Myanmarese v. Japan (Minister of Justice)
– Nagoya District Court (25 September 2003)

Country of jurisdiction	Japan
Court	Nagoya District Court
Division	Civil: 9th Division
Judge	Yukio KATOH (Presiding Judge) Kyoko FUNABASHI Kaoru HIRAYAMA
Date of decision/judgment	25 September 2003
Citation	Heisei 14 (2002) Gyo-U (Administrative Case) No. 19
Case	Lawsuit for Revocation of Decision to Reject Application for Refugee Status
Summary	The Court revoked the written deportation order issued to the plaintiff accordance with the principle of non-refoulement

Judgment

Conclusions

1. The decision of 16 January 2002 taken by the Minister of Justice (defendant) 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 revoked.
2. The issuance of the written deportation order of 18 January 2002 against the plaintiff, undertaken by the Supervising Immigration Inspector of the Nagoya Immigration Bureau (defendant), shall be revoked.
3. The plaintiff's other cases against the Minister of Justice (defendant) shall be dismissed.
4. A third of the legal costs shall be reimbursed by the plaintiff, and two thirds by the defendants.

Findings and Reasoning

Section 1: Claims

1. The decision of 16 January 2002 taken by the Minister of Justice (defendant), not recognizing the plaintiff's refugee status, shall be revoked.
2. The same as 1 and 2 of the Conclusions.

Section2: Summary of the case

When the plaintiff, who was born in the Union of Burma/Myanmar*, applied to the Minister of Justice, one of the defendants (hereinafter referred to as "the Minister"), for refugee status, the Minister decided not to recognize him as a refugee. At the same time, the Minister decided that the plaintiff's objection to the decision of the Supervising Immigration Inspector, 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, has no basis. Therefore the plaintiff filed a suit

against the Minister and demanded the withdrawal of these decisions. At the same time, he sued the Supervising Immigration Inspector of the Nagoya Immigration Bureau, one of the defendants (hereinafter referred to as "the Supervising Immigration Inspector"), and demanded the withdrawal of the written deportation order issued by him on the basis of the Minister's decision.

* Hereinafter referred to either as "Burma" or as "Myanmar", depending on whether the descriptions refer to situations before or after 18 June 1989, respectively, when the name of the country was officially changed. This does not apply to the Burmese people or Burmese language, both of which will be referred to as "Burmese"; when distinction is to be made on the basis of citizenship, a citizen or ex-citizen of Myanmar will be referred to as "a Myanmarese".

1. Relevant Facts

(1) About the plaintiff and how he entered Japan

The plaintiff is an alien of Myanmar nationality, born on 4 January 1967. He arrived at the Nagoya Airport on 22 June 1992 in possession of a passport under the name of another person "A".

At the airport, the plaintiff requested a permission for landing to an immigration inspector of the Nagoya Airport Office of the Nagoya Immigration Bureau (hereinafter referred to as "NIB"), stating that he came to Japan for "visit" and would stay for "10 days". The plaintiff was issued a "temporary visitor" visa by the immigration inspector, valid for "15 days", and landed on Japan.

(2) Deportation and detention procedures

(i) The plaintiff reported to the NIB on 6 December 1999, wishing to return to his country. An immigration control officer of the NIB conducted an investigation for any possible violations on the same day and requested him to report again on 9 December 1999, however the plaintiff did not.

(ii) After the plaintiff was arrested and detained on 2 November 2001 on the charge of the violation of Article 70, para.1 (5) (illegal stay) of the Immigration Control and Refugee Recognition Act (hereinafter referred to as "the Immigration Act"), an immigration control officer of the NIB obtained a written detention order from the Supervising Immigration Inspector of the NIB on 21 November 2001 and executed it on the next day, after the plaintiff had been acquitted of a prosecution. Since then the officer conducted investigations for violations four times by 6 December 2001.

Meanwhile, the plaintiff was delivered by the immigration control officer to the immigration inspector of the NIB on 22 November 2001, who conducted investigations for violations four times by 14 December 2001. As a result, the inspector found that the plaintiff had violated Article 24, clause (1) (illegal entry) of the Immigration Act and notified the plaintiff of the finding on the same day.

(iii) Not being satisfied with the finding, the plaintiff requested a special inquiry officer of the NIB for a hearing on the same day, in accordance with Article 48, para.1 of the Immigration Act. The latter held a hearing on 20 December 2001, found that there was no error in the original finding and notified the plaintiff of this result.

(iv) Not being satisfied with the result, the plaintiff filed an objection with the Minister on the same day, in accordance with Article 49, para.1 of the Immigration Act. The Minister decided that the objection had no basis on 16 January 2002 and notified the plaintiff of the decision through the Supervising Immigration Inspector on 18 January 2001.

(v) On the same day, the Supervising Immigration Inspector issued a written deportation order against the plaintiff, indicating Myanmar as the destination.

(vi) The plaintiff was transferred to the West Japan Immigration Control Center of

the Ministry of Justice on 14 February 2002 but was released on a provisional basis on 3 June 2002.

(3) Refugee recognition procedures

(i) The representative of the plaintiff, B, submitted an application for refugee status on his behalf to the Minister on 20 November 2001, when the plaintiff was under detention on the charge of the violation of the Immigration Act (illegal stay), stating that the plaintiff was at risk of persecution on the ground of political opinion. The NIB received the application on 22 November 2001, when the plaintiff's will was confirmed in this regard, in accordance with Article 55 of the Regulations on the Application of the Immigration Law, which limits the capacity of a representative in the application for refugee status.

After two inquiries by a refugee inquirer, the Minister decided on 16 January 2002 not to grant refugee status to the plaintiff, on the ground that the application was submitted after the prescribed period under Article 61-2, para.2 of the Immigration Act and that the proviso of the said provision does not apply to the delay in this case. The Minister notified the plaintiff of this decision on 18 January 2002.

(ii) Not being satisfied with the decision, the plaintiff filed an objection with the Minister on 22 January 2002, which is currently under consideration by the Minister.

(4) Filing of the present suit

The plaintiff filed suit against the defendants on 12 April 2002.

2. Main issues in the case

(1) Whether the Minister's decision not to grant refugee status (see 1-(3)(i) above) was appropriate

(i) Whether the provision limiting the period of an application for refugee status (Article 61-2, para.2 of the Immigration Act, hereafter referred to as "the 60-days rule") is constitutional

(ii) Whether there had been "unavoidable circumstances" in terms of the proviso of Article 61-2, para.2 of the Immigration Act

(iii) Whether due process of law was ensured

(iv) Whether the plaintiff is a refugee or not

(2) Whether the Minister's decision to dismiss the plaintiff's objection (see 1-(2)(iv) above) was appropriate

(3) Whether the Supervising Immigration Inspector's order to deport the plaintiff (see 1-(2)(v) above) was appropriate

3. The parties' arguments on the issues

(1) On the issue (1)(i) (whether the 60-days rule is constitutional or not)

(The plaintiff's arguments)

(i) The 60-days rule is in breach of international law and Article 98, para.2 of the Constitution (violation of international customary law concerning the treatment of refugees)

As a Contracting Party to the Convention Relating to the Status of Refugees (hereinafter referred to as "the Convention") and the Protocol Relating to the Status of Refugees (hereinafter referred to as "the Protocol"), Japan has the obligation to give a variety of facilities to a person falling under the definition of a refugee under Article 1 of the Convention. When such a person seeks for asylum as a refugee, Japan is not allowed not to give him/her such facilities. Since, in the

light of the basic structures of the Convention and the Protocol, a person does not become a refugee through recognition but is confirmed and declared as a refugee through it, a person should be treated as a refugee in terms of the Convention and the Protocol immediately, without going through specific refugee status determination procedures, whenever he/she meets the requirements in the above definition. The Convention and the Protocol thus requires the Contracting Parties to recognize such persons correctly as refugees. If any refugee status determination procedures under national legislation result in non-recognition of certain persons who fall within the definition of refugees under the Convention and the Protocol, the procedures are very likely to be in breach of these instruments. In fact, European and other developed countries do not set deadlines for an application for refugee status; even if there are such deadlines, such as in Belgium and the United States of America, exceptions are allowed in practice.

In the absence of specific provisions on refugee status determination procedures in the Convention and the Protocol, the Contracting Parties, including Japan, are allowed to choose such administrative and judicial procedures for refugee status determination as they consider reasonable and to require asylum-seekers to submit applications within a specified period of time. The Convention and the Protocol, however, does not allow the Contracting Parties to establish refugee status determination procedures as they like, as is assumed by the defendants. Since such procedures must be consistent with the objects and purposes of these instruments, any practice is not allowed when it denies refugees' rights and fundamental freedoms because procedural requirements have not been met. In this regard, the defendants incorporate the judgment of 28 October 1997 by the Supreme Court, which concerns the case in which Mr. C was not recognized as a refugee. This judgment, however, did not establish any guidelines concerning the application of legal provisions and principles, thus lacking binding forces. In addition, Mr. C was thereafter recognized as a refugee either in the second or third application for refugee status, which was regarded as having good grounds. Therefore the logical conclusion on the basis of the Convention and the Protocol should be that, even when a person did not apply for refugee status within a specified period, the authorities should not exclude him/her from the subjects of consideration but should make a substantial decision on whether he/she is to be recognized as a refugee. If Article 61-2 of the Immigration Act, which states a very short period of 60 days for an application, is to be interpreted in a consistent manner with this principle, the period should be understood as a flexible deadline which should be met as much as possible, or make it necessary to adopt a broad interpretation of "unavoidable circumstances", an exception to the deadline, so that an application after the deadline is also considered on its merits as a rule.

The defendants argue, however, that the deadline for an application is a condition which should be met before the authorities go into considerations on its merits, interpreting "unavoidable circumstances" in a very restrictive way. Such an approach, however, would systematically lead to a situation where some persons would not be recognized as refugees, even if they were refugees in terms of the Convention and the Protocol since they have not applied for refugee status within 60 days. This situation is unreasonable, virtually creating two categories of refugees, namely "refugees under the Immigration Act" and "refugees under the Convention and the Protocol". Such an interpretation will make it impossible to fulfill a variety of refugee protection measures prescribed in Articles 7 - 34 (in particular, the principle of non-refoulement under Article 33, para.1, the issuance of travel documents under Article 28, exemption from reciprocity under Article 7, the issuance of identity papers under Article 27 and treatment with respect to education under Article 22, para.2). The defendants argue, in this regard, that the principle of non-refoulement is ensured by Article 53, para.3 of the Immigration Act, which concerns deportation procedures. However, while consent of the country concerned is required to deport aliens to a third country, there is no institutional guarantee that they will be admitted into the country. In addition, it is obvious that the present deportation procedures do not ensure the principle of non-refoulement, since priority is

given to discretionary decisions in the light of what is regarded as "the national interest" by the Ministry of Justice (the Immigration Bureau) in practice. Further, it is in itself a grave contradiction to say that the principle is ensured through the system of special permission to stay, which is regarded as a privilege. On the basis of these assumptions, it should be considered that the Immigration Act envisages ensuring the principle of non-refoulement through the refugee status determination process itself.

These interpretations are reflected in the Conclusion No.15 concerning "Refugees Without an Asylum Country", adopted by the Executive Committee of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as "UNHCR"), which states, "While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfillment of other formal requirements, should not lead to an asylum request being excluded from consideration." The rule that prohibits denial of protection for Convention refugees who had not applied for refugee status within a short period of time should be understood as constituting part of international customary law.

In this regard, the defendants argue that, even if Convention refugees have not been recognized as a refugee through the application of the 60-days rule, they can still benefit from most of the protective measures under the Convention, either because (a) the protective measures can be enjoyed with or without refugee status or (b) they can be enjoyed on the basis of separate decisions by the relevant authorities that the beneficiary is a refugee. It is not efficient, however, for each authority to make complex decisions concerning refugee status determination whenever it becomes necessary to do so; it is also likely, under such circumstances, that inconsistencies among the authorities would emerge or that there would be problems in the fulfillment of the obligations under the Convention and the Protocol. It should be understood, therefore, that the authorities are not allowed to make their own decisions that a particular person is a refugee without the process of refugee recognition by the Minister of Justice (namely "the centralized determination system".) Thus a certificate of refugee status and a refugee travel document, issued to persons recognized as refugees, are to prove that the holder has been recognized as a refugee by the Minister of Justice, who has the exclusive power to undertake such recognition. The protective measures that can be enjoyed with or without refugee status ((a)) are, in fact, either restricted in practice by circulars and other measures to Convention refugees or do not fall within the protective measures defined in the Convention. The argument that the protective measures can be enjoyed on the basis of separate decisions by the relevant authorities that the beneficiary is a refugee ((b)) is far from the reality.

The defendants further argue that, in order to avoid fear of being persecuted, refugees should seek for protection in another country promptly in usual circumstances; the fact that the plaintiff did not do so causes doubt with regard to his claim as being a refugee. Many refugees, however, have gone through experiences which make them suspicious of the authorities. In particular, irregular immigrants are very fearful that they may be deported to their country of origin if they have applied for refugee status; they may well be fearful of the possibility of placing others into danger. It is thus a grave factual or empirical error to deny refugee status of a particular person simply on the basis of his/her delay in the application for refugee status. In addition, the refugee determination procedures in Japan are not widely known among aliens, including the deadline for applications, and lack procedural transparency; the administration of these procedures are (unnecessarily) rigid, which makes asylum-seekers more concerned. Without considering such special circumstances of refugees, the defendants regard the delay in the application as a proof against the credibility of the refugee's claim, giving up the examination of their cases on merits. Such practice and reasoning by the defendants is totally inappropriate, being incompatible with the fact that Japan has ratified the Convention without any reservations. It is thus in breach of international law, including the Convention and the Protocol as well as international customary law, and Article 98, para.2 of the Constitution, which recognizes domestic applicability of international

treaties.

(ii) The 60-days rule is in breach of Article 31 of the Constitution

The principle of due process of law, enshrined in Article 31 of the Constitution, apply mutatis mutandis to administrative procedures. Thus asylum-seekers should not be deprived of opportunities to apply for refugee status without legitimate reasons, and they should be given adequate time to prepare for the application. The 60-days rule results in denying them the possibility of asylum in Japan, by rejecting recognition of refugee status without examining their cases on merits after the short period of time, thus being in breach of Article 31 of the Constitution.

