Right to health in international human rights law

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Ⅰ. Introduction

The right to health is an essential one for an individual's well-being. The right encompasses many areas of human living, including hygiene, environment, and medical treatment. The present article seeks to explore the relationship between the right to health and the right of a foreigner not to be expelled in the context of immigration control. The author recently published a Japanese case commentary concerning the topic above, and the present article is based on the case study developed in the case commentary.

In order to examine the question above, the present article will first

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examine the normative scope of the right to health, especially as enshrined in the International Covenant on Economic, Social, and Cultural Rights (Chapter Ⅱ). It then examines Japanese cases in which the right to health was at issue in the context of the deportation of aliens (Chapter Ⅲ). The cases before the European Court of Human Rights give us additional insight regarding the issue, so the jurisprudence of the Court is also examined (Chapter Ⅳ). The present article ends with a comparative analysis of the Japanese and European cases (Chapter Ⅴ).

Ⅱ. Normative scope of the right to health

Article 12 of the International Covenant on Economic, Social and Cultural Rights (the Covenant) provides the right of everyone to health and States' obligations corresponding to that right. It states:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
   (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
   (b) The improvement of all aspects of environmental and industrial hygiene;
   (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
   (d) The creation of conditions which would assure to all medical

service and medical attention in the event of sickness.

The right to health as stipulated in Article 12 of the Covenant has its origin in Article 25(1) of the Universal Declaration of Human Rights.[1] The right to health can also be found in universal and regional human rights texts, such as the International Convention on the Elimination of All Forms of Racial Discrimination (article 5(e)(iv)), the International Convention on the Elimination of All Forms of Discrimination against Women (article 11(1)(f)),[2] the Convention on the Right of the Child (article 24), the European Social Charter (article 16), the African Charter on Human and Peoples' Rights (article 16), and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (article 10).

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1 Article 25(1) of the Declaration provides:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The right to health recognised in Article 25 is intertwined with the right to an adequate standard of living. *See*, Manisuli Ssenyonjo, ***Economic, Social and Cultural Rights in International Law*** (2nd Edition), Hart Publishing, 2016, pp. 512-3.

2 In the General Recommendations of the Committee on the Elimination of Discrimination against Women, access to health care is also emphasised in connection with women and health. *See* General Recommendation No. 15 (Avoidance of discrimination against women in national strategies for the prevention and control of acquired immunodeficiency syndrome (AIDS)); No. 24 (Article 12 of the Convention (women and health)), reprinted in U.N. Doc., HRI/GEN/1/Rev. 9(Vol. II) (27 May 2008), pp. 327, 358.

The text of Article 12, together with Article 25(1) of the Universal Declaration of Human Rights, does not contain any precise definition of the word "health". In the drafting the history of Article 12, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of the World Health Organization.[3] In the General Comment of the Committee on Economic, Social, and Cultural Rights (the Committee), it is understood that the right to health means not only health care, but extends to the underlying determinants of health, thereby encompassing a broader scope.[4] The right to health is therefore closely intertwined with other substantive rights, e.g., the right to the highest attainable standard of living, the right to food and water, the right to a healthy environment, and the right to life, just to name a few.

According to the General Comment of the Committee, the right to health is illustrated as a multidimensional one.[5] First, it is understood as

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3 Committee on the Economic, Social, and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of health (art. 12) [General Comment No. 14], para. 3, reprinted in U.N. Doc., HRI/GEN/Rev. 9 (Vol. I) (27 May 2008), pp. 78-96.

In the preamble to the Constitution of the WHO, health is defined as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."

4 General Comment No. 14, *supra* note 3, para. 4.

Chapman criticises the lack of conceptual clarity on health, which has led to complicated implementation and monitoring. Audrey Chapman, "Core Obligations Related to Right to Health," in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social, and Cultural Rights*, Intersentia, 2002, p. 187.

5 *See*, John Tobin, *The Right to Health in International Law*, Oxford University Press, 2012, which illustrates the broad issues related to the right to health.

a social construct; individuals' health has biological and socio-economic preconditions.[6] Thus, the State Parties to the Covenant are required to take measures as illustrated in Article 12 (2), i.e., to diminish the stillbirth rate and infant mortality (article 12 (2) (a)), to improve all aspects of environmental and industrial hygiene (article 12 (2) (b)), to prevent, treat and control diseases (article 12 (2) (c)), and to provide health facilities, goods and services (article 12 (2) (d)).[7] Like the other rights enshrined in the Covenant, General Comment No. 14 prescribes the essential elements inherent in the right to health: availability, accessibility, acceptability, and quality.[8]

In response to the right to health contained in Article 12 (1), States are under a general obligation to respect, protect and fulfil the right.[9] The obligation to respect the right to health means refraining from denying or limiting equal access for all persons. The obligation to protect includes taking measures to ensure equal access to health care and health-related services provided by third parties. The obligation to fulfil includes sufficiently recognising the right in the national policy planning and legal systems, such as the national strategy and framework law.[10] In addition, State parties are required to ensure access to effective judicial or other appropriate remedies for any person or group victim of a violation of the right to health, together with legal recognition of the incorporation of the international instruments in the domestic legal

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6 General Comment No. 14, *supra* note 3, para. 9.

7 *Ibid.*, paras. 14-17.

8 *Ibid.*, para. 12.

9 *Ibid.*, paras. 30-33.

10 *Ibid.*, paras. 34-37, 53-56. A set of core obligations is illustrated in paras. 43-44.

system.[11]

In the context of the present article – the deportation of non-nationals with intractable disease –, some points merit attention. First, it is important to note that the right to health is to be available to all persons, irrespective of their nationality.[12] Of course, this does not require States to accord free medical treatment to all persons, because the cost to realise this is too high.[13] The non-discriminatory nature of the right is also emphasised in this context. Second, a reference to immigration control is not found in General Comment No. 14. However, a deportation measure might interfere with an individual's right to health if a State party does not take the individual's health status into account during the process. In such a case, the State might be liable for being in violation of the right as an act of the State. This point is very important in the context of the present article, and thus, it will be examined in depth after an examination of the Japanese cases.

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11 *Ibid.*, paras. 59-60. The necessity of incorporating international instruments in the domestic legal system is also emphasised in the Committee's General Comment No. 9. CESCR, General Comment No. 9: The domestic application of the Covenant, reprinted in U.N. Doc., HRI/GEN/Rev. 9 (Vol. I) (27 May 2008), p. 47.

12 General Comment No. 14, *supra* note 3, para. 12.

13 The issue is also discussed in the jurisprudence of the European Court of Human Rights. *See* Chapter IV, especially the case of *N. v. the United Kingdom*.

