

Seoul Administrative Court
The 14th Branch
Decision

Case No. 2021GuHap78282 Revocation of Deportation and Detention Orders

Plaintiff [REDACTED]
Legal Representative Kim, Jong Chul

Defendant Head of the Daejeon Immigration Office, Cheonan Branch

Closing of Hearings 28 April 2022
Date of Decision 18 August 2022

Rulings

1. The defendant's deportation and detention orders are revoked.
2. The litigation costs shall be borne by the defendant.

Purport of the Claim

As stated in the rulings

Reasoning

1. Background of the disposition

A. The plaintiff is an alien (Article 2 of the Immigration Act) of *** nationality. He disguised himself as a participant in A and entered with a status of stay for Short-Term Visit (C3) through the Incheon International Airport on 6 Nov 2012.

B. The plaintiff applied for recognition of refugee status with the 'fear of persecution including from arrest or torture after his father serving in the military went missing' on 4 Jan 2013. The Minister of

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Justice accepted that the plaintiff has a well-founded fear of being tortured if he returns to *** and recognized him as a refugee on 11 Apr 2014 (hereinafter “refugee”, “recognized refugee” and “refugee applicant” shall be used in accordance with the definitions as set forth in Article 2 of the Refugee Act).

C. The plaintiff has resided in the Republic of Korea since he changed his status of residence to F2 (Article 12, Attachment 1-2 No. 24, para. Da: A person recognized as a refugee, Enforcement Decree of the Immigration Act) on 30 Apr 2014.

D. The plaintiff has been arrested for assault, etc. on 3 Dec 2019 and his period of residence expired on 25 Jan 2020. The D, on 24 Apr 2020, found the plaintiff guilty of assault, inflicting bodily injury, indecent act by compulsion, etc. and sentenced the plaintiff to 1 year and 4 months of imprisonment and 3 years of employment restriction on children and youth related institutions [D 2019Godan****, ****(Combined), ****(Combined), ****(Combined)]. The court decision was confirmed.

E. The plaintiff has been released from B on 16 June 2021. The defendant issued a detention order, as a period of detention from 16 June 2021 to 25 June 2021, under the Articles 51 and 63 of the Immigration Act to review whether he should be subject to deportation, and extended the detention period until 5 Jul 2021 under the Article 52(1) of the Immigration Act.

F. The defendant gave notice to the plaintiff of the Decision on Examining Immigration Offender that ‘the plaintiff shall be deported as ‘plaintiff’s crimes have been clearly harmful to interests or public security of the Republic of Korea and may disturb good morals (the plaintiff has committed serious crimes punished under the Chapter XXXII: Crimes Concerning Rape and Infamous Conduct of the Criminal Act).

G. On the same day, the defendant issued a deportation order to the plaintiff (hereinafter referred to as the “Deportation Order”) under the Article 59 of the Immigration Act, under the grounds of Article 46(1) subpara. 3 and 13 and Article 11(1) subpara. 3 and 4 (A person released after being sentenced to imprisonment without labour or heavier punishment, a person deemed highly likely to engage in any conduct harming the interests or public security of the Republic of Korea, a person deemed highly likely to engage in any conduct that disturbs economic or social order or good morals) of the same Act. The written notice of the Deportation Order, issued with the Deportation Order, had the ‘country of repatriation’ as blank.

H. On the same day, the defendant issued a detention order based on the Deportation Order under the Article 51 and 63 of the Immigration Act until the plaintiff could be repatriated (hereinafter referred to as the “Detention Order”).

[Grounds for Reasonings] Undisputed facts, plaintiff’s evidence 1 and 2 (including branch numbers if there are branch numbers, the same shall apply hereinafter), defendant’s evidence 1 to 8, and the overall purport of pleadings

2. Summary of Arguments

A. Plaintiff

1) Deportation Order is illegal for the following reasons, as the plaintiff would inevitably be repatriated to *** where he has a high risk of being tortured.

A) Article 3 of the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatments or Punishments (hereinafter referred to as the “CAT”), and Article 7 of the International Covenant on Civil and Political Rights (hereinafter referred to as the “ICCPR”) provides for absolute *non-refoulement* without exception where a person has substantial grounds for being subjected to torture; and therefore the Deportation Order is in breach thereof.

B) The plaintiff’s crime is not a ‘particularly serious crime’ and he is not a ‘danger to the community’ based on the circumstances of his crimes, his sentence, and the criteria for deportation for a permanent resident provided in the Article 46(2) of the Immigration Act. Therefore, the plaintiff does not fall under the exception to the principle of *non-refoulement* under the Convention Relating to the Status of Refugees Article 33(2) (hereinafter referred to as the “Refugee Convention”). Therefore, the Deportation Order is in breach of Article 33 of the Refugee Convention.

