

0905614 [2009] RRTA 1009 (19 October 2009)

DECISION RECORD

RRT CASE NUMBER: 0905614

DIAC REFERENCE(S): CLF2009/56838

COUNTRY OF REFERENCE: Democratic People's Republic of Korea

TRIBUNAL MEMBER: Andrew Mullin

DATE: 19 October 2009

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the Applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The Applicant, who claims to be a citizen of the Democratic People's Republic of Korea, applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the Applicant of the decision and his review rights by letter dated the same day.
3. The delegate refused the visa application on the basis that the Applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The Applicant applied to the Tribunal for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the Applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

10. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.
11. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
12. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
13. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
14. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.
15. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
16. Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if

stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Protection obligations

19. Subsection 36(2)(a) of the *Act* provides that a criteria for the grant of a protection visa is that the applicant '*a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol*'. However s.36(2)(a) is qualified by subsections (3) to (5) which set out circumstances in which Australia is taken not to have protection obligations. These provisions call for consideration of whether an applicant has access to protection in any country apart from Australia. In effect, they provide that Australia is taken not to have protection obligations to non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country where they do not have a well-founded fear of being persecuted for a Convention reason or of being returned to another country where they will be persecuted for a Convention reason. Accordingly, an applicant may be found not to be a person to whom Australia has protection obligations, even if they might satisfy the Convention definition of "refugee", because of the availability of protection in another country.

CLAIMS AND EVIDENCE

20. The Tribunal has before it the Departmental and Tribunal files relating to the Applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
21. The Applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal also heard witness evidence from a friend of the Applicant, Person A. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.
22. The Applicant was represented in relation to the review by his registered migration agent who attended the hearing.

Summary of written claims

23. In his protection visa application the Applicant claims to have been born in the Democratic People's Republic of Korea (DPRK). He gives no details of his former place of residence in the DPRK and claims to have lived in China from the mid 1990s for a number of years. He claims to have received a total of eleven years of formal education in the DPRK and to have been employed as a worker in a factory prior to the mid 1990s. He claims that he was employed in a factory during his residence in China. He claims to have been married in the early 1990s and lists his wife and daughter as living in China.
24. The Applicant's substantive claims are set out in a Statutory Declaration, in the Korean language, which is attached to his protection visa application. According to an accompanying English translation they may be summarized as follows:

- In his factory he was regarded as a model worker and he led the other workers at factory meetings.
- The workers became dissatisfied with their pay and working conditions. He represented them in their demands and he was arrested, taken to a police station and interrogated. When he refused to modify his views he was beaten severely. He was released after his wife paid a bribe to the police with money given to her by her relative who had business dealings in China. He was warned that if he gave any more trouble the police would kill him.
- After his return to work he was treated badly by the factory management and he was closely monitored. He again argued with the management when a friend was injured by a faulty machine. He was told to go home to wait for further orders. Soon after he went home a friend warned him that government officials had come to the factory to hold a meeting with the management and that he might be re-arrested. He and his wife fled to a relative's house and were taken by a friend to the home of a man who could help them cross into China. His wife called her relative in China who promised to pay the man. They crossed illegally into China that night.
- His wife's relative paid for his wife and daughter to obtain fraudulent Chinese identity cards. They are now hiding with the relative. The Applicant worked in the relative's factory but did not have any identity cards.
- One day a South Korean businessman offered to take the Applicant to Australia for a fee. Following discussion with his wife and her relative he agreed. He arrived around a specific date, apparently in City X. He travelled to City Y and with the help of the Korean population he found some work and survived.
- He would be killed if he returned to North Korea.

25. Also attached to the protection visa application is a photocopy of a document in the Korean language which appears to be an identity card issued to the Applicant, another Korean language document and seven photographs showing the Applicant with other people

Departmental interview

26. I have reviewed the audio recording of a Departmental interview attended by the Applicant. In it he added to his written claims by claiming, relevantly, that:

- His wife was working as in a specific occupation in China and was also caring for their daughter. Her nationality was North Korean. She and her daughter did not have their own identity documents but were using Chinese identity cards in other names obtained by his wife's relative. They had been able to access state services in the past but probably could not do so now. There had not been enough money to obtain these documents for him as well.
- He contacted his wife by telephone every month and had done so recently. His daughter was in Year 12 and planned to enter University next year. He was worried that her fraudulent identity card might pose a problem for her

enrolment. There had not been any problems in the past over these identity documents. His wife is able to speak a little Mandarin and his daughter is fluent in it.

