

sion. Since the above Summary and Opinion are extracts from it and the Facts are drafted with reference to it, please refer to <http://www.courts.go.jp/english/judgments/text/2008.04.24-2006.-ju-No..1632.html> for the details of the decision.

4. Family Law

X v. Y (Minister of Justice)

Supreme Court 1st P.B., June 4, 2008

Case No. (*Gyo tsu*) 135 of 2006

62 (6) MINSHU 1367; 2002 HANREI JIHO 3; 1267 HANREI TAIMUZU 92

Summary:

Art. 3, Para 1 of the Law of Nationality accepts that a child who is born between a Japanese father and a foreign mother and recognized by his father after the birth can receive Japanese nationality on the condition that his parents legally marry each other and give notice that they want their child to receive Japanese nationality is submitted to the Minister of Justice. By the article, the distinction between receiving Japanese nationality as a child who is only recognized by his father after the birth and as one who is recognized similarly and legitimated by his parents' subsequent marriage violates Art. 14 of the Constitution; the child can receive Japanese nationality so far as all the requirements are met apart from the "marriage of his parents" and being "legitimated by his parents' marriage".

Reference:

Law of Nationality, Art. 2, Para. 1 and Art. 3, Para. 1; Civil Code, Art. 779, Art. 783, Para. 1 and Art. 789; Constitution, Art. 14, Para. 1

Facts:

X, a boy aged 6, whose mother is a Filipina and father is a married Japanese submitted notice of wanting to receive Japanese nationality to Y, because his Japanese father recognized X; Y rejected it, because all

requirements were not met. And X filed a complaint to the District Court seeking confirmation that he could receive it.

In the first instance, the court held that Art. 3, Para.1 of the law of nationality was inconsistent with Art. 14, Para. 1 of the constitution on the point that it made an unreasonable difference in receiving Japanese nationality between a child legitimated by his parents' subsequent marriage and an illegitimate child born out of wedlock, though his parents had a *de facto* marriage, and that this paragraph should have been construed partially void on the point that it provided that a child could receive it only if he or she had had the status of a "legitimate child", and it permitted X to receive it (Tokyo District Court, April 13, 2005); Y appealed to the High Court.

In the second instance, the court held that even if this provision has been inconsistent with the constitution and has been void, that could not have created a system of law which permitted a child only recognized by his father after the birth to receive Japanese nationality, so X naturally did not receive it, and that since the law of nationality might not be construed by analogy nor broadly, X could not receive it under such a construction, and it set the judgment of the District Court aside and rejected X's claim (Tokyo High Court, February 28, 2006); X appealed to the Supreme Court.

Opinion:

The original decision was reversed, and Y's appeal to the High Court was dismissed.

Art. 3, Para. 1 of the law of nationality, which concerns a child born between a Japanese father and a foreign mother, which does not permit an illegitimate child, only recognized by his father after the birth, but a legitimate child, recognized similarly and legitimated by the parents' subsequent marriage (*junsei* in Japanese) to receive Japanese nationality; such requirements make a difference between them. The legislative intent is that a child recognized by his Japanese father after the birth should receive it because of the parents' subsequent marriage through which he or she may acquire a status of a legitimate child, living with a Japanese father, and so having a closer tie with Japanese society through the family life.

Since that time, our consciousness of family life, including how cou-

ples live together and the parent and child relationship, however, has been changing with the change in our social and economic situation, and, today, the proportion of illegitimate children to the number of live births is increasing, the current status of family life and of the parent-child relationship is changing and becoming more diverse. In addition to this, international transactions increasing with developments in our internationalization increase the number of children born between a Japanese father and a foreign mother. The current status of family life, including living together or not, and the consciousness of *de jure* marriage and of the parent and child relationship based on it is more complicated and diverse than those of Japanese fathers and mothers, so the strong or weak tie of the children to our country may not be measured by whether their parents are *de jure* married or not. As mentioned above, if the children can have a sufficiently closer tie to our country to receive Japanese nationality by the fact that a Japanese father *de jure* marries a foreign mother, in these days, this is not necessarily consistent with the reality of family life.

In some countries, legal discrimination against illegitimate children is tending to be eliminated, and there are some provisions that States Parties shall respect and ensure the rights of each child without discrimination of any kind in both the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, ratified by our country. And after setting down Art. 3 Para. 1 of the Law of Nationality, in many countries where they had permitted an illegitimate child to receive their nationality because of the legitimation by subsequent marriage, this provision has been revised, and then, the child may receive it only because of the recognition by his father.

In the light of the changes in the domestic and international situation of our society, it is difficult to find any reasonable relevance to the legislative intent in maintaining the *junsei* provision.

Meanwhile, Art. 2, Para. 1 of the law of nationality employs the lineage principle¹, having a *de jure* parent and child relationship with either a Japanese father or a Japanese mother makes the child have a closer tie

¹ In Japan, a child can get his nationality based on the blood lineage of his *both* parents (*jus sanguinis*); in common law countries, they employ the birthplace principle (*jus soli*).

with Japanese society and gives him Japanese nationality; on the birth, if either the father or mother is a Japanese, he can receive it. As a result, the legitimate child of a Japanese father or mother, an illegitimate child of a Japanese father, recognized by him *before* the birth² and an illegitimate child of a Japanese mother may naturally have Japanese nationality; an illegitimate child of equally a Japanese father, recognized by him *after* the birth cannot get the status of a legitimate child nor Japanese nationality by nature based on Art. 2, Para. 1, as well as by the notice to the Minister of Justice based on Art. 3, Para. 1, regardless of having a *de jure* parent-child relationship, unless his parents marry each other subsequently. As a result of this distinction, the illegitimate child, only recognized by a Japanese father *after* the birth suffers striking discrimination in receiving Japanese nationality.