C) The defendant should have thoroughly investigated the risk of torture to the plaintiff if he returns to *** under Article 3(2) of the CAT, etc. As the defendant has not done so, the Deportation Order is illegal on procedural grounds.

D) Additional to the risk of torture, the Deportation Order would separate the defendant from his mother. This is in breach of the right to family life, etc. under the Article 36(1) of the Constitution and

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Article 17 and 23 of the ICCPR, etc. The violation of plaintiff's private interests outweighs the public interest protected by the Deportation Order, and thus the Deportation Order is illegal on excess and abuse of discretion.

2) Even if the plaintiff is not deported to ***, the Deportation Order is illegal for the following reasons.

A) The defendant should have received suitable and reliable diplomatic assurances from the country the plaintiff is eligible for entry without visa, before the defendant issued the Deportation Order, that he would not be repatriated to *** where he has a risk of torture or persecution, so that the risk of repatriation to *** is effectively removed. The defendant has not done so. Therefore, the Deportation Order is in breach of principle of *non-refoulement* under the Article 3 of the CAT, Article 7 of the ICCPR, and Article 33 of the Refugee Convention.

B) The defendant only provided a notice of deportation order to the plaintiff when it issued the Deportation Order, and the notice only states the relevant Articles in Korean. Therefore, the plaintiff was not provided with reasons for the issuance of the Deportation Order. Thus the plaintiff could not submit evidence to claim that he has no reasons to be deported, and was not ensured procedural rights under the Article 32(2) of the Refugee Convention.

3) As the Deportation Order is illegal as above, the Detention Order which is to be based on a legal deportation order is also illegal.

B. Defendant

1) The Immigration Act provides for a separate dual system of issuance of deportation order and enforcement of deportation for a foreigner, and the country of repatriation is not decided at the stage of the issuance of the deportation order. The Deportation Order did not specify the country of repatriation, in order to consider the plaintiff's preferred country, etc. at the stage of enforcement. As the plaintiff's country of repatriation has not been confirmed nor decided as *** currently, the Deportation Order's legality should not be based on whether it is in breach of the Art. 33 of the Refugee Convention or the Article 3 of the CAT. Therefore, breach of the principle of *non-refoulement* cannot be considered in this case.

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2) The principle of absolute *non-refoulement* without exceptions does not have the status of international *jus cogens*, and considering the number of crimes, their seriousness, and the plaintiff's disrespect of law and order, the plaintiff is considered to be a person that has been convicted of a particularly serious crime and a danger to the community of the Republic of Korea, under the Article 33(2) of the Refugee Convention. Therefore, even if the defendant decides the plaintiff's country of repatriation to be ***, this cannot be considered as in breach of international *jus cogens*. (made as a supplemental claim)

3) Although the plaintiff received warnings from the immigration office, he has repetitively committed crimes and has been imprisoned as a result. Therefore, the plaintiff is subject to deportation under the Immigration Act. This falls under deportation for public order provided by the Article 32(1) of the Refugee Convention, and therefore the Deportation Order is not in breach of the Refugee Convention.

4) The defendant, in consideration of the fact that the plaintiff is a refugee, did not specify the country of repatriation when issuing the deportation order. Under the Article 64 of the Immigration Act, deportation order cannot be enforced before the country of repatriation has been decided. Detention Order that detains the plaintiff until he can be repatriated from the Republic of Korea is legal.

3. Established Facts

From the facts not disputed by the parties and the evidence examined above, as well as plaintiff's evidence 7, 9, and 10, and defendant's evidence 9 to 27, as well as the overall purport of pleadings, the following facts are established.

1) Since 7 Oct 2013, during his stay in the Republic of Korea, the plaintiff committed crimes more than 20 times including assault, interference with business, violation of the Road Traffic Act (Driving Motor Vehicle without Driver's License, Driving while Intoxicated), inflicting bodily injury on other, violation of the immigration Act, fraud, destruction and damage of property, and indecent act by compulsion. The plaintiff has been given lenient punishment of fines 10 times, but has been given 6 months of imprisonment and 2 years of suspension of execution of sentence for assault and insult by the E on 8 Dec 2017 (confirmed on 16 Dec 2017). During the period of suspension of execution of sentence, the plaintiff committed attempted larceny and was given 8 months of imprisonment by the D on 12 Sep 2018, which ended on 10 Jan 2019.

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2) When the plaintiff has been punished by a fine of 30 thousand won for assault on 25 Nov 2012, the Seoul Immigration Office conducted an immigration offender inspection, and determined the plaintiff's violation of law to be trivial and issued a grave warning to him, and received from him a declaration to abide by the law of the Republic of Korea and that if not, he would accept deportation. Although the plaintiff continued to commit crimes thereafter, the defendant and other immigration offices investigated whether the plaintiff should be subject to deportation, and considering the fact that he is a recognized refugee and forcible return would be in violation of Art. 3 of the Refugee Act, only received the declaration to abide by the law 6 times from the plaintiff and issued serious warnings but not a deportation order. The plaintiff's declaration to abide by the law stated that "I will not violate law. If not, I have been informed that I would be subject to dispositions such as the deportation, and I swear to not appeal against such punishment."

