

Notable Supreme Court Cases: Administrative Law

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*Translated by JKL student editors***

I. Supreme Court Decision 2017Du38874, Decided July 11, 2019 [Revocation of disposition refusing visa issuance] <Case on the legitimacy of an administrative office's disposition to reject an overseas Korean's visa application on the basis of an entry ban issued against that person, without exercising any discretion regarding the bindingness of the entry ban>

1. Summary of the Case

(1) Plaintiff was born in the Republic of Korea on December 15, 1976. Upon acquisition of U.S. citizenship on January 18, 2002, Plaintiff lost his legal status as national of the Republic of Korea and became an 'Overseas Korean' (a legal status encompassing Korean nationals residing abroad and non-national Koreans having foreign nationality ("foreign national Korean")); Plaintiff constitutes a foreign national Korean). Defendant is the head of a diplomatic mission delegated with the authority to issue visas by the Minister of Justice.

(2) The Commissioner of the Military Manpower Administration filed a request with the Minister of Justice on January 28, 2002 to the following

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effect: “The Plaintiff effectively evaded mandatory military service by acquiring U.S. citizenship after having left the country with permission from the Commissioner of the Military Manpower Administration to travel overseas for the purposes of performing in concerts. Should the Plaintiff enter the country as a foreign national Korean and engage in the entertainment business such as by making television appearances, launching albums, giving performances, etc., it is expected that the morale of officers and soldiers of our armed forces would be eroded, that juveniles will neglect their duties for mandatory military service, and that the acquisition of foreign nationality would be abused as a means of evading military service. As such, we request the Ministry of Justice, should the Plaintiff seek to reenter the country under the status of overseas Korean, to forbid him from engaging in for-profit business activities, for example, through either formal or informal employment as a singer. Where such measures are rendered impossible, we request that the Ministry of Justice prohibit the Plaintiff from entering the Republic of Korea.”

(3) On February 1, 2002, the Minister of Justice decided to prohibit the Plaintiff from entering Korea pursuant to Article 11(1) iii, iv, and vii of the Immigration Act, and entered such information on the intranet (“Immigration Management Information System”) but did not notify the Plaintiff of its decision to forbid Plaintiff’s entry into Korea (hereinafter “the Instant Entry Ban”).

(4) On August 27, 2015, the Plaintiff filed an application to the Defendant for the issuance of an F-4 (Sojourn as Overseas Korean) visa. On September 2, 2015, the Defendant informed the Plaintiff’s father (a nonparty) via telephone call that “The Plaintiff constitutes a person subject to immigration restriction and the issuance of the visa is thus rejected. Inquire the Ministry of Justice for detailed information.” Around this time, Defendant returned Plaintiff’s passport and visa application form, but did not issue a written document of disposition rejecting the issuance of visa and specifying the grounds for the disposition (hereinafter “Instant Disposition Refusing Visa Issuance”). The grounds for the Instant Disposition Refusing Visa Issuance, as described by the Defendant in the case at hand, was that the Instant Entry Ban, issued in 2002, forbids the Plaintiff’s entry.

(5) The Plaintiff filed a lawsuit seeking revocation of the Instant

Disposition Refusing Visa Issuance. The first instance court and the lower court both ruled that the Instant Disposition was legitimate. The lower court's decision was based on the following grounds. The Instant Entry Ban constituted a "disposition"; as such, insofar as there exists no serious or conspicuous flaw in the disposition, the Plaintiff should have raised a complaint against the Instant Entry Ban by filing an administrative lawsuit seeking its revocation within the prescribed period for the filing of revocation suits. As the Plaintiff did not do so, the Instant Entry Ban became incontestable, and the Defendant was bound by the effect of the Entry Ban. As such, it was justifiable for the Defendant to issue the Instant Disposition Refusing Visa Issuance pursuant to the foregoing decision. Based on these grounds, the lower court found that the Instant Disposition Refusing Visa Issuance was legitimate and that Plaintiff could not assert a flaw in the Instant Entry Ban as the flaw in the Instant Disposition Refusing Visa Issuance in the case at hand, which is an administrative suit seeking the revocation of the Instant Disposition Refusing Visa Issuance. The Plaintiff appealed the lower court's decision, leading to the Supreme Court case at hand.

2. Findings of the Supreme Court Decision

The decision at hand remanded the lower court ruling on the grounds that the Instant Disposition Refusing Visa Issuance is not exempt from the documentation principle pursuant to the Administrative Procedures Act. In addition, the Supreme Court found that the Instant Disposition Refusing Visa Issuance was possibly in violation of the principle of proportionality, for the head of the diplomatic mission abroad was completely negligent in its exercise of discretionary authority in rejecting the visa application, rendering the Instant Disposition Refusing Visa Issuance solely on the grounds that it was bound by the Instant Entry Ban, which had been made 13 years and seven months earlier.

