

Comments on OKUDA, Statelessness and the Nationality Act of Japan: Baby Andrew Becomes a Teenager and other Changes?

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I. INTRODUCTION

I read with great interest Professor *Yasuhiro Okuda's* Article in Volume 8(15) of this Journal titled, "The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law".¹ Having read in Japanese his excellent earlier book on nationality law in Japan² and his analysis of the surveys collected by the International Social Service, Japan (ISSJ),³ I was delighted to be able to include an English language source in the materials on this topic for my course *Issues in Japanese Law*.⁴ My students who cannot read Japanese may now also enjoy *Okuda's* scholarship.

* The author thanks Mr *Kent Anderson* (Senior Lecturer, Faculty of Law, The Australian National University and Co-Director, Australian Network for Japanese Law) for his comments on the draft of this Article.

1 Y. OKUDA, The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law, in: ZJapanR 15 (2003) 87.

2 *Okuda* has written extensively on issues such as nationality law, discrimination and conflict of laws. Here I am referring to: Y. OKUDA, *Kazoku to kokuseki* [Family and Nationality] (1996). A revised edition of this book was published in 2003. References in this Article are to the 1996 edition. *Okuda's* most recent book-length work is *Kokuseki-hô to kokusai oyako-hô* [Nationality Law and International Family Law] (2004), where he also discusses Article 2(iii), at 118-121, and the Andrew case, at 125-136.

3 Y. OKUDA, *Sûji de miru kodomo no kokuseki to zairyû shikaku* [Nationality and Visa of the Child: Statistical Analysis] (2002).

4 Undergraduate optional course for the LLB program at the University of Melbourne Law School. We use Andrew's case (discussed below) as a case study for our class on Japanese nationality law issues.

The purpose of this short Article is twofold. First, I want to comment on a number of issues that arise from *Okuda's* Article from an international law perspective. His scholarship and application of international law of themselves are interesting topics. Secondly, I want to expand on *Okuda's* comments on statelessness and the case dubbed by the media in Japan as the “Baby Andrew” (*Andre chan*) case.⁵ January 2005 will be the tenth anniversary of the Supreme Court of Japan's decision in relation to his nationality. *Okuda's* empirical research, however, suggests that despite the passage of time and an increase in the number of stateless children in Japan, the Ministry of Justice's approach to these cases has not changed much. In fact, the Ministry's application of the black letter law provisions relating to nationality and the rights of children suggests a continuing lack of compassion in light of the best interests of the child.

The Ministry of Justice's attitude towards the Nationality Act of Japan⁶ and stateless children presents Australians with an opportunity to reflect on our own legal system's treatment of similar issues. The outcome of a recent High Court of Australia case⁷ dealing with a stateless man born in Kuwait in 1976 to Palestinian parents suggests that Australian legislation and courts can be just as unfriendly to stateless people as the Ministry of Justice and courts were to Baby Andrew in Japan. Despite international law and the proud Australian tradition of giving people a “fair go”, the High Court found that the stateless man could be detained indefinitely in Australia, because he did not have any country that would accept him.⁸ This Article also follows a tradition of strong interest in this area of Japanese law and society in Australia.⁹

5 I am indebted to *Okuda* for pointing out to me that the baby's name in Japanese (*Andore*) is rendered as Andrew in English. His adoptive father and mother chose the name based on the name of one of the twelve disciples in the Bible. Personal communication to the author, 30 December 2004. Accordingly, I have used Andrew in this Article.

6 *Kokuseki-hō* [Nationality Act], Law No. 147/1950, last amended by Law No. 89/1993. The English translation is available at <<http://www.moj.go.jp/ENGLISH/CIAB/law01.html>>.

7 *Al-Kateb v Godwin* [2004] HCA 37 (6 August 2004).

8 See the discussion of the case by *Hilary Charlesworth* and *John Williams* (both academics at the Australian National University) in their newspaper article: H. CHARLESWORTH and J. WILLIAMS, Something's not right in the Lucky Country, *Australian Financial Review*, Sydney, 20-21 November 2004, 62. Australian politicians like to talk about Australia as the “Lucky Country” and people having a “fair go”, *i.e.* being given an equal opportunity to succeed and having a sense of fair play.

9 See *e.g.* V. TAYLOR, Revisions to Japan's Nationality law 1980-1985: Eroding the Structural Barriers to Becoming Japanese (Department of Japanese Studies, Monash University, Honours Thesis, 1985) and V. TAYLOR, Gender, Citizenship and Cultural Diversity in Contemporary Japan, in: V. MACKIE (ed.), *Feminism and the State in Modern Japan* (1995). See also K. ANDERSON, An Asian Pinochet? – Not Likely: The Unfulfilled International Law Promise in Japan's Treatment of Former Peruvian President Alberto Fujimori, in: 38 *Stanford Journal of International Law* (2002) 177 and V. MACKIE, *Feminism in Modern Japan: Citizenship, Embodiment and Sexuality* (2003).

