8. International Law and Organizations

X v. Minister of Justice
Nagoya District Court, September 25, 2003
Case No. (*gyo-u*) 19 of 2002
1148 HANREI TAIMUZU 139

Summary:

Case concerning the deportation of a refugee from Myanmar.

Reference:

(1) Immigration Control and Refugee Recognition Act, 1951 (ICRRA)
(2) Convention Relating to the Status of Refugees, 1951 (the Refugee Convention)

Facts:

The plaintiff is a national of Myanmar, belonging to the minority group of Rohingyan. Since its independence from the United Kingdom soon after World War II, Burma (now Myanmar) has continuously suffered from political instability through repeated coups d'etat and military dictatorships. In 1962, General Ne Win established a military government and severe political and economic conditions were imposed under its socialist policy. In 1988, the State Law and Order Restoration Council (SLORC) led by General Saw Maung took the power. In 1997, SLORC changed its name to the State Peace and Development Council (SPDC), which continues to rule the country to this day.

As SLORC oppressed the people, Daw Aung San Suu Kyi, a popular democratic activist, established the National League for Democracy (the NLD) in 1988 and led the public in resisting the government. The government clamped down on the NLD and put her under house arrest several times.

Amidst such political disorder, the Rohingya has been discriminated against as a minority Muslim group, while the majority consists of Buddhists who came originally from Tibet. The situation became worse

particularly under the SLORC administration. At that time, the plaintiff supported the NLD and participated in its resistance activities. As the military police tried to arrest him, he escaped from the country and continued political activities in Bangladesh, Pakistan and Thailand. After the NLD's victory in the 1990 election, he returned to Myanmar and rejoined the democratic movement. SLORC, however, continued its oppression of the NLD and the plaintiff was in danger of being arrested again. Therefore, he went to Thailand and, having obtained a false passport under another person's name, traveled to Hong Kong and Taipei, and arrived at Nagoya airport on June 22, 1992. He was admitted into Japan as a Temporary Visitor for fifteen days. He stayed with his acquaintances and worked illegally for several years, while continuing his political activities as a member of the League for Democracy in Burma (LDB) in Japan.

On December 6, 1999, he visited the Immigration Bureau in Nagoya in order to prepare for his return to Myanmar. The officer told him to report to the Bureau another day for the investigation of a possible violation of the law, but he never did. On November 2, 2001, he was arrested for violation of Article 70, paragraph 1, item 5, of ICRRA (illegal stay in Japan). On November 22, his indictment was suspended and he was transferred to the Immigration Bureau in Nagoya. On December 14, upon examination by the Immigration Inspector, he was charged with the violation of Article 24, item 1, of ICRRA (illegal entry). The plaintiff filed a complaint with the Minister of Justice (hereinafer "the Minister"), who rejected it as groundless. Accordingly, the Supervising Immigration Inspector issued an order to deport him to Myanmar.

In the meantime, on November 20, 2001, the plaintiff's attorney submitted an application for his status as a refugee. On November 22, the Immigration Bureau received the application formally, but on January 16, 2002, the Minister rejected the application on the grounds that it was submitted after the period required under Article 61-2, paragraph 2 (i.e., 60 days) had passed and that there was no "unavoidable circumstances" that could be invoked in accordance with the proviso of that article. On April 1, 2002, the plaintiff filed a suit with this Court, seeking the revocation of the Minister's decision and the deportation order of the Supervising Immigration Inspector.

The main questions at issue in this case are as follows:
(1) Is the limited time period for filing application for refugee status as prescribed in Article 61-2, paragraph 2 (the so-called 60-day rule), of such a nature as to unduly restrict the application by potential refugees, who are obliged to be in a difficult situation due to persecution by their government?
(2) Granted that the said rule is lawful, should the plaintiff be exempted from the rule because of the "unavoidable circumstances", mentioned in the proviso of that article?
(3) Apart from the above-mentioned two issues, did the Minister for Justice abuse his discretion by not granting the plaintiff special permission to stay in Japan without examining in a substantive manner the applicability of refugee status to him, who was in fact being persecuted by his home government?
(4) Does the deportation order of the Immigration Bureau to forcefully return the plaintiff to his home country where he is being persecuted, without adequate examination of his potential refugee status, violate the law?

