

Petition for Request for Adjudication on Constitutionality of Statute

Case 2023GoJung250 Violation of the Passport Act

Petitioner Jin-young Jang

With respect to the above case, the petitioner's counsel files a petition for request for adjudication on constitutionality of statute as follows:

Purpose of Subject Matter

Regarding the above case, Article 26(3) and Paragraph 1 Article 17 of the Passport Act violate Paragraphs 1 and 2 of Article 21 and Article 37 of the Constitution of the Republic of Korea.

Relevant Act

Passport Act

Article 26 (Penalty Provisions) Any of the following persons shall be punished by

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imprisonment with labor for not more than one year or by a fine not exceeding 10 million won. <Amended on Jan. 21, 2014>

3. A person who uses a passport, etc. or visits or stays in a country or region publicly notified as a country or region where visits or sojourn is prohibited under Article 17 (2) and the main sentence of Article 17 (1) without obtaining permission (including cases applied mutatis mutandis in accordance with Article 14 (3)) under the proviso to paragraph (1) of the said Article, despite being aware of such fact.

Article 17 (Restrictions on Use of Passport) (1) When deemed necessary to suspend any visit to or sojourn in any specific country or region in order to protect the lives, physical safety and property of people against dangerous circumstances overseas prescribed by Presidential Decree, such as a natural disaster, war, internal disturbance, revolt, terror, the Minister of Foreign Affairs may restrict the use of a passport or prohibit any visit to and sojourn in the relevant country or region (hereinafter referred to as "restrictions, etc. on the use of passports") for a fixed period: **Provided, That the Minister of Foreign Affairs may, if he or she deems it necessary, permit the use of a passport, visit or sojourn for any travel to be made for purposes prescribed by Presidential Decree, such as permanent residence, covering and reporting, urgent humanitarian causes, or official duties.** <Amended on Mar. 23, 2013> [*emphasis added*]

Reasons of the Petition

1. The petitioner's fundamental right is at stake at the trial

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A. Factual Backgrounds

1) Petitioner's past reporting as a freelance photojournalist

The petitioner is a freelance photojournalist with seven years of experience, and during the 2019 Hong Kong pro-democracy protests, he personally photographed the scene from the front lines of the protests and reported on the scene in the weekly newspaper *Sisain*, *Hankyoreh 21*, and *Vostok*. (See Exhibits Nos. 1 to 3 respectively) Editor-in-chief of the *Sisain*, *Ko Je-kyu* complimented the petitioner in December 3, 2019 in "Records of the Hong Kong Protests 'Close' Enough, [Behind the Scenes]," describing him as "a photographer recognized by *Yoon Moo-young*, head of the photography team, and *Lee Jung-hyun*, head of the art team. Every time I see the photos of the Hong Kong protests he covered, I give them a thumbs up! Photographer *Jang Jin-young* is a literally exclusive photographer of Hong Kong-related articles in *Sisain*. He is a photographer who has been covering Hong Kong since November 17th." (Exhibit No. 2 Refer to the editor-in-chief's comment in the *Behind the Scene* of December 3, 2019)

Petitioners' photographic coverage of the 2019 Hong Kong pro-democracy protests

<https://www.sisain.co.kr/news/articleView.html?idxno=35318>

(Exhibit No. 1-1 of August 22, 2019)

<https://www.sisain.co.kr/news/articleView.html?idxno=35351>

(Exhibit No. 1-2 of August 26, 2019.)

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<https://www.sisain.co.kr/news/articleView.html?idxno=40091>

(Exhibit No. 1-3 of September 2. 2019.)

<https://www.sisain.co.kr/news/articleView.html?idxno=40610>

(Exhibit No. 1-4 of November 11. 2019.)

<https://www.sisain.co.kr/news/articleView.html?idxno=40742>

(Exhibit No. 1-5 of December 4. 2019.)

<https://www.sisain.co.kr/news/articleView.html?idxno=40795>

(Exhibit No.1- 6 of December 9.2019.)

Comments of Editor-in-chief of *Sisain* [Behind the scenes]

<https://www.sisain.co.kr/news/articleView.html?idxno=40770>

(Exhibit No. 2, 2019. 12. 3. Behind the Scenes of the editor-in-chief of *Sisain*)

Hankyoreh21

<https://h21.hani.co.kr/arti/photo/oneshot/47481.html>

(Exhibit No. 3 of May 2. 2020. Reports on *Hankyoreh 21*)

2) The outbreak of the Ukraine war and the dispatch of media abroad

Russian President Vladimir Putin announced on February 24, 2022 in a televised speech, the start of a special military operation in the *Donbas* region of eastern Ukraine and invaded Ukraine. (hereinafter referred to as the "Ukraine War")

Regarding the coverage of the war in Ukraine, there is almost no on-site coverage by domestic media outlets due to the Passport Act, but the foreign press was covering and reporting the War at the frontline. CNN has 75 people and British news companies have dispatched more than 50 people to the scene to cover the War. According to Professor *Lim*

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Young-ho's media critique on April 14, 2022, "I know that there are very few Korean journalists who have jumped into the field in Ukraine." (Lim Young-ho, professor of media and communication at Pusan National University, "Problems in Foreign Press Stories unveiled by Coverage of the War in Ukraine", April 14, 2022)

Young-ho Lim, Professor of Media and Communication at Pusan National University, "Problems in Foreign Media Stories Revealed by Coverage of the War in Ukraine", April 14, 2022 {excerpt}

A most striking problem is the fact that, despite the enormous volume and importance of the coverage, there is almost no direct coverage from the scene. ...<>...

