

**The Immigration Detention of Foreign Nationals Pending  
Deportation Case**

**Issue**

1. Is it constitutional to not provide prompt judicial remedy to a foreign national who is facing deportation and being temporarily detained by the National Immigration Agency?
2. Is it constitutional to not have a court review of an extension of a foreign national's temporary detention?

**Holding**

Article 38, Paragraph 1 of the Immigration Act (as amended on December 26, 2007; hereinafter the “Act”) provides, “[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ...” (this provision is the same as the provision promulgated on November 23, 2011, which provides, “[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ...”). Under this provision, the temporary detention of a foreign national for a reasonable period in order to complete repatriation does not provide the detainee with prompt judicial relief. Moreover, an extension of the aforementioned temporary detention also is not subject to judicial review. These two aspects of that provision are both in violation of the meaning and purpose of personal freedom protection guaranteed under Article 8 of the Constitution and

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shall be null and void no later than two years from the issuance of this Interpretation.

## **Reasoning**

[1] Personal freedom is fully guaranteed. It is a prerequisite to the exercise of other freedoms and rights protected under the Constitution and a critical and fundamental human right. Therefore, Article 8, Paragraph 1 of the Constitution expressly provides, “Personal freedom shall be guaranteed to the people. Except in case of *flagrante delicto* as provided by law, no person shall be arrested or detained other than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished other than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or punishment which is not in accordance with the procedure prescribed by law may be rejected.” In order to comply with the meaning and purpose of the foregoing constitutional provision, any disposition by the government that deprives or restricts personal freedom - irrespective of whether the person is facing criminal charges - must be regulated by law and also fulfill required judicial procedures or other due process requirements (*see* J.Y. Interpretations Nos. 588 and 636). Furthermore, personal freedom is a fundamental human right and the foundation of all freedoms and rights of humankind. Protecting the personal freedom of each individual, regardless of his nationality, is a common principle upheld by all modern rule-of-law states. Thus, the guarantee of personal freedom under Article 8 of the Constitution extends to foreign nationals, and they shall receive the same protection as domestic nationals.

[2] Article 38, Paragraph 1 of the Act (as amended on December 26, 2007) provides: “[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ...” (this is the same as the

provision promulgated on November 23, 2011: “[t]he National Immigration Agency may temporarily detain a foreign national under any of the following circumstances ...”) (hereinafter the “disputed provision”). Accordingly, the National Immigration Agency (hereinafter the “Agency”) may detain a foreign national through administrative acts.

[3] While the term “detention” prescribed in the disputed provision differs from criminal detention or punishment in nature, it confines foreign nationals to a certain place for a certain period of time in order to isolate them from the outside world (*see* Article 38, Paragraph 2 of the Act, and the Regulations Governing the Detention of Foreign Nationals). Such detention constitutes deprivation of personal freedom and a compulsory measure that severely interferes with personal freedom (*see* J.Y. Interpretation No. 392). Therefore, it must fulfill the required judicial procedures and other due process requirements in accordance with the meaning and purpose of Article 8, Paragraph 1 of the Constitution. Nonetheless, given that restrictions on personal freedom of criminal defendants and non-criminal defendants differ in terms of their purpose, methods and degree, the required judicial procedures and other due process requirements for restrictions on personal freedom of non-criminal defendants and of criminal defendants need not be identical (*see* J.Y. Interpretation No. 588). A foreign national does not have the right to freely enter our state’s territory. The Agency detains foreign nationals in accordance with the disputed provision in order to repatriate foreign nationals as soon as possible, rather than to arrest and detain them as criminal suspects. In the event that a foreign national can be quickly repatriated in a short period of time, the Agency needs a reasonable period of time to take care of repatriation-related-matters, such as purchasing plane tickets, applying for passports and other travel documents, contacting relevant institutions for assistance and conducting other matters essential to repatriation. Thus, given the values implicit in the entire legal system, it is reasonable and

