

National Human Rights Commission of Korea

Committee on Human Rights Violations 2

Decision

Title **Opinion on the human rights protection of child asylum-seekers staying at the airport terminal for an extended period**

Ruling

1. The petitioners' petition is dismissed.
2. The Committee hereby recommends to the Justice Minister that, if the person who is challenging the justification of the decision to not refer his/her asylum application for refugee status determination through lawsuits and other methods is a child, there is a need to ensure his/her basic treatment during the relevant period and to improve the applicable laws and policies to allow his/her entry into Korea considering the best interest of the child as a primary concern, provided that the asylum application is not clearly abusive in nature.

Reason

I. Result of Investigation on the Petition

1. Case Overview

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|----|-------------|----------------------|---|
| A. | Case | 19Petition0607200 | Human rights violation of child asylum-seekers staying at the airport boarding area |
| B. | Petitioners | As listed in Annex 1 | |
| C. | Defendant | Justice Minister | |

2. Content of Petition

The petitioners are children holding the nationality of the Republic of OOO (hereinafter referred to as "OOO"). The petitioners arrived at Incheon International Airport accompanied by their parents on xx xx, 201x and applied for refugee status. However, the petitioners received a decision of non-referral of their case for RSD and, in objection to the decision, filed a lawsuit to seek a revocation of the decision.

The defendant has not permitted the petitioners' entry into the country and, accordingly, the petitioners have been staying in the departure lounge at Passenger Terminal 1 of Incheon International Airport (area from the security screening zone to the aircraft boarding gate, hereinafter referred to as "airport terminal") since xx xx, 201x after they received the non-referral decision.

On xx xx, 201x, the petitioners requested the defendant to perform its duty as a state party that ratified the United Nations Convention on the Rights of the Child to guarantee the human rights of children by permitting the petitioners' entry into the country on the grounds that staying at the airport terminal seriously damages the rights of the children. The defendant, however, violated the human rights of the children by replying to the petitioners' request that it is difficult to take measures to permit their entry into the country.

3. Arguments of the Parties

- A. Petitioners
As listed in the Content of Petition above.

B. Defendant

According to Article 12 of the Immigration Act, an alien intending to enter the Republic of Korea shall undergo an entry inspection. An alien who is not subject to the prohibition or denial of entry under Article 11 of the same Act and satisfies the requirements for entry under Article 12 is granted entry.

On xx xx, 201x, the petitioners underwent entry inspection together with their parents and their entry was denied as they did not satisfy the requirements for entry. The petitioners then applied for refugee status with their parents on xx xx, 201x and received a decision of non-referral of their case for RSD on the x date of the same month. There are no measures such as entry permit under consideration since there are no additional reasons for permitting their entry.

4. Established Facts

In summary of the arguments of the parties, the following facts are considered established:

A. On xx xx, 201x, the petitioners arrived at Incheon International Airport accompanied by their parents. They intended to enter the Republic of Korea on a 90-day visa. However, on the same day, their entry was denied and the reason cited was that “the purpose of entry is unclear.”

B. On xx xx, 201x, the petitioners’ family applied for refugee status on the ground of “persecution based on the country of origin” and remained in the waiting room for refugee status applicants inside the airport during the review period for determining whether or not to refer the case for RSD. On the x date of the same month, they received notification of non-referral of their case for RSD. The defendant, deeming that there was no reason to permit the entry of the petitioners’ family according to relevant regulations, categorized them as persons who are subject to repatriation and issued an order of repatriation. However, the petitioners’ family refused to be repatriated.

C. On the x date of the same month, the petitioners’ family filed suit to revoke the decision of non-referral of their case for RSD and stayed at the airport terminal until receiving a favorable decision at the appellate court for revocation of the decision on xx xx in the same year. They entered the Republic of Korea on xx xx in the same year and have been living in OO of OO Province as refugee status applicants.

5. Judgment

On xx xx, 201x, while the Committee was investigating their petition, the OO High Court ruled that the decision of non-referral of the petitioners’ case for RSD was unlawful. Accordingly, the non-referral decision was revoked and the petitioners’ entry was permitted. The petitioners expressed an intention to withdraw their petition since the situation in which their rights were being violated came to an end and their petition is therefore dismissed.

6. Conclusion

Based on the reasons above, a decision is made as to Ruling 1 in accordance with Article 32(3) and Article 32(1)8 of the National Human Rights Commission Act.