Most of the reporting and news articles about Ukraine that have come out so far in Korea are a compilation of articles from foreign news agencies such as AP, Reuters, and AFP, as well as articles from major foreign media outlets such as CNN, The New York Times, The Times, and The Guardian. It is unprecedented that even the contents of English-American tabloids such as the Mirror and the New York Post have been introduced to Korea. CNN currently has a headquarters in Lviv, Ukraine, and dispatches as many as 75 employees to deliver live news. This figure includes not only professional journalists who have been covering the former Soviet Union, but also auxiliary personnel such as interpreters and drivers. British news agencies have also sent more than 50 journalists to the scene in Ukraine. ...<>...

From what we have learned from the reports so far, we know that very few Korean journalists have jumped into the field in Ukraine. A broadcasting news showed a reporter interviewing Ukrainian refugees in a Polish border town, and although he did not enter Ukrainian territory directly, this is probably the closest he has ever gotten to the scene of a war in the country. ...<>...

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To put it a little roughly, many of the reporting and articles about the war in Ukraine are reminiscent of the reports of lazy undergraduates who searched and spliced together here and there. In the middle of the article, the source is mentioned slightly, such as "according to the AP and AFP", but there is no way to verify which part of the content, quotations, and facts are referred to the AP and which part of the report was investigated by the reporter in charge in the articles. ...< >... One example is the lack of fact-checking.

Independent journalists have been in the field, including the late award-winning documentary filmmaker Brent Renaud, a World Press Photo awarded independent photojournalist Juan Arredondo, and Lynsey Addario, a Pulitzer Prize-winning photojournalist. The late independent documentary filmmaker Brent Renaud was killed while covering the war in Ukraine, but no country has argued that journalists should be banned from covering war zones for their safety. (Exhibit No. 5 "Journalists risking their lives in Ukraine," featured news article on March 15, 2022)

Over the years, the world has admired and respected journalists in the conflict zones for their life-risking reporting on humanitarian crises, and many journalists covering wars or war correspondents have worked independently to report on the impacts of war on civilians rather than working as full-time employees of a particular media outlet because of their expertise and specialization in reporting on conflict zones. The late Marie Colvin, a legendary journalist blinded in one eye after being hit by a grenade in Sri Lanka wearing her signature black eye patch, was killed by the bombardment of the Syrian government while working as an independent journalist in Syria, and had won several Foreign Reporter of the Year Awards, the International Women's Media Foundation award for

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Courage in Journalism and Reach All Women in War. Her life was recaptured in the 2019 film "A Private War." (Exhibit No. 6 On Marie Colvin; Exhibit No. 7 "<Private Hour>: What to Watch, See, and Say," *Newspaper and Broadcast*)

For Korean journalists, however, such reporting has been effectively banned or restricted by the Passport Act. Journalists in conflict zones like the petitioner, who reported the horror and death of civilians including children and tried to reach out the ignored by other news reports, are prosecuted for travelling to the conflict zone without government's permission. In other words, this is because, as we will see below, the Passport Act operates on a licensing system prohibited by the Constitution.

3) **The Ministry of Foreign Affairs's permit procedure working as ban on covering conflict zones**

The petitioner had planned to file an application to travel to Ukraine to cover the war after the outbreak of the Ukraine war on February 24, 2022, but found that the Ministry of Foreign Affairs hardly permits travel even the exceptions for the restriction set forth in the Passport Act, even for "reporting purposes". Even as photos and videos from the BBC, CNN, and Reuters were already circulated, Korean media outlets were unable to cover Ukraine because the Ministry of Foreign Affairs banned journalists from traveling.

The Ministry of Foreign Affairs had placed a total ban on even visit for covering and reporting to Ukraine for public interests from the onset of the war to March 18, 2022. Since then, the Ministry announced its policy that traveling to Ukraine for the purpose of

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covering and reporting will be permitted not to ‘journalists’ but to a small number of media outlets, particularly those who assign exclusive correspondents covering the Ministry. Furthermore, even the coverage allowed to a very small number of media outlets is not free coverage, but conditioned to (1) **employees of media outlets which have exclusive correspondents for the Ministry of Foreign Affairs (if there are multiple media outlets wishing to visit for the same period, the applicant shall be determined by coordinating among the media outlets in advance)**, (2) travelling region shall be limited to **Chernivtsi Oblast**, where the temporary Korean embassy is located (*Chernivtsi Oblast* is far away from the place where the conflict occurred, as shown on the map below), (3) **within 3 days** of the visit period (it is not possible to cover the conflict area within 3 days), (4) limited to **4 people** or less, and (5) subsequent to receiving the application for permission, review by the relevant ministries, and deliberating and voting by the Passport Policy Review Committee will proceed, which takes at least one week before being notified of the decision (in a situation where an urgent coverage and reporting is required, this period of minimum one week is equivalent to banning coverage). As we have seen, when the war in Ukraine broke out, the BBC, CNN, Reuters, The New York Times, The Times, Guardian and other media sent large groups of reporters without any restrictions to cover the scene firsthand. Domestically, the Ministry of Foreign Affairs' operation of this permit system for the press was severely restricting on-the-spot coverage.

