State Practice of Asian Countries in International Law

Korea

*Buhm-Suk Baek**

HUMAN RIGHTS – ISSUANCE OF A VISA – DOMESTIC MEASURES

Decision of the Supreme Court on ‘Revocation of Disposition Rejecting the Issuance of a Visa’

Supreme Court Decision 2017Du38874 (decided on July 11, 2019)

Facts of the Case & Issues Presented

The Commissioner of the Military Manpower Administration requested the Minister of Justice to the following effect: “Party A, a singer, departed from the Republic of Korea for a concert by obtaining permission to travel overseas, and then subsequently acquired U.S. citizenship, thereby effectively evading mandatory military service. If Party A seeks to reenter the Republic of Korea with the status of overseas Korean, forbid him from engaging in for-profit business activities, for example, through either formal or informal employment as a singer. Where such measures are rendered impossible, do not admit Party A into the Republic of Korea[.]” Upon receiving the request, the Minister of Justice made a decision prohibiting Party A’s entry into the Republic of Korea and entered the information into the intranet (immigration management system), not notifying Party A of such a decision. Then Party A submitted an F-4 (Overseas Korean) visa application to the head of an overseas diplomatic mission, but the head of the mission notified Party A’s father of the rejection of the issuance of the visa via phone instead of presenting a dispositive document that indicated the grounds for the rejection.

Judgment & Comment

The Court decided that the disposition was flawed in that it violated Article 24(1) of the Administrative Procedures Act. Also, it ruled that the lower court should

* Professor, Kyung Hee University, Korea.

have examined whether it violated the principle of proportionality for the head of the diplomatic mission abroad to render a disposition rejecting the issuance of the visa on the sole ground of, and by being bound by the decision forbidding entry into the Republic of Korea which was made 13 years and seven months earlier.

However, the lower court found that the Defendant's disposition rejecting the issuance of the visa following the decision to forbid entry was justifiable, which is a misapprehension of the relevant legal principle due to the following reason: Relevant provisions allow an administrative agency to enjoy certain discretion in determining the requirements and effect of the disposition. However, it would be deemed as a failure to exercise discretion by the agency if it issued a disposition without weighing and balancing the public interest to be attained by disposition and the substance and degree of the disadvantage that may be suffered by the counterparty, misconceiving of its conferred power. In other words, the act itself is a reason for illegality and to revoke the pertinent disposition due to deviation or abuse of discretionary authority.

* Administrative Procedures Act [Act No. 5241 (Enforced 31 December 1996)] Article 24(1) (Method of Dispositions) *When administrative agencies render dispositions, the disposition shall be made in writing except for cases otherwise stipulated by other Acts and subordinate statutes: Provided, That in cases necessitating prompt action or cases of minor matters, the dispositions may be conducted by way of oral statement or other methods, and in such cases, if requested by parties, the documents concerning the disposition shall be delivered without delay.*

TREATIES – INTERPRETATION – OBLIGATIONS

Decision of the Constitutional Court on the Omission of Dispute Settlement under Article III of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between the Republic of Korea and Japan

Constitutional Court Decision 2012Hun-Ma939 (decided on December 27, 2019)

Issues Presented

The Complainants are persons who permanently returned to the Republic of Korea after having been mobilized to Sakhalin for forced labor etc. under the Japanese colonial rule, and their family members, all of whom have the

nationality of the Republic of Korea. They have not received back the wages for their forced labor in places such as coal mines run by Japanese companies, which they had to compulsorily deposit in the form of postal savings or postal life insurance in Japan. The Complainants argued that the Respondent, being the Minister of Foreign Affairs of the Republic of Korea, was not fulfilling his duty to take action to resolve the dispute over the treaty interpretation in accordance with the procedures specified in Article III of the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation between the Republic of Korea and Japan (Treaty No. 172) in 1965 (hereafter “the Agreement”). Specifically, there exist different interpretations as to whether the Complainants have the right to claim for refund and damages against Japan have been extinguished by the Agreement; Japan holds that such claims have already been extinguished whereas the Republic of Korea does not believe so. Therefore, the Complainants filed a constitutional complaint on 23 November 2012, seeking confirmation that such omission by the Respondent infringed on their basic rights and thus violated the Constitution.