II. COMMENTING ON OKUDA'S ARTICLE

1. *Okuda's Article in Summary*

In his Article, *Okuda* makes a convincing case for the amendment of various Japanese statutes dealing with nationality and the rights of children. Although he acknowledges that most children in Japan are “well fed, clothed, educated, and safe from life threatening harm”, there are some children who do not share in their good fortune. Based on a comparison of (1) various Japanese statutory provisions and their application, and (2) Japan's obligations under the United Nations Convention on the Rights of the Child (hereafter, “Child Convention”), *Okuda* also makes a strong case that Japan is in breach of the Child Convention. Further, he criticises the Japanese government's failure to admit any contravention of the Child Convention in its reports on the implementation of the Child Convention in 1996 and 2001.

Okuda focuses on three issues: (1) registration of birth and the right to nationality, including the causes of children becoming stateless in Japan; (2) the right to preserve nationality; and (3) international family matters such as intercountry adoption, recovery abroad of maintenance and international child abduction. In all of these areas, he finds room for improvement in the legislative and bureaucratic approach to the rights of children in Japan. *Okuda* also uses empirical research and cases to illustrate his arguments. He cites, for example, the results of the ISSJ surveys he has analysed in detail previously¹⁰ and statements by the Ministry of Justice. His Article is an excellent summary of the main issues being considered in respect of nationality law and the rights of children in Japan today.

2. *The Universal Applicability of the United Nations Convention on the Rights of the Child?*

Okuda notes that the purpose of his Article is to:

develop a rational and enlightened framework for Japan's approach to international family law within the context of the Child Convention.¹¹

Okuda's normative approach in his Article, as a Japanese academic, writing in English, interests me. First, *Okuda* does not dwell in his Article on the constitutional implications of applying international law to issues such as statelessness in an arguably do-

10 See OKUDA (2002), *supra* note 3.

11 OKUDA, *supra* note 1, at 88.

mestic context in Japan.¹² The issue of the domestic applicability of international law in Japan has been dealt with elsewhere in detail,¹³ but it is an important point to note in the broader context of the Child Convention as analysed by *Okuda*. It may also have implications for the pace of legislative reform in Japan (or lack thereof).

Secondly, and more interestingly, *Okuda* does not question the validity of the universal application of the international law principles that he analyses in the Japanese domestic law context. In a thoughtful Article, *Harris-Short* argues that the decade-long drafting process and text of the Child Convention, which was ratified in 1989, reveal at least an attempt to identify “culturally legitimate” universal standards.¹⁴ The Child Convention’s application by the Committee on the Rights of the Child she contends, however, has focused on “Western” standards.¹⁵ *Harris-Short* picks up on earlier commentary and uses Japan as an example of Asian countries that “have neither accepted nor incorporated into their political and legal ideology liberal ideals such as ‘individualism, individual freedoms and equal rights’”.¹⁶ She goes on to argue that, “[T]his indifference to individual rights has not, however, resulted in widespread human rights abuses”.¹⁷ I doubt that *Okuda* would agree *in toto* with the descriptions of the Japanese position that she has adopted. Further, he is very comfortable with applying the Child Convention’s standards to Japan, in particular, every child’s right to nationality (Child Convention, Article 7(1)).

Harris-Short’s central argument that there may be other solutions to “potential abuses by a powerful centralised state” (rather than traditionally Western-oriented human rights solutions) is powerful and politically correct. Leaving aside her lumping of all “Asian countries” together, the concerns raised by *Harris-Short* also speak loudly for comparative lawyers. The Committee’s wilful application of so-called Western standards and misunderstanding of other cultures is based on a failure to properly understand the legal context in which other societies operate. These actions also tend to increase suspicions that the rights set out in the Child Convention are not universal,

12 *Okuda* notes these issues were dealt with in other sections of the Report from which his Article originated. Personal correspondence to the author from *Okuda*, dated 2 December 2004 and see OKUDA, *supra* note 1, at 87, first footnote. See also Japan Federation of Bar Associations, Alternative Report to the Second Report of the Japanese Government on the Convention on the Rights of the Child, May 2003. The English version may be found at: <<http://www.nichibenren.or.jp/en/activities/statements/20030601.html>>, accessed 5 January 2005. The Report recommends that the Child Convention be “explicitly accepted” as having “precedence over domestic legislation” (at 10).

13 See e.g. Y. IWASAWA, *International Law, Human Rights, and Japanese Law* (1998) and K. PORT, *The Japanese International Law “Revolution”*: International Human Rights Law and its Impact in Japan, in: *Stanford Journal of International Law* 1(1991) 39.

14 S. HARRIS-SHORT, *Listening to ‘The Other’?* The Convention on the Rights of the Child (2001) 2 *Melbourne Journal of International Law* 304.