[Ministry of Foreign Affairs' Memo on the Application to travel Ukraine for reporting purpose on March 18, 2022]

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우크라이나 취재 목적 입국(예외적 여권사용) 허가 신청 안내

1. 기본원칙

- (대상) 우크라이나 상황에 대한 공익적 보도를 위한 현지 방문 취재를 희망하는 언론사 소속 직원 ★ 단, 외교부 출입 언론사에 한정
- (조건) 방문지역 : 체르니우치州 / 방문기간 : 3일 이내 / 방문인원 : 4명 이내
★ 동일 기간에 대해 방문 희망하는 언론사가 복수인 경우, 사전 조율을 통해 신청자 결정, 대변인실에 통보 후 신청 접수
- (절차) ① 허가 신청 접수 ② 관계부처 검토 ③ 여권정책심의위원회 심의·의결 ④ 허가 여부 통지
★ 접수 후 허가 여부 결정까지 1주 이상 소요됨을 감안하여 방문일정 수립 요망

Regarding the Ministry of Foreign Affairs' permission system to cover conflict areas, *Kim Young-mi*, an independent producer who have extensively covered conflict zones, shared her frustration in the interview with MBC Radio<Kim Jong-bae's Attention Focus> on April 20, 2022, "There are hundreds of reporters in *Kyiv* alone, and there are a lot of reporters in *Lviv*. Even the British Prime Minister is walking around the streets in *Kyiv*, but only Korean reporters are not allowed to enter Ukraine, so they can't cover the war at all." Regarding the two-night, three-day coverage period limit set by the Ministry of Foreign Affairs as a condition of permission at the time, *Kim Young-mi* added, "In the case of a documentary, there is nothing to do for two nights and three days to cover the war, and that place (*Chernivtsi*) is not the focus of the news." (Exhibit No. 8 [Attention Focus] Producer *Kim Young-mi*, "Ukrainian refugees speak gibberish in the shock of war, suffering from momentary amnesia..." April 20, 2022) Earlier, Korean Broadcasting System(KBS)'s reporter *Yu Won-jung*, who returned from covering Ukraine, criticized the government in his report titled in "Covering the War in 'Three Days and Two Nights' War

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Coverage and the Foreign Ministry's Backward View on the Press." He said, "I couldn't tell if I went to cover the war or if I came in to take a video of myself to say "Hey, I am in Ukraine," on the air" and "[I wonder if the Ministry believes that] four people a day are safe and 10 people are not safe." (Exhibit No. 9 "Correspondent's Report on 'Three Days and Two Nights' War Coverage and the Foreign Ministry's Backward View on the Press," KBS, April 6, 2022)

Excerpt from the KBS reporter Yu Won-jung's report on April 6, 2022, "Three Days and Two Nights' of War Coverage and the Foreign Ministry's Backward View on the Press"

I felt a disgrace to be a war correspondent who escaped from the frontline after completing the two nights and three days permitted period, which is unprecedentedly short for covering any war. What I have experienced through my coverage of Ukraine in that period is the weak and frustrating policy of the Foreign Ministry's "exceptional passport use" system rather than the situation of the war....(omitted)

The online application process was not easy. In particular, I wondered if ordinary people who want to stay abroad to earn a living could really prepare for such requirements. Most of all, the biggest obstacle was to certify the contract with a security company and the accommodation reservation. There is also a warning on the online site that if you do not have these certification, your application may not be proceeded.

But is it rational to request to prepare for all these documents in advance, in a country

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at war?

The Ministry of Foreign Affairs, which had asked us to contract with a security company and to book accommodation in advance, notified us of the permission to enter the country in the early morning of the 18th, that is, on the day they were scheduled to enter the country. It was also only for three days and two nights.

If I had been given a little more time, I would have been able to take care of all the necessary things in advance after a local coordinator was hired. The Ministry of Foreign Affairs issued the final entry permit only on the day of the supposed entry to Ukraine....(omitted)

Korean journalists were only allowed to cover a scene of great significance in modern history for two nights and three days. That, too, in a calm area farthest from the frontline. If there are multiple media companies wish to enter Ukraine, they should take turns to cover the war. I was speechless and choked....(omitted)...

I couldn't tell if I was there for covering the war or if to take videos to prove that "I'm in Ukraine" on the air....(omitted)...

As I was fleeing Ukraine after two nights and three days of coverage, I was so sorry to see people living in Ukraine, and I tried to avoid embarrassment by explaining the ridiculous "Korean government's permit system for exceptional passport use." Instead,

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I promised that I would definitely come back and do more reporting.

■ Challenging again to apply for travel to Ukraine to cover the war ... Ministry of Foreign Affairs, 'unable to process the application'

After returning to Paris, France, I reapplied for an exceptional passport use to cover the war. The regions to travel were *Chernivtsi*, where I entered last time, and *Lviv*, where journalists from all over the world gathered. The coverage period was one month (two KBS teams take turns covering the coverage). However, the response from the Ministry of Foreign Affairs, which came back one week after the application, was that "the application cannot be processed for failing to meet the conditions announced in advance."

I should check this with the Ministry of Foreign Affairs, but "unable to process the application" can be read as saying that it was rejected without even going to the "examination process", which is a legal procedure....(omitted)...

Due to the Foreign Ministry's travel permit system for journalists in conflict zones, which does not exist in other countries, there are currently few Korean journalists covering conflict zones in Ukraine. This ban on travel leads to the consequence that shared experiences of covering conflict zones are almost vanished among journalists. In 2003, when Iraq War broke out, there were nearly 100 Korean reporters, but now it is difficult to improve and develop expertise in war-reporting in a situation where it is not possible to report on the war. Accordingly, at a press conference on *Jang Jin-young's* petition

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for this request for an adjudication on the constitutionality of statute, Producer *Kim Young-mi* pointed out, "This could make Korea a colony in journalism." *Na Joon-young*, president of the Korean Video Journalist Association, said, "As there was nothing we could do at the border ... (omitted) ...we became international laughingstock and berated by many domestic citizens who were exposed to international reporting. We have stopped at that level of reporting the Iraq war." (Exhibit No. 10, "Journalist criminally punished for covering the war in Ukraine, Constitutionality of the Passport Act adjudicated," in Report of Journalist Association of Korea, June 23, 2023). Furthermore, the statements of journalists who experienced applying process indicate that the Ministry of Foreign Affairs has requested "a plan of coverage" during the reviewing the applications, which in fact involves and meddles in the contents of reports, similar to the internal editing process of news agencies. This practice inevitably curtails freedom of the press.

