

ment with respect to working conditions, but also through actual isolation or exclusion. Since employees get a lot of information, skill and know-how from relationships in the workplace, isolation or exclusion not only causes emotional damage but also serious unfair treatment in training and promotion. It is very hard to show that such isolation or exclusion constitutes discriminatory treatment compared with the treatment of other employees in the same workplace. This decision of the Supreme Court appropriately dealt with such a special problem, and we have to note how the doctrine of the freedom to engage in free relationships in workplace will apply to the type of discrimination in which the victim is isolated.

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8. International Law

- 1. A case in which it was held that a disposition not recognizing a person as a refugee was lawful because the application for recognition of refugee status was done beyond the due date stipulated in Article 61.2 (1) of the Immigration Control and Refugee Recognition Act (hereinafter cited as “the Act”) and there is no basis for applying the proviso of this provision.**

Decision by the Second Civil Division of the Tokyo District Court on February 28, 1995. Case No. (*u*) 126 of 1991. A case requesting the revocation of the disposition not recognizing the plaintiff as a refugee. 1533 *Hanrei Jihō* 43.

[Reference: Immigration Control and Refugee Recognition Act, Article 61.2 (1) and (2); Convention Relating to the Status of Refugees of July 28, 1951, Article 1.]

[Facts]

The plaintiff is a Chinese national and entered Japan in Septem-

ber 1988 having been granted residence for a 6-month period to study Japanese. After that, he was permitted to extend his period of stay three times. On September 7, 1990 he applied for a change of status of residence to enter a Japanese university, but on October 25, 1990, the defendant Ministry of Justice disapproved the application. Thereafter, the plaintiff applied for a short term stay to prepare to return to China and received permission for an additional 90-day period of stay.

The plaintiff was one of the leaders of the pro-democracy movement by Chinese students who was staying in Japan and he also supported the Tienanmin Square Incident in 1989. He believed he had qualified to become a refugee for these reasons and then he applied to be recognized as a refugee based on Article 61.2 (1) of the Act. The defendant made a disposition not recognizing the plaintiff as a refugee on the grounds that his application of March 7, 1991 was not filed within 60 days from the day he arrived in Japan, as stipulated in section (2) of the article and the court could not find any “unavoidable circumstances”.

The plaintiff undertook an action demanding revocation of the defendant’s disposition of his application for refugee status.

[Opinions of the Court]

The present complaint should be dismissed.

In this case there are three issues: 1) When did the plaintiff know the reasons that would cause him to become a refugee? 2) With respect to the application which was not timely filed, were there any unavoidable circumstances as provided for in Article 61.2 of the Act? 3) Is the provision which imposes such a time limit for the period of application invalid because it violates the objectives of the Convention Relating to the Status of Refugees (hereinafter cited as “the Convention”) and the Protocol Relating to the Status of Refugees (hereinafter cited as “the Protocol”)?

As for the first issue, Article 61.2 (2) of the Act stipulates that, in the case of a person for whom the decision that he is a refugee occurs during his stay in Japan, the application must be filed within 60 days from the day when he knows that fact. Based on this provi-

sion, the court stated that the burden of proof that he qualified to be a refugee and that the application was filed within the limit rested on an applicant.

As for "the day when he became aware of that fact", the critical date from which the timeliness of an application is determined, "the plaintiff claimed that to determine the critical date, the day on which he in fact happened to become a refugee should first be recognized, and then the day on which he actually knew on the basis of concrete and objective materials should be considered." The court, however, stated that "Article 61.2 (2) properly limited the period of application in order to recognize the status of refugee because if an application is made long after the time that he actually became a refugee it would be very difficult to determine the facts at that time. After the application is filed timely, it should be examined substantively to determine if the applicant qualifies for the status of a refugee, that is to say, if there is well-founded fear of being persecuted as stipulated in Article 1 of the Convention. The plaintiff claimed that in a document dated January 8, 1991, in his explanation concerning the expiration of the time for application for recognition of political refugee status and in an interview with the Refugee Examiner on January 30, 1991 that in July 1990 he knew from a Chinese magazine that he had been persecuted and in September 1990 he knew that his name was on the list of the members of the Chinese pro-democracy movement in Japan made by the Chinese authorities. Then the court could have approved the defendant's statement that the critical date for his application was in July or September 1990, or at the latest in September.

As for issue number two, the court stated that the "unavoidable circumstances stipulated in the proviso of Article 61.2 (2) mean a case in which a person willing to apply within the time limit cannot physically go to the Immigration Department for objective reasons, for example sickness or transportation breakdown or the case in which there is a special reason making it difficult to decide whether to apply for recognition of refugee status." The court rejected all the reasons that the plaintiff claimed as not being one of the stipulated "unavoidable circumstances".

The court's decision about issue three is as follows: "Neither the Convention nor the Protocol has a particular procedural provision for recognition of refugee status. Selection of the procedure rests on legislative discretion of the State Party. The State Party can establish the procedure according to its particular circumstances. Article 61.2 (2) of the Act limits the period for the application to ensure fairness of administration of refugee recognition and smooth enforcement, because if an application is made long after the fact that the applicant happened to become a refugee, it would be very difficult to determine the facts at that time and to properly recognize refugee status. In the light of the objective of Article 61.2, it is found to be reasonable and it cannot be regarded as invalid."

The plaintiff claimed that according to the reply from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Conclusions of the Executive Committee of that Office at the 30th session in 1979, recognition of refugee status cannot be refused without considering substantive requirements and solely because the application was not completed within the time limit." The court stated that "the reply and the Conclusions are only recommendations for the States Parties of the Convention and cannot bind the States."

On the grounds stated above, the instant claim was dismissed.

