1998(wa) No. 764, No. 1000 & No. 1282, and 1999(wa) No. 383, "Leprosy Prevention Act" Unconstitutional State Compensation Claim Case

Summary of Decision[1]

I. Major issues of the case

(1) Whether the Minister of Health and Welfare was illegal and intentional or negligent in the execution of the Hansen's disease policy

(2) Whether the legislative action of members of Parliament was illegal under the State Compensation Act and whether it is intentional or negligence

(3) Damage

(4) Exclusion period

II. Judgment of the Court

(1) Regarding whether the Minister of Health and Welfare was illegal and intentional or negligent in the execution of the policy on Hansen's disease (Issue 1)

{1} Regarding the execution of the Ministry of Health and Welfare's isolation[2] policy

The Ministry of Health and Welfare had isolated 8,325 patients (about 75% of the population of the patients) as of 1950 under the former Leprosy Prevention Act enacted in 1931. Following the enactment of the Leprosy Prevention Act in 1953 (hereinafter referred to as the "New Act"), the isolation of these patients into sanatoriums had been continued, and also the isolation and placement of new patients

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[1] Translators note: This translation is prepared by S. Yamamoto, a member of the attorneys' group representing the plaintiffs of the case. It is translation of the Summary of Decision (判決要旨) provided by the Court rendering the Judgment for an information purpose, and thus please be advised that (i) this translation is not an official translation by any court nor the government and (ii) the original "Summary of Decision" itself was prepared just for an information purpose and not an official court document in terms of the judicial proceedings. Further, minimal adjustments are made at the discretion of the translator for the purpose of translation/ease of understanding, such as adding underlines for the headings and breaking long one sentence into a couple of sentences.

[2] Translator's note: The Japanese word "*kakuri* (隔離)" can be translated to "isolation," "segregation," "seclusion," "quarantine" or "separation" etc. depending on the context. For the translation of this document, the translator chooses "isolation" for consistency without paying regard to each context where the word is used.

into sanatoriums had been continued. It had isolated Hansen's disease patients into sanatoriums (approximately 91% of the population of the patients), and had subsequently isolated Hansen's disease patients to sanatoriums nationwide with a retention rate of around 90%.

By the way, Article 6 (1) of the New Act stipulated an admission by recommendation, but it presupposed (was backed up by) the admission order of Article 6 (2) and the direct enforcement of Article 6 (3), and thus legally speaking it is difficult to equate such an admission with a voluntary admission. In addition, until the New Act was abolished, because anti-leprosy drugs were not included in the qualified medicines that were available for medical treatment under national health insurance, medical institutions other than sanatoriums that could provide medical treatment for Hansen's disease were extremely limited; especially, under the medical system that it was only Kyoto University that was able to virtually provide inpatient treatment, patients requiring inpatient treatment were in a situation that they had no choice other than to inevitably admit themselves into sanatoriums and to keep staying there. In addition, thorough and enhanced pre- and post-war implementation of placement of almost all patients into sanatoriums led to many people becoming overly fearful based on the false perception that Hansen's disease were an intense epidemic. As a result, social discrimination and prejudice against Hansen's disease was strengthened, and even after the introduction of promin that made Hansen's disease be curable disease, the discrimination and prejudice against Hansen's disease was fomented and maintained by the New Act which continued its policy of isolating Hansen's disease, and persistent discrimination and prejudice continued to exist severely until the abolition of the New Act. It is found by this Court that, in this situation, a Hansen's disease patient was cornered into a situation where he/she had no choice but to enter a sanatorium, and he/she was actually compelled to do so, since, for instance, once he/she was diagnosed with Hansen's disease, public health center staff repeatedly recommended such a patient to enter a sanatorium, and this was followed by the situation where a patient with Hansen's disease and his/her family were looked coldly on by neighbors. Therefore, at least as far as the situation up to around 1973 when the latest of the plaintiffs were admitted are concerned, even for them who were admitted in the form of a recommendation by the authorities, their actual situations cannot be found to have been voluntary admissions.

In addition, extremely strict management was being carried out for the release of sanatorium residents, and even in 1960, when the number of persons in remission who left sanatoriums was the largest, the ratio of the number of such discharged persons

to the number of residents in that year was only 2%. In most cases, the percentage of persons who left the sanatoriums in each year from 1951 to 1997 was less than 1%. "The provisional rules for the decision to discharge Hansen's disease patients," which are the only criteria for the leaving from the sanatoriums indicated by the Ministry of Health and Welfare to the heads of the sanatoriums in 1956, were extremely strict, and were not communicated to residents at that time. Nothing had been officially declared about freedom to leave even after 1975.

