

**Afghan v. Japan (Prosecutor), Heisei 14 (2002) U (Criminal Case) No.129, Japan: High Courts, 20 September 2002**

Presiding Judge: Judge Kubo, joined by Judge Ashitaka and Judge Shimada

Judgment

**Conclusion**

The original judgment shall be quashed.

The defendant shall be sentenced to a fine of JPY 300,000.

The period of the defendant's detention pending trial shall be converted into his sentence, at the rate of JPY 5,000 per each day served, up to the total amount of the fine.

**Reasoning**

The gists of the present appeal are found in the prospectus of the appeal submitted by the Prosecutor and the answers to it are found in the written defense and as well as the correction of and supplement to the written defense prepared by the Defense Council. These documents are quoted below.

The Prosecutor argues, in sum, that the original judgment misapplied Article 70-2 of the Immigration Control and Refugee Recognition Act (hereinafter referred to as "the Immigration Act") on the basis of erroneous findings due to the wrong choice of or evaluation of the evidence, by ruling that "it is proved that the defendant meets the requirements under Article 70-2 of the Immigration Act", and that "he can also be regarded as submitting a prompt report to this effect in the presence of an immigration inspector after having entered and stayed in Japan illegally" and that "[t]herefore the defendant shall be exempted from penalty".

On the basis of the relevant evidence, the original judgment can be sustained in terms of the findings described in sections 1 and 3, of the judgment regarding the proof that the defendant meets the requirements under Article 70-2 of the Immigration Act, which can be approved as generally legitimate, including the findings about the credibility of the defendant's statements; the present Court found no need to correct the previous findings after its own inquiries into the facts. The defendant, however, cannot be regarded as having submitted a prompt report in the presence of an immigration inspector, after having entered Japan illegally, that he met the requirements under the said provisions. Therefore the original judgment made erroneous findings as far as this issue is concerned, as was argued by the Prosecutor, and thus misapplied Article 70-2 of the Immigration Act.

Now the Court examines the issues taking the Prosecutor's arguments into consideration.

**Section 1: Whether the defendant qualifies as a refugee**

1. The Prosecutor's arguments can be summarized as follows: The "refugee" in terms of the Immigration Act means a person "who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political

opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country. In order to regard someone as having "well-founded fear of being persecuted", there should be, not only subjective elements that the person fears that he/she will be persecuted, but also objective elements that would make a person to fear the persecution if he/she was placed in the position of the former; in other words, the alleged fear should be proved by evidence in an objective manner as well-grounded, and the burden to present the proof falls on the alleged refugee. The original judgment finds that the defendant's fear of being persecuted is proved exclusively on the basis of the defendant's statements, which is found to be credible by the first-trial court. When refugee status is to be granted primarily on the basis of the applicant's statements, however, the authorities should carefully discern between truth and falsehood contained in the statements. The Prosecutor further states that, in the present case, the defendant's statements are unreasonable and implausible, and contain major inconsistencies on some of the important issues, and that some of the material evidence have been proved to be false. The Prosecutor then argues that despite such conditions, the original judgment disregarded these elements and easily concluded that the defendant's statements were credible, without conducting sufficient examinations of the statements. The Prosecutor concludes that the original judgment thus made erroneous findings.

2. The summary of the defendant's statements is as follows: He is a Hazara, an ethnic minority in Afghanistan, and also a Shi'a Muslim, a religious minority in the country. The Hazaras have been subjected to ethnic and religious discrimination by other ethnic groups. He graduated from the Department of Economics in Kabul University in 1991 and, after the collapse of the Najibullah regime in March 1992, joined the Islamic Unity Party, a political organization of Shi'a Hazaras, engaging mainly in interpretation and public relations as a member of its Cultural Committee at its office in Kabul. After 1992, he was also engaged in military activities against the Sunni Pushtuns as well as the Tajik forces when they had conducted military attacks against the Hazaras in the west of Kabul. However, he fled to Peshawar, Pakistan for the Pushtuns formed the Taliban in 1994 and approached Kabul by February 1995 and Karteh Sahe in west Kabul was militarily attacked and came under siege by the Tajik forces in March 1995. Since then he has been unable to enter and leave Afghanistan safely. Indeed, he has only entered the country to meet his parents only twice, namely in March 1999 and in 2000. Meanwhile, the Taliban massacred the Hazaras in Mazar-i Sharif in August 1998; after this incident, the Taliban regime issued a religious edict stating that the Hazaras are Shi'a Muslims and that it is not a crime to kill Shi'a Muslims. When the defendant returned to Afghanistan on 7 April 2001 with a view to meeting his parents, he heard from his aunt that the Taliban came to his parents' house to arrest the defendant, knowing his activities in the Islamic Unity Party through his acquaintance whom they had arrested and tortured, and that, since they could not find the defendant, they arrested the defendant's father instead. The defendant therefore contacted a smuggling broker through his uncle in Pakistan, decided to seek asylum in Japan and committed the offence of illegal entry into Japan.