15 *Ibid.*, at 304-5.

16 *Ibid.*, at 309.

17 *Ibid.*, at 310.

because their application by the Committee appears Western-centric. Yet *Okuda's* application of those standards to a domestic legal situation in Japan give credence to arguments that the standards are universal. His empirical research also suggests a general acceptance of the standards applied under the Child Convention, notwithstanding the Japanese government's recalcitrant position noted in his conclusion. He explicitly argues for amendment to Japanese legislation in order to implement the international law standards set out in the Child Convention.

3. *Nationality Law as International Family Law*

The failure to implement international law domestically has also been criticised in Australia.¹⁸ The leading case in Australia on this issue is the *Minister for Immigration and Ethnic Affairs v Teoh*,¹⁹ where Evatt notes that the High Court found that, so far as possible, Australian law should be "interpreted and developed consistently with [Australia's] international [treaty] obligations".²⁰ Evatt's comments were made as part of a distinguished lecture that she was invited to give as a member of the United Nation's Human Rights Committee. She went on to note that the Australian government's response to *Teoh* was to deny that Australians should expect that "administrative decisions will be made in accordance with a ratified treaty, unless there is specific legislation on the point".²¹ She argues that Australia's federal system, "lack of enthusiasm" and general Constitutional silence on the issue of civil and political rights have all contributed to a lackluster approach to championing international human rights in domestic cases in Australia.²²

18 See e.g. E. EVATT, National Implementation: The Cutting Edge of International Human Rights Law, Law and Policy Paper 12 (1999).

19 (1995) 183 CLR 273. As discussed by EVATT in *Ibid.* For a discussion of the case, see also I.A. SHEARER, The Relationship Between International Law and Domestic Law, in: B.R. Opeskin / D.R. Rothwell (eds), International Law and Australian Federalism (1997), at 57-59. The case dealt with an application by a non-Australian to review a decision to deport him. He had a wife and children in Australia. Note, however, that the full statement of the law is as set out in M.N. SHAW, International Law (2003, 5th ed), at 152-3:

"provisions of an international treaty to which Australia is a party do not form part of Australia law, and do not give rise to rights, unless those provisions have been validly incorporated into municipal law by statute. It was noted [in *Teoh's* case] that this was because of the constitutional separation of functions whereby the executive made and ratified treaties, while the legislature made and altered laws ... however, ... the fact that a treaty had not been incorporated did not mean that its ratification by the executive held no significance for Australian law".

20 See the Editorial Board's comments in the Preface to *Ibid.* Evatt was also the first Chief Justice of the Family Court of Australia and President of the Australian Law Reform Commission.

21 *Ibid.*, at 21. See also comments by SHEARER, *supra* note 18, at 58-9.

22 *Ibid.*, at 19 and 21.

In the case of Japan, I find it interesting that *Okuda* stakes out the territory for his Article as part of the international family law arena – even if this classification is traditionally adopted by legal academics in Japan. I wonder if the traditional categorisation of the international human rights dealt with in *Okuda's* Article as “international family law” has hampered the advancement of legislative reform in this area in Japan. His title refers to “Japan’s International Family Law *including* Nationality Law” [emphasis added]. In *Okuda's* conclusion, however, he notes that the Japanese government is wary of any interference by the state in family law. Further, it has resisted attempts to modify Japanese family law based on so-called foreign principles.²³

Other approaches to the issues of nationality law and the rights of children include discourses from gender studies²⁴ and labour regulation, and closely related arguments about the aging population in Japan. It is optimistic to think that a multi-nuanced attack on the problems identified by *Okuda* will have an immediate impact on the Ministry of Justice, but they may offer more hope for change than *Okuda's* conclusion allows for.²⁵ Wolff has argued persuasively that elements of civil society in Japan, including media attention, litigation and women’s rights groups, have been able to bring about at least limited legislative and attitudinal change in the context of sexual harassment in Japan.²⁶ At the Australia-Japan Joint Business Conference held in Melbourne in 2004, the then Australian Ambassador to Japan, Mr John McCarthy, commented that one of the greatest challenges facing Japan is its aging and declining population. He did not, however, perceive an overwhelming sense of urgency for social change to encourage more females to remain in work or to increase immigration. Labour mobility (an issue often disguised as a question of immigration and vice versa) was also identified at the Conference as one of the major issues being debated between Japan and the Philippines as part of free trade agreement negotiations. Perhaps international diplomatic and trade forums can bring opportunities for change, but this may require the recasting of the debate about nationality law and statelessness away from a traditional categorisation of “international family law”.

Globalisation has also increased interest in nationality and immigration theory. Writing and research on these topics might also be useful in re-contextualising these

23 OKUDA, *supra* note 1, at 109.

24 E.g. L. STRATTON, The Right to Have Rights: Gender discrimination in Nationality Acts, in: *Minnesota Law Review* 77 (1992) 195. See also V. TAYLOR (1995), *supra* note 9.

