MAJOR JUDICIAL DECISIONS

Jan.–Dec., 2008

1. Constitutional Law

X v. Japan
Supreme Court G.B., June 4, 2008
Case No.〔*Gyo-Tsu*〕135 of 2006
2002 HANREI JIHO 3; 1267 HANREI TAIMUZU 92

Summary:

In this case, the Supreme Court struck down the portion of Article 3 Section 1 of Nationality Law that provided the requirements for children to acquire Japanese nationality, when the father is a Japanese citizen and mother is not. According to the law, if their parents did not get married, they could not be Japanese citizens. On the contrary, it provided that all children have Japanese nationality when their mother is Japanese. The Majority of the Court thought that the law violated the fundamental constitutional principle of equal protection, so that it not only declared its incompatibility with the Constitution but also admitted children's citizenship through the interpretation of the statute. The conclusion is supported by 9 majority Justices but one Justice has another opinion on the issue of the

constitutional violation. 5 Justices wrote dissenting opinions.

Reference:

Constitution, Article 10, 14; Nationality Law, Article 2, 3

Facts:

Article 10 of the Constitution provides that "[t]he conditions necessary for being a Japanese national shall be determined by law". Following this, the Diet enacted the Nationality Law to determine the requirements for Japanese citizenship. When the plaintiff filed a law suit, the law admitted the nationality of children whose mothers were Japanese citizens. However, children whose fathers are Japanese but mothers are foreigners could not naturally be Japanese. Article 3(1) said that those children could acquire Japanese nationality by registration to the Minister of Justice only when their parents are married. According to the government, this kind of distinction is completely rational because of the following reasons. When their mothers are Japanese, it is the fact that either of the parents are of Japanese citizenship. However, if their mothers are foreigners, it is not so clear that their fathers are Japanese nationals. Therefore, it is an appropriate measure to require the parents' marriage for their children to gain the nationality.

The plaintiff whose mother is a Filippine complained of the unconstitutionality of the law and asked for nationality to be granted. And the father is a Japanese citizen and he confesses she is his child. The basic argument is that the Law which discriminates against some children on the basis of their birth is unconstitutional under the Equal Protection clause(Article 14 of the Constitution). Tokyo District Court ruled for her to acknowledge its violation of equal protection and gave her Japanese citizenship. To the contrary, Tokyo High Court ruled against her and said that the Diet had discretionary power to enact the law concerning the nationality. The determination of its conditions is mandated to legislative policy, so that courts should differ in its judgments and not examine the legislative actions strictly. Moreover, in this case, the High Court said that courts could not grant nationality because this was equivalent to rewriting the law. The law plainly placed some requirements on nationality. Despite its clear statements, if courts granted permission for children to gain

nationality, it would be exercising legislative power, which only the Diet has under the Constitution. The plaintiff appealed to the Supreme Court of Japan. It ruled for her again and played its trump card. This is the eighth case in which the Court exercises its judicial review power to validate the legislation on the constitutional grounds. In addition, the diversity of reasoning suggested by the majority opinion and other ones is very interesting. It is likely to be the beginning of active judicial review in Japan.

Opinion:

The previous decision shall be repealed.

Majority Opinion (Chief Justice SHIMADA Niro, Justice IZUMI Tokuji, Justice IMAI Osamu, Justice NASU Kohei, Justice WAKUI Norio, Justice TAHARA Mutsuo, Justice KONDO Takaharu, Justice NAKAGAWA Ryoji, Justice SAIGUCHI Chiharu):

The basic structure of the law is as follows. Article 2(1) recognizes children's having Japanese nationality if their mothers are Japanese, or their mothers are not Japanese but fathers are, and they acknowledge them as their children before their birth. Then article 3 provides another category in which children are not fathered and their mothers are foreigners. In this case, they could be given recognition to have the nationality only when their parents get married. The plaintiff has a non-Japanese mother but her father has the nationality and has recognized her as his child after her birth. She requested the Minster of Justice to recognize her nationality. However, according to article 3, she could not receive any permission simply because her parents do not marry. She just has acknowledgement as a Japanese citizen's child. She argued that such a distinction is an unequal requirement against some kinds of children and they should be recognized as Japanese citizens. Therefore, the issue before us is whether the distinction among children is unconstitutional and whether their nationality should be recognized though the law plainly does not.