3) The plaintiff's mother C entered the Republic of Korea on 26 Oct 2008 and applied for a recognition of refugee status to the Minister of Justice on 8 Nov 2008 from the fear of persecution such as torture. She was recognized as a refugee on 18 Jun 2010.

4) The defendant's higher authority, the Korea Immigration Service of the Ministry of Justice (Refugee Policy Division), instructed a 'investigation on the recognized refugee', and the defendant's employee visited C to conduct preliminary investigation for considering the plaintiff's deportation. C informed the defendant's employee that the 'plaintiff's father is still missing. I fear returning to *** as my family has been threatened since my husband went missing. The plaintiff's older sister is a nurse in United States. The plaintiff's younger sister lives at her boyfriend's house in ***, and has not been threatened in *** unlike other family members had been in the past. I am unsure about the reason.' The investigator confirmed that C often communicates with the plaintiff's older and younger sisters through text messages.

5) The Immigration Investigation Division and Refugee Policy Division of the Korea Immigration Service, Ministry of Justice, internally reviewed the plaintiff's case in or around September 2021. They have created a document titled "Report on Measures for Immigration Offense of a Recognized Refugee (Criminal Offender)". The defendant issued the Deportation Order based on this document. The document included country of origin information of ***, as follows: 'the A government that served its sixth term has been internationally criticized for illegitimately arresting and assaulting opponents and protestors. In 2020, anti-government protests and the government's suppression intensified ***'s unstable political circumstances. The government operates unofficial detention centers to arrest and detain innocent suspects, opposing party's leader, politicians, protestors, journalists, and people charged with violation of COVID

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19 restrictions.’ Concluding remarks based on such information on ***, plaintiff’s crimes, and preliminary investigation on C are as follows.

- Although ***’s situation is not stable, the plaintiff has a *** passport (expiry date – 19 Dec 2021) and is eligible for no visa entry to 34 countries including Hong Kong, Singapore, Malaysia, etc. The plaintiff’s older and younger sisters reside in United States and ***.
- The plaintiff repetitively committed multiple crimes since 2014. Considering that there is high concern on repeat offences, multiple victims, the nature of the plaintiff’s crime - particularly, assaulting an elderly victim multiple times and committing an indecent act by compulsion to a minor, and he has committed crimes during the period of repeat offence, there is little need to continue to provide protection in Korea.
- Recently, the plaintiff has been given a sentence of 1 year and 4 months of imprisonment and 3 years of employment restriction on children and youth related institutions for assault, inflicting injury on other, and indecent act by compulsion and was released from B on 16 June 2021. The plaintiff is therefore clearly a person subject to deportation under the Art 46(1) subpara. 13 of the Immigration Act.
 - The Article 33 (Prohibition of Expulsion or Return) of the Refugee Convention states that the benefit of the provision may not be claimed by a refugee convicted by final judgement of a particularly serious crime and constitutes a danger to the community of the country.
 - The plaintiff’s repeated crimes convey his disrespect of the Korean government authority as well as its law and order, and it is concluded that he has not shown any remorse for previous crimes.
 - Despite multiple crimes, he has been granted permission to stay with 7 declarations to abide by the law, only because he is a recognized refugee.
 - The State’s right to deport an undesirable foreigner is evident through the nature of its sovereignty, and immigration must be strictly regulated for the country to function as a sovereign state. Therefore, we recommend that the deportation order should be issued, and in case of a lawsuit, respond in accordance with the court’s decision.

6) The plaintiff appealed to the Minister of Justice on 5 Jul 2021 on the Deportation Order and the Detention Order. The plaintiff claimed that the Deportation Order is in breach of the Art 3 of the CAT which provides that State shall not expel or return a person to another State where he would be in danger. The plaintiff also claimed that he did not commit a particularly serious crime as provided by the Article

33(2) of the Refugee Convention. Therefore, the Deportation Order, and the Detention Order based thereon is illegal. The Minister of Justice dismissed both appeals on 30 Jul 2021 on following reasons:

