

# Consideration of the Best Interests of the Child in Deportation Cases in Japan

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## Abstract

Article 3(1) of the Convention on the Rights of the Child stipulates that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” This paper analyzes how the best interests of the child mentioned above is taken into account by recent court judgments in Japan in deportation cases where the child is affected either directly or indirectly. This paper intends to demonstrate that the interests of the child are rarely weighed more than the fact of the illegal stay in Japan.

## A. Introduction

The main issue of this paper is to analyze how the best interests of the child – as stipulated in Article 3(1) of the Convention on the Rights of the Child<sup>1</sup> (hereinafter referred to as the CRC) – is taken into account by recent court judgments in Japan in deportation cases that affect children.<sup>2</sup> For example, this paper will discuss a case which was brought by an irregular foreign family.<sup>3</sup> They claim that the

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<sup>1</sup> Convention on the Rights of the Child, adopted by General Assembly Resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990. Japan has ratified the Convention on 22 April 1994.

<sup>2</sup> This paper is based on my presentation *Expulsion of Irregular Foreign Residents in Japan: Consideration of the Right to Family Unification and the Best Interests of Children*, presented at the 13<sup>th</sup> World Conference of the International Society of Family Law (Vienna, 16-20 September 2008). A paper based on this contribution (*Expulsion of Irregular Foreign Residents From Japan – The Right to Family Unification and the Best Interests of the Child*) will be published in the 2009 Yearbook of the International Society of Family Law. This latter paper focused on the issues of the right to family unification upon the deportation of irregular foreign families from Japan, and discussed the best interests of the child in relation to the right to family unification. In contrast, in the current paper I have identified deportation cases which affect children directly and indirectly, shifted the focus to analyze the best interests of the child upon deportation of irregular foreign families, stressed the link between the protection of the best interests of the child and the right to family unification, and discussed the right to family unification and the protection of family life from the point of view of the protection of the best interests of the child.

<sup>3</sup> In this paper, I use the words ‘irregular foreign nationals’ and ‘illegal foreigners’ equivalently and interchangeably, and the same for the words ‘deportation’ and ‘expulsion’. In addition, foreign nationals include stateless persons in Japan.

deportation order issued to the family members should be revoked because the family has stayed in Japan for a long time; and the child was born in Japan and has never been to the country of nationality. The Ministry of Justice, however, is determined not to grant the special permission to stay because the family is illegal. The criteria used by the courts in judging whether there are special grounds for legal protection of the child and the family, and the attitude of the court to apply the relevant clauses of international human rights conventions will be discussed from the point of view of the protection of the best interests of the child.

Japanese immigration control administrations are taking urgent measures to substantially reduce the number of these illegal foreign residents, because there are many irregular foreign nationals and their families living in Japan.<sup>4</sup> In many cases the child is facing deportation together with the parents even though she/he was born in Japan and only speaks Japanese. In some other cases, where the parents have different nationalities, the child is facing deportation with only one of the parents and will thus be separated from the other parent. Sometimes, a Japanese child is affected by deportation indirectly, in cases where the foreign parent is facing deportation. Common arguments in deportation cases are the best interests of the child to stay in Japan, together with the right to family unification and the protection of family life. Although Japan does not want to adopt any amnesty policy – because they fear that an amnesty policy would encourage an inflow of new illegal foreign nationals or encourage the extension of illegal stay – the ‘special permission to stay’ has been granted to those irregular foreign residents who have close links with Japanese society or who would suffer from a humanitarian point of view if deported.<sup>5</sup>

Till recently, the special permission to stay was granted mainly to irregular foreign nationals, such as a spouse or a parent of a Japanese national, who had a special relationship with Japanese nationals.<sup>6</sup> Since September 1999, groups of irregular foreign families and individual irregular foreign nationals voluntarily presented themselves at the Tokyo Immigration Bureau, declared their illegal stay in Japan and applied for the special permission to stay in Japan at the same time.<sup>7</sup> This event was as a turning point, resulting in more cases where irregular foreign residents apply for the special permission to stay on the grounds of a strong tie

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<sup>4</sup> Ministry of Justice, *Basic Plan for Immigration Control (3<sup>rd</sup> ed.)* III-2 (2005), the provisional translation in English is available at <http://www.moj.go.jp/ENGLISH/information/bpic3rd.html>, accessed on 15 February 2009.

<sup>5</sup> Ministry of Justice, *supra* note 4.

<sup>6</sup> A. Kondo, *Hirei Gensoku ni Hanshite Shiiteki ni Taikyo Kyousei sarenai Kenri to Rikken Seisitsu Ron [Regularization and Constitutionalism]*, 15 Kokusai Jinken [Human Rights International] 17, at 17 (2004). From 1955 to 1965, approximately 2,000 cases of special permission to stay were granted per year mainly to persons who came from the former colonies of Japan and were separated from their family. After that, the number of special permissions to stay decreased to about 500 per year because of the 1965 Agreement between Japan and the Republic of Korea Concerning the Legal Status and Treatment of the People of the Republic of Korea Residing in Japan (Treaty No. 28 of 1965 in Japan). Based on the agreement, people who had the nationality of the Republic of Korea and had been living in Japan since before the end of WWII were granted the status to reside in Japan permanently.

<sup>7</sup> See, e.g., APFS, *Kodomo Tachi ni Amunesuty wo [Grant an Amnesty to the Children]* (2002).

between the foreign families and the Japanese society, arguing for the protection of the best interests of the child and the protection of family life.

Since the 1980s, there is an increasing number of irregular foreign nationals living with their families in Japan. When they and their families are subject to deportation, their human rights, especially the best interests of the child and the rights to family life are claimed against deportation. Therefore, it is essential to examine how the courts consider the best interests of the child and how the courts apply the international human rights conventions in deportation cases. Hereinafter, I will give an overview of foreign nationals living in Japan (B); explain briefly about the subjects of deportation and the situation of irregular foreign residents in Japan (C); and summarize the deportation procedure and the special permission to stay (D); then I will identify the deportation cases which affect children directly or indirectly (E); and analyze the court judgments (F).<sup>8</sup>

## **B. An Overview of Foreign Residents in Japan**

### **I. Foreign Nationals Residing in Japan Increasing Steadily**

#### **1. Foreign Residents Increasing Steadily in Japan**

The statistics on registered foreign nationals (graph 1)<sup>9</sup> indicate the number of foreign nationals who are residing in Japan. According to Article 3(1) of the Alien Registration Law, every foreign national who has entered Japan must be registered within 90 days after landing or within 60 days of the day of his having become an alien or the day of his birth in Japan.<sup>10</sup> However, more than 90% of the total foreign nationals who entered Japan with the status of ‘temporary visitors’, leave Japan within 90 days without registering. Therefore, the statistic on registered foreign nationals is considered as the number of foreign nationals who stay in Japan for a long period of time, for purposes such as study or employment, and living a settled life in the local community.

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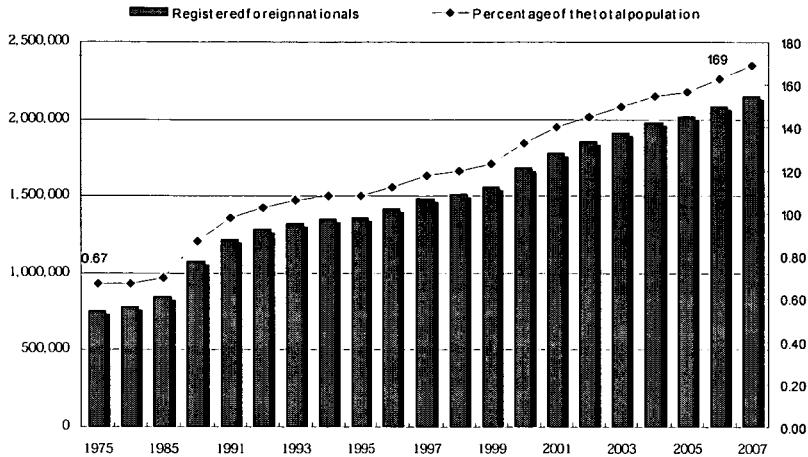
<sup>8</sup> The first part of this paper summarizes the general situation of foreign nationals in Japan; irregular foreign nationals in Japan; and the deportation procedure which can also be found in my paper *Expulsion of Irregular Foreign Residents From Japan – The Right to Family Unification and the Best Interests of the Child*, *supra* note 2. I have included this summary to provide the readers with some basic information to better understand the main issues in the second half of this paper. Nevertheless, the description of the situation of foreign national residing in Japan in this paper is more detailed, and the explanation of the situation of children with multi-cultural backgrounds and some other parts are added.

<sup>9</sup> Graph 1, 2, 5, the ‘Flow chart of deportation procedure’ and Table 1 were prepared for my presentation *Expulsion of Irregular Foreign Residents in Japan: Consideration of the Right to Family Unification and the Best Interests of Children*, *supra* note 2. These graphs were used in the my paper *Expulsion of Irregular Foreign Residents From Japan – The Right to Family Unification and the Best Interests of the Child*, *supra* note 2. However, some figures are updated in this paper.

<sup>10</sup> Alien Registration Law (Law No. 125 of 1952, latest amendment of Law No. 134 of 1999), the provisional translation in English is available at <http://www.moj.go.jp/ENGLISH/information/tarl-01.html>, accessed on 15 February 2009.

As of the end of 2007, the number of registered foreign nationals set a new record of 2,152,973 – nearly three times as much as twenty years ago – and reached 1.69% of the total Japanese population.<sup>11</sup> Due to the influences of economic globalization and mixed marriages, the total number of registered foreign nationals residing in Japan has been increasing every year. More and more foreign nationals set up their livelihood and form families in Japan.

Graph1: Registered foreign nationals in Japan



\* Created by author according to the statistics of Immigration Bureau, Ministry of Justice at <http://www.immi-moj.go.jp/toukei/index.html>, accessed on 15 February 2009.

## 2. Foreign Residents by Major Nationalities

While the foreign residents in Japan came from 190 countries or place of origin,<sup>12</sup> the statistics (graph 2) show the increasing number of registered foreign nationals by major nationalities. Until the late 1980s, most foreign residents were people that had immigrated or been brought by force to Japan from the former Japanese colonies, such as the Korean Peninsula and Taiwan, before or during WWII. Since 1992, the people from former Japanese colonies who stayed in Japan were granted the legal status of 'special permanent resident'.<sup>13</sup> Those special permanent residents are so called 'old comers' compared to those 'new comers' who came to Japan later under the effects of globalization.

Graph 2 indicates that the number of registered foreign nationals from Korea<sup>14</sup> has been gradually decreasing while the number of registered foreign nationals

<sup>11</sup> The number of registered foreign nationals is measured at the end of each year, the number of Japanese population at 1 October each year. Immigration Bureau, Ministry of Justice, *2008 Immigration Control 18* (2008) at <http://www.moj.go.jp/NYUKAN/nyukan80.html>, accessed on 15 February 2009.

