

Credit:

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

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## Comparison 3 with Japanese jurisprudence Burden &/or Standard of proof comparisons

Several of Japanese judgements state that as no standards are defined in the CSR so: “it is construed these should be in accord with the legislative policies of the contracting state\*.”

Hence not only is the burden stated( rightly) to be on the claimant to make his/her own case ***but also that they must submit objective evidence /materials to clearly demonstrate eligibility to qualify as a refugee....***

***\* We will discuss important Tokyo HC rulings on this in BCD Sri Lanka case later.***

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### **Comparison 3 with Japanese jurisprudence**

As can be seen under the differences noted about the unique nature of refugee law in Course 1: as in Points b,c,e,j,k and l, plus the “shared burden”, are all relevant and thus strict insistence on evidence to demonstrate eligibility is not comparatively the approach taken internationally.

Next the *Standard of Proof*, seen in several decisions, is also at strong variance to international norms.

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### **Comparison 3 with Japanese jurisprudence (SoP)**

It appears Judges consider they should follow Art 7 of the Administrative Case Litigation Act and adopt a “civil” standard, they state as of : *“a high degree of probability beyond reasonable doubt”*

Internationally this standard would be seen as very confusing , extremely high-indeed & well above a criminal standard, to an almost virtual certainty. This standard, to me, sadly overlooks the whole reality and humanitarian nature of refugee protection.

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**Comparison 3 with Japanese jurisprudence**

Recognising the reality of the predicament of refugees in their flight from the risk (wff) of being persecuted the almost universal standard for risk assessment is set variously at : ‘real chance’, ‘real risk’, ‘reasonable likelihood’, ‘serious possibility’, etc –all these equating to same reality v. remoteness test.

NB. Very importantly this proof standard only applies to risk on return and NOT the credibility findings!...

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### Comparison 3 with Japanese jurisprudence

For credibility assessment of the claimants' evidence (which does not appear to be discussed much at all in Japanese judgements) ***there is, internationally, no specific standard and thus no “probabilistic cut off point”***, Everything material must be weighed up, with reasoning, in their totality. Thus in this way we find the “accepted facts or characteristics” of the claimant & this is then used for risk assessment against COI. (Often termed : Assessed “in the round”)

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## Comparison 4– What evidence is at Court ?

It is hard to tell from the material we have read thus we must try to compare like for like if possible ? **Thus is our discussions can we discuss -- maybe the first topic on Day 2:-**

1. At the District Court appeal are the full files of MOJ and RECs including reasoned MOJ &/or RECs decisions available for the Court, and both sides?
2. In the i/v or hearings at MOJ & RECs, is all, evidence, including COI, experts' etc shared so all parties can examine & cross examine? How are credibility and fairness issues handled at all instances ? What is role of counsel?

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## Comparison 4– What evidence is at Court ?

3. At Court are appellants allowed to attend? With counsel? Give evidence? Credibility/fairness issues?
4. Is the Court procedure – investigative? Adversarial? Or a mix of both? Does the Court hearing the case consider the evidence just on the papers with just submissions from counsel? Is any fresh evidence allowed and does the High Court ever take just an error of law approach( *certorari*)?



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## **Comparison 4– What evidence is at Court ?**

In most common law countries the 1<sup>st</sup> stage i/vs will be with shared info and fairness issues are put for comment to claimants usually in writing. In civil law I/Vs more a purely investigation then oral comments.

On appeals, as discussed the 3 options above all have counsel & strong fairness checks built .

At the Higher court appeal levels – almost always a pure JR approach is taken.

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**Shall we now look recent judgements –**

**Firstly-- From Korean courts**

**Then at number from Japanese Courts,**

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