25 One of the things I like about *Okuda's* research is his self-reflection and his commitment to his cause. In his book (2002), he said that he appreciated the willingness of the employees of the Child Support Offices to respond to the ISSJ’s survey even though they often probably feel that the media and researchers are just using them as objects of analysis. See *supra* note 3, at 184-5.

26 See e.g. L. WOLFF, Japanese Women and the ‘New’ Administrative State, in: P. Drysdale / J. Amyx (eds.), *Japanese Governance: Beyond Japan Inc* (2003).

issues in Japan.²⁷ As industrialised countries try to balance the competing tension of seeking skilled migrants on the one hand, whilst protecting their borders on the other, the classical categorisation of nationality law itself (*i.e. jus soli* or “nationality by blood” versus *jus sanguinis* or “nationality by place of birth”) is breaking down even further. In Australia, for example, the underlying principle of immigration law policy is *jus soli*. It is not an automatic rule, however, as applied in the United States of America and Canada; rather, the parents of a child born in Australia must have lawful residence for the child to obtain automatically Australian nationality.²⁸ Similarly, Japan is traditionally seen as a *jus sanguinis* country, but cases such as Baby Andrew’s show us that elements of *jus soli* practices have been incorporated into the laws relating to nationality.

III. THE BABY ANDREW CASE

In his Article, *Okuda* referred to the leading Supreme Court case²⁹ from 1995 involving a baby called Andrew who was denied nationality under Article 2(iii) of the Nationality Act by the Ministry of Justice. Article 2(iii) provides that a child shall be a Japanese national when both parents are unknown or have no nationality in a case where the child is born in Japan. Given that the focus of *Okuda*’s Article was not the Baby Andrew case and that he has dealt with it in full in Japanese elsewhere,³⁰ he did not consider the Supreme Court’s decision in detail in his Article. The Baby Andrew case illustrates a number of important issues for the topic of statelessness and the rights of children, including the following. First, it was the first time that the Supreme Court addressed the definition of “when both parents are unknown” in Article 2(iii) of the Nationality Act and the burden of proof with respect to that requirement.³¹ Secondly, the case is an example of the Ministry of Justice’s attempt to control social change by reserving to itself the power to define who is Japanese. Accordingly, the case has legal and social implications for the concept of nationality in Japan. It also offers an alternative institution for redress and change: the Supreme Court. Thirdly, the case highlights the role that litigation may play in increasing public awareness of social problems in Japan.

27 See *e.g.* T. ALEXANDER ALEINIKOFF / D. KLUSMEYER, *Citizenship Policies for an Age of Migration* (2002).

28 *Ibid.*, at 10 and 12. *Aleinikoff* and *Klusmeyer* argue in favour of a concept of “generations” as opposed to the classical distinction between “birth-place” and “blood”.

29 OKUDA, *supra* note 1, at 92-3. The case citation is Supreme Court, 27 January 1995, in: *Minshû*, Vol. 49, No. 1, 56; English translation in: *The Japanese Annual of International Law*, No. 40 (1997) 129. Also reported at: *Hanrei Jihô*, No. 1520, 32 and *Hanrei Taimuzu*, No. 872, 78.

30 See *e.g.*, OKUDA (1996), *supra* note 2, at 35-59. The case also did not go to his main arguments in favour of legislative reform in Japan on the basis that Japan is in breach of the Child Convention. Personal communication to the author from *Okuda*, 30 December 2004.

31 *Hanrei Taimuzu*, No. 872 (1995), at 80.

1. *“When Both Parents are Unknown” and the Burden of Proof*

Andrew was born in a Nagano Prefecture hospital on 18 January 1991.³² His mother left the hospital a few days later on 23 January 1991 without registering his birth. She did not return. The mother left the baby in the care of William and Roberta Rees, an American missionary and his wife, who were guarantors for the woman when she was admitted to the hospital. They received no contact from the woman after her disappearance, although a friend who had accompanied the mother to the hospital telephoned about two weeks after the birth to enquire after Andrew.

Andrew’s mother did not have any personal identification when she was admitted to hospital and had communicated with the staff through broken English and gestures. Based on the information that she gave to the hospital staff, the name “Cecilia M. Rosette” and the birth date “November 21, 1965” had been written on her medical chart. A doctor filed the baby’s registration on 30 January 1991, attaching adoption and immigration documents that had been filled out on 19 January 1991 by the friend of the mother who had accompanied her to the hospital. In the section which required her to fill out the name of the baby’s real parents, the friend had written “Ma CECILIA ROSETTE” (as written).

