

decided that it removed the purpose of a delay of payment and the due date arrived at the latest when the ready-mixed concrete section was closed from the viewpoint of the purpose of a delay of wage payment. It is due to the interpretation of an agreement based on the concrete facts.

6. International Law and Organizations

Claims for revocations and rescissions of administrative determinations and requests of special permissions to stay in Japan and rescission of issuing written deportation order

The Nagoya District Court, April 18, 2019,

Case no. (*gyo u*) 104 of 2019

Summary:

This is a case concerning administrative determinations on the Immigration Control of an Iranian and Columbian Family (the “Plaintiffs”). The Plaintiffs A and B have their first son, who has both Iranian and Columbian nationality (Plaintiff C), their first daughter (Plaintiff D) and second son (Plaintiff E), who have Iranian nationality. An Immigration Inspector (the “Immigration Inspector”) and Supervising Immigration Inspector of the Nagoya Regional Immigration Bureau (the “Supervising Immigration Inspector”) considered them as illegal stayers under Art.24 (iv) (b), (vii) of the Immigration Control and Refugee Recognition Act. The plaintiff raised objections, however, and the Director of the Nagoya Regional Immigration Bureau (the “Director”) made administrative determinations, and the Supervising Immigration Inspector issued the written deportation orders to the Plaintiffs. These orders were issued to the Plaintiffs A, B, C in 2004, to the Plaintiff D in 2010, and the Plaintiff E in 2017. On August 6, 2004, the Plaintiffs A, B, C filed actions for revocations of the administration determinations and declarations of nullity of the written deportation orders. However, the Nagoya District Court (the “Court”) and the Nagoya High Court rejected their requests, and the Justices of the Supreme Court also did not accept their requests in 2006. Consequently, the Plaintiffs filed actions to the Justices of the Supreme

Court to the Court to request for revocations and rescissions of the administrative determinations, and other requests.

In rendering its judgement, the Court ruled as follows;

Since the plasticity and flexibility of Plaintiff C in connection with living conditions has waned considerably, and Plaintiff C was 18 years old, Plaintiff C could live independently from the parents. Therefore, the Court concluded that the administrative determination was revoked and the request of special permissions to stay in Japan was upheld. As for the Plaintiffs A, B, D and E, the Court dismissed requests of special permissions to stay in Japan as unlawful, and rejected the remaining requests as there was no ground.

References:

Art.3, 7 & 37-2(1) of the Administrative Case Litigation Act

Art.22 of the Constitution of Japan

Art. 1&9 of the Convention on the Rights of the Child

Art.21, 22, 24, 49, 50, 54, 61 & 70 of the Immigration Control and Refugee Recognition Act

Art.61 &64 of the Code of Civil Procedure

Facts:

Plaintiff A was born in Iran and is an Iranian. Plaintiff B was born in Columbia and is a Columbian. Plaintiffs A and B registered a notification of marriage in 2001 at the Embassy of Colombia in Tokyo and the Embassy of Iran in Japan. Plaintiff B acquired Iranian nationality by registering the notification. Plaintiff A immigrated to Japan in 1991, and Plaintiff B in 1997, with authorized verifications for landing recognizing a status of residence and a period of stay as “Temporary Visitor” and “90 days.” They then illegally stayed in Japan over the period of stay without obtaining an extension or change. Plaintiff C illegally stayed in Japan over 60 days from his birth without permission specified in Article 22-2 (iii) or (iv) of the Immigration Control and Refugee Recognition Act. Plaintiffs D and E filed applications for permission to acquire the status of residence, which was rejected. Accordingly, Plaintiffs D and E continued staying illegally in Japan over 60 days from their birth. The Immigration Inspector decided that the Plaintiffs were recognized as illegal stayers under Art.24 (iv) (b)

of the Immigration Control and Refugee Recognition Act, and the Plaintiffs did not fall within as foreign nationals following written deportation orders. The Supervising Immigration Inspector notified Plaintiff A that there was no error in the investigation. Plaintiff A made objections pursuant to the provision of Article 49 (1) to the Minister of Justice (the “MOJ”). The Director delegated the authority by the MOJ issued administrative determinations as there were no grounds. The Supervising Immigration Inspector notified the Plaintiffs of the administrative determinations, and issued the written deportation orders to Iran as the destination for Plaintiffs A, C, D, and E, and to Columbia for Plaintiff B.