II. Expression of Opinion

1. Background

According to the Immigration Act, an alien who is subject to repatriation is not allowed entry into the country even during the period of a lawsuit for RSD. Therefore, he/she must stay at the airport terminal or in the departure waiting room until the outcome of the lawsuit is issued. The airport terminal or departure waiting room is an area designed for short-term use, and thus is not suitable for long-term stay. For children in particular, such as the petitioners, long-term stay at the airport terminal or in the departure waiting room is in violation of their rights as it can pose threats to the children’s physical, cognitive and emotional development.

Therefore, when the repatriation of a child who has been denied entry is postponed by reasons of a lawsuit, etc., the decision not to consider the entry of the child is not in compliance with the intent of the Constitution of the Republic of Korea which guarantees human dignity and basic human rights as well as the U.N. Convention on the Rights of the Child (hereinafter referred to as the “Convention on the Rights of the Child”) which defines the principle of the best interest of the child as well as rights to education, health and development. Accordingly, under subparagraph 1, Article 19 of the National Human Rights Commission Act, the committee reviewed this expression of opinion.

2. Standards for Decision and Reference

Articles 6 and 10 of the Constitution of the Republic of Korea, Articles 2, 24, 27 and 28 of the Convention on the Rights of the Child and Articles 3, 4, 16, 20, 22, 27, 31 and 33 of the Convention Relating to the Status of Refugees (hereinafter referred to as the “Refugee Convention”) were applied as the standards for the decision. Articles 15 and 76 of the Immigration Act and the Enforcement Decree of the same Act, the Refugee Act and Enforcement Decree of the same Act, the 3rd and 4th Concluding Observations of the Committee on the Rights of the Child on the report of the Republic of Korea government, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* by the United Nations High Commissioner for Refugees and *Recommendation for Improvement of the System of Refugee Status Application at the Ports of Entry and Departure and Departure Waiting Room Operation* by the National Human Rights Commission of Korea were applied as the standards for reference.

3. Issues with Airport Terminal and Departure Waiting Room

An alien subject to repatriation can use the departure waiting room and other facilities inside the airport and receive medical treatment with emergency landing permission according to Article 15 of the Immigration Act in the case he/she becomes ill while awaiting repatriation. Onsite medical treatment by a physician can be arranged, if necessary, by applying to the Incheon International Airport Corporation for access to security areas. When an alien subject to repatriation requests consultation with an attorney, the defendant makes arrangements by obtaining a permit for access to security areas in the airport from the Incheon International Airport Corporation and also provides an area necessary to hold the consultation.

However, the departure waiting room is where aliens who are denied entry can stay temporarily until their departure. The departure waiting room is small and lacks convenience facilities, and thus is not suitable for long-term stay. The conditions are all the poorer for children as free entry to and exit from the room are not permitted. Therefore, the petitioners’ family refused to stay in the departure waiting room and, even though there is a hotel for transfer passengers at Terminal 1 of the Incheon International Airport, they have been living at their own expense in the departure lounge rather than using the hotel due to economic reasons.

The departure lounge where the petitioners’ family stayed is a resting space for passengers using the airport. As the intensity of lighting is lower than in other departure lounges, the petitioners’ family remained in this area by connecting chairs for passenger use and utilizing them as their bed.

The petitioners had received formal education in their country. During the period of stay at the airport terminal, however, they did not receive any form of education. In addition, the petitioners’ family spent approximately USD 50 a day on food as they did not have a stable income. Due to the high prices of products at the airport, they mainly lived on cheap bread and milk. They remained in an open area 24 hours a day, had no access to direct sunlight or fresh outdoor air and could not perform any outdoor activities.

Meanwhile, according to Article 76 of the Immigration Act and Article 88(3) of the Enforcement Decree of the same Act, the obligation to bear the expenses related to transportation, meals and accommodation of an alien subject to repatriation is with the airline of the flight that the said alien boarded at the time of arrival. However, the airline that the petitioners’ family boarded claims that it can bear expenses for an alien subject to repatriation only when the alien stays in the departure waiting room that is managed jointly by airlines operating flights to Korea.

4. Judgment

A. Necessity to Consider the Best Interests of the Child as the Top Priority

Article 6 of the Constitution of the Republic of Korea prescribes 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.” Article 2 of the Convention on the Rights of the Child prescribes that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his/her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status” and that “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.”

Article 3 prescribes that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” and that “States Parties undertake to ensure the child such protection and care as is necessary for his/her well-being, taking into account the rights and duties of his/her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.” In addition, Article 6 of the same Convention prescribes that “States Parties shall ensure to the maximum extent possible the survival

and development of the child.”