(The defendants' arguments)

(i) Compatibility with international law and Article 93, para.2 of the Constitution

The defendants dispute the plaintiff's arguments contained in (i).

The plaintiff's arguments are, as is shown below, based on wrong understanding of the Convention and the Protocol and other international law as well as the legal system in Japan, and thus inappropriate.

The Convention, while having very detailed provisions concerning the definition of refugees and "protective" measures taken by the Contracting Parties, does not have any provisions concerning refugee status determination procedures. This is because there is a significant degree of diversity among national immigration control systems, reflecting the common understanding among the international community that it is difficult to accept modifications to a traditional principle of international law, which has left it to the discretion of each sovereign state to admit or not to admit aliens (including refugees) in the context of the state's political, social, economic, geographical and other factors. Furthermore, each country has its immigration control system and as far as refugees' entry into and stay in a state, the state's burdens are intertwined with other states' interests in a complex manner. The Contracting Parties are therefore not obliged under the Convention to admit refugees in an active manner or to provide "asylum" to refugees. The Convention and the Protocol only obliges the Contracting Parties to provide a certain degree of "protection" to the refugees whom they had admitted into their territories. It is left to the legislative discretion of each Contracting Party to establish or not to establish determination procedures and, if a Contracting Party does, to do so in what way. Thus there is space for a theoretical possibility that refugees in terms of the Convention and the Protocol may not be able to enter or to apply for refugee status in a Contracting Party of their wish. This reasoning was confirmed by the Supreme Court in its judgment of 28 October 1997, which explicitly dismissed similar arguments to the ones submitted by the plaintiff.

In Japan, the Immigration Act provides for the refugee status determination procedures. Since the 60-days rule, contained in Article 61-2, para.2, is a procedural requirement for applications for refugee status, it is natural that those who have submitted unlawful applications in violation of the provision would not be granted refugee status. Since the provision neither modifies the concept of "refugees" under the Convention and the Protocol by adding additional factors to the definition nor excludes or modifies its legal effects, the said paragraph is not incompatible with Article 42 of the Convention, which prohibits any reservations to Article 1 of the Convention. It is up to sovereign decisions of the Contracting Parties whether or not they admit someone as a refugee and provide "protection" under the Convention. This is obvious on the basis of the preamble of the Convention, which establishes a clear distinction between "asylum" (admitting refugees into their territories and permitting them to stay) and "protection" (granting a variety of rights and benefits to refugees), as well as the travaux preparatoires of the Convention.

In this regard, the plaintiff invokes the views of the Executive Committee of the UNHCR. However, interpretation of a treaty means clarifying the meaning and scope of the provisions of the treaty in a way consistent with the Contracting Parties' will. The Executive Committee of the UNHCR is nothing more than an independent body, not established under the Convention, whose

views cannot have binding forces on the Contracting Parties outside their agreement. Moreover, its Conclusion No.15 does not concern refugee status determination procedures; it is no more than guidelines to the effect that states should use their best endeavors to grant asylum to refugees without an asylum country. Further, the Conclusion No.30 of the Executive Committee states that the states can establish special arrangements to deal with manifestly unfounded applications speedily. Thus the establishment of limitations on periods for applications is not prohibited by the Executive Committee, let alone by international customary law. In fact, asylum-seekers are required to apply for refugee status within one year after arrival in the United States, 8 working days for illegal immigrants in Belgium and one year after arrival in Spain.

Furthermore, even if Convention refugees have not been recognized as a refugee through the application of the 60-days rule, they can still benefit from most of the protective measures under the Convention, except for the issuance of a refugee travel document (Article 61-2-6, para.1 of the Immigration Act and Article 28 of the Convention). This is either because (a) the protective measures can be enjoyed with or without refugee status (protective measures with regard to education, labour legislation and social security, the issuance of identity papers and the guarantee against expulsion of refugees who stay in Japan lawfully) or (b) benefits can be virtually enjoyed on the basis of separate decisions by the relevant authorities that the beneficiary is a refugee (the principle of non-refoulement, exemption from reciprocity, the issue of lex personalis and exemption from criminal liability in case of illegal entry into and stay in the country of asylum.) Even in the absence of the refugee travel document, refugees who stay in Japan lawfully can travel abroad by being granted re-entry permission (Article 26 of the Immigration Act), which is treated as an equivalent to a passport. It is thus inappropriate on the plaintiff's part to use authorities' practice as an element to judge compatibility of the Immigration Act with the Convention. In addition, the plaintiff misunderstands the objects of the circulars, mentioned by the plaintiff, which do not put restrictions on refugee who have not been recognized as such.

In the first place, it is regarded as a general empirical principle that refugees who stay unlawfully in an asylum country should usually seek for the country's protection promptly in order to flee from fear of persecution as soon as possible. This principle is reflected in Article 31, para.1 of the Convention, which states that those refugees shall be exempted from penalties provided that they present themselves without delay to the authorities; the training modules concerning determination of refugee status, prepared by the UNCHR, which states that asylum-seekers should promptly inform the authorities of the asylum country or the UNHCR of their will to seek asylum; and legal provisions as well as administrative and judicial interpretations of the provisions in developed countries. Even if, as the plaintiff argues, some Contracting Parties to the Convention do not establish deadlines for applications for refugee status, this does not nullify the empirical principle. When such an empirical principle is recognized, the Convention and the Protocol leave it to the discretion of each Contracting Party, either to use the principle merely as one of the factors in determining credibility of an applicant's claim as a refugee or, as is the case in Japan, to establish a reasonable deadline with a view to achieving the aim of proper and smooth administration of refugee recognition on the basis of this principle. Article 61-2, para.2 is a provision which was introduced on the basis of this principle in order to achieve the said aim.

Furthermore, even if an application is submitted after 60 days after the applicant's landing on Japan, the application can be considered on its merits in the same manner with applications submitted within the prescribed period, provided that there had been "unavoidable circumstances" in terms of the proviso of Article 61-2, para.2. Taken together with this exception, Article 61-2, para.2 can neither be regarded as unreasonable in the light of the objects of the Convention and the Protocol nor as incompatible with Article 98, para.2 of the Constitution.

(ii) Compatibility with Article 31 of the Constitution

The defendants dispute the plaintiff's arguments in this regard.

As has been stated, Article 61-2, para.2 provides for a reasonable and proper procedure in line with the actual situation in Japan.

Even if an application is submitted after 60 days after the applicant's landing on Japan, the Minister of Justice receives it and considers whether there had been unavoidable circumstances for the delay. In addition, even when the applicant was not recognized as a refugee on the basis of Article 61-2, para.2, the alien can virtually enjoy the benefits of protective measures under the Convention and the Protocol, provided that he/she is regarded as a refugee after the examination with regard to whether he/she falls within the definition under the international instruments. Since the procedures under the Immigration Act do not give adverse effect to refugees in terms of the Convention and the Protocol, they are proper and compatible with Article 31 of the Constitution.

(2) On the Issue (1)(ii) (whether there had been "unavoidable circumstances" in terms of the proviso of Article 61-2, para.2 of the Immigration Act)

(The plaintiff's arguments)

(i) Special circumstances of refugees and the purpose of "unavoidable circumstances")

Even if the 60-days rule is not in breach of the Convention and the Protocol, delays in submitting applications can be regarded as natural from the perspectives of refugees. A declaration of being a refugee brings about a serious consequence, which is cutting off ties with their country of origin, and is dangerous in itself. Thus, refugees may sometimes be uncertain about whether the country of asylum can be trusted or not. (Aliens are well aware that the immigration authorities in Japan are reluctant to admit refugees; in order to persuade the authorities, they need to have clear evidence and invest a lot of effort, time and money into translation of the relevant materials and other preparations.) Since they can be free from fear of being persecuted as long as they can stay in Japan without hindrance, it may be natural for them to hide about being a refugee and, when it becomes impossible to do so, seek for protection as a refugee, so to say, as a last resort. In the light of these realities, it should be considered that "unavoidable circumstances" had existed whenever refugees have not applied for refugee status as long as they could stay in Japan without hindrance. Except for cases where there are particular circumstances to show that a person does not deserve protection as a refugee, for example, due to abuse of the right to apply for refugee status, or where an application is manifestly unfounded even in the absence of considerations on its merits, it should be assumed that there had been "unavoidable circumstances" leading to the delay in submitting an application, irrespective of an applicant's knowledge about the refugee recognition system or of the time when he/she decided to apply for refugee status. This interpretation is consistent with the purposes of the Convention and the Protocol as well as the Immigration Act.

In the light of the purposes of the Convention and the Protocol as well as the Contracting Parties' obligations under them, whether there had been "unavoidable circumstances" in terms of the proviso of Article 61-2, para.2 should be determined on a case-by-case basis, even if an application was formally submitted after 60 days, taking into consideration a variety of factors, such as how long it took after the deadline to submit the application, why the application was delayed and whether the applicant falls within the definition of refugees, in a comprehensive manner. When a decision in this regard is significantly unreasonable, it should be regarded as unlawful by going beyond the permitted boundaries of the discretion.

(ii) Rebuttal to the defendants' arguments

The defendants regard the deadline for an application as a precondition which should be met before going into the examination of the application on its merits. They adopt a very restrictive interpretation of the term "unavoidable circumstances", limiting them to cases where an asylum-seeker could not present him/herself physically to the immigration authorities due to illness, disruption of the traffic and other objective circumstances or where there had been particular circumstances which had made it objectively difficult for an asylum-seeker to decide to apply for

refugee status in Japan. This is, according to the defendants: because it would be significantly difficult to understand the factual situations if an application for refugee status is submitted after a long period of time; because asylum-seekers should inform the authorities of their intention promptly; and because the period of 60 days is regarded as sufficient time to prepare for an application in the geographical and social context in Japan. However, those who have fled from persecution usually arrive at Japan only with a very limited amount of necessities, and thus make little sense to enforce the 60-days rule rigidly in terms of fact-finding. The defendants' argument, stating that a delay in the application itself shows that the applicant is not a refugee, is contrary to the empirical principle. Further, it is impossible to justify the abandonment of the examination of an application on its merits only on the basis of the physical environment of Japan. The defendants' interpretation is thus unreasonable, being incompatible with the Convention and the Protocol.

(iii) The circumstances of the plaintiff concerning his application for refugee status

Although the plaintiff was not granted any status of residence, he had stayed in Japan without trouble. He had no one to count on after the entry into Japan and hardly knew about the procedures concerning applications for refugee status, much less about the 60-days rule. It was therefore impossible to expect that the plaintiff would have applied for refugee status within 60 days after his entry into Japan. Since he had good reasons for not applying for refugee status within the prescribed period, there is no space for denying his refugee status on the basis of the delay. It should be considered that there had been "unavoidable circumstances" that led the applicant to have applied for refugee status after the period prescribed in the Immigration Act.

(The defendants' arguments)

The defendants dispute the plaintiff's arguments.

(i) The meaning of "unavoidable circumstances"

The reasons why the Immigration Act provides that an application for refugee status must be submitted within 60 days after the day the person landed in Japan (or the day he/she became aware of the fact that the circumstances in connection with which he may become a refugee arose while he is in Japan), are as follows. First, it would be significantly difficult to understand the factual situations if an application for refugee status is submitted after a long period of time had passed, since the incident which made the applicant a refugee happened, making it impossible to pursue the proper and fair recognition of refugees. Secondly, since asylum-seekers should inform the authorities of their intention promptly, the fact that they had not done so itself shows that they are not refugees. Thirdly, the period of 60 days are regarded as sufficient time to prepare for an application in the light of the geographical space of the country, the traffic and communication infrastructures and the geographical and social context in Japan, including locations of local immigration bureaus. Along these lines, the term "unavoidable circumstances" should be interpreted as referring to cases where an asylum-seeker, who had had the intention to apply for refugee status 60 days after the day he/she had landed in Japan (or the day he/she became aware of the fact that the circumstances in connection with which he may become a refugee arose while he is in Japan), could not present him/herself physically to the immigration authorities due to illness, disruption of the traffic and other objective circumstances or where there had been particular circumstances which had made it objectively difficult for him/her to decide to apply for refugee status in Japan.

(ii) Rebuttal to the plaintiff's arguments

If the term "unavoidable circumstances" is to be interpreted as the plaintiff argues, it is likely that some asylum-seekers are tolerated even if they have not applied for refugee status for a significant period of time. By permitting them a long period of grace, there would be greater risk that the relevant evidence is scattered and lost with the elapse of time; the collection of accurate information would be more difficult as a result of the confusion of memory of the asylum-seekers and others concerned. In addition, due to the rapid increase in applications for refugee status, in

particular since the latter 1980s, the issue of immigrants disguising as refugees have become serious at the global level, which makes it more and more necessary to prevent abuse of refugee recognition procedures. In this context, it is totally unacceptable to adopt a wide interpretation of the exception to the deadline for applications, which was introduced in order to prevent difficulties in the collection of accurate information as well as to deal with the issue of disguised refugees.

The plaintiff further argues that his stay without hindrance itself supports the existence of "unavoidable circumstances". This kind of unlimited interpretation cannot be adopted. In addition, the plaintiff illegally entered and stayed in Japan, without applying for alien registration; he had allegedly remitted the profits gained through unlawful employment outside Japan, without following the formal procedures; he was also involved in driving without a driver's license. The plaintiff had thus committed a lot of serious and vicious unlawful activities and, despite he had received a variety of protection and benefits in daily lives through the communities of Japan, there is no evidence that he had paid taxes which support such benefits. In terms of the national interests of Japan, his stay cannot be described as being "without hindrance" at all, compared to the one of ordinary good-natured people.