Also, Article 15 of the New Act strictly restricted inpatients to go out to the outside of a sanatorium, and if they violated this provision, penalties were to be imposed under Article 28 of the same law, and strict handling of the outgoing restrictions had been maintained until late 1950s and early 1960s. Since the late 1970s, the operation had become fairly modest, but the Ministry of Health and Welfare and the sanatoriums had never officially stated that they had virtually lifted restrictions on going out to the outside of sanatoriums.

In addition, under the leprosy clause of the Eugenic Protection Law, there were sanatoria which maintained inhumane operation until late 1950s or early 1960s in which eugenic surgery was required as a condition for moving in residence spaces for married couples, and the situations were such that the consent to eugenic surgery was required in order to get married in a sanatorium.

From around 1975, living conditions in sanatoria have been improved, and restrictions on going out to the outside of sanatoriums have been moderately enforced. As for the leaving from sanatoriums, as long as residents were willing to do so, the operation became such that sanatoriums did not dare to restrict it. It became, however, by that time, most residents had been living in sanatoriums for long periods of time and became elderly, and prejudice and discrimination against Hansen's disease in society outside of sanatoria still remained, so the number of residents wishing to leave sanatoriums to live in society was gradually decreasing. Under such circumstances, the Ministry of Health and Welfare did not abolish the isolation policy under the New Act until April 1996, which had the content of significantly violating the human rights of patients with Hansen's disease and continued to have the adverse effect of promoting and maintaining discrimination and prejudice against Hansen's disease.

{2} Necessity of Isolation

Since patient isolation imposes ongoing and grave restrictions on human rights to patients, the approach to it should be taken with utmost caution under the current Constitution which guarantees basic human rights as a permanent right that cannot be violated for all individuals, and which requires maximum respect of the basic human

rights in governmental affairs to the extent that it does not interfere with the public welfare, and it should be only permitted to the extent that at least the public health necessity to prevent Hansen's disease ("the Necessity of Isolation) can be found. The determination of the Necessity of Isolation should be made with great care, based on the latest medical knowledge from time to time and taking into account the seriousness of the human rights restrictions to be caused by isolation.

Considering the Necessity of Isolation, it should be noted that (i) from the beginning Hansen's disease was a disease with a very low risk of becoming infected and resulting in onset, and this was well recognized by the government and Hansen's disease specialists long before the enactment of the New Act; (ii) the number of patients with Hansen's disease in Japan had been reduced by half or less during the period of 50 years from 1900 to 1950, and as a result the prevalence had fallen to about one-fifth, from 6,92 per 10,000 to 1.33. The prevalence of Hansen's disease at the time the New Act was enacted was no longer serious, and the incidence of patients was anticipated to decrease spontaneously; (iii) Hansen's disease progresses in a chronic course, but is not fatal in itself from the beginning. In addition, not all cases become severe and some cases heal spontaneously; (iv) at the time of the enactment of the New Act, it was already known in Japan and abroad that promin had a significant effect on Hansen's disease. Especially, the situation became such that the condition of patients with nodular type, which is likely to become severe, could be relieved significantly, and since 1949, promin became widely used in sanatoriums in Japan, and the notion that Hansen's disease was an incurable and tragic disease was no longer valid. Furthermore, since around 1948, DDS, which is the same sulfone agent as promin and can be administered orally, was found to be effective no inferior to promin in a small dose, and at the first WHO Expert Committee on Leprosy in 1952, the year before the enactment of the New Act, it (DDS) received a high valuation that it would expand the possibilities of home treatment; and (v) at international conferences and the like on Hansen's disease, the idea of limiting isolation had appeared everywhere since the pre-war period, and especially the idea that patients were divided into infectious and non-infectious patients and only the former should be the subject of isolation has been repeatedly propounded since the Third International Leprosy Conference in 1923, and a report of the 1st WHO Expert Committee on Leprosy in 1952 also pointed out that. In addition, according to "the principles of the prophylaxis of leprosy" issued by the Leprosy Commission of the League of Nations in 1931 and the report of the 1st WHO Expert Committee on Leprosy in 1952, it was also pointed out that the policy of mandatory isolation tends to make patients try to avoid the isolation and to hide out and thus may not have a

sufficient effect on Hansen's disease prevention, and although it was after the enactment of the New Act, it is found that "Leprosy: A Survey of Legislation" summarized in 1954 by WHO also called into question the legitimacy and effectiveness of the isolation policy.