Ⅲ. Japanese case analysis - Right to health and immigration control –

1. Japanese case: X and others v. Minister of Justice

1) Facts and Backgrounds of the case

The case of *X and others v. Minister of Justice* concerned the right to health of foreign residents in connection with immigration law.[14] Mr. X, a Bangladeshi national, stayed and worked in Japan after the expiration of his valid work permit. He was therefore found to be in contravention of Japanese immigration law. As a consequence, an administrative decision was issued to expel him and his family (his wife and son, both Bangladeshi nationals). They then filed a case before the Japanese national court in order to compel the Minister of Justice to withdraw the above-mentioned decision. In the proceedings before the Court, they insisted that the Minister should have taken their special circumstances into account and should have accorded them a special permit to stay in Japan. According to them, Mr. X suffered from ulcerative colitis; therefore, it was necessary for him to receive medical treatment in Japan. This was also true for his son (Mr. Y), four years old at the time of the decision, who had just undergone medical surgery to cure cryptorchidism. It was also necessary for Mrs. Z, Mr. X's wife, as well as Mr. Y's mother, to providing nursing care for them. In sum, they claimed that the Minister of Justice erred in the evaluation of their health status

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14 *X and others v. Minister of Justice*, 16 June 2015, Judgement, Tokyo District Court.

Yutaka Watanabe, "Special permit for residence and humanitarian consideration," *Jyuyo Hanrei Kaisetsu* [Case commentaries of importance in 2015], *Juristo* special issue No. 1492 (April 2016), p. 282 (in Japanese).

when he made his decision. According to their claim, it would not be possible to receive the medical treatment necessary for Mr. X and Mr. Y if they were expelled to Bangladesh due to the inferior standards of medical treatment and health status in Bangladesh.

At the same time, Mr. X and his family had some disadvantageous points. Mr. X was barred from entering Japan when he visited Japan due to his prior illegal residence. He therefore obtained a counterfeit passport and a false marriage certificate in order to enter Japan and to invite his wife from Bangladesh. No one in the family had a legitimate resident status. They submitted their circumstances before the Immigration Bureau and applied for a special permit for residence.[15]

Japanese immigration law (Immigration Control and Refugee Recognition Act) provides that the Minister of Justice has the discretion to allow foreign residents to stay in Japan, even though they are subject to deportation.[16] The Law does not stipulate any substantive standards in the exercise of the discretion, and it has been held that the Japanese Immigration Bureau should be more transparent in this matter. The Immigration Bureau of the Ministry of Justice issued a guideline in 2006,

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15 Japanese immigration law and the guideline provide that the voluntary submission of illegal residence will not be counted as a disadvantageous element in the evaluation for granting a special permit for residence, except for a "grave contravention" of immigration law.

16 Article 50 (1) provides: "Even if the Minister of Justice finds that a filed objection is without reason in making the determination set forth in paragraph (3) of the preceding Article, he/she may grant the suspect special permission to stay in Japan if the suspect falls under any of the following items: […]

(iv) the Minister of Justice finds grounds to grant special permission to stay, other than the previous items."

and the guideline provides both positive and negative circumstances in the process.[17] It is considered in Japanese jurisprudence; however, the guideline is not legally binding *per se*, and the examination is carried out on a case-by-case basis, taking personal circumstances into account. It does not follow, therefore, that certain foreign residents are allowed to stay in Japan even when they fall within the "positive elements" contained in the guideline. In the context peculiar to the present article, it is quite interesting to note that an element concerning health status is clearly stipulated in the guideline, which reads:

> ***1 Positive elements to be given particular consideration***
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> *(…)*
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> *(5) When the applicant requires treatment in Japan for a serious illness, etc., or when the applicant's continued presence in Japan is deemed necessary in order to nurse a family member who requires such treatment. (…)*
>
> ***2 Other positive elements***
>
> *(…)*
>
> *(6) When there are humanitarian grounds or other special circumstances. (…)*

In the present case, the main issue concerned whether they qualified for the above-mentioned positive circumstances and thus were allowed to stay in Japan, relying upon their health status. The present

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17 Immigration Bureau, Ministry of Justice, *Guidelines on Special Permission to stay in Japan* (October 2006, revised in July 2009), available at <http://www.moj.go.jp/content/000048156.pdf> (last accessed 6 December 2016; emphasis added).

case is the leading case in this field because health status does not appear as a major issue in Japanese immigration cases.[18]

The Minister of Justice contended that they did not qualify for a special permit to stay in Japan because the necessary medical treatment was available in Bangladesh. He claimed that there was no hindrance to deportation because no circumstance could be found to illustrate a deterioration of their health status, even if they returned to Bangladesh. As for Mr. X, the Minister of Justice insisted that his health status was not very serious and that he was now capable of working, thanks to medical treatment and medication.[19] The medicine he had taken was now also available in Bangladesh in a generic form, and it was affordable for him.[20] Therefore, the Minister of Justice claimed that there were no special circumstances that he should have taken into account in regard to Mr. X's health status, and that there was no error in the evaluation of Mr. X's circumstances.

As for Mr. Y's health status, the Minister of Justice claimed that there was no legal bar to expelling him from Japan. Because he was four

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18 In most cases, the main issue has concerned whether a stable tie can be found with Japanese society, and whether or not a family member is becoming a part of Japanese society. In the process of the evaluation, the existence of a breach of an immigration regulation (overstay, counterfeit of identification documents) is heavily taken into account.

19 Ulcerative colitis is now designated as an intractable disease in Japan, but the disease does not prevent one from working. Periodic medical treatment, together with the appropriate medication and a prudent lifestyle, prevents the disease from becoming more serious.

20 According to the judgement, the Minister of Justice showed that the price of the generic medicine (MESACOL) in Bangladesh amounted to 361.50 taka (equivalent to 462 yen).

years old at the time of the decision, it was not desirable to separate him from his parents. Because his father, Mr. X, should be expelled, he would also be expelled together with his parents. Moreover, Mr. Y recently received medical surgery to cure cryptorchidism, but he could also receive medical treatment in Bangladesh. Therefore, there was no legal hindrance to expelling him from Japan.

2) Judgement

The Tokyo District Court held that the Minister of Justice erred in the evaluation of their health status and that they qualified for a special permit to stay in Japan. In the judgement, the Court held that Mr. X's continued medical treatment in Japan was deemed necessary. According to the judgement, there was no dispute as to the fact that Mr. X had suffered from ulcerative colitis since December 2005. His health status was stable thanks to the appropriate medication.

The Court considered the case from the viewpoint of whether or not there was a substantial hindrance to expelling them from Japan. It first examined the case of Mr. X, holding that the medication Mr. X had taken did not appear in the pharmacopoeia published by the Bangladeshi Ministry of Health. Even though it is possible to obtain a generic one with a similar effect, the price amounts to a third of the average Bangladeshi income (roughly 1500 taka), which casts doubt on the possibility for his periodic treatment by availing himself to the necessary quantities of medicine. The above-mentioned circumstance illustrates the fact that Mr. X was in a situation in which he required treatment in Japan for an intractable illness, as shown in the guideline above.

