

The processes, contents, and remained issues of legislation in the Korean Refugee Act

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3 key words

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Civil society,

1. Introduction to the Korean refugee situation and system

(1) Refugee system

In the current refugee system, the basic law regulating refugees in Korea is the Immigration Control Act, but the Act has only 10 clauses: the definition of a refugee (clause 2), permission on temporary landing for asylum application (clause 16-2), non-refoulment (clause 64), recognition of refugees (clause 76-2), cancelation of the recognition (clause 76-3), appeal (clause 76-4), travel document (clause 76-5,6), appeal to exit order (clause 76-7), fact finding investigation and corporation of relevant agencies (clause 78, 80), and penalty on fake recognition (clause 95). Because there are no detailed provisions on the refugee recognition procedure, social treatment or the legal status of asylum seekers, refugees, especially refugee applicants, in Korea have suffered from this 'vacuum' (lack of address) in the law.

However, on December 29, 2011, the South Korean National Assembly passed the Refugee Act separate from the Immigration Control Act². This law is meaningful and significant because firstly, it was drafted and presented by the Korean civil society (NGOs, lawyers), secondly civil society, the Ministry of Justice, National Assembly, National Human Rights Commission, and UNHCR cooperated together in the process of making the law, and lastly, the content of the law in regards to the refugee recognition procedure or the treatment of refugees, and especially on the status of refugee applicants, is comparatively well-structured and can be of reference to the

refugee legislation in other nations.

In this article, I want to mention the efforts that took place to create the law in Korea, the content of the Korean Refugee Act, and what is desired to be done further.

(2) Refugee situation

To describe the refugee situation in South Korea, from the day South Korea signed the refugee convention in 1992 and started to receive asylum applications, an accumulative number of 3,926 (in the year of 2011, 1,911) asylum seekers applied, and 260 (in 2011, 38) were recognized as refugees, 144 (in 2011, 8) got temporary protection on humanitarian grounds, 1,854 (in 2011, 280) were rejected, 646 (in 2011, 88) withdrawn, and 1,022 were still under examination (as of the end of 2011). The recognition rate is 11.5% and the protection rate (including the rate of those granted humanitarian status) is 17.9%. The main countries of origin of the refugee applicants are Pakistan, Nepal, China, Myanmar, Sri Lanka, Uganda, Nigeria, Bangladesh, Cote d'Ivoire, Ghana, D.R.Congo, and so on.

The refugee recognition process is overseen by the Ministry of Justice (MOJ). It can take up to 20 months, or even 4-5 years to go through the entire legal/court process. Refugee applicants are not allowed to work and are not provided with a living stipend or basic necessities such as food, clothing or shelter. Over 80% of refugee applicants work illegally to survive. Such a system is criticized of infringing the refugee claimants' basic right to live.

It is a requirement that the application for the recognition of refugee status be filed within 1 year after the arrival of the claimant, but around 50 % are submitted after this period. If the application is filed while the applicant has a visa, temporary sojourn status (G-1) is granted to the claimant. However, if it is filed after visa expiration, claimants can receive the G-1 status only when they pay a fine for their overstay. Otherwise, legal status is not given, but refugee applicants are not deported until the refugee determination process is completed.

The process, however, is not easy. Applications are often denied at the Reception Desk of the Refugee Office after a summary interview or screening. Most of the applicants are from non-English speaking countries, but interviews are conducted in English in 66% of cases and in Korean in 20% of cases. Around 70% of interviews are held without an interpreter. There is no

system of free legal representation or assistance during the asylum application process at the Ministry of Justice. The verification of the written record of interviews is not given to claimants in their mother language (50%), nor is the copy of the interview record provided. Only the copy of the written application form and the applicant's written statement can be provided upon request.

Furthermore, provisions on the maximum length of detention, the judicial control on the adequacy or necessity of continuing detention, as well as alternative systems of detention are insufficient³. Most rejected claimants bring their case to litigation, the administrative court, high court, and supreme court. Most of them can get legal aid assistance from the government, bar associations, or NGOs. But even if they file a suit, appealing applicants are not given a legal sojourn status; the enforcement of the deportation order is merely postponed.