(1) Whether the Instant Entry Ban has binding force

1) A disposition is not established until an administrative agency externally expresses its administrative determination, thereby precluding itself from freely revoking or withdrawing the said disposition; hence, the

Minister of Justice's decision to forbid Plaintiff's entry pursuant to the relevant legal provisions does not necessarily establish itself as a 'disposition.' The Instant Entry Ban was not an official, externalized expression of the Minister of Justice's intent, but merely an internal management of information by entering such decision in the Immigration Management Information System on the government intranet. Therefore, the Instant Entry Ban does not constitute a "disposition," which allows for review by an appeals court.

However, the lower court determined that the Instant Travel Ban constituted a disposition, and thus deemed it equitable and appropriate as well as granting incontestability to the Instant Travel Ban. In so determining, the lower court erred by misapprehending the legal principle on the nature of a disposition, thereby adversely affecting the conclusion of the judgment.

2) The Instant Entry Ban has the nature of a directive order within administrative agencies regarding the visa issuance or permission of entry. In other words, it can be deemed that the Minister of Justice made an order, to the heads of diplomatic missions abroad, etc. delegated with the authority to issue visas, to the effect that "The Plaintiff constitutes a person who is prohibited from entering the Republic of Korea pursuant to each subparagraph of Article 11(1) of the Immigration Act; as such, do not issue a visa or make a decision to allow his entry into the Republic of Korea."

However, even though the Instant Disposition Refusing Visa Issuance was made on the basis of the Instant Travel Ban, which constitutes the Minister of Justice's instruction to the head of diplomatic missions, etc., this does not necessarily guarantee the legitimacy of the Instant Disposition. Whether the said disposition is legitimate ought to be determined on the basis of the Constitution, relevant law, externally binding legal provisions and their legislative purposes, and whether it conforms to general legal principles including the principles of proportionality and equality.

Nevertheless, the lower court determined, without further deliberation, that the Defendant's Instant Disposition Refusing Visa Issuance was legitimate as it was bound by the effect of the Instant Travel Ban. In so determining, the lower court erred in its judgment by misapprehending the legal principle on administrative direction amongst administrative agencies, thereby failing to exhaust all necessary deliberation and thus adversely affecting the conclusion of the judgment. The grounds of appeal

assigning this error are with merit.

(2) Violation of the Administrative Procedures Act

The Administrative Procedures Act, a general law regarding administrative procedures, stipulates in Article 24(1) that “In rendering dispositions, administrative agencies shall do so in writing except as otherwise specifically provided in other Acts and subordinate statutes, etc., and, where such rendering is made in the form of electronic document, they shall obtain the consent of the concerned parties, etc.: Provided, that in cases necessitating prompt actions or in cases of minor matters, such dispositions may be rendered by way of oral statement or other methods.” This provision is intended to secure the conspicuousness of the dispositive contents and protect the rights and interests of the counterparty of a disposition by preventing controversy over the existence of the disposition. As such, any disposition in violation of the foregoing provision shall be deemed null and void, because of the serious and conspicuous flaws therein.

Examining the contents of relevant provisions, including Article 3(2), ix of the Administrative Procedures Act and Article 2, ii of the Enforcement Decree of the Administrative Procedures Act, in light of the legislative intent of the Administrative Procedures Act, which is to secure impartiality, transparency and credibility of administration, and to protect the rights and interests of the counterparty of dispositions, the “matters regarding entry and exit of foreigners,” which are excluded from the application of the Administrative Procedures Act, refer only to the matters prescribed by the Enforcement Decree of the Administrative Procedures Act, namely, those matters either considered to be unnecessary or difficult to be resolved through administrative procedures due to the nature of the relevant administrative action, or matters resolved through the procedures comparable to administrative procedures. However, the need to undertake administrative procedures is not denied as a matter of fact on the sole ground that the matters at issue pertain to the entry or exit of foreigners.

A disposition rejecting a foreigner’s application for a visa is not a disposition that imposes a duty on, or actively restricts the rights and interests of, the party concerned. Thus, a counterparty of a visa refusal is not afforded the ‘opportunity to be given a prior notice of disposition’ under Article 21(1) of the Administrative Procedures Act, or the ‘opportunity to

present opinions' under Article 22(3) of the Administrative Procedures Act. However, a disposition rejecting an application for a visa may not be readily and uniformly considered as a disposition for which, by its nature, the 'drafting and delivery of a dispositive document' is unnecessary or impossible as prescribed in Article 24 of the Administrative Procedures Act. Indeed, a review of general work protocol regarding visa issuance suggests that some heads of overseas diplomatic missions, unlike the Defendant, issue written documents when rejecting visa applications and/or allow for visa applicants to access their application results and grounds for those results online. In addition, as immigration-related Acts do not provide for a separate provision regarding the drafting of a dispositive document when rejecting a visa application, the competent authority rendering a disposition rejecting a foreigner's application for the issuance of a visa is precluded from substituting procedures prescribed in Article 24 of the Administrative Procedures Act for procedures comparable to administrative procedures.

