Annex 2

2020 (*Gyo-sa*) No. 81

STATEMENT OF REASONS FOR FINAL APPEAL

12 October 2020

To the Supreme Court

Appellant Father: Fujio Mizuoka
Appellant Child: Reiryu Mizuoka

Appellee: The Prefecture of Saitama
Appellee: The Government of Japan

With regard to the case of the filing of administrative appeal of 2020 (*Gyo-sa*) No. 81, between the aforementioned parties, the appellants of final appeal jointly submit the reasons for final appeal as follows:

The Reasons for Final Appeal

Chapter I: Reason for final appeal: Violations of the Constitution

1. This is a serious case in which the illegality of grave human rights infringements is questioned.

Seven and a half years have passed since Appellant Child Y (Hereinafter referred to as “Appellant Child”), who was in the fourth grade at K Elementary School, was taken into temporary custody by the Tokorozawa Child Guidance Centre (hereinafter referred to as "Appellee Prefecture (CGC)") on 1 May 2013. Following repeated notice from the non-litigant private K School, the Appellant Child was subsequently confined in an alternative care facility (“ACF” hereafter)

by the Appellee Prefecture (CGC).

Since the Appellee Prefecture (CGC) made a comprehensive administrative disposition to prohibit visitation between the Father and Child, they have not been able to meet during this period [for seven and a half years].

The Appellant Father X (Hereinafter referred to as "Appellant Father"), protested against repeated abuse of the Appellant Child by the homeroom teacher at K Elementary School. In order to cover up this abuse (school corporal punishment), the principal of K Elementary School laid blame of the abuse with the Appellant Father.[1]

The Appellee Prefecture (CGC) created the information on the 'abuse notification' of the Child and several documents that were used as grounds for the measures of temporary custody and confinement in an ACF. A piece of documentary evidence that the Appellee Prefecture submitted to the family court was the voluminous 'elementary school life account,' of which the Appellee Prefecture claimed that K Elementary School had been the preparer. In the lawsuit against K School (Tokyo District Court, 2014 (*wa*) 18754), the administrators of the School testified, 'I have not seen this "elementary school life account"', and 'I was not involved in preparing it' in the court testimony given under oath. It is [therefore] considered that the 'elementary school life account' was fabricated by the Appellee Prefecture (CGC).

The Appellant Father argues that the 'abusive behaviour' itself was a false notification for the purpose of covering up the fact of abuse in the Child's school, as mentioned above, and that there was no act of abuse committed by the Appellant Father. Furthermore, no past rulings of the family courts (of so-called

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[1] In 2010, the UN Committee on the Rights of the Child (UNCRC) issued its Concluding Observations to the Government of Japan. Paragraph 62 of the said Observations recommended, 'the Committee observes with concern that children who do not meet the behavioural expectations of school are transferred to Child Guidance Centres'. The notice of abuse by the Principal of K Elementary School in the present case, in which the blame for abuse was shifted from the homeroom teacher to the Appellant Father by the principal, can be regarded as a typical example of human rights infringement that merits attention [of the UNCRC] and concern.

Article 28 plea) acknowledged the 'abusive behaviour' of the Appellant Father, even though they approved confinement [of Appellant Child] to an ACF.

Under such circumstances, the Appellant Father longed for the return of the Child to the family as soon as possible. However, for the past seven and a half years, the Appellee Prefecture (CGC) continued to prohibit visitation between the Father and the Child, let alone the Child's return to the family.

It is likely that the Appellant Child graduated from junior high school and went on to senior high school. The Appellant Father has not been informed of the high school the Appellant Child attends. On the other hand, the Child has been unable to meet the Appellant Father and has been unable to communicate freely. For the Appellant Child, the time passed in vain without significant opportunity to develop Appellant Child's intellectual and athletic capacities. Under the custody of the Appellant Father, the Child was [receiving awards for scholastic achievement, trekking a mountain, and skiing], activities which Appellant Child enjoyed when he lived with the Appellant Father.

This is a serious case in which the illegality of such human rights infringements under the State Redress Act is questioned.

2. Background to the human rights violations

Why did this result in serious human rights infringement?

To put it simply, the Appellee Prefecture (Tokorozawa CGC) insisted on forcing the Appellant Father to admit the charge of abuse of the Appellant Child, whom the CGC removed from the family upon receiving a notice from K Elementary School under the intention of expelling the Appellant Child from the school. Thereafter, the Appellant Child was treated like a hostage.

The Appellee Prefecture (CGC) clung to the ban on any visitation between the Appellant Father and Child and denied the reintegration programme for the Appellant Father and Child (unless the Appellant Father admits to abuse). As a result, detention of the Appellant Child and the ban on visitation were prolonged for as long as seven and a half years. Family ties were severely dwarfed and remain difficult to recover.