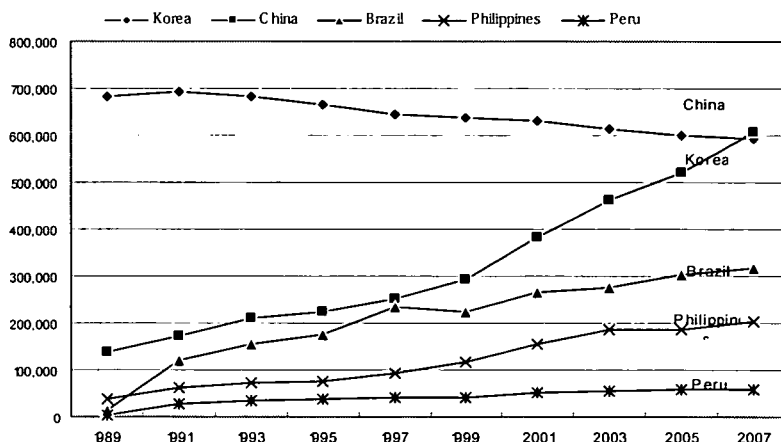
<sup>12</sup> Excluding stateless persons.

<sup>13</sup> Solidarity Network with Migrants Japan, *Living Together with Migrants and Ethnic Minorities in Japan, NGO Policy Proposals 8-9* (2007).

<sup>14</sup> In this case Korea, stands for the people from the Korean Peninsula, namely the Republic of Korea (ROK) and the Democratic People's Republic of Korea (DPRK).

from China,<sup>15</sup> Brazil, Philippines and Peru has been continually increasing. At the end of 2007, the statistics show that the Chinese population overtook the Korean population for the first time and marked the largest number as 28.7% of the total.<sup>16</sup> A reason for the declining number of registered Korean residents is their naturalization to Japanese nationality. In the meanwhile, the number of Chinese coming to Japan for the purposes of study or technical trainings is continuously increasing. Furthermore, the amended Immigration Control and Refugee Recognition Act<sup>17</sup> (hereinafter referred to as the ‘Immigration Control Act’) enforced in 1990 favors Japanese descendants by providing them a stable ‘long-term resident’ status with unrestricted rights of employment. This attracted many Japanese descendants from Brazil and Peru to Japan to work. The people coming from Peru and Brazil have been increasing almost every year for the last ten years. As for people from the Philippines, the registered number of Filipinos was exceeding 200,000 for the first time in 2007.

Graph2: Registered foreign residents by major nationalities or place of origin



\* Created by author according to the statistics of Immigration Bureau, Ministry of Justice at <http://www.immi-moj.go.jp/toukei/index.html>, accessed on 15 February 2009.

\*\* Korea indicates the people from Korean Peninsula (DPRK and ROK).

\*\*\* China includes the people from China (PRC), Hong Kong and Taiwan (ROC).

### 3. Foreign Residents by ‘Status of Residence’

#### a. The ‘status of residence’

Foreign nationals who wish to come to Japan to work legally should have a ‘status of residence’ listed and categorized in the Appended Table I and II of

<sup>15</sup> The number of registered foreign nationals from China includes people from Hong Kong and Taiwan.

<sup>16</sup> Ministry of Justice, *supra* note 4.

<sup>17</sup> Immigration Control and Refugee Recognition Act (Cabinet Order No. 319 of 1951, latest revisions of Act No. 30 of 2008 (effective 12 May 2008)), the provisional translation in English is available at <http://www.cas.go.jp/jp/seisaku/hourei/data/icrra.pdf>, accessed on 15 February 2009.

the Immigration Control Act. There are two types of status of residence. The first is a status of residence for the purpose of employment, and activities are limited within the range of the status of residence. The status of residence for this purpose are listed in the Appended Table I of the Immigration Control Act, and are 'professor', 'artist', 'religious activities', 'journalist', 'investor or business manager', 'legal or accounting services', 'researcher', 'instructor', 'engineer', 'specialist in humanities or international services', 'intra-company transferee', 'entertainer', 'skilled labor', 'diplomat' and 'official'. The second type of status of residence without limitation of employment are listed in the Appended Table II of the Immigration Control Act, and are 'permanent resident', 'spouse or child of permanent resident', 'long-term resident' and 'spouse or child of Japanese national'.

*b. Foreign residents by 'status of residence'*

From the end of 2002 to the end of 2007, the number of regular 'permanent residents' has increased, while the number of 'special permanent residents' decreased every year. The special permanent residents mainly comprised of Koreans who have been residing in Japan since the colonial period. As of the end of 2007, the number of permanent residents rose nearly to 870 thousands which represents 20.4 % of the total registered foreign nationals. The largest number of permanent residents came from China, Brazil, the Philippines, Korea (ROK and DPRK) and Peru.

Since 2002, there has been a steady increase in the number of registered foreign nationals with the status of residence as 'specialist in humanities or international services', 'Engineer', 'skilled labor', 'professor', 'investor', 'business manager' and 'legal or accounting services'. The number of those who stay in Japan with the status of residence of 'entertainment' drastically decreased since the end of 2005.<sup>18</sup>

## **II. Children With Multi-cultural Backgrounds in Japan Increasing Steadily**

### **1. Increase in Number of Mixed Marriages**

According to the statistics by the Ministry of Health, Labour and Welfare, approximately one out of fifteen couples where one or both are foreign national(s) had registered their marriage in Japan through the fiscal year of 2006.<sup>19</sup> Among those couples, there were 35,993 couples where the wife was a foreign national and the husband was a Japanese national. On the other hand, the number of couples where the husband was a foreign national and the wife was a Japanese

<sup>18</sup> The number is based on the statistics by Immigration Bureau, Ministry of Justice (in Japanese) at <http://www.immi-moj.go.jp/toukei/index.html>, accessed on 15 February 2009.

<sup>19</sup> Ministry of Health, Labour and Welfare, *Heisei 19 Nendo Nihon ni okeru Jinkou Doutai [Vital Statistics of Population in Japan in the Fiscal Year of 2007]*, at <http://www.mhlw.go.jp/toukei/saikin/hw/jinkou/tokusyuu/gaikoku07/index.html>, accessed on 15 February 2009.

national was 8,708. The number of couples where both wife and husband were foreign nationals was 4,161. All the combinations of mixed marriages are on the increase, and this indicates that the number of families with different nationalities and with multi-cultural backgrounds is increasing.

## 2. Children Born with Multi-cultural Backgrounds in Japan

According to the Vital Statistics, the number of babies born with mixed-cultural backgrounds is 35,651, which is 3.4% of the total of 1,104,862 babies born in Japan in the fiscal year of 2006.<sup>20</sup> The number of babies born with foreign fathers and Japanese mothers was 14,040 which is 1.3% of the total. The number of babies born with foreign mothers and Japanese fathers was 9,432 which is 0.9% of the total. Beyond that, the number of foreign babies with foreign mothers who were born out of wedlock was 2,794 which is 0.3% of the total.

Since mixed marriages and children born with multi-cultural backgrounds are increasing year by year, there are more and more families with multi-cultural backgrounds establishing their family life in Japan. Among the increasing numbers of foreign families, there are a number of children with multi-cultural backgrounds facing deportation from Japan directly with the family, or are affected by deportation indirectly as will be discussed later (E). Hereinafter, I will briefly explain the subjects of deportation under the Immigration Control Act.

## C. Subjects of Deportation and Irregular Foreign Residents

### I. Subjects of Deportation

#### 1. Subjects of Deportation under the Immigration Control Act

According to the Immigration Control Act, any foreign national who has illegally entered Japan; has stayed beyond the permitted period of stay; has worked without a work permission; has committed trafficking of persons; has committed drug offences; or has fallen under any other conditions as stipulated in Article 24 of the Immigration Control Act may be deported forcibly from Japan.

#### 2. Foreign Nationals Under the Deportation Procedure<sup>21</sup>

There were 39,382 foreign nationals accused of violating the Immigration Control Act and underwent deportation procedures in 2008 (graph 3). Among them, there were 31,045 who stayed beyond the permitted period, which is 78.8% of the total;

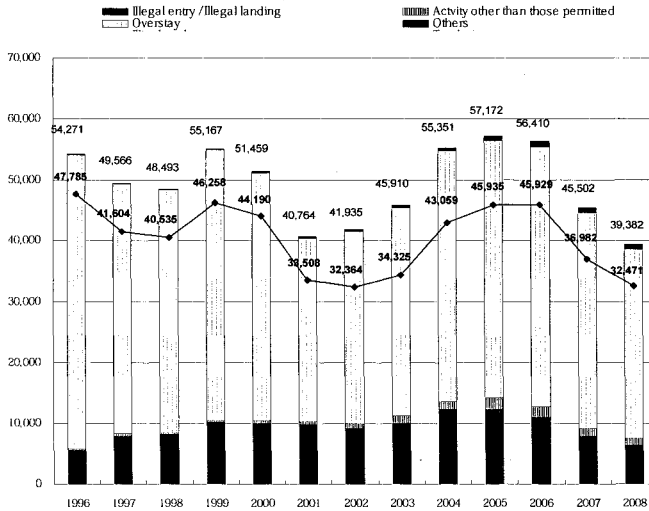
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<sup>20</sup> *Id.*

<sup>21</sup> The numbers relating to deportation in this section are taken from the Immigration Bureau, Ministry of Justice, *Heisei 20 Nen ni okeru Nyukan Hou Ihan Jiken nitsuite [Cases Against the Immigration Control Act in 2008]* (2009) available at <http://www.moj.go.jp/PRESS/090217-3-1.html>, accessed on 22 February 2009.

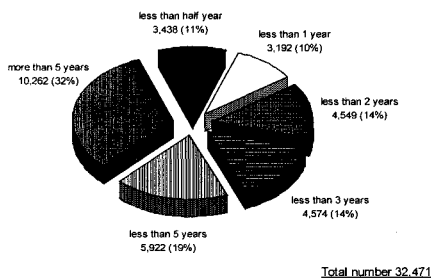
and 6,389 entered Japan illegally.<sup>22</sup> They came from 109 countries or place of origin, and the number of Chinese nationals<sup>23</sup> reached 10,963, 27.8% of the total.

Graph3: Foreign residents under deportation procedure (by reasons for violation of Immigration Control Act)



Among the foreign nationals in the deportation procedure, there were 32,471 persons (which is 82.5% of the total) who had been working illegally (graph 4). Those who had been working illegally for more than 5 years reached 31.6% (10,262 persons). Males tend to work in a factory (7,670 persons) or at a construction site (3,792 persons), and many females were working as hostess in snack bars (4,023 persons) or working in factories and restaurants.