- The plaintiff claims that a “particularly serious crime” under the Art 33(2) of the Refugee Convention should be interpreted more strictly at least than the Art 46(2) of the Immigration Act that provides for deportation of a permanent resident, and thus his crime is not a “particularly serious crime”, and the Deportation Order to him is in violation of the Convention. Recognized refugees only have a status of a foreigner, and as not being a foreigner with permanent residence, they are not included in the scope of the Article 46(2) of the Immigration Act that provide for non-deportation of foreigners. However, considering the special status of refugees, they are given special consideration of *non-refoulement*.
- Therefore, a recognized refugee may be deported under the Immigration Act if he or she violated the law of Republic of Korea. As Article 32 of the Refugee Convention (expulsion) states that “the Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order”, a refugee may be deported if there is serious concern that he or she will commit acts that violate of the public order of the Republic of Korea. Article 33 of the Convention (prohibition of expulsion or return) states that “the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.” Therefore, issuing a deportation order to a recognized refugee is not in breach of the Convention.
- The plaintiff has committed a high number of crimes that caused many victims. The degree of his crime of assault, inflicting injury on others, and indecent act by compulsion is not light. Particularly, he has assaulted multiple elderly victims, and committed indecent act by compulsion to a young student in a public area, in the subway. The plaintiff has multiple violence-related criminal history and committed crimes during the period of repeat offense. Considering the above, it is clear that he is subject to deportation under the Art. 11(1) subparas. 3 and 4, and Art. 46(1) subparas. 3 and 13.

Therefore, the Deportation Order is a legal disposition and is not in excess or abuse of discretion.

- The plaintiff claims that under the absolute non-refoulement principle under the Art. 3 of the CAT, repatriation to a country of danger of torture is illegal.
However, while a Contracting State shall not expel or return a refugee in any manner whatsoever to the frontiers of 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, Art 64(2) of the Immigration Act allows repatriation to a country of the person's preference.
- Additionally, the plaintiff claims that the deportation order is in breach of the Art. 36 of the Constitution on family unity and protection of family life as the deportation order separates the plaintiff from his mother, a recognized refugee. However, the plaintiff has a *** passport and is eligible for no visa entry to 34 countries including Hong Kong, Singapore, Malaysia, etc. The plaintiff's older sister (born in **) and younger sister (born in **) reside in United States and ***, and therefore, his family can unite anytime.
- The State's right to deport an undesirable foreigner is evident through the nature of its sovereignty, and a broad policy discretion is allowed for immigration matters, which must be strictly regulated for the country to function as a sovereign state.
- Therefore, even considering the plaintiff's arguments in full, the public interest from the plaintiff's deportation outweighs the private interest of the plaintiff that would be achieved through allowing him to stay in Korea. The Deportation Order is not in excess or abuse of the discretion and is reasonable.
- The Detention Order based on the legal Deportation Order is also legitimate and appropriate.

7) The defendant has not confirmed the plaintiff's preferred country of repatriation before issuing the Deportation Order.

5. Decision

A. Whether investigation on the principle of *non-refoulement* should be conducted when issuing deportation orders to recognized refugees

1) Chapter 6 of the Immigration Act regulates the procedure of issuing a deportation order such as reasons for deportation (Section 1 Article 46), investigations on aliens suspected of such reasons (Section 2, Articles 47 to 50), detention for investigations on reasons for deportation (Section 3, Articles 51 to 57), deportation examinations, decisions, and appeal procedures (Section 4, Articles 58 to 61). Separate from the deportation order procedures, the Immigration Act provides for the procedure of executing a deportation order (Section 5, Articles 62 to 64) including procedures for determining the country of repatriation for the person given deportation order (Article 64). Additionally, Article 46(2) provides that permanent resident is not deported in principle, unless the person has committed crime of insurrection, etc. under the Criminal Act. Article 62(4) of the Immigration Act, on procedures for executing deportation order, prohibits forcible repatriation where a person given deportation order has applied for refugee status pursuant to the Refugee Act but a decision on whether to grant refugee status has not been made, or where the person filed an objection pursuant to Article 21 of the Refugee Act, but the examination thereof has not yet been finished. Therefore, it applies the principle of *non-refoulement* in a way that deportation orders to refugee applicants, who shall not be repatriated as provided by Art 3 of the Refugee Act, may be validly issued, but not to be executed. In practice, Heads of Regional Immigration Services applies the non-refoulement principle by issuing the deportation order to refugee applicants if they fall under Article 46, but not executing the orders until the decision is made on their refugee status. Furthermore, although Article 64 (1) states “A person subject to a deportation order shall be repatriated to the country of which the person is a national or has citizenship”, Paragraph (2) provides that “If it is impossible to repatriate a person subject to a deportation order to the country provided for in Paragraph (1), the person may be repatriated to any of the following countries”, including ‘a country in which he or she had resided before he or she entered the Republic of Korea’ in subparagraph 1, ‘the country where he or she was born’ in subparagraph 2, ‘the country to which the port at which he or she boarded the ship, etc. to enter the Republic of Korea belongs’ in subparagraph 3, and ‘any other country than those provided for in subparagraphs 1 through 3, to which he or she desires to’ in subparagraph 4. According to the articles above, there is still possibility of repatriation to a safe country without concern on one’s life or freedom, when a deportation order has been executed. Considering the above, when only a deportation order to a recognized refugee has been issued under the Immigration Act, the country of repatriation has not been decided, and thus it may seem that Article 3(Prohibition of Refoulement) of the Refugee Act needs not to be taken into consideration.