Judgment

First of all, the Court viewed that the Agreement is a treaty duly concluded and promulgated under the Constitution and holds the same effect as domestic law pursuant to Article 6 (1) of the Constitution. According to Article III of the Agreement governing dispute settlements, where a dispute between Korea and Japan arises over the interpretation of the Agreement, the respective governments shall settle it first through diplomatic channels and then through arbitration. In this regard, the Court first confirmed that there exists a dispute over the interpretation of the Agreement between Korea and Japan.

Next, the Court recognized the Respondent's duty to seek dispute settlement under Article III of the Agreement stems from a constitutional mandate, particularly in light of the Preamble, Article 2(2), and Article 10 of the Constitution. (Specifically, the Court viewed that such duties can be derived from the part of the Preamble of the Constitution which states that the People of Korea upholds the cause of the Provisional Republic of Korea Government born of the March First Independence Movement of 1919. Since the state failed to protect the lives and security of its people and led to mobilization during Japanese colonial rule, the Court acknowledged that the current government is obligated to recover human dignity and values of the forced laborers and their unreturned property.) That is, the Respondent is obliged to assist and protect its people, whose human dignity and value had been seriously impaired by the organized and continued unlawful acts of Japan, exercise their rights of claim

over the unreturned property and damages caused by it. And the fundamental rights of the Complainants might be seriously infringed if the Respondent failed to perform this duty.

Lastly, the Court examined whether the Respondent fulfilled its duty under the Agreement. According to the records, the Respondent has endeavored to settle the issue of claims of Sakhalin Koreans through various diplomatic channels. Therefore, it is difficult to say that the Respondent did not carry out the duties, since the Respondent suggested the commencement of diplomatic consultation to the Japanese government through the verbal note on 3 June 2013 and the Respondent requested Japan to make a sincere response on several occasions. Even if the Respondent has not been as prompt and active in dealing with the Complainants' claims against Japan as expected, given that diplomatic acts occur in the international environment in which the values and laws of countries differ, the Court recognized that the Respondent enjoys considerable discretion over when and how to implement dispute settlement procedures. Having considered all the circumstances, the Court viewed that the Respondent failing to utilize the dispute settlement procedure under Article III of the Agreement hardly constitutes an omission. Therefore, the Court ordered that all requests for adjudication are unjustifiable and thus should be dismissed. This decision was rendered based on the consensus of all of the Justices except for the concurring opinion of Justice Lee Jong-seok.

Comment

Though the Court acknowledged that the duty to act includes taking diplomatic action, it viewed that the Respondent has not failed to fulfill its duty as it utilized various diplomatic channels attempting to settle the issue of claims. Furthermore, the Court maintained that the Respondent enjoys considerable discretion when it comes to taking diplomatic action, which may not produce enough tangible results as expected by the complainants.

* Article III paragraph 1 and 2 of the Agreement stipulates as below.

1. *Any dispute between the Contracting Parties concerning the interpretation and implementation of the present Agreement shall be settled, first of all, through diplomatic channels.*
2. *Any dispute which fails to be settled under the provision of paragraph 1 shall be referred for decision to an arbitration board composed of three arbitrators, one to be appointed by the Government of each Contracting Party within a period of thirty days from the date of receipt by the Government of either Contracting Party from the Government of the other of a note*

requesting arbitration of the dispute, and the third arbitrator to be agreed upon by the two arbitrators so chosen within a further period of thirty days or the third arbitrator to be appointed by the government of a third country agreed upon within such further period by the two arbitrators, provided that the third arbitrator shall not be a national of either Contracting Part

TREATIES – CONSTITUTION – HUMAN RIGHTS

Decision of the Constitutional Court on Announcement of the Agreement on the “Comfort Women” Issue

Constitutional Court Decision 2016Hun–Ma253 (decided on December 27, 2019)

Issues Presented & Judgment

On 27 March 2016, the Complainants filed a constitutional complaint requesting the confirmation of the unconstitutionality of the agreement announced at a joint press conference by the Foreign Ministers of the Republic of Korea and Japan on 28 December 2015, claiming that the details of the agreement infringe upon their human dignity and value.

