

the employees, while making further efforts to avoid discharging them for reasons of company reorganization, for instance, by soliciting voluntary retirement, etc. Such a way of thinking has so far underlined many past decisions made in court.

By Prof. KAZUHISA NAKAYAMA
KUNIYUKI MATSUO

8. International Law

a. Public International Law

1. Status of Aliens

Action for cancellation of a deportation order. Osaka District Court, Case No. (*gyo u*) 20 of 1975; No. (*gyo u*) 44 of 1976. Decision by the No. 2 Civil Affairs Department on March 29, 1979. Appeal dismissed. 395 *Hanrei Taimuzu* 127.

[Issues]

Whether or not the Justice Minister abused his right of discretion by not giving special permission for residence to an alien who smuggled himself into Japan, stayed in the country for 10 years, and enjoyed economic stability with his own children.

[Reference: Immigration Control Order § 50 (1) (iii) and Administrative Litigation Act § 30]

[Facts]

See Issues.

[Opinions of the Court]

“Whether or not the Justice Minister should give special permission to stay to anyone who files an objection according to Article 50 of the Immigration Control Order belongs to the ex-

tensive, free discretion of the minister.

“Because, whether or not to give an alien permission to enter or stay is a matter of free choice of the country concerned, unless there is a specific arrangement such as a treaty. In this respect, the Justice Minister in handing down a decision according to Article 50 of the Immigration Control Order is entitled to make his decision within the bounds of free discretion out of administrative convenience or as a favor from objective standpoints, while taking into consideration the prevailing international situation and foreign policies.

“However, the scope of this free discretion is not unlimited although very much extensive. It is reasonable to assume that the Justice Minister has abused or deviated from his right of free discretion in such exceptional cases where his decision violently infringed upon human rights or runs counter to the spirit of justice.”

[Comment]

The Supreme Court ruled that whether or not to give special permission to stay in accordance with Article 50 of the Immigration Control Order belongs to the discretion of the Justice Minister. (Decision by the Third Petty Bench, the Supreme Court, November 10, 1960. 13 *Minshū* 1493). Moreover, it ruled that whether or not to have the alien's period of stay renewed according to Article 21 of the Order belongs to the extensive discretion of the Justice Minister (Decision by the Grand Bench, the Supreme Court, October 4, 1978. 32 *Minshū* 1223).

Since the special permit to stay is given as an exception against the validity of compulsory expulsion, it is interpreted that the Justice Minister has more extensive discretion even when compared with cases of renewing the period of stay for those who have been staying here lawfully.

There have been many judicial decisions made by lower courts that refusal to give permission to stay to a person or persons who have smuggled themselves into this country does not constitute an abuse of discretion. The current decision is in line with these past

judicial decisions. Referring, in particular, to the exceptional circumstances that restrict discretion, the current decision held that judging from various circumstances the Justice Minister did not give the plaintiff permission to stay, and that there was neither abuse nor deviation of discretion since it did not extremely infringe upon human rights nor did it markedly run counter to justice.

2. Private Law Order under the Occupation

Tokyo District Court, Case No. (*re*) 270 of 1976. Appeal concerning the claim for registration of land ownership transfer. Decision at No. 33rd Civil Affairs Department on June 11, 1979. Appeal dismissed. Final. 392 *Hanrei Taimuzu* 99, 935 *Hanrei Jihō* 67.

[Issues]

Whether or not the acquisitive prescription of land ownership in the Bonin (Ogasawara) Islands was in effect during the occupation by U. S. forces.

[Reference: Civil Code § § 162, 164]

[Facts]

X(State, plaintiff and appellant) made an appeal for carrying out the formality of transfer registration of land ownership, contending that the now defunct Naval Ministry on October 1, 1942, during the Pacific War, purchased the land in question owned by Y (defendant and appellee) through Y's mother-in-law as part of its operation to fortify the island. Y declared that he had never concluded a sales contract and X lost the case in the first instance.

The points at issue were many, one of them concerning the so-called completion of prescription claimed by X. In other words, X began the independent possession of the land from what it claimed the date of concluding the contract, namely, Oct. 1, 1942.

It also claimed that from the day of Japan's surrender, Aug. 15, 1945, through June 25, 1968, when the administrative au-

thority of the islands were returned to Japan, the U. S. forces held the possession of the land by proxy with the passage of the prescription period of 10 or 20 years.