On August 6, 2004, Plaintiffs A, B, and C filed actions for a claim for revocations and rescissions of the administrative determinations and requests of special permissions to stay in Japan and rescission of issuing a written deportation order to the Court. On 2005. In 2005, Plaintiffs A, B, and C filed actions for a claim as they were dismissed, and the requests were dismissed in 2006. On November 8, 2017, Plaintiffs A, B, and C filed an action to the Nagoya High Court, and the action was dismissed as inadmissible. Consequently, the Plaintiffs filed an action in this case.

Opinions:

1. The Lawfulness of the Plaintiffs’ mandamus actions

The Court took into account if there was any serious damage caused when a certain original administrative determination was not made following Article 3, paragraph (6), item (i) of the Administrative Case Litigation Act. As to the existence of serious damage, the Court needed to consider if there was a substantial change in conditions, in which a decision of special permissions to stay in Japan was to be reviewed. The Court decided, as for Plaintiffs C and D, that there was a relationship between Plaintiffs C and D and Japan and a necessity of staying in Japan of Plaintiffs A and B, who had the duty of the custody of a child. Considering all of the above, the Court concluded that there were substantial changes for Plaintiffs A, B, C, and D.

2. The evaluation of taking accounting the Plaintiffs’ requests

A state has the discretion of accepting of foreign nationals, and the Immigration Control needs political judgment at a high level in some

cases. If the decisions of special permissions to stay in Japan were to be reviewed based on Art.50 (1) of the Immigration Control and Refugee Recognition Act they would be dealt with on the substantially extensive discretion of the MOJ or the director of a regional immigration bureau. If the administrative decisions are revoked the matter is dealt with by its nature by a more substantially extensive discretion. Accordingly, the Court considered if the first administrative determinations were beyond the bounds of the agency's discretionary power or through an abuse of such power. Then the Court judged if a substantial change in conditions meant that the first administrative determinations were to be reviewed. The Court, firstly considered the Plaintiffs' claim regarding the best interests of the child based on Art.9 of the Convention on the Rights of the Child. The plaintiffs claimed there are substantial changes in light of the best interests of the child. The Court found that the provision under the Convention on the Rights of the Child premises on the principle of international law that a state freely decides the method of accepting foreign nationals. This means, the MOJ and others have the discretion of decisions.

Building on this reasoning, the Court found that it is difficult for the plaintiff D, who was 12 years old, to live independently from the Plaintiffs A and B in Japan. Therefore, there is the necessity for staying in Japan, for both or either of the Plaintiffs A and B if the Plaintiff D stays in Japan. However, the Court indicated that Plaintiffs A and B had chosen to fail to comply with the regulation and continued their state of illegally staying in Japan, and then found that permitting the Plaintiffs A and B to stay in Japan impairs the administrative propriety of the Immigration Control. As for Plaintiff C, the Court considered that he was 18 years old at the time of the conclusion of oral arguments, therefore the plasticity and flexibility of the Plaintiff C in connection with living conditions considerably would suffer if he was deported to Iran; learning and developing a language, and environmental changes in culture, society, and education. Additionally, the Court also considered that Plaintiff C was old enough to stay in Japan independently from his parents, and there is no necessity of permitting Plaintiffs A and B to stay in Japan. This means there was no impairment of the administrative propriety of Immigration Control. As for Plaintiff E, the Court relied on the fact he was 5 years old when the first administrative determination was issued, and he had the plasticity and flexibility in

connection with living conditions. The Court found that there was no serious consequence by sending back with Plaintiffs A and B based on the fact.

3. Decisions on the Plaintiffs' requests

Since there are reasonable grounds for the request regarding Plaintiff C, the Court revokes the administrative determination and upholds the request of special permission to stay in Japan under Art.7 of the Administrative Case Litigation Act, Art.61 and 64 of the Code of Civil Procedure. As for Plaintiffs A, B, D and E, the Court dismisses the requests for special permissions to stay in Japan as unlawful, and rejected the remaining requests as there was no ground.

