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8. International Law

1. The ownership of Chinese property abroad after the Sino-Japanese normalization.

Decision by the Third Civil Division of the Kyoto District Court on February 4, 1986. Case No. (*wa*) 1382 of 1982. A case of claim for evacuation. 1199 *Hanrei Jihō* 131.

[Reference: Sino-Japan Joint Communiqué; Art. 206 of the Civil Code.]

[Facts]

The land and building thereon, which the plaintiff requested the defendants to evacuate, had been leased by Kyoto University from the former owner during World War II, and had been used as a residence for Chinese students. When the war ended, Kyoto University was unable to continue to pay the rent. In 1947 the plaintiff, the Government of the Republic of China, purchased the building concerned and its ownership was formally registered in 1961. In 1966, the plaintiff filed a suit with the Kyoto District Court, calling for removal of Chinese students who were continuously possessing the building concerned defying the Government's will. The court, while admitting the plaintiff's capacity to be a party to the litigation, dismissed its claim. It held: "Since the Japanese Government recognized the Government of the People's Republic of China as the sole legitimate Government in China, the ownership of the government to the property concerned which was publicly owned by China was transferred to the Government of the People's Republic of China from the Government of the Republic of China." (Decision by the Third Civil

Division of the Kyoto District Court on September 16, 1977. Case No. (*wa*) 1025 of 1967.) On April 14, 1982, however, the Osaka High Court, in *koso* appellate instance, reversed the decision and remanded the case to the Kyoto District Court, ruling that the ownership of public assets other than public assets which were directly related to the representation function of a State was not necessarily transferred to the successor government. (Decision by the Sixth Civil Division of the Osaka High Court on April 14, 1982. Case No. (*ne*) 1622 of 1978.)

[Opinions of the Court]

“It is a general understanding that when a new government is established in a certain State after the total disappearance of a former government all property owned by the former government is succeeded to by the new government (the case of complete succession of government): that when the former government has not totally disappeared, still effectively dominating part of the State, property owned by the former government is succeeded to by the new government as long as it is located in the area controlled by the new government (the case of incomplete succession of government).

In case of incomplete succession of government, property owned by the former government in a foreign State is not succeeded to by the new government because it is not under the control of the new government and the former government still exists. However, if the foreign State, in whose territory is located the property in question, recognizes the new government (the case of change of recognition), property owned and controlled by the former government in the capacity of representing a State (diplomatic property such as embassy premises) and property recognized by the foreign State as for exercising state power (such as premises for a consular tribunal) are assumed to be succeeded to by the new government at the time of the change of recognition, because it is a necessary consequence of the recognition of government that the foreign State treats the newly recognized government as representing its own State. As far as other types

of property are concerned, however, the ownership of the former government in the foreign State is not assumed to be affected by the change of recognition.”

“Japan changed its recognition of China from the Government of the Republic of China to the Government of the People’s Republic of China on September 29, 1972. Given the fact that the former Government has continuously secured effective control over Taiwan, part of China, this case falls under the category of incomplete succession of government. While the building concerned is situated in Japan, it is not considered diplomatic property or property for the exercise of state power. In addition, it was owned by the plaintiff, the Government of the Republic of China, after the establishment of the Government of the People’s Republic of China, which has never claimed the ownership or actually controlled it until today. It follows therefore that the plaintiff is assumed to retain and be able to exercise the ownership of the building concerned in Japan irrespective of the change of recognition.”

“The building concerned had been used as a dorm for Chinese students, and the plaintiff purchased it so that it would be used for the same purposes. Such management of the building concerned has nothing to do with the exercise of state power that requires the consent of the State authorities in whose territory it is located. Thus, it is concluded that the building concerned is not property to be succeeded to by the new government with the change of recognition.”