Article 24 of the Convention prescribes that “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health, shall strive to ensure that no child is deprived of his/her right of access to such health care services and shall pursue full implementation of this right and take appropriate measures.” Article 27 emphasizes that “States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development and shall take all appropriate measures to ensure full implementation of this right” and Article 28 states that “Primary education shall be made compulsory and available free to all.”

With respect to the best of interests of the child, the United Nations Committee on the Rights of the Child, through the 3rd and 4th Concluding Observations on the report of the Republic of Korea government in 2011, urged the Korean government to strengthen efforts for the appropriate integration and continuous application of the principle of the best interests of the child as the top priority in all administrative procedures, policies, programs and projects that have impact on or are related to the child. Therefore, even if there were reasons for the children who had been denied entry to stay for a long period of time at the airport terminal, the principle of the best interests of the child must be applied as the primary consideration.

B. Necessity to Consider Guarantee of Procedural Rights and Treatment of Refugee Status Applicants

The Refugee Convention does not specify detailed procedures for the refugee status determination and leave them to the respective Contracting States. However, the Contracting States have the obligation to faithfully implement the Convention and guarantee the treatment of asylum-seekers considering the purpose and intent of the Convention.

When an alien expresses an intention to apply for asylum, the Refugee Convention prescribes that non-discrimination (Article 3), religion (Article 4), access to courts (Article 16), rationing (Article 20), public education (Article 22), issue of identity papers (Article 27), freedom from penalty due to illegal entry (Article 31) and prohibition of expulsion or return (Article 33) are guaranteed for asylum-seekers. In addition, the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* published by the United Nations High Commissioner for Refugees prescribes for the States Parties to secure the provision of basic guarantees to asylum-seekers by considering their special circumstances.

The recommendation adopted by the Executive Committee of the Programme of the United Nations High Commissioner for Refugees at the 28th session in October 1977 on ‘Determination of Refugee Status’ states that “The applicant should be permitted to remain in the country pending a decision on his/her initial request by the competent authority [...] unless it has been established by that authority that his/her request is clearly abusive.” This is also specified in the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees.

In the same context, the National Human Rights Commission of Korea recommended in August 2016 through the “Recommendation for Improvement of the System of Refugee Status Application at the Ports of Entry and Departure and Departure Waiting Room Operation” to revise the relevant laws to guarantee the basic treatment of an alien who received a decision of non-referral for refugee status determination, objects to the decision and contends for justifiability of the disposition through a lawsuit, etc. during the period of the lawsuit.

Therefore, in the case there are reasons for a refugee status applicant who has been denied entry to stay for a long period of time at the airport terminal by reason of a lawsuit, etc., the guarantee of basic treatment of the person according to the Convention of Refugees and the permit for his/her entry need to be reviewed.

C. Necessity of System Improvement

An alien who submits a refugee status application at the port of entry undergoes screening for referral for an official refugee status determination process separate from the entry inspection process according to the Immigration Act and, if he/she is determined to have a refugee claim, the alien enters the country and undergoes refugee status determination. However, if it is decided that there is no refugee claim, he/she receives a decision of non-referral. Upon this decision, the alien receives inspection for entry permission according to the Immigration Act and either enters the country or is denied entry, and thus comes within repatriation procedures.

An alien who is not referred for refugee status determination or does not satisfy the requirements for entry is categorized as an alien subject to repatriation as his/her entry into the country is not permitted. When a refugee status applicant objects to this decision, he/she can file a lawsuit to revoke the decision and the applicant’s repatriation is postponed until the outcome of the lawsuit is issued which can be as short as six months or up to one year. However,

according to the current system, an alien subject to repatriation cannot enter the country even during the course of a lawsuit and, as a result, he/she has to stay at the airport terminal or in the departure waiting room.

Between the airport terminal and departure waiting room, it is more advantageous in terms of the burden of expenses to stay in the departure waiting room. However, the departure waiting room is where aliens who are denied entry stay temporarily until their departure. The departure waiting room is small in scale and lacks convenience facilities. Therefore, long-term stay in the departure waiting room can lead to hygiene and health issues. In addition, free entry to and exit from the departure waiting room are not permitted.

The airport terminal is also not a suitable place for long-term stay. It is all the more so when the alien in question is a child. Aliens staying at the airport terminal have limited access to sunlight or fresh outdoor air, lack access to proper nutrition, lack access to educational institutes such as schools and childcare centers, and are exposed to airport users and staff 24 hours a day. As such, the environment threatens their health as it can cause stress and affect their quality of sleep. In this place, the child's right to development as well as the rights to education (Article 28) and health (Article 24) as prescribed in the Convention on the Rights of the Child cannot be guaranteed. In addition, it does not conform to Article 3 of the same Convention, which prescribes that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Moreover, provided that the application is clearly not abusive according to international standards, allowing a person who is challenging the justification of the decision to not refer his/her asylum application for refugee status determination through lawsuits and other methods to stay in the country for the duration of the appeal to an administrative body and the courts, and providing basic guarantees to the person as prescribed in the Refugee Convention would be an ideal approach for the Korean society which strives to be an advanced human rights oriented country.