Graph4: Foreign residents under deportation procedure who worked illegally & the period of work (2008)



\* Created by author according to the statistics by Immigration Bureau, Ministry of Justice  
<http://www.immi-moj.go.jp/outline/index.html#sec08> on 8 February 2009.

<sup>22</sup> Foreign nationals who entered Japan illegally, are those who entered Japan without valid passports or visas (illegal entry) and those who landed in Japan without obtaining permission for landing from an immigration inspector (illegal landing). Immigration Bureau, Ministry of Justice, *supra* note 11, at 32-34.

<sup>23</sup> Excluding persons from Hong Kong and Taiwan.



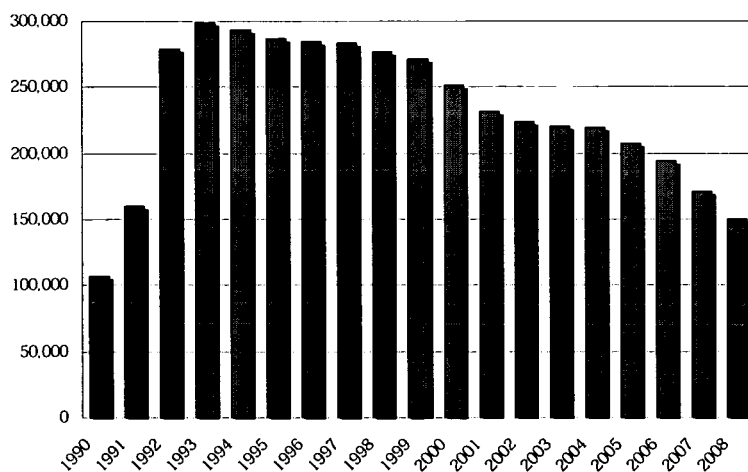
## II. Irregular Foreign Residents as Subjects of Deportation

### 1. Irregular Foreign Nationals Residing in Japan

Irregular foreign nationals indicate the so called ‘over-stayers’ who are living irregularly in Japan beyond the permitted period of stay without obtaining permission for extension or change of a status of residence, and those foreign nationals who entered Japan illegally.<sup>24</sup>

According to the statistics by the Immigration Bureau, it is estimated that there are approximately 150,000 foreign nationals in Japan who have overstayed beyond the permitted periods without obtaining extension permission or a new status of residence as of 1 January 2008 (graph 5).<sup>25</sup> The fact of the notable decline in the number of irregular foreign nationals in recent years is considered the result of the implementation of various measures against illegal foreign residents such as intensified detection, and also owing to the prolonged economic slump in Japan.<sup>26</sup> In addition, it is estimated that about 24,000 foreign nationals have been smuggled into and illegally entered Japan.<sup>27</sup> Thus, the total number of irregular foreign residents is considered approximately 174,000 which is around 10% of the total number of registered foreign residents. Since they do not have a legal ‘status of residence’, most of them are working illegally and are the major targets of deportation.

Graph5: Estimated number of over-stayed foreign residents



\* Created by author according to the statistics of Immigration Bureau, Ministry of Justice at <http://www.immi-moj.go.jp/toukei/index.html>, accessed on 15 February 2009.

<sup>24</sup> Ministry of Justice, *supra* note 4.

<sup>25</sup> The number was estimated by the Immigration Control Bureau based on computer statistics. Immigration Bureau, Ministry of Justice, *supra* note 11, at 29.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

## 2. Backgrounds of Irregular Foreign Residents

### a. *'Unskilled workers' are not accepted in Japan*

As mentioned in section B-I-3, any foreign national who wishes to work in Japan legally should have a 'status of residence' listed in the Immigration Control Act. The so called "unskilled workers" are not accepted under the Japanese immigration policy and law. Despite the fact that there is a strong demand for less skilled workers in the Japanese labor market, the Japanese government maintains the professionally-segmented status system rather than accepting foreign workers in general.<sup>28</sup>

### b. *Demand for workers in the Japanese labor market*

Due to the economic gaps between Japan and its neighboring countries, and a high excess supply of workers in the neighboring Asian countries, people from the Philippines, Thailand, and South Korea come to Japan to benefit from job opportunities and higher wage levels in the labor market. However, even though there is a high demand for workers in Japan's labor market, Japan's immigration policy consistently maintains the precondition that unskilled workers are not accepted.<sup>29</sup> As a consequence, those who are not able to obtain a legal status to work, try to come to Japan to work even illegally. Most of them enter Japan with a 'temporary stay' visa, work without work permission, and stay beyond the permitted period. The fact is that employers, especially in small companies, are willing to employ such workers at low wages. In reality, these workers play an important and increasing role in the reduction of the labor shortage in Japan's economy.

### c. *Lack of system to monitor the stay of foreign nationals*

Since the Japanese immigration control system mainly focuses on the control of foreign nationals' entry and departure but lacks the system to monitor the situation of foreign nationals who stay in Japan, many irregular foreign nationals find a partner to marry, have children born in Japan and settle in Japan for years. However, since they do not have a legal status and are not allowed to work legally, they are subjects of deportation under the Japanese Immigration Control Act. Indeed, the Japanese immigration control administration plans to take tough measures to reduce the number of irregular foreign residents,<sup>30</sup> and in fact, most of the deportation orders issued were to this kind of irregular foreign residents.

## 3. Policy Against Irregular Foreign Residents

The Japanese immigration policies aims to accept 'favorable foreigners' for Japan on the one hand and to expel 'unfavorable foreigners' – based on the

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<sup>28</sup> Solidarity Network with Migrants Japan, *supra* note 13, at 10-13.

<sup>29</sup> Ministry of Justice, *supra* note 4.

<sup>30</sup> *Id.*

precondition of ‘no unskilled workers accepted’ – on the other hand.<sup>31</sup> In the meantime, reflecting the sociopolitical backgrounds such as ‘counter-terrorism’ since ‘9.11’ in 2001 and the ‘worsening security’ campaign which alleges that the illegal foreigners are creating the hot bed for crimes in Japan, the cabinet meeting for crime prevention which was held in December 2003 set a target to “decrease illegal staying foreigners by half over the next five years” from 2003 to 2008.<sup>32</sup> According to the third Basic Plan for Immigration Control issued by the Ministry of Justice in 2005, the Ministry of Justice and its relevant administrations will take strong and effective measures to expose and deport irregular foreign residents.<sup>33</sup>

## **D. Deportation Procedure and the ‘Special Permission to Stay’**

### **I. Deportation Procedure and Destination of Deportation**

#### **1. Deportation Procedure<sup>34</sup>**

When a foreign national is detected who falls under the subject of Article 24 of the Immigration Control Act, and if the violation has been revealed through the investigation by an immigration control officer and there are grounds to be deported, the immigration control authority will detain the foreign national by implementing the issued detention order from the supervising immigration inspector. Following the examination by an immigration inspector, if it is determined that the foreign national is subject to deportation, and the foreign national accepts the deportation wishing to go back to the country of origin, then a supervising immigration inspector will issue the deportation order and the foreign national will be deported from Japan. On the other hand, if the foreign national argues that the examination has some errors or wishes to stay in Japan, the foreign national may request a hearing process, which represents the second stage of the examination. When the special inquiry officer finds no error in the immigration inspector’s findings, and the foreign national also accepts the findings and wishes to go back to the country of origin, then a supervising immigration inspector will issue the deportation order and the foreign national will be deported from Japan. However, if the foreign national argues that the findings have some errors or wishes to stay in Japan, the foreign national may seek the Minister of Justice for the final decision by filing an objection to the Minister of Justice, which represents the third stage of the examination. In case the Minister of Justice finds no reasonable ground in the objection filed by the foreign national, a supervising immigration inspector will issue the deportation order. Nevertheless, even if

<sup>31</sup> Solidarity Network with Migrants Japan, *supra* note 13, at 10.

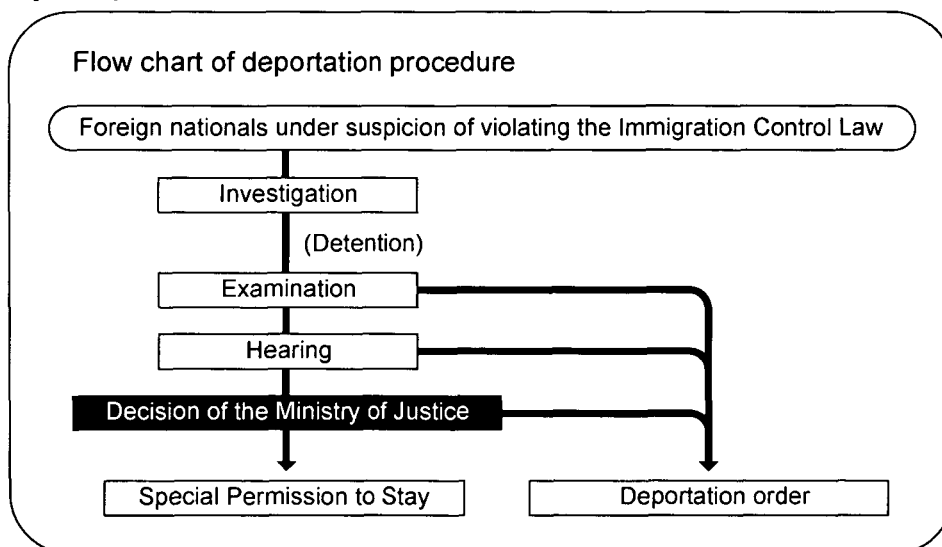
<sup>32</sup> *Id.*

<sup>33</sup> Ministry of Justice, *supra* note 4.

<sup>34</sup> For more detailed explanation of deportation procedure, see Immigration bureau, Ministry of Justice, *Immigration Procedures Guidebook*, available at <http://www.immi-moj.go.jp/english/tetuduki/index.html>, accessed on 15 February 2009.

finding no reasonable ground in the objection filed, the Minister of Justice may grant the special permission to stay to the foreign national as described in the following Section.

In case the Ministry of Justice finds no reasonable ground in the objection filed by the foreign national and no ground to grant the special permission to stay to the foreign national, if the foreign national desires to stay in Japan for some reason, since the administrative procedure is exhausted, the foreign national may file a suit in the court requesting to revoke the deportation order and arguing the determination by the Ministry of Justice is illegal for not granting the special permission to stay (hereinafter referred merely as ‘the determination of the Ministry of Justice’). In this paper, I will examine those deportation cases which especially affect the interests of the child.