As such, at least it should be found that there was no such Necessity of Isolation that had to go that far covering almost all Hansen's disease patients in disregard of the degree of infectivity based on the type of disease. It should be so found even by taking into account the situation, on the other hand, where at the time of the enactment of the New Act, as the frequency of recurrence due to sulfone drug treatment had not yet been clarified, it was not possible to say that the evaluation of sulfone drugs had become completely definite, and where, as represented by the report of the 1st WHO Expert Committee on Leprosy in 1952, the opinions of Hansen's disease experts in Japan and abroad didn't go to the point of the complete denial of the isolation policy.

In addition to the above, since the enactment of the New Act, (vi) from around 1956 onward as well, ten years after the commencement of promin therapy in Japan, the continued superiority of sulfone drugs remained firm in the treatment of Hansen's disease worldwide. As treatment results were accumulated, the evaluation of sulfone drugs became more and more reliable; (vii) with this, the direction of denial of forced isolation became increasingly prominent internationally. At the international conferences on Hansen's disease, such as the Rome Congress in 1956, the 7th International Congress on Leprology (Tokyo) in 1958, and the Second WHO Expert Committee on Leprosy in 1959, the abolition of special laws on Hansen's disease was even repeatedly advocated; (viii) the evaluation of sulfone drugs in Japan was also basically the same as the international evaluation as stated above. In fact, the number of severely progressive patients in Japan had dropped sharply since the advent of sulfone drugs; and (ix) since 1955 the number of newly discovered patients had markedly decreased, as the socio-economic situation recovered from the postwar turmoil. In summary, it has to be said that at the latest on and after 1960, Hansen's disease became no longer such a special disease that had to have recourse to the isolation policy, and in all cases irrespective of the type of the disease, the Necessity of Isolation was lost for all sanatorium residents and Hansen's disease patients.

{3} Examination of illegality and negligence

In light of the above, it was necessary for the Ministry of Health and Welfare, as of 1960, when the Necessity of Isolation was lost in relation to all the residents and the patients with Hansen's disease, to make a drastic conversion of the isolation policy, including proceeding with the revision or abolition of the New Act. And the Ministry of

Health and Welfare should have taken at least reasonable measure to make it clear to all the residents that they were free to leave the sanatoria. In addition, as stated above, where medical institutions other than sanatoriums that could provide medical treatment for Hansen's disease were extremely limited, and in particular, under the medical system that it was only Kyoto University that was able to virtually provide inpatient treatment, patients requiring inpatient treatment were effectively forced to enter and stay in sanatoriums. Because this was largely due to institutional deficiencies, such as that anti-leprosy drugs were not being included in the qualified available medicines officially available in medical care under the national health insurance system, the Ministry of Health and Welfare should have taken reasonable steps to eliminate such institutional deficiencies that prevented Hansen's disease care outside of sanatoriums. Furthermore, the long-standing policy of Hansen's disease, combined with the existence of the New Act, played a major role in the creation and furtherance of discrimination and prejudice against patients with Hansen's disease and former patients. Under such antecedent facts, the existence of discrimination and prejudice in society continued to cause tremendous distress to Hansen's disease patients and former patients and was also a major factor in preventing residents from returning to society, and furthermore such discrimination and prejudice is not fundamentally resolved as long as it advocates the national policy of isolation of patients who may cause transmission. Considering the above, the Ministry of Health and Welfare should have taken considerable measures to eliminate discrimination and prejudice in society, such as by making it clear in such a way that the general public was able to recognize that even if it made residents free to leave the sanatoria it did not pose a public health problem.

In this regard, the Ministry of Health and Welfare cannot be regarded, until the (actual) abolition of the New Act, as having implemented a drastic conversion of the isolation policy, including proceeding with various procedures for the amendment or abolition of the New Act, nor as having taken the considerable measures described above.

The Minister of Health and Welfare should be held legally liable for not having made the drastic conversion of the isolation policy as shown above and not having taken considerable measures necessary for it, and also for having irresponsibly let alone the situation of admitted residents in sanatoria, and continuing isolation under the Articles 6 and 15 of the New Act, and further for having left as it stands such public perception that Hansen's disease was a terrible epidemic and that Hansen's disease patients were such danger to be isolated. Therefore, it is reasonable to find that the Ministry's manner of performing the duties as public power exercises are illegal under the State

Compensation Act. It is also easy to find that the Minister of Health and Welfare was negligent.

