

Notable Supreme Court Cases on Administrative Law*

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1. Nature of Administrative Legislation Listing the Types of Disabilities (Supreme Court, 2016Du50907, Oct. 31, 2019)

A. Case Overview

(1) Article 34 (1) of the Constitution stipulates that “All citizens shall be entitled to a life worthy of human beings”, while paragraph 5 stipulates that “Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age or other reasons shall be protected by the State under the conditions as prescribed by Act”. This article states that the State should especially protect and support the socially disadvantaged. Accordingly, the purpose of the Act on Welfare of Persons with Disabilities is to contribute to social integration through improving welfare and encouraging participation in social activities of persons with disabilities, by clarifying the State’s and local governments’ responsibilities to ensure a decent life and the rights of persons with disabilities, by advancing overall welfare measures for persons with disabilities through activities concerning areas such as medical care for persons with disabilities, and by deciding on necessary matters concerning protection, allowances, etc. of persons with

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disabilities (Article 1). According to the Act on Welfare of Persons with Disabilities, the term “person with disability” means a person whose daily life or social activity is substantially hampered by physical or mental disability over a long period of time (Article 2 (1)). Persons with disabilities who are governed by this Act shall have the types and standards of disability prescribed by Presidential Decree (Article 2 (2)). The term “physical disability” means a disability of principal external bodily functions and of internal organs, and et cetera (Article 2 (2) 1.), while “mental disability” means a disability caused by psychological development disorder or mental disease (Article 2 (2) 2.). Hence, Article 2 (1) of the Enforcement Decree of the Act on Welfare of Persons with Disabilities [Attached Form 1] (hereinafter referred to as the “Enforcement Decree of this case”) defines persons with disabilities subject to the Act on Welfare of Persons with Disabilities as those who suffer from any of the 15 types of disabilities (physical disability, disability of brain lesion, visual disability, hearing disability, speech disability, intellectual disorder, autistic disorder, mental disorder, kidney dysfunction, cardiac dysfunction, respiratory disorder, liver dysfunction, facial disfigurement, intestinal urinary fistula, epilepsy). Once registered as a person with a disability according to the acts and regulations concerning welfare of persons with disabilities, one can receive benefits such as disability allowance and reduction of automobile tax.

(2) Tourette’s syndrome refers to a condition involving “motor tics”, or quick and repetitive movements of parts of body such as face, neck, shoulder, and torso, and “vocal tics”, or strange sounds, where both symptoms lack any particular reason and last for over a year. Its medical cause has not been identified.

(3) The plaintiff of this case has been living in a state of complete isolation from his surroundings, unable to maintain normal relations or social life since the 6th grade in elementary school, due to Tourette’s syndrome exhibiting both motor and vocal tics. While having been treated for over 10 years and taking a gradually increasing dosage, the symptoms have not improved at all. The plaintiff has faced significant restrictions in his daily life and social relations for a long time as not only is he unable to sit down to work or have a normal conversation with others, but he is incapable of traveling long distance with a car because the symptoms

aggravate in an enclosed space.

(4) The defendant, the head of the local government, took the disposition of this case rejecting the plaintiff's application for disability registration on the grounds that the plaintiff's disability was not stipulated in the provisions of the Enforcement Decree of this case. The plaintiff filed a lawsuit seeking the cancellation of the disposition. The court of the first instance dismissed the plaintiff's claim, but the original court (Seoul High Court Decision 2015Nu70883, Aug. 19, 2016) upheld the plaintiff's claim. The reason is as follows: the provisions of the Enforcement Decree of this case do not include tic disorders, regardless of the severity. On the other hand, people with brain lesions and epilepsy who exceed certain standards are included in the provisions. Because people with tic disorders were treated differently from the other registered disabled people, it is an incomplete administrative legislation that goes against the Constitutional principle of equality. Therefore, the disposition of this case based on those particular provisions is consequently unlawful.

B. Judgment of the Supreme Court

The above ruling aligned itself with the original court's conclusion that the administrative disposition in this case was illegal, for a different reason, however. The original court decided that the article of the Enforcement Decree was unconstitutional under the premise that the article is an exhaustive list of types of disabilities to be protected. However, the Supreme Court considered the list to be illustrative.

