Commentary

Undocumented Workers May Establish Trade Unions in South Korea

By Tae-Ung Baik, Associate Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa, United States; Member, UN Human Rights Council Working Group on Enforced or Involuntary Disappearances

Better Protection of Foreign Workers

The Supreme Court of the Republic of Korea (South Korea) took a bold step to protect the rights of foreign workers on 25 June 2015 in allowing a migrant workers’ trade union to be established and to include undocumented migrant workers in its membership.

On 24 April 2005, a group of ninety-one migrant workers held an inaugural meeting of the Seoul-Gyeonggi-Incheon Migrants’ Trade Union to draft and adopt bylaws and to elect union officers. They subsequently submitted the required labor union establishment report along with relevant documents to the Minister of Labor. Finding that some of the members of the union including the president were undocumented “illegal” aliens, the Seoul Regional Labor Office requested them to supplement their submitted documents to include “the names of each entity, number of union members, and name of the representative” as prescribed under Article 2 subparagraph 4 of the former Enforcement Rule on Trade Union and Labor Relations Adjustment Act (Enforcement Rule). The workers, however, refused to comply, citing that the provisions under Article 2 subparagraph 4 of the Enforcement Rule do not constitute a necessary requirement for establishing a labor union. Their establishment report was returned on the grounds that they had failed to comply with the request and that the union primarily comprised of undocumented workers.

The Court’s decision, which came eight years after its 2007 ruling on migrant workers, has drawn significant attention because Anwar Hussain, the union’s
initial president, and several other key members had been forcefully deported to their home countries after submitting the documents in 2005 to establish the union. Speculations circulated that the case might be dismissed on those grounds. The National Human Rights Commission of Korea submitted its opinion to the Court recommending a favorable decision for the migrant workers on 26 May 2008. The Supreme Court referred the case to the plenary session in January 2015, reaching its own favorable conclusion in June. This decision can be considered a result of ongoing migrant worker reforms in South Korea.

This case clearly demonstrates that Korean judiciary bodies are attempting to adhere to international human rights standards—such as those in the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) (Migrant Workers’ Convention)\(^1\) and the ILO Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (Supplementary Provisions) (No. 143)—in its interpretation of the Constitution and domestic statutes.\(^2\)

### Findings

The Court found that Article 2 subparagraph 4 of the Enforcement Rule—requiring the names of each entity, number of union members, and name of representative—is invalid because the provision is not based on and cannot supersede the Trade Union Act. The Court therefore determined that the establishment report cannot be returned on grounds that those stipulations were not met.

The Court also decided that even a foreigner who has not obtained the appropriate residency status to work in the Republic of Korea in accordance with the Immigration Control Act but nonetheless provides labor to another party based on a subordinate relationship and receives wages in return is included in the scope of worker as defined under the Trade Union Act. This definition opened the door to giving undocumented migrant workers the right to form and belong to trade unions.

Article 32 of the Constitution of Korea provides that its citizens have the right to work. The Constitutional Court decided in 2007 that the civil rights

---

element of the right to work in Article 32 applies to foreign migrant workers as well as citizens. Article 33—which prescribes workers' rights to independent association, collective bargaining, and collective action—is also considered a fundamental civil right. The Trade Union Act specifies this by providing that workers are free to establish or join a labor union (Article 5) and a labor union member shall not be discriminated due to race, religion, sex, age, physical conditions, type of employment, political affiliation, or social status (Article 9). These provisions should be applicable for migrant workers. In this regard, the decision of the Supreme Court ensuring that even undocumented migrant workers are workers under the Trade Union Act seems to be an appropriate way of interpreting the principle. The decision made it clear that undocumented workers' labor rights were not restricted under the Immigration Control Act and that the intent of the Immigration Control Act is entirely different from that of the Trade Union Act.

The Supreme Court's decision seems to conform to international labor standards. Article 26 of the Migrant Workers' Convention, for example, obligates state parties to recognize the right of migrant workers and members of their families to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protect their economic, social, cultural, and other interests, subject only to the rules of the organization concerned. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and that are necessary in a democratic society in the interests of national security, public order, and the protection of the rights and freedoms of others.

Although the decision was generally welcomed by civil society, some concerns were also raised. The decision did not clearly indicate where the South Korean Supreme Court is headed. Is it toward a broader protection of labor rights of undocumented workers? The Court provides in its decision that, for example, when an organization's activity is aimed at political movements, the administrative office can return the establishment report after substantive review, and even if the establishment was reported and its certificate issued, such organization cannot be acknowledged as a lawful labor union. In other words, the Court is still cautious in regard to migrant worker union activities.

The Future of Undocumented Migrant Worker Rights

South Korea has seen a rapid increase in migrant workers in recent decades and has adopted several measures to protect both migrant workers and their

---

3 Constitutional Court Decision, Republic of Korea, 2004 Heonma 670, 30 August 2007.

INTERNATIONAL LABOR RIGHTS CASE LAW 2 (2016) 162-165
labor rights. Abolishing the problematic labor trainee system in 2005, South Korea adopted the uniform employment authorization system effective 1 January 2007. It has also passed several related measures, such as the Act on Foreign Workers' Employment in 2003, the Act on the Immigration and Legal Status of Overseas Koreans in 2004, and amended the Immigration Control Act multiple times.

The finding that a worker is a person who provides labor to another party based on a subordinate relationship and receives wage or other remuneration in return is a critical one because it underscores the right of an undocumented migrant worker to the three basic labor rights: the rights to independent association, collective bargaining, and collective action enumerated in the Article 33 of the Korean Constitution. It is equally decisive that residency status does not deny a worker his or her labor rights.

Challenges to the rights of undocumented workers are common in case law. For example, in Hoffman Plastic Compounds, Inc. v National Labor Relations Board 2002, the US Supreme Court ruling denied an award of back pay to an undocumented worker laid off for participating in a union-organizing campaign.4 The Court interpreted the Immigration Reform and Control Act of 1986 to disallow invoking punitive National Labor Relations Board provisions against an employer that would benefit any person who knowingly broke immigration law, which the plaintiff had done in assuming a false identity to secure his employment. In January 2003, at the request of Mexico, the Inter-American Court of Human Rights decided on this case that “the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature.”

As the Migrant Workers’ Convention states, the rights of migrant workers and members of their families have not been sufficiently recognized and require appropriate international protection.5 Workers who are not documented or are in an otherwise irregular situation are frequently employed under less than favorable conditions of work.6 The Court's decision was a big first step to acknowledge the need to protect the rights of the migrant workers, but South Korea should look more closely at its own laws to find ways to broaden that protection.

6 Ibid.