In response to this, a Korean NGO, the MediaReform criticizes the Ministry of Foreign Affairs' policy on April 21, 2022; "In the context of the extreme violence of war, the media's first responsibility should be to convey the horrors of war. It is difficult to understand that the news on the victims of bombing in Ukraine is coming through the foreign press, but the domestic media does not even have access to the site. It is said that it is imperative to "protect its own citizens," but criticism has been raised that the restrictions currently applied are abuse of the administrative discretion. It is also a measure that does not take into account the characteristics of various broadcast programs, such as documentaries, current affairs and reporting." (Exhibit No. 11, MediaReform, "on-the-site coverage' of Ukraine, should be guaranteed as much as possible." On April 21, 2022.)

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Facing criticism over the permit-policy regarding coverage of the Ukraine war, the Ministry of Foreign Affairs announced that it mitigated the guidelines on April 25, 2022 that increase the duration of visits from three days to five days and the number of visitors to no more than six. This could not be considered mitigation as it was impossible to cover the conflict zone, even under the mitigated permit system of the Ministry of Foreign Affairs. In a situation where leading foreign media outlets were reporting without time limits or place of visit, these restrictions on domestic journalists have become the biggest reason why it is not possible to cover conflict zones.

[Memo of the Ministry of Foreign Affairs on the conditions to permit exceptional passport use to cover the Ukraine war, said to have been mitigated, on April 25, 2022]

우크라이나 취재 목적 방문(예외적 여권사용) 허가 신청 안내[2]

2022.4.25.(월), 외교부

1. 기본원칙

- (대상) 우크라이나 상황에 대한 공익적 보도를 위한 현지 방문 취재를 희망하는 언론사 소속 직원
- (조건) 방문지역 : 체르나우치주, 르바우주, 자카르파티야주, 이바노프랑키비츠주
방문기간 : 5일 이내 / 방문인원 : 6명 이내
★ 동일기간에 방문을 희망하는 언론사가 다수인 경우, 인원 및 일정 조정 예정
- (절차) ① 신청서류 접수, 상담·조정, 서류 보완 ② 관계부처 검토
③ 여권정책심의위원회 심의 개최 ④ 허가여부 통지 및 허가서 발급
★ 접수 후 허가여부 결정까지 최소 7일 소요되므로 급변 완화된 조건에 따른 실제 방문은 5.7.(토) 이후에 가능함을 감안, 방문일정 수립 요망

In particular, the provinces of *Chernivtsi*, *Lviv*, *Zakarpatiya*, and *Ivano-Frankiwicz*,

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which are the Ukraine regions allowed to visit under this mitigated conditions, are the areas unaffected by the war at the initial stage. The Ministry arbitrarily restricted the coverage of the war, resulting in interference with and restricting contents of media coverage and reporting.

[MAP: Regions occupied by the Russian Troops in Ukraine on August 21, 2022.

Source: Institute for the Study of War, U.S.A.]

우크라이나 내 러시아군 점령 지역



4) How the petitioner entered Ukraine and covered the war

The petitioner flew to Poland on March 1, 2022 and entered Ukraine via land route. Since the outbreak of the war in Ukraine on February 21, photos and videos of the scene

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covered by foreign journalists had been broadcasted in real time, but in the case of Korea, it was not even possible to cover the site due to the restrictions of the Passport Act, so it was inevitable for the petitioner to take photos of Ukraine war from March 5 to March 20, 2022. His photos showing the horrors of the war were featured in news reports of *Sisain* and *Danbi News*. **At the time of the petitioner's on-the-ground reporting in Ukraine, the Ministry of Foreign Affairs had not granted any permission for journalists to cover the armed conflict.**

Photographs of the war taken by the petitioner were published on April 7, 2022 in the report, "Ukraine now, a place where farewells float everywhere," and the photos were the first ones taken by a Korean journalist.

<https://www.sisain.co.kr/news/articleView.html?idxno=47167> In this report, the petitioner's name is reported under the pseudonym *Kim Se-geun*, because he feared of being prosecuted for violating the Passport Act (Exhibit No. 12, the photos featured in *Sisain*)

Since then, the petitioner's photographs of Ukraine had also been reported by *Danby News* and *Workers*.

B. Issuance of summary order against petitioner

On March 28, 2023, the *Uijeongbu* District Court's *Goyang* Branch ordered the petitioner (then 'the accused') a fine of 5,000,000 KRW for the reason that "No person

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shall use his passport or visit or stay in a country or region where restricted from visiting or staying without the permission of the Minister of Foreign Affairs. The accused was aware of the fact that Ukraine was designated as a restricted area due to the outbreak of war in Ukraine by the official notification of the Ministry of Foreign Affairs No. 20022-2, "restrictions on the use of passports or prohibition of visits and stays, etc." on February 12, 2022. Nonetheless, the accused did not obtain permission from the Minister of Foreign Affairs to take photographs of the war situation and visited and stayed in Ukraine from March 5, 2022 to March 20, 2022," and the court ruled that the petitioner violated Article 27(3) and Paragraph 1 of Article 17 of the Passport Act.