However, the lower court concluded that the disposition rejecting a foreigner's application for the issuance of a visa constituted a disposition that was either impossible or deemed unnecessary to complete through administrative procedures due to the nature of the relevant disposition, and thus, may not be subject to the application of the Administrative Procedures Act. In so determining, the lower court erred in its judgment by misapprehending the legal principle on the exclusion of the application of the Administrative Procedures Act, thereby adversely affecting the conclusion of the judgment.

(3) Discretionary acts and the non-use of discretionary authority

The issuance of a visa for an overseas Korean constitutes an act of discretion by an administrative agency, meaning that an administrative agency is not indiscriminately obliged to grant a visa whenever an overseas Korean applies for the issuance of a visa and satisfies the requirements for the status of sojourn as overseas Korean, as prescribed in Attachment 1-2 of the Enforcement Decree of the Immigration Act. In a case where an overseas Korean applying for the status of sojourn meets certain conditions for denying entry, such as those prescribed in each of the subparagraphs of Article 11(1) of the Immigration Act or the grounds for exclusion from the granting of the status of sojourn as overseas Korean prescribed in Article

5(2) of the Overseas Korean Act (e.g., “where a Republic of Korean male becomes a foreigner by renouncing or losing the nationality of the Republic of Korea with a view to evading mandatory military service”), the administrative agency has discretion not to issue a visa for the status of sojourn as overseas Korean, where the public interest to be attained by not allowing the overseas Korean’s sojourn in the Republic of Korea is greater than the disadvantage resulting therefrom.

In the event where the legal basis for a given disposition grants the competent administrative agency discretionary power to determine the requirements and the effect of the disposition, yet the administrative agency fails to exercise this discretionary authority due to its ignorance of its own discretionary power and issues a disposition without any comparative assessment of the proportionality between the public interests sought by the disposition and the disadvantages suffered by the counterparty of the disposition, this non-use of discretionary authority in and of itself constitutes a deviation and abuse of discretion, providing ground for revocation of such an unlawful disposition.

In the case of sanctionary dispositions issued due to the counterparty’s breach of duty, at least a considerable, if not strict, proportional relationship must exist between the content of the breach of duty and the sanctioning effect of the disposition. If the sanctionary disposition is too severe that it becomes unreasonable based on common sense, such a disposition is unlawful, as it constitutes a deviation from, and/or abuse of, discretionary power.

The lower court determined without further questioning that Defendant’s rendering of the Disposition Refusing Visa Issuance on the ground of the Instant Entry Ban was legitimate. In reaching this decision, the lower court erred by misapprehending the legal principles concerning deviation and abuse of discretionary power.

3. Comments on the Supreme Court Decision

There has been a general tendency to consider many elements of constitutional control to be excluded or limited in the area of immigration administration, especially regarding the entry of aliens. The Administrative Procedures Act explicitly excludes “entry and exit of foreigners” from its

scope of application (Article 3(2) ix), and a considerable extent of discretionary power is granted in exercising administrative authority in this area. This means that “of the matters concerning immigration, the entry and exit of foreigners is especially an arena reserved for the state to exercise its sovereignty and where a wide extent of political discretion is allowed” (Constitutional Court Decision 2003Hun-Ma87, Decided March 31, 2005).

The decision at hand goes against this trend. It states that the provision excluding the application of the Administrative Procedures Act shall be applied to a limited scope, and that the documentation principle, at the least, should be applied to dispositions rejecting visa applications. In addition, with respect to the judicial control of a misuse of discretionary power, the decision at hand does not refer to the unique nature of immigration administration; rather, it only applies general legal principles concerning the control of discretionary power regarding sanctionary dispositions. However, although this decision appears to expand constitutional control on immigration administration, the significance of this decision is limited when considered jointly with the Supreme Court’s position on standing to sue. In general, standing to sue regarding the rejection of visa issuance is not granted to foreign nationals, even in the case of marriage immigration (*see* Supreme Court Decision 2014Du42506, Decided May 15, 2018). Hence, only a very limited group of non-nationals in special circumstances such as that of the Plaintiff, namely those who have legal status as overseas Koreans and who were “born in Korea and held Korean nationality for a long time” (*see* Section 3. A. of the decision at hand), are granted the opportunity to have the rejection of their visa applications judicially reviewed.

