
Comments

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SINS OF THE MOTHER: AUSTRALIA, WEST PAPUANS, JAPAN AND VISAS

On 18 January 2006, an interesting and important case developed around whether Australia should grant asylum from Indonesia to 43 West Papuans who found their way to Cape York Peninsula in a traditional canoe.¹ On 23 March 2006, Australia issued temporary protection visas to 42 of the asylum seekers.² This caused a diplomatic tiff between Australia and Indonesia culminating in Indonesia recalling its ambassador from Canberra.³ Subsequently, the Prime Minister proposed a Bill to extend the "Pacific Solution" to the Australian mainland, so that Australia would not be designated as Australia when asylum seekers reached its shores.⁴ Finally, in one of the Prime Minister's only recent setbacks, the United Nations Human Rights Commission's statement that it would refuse to assist in processing the relevant applicants and a backbenchers' protest forced the shelving of the controversial Bill.⁵ What was lost in this furore, though, was the fate of the lone refugee left on Christmas Island, David Wainggai.

Mr Wainggai is the son of the founder of the West Papuan independence movement, Dr Thomas Wainggai, who died in a Jakarta prison in 1996, eight years after being arrested during a Papuan independence rally. Mr Wainggai's sin was not of his father, though.⁶ Rather, he was being held for the sins of his mother. It seems Mr Wainggai's iniquity was that his mother was born in Japan. This raised the view in the Immigration Department's eyes that he was Japan's responsibility, not theirs. The Refugee Convention,⁷ to which both Australia and Japan are signatories,⁸ has increasingly been subject to restrictive application in Australia, deeming refugee status only to be granted when all the possible options for residing in another safe country have been exhausted.⁹

Whether Mr Wainggai had a right to live in Japan, however, is not a difficult issue that requires months of investigation. The right to reside in Japan is based on nationality, immigration or refugee

¹ Allard T and Forbes M, "Papuans Sail into Diplomatic Hot Water", *Sydney Morning Herald* (19 January 2006).

² Allard T and Skehan C, "Visa Ruling Puts Jakarta Ties at Risk", *Sydney Morning Herald* (24 March 2006).

³ "Indonesia Recalls Australia Envoy", *BBC News*, 24 March 2006.

⁴ *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth), <http://www.aph.gov.au/LIBRARY/Pubs/bd/2005-06/06bd138.htm> viewed 18 May 2006. The Bill was intended to expand the offshore processing regime so that all unauthorised boat arrivals, even at mainland Australia, would automatically be transferred to offshore processing centres located in various Pacific countries for assessment of their refugee claims. This would have amounted to excluding the whole territory from the application of the Refugee Convention: see *Migration Amendment (Designated Unauthorised Arrivals) Bill 2006* (Cth), Explanatory Memorandum (House of Representatives), <http://www.minister.inmi.gov.au/media/bills/pdf/supplementary-explanatory-memorandum.pdf> viewed 18 May 2006. For background to the "Pacific Solution" see eg Crock M, Saul B and Dastyari A, *Future Seekers II: Refugees and Irregular Migration in Australia* (2nd ed, Federation Press, Sydney, 2006) pp 115-120.

⁵ "Australian PM Drops Asylum Bill", *BBC News* (14 August 2006); "PM Dumps Asylum Laws", *The Age* (14 August 2006).

⁶ Exodus 34:7 ("Keeping mercy for thousands, forgiving iniquity and transgression and sin, and that will by no means clear [the guilty]; visiting the iniquity of the fathers upon the children, and upon the children's children, unto the third and to the fourth [generation]"); Euripides, *Phrixus* ("The gods visit the sins of the fathers upon the children.").

⁷ *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁸ Australia acceded to the Convention on 22 January 1954 and to the Protocol on 13 December 1973. Japan acceded to the Convention on 3 October 1981 and to the Protocol on 1 January 1982.