Claimants in litigation are not given work permits nor any means to support themselves. If a person in litigation gets caught while working illegally, he or she is sent to a detention center. On December 19, 2008, the Immigration Control Act was amended so that work permits could be given to humanitarian status holders, refugee claimants whose cases are protracted over 1 year, and vulnerable claimants permitted by the Minister of Justice. Furthermore a refugee support center has been established to offer Korean language classes, job counseling, social adjustment training, integration, medical services for refugee claimants, legally recognized refugees, and humanitarian status holders⁴.

2. Procedure of legislation

(1) What we did in Korea

Since 2005, NGOs and refugee aid lawyers, sponsored by the UNHCR and National Human Rights Commission have prepared a draft of a refugee act that is separate and different from the Immigration Control Act and that was tabled on May 25, 2009 at the National Assembly by lawmaker, Woo-Yea Hwang (The Hannara Party⁵). A lot of work went behind this draft. A survey, sponsored by the National Human Rights Commission, on the refugee human rights situation was held 3 times (in 2004, 2008, 2010) by NGOs, lawyers, and scholars. Monthly meetings between refugee aid NGOs and lawyers' network (since 2006) observed by National

Human Rights Commission and the UNHCR, led to the making of the draft law and the organization of public hearing, forums, and seminars on the topic at the National Assembly, bar associations, and National Human Rights Commission.

Relatively from the beginning of the discussion on the creation/amendment of the Refugee Act, the Ministry of Justice created a committee for the creation/amendment of the Refugee Act centered on the Refugee Office and researched the measures for the amendment to the Refugee Act, and did not greatly oppose the independent Refugee Act. The draft to the Refugee Act that was provided by civilians was proposed as a bill by National Assembly member Woo-Yea Hwang who has great interest in North Korean refugees and the protection of human rights.

After the draft was created and submitted to the National Assembly, 2 years passed without significant lawmaking or lobby and it almost died. The only meaningful legislative campaign civil society did was visiting the lawmakers who are the members of legislation and the judiciary committee office, meeting Woo-Yae Hwang, who is the expert adviser and secretary of the draft proposer, expressing our opinions through the lawyers' association, and so on, but we did not do so much to converge the voices and demands of refugees, and direct meetings between civil society and Ministry of Justice was not sufficient enough.

The proposed bill was submitted to 'Legislation and Judiciary Committee' on Nov 18th, 2009 and referred to 'Examination Sub-committee of Legislative Bill', after examining and reporting of the proposal. On Apr. 14th, 2010, 'Examination Sub-committee of Legislative Bill' decided to hold a public hearing to deliberate on the stance of 'Ministry of Justice' which is in charge of the implementation of the law. The public hearing was held in 'Legislation and Judiciary Committee' on Nov 24th, 2010. On June 23rd, 2011, 'Examination Sub-committee of Legislative Bill' presented a rectified proposal that refugee applicants who may have the right for living, such as livelihood, employment and housing, are limited to the appeal process under jurisdiction of Ministry of Justice. Also, the rectified proposal, heavily influenced by 'Ministry of Justice', includes that prolonged or abuse application will be handled by a simplified procedure and a system of refugee officers or RSD officers will be set up to perform factual investigations.

However, when Woo-Yea Hwang became the representative of the National Assembly members from Grand National Party, he expressed great will about the enactment of the law and after

leading the negotiations on the disagreements surrounding the main issues of the draft. ‘Legislation and Judiciary Committee’ and ‘Examination Sub-committee of Legislative Bill’ respectively passed the draft bill of the Refugee Act on December 28th and the plenary session of the National Assembly did on December 29th.

(2) Factors contributing to the adoption of the Refugee Act

To give a self-assessment of the legislation process of the Refugee Act, although the entire process from the beginning of discussions to effectivation took 10 years, each actor shared a cooperative role and the roles were divided in a cooperative manner. For example, civil society, consisting of NGOs and lawyers, provided the draft and the lawyers’ association, human rights committee, and UNHCR supported it, and the Ministry of Justice did not greatly oppose it. The Ministry of Justice provided an amendment and lawmakers passed the draft at the National Assembly.

On the 60th anniversary of the Refugee Convention agreement UNHCR encouraged and made efforts to prompt the Korean government through its Korean headquarters to display the aspects of an advanced human rights country by passing the Refugee Act draft. The national human rights committee also showed great interest in the issue of refugees by recommending and participating.