necessary that the disputed provision provides the Agency with a reasonable period for repatriation operations and permits the Agency to temporarily detain foreign nationals during this short period in order to prevent escape and achieve quick repatriation. This is also an exercise of sovereignty and does not contravene the meaning and purpose of personal freedom protection under Article 8, Paragraph 1 of the Constitution. Accordingly, such temporary detention need not be decided by a court. However, based on the meaning and purpose of the aforementioned constitutional provision, and in order to ensure prompt and effective protection, foreign nationals under the foregoing temporary detention should be afforded a remedial opportunity to request prompt judicial review of the detention. If a detainee objects to the temporary detention or requests judicial review while under detention, the Agency must transfer the detainee to the court within twenty-four hours for speedy review of whether detention should be imposed. Once a temporary detention is imposed via an administrative act or a court ruling, the detained foreign national shall be notified in writing using a language comprehensible to him. The written notice should include the reason and legal basis of the detention, as well as the methods of judicial remedy. In order that the detainee is able to avail himself of the aforementioned procedures for relief to promptly and effectively protect his rights, and thus comply with the spirit and meaning of physical freedom protection under the Constitution, notice shall also be given to the detainee's designated relatives or friends in Taiwan, or the embassy or authorized organization of the detainee's nation of origin. With regard to the length of the temporary detention for the enforcement of repatriation, the legislature should prescribe it by law after taking into consideration the time required for administrative processing and the practical concerns in pre-repatriation operations. Nonetheless, the length of the temporary detention may not be too long, so as to avoid excessively interfering with the detainee's personal freedom. Moreover, the Agency's current practice results in around seventy

percent of detainees being repatriated within fifteen days (*see* National Immigration Agency Memorandum Yi-Shu-Zhuan-Yi-Lian No. 1020011457, January 9, 2013). Given the foregoing considerations, the maximum duration for the temporary detention imposed by the Agency shall not exceed fifteen days.

[4] In the event that a detainee does not object to or request judicial review of the detention during the period of temporary detention and the detention period is about to expire, if the Agency deems it necessary to continue the detention, an impartial and independent court shall, in accordance with the law, review and decide whether the temporary detention, as stipulated in the disputed provision, shall be extended. The reason is that such extension involves a long-term deprivation of personal freedom and thus must comply with the due process requirements of personal freedom protection under the Constitution. Accordingly, the Agency shall transfer the detainee to a court prior to the expiration of the temporary detention and apply for a ruling to continue the detention; thereafter, if, in accordance with the law, it is necessary to extend the detention again, such extension shall be handled in the same manner.

[5] In sum, the disputed provision authorizes the Agency to temporarily detain foreign nationals facing deportation via administrative acts. It is not unconstitutional that the disputed provision allows a temporary detention for a reasonable period due to the repatriation operation. As far as the necessary protection of a detainee is concerned, Article 38, Paragraph 8 of the Act, as amended on November 23, 2011, has already provided that the detainee shall be notified in writing using a language comprehensible to him; the written notice shall contain the reason of the detention, and the methods, time and relevant authorities for remedies; and that notice shall also be given to the embassy or authorized organization from the detainee's nation of origin. Nevertheless, the disputed provision can hardly be deemed to have sufficiently protected the fundamental human rights of detainees, because it does not afford temporary

detainees with prompt and effective judicial remedies. Therefore, the disputed provision violates due process of law under Article 8, Paragraph 1 of the Constitution. Furthermore, the disputed provision's allowance for the Agency to extend the temporary detention without court review also contravenes the aforementioned meaning and purpose of personal freedom protection under the Constitution.

[6] Amending the laws relevant to this case will require a certain period of time, in order to preserve human dignity while also protecting the rights of foreign nationals and ensuring national security. The amendments should contain a thoroughly-studied and comprehensive set of supporting regulations, for instance, whether to allow release on bail or release of detainees to the custody of another, as well as legal aid and how to structure the mechanisms for hearing cases, such as the courts' speedy review and appellate remedies. The amendments should provide regulations for the facilities of immigration detention centers and the reasonableness of their management. The amendments should also include comprehensive regulations on issues including the effect of the original temporary detention disposition when the detainee objects to or requests judicial review on whether to impose detention, as well as whether the scope of judicial review should necessarily include the deportation decision. In light of the foregoing, the relevant authorities should review and amend the disputed provision and relevant statutes in accordance with the meaning of this Interpretation within two years from the issuance of this Interpretation. The unconstitutional portions of the disputed provision shall become null and void if they have not been amended within two years from the issuance of this Interpretation.