Opinion:

The decision by the Minister and the deportation order by the Supervising Immigration Inspector are revoked. The request for revoking the decision not to grant the plaintiff refugee status is dismissed.

(1) Even if the Refugee Convention provides for the duty of the contracting parties to protect refugees, a refugee is not ipso facto granted the right to be protected unconditionally. In principle, each contracting party is given discretion to establish its own procedures for recognizing the status of refugees. The UNHCR Executive Committee's Conclusion No.15 also states that "asylum seekers may be required to submit their application within a certain period of time", thus allowing governments to set time limits. In the light of telecommunication and transportation convenience in Japan, the 60-day limit as prescribed in ICRRA cannot be considered to be unreasonably short. Moreover, even where the time limit has passed, there is a room for invoking "unavoidable circumstances" under the proviso. The 60-day rule therefore cannot necessarily be con-

sidered unlawful.

(2) "Unavoidable circumstances" in the proviso must be those cases where objective and physical obstacles such as illness or traffic suspension occur. The plaintiff contends that he had difficulties in applying for a refugee status because his stay in Japan was illegal. Such assertion, however, cannot be acceptable because it is quite natural that the state does not condone the continuation of a foreigner's illegal presence. Therefore, the plaintiff cannot be considered to have been under "unavoidable circumstances".

(3) However, even though the plaintiff was not recognized as a refugee under the ICRRA procedures, the question whether the Immigration Bureau abused its discretion in dealing with the complaint against the decision of illegal stay and in issuing the deportation order is a matter to be considered separately. Article 53, paragraph 3, of ICRRA provides that an asylum seeker shall not be deported to the territories of countries stipulated in Article 33, paragraph 1, of the Refugee Convention, i.e., the "territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". This is the so-called "non-refoulement" principle in international law. The Minister should have made the decision concerning the special permission to stay after he had examined whether the plaintiff deserved to be recognized as a refugee. Naturally the plaintiff had the burden to prove his own refugee status. Judging from the evidence provided, the plaintiff's assertion is on the whole reliable despite certain doubts as to the details, which are within the permissible range in light of the difficult situation in which he was placed. The plaintiff therefore should have been regarded as a refugee under the Refugee Convention. The fact that the Minister has merely applied the 60-day rule and refused to grant a special permission to stay in Japan without considering the possible refugee status of the plaintiff constitutes an abuse of his discretion.

(4) Since the Minister's decision is found not in conformity with the law, the deportation order issued on the basis of that decision lacks the legal basis, and accordingly unlawful.

Editorial Note:

This is a case involving the plaintiff, who had participated in resistance activities against the government in Myanmar, entered Japan illegally to escape from the persecution, and then was ordered by the Japanese authorities to be deported to his home country because he had failed to apply for the status of refugee within the required period.

In recent years, an increasing number of foreigners seeking asylum enter Japan illegally from other Asian countries, but the Japanese government has been taking rather a strict policy toward asylum seekers. Higher courts in Japan have also kept a similar attitude in a growing number of lawsuits brought by potential refugees. On the other hand, there are some lower courts which have reversed the government decision not to recognize the refugee status (See, e.g., Case concerning a refugee who illegally entered Japan from Afghanistan, *Waseda Bulletin of Comparative Law, Vol. 22*, 2002, pp. 118–121). The present case follows the recent trends among lower courts by ruling the deportation order as an abuse of discretion and hence not lawful, though it did not go so far as to revoke the decision not to recognize the plaintiff's refugee status. The following observations may be made regarding the issues raised by the present case.

