CASE NOTE

# *NAGOYA HIGH COURT, DECISION, REIWA 6 NEN (RA), NO 431* (11 SEPTEMBER 2024)

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## I INTRODUCTION AND CASE CONTEXT

Japan is not a contracting party to either the 1954 *Convention relating to the Status of Stateless Persons*[1] or to the 1961 *Convention on the Reduction of Statelessness*.[2] It also does not have a systematic determination mechanism for determining the status of stateless persons.[3] However, statelessness, or being 'without nationality', is an important matter in Japanese nationality law.[4] Article 2 of the *Japanese Nationality Act* ('*Nationality Act*') provides for the method to acquire nationality

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1 *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960).

2 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

3 Osamu Arakaki, *Statelessness Conventions and Japanese Laws: Convergence and Divergence* (Report, UNHCR Representation in Japan, 2015) 47 [tr Hajime Akiyama] <https://www.unhcr.org/jp/sites/jp/files/legacy-pdf/Statelessness_Conventions_and_Japanese_Laws_EN.pdf>, archived at <https://perma.cc/84VP-YN5Y>.

4 *Japanese Nationality Act* art 2(iii) (Japan) ('*Nationality Act*'). For a tentative English translation of the *Nationality Act*, see the following <https://www.japaneselawtranslation.go.jp/ja/laws/view/4366>, archived at <perma.cc/FY2K-C3GL>.

by birth.[5] It follows the *jus sanguinis* principle, so that children acquire Japanese nationality if at least one of the parents is a Japanese national. In addition, art 2(iii) of the *Nationality Act* introduces the *jus soli* principle for limited circumstances. A child acquires Japanese nationality 'if the child was born in Japan, either both of the parents are unknown or if known, both of them are without nationality'.[6] In this context, the interpretation of 'without nationality' is important because it determines whether children acquire Japanese nationality.

In 2024, a decision related to the interpretation of the words 'without nationality' was made in the Nagoya High Court ('Court').[7] In this case ('Afghan Case'), a child ('the Appellant') was born in Japan in 2022 to Afghan parents. Initially, the parents were regarded as possessing Afghan nationality, so the child did not acquire Japanese nationality. However, in 2021, the Taliban took control of Afghanistan, leading to the collapse of the former government. The de facto authorities were not recognised by many governments, including Japan. Based on this background, the Court stated that parents from Afghanistan should be regarded as 'without nationality' and, as a result, the child born to these parents should acquire Japanese nationality.[8] This case is the first one of its kind.[9] It can be regarded as a positive example from the perspectives of human rights and the right to a nationality. However, the Court's ruling raises questions about the interpretation of the recognition of statehood and government under international law.

## II FACTS ABOUT THE CASE

In 2022, the Appellant was born in Toyohashi City, Aichi Prefecture, to parents who were originally nationals of the Islamic Republic of Afghanistan ('Republic'). By the time of the Appellant's birth, the Republic was taken over by the Taliban, a group considered by many as a terrorist organisation. The Appellant claimed that the Republic lost its statehood because it has been taken over by the Taliban. As a result, the Appellant argued that her parents did not possess any nationality, and therefore she should be recognised as a Japanese national and registered in the Japanese household or family registration record ('*koseki*') under art 2(iii) of the *Nationality Act*.

The original judgment by the Toyohashi Branch of the Nagoya Family Court ('Family Court') rejected the Appellant's claim for Japanese nationality.[10] The Family Court first stated that the *Nationality Act* follows the *jus sanguinis* principle, and art 2(iii) of the *Nationality Act* introduced the *jus soli* principle to prevent the occurrence of statelessness because there is no state to protect the benefits of these [stateless] people.[11] It further stated that even if a particular state

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5 ibid art 2(i).

6 ibid art 2(iii).

7 Nagoya High Court, Decision, *Reiwa 6 Nen (Ra)*, No 431, 11 September 2024, LEX DB No 25620948 ('*Nagoya High Court, Reiwa 6 431*').

8 ibid 2.