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2) However, considering the below based on the facts established above as well as the overall purport of the pleadings, as well as the interpretation of Article 3 of the Refugee Act, Heads of Regional Immigration Services, by virtue of the prohibition of refoulement under the Article 3, must, for recognized refugees unlike general foreigners or refugee status applicants, identify the possible country of repatriation at the investigation and inspection stage for a deportation order, reflect what is identified once the deportation order is issued, and specify the repatriation country as much as possible in a way of writing the country of repatriation, or at the minimum explicitly exclude countries with risk of persecution or torture when a recognized refugee is repatriated in the written deportation order. If there had been no such specification of the country of repatriation, or a country with risk of persecution or torture had been included in the specified countries of repatriation, such deportation order is in violation of Article 3 of the Refugee Act.

A) The Article 6 (1) of the Constitution provide that “treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.” Republic of Korea has ratified the United Nations Convention Relating to the Status of Refugees and the Protocol Relating to the Status Refugees on 3 December 1992, and the Convention went into effect on 3 March 1993. Korea has also ratified the Convention against Torture on 8 February 1995. Therefore, the Refugee Convention and the CAT have the same effect as domestic laws, as treaties concluded and promulgated under the Constitution.

B) The Article 3 of the Refugee Act declares the basis for the prohibition of refoulement of recognized refugees as Article 33 of the Refugee Convention and Article 3 of the CAT by providing that “Recognized refugees, humanitarian status holders and refugee status applicants shall not, in accordance with Article 33 of the Convention relating to the Status of Refugees and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, be forcibly returned against their will.” The expulsion or *refoulement* of refugees is prohibited in Article 33 Paragraph 1 of the Refugee Convention that provides “No Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of 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”, although an exception of the prohibition is provided by Paragraph 2, where “The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.” Article 3 Paragraph 1 of the CAT provides “No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial

grounds for believing that he would be in danger of being subjected to torture.” The CAT does not provide for an exception to the prohibition of *refoulement* as does Article 33 Paragraph 2 of the Refugee Convention, and thus the principle of *non-refoulement* within the CAT applies to anyone, without exception. Article 64 (3) of the former Immigration Act (the Immigration Act before its amendment to Act No. 11298 in 10 February 2012, hereinafter referred to as the “Former Immigration Act”) had included, as the basis for prohibition of forced repatriation, only Article 33 Paragraph 1 of the Refugee Convention. This article was removed through the Act No. 11298 on 10 February 2012, when the Refugee Act was legislated as Act No. 11298 on the same day which aimed to “stipulate in detail the refugee recognition procedure and the treatment of refugees, etc., seeking to harmonize international and domestic laws, such as the Convention Relating to the Status of Refugees, and laying the foundation for advancing to an advanced country in human rights,” and included Article 3 which additionally relies on the Article 3 of the CAT for basis for prohibition of forced repatriation. Exceptions to the prohibition of forced repatriation under the CAT cannot be created on the basis of Article 33 Paragraph 2 of the Refugee Convention, as Article 5 of the Convention provides that “Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.” Considering the above in whole, even when a recognized refugee falls under the scope of exceptions provided by the Art 33(2) of the Refugee Convention, his or her repatriation to a country with reasonable grounds to believe to have risk of torture is prohibited under Article 3, para. 1 of the CAT.

C) The principle of *non-refoulement* stipulated in Article 3 of the Refugee Act requires an examination of the country of repatriation for the recognized refugee who is eligible for deportation, for the following reasons. First, a reading of the text of Article 33 of the Refugee Convention and Article 3 of the CAT clearly shows that ‘expulsion’ provided in the Articles includes deportation under the Immigration Act, an act of ‘forcibly repatriating foreigners, who have violated the Immigration Act, from the Republic of Korea against their will.’ Second, according to the Article 3 of the Refugee Act, a recognized refugee shall not be deported to the border of a territory where his or her life or freedom would be in danger, or to another country where there are substantial grounds to believe that he or she will be at risk of being tortured. Furthermore, Article 59 (2) and (3) and Article 64 of the Immigration Act, and Article 63 of the Enforcement Rule of the same Act provides that when the head of Regional Immigration Services examines the reason for deportation and then issues a deportation order to a foreigner, a written notice of deportation order must be issued to the suspect and the country of repatriation must be specified in the said notice of order, thereby allowing one to argue whether repatriation to the country specified in the notice results in violation of the principle of *non-refoulement*, when the legality of the deportation order is in dispute.