[Comment]

(1) A preliminary question that may be posed in connection with the present litigation is whether the Government of the Republic of China has the capacity to be a party before a Japanese court even after 1972 when the recognition was withdrawn by the Government of Japan. The Osaka High Court, remanding the case to the Kyoto District Court, ruled on this point as follows:

“Recognition of States or Governments is more or less a

political act. The decision on granting recognition is usually made in light of how the recognizing government develops relations with the recognized State or Government. On the other hand, municipal courts are charged with rendering pronouncements with a view to settling legal disputes ensuing from, *inter alia*, private transactions in a reasonable manner. Given the difference in nature between the act of recognition and the rendering of judgments by municipal courts, it is far from inevitable in our understanding that the recognition of a foreign government should be linked to its standing before a municipal court."

"Since there is no denying that the plaintiff, the Government of the Republic of China has been indeed governing and controlling Taiwan and its surrounding islands under a state system for over thirty years since the end of 1949, and that the plaintiff occasionally appears before municipal courts as a party to private transactions, it is reasonable to admit the capacity of plaintiff to be a party. This judgment is not assumed to disregard or prejudice the view of the Government of the People's Republic of China to the effect that Taiwan is an integral part of the PRC because it has no influence upon the position of the Government of the PRC under international law."

The issue of the standing of a government with respect to which recognition was withdrawn was for the first time brought up in Japan in connection with the present case, there having been no judicial precedent in this regard. Yet, the judgment of the Osaka High Court described above, which is essentially the same in result as that of the Kyoto District Court as it originally dealt with the present case, is largely supported by scholarly opinions for its justness.

(2) The major issue before the Kyoto District Court in dealing with the remanded case concerned "succession of government." The issue of "succession of government" involves the extent to which new governments succeed to rights and duties under international law, as well as public property, pertaining to former governments. As a general rule, new governments succeed, in a comprehensive manner, to rights and public property

retained by former governments. This is because public (State) property is considered to belong to a State, and so is not considered to be affected, in terms of ownership, by the change of governments. In this connection a legal maxim *forma civitatis mutata, non mutatur civitas ipsa* may be recalled. However, the succession of comprehensive nature occurs only when the former government has been totally replaced by a new government. If the former government, exercising domination *de facto* of a part of the State territory, continues to exist, comprehensive succession does not necessarily supervene. On this occasion, property located in the area still under the effective control of the former government is not necessarily succeeded to by the new government, although it is unequivocal that the succession to property situated in the area controlled *de facto* by the new government is effectuated. With regard to the public property in foreign States owned by the former government, paucity of precedent prevents the forthright resolution of the issue as to whether succession occurs. Notwithstanding this, the Kyoto District Court came to a justifiable conclusion when it stated that, given its use and nature, the building concerned was not considered to be an asset directly related to the representation function of a State, and thus was not succeeded to by the new government. This judgment is particularly justifiable in light of scholarly opinions and judicial precedents regarding "succession of State" which may to a great extent be analogized to "succession of government."

Incidentally, the Kyoto District Court as it originally dealt with the present case suggested that the change of recognition would effect the shift of all public property owned by former governments. Recall that the court stated: "Since the Japanese Government recognized the Government of the People's Republic of China as the sole legitimate Government in China, the ownership of the government to the property concerned which was publicly owned by China was transferred to the Government of the People's Republic of China from the Government of the Republic of China." This judgment, which placed so much emphasis on

recognition in terms of its effect, may not be in accord with the international trend that shows an increasing number of States are abolishing or de-emphasizing the institution of recognition of government so as to be free from whatever effects may ensue from the act of recognition. Indeed, in actuality, what counts is not whether recognition has been granted but whether there are dealings with extant foreign Governments. It may be submitted therefore that, in view of the actual dealings that have been conducted between the Republic of China and Japan on either the public or the private level, if the effect of recognition were held to extend even to such aspects as have nothing to do with the State function it would only end up in separating law from reality. Thus, the Kyoto District Court as it dealt with the remanded case was correct in reversing the original decision described above so as to narrow the effect of the change of recognition only to the ownership of public property which was directly related to the representation function of a State.