Andrew was adopted by Mr and Mrs Rees on October 17, 1991. When Mr and Mrs Rees claimed Japanese nationality for Andrew, the local government office referred the decision to the Ministry of Justice. The Ministry of Justice investigated the case and refused to grant Japanese nationality on the basis of Article 2(iii), arguing that the mother was not “unknown”. Based on the Ministry of Justice’s investigation, the baby was issued an alien registration card as a Filipino citizen, because members of the hospital staff were under the impression that the mother was from the Philippines. The issue came to a head when the Rees family wanted to return to the United States temporarily and sought a Filipino passport for him. The Philippine Embassy rejected the Japanese Ministry of Justice’s assignment of Filipino nationality, because there was no passport on issue for his mother (Filipino nationality is based on the nationality of a child’s father and mother³³). Instead of being re-registered as having Japanese nationality because his parents are unknown, Andrew was re-registered as having no nationality.

The Ministry of Justice produced an Entry and Departure Card in the name of “Cecillia Rosete” as evidence that Andrew’s mother was known. According to the card, a woman of that name with Filipino nationality had entered Japan on February 24, 1988 and was to have left by March 10, 1988. There was no record of departure. In an Article

32 The following statement of the facts of the Baby Andrew case expands on the summary provided by Professor *Okuda* in his Article. It is based on OKUDA (1996), *supra* note 2, at 51-4, OKUDA (2002), *supra* note 3, at 9-11 and the Supreme Court’s judgement, *supra* note 29. See also *Chi no tôta hômu gyôsei wo*, *Asahi Shimbun*, 6 February 1995.

33 OKUDA (1996), *supra* note 2, at 41. As *Okuda* points out, the father in Andrew’s case did not come forward, so the investigation focused on the nationality of the mother.

that focuses on the gender issues surrounding the determination of this case at the District and High Court level, Taylor describes the evidence offered by the Ministry as “fairly limited”, relying on a “coincidence of names and dates to support the contention that Andrew’s mother was ‘known’”.³⁴ Apart from the difference in the spelling of the mother’s name, the date of birth on the Entry and Departure Card was different to that of the mother of the baby by five years (1960), although the day and month were the same (November 21). Taylor also argues that there was a “strong” probability that, “this woman, or the one admitted to hospital in Nagano, or both, were using an assumed name”.³⁵ The legal team for Andrew focused on the discrepancies in the evidence, which may be summarised as follows.³⁶

	Date of birth	Name	Signature
ED Card (Entry/Departure Card)	21 November 1960	ROSETE, CECILIA, M	Cecillia m Rosete
Record of issue of airplane ticket	21 November	CECILIA MERLADO ROSETE	
Rosete’s birth certificate	21 November 1960	Cecilia Rosete	
Andrew’s birth certificate	21 November 1965		
Adoption/immigration certificate			Ma Cecilia ROSETE
Admission (to hospital) certificate	21 November 1965	Cecilee M. Rosete / Cecille M. Rosete	

The Tokyo District Court at first instance determined the three main points of the case on February 26, 1993.³⁷ First, the court had to construe the meaning of “when both parents are unknown” in Article 2(iii) of the Nationality Act. Secondly, they had to decide who had the burden of proof with respect to that requirement. Thirdly, the court had to decide whether the facts in this case fell within the provision as it was thus

34 TAYLOR (1995), *supra* note 9, at 120.

35 *Ibid.*

36 OKUDA (1996), *supra* note 2, at 53. Translated by the author.

37 Tokyo District Court February 26, 1993, No. 809, at 238.

construed. Both appellate courts followed this interpretation of the issues involved in the case.

At first instance the baby's Japanese nationality was recognised.³⁸ The court treated the issue of the burden of proof in the plaintiff's favour and accepted the plaintiff's argument that the evidence offered by the Ministry did not amount to showing that the mother was "known". The Ministry's appeal to the Tokyo High Court was successful, partially because the court placed the heavy burden of proving that "both parents are unknown" on the child.³⁹ Unlike the District Court, the High Court accepted the Ministry's contention that on the evidence, the mother was probably a person from the Philippines and thus the circumstances of Andrew's case did not fall within Article 2(iii).

On appeal to the Supreme Court, the definition of the requirement that "both parents are unknown" was given a broad interpretation. The Court stated that:

The Act ... provides that a child who was born in Japan shall be a Japanese national when both father and mother are unknown or have no nationality (Article 2(iii)). If the principle that the nationality of a child shall depend on the parents' nationality is to be maintained, a child whose father and mother are unknown will be stateless. Therefore, in order to prevent the occurrence of stateless persons, the ... Act recognizes the acquisition of Japanese nationality by a child in such a situation. Therefore, "when both father and mother are unknown" in Article 2(iii) means when both father and mother are not identified. This requirement should be considered to be satisfied where a person quite possibly is the child's father or mother but cannot be definitely identified as such. For even if a person quite possibly is the child's father or mother, the nationality of the child cannot be determined on the basis of such a person's nationality, and it is not until that person is identified that the child's nationality can be determined on the basis of his or her nationality.⁴⁰

