministry of Justice Immigration Control Department investigated the authenticity of the relevant documents furnished by the plaintiff, the agency in charge confirmed that the extra-jurisdictional decision was not related to the facts and that the documents had not been issued by the Adiyaman Summary Criminal Court. The director of the Anti-Terror Department of the Turkish National Police also responded that some applicants for refugee status ask brokers to forge warrants of arrest or other documents. In the light of all these facts, it is impossible to exclude the doubt that the warrant of arrest might have been forged, reinforced by the fact that the plaintiff could have left the country with his own passport.

However, although the warrant of arrest has deficiencies in its form in the light of the Japanese standards, it does not immediately mean that it had been forged. In addition, as long as the details of the investigation by the officer in charge of the Ministry of Justice are not available, the Court is reluctant to conclude that the warrant had been forged because it cannot examine the reasonableness of the investigation. Thus the Court can only state that whether the warrant had been forged or not is not clear. Even if the warrant had been forged, the plaintiff obtained it, according the plaintiff himself, through his relatives in Turkey who sent it to him upon his request after the first application for refugee status had been dismissed. Thus it is not possible to find that the plaintiff himself had been positively involved in forging the warrant.

Next, according to the relevant evidence, the resident registration card contains, in addition to the names and addresses of the plaintiff's parents, brothers and sisters, description "F [the plaintiff's name] Wanted by the police" in the remarks column. According to the relevant evidence, however, when an officer of the Ministry of Justice Immigration Control Department went to Turkey and met Mr. G, deputy director of the Turkish Ministry of Interior Family Registry and Nationality Department, answered that such information cannot be contained in the resident registration card, because it only copies the descriptions in the family registry, which does not reveal whether or not the person concerned is a draft dodger or offender, and that the remarks column in the resident registration card is for recording the details of identity transitions through marriage or other personal affairs and in no way for describing that a warrant of arrest had been issued. The director of the Anti-Terror Department of the Turkish National Police also responded that the criminal procedures and the family registration system are independent of each other and that the family registry cannot contain a description that a warrant of arrest had been issued. In the light of these facts, it is impossible to exclude the doubt that the resident registration card might have been forged.

On the other hand, this card is the one which E, who runs construction company in Suzuka City, Mie Prefecture, had received from the plaintiff's relatives in Turkey upon the latter's request, with a view to adopting the plaintiff. Given the tendency of the Turkish security organs not to observe laws and rules at all times, the Court can only state that whether the registration card had been forged or not is not clear. Even if it had been forged, it is not possible to find that the plaintiff himself had been positively involved in the process, in the light of the way how he had obtained it.

Thus it is reasonable to conclude that the warrant of arrest and the resident registration card neither provide substantiation of the above findings nor is adequate enough to overrule the findings.

(4) Issue (1)(iv) (whether the plaintiff is a refugee or not)

(i) Generally speaking, states essentially attempt to prevent moves to weaken themselves by mobilizing 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 recognized 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-defense. If an alien has fled such a state, it is inevitable that he is recognized as a refugee who had fled from persecution after the examination of his specific circumstances. Even if the government itself does not tolerate such 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.

The Court now applies this principle is applied to the present case on the basis of the above findings. The plaintiff had supported the PKK in Turkey and, having entered Japan, taken part in demonstration marches and other activities appealing improvement of the situation of Kurds. Since these acts are offences under the Anti-Terror Law and other laws, the plaintiff may be arrested and prosecuted on charges of violations of Article 4 (Article 169 of the Criminal Code) or Article 8 of the Law and be sentenced to heavier penalties compared to ordinary offences; furthermore, he is at risk of being subjected to ill-treatment, assault and torture outside the legal criminal procedures during the process.

Meanwhile, even if the plaintiff had been taken away and beaten by police officers, it might have been not more than simple harassment or part of the routines for information-gathering, given the fact that he was allowed to go home after a while and that he could have obtained his own passport even through a broker to whom he had paid a large amount of money. There is in fact some space to doubt the argument that the Turkish security authorities did recognize the plaintiff as a supporter of the PKK and has looked after him. (As has been stated, the warrant of arrest and the resident registration card cannot sweep away this doubt, as long as the possibility of forging cannot be excluded.)

As has been stated, however, acts of arbitrary detention, violence and ill-treatment of alleged supporters of or sympathizers with the PKK as well as Kurds who are allegedly antagonistic to the government had not been eradicated yet at the time of the decisions and the order at issue in the present case, even though there has been significant improvement in the situation of human rights violations by the security authorities. 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.

(ii) In this regard, the defendants argue that, when a person is prosecuted or punished because of political crime, distinction should be made between prosecution because of "political opinion" and that because of specific "act" motivated by political reasons; in the latter case, punishment should in principle be left to each state's sovereign powers and the Refugee Convention does not apply. Since acts of terrorism are punishable to a stronger degree than ordinary crime, continue the defendants, the application of the Anti-Terror Law to the plaintiff's support activities for the PKK does not fall under persecution in terms of the Refugee Convention.