This was also the case for Mr. Y, Mr. X's son. In the judgement, the Court held that Mr. Y had received medical surgery in order to cure his

cryptorchidism in September 2015. The surgery was necessary in order to prevent the deterioration of his health status, because cryptorchidism can lead to testicular cancer and a lack of fecundity. The Court held that it deemed it necessary for him to have his status followed up periodically. Because the level of medical treatment in Bangladesh is inferior to that in Japan, there was doubt as to the possibility of his continued follow-ups. It was therefore necessary for him to stay in Japan when the deportation order was issued against him just prior to his medical surgery. Together with the special circumstances of his father Mr. X, Mr. Y could not be separated from his parents, as enshrined in the Convention on the Rights of the Child (Article 9). Therefore, the Court recognised that the Minister of Justice had also erred in the evaluation of his circumstances, and he was also qualified for a special permit to stay in Japan. The decisions mentioned above also led to the same conclusion as to Mrs. Z. It was clear that both Mr. X and Mr. Y were entitled to stay in Japan for their serious disease, and therefore, she needed to nurse them, as illustrated in the guideline.

During the proceedings before the Court, the Minister of Justice contended that the Japanese government did not have any obligation to allow foreign nationals to receive medical treatment, because the State of their nationality has the primary responsibility to cater for their nationals. Relying upon the above-mentioned claim, the Minister insisted that he did not make any errors in the evaluation. In response, the Court held as follows:[21]

> In general, foreigners do not always have a legal right to receive medical treatment, nor do they qualify for benefits from

21 Translated by the author from the original Japanese text.

the social system and medical level just because they stay in Japan. However, there may be room for different consequences in a certain situation where a foreigner is found to suffer from an intractable disease during his/her stay in Japan, and his/her health status is improving due to medical treatments; his health status will deteriorate when he returns to his home country, due to the lack of sufficient availability of medical treatment. (…)

Furthermore, Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights, to which Japan is a party, states "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12 (2) also stipulates "[t] he steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:". It provides a list of the "creation of conditions which would assure all medical services and medical attention in the event of sickness."

It is clear from the provision above that it is our duty to accord special benefits to a foreigner in the special circumstances mentioned above; with due consideration in the process of according a special permit to stay, as well as the individual circumstances.

In conclusion, the Court held that the Minister of Justice erred in the evaluation of their personal circumstances, which led to an erroneous conclusion. It was therefore legally invalid, and the administrative order at issue should be withdrawn.

2. Brief evaluation: the right to health in connection with immigration

1) Theoretical status of the right to health in the judgement

The case of *X and others v. Minister of Justice* illustrated a theoretical issue: how a right to health is to be evaluated in the context of immigration control. Put in another way, under what circumstances is a foreigner protected from deportation in order to receive medical treatment? In the present case, the issue appeared in the interpretation of the guideline, as well as in the evaluation of individual health status.

The judgement examined these issues based on substantial hindrance and the availability of the necessary medical treatment in Bangladesh. It particularly examined the availability and affordability of Mr. X's medication, and concluded that the deportation surely constituted substantial hindrance.

In the process, the judgement explicitly referred to Article 12 of the Covenant in order to determine the obligations of the State. However, the theoretical relationship between the guideline and the Covenant is not clear. One question remains: How was the right to health incorporated in the present case?

As shown above, Article 12 (1) of the Covenant recognises an individual's right to health, and Article 12 (2) stipulates the State obligations in relation to paragraph 1. From this point of view, the text of Article 12 does not confer a right of foreigners to receive medical treatment in a foreign country. This point is clearly stated in the judgement, which held: "In general, foreigners do not always have a legal right to receive medical treatment, nor do they qualify for benefits from the social system and medical level just because they stay in Japan". However, the access to health care for all persons, irrespective of their

nationality, is to be secured in the context of the right to health. Therefore, in the present case, the question arises regarding the circumstances under which a foreigner is allowed to stay in Japan in order to receive medical treatment due to his/her health status. The judgement seems to search for the answer in the State's obligations to offer health services to non-nationals, relying upon the Covenant.

The guideline simply states that a foreigner is allowed to stay in Japan when "the applicant requires treatment in Japan for a serious illness" or when "there are humanitarian grounds or other special circumstances." The judgement seems to have found the answer in the words of Article 12 of the Covenant. The Committee on Economic, Social and Cultural Rights articulated an obligation of the State Parties to provide health services to everyone, regardless of nationality, in its General Comment No. 14, which reads:[22]

> In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum-seekers and illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs.

This point becomes clear in the context of emergency medical care, which emphasises the right of everyone to receive it in the following

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22 General Comment No. 14, *supra* note 3, para. 34 (emphasis added).

way:[23]

> Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

It is in this context that the Tokyo District Court found that there was room for "special circumstances with different treatment" for a foreigner who suffers from a serious disease. In the judgement, the Court found that "[i]t is clear from the provision above [Article 12 of the Covenant] that it is our duty to accord special benefits to a foreigner in the special circumstances mentioned above; with due consideration in the process of according a special permit to stay, as well as the individual circumstances." In line with the guiding principles mentioned above, the Court carefully examined whether or not there are substantial hindrances if the applicants were to be expelled and returned to Bangladesh. In the context of the present case, an issue appeared regarding how to evaluate the "seriousness" of the disease, and how to evaluate the existence of "humanitarian grounds" as provided in the guideline.

The judgement evaluated the issue in light of the hindrances they

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23 CESCR, General Comment No. 19: The Right to Social Security (art. 9), U.N. Doc., E/C.12/GC/19 (4 February 2008), para. 37 (emphasis added). *See* also, Yutaka Watanabe, "Right to social security in international human rights law," 48(4) *HOUSEI-RIRON* (2016), pp. 189-190.

would face when deported to Bangladesh. In the evaluation of the individual circumstances of Mr. X, the judgement recognised that the medication he had taken did not appear in the Bangladeshi pharmacopoeia. Together with the high price of his necessary medication (roughly a third of the average income of the middle class, according to the findings of the judgement), the Court found the existence of a substantial hindrance on the part of Mr. X. As for Mr. Y, the Court found that a follow-up was necessary for him, but indicated that there was no guarantee he would receive it in Bangladesh. This is how the Tokyo District Court reached its conclusion. Relying upon the obligations enshrined in the Covenant, the Court emphasised the humanitarian aspect of foreigners with serious diseases as illustrated in the guideline. It then examined the overall availability of the medical treatment necessary for them. This is how the Court reached its conclusion that the applicants fell within "special circumstances" in the words of the judgement.

Although the normative status of the Covenant is neither stated nor established in the judgement, the judgement relied upon the words of the Covenant to emphasise the State's obligations to provide medical treatment to all persons, irrespective of their nationality. In line with the humanitarian considerations, the judgement carefully examined the individual circumstances of the applicants, which led to a conclusion in their favour.