(iii) The circumstances of the plaintiff concerning his application for refugee status

First of all, the plaintiff had showed questionable behaviour, reporting to the NIB on 6 December 1999 and stating that he lost his job, and attempting to go back to his country. He had thereafter continued to stay in Japan unlawfully, without presenting himself to the investigation of violations as had been instructed by the NIB, due to fear of being arrested after going back to his country. He was then detained by the NIB on 22 November 2001, after which he applied for refugee status. As regards the reasons why he had submitted an application after the legal deadline, the plaintiff argues that he was arrested just after he had begun to collect materials with a view to applying for refugee status, soon after having heard about the procedures from an attorney in January or August 2001. On the other hand, he stated, "I came to know [about an application for refugee status] when I participated in a demonstration in Tokyo in 1998, when I talked with someone of the same Rohingya origin." During the deportation procedures in 2001, he changed his explanation about the reason why he had reported to the NIB in 1999, saying that it was to visit his sick mother. While a person who truly had fled from persecution and seeks for asylum should naturally apply for refugee status as soon as he came to know about the procedures, the plaintiff cannot be regarded as having tried to do so. In addition, the plaintiff only argues that he was not aware about the legal provisions, without presenting concrete facts that can be regarded as unavoidable circumstances. Thus there is no space to find unavoidable circumstances for his delay in submitting the application.

(3) On the Issue (1)(iii) (whether due process of law was ensured)

(The plaintiff's arguments)

(i) Unsuitability of the interpreter

In a refugee case like this, the authorities should have appointed an interpreter who had no interests in the government of Myanmar or prejudice against the nationality to which the plaintiff belongs. Nevertheless, the interpreter who served during the inquiry of facts for the plaintiff's refugee recognition was apparently a Myanmarese from the Rakhine nationality, who are critical of the Rohingya nationality; in fact he could not serve efficiently as an interpreter, for example, translating "the Rohingya nationality" simply as "citizen". Being distrustful of the interpreter, the plaintiff even intervened into the translation of the interpreter and made explanations to the inquirer in Japanese, thinking that it would be better to do so than relying on this kind of interpreter.

(ii) Preconditions of the refugee inquirer

In addition, the refugee inquirer in charge of the plaintiff (now working in the Osaka

Immigration Bureau) had preconditions against the plaintiff. The inquirer told the plaintiff that he could not hear everything because of limited time and that he would quote the statements the plaintiff had made so far. The inquirer deliberately excluded the story about the liberation movement at Sittwe Prison in his report, which the plaintiff had repeatedly mentioned as evidence that he was a refugee. It cannot be tolerated that a refugee inquirer prepares such an insufficient report on personal reasons.

Thus due process of law was breached during the inquiry of facts for refugee recognition.

(The defendants' arguments)

The defendants dispute the plaintiff's arguments.

(i) Suitability of the interpreter

The NIB routinely chooses a suitable person from the list of interpreters, prepared on the basis of the evaluation of abilities and characters, paying attention to their records of the past few years and the possibility of having interests with an applicant for refugee status. The person selected by the NIB will serve as an interpreter unless the applicant objects to the choice. During the inquiry of facts for possible recognition of the plaintiff as a refugee, there was no problem in terms of the interpreter's suitability and the plaintiff did not object to the choice. The plaintiff does not present clear grounds for his assumption that the interpreter was from the Rakhine origin; even if that was the case, it does not immediately mean that there were errors in the translation. In any case, if the plaintiff considered that there were problems in the interpreter's translation, he should have indicated it during the inquiry, given his capacity to speak Japanese to a significant degree, which he did not. Furthermore, the plaintiff listened to the content of the report prepared during the inquiry, which was read out in Burmese, and stated that there were no errors in it; he also said, "I understood yesterday's translation well." This should have not been the case if the plaintiff considered that there were problems in the interpreter's translation.

(ii) Validity of the hearing by the refugee inquirer

The inquirer did not tell the plaintiff that he could not hear everything because of limited time; on the contrary, he took sufficient time to hear the plaintiff. The inquirer did not tell the plaintiff that he would quote the statements the plaintiff had made so far, either; in fact, the plaintiff asked the inquirer to use the previous statements as evidence of his position as a refugee, stating that he would not like to be regarded as a liar as a result of possible inconsistencies, which might emerge if he would be asked about his background repeatedly. Moreover, when the inquirer quotes other statements in his report, it is indicated so in the report. As far as the story about the liberation movement at Sittwe Prison is concerned, the story was mentioned in the plaintiff's application, but was not included in the inquirer's report since the statement was not made in this regard during the inquiry and other procedures for refugee recognition.

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

(The plaintiff's arguments)

(i) Proof that the plaintiff is a refugee

Applicants for refugee status do not always depart the country of origin with information for corroboration. Therefore, with regard to the possibility of being persecuted in their country of origin, it should be ultimately determined on a case-by-case basis in accordance with credibility of their statements. Since such determination requires high-level capacities in terms of fact-finding and intercultural communication, those involved in the refugee recognition procedures must have adequate experience and discernment.

The plaintiff's statements concerning his position as a refugee are sufficiently credible, being concrete and consistent, although there are some confusion of memory or differences in articulation. If there are inconsistencies in the plaintiff's statements, the refugee inquirer should have asked for explanations in this regard, without which he cannot deny that the plaintiff is a

refugee simply on the basis of the inconsistencies.

(ii) General situation of Myanmar

(a) Political situation

Burma declared independence from the United Kingdom in 1948. In 1962, General Ne Win took full powers over the country through the military coup d'etat, after which the Burmese Socialist Program Party (BSPP) pursued one-party rule on the basis of its unique socialist ideology, using the military and intelligence agencies. Burma had suffered from extreme depression, however, being designated as one of the least developed countries (the so-called poorest countries) by the United Nations in 1987.

In March 1988, some students of the former Rangoon Institute of Technology (now Yangon Institute of Technology) started a resistance movement against the regime. The movement reached its peak in late August and early September 1988, transforming itself from the original "anti-Ne Win" strife into a struggle for democracy based on three pillars, namely the realization of a multi-party system, the establishment of human rights and the liberalization of economy. Some hundreds of thousands of people took part in demonstrations and assemblies every day in the capital of Rangoon (hereinafter referred to as "Yangon" when mention is made to incidents after 18 June 1989). Aung San Suu Kyi (hereinafter referred to as "Suu Kyi") came to the fore in August 1988 with the students' support. In 18 September 1988, however, the establishment of a military regime was declared, ruled by the State Law and Order Restoration Council (SLORC) composed of twenty high-ranking officers of the national army. Thereafter the national army, which had not come to the fore of the politics officially, began to exert full political powers.

While continuing to fire at demonstrators, the SLORC publicly promised to introduce a multi-party system and to hold a general election. When the multi-party general election of the People's Parliament was held on 27 May 1990, the National League for Democracy (NLD), led by Suu Kyi who served as Secretary-General of the party, swept the board by winning 392 seats, 81% of the 485 seats in total, compared to 10 seats won by the National Unity Party (NUP) which had been supported by the military regime. This result was achieved in spite of the overt interferences in their election campaigns, including the house arrest of Suu Kyi in accordance with the State Protection Law, which had been in force since July 1989. However, the SLORC did not recognize the result and had postponed the delegation of power indefinitely, without even calling the Parliament. In January 1993, the SLORC convened the National Constitutional Convention, which included only 99 Parliamentarians who had been elected in the prior election among 701 delegates. When all the 86 delegates who belonged to the NLD walked out of the Convention in November 1995 because of its undemocratic nature, the SLORC expelled them and has continued deliberations on the draft Constitution at length until present, while repeating a long period of adjournments.

While recognizing the NLD as a legitimate political party, the authorities have interrupted its daily political activities by closing a lot of its local offices without any explicit legal grounds, refusing to recognize the political status of Suu Kyi and other leaders of the party. Meanwhile, 34 people who had been involved in a major protest rally toward the end of 1996, 11 of whom were members of the NLD, were sentenced to imprisonment of 7 years at the minimum toward the end of January next year, on the ground that they were members of the nonexistent Burmese Communist Party. The SLORC also arrested other members of the NLD one after another. The Parliamentarians belonging to the party were threatened that their family members would be arrested or dismissed from the public sector permanently unless they resign, and more than 20 members were forced to resign. Other 7 members were arrested in this period, increasing the number of the Parliamentarians under imprisonment to 33 in total.

On 25 December 1996, a bomb exploded at the Kaba Aye Pagoda in Yangon and caused death of 5 persons and injuries of 17 persons, just before Lieutenant-General Tin U, Second Secretary of the SLORC and a military commander, was to visit there. In 7 April 1997, his daughter

was killed by a parcel bomb delivered to his home. The SLORC blamed armed opposition groups for these incidents, namely the All Burma Students Democratic Front (ABSDF) and the Karen National Union (KNU), and condemned the NLD as "overt subversive elements" who had contacted these groups. As far as the latter incident is concerned, the SLORC identified G.A, who would be recognized as a refugee in Japan later, as a perpetrator.

Since the military junta would not convene the Parliament, the NLD dared to convene the 10-member Committee Representing the People's Parliament (CRPP) on behalf of the government on 16 September 1998, declaring its legitimacy on the basis of the proxies obtained from the majority of the parliamentarians who had been elected in the general election. The military junta became even more oppressive against the NLD, however, taking a variety of measures such as: forcing the members to withdraw from the party; publishing defamatory articles and cartoons on the government newspaper; and having the Union Solidarity and Development Association (USDA), the cult of the military junta, adopt resolutions blaming the party and demanding Suu Kyi out of the country. Furthermore, the military junta prevented Suu Kyi from going out of Yangon, taking her back and confining her to her house three times. Due to the increasing pressure of the sanction imposed by the United States, she was finally released from house arrest on 6 May 2002. The progress in dialogue has not been made since then, however, and Suu Kyi was taken into custody by the military junta for the fourth time, as is well-known, just before the conclusion of oral hearings in the present case.

The defendants argue as if political persecution has disappeared in Myanmar because Suu Kyi has been freed from house arrest and restrictions on her movements. The character of the military junta, however, cannot be judged simply by the political changes in Yangon. What is important is its attitude toward minorities. The State Peace and Development Council (SPDC, the successor of the SLORC which changed its name on 15 November 1997) has severely oppressed and interfered with more than 20 ethnic minority political parties. The release of political prisoners, mentioned by the defendants, has been limited to the members of the NLD; students, priests, minority rights activists and member of other political parties have not been released at all, with more than 1,400 political prisoners still being in prison. Reports have made about disappearances of political activists under temporary arrest, torture and interference with family life; there is even a case in which a nun was imprisoned on the ground that she had posted placards. In addition, the judiciary is not independent from the administrative authorities and does not undertake fair and public hearings.

(b) Treatment of the Rohingya minority

The Kingdom of Arakan, a Buddhist country, had thrived in the Arakan region (now the Rakhine Province) in the south-west part of Burma. Muslims had flown into the region from the Bengal region (now Bangladesh) around the 15th century, and the two groups had coexisted peacefully even after the colonization by the United Kingdom in the 19th century. The nationalist movement by the Buddhist Burmese was elevated in the 20th century, which had led to independence of the country from the United Kingdom in 1948. The Muslims living in the Arakan region also elevated their political activities and, since early 1960s, the Muslim group who call themselves Rohingyas came into conflict with the Burmese government.

The government of Myanmar has called them "Rohinjas", in the absence of the sound "gya" in the Burmese language, and regarded them as a Muslim group who had historically moved from the Bengal region into the Arakan region at their own discretion. The government has not recognized their right to remain in the country, treating them as an anti-Myanmar group and illegal aliens who do not fall within any of the three categories under the Myanmar Citizenship Law, namely "citizen", "associate citizen" and "naturalized citizen". As a result, the Rohingyas were forced to avoid identifying themselves as such and to have pains in manipulating various papers so that they can be recognized as citizens under the names of other nationalities. Even if they

managed to become "citizens", they are not treated equally because of their Muslim belief. Prejudice and discriminatory feelings against Muslims, generally entrenched among Buddhist Burmese, actually prevent secured life of the Rohingyas, together with the denunciation against them by the government. The Rohingyas are persecuted as a group, being subjected to forced labour, deprived of the right to use land, charged with a variety of new taxes and only enjoying limited freedom of movements. Even when members of the Rohingya nationality are killed by the Myanmar Army, the police would not conduct investigations.

Because of these sufferings, some 250,000 or 300,000 Rohingya refugees fled from the Arakan region into Bangladesh from December 1991 to March 1992. With the mass influx of refugees into its territories, Bangladesh had often deported them back by force, despite the condemnation by the UNHCR and the international community. While arrangements were made to promote their return as a result of the negotiations among Myanmar, Bangladesh and the UNHCR, the progress has been slow due to the same situation of persecution on the part of Myanmar.

(iii) Specific circumstances of the plaintiff

(a) Political activities

As a student of a private school in Rangoon, the plaintiff started to take part in student movements for democracy since around 1988 and got acquainted with D, a high-ranking official of the NLD, and E who was arrested in July 1988 and disappeared thereafter. The plaintiff then joined political organizations in Rangoon and Akyab (also called Sittwe), Arakan Province, as well as the Muslim Student Association, a political organization of Muslim students.

When a national demonstration was organized on 8 August 1988, the plaintiff took part in it as a flagman of the group which departed from the Alothama ("Labour") Hospital. Although the authorities came to his house in the view of arresting him, he happened to escape from being arrested because he was not there. Just after he fled to Sittwe in order to avoid the risk, two Rohingyas and a student were burned to death at the Sittwe Prison. The plaintiff raided the house of the prison manager with his fellows, obtained the keys of the prison from him and freed Rohingyas and fellow students from the prison.

Some ten days after the incident, the plaintiff heard that the authorities had come to his parents' house and issued a warning. He also heard that two classmates of Rohingya origin had been arrested around 26 September 1988. Although he hid himself in his father's hometown to avoid the risk, he left the village when he received letters from his father, stating that his father and eldest brother had been beaten and investigated by the authorities. He crossed the border with Bangladesh around October the same year and went to a camp for Rohingya refugees, then to India and to Pakistan.