\* Created by author according to the flow chart by the Immigration Bureau at [http://www.immi-moj.go.jp/english/tetuduki/taikyo/taikyo\\_flow.pdf](http://www.immi-moj.go.jp/english/tetuduki/taikyo/taikyo_flow.pdf) (15 December 2008)

## 2. Destination of Deportation

In principle, according to Article 53(1) of the Immigration Control Act, a foreign national will be deported to the country of his/her nationality by the immigration control authority. However, if it is impossible to do so, the foreign national will be deported to the following destinations: i) a country in which the foreign national had been residing immediately prior to his/her entry into Japan; ii) a country in which the foreign national once resided before his/her entry into Japan; iii) a country to which the port, where the foreign national boarded the vessel or aircraft departing for Japan, belongs; iv) a country where the foreign national's place of birth is located; v) a country to which the foreign national's birthplace belonged at the time of birth; or vi) any country other than those given in the preceding items.

In case the foreign family members have different nationalities, the family members will, in principle, be deported to different destinations upon deportation. As a result, the child will be separated from the parent with a different nationality than the child. Additionally, there would be difficulties to overcome before the family could reunite again after they are deported to different countries. Moreover, in case the parents met each other in Japan and the child was born in Japan, the family claims that their family life and the right to family unification, together with the child's interests to stay in Japan, should be protected.

## **II. 'Special Permission to Stay' Granting to the Subjects of Deportation**

### **1. 'Special Permission to Stay' under Discretion of the Ministry of Justice**

Article 50(1) of the Immigration Control Act stipulates that the Ministry of Justice may grant the 'special permission to stay' in Japan to the foreign national who is subject of deportation, if the foreigner is (i) one who has obtained the permission for permanent residence; (ii) one who has had in the past a registered domicile in Japan as a Japanese national; (iii) one who resides in Japan under the control of another due to trafficking of persons; and (iv) one whom the Minister of Justice finds grounds for granting the special permission to stay, other than the previous items. The third Basic Plan for Immigration Control states that "special permission to stay has been granted to illegal foreign residents who have close links with Japanese society or who, from a humanitarian standpoint, would suffer from deportation."<sup>35</sup>

### **2. 'Special Permission to Stay' Granted to Irregular Foreign Residents**

The special permission to stay has been granted to an increasing number of irregular foreign residents as depicted below. There were around 10,000 cases per year in which the special permission to stay was granted to irregular foreign nationals since 2003. It marks one third to one fourth of the deportation cases (table 1). The number of foreign nationals who received the special permission to stay from the Ministry of Justice was 7,388 in 2007. Although the number has been decreasing from 2005, it still maintains a high level.<sup>36</sup> According to the immigration control report in 2008, "[m]ost of the foreign nationals who received special permission to stay had established close relationships such as marriage with Japanese nationals and had, in fact, settled down in Japan in many respects."<sup>37</sup> Nonetheless, a significant number of illegal foreign nationals residing in Japan have been subject to deportation.

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<sup>35</sup> Ministry of Justice, *supra* note 4.

<sup>36</sup> Immigration Bureau, Ministry of Justice, *supra* note 11, at 41-42.

<sup>37</sup> *Id.*, at 41.

Table 1

Year	Number of deportation orders issued	Number of deportations	Number of special permissions to stay
1998	45,864	45,699	2,497
1999	50,813	50,381	4,318
2000	44,417	45,145	6,930
2001	35,408	35,380	5,306
2002	34,455	33,788	6,995
2003	35,850	35,911	10,327
2004	42,074	41,926	13,239
2005	33,520	33,192	10,834
2006	33,202	33,018	9,360
2007	28,225	27,913	7,388

\* Created by the author based on the statistics of the Immigration Bureau, Ministry of Justice, available at <http://www.immi-moj.go.jp/seisaku/index.html>, accessed on 22 February 2009.

Hereinafter, I have summarized and categorized the deportation cases which, especially affect children, and were brought by irregular foreign families requesting to revoke the deportation order and arguing that the determination by the Ministry of Justice is against the best interests of the child to stay in Japan and against the protection of their family life established in Japan, and therefore is illegal.

## **E. Deportation Cases Which Affect Children**

There are various cases of deportation which affect foreign children who have been living in Japan for all or almost of their life, either directly or indirectly. Below, I will illuminate the deportation cases which were brought to the courts and in which the children's interests were challenged particularly. I have classified the deportation cases into two large groups by whether the child is a subject of deportation or not. Firstly, the deportation cases which affect children directly are the cases where the child is facing deportation with one or both parent(s), or even to be deported alone. Secondly, the deportation cases which affect children indirectly are the cases where, although the child is not a subject of deportation, it will be influenced by the deportation of the parent.

### **I. Deportation Cases Which Affect Children Directly**

#### **1. Children Facing Deportation With the Parents**

In cases where the irregular foreign family members with the same nationality, the child will face deportation with the parents to their country of nationality. In many cases, the country of nationality is absolutely new to the child because the

child was either born in Japan or came to Japan in his/her early childhood. Since the family has been in Japan irregularly and did not travel back to their country of origin, the child has had no exposure to the culture or a chance to learn the language of his/her parents' country of origin. On the contrary, since the child was born or has grown up in Japan, he/she speaks Japanese fluently, and is familiar with the Japanese lifestyle and culture. Especially in cases where the child will be deported to a country in which there is not only a huge gap in lifestyle or culture but also discrimination based on religion and/or based on gender compared to Japan, the interests of the child to stay in Japan rather than to be deported to the country of nationality are claimed in deportation cases.

## 2. Children Facing Deportation With One of the Parents

### *a. When a child and one parent have a different nationality than the other parent*

Since in principle, a person will be deported to his/her country of nationality under Article 53(1) of the Immigration Control Act, in case the parents have different nationalities, the child will face deportation with the parent who has the same nationality as the child. When the destinations of deportation are different, family separation will occur. Therefore, along with the interests of the child to stay in Japan, the right to family unification and the protection of family life under Articles 23(1) and 17(1) of the International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR)<sup>38</sup> and Article 9(1) of CRC are often claimed by the irregular foreign family before the court.

### *b. When a child is born to a Japanese father but faces deportation with the foreign mother*

Before the amended Japanese Nationality Law (Law No. 88 of 2008) which came into force on 1 January 2009, a child born out of wedlock to a foreign mother and a Japanese father could not acquire Japanese nationality, unless the father legally acknowledges the child before the child's birth, or under the conditions of the acknowledgment of the child by the Japanese father after the child's birth and the marriage of the foreign mother and the Japanese father (Article 3(1) of the Nationality Law (Law No. 147 of 2004)).<sup>39</sup> Since there are many cases where a

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<sup>38</sup> International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976. Japan has ratified the covenant on 21 June 1979.

<sup>39</sup> According to the new Nationality Law, a child may acquire Japanese nationality by the acknowledgment of the Japanese father even after the child's birth without the condition of the parents' marriage (Art. 3(1) of the Nationality Law (Law No. 88 of 2008)). The amendment of Art. 3(1) of Nationality Law followed the Judgment of the Supreme Court (full court) of 4 June 2008 (2007 (Gyo-tsu) No. 135 and 2007 (Gyo-tsu) No. 164), 2002 *Hanrei Jihou* 3 (2008), 1267 *Hanrei Taimuzu [Hanrei Times]* 92 (2008), *Hanrei Taikei* database ID: 28141352, which judged that Art. 3(1) of Nationality Law (Law No.147 of 2004) was against the Constitution because it is illegal to discriminate the illegitimate child from the acknowledged child, by the requirement of

foreign female has a relationship with a Japanese male even though the Japanese male is already married, many children who were born out of wedlock from a foreign mother and a Japanese father could not acquire Japanese nationality for the reason that the Japanese father could not acknowledge the child before the child's birth and could not marry the foreign mother. Consequently, in case the foreign mother is living in Japan irregularly, the child will face deportation with the mother. Along the course, their relationship to the Japanese father is often emphasized in the court hearings of deportation cases.

*c. Other cases*

There are some cases in which the child is facing deportation with a parent who is staying in Japan irregularly and has a relationship with a Japanese national, or a foreign national, who is not the parent of the child. The child who has been adopted by the Japanese national may fall in the same situation as the child staying irregularly with the foreign parent mentioned above (E-I-2-b). In this situation, in addition to the interests of the child to stay in Japan, the child and the parent who are subjects of the deportation claim that their relationship to the Japanese national, or to the foreign national, and their quasi-family life in Japan should be protected.

### 3. Children Facing Deportation Alone

It is rare but it happens that the child will face deportation alone if the child has a different nationality than the parents' nationality.<sup>40</sup> Moreover, there may be some cases in which the child is deported alone physically since the family members' claims are reviewed individually. For instance, while the child's case is pending in the court, the parents had already been deported to the country of origin.<sup>41</sup>

## II. Deportation Cases Which Affect Children Indirectly

### 1. A Parent of a Japanese Child Facing Deportation

According to the Nationality law, a child may obtain Japanese nationality by birth when the father or the mother is a Japanese national (Article 2(1)). In case the child's mother is a Japanese national, the child may acquire Japanese nationality under the proof of parent-child relationship by the fact of delivery. As mentioned above (E-I-2-b), under the Nationality Law (Law No. 147 of 2004), in case the

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the parents' marriage to acquire Japanese nationality. In response to strong public opinions that the new Nationality Law may be misused by a foreign national who applies for Japanese nationality through filing a false notification, the new clause (Art. 20 of the Nationality Law (Law No. 88 of 2008)) which states the punishments against a false notification to acquire Japanese nationality under Art. 3(1) is added in the amended Nationality Law.

<sup>40</sup> *E.g.*, the case of Judgment of the Tokyo District Court of 13 March 2001 (1998 (Gyo-u) No. 130), 1784 *Hanrei Jihou* 67 (2002).

<sup>41</sup> *E.g.*, the case of Judgment of the Tokyo District Court of 19 July 2006 (2005 (Gyo-u) No. 80), *Hanrei Taikei* database ID: 28111700.



child's father is a Japanese national, the child may acquire Japanese nationality by birth if the father acknowledged the child before the child's birth, or acquire Japanese nationality through notification under the conditions of the father's acknowledgment of the child and the parent's marriage. Furthermore, under the new Nationality Law (Law No.88 of 2008), the child may acquire Japanese nationality simply by the father's acknowledgment even after the child's birth. Therefore, it can be assumed that there will be many Japanese children with a parent who is a Japanese national and another parent who is a foreign national.

In case the foreign parent is facing deportation, the interests of the child who holds Japanese nationality may be affected significantly. Under such circumstances, the parent-child relationship and the marital relationship of the foreign national to the Japanese national, their family life in Japan together with the child's interests are argued in the court of deportation cases.

## 2. A Parent of a Foreign Child Facing Deportation

Since the increasing number of foreign nationals residing in Japan, in addition to the fact that there are families in which the family members have different nationalities, it is unsurprising that the legal status of family members is different. Similar to the cases mentioned above (E-II-1), in a case where one of the child's parents is subject of deportation, the interests of the child who stays legally in Japan are claimed in the court.