A constitutional complaint is a legal instrument through which a person can seek relief when an exercise or non-use of governmental power infringes on one's fundamental rights guaranteed under the Constitution. However, as the Court previously confirmed in the case 2014Hun–Ma926 decided on 28 May 2015, the person would not be allowed to file a complaint, if the exercise of governmental power, being the subject of judgment, does not affect the legal status of the person who wishes to file a constitutional complaint, since neither the possibility nor the risk of infringement of rights can be said to exist. In the same vein, the Court reviewed the following issues.

First, a treaty is an international agreement between subjects of international law intended to produce legal effects and governed by international law. But, states can also agree upon non-legal or non-binding agreements. Such agreements, in many cases, are not concrete or too abstract in content to be legally binding, like a confirmation of a common goal or a declaration of principles, and they generally do not undergo formal treaty conclusion procedures. It, however, still can be used as grounds to criticize or protest non-adhering states since states expect the agreement to be respected. Additionally, one needs to comprehensively take into account not only its form but also its

substance when distinguishing a treaty from a non-binding agreement. If an agreement is deemed non-binding based on such considerations, the agreement will not affect the legal status of the individual. In other words, such agreements may not be subject to adjudication on a constitutional complaint.

It is evident in this case that the Agreement is an official commitment jointly announced by the Foreign Ministers of Korea and Japan, and then endorsed by the head of the two countries. However, whereas often treaties are generally concluded in written form, the Agreement is an oral agreement. According to the Ministry of Foreign Affairs website of the two countries, the Republic of Korea uses “press availability” and Japan, “announcement at the press occasion,” both adopting a title different from that of any ordinary treaty. Also, the Agreement was presented in the form in which two countries state their position numbered as ①, ②, and ③, which is also not a form of provisions usually used in treaties. Moreover, although the statement does not expressly specify the non-binding nature of the Agreement as to its validity, it does not use any expression that the binding intent of the parties can be inferred, adopting vague and everyday language in general. In addition, while the Agreement addresses the issue of redressing harm inflicted upon “Comfort Women” victims, which involves a sharp conflict between Korea and Japan and also related to the people’s fundamental rights, the Agreement did not undergo any treaty conclusion procedure under the Constitution, such as the deliberation process by the State Council or approval from the National Assembly. Also, neither a treaty number was granted to the Agreement nor was given notice like treaties effected by notice, which are treaties dealt in practice due to their simple content. The same is also true of Japan. Above all, it is unclear whether any specific rights and obligations for Korea and Japan have been created considering the content of the Agreement.

Overall, the Court determined that the Agreement can hardly be considered as a legally binding treaty. Moreover, there is no reason to believe that the Agreement deals with any relinquishment or disposal of the rights of claims for damage of the “Comfort Women” victims because the Agreement does not stipulate contents such as but not limited to the relinquishment of such rights or waiver of judicial proceedings or legal measures, which general lump-sum settlements often include. Furthermore, after the conclusion of the Agreement, the Respondent has stated that it will make every effort to do what the Government needs to do to restore the honor and dignity of the “Comfort Women” victims as well as to heal their psychological wounds and that it will seek victim-centered solutions. This clearly shows that the Respondent did not or had no intention to give up exercising diplomatic protection.

In light of the above, the legal status of the “Comfort Women” victims is hardly affected by the Agreement. It is therefore difficult to say that the Agreement can infringe on the fundamental rights of the victims, such as their rights of claims for damages. Thus, the request for adjudication on a constitutional complaint against the Agreement is non-justiciable.

Comment

In this case, the Court rejected a petition filed by a group of “Comfort Women” victims and their bereaved relatives who claimed that the controversial deal in 2015 with Japan to settle the matter is unconstitutional. Although the Court recognized that gathering of views from the victims was not sufficient in the process of reaching the Agreement, it confirmed that the Agreement was a political agreement and therefore not subject to the Constitutional Court’s review.