2) Japanese cases related to the right to health and immigration law

a. Korean woman case (2013)

The number of Japanese cases in which a person's health status was a main issue in relation to the expulsion of foreigners is small. There

is a case similar to the present case in which the right to health was examined in relation to the Covenant. The case concerned a Korean woman with terminal thymic carcinoma.[24] She did not have a legitimate status to stay in Japan, so she was subject to deportation. In the proceedings, the Minister of Justice insisted that she did not have any substantive hindrance. According to the statement of the Minister, she could take advantage of similar medical treatment in Korea, so she did not face any substantive hindrances. In response, the Nagoya High Court relied upon the text of Article 12 of the Covenant in its judgement. According to the judgement, "[i]n the exercise of the discretion [under the immigration law] accorded to the Minister of Justice, an interest related to medical treatment is to be treated as the most important one." The Court therefore found that "a humanitarian consideration must be the paramount one for persons with a bad health status, in particular for those with a life-threatening disease."[25] In the particular context of this case, the applicant's cancer was strongly expected to come back; it was therefore necessary for her to keep receiving medical treatment in the same hospital that she had frequented, where there was sufficient information and she had a personal relationship with the doctors and medical staff. Of course, she could also have taken similar medical treatment in Korea. Considering the difficulties she would face if removed, including the hardship of constructing a new relationship with different doctors and medical staff while experiencing the pain due to the

24 *X v. Minister of Justice*, 27 June 2013, Judgement, Nagoya High Court.

25 It should be noted, however, that the judgement does not touch upon the binding nature of the guideline, nor does it examine the theoretical status of the Covenant.

disease, the Nagoya High Court seemed to have reached a conclusion to allow her residence status as a result of her health status. The judgement referred to Article 12 of the Covenant in order to emphasise the State obligations in certain circumstances, similar to the judgement addressed in 1) above.

b. Peruvian family case (2010)

Although the right to health is not directly stated, we can find some cases related to the right to health and immigration control. One example can be found in a case concerning a Peruvian family.[26] The family was found to be in contravention to the immigration law because of the absence of legitimate resident status, and they became subject to deportation. During the process of deportation, one of the family members, a 14-year-old boy at the time of the administrative decision, was found to suffer from a brain tumour. He underwent a medial surgery to remove the tumour, and it was necessary for him to have periodic follow-ups. As a result, the family as a whole brought a case in order to have the decision withdrawn. They insisted in the proceedings that they be granted a special permit to stay in Japan, partly because of the necessity of continued medical treatment for a member of the family.

The District Court judgement did not touch upon the Covenant and made a conclusion only within the framework of the immigration law. It found that the Peruvian medical level was inferior to that in Japan, which might have led to serious consequences for the boy. Based on the finding that he had an independent personality, together with his stable

26 *X and others v. Minister of Justice*, 22 January 2010, Judgement, Tokyo District Court.

relationship with the Japanese community and the availability of assistance from the Peruvian community in his living area, the Court found that he could qualify for a special permit to stay, although the other family members could not. The case emphasised the necessity to receive continued medical treatment in Japan, taking due account of the inferior medical level and the availability of the necessary medical treatment in the country of his origin.

c. Philippine family case (2014)

A recent case concerned a Philippine child with Down syndrome.[27] Mr. X, the plaintiff with a Philippine nationality, became subject to deportation due to his illegal entry into Japan. He had a common-law partnership with a Philippine woman who held permanent resident status. He and his common-law partner had a baby suffering from Down syndrome, an intellectual handicap, and an underactive thyroid function as a consequence of the syndrome.[28] In the proceedings before the District Court, Mr. X insisted that the administrative decision be withdrawn because his deportation to the Philippines entailed a hardship on the part of his partner and their children, especially the baby suffering from the handicap. According to the claim of Mr. X, the baby needed to receive frequent observation and medical treatment, which is not available in the Philippines. The Tokyo District Court held that there is a poor level of assistance to handicapped children in the Philippines, which

27 *X v. Minister of Justice*, 10 January 2014, Judgement, Tokyo District Court.

28 According to the judgement, the baby in question obtained legitimate resident status, owing to the birth from a mother with legitimate permanent resident status.

implied that the baby would face severe living conditions, and it thereby concluded that Mr. X was qualified to stay in Japan in order to take care of the child, who needed to receive continued medical treatment and special care as a handicapped child. Like the case concerning the Peruvian family, the judgement emphasised the poor system for handicapped children in the Philippines.

d. Chinese man case (2014)

However, pleas related to health status tend to be rejected in many cases. An example can be found in the case of a Chinese man suffering from a congenital deformity in both limbs.[29] He visited Japan and lived with his sister, who had already been naturalised and had obtained Japanese nationality. He tried to cure his disability through medical surgery, but received the diagnosis that there was little hope of success even if multiple surgeries were performed. He applied for permanent status owing to his serious disease, but the application was rejected. He was unable to walk by himself and was fit to move in a wheelchair. His health status was not so serious as to require full-time care by others. In the judgement, the Tokyo District Court held that there were no special circumstances that required him to receive medical treatment in Japan. He had not received medical treatment to cure his disability, he could move in a wheelchair, and he had lived in an apartment (on the 3rd floor) prior to his arrival in Japan. These factors implied the possibility of living at a certain standard of life in China. Further, it was his state of nationality that should be responsible for his health status. China had

29 *X v. Minister of Justice*, 30 September 2014, Judgement, Tokyo District Court.

enacted a law providing for the social welfare and security of persons with disabilities. These factors illustrated the possibility of the availability of a certain level of life, even in China. In light of the above-mentioned findings, the Court rejected the claim. In this case, in contrast with the above-mentioned cases, the primary responsibility of the state of nationality was emphasised, which led to the denial of a special permit to stay in Japan.

3) Brief summary of the cases and some reflections

In a closer look at the cases above, it is possible to find some common characteristics in the cases related to health and immigration control. First, in order to have a permit admitted on the basis of serious disease, it is not sufficient to merely illustrate the fact that the medical level in the country of origin is inferior to that in Japan. At the least, it is necessary to prove that a removal measure entails a negative impact on health status, mainly due to the lack of availability of the necessary medical treatment. Second, a case-by-case examination is conducted regarding whether the applicant meets the standard of "serious disease" or "special circumstances" as enshrined in the guideline. The standard should be transparent, but it is surely dependent on the personal circumstances. This leads to a case-by-case analysis, but the availability and affordability of the necessary medical treatment seem to be a common feature in the process of evaluation. Third, as a substantive criterion, the foreseeability of a deteriorating health status due to lack of medical treatment as a result of deportation is emphasised. However, such a standard does not appear in the guideline, which shows the discrepancy between the text and the practice. In addition, the right to health as articulated in Article 12 of the Covenant is not generally

emphasised. In some cases, the right is certainly indirectly illustrated, but a theoretical relationship with the guideline should be examined in more depth in additional cases in the future.

The issue of a substantial evaluation of the real risk to health can also be seen in the jurisprudence of the European Court of Human Rights, as we shall see later in a comparison with the Japanese cases. After considering the European jurisprudence, we shall return to this point in the Conclusion.