3. Reasons for final appeal: unconstitutional

The adjudications in the first and the second instances basically admit the acts of the Appellee Prefecture (CGC), the direct actor of the infringement of human rights, as well as the nonfeasance of the Appellee State, which neglected to correct the act of infringement on human rights. There are several errors, not only in the fact findings, but also in the interpretation and application of the Constitution in the judgements. These errors are described below:

First, the rules of due process (Article 31 of the Constitution) apply not only to criminal but also to administrative proceedings. An administrative body is required to undergo a prior judicial review to place a child under physical restraint. The [current] system of temporary custody that allows a child to be placed under physical restraint without going through a prior judicial review procedure (Article 33 of the Child Welfare Act) is itself in violation of Article 31 of The Constitution. Leaving the temporary custody system as it is by the Appellee State and bringing the Appellant Child into temporary custody by the Appellee Prefecture (CGC) violate Article 31 of the Constitution.

Furthermore, the Appellee Prefecture (CGC) demanded the Appellant Father to acknowledge his past acts of abuse. As soon as the Appellant Father, who did not commit such acts of abuse, rejected the acknowledgment, the Appellee Prefecture (CGC) comprehensively banned the visitations of the Appellant Father to his Child and did not carry the family reunification procedure forward. These acts are in violation of Article 38 (1) of The Constitution, which prohibits forced self-incriminating testimony.

Furthermore, the Constitution ensured that family members would not be unduly interfered with by authorities and that the autonomy of the family, which includes the parents' right and obligation to care for their own child as part of respecting the autonomy of each individual (First sentence of Article 13 of the Constitution). It is therefore unconstitutional for the Appellee Prefecture (CGC) to refuse to carry out the family reunification programme and to impose an indefinite and complete prohibition on visitation.

4. Supplementing the Constitution with Human Rights Treaties

The guarantee of specific rights in the above provisions of the Constitution shall be replenished and supplemented in the treaties ratified by the State.

Thus, in what follows, while clarifying what is protected as the rights of parents and children and their families in the relevant treaty provisions (Chapter II), violation of the provisions of the Constitution shall be discussed (Chapter III and thereafter).

Details shall be discussed below.

Chapter II: Protection of the rights of parents, children, and their families under the Treaties

1. Introduction

Article 98 of the Constitution of Japan provides that 'The treaties concluded by Japan and established laws of nations shall be faithfully observed.' The failure to comply with the provisions of the International Covenant on Civil and Political Rights ('Covenant' hereafter) and the Convention on the Rights of the Child ('Convention' hereafter), both of which have legal power to impose obligations on human rights in Japan (Shen Hui-Feng, 'Interpretation and application of international human rights law by domestic courts' In: *Contemporary Development of Human Rights Treaties*. Shinzansha, 2009, p.378ff.). Such failures constitute a violation of Article 98 of the Constitution; in particular, the provisions of the Convention in which compliance is explicitly required pursuant to Article 1 of the Child Welfare Act ('CWA' hereafter).

Article 43 of the Convention establishes the Committee on the Rights of the Child ('ommittee' hereafter) as a 'treaty body' to monitor compliance in States Parties.

'Under human rights treaties which establish a treaty body to monitor the domestic implementation of a State Party, special authority should be given to the interpretation of the treaty made clear by the treaty body' (Shen, pp. 374-375). 'In interpreting and applying human rights treaties, it is requested that full

consideration be given to the interpretations made by treaty bodies in … "views", etc.' (Shen, p. 389). Therefore, the Convention itself, as well as the Committee's Concluding Observations that audit the compliance of States Parties established under the Convention, must be faithfully observed.

Paragraph 7 of the 2019 Concluding Observations states that 'the State party … take steps to fully harmonize its existing legislation with the principles and provisions of the Convention.' This clearly indicates that existing domestic laws and regulations of Japan do not conform to the principles and provisions of the Convention. Their amendments are required.

2. The Rights of Parents, Children, and Families Ensured in the Treaties

(1) Respect for 'the best interests of the child'

Article 3, paragraph 1 of the Convention provides for respect for 'the best interests of the child'. Respect for 'the best interest of the child' must be satisfied on both short- and long-term time scales. That is, in the short term, children should be provided with food, clothing, and shelter necessary for the maintenance of their mental and physical development. In the long term, children should be provided with the right to develop according to their characteristics ("developmental right" hereafter) and the right to develop themselves according to their characteristics. This can be regarded as a part of the guaranteeing the right for the pursuit of happiness set forth in Article 13 of the Constitution; thus, an administrative act that disregards the child's best interests can be judged unconstitutional.

In addition, Article 5 of the Convention summarises the relationship between children, parents, and the State. 'States Parties shall respect the responsibilities, *rights* and duties of parents …to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.'