Since then the plaintiff had been involved in political activities in Bangkok, Thailand, and other places. Upon hearing the victory of the NLD in the general election in May 1990, he decided to return to the country with a view to supporting the democracy movement led by Suu Kyi, and with the assistance of his childhood friend, smuggled into Myanmar and arrived at Yangon around February 1991. After drifting from a relative's house to another, he had been involved secretly in the democracy movement, such as distributing leaflets, while helping his father and eldest brother in peddling. Meanwhile, he had obtained a passport through a broker in order to flee to another country in case of an emergency. When he was demanded by the military around April 1992 to submit identity papers and other documents describing his personal history, family relations and other matters, he felt that he might be arrested and, after consulting his friend, went to Bangkok, Thailand, by air in May 1992. He then arrived at Japan on 22 June 1992, as is indicated in Section 2: 1 (1).

Having arrived at Japan, the plaintiff attempted to contact the "Rohingya Group" in Japan. Since he could not, he came to Nagoya with a view to joining a political organization based in the city, which he had heard about from a Myanmarese who lived in Tokyo. He declined to join the

organization, however, because a Myanmarese whom he met demanded him to join the KNU, the guerrilla rebel group opposing to the Burmese Army. He managed to find a job in Nagoya after a lot of effort and started to live there. Meanwhile, he had contacted Rohingya political activists in Thailand and sent them JPY 30,000 or so every month. In the meantime, the plaintiff's father published an announcement renouncing his relationship with his son on a newspaper in the middle of 1994, in line with the local custom, because he and the plaintiff's brother-in-law had been assaulted and his house searched many times by the army on suspicion of contacting the plaintiff.

Since 1997, the plaintiff had taken part in a student volunteer association, which was composed of members of Rohingya and other groups who had been involved in anti-governmental activities in Myanmar and which would become the League for Democracy in Burma (LDB) later. Serving its Nagoya branch as the financial manager, the plaintiff had been involved in political activities against the government of Myanmar, including demonstrations in front of the Embassy of Myanmar in Japan. Meanwhile, around 6 November 2001, after the plaintiff was arrested on the charge of violations of the Immigration Act on 2 November 2001, which was before he applied for refugee status, letters were delivered via Thailand from his parents, who apparently did not know about their son's arrest. According to the letters, it is obvious that the authorities of Myanmar were aware about the political activities of the plaintiff in Japan and have persecuted his family members. The plaintiff's father was taken away by the army intelligence unit after the Christmas of the same year and did not come home until 3 January 2002, during which he was subjected to violence and broke his arm and ribs.

And now, both the plaintiff's passport and the stamp for its renewal therein had been forged. The defendants' argument that the plaintiff cannot be regarded as a refugee if he could have solved problems arising from discrimination by way of bribing, is totally unreasonable.

(b) Being of Rohingya origin

The plaintiff has a Rohingya name "F". His Rohingya origin is evident from the description in his certificate of citizenship which indicates "Nationality: Bengali/Rakhine", his capacity to speak the Rohingya language and affirmation by his childhood friend. Although the defendants argue that the plaintiff's mother is of Rakhine origin, the mother, her father and her grandfather are all of Rohingya origin, having Rohingya names, "G", "H" and "I" respectively. Due to his Rohingya origin, the plaintiff was fired three shots of the rifle close to his ears around 1984, for refusing a soldier's order to carry some packs, resulting in hearing disorder on the one ear.

The defendants suspect persecution against the plaintiff and his Rohingya origin, stating that his father was a soldier; that he could have been educated; and that his family had moved to Yangon. However, the plaintiff's father became a soldier because it was before the inauguration of Ne Win in 1962; although he continued to serve the military thereafter thanks to his educational background, capacity to speak English and skills in repairing vehicle, he retired in 1988 because he was subjected to violence on the ground of his participation in a demonstration. As far as education is concerned, the plaintiff could go to school because he did not reveal his Rohingya origin; in fact, he was not aware of his origin until the age of 11 years because he was born in Sittwe and had been raised under a Burmese name. In addition, his family members are being persecuted as a matter of fact; some relatives of the plaintiff were killed by Buddhists or injured by the army, and they are not permitted to move freely without permission. Thus the defendants' arguments in this regard have no basis.

(c) The plaintiff came to Japan not for the purpose of working (Rebuttal against the defendants' arguments)

The defendants argue that the plaintiff entered Japan with a view to working illegally, pointing out that he presented to the NIB on 6 December 1999 with a view to returning to his country due to the loss of job and that he had paid a significant amount of money to a passport broker before coming to Japan.

However, the had heard from his father in Thailand, around 23 November 1999, that his mother was in a hospital in Thailand because of the aggravated condition of her heart disease. With a view to going to Thailand, he called the NIB and then presented himself around 6 December 1999 in order to ask whether he could return to Myanmar via Thailand. Since he was told that the NIB would decide whether it would deport the plaintiff through Thailand or directly to Myanmar, he gave up the return on advise of his sister in Myanmar, who warned against it. It was because of the judgment of an immigration control officer of the NIB, who had heard the plaintiff in Japanese, that the motivation of his reporting to the NIB was recorded as the loss of job.

In addition, at the time when the plaintiff obtained a passport, it was possible even for anti-military junta activists to do so by bribing. It is naive to determine that the plaintiff came to Japan for the purpose to work because he had paid a significant amount of money to the passport broker. The money had been collected by his father on his credit. Further, one of the reasons why the plaintiff came to Japan was that he had good feelings toward Japanese because his father and brothers had been raised by Japanese after his grandparents had been killed by Buddhists.

(iv) Conclusion

In the light of these circumstances, the plaintiff is actually at risk of being arrested, imprisoned, tortured or made disappeared by the military junta upon returning to Myanmar. The plaintiff thus falls within the definition of refugees, to whom the Convention is applied under Article 1 A (2) of the Convention and Article 1 of the Protocol, who, "owing to well-founded fear of being persecuted for reasons of race, …membership of a particular social group or political opinion, is outside the country of his nationality and …owing to such fear, is unwilling to avail himself the protection of that country."

Although the defendants quote the fact that the plaintiff has not been recognized as a mandate refugee by the UNHCR against the plaintiff, it is completely irresponsible for them to do so.

(The defendants' arguments)

(i) The definitions of "refugees" and "persecution" as well as the burden of proof

(a) The definition of "refugees" and "persecution"

The "refugee" in terms of the Immigration Act means a person to whom the Convention is applied under Article 1 A (2) of the Convention and Article 1 of the Protocol. "Persecution" in terms of the definition means assault or oppression causing such sufferings as cannot be endured by an ordinary person, which is violation of or oppression against life or freedom of person. 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/she will be persecuted, but also objective elements that would make an ordinary person have fear of being persecuted when he/she was placed in the position of the former.

(b) The burden of proof on the part of the applicant

First of all, the recognition of refugee status should be based on specific circumstances of each applicant after the examination of credibility of his/her case. Since an application is an attempt by the applicant to be offered benefits for himself, the applicant is naturally in a position to be required to prove actively that he/she is a refugee. Article 61-2, para.1 of the Immigration Act, which provides that the Minister of Justice may recognize an applicant as a refugee based on the data submitted, is no more than the expression of a general principle of law, i.e., those who attempt to be offered certain benefits should prove their eligibility by themselves.

Also in view of the provision in Article 61-2-3, para.1 of the Immigration Act, in Japan, an applicant for refugee status is required to submit sufficient materials to show that he/she has well-grounded fear of being persecuted, which is confirmed by the proviso of Article 31, para.1 of the Convention. Practically speaking, since the incidents that is utilized in assessing him as refugee, happened abroad and in a covert manner in many cases, the applicant is in the best position, having

experienced the incidents personally, to explain whether and how these incidents have actually happened. On the other hand, it is difficult for the Minister of Justice to collect materials on these facts. Thus Article 61-2, para.1 of the Immigration Act is reasonable in that it puts the burden of proof on the applicant.

(ii) General situation of Myanmar

(a) Political situation

Among the plaintiff's arguments presented in (ii)(a) above, the defendants agree with regard to the following facts: that Burma declared independence from the United Kingdom in 1948; that the socialist regime was established in 1962 in Burma; that the army organized the SLORC and came into power in 1988; that a general election for the parliament was held in 1990 and the NLD, led by Suu Kyi, swept the board; that the government of Myanmar has not delegated the power on the ground that a solid Constitution is necessary for civil government; that the government took Suu Kyi under house arrest on the charge of violations of the State Protection Law; and that the restrictions on Suu Kyi's activities were lifted in May 2002.

The government of Myanmar had kept Suu Kyi under house arrest between 1989 and 1995 and, in September 2000, took her and others virtually under house arrest again. Since October 2000, however, the direct talks between the military junta and Suu Kyi started. The government had released some 170 political prisoners by October 2001 and permitted the NLD to reopen its branches in nine locations. In May 2002, the government lifted the restrictions on Suu Kyi's activities and permitted freedom of all activities, including political activities.

(b) Treatment of the Rohingyas

Among the plaintiff's arguments presented in (ii)(b) above, the defendants agree with regard to the following facts: that many Muslims moved to the present Rakhine Province in the south west part of Myanmar, which under British territory at the time, and their descendants are called Rohingyas; that the Rohingyas are an ethnic group who believe in Islam in Myanmar; that they were not recognized by the government of independent Burma as one of the nationalities in the country; that, because of the restrictions on their freedom of movement, they have been subjected to social discrimination and had great difficulties in receiving basic social, educational and health services; in March 1978, as a result of the major survey of the residents undertaken by the socialist regime, aiming at the exclusion of illegal immigrants near the border, 225,000 Rohingyas fled to Bangladesh, fearing the penalties; and that refugees flowed in Bangladesh again around March 1991, with more than 250,000 such refugees in the country temporarily. The defendants are unaware of the other facts presented by the plaintiff.

After the mass influx, many Rohingya refugees returned to Myanmar as a result of the support of the international community and cooperation of the UNHCR. As of September 2001, the Rohingyas who still remain in Bangladesh were reduced to 21,600 in numbers, and an important challenge is assistance for resettlement of these returnees. Although it is true that it has been extremely difficult for the Rohingyas to acquire citizenship even under the new nationality law (Burma Citizenship Law) of 1982, it does not mean that all the Rohingyas have not been able to acquire citizenship. As of the year 2000, the UNHCR has been involved in the exchange of opinions with the government of Myanmar concerning the resolution of the citizenship issue for the Rohingyas. The UNHCR, however, admits that the Rohingyas who are outside of the country fall within neither the definition of "refugees" under the Convention or the Protocol nor what is called "mandate refugees", who are recognized as such as "persons of concern to the High Commissioner" on the basis of the mandates provided in the Statute of the UNHCR, which applies to broader categories of people who are placed in refugee-like situations, reflecting the resolutions adopted by the UN General Assembly and Economic and Social Council.

On the basis of the above facts, it is very suspicious whether it can be said, as regards the present case, that the Rohingyas are truly under persecution.

(iii) Specific circumstances of the plaintiff

(a) The plaintiff's political activities

The defendants are unaware of the facts presented by the plaintiff in (iii)(a) above.

The plaintiff argues that he was picked on by the authorities because he had taken part in a major anti-government demonstration in Rangoon on 8 August 1988. It is hard to believe, however, the very fact that the plaintiff had taken part in the demonstration. Indeed, he returned to Myanmar in 1991 after he had left to Pakistan via Bangladesh and India in 1988. In addition, the plaintiff had obtained a legitimate passport issued by the government of Myanmar. In this regard, the plaintiff at first stated that he could do so through the connection of his father and the power of money; at the trial, however, he stated that it was thanks to the bribe offered to a broker. His explanation has thus gone through a major change in an unnatural way without reasonable grounds. In any case, the plaintiff cannot be regarded as a refugee if he could have solved problems arising from discrimination by way of bribing. Further, the plaintiff obtained a driver's license in Myanmar between August and October 1991; he was reissued the license by the Transportation Administration Bureau in 1993, when he was in Japan; and he had renewed his passport at the Embassy of Myanmar in Tokyo between 1995 and 1999. These facts show that the plaintiff is protected, rather than persecuted, by the government of Myanmar; it is hard to believe that he is pursued after by the government.

Next, the plaintiff argues that he took part in a students' movement and freed seven or eight Bangladeshis from the Sittwe Prison in September 1988. However, the plaintiff did not tell the NIB about this movement, which is the most concrete and important fact among his political activities in Myanmar. It is also unreasonable that the prison director had given him the keys. Accordingly it is strongly assumed that the plaintiff had not taken part in such a movement. Even if the plaintiff indeed began to be pursued later by the police because of this movement, it is reasonable to consider it as part of the normal criminal procedures against a serious crime, which is assault on a prison in this case. It is thus impossible to say that the plaintiff had been persecuted on the ground of his political opinion on the basis of the fact that he is pursued by the police.

Finally, the plaintiff argues that he received letters from his family, stating that the government of Myanmar is already aware of his anti-government activities in Japan and telling him not to return until the military junta is overthrown. However, in spite of his knowledge of the activities of the Rohingya Group in Japan, the plaintiff moved from Tokyo to Nagoya, where he had no connection, and had allegedly involved in political activities with a entirely different group, simply because he could not contact the representative of the Rohingya Group when he called him to the number he had learned in Thailand. The plaintiff does not appear to have had contact with the Rohingya Group since then. While the plaintiff argues that he had sent JPY 30,000 or so, which had been earned through unlawful employment, to Rohingya political activists in Thailand every month, he did not furnish any corroboration in this regard. On the basis of these facts, it is doubtful that the plaintiff had been actually involved in political activities against the government of Myanmar for the restoration of the Rohingyas' rights. As far as the letters from his family are concerned, the postmark and the address on the envelope are questionable; it is assumed that the letters had not been sent from his family in Myanmar but forged by the plaintiff or his acquaintance in Japan in line with his arguments. Thus the plaintiff's arguments are not credible in this regard.

(b) The plaintiff's national origin

The defendants are unaware of the facts presented by the plaintiff in (iii)(b) above.

The plaintiff argues that one can easily identify whether someone is a Rohingya or not by appearance in Myanmar. On the other hand, he also states that he cannot give detailed explanation about the customs of the Rohingyas, which causes doubt as regards his identity as a Rohingya.