⁹ *Migration Act 1958* (Cth), s 36(3), inserted by *Border Protection Legislation Amendment Act 1999* (Cth); and Div 3, Subdiv AI (what is called "safe third country" provisions), inserted by *Migration Legislation Amendment Act (No 4) 1994* (Cth). For details see Crock et al, n 4, pp 110-112; Kneebone S, "The Rights of Strangers: Refugees, Citizenship and Nationality" (2004) 10 *Australian Journal of Human Rights* 33.

status.¹⁰ As seen through Mr Wainggai's case, Japanese nationality and immigration rules are restrictive and its refugee policy is even tighter than that of Australia.¹¹ Despite his mother's birth in Japan, even the most cursory understanding of the facts shows that none of these means for settling in Japan were a practical reality for Mr Wainggai.

First, consider nationality. Like the majority of nations, Japan follows the *jus sanguinis* rule: nationality is based on blood relations rather than place of birth.¹² However, in 1977 when Mr Wainggai was born, the rule only extended to Japanese fathers.¹³ It was only in 1985, upon ratification of the *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, that Japan allowed nationality to pass to children of Japanese mothers.¹⁴ Furthermore,¹⁵ Mr Wainggai's mother had renounced her Japanese nationality in 1968 when she married, so she had not even been Japanese for nearly a decade when he was born.¹⁶ Thus, not only could Mr Wainggai's mother not legally pass on Japanese nationality to him, she had none to give.

The Immigration Department might conceivably have thought that though Mr Wainggai had never been a Japanese national, he might become one through naturalisation. Indeed, Japanese nationality law provides an easier road to naturalisation if one's parent was Japanese or born in Japan.¹⁷ Even under this less stringent criterion, though, Mr Wainggai would still need to be found by the Minister of Justice to be of "upright conduct" (sic) (*sokō ga zenryō dearu*)¹⁸ and somehow to be domiciled in Japan for three years.¹⁹ Furthermore, even clearing these hurdles, acceptance of a naturalisation application is still purely a discretionary matter for the Minister of Justice.²⁰ Thus, squeezing through this legal hole requires meeting an ambiguous, unrestricted standard, somehow establishing domicile in Japan, and satisfying ministerial discretion.

To establish the requisite three years of domicile, Mr Wainggai would need to have a valid passport – which he does not have – and to fit within one of the 27 visa categories that Japan uses.²¹ Mr Wainggai has done this in the past when he had a temporary visa to Japan. However, presently, like

¹⁰ Kokuseki Hō (the *Nationality Act*), Law No 147 of 1950, as amended by Law No 268 of 1952, Law No 45 of 1984 and Law No 89 of 1993, <http://www.moj.go.jp/ENGLISH/information/tnl-01.html> viewed 19 September 2006; Shutsunyukoku Kanri oyobi Nanminintei Hō (*Immigration Control and Refugee Recognition Act*), Cabinet Order No 319 of 1951, as most recently amended by Law No 43 of 2006, <http://www.moj.go.jp/ENGLISH/information/icrr-01.html> viewed 19 September 2006.

¹¹ See generally Furuya S, "Implementing International Refugee Law through a National Legal System: Practice in Japan" (2004) 47 *Japanese Annual of International Law* 1; Arakaki O, "Historical Aspects of Japan's Accession to the Refugee Convention and Protocol" (2004) 10 *New Zealand Association for Comparative Law Yearbook* 137.

¹² Weil P, "Access to Citizenship: A Comparison of 25 Nationality Laws" in Aleinikoff TA and Klusemeyer DB (eds), *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace, Washington DC, 2001) p 20.

¹³ Before the amendment of 1984, there were two exceptions to this principle: when the father is unknown or has no nationality in a case where the mother is a Japanese national; and when both parents are unknown or have no nationality in a case where the child is born in Japan. See *Nationality Act 1984* (Jap), Arts 2(3), 2(4).