In both deportation cases which affect children directly or indirectly, the plaintiff families claim for the annulment of the determination by the Ministry of Justice not to grant the special permission to stay to them, and insist that they should be granted the special permission to stay based on the best interests of the child and some other grounds.

## **F. Consideration of the Best Interests of the Child in Deportation Cases**

Hereinafter, I will expose how the best interests of the child are considered in Japan through the analysis of recent courts judgments of deportation cases which affect the interests of children. At the same time, I will highlight how the international human rights conventions such as CRC and ICCPR are applied in Japanese courts, and identify some issues which relate to the protection of the best interests of the child under Article 3(1) of CRC in deportation cases in Japan.

Firstly, by analyzing the courts judgments of deportation cases, I will illustrate the general view of the Japanese courts on foreigners' rights to enter and stay in Japan, the nature of the special permission to stay and the wide discretion of the Ministry of Justice, and the interpretation and application of human rights treaties such as ICCPR and CRC in deportation cases (I). These general points of view will help one to understand the fundamental ideas behind the judgments of

deportation cases. Secondly, I will analyze the criteria for judging whether there are needs of protection of the child's interests to stay in Japan (II), and identify some issues which need further discussion (III).

## I. Human Rights of Foreign Nationals in Deportation Cases

### 1. Foreign Nationals' Human Rights Within the Scheme of Immigration Control

#### a. *Foreign nationals have no rights to enter and stay in Japan*

In the judgments of deportation cases, the common view on foreigners' right to enter or stay in Japan that followed the Judgment of the Supreme Court<sup>42</sup> has been demonstrated as below.

Under the international customary law, a state does not undertake obligation to accept foreigners, unless there is a special treaty, and may decide freely whether to admit foreigners into the territory and the conditions in case the state admits them. As well as in our constitution, there is no clause which ensures the freedom of entry or the right to stay (including the right to claim the continuing stay), or which obliges the admissibility of entry or stay in our country to foreigners.<sup>43</sup> (Translated by author)

#### b. *Wide discretion of the Ministry of Justice on granting the special permission to stay*

Regarding the nature of the 'special permission to stay' which is granted by the Ministry of Justice under Article 50(1)(iv) of the Immigration Control Act, the common view of the courts in deportation cases is as described below.

<sup>42</sup> Judgment of the Supreme Court (full court) of 4 October 1978 (1975 (Gyo-stu) No. 120), 903 *Hanrei Jihou* 3 (1978).

<sup>43</sup> Judgment of the Tokyo District Court of 28 August 2007 (2006 (Gyo-u) No. 476), 1984 *Hanrei Jihou* 18 (2008), *Hanrei Taikei* Database ID: 28140047. The same view may be found in most of the judgments of deportation cases, e.g., Judgment of the Tokyo District Court of 23 March 2007 (2004 (Gyo-u) No. 111), *Harei Taikei* database ID: 28130871; Judgment of the Tokyo District Court of 21 December 2007 (2006 (Gyo-u) No. 504, 2006 (Gyo-u) No. 518 and 2006 (Gyo-u) No. 519); Judgment of the Tokyo District Court of 27 February 2007 (2006 (Gyo-ko) No. 126); Judgment of the Nagoya District Court of 31 January 2007 (2005 (Gyo-u) No. 45), *Hanrei Taikei* database ID: 28130479; Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41; Judgment of the Osaka District Court of 18 November 2005 (2002 (Gyo-u) No. 161), *Hanrei Taikei* database ID: 28131598; Judgment of the Nagoya District Court of 31 August 2005 (2004 (Gyo-u) No. 48, 2004 (Gyo-u) No. 49 and 2004 (Gyo-u) No. 50), *Hanrei taikei* database ID: 28102154; Judgment of the Fukuoka High Court of 7 March 2005 (2003 (Gyo-ko) No. 13), 1234 *Hanrei Taimuzu [Hanrei Times]* 73 (2007); Judgment of the Fukuoka District Court of 31 March 2003 (2001 (Gyo-u) No. 43), *Hanrei Taikei* database ID: 28081484; Judgment of the Tokyo District Court of 5 November 2004 (2003 (Gyo-u) No. 340), 1216 *Hanrei Taimuzu [Hanrei Times]* 82 (2006), *Hanrei Taikei* database ID: 28101395; Judgment of the Kobe District Court of 10 October 2003 (2000 (Gyo-u) No. 36), *Hanrei Taikei* database ID: 28091726 and Judgment of the Tokyo District Court of 15 March 2001 (1998 (Gyo-u) No. 130), 1784 *Hanrei Jihou* 67 (2002).

Even under Article 50(4)(iv) which only states that “[t]he Minister of Justice finds grounds for granting special permission to stay, other than the previous items,” and there is not anything which restricts the condition specifically by wording or which restricts the determination [of the Ministry of Justice] by stating items which the Ministry of Justice should consider. Moreover, the foreigners who fall under such determination are the persons subject to deportation and at the place that they should already be deported forcibly from our country. Furthermore, the immigration control of foreigners is operated for the purposes to maintain the public order and good manners, ensure the health and hygiene, sustain the stability of the labor market and the state interests, and for its nature, it is necessary to collect information widely, and based on the analysis of this information, to make appropriate decision according to the circumstances and it may require a high-grade political decisions.<sup>44</sup> (Translated by author)

The above mentioned common view leads to the theory that the basic human rights of foreigners are ensured only within the immigration control framework.<sup>45</sup> In addition, some judgments also indicated the view to refuse the allegation of the foreigners’ right to stay in Japan based on the rights of freedom to choose and change ones residence under Article 22(1) of the Constitution.<sup>46</sup>

Article 22(1) of the Constitution only ensures the freedom to choose and change ones residence within Japan. [...] Therefore, under the Constitution, not only the freedom to enter Japan is not ensured to foreigners, but the right to stay or the right to claim continued stay are not ensured either. In this manner, since the state can decide whether to admit foreigners’ entry and their stay, it should be interpreted that only within the framework of the immigration control system under the Immigration Control Act, the basic human rights stipulated in the Constitution are guaranteed to foreigners who stay in Japan (*see*, Judgment of the Supreme Court (full court) of 4 October 1978 (1975 (Gyo-tsu) No. 120), Vol.32, 7 *Minsyuu* 1223 and Judgment of the Supreme Court (full court) of 9 June 1954 (1951 (a) No. 3594), Vol. 11, 6 *Keisyuu* 1663).<sup>47</sup> (Translated by author)

Accordingly, the Ministry of Justice’s discretion on granting the special permission to stay, for its nature mentioned above, is considered broad and is with grace. In other words, the restriction to the discretion of the Ministry of Justice in the sense of granting the special permission to stay is limited narrowly.<sup>48</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *E.g.*, Judgment of the Tokyo District Court of 27 February 2007, *supra* note 43.

<sup>46</sup> *E.g.*, Judgment of the Osaka District Court of 18 November 2005, *supra* note 43; Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43; Judgment of the Tokyo District Court of 27 February 2007, *supra* note 43; Judgment of the Fukuoka High Court of 7 March 2005, *supra* note 43; Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43 and Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43. Art. 22(1) of the Constitution stipulates that “[e]very person shall have freedom to choose and change his residence and to choose his occupation to the extent that it does not interfere with the public welfare.”

<sup>47</sup> Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43. The same view may be found in some judgments of deportation cases, *e.g.*, Judgment of the Kobe District Court of 10 October 2003, *supra* note 43; Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43 and Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43.

<sup>48</sup> *E.g.*, Judgment of the Nagoya District Court of 31 January 2007, *supra* note 43 and Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

## 2. The Little Impact of International Human Rights Conventions

### a. *General view of the courts*

In deportation cases, the courts indicate that there is no impact of ICCPR and CRC that change the view of the above mentioned international law and the Constitution related to foreigner's rights to entry or stay in Japan.<sup>49</sup> The interpretation of the related clauses of ICCPR and CRC by the courts that support its arguments is as mentioned below.

The ICCPR does not set a clause which restricts the above mentioned international law. In contrary, Article 13 of ICCPR stipulates that “[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law”. Since such clause is interpreted based on the assumption that it is able to conduct forcible deportation measures against a person who stays illegally, ICCPR is interpreted based on the assumption that the state has free decision power over the admission of foreigners’ entry and stay.<sup>50</sup> (Translated by author)

Article 9(4) of the Convention on the Rights of the Child states in the case of the separation of a child from the parents as a result from the action initiated by a state party, such as detention, imprisonment, exile, deportation or death of one or both parents or of the child. Therefore, this clause is interpreted based on the assumption that the parents and the child may be separated by forcible deportation measures, and the Convention on the Rights of the Child is also interpreted based on the assumption that the state has free decision power over the admission of foreigners’ entry and stay.<sup>51</sup> (Translated by author)

By upholding Article 13 of ICCPR and Article 9(4) of CRC, the courts lead to the conclusion that the state may decide the admission of foreigners’ rights to enter or stay unrestrictedly, and therefore, those treaties could not be the grounds to restrict the discretion of the Ministry of Justice on granting the special permission to stay to foreigners who are subjects of deportation. Moreover, there are some judgments stating that the best interests of the child is also only ensured within the immigration control framework.<sup>52</sup> And some courts referred to the clauses

<sup>49</sup> *E.g.*, Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43; Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41 and Judgment of the Tokyo District Court of 15 March 2001, *supra* note 43.

<sup>50</sup> Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43. The same interpretation may be found in some judgments of deportation cases, *e.g.*, Judgment of the Tokyo District Court of 23 March 2007, *supra* note 43; Judgment of the Osaka District Court of 18 November 2005, *supra* note 43; Judgment of the Tokyo District Court on 15 March 2001, *supra* note 43; Judgment of the Tokyo High Court of 13 April 2005 (2004 (Gyo-ko) No. 389), *Hanrei Taikei* database ID: 28112011; Judgment of the Fukuoka High Court of 7 March 2005, *supra* note 43; Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41; Judgment of the Osaka High Court of 31 August 2006, (2005 (Gyo-ko) No. 112), *Hanrei Taikei Database* ID: 28112504 and Decision of the Tokyo District Court of 6 November 2002 (2002 (Gyo-ku) No. 159), *Hanrei Taikei* database ID: 28081868.