First, the Court clearly takes a favorable stance for potential refugees by stressing the need for the government to examine their potential status also at the time when it takes the decision on whether or not to grant special permission to stay in Japan. When the government examines an application for recognition as a refugee, it is rejected in some cases solely for procedural or formal reasons. It is only in rare cases that the applicant whose application was rejected once is recognized as a refugee upon filing a complaint against the decision. The present Court points out that the Justice Minister should have examined the possible refugee status in the deportation procedure also, and decided that it was contrary to the non-refoulement principle to deport the plaintiff to his home country where he was likely to be persecuted.

On the other hand, the Court may be criticized for being inconsistent because, while upholding the rejection of the plaintiff's refugee status on account of the 60-day rule, it recognized the need to examine the

possible refugee status in the deportation procedure. The Court allud to the need for reconsidering the reasonableness of the 60-day rule a matter of future legislative policy. It considered, nevertheless, that t setting of a time limit to the application was justified due to the need terminate the illegal presence of foreigners as soon as possible. It m be argued, however, that 60 days would not necessarily be sufficient f asylum seekers, who are normally under difficult conditions after ent into a foreign country. This decision could have the effect of obligi some potential refugees to hide themselves illegally due to procedu difficulties even if they are in fact genuine refugees.

Second, the present case has left unclear the question of how t destination country of a deportee should be decided. In the deportati procedures under ICRRA, no decision is to be made on the destinati of a deportee. The deportation order, including the destination, is to issued by the Supervising Immigration Inspector after the examination the Immigration Inspector and the ruling of the Minister for Justice on t illegality of the entry into Japan (Art. 51 of ICRRA). The destination is principle the country of the deportee's nationality or citizenship (Art. 5 Para. 1). It is possible exceptionally to be deported to another coun which he/she chooses if the country gives consent (Para. 2). It is al required in accordance with the principle of non-refoulement (Para. that a refugee be not returned to the territory where his/her life or freedc would be threatened. It is, however, only in rare cases that a deportee sent to a country different from his/her home country. The problem is t fact that no clear procedure has been established for implementing the provisions, especially including the procedures to hear a deportee's wi or select the destination different from his/her home country. It is hop that in the future, more systematic efforts will be made in order to ensu that this principle is applied in an effective manner.

In this connection, it must be added that on May 27, 2004 the D passed a major amendment to ICRRA, including important chang regarding the procedures raised in the present Case. The changes, whi are considered to be favorable to asylum seekers, include the followir ① the abolition of the "60-day rule"; ② the establishment of a ne review system involving non-governmental experts, to which a cor plaint may be filed against the Justice Minister's decision not to gra

the refugee status; ③ the granting of "temporary permission to stay" in Japan to those who meet certain conditions while their application for refugee status is being processed; and ④ the adoption of a simplified "departure order" for certain qualified asylum seekers, respecting their voluntary wish, instead of the compulsory deportation including the designation of the country of destination.

Recently, the number of applications for the status of refugees in Japan has been about 300 each year, and the number of those who were recognized as refugees amounts more than ten. But the rate of those who have been recognized is less than 10 percent of the applicants. Moreover, it is pointed out that there are several times as many potential refugees as the actual applicants. In view of the continued increase in regional conflicts and the existence of several governments which keep oppressing their peoples, it would be important that Japan take a more positive attitude and consider adopting more concrete steps in dealing with potential refugees. The amended ICRRA would hopefully be a positive step toward this goal.

X v. Japan

Tokyo District Court, September 29, 2003
Case No. (*wa*) 24230 of 1996
1843 HANREI JIHO 90; 1140 HANREI TAIMUZU 300

Summary:

The Government of Japan had the duty to give information to China on the poison gas weapons which the Imperial Army had abandoned or buried in China upon the termination of the Sino-Japanese war in order to cooperate with China in recovering them and preventing possible human injuries. The Government is accordingly liable for the death and injuries which they have accidentally caused to several Chinese workers and residents.