Concerning the credibility of the defendant's statements, they are, first of all, concrete and detailed to the point that it would be difficult for those without such experiences to reveal. In addition, the defendant received higher education at university, is fluent in English and has abundant knowledge about the leaders of Shi'a Muslims, the members of the Islamic Unity Party and their political activities as well as the activities of the enemy forces. The statements are sufficiently consistent with what is said in the reports prepared by the Office of the United Nations High Commissioner for Refugees and other actors, in terms of the fact that the

Hazaras are subjected to ethnic and religious discrimination by the enemy forces, that the enemy forces conducted military attacks against them, that the Taliban had extended influence and massacred and subjected the Hazaras to arbitrary arrest, detention and torture, and also that the Taliban issued the religious edict quoted above. Furthermore, the defendant had a certificate which seemed to prove his membership of the Islamic Unity Party. On the basis of these findings, the defendant's statements about his membership of and activities in the Islamic Unity Party as well as the military attacks against the Hazaras by the enemy forces, are plausible, being credible to an adequate degree.

While there is no clear evidence to prove that the Taliban came to arrest the defendant and that his father was arrested as a proxy, the Taliban's leader is reported, in addition to having issued the religious edict quoted above, to have ordered killing of all the men aged 13-70 who were considered as anti-Taliban in December 2000, after the battle in Yakaolang. Further, the defendant had illegally entered Japan with a forged passport and had a copy of a writ of detention against "E", which he had obtained through the smuggling broker. On the basis of these findings, the defendant's statements regarding the process of his illegal entry, that he had heard from his aunt about the arrest of his father as his proxy, feared the possibility of being persecuted, contacted the smuggling broker and committed the offence at issue, are also plausible and can be considered as credible, too.

3. In response, the Prosecutor points out the following four issues to argue that the defendant's statements are not credible.

(1) The Prosecutor points out that the defendant had never applied for refugee status, in spite of the fact that he had legally entered Japan as many as eight times from 14 April 1996 to 23 June 2000. The Prosecutor further states that in addition, the defendant had visited Afghanistan in March 1999 and in 2000 during the Taliban's control, where he was allegedly at risk of being killed. According to the Prosecutor, such behavior of the defendant cannot be considered as the one which would be seen by someone who had fear of being persecuted.

The Court notes that the defendant's entry into Japan and visits to Afghanistan can be regarded as factual on the basis of the relevant evidence. However, the Court also notes that when he had legally entered Japan eight times after 1996 and visited Afghanistan under the Taliban's control twice, he was based in Pakistan and the United Arab Emirates (hereinafter referred to as "UAE") and was considering the application for refugee status as a last resort. Although the defendant was undeniably at risk of being persecuted at the time he legally entered Japan eight times, the likelihood of persecution had become considerably higher when he committed the offence at issue, because the likelihood had become more real due to the arrest of his father as his proxy in April 2001. Furthermore, he had visited Afghanistan only twice with a view to meeting his parents. On the basis of these findings, it is not appropriate to conclude that the defendant's behavior, in that he had never applied for refugee status in Japan before and that he had taken risk of visiting Afghanistan, is contradictory to the expected behavior of someone in fear of being persecuted. The Court thus overrules the Prosecutor's argument.

(2) The Prosecutor points out that, when the defendant applied for refugee status at the Fukuoka Immigration Bureau on 12 September 2001, he pretended that he was "J", a member and military commander of the Islamic Unity Party. The Prosecutor also notes that, although the defendant submitted a writ of detention issued by the Taliban against "J", as material evidence of his refugee status, and made a false statement deliberately that he had been

detained by the Taliban, he still did not mention the arrest of his father as his proxy. In addition, when he was subjected to the inquiry by the Osaka Immigration Bureau on 30 January 2002, he stated, "My parents were alive until August 2001". The Prosecutor argues that, if the defendant were really a refugee, he did not need to make false statements or to make considerable changes in his accounts on the important issues. According to the Prosecutor, the fact that the defendant nonetheless did so casts serious doubt on his statement about the arrest of his father. In addition, argues the Prosecutor, it is unreasonable and inconceivable that he sought asylum alone, leaving his wife and children in Afghanistan.