Woo-Yea Hwang, the main proposer of the bill, became the representative of the National Assembly members from the Grand National Party (currently the chairman of the ruling Saenuri Party, which means new frontier) and showed clear resolve to complete the Refugee Act before the year ended and his term was finished. Hwang, the secretary to the National Assembly member who was in charge of the proposal and amendment and the expert adviser who was in charge of the National Assembly law led the revisions on the disagreement with the Ministry of Justice with an understanding of and will for the Refugee Act.

3. New procedure of the refugee status determination

(1) Detail clauses on the refugee status determination procedure

Up to now, there were no clauses on the refugee determination procedure, so interpretation and legal aid was inadequate, and the verification of facts was not being properly conducted. But through this Refugee Act, most rules on the procedure were laid down. The detail clauses on the refugee status determination procedure include the Refugee Status Application (article 5) and handling method (article 18, section 4), Application at the Port of Entry (article 6), Notice of Relevant Information on Refugee Status Application (Article 7), Interpretation (Article 14), Right to Assistance of an Attorney (Article 12), Presence of a Person in a Relationship of Trust (Article 13), the right to request an interview officer of the same gender (Article 8, section 2), the right to request a record or videotape of the interview process (article 8, section 3), Confirmation of Written Record of Interview (article 15), Right to Access and Copy Relevant Documents (article 16), Prohibition of Disclosure of Personal Information (article 17), “Protection” to Verify Identity⁶ (article 20), closed hearings (article 23), appeal (article 21), the refugee committee (chapter 3), etc. It states that interpretation is mandatory, that applicants have the right to receive assistance from lawyers and to request the presence of a person in a relationship of trust.

(2) Professionalism of refugee recognition organization, strengthening independence

Until now, there were issues with the professionalism of refugee evaluation and the independence of the recognition organization, and there was criticism that because the refugee recognition standard was excessively high and required strict proof, the percentage of refugee recognition is low. On this matter, the Refugee Act requires the Minister of Justice to have refugee status determination (RSD) officers responsible for interviews and factual investigations (article 8, section 4), and will get rid of the policy function of the refugee committee and in turn it will become a quasi-judicial appeal evaluation organization (articles 25, 26). This will strengthen its professionalism and independence.

(3) The expediency of the evaluation period

Also until now, the refugee evaluation period was criticized as excessively long, at an average of 20 months with instances of 4-5 years of delay. The Refugee Act made it a principle that the 1st decision and the decision of the appeal will be made within 6 months (article 18, section 4; article 21, section 7), making it a simplified and accelerated procedure (article 8, section 5), and the termination of the procedure if an applicant fails to appear 3 or more consecutive times (article 8, section 6).

(4) Introduction of the refugee status determination officer and simplified/accelerated procedure

The Ministry of Justice insisted to include in the law simplified/accelerated procedure in order to check the manipulation of the refugee application, and it also insisted to institute RSD officers who are in charge of the interview and factual investigation in the RSD process. The stance of NGOs was that there were no complaints against the introduction of RSD officers but the issue at hand was the simplified/accelerated procedure. NGOs claimed that there needs to be such procedure only when it is clear that the applicant is not claiming refugee protection. However, the Ministry of Justice listed a. false application, b. reapplication, c. application close to the expiration date or for purposes to delay compulsory eviction after a year of residence in the country, and d. cases of application after 1 year of arrival as cases appropriate for the simplified/accelerated procedure. After negotiations d was taken out.

4. The treatment of refugees and refugee applicants

(1) Improving treatment of refugee applicants

The biggest issue regarding treatment was the lack of support for livelihood for the refugee applicants. Employment for livelihood was not permitted which was a violation of the refugee applicant's right to live. The December 2008 amended Immigration Control Law only allowed those whose refugee status had not been determined for a year after they applied refugee recognition to work. Those whose refugee status were denied in the first instance, even if they appeal, make litigation, or re-apply since then, they are not allowed to work and could not receive any support for livelihood. This was a problem, but in the new Refugee Act all refugee applicants (including those who are appealing or in the middle of a lawsuit; article 2, section 4) may receive living expenses (article 40, section 1), access to residential facilities, medical services (article 42), and education (article 43), and applicants may get a work permit after 6 months (article 40, section 2) of their refugee application. Applicants in the middle of a lawsuit or reapplying may have limited support on the basis of swift procedure, but even in such cases, work permit can be given (article 44).