<sup>51</sup> *Id.*

<sup>52</sup> *E.g.*, Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50; Judgment of the Kobe District Court of 10 October 2003, *supra* note 43 and Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43.

of Article 17(1) and Article 23(1) of ICCPR and Article 9(1) and Article 3(1) of CRC that state the protection of family life and judged that those clauses do not provide more protection than the human rights under the Constitution.<sup>53</sup>

*b. Exceptional positive approach*

However, in addition to the above mentioned general view of ICCPR and CRC, some judgments pointed out that the right to family unification, the protection of the minor by the family, the best interests of the child and ensuring the child not to be separated from the parents based on the related clauses of ICCPR and CRC, in general terms, should be respected even under the Immigration Control Act and should be considered as factors for the determination of special permission to stay by the Ministry of Justice.<sup>54</sup> Especially, in cases where the foreigner's spouse is a Japanese national and they have achieved their life in Japan, these elements should be considered as positive factors for granting the special permission to stay.<sup>55</sup>

It should be noted that there is a judgment which, although following the general view that ICCPR and CRC do not influence the state's authority to expel foreigners and do not restrict the wide discretion of the Ministry of Justice, on the other hand, indicating that the Ministry of Justice should respect and consider the spirit and the purposes of international human rights treaties as important elements on granting the special permission to stay.<sup>56</sup>

Indeed, according to Articles 98(1) and (2) (compliance with treaties and international rules) and Article 99 (public servants' obligation to respect and safeguard the constitution), the civil servants in our country should observe and undertake obligations to respect the spirit faithfully of foregoing international treaties (ICCPR and CRC) and the purposes (protection of the family unification and guarantee of the best interests of the child). Hence, in determining whether to grant the special permission to stay to the foreigner, the Ministry of Justice as a defendant should consider the spirit and the purposes of the international human rights treaties (ICCPR and CRC) as important elements.<sup>57</sup> (Translated by author)

## **II. The Best Interests of the Child in Deportation Cases Examined by the Courts**

In most of the recent judgments of deportation cases where a child is involved, the interests of the child to continue to live and to be educated in Japan, the

<sup>53</sup> *E.g.*, Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43 and Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50.

<sup>54</sup> *E.g.*, Judgment of the Tokyo District Court of 23 March 2007, *supra* note 43 and Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

<sup>55</sup> *E.g.*, Judgment of the Tokyo District Court of 28 August 2007, *supra* note 43 and Judgment of the Nagoya District Court of 9 February 2006 (2005 (Gyo-u) No. 11), *Hanrei Taikei* database ID: 28110958.

<sup>56</sup> Judgment of the Fukuoka High Court of 7 March 2005, *supra* note 43.

<sup>57</sup> *Id.* The same view may be found in Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

obstacles the child will face if the child was deported to the country of nationality, the protection of family life and the child's own will have been claimed by the family facing deportation and examined by the court. Hereinafter, I will analyze, from the interests of the child's point of view, how the judgments of deportation cases examined these factors.

## 1. The Interests of the Child to Continue to Live in Japan

### a. *The child's interests to stay in Japan with the family*

Since there is an increasing number of children born in Japan with multicultural backgrounds as described in B-II or who came to Japan in their early childhood with the parents, in a deportation case where a child is involved, the best interests of the child to continue to stay in Japan is often claimed by the plaintiff families. Beside the fact that any child who falls subject under Article 24 of the Immigration Control Act should be deported from Japan in the legal sense, the fact of the illegal entry and working illegally of the parents are deemed as important negative factors for granting the special permission to stay to the family. Therefore, there are only a few cases in which the courts judged that the child's adaptation into the Japanese society and the family life in Japan are worth legal protection.<sup>58</sup>

In the cases in which the court judged that when the child is familiar with Japanese customs and culture and will face serious obstacles upon deportation, the child's interests to stay in Japan for the welfare and education of the child should be considered worthy of legal protection.<sup>59</sup>

### b. *Acknowledging the foreign family's strong tie to Japan's society*

There are a few cases in which the courts judged that the irregular foreign family who had been in Japan peacefully for a long time as good citizens and established the basis of their life confirming positive criteria for granting the special permission to stay.<sup>60</sup> In these cases, the courts decided that the determination by the Ministry of Justice which ignored these criteria is illegal. Furthermore, the court valued that the family basis which was established when there were serious restrictions for the family since the family members did not have legal status and the parents had a limited job selection, and the court foreseen the basis of the family life will be even stronger after obtaining a legal status to stay in Japan.<sup>61</sup>

<sup>58</sup> E.g., Judgment of the Tokyo District Court of 17 October 2003 (2001 (Gyo-u) No. 34), *Hanrei Taikei* database ID: 28090050 and Judgment of the Tokyo District Court of 19 September 2003 (2000 (Gyo-u) No. 211), 1836 *Hanrei Jihou* 46 (2003), *Hanrei Taikei* database ID: 28082829.

<sup>59</sup> *Id.*

<sup>60</sup> Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58 with regard to a Korean family that stayed in Japan for six years, and Judgment of the Tokyo District Court of 19 September 2003, *supra* note 58 with regard to an Iranian family that stayed in Japan for ten years respectively at the time of the determination by the Ministry of Justice that the special permission to stay was not granted to those families.

<sup>61</sup> Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58.

In contrary, many courts judgments in deportation cases place emphasis on the illegality of the parents' illegal entry, illegal overstay and working illegally. Against the claim by the irregular foreign family that they have established their family life and are living peacefully without violate any rule other than the Immigration Control Act, the court censures that the conducts of the irregular parents, such as 'illegal entry' and 'faked purpose of stay' upon entry, 'illegal overstay' and 'working illegally' harmed the national interests of Japan, rather than weighing their peaceful life in Japan and their contributions to Japanese society.<sup>62</sup> According to the judgments, even if the foreign family who has a close connection and contributes to the local community, however, the connection was created on the illegal entry, and the continuous situation of illegal overstay and illegal work, that consist a malicious violation of laws and therefore should not be overlooked.<sup>63</sup>

## 2. Obstacles in Case the Child is Deported to the Country of Nationality

In most of the cases which relate to the deportation of a child, the obstacles which the child would face if deported to the country of nationality are examined by the courts.<sup>64</sup> Especially in case the child is educated in Japan, only speaks Japanese, and is familiar with Japanese customs and culture, there will be a heavy burden when the child is deported to the country of nationality where the child may have never been.

### *a. Obstacles based on the consideration of the child's interests*

In regard to the case of a Korean family with a child who came to Japan when she was one and a half years old and was about eight years old at the time of determination by the Ministry of Justice not to grant the special permission to stay to the family, the court judged that there are foreseeable serious obstacles in the child's future growth in case of deportation.<sup>65</sup> The court pointed out that the Ministry of Justice failed to examine how the child, who has been in Japan since her early childhood, will be influenced when the child went back to Korea where the language, customs and manners are completely different from Japan's and there is a complicated national emotion to Japan for historical reasons. Through

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<sup>62</sup> Judgment of the Tokyo District Court of 23 March 2007, *supra* note 43; Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43; Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43; Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43 and Judgment of the Kobe District Court of 10 October 2003, *supra* note 43.

<sup>63</sup> Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43.

<sup>64</sup> *E.g.*, Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58; Judgment of the Tokyo District Court of 19 September 2003, *supra* note 58; Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43; Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50; Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41; Judgment of the Fukuoka High Court of 7 March 2005, *supra* note 43 and Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43.

<sup>65</sup> Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58.

examining not only the school life of the child but also her after-school lessons, the court stressed that the child was assimilated completely into the Japanese society. Therefore, the court judged that the determination by the Ministry of Justice not to grant the special permission to stay to the family was illegal.

Likewise the case mentioned above, in the case of an Iranian family with two children, one was about twelve years old and the other was about four years old at the time of determination by the Ministry of Justice, the court judged that the children, especially the twelve year old daughter who had been in Japan under the same treatment as males, will be traumatized seriously if she was deported to Iran, because the status of women is subordinate to man and a completely different language, customs and manners in Iran.<sup>66</sup> In conclusion, with other grounds for protection of the family life, the court judged that the special permission to stay should be granted to the family.

However, the above mentioned judgments are not the common ones. In many cases, even when the court realizes the serious obstacles for the child if they were deported from Japan and they have to pay a great amount of efforts to adapt into a new society, the courts justify the deportation of the child together with the parents because of reasons described below.

*b. Obstacles judged as surmountable hurdles*

In a case regarding a Filipino family with a child who was born in Japan and was twelve years old at the time of determination by the Ministry of Justice, the court stated that the obstacles for the child upon deportation, namely the serious psychological and physical distress caused by the changing of the surrounding environment and lifestyle, are generally faced by a child who was born and stayed in a foreign country when the child is brought back to the country of origin.<sup>67</sup>

Additionally, the word 'adaptability', which is used to justify the deportation of the child together with the parents, often appears in the court judgments in deportation cases.<sup>68</sup> The court explains that even if there are some obstacles when the child is deported to the country of nationality, the child can adapt in a new environment and learn the new language quickly. Remarkably, this word was applied to children who are about two years old even up to a child who is about fifteen years old in the court judgments. Besides, the court pointed out that after the child is deported to the parents' country of origin, the child will be under the protection and custody of the parents who had been in the country till they came

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<sup>66</sup> Judgment of the Tokyo District Court of 19 September 2003, *supra* note 58.

<sup>67</sup> Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43. Some judgments share the same point of view, *e.g.*, Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50.

<sup>68</sup> Judgment of the Tokyo District Court of 23 March 2007, *supra* note 43; Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43; Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43; Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50; Judgment of the Kobe District Court of 10 October 2003, *supra* note 43 and Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43.



to Japan and speak the language of the country, also with the support of relatives who stayed in the country, the child will adapt in the new environment as time passes.<sup>69</sup>

Along the course, the court concludes that even though there are considerable psychological and physical burdens for the child, if the child is deported together with the parents, the deportation is not against humanity. Although when there is a separation of the family caused by deportation as described later (F-II-3(b) and (c)), in case the child is deported with one of the parent and be separated from the other parent, the court finds that there is no considerable serious obstacles for the child if the child is with one of the parents.<sup>70</sup>

### 3. Protection of Family Life and the Right to Family Unification

#### *a. Protection of family life in Japan*

Against the claim of the foreign family that they have established their family life in Japan which should be protected, the court often judges that their family life established in Japan was created on the parents' illegal conducts, such as over-stay and working illegally, and therefore can not be a positive factor for instantly granting the special permission to stay as mentioned above (F-II-1-b).<sup>71</sup>

Nevertheless, in case the subject of deportation is a foreign national who is a parent of a Japanese child and/or has a relationship with a Japanese national, the judgments recognize that the interests of the family unification and their family life in Japan should be respected.<sup>72</sup> A judgment stated that a substantive marital relationship is worth of humanitarian protection under Article 24 of Constitution, Article 10 of International Covenant on Economic, Social and Cultural Rights<sup>73</sup> and Article 23 of ICCPR.<sup>74</sup> According to the court, in the case of the child whose parents are alive, generally, the best interests for the child is to live under the custody of the parents, therefore, from the child's welfare point of view, it is widely accepted observation that a child should not be separated from the parents against the parents' will under Article 9 of ICCPR.<sup>75</sup>

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<sup>69</sup> Judgment of the Tokyo District Court of 23 March 2007, *supra* note 43; Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43; Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50 and Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

<sup>70</sup> Judgment of the Tokyo District Court of 23 March 2007, *supra* note 43 and Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

<sup>71</sup> *E.g.*, Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58 and Judgment of the Tokyo District Court of 19 September 2003, *supra* note 58.