The burden of proof was the most important issue in this appeal, because it was on this point that the two lower courts differed most significantly. The plaintiff argued that the proof of a negative requirement, such as showing that a person is unknown, is very difficult. Further, the State was the party in the best position to make inquiries as to the parents' identity because of its financial and administrative resources. The State argued that it should not be made to bear the burden of proof, because that would change the meaning of the law; in essence, it would require them to prove that the mother was "known".⁴¹

In Japanese civil cases, the plaintiff generally has the burden of proof with respect to fact.⁴² If there is doubt with respect to fact, then the plaintiff is said not to have satisfied the burden of proof. Accordingly, the Supreme Court found that the burden of proving

38 *Ibid.*

39 Tokyo High Court January 26, 1994, No. 840, at 64.

40 Translation of Supreme Court decision, *supra* note 29, 130. For the Japanese original, see Hanrei Taimuzu, No. 872 (1995), at 81.

41 Hanrei Taimuzu, No. 872 (1995).

42 For a discussion on the burden of proof, see also OKUDA (1996), *supra* note 2, at 55-57.

the requirement “when both parents are unknown” fell to the plaintiff in this case; that is, Andrew.⁴³ However, the court took steps to circumvent the detrimental effect that this may have had on Andrew’s ability to obtain nationality in a case such as this. It found that:

It is reasonable to consider that the burden to prove the facts required by the language “[w]hen both father and mother are unknown” in Article 2(iii) should be borne by those who claim the acquisition of nationality. However, once the claimant shows that by common sense neither the father nor the mother is considered to be identifiable, judging from the circumstances concerning the child’s father and mother including the circumstances at the birth of the child, prima facie it is presumed that the requirement of “when father and mother are unknown” is fulfilled.⁴⁴

Although the Supreme Court’s initial statement of the law follows the traditional view of the burden of proof for a civil case, in reality it reverses the burden of proof.

The Court’s decision requires the party contesting the acquisition of nationality (Japan) to show that the parents are “known”, because if they cannot do this, the court will treat the case as if the plaintiff (the child) has shown that both parents are unknown. The Court said that:

the requirement of Article 2(iii) should be deemed to be met when a person quite possibly is the child’s father or mother but cannot be definitely identified as such. From this it follows that if one who contests a child’s acquisition of nationality only demonstrates by rebuttal that he or she very possibly may be the child’s father or mother but fails to show that he or she can be identified as such, then the above presumption cannot be considered to be refuted.⁴⁵

In practice, the result in this part of the case has not led to a revolution in the Ministry of Justice’s approach. It continues to use names on Entry and Departure Cards to determine the nationality of children.⁴⁶

43 Y. HAYATA, *Kokuseki-hô nijô sangô no ‘Fubo ga tomo ni shirenai toki’ ni igi*, in: *Jurisuto*, No. 1068 (1995), at 271. Hayata notes that there is room for the argument that a case seeking to confirm nationality, does not fall within the usual parameters of a civil case and thus the civil law burden of proof should not be applied. He cites a number of legal scholars as evidence of an emerging trend of thought that division of the burden of proof should be decided upon a variety of factors, including the aim of achieving equality between the parties, the nature of the case in question, and the difficulty of proving the necessary requirements. He notes that proving that “both parents are unknown” is an extremely difficult thing to do. Further, the party in the “best position” to “collect evidence and make inquiries” in such cases, is the State.

44 Translation of Supreme Court decision, *supra* note 29, 130-1. For the Japanese original, see *Hanrei Taimuzu*, No. 872 (1995), at 81.

45 Translation of Supreme Court decision, *supra* note 29, 131. For the Japanese original, see *Hanrei Taimuzu*, No. 872 (1995), at 81.

46 OKUDA, *supra* note 1, at 93. See also the examples cited by Okuda of the use of E.D. Cards by the Ministry of Justice in OKUDA (1996), *supra* note 2, at 60-62. In that context, he also

Despite the Court's generous interpretation of the definition of "when both parents are unknown" and the heavy burden of proof that it places on the State, its judgement does not directly refer to the social injustice that would be caused if Andrew were to be denied Japanese nationality. The judges emphasised the purpose of the legislation, pointing out that Article 2(iii) had been included in the Nationality Act to avoid the instances of stateless children which arose out of Japan's *jus sanguinis* system. The Court said,

Under a system which works on the principle that the acquisition of nationality by a child is dependent upon the nationality of the parents, a child in circumstances such as these would become stateless. As such, in order to prevent the incidence of statelessness as much as possible, this [Article 2(iii)] was designed to recognise the acquisition of Japanese nationality by a child who was born in Japan in circumstances such as these.⁴⁷

The Court recognised that the child's right to a nationality was paramount and overruled the Ministry of Justice's decision in this case.

