

ing conditions to allow an employer to determine working conditions unilaterally. Therefore, the Supreme Court has confined the right to unilateral changes within the framework of "rationality". This framework, however, does not change the reality that an employer may determine working conditions without the agreement of the workers. And arguably no one can definitely state standards for neutral and fair "rationality" in industrial relations.

Consequently, we should interpret the Labor Standards Act from the standpoint of the principle of "equal voice" in determining working conditions. Even if negotiations between workers and employers come to an impasse, negotiations in good faith must eventually lead to some agreement. Though it may be difficult for an employer to obtain the consent of all employees, it is usually possible to agree with the trade union or the representative of the employees. There seems to be no reason to give the employer the unilateral authority to determine working conditions about which there is a dispute between the workers and the employer.

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8. International Law

a. Public International Law

A case in which the accused was not deemed a so-called "refugee" and therefore not granted remission of punishment.

Decision by the Ninth Criminal Division of the Tokyo High Court on December 6, 1982. Case No. (*u*) 2189 of 1981. Charges of violation of the Immigration Control Order and the Alien Registration Act. 1076 *Hanrei Jihō*, 150.

[References: The Immigration Control Order, Article 70, Paragraph 5; The Alien Registration Act, Article 18, Paragraph 1 (1) and Article 3, Paragraph 1; The Convention Relating to the Status of Refugees, Article 31, Paragraph 1; The Immigration Control and Refugee Recognition Act, Article 70–2.]

[Facts]

The accused, X, was born as a child of an expatriate Chinese and lived with his family in Laos up to February, 1975. During a stay by X in Japan after February 20, 1975, a war broke out in Laos, and X was prevented from going back to his country. In August of the same year, X left Japan for Formosa to join his family, which had escaped from Laos. For about 2 years following his arrival, X worked as a page boy at a hotel and lived with his family. In March, 1976, he was entered into his father's family register which had been prepared in Formosa. (The accused had never acquired Laotian nationality.) The accused re-entered Japan in November, 1977, bearing a formal passport issued by the Formosa government and a tourist visa. In May, 1981, he was arrested on charges of illegal stay in Japan (the Immigration Control Order, Article 70, Paragraph 5) and failure to apply for registration (the Alien Registration Act, Article 18, Paragraph 1 (1) and Article 3, Paragraph 1), and was taken into custody.

The Tokyo District Court convicted X and sentenced him to penal servitude for 7 months. It also ordered the suspension of application of punishment for 2 years (Case No. (*toku-wa*) 1413 of 1981). The present case related to the *koso* appeal filed by the accused from this decision, alleging that the accused was an "Indo-Chinese refugee" and that he was a "Convention refugee" under the "Convention Relating to the Status of Refugees" and "Protocol Relating to the Status of Refugees".

[Opinions of the Court]

Koso appeal dismissed.

Prior to judgment on the statement of reasons for *koso* appeal, the Tokyo High Court examined whether the accused was a Convention refugee or fell under the category of Indo-Chinese refugee. "We recognize (1) that the accused did not fall under the category of refugee, as defined in the Convention Relating to the Status of Refugees and its Protocol, at the time he entered this country on November 27, 1977, as described in the facts constituting the offense charged; and (2) that he is not an Indo-Chinese refugee of the so-called boat people or land people. In particular, the fact that the accused was unable to return to Laos from Japan because of the Laotian war, and was forced to leave on August 19, 1975, for Formosa where his father and other family members had arrived from Laos via Thailand, is proved by relevant evidence. It is clear from the records that the accused had entered himself in his father's family register on March 3, 1976, and was formally issued a new passport as a Chinese (Formosan) national by the Formosan government when he re-entered Japan. In light of these facts, even though the accused's refugee status in substance may be valid, since he could not go back to Laos because of the Laotian war during his above-mentioned stay in Japan, the fact remains that he later acquired Chinese (Formosan) nationality and established himself as falling under the protection of Formosa. Thus the original judgment that the accused 'had lost refugee status prior to his second entry to Japan', in view of the purpose of the provision of Article 1, Section C of the Refugee Convention, is recognized as valid."

Concerning the argument that punishing the accused on account of his illegal stay would violate Article 31, Paragraph 1 of the Refugee Convention, the Court pointed out that "since the accused did not fall under the category of persons to be protected as refugees by the Convention, there was not an error recognizable in the original judgment." The original judgment had ruled that "X's defense is without grounds because Article 31 of the Refugee Convention does not deem such deeds as those in the present case unpunishable."