Accordingly, for the protection of the human rights of children seeking asylum, the Committee expresses to the Justice Minister the opinion that, if the person who is challenging the justification of the decision to not refer his/her asylum application for refugee status determination through lawsuits and other methods is a child, provided that the asylum application is not clearly abusive in nature, there is a need to ensure his/her basic treatment during the relevant period and to improve the applicable laws and policies to allow his/her entry into Korea considering the best interest of the child as a primary concern.

5. Conclusion

Based on the reasons above, a decision is made as to Ruling 2 in accordance with Article 25(1) of the National Human Rights Commission Act.

February 17, 2020

Chairperson	Lee Sang-cheol
Commissioner	Cho Hyeon-wook
Commissioner	Moon Sun-hui

<Annexed Paper 1>

Petitioners

1. ○○○ ○○○ ○○○○ (Born in 201x, male)
2. ○○○ ○○○ ○○ ○○○○ (Born in 201x, male)
3. ○○○ ○○○ ○○ ○○○○ (Born in 201x, female)
4. ○○○ ○○○ ○○ ○○○○ (Born in 201x, male)

Relevant Regulations

1. Constitution of the Republic of Korea

Article 6

- ① 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.
- ② The status of aliens shall be guaranteed as prescribed by international law and treaties.

Article 10

All citizens shall be assured of human worth and dignity and have the right to pursuit of happiness. It shall be the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals.

2. Immigration Act

Article 15 (Emergency Landing Permission)

- ① If it is deemed necessary for an alien on board a ship, etc. (including crew members) to land urgently due to a disease or any other accident, an immigration control official may permit an emergency landing for up to 30 days, upon receipt of an application filed by the captain of the ship, etc. or the forwarding agent.
- ② Article 14(3) and (5) shall apply mutatis mutandis to paragraph (1). In such cases, “crewman’s landing permit” shall be construed as “emergency landing permit” and “landing permission for crew” as “emergency landing permission.”
- ③ The captains of ships, etc. or forwarding agents shall bear the living, medical and funeral expenses of a person who makes an emergency landing and all other expenses incurred during such landing.

Article 76 (Obligation to Repatriate)

- ① The captain of a ship, etc. or a forwarding agent operating a ship, etc. on which any of the following aliens embarked shall immediately repatriate such alien out of the Republic of Korea at his/her expense and on his/her own responsibility:
 1. A person who fails to meet any of the requirements under Article 7 or 10;
 2. A person whose entry is prohibited or refused under Article 11;
 3. A person whose entry is not permitted by any reason attributable to the captain of the ship, etc. or the forwarding agent under Article 12(4);
 4. A crew member who has landed under Article 14 or a passenger who has landed for tourism under Article 14-2 fails to return to the ship, etc. on which he/she embarked until the ship, etc. departs from the port;
 5. A person falling under Article 46(1)6 or 7 who receives a deportation order.
- ② Notwithstanding paragraph (1), if necessary for the effective repatriation of aliens, the head of a Regional Immigration Service may provide the captain of a ship, etc. or a forwarding agent with a specific place located in a port of departure and entry until repatriating the aliens. In such cases, where the head of the competent Regional Immigration Service makes a request regarding the management of the place or aliens staying in the place, the captain of the ship, etc. or the forwarding agent shall comply with such request unless there is a compelling reason not to do so.

3. Convention on the Rights of the Child

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his/her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his/her well-being, taking into account the rights and duties of his/her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 6

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his/her right of access to such health care services.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures, such as the introduction of free education and offering financial assistance, in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

4. Convention Relating to the Status of Refugees

Article 3 (Non-discrimination)

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4 (Religion)

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

Article 16 (Access to Courts)

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he/she has his/her habitual residence the same treatment as a national in matters pertaining to access to the Court, including legal assistance and exemption from *cautio judicatum solvi*.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he/she has his/her habitual residence the treatment granted to a national of the country of his/her habitual residence.

Article 20 (Rationing)

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 22 (Public Education)

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 27 (Identity Papers)

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 31 (Refugees Unlawfully in the Country of Refugee)

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 33 (Prohibition of Expulsion or Return (“Refoulement”))

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.
2. 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/she is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.