Reference:

(1) The Hague Convention Respecting the Laws and Customs of War on Land and its Annex (Regulations Respecting the Laws and Customs of War on Land), 1907

(2) Civil Law of Japan
(3) Civil Law of the People's Republic of China.
(4) State Redress Law

Facts:

The plaintiffs are 13 nationals of China who were the victims or family members of the victims of serious injuries caused by the following three separate incidents involving chemical weapons or their material abandoned in China by the Japanese Imperial Army before it withdrew from China after the end of the Sino-Japanese War:

① In October 1974, A (husband of one of the plaintiffs) and two other plaintiffs suffered bodily injuries from liquefied yperite and lewisite gas which leaked from a bombshell while they were engaged in dredging work in a river in Jiamusi, Heilongjiang.

② In July 1982, four of the plaintiffs suffered injury from yperite which leaked from a drum can while engaged in construction work in Mudanjiang, Heilongjiang.

③ In May 1995, B (husband of one of the plaintiffs) and C (husband of another plaintiff) died and another plaintiff was injured when an abandoned bombshell exploded while they were engaged in road construction work in Shuangyashan city, Heilonjiang.

The plaintiffs demanded compensation in the amount of 20,000,000 Yen for each of the victims from the defendant, the Japanese Government, for these injuries on the basis of international law (the 1907 Hague Convention), the Chinese civil law, the Japanese State Redress Law, and the Japanese Civil Law. They claimed that they had suffered injuries by the chemical weapons and shells left or buried in China by the Imperial Army at the end of the Sino-Japanese War and the inaction by the Japanese Government after the War.

The Government argued that it was impossible to avoid the accidents because, inter alia, ① they were unforeseeable, ② the recovery of abandoned weapons was not possible since they were in a foreign country which was outside Japanese sovereignty, and ③ there was no clearly established duty to take positive action under such diplomatic and political circumstances. The Government also invoked Article 724 of the Civil Law, which requires claims for compensation for injury to be filed within

20 years after the injury. It further contended that, even if the plaintiffs had the right to claim compensation, it had been renounced by China through the Japan-China Joint Communiqué of 1972.

Opinion:

1. Injuries caused by chemical weapons abandoned by the Imperial Japanese Army

The Imperial Japanese Army produced poison gas weapons, whose use was prohibited under international law, and deployed them mainly for its troops in Manchuria. The Army actually started to use them as the Sino-Japanese War progressed. Despite the acceptance in 1945 of the Potsdam Declaration, which required Japan to surrender all weapons and arms, chemical weapons in China were ordered by the Army superiors to be abandoned or buried in rivers and underground in order to avoid international blame. The shells and liquefied gas which had caused the injuries in question can be considered to belong to them because of their similarity to those used by the Army and the fact that its troops were stationed in the vicinity of the places where the three incidents took place.

The concealment of chemical weapons was carried out systematically by the Army, including the Minister of the Army, who ordered all troops to incinerate the confidential papers immediately on August 20, 1945.

2. The Government's inaction with regard to the abandoned weapons

The abandonment of the poison gas weapons was thus carried out in the exercise of public power by the Government. The act of leaving the abandoned weapons as they were in China may likewise be regarded as part of the exercise of public power since the question involved is whether the Government had or had not taken necessary measures for their safe disposal.

In the present case, the key question is whether Article 1 of the State Redress Law, which allows compensation for injuries caused by the illegal exercise of public power, applies to the act of the Government which had not taken any measures with regard to the abandoned weapons. Although there are no laws or regulations obligating the public authorities to take specific action in this matter, it must be recognized that order

demands that a certain obligation arises for the authorities to take positive measures to remove the dangerous situation where ① there is an imminent and clear danger to human life and body, ② possible injury is predictable by the authorities, and ③ the injury is avoidable by taking preventive measures.