Article 14(1) of the constitution provides the equal protection before the law and prohibits any unreasonable discrimination which does not have a rational basis related to the nature of things. On the other hand, article 10 says that "[t]he conditions necessary for being a Japanese national shall be determined by law". It means that deciding the requirements for acquirement or loss of the nationality is mandated to legislative

discretion. The Diet could prescribe them with considering the history, tradition and political, economic or social circumstances of this country. However, its legislative power is not absolutely arbitrary and should be restricted by the equal protection principle under article 14. So any legislative actions are unconstitutional if they have no rationale to justify legal discrimination in laws.

The nationality is not just a status as a Japanese citizen but is children's legal qualification for the protection of their constitutional rights, public aid and benefit. Therefore, we should cautiously examine the law's different measures among children because it has a huge influence on their legal status in Japan.

The Nationality Law is mainly based on the concept of blood which means a principle that legally formal marriage and the status of children whose parents are in such a preferable relationship should be primarily respected. In addition, it in part opens the door to children who belong to another category in which their parents are not a married couple. It is said that article 3 makes a balance of those different categories to recognize the exceptional acquisition of the nationality for children outside legal marriages. Moreover, it was a legitimate measure to require some kind of relationship with this country for children who hoped to be Japanese, in the light of common sense and social circumstances in this country when the law was enacted. Consequently, we think that the purpose of the law itself has rational bases to justify some distinctive measures.

However, we have to consider recent changes in such circumstances and people's ideas about the family. In these days, the dramatic increase of international communication with globalization has varied the life style of people all over the world. It has delivered a diversity in the way of family planning, which has shifted the concept of marriage as a preferable style into one of many options. It means that it is no longer a criterion for showing the relationship with this country. In giving regard to those changes, we could not say that the requirement of parent's marriage has relevance with the purpose of the law that takes a balance between the principle and the exception. It is difficult to find the rational base for it today.

In the light of the significance of the nationality as qualification for the protection of constitutional rights, and the fact that children in other cate-

gories could be of it, we think children whose mothers are foreigners have suffered from discrimination by the unreasonable measure.

We conclude that article 3 is a violation of constitutional equality under article14(1). We think that even if we pay due respect to the legislative discretion, we could not find a reasonable relationship between the purpose and the measure requiring parental marriage as the condition necessary for being a Japanese national.

Now, we have to consider the more complicated issue about the limits of judicial power. If we eliminate the provision which thinks it is unconstitutional, it would lead to completely ignoring the clear intent of the legislature that in the limited cases children whose mothers are not Japanese citizens are recognized as being nationals. It is necessary for us to relieve the victims of unconstitutional conditions, considering the clear intent of the law makers.

Thereupon, we should deal with this problem as follows. If other requirements are satisfied than parental marriage and registrations are made appropriately, any children could have the nationality. It means that we should interpret the provision retaining its constitutionality and reasonableness. It is an entirely proper construction of the law, which eliminates only surplus requirements through the statutory interpretation and enables the Court to provide direct remedies suitable for the victim in this case. It also just redresses the unconstitutional situation, and does not rewrite the law or exercise the legislative power.

We conclude that when all requirements in article 3 of the Nationality Law except parental marriage are satisfied, we could recognize any registered children as having Japanese nationality. Otherwise, the provision is a violation of Article 14(1) of the Constitution.

Concurring Opinion (Justice IZUMI Tokuji):

Article 3 discriminates against those who are children born of single mothers. It is no less discrimination based on their social status and parent's sex which the Constitution bans with the quite clear statements in Article 14(1). It means that we should examine whether the government has justified such a measure with enough persuasive rationales. To be sure, the purpose of the law that requires the substantial relationship with the country for those who apply for the nationality is rational. However, it does not mean that any measures are appropriate for that purpose. Any

children whose fathers are Japanese citizens should have the same relationship to this country because even if their parents are not in marriage, they have the legal status as parents and an obligation to maintain each other. I can not find any reasons to believe that those whose parents do not get married are irrelevant people for this country. Therefore, I think that the requirement is not an appropriate means for the legislative purpose. Finally, I conclude that it violates constitutional equality under Article 14(1). In addition, I agree with the majority opinion in the sense that the plaintiff should have the nationality.