9 Kyoka Watanabe, 'Afugan Nanminno Koni Nihon Kokuseki Mitomeru "Shusshoujini Ryousin Mukokuseki" Nayoya Kousai' [Japanese Nationality is Recognised for a Child of Afghan Refugees 'Parents Were Stateless when the Child Was Born' Nagoya High Court] *The Asahi Shimbun* (online, 12 September 2024) <https://www.asahi.com/articles/ASS9D1VHCS9DOIPE001M.html>, archived at <perma.cc/7PES-GBB3>.

10 *Nagoya High Court, Reiwa 6 431* (n 7) 3.

11 ibid 2.

loses control over certain territory or government functions, this does not mean people with the nationality of the state legally lose their nationality.[12] The Appellant's parents still retained their nationality, and they therefore were not considered 'without nationality' under art 2(iii) of the *Nationality Act*. Furthermore, any issues concerning the nationality of the Appellant and her parents should be resolved by the legislation of Afghanistan.[13] The Appellant subsequently appealed to the Nagoya High Court.

## III LEGAL ISSUES

The main issues before the Court included the following:

1. Should the Appellant's parents be regarded as 'without nationality' at the time of the Appellant's birth under art 2(iii) of the *Nationality Act*?[14]
2. Is the failure to confer the Japanese nationality and registration in the *koseki* in breach of the obligations under arts 13 (necessity of individuals to be respected and right to pursue happiness) and 98(2) (good faith compliance with international law) of the *Japanese Constitution* ('*Constitution*')?[15]

## IV COURT'S DECISION

The Court overturned the original judgment of the Family Court, and approved the registration of the Appellant to the *koseki*. The Court explained its reasons as follows:

Articles 2(i) and 2(ii) of the *Nationality Act* adheres to the *jus sanguinis* principle. Article 2(iii) of the *Nationality Act* attempts to prevent the occurrence of statelessness 'as much as possible' by providing that a child is a Japanese national 'if the child was born in Japan, either both of the parents are unknown or if known, both of them are without nationality'.

According to the document submitted to the Court, the Taliban took military action in May 2021, and it seized the capital, Kabul, on 15 August 2021.[16] It declared the establishment of the Islamic Emirate of Afghanistan ('Emirate') on 7 September, and the Republic lost control over the territory. As a result, there is no effective government of the Republic. Although the Taliban declared the establishment of the Emirate and the de facto government, no state, including Japan, has recognised the Emirate.

Accordingly, the Court found that the Republic of Afghanistan lost the substance of being state at the time of the Appellant's birth.[17] According to art 1 of the 1933 *Montevideo Convention on the Rights and Duties of States* ('*Montevideo Convention*'), a number of prerequisites indicate whether or not an entity can be considered to be a state: (1) a permanent population; (2) a defined territory; (3) a government; and (4) capacity to enter into relations with the other

12 ibid 3.
13 ibid.
14 ibid 2.
15 *Japanese Constitution* (Japan) ('*Constitution*') arts 13, 98(2); *Nagoya High Court, Reiwa 6 431* (n 7) 2.
16 *Nagoya High Court, Reiwa 6 431* (n 7) 2. .
17 ibid 2.

states.[18] The Court observed that the Republic of Afghanistan did not satisfy the *Montevideo Convention*'s second and third conditions required for statehood. In addition, it held that the de facto authorities (Taliban authorities) do not satisfy the fourth condition. It also seems that the Appellant's parents have not been willing to ask the de facto authorities for protection.

Nationality requires the existence of the state, so the Appellant's parents were 'without nationality' under art 2(iii) of the *Nationality Act* 'at least in fact'. The Appellant's parents could not be protected as nationals either by the Republic nor the de facto authorities at the time of the Appellant's birth.[19] If the Appellant's parents were regarded as possessing no nationality from either the Republic or the Emirate, and the Appellant's Japanese nationality is denied, there are two issues. First, the purpose of art 2(iii) of the *Nationality Act* is to prevent the occurrence of statelessness 'as much as possible' to protect the benefits of individuals by the state. Following that, if the Appellant is denied Japanese nationality despite being born in Japan, failure to confer Japanese nationality would be contrary to the purpose of art 2(iii). Second, art 7 of the *Convention on the Rights of the Child* ('*CRC*')[20] provides for children's right to acquire a nationality, and for contracting parties to ensure the implementation of this right. If Japanese nationality is not recognised to the Appellant, this is against the purpose of this article. Thus, the Appellant should acquire Japanese nationality under art 2(iii) of the *Nationality Act*.