Editorial Note:

The case summarized above takes into account evaluating if the denial of the revocation regarding the special permission is beyond the bounds of the agency's discretionary power or through an abuse of such power. In this evaluation, the Court considered the substantial changes in the Plaintiffs' circumstances. There is the necessity of ensuring the interest of the Plaintiffs resulting from the relationship between the Plaintiff and Japan. As to the necessity, the Court found that the circumstances of the Plaintiffs C and D have the substantial changes. However, different from the circumstance of Plaintiff C, the Court found that there is the necessity of custody in the circumstance of Plaintiff D, concluded that the judgement of the special permission is not to be revoked by the difficulty of custody of Plaintiff D by Plaintiff C and the admissibility of staying in Japan by Plaintiffs A and B. As to the consideration by the Court, there are two points as follows;

1. The relationship between the free discretion of the state under Customary International Law and the Convention on the Rights of the Child.

The Court considers that Art.9 (4) of the Convention on the Rights of the Child does not strictly restrict the free discretion of the state on the acceptance of foreign nationals, and the provision premised on the separation from parents may occur by the deportation. Following this

point, the Court, furthermore, concludes that the scope of the consideration under the Convention on the Rights of the Child falls within the domestic legal framework.

In the reasoning summarized above, Art.9 of the Convention does not preclude the separation from parents. It is true that the General Comment No.14 (2003) of the Committee on the Rights of the Child notes that assessing and determining the best interests of the child may result in the separation (Art.9, 18 and 20). However, it also notes “that a child shall not be separated from his or her parents against their will, except when [...] such separation is necessary for the best interests of the child”, because “Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in article 9, paragraph 1” (UN. Doc., C/C/GC/14, para.60).

Building on the reference to the best interests by the Committee, the provision assumes a case of separation by deportation rather than a case of child abuse or neglect. Since Japan ratified the Convention in 1994, the understanding of the provision shall be followed by the judgement of the national court. However, according to the Concluding Observations of the Committee (1998), with regards to the situation in Japan, the Committee “notes with concern that although the Convention on the Rights of the Child has precedence over domestic legislation and can be invoked before domestic courts, in practice courts in their rulings usually do not directly apply international human rights treaties in general and the Convention on the Rights of the Child in particular.” (para.7). In regard to the interpretation of Art.9 (1), Japan also proclaimed that the government did not exclude a case that leads to the separation from parents as a result of the deportation based on the Immigration Control and Refugee Recognition Act. In our view, the interpretation has the actual effect as well as the reservation of the Convention, so it is questionable that the natural court sufficiently applies the provision in practice.

2. Assessing and determining the best interests of the child

The Court took into account the relationship between the Plaintiffs and Japan, the necessity of custody of the child, and the liability of the state of illegally staying to Plaintiffs A and B, not family unity as the condition of the best interests under Art.9. The Court considered if the interpretation of

the best interests of a child by the Court is consistent with the interpretation under the Convention. According to the question of the concluding observation by the Committee (1998), with respect to a case assumed under Art.9 (1), Japan answered that the provision did not exclude the separation by the measure permitted under Art.9 (4), such as the detention, imprisonment, exile, deportation or death. Then Japan also considered that the provision did not oblige a state party to ensure separating from parents only in a particular case, such as abuse or neglect of the child by the parents, living separately by the parents.

However, General Comment No.14 (2003) noted “Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child.”

In this case, the Court considered that the circumstance of Plaintiff C was not rare in light of his age at the time (18 years old) since in International Society a minor may live independently in a foreign country on various grounds. However, as mentioned above, a state party shall determine such separation as a last resort measure because of the gravity of its impact, and the Convention places a great importance on family unity. Therefore, it is questionable that, in assessing and determining the best interests of the child, the Court considered the administrative propriety of the Immigration Control in a state as the condition of greatest importance rather than family unity.

Considering all the above, in this case, this judgement by the Court is not sufficiently in line with its understanding under international law.