Concurring Opinion (Justice IMAI Osamu):

I agree with the majority opinion. I would like to write an opinion about the issue of remedy when a part of a particular provision is unconstitutional in order to respond to dissenting opinions.

Dissenting opinions point out that even if the provision in question is unconstitutional, recognition of the nationality is not an exercise of the judicial power allowed any courts by the Constitution. The main purpose of judicial review is to relieve victims of unconstitutional legislation by striking them down on constitutional grounds. Basically, it is enough to avoid applications of unconstitutional laws to cases for that purpose.

However, the basic assumption is quite difficult in the case, like this case, that laws give people some benefits or rights, because if courts validate those, the government could provide nothing. For example, suppose a law provides requirement *A* and *B*. If requirement *B* is unconstitutional, should or could courts relieve plaintiffs who satisfy only requirement *A*? In such a situation, courts should make their judgment in the light of the basic structure of the law, the constitutional grounds on which courts depend in deciding cases, and the appropriateness of the result. And it is possible to interpret a law reasonably to provide benefit for those who satisfy only requirement *A*.

Article 2 of the Nationality Law recognizes the acquirement of citizenship by children whose mothers are Japanese or whose fathers recognize them. But Article 3 provides the additional requirement of parental marriage in cases of children who are not given recognition before birth. According to dissenting opinions, the Diet did not enact an additional requirement but failed to revise the law and left the law unconstitutional. However, I think that the Diet clearly exercised its discretion to eliminate

children belonging to a particular category, even if its action was not a positive one but just the neglect of a constitutional violation.

Therefore, the majority opinion is not creating a new legislation but just interpreting the law while removing an unconstitutional requirement. It is completely possible and not an intervention against the legislative power to construct the law in such a way.

Concurring Opinion (Justice TAHARA Mutsuo):

Nationality is a status as a national and the qualification for the protection of fundamental rights. Though Article 26(1) provides the right to education, its enjoyment depends on whether they are Japanese nationals or not. And laws concerning social security frequently have nationality requirements. Thus, a nationality is decisive in educational and social laws.

According to the law, children are divided into two categories, those who are recognized by their fathers before their birth and those who are recognized after that. While the former is always a Japanese national, the latter may not be. To resolve those unreasonable discriminations, I agree with the majority in the sense that we should recognize any registered children as having Japanese nationality, when all requirements in article 3 of the Nationality Law apart from parental marriage are satisfied.

Concurring Opinion (Justice KONDO Takaharu):

The approach of the majority is criticized as depriving the legislature of any opportunities to consider the requirements in question and restricting legislative discretion unduly. On this problem, I agree with the Concurring Opinion delivered by Justice Imai.

Furthermore, the majority opinion does not mean that it is unconstitutional to revise the law to add other conditions for the acquisition of nationality. It is absolutely possible to prescribe them as long as they are constitutional ones. For example, it is permissible to require children who seek Japanese nationality to be born in Japan or live there for a certain period.

Opinion (Justice FUJITA Tokiyasu):

I think the purpose of article 3 is not to make it hard for children of unmarried couples to be Japanese nationals, but to give good treatment to them when the required conditions are satisfied. In other words, it enables them to acquire the nationality, which otherwise could not be recognized.

I mean that the law does not have the unconstitutional requirement, but the law is unconstitutional because it does not have any provisions that enable children whose parents are not married to be Japanese. Therefore, I could not agree with the basic assumption of the majority that the law has a surplus requirement. Rather, I think the best approach is not to remove them, but to supplement to inadequate conditions by interpreting the law to dissolve its unconstitutionality.

The real issue in this case is whether such an interpretation could be allowed or not. It might be outside the judicial power mandated by the Constitution, as dissenting opinions argue. However, I think the Court should interpret the law as recognizing their nationality. It is not always impossible to make an expanded interpretation of a law for the purpose of redressing its unconstitutionality. Rather, it is just the duty of the Court to do that, not an interference with the legislative power.