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

As far as the defendant is concerned, he had feared that he might not be easily found credible even if he made oral statements about his own experiences, for he did not have solid material evidence to prove his fear of being persecuted and also for he had come to Japan previously. Partly on the advice of the smuggling broker, who had told the defendant that he had better not apply for refugee status in his real name, he submitted a false application for refugee status to the Fukuoka Immigration Bureau, thinking that he would be granted refugee status easily by submitting a copy of the writ of detention against "J", which he had obtained beforehand. At this stage the defendant did not mention the arrest of his father as his proxy, because it was unnecessary to do so since he had pretended that he himself had been arrested; if he did, it was likely that his statements would be inconsistent and incoherent. In addition, on 7 July 2001, when he applied for refugee status in his real name, he admitted that the application to the Fukuoka Immigration Bureau was false and withdrew it voluntarily, before he was questioned on these issues by the authorities; since then, he has spoken about the arrest of his father as his proxy without inconsistencies. On the basis of these findings, it is reasonable to some extent that the defendant had made a false application for refugee status to the Fukuoka Immigration Bureau and that he did not mention the arrest of his father at that time.

Further, the fact that his father was arrested does not necessarily contradict the defendant's statement that the father was alive. As far as the fact that he left his wife and children in Afghanistan with his mother, who was left alone, it cannot be readily considered as unreasonable and implausible, because the risks of being persecuted was different between the member of a political party himself, who was likely to be detained by the persecutor, and his family members; in addition, the Taliban had not gone so far as to target women and children

indiscriminately.

Therefore, even when the Court takes into consideration the circumstances pointed out by the Prosecutor, it cannot doubt the credibility of the defendant's statements. The Prosecutor's argument is thus overruled.

(3) The Prosecutor further argues that the defendant was not a high-ranking official of the Islamic Unity Party and that he had apparently retired completely from the Party's activities by April 1996 at the latest. The Prosecutor concludes that since there was no need to arrest him in April 2001, five years after the retirement, the defendant's statement concerning the arrest of his father as his proxy is not credible.

On the basis of the relevant evidence, the following findings can be made. First, it is clear that the defendant had been engaged in interpretation and other activities as a member of its Cultural Committee at the office of the Party in Kabul until 1995. Although he moved to Peshawar, Pakistan, and other places after the collapse of the office, he continued to work for the Party at its office in Peshawar until around 1998 while working to earn livelihood. He had been involved in hostilities as a combatant. The civil war in Afghanistan was deeply rooted in not only political conflicts but also ethnic and religious conflict, and had continued for many years. The Taliban had gained ground and repeatedly subjected the Hazaras to arbitrary arrest, detention and cruel executions; in addition, as has been stated before, the Taliban's leader had ordered killing of all the men aged 13-70 who were considered as anti-Taliban in December 2000, after the battle in Yakaolang.

Therefore, although the defendant was not a high-ranking official of the Party and had suspended his activities for more than three years after 1998, it cannot be stated that the need for the Taliban to arrest him had disappeared. The statement about the arrest of his father as his proxy, which he had heard from his aunt, is vivid and sufficiently credible. The Prosecutor's argument is thus overruled.

(4) The Prosecutor points out that the executive director of P Factory Corporation, A, had applied for a certificate of eligibility for residency status on behalf of the defendant twice, on 1 December 2000 and 6 August 2001, with a view to employing the defendant; in April 2001, A advised the defendant to apply for a temporary visitor visa. The Prosecutor argues that it is implausible and unreasonable, that the defendant did not fear and tell A about the arrest of his father as his proxy and about his illegal entry, when the defendant met A after the illegal entry.

However, although A had been a partner for the defendant in the latter's business of purchasing second-hand vehicle parts and attempted to employ the latter in his own corporation, he is not a relative or a close friend to the defendant. It is not implausible at all that the defendant, in order to maintain his confidence in terms of business or employment, did not confess to A his illegal entry and the fact that he was a refugee. The Prosecutor's argument is overruled.

4. Having considered all the other issues pointed out by the Prosecutor, the defendant's statements are sufficiently credible. The Court also accepts that there had been not only subjective elements but also objective elements to substantiate the defendant's fear of being persecuted. Therefore the original judgment is reasonable, in that it found that the defendant is

someone who has well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.