## V LEGAL AND NORMATIVE ANALYSIS

This decision can be regarded as a positive precedent for several reasons. First, nationality is treated by states as the basis for the protection of human rights.[21] If the Appellant's Japanese nationality was not recognised, no state could protect their human rights as their state of nationality. Under the current *Nationality Act*, the determination of parents as stateless assists the child's acquisition of Japanese nationality. Moreover, the *Constitution* as 'the supreme law of' Japan'[22] enshrines human rights as a fundamental principle regardless of nationality.[23] From this perspective, the acquisition of Japanese nationality for the child was desirable to ensure the protection of their human rights.[24]

Second, the Court relied upon international human rights law. Japan is a contracting party to many international human rights treaties, including the *CRC*,

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18 *Montevideo Convention on the Rights and Duties of States*, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

19 The court declared so because it argued that the Republic of Afghanistan lost the substance of being state and the Appellant's parents do not have willingness to be protected by the de facto authorities: *Nagoya High Court, Reiwa 6 431* (n 7) 2.

20 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7.

21 Alice Edwards, 'The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press 2014) 11, 12.

22 *Constitution* (n 15) art 98.

23 It is assumed that the concept of human rights existed before the establishment of the modern state system: Kazuyuki Takahashi, *Rikken Shugito Nihonkoku Kempo* [Constitutionalism and the Constitution of Japan] (Yuhikaku, 6th ed, 2024) 94. Thus, human rights should be protected regardless of nationality.

24 This reminds the author that a nationality can be regarded as the 'right to have rights', as Hannah Arendt notes: *The Origins of Totalitarianism* (Harcourt, Brace and Company 1951) 294.

and under art 98(2) of the *Constitution*, '[t]he treaties concluded by Japan and established laws of nations shall be faithfully observed'. However, the Japanese courts do not often engage with international law in practice.[25] Going against this historical practice, the Court considered the *CRC*. It argued that if the Appellant does not acquire Japanese nationality, the purpose of art 7 of the *CRC* is not met.[26]

Third, the examination of nationality from a substantial perspective is significant. The Court argues that the parents of the Appellant are 'without nationality […] at least in fact'.[27] For nationality to serve as a foundation to access other human rights, its substance requires careful examination. In this regard, this Court decision's emphasis on substance is significant.

However, there is an issue with this decision concerning the distinction between recognition of a state and recognition of a government, which appear to be conflated.[28] In international law, recognition of a state and that of a government are regarded as different matters. Recognition of a state concerns whether a particular entity is recognised as a state so that the entity can be regarded as a holder of sovereignty, whereas recognition of a government concerns whether a particular government is a legitimate government of a particular sovereign state.[29] In the Afghan Case, the question is about recognition of the government, which generally does not affect the legal validity of nationality. Thus, this decision seems to blur these distinct concepts. When a nationality is discussed in international law, a state, not a government, is relevant,[30] so the ambiguity of concepts of state and government can be regarded as problematic. That said, when nationality 'in effect' is in question, this distinction may not be very significant. A nationality may lose its substance when the government loses control over the state as can be seen in the Afghan Case. This implies that when the government's ability to exercise control becomes questionable, the substance of a nationality becomes questionable. This can be interpreted as a similar case when a statehood is lost in substance, although they are different academically. Therefore, it is important to carefully

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25 Kanami Ishibashi, 'Implementation of International Law in Japanese Courts: From Their Traditional Reluctance in Invoking International Law to Some Innovative Rulings Based upon International Human Rights Law' (2015) 3 *Korean Journal of International and Comparative Law* 139, 140.

26 A similar logic can be applied based on the *International Covenant on Civil and Political Rights*, to which Japan is a contracting party: opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). See also Hajime Akiyama, '*Jiyuken Kiyaku niokeru Kodomo no Kokuseki Shutoku Ken to Kokka no Gimu: Jiyuken Kiyaku Dai 2 Jo no Kanten kara* [Children's Right to Acquire a Nationality and States' Obligation under the ICCPR: The Perspective from Article 2 of the ICCPR]' (2019) 30 *Human Rights International* 115.

27 *Nagoya High Court, Reiwa 6 431* (n 7) 2.