Applying these requirements to the present case, first, the imminent and clear danger did exist because of the highly toxic and dangerous nature of the gas used for weapons. Secondly, the Government was in a position to collect a sufficient amount of information on those abandoned weapons through various means well before the first incident occurred 29 years after their abandonment, and thus able to predict the possible injuries caused by the leaking or explosion of the gas. Thirdly, although the weapons were located outside Japanese territory, the Government should and could have offered cooperation with the Chinese Government for the investigation of the weapons and their safe disposal. It thus had a duty to take positive measures to cooperate with China, or to entrust the Chinese Government to take preventive measures by providing full available information on the abandoned weapons.

The Japanese Government failed to perform such a duty even after the restoration of formal relations between the two countries through the Joint Communiqué of September 1972, which removed obstacles for its performance, and such inaction led to the incidents in the present case. It must therefore be concluded that the inaction on the part of the Government from the signing of the Joint Communiqué of September 1992 to the time of the respective incidents constitutes an illegal exercise of public power.

3. The 20-year limitation for filing claims under the Civil Law

Article 4 of the State Redress Law provides that the Civil Law procedures apply to the liability of civil servants for compensation for injuries caused by them. According to Article 724 of the Civil Law, the right to file claims for compensation for injuries caused by wrongful acts lapses after 20 years from the date of the wrongdoing. However, since the application of this limitation rule would have the effect of absolving the wrongdoer from his/her duty to compensate, exceptions should be made to its strict application in cases where it results in a situation which

would be grossly against justice and fairness. In the present case, it is the Government itself which had enacted the limitation rule that would benefit from its application despite the clearly unjustifiable act of leaving in China the poison gas weapons which had been deployed by the Imperial Army in violation of international law. The plaintiffs for the 1974 incident, for their part, had been prevented by the Chinese law from coming to Japan to institute a lawsuit for more than 11 years after the incidents. It would therefore be against equity that they would be deprived of their right to claim compensation simply because of the lapse of the 20-year limit. It is thus reasonable that an exception be made to the application of the limitation rule and the plaintiffs be allowed to exercise their rights to claim compensation.

4. Renouncement of claims by the Japan-China Joint Communiqué

The Joint Communiqué of the Governments of Japan and China of September 29, 1972, provided that the Chinese Government "renounces its demands for war compensation from Japan". The Japanese Government interpreted this as following the same method of settlement as under Article 14 of the San Francisco Peace Treaty, i.e., renunciation of claims by China and its people for the acts done by Japan and its people in the course of the War. However, what is at issue in the present Case is the continuous inaction of the Japanese Government *after* the Joint Communiqué until the time of the three incidents in question. Since this inaction is not what had happened during the War, the plaintiffs' claims originating in such inaction have not been renounced by the Joint Communiqué.

Editorial Note:

The case concerns the injuries that caused by the accidents happened after WW II. On this point, it differs from other war-compensation lawsuits in which the plaintiffs claimed compensation for injuries caused "during" the war. Moreover, among similar recent war compensation cases, this is the first case where compensation to the victims of incidents caused by abandoned weapons was recognized on account of inaction of the Government under the State Redress Law. Earlier, in May, the same Court had rejected the plaintiffs' claims in almost the same

kind of lawsuit (Tokyo District Court, May 15, 2003). Among a series of war compensation lawsuits, the present case is the fifth case in which the plaintiff won compensation for war-related injuries from the Japanese Government or company. It should be noted, however, that all of these were rendered by the courts of first instance, and there has been no case where a higher court recognized the claims at the final phase of the case. Since the Government has appealed this case, just as the plaintiffs of the above-mentioned May 2003 case did, the final judgment on the case is still pending. Depending on the final judgment, the case may have significant influence for future similar lawsuits since the number of those who have suffered injuries by the weapons abandoned in China after World War II is estimated by China as exceeding 2,000.