According to the above findings, however, the plaintiff had been motivated by political reasons, which is the improvement of Kurds' status, and, having sympathy with the PKK's case for separation and independence, had simply supported them in financial and other terms, posted bills with slogans and taken part in meetings and demonstration marches; he had not been involved in acts directly linked with terrorism, such as resorting to violence himself or assisting in transport of weapons and ammunitions used for that purpose. If Articles 4 or 8 would be nevertheless applied to

these acts, the plaintiff is likely to be punished with imprisonment increased by one half of the penalties under Article 169 of the Criminal Code, which is rigorous imprisonment of between three to five years, on charges of support to the PKK; with regard to posting bills and participating in meetings or demonstration marches, the penalties may be imprisonment of between one to three years together with a heavy fine of between 10 million to 30 million liras. Given the nature of the plaintiff's acts, the expectant penalties are disproportionately heavy, compared to penalties in democratic countries. In addition, the possibility cannot be excluded, in the light of the realities of the security operations in Turkey, that the plaintiff may be subjected to human rights violations, including beating and torture, through the prosecution process without the guarantee of due process of law.

Since the plaintiff's acts do not fall under "serious … crime" in terms of Article 1, F (b) of the Refugee Convention or other grounds listed in the paragraph, the application of the Refugee Convention to the plaintiff should not be excluded.

(iii) Therefore the plaintiff does have well-founded fear of being arrested, prosecuted and punished with the heavy sentences referred to above or being tortured for reasons of race or political opinion. It is thus reasonable to conclude that the plaintiff is a Convention refugee.

In conclusion, the Minister's decision not to grant him refugee status was based on erroneous findings at the time when the decision was made concerning the plaintiff's refugee status and thus should be revoked as an illegal disposition.

(5) Issue (2) (whether the Minister's decision is invalid)

(i) The existence of any of the grounds for deportation

As has been stated in the Relevant Facts (1), the plaintiff has stayed in Japan beyond the expiry date of his visa, which is 30 April 1997, and thus falls under the ground prescribed in Article 24, clause (4)(b) of the Immigration Act.

(ii) The plaintiff's refugee status and the discretion of the Minister of Justice in granting special permission to stay

As has been stated, a state is not obliged under international customary law to admit aliens in its territory; the state can freely decide whether or not to admit them in its territory and on what conditions, which means that alien do not have the right to enter Japan freely. In the light of this principle, it should be understood that the Minister of Justice has the wide discretion in political and diplomatic terms in deciding whether or not to grant special permission to stay to aliens who have any of the grounds for deportation prescribed in Article 24, clause (4)(b) of the Immigration Act, unless the discretion is restricted by the Refugee Convention or other international instruments. And the discretion is broader than the one with regard to the extension of the period of stay for aliens residing in Japan with lawful residential status.

Meanwhile, the Refugee Convention and the Protocol requires the Contracting Parties to provide protection to refugees, on the basis of such distinctions as all "refugees" in terms thereof, "refugees in their territory", "refugees lawfully staying in their territory" and refugees who are "lawful residents in their territory" (The relevant articles of the Convention ad Article 1, para.1 of the Protocol).

In Japan, on the other hand, the Convention and the Protocol was approved and came into force respectively on 15 October 1981 and 1 January 1982. On this opportunity, the Immigration Control Decree, of which legal effects have been recognized under Article 4 of the Law on the Treatment of Decrees by the Ministry of Foreign Affairs on the Basis of the Circular Concerning Decrees Issued on the Occasion of the Acceptance of the Potsdam Declaration, was renamed the Immigration Control and Refugee Recognition Act in accordance with the Act No.86/1981. In addition to the previous provisions concerning immigration control, new provisions were introduced and came into force on the same day concerning the refugee status determination procedures and

other related issues (Article 18-2, Chapter 7-2 (Article 61-2 and thereinafter) and Article 70-2). When one compares the provisions of the Immigration Act with those in the Refugee Convention, a refugee travel document, issued under Article 61-2-6 of the former to "an alien in Japan who has been recognized as a refugee", is equivalent to "travel documents for the purpose of travel outside their territory" in Article 28 of the latter, which is to be issued to "refugees lawfully staying in their territory". And Article 70-2 of the former provides that, when "a refugee" who has committed such offenses as unlawful entry, landing, stay and residence had entered Japan directly from a territory which was likely to be harmful to his life etc., he shall be exempted from penalty, provided that, after having committed the offense, a prompt report was submitted in the presence of an Immigration Inspector. This provision can be regarded as the equivalent to Article 31, para.1 of the Refugee Convention, which states that the Contracting States "shall not impose penalties, on account of their unlawful entry or presence, on refugees who [came] directly from a territory where their life … was threatened".