The Supreme Court also determined that the Instant Entry Ban did not constitute a disposition, as to allow for the review of exercise of discretionary power in the Instant Disposition. This decision contradicts the recent trend of Supreme Court decisions that tend to recognize the dispositional nature of internal interim decisions of administrative agencies when relief of right is needed (“if the subject was aware that the decision was made by individual notification, etc. ... since there would be no special reason not to give early opportunity for relief of right ... it could be the matter of an appeals suit,” Supreme Court Decision 2019Du49130, Decided June 27, 2019). This would be the result of the Supreme Court’s attempt to adhere to

existing legal principle about succession of flaw across administrative dispositions, namely that if the preceding administrative action is considered a disposition, its binding power on a subsequent disposition would be dismissed only in exceptional cases (*see* Supreme Court Decision 2017Du40372, Decided January 31, 2019). However, considering the recent trend of extending the scope of “disposition” for the purpose of reinforcing the relief of right and judicial control, the current legal principle regarding succession of flaw that associates disposition with binding power must be reconsidered.

II. Supreme Court Decision 2018Du104, Decided October 17, 2019 [Confirmation of the nullity of road occupancy permit] <Residents’ lawsuit raised by citizens of Seocho-Gu against road occupancy permit issued by the Head of Seocho-Gu>

1. Summary of the Case

(1) Person X purchased land in Seocho-Gu on June 1, 2009, for the construction of a church building. In the process of building the church, X applied for a road occupancy permit for the below ground area of a road owned by Seocho-Gu, intending to build a passage to the underground parking lot of the church and to use it as a part of the chapel built underground.

(2) On April 6, 2010, the Head of Seocho-Gu granted the road occupancy permit, stipulating that X may occupy the “7 m wide, 154 m long” area underground of the road from April 9, 2010, to December 31, 2019 (hereinafter the “permit of this case”). A collateral clause was added to the permit, stipulating that X would donate a part of the church building as contributed asset to Seocho-Gu to be used as a day care center. In addition, Seocho-Gu would collect fees for the occupation and use of the underground area during the period of occupation.

(3) On December 7, 2011, 293 citizens of Seocho-Gu made a resident audit request to the Mayor of Seoul Special Metropolitan City (hereinafter “Mayor of Seoul”) to demand measures of correction regarding the permit

of this case. After deliberation by the Seoul Government Audit Claims Council on April 9, 2012, the Mayor of Seoul decided that the permit of this case was unlawful and unjust, and on June 1, 2012, ordered correction within 2 weeks. However, on July 31, 2012, the Head of Seocho-Gu notified the Mayor of Seoul that it would resist the latter's correction order. To this, some of the citizens who made the resident audit request filed a residents' lawsuit claiming confirmation of nullity (as main claim) or revocation (as preliminary claim) of the permit of this case.

(4) The first instance court rejected the claim because the permit of this case was not one of "matters concerning the acquisition, management and disposal of property," (Local Autonomy Act, Article 17(1)) hence not a matter of resident litigation. The appellate court maintained this judgment. However, the Supreme Court found that the permit of this case was indeed a "matter concerning the acquisition, management and disposal of property," and remanded the case to the first instance court after reversing the original judgment.

(5) After the case was remanded, the first instance court and the appellate court revoked the permit of this case, citing that the permission was unlawful since it violated the principle of proportionality and equity considering the comparison between public and private interests. Specifically, the following facts were used as grounds for the court's judgment. First, underground structures such as the chapel, choir room, broadcasting room, etc., would not only be difficult to remove but also entail considerable risk and responsibility in their maintenance, management, and security. Additionally, if the permit of this case is granted, it would be hard to reject similar requests to occupy the underground areas of public roads, which could lead to the indiscriminate use of road area and cause danger to public safety. Finally, the granting of the permit of this case would effectively attach the underground area of a public road permanently and exclusively to the church building, rendering it difficult for authorities to respond to changes in the condition of the road and surrounding areas in a flexible and active manner.

2. Findings of the Decision to Reverse and Remand (Supreme Court Decision 2014Du8490, Decided May 27, 2016)

The Supreme Court presented the legal principle about whether road occupancy permits were a matter of resident litigation in its decision to reverse and remand in 2016. That is, if a permit of occupancy allowing a specific private person to exclusively use roads, public facilities, or other publicly owned goods is deemed to allow that person to take advantage of the goods' use value regardless of their primary purpose or function, it should be viewed as "matters concerning the acquisition, management and disposal of property (Local Autonomy Act, Article 17(1)),” and as such, a matter of resident litigation. This is because resident litigation is an institution designed to guarantee the legality of financial administration and enforce the sound and appropriate operation of local finance.

3. The Findings of the Supreme Court Decision at Hand

The Supreme Court maintained the lower court's judgment that the permit of this case was unlawful because there was a flaw in its exercise of discretion. The legal principles that the Supreme Court presented are as follows.