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D) Article 3 of the Refugee Act provides greater protection for recognized refugees than general foreigners by prohibiting forced repatriation, thus the key requirement for the execution of a deportation order to a recognized refugee is not whether the refugee falls under Article 46 of the Immigration Act, but whether deportation will be in violation of Article 3 of the Refugee Act. Therefore, there is great need to examine whether the country of repatriation written in the notice of deportation order for the refugee is a territory where deportation or repatriation is prohibited under Article 3 of the Refugee Act. In fact, the heads of Regional Immigration Services, including the defendant, have allowed the plaintiff to stay in Korea when making decision relating to his deportation, invoking Article 3 of the Refugee Act as the main grounds. It seems clear that the plaintiff is eligible for deportation as stipulated in Article 46 of the Immigration Act, so there has been little need to examine whether the plaintiff fell under the Article upon issuing the Deportation Order. Examination relating to plaintiff's deportation by the defendant and the Korea Immigration Service of the Ministry of Justice was mainly focused on violation of the principle of non-refoulement.

E) The defendant argues that the practice for immigration orders is that foreigners who have grounds for deportation are issued deportation order after examining whether or not they are eligible for deportation, and the specific repatriation country is determined at the execution stage of the deportation order. However, the argument above cannot be accepted for the case of recognized refugees to whom the principle of *non-refoulement* to be respected by Article 3 of the Refugee Act. The reasons are elaborated as follows.

(1) A foreigner who has been issued a deportation order can leave the country at any time unless there are special circumstances, whereas it is impossible for a recognized refugee to return to the country of nationality due to fear of persecution. Therefore, the two groups cannot be given same consideration.

(2) Article 32(2) of the Refugee Convention stipulates that 'the expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.' However, the principle of *non-refoulement* of Article 33 of the Refugee Convention is the cornerstone of international protection for refugees and is the minimum obligation of protection applied to all refugees without limitation. Thus, procedural safeguards of this principle should, at the minimum, be similar to that of Article 32 of the Refugee Convention for refugees lawfully residing in the Republic of Korea. It follows that the guarantee of due process stipulated

in Article 32(2) of the Refugee Convention should be applied when a recognized refugee falls under the exception to the principle of *non-refoulement* of Article 33(2) which makes it possible to repatriate to border of territory where his or her life or freedom is threatened. Meanwhile, Article 3(2) of the CAT provides that “For the purpose of determining whether there are substantial grounds for believing that the person would be in danger of being subjected to torture, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.” “Competent authorities” here refers to an administrative or judicial body that makes decisions on deportation, repatriation, etc. However, since decisions on whether there is a risk of torture in the country of repatriation has a significant impact on the recognized refugee's legal status, even if an administrative body has determined the above matters, it is necessary to provide and guarantee the opportunity to appeal through judicial bodies.

(3) Article 64 of the Immigration Act provides for the country of repatriation for a person given deportation order, but for recognized refugees who cannot return to their country of nationality or citizenship (Article 64 paragraph 1) due to fear of persecution, etc., only possible country of repatriation are, according to Paragraph 2 of the same Article, the country in which he or she had resided before he or she entered the Republic of Korea, the country where he or she was born, the country to which the port at which he or she boarded the ship, etc. to enter the Republic of Korea belongs, or any other country to which the recognized refugee desires to be repatriated. However, since the countries listed above are not obligated to receive those who have been given orders to deport from the Republic of Korea. Head of Regional Immigration Service determines the country of repatriation by considering issues including capability of executing of deportation order and the likelihood of reception by the countries. Thus, it cannot be said that the country of repatriation is being determined automatically by Article 64 of the Immigration Act without administrative discretion. Therefore, procedures for access to remedy needs to be established to control over discretion exercised by the heads of Regional Immigration Service. However, the Immigration Act does not have any specific regulations regarding repatriation procedures, and there are no procedural rules or appeal procedures that allow recognized refugees to dispute the decision of the head of Regional Immigration Service regarding the choice of country of repatriation, separate from the deportation order itself. In addition, it is extremely difficult for recognized refugees to use judicial remedies challenging either the decision on the country of repatriation made by the administrative agency or the execution of a deportation order after the issuance of deportation order, because Article 62 (3) of the Immigration Act stipulates that in executing a written order of deportation, the person subject to such order shall be repatriated “without delay” to the country of repatriation after the written order of deportation shall be produced to the person and foreigners such as recognized refugees are in a more vulnerable situation due

to language restrictions, etc. Furthermore, being deported to another country where one's life or freedom may be threatened is an important issue that cannot be taken lightly as the life of the deported refugee may depend on it; however, deportation is a factual act following a deportation order, so once it is executed, it is de facto impossible to object, and there is no practical benefit to argue its illegality. Thus, if the examination of the principle of non-refoulement is carried out only during the execution procedure of the deportation order, the recognized refugee's opportunity to object through administrative or judicial procedures will not be substantially guaranteed. This goes against the purpose of procedural safeguards stipulated in the Refugee Convention and the CAT and also causes a major flaw in the appliance of Article 3 of the Refugee Act. Therefore, we find that the head of the Regional Immigration Service should: investigate the country to which the recognized refugee will be repatriated during the deportation order procedure; specify it in the written notice of deportation order as much as possible; examine whether repatriation to that country would violate Article 3 of the Refugee Act; and guarantee to recognized refugee an opportunity to appeal whether the principle of *non-refoulement* has been violated, through filing either an opposition (Article 60 of the Immigration Act) or an administrative lawsuit against the deportation order.