(2) State 'intervention' should be exceptional and temporary

Since the primary responsibility for raising a child rests on the parents, the international codes of human rights recognise *'intervention' by the State to be exceptional and temporary*. That is, the principle here is to 'aid' parents, who

hold primary responsibility for raising their own children. It should be confirmed that 'intervention' to remove children from their parents is an exception and should only be used as a last resort for the shortest appropriate period of time (Article 9 (1) and Article 37 (b) of the Convention).

Furthermore, it should be noted that even in the case of 'intervention' to fulfil 'the best interests of the child', especially for the short-term, action should only be taken when it does not jeopardise the long-term 'best interest of the child'.

(3) The family reintegration obligation

Even in the case that a child is removed from his/her parents as an 'intervention', the parents continue to occupy the position of the primary caretaker of the child, as provided in Article 18, paragraph (1) of the Convention, unless the parent is deprived of parental authority. The State therefore must 'aid' towards restoring the position of the parents, so that the parents can resume responsibility for raising their children. This obligation that the state has to bear is called 'the obligation of family reintegration'.

(4) Summary

For a child, being nurtured and cared for by biological parents is an essential condition for growing up into a personally independent adult.

Therefore, the right of a child to demand reunification of the family, so that the separated child is returned to the biological parents [who guarantee the development of the child into a personally independent adult] should be guaranteed under the right of the pursuit of happiness (first sentence of Article 13 of the Constitution). Similarly, for biological parents, the right to demand family reunification to restore their children to their original care environment should be guaranteed as part of the right of the pursuit of happiness (first sentence of Article 13 of the Constitution) to be enjoyed by the parents [as long as they guarantee the long-term best interest of their children].

3. Fundamental Allegation about Motives of CGC Administration Revealed by the Committee

The Committee further stated in its 2019 Concluding Observations, para. 28 (c), 'There is *allegedly* a strong *financial incentive* for the child guidance centres

to receive more children'. This raises suspicions that the actions of the government authority for child abuse and child affairs, the Ministry of Health, Labour and Welfare of the Japanese government is being carried out not for the real welfare of children, but to benefit the financial interests of its institutions - child guidance centres.

Although more than a year and a half have passed after the Concluding Observations was issued. The Japanese government has never made any official protest or rebuttal to the UN in response to this allegation. The suspicion raised by the Committee is valid. It is suspected that the confinement of the Appellant Child for more than seven and a half years since being admitted into 'temporary custody,' as well as the total ban against visitation of the Appellant Father since, was not for the 'just cause' of guaranteeing the rights of the child's welfare, but for the 'financial incentive' of the securing the authority's budget for the next fiscal year.

4. Summaries

Based on the above understanding, this appeal explains that the system and the specific dispositions in this case are in violation of the provisions of the Constitution. Therefore, the acts of the Appellee State and Prefecture (CGC) are illegal under Article 1 of the State Redress Act.

Chapter III: The temporary custody system and the temporary restraining order in this case are in violation of Article 31 of the Constitution

1. Introduction

The system of temporary custody (Article 33 of the CWA) is in violation of Article 31 of the Constitution in that it permits the removal and physical confinement of a child from his/her family by the Child Guidance Centre ('CGC' hereafter), an administrative body, without prior judicial review.

In addition, the administrative act of the temporary custody order (in this case performed by the Appellee Prefecture (CGC)), which commenced without sufficient investigation or adequate verification of the allegations of abuse reported by K Elementary School, violates Article 31 of the Constitution.

First, this appeal argues that the system of temporary custody is in breach of Article 31 of the Constitution (2 to 4). The temporary custody in this case was implemented without due process and it also violates Article 31 of the Constitution (5).

2. Specific normative content of Article 31 of the Constitution

Article 31 of the Constitution applies directly to both criminal proceedings and administrative proceedings.

This article calls for the 'procedure established by law' and since the 'law' naturally includes Article 9 (1) and Article 37 (b) of the Convention, which are valid as domestic law, the principle of due procedure requirement (Article 31 of the Constitution) dictates that the system of temporary custody, which restricts physical freedom, one of the most important human rights, should undergo due judicial review before it is imposed. In the *ex post* judicial review, the appropriate judicial review had not been conducted prior to or at the time of the physical constraint, which cannot be deemed to comply with Article 31 of the Constitution.

Article 9, paragraph (1) of the Convention provides for the so-called 'judicial enforcement principles', which means that, in light of the significant human rights consequences of removing the custody of a child from the parents for a substantial period of time, a fair and impartial judicial review is required prior to physical restraint. Thus, the legitimacy of removal should be checked during this review. This judicial review, to be conducted under due judicial proceedings, is the only means to confirm the legitimacy of physical constraint of a child by the state authority and it is, needless to say, extremely important from the viewpoint of ensuring human rights.