(1) Article 17(1) of the Local Autonomy Act provides that the resident who made an audit request about "matters concerning the acquisition, management and disposal of property," can file a residents' suit against the head of the competent local government concerning the unlawful acts or the neglect of duties related to matters for which a request for the inspection has been filed. However, the Local Autonomy Act does not necessarily limit the object of resident litigation to acquisition, management, etc., of property that incur losses to local finance. Hence the ground for appeal that the permit of this case is not an object of resident litigation since it did not cause any damage to local finance does not stand to judgment, as it goes against the explicit wording of the Local Autonomy Act which defines the subject matter of residents' suits.

(2) If the meaning and structure of Local Autonomy Act Articles 16, 17(1), 17(2) ii, and 17(17) as well as the legislative nature and features of the

resident litigation system are taken into consideration, the unlawfulness of a disposition which is the object of resident litigation should be judged based on the same standards applied in appeals suits pursuant to the Administrative Litigation Act, i.e. whether it violates any standing laws or regulations, including the Constitution, laws, statutes, general principles of law, etc., that comprise the objective legal order. Legality of a disposition should not be judged solely based on whether the disposition caused local finance to suffer losses.

4. Comments on the Supreme Court Decision

A residents' lawsuit is a form of litigation allowing residents of a local government to contest unlawful financial accounting acts undertaken by their respective local governments. It is an institution that strives to secure the fiscal sustainability of a local government by monitoring its administration through residential autonomy. Since a residents' suit does not presuppose that the legal interest of the plaintiff resident be infringed, it constitutes a form of an *actio popularis*, a rare form of litigation within the administrative litigation system of Korea (Article 3(3), Administrative Litigation Act). Especially in cases concerning administrative actions which, by their character, render it difficult for there to exist persons with a standing to sue to seek revocation, or, in other words, persons who have a legal interest in requesting the revocation of those actions (Article 12, Administrative Litigation Act), expanding the litigable range of residents' lawsuits generates the effect of supplementing the limitations of appeals suits and enforcing democracy in the judicial control of administrative affairs. Disputes concerning permissions to occupy and use roads are representative examples of these cases.

The 2016 decision of remand based its judgment solely on the litigation requirements of residents' lawsuits, but the decision at hand proceeded on to judging the merits and confirmed the unlawfulness of the occupation and use permit issued in this case. Through this decision, the enduring legal dispute on whether the underground spaces of public roads could be utilized as church chapels was finally settled, nearly ten years after the road occupation and use permit of this case was originally issued, and at a moment when the occupancy period according to the contested permit was

on the brink of expiration.

The institution of residents' litigation was implemented in 2006 and this year marks the fourteenth year of its taking effect. Contrary to initial hopes that it would strengthen the control on local administration through residential autonomy, the actual count of residents' lawsuits remains low. Out of the forty-three cases of residents' lawsuits that have been filed up to date, only one suit granted victory to the plaintiff, which was a case partially won by the plaintiff in a dispute concerning a government office's denial of information disclosure.¹⁾ Following the initial decision of remand that assumed a broad interpretation of the objects of residents' lawsuits, the subsequent decision at hand made clear that whether an administrative action had induced losses to local finances was not a matter to be taken into consideration at either the litigation requirements stage or the merits stage. The Supreme Court's adoption of such an active interpretation may hopefully serve as a momentum for residents' lawsuits to effectively establish itself as an institution of control over local administration.

III. Supreme Court *en banc* Decision 2015Du49474, Decided November 21, 2019 [Revocation of Orders on Sanction Measures] (Whether a broadcast program had violated the duty to maintain objectivity, impartiality, and balance, and the duty to respect the dignity of deceased persons according to broadcast standards)

1. Summary of the Case

(1) Plaintiff, the Citizen's Broadcasting Foundation (*Jaedanbeobin Siminbangsong*), who is a program-providing business under the Broadcasting Act, is a legal person that operates a television channel specializing in 'public access' (a form of broadcast consisting of viewer-produced videos) by concluding exclusive usage contracts with CATV broadcasting businesses or satellite broadcasting businesses for the entire or

1) Ministry of the Interior and Safety (Republic of Korea), Statistics on the Operational Status of Residents' Voting, Resident Recall, and Resident's Lawsuits (as of Dec. 31, 2019).

partial time slots of certain channels.

Through this channel, the Plaintiff, in dozens of occasions circa January 2013, broadcasted two documentaries produced by the Korean Issues Research Center (*Sadan Beobin Minjok Munje Yeonguso*), who is also a subscriber to the channel.

(2) One of the documentaries consists of contents re-evaluating former Korean president Syngman Rhee by inserting approximately thirteen episodes related to the former president. The other consists of contents re-evaluating former president Park Chung-hee based on the substance of the Fraser Report (produced in the United States), presenting the perspective that Korea's economic development was mainly a consequence of the transition to an export-driven economic policy caused by U.S. anti-communist policies in East Asia.