2. A case in which a foreigner refused to be fingerprinted in defiance of Article 14 (1) of the Alien Registration Act.

Decision by the Ninth Criminal Division of the Tokyo High Court on August 25, 1986. Case No. (u) 1484 of 1984. 1208 *Hanrei Jihō* 66.

[Reference: Arts. 14 (1) and 18 (1) (viii) of the Alien Registration Act; Arts. 13, 14 and 31 of the Constitution of Japan; Arts. 2, 7 and 26 of the International Covenant on Civil and Political Rights.]

[Facts]

The accused was amerced by the Tokyo District Court, the court of first instance, in the sum of 10,000 yen for having refused to be fingerprinted on the registration card and registration certificate on the occasion of application for reaffirming the truth of the description in his registration card (Han case; for details, see Waseda Bulletin of Comparative Law, vol. 6, pp. 78-79 and 80-81). Appealing from this decision, the accused con-

tended that the fingerprinting system under the Alien Registration Act was repugnant to Arts. 13, 14 and 31 of the Constitution of Japan and Arts. 2, 7 and 26 of the International Covenant on Civil and Political Rights.

[Opinions of the Court]

“The fingerprinting system, which obliges aliens residing in Japan to have their fingerprints taken on the occasion of alien registration, and which is designed to be indirectly enforced by criminal punishment, is a necessary and reasonable system meant to achieve the just administrative purpose of clarifying the residence and personal status of alien residents and contributing to their fair control. Such being the case, it is not assumed that the fingerprinting system impinges upon freedom from being fingerprinted without good reason or without one’s consent, which is secured as part of individual liberty of private life. Furthermore, the taking of a fingerprint of a finger which usually is not covered by clothes is not assumed to be a degrading treatment either because it is indirectly enforced by criminal punishment, and not directly compelled with physical force, with a view to achieving necessary and reasonable administrative purposes. The fingerprinting system, therefore, is not repugnant to Article 13 of the Constitution or Article 7 of the International Covenant on Civil and Political Rights.”

“The statutory inequality whereby the fingerprinting is imposed upon only aliens is deemed to be necessary and reasonable in terms of the commonly accepted view: Recall that Japanese nationals are constituent members of our society whereas aliens, being non-constituent members of our society, have no right to enter or reside here, and they are not so closely tied to Japan as Japanese nationals.

Even in case of so-called settled resident aliens such as the accused, they are essentially different from Japanese nationals in their relations with Japan. Moreover, those long-time resident aliens may vary in terms of the degree of attachment to the Japanese society: Some may have as strong ties to our society

as Japanese nationals while others may have much weaker ties. Consequently, it is within the discretion of the legislature to decide what kind of aliens fall under the category of the settled resident alien to be differentiated from other alien residents. It is also within the discretion of the legislature to decide what kind of system is appropriate to clarify their residence and personal status. Thus, it may not be assumed to be discriminatory treatment between nationals and settled resident aliens to uniformly impose the fingerprinting upon aliens under the Alien Registration Act without differentiating settled resident aliens from other aliens. Therefore, the fingerprinting system is not in conflict with Article 14 of the Constitution, and Articles 2 and 26 of the International Covenant on Civil and Political Rights.”

[Comment]

This is the first judgment rendered by an *koso* appellate court concerning a series of so-called “fingerprint-refusal incidents.” District courts which dealt with fingerprint-refusal cases had all ruled that the fingerprinting system was not unconstitutional. The Tokyo High Court upheld the lower courts’ decisions.