<sup>72</sup> *E.g.*, Judgment of the Nagoya District Court of 9 February 2006, *supra* note 55 and Judgment of the Tokyo District Court of 28 August 2007, *supra* note 43.

<sup>73</sup> International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1966 and entered into force on 3 January 1976. Japan has ratified the Covenant on 21 June 1979.

<sup>74</sup> Judgment of the Tokyo District Court of 28 August 2007, *supra* note 43.

<sup>75</sup> *Id.*

*b. Harmful impacts of family separation on the child upon deportation*

In case the family members have different nationalities and are facing deportation to different destinations, the family claims that the family separation, especially when the child will be separated from the parent who has a different nationality than the child, should be avoided for the best interests of the child and the right to family unification. However, the judgments indicated that even if the family members are deported to different countries, it is not impossible to reunite the family again in one of their countries of origin.<sup>76</sup>

In the case regarding a family where the father has a different nationality (Turkish nationality, Kurdish) than the mother and the child (Filipino nationality), despite the family claims that there will be extremely tough challenges for the family to reunite either in Turkey or in the Philippines especially on religious grounds, the court stressed that the family's strong tie to Japanese society<sup>77</sup> was based on the continuous situation of illegal stay and their contribution to Japanese society was nothing but working illegally. In this case, as for the interests of the child who was born in Japan and was about three years old at the time of the determination by the Ministry of Justice, against the claim of the family that the child may face serious physical and mental problems if the child is separated with the father, the court alleged that the child may adapt in a new environment and learn a new language quickly either in Turkey or in the Philippines, and judged that since the child has no health or growth problem other than the depression caused by the separation from the parents when the parents were under detention, there will be no serious psychological or physical impact on the child if the child stays with the mother and be separated from the father temporarily upon deportation.

In another case where the child is facing deportation with the father and will be separated from the mother,<sup>78</sup> despite the claim by the family that the family reunification can not be realistic for discrimination on religion and females in Iran and the deteriorated security and economic situation in Colombia, the court remarked that in addition to the fact that Japan is not responsible for the situation in Iran and in Colombia, the family has to overcome such situations by their own efforts to achieve family unification under their own responsibilities since the parents have made the choice to marry each other even though they have different nationalities, and the basic assumption in Japan that the child is better to be with the mother should not be forced to foreign nationals to follow,<sup>79</sup> and eventually the court justified the child to be deported with the father and be separated from the mother.

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<sup>76</sup> Judgment of the Tokyo District Court Decision of 23 March 2007, *supra* note 43.

<sup>77</sup> In this case, the father had been in Japan for eleven years and the mother had been in Japan for seven years at the time of the determination of Ministry of Justice.

<sup>78</sup> In this case, the father has Iranian nationality, the mother has Colombian nationality and was granted Iranian nationality by marriage but does not hold an Iranian passport, and the child was born in Japan and has dual nationalities of Iran and Colombia but holds only an Iranian passport. Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

<sup>79</sup> From the child's welfare point of view, the court stated that it is considered in Japan that the child should be with the mother at least till three years old, otherwise there may be significant

*c. Independent interests of the child on the condition to be separated from the parents*

In case the special permission to stay is only granted to the child by the Ministry of Justice or recognized by the court, the family will have difficult choices to either let the child to stay in Japan alone or to let the child be deported with them.<sup>80</sup>

In a case relating to a fifteen year old Chinese girl whose parents have already had been deported, the court examined her interests, which are independent from the interests of the parents, to continue to study and live in Japan are worth legal protection and there may be significant disadvantages for the child to be deported to China.<sup>81</sup> For the same reasons, the court judged that the girl's brother, who was seventeen years old and stayed in Japan for about eight years at the time of determination by the Ministry of Justice, should be granted the special permission to stay.<sup>82</sup> In both of the judgments, the court emphasized that the children were not responsible for the illegal entry and illegal stay in Japan. While the parents of the children were already deported to China, as a guarantee for the children's living costs, the economical and social backup by the supporting group was also taken into account by the court. Regard to this case, although the children's interests to stay in Japan was recognized, the children have to live in Japan without parents.<sup>83</sup>

However, in the similar case, the claim of a Filipino girl who, was born in Japan and was fourteen years old at the time of determination by the Ministry of Justice, was accepted in the District Court judgment but then was overturned on the appeal court.<sup>84</sup> The court stressed that her fourteen years stay in Japan was based on the illegal state, and it is not worth legal protection instantly even though the child is not responsible for the illegal stay. The court also emphasized that, if her parents were deported to the Philippines and the child had to live in Japan alone, there will not only be a financial problem to live in Japan for the child, but also serious psychological and physical damages for the child since she cannot be

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influences even if the child is separated from the mother for a short time. Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

<sup>80</sup> Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41 and Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43.

<sup>81</sup> Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41.

<sup>82</sup> Judgment of the Tokyo District Court of 28 March 2006 (2005 (Gyo-u) No. 79), 1952 *Hanrei Jihou* 79 (2007), 1236 *Hanrei Taimuzu [Hanrei Times]* 1 (2007), *Hanrei Taikei* database ID: 28130331. However, the child's claim was rejected in the appealed court, Judgment of the Tokyo District Court of 27 February 2007, *supra* note 43.

<sup>83</sup> There is another case concerning a child who was born to Chinese parents in China but holds Bolivian nationality, which was acquired by fake documentations, and stayed in Bolivia for only two months of her life, the court stressed that there are foreseeable obstacles if the child were deported to the country of nationality. Also in this case, only the child's special permission to stay was justified and the parents were already deported to China. Judgment of the District Court of 13 March 2001, *supra* note 40.

<sup>84</sup> Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43 and Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50.

in the parents' custody, and there is no legal status on the assumption for a child to live in Japan alone under the current Immigration Control Act. Moreover, the court stated that she is still young enough to adapt in a new environment.

#### 4. The Child's Own Will

In case the child is facing deportation, the child's own will is taken into account by some court judgments.<sup>85</sup> In the case regarding a Chinese girl who came to Japan with her family when she was seven years old and was fifteen years old at the time of the determination by the Ministry of Justice, the court observed that the child is old enough and is in the situation that her own determination should be respected on some levels.<sup>86</sup> In this case, the court referred to the child's efforts to learn Japanese after she came to Japan, and the obstacles she will face when she goes back to China in the sense that she will not be able to follow the school or pay huge efforts to adapt in a new environment again. Taking the child's own will to stay in Japan into consideration, and owing the fact that she was adapted into the Japanese society already and the obstacles when she was deported back to China, the court decided that the child should be granted the special permission to stay.

However, in the case regarding a Filipino child who was born in Japan and was eleven years old at the time of the determination by the Ministry of Justice, the court judged that the child is still too young to decide for herself properly about whether she should stay in Japan or not.<sup>87</sup> Indeed, the courts are not always taking into account the child's own will, even if the child expresses his/her will to stay in Japan through the plaintiff family's claim.<sup>88</sup>

### III. Analysis of the Best Interests of the Child in Deportation Cases

#### 1. The Best Interests of the Child in Deportation Cases

In the cases where the child is affected directly or indirectly, it is obvious that the best interests of the child are – as claimed by the child and the family involved – to continue to live and study in Japan as it has always been in the past and not to be separated from the parents against their will. However, in case the family members are subject to deportation under Article 24 of the Immigration Control Act, the family should be deported from Japan for breaching the Law. Nevertheless, the special permission to stay may be granted to the family under the discretion of the Ministry of Justice. Accordingly, in some court judgments, an approach to compare the disadvantages of the family members upon deportation and the benefits of the state to expel illegal foreign nationals, was applied to

<sup>85</sup> *E.g.*, Judgment of the Tokyo District Court 21 December 2007, *supra* note 43; Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41 and Judgment of the Tokyo District Court of 5 November 2004, *supra* note 43.

<sup>86</sup> Judgment of the Tokyo District Court of 19 July 2006, *supra* note 41.

<sup>87</sup> Judgment of the Tokyo District Court of 21 December 2007, *supra* note 43.

<sup>88</sup> *E.g.*, Judgment of the Tokyo High Court of 13 April 2005, *supra* note 50 and Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43.

judge whether the determination by the Ministry of Justice not to grant the special permission to stay to the family should be revoked or not.<sup>89</sup> From the point of view of the protection of the best interests of the child, I consider that the courts should first judge whether the child's interests should be protected and grant the special permission to stay in Japan through examining i) the interests of the child to stay in Japan; ii) the obstacles for the child upon deportation; iii) the child's family life in Japan and family separation upon deportation; and iv) the child's own will, and then judge whether the parents should be granted the special permission to stay or if they should be deported.<sup>90</sup>

## 2. Illegal Stay Weighs More than the Child's Interests

As mentioned earlier in this paper (F-II-1), the courts tend to stress the 'illegal entry', 'illegal over-stay' and 'illegal work' of the parents and judge that the foreign family's close tie to Japanese society was based on those illegal conducts and that harmed Japanese national interests, rather than weigh their peaceful life in Japan and their contributions to the Japanese society.

Thus, in most of the cases where the child is facing deportation, the courts examined whether there were interests for the child that need legal protection from deportation, but on the assumption of the deportation of the parents. Consequently, even the courts recognize the interests to stay and to study in Japan for the child, who was born in Japan or came to Japan in their early childhood, the courts justify the deportation of the child with the parents for the reasons that i) the child is young enough to adapt in a new environment and learn the new language quickly; and ii) it is for the sake of the child's welfare that the child is under the parents' custody. The fundamental theory and perception behind the logics of the judgments are i) the general view that human rights of foreign nationals, including children, is only ensured within the immigration control framework; and ii) the general conception that the child should be under the parents' custody and the child is an appendage of the parents in Japan. Moreover, the court explained that the psychological and physical damages to the child if separated from the parents would be more serious than the damages faced upon deportation.

Nevertheless, in contrast, the courts justified the deportation of the child with a parent and to be separated from the other parent by alleging that the psychological and physical damages to the child caused by the separation from a parent is not serious if the child is to stay with one of the parents. Eventually, the child will be deported with the parents or one of the parents, despite the interests of the child to continue to live in the country where the child was born and has grown up, and has to leave to a country which is the child's country of nationality but is completely new to the child.

It seems that the consistency principle in the judgments is to expel the child either with one of the parents or with both parents, but not for the consistency principle to protect the child's interests to be under the custody of the parents. I strongly argue that, the emphasis of the parents' violation of the Immigration

<sup>89</sup> *E.g.*, Judgment of the Tokyo District Court of 19 September 2003, *supra* note 58.

<sup>90</sup> *E.g.*, Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58.

