It is true that the Constitution leaves the determination of the electoral system to the Diet. However it is very difficult for the members of the two Houses to discuss this problem without considering their own interests. The attitude the Court showed on these cases is excessively deferential to the Diet, and it results in an infringement of the crucial right of citizens to vote. Justice Fukuda wrote, "when the Diet ignores the constitutional principle of equality of the value of a vote, it is the duty of the Judiciary to declare the Diet's political decision unconstitutional."

MOTONARI IMASEKI
JUNKO NAKAJIMA

2. Administrative Law

Supreme Court 2nd P.B., April 10, 1998

Che v. Minister of Justice
52(3) MINSHŪ 677, 1638 HANREI JIHŌ 63, 973 HANREI TAIMUZU 121

A refusal to permit reentry of a Korean permanent resident who refused fingerprint registration was held to be within the discretion of the Minister of Justice.

Reference:

Immigration-Control and Refugee-Recognition Act, art. 26, para. 1; Alien Registration Law (before 1987 Amendment), art. 14, para. 1; Act to enforce the Agreement between Korea and Japan concerning the Legal Status and the Treatment of the Nationals of the Republic of Korea Residing in Japan, art. 1; Administrative Case Litigation Law, arts. 9, 30.

Facts:

Plaintiff X was born and resided in Japan. She is a national of

the Republic of Korea, but has qualified for permanent residence under 'the Agreement between Korea and Japan concerning the Legal Status and the Treatment of the Nationals of the Republic of Korea Residing in Japan' (hereinafter referred as 'the Agreement on the Legal Status'). Article 14 of Alien Registration Law required an alien (who is over 16 and is going to stay in Japan more than one year) to register his fingerprint. In 1981, X refused to register her fingerprint at the 7th reissue of her alien registration card. She was convicted of refusal to register a fingerprint and fined 10,000 yen on August 1985. After the conviction, X refused fingerprint registration again at the 8th reissue on January 1986. In those days, the movement against fingerprint registration had expanded throughout the country and many Koreans who had qualified for permanent residence rejected it. Under such a situation, the Government took a hard line never to permit the reentry of those who refused fingerprint registration.

In 1986, X applied to the Minister of Justice for permission to reenter in the future for the purpose of study in the United States. The Minister refused it for the reason that X continued to violate the Alien Registration Law and never showed an intention to change her attitude. X departed from Japan without permission for reentry. Then in 1988, X returned to Japan and made an application for landing. But the officials of the Immigration Bureau refused, stating that X had lost the qualification for permanent residence because of her departure without permission for reentry. However, in response to X's objection, the Minister gave a temporary grant of landing for 180 days.

X brought an action, alleging that the administrative disposition, *i.e.*, the refusal to permit reentry based on her rejection of fingerprint registration was illegal and unconstitutional. X claimed that (1) the Minister of Justice should cancel the refusal, (2) the Government should confirm her qualification for permanent residence, and (3) the Government should compensate 1,000,000 yen.

The Fukuoka District Court dismissed the first and second claims on the ground that the departure without permission for reentry had already deprived X of the qualification for permanent residence, so that X did not hold a standing to challenge her status. And the court refused the third claim, as it could not concluded that the refusal by the

Minister was illegal. Fukuoka District Court, September 29, 1989, 40 (9) GYŌSAISHŪ 1300.

However, the Fukuoka High Court made a judgement that X had a standing to sue for the cancellation of the refusal so that the qualification for permanent residence should be restored. The court stated that the Government's claim denying X's standing was against the principle of faith and trust, and that the Minister must reexamine the application for permission for reentry where the previous refusal could be cancelled as illegal disposition. Under the principle of balancing, the disadvantage caused by the refusal of permission would be too severe. Therefore the Fukuoka High Court found that the refusal was invalid as it was beyond the discretion or abuse of authority. However, the court dismissed the second claim since she voluntarily left Japan without permission for reentry and had lost her qualification for permanent residence. And the third claim was dismissed too, since the Minister could not expect that the refusal was illegal. Fukuoka High Court, May 13, 1994, 1545 HANREI JIHŌ 46, 855 HANREI TAIMUZU 150.