As regards to citizenship, Article 2 of the Burma Citizenship Law provides for three categories of persons with Burmese nationality, namely "citizen", "associate citizen" and

"naturalized citizen." Article 3 of the Law recognizes the Rakhine as citizens who have full-fledged rights in the country and Article 7 provides that persons of parents, one of whom is a "citizen" and the other an "associate citizen" or "naturalized citizen", are also "citizens." The description in the plaintiff's certificate of citizenship, "Nationality: Bengali/Rakhine", is reasonably understood as showing that his parents are of Bengali and Rakhine origin. As long as his mother is a "citizen", the plaintiff is also regarded as enjoying treatment as a full-fledged "citizen." This is also clear from the Myanmarese "nain", which is written on the upper right of his certificate of citizenship, proving that the bearer of the certificate is a citizen of Myanmar.

As regards the plaintiff's argument that his father was a soldier, it is obviously in contradiction to his case that he had been persecuted by the government of Myanmar because, given the nature of the army which is itself the national authority, its soldiers should naturally be citizens of the country; it is inconceivable that nationals who are likely to be persecuted by the government are recruited into the army. In addition, since the plaintiff's father had been permitted by his superior Captain J to run a rice polishing factory, he should be regarded as having enjoyed protection, by virtue of being permitted to become self-employed, rather than having been persecuted. The plaintiff further argues that, around 1984, he was fired three shots of the rifle close to his ears by a soldier because of his Rohingya origin. Even if the soldier did shoot, it is reasonable to consider that the soldier did so for threatening, being upset by the plaintiff's refusal to carry some packs.

The plaintiff further argues that the Rohingyas are deprived of opportunities for education and that being denied the right of residence, they are not authorized to live in Yangon. On the other hand, the plaintiff states that he received education in a five-grade elementary school and a five-grade secondary school in an army base, located in Sittwe, Rakhine Province, and that he was enrolled in the Sixth School in Akyab, being promoted until the eighth grade. In addition, all of his family members had moved to Yangon and continue to live there, no one of whom having left Myanmar on the ground of persecution. They are rather privileged in Myanmar and had not need to receive money from the plaintiff who had worked illegally in Japan. It is inconceivable that only the plaintiff had been persecuted because of his Rohingya origin. Although the plaintiff argues that one of his relatives was injured by the army, it is more than 20 years ago and is impossible to confirm. Even if it is true, it is not clear whether it was caused as part of persecution or as a result of personal violence as well as what kind of injuries were caused and how serious they were.

Therefore it is impossible to believe the plaintiff's arguments that he was not treated as a citizen in Myanmar and that he had been persecuted. In addition, serious doubt remains as regards his identity as a Rohingya; thus the plaintiff cannot be regarded as having fear of being persecuted by the government of Myanmar because of his Rohingya origin.

(c) The plaintiff came to Japan for the purpose of working

The plaintiff states that he went to Thailand after leaving Myanmar for the second time and that he paid $4,500 or $6,000 in order to obtain a forged passport to go to Japan. This amount is, however, so large that it is twenty times as much as per capita GNP in Myanmar in 1997, which cannot be provided by an ordinary citizen of Myanmar, much less by the plaintiff's father who allegedly lives under discrimination and persecution. It is thus reasonable to consider that the plaintiff asked for a broker to arrange his entry into Japan for the purpose of working. This is also consistent with the plaintiff's statement on 6 December 1999, when he presented himself to the NIB as an illegal immigrant, that he wanted to return to Myanmar because lost his job due to a bankruptcy of the company in which he had been employed.

Empirically speaking, there are very many cases in which aliens, having entered Japan illegally and earned money through illegal work, present themselves to local immigration bureaus and return to their countries. In addition, the plaintiff did not report to the NIB again in spite of the latter's request, continuing to work unlawfully in Japan for nearly two years. Given these facts, the

plaintiff can reasonably be regarded not as a refugee in terms of the international instruments but as an illegal immigrant, who migrates for better life by unlawful means.

The plaintiff also states that he came to Japan because his father and brothers had been raised by Japanese. It cannot be the case, however, because aliens were allegedly prohibited from entering the areas where the Rohingyas live. Even if that is true, and if his family members are actually persecuted by the government of Myanmar, they should also come to Japan; however, the plaintiff is the only person in the family who came to Japan.

(iv) Conclusion

The defendants dispute the plaintiff's arguments presented in (iv) above.

As was stated in (i) of the defendants' arguments, an applicant for refugee status has the burden of proof as regards his/her eligibility. In this regard, the plaintiff's statements lack compatibility with the actual situations as well as consistency, as was pointed out by (ii) and (iii) of the defendants' arguments. Further, the plaintiff had entered Bangladesh, India, Pakistan, Thailand, Hong Kong and Taiwan before arriving to Japan, without applying for refugee status in these territories. He did so only when he was detained by the NIB, after having worked unlawfully for more than nine years in Japan. Thus his arguments with regard to persecution by the government of Myanmar are not credible, in the absence of any materials substantiating the arguments. Therefore, since it cannot be admitted at all that the plaintiff has well-grounded fear of being persecuted upon his return to the country, he cannot be recognized as a refugee.

Also, the plaintiff apparently applied for refugee status to the UNHCR after being detained by the NIB. However, he has not stated that he had been recognized as a mandate refugee, which proves that there will be no risk of humanitarian problems when he would be deported to his country of origin.

(5) On the Issue (2) (Whether the Minister's decision to dismiss the plaintiff's objection was appropriate)

(The plaintiff's arguments)

As has been stated, the plaintiff is a refugee. Refusal by the Minister to grant the plaintiff special permission to stay, without determining whether he is a refugee or not, is abuse of or deviation from his discretion, and is thus unlawful.

In addition, the date of an oral hearing by the Special Inquiry Officer of the NIB, which was held before the Minister's decision, was notified only two days before the hearing. Further, the plaintiff could not understand adequately about his procedural guarantees, including that he could request the attendance of his representative and change the date, because they were explained in Japanese; he was virtually deprived of the opportunity to be represented. Thus the Minister's decision was taken in violation of due process of law, which makes it illegitimate. Although the defendants argue that the plaintiff had sufficient capacity to speak Japanese, naturally it was required to provide an interpreter in his mother tongue even if the plaintiff could speak some Japanese.

(The defendants' arguments)

The defendants dispute the plaintiff's arguments.

Under international customary law, a state is not obliged to accept aliens. Also under the Constitution of Japan, aliens do not have the right to enter Japan freely, much less the rights to stay in Japan or to demand permission to stay. This also applies to decisions about the extension of the period of stay for aliens who lawfully stay in Japan, which fall within the discretion of the Minister of Justice who will determine whether there are "reasonable" grounds for the extension in accordance with Article 21, para.3 of the Immigration Act.

In particular, special permission to stay is no more than a privilege, which can be offered to aliens who have legal grounds for deportation. The right to request such permission is not

recognized, and specific requirements for such permission are not provided for in Article 50, para.1 (3). In addition, special permission to stay comes under the discretion of effect, under which the Minister of Justice determines "whether or not to grant" such permission. The Immigration Act leaves such decisions to the discretion of the Minister because, in order to take proper decisions on the issue, various and expert knowledge as well as political considerations are required. Appropriate results cannot be expected in these cases unless decisions are left to the discretion of someone who is familiar with the situations in and outside the country and who always supervises the immigration control. Given these considerations, the Minister's discretion with regard to special permission to stay should be understood as much broader in qualitative terms than the one with regard to the extension of the period of stay.

Therefore, even if the Minister's decisions with regard to special permission to stay are disputed in some cases, it is difficult to imagine a case in which his decision is judged unlawful. While there may be an exception, it is limited to cases that involve extremely special circumstances, such as obvious incompatibility with the objects of the Immigration Act which provides for the system of special permission to stay. In order to fall under such extremely special circumstances, an alien must have positive reasons to be granted permission to stay in spite of his/her status as an illegal immigrant who is to be deported in accordance with law. Only when such extremely special circumstances exist, refusal to grant special permission to stay may be judged unlawful in some cases.

In this regard, the plaintiff argues that it is abuse of or deviation from the discretion not to grant special permission to stay to the plaintiff who is a refugee. However, the procedures to file an objection against dismissal of an application for refugee status are completely separate from and independent of the deportation procedures. Even if the plaintiff is a refugee as a matter of fact, this does not mean that he is acquitted of the unlawful acts constituting the grounds for deportation. Under Article 61-2-8 of the Immigration Act, the authorities are required to proceed with deportation, even if the subject has been recognized as a refugee, whenever there are grounds prescribed under Article 24, para.1 of the Immigration Act. In sum, an application for refugee status or its recognition does not necessarily have the immediate effect of suspending the deportation procedures; it is no more than one of the factors that would be taken into consideration by the Minister of Justice when he/she determines whether or not to grant special permission to stay.

In this regard, the plaintiff had illegally entered Japan with the passport with someone else's name, which constitutes a ground for deportation under Article 24, para.1 of the Immigration Act. In addition, as has been stated, he cannot be regarded as a refugee. He had also been involved in a lot of illegal acts. For example, he is totally unaware of the fact that his assault on a prison in his country of origin constitutes crime. He repeated unlawful departure and entry when he went abroad for the first time; he also stated that he had had no feeling of guilt with regard to the entry into Japan with a forged passport. Further, a doctor who examined the plaintiff, when he was detained in the West Japan Immigration Control Center of the Ministry of Justice, reported that his behavior was a kind of deliberate intimidation of a vicious nature. On the basis of these findings, the plaintiff should be regarded as a person who is not law-abiding and who takes any necessary measures to realize his desire. Since he has shown behavior apparently of a false nature many times, there is no positive reason to grant him permission to stay.

Thus the Minister took the decision at issue without granting special permission to stay, considering that there were no special circumstances under which the plaintiff should be permitted to stay in Japan. There is no space to find abuse of or deviation from the discretion in the Minister's decision.

Meanwhile, the plaintiff is so competent in Japanese that he had translated the statement of his acquaintance, who was considered to have significant capacity of Japanese, into Japanese by

himself. In addition, the special inquiry officer of the NIB explained the procedures to him in plain Japanese.

(5) On the Issue (2) (Whether the Supervising Immigration Inspector's order to deport the plaintiff was appropriate)

(The plaintiff's arguments)

The Supervising Immigration Inspector issued the written deportation order when it was not yet determined whether the plaintiff was a refugee or not. This is totally unacceptable, in the light of the irretrievable damage that deportation would cause to the plaintiff who is a refugee.

(The defendant's arguments)

The defendant disputes the plaintiff's arguments.

When an alien suspected of having 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 (Articles 47, para.4, 48, para.8 and 49, para.5). The Supervising Immigration Inspector has no discretion with regard to the issuance of a written deportation order. In addition, the Supervising Immigration Inspector did not made an inappropriate decision with regard to the destination in the present case. Thus the issuance of the deportation order by the Supervising Immigration Inspector was legitimate.

Section 3: Judgments of the Court

1. Whether the 60-days rule is constitutional or not

(1) The issues at stake

According to (1) and (3) in the Relevant Facts, the application for refugee status in the present case was submitted on 20 November 2001, running well beyond 60 days after the plaintiff had landed on 22 June 1992, which is in violation of Article 61-2, para.2 (60-days rule). (It is obviously not the case, even according to the plaintiff, that "the circumstances in connection with which he may become a refugee arose while he is in Japan".) Therefore the Court determines, first of all, whether the provision is compatible with international law as well as Articles 98, para.2 and 31 of the Constitution.

(2) The concept of "refugees"

According to the Convention and the Protocol, the term "refugee" means, in addition to those who are mentioned in Article 1, A (1) of the Convention, a person who, "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" or stateless persons who are in a similar situation (Article 1, A (2) of the Convention and Article 1, para.2 of the Protocol). On the other hand, Article 2 (3)-2 of the Immigration Act makes it clear that the "refugee" for the purpose of the Act refers to refugees in terms of the Convention and the Protocol, making the concept of "refugees" harmonized with the international instruments.

Logically, when the Contracting Parties to these instruments are to treat someone as a refugee, they should determine that the person is indeed a refugee in terms of the above definitions in the first instance. Therefore, it is obviously necessary to establish some kind of procedures for such recognition. On the other hand, the Convention and the Protocol do not have any provisions with regard to such recognition procedures, while having detailed provisions concerning the substantial requirements for being recognized as a refugee. This is because it was considered

reasonable that the Contracting Parties establish their own procedures and requirements in the context of their specific situations in the exercise of their sovereign power, since even refugees are not granted the right to unconditional asylum (in other words, there is no international agreement among the Contracting Parties that they have obligations to grant unconditional asylum to refugees), as is expressed in the preamble of the Convention which states that "the grant of asylum may place unduly heavy burdens on certain countries." The Convention itself provides for different degrees of protection to refugees, depending on whether their stay and residence is legitimate or not as well as other factors; this is because, on the basis of the common understanding in the international community that it is generally not permitted to enter and stay in foreign countries unlawfully, it is considered reasonable to require refugees to observe these norms (see Article 2 of the Convention). Therefore, it is observed that the Convention and the Protocol expect that the Contracting Parties may determine, when an application for refugee status was submitted by a refugee in terms of the international instruments, that his/her stay or other status is unlawful due to his/her failure of meeting the procedural requirements. Thus it is basically left to the legislative discretion of the concerned Contracting Party as regards to what kind of procedures it would establish. Therefore, even if Japan has different procedures from other states, it is not immediately deemed as incompatible with international law, including the Convention and the Protocol, as well as Article 98, para.2 of the Constitution.

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

Whether the refugee recognition procedures disregard the objects of the Convention and the Protocol should be determined on the basis of comprehensive considerations on the effects of refugee recognition and the rigidity of the procedures. Thus the Court will examine whether the 60-days rule, a unique feature of the refugee recognition procedures in Japan, is constitutional or not.

(3) The provisions of the Convention and the Protocol as well as the Immigration Act concerning refugee recognition

The 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 recognition procedures and other related issues (Article 18-2, Chapter 7-2 (Article 61-2 and thereafter) and Article 70-2). Specifically, Articles 61-2 and 61-2-4 provide for the procedures for refugee recognition and objection. And as regards to those who have been recognized refugees, Articles 61-2-6 and 61-2-7 provide for the procedures for the issuance of a refugee travel document as well as for the restoration of a

certificate of refugee status and a refugee travel document; Articles 61-2-5 and 61-2-8 provides that refugee status shall be a special consideration for the Minister of Justice in granting permanent residence permit and special permission to stay; Article 18-2 provides for permission for landing for temporary refuge; and Article 70-2 provides for the exemption of penalty in certain offences committed by refugees.