(2) Improvements in the treatment of recognized refugees

For recognized refugees, regulations such as social security (article 31), basic livelihood security (article 32), social adaptation program, and so on have been made to remedy the difficulties in the application of law that lacked regulations on refugees. It also created regulations on the recognition of academic degrees (article 35), recognition of qualifications (article 36), and permission of entry of family members (article 37).

(3) Humanitarian status holders and resettled refugees

The final Refugee Act that was passed states that humanitarian status holders may engage in wage-earning employment (article 39) but the law did not mention any other terms of treatment in regards to humanitarian status holders.⁷

The Refugee Act is characteristic in that an article on the acceptance of refugees hoping for resettlement has also been provided (article 24)⁸.

(4) Expansion of the range of refugee applicants to include applicants in litigation

The content that the Ministry of Justice expressed its most disapproval on was the expansion of the range of refugee applicants to include those in the middle of litigation until their trial was determined, and to make it mandatory for the state to support the livelihood of refugee applicants. The Ministry of Justice has until now considered those within South Korea who applied for refugee recognition but had not yet received the decision notice for the Minister of Justice as refugee applicants. They wanted to address the support of livelihood for those who are in the middle of litigation with the general social welfare support and the support of refugee aid organizations. Finally, although the Ministry of Justice decided to include applicants in litigation within the scope of refugee applicants, and allow refugee applicants basic livelihood security, employment, residence, medical education support by negotiating with civil society,, they made it based on discretion rather than the duty of the state. There are opinions that it is unfortunate that it was not made into a mandatory condition, but because of concerns that it would lead to a vehement opposition from the Ministry of Justice and suspicion from media and members of the national assembly and a failure to be ratified in the national assembly, it was compromised by civilians because even if it had been a mandatory condition, there was a high possibility that it would be interpreted as a program clause without binding force.

5. Issues to be done

(1) Regulations on the simplified/accelerated procedure

There is a need to deal swiftly with cases that should clearly be given refugee recognition or cases with applicants who are at the airport or detained. If clearly manipulative cases were dealt with through the general procedure, there is concern of delay and rejection of application so an introduction of the accelerated procedure is necessary.

However, there is concern that on 3 occasions the law says the simplified procedure itself can be misused. In the case of a refugee application based on lies, there are occasions when most of the refugee applicants have no choice but to lie, and occasions when they tell the truth but it is misunderstood as a lie without any way to prove otherwise, so the standard is vague, and the standard for changes in circumstances for re-application without changes in circumstances is vague. There is also the issue that it is difficult to pass judgment on refugee applicants who apply after a year's stay in the country when their expiration date is close or who apply to delay forced eviction. It is hard to blame them for seriously perceiving danger on their return to their country of origin and thus trying to extend their stay by applying for asylum.

Even if it were processed on a simplified procedure, it must be evaluated that the interview cannot be omitted.

(2) Work permit for refugee applicants

Employment will be permitted for refugee applicants. The reason it is left to discernment rather than made mandatory for the government is because of remaining concerns of side effects that this work permit will bring. If the work permit is too hard to get, it is the same as banning employment to refugee applicants, so research should be made on the method of bridging the gap between general permission and a general ban. So, rather than giving general permission, compromising ideas including granting a work permit for specific public labor for a certain period of time, charging income tax on earnings made by refugee applicants with a work permit⁹, or allowing refugee applicants to share burdens or expenses should be considered.

Also, according to article 18 of the Refugee Convention, having a self-employed business will at

least be allowed for refugee applicants, and an according stay permit must be made¹⁰.

(3) Refugee application at the port of entry

On refugee applicants at the port of entry, the law says that it must be decided within 7 days, whether or not the application be referred to the refugee status determination procedure (Refugee Act Article 6, section 3). It should be revised so that once refugee application is made, rather than simply deciding whether to refer the application to the refugee status determination procedure, refugee status should be determined by the accelerated procedure at the port of entry or by the normal process after entry permit. Appeal process should be guarantee at the port, however judicial review could be considered to be restricted.