Compared to Article 70-2 of the Immigration Act, which simply treats refugee status as one of the requirements, Article 61-2-6 requires that a person has been recognized as a refugee. This is intended to restrict the right to be issued travel documents to "refugees lawfully staying in their territory". In addition, Articles 61-2-5 and 61-2-8 provides for the relaxation of the requirements for permanent residence permit and special permission to stay as the effects of refugee status. On the basis of these provisions, it should be concluded that the refugee status determination procedures under the Immigration Act are nothing but the procedures to enable Convention refugees to stay in Japan lawfully. Even if a person has not been recognized as a refugee, therefore, he would not be deprived of protection other than the right to lawful stay in Japan. In this sense, the refugee status determination procedures do not determine that an alien is not "refugee" in substantial terms.

Meanwhile, Article 33, para.1 of the Refugee Convention provides, "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". The protection is not limited to refugees lawfully staying in the country but must be applied to refugees whose stay or residence is unlawful. Under the Immigration Act, when an immigration inspector found that a suspect had any of the grounds for deportation under Article 24 of the Immigration Act (Article 47, para.2), when a special inquiry officer found, as a result of an oral hearing held at the request of the suspect, that there was no error in the finding (Article 48, para.7) and when the Minister of Justice decided that an objection to the latter finding had no basis, a supervising immigration inspector shall issue a written deportation order upon notification (Article 49, para.5). The destination shall be, as a rule, a country of which the suspect is a national or citizen(Article 53, para.1); when it is possible, he/she shall be deported to another country, including a country in which he/she had been residing immediately prior to his entry into Japan, according to his/her desire (Article 53, para.2). Except for cases where the Minister of Justice finds it considerably detrimental to the interests and security of Japan, the destination shall not include the territories of countries stipulated in Article 33, para.1 of the Convention (Article 53, para.3). In this way the principle of non-refoulement is ensured under the Immigration Act.

Deportation of an alien, however, cannot be enforced without consideration to the consent and reception arrangements of the destination country; depending on the country's situation, humanitarian issues may arise. Therefore a high level of political consideration is required, in the light of each country's situation, to decide to which country the alien should be deported or whether deportation itself is reasonable when there is no appropriate countries as a destination. This kind of decisions can most properly made by the Minister of Justice, rather than a supervising immigration inspector who has no discretion in the issuance of a written deportation order. In making a decision on an objection filed by the suspect who are to be deported, therefore, the Minister of Justice should

first determine whether the suspect is a "refugee" or not and, when he/she indeed is, decide to which country he/she should be deported or whether deportation itself is reasonable. If the Minister decides that the objection has no basis without determining the suspect's status as a refugee, even when he/she can be regarded as such, it would be abuse of or deviation from his discretion, thus illegal, unless there are special circumstances.

(iii) Validity of the Minister's decision at issue

In the present case, the plaintiff could have been recognized as a Convention refugee in substantial terms, as has been stated, at the time of the Minister's decision at issue (7 January 2000). The Minster should have decided, in accordance with the above reasoning, to which country he/she should be deported or whether deportation itself is reasonable before determining whether or not to grant him special permission to stay. The Minister did not consider these issues in making the decision at issue, however, as is clear from the fact that he only stated the conclusion that "the objection has no basis". Thus it was obviously aimed at deporting the plaintiff to his country of origin, in violation of the principle of non-refoulement under Article 33, para.1 of the Convention, in spite of the fact that the plaintiff is a Convention "refugee" who is not to be excluded from protection in accordance with Article 33, para.2 of the Convention. Even if the Minister has the wide discretion as regards special permission to stay, the decision was nothing but grave deviation from or abuse of the discretion. Since its unlawfulness is significant and clear, it is reasonable to conclude that the Minister's decision at issue is invalid.

(6) Issue (6) (whether the issuance of the deportation order against the plaintiff is invalid)

Article 49, para.5 of the Immigration Act provides, "The Supervising Immigration Inspector shall, upon receipt of the notification from the Minister of Justice of his decision that the objection is groundless, … issue a written deportation order…". It makes it clear that the Minister's decision under para.3 of the same article and a written deportation order both aim at deportation of the plaintiff, which is effectuated through the combination of the two acts, and that the legal basis of a deportation order is the Minister's decision.

Since the Minister's decision at issue is invalid because of its grave and clear illegality, as has been stated, it is reasonable to conclude that the deportation order based on the decision is also invalid because of its grave and clear illegality.

(7) Conclusion

In accordance with the above reasoning, all of the plaintiff's claims are admitted as there are legitimate grounds. With regard to the legal costs, the Court decides as is stated in para.4 of Conclusions, applying Article 7 of the Administrative Case Litigation Act as well as Articles 61 of the Civil Procedure Act (The Court does not refer to Article 65 of the latter in the light of Article 35 of the former).