JURISDICTION – SOVEREIGN IMMUNITY – MUNICIPAL LAW

Seoul Administrative Court Decision on Sovereign Immunity and Employment Relationship

Seoul Administrative Court Decision 2018GuHap67909 (Appeals) (decided on September 5, 2019)

Issues Presented

The Defendant-Intervenor had worked in the Embassy of Finland in Korea as a Public Relations Officer for two years whose employment relationship has been terminated due to the expiration of the contract. The Intervenor applied for a remedy for unfair dismissal to the Seoul Regional Labor Relations Commission (hereafter “the Seoul Commission”), designating the Finnish Ambassador as the Respondent. The Seoul Commission approved the application considering the dismissal to be unfair as there were no reasonable grounds for the justification of the termination of the contract as it was done by communicating the expiration of the contract to the claimant. Accordingly, the Plaintiff filed a lawsuit challenging the decision of the Seoul Commission based on sovereign immunity and other grounds. The Court confirmed that, whereas states enjoy jurisdictional immunity over their sovereign acts according to customary international law, this is not applied to the case regarding

private actions. The Supreme Court of Korea also decided that the Court can exercise jurisdiction over the foreign state's private acts unless there are particular circumstances to take into account. The aforementioned legal principle: so-called jurisdictional immunity of foreign states, sovereign immunity, state immunity, or judicial immunity, has the character of customary international law. It is generally understood that this rule incorporates not only the jurisdiction to adjudicate but also the jurisdiction to prescribe and enforce.

Judgment

The Court reviewed that the adjudication system under the Labor Commission promotes a fast, economical, and flexible process for remedy requests, which helps avoid overly costly and unnecessarily complicated and delayed proceedings under the civil procedure. But at the same time, the system is essentially a procedure for remedy. Therefore, it can be applied to determine whether the Seoul Commission and the National Labor Relations Commission can exercise administrative jurisdiction over the Republic of Finland.

The Intervenor carried out duties such as observing and analyzing the Korean media, planning and assisting the public diplomacy activities of the Embassy and promotion of Finland, organizing and assisting cultural events, preparing for visits of Finnish personnel to Korea, and administering and contents planning for the Embassy website and the Social Network Service. However, it is difficult to view that such duties are directly related to the exercise of sovereignty. Moreover, considering all circumstances (such as the status and responsibilities of the Intervenor, sovereign activities of Finland, and the correlation between the two), the Court maintained that termination of a contract is an act conducted by the Plaintiff as a party to a private contract rather than a sovereign one. In other words, it is not to say that there is a concern of interfering with the sovereign acts of the Republic of Finland when the Seoul Commission and the National Labor Relations Commission exercise jurisdiction regarding the termination of contract disputed in this case. Therefore, the Court ruled that the argument on sovereign immunity cannot be upheld.

HUMAN RIGHTS – RACIAL DISCRIMINATION – MUNICIPAL LAW

Decision of the Seoul Central District Court on Individual Communication on International Convention on the Elimination of All Forms of Racial Discrimination and National Compensation

Seoul Central District Court Decision 2018Ga-Dan5125207 (decided on October 29, 2019)

Facts of the Case & Issues Presented

The education superintendent requested the Plaintiff, an English assistant teacher from New Zealand, to submit medical examination records that include HIV testing results in the process of discussing contract renewal. Plaintiff failed to renew the contract because Plaintiff refused to submit the documents as requested. Therefore, the Plaintiff filed an individual communication to the Committee on the Elimination of All Forms of Racial Discrimination (hereafter “CERD”), and CERD expressed the view that it infringed on the Plaintiff’s rights. Then the Plaintiff filed a claim for redress against Korea. Defendant, however, argued that it is not clear whether a Korean national can demand compensation for the damages against the Government of New Zealand. And if so, the conditions are not far off-balance compared to that of Korea by referring to Article 7 of the State Compensation Act, which stipulates that “This Act shall apply only in cases where a mutual guarantee with a corresponding nation exists if a victim is an alien.” Overall, the Defendant challenged that Plaintiff’s claim is unfounded under the mutual guarantee principle (so-called reciprocity rule) in the State Compensation Act.