(4) Although the Immigration Act has separated the procedures for issuance and execution of deportation order, the issuing of the deportation order under the Immigration Act is carried out by the head of Regional Immigration Service, and the execution is done by an immigration official. Therefore, in practice, the superior (the head of Regional Immigration Service) and the subordinates (immigration official) of the same Regional Immigration Service issue and execute the deportation order; thus the procedures cannot be considered to be substantially separated nor is procedural control being achieved through the separation of procedures. The head of the Regional Immigration Service must specify the country of repatriation when issuing a deportation order [Article 59 (2) and (3), and Article 64 of the Immigration Act, and Article 63 of the Enforcement Rule of the same Act], and so the decision on the country of repatriation can already be made at the stage of examining and deciding on deportation order. Therefore, there is not much need to adhere to the logic that the country of repatriation must be determined in the execution procedure separated from the procedure of issuance of deportation order.

(5) The Immigration Act stipulates in Article 62 (4) (Execution of Written Orders of Deportation) that "In cases where a person who has been subject to a deportation order has applied for refugee status pursuant to the Refugee Act, but a decision on whether to grant refugee status has not been made, or a person who has filed an object pursuant to Article 21 of the Refugee Act but the examination thereof has not yet finished, repatriation is banned." In other words, the Act connects refugee recognition procedure and the execution of the deportation order, and explicitly prohibit repatriation of refugee applicants until

decision on their refugee status is made. In practice, the heads of Regional Immigration Service do not execute deportation orders when a decision on refugee status has not been made due to ongoing lawsuits by refugee applicants, etc. (in most cases, refugee applicants in such cases are detained for the purpose of executing the deportation order, so there is little practical benefit to urgent execution of the deportation order); thus it seems there is nothing particularly unreasonable in issuing a deportation order after determining whether the person is subject to deportation, without consideration of the person's refugee status or violation of the principle of *non-refoulement*. However, we find that, at least after the implementation of the Refugee Act, Article 3 of the Act, which takes precedence over the existing Immigration Act for the status and treatment of recognized refugees, must be considered before issuing a deportation order, and not during its execution procedures, for the following reasons: unlike refugee applicants, there is no explicit provision limiting the execution of deportation orders in the Immigration Act for recognized refugees; if the head of Regional Immigration Service has intention of executing the deportation order without delay under the premise that the refugee applicant falls under the *proviso* of Article 62 (4) of the Immigration Act, it is necessary to review whether the refugee applicant should be recognized as a refugee or whether the order complies with Article 3 of the Refugee Act at the stage of the examination of the deportation order; and the former Immigration Act had provided for *non-refoulement* of refugees in Article 64 (3) which laid out execution of deportation orders, and in its *proviso* provided an exception to *non-refoulement* where the Minister of Justice deems that the security of the Republic of Korea is undermined, providing a broader exception than the exceptions stipulated in Article 33 (2) of the Refugee Convention, whereas this provision was deleted on 10 February 2012, and the principle of *non-refoulement* was newly defined to strengthen protection for refugees in Article 3 of the Refugee Act, and Article 4 stipulates that the Refugee Act take precedence over the Immigration Act in relation to the status and treatment of recognized refugees [Article 30 (1) of the Act also provides that recognized refugees residing in the Republic of Korea shall be treated according to the Refugee Convention despite other legislations].

(6) The principle of *non-refoulement* provided in Article 3 of the Refugee Act can be understood as inherently including permission for recognized refugees to continue to stay in the country if it is impossible to deport them to a country where there is no risk of persecution or torture (heads of Regional Immigration Service, including the defendant, have allowed the plaintiffs to stay for similar reasons). Regarding the status and treatment of recognized refugees, the Refugee Act or the Refugee Convention takes precedence over the Immigration Act (Art 4 of the Refugee Act and Article 30 (1) of the Refugee Convention). Since issuing a deportation order and detaining a foreigner under the Immigration Act presupposes that the foreigner may be repatriated to a country other than the Republic of Korea, it is possible that deportation order on a recognized refugee is prohibited if there is no country for the refugee to return to under the principle of *non-refoulement*. Furthermore, we find that if an examination of the country of

