
J.Y. Interpretation No. 649 (October 31, 2008)*

Preferential Treatment of Vision-Impaired Individuals Case

Issue

Is it constitutional for the Physically and Mentally Disabled Citizens Protection Act to restrict the practice of massage business to vision-impaired individuals only?

Holding

The first sentence of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, provides that “those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business.” (The name of the Act was changed to Physically and Mentally Disabled Citizens’ Rights Protection Act on July 11, 2007, and the above quoted “those who are not vision-impaired as defined by this Act” has been amended to “those whose vision is not functionally impaired” and reassigned as Article 46, Paragraph 1 with the same regulatory meaning.) Such provision does not conform to the right of equal protection as stipulated in Article 7, right to work as stipulated in Article 15, and the principle of proportionality as stipulated in Article 23 of the Constitution, and shall be invalid no later than three years after the issuance of this Interpretation.

Reasoning

[1] The first sentence of Article 37, Paragraph 1 of the Physically and Mentally

* Translation by Andy Y. SUN

Disabled Citizens Protection Act, as amended and promulgated on November 21, 2001, provides that “those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business.” (The name of the Act was changed to Physically and Mentally Disabled Citizens’ Rights Protection Act on July 11, 2007, and the above quoted “those who are not vision-impaired as defined by this Act” has been amended to “those whose vision is not functionally impaired” and reassigned as the first sentence of Article 46, Paragraph 1 with the same regulatory meaning.) As a preferential treatment to protect the right to work of vision-impaired individuals, and, conversely, a prohibition against non-vision impaired individuals in regard to the freedom to choose their occupation, this provision must conform to the right of equal protection as stipulated in Article 7, right to work as stipulated in Article 15, and the principle of proportionality as stipulated in Article 23 of the Constitution.

[2] Vision impairment is a physical condition beyond any human control. The disputed statutory provision, which establishes discriminatory treatment in regard to a category of who may engage in massage business, has a profound impact on the majority of population who are not vision-impaired. While the legislators have taken into consideration the limited occupation and career options available to the vision-impaired in light of the many obstacles they need to overcome, such as their growth, movement, learning and education, as well as the vulnerability of their social status, together with the reality that vision-impaired individuals have traditionally been dependent upon the massage business for their livelihood, such legislation, in order to achieve an important public interest and comply with the right of equal protection, should nevertheless adopt a measure not excessively restrictive of the rights of those who are not vision-impaired and ensure that the protective measures for the vision-impaired have a substantial nexus with the objectives they intend to accomplish. The constitutional provisions concerning fundamental rights have emphatically

focused on the protection of the socially disadvantaged. Article 155 of the Constitution states, "... [t]o the aged and the infirm who are unable to earn a living, and to victims of unusual calamities, the State shall provide appropriate assistance and relief." Article 10, Paragraph 7 of the Additional Articles of the Constitution states, "[t]he State shall guarantee availability of insurance, medical care, obstacle-free environments, education and training, as well as support and assistance in everyday life for physically and mentally handicapped persons, and shall also assist them to attain independence and to develop [their] potential..." These provisions have clearly demonstrated the principle of assisting the disadvantaged. As a result, there is a significant public interest in protecting the right to work for the vision-impaired, and the objectives for preferential or discriminatory treatment are justified under the relevant provisions of the Constitution.

[3] When the Handicapped Welfare Act was enacted and promulgated in 1980, there were few career options available for vision-impaired individuals. The prohibition against non-vision impaired individuals engaging in the massage business was beneficial for the vision-impaired willing to engage in such business, and the reality was that a high percentage of the vision-impaired chose massage business as their livelihood. However, the nature of massage and the skills required for those intending to engage in the massage business suggest that the business is not limited to the vision-impaired only. With the expansion of the market for massage careers and service consumption, the disputed provision has become excessively restrictive to non-vision impaired individuals, which include other physically or mentally disabled who are not vision-impaired but who do not otherwise enjoy the preference of occupation reservation. With the knowledge and capability of [many] vision-impaired having been enhanced gradually, and their selectable occupation categories increasing by the day, the statutory provision in question tends to make the governing authority overlook

the fact that the talents of the vision-impaired are not limited to the massage business alone. But, nearly thirty years after the statute's promulgation and in light of the availability of diverse occupations nowadays, the socioeconomic conditions of the vision-impaired have yet to see any significant improvement. Since there is hardly a substantial nexus between the objectives and the means, [the provision] contradicts the meaning and purpose of Article 7 of the Constitution on the right of equal protection.

[4] The citizens' right to work must be protected under Article 15 of the Constitution, and J.Y. Interpretations Nos. 404, 510, 584, 612, 634, and 637 further illustrate the freedom to engage in employment and to choose an occupation. The Constitution has set forth different standards of permissibility, based on different content, as to restrictions on the freedom to choose an occupation. The legislators, in pursuance of the general public interest, may impose proper restrictions on the methods, time and location in regard to which an occupation may be carried out. Yet on the freedom to choose an occupation, if [the restrictions] concern the subjective condition needed, which means professional capability or license to perform the specific occupation, and such capability or [license] status can be gained through training and development, such as knowledge, degree or physical capability, no restrictions may be permitted without justification of important public interest. The objective condition needed for people to choose an occupation means those restrictions on the pursuance of an occupation that cannot be achieved by individual efforts, such as monopoly of certain sectors. Such restrictions may be justified only with the showing of an extraordinarily significant public interest. Irrespective of the condition under which the restrictions were imposed, the means adopted must not violate the principle of proportionality.