- He, his wife and daughter crossed the border into China. His wife's relative was waiting for them and paid the people smuggler then took them to his house. The Applicant worked for the relative in his factory for four years.
- He travelled from China to Australia with a number of other people of other nationalities. The trip was paid for by his wife's relative. Asked how he had passed through Customs he said they landed at night in a deserted area outside City X. They were met by someone with a car who transported them to an unknown location and from there he was driven to City Y where he met many Koreans who found him accommodation and employment. He could not work full-time because of his visa status but had obtained a little part-time work.
- Asked why he left China the Applicant said he met a South Korean businessman who told him he could take him to Australia. Asked why he had not gone to South Korea he said he did not have any documents and if he went to South Korea he would be tricked into saying that he escaped from North Korea.
- It was put to the Applicant that in South Korea he would be treated as a South Korean citizen and given assistance. He said he was aware of this but even if he was given money and a place to live in South Korea he would still be treated as a low-level person from North Korea. He was concerned that this might affect his daughter. It was put to him that his ability to find effective protection in South Korea could mean that Australia did not have an obligation to give him protection. He repeated he had been told many times that he would receive accommodation and food in South Korea but that he and his family would suffer discrimination.
- Asked why he had not applied for protection earlier he said he had not really thought about it and had been a little scared. He had consulted a migration agent once, about five years ago, but the agent held onto the case for three years without doing anything. Asked why he was applying for protection now he said he was told many times that the Australian government accepted refugees from North Korea. He had not seen his daughter for many years and decided that he wanted to solve his problem by applying for protection.
- He was afraid that if he returned to North Korea he might be shot by the government.

Claims at hearing

27. The Applicant said he prepared his protection visa application by writing down his experiences in Korean. This was translated into English and read back to him in Korean. He said he understood everything which was claimed in the protection visa application and that everything claimed there and at his the Departmental hearing was true. He did not wish to amend any of his claims.

28. Asked why he had left North Korea the Applicant gave an account of his experiences which appeared generally consistent with that in his protection visa application. In summary, he had been beaten and jailed for speaking out on behalf of fellow workers and fled to China with his family after he protested about the death of his friend in an industrial accident. He feared he would be arrested and killed if he returned. He had worked hard in North Korea but had been forced to leave. Because of his perceived opposition to the regime and the fact that he had left illegally he was regarded as a 'traitor' in consequence. After working in China for his wife's relative he decided to come to Australia. Asked if he feared harm in North Korea for any other reason he said there was no other reason.
29. The Applicant confirmed the biographical details set out in his protection visa application. He had lived at the same address with his family all his life until his departure. He said that after graduating from school he had been employed continuously in a factory. He had worked hard and was given recognition as a model worker in the form of a certificate of excellence (this proved to be the second Korean language document attached to the protection visa application) Asked why his name did not appear on this document he said there was no space for it. I pointed out that there seemed to be a great deal of space on the document for his name. He said it was standard for the names of recipients not to be recorded.
30. The Applicant agreed that he spoke Korean with a North Korean accent and that he used some Korean words which were not current in South Korea.
31. The Applicant said that after working in China in a factory owned by his wife's he saw an advertisement about the possibility of travelling to the Country Z or Australia to live. He was motivated to leave because there were risks involved in remaining in China where he was living illegally and where he was still experiencing difficulties over the language barrier. He heard that Australia was a place which valued hard work, which had no racism and which accepted North Koreans. His travel was organised by a South Korean businessman who arranged for him and a group of others to board a cargo ship in Dalian Asked why he had not taken his wife and child with him he said his child was young and it would have been too dangerous for her to travel. Both his wife and child had been able to buy Chinese identity cards and these had allowed his child to go to school but he was worried that she might face problems when she tried to enter university where the identity checks were more stringent.
32. I asked the Applicant why, if he had been afraid that he would be returned to North Korea, he had delayed his application for protection until many years after his arrival in Australia. He said that when he arrived in Australia he did considerable research into the possibility of seeking refugee status and contacted an agent in City W (not his current representative) This person kept his papers for three years and advised him to wait in case there were policy changes which would favour his case. Eventually the Applicant decided that too much time had been wasted so he took his documents back and contacted his current representative. I asked what had happened during the remaining years after retrieving the documents. He said he was unable to speak English and could not communicate well with Koreans here. Additionally, he could not find satisfactory employment and was unable to earn sufficient money for a protection visa application.
33. I noted that there is independent country information before the Tribunal indicating that South Korean law provides the right of entry and residence, as South Korean citizens, for North Korean citizens. The South Korean government encourages this by providing assistance and support for such people. This indicated that, as a North Korean citizen, he