With Japan's accession to the Refugee Convention and its

Protocol on January 1, 1982, the Immigration Control Order was amended as “the Immigration Control and Refugee Recognition Act” and enforced as of January 1, 1982. Article 70–2 of the said Act provides that a refugee who committed the act of “illegal stay” is absolved of punishment. Here, the statement of reasons for *koso* appeal asserted that Article 70, Paragraph 2 of the Act should be applied to the accused, the original decision quashed, and absolution from punishment pronounced. The Court dismissed this assertion, based on the judgment that “it is clear that the accused does not fall under the refugee (in the Refugee Convention or its Protocol) as provided in Article 70–2 (1) of the Act”.

[Comment]

The central issue in this case was the evaluation of the accused’s refugee status in order to determine whether the accused might enjoy the benefits of the Refugee Convention, i.e. absolution of punishment as mentioned in Article 31, Paragraph 1 of the Convention.

Based on the fact-finding of the Court, the evaluation that the accused did not fall under the Refugee Convention, at least at the time he entered Japan in 1977, is acceptable. In other words, (1) the fact that the accused had acquired Formosan nationality, and was issued a passport through formal procedures, as well as (2) the fact that the basis for his family’s livelihood had already been transferred to Formosa, sufficiently caused him to fall under the language of Article 1, Section C (3) of the Refugee Convention. This provision states that the Convention shall cease to apply to any refugee where “he has acquired a new nationality, and enjoys the protection of the country of his new nationality”. Since retaining the nationality of a given country and enjoying its protection are not necessarily directly related to each other, the acquisition of a new nationality alone cannot terminate status as a refugee. The language of Article 1, Section C (3) clearly requires the new nationality to be an effective one. In other words, it should be objectively confirmed that the country of nationality has the intention to protect the refugee, and

that he has the desire to be protected by this country. The country of nationality is required to recognize at least the fundamental elements of nationality, which include the right of return and residence. Having confirmed that the accused had voluntarily acquired nationality in Formosa, the Court recognized that "it is clear that he enjoys residence and protection in Formosa". Unless there has been an error in fact-finding by the Court, the interpretation and application of Article 1, Section C (3) in this decision seem compatible with the purposes of the Convention.

The decision does not provide any clear ruling on whether X fell within the definition of a refugee under the Convention at the time when it became impossible for him to return to Laos. The decision did recognize X's refugee status in substance in the sense that he could not return to Laos because of the war. However, the Court also stated that any "refugee status in substance" was lost prior to X's entry into Japan in 1977. This does not necessarily mean that the decision presupposes the previous status of the accused as a Convention refugee. Rather, the accused was not considered to be in fear of political persecution in Laos or in Formosa. (The original decision recognized this point, and the accused did not dispute this point in the present case.) Therefore, the accused could not become the direct subject of protection under the Refugee Convention. However, it is true that X was a victim of an unexpected incident — a sudden uprising — for which he was not responsible, and that X stood substantially in the same position as a Convention refugee at the time it became impossible for him to return to Laos. Thus, the concept of "refugee status in substance" as mentioned in the decision might be understood to be based on the previous status of the accused as a "displaced person".

Under the policy of allowing settlement and temporary residence to refugees, Japan accepts Indo-Chinese refugees, most of whom are "displaced persons" not qualified for the status of Convention refugees. (For settlement, the quota is for 5,000 persons; the total number of Indo-Chinese refugees who had settled in Japan by the end of 1984 was 3,812.) Since the accused "has

acquired a new nationality, and enjoys the protection of the country of his new nationality”, he can no longer be deemed an Indo-Chinese refugee entitled to enjoy the benefits of reception (which include absolution from punishment on account of illegal stay) equivalent to those of the Convention refugee.

Although the act *per se* of the accused was committed prior to Japan's accession to the Convention or the effective date for enforcement of the Immigration Control and Refugee Recognition Act, Article 31, Paragraph 1 of the Convention does not require that such acts should occur after the Convention enters into force for the state concerned. In other words, a refugee who has committed the crimes of illegal entry and/or illegal stay prior to the Convention's coming into force must not be punished if he has not been subject to a final and conclusive judgment by then. This interpretation concurs with the intent of Article 6 of the Criminal Law of Japan concerning changes of penalties. Therefore, the Court's attitude in examining the applicability of Article 31, Paragraph 1 of the Refugee Convention to the accused's deed appears most reasonable.

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b. Private International Law

A case in which the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was applied.

Decision by the 18th Civil Affairs Division of the Osaka District Court on April 22, 1983. Case No. (wa) 4919 of 1981. Application for execution judgment. 1090 *Hanrei Jihō* 146; 501 *Hanrei Taimuzu* 182.

[Reference: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article 3 and Article 5, Para-