

Administrative Court of Paris, December 18, 2009 N° 0701946  
Association for Cultural Action

Mrs. Reuland

Rapporteur

Mrs. Nguyễn-Duy

Rapporteur public

Administrative Court of Paris

December 4, 2009 Hearing

24.01.02.025

In light of the petition, filed on February 10, 2007, submitted for the association Cultural Action, whose head office is located at 51 Unni-Dong Chongro-Gu 110-350, Seoul, South Korea, by Mr. Kim, Esq.; Cultural Action is petitioning the court:

1°) to set aside the decision dated January 2, 2007 in which the Minister of Culture refused to grant its application for declassification from the French public domain of the Korean Royal Archives of the Joseon dynasty;

2°) to acknowledge, principally, that the royal archives are not part of the property of the public domain of the French government;

3°) to acknowledge, in the alternative, that declassification of the property from the public domain of the French government is possible in any event;

4°) to direct the Minister of Culture to order the declassification from the French public domain of the Korean royal archives and their restitution to CULTURAL ACTION, subject to a penalty of 1,500 euros for each day's delay after one month from the date on which the future decision shall have the force of res judicata;

5°) to require the government (Ministry of Culture and Communication) to pay the sum of 5,000 euros in accordance with Article L. 761-1 of the Code of Administrative Justice;

In light of the contested decision;

In light of the notice sent to the Minister of Culture and Communication on January 17, 2008, pursuant to Article R. 612-3 of the Code of Administrative Justice, and the acknowledgement of receipt of this notice;

In light of the reply brief, filed on March 19, 2008, submitted by the Minister of Culture and Communication who recommended rejection of the petition;

In light of the new brief, filed on August 28, 2008, submitted for Cultural Action, which repeats the claims made in its petition and the same arguments, and further, asks the court to direct the regulatory authorities to submit a bill before Parliament for purposes of declassification from the French public domain of the Korean Royal Archives of the Joseon dynasty, subject to a penalty of 1,500 euros for each day's delay after one month from the date on which the future decision shall have the force of *res judicata*;

In light of the new brief, filed on August 27, 2008, through which the Minister of Culture and Communication which repeats the claims of its petition and the same arguments;

In light of the new brief, filed on September 2, 2009, submitted for Cultural Action, which repeats the claims from its petition and the same arguments;

In light of the other documents in the file;

In light of the January 10, 1962 Korean law n° 961, consolidating the September 23, 1954 Korean law n° 339, protecting the assets of the Joseon dynasty;

In light of Council Regulation 3911/92 and directive 93/7/CEE, codified in Articles L. 112-1 *et seq.* of the code du patrimoine [French Heritage Code];

In light of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954;

In light of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property signed in Paris on November 14, 1970:

In light of the Unidroit Convention of June 24, 1995 on Stolen or Illegally Exported Cultural Objects;

In light of the UNESCO International Code of Ethics for Dealers in Cultural Property;

In light of the code du patrimoine [French Heritage Code];

In light of the code de la propriété des personnes publiques [General Public Property Code];

In light of the July 1, 1901 law on association agreements;

In light of law n° 79-587 of July 11, 1979 on the motivation of administrative acts and the improvement of relations between the administration and the public;

In light of decree n° 94-3 of January 3, 1994 establishing the Bibliothèque nationale de France [French national library];

In light of the code de justice administrative [Administrative Justice Code];

The parties having been informed of the date of the hearing;

Having heard, during the December 4, 2009 public hearing;

- the report of Mrs. Reuland;
- the observations of Mr. Kim, Esq., for the claimant association;
- and the conclusions of Mme Nguyễn-Duy, rapporteur public;

Mr. Kim, Esq., having been asked to present brief observations;

On the capacity to act:

Whereas, pursuant to Article 2 of the law of July 1, 1901: "Associations of persons may be formed freely without authorization or prior declaration"; whereas it follows there from that associations, even those that have not been declared, may claim a legal existence; whereas although, pursuant to Articles 5 and 6 of said law, undeclared associations do not have the capacity to appear in court to defend patrimonial rights, the lack of a declaration does not bar any legally constituted associations from being empowered to challenge, by means of illegality proceedings, the lawfulness of the administrative acts adversely affecting the interests whose mission it is to defend; therefore, it follows from the law of October 9, 1981, amending the law of July 1, 1901 on association agreements with respect to associations run *de jure or de facto* by foreigners, clarified by the parliamentary proceedings that preceded it, that the law intended to place foreign associations in the same position under ordinary law of associations governed by the law of July 1, 1901; therefore, the Minister of Culture and Communication is not justified in arguing that Cultural Action, legally formed in Korea but not established in France where it was not covered by a declaration provided for under Article 5 of the law of 1901, does not have the capacity to seek to set aside the decision being appealed;