(3) On August 21, 2013, the Defendant, the Korea Communications Commission, ordered the imposition of disciplinary actions and the issuance of warnings against officials of the Plaintiff's broadcasting program on the grounds that the abovementioned documentaries violated the provisions of the Regulations on Broadcast Standards addressing objectivity and impartiality, and the respect for the dignity of deceased persons. Furthermore, the Defendant ordered the Plaintiff to air a broadcast of notification informing viewers of the imposition of these sanctions (heretofore collectively referred to as "sanction measures of this case").

(4) The Plaintiff raised objections to these measures and filed a lawsuit requesting the revocation of the sanction measures of this case. The court of first instance and the appellate court both ruled that the sanction measures of this case were legal. The case at hand is the case initiated by the Plaintiff's file for appeal to the Supreme Court challenging the lower courts' decisions.

2. *Issues of the Case*

The issues in this case were as follows: (a) whether programs subject to deliberation under the Broadcasting Act regarding fairness and public concern were limited to news programs; and (b) whether the contents of the above-mentioned documentaries violated the duty of programs to maintain objectivity, impartiality and balance; and (c) whether the above-mentioned documentaries violated the provision on the respect for the dignity of

deceased persons. All Supreme Court justices agreed on the view that programs subject to deliberation under the Broadcasting Act for fairness and public concern were not limited to news programs. However, on the other two issues, views were sharply divided. The majority opinion, supported by seven justices, ruled that the sanction measures of this case were unlawful, while the dissenting opinion of six justices attested that the sanction measures of this case were legally justified. The majority opinion found that the above-mentioned documentaries did not violate the provision on the duty to maintain objectivity, impartiality, and balance, nor the provision on the respect for the dignity of deceased persons. On the other hand, the dissenting opinion saw that the documentaries had violated both provisions.

3. Findings of the Supreme Court Decision

(1) The Majority Opinion

A. The Duty to Maintain Objectivity, Fairness and Balance

Applying a uniform standard in evaluating objectivity, impartiality and balance, without taking into consideration the specific differences in how each form of broadcast exerts social influence, may excessively constrain the Broadcasting Act's legislative purpose of improving the quality of people's lives and ensuring the diversity of broadcasts by pursuing diverse objectives through each broadcast program, which is supported by the fact that the Act prescribes different sets of regulations between various media, channels, and broadcast fields by differentiating between them. Likewise, this may also place excessive constraint on the role of broadcast in forming an equitable field of public opinion. Therefore, when judging whether the content of a broadcast adequately maintains impartiality and is in accordance with public concern, the characteristics of the particular type of media, channel and/or program must be thoroughly taken into consideration.

(i) When the Korea Communications Standard Commission reviews the objectivity, impartiality and balance of a broadcast, it must be cautious to make sure that the autonomy, expertise and diversity of broadcast media and channels is not infringed. It should undertake this by sufficiently considering the degree and extent of the influence on people's lives and

sentiments and the formation of public opinion wielded by the broadcast media or channel airing the pertinent broadcast program. And if the degree and extent of the influence of the broadcast media or channel airing the pertinent broadcast program on people's lives and sentiments and the formation of public opinion is not extensive, while it mainly contributes to enabling the exchange of diverse opinions and views, a more lenient standard should be applied in judging its objectivity, impartiality and balance. The ultimate purpose of tasking the Communications Standards Commission with the assignment of reviewing the objectivity, impartiality and balance of a broadcast channel lies in strengthening the freedom of broadcasting and that of the press by paying utmost deference to the autonomy, expertise and diversity of the pertinent broadcast program through the acceptance of such a lenient standard.

(ii) Viewer-produced broadcast programs were introduced to enhance the public role of broadcasting in forming diverse social opinions by reflecting the opinions and perspectives of minority groups to broadcast programs. Because they are produced by viewers, such programs inherently lack professional expertise or popular appeal due to limitations in the technology, capital, and information accessible by viewers. The characteristic of such limitations is that they can be mitigated by encouraging viewers with differing opinions to produce their own broadcast programs presenting their respective perspectives. Therefore, the degree of expectation towards the truthfulness and reliability of the broadcast's content or the social influence of viewer-produced broadcast programs is inherently different from that towards broadcast programs produced directly by broadcast businesses. Thus, when the Communications Standards Commission reviews the objectivity, impartiality, and balance of viewer-produced broadcast programs, it should apply a more lenient standard compared to when reviewing programs produced by broadcast businesses.