Both X and the Minister appealed to the Supreme Court. The Court addressed two issues in separate decisions. The first was, where a permanent resident rejected fingerprint registration, whether the refusal of permission for her reentry was illegal or not. The second was whether she had a standing to sue for the cancellation of rejection. In this article, I will discuss the first issue only.

Opinion:

Appeal dismissed.

Article 26, paragraph 1 of the Immigration-Control and Refugee-Recognition Act (hereinafter referred as the Immigration-Control Act) does not provide anything about the criteria for permission for reentry. The omission of the criteria implies that it leaves it to the broad discretion of the Minister of Justice to permit reentry. In light of the comprehensive nature of the administrative discretion of the Minister of Justice, his disposition was beyond the discretion or abuse of authority only when his decision utterly lacks factual basis or reasonableness in view of common sense.

If the applicant was a permanent resident, the Minister should also

take seriously the preservation of her living. X suffered grave disadvantage from the refusal, since the refusal forced X to make a hard choice of giving up studying in the United States or losing her qualification for permanent residence.

However, the fingerprint registration had been the most secure system to regulate aliens and it promotes the interest of immigration control, though it was eliminated with regard to permanent residents in 1987. In those days the movement against the fingerprint registration was widespread and it seems necessary and reasonable for the Minister to take a strong attitude toward those who refused the registration, in order to preserve the registration and regulate aliens and immigration.

Considering these factors, we cannot say that the decision of the Minister was utterly unreasonable, beyond his discretion or abuse of authority, and illegal.

Editorial Note:

Koreans in Japan have a unique legal status as the largest ethnic minority group. Most of them came to Japan during the colonial period, notably, many Koreans were brought to Japan as forced laborers during World War II. At the end of the War, there were more than 2 million Koreans, many of whom repatriated after Japan's surrender. During the colonial period, Koreans had been granted Japanese nationality, but in 1952 the Japanese government declared them aliens and disenfranchised them. Japan does not automatically assure Japanese citizenship, unless one parent is a Japanese national (Nationality Law, art. 2). On the other hand, many Koreans want to keep their Korean nationality and refuse to apply for naturalization. However, under the 1965 Korean-Japan Agreement on the Legal Status of Koreans in Japan, the Japanese government granted permanent resident status to Koreans. The government cannot deport a Korean unless he has committed a serious felony. The government must pay appropriate attention to secure the right to receive education and welfare benefits, including national health insurance. In 1990, approximately 688,000 Koreans reside in Japan, 90 percent of them are second or third generations. *See* KŌDANSHA'S JAPAN AN ILLUSTRATED ENCYCLOPEDIA

830 (1993).

These Koreans had to register their fingerprint at the issue of alien registration card. The fingerprint registration was enacted in 1952 and enforced over objections among Koreans in Japan. An Alien who is over 16 and wants to stay in Japan more than one year must apply to the Head of the City, Town, Village, or District for alien registration by submitting his passport, two pictures, and his fingerprint of the forefinger of the left hand. He must carry the registration card with him and show it at the request of law enforcement officers.

The fingerprint registration has been criticized as inhumane, since it treats aliens, even permanent residents, like criminals. The 1987 Amendment to the Alien Registration Law required an alien to register his or her fingerprint only once. The fingerprint registration was partially eliminated with regard to permanent residents in 1992, and totally abolished in 1999 (Law No. 134, Aug. 18).

On the scope of discretion of the Minister of Justice in deciding whether to permit reentry, this article consults not only the Supreme Court decision, but also the Fukuoka High Court decision.

1. Article 26, paragraph 1 of the Immigration-Control Act provides nothing about the criteria for permission for reentry. The omission of the criteria is considered as leaving to the broad discretion of the Minister of Justice as to whether to permit reentry.