¹⁴ *Kokuseki Hō oyobi Koseki Hō no Ichibu wo Kaisei suru Hōritsu* (Act Partially Amending the Nationality Act and Family Registration Act), Law No 45 of 1984; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁵ Even assuming the 1985 law was in effect, Mr Wainggai would not have received Japanese nationality without his mother registering his birth within three months of his birth. See *Nationality Act*, Art 12; *Koseki Hō (Family Registration Act)*, Law No 224 of 1947, Art 104.

¹⁶ Jackson A, "No Asylum in Japan, Say Family", *The Age* (9 May 2006). Depending upon the Indonesian nationality law in 1968, the mother may have automatically "lost" (*sōritsu*) her Japanese nationality rather than voluntarily "renounced" (*ridatsu*) it. See *Nationality Act*, Arts 11(1), 13(1).

¹⁷ *Nationality Act*, Arts 6(1), 6(2).

¹⁸ *Nationality Act*, Art 5(3).

¹⁹ *Nationality Act*, Arts 6(1), 6(2).

²⁰ *Nationality Act*, Arts 5-6.

²¹ *Immigration Control and Refugee Recognition Act*, Annexed Table 1. Any alien who seeks to land in Japan must have a valid passport (Arts 6, 7).

most refugees, it is likely that he will have difficulty meeting the various requirements for one of the visas, such as sufficient financial assets, and questionable whether he could piece together three consecutive years through visa and passport extensions and renewals.²² Application for permanent (*eijūsha*) or long-term (*teijūsha*) residency is a possibility, and since 1990 that process is slightly easier for a second or third generation ethnic Japanese.²³ Even under this process, though, satisfaction will still require the favourable exercise of discretion by the Minister of Justice “in accordance with the interests of Japan” after showing both financial self-sufficiency and the ambiguous good character.²⁴ Again, as with naturalisation, Mr Wainggai has no right to a Japanese visa and only upon the exercise of discretion may he attain one.

The possibility that the Japanese Government will grant him protection under the Refugee Convention is even more remote.²⁵ First there is a procedural Catch-22 clash between Australian and Japanese rules for asylum seekers. Australia will send asylum seekers on to safe third countries if one can be located after the asylum seeker has applied for protection in Australia.²⁶ Conversely, legal practitioners in Japan report that if an applicant answers that she or he has sought asylum previously in another country, refugee status will almost automatically be rejected.²⁷ Thus, if Australia sent Mr Wainggai to Japan because it was a safe third country, Japan would likely reject his asylum application since he applied in Australia.

Even assuming Mr Wainggai somehow paddled his canoe not to Cape York but to Cape Sata, mainland Japan’s southernmost point, and directly sought refugee status there, he would not be likely to fare any better. Over the decade from 1995 to 2004, Japan – a country of nearly 130 million people geographically not far from China, North Korea and the former Soviet Union – has granted asylum to only 122 of 2,378 applicants.²⁸ This is worth repeating: over the most recent decade Japan has admitted less than one refugee per million population; at that rate Australia would admit fewer than two refugees a year. It appears Japan has never granted asylum to someone from Indonesia, and recently has only approved applicants from Myanmar, Afghanistan and Iran.²⁹ Even Japanese officials

²² *Immigration Control and Refugee Recognition Act*, Art 5(3). Of course, the specific requirements for each visa differ; thus, visas for spouses do not require proving that one has sufficient funds, visas for students require enrolment in recognised courses, and so forth. See Okuda Y and Yanagawa S, *Gaikokujin no Hōritsu Sodan Chekku Manyuaru (Check Manual on Legal Advice for Foreigners – authors’ translation)* (2nd ed, 2005) Pt 1.

²³ See Hur CJ, “Returnees from South America: Japan’s Model for Legal Multiculturalism?” (2002) 11 *Pacific Rim Law and Policy Journal* 643; Shin S, “Global Migration: The Impact of ‘Newcomers’ on Japanese Immigration and Labor Systems” (2001) 19 *Berkeley Journal of International Law* 265.