(2) Regarding the illegality of the legislative acts of Parliament members under the State Compensation Act and the willfulness or negligence (Issue 2)

{1} Unconstitutionality of the New Act

The New Act, Articles 6, 15 and 28, as a whole, provided for the isolation of potentially contagious patients, and the restrictions on human rights imposed by these provisions (hereinafter referred to as the "Isolation Provisions of the New Act") cannot be accurately grasped within the framework of freedom of residence and relocation guaranteed by Article 22 (1) of the Constitution. Isolation of Hansen's disease patients was usually very long but, even if in a case it lasted for a few years, it has a crucial impact on the patient's life and severely undermines all the potentials of life that a person should naturally have as a person, and the limitations of human rights extend to the entire social life as a human being. It is reasonable to regard the actual situation of such restrictions on human rights more broadly as being against the right to personal integrity itself, which is based on Article 13 of the Constitution.

With that said, these human rights are not completely unlimited and are subject to reasonable restrictions by public welfare. However, given the significance of the consequences of patient isolation, utmost caution must be exercised in allowing this; it cannot be allowed unless there is no other appropriate way to prevent transmission than patient isolation, and also it should be allowed only for very limited special diseases.

Looking at this case, in light of the situation at the time of the enactment of the New Act pointed out in the above paragraph (1){2}, especially in light of the situation of Hansen's disease medicine at that time -- such as the fact that the risk of Hansen's disease being infected and leading to onset was extremely low and the perception of medical personnel regarding this fact; the situation of the spread of Hansen's disease in Japan; and the idea that Hansen's disease was an incurable and disastrous illness was no longer valid as the advent of promin which had a prominent effect on Hansen's disease and had Hansen's disease become a sufficiently treatable disease --, it should be found that the Isolation Provisions of the New Act had imposed undue restrictions on human rights beyond the necessity for Hansen's disease prevention already at the time of the enactment of the New Act, and had deviated from reasonable restrictions justified by public welfare.

Furthermore, judging from the situation after the enactment of the New Act pointed out in the above paragraph (1){2}, -- especially the facts that the evaluation of sulfones such as promin in Japan and overseas became definitive by late 1950s; the

number of progressive severely ill patients of the disease actually dropped sharply in Japan since the advent of the sulfones; the number of newly discovered patients was remarkably reduced from 1955 to 1960; and the trends in international conferences on Hansen's disease such as Rome Congress in 1956, the 7th International Congress on Leprology (Tokyo) in 1958 and the Second WHO Expert Committee on Leprosy in 1959 --, it should be found that at the latest in 1960, the Isolation Provisions of the New Act were completely lacking any grounds to support their rationality, and that their unconstitutionality became clear.

{2} Regarding the illegality of legislative acts under the State Compensation Act and the willfulness or negligence

Even if certain statute is unconstitutional, the legislative act of the legislators who enacted it or the omission of the legislators who did not revise or abolish it would not immediately become illegal under the State Compensation Act. The legislative acts of legislators (including the omission in legislation) are illegal under the State Compensation Act only in very special and exceptional cases that are difficult to imagine.

The unconstitutionality of the Isolation Provisions of the New Act was evident at the latest in 1960, and in addition to this, the following factual situations are taken into account: as ancillary resolutions of the New Act stated the New Act expected to be amended in the near future, it was planned that the Isolation Provisions of the New Act should be reviewed from the time the New Act was enacted; in the late 1950s, the evaluation of sulfone drugs became solid, and as a result, internationally, denial of forced isolation gradually became remarkable; at the Roma Congress in 1956 and the subsequent international conferences on Hansen's disease, the abolition of the special law on Hansen's disease was repeatedly advocated; at the 8th International Congress of Leprology in 1963, it was even stated that "indiscriminate isolation is an anachronism and must be abolished"; during the movement to reform the New Act around the same year, Zen-Kan-Kyo actively performed activities such as submitting written requests of revision and lobbying for revision of the New Act to members of the Diet and the Ministry of Health and Welfare; and it is clear even from the words and actions of the Diet members at that time and from "the Views on the Current Situation of Leprosy" which was summarized by Tuberculosis Prevention Section of the Public Health Bureau of the Ministry of Health and Welfare in March 1964 that the Isolation Provisions of the New Act were not rational. In view of the above factors, and in light of the seriousness of human rights harm by the continuation of the Isolation Provisions of the New Act as well as the necessity of judicial remedy, as a very special and exceptional case that is

almost unlikely to be envisaged in other situations, it is reasonable to find the illegality under the State Compensation Act for the legislative omission of the members of the Diet who did not amend or abolish the Isolation Provisions of the New Act at the latest on or after 1965.

Furthermore, the facts that this Court finds as prerequisites for judging the unconstitutional nature of the Isolation Provisions of the New Act could be easily known by Diet members' investigation. Judging from this and the fact that Zen-Kan-Kyo was carrying out the campaign for the revision of the New Act, as well as petitioning to members of the Diet and to the Ministry of Health and Welfare was actively pursued, it should be said that the members of the Diet would be negligent.