Under the Alien Registration Act, foreigners residing in Japan (except for those who are temporarily in Japan) are required to apply for alien registration with local authorities. Previously, in filing applications, foreigners over fourteen years of age residing in Japan over one year were obliged to be fingerprinted on a registration card, a registration certificate and fingerprint sheets of paper. They were required to renew their registrations every three years; each time their fingerprints were to be taken. For refusing to be fingerprinted, a foreigner was to be penalized with not more than one year’s personal servitude or imprisonment, or be amerced in the sum of not more than thirty thousand yen. The Alien Registration Act was amended in 1982 with the result that the age of a foreigner obliged to be fingerprinted was changed from fourteen to sixteen, that the renewal period from three years to five years, and that the sum of amercement from not more than thirty thousand yen to not

more than two hundred thousand yen. As regards the method of taking fingerprints, it was also changed: Previously a foreigner was required to roll the left-hand forefinger from side to side on the sheet; in July 1985, the Japanese Government introduced a "flat" fingerprinting method with a view to "reducing the psychological pressure felt by aliens at the time of fingerprinting (Cabinet Ordinance, No. 125 of May 1985)." The present case took place under the previous procedures set forth by the Alien Registration Act before it was revised in 1982. Comments below will be focused upon international law aspects of the case.

Japan acceded to the International Covenant on Civil and Political Rights (hereinafter called "ICCPR") on September 21, 1979. Article 98 (2) of the Constitution of Japan provides: "Treaties concluded by Japan and established laws of nations shall be faithfully observed." The Government and the courts have taken the position that the treaties have force of law in Japan through this provision, which position has been supported by scholars. This position, however, does not go so far as to indicate that *all* treaties concluded by Japan automatically have validity in Japanese law. In order that treaties may have force of domestic law, they must be of such nature as is generally referred to as "self-executing." In Japan, scholars agree that the ICCPR is in general self-executing. The courts have assumed *sub silentio* the self-executing nature of the ICCPR. One may hasten to recall in this respect that during consideration of Japan's report on the ICCPR at the Human Rights Committee, a Japanese representative expressed a similar view (U. N. Doc. CCPR/C/SR. 324 (1981)). Thus, it is safely understood that the ICCPR is directly applicable in Japanese courts. As regards the "rank" of treaties in Japanese law, although no reference is made in Article 98 (2) of the Constitution scholars agree that treaties prevail over statutes, either prior or posterior. As far as the relationship between treaties and the Constitution is concerned, most of the recent literature takes the view that the Constitution prevails over treaties. From above, the status of the ICCPR in Japanese Law may be summarized as follows: It has force of law; it is

directly applicable in Japanese courts; it invalidates conflicting statutes; it does not take precedence over the Constitution.

In the present case, the Court first dealt with the question whether the fingerprinting system was compatible with Article 7 of the ICCPR which prohibited "degrading treatment." The Court was of the view that so long as it was indirectly enforced by criminal punishment fingerprinting did not fall under degrading treatment. It is not necessarily clear what kind of conduct "degrading treatment" means even if *travaux préparatoires* of the ICCPR are looked to. There is no judicial precedent in Japan or in other States which are parties to the ICCPR in relation to this provision. Only in the case law of the European Court of Human Rights is found an indication as to the substance of such treatment. Indeed, the European Court of Human Rights in the *Tyrer* case opined: "In order for a punishment to be 'degrading' the humiliation or debasement involved must attain a particular level and must in any event be other than that usual element of humiliation." Thus, the determination of "degrading treatment" may have been possible based upon objective criteria as well as the subjective state of mind of the foreigner concerned.

The second question dealt with by the Court was whether the fingerprinting system was repugnant to Articles 2 (1) and 26 of the ICCPR which prohibited undue discrimination. The opinion of the Court was that the fingerprinting system did not impose undue discrimination upon aliens because, although applied to aliens only, it could be construed to have good reason. Given that Article 2 (1) of the ICCPR prohibits discrimination "of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" to the specific exclusion of "nationality," it remains to be resolved whether the ICCPR prohibits discrimination based upon "nationality." Yet the Japanese Government has taken the unequivocal position that "nationality" falls under "national origin"; the indication is that the rights set forth in the ICCPR are applied not only to nationals but also to foreigners except for those few rights which are designed to be applied to nationals

only. The scholarly opinions endorse the Government's position. Notwithstanding this, one must note that deviation from the equal treatment between nationals and foreigners may be permissible under the ICCPR if it is based upon reasonable grounds. It is understood that the Court considered the fingerprinting system to be permissible under the ICCPR because it differentiated aliens from nationals with reasonable grounds for that differentiation.