²⁴ *Immigration Control and Refugee Recognition Act*, Art 22(2) (with regard to the application for permanent residency). There are no such legislative requirements for long-term residency, but in practice financial self-sufficiency has traditionally been required and more recently good character criteria have been introduced by partial amendment to the notification for long-term residency, available in Japanese at <http://www.moj.go.jp/NYUKAN/HOUREI/h07.html> viewed 6 February 2007, which came into force on 29 April 2006.

²⁵ For a full report on Japanese refugee law see Dean M, *Japan: Refugees and Asylum Seekers*, a Writenet Report commissioned by United Nations High Commissioner for Refugees Protection Information Section (February 2006). For an interesting article comparing Japan and Australia’s approach to detention of asylum seekers see Flahive E, “National Identity Crisis: The Politics of Constructing National Identity and Mandatory Detention of Asylum-Seekers in Australia and Japan” (2007) 24 *Journal of Japanese Law* (forthcoming).

²⁶ See n 9.

²⁷ In Japan asylum seekers are asked, “Have you ever sought asylum in another country?” and it is reported that an affirmative answer to this question practically results in denial of the application. See Japanese Ministry of Justice, *Application for Recognition of Refugee Status*, Question 10, <http://www.moj.go.jp/ONLINE/IMMIGRATION/16-6-1.pdf> viewed 6 February 2007. See also Okuda and Yanagawa, n 22, p 64.

²⁸ UNHCR, *Statistical Yearbook, Japan* (2004), <http://www.unhcr.org/cgi-bin/texis/vtx/statistics/opendoc.pdf?tbl=STATISTICS&id=44e5c76f0&page=statistics#search=%22japan%20refugee%202004%2015%20426%22> viewed 6 February 2007.

²⁹ Dean, n 25, Table 5 (providing citations to the Ministry of Justice materials).

confess: "Very few people get asylum status in Japan. It is a very long procedure."³⁰ In short, Japan is even less likely to be an option to enter as a refugee than it is to enter as an immigrant or through nationality.

The Federal Court of Australia in *Koe v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 508 at 519-523 held that the Australian Government must give account to whether an asylum applicant will be given effective protection by the country of her or his putative nationality, not mere possibility or presumption of protection.³¹ Even though the *Migration Act 1958* (Cth) was subsequently amended to widen the scope of exceptions to protection obligations,³² the right to enter or reside in a safe third country is still not to be inferred as mere speculation. Thus, to satisfy this requirement the asylum seeker must have a legally enforceable right to reside in the third country³³ or alternatively effective protection in the third country "as a matter of practical reality and fact".³⁴

Given the legal situation in Japan and the factual reality of Mr Wainggai's case, it is difficult to see how those standards were satisfied. Mr Wainggai did not have a legally enforceable right to enter or reside in Japan without a risk that Japan would return him to Indonesia; nor was he likely to be given effective protection by virtue of the well-known practical reality and fact of how Japan has handled refugee issues. The Australian Government had over 60 days from the Papuans' landing in Australia until the favourable decision regarding the first 42 applicants in which to investigate Mr Wainggai's case and research the legal situation in Japan. It is difficult to see this decision taking that long, let alone another four months.

Mr Wainggai suggests that Canberra's failure to do the basic investigation and maths in a timely fashion leads to the inference that his extended detention was a political offering to appease Indonesia.³⁵ Given that Mr Wainggai's father was one of the highest-profile people in the West Papuan independence movement and Mr Wainggai himself is seen as a leader of the present group, this is feasible. On the other hand, both of Mr Wainggai's siblings are working in Japan on temporary work visas and he himself worked there before returning to West Papua.³⁶ Moreover, Japan has been known to exercise the discretion under its nationality, immigration and refugee legislation in an expeditious way that favours its political interests. Thus, though former Peruvian President Alberto Fujimori was legitimately immune from extradition back to Peru as a Japanese and Peruvian dual national, the Ministry of Justice did not exercise its discretion in a way that rationally would have challenged that

³⁰ Jackson, n 16.