Judgment

Article 7 of the State Compensation Act requires “a mutual guarantee with a corresponding nation if a victim is an alien” to invoke the right to state compensation. But the Court maintained that requiring the conditions in the respective country to be equivalent or more generous results in excessive restriction of the rights of aliens. It even goes against the current trend in which international exchange is active more than ever. Besides, the respective country may reciprocally refuse to protect the Korean nationals in the future. Therefore, it is reasonable to say the individual meets the requirements to exercise their right if the conditions to invoke the right to state compensation are not far off balance, and the terms of the respective country are not more onerous than that of Korea, having no actual difference between each other in essential points. The Supreme Court confirmed in its previous decisions mutual guarantee exists if the individual can expect the recognition of the invocation of the rights by the Court of the respective country, absence of a precedent. Also, a treaty is not required, but comparing the conditions provided by laws, cases, and customs is sufficient to prove the existence of the guarantee.

Crown Proceeding Act 1950 of New Zealand Part 1 (Substantive Law) Article 3 para 2 (b) and Article 6 stipulates in a way that the Government of New Zealand is liable in respect of torts committed by its servants or agents. Here, regardless of the nationality of the person, all people have the right to claim or demand compensation through the civil proceedings against the torts that the Government is liable. Since the requirements set by New Zealand are not far off balance, and the conditions are not more complicated than the State Compensation Act, it is expected that the Court of New Zealand would recognize the rights of state compensation of a Korean national. Therefore, the Defendant's argument cannot be upheld as there exists a mutual guarantee under Article 7 of the State Compensation Act between the Republic of Korea and New Zealand.

The Court also reviewed the completion of the extinctive prescription. Setting aside the validity of the views by the CERD or its legal effect, Plaintiff had access to the specifics and the background on this case only after the CERD made public of its views on June 12, 2015. That is, Plaintiff objectively had obstacles in exercising the rights to compensation before the date of release of the views of the CERD. Although Plaintiff suffered from damage such as departing Korea without contract renewal, he has continuously worked for the abolishment of such unlawful guidelines. Taking account of the circumstances, it is clear that at least the Plaintiff was not silent over the infringement of the rights. Therefore, the necessity of protecting the Plaintiff is significant. On the other hand, it seems that the Defendant had a thought that such a request is unjust as either the Defendant or the Ulsan Metropolitan Office of Education did not further request HIV test results to English assistant teachers from 2010, a year after the filing of this case. However, it is still far unjust to deny the fulfillment of obligation grounded on the completion of the extinctive prescription. Therefore, the Court ruled that the plead regarding the extinctive prescription cannot be upheld as it goes against the principle of good faith.

ENVIRONMENTAL LAW – MARINE SPACE – OCEAN ENVIRONMENT

Act on Marine Spatial Planning and Management (Act No. 15607)

Legislation and Administrative Regulations

The Republic of Korea's climate change response policies for the ocean are implemented under the Ministry of Ocean and Fisheries, and the Ministry of leads the integrated management of marine spaces as well as efforts to

strengthen the national management system for ocean environments. In this vein, the Act on Marine Spatial Planning and Management was entered into force on April 18, 2019 (which was newly enacted on April 18, 2018) for the integrated management of marine spaces.

With the growing demands for the development of marine space, the legally and scientifically sound system for efficient and effective management of ocean space is now in place based on this Act. Article 1 states that “[t]he purpose of this Act is to promote public welfare and establish a prosperous environment for the ocean by prescribing matters necessary for formulating, implementing, etc. of a plan for the sustainable use, development and conservation of marine space.”

Under the plan, the Ministry of Ocean and Fisheries aims to formulate spatial plans (continuing an undertaking that started with the southern coast in 2018) up to the eastern coast in 2021 and all ocean areas by 2022. Climate change response policies for the ocean are also scheduled to be implemented in coordination with the Ministry of Ocean and Fisheries’ integrated coast management.