## **Section 2: Whether the defendant entered Japan directly from a territory which was likely to be harmful to his life, physical being, or physical liberty**

1. The Prosecutor states that, the original judgment seems to have regarded the UAE, instead of Afghanistan, as a territory likely to be harmful to the defendant's life and so forth and found that the defendant was likely to be arrested because the UAE had recognized the Taliban as a legitimate government of Afghanistan. The Prosecutor then argues that it is completely a leap in logic to accept the likelihood of the defendant being arrested only on the basis of the findings above. The Prosecutor further notes that, in addition, the defendant has obtained a permission to stay in the UAE, on 15 January 2001, valid until 14 January 2004, and had stayed in the country even after he had been aware of the arrest of his father as his proxy. He further obtained a visa at the Consular Office of Singapore in Dubai, visited Singapore from 4 to 16 May 2001 and returned to the UAE on 17 May 2001. Since he was under adequate protection of the UAE in this way, argues the Prosecutor, the UAE cannot be considered as a territory which is likely to be harmful to his life etc.

2. The original judgment, however, admitted that the defendant returned to the UAE via Pakistan from Afghanistan, around 7 April 2001, entered the Republic of Korea via Hong Kong and then entered Japan illegally. On this basis, it found that it would have been likely for the defendant to be arrested in the UAE as well and that he could be regarded as having entered Japan directly from a territory where he was at risk of persecution, coming through the transit territories. The original judgment regarded both Afghanistan, the country of the defendant's origin, and the UAE as territories where he was at risk of persecution, instead of excluding Afghanistan from this finding.

Furthermore, on the basis of the relevant evidence, it can be found that the defendant had fear of being detained in the UAE and deported to Afghanistan, if the Taliban obtained information about his places of work and residence by torturing his father. It can also be found that, while the UAE was unlikely to persecute the defendant directly, it was a country where the defendant's protection and safety would not be secured, as the country had approved the Taliban regime and had not ratified the Convention on the Status of Refugees (hereinafter referred to as "the Refugee Convention"), which made it impossible for the defendant to receive protection as a refugee even if he asked for it. Drawing also from the interpretations of Article 31 of the Refugee Convention provided in the 1999 Guidelines of the Office of the United Nations High Commissioner for Refugees, the term "entered Japan directly" can be interpreted as "including the case in which an asylum-seeker entered Japan directly from the country of his/her origin or other countries where his/her protection, safety and security may not be ensured, going through the transit countries within a short period without seeking or receiving asylum".

On the basis of these findings, the defendant can be regarded as having entered Japan directly from a territory which was likely to be harmful to his life, physical being, or physical liberty. The finding in the original judgment was, in conclusion, reasonable in that it confirmed that the requirement of direct entry had been met.

Further, the fact that the defendant obtained a visa at the Consular Office of Singapore in Dubai does not mean that he was under the protection of the UAE. While the defendant had

obtained a permission to stay in the UAE, valid for the prescribed period with the guarantee of the company N+ located in the country, it had only temporary effect. Thus the fact that the defendant had stayed in the UAE for a certain period before entering Japan does not preclude the above finding. The Prosecutor's argument is overruled.

### **Section 3: Causality: Whether the offence at issue was caused by the defendant being a refugee**

1. The Prosecutor argues, in sum, that the UAE was not a territory which was likely to be harmful to his life and so forth. and that he had not illegally entered and stayed in Japan because of the existence of such likelihood. In addition, the defendant had received a salary of JPY 250,000 or so every month, by purchasing second-hand vehicle parts and exporting them to Dubai since 19 June 2001, just after his illegal entry into Japan, with the funds of as much as JPY 44.95 million paid to his bank account by the owner of the company N+. Thus, argues the Prosecutor, the defendant illegally entered and had stayed in Japan solely for the purpose of working in Japan. The Prosecutor then deems that the original judgment made an erroneous finding in that, while it accepted that the defendant had chosen Japan as a country of asylum partly because he would be able to work in Japan, it also found that he was at the same time motivated by his fear of persecution in Afghanistan, the country of origin, as well as Pakistan and the UAE where the Taliban, which had taken control of Afghanistan, had strong influence. Even if the defendant was motivated by the possibility of working in Japan at the same time, says the original judgment, it does not preclude the recognition of the causality between his status as a refugee and his illegal entry into and stay in Japan. This was, concludes the Prosecutor, an erroneous finding.