³¹ See also *Tji v Minister for Immigration and Ethnic Affairs* (1998) 158 ALR 681; *SSRP v Minister for Immigration and Multicultural Affairs* [2000] AATA 878. For further background see Mathew P, "Lest We Forget: Australia's Policy on East Timorese Asylum Seekers" (1999) 11 *International Journal of Refugee Law* 7.

³² Section 36(3) of the *Migration Act 1958* (Cth) provides: "Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national."

³³ *S115/00A v Minister for Immigration and Multicultural Affairs* (2001) 180 ALR 561 at [24]; *Applicant C v Minister for Immigration and Multicultural Affairs* [2001] FCA 229 at [28]-[30].

³⁴ *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408 at [31]; *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 at [42]; *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443 at [26] (Emmett J). Cf *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 (overruling the common law doctrine of effective protection).

³⁵ "Papuan Asylum Seeker Says Visa Refusal Was Political", *Pacific News Agency*, 3 August 2006; Lenaghan N, "Papuan Asylum Case Ends in Federal Court", *AAP Bulletin*, 28 April 2006; Steketee M, "The Vanstone Wiggle", *The Australian* (27 May 2006) ("The delay and dubious decision on Wainggai's rights in Japan and Vanstone's slippery answers are a sign of how sensitive the [political relations] situation remains").

³⁶ Jackson, n 16.

status.³⁷ Similarly, when for similar reasons Fujimori's brother-in-law needed to regain his Japanese nationality that he had renounced to be Peru's ambassador to Japan, the Ministry of Justice affirmatively exercised its discretion in an expedited fashion.³⁸ Needless to say, the political factors influencing the discretionary case for Mr Wainggai in Japan seem to be aligned in the opposite direction. The simple message is that even the allegedly neutral application of immigration law – anywhere – can sometimes be political at the edges.

Despite the delays, the story seems to end well for Mr Wainggai in a twisted way. First, on 24 May 2006, the Immigration Department factually found that he was a refugee and would face human rights abuses if he returned to Indonesia, but in the same breath it denied him protection saying he could go to a third country, ie Japan.³⁹ Mr Wainggai appealed from Christmas Island. On 1 August 2006, the Refugee Review Tribunal overturned the Department's decision to withhold the asylum visa on the basis that if he had been refused entry to Japan there was a prospect that he would be sent back to Indonesia.⁴⁰ Indonesia was conspicuously silent on the decision, deciding to focus on "[more] serious issues" in its Australian relationship.⁴¹

It is unclear whether the Immigration Department's decision in the first instance not to approve Mr Wainggai's application with the other 42 Papuans was due to insufficient investigation or political intervention. Yet, it is interesting to note that the Refugee Review Tribunal's decision has not been made publicly available. Presumably this is because it is not considered to be of "particular interest" by the Tribunal's principal members.⁴² This is especially disappointing as this case seems to provide so many important lessons about Australia, West Papua, Japan and the responsibility for the sins of our parents.

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³⁷ Anderson K, "An Asian Pinochet? – Not Likely: The Unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimori" (2002) 38 *Stanford Journal of International Law* 177 at 191-192; Anderson K and Okuda Y, "Issues Raised under Japanese Nationality Law and International Criminal Law by the Case of Former Peruvian President Alberto Fujimori" (2003) 54 *Hokkaido Law Review* 1088 (in Japanese).

³⁸ Anderson, n 37 at 191-192, n 73.

³⁹ Topsfield J and Debelle P, "Canberra Refuses Bid for Asylum", *The Age* (25 May 2006).

⁴⁰ Grattan M, "Justice Comes Ashore", *The Age* (2 August 2006); O'Brien N and Hart C, "Last Papuan Refugee Gets Visa", *The Australian* (1 August 2006).

⁴¹ Hart C, "Jakarta 'No Comment' on Visa Case", *The Australian* (3 August 2006).

⁴² *Migration Act 1958* (Cth), s 431(1) inserted by *Migration Legislation Amendment Act (No 1) 1998* (Cth), Sch 3.