C. Petitioner's Request for a Formal Trial

The petitioner could not accept the ruling of the above summary order, so he requested a formal trial, which is currently pending as the case of No. 2023GoJung250 in the Uijeongbu District Court.

D. Summary of the case

Timeline of the case

Year 2022

- February 24 Russia invades Ukraine
- March 5 *Jang Jin-young*, a photojournalist entered and covered the frontline in Ukraine for 15 days as the first Korean journalist

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- April 6 Jang's photos featured in *Monthly Workers*, "Ukraine 2022"
- April 7 Jang's photos featured in *Sisain*, "Today's Ukraine, a place where farewells float everywhere"
- April 14 Jang's case was booked with the investigative agency on charges of violating the Passport Act
- April 21 Korea Video Journalist Association held a meeting with journalists on the issue of on-the- scene reporting of the Ukraine war, titled in "'Passport Act Restricts War Coverage, Infringes on Freedom of the Press and the Right to Know of Citizens."
- April 27 Producer *Kim Young-mi*, exclusively covering conflict zones, made a presentation, "Passport Act and Restrictions on War Coverage" at the seminar of the Korea Press Foundation, "The War in Ukraine and Media Coverage"
- The article titled in "The War in Ukraine and Our Work field" was published in *Broadcasting Journalists*, Issue no. 66 (May 2022), Korea Broadcasting Journalist Association
- May 3 "Korean Media Doesn't Go to the Real Battlefield of War," *Video Journalists Issue No. 137*, Korea Video Journalist Association, and the article by Producer *Kim Young-mi*, "the Difficulties of War Reporting and Its Reality: We need to improve the permit system for covering wars to guarantee the right to know of citizens" published in *Newspapers and Broadcasting* in May
- May 31 "Forbidden Sites," an exhibition of photos taken in conflict zones

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around the world to improve the Passport Act was held, which was co-curated

by *Onvit Documentary* and *Ryu Gaheon*

- June 3 Issued a public statement and held a conference on improving the Passport Act

Year 2023

- March 28 *Uijeongbu* District Court's *Goyang* Local Branch issued a summary order of 5million KRW in fine against Jan Jin-young
- April 18 *Jang Jin-young* filed a request a formal trial of his case
- May 15 National Assembly Photo Exhibition, "One Year in Ukraine, Going to the Forbidden Sites," KISH KIM, Documentary & News Korea
- June 23 Press Conference held on the request for adjudication on the constitutionality of the Passport Act
- June 28 Formal trial of *Jang Jin-young* on the charge of violating the Passport Act begins

As we have seen, the Ministry of Foreign Affairs operates on a permit system within the discretion of the Ministry of Foreign Affairs for the use of passports for the purpose of covering and reporting on the basis of the proviso to Article 17 of the Passport Act, and the proviso to Article 17, which reads, "even in the case of the purpose of investigative reporting, the Minister of Foreign Affairs may authorize the use of passports and visits if the Minister of Foreign Affairs deems it necessary" to be ruled unconstitutional for the reason that the permit system for journalism in conflict zones is unconstitutional, the interpretation of Article 17 as a whole will change. In other words, in the case of covering and reporting, it will be possible to use a passport and stay in the country even if one does

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not obtain a permission, according to the above adjudication on unconstitutionality, so it is fair to read that the entire provision of Article 17 applies in relation to the *Uijeongbu* District Court 2023GoJung250 case.

In other words, since the statute in question applies in connection with the trial of this criminal case, the case is pending before the court, and the court will reach different ruling depending on whether the statute is in breach of the Constitution or not, the petitioner has the standing to ask this court to request for adjudication on constitutionality of the Passport Act to the Constitutional Court.

2. Unconstitutionality of Article 17 of the Passport Act

A. The Past Adjudication of the Constitutional Court regarding the Amendment of Article 17 of the Passport Act

Article 17 of the Passport Act was enacted in 2007 with the aim of protecting the lives, bodies and property of citizens from the crisis outside the country, and ultimately fulfilling the obligation of the State to guarantee the fundamental rights of its citizens as set forth in Article 10 of the Constitution and its obligation to protect its citizens abroad after the "Afghan Kidnapping Incident" in 2007, when 23 Korean nationals who visited Afghanistan for missionary purposes were abducted by Taliban militants, two were killed during detention, and the remaining 21 were released after 42 days.

In the past, the Constitutional Court had ruled that Article 17 of the Passport Act does

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not violate fundamental rights protected by the Constitution in a ruling on the constitutional appeal brought by a person who was employed by an international aid and development NGO while living abroad alleging that the said Article violates the rights to freedom of residency and movement, freedom of occupation, equality, and the pursuit of happiness (Constitutional Court on February 27, 2020, 2016Hunma945 Decision). However, the above ruling only dealt with whether or not the right to freedom of residency and movement, freedom of occupation, the right to equality in general, and the right to the pursuit of happiness were violated. In other words, the Constitutional Court has not adjudicated whether or not the Passport Act imposes *de facto* licensing system on the press whose freedom has been recognized as a prerequisite for securing constitutional values such as freedom of thoughts and the pursuit of truth that are indispensable elements of a pluralistic democratic society and thus it violates the principle proportionality. Therefore, this case should be examined as a case challenging the unconstitutionality of the Passport Act, which has no precedent in the past.

Below, we will look at the unconstitutionality of the statute in question from the perspective of freedom of speech.