could apply to the South Korean government and would be accepted in South Korea as a citizen of that country, with all the rights and benefits that provided. The Applicant said he had heard of this policy of the South Korean government and admired it. However, even if the South Korean government were to accept him, he and his daughter would have to live there under the name of traitors. Nobody could guarantee the safety of all North Koreans who go to South Korea to live, particularly those who go as 'traitors' rather than because they are forced to leave the North because of hunger. Nobody could be trusted in South Korea in relation to his safety and security. He had no intention of going to South Korea.

34. Asked what he meant by saying that he and his daughter would be given the name of 'traitor' in South Korea the Applicant said that anyone who left North Korea was regarded as a traitor and people would not leave unless they were absolutely forced to do so. Even if they went to live in South Korea they would be seen as traitors by their neighbours for running away from North Korea. Asked how he knew of this he said all North Koreans knew about this. Asked which North Koreans had told him about it he said he had never discussed it but had heard the words of South Koreans.
35. I put to the Applicant that there were reports indicating that North Koreans who settled in South Korea could experience some difficulties in adjusting to their new environment and could generally be seen as unsophisticated by South Koreans, but there was nothing in this information to suggest that they were ever regarded as traitors. He said this was certainly the way South Koreans saw those who had come from North Korea, according to what he had heard. North Koreans were only able to obtain lower paid jobs in the South. Labourers were looked down on there as the lower class, in contrast to Australia where people could live well by working hard and playing hard.
36. I asked the Applicant if he meant that there would be no economic opportunities in South Korea, other than in lowly paid jobs, for people like him and other North Koreans. He said he meant that even if people went to South Korea to live and work the South Koreans did not treat them like human beings and nobody could guarantee their safety.
37. Asked who would threaten his safety in South Korea the Applicant said he had heard, from a rented video tape, that there are North Korea agents operating there. I noted that the independent country information reveals only one case of a North Korean defector possibly having been targeted by North Korean agents in South Korea – that of Lee Han Yong who was shot and killed in Seoul in 1997. This was a special case, however, since Lee was the nephew of Kim Jong Il's mistress, had been raised with Kim's unacknowledged son and had drawn attention to himself by publishing accounts of his experiences and connections to North Korea's ruling family. He had thus embarrassed the North Korean leadership and focused attention on himself as a North Korean living in South Korea. I put to the Applicant that Lee's case was very different to his own and that there was no reason to believe he would come to public attention. The Applicant responded that it would not be necessary for him to publicise his own case because his neighbours would talk about him. He said he had no intention of going to South Korea because it was dangerous there: he had only one child and he did not wish to live a life in which she could be harmed.
38. I asked the Applicant whether there was not an existing risk that his wife and child might be sent back to North Korea from China if they were discovered to be using falsified identity documents. He agreed this was so but said it would be equally dangerous for them in South Korea. I noted that reports indicated more than 12,000 North Koreans had gone to live in South Korea and there had been only one reported case of targeting by North Korean agents.

On this basis it seemed hard to believe that he or his family would come to harm at the hands of North Koreans in South Korea, a modern democracy of some fifty million people. He said it was 'not definite' that North Korean agents would target him and his family there. However he and his family would have to live with the traitor label and he did not want this for his child.