28 There is a similar view by another scholar, see Dai Yokomizo, 'Tariban niyoru Seiatsugo ni Afuganisutan Jin no Ryoushin no Ko toshite Nihon de Shusshositamono to Kokuseki Hou 2 Jou 3 Gou – Nagoya Kou Ketsu Reiwa 6, 9, 11' [A Person Born in Japan as a Child of Afghan Parents after the Control by the Taliban and Article 2(iii) of the Nationality Act: Decision of the Nagoya High Court on 11 September 2024], *Yuhikaku* (online, 15 January 2025) <https://yuhikaku.com/articles/-/27256>, archived at <perma.cc/JAN3-7HER>.

29 Malcolm N Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 445, 459.

30 Note that the International Court of Justice ('ICJ') states that '[n]ationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals': *Nottebohm Case (Liechtenstein v Guatemala)* (Second Phase) [1955] ICJ Reports 4, 20. This indicates that a state, not a government, is relevant to the concept of nationality for international law in general.

consider the substantive difference between recognising a state and a government, and how these relate to nationality.[31]

## VI CONCLUSION

This case is significant because the Court's decision seems to be in line with the purpose of art 2(iii) of the *Nationality Act* and art 7 of the *CRC*. However, the logic behind this conclusion can be revisited, and it may be necessary to rethink the understanding of the recognition of a state and that of a government concerning nationality and statelessness.

After this decision, a new administrative notification of the Japanese Ministry of Justice was issued. This notification mentions that 'it is inappropriate to treat individuals who have been recognised as Afghan nationals until now as stateless when art 2(iii) of the *Nationality Act* is applied' because Afghan nationality will not be lost automatically as a result of the change of the name of the state or the government.[32] This shows that the Japanese Government does not share the same view as the Nagoya High Court. The reason why the Japanese Government issued this notification is not clear, but it must be noted that the Japanese nationality system is related to the *koseki* which is the basis of the *jus sanguinis* system. For the administration, this case is treated as an exception. As a principle, the *jus sanguinis* system remains significant. The *koseki* is related to Japanese modernisation experience, and it seems to be the Japanese collective identity, so it seems that the assumption to prioritise the *jus sanguinis* system is difficult to change.[33] Given the uncertainty surrounding the nationality of Afghan individuals, the question of how to determine nationality and statelessness remains a major issue for both the Japanese administration and judiciary.

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31 Yokomizo (n 28) also questions whether the recognition of a state is a matter of discussion in this case. He implies that 'efficiency and legitimacy' of the nationality laws of the Republic of Afghanistan and the provisional government can be questionable, so that these nationality laws cannot be the basis to interpret art 2(iii) of the *Nationality Act*. Another scholar suggests that the reality of Afghanistan needs to be examined to consider whether the Appellant's parents were stateless: Anna Nakamura, 'Kokuseki 2 Jou 3 Gou Koudanni Motozuki Mukokusekishano Ko no Nihon Kokuseki Shutoku wo Mitometa Kettei' [Decision to Allow Acquisition of Japanese Nationality to a Child of Stateless Persons under the Latter Part of Article 2(iii) of the Nationality Act] (2025) 36 *Sokuhou Hanrei Kaisetsu* [Shin-Hanrei Kaisetsu Watch] 25, 27.

32 Ministry of Justice [Japan] Notification, see 'Nihon de shussei shita Afuganisutan hito fūfu ainoko no Nihon kokuseki no shutoku ni tsuite (ryō wa 6-nen 11 tsuki 11-nichi tsuke hōmushō-min ichi dai 2450-gō Hōmushō Minjikyoku minji dai ichi kachō tsūchi) henshū-bu' [Regarding the acquisition of Japanese nationality for a child born in Japan to an Afghan couple (Notice No 2450 of the Director of the First Civil Affairs Division, Civil Affairs Bureau, Ministry of Justice, dated 11 November 2024) Editorial Department] (2024) 53 *Katei Niwa no hō to saiban* [*Family Court Journal*] 168.

33 See Hajime Akiyama, 'Global Movement to End Statelessness and Japanese Nationality: History, Human Rights and Identity' (2021) 39 *The Hallym Journal of Japanese Studies* 259, 264–7.