B. The UN Special Rapporteur on Freedom of Expression, Report to the UN General Assembly on Disinformation and Freedom of Opinion and Expression in Armed Conflict on August 12, 2022

Ms. Irene Khan, UN Special Rapporteur on Freedom of Expression emphasizes the need to protect journalists' freedom of expression in times of armed conflict in her recent report

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on disinformation and freedom of opinion and expression in times of armed conflict submitted to the UN General Assembly, saying "uncensored and unhindered news media and the right of journalists to work safely and without fear are not only integral to the fight to freedom of opinion and expression, but also key to countering disinformation, including in conflict settings." While the report does not explicitly deal with a similar situation with the petitioner for there is no such country operates permit system for reporting and covering conflict zones around the world, it does point out that it is an intrinsic part of freedom of expression to ensure that journalists can report safely and fearlessly in conflict situations.¹

C. European countries consider ensuring journalists' access to conflict zones from the perspective of freedom of expression and content regulation.

1) Special Report of the Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe, 2006

A special report by the Representative on Freedom of the Media of the Organization

¹ 47. Uncensored and unhindered news media and the right of journalists to work safely and without fear are not only integral to the right to freedom of opinion and expression, but also key to countering disinformation, including in conflict settings. International human rights law protects the practice of free, independent and pluralistic journalism and the right of journalists of reexpression, while international humanitarian law is silent on the issue.

for Security and Co-operation in Europe (OSCE) in 2006 stated, "Journalists have access not only to certain places with limited space, but also to certain closed areas, such as war zones or places that are considered dangerous or have been sealed off by the authorities for safety reasons. Also journalists should be allowed to participate in official events and visits," which in principle treats journalistic activities in war zones as exercise of freedom of expression. The report also states that the accreditation associated with press badges (identification of journalists) should not be misused as a license, which constitutes undue control over journalists. (See Exhibit No. 13, "Special Report: Accreditation of Journalists in the OSCE are," Translation of the Special Report of the Representative on Freedom of the Media of the Organisation for Security and Co-operation in Europe, 2006.)

2) Council of Europe's Principles of Journalism in Situations of Conflict and Aggression

The Council of Europe published recommendations on March 7, 2022 to the relevant actors reaffirming the principles of journalism in situations of conflict and aggression (Exhibit No. 14, See the Council of Europe's "Principles of Journalism in Situations of Conflict and Aggression" on March 7, 2022). It explains that the **protection of journalists in situations of conflict and aggression should not be used as an excuse to restrict the rights of journalists**, and that European Member States **"should guarantee freedom of movement and access to information to journalists, including cross-border movement and access to conflict zones. This includes issuing visa and other necessary documents, as well as facilitating the import and export of professional equipment."** In particular, with regard to accreditation, "accreditation

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should be given **to all media professionals without discrimination according to clear and fast procedures free of administrative obstacles. Furthermore, the exercise of journalism and journalistic freedom should not be made dependent on accreditation."**

According to the above recommendations of the Council of Europe, the restriction of coverage under the current Passport Act amounts to a violation of freedom of expression under international human rights law by suppressing freedom of the press and operating on a permit basis under the pretext of the need to protect journalists.

**D. Regarding the violation of Paragraph 2, Article 21 of the Constitution
(principle of prohibition of prior licensing)**

Paragraph 2, Article 21 of the Constitution does not recognize the license of the press or the publication. The principle of prohibition of prior licensing in Paragraph 2, Article 2 of the Constitution refers to the system in which the administrative takes the lead and suppresses the publication of ideas and opinions as a preventive measure before they are published, and if the licensing system for the press and publication is allowed, not only will the public's right to know be violated, but the administrative may also suppress contents or expressions that are unfavorable to the ruling party, which is why the Constitution specifically prohibits it without any reservations. However, although the principle of non-prior licensing does not extend to the physical facilities necessary for the press and publication or the activities of a businessman who runs a media company (Constitutional Court on June 26, 1992, 90Hunga23 Decision and many others), if it is

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not the content regulation itself, it can be construed as licensing prohibited by the Constitution if it has the effect of regulating content.

For almost a month since the outbreak of the Ukraine war, the Ministry of Foreign Affairs had maintained a blanket ban on traveling to Ukraine, applying the proviso to Article 17 of the Passport Act, that is a "complete ban on travel to countries or regions where it is prohibited to visit or stay" on Koreans, including journalists who want to cover and report from the frontline. In addition, even after March 18, 2022 when some conditions had been lifted, normal coverage was still limited to a small number of media with exclusive correspondents for the Ministry of Foreign Affairs for up to three days, and the situation had not changed much by the mitigated permit conditions announced on April 28, 2022.

Covering and reporting on the war in Ukraine is also integral to freedom of expression, which falls under the essential aspect of freedom of speech and the press, yet the Ministry of Foreign Affairs interfered with the contents of media by imposing a blanket ban on on-the-scene coverage for about one month from the outbreak of the war to March 18, 2022. Since then, the Ministry has arbitrarily decided who might cover the war deciding the areas and duration of coverage, the number of reporters to enter, and which media outlet to go. The Ministry of Foreign Affairs have made it virtually impossible to cover the war by placing arbitrary conditions, and decided which media outlet to visit, consequentially, denying any application by independent producers or journalists or freelancers. This practice has brought chilling effect on the majority of journalists. In other words, in terms of freedom of expression, this is not an issue of content-neutral travel permit, but **rather**

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a **"permission or licensing" prohibited by Paragraph 2, Article 21 of Korean Constitution as it has the effect of content regulation that determines whether or not our journalists can cover content about the war in Ukraine.** In particular, when covering the Ukraine war, it is not the media organization itself, but the Ministry of Foreign Affairs directly reviewed, in processing applications of the media, the **duration of the report, the location of the report, the content of the report, and the nature of the media, so it can only be considered that it falls under the content regulation or prior-censorship.** In other words, the government organization is meddling and interfering by carrying out editorial tasks, which usually occur in news organizations among the editors and reporters for journalism.