(4) The definition of refugee recognition

When we compare the provisions of the Immigration Act with those in the Convention and the Protocol, 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 Convention, which is to be issued to "refugees lawfully staying in their territory." This understanding is collaborated by the exception clauses in the proviso of Article 61-2-6, para.1 as well as para.7 in the same article, providing that the Minister of Justice may refuse to issue, or order the restoration of, a refugee travel document if he/she "finds that there is a possibility of the person committing acts detrimental to the interests and security of Japan", which corresponds to the grounds for not issuing travel documents, which are "compelling reasons of national security or public order", contained in Article 28 of the Convention. On the other hand, Article 70-2 of the Immigration Act provides that a person who has committed such offenses as illegal entry, landing, stay and residence 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 clearly corresponds to Article 31, para.1 of the 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".

In line with Article 31, para.1 of the Convention, Article 70-2 of the Immigration Act simply treats refugee status as one of the grounds for the exemption; on the other hand, Article 61-2-6 of the Immigration Act requires that a person should have been recognized as a refugee. This is understood as an attempt to ensure harmonization with the Article 28 of the Convention, which, unlike Article 31, para.1, restricts the right to be issued travel documents to "refugees lawfully staying in their territory." In addition, a person who has been issued the refugee travel document may enter and depart from Japan within the term of validity without re-entry permission (Article 61-2-6, para.6 of the Immigration Act); Articles 61-2-5 and 61-2-8 of the Immigration Act 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 recognition procedures under the Immigration Act are nothing but the procedures to enable refugees in terms of the Convention and the Protocol to stay in Japan lawfully. Even if a person has not been recognized as a refugee, he/she would not be deprived of protection other than the right to lawfully stay in Japan. In this sense, the refugee recognition procedures do not determine that an alien is not "refugee" in substantial terms.

The plaintiff argues, in this regard, that refugee recognition is based on what is called "the centralized recognition system" under the Immigration Act. As was stated in (3) above, however, in spite of the evident fact that Chapter 7-2 and other provisions concerning refugees were introduced in the Immigration Act and came into force on the opportunity of the entry into force of the Convention and the Protocol, there are no other provisions in the Immigration Act corresponding to the protective measures for refugees provided in Articles 7 or 34 of the Convention. In the light of this legislative process, the Immigration Act is to ensure these protective measures by the administration of the systems which had been in place before the introduction of the new provisions. Therefore, while the plaintiff's arguments may have meanings as an indication of the practical problem or as a legislative argument, they cannot be sustained as an interpretation of law.

(5) The definition of the 60-days rule

The Court goes on to examine Article 61-2, para.2, which provides for specific procedures for refugee recognition in Japan. The paragraph requires a refugee, whether or not he/she landed or has stayed in Japan lawfully or unlawfully, to submit an application for refugee status within 60 days after the day he landed in Japan or the day he became aware of the fact that the circumstances in connection with which he/she may become a refugee arose while he/she is in Japan. As was stated before, a refugee means a person who has " well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." If a person is indeed a refugee, he/she would, in many cases, seek for asylum promptly in order to flee from the fear. As regards to refugees who landed and have stayed in Japan unlawfully, in particular, it should not be regarded as too rigid to require them to report their status as refugees within a specified period, with a view to regularizing the unlawful situation (see Article 2 of the Convention.) In the light of the time which is generally regarded as necessary for the preparation of such reports, and given the well-established infrastructures for communication and transportation in Japan, the period of 60 days cannot be regarded as unreasonably short.

In addition, the proviso of the said provision permits exceptions to this deadline when there are "unavoidable circumstances" for the failure to be bound by the deadline. Therefore, as will be stated below, even an application submitted after the period of 60 days can be subject to the examination on its merits when there are objective and specific circumstances which make it impossible to expect the observance of this rule.

As a result, the 60-days rule cannot be regarded as imposing virtually impossible conditions on an asylum-seeker.

(6) Conclusion: The constitutionality of the 60-days rule

As was stated above, the refugee recognition procedures in Japan are the procedures to enable refugees in terms of the Convention and the Protocol to stay in Japan lawfully; even if a person has not been recognized as a refugee, the procedures do not determine that he/she is not a "refugee" in substantial terms. And the procedural requirements therein do not impose virtually impossible conditions on an applicant. In addition, paragraph (i) of the Conclusion No.15 of the UNHCR Executive Committee states, "While asylum-seekers may be required to submit their asylum request within a certain time limit, failure to do so, or the non-fulfillment of other formal requirements, should not lead to an asylum request being excluded from consideration." On the basis of these findings, the 60-days rule cannot be regarded as disregarding the objects of the Convention and the Protocol, and consequently as incompatible with international law and Article 98, para.2 of the Constitution, apart from legislative arguments.

The plaintiff also argues that the 60-days rule is incompatible with Article 31 of the Constitution. Although the article may apply not only to criminal procedures but also to administrative procedures mutatis mutandis, it is natural to consider that it only applies to adverse dispositions (see Article 2 (4) of the Administrative Procedure Act.) Refugee recognition, which is the issue in the present case, does not fall within this category. Also, in substantial terms, it cannot be said that the 60-days rule provides for an unreasonably short period for applications that is contrary to Article 31 of the Constitution.

2. Whether the Minister's decision not to recognize the plaintiff as a refugee was appropriate

(1) The definition of "unavoidable circumstances"

The Court first examines the meaning of the term "unavoidable circumstances" under the proviso of Article 61-2, para.2. In the light of the meaning of refugee recognition, the object of the

60-days rule and its ordinary meaning as a legal term, it is reasonably interpreted as referring to: cases where there had been objective and specific circumstances which made it unreasonable to expect that an asylum-seeker applies for refugee status within the prescribed period, specifically, when an asylum-seeker could not physically do so due to illness, disruption of the traffic due to disasters and other factors. Cases where a person is eligible for legal stay in Japan and has no motivations to apply for refugee status, or cases where there had been particular circumstances which had made it objectively difficult for an asylum-seeker to decide to apply for refugee status in Japan, for example, when the application is likely to jeopardize the applicant's family members are also included. In these cases, if an asylum-seeker applies for refugee status within a reasonable period after these obstacles were eliminated, it should be considered that "unavoidable circumstances" in terms of the provision, had existed.

The plaintiff argues, in this regard, that it should be considered that "unavoidable circumstances" had existed whenever refugees have not applied for refugee status as long as they could stay in Japan without hindrance, unless there are special circumstances. If aliens lawfully stay in Japan without hindrance, it would be difficult to expect them to be motivated to apply for refugee status. If they are in an illegal situation, however, it is reasonable for Japan, a sovereign state, to require them to regularize their situation within a specified period, in the light of the common understanding among the international community that it is generally not permitted to enter and stay in foreign countries illegally. The aliens should also make efforts to regularize their unlawful situation. Thus the plaintiff's arguments in this regard cannot be sustained.

(2) Whether there had been "unavoidable circumstances" in the present case

Now the Court examines the application of the above findings to the present case. According to (1) and (3) in the Relevant Facts, the plaintiff had landed on Japan unlawfully with a passport under someone else's name and has stayed unlawfully in Japan for more than nine years without applying for any category of status of residence. Clearly, there have not been physical obstacles to such an application, including illness or disruption of the traffic for this length of period.

In addition, according to the relevant evidence, the plaintiff was well aware of the fact that he had landed on Japan illegally with a passport under someone else's name. Further, the plaintiff had been in close connection with members of a student volunteer group in Nagoya since around 1997 and, around 1998 at the latest, began to take part in demonstrations and other activities. By October 2000, he had been involved in overt political activities as a member of the Study Group for Democracy and Development (SGDD) and LDB Nagoya, which stood against the government of Myanmar. Even if it is true, as will be stated below, that the plaintiff's father was forced to publish an announcement of renouncing the relationship with the plaintiff on a newspaper because he and the plaintiff's brother-in-law had been assaulted on suspicion of contacting his son, it is difficult to consider that the plaintiff's application for refugee status would jeopardize his family members, since he had already been involved in overt political activities. Therefore, in the present case where an application for refugee status had not been submitted within a reasonable period of time after the beginning of the plaintiff's political activities, it cannot be considered that there had been "unavoidable circumstances" in terms of the proviso of Article 61-2, para.2.

(3) Whether the Minister's decision not to recognize the plaintiff as a refugee was appropriate

In conclusion, irrespective of the existence of procedural failures indicated by the plaintiff, the Minister's decision not to recognize the plaintiff as a refugee, on the ground that "the application was submitted after the deadline prescribed in Article 61-2, para.2, and the proviso in the provision does not apply to the delay in the submission in the present case", should be regarded as legitimate.

3. Whether the Minister's decision to dismiss the plaintiff's objection was appropriate

(1) The issues at stake

Next, the Court examines the legal position of the plaintiff's arguments that, given the plaintiff's status as a refugee, the refusal by the Minister to grant the plaintiff special permission to stay without determining whether he is a refugee or not is abuse of or deviation from his discretion.

As has been stated, even if a person has not been recognized as a refugee in the application of the 60-days rule, it does not mean that he/she is confirmed as not being a "refugee" in substantial terms; it has only been found that he/she has no status of residence in Japan. And when the person is a "refugee" in terms of the Convention and the Protocol, he/she should be protected, even if he/she stays or resides in Japan illegally, by what is called the principle of non-refoulement, provided in Article 33, para.1 of the Convention, which states, "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." 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 are no appropriate countries as a destination. This kind of decisions can most properly be 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/her discretion, thus illegal, unless there are special circumstances.

In this regard, whether the plaintiff is a refugee in terms of the Convention and the Protocol or not is likely to influence the legality of the Minister's decision. Thus the Court goes on to examine this issue.

(2) The burden of proof on the status as a refugee

Generally speaking, it is appropriate to establish the burden of proof in different ways in accordance with the nature of the disposition at issue in an appeal trial. As a rule, when what is called an "intrusive disposition", which restricts someone's freedom or imposes duties on someone,

is concerned, an administrative authority which has made the disposition should bear the burden of its legality. On the other hand, when what is called a "beneficial disposition", in which someone is to gain privileges or special rights or to be freed from legal duties, the plaintiff should prove that he/she meets the requirements under the concerned legislation (that the dismissal of his/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.

Special permission to stay under Article 50 of the Immigration Act is in itself, permission to stay in Japan, granted by the exercise of the special discretion of the Minister of Justice, to an alien who does not have the inherent right to do so (See the Supreme Court judgment of 4 October 1988) and who have the grounds for deportation under Article 24 of the Immigration Act. In addition, the incidents on the basis of which someone is regarded as a refugee usually happen within his/her living area. Thus it is reasonable to understand that the alleged refugee has the burden of proof as far as his/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 corporation 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 have faded 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.

(3) The facts concerning the situation in Myanmar

On the basis of the facts on the political situation in Myanmar and the treatment of the Rohingyas as well as the relevant evidence and statements, the following facts have been established with regard to the history and social situation of Myanmar.

(i) The colonization and independence

Previously Burma had been divided by Tibetan Burmese ethnic groups who had come southward from the Tibet. In the 11th century, the Burmese unified the country and established the Khaghan dynasty.

In 1886, Burma was incorporated in India under British rule and was enlightened by parliamentary democracy as a colonial territory of the United Kingdom. General Aung San's provisional regime, established after the World War II while still under British rule, also pursued parliamentary democracy. Although General Aung san was assassinated with his aides on 19 July 1947, his successor, Prime Minister U Nu, declared independence from the United Kingdom in 1948. Although he was expelled temporarily from the regime in the coup d'etat in 1958, led by General Ne Win, the then Vice Prime Minister, came back to power two years later.

(ii) The establishment of a socialist regime

General Ne Win took full powers over the country by the second military coup d'etat in March 1962, after which he established the Burmese Socialist Program Party (BSPP) and pursued one-party rule on the basis of its unique socialist ideology. The country, however, fell into a progressive decline in economic terms.

In March 1978, the socialist regime launched a plan to exclude "immigrants", called the Operation Nagamin, and conducted major surveys of the population with force, during which some 200,000 Rohingyas fled to Bangladesh due to persecution.

Burma could not improve its economic situation with these measures and was designated as one of the least developed countries (the so-called poorest countries) by the United Nations in 1987.

(iii) Democracy movements and the establishment of a military regime

A student of the Rangoon Institute of Technology was killed by an army intelligent officer on 13 March 1988, which triggered a democracy movement against the Ne Win regime among the students of the Institute. This movement then spread among the citizens.

Although General Ne Win resigned from his post because of the emerging democracy movement, he still had influence on the national army, and on 23 July 1988, martial law was proclaimed in the country. On 18 September 1988, the army organized the SLORC (the State Law and Order Restoration Council) and took power (hereinafter referred to as "the military regime" or "the military junta".) It expressed the intention to hold a general election in May 1990, with a view to save the situation. Meanwhile, the NLD was established under the leadership of Aung San Suu Kyi, eldest daughter of General Aung San, around 24 September 1988.

The SLORC changed the name of the country to "Myanmar" and the capital to "Yangon" on 18 June 1989.

(iv) The general election and disrespect for its outcome

The SLOFC oppressed and restrained political activities of the NLD for the general election, such as taking Suu Kyi under house arrest on 20 July 1989. In the multi-party election held on 27 May 1990, however, the NLD swept the board by winning 392 seats out of the 485 seats in total. The SLORC would not recognize the outcome, pressuring the elected Parliamentarians to resign, imprisoning the elected Parliamentarians who belonged to the NLD and expelling them with some thousands of political activists. Moreover, the SLORC did not call the Parliament in accordance with the outcome of the general election, on the ground that a solid Constitution is necessary for civil government.

On 23 April 1992, General Than Shwe took the post of the President of the SLORC after General Saw Maung. On 9 January 1993, the SLORC convened the National Constitutional Convention by appointing the delegates in a significantly arbitrary fashion. When the delegates who belonged to the NLD, who had managed to have been appointed, walked out of the Convention on 29 November 1995 because of its undemocratic nature, the SLORC expelled them two days later. The Convention has been out of session for a prolonged period since March 1996.