Dissenting Opinion (Justice YOKOO Kazuko, Justice TUNO Osamu, Justice FURUTA Yuki):

Recognition of nationality is a basic operation of state sovereignty. According to its nature, the legislature should have the discretionary power to decide its conditions. Even though nationality has the significance of the protection of fundamental rights, the general right to the nationality of a particular country does not exist.

Indeed, the law provides an easy method of naturalization in article 4. It means that, if not for article 3, all people could apply for citizenship. Its procedures have been made much simpler. Therefore, we think that requiring parental marriage to show the close connection to Japan is within the legislative discretion.

Even if denial of application without parental marriage were unconstitutional, the appeal should be dismissed. The reason why children whose parents are not married could not be recognized as Japanese citizen is not the surplus condition of the law, but a lack of provisions covering them. It is not related to whether article 3 exists or not. Expanded interpretation as attempted by the majority is clearly inconsistent with the legislative intent and the content of the law. It is no less than to enact a new law to give citizenship to those who otherwise could not be Japanese. If such an interpretation is allowed, the Court could give any benefit and status by altering the qualifications. Moreover, recognition without confirming their rela-

tionship with this country will lead to problematic situations in which all people could be nationals without any necessary conditions.

Dissenting Opinion (Justice KAINAKA Tatsuo, Justice HORIKAGO Yukio):

We think that the appeal should be dismissed.

The law is to create legal qualifications for Japanese nationality from the beginning. The fact that the law does not provide recognition in some cases is not a denial of them. The legislature is thought not to have any conclusions about them. Therefore, the problem in this case should be the non-existence or lack of statutory law. What is unconstitutional is not the surplus condition of parental marriage, but the lack of a provision enabling children to be Japanese citizens without such a condition or by showing their relationship with this country otherwise. In other words, article 3 itself is giving some children a good treatment, but is not unconstitutional. Ignoring the revision of the law or failing to add new provisions are unconstitutional in this case.

And the interpretation which the majority adopts to recognize the plaintiff's status is not a correct one, simply because it amounts to rewriting the law. We also conclude that the expanded interpretation is impossible. We could not agree with the opinion delivered by Justice Fujita in that sense.

Editorial Note:

This is the eighth case in which the Supreme Court has struck down legislation on constitutional grounds. During sixty years, the Court rarely exercised the judicial review power of legislation. In the new century, it held the Grand Bench and validated legislation in three cases. In addition, its control of administrative actions has been made much stricter increasingly. These tendencies are favorable for public law professors and human rights lawyers.

However, this case has some theoretical problems. First of all, the remedy which the majority found for the plaintiff might be beyond the judicial power. Article 41 of the Constitution mandates the power to enact laws to the Diet. It means that it is the only institution in the government which can exercise the legislative power. Is the construction taken by the nine justices within the role of the judiciary? Is it revising the law, and

should that the legislature do that? The structure of constitutional reasoning also matters. The dissenting opinions suggested that the law itself is constitutional and that the problem is that the Diet continues to leave children who could not be recognized as Japanese citizens. This is persuasive in its way. To be sure, most law professors agree with the conclusion. But, the theoretical difficulties which the case made clear should be considered in the future. This kind of litigation is a litmus test for policy-making by the judiciary and further developments are expected.

2. Administrative Law

Xs v. Hamamatsu City
Supreme Court.G,B. September 10, 2008
Case No.(gyo-hi) 397 of 2005
2020 SAIBANSHO JIHO 21; 1280 HANREI TAIMUZU 60

Summary:

The approval decision for a plan of land readjustment project is relevant to "an action constituting exercise of police power" of art 3.2 of the Administrative Litigation Act, and in this case, it is admitted for appellants to raise the suit asking for the quashing of the approval decision for this plan for a land readjustment project

Reference:

Land Readjustment Act Art 6. 1, Art 52. 1 Art 54 Art 55. 9 Art 76 Art 85 Art 140.

Facts:

This case was one concerning an approval decision about a plan for a land readjustment enterprise which Hamamatsu City(appellee, defendant) carried out, The appellants Xs(plaintiffs) who had estates on the site of the land readjustment enterprise area brought the case before the court asking it to quash the approval decision of the plan.

As a part of the railroad continuative two-level crossover enterprise of