Extension of residence is also applied to and permitted by the Minister of Justice (Immigration-Control Act, art. 21). As to permission for extension, the Supreme Court has made the following ruling. Supreme Court G.B., October 4, 1978, 32 (7) MINSHŪ 1223.

(1) The criteria for permission of extension are not specifically provided. It implicates that the decision of permission was left to the broad discretion of the Minister of Justice.

(2) The decision is beyond the discretion or abuse of authority, and illegal only when (a) it utterly lacks factual basis because the Minister has misunderstood the important facts, or (b) it was unreasonable in view of common sense because his assessment on the important facts was clearly unreasonable.

In other words, as to permission for extension of residence, judicial control over administrative discretion is limited.

2. In this case, the Court, admitting the broad discretion of the Minister of Justice, clearly followed the precedent as to permission for extension. Yet, there is room for further argument as to whether the case of extension and the case of reentry can be treated similarly. While an applicant for extension has no vested right to remain, an applicant for reentry has once qualified for the right to "permanent" residence.

3. The Agreement on the Legal Status and the domestic act based on it aims to preserve the living of Korean permanent residents. The Minister of Justice should take this aim into consideration, even if these provisions by themselves do not limit the discretion of the Minister.

4. The most controversial point is whether the refusal was reasonable under the facts at hand. The Court recognizes the severe disadvantage X suffered from the refusal of reentry. Nevertheless, it says that the refusal was neither unreasonable nor beyond discretion, in light of totality of circumstances, especially the broad discretion exercised by the Minister of Justice.

However, in reviewing this case, we must take seriously that (1) X had once registered her fingerprint, so imposing on her the need to have her fingerprint taken again and again at the reissue of alien registration would not promote a substantial interest in the immigration control, and that (2) the Immigration-Control Act is different from the Alien Registration Law in nature and purpose. The decision of the Fukuoka High Court may give some suggestions for a better solution.

The Fukuoka High Court indicated that fingerprint registration from the second time had lost importance in the immigration control because of the change of registration practice. In 1974 the Ministry of Justice issued an administrative ruling that from the second time a foreigner need not register his or her fingerprint on the basic registry submitted to the Ministry. So, the Ministry has not collected second time fingerprints for almost 14 years. This means second time fingerprints has lost importance to the Minister.

It seems to me that the Minister's only motivation to refuse permission of reentry was X's objection to the fingerprint registration. However, it was evident that the refusal of reentry, which amounts to

deportation, was too severe a penalty for the objection to the fingerprint registration. Considering the difference between the two statutes in nature and purpose, to refuse permission of reentry to those who have not met an obsolete requirement of the Alien Registration Law leads to the arbitrary discretion of the Minister of Justice. Such a refusal was suspected to violate the due process of law and constitute an abuse of authority as retaliation by the government.

SHIGEYUKI SUTO
TAKATOSHI MUNENO

3. Law of Property and Obligations

1. Supreme Court 2nd P.B., July 17, 1998

Abe v. Credit Association of Hyogo and Daiichi-Kangyo Bank
52 (5) MINSHŪ 1296, 1650 HANREI JIHŌ 77, 983 HANREI TAIMUZU 173

When an unauthorized agency succeeded a principal after his refusing to confirm, the unauthorized act is invalid.

References:

Civil Code, arts. 113, 117, 896.

Facts:

Owing to brain damage, A lost his mental capacity. His son B borrowed money from Cs (defendants, *kōso* appellants, *jōkoku* appellants). Without authority, B gave Cs a property right on A's real estate (*Teitō-ken*, hypothec: real and proprietary security to take money back by public auction if the debt had been paid at the proper time). Cs' right was registered with a public office. Afterwards B died. His wife D and a son and daughters Es (plaintiff, *kōso* defendant, *jōkoku* defendant) succeeded him. A was judged by a Family Court to be incapable of any legal acts. D became A's guardian. D claimed as A's agency to