repatriation by principle of *non-refoulement* results in a finding that there is no country of repatriation not in violation of the principle of *non-refoulement*, or it will take a prolonged period of time to repatriate him or her, the refugee may be given permission to stay or released from detention with necessary conditions attached (Art. 76-7 *proviso* and Art. 61(2) of the Immigration Act), when we consider the following: Article 60 (1) of the Immigration Act stipulates that a foreigner who has received a deportation order may file an objection to the Minister of Justice, and in this case the Minister of Justice may permit his or her stay, even if they do not fall under any reason mentioned in Article 61 (1) of the same Act (having had Korean nationality or other special circumstances to stay in the Republic of Korea) and the objection is deemed groundless (Article 76-7 of the Immigration Act); and Article 63 (4) of the Immigration Act provides that “If it becomes obviously impossible to repatriate a person subject to a deportation order for such reasons, as his or her entry into another country being rejected, the head of a Regional Immigration Service may release the person from detention.” Considering above, we find that there is great practical benefit to examining the country of repatriation of a recognized refugee at the stage of a deportation order.

B. Legitimacy of the Deportation Order

According to the interpretation of Article 3 of the Refugee Act examined in A. above, by comprehensively considering the facts established above and the overall purport of the pleadings, we find that the Deportation Order is in violation of the principle of *non-refoulement* of the Article 3 of the Refugee Act and therefore illegal (inasmuch as we accept the plaintiff's arguments regarding the violation of the principle of *non-refoulement*, we do not consider the rest of the plaintiff's arguments).

1) The defendant had an obligation to investigate possible country of repatriation for the plaintiff, a recognized refugee, at the stage of investigation and examination of deportation order, and examine whether repatriation of the plaintiff to that country violates Article 3 of the Refugee Act, before issuing the Deportation Order. However, the defendant, in erroneous understanding of the Article 3 of the Refugee Act, issued the Deportation Order on the sole grounds that reasons for deportation existed after examining the eligibility for deportation prescribed in Article 46 (1) of the Immigration Act. The defendant did not specify at all the country of repatriation in the written notice of deportation order. The above reasons are sufficient to conclude that the Deportation Order is illegal and must be revoked.

2) The country in which the plaintiff resided before entering the Republic of Korea or the country where the ship, etc. the plaintiff boarded to enter the Republic of Korea belongs seems to be only ***, which is where the plaintiff is likely to suffer persecution such as torture, etc. upon repatriation. Thus the country of repatriation cannot be determined according to Paragraph (1) and Paragraph (2) subpara. 1, 2,

and 3 of the Immigration Act, and the plaintiff must be repatriated to a country which the plaintiff desires to be repatriated in accordance with Article 64 (2) subpara. 4 of the Immigration Act. If it is not possible to specify the country of repatriation due to the refugee's lack of cooperation in specifying the country of repatriation, the failure to specify a country cannot be considered illegal, as the reason is attributable to the recognized refugee himself. However, Articles 47 to 50 of the Immigration Act stipulate that immigration officials may investigate foreigners suspected of having a reason for deportation and, if necessary, request the foreigner to appear for questioning. Article 52 of the same Act allows the foreigner to be detained for up to 20 days in order for authorities to examine whether or not he or she is subject to deportation. In this case, the defendant detained the plaintiff for 20 days, but failed to inquire the country of repatriation to the plaintiff.

3) The plaintiff, like the plaintiff's mother, was recognized as a refugee because it was recognized that there exists a well-founded risk of being tortured if the plaintiff returned to ***. It is difficult to find that the situation in *** has changed significantly since then, and that the possibility of being tortured has disappeared. Therefore, since there is considerable ground to believe that the plaintiff is at risk of being tortured if repatriated to ***, he cannot be deported to *** in accordance with Article 3 of the Refugee Act and Article 3 (1) the CAT. The defendant did not include any statement to the effect that *** would be excluded from the list of the 'country of repatriation' in the written notice of deportation order issued to the plaintiff. Rather, considering the contents of the defendant's preliminary investigation for the examination of deportation of the plaintiff, the review of the Korea Immigration Service of the Ministry of Justice that the defendant reflected in the Deportation Order [Report on Measures for Immigration Offense of a Recognized Refugee (Criminal Offender)], determination made by the Minister of Justice regarding the plaintiff's opposition, and the argument made by the defendant in this court, we find that the defendant, based on erroneous understanding of the Article 3 of the Refugee Act, issued the Deportation Order on the premise that the plaintiff could be repatriated to ***.

C. Legality of the Detention Order

Article 63 of the Immigration Act stipulates that in cases where a person who has received a deportation order cannot be immediately repatriated out of the Republic of Korea, he or she may be detained. Thus, Detention Order must be premised upon a lawful deportation order. As the Deportation Order is found to be illegal, the Detention Order is also illegal *ipso facto*.

6. Conclusion

[UNOFFICIAL TRANSLATION]

Therefore, the court accepts all of plaintiff's claims and it is so decided as per rulings.