[7] The petitioners argued that the term "detention" in Article 1 of the Habeas Corpus Act should include the "[immigration] detention" in the disputed provision, and thus a person who is not otherwise being arrested and detained as

a criminal suspect may petition for habeas corpus. Accordingly, the petitioners challenge the appropriateness of the final criminal judgments of the Taiwan High Court Taichung Branch 99 Kang No. 300 (2010) and the Taiwan High Court 99 Kang No. 543 (2010). The petitioners' arguments actually disputed the appropriateness of the fact finding and application of law in the courts' final judgments rather than specifically challenging the constitutionality of Article 1 of the Habeas Corpus Act. The petitioners also challenged the constitutionality of Article 38, Paragraphs 2 and 3 of the Act (as amended on December 26, 2007), Article 36, Paragraphs 2 to 5 and Article 38, Paragraph 1, Subparagraph 4 of the Act (as amended on November 23, 2011), as well as Article 8 of the Habeas Corpus Act. However, the petitioners may not petition for an interpretation of these provisions, because the courts did not apply them in the final judgments on which the petitioners relied. The aforementioned portions of the petitions do not comply with Article 5, Paragraph 1, Subparagraph 2 of the Constitutional Court Procedure Act and shall all be dismissed in accordance with Paragraph 3 of the same Article.

### **Background Note** by Rong-Gen LI

In 2008, the Agency issued SU Hu-Hsing, a Thai national, a deportation order because she provided false information on her immigration documents. However, SU did not physically leave Taiwan after receiving the order and was arrested in 2010. Based on Article 38, Paragraph 1, Subparagraph 1 (failure to depart the state in accordance with a deportation order) and Subparagraph 2 (illegal entry or overstay beyond the period of stay or residence) of the Act, as amended on December 26, 2007, the Agency detained SU at the Nantou Detention Center for 90 days before SU was repatriated.

Purwati, an Indonesian national, was dismissed by her employer after she fled from her place of employment at the end of 2008. In 2010, the Agency

detained Purwati based on Article 38, Paragraph 1, Subparagraph 2 (overstaying the period of residence) of the Act. Purwati was detained for 145 days before repatriation.

While under detention, SU and Purwati respectively petitioned for habeas corpus, but both were rejected by the courts on the grounds that they did not meet the requirements of Article 1 of the Habeas Corpus Act, because they were not arrested and detained as criminal suspects. SU and Purwati then respectively petitioned for interpretation, arguing that the foregoing provisions were unconstitutional.

Before J.Y. Interpretation No. 708, the Constitutional Court had issued several interpretations with respect to personal protection. In this Interpretation, the Constitutional Court holds that Article 8 of the Constitution also applies to foreign nationals. The personal protection for foreign nationals, nevertheless, may be different from citizens. Detention for repatriation could be decided by the immigration agency, instead of a court. The reason is that the restrictions on personal freedom of criminal defendants and non-criminal defendants differ. A foreign national does not have the right to freely enter the state's territory. In addition, the detention is to prepare for the repatriation and an exercise of sovereignty. The temporary detention is not in violation of Article 8, Paragraph 1 of the Constitution. The length of detention, nevertheless, is not to exceed fifteen days.

According to the meaning and purpose of the foregoing provision of the Constitution, however, the provisions with respect to a detained foreign national should be compliance with due process of law. A detained individual should be given an opportunity for prompt judicial review of the detention. The detained foreign national should be transferred to a court within twenty-four hours if he/she objects the temporary detention. A detained foreign national has the right



to be informed in writing using a comprehensible language. The notice should include the reason, legal basis and judicial remedy of detention. The written notice should be given to the detainee's designated relatives or friends in Taiwan, or the embassy or authorized organization of the detainee's nation of origin.

J.Y. Interpretation No. 708 establishes the due process for the personal protection for foreign nationals. It emphasizes that the detention of foreign nationals could be decided by the immigration agency, but that a detained foreign national has the right to request a prompt judicial review of the detention. In order words, according to Article 8, Paragraph 1 of the Constitution, a foreign national may not have the right to be tried by a court in regard to the repatriation, but the detainee should be guaranteed the right to prompt judicial remedy. A foreign national's personal freedom is also within the protection of Article 8 of the Constitution.

After the issuance of J.Y. Interpretation No. 708, the Constitutional Court tried a similar case. In J.Y. Interpretation No. 710, the Court held that the temporary detention provision in the Act Governing Relations between the People of the Taiwan Area and the Mainland Area was unconstitutional because it did not specify the reasons of temporary detention and did not provide a detainee with prompt judicial remedy. In addition, that provision did not specify a certain period of time of temporary detention. Both J.Y. Interpretation Nos. 708 and 710 were related to the personal freedom of non-citizens. The two interpretations held that the immigration agency is allowed to temporarily detain foreign nationals and people of the mainland area for repatriation, but that such detention should be regulated by substantive due process law, and prompt judicial remedy is to be given to detainees. In sum, according to these two interpretations, the personal freedom of foreign nationals and people from the mainland area is also within the protection of Article 8 of the Constitution.

