

Sougil Yung Decision, Japan: Supreme Court, 26 January 1976

The Decision of the Court:

The case in question is to be dismissed, and the cost incurred thereby is to be covered by the appellant.

The Opinion of the Court:

As for the three items the appellant and his counsel argued as the sources of their filing objection;

Item 1. #1. The Court today approves as legitimate the recognition and judgement made by the trial court (the court of the first instance), holding that so-called the "principle of non-refoulement" of political criminals cannot yet be recognized as an established general customary law of nations. We so approve in light of the evidentiary relations obtained prior to the original judgement. We further endorse of the judgement that the trial court duly made, yet the logics thereof cannot be adopted by the court hereof.

Item 1. #2. The judgement by the trial court can be approved as legitimate that the Deportation Law of Fled Criminals prior to the amendments (by #86, 1953: by #68, 1964) did not designate the detention of the political criminals in general, whether or not there existed a treaty in point. The argument given by the appellant cannot be deemed appropriate as it repudiates the original judgement on the ground of the stipulation that has been amended after the disposal of the case. Here again on the item, the original judgement does not violate the Constitution; yet the logics thereof cannot be adopted by the Court hereof.

Item 2. We can approve as proper the recognition and judgement made by the original court holding that from the objective point of view the appellant will not definitively be punished on the ground of his political activities, in case he be deported back to the Republic of Korea (hereinafter referred to as Korea). We do so in light of the evidentiary relations obtained prior to the original judgement.

The original judgement does not violate the Constitution in its argument; the argument given by the appellant in this court simply repudiates the rights authoritatively owned by the original court both in the selective judgement of evidence and in the recognition of facts. Accordingly, we disavow to adopt it.

The Court unanimously decides as such, pursuant to Article 7 of Administrative Case Prosecution Code, and Article 401, 95, 89 of Civil Prosecution Code.

Comments

The case at issue holds that the principle of non-refoulement cannot be recognized as an established customary law among nations.

The appellant (also plaintiff), Sougil Yung, is a national of Republic of Korea who illegally landed on and entered Japan around April, 1949. The fact of the appellant's illegal landing and entry came to the finding of the Tokyo Immigration Control Office and he henceforth came under the protection thereby. He then received the issuance of compulsory departure order designating that he be deported to the Republic of Korea. In the said case, the plaintiff sought that the disposition of his compulsory departure be cancelled, and invoked the principle of non-refoulement as a basis for his filing an objection.

The plaintiff, while in Japan had been committed to the political activities appealing the unification of North and South Korea. The activities as such would come under the Anti-Communism Law and the Special Law on Punishing Particular Crimes, which purport to curb and punish severely those political activities in the Republic of Korea. The situation around the plaintiff being as such, he is definite to be subjected to the punishment due to the laws mentioned above, in case he be deported to the Republic of Korea. The plaintiff, therefore, is a political criminal. The plaintiff herein argues that a political criminal such as himself shall not be deported to the territory wherein the probability for the persecution is extremely high. The plaintiff so argues pursuant to the principle of non-refoulement, as an established customary law binding nations.

Article 98, Section 2 of the Japanese Constitution reads as, "The treaties concluded by Japan and established laws of nations shall be faithfully observed.", which binds the Japanese Government to observe the principle of non-refoulement of political criminals. The treatment and disposition in this case to force the plaintiff to leave Japan constitutes a clear and evident violation of the said principle, therefore, of the Constitution.

Article 2, Item 1 of Criminal Extradition (Rendition) Law stipulates that in case reason of rendition being a political offense, the rendition shall not be made. The current case precisely fits within the purview of this law. The deportation is impermissible on this ground, too. The above are the core items the plaintiff claimed, on which the Government counter-argued as follows:

- 1) The principle of non-refoulement of political criminals does not constitute a customary law binding nations;
- 2) So-called "political criminal" in the said principle by definition must be in the factual conditions wherein his country formally has requested his extradition and the search for him has been officially initiated. The plaintiff in the case, therefore, lacks in the conditions necessary to make a "political criminal".

The Tokyo District Court made a following judgement on January 25, 1969. (citation translated from Hanrei-Jihoo, the Current Case Report, p.18, #543)

Principle of non-refoulement is an established customary law among nations and applicable to a said person: 1) in case his extradition has been requested by his country; 2) in case he had been convicted for political offense; 3) in case he has been indicted; 4) in case an order to arrest him has been warranted; 5) in case the situation exists wherein high probability of his punishment &/or prosecution is objectively recognizable to the degree identifiable with the preceding 4 items.

In case of the said plaintiff, the certainty of severe punishment is objectively recognizable if extradited to Korea, therefore the plaintiff is a political criminal that comes under the principle of non-refoulement.

Since compulsory departure virtually means an extradition of criminals back to his country, the principle is applicable to administrative disposition of compulsory departure.

The District Court, accordingly, made a judgement to invalidate the disposition of compulsory departure as unconstitutional, as the Article 98, Section 2 of the Japanese Constitution designates to "observe laws established among nations."

In countering the above decision, the Government filed an appeal. On April 19, 1972, The Tokyo High Court overruled the original decision, dismissing the plaintiff's argument. (Hanrei-Jihoo, the Current Case Report, p.3, #664)

This decision held: that the principle of non-refoulement of political criminals so far has remained as a mere expectation of humanity; that it can hardly be recognized as an established, general law binding nations; that the certainty of the appellant's punishment for his political activities upon his extradition back to Korea cannot be deemed conclusive. The decision rejected not only the status of the principle but also the appellant being a political criminal.

The appellant filed an appeal.

The Supreme Court on January 26, 1976, endorsed the judgement by the Tokyo High Court, dismissing the appellant's claim.

The decision by the Tokyo District Court as mentioned above got quite an attention as the first decision recognizing the principle as an established international customary law, and specifying the scope of its application. It is lamentable that the judgement was overruled by the upper courts. Japan became a party to Convention Relating To the Status of Refugees in January, 1981, and to the Protocol Relating to the Status of Refugees in January, 1982, respectively. As a result, the former Immigration-Control Act got amended to be newly titled as "Immigration-Control and Refugee-Recognition Act" (Cabinet Order #319 of 1951). The act as amended newly includes therein the Article 53, Paragraph 3, stipulating that a person is not to be deported, in principle, to the territories wherein his life or freedom would be threatened. This corresponds with the Article 33, Paragraph 1 of the Refugee Convention wherein the principle of non-refoulement is expressly stipulated. The Article 53, Paragraph 3 of the Act is applicable to all aliens as well as to those who have been recognized as "refugee". The Immigration-Control and Refugee-Recognition Act as amended came into effect as of January 1, 1982. With regard to the types of question posed by the current case, deportation back to Korea is not permissible within the scope of legality, "unless the Minister of Justice finds it considerably detrimental to the interests and security of Japan."