2. *Controlling Social Change and the Ministry of Justice*

Andrew is representative of illegitimate, stateless children born in Japan to overseas sex workers, often from the Philippines. *Okuda's* findings suggest that the other large group of stateless children come from the ethnic Brazilian community in Japan.⁴⁸ At the time of the Andrew case, the trends suggested an increasing number of children were being born in similar circumstances.⁴⁹ In 1990 there were 74 children in Japan under the age of four who were stateless; by 1992 there were 138.⁵⁰ From the Ministry of Justice's point of view, this two-fold increase of statelessness reflected a growing social problem that, when viewed in the context of other demographic changes in Japan, threatened to dilute "the nexus between Japanese ethnicity and nationality"⁵¹ and subvert Japanese society's perceptions of its own national identity. The Ministry of Justice was also pro-

argues that E.D. Cards are problematic sources of evidence because: (1) they might be falsified; (2) it takes time to dig up this evidence; and (3) it is a superficial, bureaucratic mechanism for deciding such an important issue.

47 Hanrei Taimuzu, No. 872 10 May 1995, at 81, author's translation. On the amendment of the Nationality Act in 1985 see K. HOSOKAWA, *Japanese Nationality in International Perspective*, in: Ko Swan Sik (ed.) *Nationality and International Law in Asian Perspective* (1990), at 193.

48 OKUDA (2002), *supra* note 3, at 111.

49 During the 1980s, there had also been a notable increase in the number of foreign visitors to Japan and of people overstaying their visas. See OKUDA (1996), *supra* note 2, at 35.

50 *Chi no tôtta hômu gyôsei wo, Asahi Shimbun*, 6 February 1995. See also OKUDA (1996), *Ibid.*, at 43-4.

51 TAYLOR (1995), *supra* note 9, at 110.

tecting its power to influence the pace of social change and the definition of the Japanese citizenry.

By the time the Supreme Court had handed down its decision on January 27, 1995, Andrew was no longer a baby, but a four-year old boy. His application for Japanese nationality was accepted by the Ministry of Justice on January 30, 1995.⁵² Under the Nationality Act, Andrew could have obtained Japanese nationality through naturalisation when he turned three years old (Article 8(iv)).⁵³ Further, had the Ministry of Justice made a greater effort to find Andrew's father, who may have been Japanese, Andrew may have been able to receive nationality through the legal procedure of "legitimation" (*ninchi*).⁵⁴ The fact that Andrew's case did not follow either of these scenarios suggests that there was more at stake than Andrew's nationality. The case may be seen as being about who has the right to control the definition of "Japanese" and what that definition is.

Although the Nationality Act *prima facie* guarantees the otherwise stateless child Japanese nationality through naturalisation, there is still room for bureaucrats to exercise their own judgement based upon their own value system and perception of the nation's "best" interest.⁵⁵ This might include a wide variety of issues such as gender roles, foreign workers and what it means to be Japanese. This means that it is possible for a gap to emerge between a *prima facie* interpretation of the intention of the text of the law and policy design and implementation. Further, it suggests that it is possible for the bureaucrats' rules of practice to have a different outcome to the one intended by the legislation. If the Ministry of Justice can confine cases such as Andrew's to the situation of someone having to apply for naturalisation on the child's behalf for a child to become a Japanese national, then they could maintain control over the definition of the Japanese citizenry.

As noted by *Okuda* in his Article, the provisions relating to naturalisation give the Minister of Justice broad discretion.⁵⁶ *Okuda* argues that this is no "substitute" for an otherwise stateless child obtaining nationality by birth.⁵⁷ Furthermore, the Ministry of

52 Mainichi Shimbun, 28 January 1995, at 5.

53 Article 8(iv): "A person who was born in Japan, had had no nationality since the time of birth, and has had a domicile in Japan continuously for at least three years since then", is eligible for naturalisation. This Article was introduced into the Nationality Act in the 1985 amendments to relax the conditions for naturalisation of stateless persons born in Japan.

54 The "legitimation" (*ninchi*) procedure is voluntary.

55 See A. DRUMMETT / A. NICOL, *Subjects, Citizens, Aliens and Others: Nationality and Immigration Law* (1990), at 14-20 on this point. They follow a similar line of argument with respect to the bureaucracy's power over immigration and the granting of nationality in the United Kingdom.

56 Obtaining nationality is completely up to the Minister. There is a simplified nationality procedure that involves the relaxation of the minimum requirements relating to residency and livelihood, but the discretion itself is not affected.