3. No prior judicial review provided under the system of temporary custody (Article 33 of the CWA)

However, Article 33 of the CWA does not require judicial review *ex ante* before a child is placed under the physical constraint of temporary custody. This is in violation of the requirement of the 'procedure established by law' set forth in Article 31 of the Constitution, which embodies the provisions of the Convention, to go through judicial review *ex ante*.

The Appellant Father has argued, even at this stage, that the temporary custody system without *ex ante* judicial review violates Article 9, paragraphs (1) and (2) and Article 37 (b) of the Convention.

This statement of the Appellants is endorsed by the urgent recommendation of Paragraph 29 (a) of the Concluding Observations of the Committee issued in 2019. That is, '[i]ntroduce a mandatory judicial review for determining whether a child should be removed from the family, set up clear criteria for removal of the child and ensure that children are separated from their parents as a measure of last resort only, when it is necessary for their protection and in their best interests, after hearing the child and its parents.'

Here, the Committee requested not only the judicial review but also 'clear criteria' and 'hearing the child and its parents' as prerequisites, and recommended to the Japanese Government that 'temporary custody' should only be made 'as a measure of last resort only'

4. Adjudication by the court of second instance

(1) Introduction

The high court finds that the system of temporary custody does not violate these provisions for the following reasons:

(2) **A**. First, the court of second instance stated, 'temporary custody, as an administrative disposition, may be the subject of judicial review through actions for revocation under the Administrative Case Litigation Act, etc. and may be the subject of provisional remedies.' Furthermore, it stated that 'it is obvious to this court that a determination can be made within two months under the stay of execution system.' 'Even if such determination is made after two months have passed, this does not mean that there was no judicial review of temporary custody.'

B. However, what is required here is an *ex ante* judicial review.

The question is whether or not the system of temporary custody, which enables removal of a child from his/her parent for two months without prior judicial review, complies with the provisions of the Convention and Article 31 of the

Constitution. It is obvious that the system of appeal proceedings and the suspension of execution under the Administrative Case Litigation Act does not satisfy this requirement.

(3) **A**. Moreover, the court of second instance stated, 'considering that further introduction of judicial review on top of the existing procedures raises concern that heavier procedural burden may hinder the ready implementation of temporary custody and the interests of children would thereby be harmed, it is considered to be a matter of legislative policy'.

B. However, it is obvious that no matter the legislative policy the Japanese government cannot continue operating this system, which is in violation of the Convention and the Constitution to such a degree that it has received urgent recommendations from the international community, the UNCRC, to do away with the practice.

If temporary custody is truly needed in the interests of the child, the need can readily be demonstrated in *ex ante* judicial review.

The 'temporary custody' that could not stand *ex ante* judicial review is either a 'temporary custody' that the CGC did not fully investigate in accordance with the law, or it is unworthy as 'a measure of last resort,' as provided in Article 37 (b) of the Convention. At worst, [as in this case,] it is an action taken on false charges and false pretences that do not consider the best interests of the child. From the viewpoint of ensuring human rights, such temporary custody should not have been arbitrarily implemented.

In foreign countries where human rights prevail, when an administrative authority removes a child from his/her parent, an *ex-ante* judicial review is conducted in all cases. The judicial review procedure has not caused any known problems in dealing with child abuse. In Japan, however, many children are removed from nurseries or schools by CGC and placed in 'temporary custody' solely on the grounds of unproven accusations of abuse, which are not fully investigated or confirmed.

There is no reasonable and justifiable evidence to support that all such removals in Japan are in the best interest of the child.

In the [Japanese] criminal justice system, *ex ante* judicial proceedings are

implemented in all cases without exception. There is no valid reason to consider it as an 'excessively heavy procedure' or to consider such procedures as unnecessary, particularly regarding cases as serious as those concerning the temporary custody of children.

(4) **A.** Furthermore, the court of second instance ruled that it does not violate Article 37 (b) of the Convention on the ground, that 'as a general rule, temporary custody should not exceed two months and is not expected to last for a long period of time.'

B. Considering the fact that a child and his/her parents are physically separated by a sudden removal, and in many cases, even visitation to the child is not permitted thereafter, the restriction on the human rights of the affected child and his/her parents for even a period of two months is, in principle, extremely severe. Furthermore, in this case, such separation without visitation lasted for seven and a half years. In contrast to the fact that detention questioning (i.e., judicial review) is usually conducted within 72 hours of arrest in criminal cases, the two-month period is unreasonably long and difficult to justify.

(5) Summary

As described above, these rulings of the second instance are not appropriate.

The system of temporary custody violates Article 31 of the Constitution, which requires due process. Thus, it is unconstitutional. The temporary custody measures in this case were taken based on this faulty system and are judged to be illegal under Article 1 of the State Redress Act.

5. The procedures of temporary custody in this case have not been properly implemented, such as fulfilling the obligation to conduct sufficient investigation. This is in breach of Article 31 of the Constitution.