[Opinions of the Court]

“With regard to the application of Japanese law on the Bonin Islands, the application was virtually suspended with the occupation by U. S. armed forces. In the light of the afore-mentioned memorandum (the writer’s note: Memorandum concerning Governmental and Administrative Separation of Certain Outlying Areas from Japan, dated Jan. 29, 1946), that is, by the separation of the administrative authority and transfer of the administrative authority in accordance with Article 3 of the Peace Treaty, Japanese law became no longer applicable legally speaking. However, on the plane of the order of private law, the U. S. forces made no change in the Bonin Islands and in that sense it can be understood that the Japanese law in existence before the occupation had maintained effect as a sort of customary law. It cannot be interpreted, however, that the U. S. occupation had anything to do with what is called ‘possession’ in private law, which is basic to the acquisitive prescription of private persons.

“Judging from the specific circumstances, it can hardly be considered that the U. S. occupation forces, either standing on the side of an appellant or an appellee, began occupation as the proxy of possession described by the private law with the intent to benefit the said person, or that the United States government began proxy possession for the sake of the appellant as a private person with similar intent on the basis of the transfer of administrative power by the Peace Treaty, as is often evidenced in cases of proxy possession where a leaseholder possesses the land for the lessor or a pawnbroker takes custody of a pledged object for a pawnee.”

“P. S. Re acquisitive prescription in the Bonin Islands: Since the former Bonin islanders of Japanese origin including the appellee were prohibited from entering the region until an agreement on the return of the islands was concluded, it is self-evident that

they had no means to file suits for recovery of possession or management of their own land or against the possessor of the land. In such a case it is reasonable to interpret that the prescription was not in effect. Originally the prescription is a system aimed at not only respecting the fixed state of factual affairs – possession for a long time in the case of acquisitive prescription – but abiding by the maxim “*Vigilantibus et non dormientibus jura subveniunt*,” in other words, a man who has a right but does not exercise his right is no longer entitled to exercise that right. As such, judging from the spirit of the system, if the person entitled had no means to carry out his right, it must be considered that the prescription was not in effect. In the current case, it is difficult to find specific reason to interpret otherwise.”

[Comment]

The occupation by the U. S. forces was conducted for specific political purposes of the victorious country. It supports neither the possessor nor loser in the acquisitive prescription system concerning the loss or gain of rights between private persons in Japan. What sort of private law was in effect during the occupation of the Bonin Islands? There is little doubt that Japanese law had been in existence and applied until Jan. 29, 1946 when the Allied Forces issued the “Memorandum concerning Governmental and Administrative Separation of Certain Outlying Areas from Japan.” In the case of Okinawa and the Amami Islands, a directive called the Nimitz directive was issued to the effect that existing Japanese laws shall be effective, but no such directive was issued in the case of the Bonin Islands. In this regard, it is believed that following the delivery of the said memorandum those similar in content to the private laws in Japan had been observed as customary laws in general except in some special cases. The current decision also followed in step with such a way of thinking. However, there is a theory based on the principle of international law, that is, Article XLIII of the Regulation Concerning the Law and Customs of War on Land, and Annex to the Hague Convention of 1907, which states that the occupant shall respect the laws in force in the

country, unless absolutely prevented. Since this belongs to the field "unless absolutely prevented," it is held in some circles that the existing laws should be applied unless otherwise provided. Moreover, the decision in its P. S. explained that since the islanders of Japanese origin had no means available to intervene in the prescription being prohibited from entering the Islands, the prescription period did not run, either. In short, although the decision did not state specifically, it seems to have interpreted the extraordinary situation caused by the occupation of the U. S. forces as the cause for natural interruption of acquisitive prescription (Civil Code § 164).

By Prof. TOKUSHIRO OHATA
SATORU TAIRA

b. Private International Law

1. Parents and Child (Choice of law to voluntary acknowledgment of a child in private international law).

Yamaguchi District Court, Case No. (wa) 129 of 1974. Claims for damages. Decision by the Civil Division, Jan. 31, 1979. Approved in part. 388 *Hanrei Taimuzu* 114.

[Issues]

The effect of the notification by a father who is a South Korean national of the birth of legitimate children who were not legitimate children and Koreans and the effect of his acknowledgment of the children.

[Reference: Act concerning the Application of Laws in General (*Horei*), § § 8, 18; Civil Code § 781, Family Registration Act, § 52]