As was stated in the section 2, however, the UAE was a country where the defendant could not receive protection as a refugee even if he sought for it, a country where his protection and safety may not have been secured. Thus the first part of the Prosecutor's argument has no basis. While it is true, as the Prosecutor points out, that the defendant had worked in Japan after his illegal entry into Japan and had been involved in business with vigor, it is also true that a refugee cannot obtain livelihood unless he/she works. With his experiences of having purchased second-hand vehicle parts in Japan and the ability to be engaged in daily conversations in Japanese, the defendant had good reasons to choose Japan as a country of asylum with a premise of working there. He also applied for refugee status, while there is a problem with regard to the timeliness of the application as will be stated below. Thus the motivation to work and the will to seek asylum can exist concurrently. Therefore the original judgment was reasonable in that it affirmed the causality between his status as a refugee and his illegal entry into and stay in Japan.

2. The Prosecutor further points out the fact that defendant had worked by going abroad, purchasing second-hand vehicle parts and exporting them and that he had trouble in obtaining a certificate of eligibility for residency status in Japan as well as a temporary visitor visa. The Prosecutor then assumes that, given the fact that he worked with vigor after his illegal entry into Japan, the defendant entered Japan illegally for the time being in order to work and, in case he could not obtain a certificate of eligibility, he had intended to obtain refugee status unjustly by making false statements that he was a refugee. This is, argues the Prosecutor, the reason why the defendant committed the offence at issue.

As was stated in section 1, however, the defendant is indeed a refugee. It can be found that he made the false application to the Fukuoka Immigration Bureau under the name of "J", on

advise by the smuggling broker, because it was difficult to prove that he was a refugee. Therefore the Court cannot sustain the Prosecutor's argument, which states that the defendant committed the offence at issue with an intention of obtaining refugee status unjustly by making false statements in this regard.

Further, the defendant made false statements when he applied for refugee status, with regard to the date of entry and the routes that he had taken. As far as the date of entry is concerned, however, it is because he was aware of the rule providing that an application for refugee status must be made within 60 days after the entry into Japan. As far as the false statement that he had landed at the Yokohama Port by a smuggling ship, it was apparently because he wished to exaggerate the facts in the absence of material evidence that he was a refugee, or because he attempted to diminish his liability by hiding the use of a forged passport. Thus these false statements do not cast doubt on the fact that he is a refugee or on the causality between his being a refugee and the offence at issue.

On the basis of these findings, the Prosecutor's argument in this regard is overruled.

#### **Section 4: Whether the defendant made a prompt report in accordance with Article 70-2 of the Immigration Act**

1. The Prosecutor argues, in sum that in the two applications for refugee status submitted by the defendant, he had not met the requirements under Article 70-2 of the Immigration Act, under which a prompt report should be submitted to an immigration inspector. .

2. On the basis of the relevant evidence, the following findings can be made. The defendant left Pusan, the Republic of Korea, and arrived at the Fukuoka Airport to enter Japan illegally with a forged passport on 10 June 2001. Having landed in Japan, he continued to stay in Japan illegally until 27 February 2002. Meanwhile, he applied for refugee status with the Fukuoka Immigration Bureau under a false name on 12 September 2001 and with the Osaka Immigration Bureau in his real name on 7 November 2001.

The provision of Article 70-2 of the Immigration Act, stating that a suspect may be exempted from penalty only when a prompt report was submitted in the presence of an immigration inspector to the effect that he/she meets the prescribed requirements, should be understood as containing an element similar to an act of surrender. Since the first application with the Fukuoka Immigration Bureau was submitted under the name of "J" instead of the defendant's real name, disguising his identity, it cannot be regarded as a "report" in terms of the said provision.

The term "prompt", which means "as soon as possible", cannot be judged simply in terms of the length of time; it should be interpreted as a reasonable period of time, determined on the basis of comprehensive considerations about individual circumstances, including the circumstances under which the suspect had committed the offence, the place of illegal entry, traffic conditions, the suspect's health status and capacity to engage in conversations in Japanese.

On the basis of the relevant evidence, the following findings can be made. The defendant had entered Japan illegally with a view to applying for refugee status. He was aware that Japan had ratified the Refugee Convention and that he had to submit an application to the immigration authorities within 60 days after the entry into Japan in order to be granted



protection. Having come to Japan eight times since 1996, he was familiar with the geography of Japan and was able to engage in daily conversations in Japanese. He had been engaged in business with vigor after the illegal entry and had not fallen ill, having no trouble to move around in the country. In addition, he had not been taken into custody until he was arrested on 28 February 2002. On the basis of these findings, it should be said that the defendant submitted the application to the Osaka Immigration Bureau with a considerable delay, far beyond a reasonable period which he had needed in submitting the application.