As a result of the Appellant Father's protests against the acts of abuse committed against the Appellant Child by the homeroom teacher in the classroom of K Elementary School, the school planned to cover up the abuse by expelling the Appellant Child from the school by reporting 'abuse' to the CGC [and thereby having the CGC remove the Appellant Child from the school as well as Appellant Father]. The Appellee Prefecture (CGC) blindly accepted the reports and took the

Appellant Child into 'temporary custody'.

When the CGC receives notice of abuse, it must investigate the accusation. In particular, the act of starting temporary custody without sufficient investigation unilaterally villainizes the living environment and the parents. Although the authority claims it is acting in the name of protecting the children, careful investigation should be conducted to comply with all due procedures.

In this case, the Appellant Child was taken into CGC custody [on 1 May 2013] without careful investigation. The Appellee Prefecture (CGC) accepted the [repeated] reports [made from December 2011 to April 2013] from K School without proof and immediately commenced temporary custody; temporary custody transformed into confinement of Appellant Child into an ACF based on Article 28 of the CWA [on 28 July 2014]. The familial tie of Appellant Father and Child have thus totally been severed for more than seven and a half years.

Consequently, the temporary custody order in this case is contrary to Article 31 of the Constitution in that it fails to examine carefully the required procedures and conditions for the commencement of temporary custody. This should be judged illegal under Article 1 of the State Redress Law.

6. Summary

The system of temporary custody (Article 33 of the CWA) is in breach of Article 31 of the Constitution. Thus, it is unconstitutional, as it allows for the arbitrary detention of children.

In addition, it is in breach of Article 31 of the Constitution and, therefore, unconstitutional that the CGC did not sufficiently investigate the allegations of abuse and it did not conduct a thorough investigation of the merits of temporary custody. In this case, the CGC blindly accepted reports from K Elementary School, without corroborating the allegation with well-documented medical or oral testimony to support the initial claim.

Therefore, the disposition of temporary custody in this case is illegal under Article 1 of the State Redress Act.

Chapter IV. The system of comprehensive visitation prohibition violates the first sentence of Article 13 of the Constitution, providing respect for individual autonomy.

1. Introduction

The prohibition of visitation stipulated in Article 12 of the Child Abuse Prevention Act ('CAPA' hereafter) unjustly infringes upon the provision of 'respecting individual autonomy' (the first sentence of Article 13 of the Constitution) and is, therefore, unconstitutional.

2. The normative content of the first sentence of Article 13 of the Constitution

The family is the most natural and fundamental social unit. Each individual family member chooses his/her own way of life without undue interference from others, including the public authorities. This is the right of autonomy of the family [provided in Paragraph 1 of Article 23 of the Covenant and Article 5 of the Convention].

The right of autonomy of families include freedom from unjust interference from government authorities in relation to the parent-child interaction. This is essential because, only when there is free exchange of ideas between parents and children can each member of the family individually make his/her own decisions on various lifestyle matters and, thus, satisfy their individual right to pursue happiness.

Therefore, the first part of Article 13 of the Constitution guarantees the autonomy of the family as part of the autonomy of the individual.

The preamble of the Convention guarantees the rights of 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community', and of the relationship between the parents and children.

Pursuant to this, Paragraph 28(e) of the Concluding Observations of the Committee in 2019 expressed serious concern that '[c]hildren placed in

institutions are deprived of their right to keep contact with their biological parents'.

These provisions in the Convention and the Concluding Observations embody the comprehensive fundamental rights of individuals, namely their rights to autonomy and the pursuit of happiness.

3. The system of comprehensive prohibition of visitation (Article 12 of CAPA) is in breach of Article 13 of the Constitution.

Article 12 of CAPA, which prohibits visitation of children by their parents, is unconstitutional.

Under this system, the Appellee Prefecture (CGC) imposed the administrative disposition to prohibit visitation and to comprehensively ban interaction between Father and his child. As a result, to date, the Appellant Father has been unable to see the Appellant Child for more than seven and a half years.

4. Summary

The system of comprehensive visitation prohibition (Article 12 of the CAPA) unjustly intervenes in the autonomy of an individual in prohibiting communication among family members. It is, therefore, in breach of Article 13 of the Constitution, which protects the autonomy of an individual, and is considered unconstitutional.

The visitation prohibition disposition in this case should inevitably be judged to be illegal under Article 1 of the State Redress Act.

Chapter V: The CGC asked the parents if they abused the child; once the parents denied the allegation, the CGC disallows their visitation or stops initiating reunification procedures for the family. These acts are in breach of Article 38 (1) of the Constitution, prohibiting the coercion of self-

incriminating testimony.

1. Introduction

This case is not a criminal investigation in which the authority demands the Appellant Father to confess that he committed an act of abuse.