3. Action demanding cancellation of a deportation order.

Decision by the Third Civil Division of the Tokyo District Court on September 4, 1986. Case No. (gyō u) 184 of 1985. 1202 *Hanrei Jihō* 31.

[Reference: Arts. 49 (1) and 50 (1) (iii) of the Immigration Control and Refugee Recognition Act.]

[Facts]

The plaintiff, an Iranian, who wished to be reunited with his Japanese wife, X, was allowed to land in Japan on August 13, 1981, with the status of stay specified in Art. 4 (1) (xvi) of the Immigration Control Order (currently the Immigration Control and Refugee Recognition Act). Although the period of stay originally allowed him was ninety days, he continuously succeeded in renewing it until November 15, 1982, when the Justice Minister, determining that the wedlock between the plaintiff and X had broken down, granted the plaintiff the period of three months during which he was required to leave Japan. Yet, as a result of the submission of application for asylum on February 14, 1983, the plaintiff obtained further permission to stay in Japan. In the meantime, the plaintiff came to have a physical involvement with another Japanese female, Y. On October 4 of the same year, the Justice Minister decided not to recognize him as refugee, against which decision he did not file an objection. In spite of his inaction, the Justice Minister allowed him to further stay in Japan, taking into account that the divorce mediation was underway between the plaintiff and X since around

May 1983. After this mediation ended up in failure, X filed a divorce suit, which was granted on November 16, 1984. The plaintiff requested a retrial. On August 15, 1985, the plaintiff applied for renewal of the period of stay for reasons of having filed a retrial request. His application was turned down by the Justice Minister, with the result that the plaintiff was immediately detained under a written detention order (Art. 39 (1) of the Immigration Control and Refugee Recognition Act). On October 24 of the same year, the plaintiff was recognized as illegally staying in Japan by an immigration inspector (Art. 45 (1) of the Act). Thereupon, the plaintiff demanded an oral inquiry and received a finding by a special inquiry officer to the effect that there was no fault in the determination of the immigration inspector (Art. 48 (1) and (7) of the Act). Then the plaintiff uttered an objection, based on Art. 49 (1) of the Act, against the Justice Minister. On November 22, the Minister decided that the said objection had no reason. After that, on November 26, the supervising immigration inspector issued a written deportation order addressed to the plaintiff under Art. 51 of the Act. Meanwhile, after consolidating her intent to marry the plaintiff, Y had submitted a notification of marriage on November 18.

The plaintiff brought an action contending that since the Justice Minister, in deciding not to give him the special permission to stay under Art. 50 of the Act, had illegally exercised his discretion, the issuance of the written deportation order which had presupposed the Minister's illegal decision was also illegal. His contention was premised upon the following claims: that the status of residence as spouse of Y should be granted to him; that the right to visit his daughter (born of the plaintiff and X) should be recognized; that his refugee status should be recognized; and that freedom of marriage and the right to pursue happiness set forth in the Constitution of Japan should be protected.

[Opinions of the Court]

The Court first determined that the marriage between the plaintiff and Y was not fraudulent nor had been contracted for

mere purposes of avoiding the plaintiff's deportation. The Court recognized that their marriage had been valid at the time the Justice Minister had rendered the decision to the effect that his objection had no reason. Then the Court brought attention to the situation in Iran in which around 1983 the government authorities had started intensively cracking down on the activities of anti-government organizations such as the Mujahidheen of which the plaintiff was a member, with the result that some of his acquaintances had been executed and that the house of his parents had been searched while his father and brother had been interrogated as to whereabouts of the plaintiff. The Court determined crackdown of the members of the Mujahidheen in Iran was such that it could be properly called harsh suppression, whereby the occurrence of summary executions was not rare. The Court let it be noted that the plaintiff's refugee status was not necessarily denied solely because he had not lodged an appeal from the negative original decision as to his application for asylum. Based upon these findings, the Court held as follows.