Control Act and pay less attention to the child's interests to stay in Japan is against the protection of the best interests of the child which is stipulated in Article 3(1) of CRC, and that may create discrimination of the child based on the status or activities of the parents which is prohibited in Article 2(2) of CRC. Especially, when taking into account the fact that the child is not responsible for the illegal stay in Japan, from the view point of the protection of the best interests of the child, the child's interests to stay in Japan should be considered as an important element to grant the special permission to stay with the parents.

### 3. Rigid Criteria for Judging the Interests and Obstacles of the Child Upon Deportation

Since the court examines the child's interests to stay in Japan on the assumption of deportation of the parents, and based on the conception that the child should be raised by the parents, naturally, the criteria for judging the interests and obstacles of the child upon deportation are rigid. Especially the obstacles, such as not only the economical and language problems, but also religious and social difficulties that the child will face to in the country of nationality, were judged under rigid criteria. For instance, a child who was baptized as a Christian, by the devout Christian mother who holds a Filipino nationality, was facing deportation with the father to Iran where a Christian may be in danger of persecution, the court did not recognize the foreseeable danger for the child or for the mother.<sup>91</sup>

It is obvious that if the child or the parent is facing predictable danger on the ground of religion, Japan has an obligation to protect the child and the parent from deportation and grant the status of refugee to them under the Refugee Conventions.<sup>92</sup> I emphasize that even if the child and the parents do not fulfill the requirements to be recognized as refugees, the child's interests to stay in Japan and the religious, cultural, social and economical obstacles should be taken into account from the point of view of protection of the best interests of the child. In this sense, granting the special permission to stay to the child and the parents may play an important role from a humanitarian perspective, as it is stated in the third Basic Plan for Immigration Control.<sup>93</sup>

### 4. Family Unification for the Interests of the Child

In deportation cases which affect children either directly or indirectly, family unification or that the child should not be separated from the parents should be taken into account from the point of view of protecting the child's interests. I

<sup>91</sup> Judgment of the Nagoya District Court of 31 August 2005, *supra* note 43.

<sup>92</sup> Art. 1 of the Convention Relating to the Status of Refugees, which was adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly Resolution 429 (V) of 14 December 1950 and entered into force on 22 April 1954 (Japan had ratified the convention on 3 October 1981), and Art. 1 of Protocol Relating to the Status of Refugees, which was approved by the Economic and Social Council in Resolution 1186 (XLI) of 18 November 1966 and was approved by the General Assembly in Resolution 2198 (XXI) of 16 December 1966 (Japan had ratified on 1 January 1982).

<sup>93</sup> Ministry of Justice, *supra* note 4.

consider that there is a close link between the right to family unification and the best interests of the child in deportation cases. However, through analyzing the recent judgments on deportation cases which affect children, I revealed that the right to family unification and the protection of the best interests of the child were applied as mutually exclusive factors. Namely, the family unification for the welfare of the child lead to the deportation of the child with the parents despite the child's interests to stay in Japan, or the protection of the child's interests to stay in Japan leads to the child being separated from the parents. Eventually, even in cases where the court judged that there are interests of the child to stay and study in Japan and that they are worth legal protection, the result is either that the child stays in Japan alone or that it is deported to the country of nationality with the parents.

*a. Protection of child's interests leads to the child's separation from the parents*

As mentioned earlier in this paper, there are only a few cases in which the child's interests to stay in Japan together with the other family members are accepted by the courts. Since the child's interests are considered under the precondition of the parents' deportation, in case the special permission to stay is only recognized for the child, the child's independent interests are examined by the courts from the point of view whether the child may live without parents economically and psychologically in Japan. In this case, I consider that it is essential that the courts examined the child's interests to live and study in Japan and respected the child's own will. However, as a consequence in many cases, the child will be separated from the parents and live alone in Japan. From the point of view of protecting the child's interests, whether this consequence meets the best interests of the child is doubtful. I argue that the child should not be separated from the parents against their will is also a part of the child's interests, and this point is rarely considered by the court. Concerning the separation of the child from the parents upon deportation, Japan has made a declaration on Article 9(1) of CRC that this clause is "interpreted not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law."<sup>94</sup> To share the international duties to protect the human rights of the child, I emphasize that this declaration should be withdrawn.

*b. Protection of child's interests leads to deportation of the child with the parents*

As mentioned above (F-III-2), even if the child has interests to stay in Japan, the protection of the child's interests to stay with the parents from the child's welfare point of view leads to the deportation of the child together with the parents. Again, I doubt that the deportation of the child, with the parents to the country of nationality that is justified under the logic to protect the child not to be separated from the parents, meets the best interests of the child.

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<sup>94</sup> Declarations and reservations of 1989 Convention on the Rights of the Child, *supra* note 1.

*c. Family reunification as a serious obstacle for the interests of the child*

In case the family members with different nationalities are subject to deportation, generally, the child will be deported with the parent who has the same nationality as the child and will be separated from the parent who has a different nationality than the child. The court alleged that it would not be extremely difficult for the family to reunite with each other after they were deported to different countries. However, as in the cases introduced in the previous Section (F-II-3-(b)), when the family may have difficulties for economical, cultural and social reasons, especially when there are additional religious obstacles and social status obstacles for the child, I consider that the deportation of the child and the family separation should be avoided to respect the best interests of the child. At least the court should apply the same criteria, in the case when a foreign national who faces deportation and will be separated from the Japanese national who has a close relationship with the foreign national, to judge how difficult it is to reunite with each other in the foreign country for the Japanese national.

## **G. Conclusion**

In this paper, I have analyzed how the best interests of the child are taken into account by the courts in the recent deportation cases which affect children directly or indirectly. Furthermore, I have examined the criteria which were judged by the court as following: i) the interests of the child to continue to live in Japan; ii) obstacles in case the child is deported to the country of nationality; iii) protection of family life for the child's interests; and iv) the child's own will. These factors were reviewed by the courts to judge whether the interests of the child need legal protection and therefore the special permission to stay should be granted to the child.

Through analysis of these criteria judged by the courts, I revealed that those elements are examined based on the precondition of the deportation of the parents because they are staying illegally and working illegally in Japan. In other words, the parent's conduct such as illegal entry, over-stay beyond the permitted period of time and working illegally were judged as serious violations of the Immigration Control Act, and the family's strong relation to Japanese society for an extended period of time was judged as the continuous violation of the Law. In most of cases, the parents illegal conduct weighed more than the child's interests to stay and study in Japan. Therefore, in these cases, despite the fact that the child is not responsible for their irregular stay in Japan, and while the child is familiar with Japanese customs and culture but does not speak the language of the country of his/her nationality, the special permission to stay for the child is denied. Eventually, the child will be deported with the parents even if it is clear that the best interests for the child is to continue to stay in Japan with the family, and that the child will be confronted with serious obstacles, not only the language problem, but also the cultural, social, economical and religious difficulties if deported. The child's



deportation to the country of nationality was justified for reason that the child will be able to adapt to the new environment and learn the language quickly even if the child was fifteen years old at the time of the determination by the Ministry of Justice. Since the child is not responsible for the illegal stay in Japan, I argue that the emphasis of the parents' violation of the Immigration Control Act and ignore the child's interests to stay in Japan, goes against the protection of the best interests of the child which is stipulated in Article 3(1) of CRC, and may create discrimination of the child based on the status or activities of the parents which is prohibited in Article 2(2) of CRC. I consider that, for protecting the best interests of the child, the immigration authority and the courts should firstly consider whether there are needs of legal protection of the child's interests to stay in Japan, and should then determine whether to deport the parents.<sup>95</sup>

On the other hand, although the child's independent interests to stay and to study in Japan were accepted by the court, as the child's interests were examined on the precondition of the deportation of the parents, the child has to remain in Japan alone. Or, in case even if the court recognized the child's interests to stay in Japan, the deportation of the child with the parents is justified under the logic that it is for the child's welfare to be under the custody of the parents. Furthermore, in case the separation of the child from one of the parents who has a different nationality than the child, the right to family unification and the protection of the child under the parents are ignored by the courts for the reason that Japan is not responsible for the separation of the family and the reunification should be realized by the family members efforts after deportation to different countries, and the court alleged that there will not be serious psychological and physical harmful effects if the child were under the custody of one of the parents. Through the analysis of these judgments on deportation cases which affect children, I demonstrated that the right to family unification and the protection of the best interests of the child were applied as mutually exclusive factors. In other words, the family unification for the welfare of the child leads to the deportation of the child with the parents despite the child's interests to stay in Japan, or the protection of the child's interests to stay in Japan leads to the child being separated from the parents. I emphasize that the consideration of the family unification and avoid obstacles for the family reunification are essential for the protection of the best interests of the child. Thus, in deportation cases which affect the children either directly or indirectly, I consider that the protection of the child not to be separated from the parents stipulated in Article 9(1) of CRC, for the best interests of the child, should be respected in deportation cases.

Incidentally, it is worth noting that the general view as the basic theory behind the judgment of deportation cases is that, the human rights of foreign nationals, including children, is only ensured within the scheme of immigration control. And the common view of the courts is that international human rights conventions such as ICCPR and CRC do not influence the above mentioned basic theory and do not guarantee more human rights than the Constitution does. There is even

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<sup>95</sup> Judgment of the Tokyo District Court of 17 October 2003, *supra* note 58.

a judgment indicated that the child welfare is not worth the legal protection in deportation cases, because the life of the child in Japan was based on the situation of illegal stay that was created by the parents.<sup>96</sup>

Indeed the illegal entry, illegal over-stay and working illegally are against the Immigration Control Act. However, many irregular foreign residents create families, settle in Japan, and the children were either born in Japan or came to Japan in their early childhood. Most of those families are living in Japan without committing crimes other than the violation of Immigration Control Act, and have strong ties to local community and are making efforts to contribute to Japanese society. To be more precise, the children are raised the same as other Japanese children and have no actual relationship to the country of nationality, and the parents are playing an important role to support Japanese economy as cheaper labor by working in the fields which are so called '3K jobs'— *Kitanai* or dirty, *Kiken* or dangerous, and *Kitsui* or demanding jobs – that the Japanese are not willing to work at. Therefore, I argue that when the foreign family settled their base of life with the child peacefully in Japan and have a strong tie to Japanese society, especially in the case where the child will be confronted with serious obstacles or be separated from a parent upon deportation, the interests of the child to stay in Japan with the family should be considered from the point of view for the protection of the best interests of the child.

In a broader sense, I emphasize that in case there is a conflict between the interests of a foreign national or a foreign family with the interests of the state, in the international society where the spirits of human rights have been developed as universal value, the treatments of foreign nationals and the state's responsibilities for the protection of foreign family members should be reconsidered from the human rights perspectives.

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<sup>96</sup> Judgment of the Fukuoka District Court of 31 March 2003, *supra* note 43.