The SLORC changed its name to the State Peace and Development Council (SPDC) on 15 November 1997.

(v) Oppression against the NLD and Suu Kyi

Suu Kyi was released from house arrest on 10 July 1995. In 1996, however, forced labour of civilians for such services as carrying military supplies and farming came under fierce protest, which forced the military junta to issue an military order to put an end to forced labour of civilians. In this context, the military regime began to impose increased restrictions on meetings between Suu Kyi and others and, on 2 December 1997, prohibited her from going out of the house. It also interrupted the assembly of the NLD with force, held on 27 May 1997, the day of commemoration of the general election. Since then, although the SLOCR has sometimes permitted the NLD to hold assemblies or Suu Kyi to go out, facing the criticism from abroad, it took Suu Kyi under house arrest for the third time around 21 September 2000. While she was freed on 6 May 2002 as a result of the progress of the dialogue between the military regime and the NLD, she was taken into custody for the fourth time in midnight of 30 May 2003 or early morning of the next day, when she was returning home from the campaigns in the Rakhine and other provinces in the north. She is still under house arrest at present.

In the present situation, someone may be arrested by the military regime even if he/she only wishes to meet or greet Suu Kyi. Partly because the judiciary does not have the independent functions, thousands of the members and supporters of the NLD, including the Parliamentarians elected in the general election, are still under imprisonment after 1996. The prisoners are often subjected to violence.

(vi) Realities of forced labour

One of the specific features of the military regime in Myanmar is forced recruitment and forced labour of civilians, in particular ethnic minorities. Even after the military order mentioned above, forced labour of civilians, including children, has continued in the name of development. In March 1997, the International Labour Organization (hereinafter referred to as "ILO") established a Commission of Inquiry into the compatibility with the ILO standard concerning forced labour and sent a fact-finding mission. In June 2000, the International Labour Conference called upon the SPDC to take "concrete and detailed action" in line with the standard by 30 November. In November 2000, however, when the SPDC issued an order which reinforced the prohibition of forced labour in October, the Governing Body of the ILO endorsed the Labour Conference Resolution of June, considering that the action had not been taken to a satisfactory level. In December 2000, the Director-General of the ILO called upon the Member States to reconsider their relationship with the SPDC.

The economic growth rate in Myanmar has been over 5% in recent years. The exchange rate of the kyat to the US dollar fell to one third in the period of January – June 1997, causing inflated prices at the rate of 300% in a year. However, the rate of increase in wages has not reacted to this rise, placing the majority of the population in a distressed situation.

(vii) Treatment of ethnic and religious minorities

In Myanmar, ethnic minorities as well as Muslims and Christians are denied or restricted of civil rights and are frequently subjected to rape and other forms of abuse, unreasonable taxation and confiscation of properties by the military regime.

Among others, the Rohingyas, whose features are close to those of Indians, are regarded as aliens who had come to the Rakhine Province from the Bengali region (now Bangladesh) and not included in the 135 nationalities of the country. In 1990, the SLORC attempted to oppress the Rohingyas, including by changing the name of the Arakan Province to the Rakhine Province named after the Buddhist ethnic group living in the area. Partly because of this, some 250,000 Rohingyas fled to Bangladesh as refugees, fearing persecution, from December 1991 to March 1992. The international framework has been made to facilitate return of these refugees and, after April 1994, the UNHCR established its office in the Rakhine Province and assisted the return while monitoring persecution. Although many refugees returned to their residence during the process, more than 10,000 Rohingyas flowed in Bangladesh again in 1997. The government of Bangladesh, which is not a Contracting Party to the Convention and the Protocol, abandoned its tolerance policy and arrested or deported some of these refugees on the charge of illegal entry. There have been killings of the Rohingyas after 2001, also.

(4) The facts concerning the plaintiff's political activities

On the basis of the facts indicated in (1) of the Relevant Facts and 2(2) of the present section as well as the relevant evidence, the following facts have been established with regard to the plaintiff and his family members.

(i) The plaintiff's circumstances in his hometown

The plaintiff was born on 4 January 1967, in an army base (Karaya 20) in Sittwe, Arakan (now Rakhine) Province, Burma, to Rohingya parents who believe in Islam, and was named "F" (with Burmese name "F+"). The father's ancestors had lived in the Arakan region since four generations before and the mother's more than ten generation before. Although the father had been an engineer in the army since around 1947, when Burma gained independence, he had never been promoted after the establishment of General Ne Win's regime in 1962.

The plaintiff had lived in Karaya using Burmese. When he was five or six years old, he moved to Invari village where there was a Muslim religious school, with his parents, brothers, sisters and other family members, and began to live with the family of the father's younger sister.

The plaintiff began to go to the Sittwe Sixth School (Ataka) after 1973 or 1974. At the same time he was enrolled in a religious school belonging to a temple (Bali), where he got acquainted with I, who was a Muslim and belonged to the Kaman ethnic group.

In March 1978, when the plaintiff became eleven years old, the Operation Nagamin was launched and the socialist regime attempted to expel the Rohingyas with military force. Since all the villagers in Invari Village were relocated to marshes, some 5 kilometers away from the village, the plaintiff began to have stronger identity as a Rohingya.

When the plaintiff visited his father's hometown for the first time around 1984, he was ordered by a soldier to carry some parcels. When he declined, the soldier shot his rifle close to his left ear, diminishing the plaintiff's hearing capability on the left side.

After moving to Invari Village, the plaintiff's father continued to commute to Karaya, while being tolerated to run a rice polishing factory in another place by giving Captain J half of the profits as bribes. However, the Captain's men had watched the factory, so that the plaintiff's father would not juggle the account, and continued to exploit him; around 1986, the plaintiff lost his patience with this situation and blamed the soldiers for exploiting the profits without undertaking their services, resulting in quarrels with the soldiers. After this incident, some military vehicles came to the plaintiff's house with a view to arresting him. While he could avoid being arrested because he had lived in seclusion, the rice polishing factory was taken over by Captain J.

(ii) Political activities in the capital

Although the plaintiff used his Burmese name at the Sittwe Sixth School, he could not concentrate on learning due to frequent cases of discrimination by the teachers. Having repeated the fifth grade once and the eighth grade three times, he was not able to continue his education in the school. The plaintiff thus moved to the capital by sea with bribery, depending on his elder sister who had lived Tamwe, Rangoon. Although he studied in a specialized school for higher level of education in order to graduate from the Ataka school, he dropped out from the school and was enrolled in a private technical college specialized in electronics. Meanwhile the plaintiff reunited with I, who had also come to the capital to help his father-in-law in his ethnic clothes shop, and began to meet him at least once a month.

In 1988, when students' movements for democracy had emerged, the plaintiff began to become involved in political activities, including by distributing anti-military junta brochures and taking part in general strikes. He also got acquainted with D and other activists, who would be high-ranking officials of the NLD later. In what is called the 888 demonstration, held on 8 August 1988, the plaintiff led the group which departed from the Alothama Citizens' Hospital, having the red flag with a yellow star and a fighting peacock, the symbol of struggle since the era of colonization. In the midnight of around 13 August 1988, the military intelligence officers came to his sister's house with a picture of the plaintiff and searched the house with a view to arresting him. However, he could avoid from being arrested because he had happened to be with D and others for another activity. Having come home and becoming aware of the search, the plaintiff gathered only his clothes and went to an acquaintance of his father in Bodhi-ta-taung, which was within an hour's walk away from his sister's house, where he felt safer due to the very existence of an army base. Being refused to hide in the house of the acquaintance, the plaintiff stayed there only for a night and decided to return to Sittwe.

On his way to Sittwe, the plaintiff was stopped at a checkpoint, which was infamous for strict inspection on the Rohingyas, and asked why he possessed identity papers and why he had been to Rangoon. He was allowed to go , however, by telling them the military number, the name of his father and the base to which the father was attached.

(iii) Political activities in Sittwe

Having returned to Sittwe, the plaintiff took part in a Rohingya group in Invari Village, being involved in activities with a student group of the Sittwe University, and also joined the

Muslim Student Association. Around 26 August 1988, two Rohingyas and a student were shot to death in the Sittwe Prison, which led to major protest movements in seven prisons across the country, involving civil servants as well, and to disturbances. The plaintiff also took part in the protest movement against the Sittwe Prison. He drove with his company in some cars to the residence of the prison director, located next to the prison, and demanded him to unlock the cells. Since the prison director handed over the keys to them without much resistance, they freed more than 100 students and some hundreds of prisoners, including seven or eight Bangladeshis.

The plaintiff continued to be involved in political activities after the incident. The curfew was soon introduced in Sittwe, however. Around 26 September 1988, some three days after the introduction of the curfew, the plaintiff heard that a few members of his group, who were living near the entrance of Invari Village, had been arrested and that the military officers were coming to arrest the plaintiff who were living near the bottom of the village. The plaintiff immediately fled to his father's hometown and hid himself there for about a month, during which he received letters from his father, stating that his father and eldest brother had been assaulted and investigated by the military.

(iv) Flight to Bangladesh and return to the country

Around October 1988, the plaintiff crossed the border to Bangladesh and stayed in a Rohingya refugee camp in the country for about two weeks, after which he went to Pakistan via India. He stayed in Karachi for nearly two years, in an area where many Rohingyas had lived. The plaintiff sought for the multiethnic coexistence, however, unlike the leaders in the area who aimed at the independence of the Rakhine Province by the Rohingyas. Having determined to return to Myanmar upon hearing on the radio that the NLD won in the general election in May 1990, the plaintiff went to Bangkok, Thailand, by sea. He got acquainted with N of Rohingya origin there and went to a village close to the border with Myanmar. The plaintiff heard that I was living in a village across the border in Myanmar and sent him a message that he wanted to meet him. I came to see him in Thailand and the plaintiff told him that he wished to return. On his advice, the plaintiff could enter into Myanmar without authorization by crossing over River Moe. He then paid 10,000 kyat to a truck driver and disguised as his assistance, managing to arrive at Yangon.

(v) Political activities in Yangon and the second flight outside the country

In Yangon, the plaintiff talked with D, who had joined the NLD, and was involved in activities by delivering D's messages and distributing anti-military junta brochures, while drifting from a relative's house and another as well as living alone. Although he assisted his father and eldest brother in peddling, he did not inform them about his activities. Meanwhile, the plaintiff forged identity papers under the name of "F+" for using when he moved. Around August 1991, he obtained a passport, in order to flee to another country in case of an emergency, by paying 20,000 kyat to a broker, O, for forging necessary documents. He also obtained an international driver's license.

Around April 1992, two military officers came to the plaintiff's house and demanded him to submit originals of his identity papers. Since he submitted a photocopy of his passport, he was ordered to report to the army's branch. When the plaintiff did so next morning, he was subjected to violent inquiries into his political activities and was ordered to report again next morning with his personal history documents. When the plaintiff asked for the postponement of one week, stating that he had to go far away for business, he was ordered to report immediately upon return from the business. When the plaintiff talked with his father and D, he was told that he would be sure to be arrested if he would report. The plaintiff thus decided to flee the country and went to Bangkok, Thailand, by air. At the airport in Yangon, he paid for the flight tickets and additional 20,000 kyat to the broker, O, and entered the boarding lounge through the special staff door.

(vi) Entry into and stay in Japan

Having gathered information through N in Bangkok, the plaintiff decided to seek asylum

in Japan, where he heard he could be freely involved in anti-government activities. When he told P, a broker, that he wished to go to Japan, he was demanded to pay some thousands dollars. He asked his father to send the money to a person designated by P through an underground bank. Although the plaintiff did not confirm the remittance by himself, he received a passport under the name of A with the plaintiff's photograph from P, some two weeks after he had given P his photograph and the passport that he had obtained in Myanmar. The plaintiff then transited in Hong Kong with P and arrived at the Nagoya Airport on 22 June 1992 via Taipei, entering into Japan. On the bus from the airport to the Nagoya Station, he handed over the passport, which he had just used, to P on the latter's request.

The plaintiff then went to Tokyo with P and began to reside in the house of Q, a Myanmarese who was engaged in trade with Myanmar at Takao. Q, however, requested the plaintiff to leave after some two months, saying that his business would be adversely affected if the government of Myanmar becomes aware of the plaintiff's existence. The plaintiff thus came back to Nagoya, expecting to work with a political organization whose telephone number he heard from Q. Then, in Anjo City, the plaintiff met political activists who had worked against the government of Myanmar in Aichi Prefecture and was asked to join the KNU. The plaintiff declined to do so, however, because the plaintiff had thought that the KNU was an armed guerrilla group that had been used by the government of Myanmar to inflame ethnic conflicts and also because he himself was not of Karen origin. Because of this, the plaintiff felt uncomfortable being with them and wandered around the streets. Having looked for a job in accordance with a piece of information, he managed to be employed as a painter and welder by the R Firm.

Thereafter the plaintiff frequently called N and asked him to return the legitimate passport. Some two years after, however, he received another passport under the name of V with the plaintiff's photograph, which was sent from Bangkok. Since he could not be given satisfactory explanations from N, he decided to keep the passport. Although the R Firm soon went bankrupt, the plaintiff opened a bank account under the name of F+ on 2 March 1994 and has sent money to Bangkok or Singapore at times through the account or his acquaintances, floating from job to job under his own name at S, T and U corporations.

The plaintiff then got acquainted with a student volunteer group in Nagoya, joined the group around 1997 and formed the SGDD on 16 January 2000 with Myanmareses living in Japan. On 10 December 2000, the SGDD merged with the Burma Youth Volunteer Association (BYVA), the Burmese Association in Japan (BAIJ) in Tokyo and the Student Organization for the Liberation of Burma (SOLB), and became the Nagoya branch of the LDB, an advocacy organization for the peaceful establishment of a democratic regime in Myanmar. In accordance with the organization's policy, the plaintiff actually took part in political and advocacy activities such as: traditional watering festivals (commemorating the New Year in the lunar calendar); distribution of brochures and demonstrations in front of the Embassy of Myanmar in Tokyo on 27 May every year (the anniversary of the general election in 1998) in collaboration with the People's Forum for Burma and the Burmese Refugees Relief Center in Tokyo; and meeting with W, a writer and member of the NLD whose work has been suppressed by the military junta. The plaintiff currently serves the LDB Nagoya as a director in charge of the finances.