3. Extent and limitation on staying in Japan? Further examination

1) Appeal Court Judgement

In the case addressed in section 1, the Tokyo District Court held that an administrative decision to expel Mr. X and his family was illegal; therefore, it was null and void. The Minister of Justice appealed, and the case was brought before an appeal court (Tokyo High Court).[30] In the appeal proceedings, the Minister of Justice again claimed that the applicants did not qualify for a special permit to stay in Japan. He then elaborated a restricted interpretation of "special circumstances" that recognises medical treatment in Japan.

According to the Minister of Justice, the legal nature of a special permit to stay in Japan is *ex gratia*, because it is the State of nationality that bears the primary responsibility to protect its nationals. In other words, foreigners are not entitled to receive medical treatment in Japan just because the medical standard in their home country is inferior to

30 *X and others v. Minister of Justice*, 20 January 2016, Judgement, Tokyo High Court.

that in Japan. Deporting a foreign national from Japan and preventing him/her from receiving medical treatment is not in itself illegal. In light of the legal nature of a special permit to stay in Japan, as well as its humanitarian nature, the permit should be allowed in very exceptional and compelling circumstances: The foreigners would face a real risk of life soon after they returned to their home country, their health status is unfit for deportation, and their disease is so serious that it is highly urgent and necessary to cure them in Japan. In the claim of the Minister of Justice, both Mr. X and Mr. Y did not fall within these circumstances, and the administrative decision in question did not contain any errors regarding their individual circumstances. It should be noted that the above-mentioned limited understanding of "special circumstances" enshrined in the guideline is similar to the jurisprudence of the European Court of Human Rights, as we shall see later.

Based on the claims above, the Minister of Justice insisted that he did not make any mistakes in the evaluation of the circumstances of Mr. X. First, the health status of Mr. X was not so serious as to prevent him from working. It was established that Mr. X had suffered from ulcerative colitis; however, his health status was relatively stable, and it was possible to maintain a status of remission with the appropriate medical treatment. He was now fit to work, and the medication necessary for him was available in Bangladesh. Second, the price of the medicine could be less expensive if he could take advantage of a generic one in Bangladesh. Together with his grave breaches of immigration law, it could not be concluded that the Minister of Justice had abusively exercised his discretion in the evaluation of the granting of a special permit to stay in Japan.

As for Mr. Y's circumstances, the Minister of Justice also claimed

that there was no error in the decision to expel him. Mr. Y had certainly suffered from cryptorchidism, and he had just received medical surgery to cure it. Moreover, it was very rare for cryptorchidism to cause testicular cancer. That means that the health status of Mr. Y was not so serious as to deprive him of his life. In addition, the medical treatment for cryptorchidism was also conducted in Bangladesh, which means that follow-ups after surgery were also possible and feasible if he returned to Bangladesh. Therefore, the Minister of Justice concluded that he had not made any mistake in the individual evaluation of Mr. Y.

Mr. X and his family rebutted the claim by the Minister of Justice. First, Article 12 of the Covenant, together with the Convention on the Rights of the Child, does constitute a legitimate basis to limit the discretion exercised by the Minister of Justice. Second, the health standards and hygienic environment in Bangladesh are too poor. Public hospitals are not available, due to the lack of sufficient medical staff and necessary medications. Nor are private hospitals available for everyone due to the high costs. Third, the medication that Mr. X had taken was neither available nor affordable, because it does not appear on the essential drug list in Bangladesh. Together with the high cost of the medicine, it was concluded that the medicine was neither available nor affordable.

The Tokyo High Court upheld the appeal and held that Mr. X and his family did not qualify for a special permit to stay in Japan. The Appeal Court first examined the availability of the health services necessary for both Mr. X and Mr. Y. The Court found that the necessary medicine for Mr. X was available in Bangladesh, because it was on the database established by the Pharmaceutical Management Bureau, the Bangladeshi Ministry of Health. It then recognised that the necessary

health services for Mr. X and Mr. Y were available, indicating the estimated prices in Bangladesh.[31] The Court found that Mr. X could have a normal life as long as he received similar medical treatment, and that a hygienic environment itself did not directly affect the deterioration of his disease. It then indicated that the necessary medicine for him was available and affordable, even if he returned to Bangladesh and lived a normal life. This was also true for Mr. Y. The Court found that cryptorchidism could lead to testicular cancer, but it was also possible for him to receive medical surgery in Bangladesh. Although the price of the surgery was relatively expensive, it was possible for his father to cover the necessary cost from his work, because he had kept working in Japan despite his ulcerative colitis. He could therefore receive the necessary health care in Bangladesh. The Court found there were no special circumstances preventing them from being deported.

The Court addressed the "special circumstances" in the guideline in response to the allegations of both parties. It first confirmed a general observation. Foreign nationals should be cared for by their state of nationality, and the International Covenant on Economic, Social and Cultural Rights does not grant any entitlements to individuals. In the District Court judgement, the Tokyo District Court found that there may be room for different treatment in a certain situation, i.e., where a foreigner is found to suffer from an intractable disease during his/her

31 The Court indicated the price as follows, illustrated from the evidence provided by the parties:
- Endoscopic examination: 140-150 USD (10,000-11,000 taka)
- Medicine for Mr. X (monthly): 1,626.75 taka
- Surgery to cure cryptorchidism: 600 USD (45,000 taka)
- Average household income (monthly): 10,000 taka

stay in Japan, and his/her health status was improving due to medical treatments. The Tokyo High Court further stated that the above-mentioned standard was to be understood in a restrictive way. For example, if the person in question had achieved a remission, it was less likely that his/her health status would deteriorate by taking advantage of the health services provided by his/her State of nationality, even though its medical standards are not similar to those in Japan. He/she can take advantage of the appropriate medical treatment even if his/her health status deteriorates. In such a case, the person in question does not fall within special circumstances "when the applicant requires treatment in Japan for a serious illness, etc., or when the applicant's continued presence in Japan is deemed necessary in order to nurse a family member who requires such treatment," as enshrined in the guideline. The Tokyo High Court held, in conclusion, that the appeal of the Minister of Justice should be upheld, and the District Court judgement should be repealed. Mr. X and his family filed an appeal before the Supreme Court, but the appeal was dismissed.[32]

2) Conclusions

In a comparison of the judgements, some differences can be found. The first difference is found in the status of the right to health as enshrined in Article 12 of the Covenant. While the District Court judgement relied upon the text of the Covenant and emphasised the State obligations to offer medical treatment to certain foreigners with special circumstances, the High Court judgement emphasised the normal

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32 *X and others v. Minister of Justice*, 5 July 2016, Decision of dismissal, Supreme Court.

interpretation of the Covenant developed before the Japanese national court. Japanese courts tend not to grant actionable rights to international human rights treaties, and the High Court judgement does not deviate from this tendency.[33] In the High Court judgement, Article 12 of the Covenant does not constitute any hindrance to the exercise of the Minister of Justice's discretion in accordance with immigration law.