The Special Report of Representative on Freedom of the Media of the Organization for Security and Co-operation in Europe (Exhibit No. 13) also explains that the issue of guaranteeing access to journalists, **accreditation, is an issue of regulating content.** He adds that **a journalist's CV may be requested, but only if it does not interfere with the journalist's access to information, places or events, and cannot be used as a tool to deny or revoke accreditation.** He takes Belarus as an example: the fact that Belarus accredited a few journalists yet denied accreditation to Radio Free Europe, Radio Liberty, the BBC, and other foreign correspondents to cover the 2014 IIHF World Championship on the grounds that the International Ice Hockey Federation prefers professional sports media amount to a violation of freedom of the press in terms of content regulation.

Therefore, as we have seen above, the permit system imposed by the Ministry of Foreign Affairs arbitrarily limiting to specific media outlets and determining whether or not to

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grant permission for coverage by examining the place, the duration, and content of coverage is nothing more than a licensing system that has the effect of regulating the content, and is a violation of the principle of prohibition of prior licensing set forth in the Constitution.

E. Whether there is a violation of Paragraph 1, Article 21 and Article 37 of the Constitution

1) Restricted Fundamental Rights

Article 17 of the Passport Act restricts the sphere of journalism that is intrinsically related to the function of the press by prohibiting journalists from reporting that is critical for the dissemination of news and opinions; thus it is interpreted as restricting freedom of the press protected under Paragraph 1, Article 21 of the Constitution.

2) Whether the principle of proportionality has been violated

a. Legitimacy of the aim and suitability of the measure

The proviso to Article 17 of the Passport Act stipulates that even for the purpose of covering and reporting, the Minister of Foreign Affairs may allow the use of a passport and the visit or stay if the Minister of Foreign Affairs deems it necessary in the situations prescribe by the Presidential Decree. In addition, travel for the purpose of covering and reporting may be completely prohibited "for the safety of journalists" or limited to certain

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media.

However, given the fact that the proviso to Article 17 of the Passport Act recognizes that travel cannot be prohibited for the purpose of covering and reporting, the government cannot justify legitimacy of the aim of the regulation to prevent journalism and the media for conducting their professional duties in times of armed conflict.

Free, independent and fair media are not only an essential foundation of a democratic society, but also contribute to protection of civilians and prevention of armed conflict. In addition, calling the attention of the international community to the horrors and realities of armed conflict is not something that should be permitted by the government, but rather value that should be protected and encouraged by the international community.

Therefore, the provisions of the Passport Act in this case are regulations that restrict freedom of the press on the grounds of the safety of journalists and therefore have no justification for that purpose. In other words, since it inherently infringes on the essence of freedom of the press in times of armed conflict, the legitimacy of the aims and the suitability of the measures cannot be recognized under any circumstances if coverage of conflict areas is operated on a permit basis under the pretext of the safety of the media personnel.

b. Requirement of Minimal Infringement

Journalists in conflict zones may face a variety of dangerous situations, but restricting

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or outright banning their coverage is an undue violation of freedom of the press. Essentially, restrictions on freedom of the press should be minimized, and a proactive suppression approach can bring a major obstacle to freedom of the press, so it should be the last resort that should be considered when there is no alternative in terms of freedom of expression.

The Council of Europe's Principles on Journalism in Situations of Conflict and Aggression (Exhibit No. 14), published on March 7, 2002 recommend a number of safeguards to protect journalists.

**Exhibit No. 14, Excerpt of the Principles of Journalism in Situations of Conflict
and Aggression of the Council of Europe**

- Journalists should not be required to disclose their sources of information or to hand over information and material gathered while covering conflict situations.
- Member states should not misuse libel and defamation legislation to limit freedom of expression and should refrain from intimidating journalists by lawsuits or disproportionate sanctions.
- Systems for the accreditation of journalists should be introduced only to the extent necessary and should facilitate the exercise of journalism in situations of conflict and tension. If required by national law, accreditation should be given to all media professionals without discrimination according to clear and fast procedures free of administrative obstacles. Furthermore, the exercise of journalism and journalistic freedoms should not be made dependent on accreditation. States should refrain from taking restrictive measures against journalists, such as withdrawal of accreditation or expulsion, on account of the

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exercise of their professional activities or the content of their reports.

- War correspondents are civilians and may not be made the object of attack; they are entitled to prisoner-of-war status upon capture.
- Media organisations should adopt in-house guidelines and procedures for the deployment of both salaried and freelance journalists on difficult or dangerous assignments, such as conflict zones. Such deployment should be voluntary and informed. Journalists should receive adequate information on the risks involved and training in all matters of safety, digital security and privacy.
- Media organisations should take appropriate preventive measures contributing to the protection of the physical safety of journalists working in conflict zones. They should adequately prepare dangerous missions in situations of conflict and tension by providing practical information and training to all journalists, whether staff or freelance, widely distributing “survival guides” and advisories as well as information on the availability of appropriate protection equipment. Media organisations should provide life insurance as well as health and travel insurance to the journalists deployed to conflict zones. Their institutional responsibilities additionally include, as relevant, the provision of legal support and representation and trauma counselling on return from assignments.
- Journalism schools and professional associations are encouraged to provide as appropriate general and specialised safety training for media professionals.
- International organisations of journalists are encouraged to facilitate the establishment of an insurance system for freelance media professionals covering conflict situations.
- Non-governmental organisations are encouraged to contribute to the safeguarding of freedom of expression and information by maintaining helplines for consultation and for reporting harassment of journalists and other alleged violations of the right to freedom of expression and by offering support, including in appropriate cases free legal assistance, to journalists facing lawsuits or problems with public authorities related to their professional

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activities.