(vii) The situation of the plaintiff's family in Myanmar

Around 1994, the army as well as the military intelligence agency subjected the plaintiff's father and eldest brother to violence because of their contact with the plaintiff. Upon the request of the plaintiff who felt regretful for them on this incident, his father published an announcement of renunciation of relationship with his son on a newspaper, which the plaintiff had been informed of. Around October 2001, however, the military intelligence agency visited his father and questioned about the plaintiff. From the end of 2001 to early 2002, they took his father away and interrogated him, during which he was subjected to violence and got injured on the arm or wrist and the

stomach.

(5) On the defendants' arguments concerning the credibility of the plaintiff's statements

Concerning the above findings, the defendants argue that the plaintiff's statements (written statements as well as outcomes of the examinations), which have played an important role in substantiating the plaintiff's specific circumstances, are not credible because they lack consistency and coherence.

As will be stated below, however, the basic content of the plaintiff's statements has not changed after the beginning of the deportation procedures on 22 November 2001; they are so specific and vivid on many points that it is difficult to create without factual basis. Although there are some contradictions or inconsistencies in details, they can be regarded as the product of the unique psychology of asylum-seekers who attempt to exaggerate their roles as much as possible, or as insignificant contradictions arising from the fact that the inquiring officers had prepared the written statements with the help of interpreters. Therefore the plaintiff's statements should be regarded as credible as far as the facts that have been stated in the above findings are concerned.

The Court now examines the main arguments of the defendants. First of all, the defendants argue that it is strongly assumed that the plaintiff had not taken part in the liberation movement at the Sittwe Prison for he did not inform the inquirers about this movement, which is the most concrete and important fact among his political activities in Myanmar, and also because it is unreasonable that the prison director had given him the keys. Indeed, there is no reference to this movement in the plaintiff's statements prepared during the deportation procedures, which were initiated when he was arrested on the charge of illegal stay, or the refugee recognition procedures. However, since the participation in the movement is mentioned in the application for refugee status as of 22 November 2001, the inquirers should have inquired the plaintiff about the details and recorded his responses in the statements. The only possible explanation for the lack of reference is that the inquirers was not concerned about the movement by any means and thus did not pose relevant questions. The fact that the prison director had given the plaintiff the keys can also be regarded as plausible, given the circumstances at that time when movements for democracy became vigorous and became likely that the military junta might collapse.

Next, the defendants argue that the three letters are not real because they were not stamped. Given the inspection system in Myanmar, however, there is a good likelihood that the letters were delivered by credible persons to Thailand. The letters without the address are not artificial at all, because the plaintiff's acquaintance X had delivered them himself. After all, the defendants' arguments in this regard cannot be sustained; rather, the letters reinforce the credibility of the plaintiff's statements.

The defendants also argue that the plaintiff could not give detailed explanation about the customs of the Rohingyas, which causes doubt as regards his identity as a Rohingya. In order to consider this assumption as legitimate, the customs of the Rohingyas need to be different from those of other ethnic groups; however, the defendants have not argued to this effect. In addition, the plaintiff's statements, explaining that the Rohingyas have Indian features and can be easily distinguished from the Burmese in Myanmar who have Tibetan features, are sufficiently credible; the fact that the plaintiff has Indian features is obvious to the Court, which examined the plaintiff in his presence.

The defendants further argue that there is a major inconsistency in the plaintiff's statements concerning the reason why he could obtain a legitimate passport issued by the government of Myanmar; he first stated that he could have obtained it through the connection of his father and the power of money and then, at the trial, he stated that it was thanks to the bribe offered to a broker. However, since both statements refer to the payment of money as a factor and since the connection of his father may mean contact with the broker, the defendants' arguments in

this regard lack the very basis that the plaintiff's statements are inconsistent.

Finally the defendants argue that the plaintiff is an illegal worker by referring to many cases encountered in the administration of immigration control, in which aliens, having entered Japan illegally and earned money through illegal work, present themselves to local immigration bureaus and return to their countries. The ground for this assumption is the fact that, when the plaintiff presented himself to the NIB on 6 December 1999, two years before the deportation procedures against him began, he stated that he had come to Japan to work and that he wanted to return to Myanmar because he lost his job due to the bankruptcy of the R Firm. The plaintiff did not respond to the request to present himself again for the inquiry of possible violations, however; thus the plaintiff's case is obviously different from the cases referred to by the defendants, in which illegal workers appear before the immigration bureaus with a view to returning to their countries by way of deportation. Further, the plaintiff explained the reason why he reported to the NIB by stating, "Since my mother was in hospital in Thailand and in critical condition, I presented myself to the NIB in order to go to Thailand. But, if I tell them the truth about how I had entered Japan, it might take time for me to go there because of long examinations, so I told them lies. I stopped going to Thailand because, when I talked with my father over the phone, he told me that it is dangerous to do so." These statements are not artificial and can be regarded as credible.

As has been seen, the defendants' arguments against the credibility of the plaintiff's statements cannot escape criticism that they overrate contradictions and inconsistencies in unimportant details, given the fact that memory of a human being inevitably changes or becomes subtle along with the passage of time and that it is rather questionable when repeated statements are completely consistent. Moreover, in the light of the psychological conditions of those who have been subjected to unreasonable oppression, one cannot always expect them to reveal their experiences as they are to third parties. Therefore it is reasonable to conclude that the lack of consistency and coherency, pointed out by the defendants, cannot be the basis for denying the credibility of the core contents of the plaintiff's statements. The core contents of the plaintiff's statements are consistent and not being particularly unreasonable, and thus can be regarded as credible.

(6) Whether the plaintiff is a refugee or not

The Court now examines, on the basis of the findings mentioned in (3) and (4) above, whether the plaintiff is a refugee or not. The Court finds that in Myanmar, particularly after 1962 when the autocratic regime of the Burmese was established, policies led by the army in favor of the Burmese have been pursued throughout the periods of Burma and Myanmar. In addition, Ne Win's regime as well as the military junta of the SLORC and the SPDC, composed of the Burmese, have consecutively or intermittently recruited civilians for forced labour and adopted oppressive policies against the minorities, in particular the Rohingyas who are regarded as having come from the Bengali region outside the country, including operations to expel them. Although the UNHCR has not always recognized the Rohingyas as mandate refugees, it is apparently because some Rohingyas have become refugees partly because of economic distress. However, such economic distress may have been due to persecution in some cases. In addition, the UNHCR has recognized the Rohingyas who had come to Bangladesh as prima facie refugees and made efforts to stop the persecution and to facilitate safe return. The policy of the UNHCR thus cannot be the basis for denying the persecution mentioned above.

It is true that the plaintiff, born in 1967, could have lived in a relatively privileged environment as a Rohingya, including by going to public school or having lived in Yangon, because his father had been a soldier. On the other hand, he had seen the actual conditions of the fellow Rohingyas, who had been restricted their fundamental freedoms of business, education and movement; he also experienced the confiscation of his father's properties. Through these

experiences, the plaintiff had become increasingly antagonistic toward ethnic discrimination. After the establishment of the military junta, in particular, he had become more and more inclined to political activities aimed at democratization through multiethnic coexistence, which became the concern of the authorities not before long. Some of his family members had actually been subjected to violence by the authorities because of their contact with the plaintiff. At the time of the Minister's decision concerning his status as a refugee, he was likely to have become the target of the military junta for interrogation and detention. Since it is easy to predict that the plaintiff would be physically and psychologically harmed by the military junta upon returning to Myanmar, it should be concluded that he has objective grounds for having fear of returning to his country.

Thus the plaintiff should be regarded as a refugee in terms of the Convention and the Protocol, who, "owing to well-founded fear of being persecuted for reasons of race … [and] political opinion, is outside the country of his nationality and …owing to such fear, is unwilling to avail himself the protection of that country".

(7) Concerning the defendants' argument denying the plaintiff's status as a refugee

In this regard, the defendants argue that the plaintiff is not at risk of being persecuted by the government of Myanmar, quoting the fact that his father had been a soldier; that the plaintiff himself had obtained and/or renewed a legitimate passport, an international driver's license and a certificate of citizenship; that his certificate of citizenship proves his full-fledged status as a citizen under the Burmese Citizenship Law; that he had been enrolled in a public school (Ataka); that he and his family members had moved freely between Sittwe and Rangoon/Yangon; that he had returned to Myanmar after having left the country once; and that his father had financial capacity to pay a vast amount of money, which is hard to imagine in Myanmar, in order to enable his son to come to Japan.

However, the plaintiff explains that his father had become a soldier before Ne Win's regime was established and could continue to serve the army thanks to his skills as an engineer, which is in itself persuasive. Even if, partly because of his father's service in the army, the plaintiff's family had been in more privileged circumstances than the Rohingyas in general, had the opportunity to save up money and enjoyed freedom to move to Rangoon/Yangon, it should be regarded as the outcome of wisdom and strategies to survive as minorities. Therefore these facts could not be the basis for denying oppression against the plaintiff and his family members as well as the plaintiff's status as a refugee.

As far as the issuance of a certificate of citizenship, a passport and an international driver's license as well as the enrollment in Ataka is concerned, the plaintiff explains that one could purchase these documents in Myanmar. The plaintiff's explanation aside, the issue here is whether the plaintiff could have enjoyed these benefits "as a Rohingya." In fact, all these benefits could be enjoyed under the plaintiff's Burmese name, which means, in turn, that he would not have been able to enjoy them as a Rohingya; it is meaningless to focus on these facts themselves as is argued by the defendants. Further, even if the description in the plaintiff's certificate of citizenship, "Nationality: Bengali/Rakhine", shows that his parents are of Bengali and Rakhine origin (it cannot be definitely concluded as such, however, since his mother also has a Rohingya name) and if the word "nain", which is written on the upper right of the certificate, shows that the plaintiff is treated as a citizen of Myanmar, it cannot be the basis for denying the plaintiff's status as a refugee; the plaintiff may have accepted such unreasonable descriptions in order to avoid disadvantages in leading the life in the country. As far as the temporary return by the plaintiff to Myanmar, the plaintiff explains that he set his hope on the victory of the NLD in the general election in 1990, which is not odd at all.

Concerning the renewal of the plaintiff's passport, the passport indeed bears the renewal stamp by Y, who has the same name with a counselor in charge of consulship who had served the

Embassy of Myanmar in Tokyo from 9 April 1995 to the year 1999. Even if the plaintiff could renew the passport at the Embassy of Myanmar, however, the passport is a forged one under the name of V, not a legitimate passport under the plaintiff's real name. Clearly, therefore, the renewal of the passport does not mean that the plaintiff has been under the protection of the government of Myanmar as a Rohingya called F.

The defendants further points to the fact that the plaintiff's family members have not come to Japan in spite of the persecution, with a view to denying his status as a refugee. It is a great leap in logic, however, to conclude that victims of persecution should always flee the country. In addition, it is futile to focus on whether the plaintiff's family members are also "refugees", since the plaintiff is at great risk of being persecuted more on the ground of his own political activities than of his membership of the Rohingya minority. Similarly, it is virtually meaningless to deny the plaintiff's status as a refugee on the ground that the UNHCR has not recognized him as a mandate refugee in spite of his request, because the examination by the UNHCR is undertaken through completely separate procedures from that of the Minister of Justice.

Therefore the defendants' arguments quoted above cannot be sustained, unable to overrule the above finding that the plaintiff is a "refugee."

(8) Whether the Minister's decision to dismiss the plaintiff's objection was legitimate

On the basis of the above findings, the Minister should have made a decision concerning special permission to stay, even if one of the grounds for deportation under Article 24 applies to the plaintiff, after having undertaken thorough considerations as to the destination, given the plaintiff's status as a "refugee" in terms of the Convention and the Protocol. There is no sign of such considerations, however, as is shown by the fact that the written deportation order, issued after the Minister's decision, designated Myanmar as the destination. This is apparently because, having decided not to recognize the plaintiff as a refugee through the application of the 60-days rule, the Minister did not go on to consider the plaintiff's application on its merits.

In this regard, the defendants argue that the liberation movement at the Sittwe Prison, in which the plaintiff had been involved, was assault on a prison which is a serious crime and that, since the plaintiff does not possess law-abiding nature, the Minister's decision was legitimate. However, the incident was strongly of a political nature, aiming at the liberation of political prisoners, and did not involve in murder, injury and other acts of serious violence. In addition, the plaintiff thereafter has pursued peaceful democratization in his political activities, distancing himself from the KNU, a groupt that is sometimes reported as an armed struggle group. While the complaints he made at the West Japan Immigration Control Center suggest that he was in unstable psychological condition, they do not prove that the plaintiff is not of a law-abiding nature. On the basis of these findings, it is still necessary to consider granting him special permission to stay on the premise that he is a "refugee".

The Minister's decision 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 abuse of or deviation from the discretion, making it unnecessary to determine whether there have been procedural errors in making the decision. Therefore the Minister's decision at issue was illegitimate.

4. Whether the written deportation order issued by Supervising Immigration Inspector was appropriate

Both the written deportation order issued by the Supervising Immigration Inspector and the Minister's decision aims at deportation of the plaintiff, which is effectuated through the

combination of the two acts. Since the latter is illegitimate and should be revoked, the former should also be regarded as having no basis and thus being unlawful.

5. Conclusion

In conclusion, the plaintiff's appeal shall be admitted as far as the appeal against the Minister's decision and the issuance of the written deportation order by the Supervising Immigration Inspector is concerned. The plaintiff's appeal to turn down the Minister's decision not to recognize him as a refugee shall be dismissed. 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 and 64 of the Civil Procedure Act. (Although the present judgment is partly favorable to the plaintiff in relation to the Minister and completely favorable to the plaintiff in relation to the Supervising Immigration Inspector, it has an effect on the State in any case in accordance with Article 35 of the Administrative Case Litigation Act; thus it is insignificant to determine the proportion of the burden-sharing between the two defendants.)