(4) Regulation on detention

The conditions for lifting detention (temporary release) of refugee applicants who apply after being detained, or refugee applicants who have been detained for having worked after making a refugee application are excessively strict and because no alternatives for detention are provided, there is criticism of long-term detention that lasts until the confirmation of the refugee determination status through lawsuits. In the proposed draft, the detention of the refugee applicant is limited to 6 months and with the permission of the court, within the 1st stage it has been made possible to extend it (article 21), but it was not incorporated into the law.

(5) The application of the law

The law will be applied to cases that are applied for the first time after July 1, 2013, but on this occasion as the law's effectivation draws closer, there will be the side-effect of refugee applications being delayed. It will be ideal to apply the new law on all cases, because it is ideal for the the refugee determination procedure to be according to the new procedure, and there is not a lot of difference for the treatment of refugees when it is discretionary.

6. Conclusion

The international society is paying attention to South Korea's legislation of its Refugee Act. This is because despite the fact that the wall against refugees is getting higher in many countries and

their treatment of refugees is deteriorating, Korea's legislation of the Refugee Act reveals its refreshed determination for the protection of refugees. There is still a lot of revisions and supplementation that is necessary, but in the sense that the legislation has provided a basic framework for the refugee determination procedure and refugee treatment and future areas of development to be addressed, Korea's civil society greatly welcomes the Refugee Act legislation.

Many people think that refugees are poor people who are in need of help, and therefore feel a certain pressure and burden about them. Also, many people are concerned that if many refugees are accepted and the treatment of refugee is improved, there will be a mass influx of refugees who do not return but permanently stay in the country, moreover that if employment is granted to refugees, their jobs will be taken away by them. However, refugees are not always poor people and if they are given an opportunity to work, they will stand on their own feet in distinct fields without competing with Koreans and they are skilled and courageous people who can contribute to our society. Also, refugees are not people who voluntarily chose to immigrate; they are forced migrants who had no choice but to leave their country because of persecution, so if the situation in their country of origin improves, they want to return. The inflow of refugees is determined not by the treatment of the country of asylum but by the degree of persecution in the refugees' countries of origin.

Through Korea's Refugee Act legislation, I hope that these kinds of misunderstandings and prejudice of citizens towards refugees will be improved so that the refugees will discover a safe refuge in Korea and be able to prepare for a new future.

¹ About pNan ; <http://pnan.org/>

² Refugee act ;

http://www.jlnr.jp/refugeelaw/refugee-law_korea/20111229_refugee-protection-act_korea_J.pdf

Korean

<http://www.law.go.kr/LSW/lsEfInfoP.do?lsiSeq=122977#0000>

English

http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=4fd5cd5a2&skip=0&query=korea_refugee_law

³ If detention occurs over more than three months, permission from the Minister of Justice is needed every three additional months.

⁴ A refugee support center has been partly entrusted to NGOs.

⁵ The name of party was changed to Saenuri party in February 2012.

⁶ In Korea, Immigration Control Act and Refugee Act use the word 'protection' as the meaning of immigration detention (or temporary custody). It is criticized for using the word 'protection' because it causes misunderstanding. Even though the word 'protection' still is used in Refugee Act, English translation is done with 'detention'.

⁷ There has been no regulation on the process of Humanitarian Status determination or the treatment of Humanitarian Status holders, except on work permission included in the revision of Immigration Control

Act on December 19, 2008. So the draft of the Refugee Act made by civil society had the clauses ensuring the procedures to determine humanitarian status in order to follow principles of refugee status determination and to treat humanitarian status holders in the same manner with that of refugees except for issues related to entry/exit.

⁸ This article was inserted to the draft by civil society that was motivated by the introduction of Japan resettlement program. On the process of legislative discussion, there has been no strong objection against the introduction of resettlement refugee program in Korea.

⁹ By charging income tax on earnings which refugee applicants got with work permit, or by letting them share burdens or expenses which may cause any of social problems due to work permission for them, if there is any.

¹⁰ A foreign investor stay permit is D8 and an investment of over one hundred million won is necessary to obtain this visa so a separate stay permit must be made for refugee applicants to set up a small self-employed business.