[5] The disputed provision that prohibits non-vision impaired individuals from engaging in the massage business amounts to a restriction on the objective

conditions concerning the freedom to choose an occupation. Since that provision was designed to protect the employment opportunities of the vision-impaired, taking into consideration the purpose of the second sentence of Article 155 of the Constitution and Article 10, Paragraph 7 of the Additional Articles of the Constitution, it concerns an extraordinarily significant public interest, and the objective [of the statutory provision] is proper. Yet in light of the social development, expansion of need in the massage occupation, as well as the provision regarding the broad hand skills required for the massage business, including, among other things, “effleuraging, kneading, chiropractics, pounding, stroking, hand arcuation, movement and other special hand skill” (*see* Article 4 of the Regulations Governing the Qualifications and Management of the Vision-Impaired Engaged in Massage Occupation, repealed on March 5, 2008, and Article 4, Subparagraph 1 of the current Regulations Governing the Qualifications and Management of Vision Functionally-Impaired Engaged in Massage and Physical Therapy Massage Occupation), the prohibition in the disputed provision against the non-vision impaired does not have a clearly defined scope and has resulted in inconsistent enforcement standards, thereby greatly increasing the possibility of violations by non-vision impaired individuals engaged in similar work or business. This can be seen in many cases pending before the Administrative Courts at all levels. Given that anyone interested in the massage business should have been eligible to engage in the occupation after receiving corresponding training and qualification review, by only permitting the vision-impaired to conduct such business, non-vision impaired are forced to transfer to other occupations or lose their jobs, hence preventing the formation of a diversely competitive environment conducive to consumers’ choices. This is not in parity with the interest to protect the right to work of the vision-impaired. Consequently, the restriction in the disputed provision is not in conformity with the principle of proportionality under Article 23 of the Constitution and

contravenes the protection of the right to work as stipulated in Article 15 of the Constitution.

[6] It is a compelling public interest to protect the right to work of the vision-impaired. The governing authority shall adopt multiple, concrete measures to provide training and guidance for occupations deemed suitable for the vision-impaired, and to set aside appropriate employment opportunities for them. In addition, [the governing authority] should provide adequate management on the massage occupation and related matters, take into consideration the interests of both vision-impaired and non-vision impaired individuals, consumers and suppliers, as well as the balance between the protection of the disadvantaged and market mechanism, so that the employment opportunities for the vision-impaired and other physically or mentally disabled [individuals] and the objectives of the Constitution to assist the disadvantaged in independent development, and the principle and spirit of substantive equality can be fulfilled. Since all of these measures require delicate planning and execution, the disputed provision shall be invalid no later than three years after the promulgation of this Interpretation.

Background Note by Vincent C. KUAN

One of the petitioners operated a barber shop and hired the other two petitioners, who were non-vision impaired, to engage in massage services on the premises, which was uncovered by the police, with relevant information being sent to the Department of Social Welfare, Taipei City Government.

The said Department found the aforesaid behavior in violation of the first sentence of Article 37, Paragraph 1 of the Physically and Mentally Disabled Citizens Protection Act, which provides, “those who are not vision-impaired as defined by this Act shall not engage in the practice of massage business” and imposed pecuniary fines on the petitioners in accordance with Article 65,

Paragraphs 1 and 2 of said Act. The petitioners brought administrative lawsuits separately, and final judgments against them were rendered. Hence, the matter was brought before the Constitutional Court, which found the provision in question contrary to the constitutionally guaranteed right of equal protection, right to work, and the principle of proportionality.

Nevertheless, an earlier interpretation rendered by the Constitutional Court, *i.e.*, J.Y. Interpretation No. 626, dealt with a similar case. The petitioner participated in the 2002 Graduate School Admission Examinations for Master's Programs administered by the Central Police University (hereinafter referred to as "CPU"). The examination was divided into two parts: the First Exam, which is a written examination, and Second Exam, which includes oral and physical examinations. Despite passing the First Exam, the petitioner was diagnosed to be green-blind and hence was physically disqualified by the CPU, thereby denying the petitioner's enrollment according to Point 7 (ii) and Point 8 (ii) of the Central Police University General Regulation in Respect of the 2002 Graduate School Admission Examinations for Master's Programs. Having exhausted all administrative relief available, the petitioner brought the matter to the Constitutional Court on the grounds that the regulations at issue were in conflict with the principle of legal reservation and infringed upon his right to education and right of equal protection as guaranteed by the Constitution.

Unlike its finding in the 2008 case, J.Y. Interpretation No. 649, the Constitutional Court upheld the constitutionality of the disputed provisions, holding that the purposes of said provisions were to train professional police talents who are equipped with both theoretical knowledge and real-world techniques and to attain effective use of educational resources, thus improving the quality of police administration and fostering the development of a rule-of-law nation; that, as such, the purposes are important public interests; and that such provisions and the purposes thereof are substantially related and thus not in

conflict with Articles 7 and 159 of the Constitution.