(1) Considering the structure of related laws and regulations, the purpose of the Act on Welfare of Persons with Disabilities, the benefits of registering as person with a disability, and the form and content of the statutory instrument and the enforcement ordinance, it is reasonable to assess that Article 2 (1) stipulates the definition of the disabled and Article 2 (2) stipulates types and standards of mental and physical disabilities, giving predictability to the content of the Enforcement Decree while simultaneously limiting the discretion of administration legislation. Due to technical limitation of legislation, it is impossible to list every kind of disability that adheres to the types of and the standards on disability stipulated in the mother law. Therefore, based on the purpose of statutory

instrument, it is only logical that the Enforcement Decree stipulated 15 types of the disabilities in order to follow the definitions articulated in the mother law as closely as possible. Therefore, the articles of the Enforcement Decree could not be interpreted as an exhaustive list, providing legal protection only to those disabilities mentioned.

(2) Even if a particular disability is not explicitly mentioned in the Enforcement Decree, in the case where the person with such disability clearly meets the definition of the disabled stated on Article 2 of the Act on Welfare of Persons with Disabilities and the provisions, in light of the content and the structure of the mother law and the Enforcement Decree, do not intend to exclude that particular disability, but there is merely a lack of administrative legislation, the administrative agency cannot refuse an application for registration as person with a disability based on the fact that it is not listed on the Enforcement Decree. In such case, the administrative agency should instead refer to the regulation concerning the disability that is most similar to it, so that the Enforcement Decree can be applied by analogy in accordance with the purpose of the mother law and the principle of equality.

(3) As it is clear that the plaintiff corresponds to a person who is severely restricted in daily life or social life for a long time due to a disability caused by an internal organ's malfunction or a mental illness, called Tourette's syndrome, the plaintiff is a disabled subject to the Act's Article 2 (2). Tourette's syndrome has similar aspects to 'epileptic disorder' in that it has symptoms such as unconscious seizures or behavior changes and that the afflicted find it difficult to have a cooperative interpersonal relationship (see [Attached Form 1] 15 of the Enforcement Rule of Act on Welfare of Persons with Disabilities). It is also comparable to 'mental disorder (schizophrenia, recurrent depressive disorder)' in that it is classified as a mental disorder and the possibility of social adaptation and social rehabilitation is low (see [Attached Form 1] 8 of the Enforcement Rule of Act on Welfare of Persons with Disabilities). Considering the degree of the plaintiff's disability, the limitations in the social life, and each disability specifically stipulated in the Enforcement Decree, it cannot be deduced that the provisions of the Enforcement Decree intend to exclude the plaintiff's disability from the application of the Act. Therefore, the defendant's disposition in this case is illegal, since the administrative

agency cannot reject the plaintiff's application for disability registration solely on the grounds that the plaintiff's disability is not stipulated in the provisions of the Enforcement Decree.

C. Analysis

The original court held that the disposition in this case was illegal because omission (*unechtes Unterlassen*) of administrative legislation, not enumerating Tourette's syndrome, is unconstitutional. Based on Article 107 (2) of the Constitution, the court considered the unconstitutionality of administrative legislation as a preliminary issue. According to its judgment, the follow-up action to be taken by the administrative agency is to amend the Enforcement Decree declared unconstitutional to include Tourette's syndrome and to register the disabled accordingly. On the other hand, the Supreme Court has taken the stance that the Enforcement Decree is not an exhaustive list of the types of disabilities, thus the administrative agency should apply the provisions on the types of disabilities most similar to the plaintiff's disability. Compared to the original court, the Supreme Court's approach has the advantage of protecting rights in a quick and effective manner because it does not have to go through the amendment process of administrative legislation. The improvement legislation, which includes Tourette's syndrome, took place in April 2021, about a year and seven months after the sentence of this ruling.

Despite these visible advantages, the following questions may arise in the ruling's approach. First and foremost, it may be seen as violating the administration's legislative discretion granted by the legislature. The reason why the Act on Welfare of Persons with Disabilities delegated the types and the standards of disabilities to administrative legislation is to grant legislative discretion to make policy decisions considering the financial burden of the state and in respect of the expertise of the administration. The general theory of this ruling recognizes a wide range of legislative discretion, but it replaces the decision made by the administrative agency by virtually drawing a particular conclusion regarding this specific case. Moreover, the ruling stated that individual administrative bodies (head of Si / Gun / Gu, etc.) can and should register disabilities not listed in the Enforcement Decree through interpretation and analogical application of

laws, but it is questionable whether this is viable. Considering the administrative reality, it is not easy to expect that the administrative agency will accept registration of unlisted disabilities through active interpretation and independent judgment. The right will likely be protected only when the court makes a ruling, and this leads again to the aforementioned problem. Consequently, the court takes over what the administration should do through improvement legislation. Despite these questions, this ruling is significant in that it attempted to resolve the social security gap due to the lack of administrative legislation through the judicial body's active intervention.