(3) Damages (Issue 3)

{1} The Court considers whether an encompassing uniform claim made by the Plaintiffs can be sustained.

Looking squarely at the plaintiffs' total sufferings, the damage should be extremely serious. However, this case is an unprecedented, very special large-scale lawsuit for damages regarding the harm resulting from the New Act and the isolation policy having relied on the act; their harm, even the shortest, lasted very long for 23 years from 1973 until around the abolition of the New Act; and if the content of their harm is taken up individually, the damage was caused to extend to entire aspects of social lives and to a wide variety of aspects indeed, such as body, property, honor, trust, and family relations. Accordingly it is clear that if proof was sought for each one, the litigation would be greatly delayed, there is no hope of remedy at all, and thus it is obviously not appropriate in the operation of justice. Originally, the concept of pain-and-suffering damages has a function to ensure the social relevance of all damages by supplementing and adjusting the damages of each item even in the case of individual calculation method. Given this, it must be allowed to grant the encompassing damages for the pain-and-suffering to cover a range in which a certain degree of commonality can be found among the sufferings claimed by the plaintiffs.

{2} Plaintiffs describe the common damage in this case as the right to a peaceful life in society, but the content of which they list individually is quite diverse.

Of these, with regard to the damage caused by isolation, which plaintiffs take up as a main item on the right to live peacefully in society, it is possible to find a certain degree of commonality if the timing is specified. The difference in the degree of damage among the individual plaintiffs, such as the difference in treatment at each sanatorium, does not adversely affect the defendant as long as the amount of damages is calculated conservatively with consideration given to the case of less damage. Therefore, it is

reasonable to see the damage caused by isolation as common damage.

Plaintiffs also include the mental harm caused by discrimination and prejudice from society in the alleged common damage of their right to live peacefully in society. In this regard, the damage should be found as mental harm that the plaintiffs have been placed in a position to suffer discriminatory treatment by false social perceptions of Hansen's disease (prejudice), not the damage by each discriminatory treatment caused by people in society, and certain commonalities can be found in this as well. Plaintiffs have various damage situations, but here too, it is possible to regard this as common damage as long as the amount of damages is calculated conservatively, keeping in mind that there is a difference in the damage situation among the plaintiffs.

And rather than monetarily assessing these two types of common damage separately, it is fair to encompass them all together as damage that has prevented them from living peacefully in society.

{3} Based on the above, the amount of pain-and-suffering damages is categorized into four stages of 14,000,000 yen, 12,000,000 yen, 10,000,000 yen and 8,000,000 yen, depending on the time of initial admissions and the period of placement in sanatoriums. It is reasonable to grant 10% of each of the above for the legal fees.

The reason the maximum amount of pain-and-suffering damages is only 14,000,000 yen is largely due to the encompassing uniform claim selected by the plaintiffs, but it is not only that but also the result of fully evaluating the efforts to improve the living conditions in sanatoria before the repeal of the New Act and the maintenance and continuation of the living conditions after the same repeal.

Therefore, it is clear that this judgment does not provide a legal basis for affecting the treatment guaranteed by Articles 2 and 3 of the Act on the Abolition of the Leprosy Prevention Law.

(4) Exclusion Period (Issue 4)

The defendant alleges that the right to claim state compensation damages for actions taken prior to twenty years from the time plaintiffs filed this lawsuit was extinguished by the latter part of Article 724 of the Civil Code, which sets the exclusion period.

Therefore, the Court examines the meaning of "the time of the tortious act" in the latter part of Article 724 of the Civil Code, which is the starting point of the exclusion period. The illegal acts in this case are determined above that the Minister of Health and Welfare did not make fundamental conversion of the isolation policy based on the Necessity of Isolation being lost from 1960 until the abolition of the New Act in 1996 and that Diet members did not amend or abolish the Isolation Provisions of the

New Act from 1965 until the abolition of the New Act in 1996, and both of these are continued omissions. The illegal acts were terminated when the New Act was abolished in 1996, and the damage was caused continuously and cumulatively until the New Act was abolished. With the above, unless the life damage (the damage to the whole span of life) is evaluated as a whole in an integrated manner at the end of the illegal acts, it is impossible to properly calculate the amount of the damages.

Considering the nature of the illegal acts and the damage in this case, "the time of the tortious act", which is the starting point of the exclusion period, is considered to be the time when the New Act was abolished in this case and thus it should be held that the rule of exclusion period is not applicable.

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