However, once the Appellant Father denied the charge of abuse, the Appellee Prefecture (CGC) disallowed the visitation to his Child and did not initiate the family reunification process. This administrative act is in violation of Article 38, paragraph (1) of the Constitution, which prohibits coercing self-incriminating testimony.

2. The normative content of Article 38 (1) of the Constitution

Article 38 (1) of the Constitution stipulates that '[n]o person shall be compelled to testify against himself.'

This guarantee applies 'not only in genuine criminal cases, but also in other proceedings. It is appropriate to conclude that the procedure generally applies directly to cases leading to the acquisition and collection of materials for pursuing criminal liability' (Supreme Court Grand Bench adjudication, 22 November 1972).

3. Ruling in the second instance ('sentence' p. 19 and thereafter)

(1) Introduction

The court of second instance copied the position of the Appellee Prefecture (CGC) that the Appellant Father's defiance toward self-incrimination was grounds for justifying the prohibition of visitation and the nonfeasance of initiating family reunification.

(2) **A.** As for the CGC's approach to preface resolution upon the parents' admission of abuse, the court of second instance ruled that parents who commit abuse should '"admit the fact of the abuse and solve the problem" [this] is a matter that should be taken into account in order to judge the appropriateness of returning the child to his/her home' (p.37). Therefore, the ruling unconditionally endorsed the administrative position of the Appellee Prefecture (CGC) that had requested a confession of abuse as a condition of returning the child. In addition,

it ruled the word 'respect' in Article 9, paragraph (3) of the Convention regarding visitation rights to be interpreted such that it 'does not mean to seek the assurance that the rights provided for in the said paragraph would be fully exercised' (p. 36); thereby, this ruling denied the legal power of the Convention.

B. However, this adjudication of the court of second instance precludes *a priori* the possibility of the CGC staff (such as Kiyoshi Okano, in this case) of coercing the parents into self-incriminating confessions of abuse. This case included adhering to false or retaliatory reports out of motivation for 'financial incentives'. Therefore, it can be generally concluded from the above adjudication that the CGC deployed the system of restricting visitation as set forth in Article 12, paragraph (1) of the CAPA towards the Appellant Father beyond the limit permissible under Article 9, paragraph (3) of the Convention to force him to confess that he abused the child. In addition, 'respect' in a provision of the Convention sufficiently containing 'strong obligation' (Shen, p.366), the court of second instance did not correctly understand the interpretation of the Convention, as applicable to this case.

(3) **A.** Furthermore, the court of second instance ruled that 'there is no evidence to prove that the CGC used the system of restriction of visitation set forth in Article 12, paragraph (1) of the CAPA as a means to induce the confession of child abuse' (p.38).

B. However, the following ruling given by the court of original instance, quoted the court of second instance: 'the CGC tried to arrange the schedule for an interview with the Appellant Father, in order to hear from the Appellant Father how he had reflected on his past ways of raising the Appellant Child and how he was making efforts to change. However, the Appellant Father immediately requested the commencement of unconditional visitation and interaction with the Appellant Child. He repeatedly requested to meet with the Appellant Child without any further restrictions. There is seemingly no evidence that the Appellant Father looked back on his own behaviour and showed an attitude of reflection in line with the sentiment of the Appellant Child' (pp.30-31). This is nothing more than an unjust affirmation of the Appellee (CGC)'s coercion to force Appellant Father to reflect on his 'abuse' adversely, in conditional exchange for

visitation with the Appellant Child and as a basis for familial reunification.

Furthermore, the Appellee Prefecture (CGC) has acted to 'arrange the interview' only once during the seven-and-a-half-year period of detention of the Appellant Child. If it had been irrelevant for the Appellee Prefecture (CGC) to make the Appellant Father confess the 'abuse' as a pre-requisite to the visitation and familial interaction, then the Appellee Prefecture (CGC) would have made far more frequent efforts to schedule the visitation interview.

(4) Conclusion: As described above, the court of second instance upheld the unconstitutional and illegal behaviour of the Appellee Prefecture (CGC) to force a confession of 'abuse,' as a pre-requisite condition to organise visitations between Father and Child.

Furthermore, as described in the next chapter, the Appellee Prefecture (CGC) has taken measures not to initiate family reunification because the Appellant Father has not admitted 'abuse.' This unconstitutionality and illegality are very serious.

4. Summary

Such an act by the Appellee Prefecture (CGC) is an administrative method of effectively coercing a confession. By requiring that the Appellant Father acknowledge reports of abuse, the CGC is attempting to take advantage of the parents' yearning for visitation and family reunification.

The administrative action of the Appellee Prefecture (CGC), which has continued such illegal administration for a long time and has continued to infringe upon the Appellants' human rights, is in violation of Article 38, paragraph (1) of the Constitution, which prohibits compulsion of self-incriminating testimony. It is illegal under Article 1 of the State Redress Act.