On standing:

Whereas the articles of the association, specifically Article 24 thereof, show that protection of Korean culture and historical heritage, as well as promotion of the return of lost cultural and historical property falls within the missions of the Committee on Cultural Heritage, the functional organ of Cultural Action, where necessary, through legal proceedings; therefore, the Minister of Culture and Communication is not justified in arguing that the claimant lacks standing;

On the grounds of a lack of justification:

Whereas pursuant to Article 1 of law n° 79-587 of July 11, 1979 on the motivation of administrative acts and the improvement of relations between the administration and the public:

"Natural or legal persons have the right to be informed promptly of the grounds for unfavorable individual administrative decisions that affect them.

For this purpose, decisions that:

- restrict the exercise of public freedoms or, generally, constitute an enforcement action;
- impose sanctions;
- subject the granting of an authorization to restrictive conditions or impose constraints;
- withdraw or repeal a decision that creates rights;
- put forward a ban, preclusion or forfeiture;
- deny benefits whose allocation constitutes a right for people who meet the legal conditions to obtain them;
- withhold an authorization;

must be justified, except where disclosing the grounds might harm a secret or interest protected by the provisions of the second through fifth paragraphs of Article 6 of law n° 78-753 of July 17, 1978 bringing about various measures to improve relations between the administration and the public." ;

Whereas the challenged decision to refuse declassification does not appear among the administrative acts whose justification is required by the law of July 11, 1979; therefore, this argument must be dismissed as inoperative;

On the grounds mistake of law:

Whereas Cultural Action claims that the decision is legally flawed because the manuscripts in litigation cannot be labeled public property of the French Government insofar as, on the one hand, considering their entry conditions, they have not been validly incorporated into French heritage and insofar as, on the other hand, the lack of a connection between the Korean royal archives and France prevents them from qualifying as "public property";

Whereas, first, pursuant to Article L. 2112-1 of the code de la propriété des personnes publiques [code governing the property of legal persons]: "Without prejudice to the provisions applicable to the protection of cultural property, property of public interest in terms of history, art, archeology, science or technology (...)" are part of the movable public property of the property holding legal person; and pursuant to Article L. 2141-1 of said code: "An asset of a legal person specified in Article L.1 that is no longer specified for public service or direct use by the public, is no longer part of the public domain as of the effectiveness of the administrative act establishing its declassification."; that one may infer from these provisions that belonging to the factitious public domain of the property rests, on the one hand, on the fact that the legal person is the owner and, on the other hand, on the situation in which the property under consideration is subject to being dedicated either to public use or to public service; that Cultural Action claims that the manuscripts in litigation have not been duly incorporated into the public domain and that their possession by the French authorities comes from looting that took place in 1866, in disregard of the customary international rules then in effect;

Whereas it is not disputed that the documents kept by the Bibliothèque nationale (national library) have been, from the beginning, and continue to be dedicated to public use; that it is equally clear that those books and manuscripts that are a component and essential part of a library appurtenant to the public domain, necessarily belong to this same domain; that consequently, the conditions for incorporation of the property are, in this case, irrelevant to the appurtenance of the latter to the public domain, which is inferred from the authority that has held them for 140 years and from their accessibility by the public; that in any event, if the petitioner states that the Treaty of Vienna entered into in 1864 between Austria-Hungary and Italy, the treaty entered into in 1866 between Prussia and the Grand Duchy of Hesse, and the Treaty of Paris of May 30, 1814, included clauses for restitution of documents or works of art looted during times of war, demonstrating the emergence of this question in the 19<sup>th</sup> century, the documents in the file do not establish that an international custom, a general practice accepted as law, prevailed then;

Whereas, second, pursuant to Article 2 of the decree of January 3, 1994 establishing the Bibliothèque nationale de France (BNF) [French national library]: "The Bibliothèque nationale de France's mission is to:

1. Collect, catalogue, preserve and enrich, within all areas of knowledge, the national heritage, with which it is entrusted, in particular, the heritage of the French language or that which relates to French civilization;

In connection therewith:

In accordance with Article 5, paragraph 2, of the aforementioned law of June 20, 1992, it engages in tasks connected with the legal deposit entrusted to it by this law and the decrees issued for purposes of its application to the

Bibliothèque nationale; it controls the legal deposit for which it is the depositary on behalf of the Government under the terms specified by the aforementioned law of June 20, 1992. It constitutes and circulates the national bibliography;

It collects, in the name of and for the account of the Government, and catalogues French and foreign collections of printed materials, manuscripts, coins and medals, stamps, photographs, maps and charts, music, choreographies, sound recordings, audiovisual materials and computer records; it participates in national and international scientific activities;

2. Ensure access by as many people as possible to the collections, subject to trade secrets protected by law, under terms complying with intellectual property legislation and compatible with the preservation of these collections; that pursuant to Article 21 of said decree:

"the Bibliothèque nationale de France receives custody of the works, documents and collections that are subject to legal deposit with the Bibliothèque nationale or acquired free of charge or for consideration by the Bibliothèque nationale or by the public corporation of the Bibliothèque de France.