The decision in the present case raises several legal issues. The following observations may be warranted on some of key issues. The first issue is the applicability of Article 1 of the State Redress Law, which obligates the Government to pay compensation for injuries caused illegally, whether intentionally or by negligence. The crucial point in dispute was whether the Government had the *duty to take positive steps*, or assist the Chinese authorities to do so, to identify and recover the chemical weapons in question. Contrary to the decision of May 2003, the Court found that the Government could have avoided the injuries by taking such action. There is no article which definitely provides for any obligation to take preventive measures. However, even in such a case, it would be quite unfair to consider that the Government has no duty to avoid accidents. It seems that the Court recognized the existence of such duty based on fairness. On the other hand, it remains ambiguous to what extent Japanese government had to take measures to prevent the accident. As was also mentioned in the defendant's statement, Japan had held some research missions since 1991. And the intergovernmental conference to deal with the matter had been held 5 times. However, the court did clarify the reason why these efforts could not be deemed to be "positive steps" to prevent the injuries. Though "positive steps" apper to mean available measures to prevent injuries, the concrete application of this criteria in fluid international relations was not clear in the finding.

Another key issue in the present Case was whether or not the Court should apply the 20-year limitation for filing lawsuit under the Civil Law.

In several recent cases involving demands for war compensation, the lower courts have rejected plaintiffs' claims on the basis of this limitation rule. The present Case reversed the trend and held that the strict application of the rule would go unreasonably against justice and fairness. A similar position was adopted in a recent Chinese forced labor case, where the Fukuoka District Court in May 2003 ordered the defendant, the Mitsui Mining Company, to pay compensation. On appeal, however, the Fukuoka High Court reversed the decision on this point in May 2004.

The basic aim of the limitation rule is to adjust conflicts of legal interests promptly by setting certain time limit. In view of this, there might be cases where consistent application of this rule produces unfair results. However, it should also be added that this time limitation has been strictly interpreted in previous cases (eg., Kyoto District Court in January 15, 2003, and Tokyo District Court in March 11, 2003). Thus the derogation from this principle may not be easily recognized.

It appears therefore that the non-applicability of the limitation rule to future claims for war compensation is likely to continue to be controversial.

A third point at issue was the scope of the renunciation of war claims by the San Francisco Peace Treaty, which was followed, according to the defendant, by the 1972 Japan-China Joint Communiqué. The issue was whether the compensation claimed by the plaintiff had been part of those renounced by the Joint Communiqué. The Court held that the plaintiffs' claims were not renounced because the inaction in question on the part of the defendant was something that happened after the war between China and Japan was over. This decision appears to be contrary to the current position of the Government. At the Special Committee of the Diet on the suppression of international terrorism and assistance for Iraq's reconstruction and other matters on October 15, 2003, the Chief Cabinet Secretary Fukuda made the following remarks:

> *All issues of compensation and claims originating in the second World War have difinitively been settled, by the San Francisco Peace Treaty and the subsequent compensation and claims agreements, at the inter-governmental levels between Japan, the Allied Powers, the occupied territories and former colonies.*

This position was adopted recently in several cases in Japan

(e.g., Tokyo High Court, October 11, 2001), as well as by a US District Court in the Walker I and II cases on September 21 and December 13, 2000, dismissing a claim brought by an ex-prisoner of war against a Japanese corporation.

While such a difficulty exists, it appears likely that lawsuits by foreign nationals for war compensation will continue for some time. Under the present system, and given the court precedents, it is difficult to predict whether some of such victims may succeed in obtaining compensation in future lawsuits. It has therefore been suggested by some courts, particularly in cases where the entitlement to pension was involved, that a new law should be prepared to cover all similar claims (e.g., Tokyo District Court, June 23, 1998). As every victim has different backgrounds, and the extent of injuries is also different in each case, the processing of applications by victims under new law would certainly be not a simple task, with numerous highly complicated legal and policy issues to be tackled. There appers however, a limit to what the Judiciary can do with respect to this humanitarian and human rights problems after nearly 70 cases have been dealt with. It would therefore be desirable that initiatives be taken in the Diet to study the feasibility of new legislative measures for the settlement of problem in future.