2. Effect of Violation of the Obligation to Disclose the Disposition Criteria in Advance (Supreme Court, 2018Du45633, Dec. 24, 2020)

A. Case Overview

(1) The defendant, Minister of Culture, Sports and Tourism, enacted the "Guidelines for Implementation of Travel Agents Dedicated to Attracting Chinese Group Tourists" (hereinafter "the guidelines of this case") to implement the designation and management of a "travel agency dedicated to attracting Chinese group tourists" (hereinafter "dedicated travel agency"), which is to be recommend to the Chinese government. Around May 2013, the defendant newly established Article 3-2 of the guidelines of this case and introduced a "dedicated travel agency renewal system" that updates the status of a dedicated travel agency through biennial re-examination. Around September 2013, when the "dedicated travel agency renewal system" was scheduled to be implemented, the defendant set a standard to renew the status of a dedicated travel agency in the case where the total score according to each evaluation area, item, and indicator is 75 or more (hereinafter "the former disposition standard") and notified it to dedicated travel agencies through the president of the Korea Association of Travel Agents.

(2) The plaintiff was newly designated as a dedicated travel agency in accordance with the guidelines of this case on April 11, 2006, and the

defendant renewed the plaintiff's status as a dedicated travel agency on December 5, 2013 after a renewal review according to the former disposition standard. At the time, the defendant notified the plaintiff and other dedicated travel agencies that it would continuously monitor the attraction performance, the product price, the administrative sanctions history, the high-value-added product sales ratio, and whether it is a low-priced product, etc., which already had been generally considered in the previous disposition criteria, and this would be reflected in the evaluation of the renewal system conducted every two years.

(3) The defendant partially changed the evaluation area, items, indicators, and allocation of the former disposition criteria around March 23, 2016, in order to strengthen sanctions against violations such as hiring unqualified guides and failing to properly fulfill their obligations, and decided not to renew the status of a dedicated travel agency for agencies with ① less than 70 points or ② more than 6 points deducted by administrative disposition (such as unqualified guides) (hereinafter "the changed disposition standard"), but this standard was applied to the renewal review without prior announcement. According to the changed disposition standard, the plaintiff received 77 points, which exceeded the renewal standard score of 70 points, but between January 2014 and October 2015, the deduction due to administrative disposition received for violations such as hiring unqualified guides and non-compliance with unauthorized departure reports amounted to 8 points, exceeding the dropout standard of 6 points.

(4) The defendant initially notified the Plaintiff on March 28, 2016 that the plaintiff would be re-designated as a dedicated travel agency, but upon confirming belatedly that the deduction due to the plaintiff's administrative disposition was 8 points, exceeding the 6 points limit, it notified the plaintiff again that the re-designation as a dedicated travel agency would be canceled ex officio on November 4, 2016 (hereinafter "disposition of this case"). The plaintiff filed a lawsuit seeking cancellation of the disposition of this case. The court of first instance (Seoul Administrative Court Decision 2016Guhap82720, November 2, 2017) ruled in favor of the plaintiff's claim, but the original court (Seoul High Court Decision 2017Nu84954, April 25, 2018) dismissed it. The former judged that there was a procedural defect of neglecting the duty to make prior announcement of the disposition

standards (Article 20 (1) of the Administrative Procedures Act), whereas the latter held that the duty to make prior announce had not been violated.

B. Judgment of the Supreme Court

The court of first instance and the original court both stood on the common premise that if there is a violation of the duty to announce in advance, the disposition should be revoked. The difference between the conclusions stems from the difference in judgment as to whether the duty itself was neglected. The Supreme Court, on the other hand, judged that the violation of the duty to make prior announcement alone cannot be considered as the grounds for revocation of the disposition of this case. Even so, it has come to the conclusion that the disposition of this case should be revoked, presenting the legal principle that the right to 'fair examination' should be guaranteed if a 'renewal system' is adopted and operated.

(1) Even if the administrative agency has made a disposition by applying a standard that has not been publicly announced in advance, violating the duty to make public pre-announcement of the disposition standards under Article 20 (1) of the Administrative Procedure Act, such circumstances alone cannot induce defects grave enough for revocation. However, if the standard applied to the disposition violated the provisions of the higher statutes or the general principles of law, such as the principle of trust protection, or if there are specific circumstances that can be objectively considered unreasonable, the disposition can be evaluated as illegal. The specific reasons are as follows.