(iii) News programs exert direct influence on the formation of citizens' individual and public opinion, consequently requiring stricter standards for impartiality and objectivity. On the contrary, it is difficult to consider educational programs, such as documentaries, or entertainment programs, such as dramas, films and sports broadcasts, as exerting the same degree of influence on the formation of public opinion as do news programs. Consequently, when the Communications Standards Commission reviews

whether an educational or entertainment program has violated the duty to maintain objectivity, impartiality and balance of a broadcast program, it must take these characteristics into consideration and apply a different standard of judgment from that which applies to news programs.

B. The Provision on Respect for the Dignity of Deceased Persons

Even if the content of a broadcast partially states a fact that damages the reputation of a public figure who is subject to historical evaluation, absent special circumstances, that alone does not constitute a violation of Article 20(2) of the pre-revision Regulations on Broadcast Standards (the Regulation applicable in the case at hand, prior to its revision on January 15, 2014 through Rule No. 100 of the Korea Communications Standards Commission; hereinafter the “pre-revision Regulations on Standards”). Furthermore, under Article 20(3) of the pre-revision Regulations on Standards, if the stated fact is a matter solely concerning the public interest that is either truthful or one in which there exists considerable reason to believe in its truthfulness, it is not subject to the sanction measures prescribed in Article 100(1) of the Broadcasting Act.

“A matter solely concerning the public interest” is taken to mean a situation in which the stated fact is conducive to public interest from an objective standpoint, and the person who states the fact does so for the public interest. Insofar as the person’s main objective or motive is for the public interest, the existence of other incidental objectives or motives of a private or otherwise non-public nature does not pose a problem. That a stated fact is “truthful” is taken to mean that the stated fact, in light of the overall purpose of its content, is in accordance with the objective truth in its main part; minor deviations from the truth in its details or moderate exaggerations are acceptable.

Moreover, defamatory statements should be differentiated from insults. Insulting remarks or simply indecent remarks that are free of factual statements may constitute a violation of Article 27(2) of the pre-revision Regulations on Standards which provides that “broadcast programs shall not cause viewers to feel repulsion through indecent expressions, etc.,” but would not as such constitute a violation of Article 20 of the pre-revision Regulations on the prohibition of defamatory statements.

C. Conclusion

The documentaries in this case were broadcast through a paid subscriber-only, non-terrestrial channel specializing in public access programs, to which the general public cannot freely access without restriction. As the documentaries are historical programs produced by amateur viewers, the evaluation of their objectivity, impartiality, and balance shall be subject to a more lenient standard compared to that applied to programs freely accessible on terrestrial television, programs produced by broadcasting businesses, or news programs. A review of the objectivity, impartiality, and balance of the documentaries in this case considering the above as well as the characteristics of the relevant media, channel, and program, based on the general impression presented to viewers, does not lead to the conclusion that the broadcasts violated the duty to maintain objectivity, impartiality, and balance by distorting the truth and/or failing to present a balanced view of persons concerned. The above documentaries were produced with the purpose of presenting debate and re-evaluation of historical facts and persons, which may be deemed as solely concerning the public interest. As the documentaries are based on official documents by foreign governments, newspaper articles, and interviews with experts and related persons, there is sufficient reason to believe in the truthfulness of the stated facts despite there being certain deviations from the truth in the details, and as such, cannot be considered to constitute a violation of the provision prohibiting the defamation of deceased persons. In conclusion, the sanction measures in this case are unlawful.

(2) *The Dissenting Opinion*

A. The Duty to Maintain Objectivity, Fairness and Balance

If the meaning of “more lenient evaluation standards” posited by the majority opinion is taken to refer to a narrow interpretation of a violation of the duty to maintain objectivity, impartiality, and balance, this would be a simple rephrasing of the standing Supreme Court principle that the legal basis of disadvantageous administrative actions shall be subject to strict interpretation. It follows, then, the practical meaning of “more lenient evaluation standards” would be that the Korea Communications Commission is tasked with a more rigorous standard of proof regarding the existence of grounds for sanctions or that it should take consideration of the

circumstances when exercising its discretionary power in determining the degree of sanctions. If so, this line of purpose can be sufficiently achieved within the boundaries of existing standing legal principles concerning revocation suits, without the need for newly establishing the concept of “more lenient evaluation standards.”

Where the concept of “more lenient evaluation standards” lacks a concrete basis and independent meaning, the evaluation of broadcasting programs, if one is to subscribe to the majority opinion’s logic, would ultimately raise the question of which media, channels, programs etc. would be subject to these lenient evaluation standards.

The majority opinion offers such elements as the scope of influence of the pertinent media, viewer participation in program production, the general culture/entertainment purpose of the particular program, etc. as bases for determining whether the lenient standard would be applied. However, these merely constitute fragmentary criteria regarding broadcasting programs and are insufficient to provide any concrete insight on the application of the lenient standard to individual programs.