[Comment]

Japan ratified the Convention and the Protocol in 1981 and in 1982 respectively and amended the Act. In recent years, the number of cases concerning the recognition of refugee status has been increasing, however this case is the first case which relates to the procedural aspects of recognition and has great legal significance.

The court explained the standards of interpretation of Article 61.2 (2). The standards for deciding the critical date for recognition and finding "unavoidable circumstances" were stated by the court for the first time. The court's interpretation of the Article is in accord with the opinion that the Japanese government has stated and it can be regarded as adequate, but the court's interpretation of the 60-day rule and "unavoidable circumstances" has been criticized from wi-

thin and outside Japan for interpreting the Article too strictly. The court viewed the critical date as the day that the plaintiff knew the fact that he had become a refugee and when he claimed it and proved it. There are some opinions stating that to regard the application in such a way makes it difficult to properly recognize the status of a refugee because the decision of the critical date should depend on the applicant's claim. Critics say that it should be decided objectively.

A question of international law arises with respect to the third issue as described above with respect to whether the provision of a time limit for the application is contrary to international law. The plaintiff presented the Convention, the Protocol, the Conclusions of the Executive Committee of UNHCR and the reply of the UNHCR Office as the bases for applying international law. The opinion of the court on this point, as stated above, should be considered to be appropriate because the Convention gives States Parties broad discretion in determining the procedure for recognition of refugee status and it is true that the Conclusions have no binding effect on the States Parties. On the other hand, if the plaintiff had proved a particular international obligation concerning the procedure, not merely saying vaguely "in light of the object of the Convention", the court would have been forced to examine the international rules about such procedures. That is to say, the plaintiff needed to have claimed that there was customary international law which prohibited the Japanese Ministry of Justice from not examining the substantive requirement for refugee status solely because the application was completed after the time limit, or prohibiting a 60-day rule because it was too short. In this respect, the Conclusion could have been utilized as important evidence in proving the existence of customary international law.

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- 2. A case in which it was held that a claim for damages caused by the slaughter by the military policemen just after World War II made against the Government of Japan under the Civil Code and**

the International Law is not accepted.

Decision by the 31st Civil Division of the Tokyo District Court on July 27, 1995. Case no. (wa) 11465 of 1991. A case claiming damages. 894 *Hanrei Taimuzu* 197.

[Reference: Civil Code, Articles 710, 715, 723 and 724; Hague Convention respecting the Laws and Customs of War on Land, Article 3; Hague Regulations respecting the Laws and Customs of War on Land, Articles 30 and 46; Charter of the International Military Tribunal at Nuremberg, Article 6; Charter of the Far-East International Military Tribunal, Article 5; Statute of the International Court of Justice, Article 38.]

[Facts]

X (plaintiff) claimed damages caused by the arrest and taking and slaughter of his father and brother by the military policemen based on a charge of espionage activities on August 17, 1945, just after World War II, under International Law (Hague Convention respecting the Laws and Customs of War on Land, Crimes against Humanity, International Customary Law). X brought an action for damages of 30 million yen and restoration of their reputation by publication of an apology in a newspaper.

[Opinions of the Court]

Claims dismissed.

(1) Hague Convention respecting the Laws and Customs of War on Land

The Hague Convention respecting the Laws and Customs of War on Land provides as follows: A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation (Article 3). This points out clearly the liability of a belligerent party for compensation of the damages. X claims that this provision imposes on the state parties of the convention the obligation to compensate when they breach the provision. But this Article only made the state responsibility clear and does not mean that states take on the liability to the individual victims of the belligerent state directly.

(2) Crimes against Humanity

The Charter of the International Military Tribunal at Nuremberg Article 6 and the Charter of the Far-East International Military Tribunal Article 5 define certain crimes as Crimes against Humanity. X made claim about Crimes against Humanity. X alleged that although crimes under international law which are “Crimes against Humanity” are attributed to the individual actor in principle, when 1) the act was committed exclusively for the sake of the Japanese government and not for the profit of the actor himself, and 2) the act was done as exercise of power by the public officer of Japan, the crime results in a breach of international law by the state of Japan. This kind of crime only calls the international criminal responsibility of the individual actor to account and does not place civil liability on the state to which the actor belongs. Therefore, the claim of the plaintiff is without reason.

(3) International Customary Law

International Customary Law is “international custom as evidence of general practice recognized as law” (Statute of the International Court of Justice Article 38). For this customary law to be found, it is necessary that there exist certain international practices (general practice) through the accumulation of the acts of states and *opinio juris* which definitely identify this practice as a legal obligation. It cannot be said that there exist general practices of states to take on liability to the individual victims directly when an act violates international humanitarian law or international human rights law. Moreover, there is no *opinio juris* which support this. Therefore there is no international customary law under which the plaintiff may make a claim.

[Comment]

The court first considered Article 3 of the Hague Convention respecting the Laws and Customs of War on Land and decided that the purpose of this Article is not to confer the right to claim damages directly to the states on the individual victim. This provision defines the international responsibility between the belligerent parties (states) and makes it clear that the law of state responsibility applies in war-

time. Therefore the court decides correctly.

As for the Crimes against Humanity, it is the individual actors who are supposed to be punished, and the opinion of the court sticks to this principle.

This case is unusual with respect to the point of the content of international customary law. It was argued generally that states should take on liability to the individual victims directly when the act violates international humanitarian law or international human rights law and not the specific rule of a treaty. But the decision does not deviate from the basic trend in jurisprudence of two elements of international customary law.

This case is the first case to decide on a post-war compensation action claiming damages from the state. The court did not consider the substance of the claim and dismissed the claim based on the purpose and existence of the law. The influence of this decision on similar cases is yet to be seen.

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