It makes no sense at all that the extent of the tie with our society is generally different in the family life with a Japanese father, especially between children recognized by him *before* and *after* the birth, and so it is hard to explain the rationality of such a distinction being set up in receiving Japanese nationality in the light of the extent of the tie with our society. In addition, denying Japanese nationality acquired even by the notice to an illegitimate child, only recognized by a Japanese father *after* the birth, does not fit with the basic stance of the Law of Nationality in part, although we employ the lineage principle of *both* the father and mother in it and an illegitimate child of a Japanese mother can receive Japanese nationality by nature based on the fact of birth.

In considering the above, that the law does not permit this illegitimate child to receive Japanese nationality, both by nature and by the notice, although he is equally a *de jure* child of a Japanese father, unless his parents enter into matrimony, an *act of status* which the child has no control over, can be said to employ a means beyond the very extent necessary for the reasonable relevance to the legislative intent that only people having a closer tie with our country should be given Japanese nationality, and thus to give rise to an unreasonable discrimination.

This distinction, therefore, had become a discrimination without rational reasons, at the latest, when X submitted the notice to Y; a distinc-

² A synonym for prebirth recognition; a father can recognize his unborn baby.

tion based on Art. 3, Para. 1 can be said to have violated Art. 14 of the Constitution.

Editorial Note:

It is not rare that women from Asian countries including the Philippines, give birth to the babies of married Japanese men, who are then recognized by them after the birth, and bring them up in our country out of wedlock. Although the children become, biologically and legally, the children of Japanese fathers in the case, they cannot gain Japanese nationality based on the Law of Nationality. It does not permit them to receive it, does it? They are Japanese children. They have been living in Japan. Over a long time, many illegitimate children of Japanese fathers, including X, have wrestled with this problem and called for the right to live as a Japanese in our country.

We have two provisions for the acquisition of nationality apart from naturalization in our law. The first is Art. 2, Para. 1, which naturally permits receiving Japanese nationality, requires a Japanese to be a legal parent at the time of the birth. A child recognized by a Japanese father only after the birth does not have any Japanese parents at the birth, since recognition is normally done after the birth and the law does not allow it to be applied retrospectively, and so he cannot receive it naturally based on it. The second is Art. 3, Para. 1, provided newly in 1984, which allows an illegitimate child to receive nationality by notice to the Minister of Justice if the parents' subsequent marriage transforms him from an illegitimate into a legitimate child (*junsei*); his parents' marriage is essential for it. Therefore, an illegitimate child recognized by a Japanese father only *after* the birth cannot receive Japanese nationality, not only by nature based on Art. 2, Para. 1 because of the question of the timing of the recognition, but also by the notice to The Minister of Justice based on Art. 3, Para. 1, regardless of having a legal parent-child relationship, unless his parents marry each other subsequently. This judgment led to the end of this unreasonable discrimination.

It is strikingly natural for X, born in Japan, and brought up as the son of a Japanese father, that the reason why "the close tie with our country" is denied is not by the fact his parents do not marry each other, or that they are in a *de facto* marriage. This unconstitutional judgment is crucially

important in that with judicial activism, it emancipated the children from the crisis of forced repatriation and secured the right of permanent residency. They should not be charged with their fathers' responsibility for the misconduct that they had children out of wedlock. In addition, the abolishment of the distinction between legitimate and illegitimate should be the point of view in the next argument for the revision of family law.

After the judgment, our legislature has revised Art. 3 in a mere 6 months³; "recognition by a Japanese father" and "notice to the Minister of Justice" are the only requirements for the acquisition of nationality. Thereby, the door is opened for its easy acquisition, while Art. 3 augments the risk of the fraudulent procurement of nationality based on false recognition by a third party. In this point, the next agenda is whether obligating a scientific method of identification for its requirement; that is, in its acquisition, a problem of to what extent certainty that the legal parent-child relationship is identical with the biological one, namely the reality of a legal parent-child relationship should be required. Even if the scientific method is not made obligatory for the voluntary recognition of all Japanese cases, the same conclusion is not necessarily reached in the case of a foreign mother under the policy of the public law eliminating fraudulent procurement of nationality. For the purpose of balancing the acquisition of nationality as a result of prebirth recognition, this is expected to be argued deeply considering the certainty and reasonability of the process and human rights.

In the end, including the above problem, it is a matter of importance whether our country will stick to or relax the lineage principle and to what extent in the future. Declining population trends are estimated because of the slumping birthrate, and we may rely on a foreign labor force pretty soon, and then, our Law of Nationality will reach a big threshold. The nature of nationality, namely the title of membership of our country, should be called into question once again, considering the change in the substance of family.

³ The law no. 88 in Heisei 20; in force from January 1, 2009; penalty is newly provided for the false notice in order to control the fraudulent procurement of nationality based on false recognition by a third party.