On behalf of the Government, the Bibliothèque nationale de France acquires and keeps documents and objects purchased from the funds at its disposal, or coming from donations and bequests that may be granted to it.

The collections specified in Article 2 of this decree remain the inalienable property of the Government.";

Whereas the manuscripts in litigation are part of the foreign collections specified by Article 2 of the aforementioned decree of January 3, 1994 and constitute national treasures within the meaning of Article L. 111-1 of the code du patrimoine [French Heritage Code], which provides that: "Property belonging to the public collections and to the collections of the museums of France, property classified in accordance with the provisions relating to historical monuments and archives, as well as other property of major interest to the national patrimony in terms of history, art, or archeology are considered to be national treasures";

Whereas the fact that the manuscripts are of foreign origin does not deprive them of the status of national treasure within the meaning of Article L. 111 of the code du patrimoine [French Heritage Code];

Whereas it follows from the foregoing that Cultural Action is not justified in arguing that the manuscripts do not constitute an appurtenance of the public domain;

On the grounds of disregard of international standards:

Whereas, as a preliminary matter, the Korean laws relied upon by the association Cultural Action are irrelevant in this particular case;

Whereas Cultural Action is arguing that, by refusing, in 2007, to declassify and return the archives of the Joseon dynasty, the Minister of Culture disregarded the commitments made by France for restitution of cultural objects illicitly removed from their territory; in particular, Regulation 3911/92 of the Council and Directive 93/7/CEE, codified under Articles L. 112-1 *et seq.* of the code du patrimoine [French Heritage Code], the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property signed in Paris on November 14, 1970, the Unidroit Convention of June 24, 1995 on Stolen or Illegally Exported Cultural Objects, the UNESCO International Code of Ethics for Dealers in Cultural Property, drafted in November 1999;

Whereas the Community provisions, transformed into national law, governing intra-community exchanges may not be invoked in this particular case; whereas France, which is not a party to the Unidroit Convention, cannot have the provisions of this text enforced against it; whereas the Hague and UNESCO Conventions may not be invoked effectively in support of the request for declassification of cultural property held prior to its entry into force; and whereas the scope of the UNESCO "International Code of Ethics for Dealers in Cultural Property", drafted in November 1999 does not cover the situation in question since it only pertains to professionals in the cultural property trade; therefore, as a result of the foregoing, without having to consider whether the texts that are being invoked are linked to any direct effect, the decision has not failed to observe the aforementioned international conventions and Community texts;

On the grounds of the Minister's refusal to exercise his power to declassify:

Whereas Cultural Action maintains that France has already made several declassifications by passing laws and therefore admits that it is departing from the principle of inalienability of public collections in consideration of the particular characteristics of each situation;

Whereas pursuant to Article L. 2141-1 of the General Public Property Code: "An asset of a legal person specified in Article L.1 which is no longer dedicated to public service or for direct use by the public, no longer belongs to the public domain as of the effectiveness of the administrative act establishing its declassification.";

Whereas the manuscripts, held by the Bibliothèque nationale de France, have not ceased to be dedicated to public use and therefore, no change in the factual circumstances justified, on the basis of the aforementioned article, the

Minister's considering the advisability of declassifying them; whereas in the absence of any other applicable legislative or regulatory provision, the Minister of Culture was not required to declassify manuscripts in litigation;

Whereas the decision being appealed is not legally flawed in any way and does not fail to observe France's international commitments, the issue of the appropriateness of restitution of the archives of the Joseon dynasty to the Korean authorities may not properly be discussed before the judge for reasons of excess of power;

Whereas it follows from all of the foregoing that Cultural Action is not justified in seeking to have the decision of the Minister of Culture dated January 2, 2007 set aside; that as a result, its submissions for an injunction can only be rejected; that the same is true of those submitted pursuant to Article L. 761-1 of the Code of Administrative Justice;

HELD:

Article 1: The petition of Cultural Action is rejected.

Article 2: Notice of this decision shall be served to Cultural Action and to the Minister of Culture and Communication.

Deliberated on following the hearing of December 4, at which the following were seated:

Mrs. Driencourt, President,

Mrs. Labetoulle, Senior Judge,

Mrs. Reuland, Judge,

Read during a public hearing on December 18, 2009.

The rapporteur,

The president,

The clerk,