Moreover, the majority opinion effectively rules that whether a broadcasting program violates the Regulations depends on the extent of influence exercised by certain media, channels, and programs, which allows for and justifies the arbitrary issuance of administrative dispositions, and thus goes against the constitutional principle of rule of law in administrative affairs. Furthermore, the lack of criteria as to how exactly the application of evaluation standards can be differentiated renders such application impossible. The dissenting opinion, therefore, cannot accept the majority opinion’s suggestion of differentiated degrees of evaluation standards, as it goes against the principle of nomocracy in administrative affairs.

B. The Provision on Respect for the Dignity of Deceased Persons

The majority opinion directly borrows the constituent elements of defamation of a deceased person from Article 308 of the Criminal Act and the legal principle regarding the justification of otherwise punishable acts. However, the provision on defamatory expressions against the deceased under the Regulations is a duty clause regarding administrative sanctions, not a constituent element of criminality clause regarding administrative penalties. Each of the sanctions of this case is not a sanction measure

against an individual director or producer who produced each of the instant broadcasts, but rather one imposed on the Plaintiff, a broadcasting business entity, who bears the obligation to respect the reputation of a deceased person under the Broadcasting Act. Therefore, there is no need to determine whether the producer intentionally disparaged the reputation of the decedent, and the court instead has to examine, based on the facts admitted by the lower court, only whether the content of each of the instant broadcasts is based on true facts and pertains solely to the public interest.

C. Conclusion

The dispositive grounds for each of the above sanctions measures are grounded on the argument that the broadcast content fell short of objectivity, impartiality and balance standards and violated the obligation to respect the reputation of the deceased, rather than that each of the said broadcast programs defamed former president Syngman Rhee and former president Park Chung-hee. Yet, the materials cited by each of the above-mentioned broadcast programs were selected from a wide range of extensive materials on the two historical figures, Syngman Rhee and Park Chung-hee, to specifically suit the production purpose. Besides, among the selected materials, the content of those in dissonance with the production purpose was omitted, and only the part that appears to be in harmony with the production purpose was excerpted and edited to make it look as if that is the exclusive truth, to say nothing of vulgarity and indecency of the language used therein. As such, each of the said broadcast programs is bereft of even the minimum level of objectivity, impartiality and balance required of broadcast programs and fails to observe the obligation to respect the reputation of the deceased. The insult and mockery against the decedents may not be subsumed under what is “solely for the public interest.” Thus, each of the said sanctions measures was lawful.

4. *Comments on the Supreme Court Decision*

In this case, there was a fierce battle about sanctions imposed by the Korea Communications Commission on documentaries which presented negative criticisms of two former presidents. There were considerable political ramifications because one of the presidents was the father of then-

incumbent President Park Geun-hye, whose administration had imposed the sanctions of this case, while the decision at hand was made by Supreme Court justices whose majority was appointed during the Moon Jae-in administration. Apart from the political arguments, this case served as a momentum to consider whether the current broadcasting review system can maintain legitimacy amid the changing media landscape.

The current broadcasting review system delegates the regulatory authority to the Korea Communications Standards Commission, which can deliberate on and pass a resolution as to whether the content of a broadcast has maintained its impartiality and public nature (Articles 32 and 33 of the Broadcasting Act). That administrative authorities have the power to censor the contents of broadcasting material, while the same is not allowed with respect to general freedom of expression or freedom of newspapers, presupposes the distinctiveness of broadcasting media. “The broadcasting sector has not fully overcome the finitude of information distribution channels, which is characterized by the concentration of media ownership and control of information distribution by a handful of media owners due to technological and economic restraints.” Furthermore, “broadcast media has a strong appeal with its easy accessibility enabled by simultaneous and direct dissemination through audio and video and, in some cases, mass manipulation is possible” (*see Constitutional Court en banc Order 2009Hun-Ka27*, rendered August 23, 2012).

However, compared to the past when only terrestrial networks existed, the current media landscape has witnessed not only an increase in the number of accessible channels, such as CATV or satellite, but also the continually expanding industry of internet broadcasting which has acquired growing influence due to the convergence between broadcasting and telecommunications. The argument that the impartiality and balance of broadcast contents must be regulated on the grounds of the radio frequency spectrum being a scarce resource no longer holds (*see Supplementary Opinions concurring with the Majority Opinion*). That the question of whether the Regulations should be applied based on a consideration of the distinctive characteristic of the channel (a paid, non-terrestrial broadcast network, public access channel) emerged as the central issue in the case at hand is no accident, but a reflection of the times. Today’s broadcasting environment is no exception to the general trend of diversification in terms

of medium and channel. How the broadcasting review system will change, with respect to legal interpretation as well as legislation, in response to the diversification of broadcast media and the convergence between broadcasting and telecommunications industries is an issue worth noting.