57 OKUDA, *supra* note 1, at 98.

Justice's attitude after Andrew's case was that the Supreme Court's judgement was not applicable in every case. It certainly was not planning to take any "special measures" in such cases in future.⁵⁸

3. *Using Litigation and the Media in Japan*

Notwithstanding the Ministry of Justice's current attitude, can it be forced to change its policies? Media attention focused on litigation may be one way of showcasing the plight of certain individuals and minorities (weaker groups) paving the way for greater social acceptance and the possibility of social change in Japan. The mass media interest in Andrew's case was huge. At a press conference after the Supreme Court judgement was handed down, Mr Rees claimed that their efforts had not been for Andrew alone.⁵⁹ He was alluding to the broader social context of the case. The Supreme Court, however, couched its judgement in terms which emphasise the legal context of the case. That is, the definition of "when both parents are unknown". *Taylor* emphasises the Rees's sense of injustice at the way Andrew and other children like him are treated *vis a vis* the technical legal aspects of the case.⁶⁰ *Okuda* also cites Andrew's lawyer, *Yukiko Yamada*, as having similar sentiments and wanting to use Andrew's situation as a test case.⁶¹

From my reading of *Okuda's* empirical analysis, however, there are important issues that remain an obstacle to change and the further use of litigation. The lack of resources and knowledge about the rights of children, for example, are having a hugely detrimental impact on children obtaining nationality. In terms of resources, naturalisation takes a large amount of time and effort, in part because it is based on the discretion of the Minister. Based on the responses to the ISSJ survey, *Okuda* argues that Child Support Offices in Japan do not have the resources to help children in this process.⁶² Further, in the ISSJ survey, 52 respondents said that the child in question was stateless, but on further analysis by *Okuda*, only 17 of these children were properly categorised as stateless.⁶³ Respondents from Child Support Offices often confused statelessness with lack of registration.⁶⁴ There also seemed to be a lack of knowledge among parents of the existence of the legitimation procedure. There was only one case of legitimation in respect of these 52 cases.⁶⁵

58 *Ibid.*, at 93. See also OKUDA (1996), *supra* note 2, at 59.

59 N. KOYAMAUCHI, *Bôdâjô no ko ni kokuseki wo*, Asahi Shimbun, 6 February 1995.

60 TAYLOR (1995), *supra* note 9, at 119.

61 OKUDA (1996), *supra* note 2, at 43.

62 See OKUDA (2002), *supra* note 3, at 172.

63 OKUDA (2002), *supra* note 3, OKUDA (2003), *supra* note 1, at 93.

64 *Ibid.*, at 43-51 and 85-86.

65 *Ibid.*, at 79.

IV. CONCLUSION

It would be nice to think that everything “turned out for the best” for Andrew, who became a teenager in January 2004. Unfortunately, only limited practical change has occurred as a result of his legal struggle. Japan, like Australia, continues to grapple with competing international obligations and domestic concerns, complicated by events such as September 11, 2001 and the Bali Bombing attack. Security fears are becoming one more reason to keep “others” out. Further, the Japanese government continues to deny that it is in breach of the Child Convention. All of this is having an adverse impact on the rights of children. As such, notwithstanding theoretical arguments about the domestic and moral applicability of international instruments such as the Child Convention and how to package and sell the required law reform, *Okuda's Article* is an important document.

ZUSAMMENFASSUNG

Mit diesem kurzen Artikel bezwecke ich zweierlei: Zum einen möchte ich auf einige Fragen eingehen, die sich für mich bei der Lektüre von Professor Yasuhiro Okudas hervorragendem Artikel „The United Nations Convention on the Rights of the Child and Japan's International Family Law including Nationality Law” in Heft 15 (2003) dieser Zeitschrift ergeben haben. Okuda plädiert überzeugend für eine Überarbeitung verschiedener japanischer Gesetze zur Staatsangehörigkeit und der Rechte von Kindern auf der Grundlage von Vorschriften des UN-Übereinkommens über die Rechte des Kindes (Kinderrechtskonvention). Ich betrachte seine Anwendung der Kinderrechtskonvention auf nationale japanische Rechtsverhältnisse im Lichte einer Reihe von kritischen Stellungnahmen, wonach die durch die Kinderrechtskonvention begründeten Rechte zum einen nicht überall in der Welt anwendbar seien und sie zum anderen – selbst wenn sie es wären – allein durch die Tatsache, dass sie ihren Ursprung in der Kinderrechtskommission der Vereinten Nationen haben, stark westlich geprägt seien.

Zum zweiten nehme ich ausführlich Stellung zu Okudas Anmerkungen zur Staatenlosigkeit und der Entscheidung, die in den japanischen Medien als „Baby Andrew“ (Andre-chan)-Fall bekannt wurde. Auf der Grundlage von Artikel 2 (iii) des japanischen Staatsangehörigkeitsgesetzes wurde Baby Andrew vom Justizministerium die japanische Staatsangehörigkeit verweigert; letztlich wurde diese Entscheidung aber vom Verfassungsgericht aufgehoben. Okudas Untersuchungen lassen jedoch vermuten, dass sich die Haltung des Justizministeriums zu diesen Fragen trotz dieser Entscheidung und ungeachtet des weiteren Anstiegs der Anzahl staatenloser Kinder in Japan nicht geändert hat.

(deutsche Übersetzung durch die Redaktion)