Chapter VI Failure to reunify the family violates the second sentence of Article 13 of the Constitution.

1. Introduction

The nonfeasance of the Appellee Prefecture (CGC) in the reunification of the

Appellant family violates the second sentence of Article 13 of the Constitution, which guarantees the right to seek the reintegration of the family as part of the right to pursuit of happiness.

2. The contents of the pursuit of happiness (second sentence of Article 13 of the Constitution) in relation to family reintegration

(1) Respect for 'the best interest of the child'

Article 2, paragraph (1) of the Child Welfare Act and Article 3, paragraph (1) of the Convention provide for the respect for 'the best interest of the child'.

Respect for 'the best interest of the child' should be satisfied over both the short- and long-term. That is, in the short-term, food, clothing, and housing that are necessary for the maintenance of the mind and body must be provided. In the long-term, the right to develop according to the characteristics of each child ("developmental right" hereafter) must be fulfilled.

In this regard, the Appellant Child, even at the time of the commencement of parent-child separation on 1 May 2013, had to be provided with clothes, food, and housing necessary for physical and mental development in the short-term and to be cared for in an environment where physical and mental safety should be ensured over the long-term, in order to guarantee the right to develop in accordance with the characteristics of the child.

(2) Confirming the 'rights and responsibilities of parents to care for children' and 'the right to be brought up by the child's parents'

It is the parent who is responsible for the fulfilment of the 'best interest of the child'. Article 3, paragraph (2) of the Convention provides that 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, *taking into account* the rights and duties of his or her parents, legal guardians, ..., and, to this end, shall take all appropriate legislative and administrative measures' and demands that the rights and obligations of biological parents should always be taken into account when the state provides the social care necessary for child welfare. In this regard, Article 18, paragraph (1) of the Convention further provides that '[p]arents or, ...legal guardians, have the primary responsibility for the upbringing and development of the child.'

This is because the parents have the closest relationship to the child. Therefore, they are in the best position to know the characteristics of the child, and to judge what is in the best interest of the child in the short- and long-term. Parents are exclusively responsible if the best interests of the child are not met and the child cannot be adequately cared for and developed. In summarising such relationships between children, parents, and the state, Article 5 of the Convention provides that 'States Parties shall respect the responsibilities, *rights* and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.' The relationship in which the right of parental care is dominant and social care is subordinate is undoubtedly explicit in the international human rights norms shown in the Convention.

In other words, parents have the right to care for their children without being interfered with by others, including the State. This point is further clarified in other international human rights treaties ratified by Japan. Specifically, Article 17, paragraph 1 of the UN International Covenant on Civil and Political Rights provides that '[n] o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'. Article 23, paragraph 1 provides that, regarding civil liberties, the State shall respect the right of parents to care for children in their families: '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

Based on the aforementioned provisions of the UN Covenant, it can be said that a child has the right to be cared for by his/her parent(s), who is aware of his/her own responsibility of caring for the child in order to actualise his/her short- and long-term best interests, as part of his/her civil liberties, without being interfered with by other parties.

The State shall assist parents so that they can exercise their rights fully. Article 18 (2) of the Convention provides that '[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of

institutions, facilities, and services for the care of children.'

From this perspective, it can be conceived that parents may claim from the State the right to receive assistance in child rearing as a social right, based on Article 10, paragraph (1) of the UN International Covenant on Economic, Social and Cultural Rights: 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society'. The Appellees are, of course, obliged to fully comply with the provisions of the international treaties to which Japan is a party.

(3). 'Aid' and 'intervention' by the state

The state is responsible for assisting parents so that their responsibility to care for their children is fulfilled. A child is guaranteed 'the best interest of the child' and the parent has the primary responsibility to guarantee the child's best interests. However, there are cases where the parent is unable to fulfil this responsibility to the child due to financial or other reasons.

In such cases, in order to satisfy the 'the best interests of the child', the state must provide sufficient support to the parents (Paragraph 2, Article 18 of the Convention). This must be real 'aid' from the standpoint of international human rights norms. State 'intervention' that is guided by a 'financial incentive' [as pointed out in Paragraph 28 (c) of the 2019 Concluding Observation of UNCRC] that undermines parents' rights and the best interests of the child should never be made.

3. Ruling by the court of second instance ('sentence', p.28 and thereafter)

(1) Introduction

The court of second instance ruled that because the civil servants, as employees of the Appellee Prefecture (CGC), do not have the legal obligation to reintegrate families, the exercise of their authority in this case is legal under the State Redress Act. However, the removal of a child from his/her parent was implemented by these civil servants, as employees of the Appellee Prefecture (CGC). Therefore, a civil servant of the same administrative body can actively sever family ties, and the judiciary effectively endorses the irresponsible wielding of the

administration's authority. The law does not allow such irresponsibility.