Second, the High Court judgement placed emphasis on the availability and affordability of the necessary health care service in the State of nationality and examined the existence of substantial hindrances upon expulsion. It did not follow a restrictive interpretation of the guideline as illustrated by the Minister of Justice, but found the absence of substantial difficulties and their impact on health status. The High Court judgement examined this point in depth and found that the applicants did not have to continue receiving medical treatment in Japan, because a similar (but not equal) level of medical treatment was available and affordable in Bangladesh.

Third, the status of the right to health in the context of the deportation of foreigners and the evaluation of the health services in the State of nationality, as well as health status – the questions raised in the present Japanese case – can also be found in the regional human rights monitoring bodies. In the next chapter, the jurisprudence of the European Court of Human Rights will be considered in comparison to the Japanese case.

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33 *See* Yutaka Watanabe, "Impact of international human rights standards on national legislation: Japanese perspective," 65 *UNB L. J.* (2014), pp. 250-254.

Ⅳ. Cases before the European Court of Human Rights – a comparison –

1. Preliminary observations

The right to health itself is not enshrined in the European Convention on Human Rights (ECHR). In a closer examination of the jurisprudence of the European Court of Human Rights (ECtHR), however, it is possible to find cases related to health, especially in the context of the deportation of aliens. The deportation of foreigners usually entails the applicability of Article 8 of the Convention, and in limited cases, Article 3.

Article 8 of the ECHR provides a right to private and family life. If an order of deportation of aliens entails the separation of family members, Article 8 is applicable.[34] It should be noted, however, that paragraph 2 of the Article permits a certain degree of discretion on the part of the Contracting parties.

Nevertheless, Article 3 of the ECHR does not contain any margin of appreciation, nor does it permit a derogation even in times of emergency (Article 4). The jurisprudence of the ECtHR shows that a measure of expulsion by a Contracting State may give rise to an issue under Article 3 where substantial grounds have been shown to believe that the person concerned faces a real risk of being subjected to torture or inhuman or

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34 Pieter van Dijk (eds.), *Theory and Practice of the European Convention on Human Rights* (4th edition), Intersentia, 2006, pp. 705-10. *See* also cases as a general framework: *Abdulaziz, Cabales, and Balkandali v. the United Kingdom*, 28 May 1985, Series A. no. 94; *Moustaquim v. Belgium*, 18 February 1991, Series A. no. 193.

degrading treatment or punishment in the receiving country.[35] The personal scope of the Article includes refugees, fugitive criminals, and persons facing similar persecution. It is in this context that the right to health is in dispute in the context of the deportation of foreigners with serious diseases. It should be noted, at the same time, that a prohibition under Article 3 does not relate to all instances involving the deportation of aliens. Such a measure has to attain a minimum level of severity if it is to fall within the scope of Article 3. The present article seeks to explore this point by examining the jurisprudence of the ECtHR.

2. Cases before the European Court of Human Rights

1) D. v. the United Kingdom (1997)

D. v. the United Kingdom is the leading case in this field.[36] Mr. D., the applicant from St. Kitts, was diagnosed as HIV positive. After serving a prison term due to his possession of cocaine, he was then placed in a detention facility pending his deportation.[37] He filed a request for the UK government to grant a leave to remain in the UK for his medical treatment, but the request was rejected. The case was then brought before the then European Commission of Human Rights, which declared that there would be a violation of Article 3 if the applicant were to be removed to St. Kitts.[38] Before the ECtHR, the main issue concerned the

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35 *cf. Soering v. the United Kingdom*, 7 July 1989, Series A. no. 161.

36 *D. v. the United Kingdom*, no. 30240/96, 2 May 1997; William Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, 2015, p. 172.

37 *D. v. the United Kingdom*, *supra* note 36, paras. 7-10.

38 *Ibid*., para. 37. The applicant alleged a violation of Articles 2, 3 and 8,

applicability of Article 3, where a similar medical treatment was not available for the applicant in the receiving State. His health status was evaluated as being in the advanced stages of AIDS; his medical condition was worsening due to opportunistic infections. The medical treatment that he received was not available in St. Kitts, which meant that his life expectancy would decrease quickly if he was deported. He had no close relatives in St. Kitts, nor was social assistance available for him. He was unfit to travel at the time of the proceedings before the ECtHR. He therefore insisted that his removal to St. Kitts would expose him to inhuman and degrading treatment in breach of Article 3.[39]

In response, the ECtHR held, as a general observation, that Article 3 prohibited in absolute terms torture or inhuman or degrading treatment or punishment, and that its guarantees applied irrespective of the reprehensible nature of the conduct of the person in question.[40] There was no dispute as to the fact that his removal to St. Kitts would hasten his death, so the Court held that the decision to remove him would amount to inhuman treatment in violation of Article 3.[41] The Court held as a general framework related to health and immigration:[42]

> [54.] Against this background the Court emphasises that aliens who have served their prison sentences and are subject to expulsion cannot in principle claim any entitlement to remain in

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together with Article 13. The Commission held that it was not necessary to examine the issue related to Article 2, and that no separate issue arose under Article 8. It also held that there was not a violation of Article 13.

39 *Ibid.*, paras. 39-41.

40 *Ibid.*, para. 47.

41 *Ibid.*, paras. 52-53.

42 *Ibid.*, para. 54.

> the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by the expelling State during their stay in prison. However, in the very exceptional circumstances of this case and given the compelling humanitarian considerations at stake, it must be concluded that the implementation of the decision to remove the applicant would be a violation of Article 3 (art. 3).

Here too, as in the Japanese case addressed in Chapter Ⅲ, the ECtHR did not recognise a right of foreigners to continue to receive medical treatment merely because they had started receiving it. However, in the words of the Court, there would be a violation of Article 3 if a foreigner were to be expelled in "very exceptional circumstances", given the "compelling humanitarian considerations at stake". In the present case, the nature and scope of "exceptional circumstances" were summarised as follows;[43]

- the advanced stage of the illness, which led the applicant to be unfit to travel.[44]
- the unavailability of medical treatment in the receiving country.
- the absence of close relatives in the receiving country.
- the absence of accommodations, financial resources, and any means of social support.

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43 These points are also illustrated in the case of *N. v. the United Kingdom*, *infra* note 47, para. 42.

44 During the proceedings, the UK government stated that it would not remove a person who was unfit to travel. *D. v. the United Kingdom*, *supra* note 36, para. 44.