① Disposition standards set and announced by the administrative agency pursuant to Article 20 (1) of the Administrative Procedure Act are administrative rules that are not externally binding unless there are special circumstances that they have been enacted and promulgated with specific delegation from the statutes on which the disposition is based.

② Whether the disposition is legitimate should be determined not by whether it conforms to administrative rules, but by whether it conforms to the provisions and legislative purposes of higher statutes. The fact that a disposition violates administrative rules does not immediately render it illegal and the fact that a disposition complies with administrative rules

does not guarantee its legality. Similar to how whether or not the administrative agency complied with the publicly pre-announced standards, in other words, the administrative rules, is not a decisive indicator of the legality of the disposition, the question whether or not the administrative agency has applied standards that were not publicly pre-announced can't be a decisive indicator of the legality of the disposition.

③ It is difficult to determine uniformly whether the disposition standards established and published by the administrative agency are specific or whether they fall under the exceptions to the obligation to disclose the disposition standards in advance under Article 20 (2) of the Administrative Procedure Act, and therefore, it is necessary to determine individually according to specific cases. If a disposition of the administrative agency is considered legal only when a specific disposition standard has been announced in advance pursuant to Article 20 (1) of the Administrative Procedure Act, the legality of the disposition becomes immoderately unstable, and the execution of individual law is practically deferred or delayed.

(2) In a case where an administrative agency adopts and operates the so-called 'renewal system', in which it grants a specific right, interest, or status to the party affected, in accordance with provisions of relevant laws and regulations or its own judgment, and examines the party at regular intervals for renewal, the party affected has the right to request a fair review based on reasonable standards for renewal with the expectation that it will be renewed after undergoing a fair review based on reasonable standards, unless under special circumstances. Here, "fair review" does not only mean that its renewal should be reviewed based on objective and reasonable standards far from discretion of the administrative agency. It also means that the standards of review should be prepared and published in advance in order to provide predictability of the criteria and methods to the parties affected and to let them examine afterwards whether the decision has been made fairly based on reasonable standards. It is allowed to change minor matters or clarify and specify somewhat unclear and abstract parts of the previously published standards of review. However, cases are different when there are material changes to the extent that they influence the result at the point where the designated time for review has already passed. Such change directly goes against the nature of the renewal

system and the request that a fair review must be conducted in accordance with the previously announced criteria of review. It is unexcused unless under special circumstances, for example, when there is a significant public interest that makes it inevitable to abolish the renewal system itself or to significantly reduce the number of renewed parties, or when related laws and regulations have been enacted or amended.

C. Analysis

It has been a long-established legal principle that when there is a breach of obligations to give prior notice, to seek opinions (Articles 21 and 22), and to present reasons for dispositions (Article 23) stipulated in the Administrative Procedure Act, the disposition must be revoked in principle. On the contrary, only few cases have been considered as a breach of obligation to establish and publicly announce disposition standards: obligation to publicly announce necessary disposition standards as concretely as possible in view of the nature of the relevant dispositions (Article 20 (1)). Therefore, the effect of a breach of this obligation has also been scarcely addressed. There would be multiple reasons why establishment and public announcement of disposition standards could not function as procedural restraint on administrative action, but a fundamental question regarding its legitimacy; in other words, a question on whether it is desirable to establish disposition standards in advance and implement them to the letter; may be one of them. While establishing standards in advance enhances transparency and predictability and guarantees consistency and equality, it makes it difficult to consider individual and specific circumstances on the other hand. It has been a matter of dispute in many countries whether it is more desirable to establish concrete and specific standards in advance and therefore bind administrative actions or to grant extended discretion and allow its active use. Article 20 of the Administrative Procedure Act of Republic of Korea is based on the Administrative Procedure Act of Japan which is a legislative decision to establish standards in advance and reduce administrative discretion, and it is a system which does not exist in corresponding legislations of the U.S. and Germany. Few will disagree that establishing standards in advance is desirable in a general sense. However, arguing that

the effect of a particular disposition must be negated for the sole reason that its standards have not been established or publicly announced is a totally different story. On this account, it seems reasonable how the Supreme Court decision did not recognize the breach of obligation of public announcement as an individual cause for revocation but on the other hand acknowledged the obligation of public announcement only in the case of renewal system, where protection of trust in continued operation has significant importance.