As discussed above, even if reporting in conflict zones requires protection for journalists, a complete ban on reporting or limiting permission to media that are to the liking of the Ministry of Foreign Affairs is a clear violation of freedom of expression and the principle of minimum infringement. We cannot find other OECD country that completely prohibits travel to conflict zones or operates on a permit system like the Republic of Korea, when we conduct comparative study on legislations of other countries.

Therefore, it is said that the use of a proactive permit system for travel for covering and reporting in conflict areas violates the principle of minimum infringement.

c. Balancing Legal Interests

While the legislative purpose of the Article 17 of the Passport Act is unclear, the provision essentially blocks the opportunity to work as a journalist in conflict zones, not only for journalists who are affiliated with large media companies, but also for independent or individual journalists such as the petitioner. This is a clear violation of freedom of speech, and the Ministry of Foreign Affairs operates the permit system according to arbitrary standards, which makes even harder to understand what legal interests it seeks to protect. In addition to the fact that coverage of armed conflict zones is important as the foundation of a democratic society, the Ministry of Foreign Affairs does not consider any support or security measures for journalists, rather controls and permits journalists to cover armed conflict zones only to the extent that there is no

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administrative burden. This level of control of journalists in areas of armed conflict is unprecedented in a modern democratic country.

Furthermore, a violation of Article 17 of the Passport Act is subject to criminal punishment under Article 26(3). No other country that values human compassion, ethics, and justice imposes barbaric administrative penalties to punish journalists covering war who should be rather respected for throwing themselves into the scene of humanitarian crisis risking their lives.

Therefore, it is clear that Article 17 of the Passport Act in this case is out of balance of legal interests, without requiring further consideration of other circumstances. It can only be interpreted as an excessive violation of fundamental rights compared to its unclear legislative purpose.

3) Summary

It is clear from all sides that the provision of the statute in this case violates the principle of proportionality and thus violates the petitioner's right to freedom of speech.

3. On Violations of international human rights norms

A. Domestic human rights organizations alleged human rights violations

On June 23, 2023, 27 NGOs including National Press Workers Union, Korea Journalist

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Association, Korea Broadcasting Journalist Association, Korea Independent PD Association, Korea Video Journalist Association, Korea PD Federation (6 working organizations), Citizens' Coalition for Media Reform, Onvit Documentary, Cultural Solidarity, Media Christian Solidarity, Media Act, Minbyun Media and Press Committee, Media and Human Rights Center, OpenNet, Seoul YMCA Citizens' Relay Office, Progress Network Center, Joint Task Force on Freedom of Expression and Media Suppression, Korea Women's Democratic Association, New Media Forum, Free Press Action Foundation, Gyeongdong E&C and the bereaved family of the late Jeong Soon-kyu, Public Interest Human Rights Lawyers' Association, How to Create Hope, International Democratic Solidarity, Solidarity for the Elimination of Precarious Labor, Citizen Net for Life Safety, Human Rights Campaign Network Baram, Korea Occupational Safety and Health Research (21 NGOs) held a press conference to raise the issue that the permit system through the Passport Act violates freedom of expression. (See Exhibit No. 15 press conference.)

B. Support and solidarity from international media and human rights organizations

- 1) “South Korea: Freelance journalist charged for coverage of Ukraine War”, International Federation of Journalists(IFJ)’s statement released on June 16, 2023 (Exhibit No. 16, Statement of the International Federation of Journalists)**

<https://www.ifj.org/media-centre/news/detail/category/press->

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releases/article/korea-freelance-journalist-charged-for-coverage-of-ukraine-war

“The Passport Act came into effect in August 2007 and has since blocked reporters from engaging in coverage in conflict zones globally. Korean journalists are also banned from reporting without a government permit in Iraq, Somalia, Afghanistan, Yemen, Syria and Libya. The Republic of Korea is the only country in the world to have a ‘permit system’ for reporting in conflict areas.”

“The use of the Passport Act, which allegedly violates the constitution of the Republic of Korea, has restricted local reporters’ right to travel to conflict areas to conduct their work, with South Korean citizens forced to rely on foreign coverage of war and conflict. The IFJ stands with the JAK in supporting the People’s Coalition for Media Reform and its appeal of Jin-young's unfound criminal charges.”

2) “South Korea must drop restrictions on journalists reporting from conflict zones”, International Press Institute(IPI)’s statement released on June 22, 2023 (Exhibit No. 17, Statement of the International Press Institute)

<https://ipi.media/south-korea-must-drop-restrictions-on-journalists-reporting-from-conflict-zones/>

“The IPI global network urges the South Korean government to drop all restrictions on journalists reporting in conflict zones around the world. We

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express our solidarity with photojournalist *Jang Jin-young*, who faces criminal charges and who was fined for traveling to report on Russia's full-scale invasion of Ukraine. We call on the South Korean government to drop all charges against Jin-young and cease its use of the provisions in the country's Passport Act to limit the ability of the country's journalists to travel abroad to cover conflicts.”

4. Conclusion

Considering all of these circumstances, it is clear that of the applicable provisions of the Passport Act and the permit system is contrary to Paragraph 2, Article 21 of the Constitution and unduly infringes on freedom of expression provided for in Paragraph 1, Article 21 of the Constitution. I hereby ask your court to request for adjudication of constitutionality of the said Act.

June 26, 2023

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