It should be noted that it is commonly very difficult to meet the criteria above, because the judgement substantially states that a violation of Article 3 takes place only in the final stage of life.[45] The standard established in the case of *D. v. the United Kingdom* was so high that the Court did not declare the violation of Article 3 in any similar cases until recently.[46]

2) N. v. the United Kingdom [GC] (2008)

The normative standard related to health and immigration in Article 3 of the ECHR was confirmed in the Grand Chamber judgement: *N. v. the United Kingdom*.[47] The case concerned a Ugandan woman diagnosed as HIV positive. The applicant entered the United Kingdom in 1998 and lodged an asylum application because of her association with a rebel group.[48] Later, she developed an Aids-defining illness and received treatment with antiretroviral drugs and monitoring. In the asylum proceedings, she claimed that the treatment necessary for her would not be available if she returned to Uganda. Her consultant physician made an expert report stating that continued medical treatment and monitoring would be necessary. The UK government refused the application,

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45 Frédéric Sudre (dir.), *Les grandes arrêts de la Cour européenne des Droits de l'Homme* (7e édition), Presses Universitaires de France, 2015, p. 192; van Dijk, *supra* note 34, p. 440.

46 A brief summary of the cases is illustrated in the case of *N. v. the United Kingdom*, *infra* note 47, paras. 32-41.

47 *N. v. the United Kingdom* [GC], no. 26565/05, 27 May 2008; François Julien-Laferrière, « L'éloignement des étrangers malades: Faut-il préférer les réalités budgétaires aux préoccupations humanitaires ? » *Revue trimestrielle des Droits de l'Homme*, t. 77 (2009), p. 261.

48 *Ibid*., para. 10.

invoking the case of *D. v. the United Kingdom*.[49] The case was brought before the ECtHR, where the main issue was whether or not there had been a violation of Articles 3 and 8.

The ECtHR rejected the claim and held that there had been no violation of Article 3. It first summarised its jurisprudence and held that the applicable principles were as follows:[50]

> [42.] (…) Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State. The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to a breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling. In the *D. v. the United Kingdom* case the very exceptional circumstances were that the applicant was critically ill and appeared to be close to death, could not be guaranteed any nursing or medical care in his country of origin and had no family there willing or able to care for him or provide him with even a basic level of food, shelter or social support.

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49 *Ibid*., paras. 8-17.

50 *Ibid*., para. 42.

Based on the principles above, the Court considered whether or not the applicant fell within "exceptional circumstances" as established in the case of *D. v. the United Kingdom*. It found that the antiretroviral medication was available in Uganda, she had family members, and her health status was not so serious as to prevent her from travelling. The Court concluded from the findings above that the applicant's case could not be distinguished from its jurisprudence; the facts did not disclose very exceptional circumstances as set forth in *D. v. the United Kingdom*.[51] It therefore held there had been no violation of Article 3.

The ECtHR maintained a restrictive approach in the interpretation of Article 3 in the case of the deportation of non-nationals with serious diseases.[52] This approach can be seen in the principle expressed in paragraph 42, which states: "The fact that the applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient *in itself* to give rise to breach of Article 3" (emphasis added). Based on this approach, the ECtHR also found that the applicant's health condition was not critical. The threshold established in the jurisprudence is so high that it has continuously been in dispute.[53]

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51 *Ibid.*, paras. 46-51.

52 Sudre, *supra* note 45, p. 193.

The judgement states that "it should maintain the high threshold set in *D. v. the United Kingdom*" (para. 43). In addition, it adds "the same principles must apply in relation to the expulsion of any person afflicted with any serious, naturally occurring physical or mental illness which may cause suffering, pain and reduced life expectancy and require specialised medical treatment which may not be so readily available in the applicant's country of origin or which may be available only at substantial cost" (para. 45).

53 It should be noted, however, that there is a case holding a violation of

The joint dissenting opinion of Judges Tulkens, Bonello and Spielmann criticised the majority based on the normative nature of Article 3. The dissent emphasised that the majority wrongly interpreted Article 3 on several points. The judgement reads:[54]

> Although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights (see *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32). Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Soering v. the United Kingdom*, 7 July 1989, § 89, Series A no. 161). Advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the Contracting State and the country of origin may vary considerably. While it is necessary, given the fundamental importance of Article 3 in the Convention system, for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, Article 3 does not place an obligation on the Contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction. A finding to the contrary would place too great a burden on the Contracting States.

Article 3 in the context of the extradition of a person with a severe mental health condition. As seen later, the Court emphasised the risk of significant deterioration in the applicant's mental and physical heath. *See, Aswat v. the United Kingdom*, no. 17299/12, 16 April 2013, especially para. 57.

54 *N. v. the United Kingdom*, *supra* note 47, para. 44 (emphasis added).

The dissent did not share the view expressed above. First, it argued that the majority ignored the integrated approach of the case of *Airey v. Ireland* and made an incomplete and misleading citation.[55] The jurisprudence of the ECtHR certainly incorporated socio-economic dimensions in some areas.[56] The majority may have placed too much emphasis on budgetary concerns, according to the dissent's argument.

Second, the dissent strongly opposed the viewpoint taken by the majority. In the dissent, a "fair balance" was not consistent with the absolute nature of Article 3.[57] Third, the dissent rebutted the policy considerations such as budgetary constraints expressed in the judgement.[58]

It seems that the differences between the majority and the dissent were based not only in the individual circumstances of the present case[59] ; rather, the main issue constituted the State's obligation to accept aliens with serious diseases in the context of Article 3.[60] However, this point was not clearly discussed in the present case.

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55 Joint dissenting opinion of Judges Tulkens, Bonello and Spielmann [Joint dissenting opinion], para. 6.

56 *See* Watanabe, *supra* note 23 and the notes cited therein, regarding social security issues before the ECtHR.

57 Joint dissenting opinion, *supra* note 55, para. 7; Julien-Laferrière, *supra* note 47, pp. 273-4.

58 Joint dissenting opinion, *supra* note 55, para. 8; Julien-Laferrière, *supra* note 47, pp. 275-6. The dissent argues that the so-called "floodgate" argument is totally misconceived, citing UK statistics.

59 The dissent emphasised the fact that the applicant's health condition would deteriorate if he were deported, citing the facts in the present case. Joint dissenting opinion, *supra* note 55, paras. 9-13; Julien-Laferrière, *supra* note 47, p. 269.

60 Julien-Laferrière, *supra* note 47, p. 274.

3) Paposhivili v. Belgium [GC] (2016)

In the case of *Paposhivili v. Belgium*, the Grand Chamber of the ECtHR clarified the scope of "exceptional circumstances" as established in *D. v. the United Kingdom* and *N. v. the United Kingdom*, and found a violation of Article 3 in the context of the deportation of aliens.