"The decision as to whether or not to give permission to stay rests with discretion of the Justice Minister. The Minister is to render the decision by synthetically considering such matters as domestic situations, international relations and foreign policies, not to mention the private circumstances surrounding the alien concerned. As was rightly pointed out by the defendant, the scope of his discretion is quite broad. However, it is not unlimited. It is reasonable to assume that the defendant Justice Minister has abused or deviated from his discretion in cases where his decision is remarkably unreasonable in terms of the commonly accepted view in our society."

"There are considerably strong probabilities that the plaintiff, if deported to Iran under the written deportation order, will be subjected to exceptional hardships including threat to his life. Under the circumstances it is assumed that the plaintiff and Y will be deprived of a chance to live a peaceful married life. On the other hand, it is hard to believe that allowing the plaintiff to stay in Japan will specifically prejudice the national interests

of Japan unless circumstances change so that their intent to continue a married life, currently recognized in both the plaintiff and Y, disappears.

Such being the case, it is an inevitable conclusion as to the present case in which no proof was made of special circumstances to be considered that the Justice Minister's decision not to give the plaintiff special permission to stay was remarkably improper in terms of the commonly accepted view in our society. It is determined therefore that the decision concerned was illegal in that the Justice Minister, deviating from the scope of his discretion or abusing it, did not grant the plaintiff permission to stay. Consequently it is determined that the decision concerned is illegal and that the deportation order which presupposed the decision concerned is also illegal so as to be rescinded."

[Comment]

The Immigration Control and Refugee Recognition Act does not grant deportable foreigners the right to apply for special permission to stay: Whether or not to give such permission belongs to the discretion of the Justice Minister (Art. 50 (1) of the Act). Although the scope of discretion is quite extensive, it is not unlimited. Discretion may be abused so as to be considered illegal if it is remarkably unreasonable in terms of the commonly accepted view in our society.

Notwithstanding this, one cannot help but feel that courts had so readily deferred to the administrative decisions that it may be no exaggeration to say that almost all the pleas to obtain special permission to stay had been rejected by the courts regardless of their merits. Given that, the mere fact that the Court in the present case came to a conclusion favorable to a deportable foreigner in itself may attract attention in that it is a noteworthy deviation from a succession of past judgments. However, the significance of the present judgment is not limited to such "rarity". Rather, the judgment may be duly understood to represent the developed awareness of human rights in our society. The enhancement of such awareness in our society may be best tes-

tified by Japan's accession to the International Covenants on human rights, and the Convention and the Protocol Relating to the Status of Refugees in 1979 and 1982 respectively. The Immigration Control and Refugee Recognition Act which came into effect in 1982 was strongly inspired by these treaties, particularly the Refugee Convention and the Refugee Protocol. Accordingly, it is assumed that the discretion of the Justice Minister that is to be exercised under the Act is now restricted by the norms of international human rights law enshrined in these treaties. To that extent, it is also arguable, the judicial review of administrative decisions such as in the present case has become stricter. Only against this backdrop may be put in perspective the present judgment that determined as illegal the Justice Minister's decision which unduly disregarded two important factors, *i.e.* the *prima facie* refugee status of the plaintiff and the protection of married life. The present judgment substantially gave effect to such fundamental norms of international human rights law as protection of family, including married life, and the protection of the refugee against forcible return to a territory where his life would be threatened. The judicial activism exercised by the Court is the proper stance to be taken by the courts in applying the Act. As such, the present judgment will serve as good reference for similar cases regarding application of the Act. Here lies the real significance of the present judgment.

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