(2) **A.** First, the court of second instance ruled that 'Article 4 of the CAPA does not provide for the obligation of civil servants as employees of a local public entity to initiate the reintegration of families, in relation to wards residing in that entity'. It also states that 'Article 48-3 of the CWA is not applicable to the employees of CWA.'

However, Article 4 of the CAPA provides that the 'local government' shall 'provide appropriate guidance and support to custodians …by taking into account the promotion of the reunion of parent and child….' The substance of the 'local government' is explicitly applicable to civil servants employed by the CGC. The subject of Article 48-3 of the CWA may be interpreted as referring mainly to the ACF; however, the head of the ACF 'performs the task in a system in which the authority originally held by a prefecture is transferred and exercised for the prefecture' (Judgment of the First Petty Bench of the Supreme Court/2005 (*Ju*) No. 2335, 2005 (*Ju*) No. 2336). Moreover, the head of the ACF has the legal obligation 'to maintain close relationships with the CGC and other relevant authorities'. Therefore, in this case, the employee of the Appellee Prefecture (Tokorozawa CGC) was obliged, as the body that transferred the authority, to cooperate actively with the ACF.

(3) Therefore, civil servants who are employees of the CGC are also in a position to assume the obligation of family reintegration. They are not allowed the personal discretion to deny services or to abdicate responsibility for reintegration efforts, both of which undermine their obligation, as representatives of the State, to execute their authority in a lawful manner.

4. The obligation of the Appellee Prefecture (CGC) for reintegration of the family.

From the above, it is evident that the employees of the Appellee Prefecture (CGC) have a legal obligation to make efforts toward family reintegration in relation to the ACF and toward the guardians of a child to whom confinement measures have been taken. Even if the Appellee Prefecture (CGC) 'intervened' with a family and the parents and child were separated, those with parental

responsibility remain in the position of the primary custodian of the child. Thus, the Appellee Prefecture (CGC) has an obligation to render 'assistance' toward the reintegration of the parent and child aiming to restore the parent back to the custodial position of caring for the child (the obligation of family reintegration). For the biological parents, the right to seek family reintegration to bring the removed child back to the original family environment and to rebuild the family ties is provided as part of the guarantee of individual autonomy implied in the first sentence of Article 13 of the Constitution.

On the other hand, being cared for by the biological parents is an essential condition for a child to grow up as a self-sustaining adult. Therefore, for a child who has been removed from his/her biological parents has the right to seek the reintegration with his/her family, so his/her return to the original biological parents is taken to be guaranteed, as [long as the parents are responsible for guaranteeing] the rights for the pursuit of the happiness of the child provided by the second sentence of Article 13 of the Constitution.

5. Family reintegration has not been implemented.

As a part of the rights for the pursuit of happiness, children and parents have the right to reintegrate into their original family, and the State has an obligation to [make attempt to] reintegrate their families (Chapter II).

However, in this case, as mentioned above, the Appellee Prefecture (CGC) requested the Appellant Father to acknowledge his alleged acts of abuse. After the Appellant Father denied the accusation, the Appellee Prefecture (CGC) completely abandoned efforts to reunite the family.

The Appellee Prefecture (CGC), continued to deploy the administrative tactic of 'Hostage CGC' (Kansai TV 'Special Press' on 6 August 2020) for a prolonged period and did not initiate the reintegration of the family, infringing upon their right to seek the reintegration of the family, as guaranteed by the rights of the child and the parent to the pursuit of happiness.

7. Summary

In this case, the failure to reunify the family infringes on the second sentence of Article 13 of the Constitution, which stipulates that the individual has the right of autonomy and the right to pursue happiness.

Chapter VII General Summary

When domestic laws, such as the CWA and the CAPA, are in conflict with the provisions of international human rights laws, such as the UN International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, it is international human rights law that should be applied, not the domestic laws.

This is the legal implication derived from Section 2 of Article 98 of the Constitution, which provides that international treaties are superior to domestic laws.

However, with regard to the system of temporary custody (Article 33 of CWA), it is in breach of Article 31 of the Constitution, which requires the principle of due process; the disposition rendered under this system is unconstitutional. Furthermore, the system of comprehensive visitation prohibition (Article 12 of the CAPA) is in violation of Section 1 of Article 38 of the Constitution, which provides for the prohibition of coercing self-incriminating testimony. The prohibition of visitation in this case is also unconstitutional.

The failure to initiate family reunification violates the first sentence of Article 13 of the Constitution, which guarantees family autonomy, and is therefore unconstitutional.

As a result, temporary custody, prohibited visitation, and refusal to initiate family reintegration in this case are collectively judged to be illegal under Article 1 of the State Redress Act.

The adjudications of the original instance court, which contradicts this conclusion, should be quashed and an appropriate adjudication in accordance with international human rights law should be passed.