3. The Defense Council presents following arguments in this regard. On the one hand, the defendant was suspicious of the authorities by virtue of his own experiences and feared that he might be detained if he applied for refugee status. On the other hand, since the application for a certificate of eligibility for residency status submitted on 1 December 2000 on his behalf was dismissed on 19 June 2001, on the ground that his whereabouts in the UAE were uncertain, he submitted a second application through A along with the necessary documents on 6 August 2001; he thought that his stay in Japan would be legalized once the certificate of eligibility was issued, and waited for the issuance. After 23 September 2001, he had consulted B who worked for a Catholic church in Osaka about the application for refugee status, but could not get sufficient advice because B was busy at that time; in addition, he was reluctant to apply for refugee status because other Afghans had been arrested and detained after they had applied for refugee status. Thus, argues the Defense Council, there were compelling reasons for the defendant not to have submitted the application until 7 November 2001.

However, suspicions against the authorities or fear of being detained are shared among refugees in general and are not unique to the defendant. In addition, a certificate of eligibility for residency status is issued on the premise of legal entry and, even if it had been issued to the defendant, it would not have legalized his stay in Japan. Although he might have had some misunderstandings about a certificate of eligibility, he should not have had trouble in applying for refugee status while applying for certificate of eligibility; indeed, he applied for refugee status, albeit using a forged name, while waiting for a decision on the second application for the certificate. He also had made false statements to B, to whom he had consulted, stating that he had entered Japan on 22 August 2001, and let misguided her understandings of the facts. Finally the defendant had sufficient knowledge and capacity to apply for refugee status on his own. Therefore the circumstances indicated by the Defense Council cannot be regarded as compelling reasons for the defendant not to submit a prescribed report in the presence of an immigration inspector within a reasonable period of time.

4. Therefore the defendant cannot be considered as having submitted a prompt report in the presence of an immigration inspector in accordance with Article 70-2 of the Immigration Act; the original judgment had made an erroneous finding in this regard.

The Prosecutor's argument in this regard is sustained.

## **Section 5: Conclusions**

On the basis of the above findings, it can be concluded that the original judgment did not make erroneous findings with regard to the defendant meeting the substantive requirements under Article 70-2 of the Immigration Act, including the qualification as a refugee. However, it made an erroneous finding in that it admitted that the defendant had submitted a prompt report, misapplying Article 70-2 of the Immigration Act, which clearly had bearing on the

judgment.

The Prosecutor's argument is sustained in this regard.

Thus the present Court dismisses the original judgment in accordance with Articles 380, 382 and 397, para.1 of the Criminal Procedure Act and, in accordance with the proviso of Article 400 of the Act, decides as follows.

**(Charges)**

No changes shall be made to the findings in the original judgment as to the facts to be considered as offences.

**(Evidence)** (omitted)

**(Legal provisions applied)**

Charges: Articles 70, para.2 and para.1 (1) and Article 3, para.1 (1) of the Immigration Act  
Sentence: Fine

Conversion: In accordance with Article 21 of the Penal Code, the period of the defendant's detention pending trial shall be converted into his sentence, at the rate of JPY 5,000 per each day served, up to the total amount of the fine.

Legal costs: In accordance with the proviso of Article 181, para.1 of the Criminal Procedure Act, the defendant shall not be charged for legal costs in the first trial and the present appeal trial.

**(Reasons for the sentence)**

The present case concerns the defendant, a refugee of Afghan origin, who had illegally entered Japan and continued to stay illegally for more than eight months. There are unfavorable elements in the offence committed by the defendant, including the use of a forged passport.

The Court found, however, many mitigating factors to be taken into consideration for the defendant. First, he had entered Japan illegally with a view to applying for a refugee status, having fear of persecution in his own country, and his motivations and circumstances are worthy of sympathy. If he had submitted a prompt report that he was a refugee after the commission of the offence, he would have been exempted from penalty. In addition, the period of illegal stay in Japan is relatively short; he has been detained for a significant period of time; and he does not have a record of criminal or other illegal activities.

Taking these factors into consideration in a comprehensive manner, the Court sentences the defendant to a fine as is indicated in Conclusion at the outset of the present judgment.