The case concerned a Georgian family living in Belgium. The applicant had lived in Belgium since 1998 with his wife and their children. He had been charged with criminal offences since his arrival in Belgium, and he was subject to deportation due to his contravention of the Dublin Convention for the examination of his asylum application. At the same time, the applicant submitted requests for leave to remain on exceptional grounds and medical grounds because he suffered from tuberculosis. His application was rejected, and an order of deportation was issued against him.[61] In the Chamber judgement, the ECtHR held that his health status was stable due to the treatment he had taken. It therefore found that his life was not in imminent danger, and he was fit to travel.[62] In addition, information provided by the Georgian government illustrated that the medications and medical treatment necessary for him were available in Georgia.[63] Applying the standard set in *D. v. the United Kingdom* and *N. v. the United Kingdom*, the Court held that the present case did not meet the threshold of severity required under Article 3, and it

61 The ECtHR indicated an interim measure under Rule 39 of the Court that it was desirable to suspend the enforcement of the order pending the outcome of the proceedings before the Aliens Appeals Board. *Paposhivili v. Belgium*, no. 41738/10, 17 April 2014, paras. 56-57.

62 *Ibid*., para. 120.

63 *Ibid*., para. 122.

thereby recognised a non-violation.[64]

The applicant requested a referral of the case to the Grand Chamber.[65] Again, the Court briefly summarised its jurisprudence and held that the violation of Article 3 occurred only in cases where the person facing expulsion was close to death. The jurisprudence, according to the Court, had deprived aliens who were seriously ill, but whose condition was less critical, of the benefit of the Article.[66] The ECtHR began to clarify the approach taken in the context of "very exceptional circumstances". It held as follows:[67]

> [183.] The Court considers that the "other very exceptional cases" within the meaning of the judgement in *N. v. the United Kingdom* (§ 43) which may raise an issue under Article 3 should be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy. The Court points out that these situations correspond to a high threshold for the application of Article 3 of the Convention in

64 *Ibid.*, paras. 117-119, 124.

65 The applicant died during the proceedings before the Grand Chamber, but his family members wished to pursue the proceedings. *Paposhivili v. Belgium* [GC], no. 41738/10, 13 December 2016, para. 1.

66 *Ibid.*, para. 180.

67 *Ibid.*, para. 183 (emphasis added).

cases concerning the removal of aliens suffering from serious illness.

In the context of the ill-treatment proscribed in Article 3, the Court illustrated some factors to be taken into consideration:[68]

- the authorities in the returning State must verify on a case-by-case basis whether the care generally available in the receiving State is sufficient and appropriate in practice for the treatment of the applicant's illness so as to prevent him or her from being exposed to treatment contrary to Article 3.
- the authorities must also consider the extent to which the individual in question will actually have access to this care and these facilities in the receiving State, including the accessibility of care, the cost of medication and treatment, the existence of a social and family network, and the distance to be travelled in order to have access to the required care.
- individual and sufficient assurances from the receiving State, as a precondition for removal, that appropriate treatment will be available and accessible to the persons concerned so that they do not find themselves in a situation contrary to Article 3.

In this way, the Court clarified the scope of "exceptional circumstances" and applied the new standard in the present case. The Court indicated that although the Aliens Office's medical adviser had issued several opinions regarding the applicant's state of health based on the medical certificates provided by the applicant, they were not

68 *Ibid.*, paras. 189-191.

examined by either the Aliens Office or the Aliens Appeals Board from the perspective of Article 3 of the Convention in the course of the proceedings concerning regularisation on medical grounds.[69] In the absence of an assessment of the risk facing the applicant in light of the information concerning his state of health and the existence of appropriate treatment in Georgia, the information available to those authorities was insufficient for them to conclude that the applicant, if returned to Georgia, would not have faced a real and concrete risk of treatment contrary to Article 3 of the Convention.[70] It therefore concluded that there would have been a violation of Article 3 if the applicant had been returned to Georgia without these factors being assessed.[71] In the present case, the circumstances in which a violation of Article 3 would be recognised were thus expanded.

3. Brief conclusion and some reflections

In the Grand Chamber judgement of *Paposhivili v. Belgium*, some factors merit great attention. First, it is important to note that the ECtHR emphasised the importance of a substantive examination of the health status of the applicant, either in the application for asylum and regularisation, or in the process of the deportation measures.[72] Second,

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69 *Ibid.*, para. 200.

70 *Ibid.*, para. 205.

71 *Ibid.*, para. 206.

72 The absence of a substantive examination of health status during the national proceedings was also criticised in the judgement of the Court of Justice of the European Union. *See, Mohamed M'Bodj v. État belge*, Case C-542/13, 18 December 2014.

the Grand Chamber also emphasised the necessity of evaluating the availability of medical treatment in the receiving State.[73] The availability and accessibility of health care services and medications are emphasised, which is echoed in the words of General Comment No. 14 of the Committee on Economic, Social, and Cultural Rights (see Chapter Ⅱ).

The jurisprudence of the ECtHR, especially after *N. v. the United Kingdom*, has maintained a high threshold for the violation of Article 3. The person in question must be close to death, unfit to travel, and without any family members who can take care of him. The case of *Paposhivili v. Belgium* extended its scope by partly incorporating the humanitarian nature, emphasising the applicant's health status and the availability of health care in the receiving State. The central question, however, seems to continue to be the substantive evaluation of health status and the availability/accessibility of health care services in the receiving State. This also leads to another question, i.e., the extent of the contracting State's obligation not to expel aliens with serious diseases under Article 3. These are the common questions that provide the background of such cases, not only in the context of the ECtHR, but also the Japanese cases.

Ⅴ. Conclusion

Lastly, let us close the present article by comparing the Japanese cases and the jurisprudence of the European Court of Human Rights. In this comparison, some remarkable differences arise. First, the Japanese

73 *Paposhivili v. Belgium* [GC], *supra* note 65, para. 190.

cases addressed in Chapter Ⅲ illustrate a more humane approach than that developed in the jurisprudence of the ECtHR. The availability and accessibility (including affordability) of medical treatment and medications were examined in depth in the Japanese case involving the Bangladeshi family. In the appeal court proceedings, the Minister of Justice made a claim developed in *N. v. the United Kingdom*, stating that the deportation did not involve an infringement of Japanese immigration law because the applicant was fit to travel, and his health status was not critical. The claim was not upheld in the Appeal judgement; however, the Court adopted the claim that the medication necessary for the applicant was actually available. The issue of the severity of the disease, including the status of the claim in the guideline, remains to be explored in future cases. Because the Covenant has not been recognised as self-executing by the Japanese judiciary, creating a substantial problem for human rights protection, the theoretical relationship with the guideline has also not yet been explored.

Second, in the jurisprudence of the European Court of Human Rights, it has been clearly stated that the guarantees under Article 3 apply irrespective of the reprehensible nature of the conduct of the person in question.[74] This has created a contrast with Japanese practice; contraventions of Japanese immigration law, especially grave ones, may lead to a conclusion of expulsion, even if the person in question suffers from a serious disease. Japanese judicial decisions tend to examine health status in more depth than the ECtHR, but the humanitarian nature of the right may sometimes be offset by illegal behaviour.

Lastly, common problematic issues remain. Precise evaluations of

74 *D. v. the United Kingdom*, *supra* note 36, para. 47.

health status and the foreseeability of expulsion are not easy tasks for the judicial branch.