39. I asked the Applicant if he had any information to indicate that North Koreans living in South Korea were being harmed or denied rights such as education, employment or the vote. He said this was not the problem. Human beings could be damaged by being labelled as traitors as this would follow them around. I asked if he had any information to indicate that the label of traitor is routinely or generally applied by South Koreans to those from the North. He said he was not aware of such information but he had grown up in North Korea and knew about what it meant to be a traitor. I put to him that he seemed to be transposing to South Korea the situation in which he might have been viewed by the North Koreans as a traitor for leaving the country. He said he had also experienced this from South Koreans since coming to Australia. People here who came from South Korea looked at him 'differently.' Asked if he had ever been called a traitor by them he said the word could come out 'in a bad situation' in an argument. I put to him that, given the long and unfortunate history of conflict between the two Koreas and the strong fear of North Korea which exists in the South, it was difficult to believe that South Koreans would in any way blame or accuse of treachery someone who had managed to escape from the North. He said he saw all Koreans, from the South as well as the North, as once race. Even though there were good people there was also jealousy.
40. The Applicant confirmed that he had never taken any steps to avail himself of a right to enter and reside in South Korea, such as by approaching the South Korean authorities in Australia to discuss moving to South Korea.
41. The Tribunal heard witness evidence from Person A, a friend of the Applicant. The witness said she had moved to Australia from South Korea in the 1970s and did not have a clear idea of what was happening there. She had not returned to South Korea since then. However when she was young she had heard that while a lot of help was given to North Koreans who went to South Korea there was not much protection for those who escaped. The South Korean government talked a great deal about what they were doing for North Koreans but this was just words and gave no real help to them.
42. The witness said she had known the Applicant for a number of years. Asked if, from her memory of South Korea, she believed there was anything about the Applicant which would expose him to harm there she said that South Koreans did not view in a good light those who had escaped from the North. If not racism there was discrimination against them. Even she would keep her distance from North Koreans if she were living in South Korea. She believed this was different from existing antipathies between regions in the South. When she was young people were nervous of even talking about North Korea because they would risk being taken away by the authorities. I put to her that this was a reflection of the fear people had at that time of North Korea as well as of the South Korean security authorities who rigorously policed and punished any indication of sympathy for the government of the North. She maintained that even now there was a negative perception of those who had come from the North and they were looked down on.
43. I explained to the Applicant, in terms of s36, that if he had not taken all steps to avail himself of a right to enter and live in South Korea it was possible that Australia did not have protection obligations toward him, even if he met the Convention definition of a refugee. If

so this would lead the Tribunal to affirm the decision to refuse to grant him a protection visa. The Applicant confirmed that he understood this information and its significance for the decision in his case. I invited him to comment or respond to the information and explained that he could do so at once, at an adjourned hearing or in writing, with further time available if necessary. In consultation with his adviser he asked for time in which to respond in writing and it was agreed that he would two weeks to do so.

44. Asked if there was anything he wished to add, the Applicant he definitely wanted to live in Australia. People like him, who worked as labourers, were treated like servants in South Korea and he did not want this. His view was that it was an honour to work for a living.

Post hearing submission

45. The Tribunal received a submission from the Applicant's advisor quoting from another decision of the Tribunal, differently constituted, in which the Member set out extracts from South Korea's *Act on the Protection and Settlement Support of Residents Escaping from North Korea 1997*, as follows:

“Article 2(1) of the Act defines “residents escaping from North Korea” to mean “persons who have their residence, lineal ascendants and descendants, spouses, workplaces, and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea”. According to Article 3, the Act applies to “residents escaping from North Korea who have expressed their intention to be protected by the Republic of Korea” Article 7 of the Act provides that “Any person who has escaped from North Korea and desires to be protected under this Act, shall apply for protection to the head of an overseas diplomatic or consular mission, or the head of any administrative agency.....” Article 9 provides that in “determining whether or not to provide protection pursuant to the provisions of the text of Article 8(1), such persons as prescribed in any of the following subparagraphs **may not be determined** as persons subject to protection”. Article 9 sets out the criteria for Protection Decision, namely, (1) international criminal offenders, (2) offenders of serious crimes, (3) suspects of disguised escape, (4) “**Persons who have for a considerable period of time earned their living in their respective countries of sojourn**” and (5) persons prescribed by Presidential Decree.”

46. The advisor submits that:

- The legislation, in Article 3, provides that a person must have expressed ‘intention to be protected by the Republic of Korea.’ ‘The applicant has expressed his clear intention that he does not want the protection of the Republic of Korea. His Honour McInnis FM in *MZXLT v Minister for Immigration* [2007] FMCA 799, has held that where the applicant has not formed the intention to seek the protection (in that case of Israel), then the provisions of s36(3) is not enlivened.’
- Additionally, Article 9(4) of the South Korean legislation operates against the Applicant because he has for a considerable period of time earned his living in Australia, his country of sojourn, and this may disqualify him from being granted South Korean citizenship.

47. Attached to the submission are a number of media articles and other reports dealing with negative attitudes toward North Koreans who have settled in South Korea and the difficulties they experience in adjusting to the very different conditions of life in the South.

Independent country information

48. Article 3 of the South Korean Constitution provides that:

The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

49. According to a 2004 report:

THE ROK CONSTITUTION REGARDS NORTH KOREANS AS CITIZENS OF THE REPUBLIC OF KOREA (SOUTH KOREA) AND THE DECISION TO GRANT CITIZENSHIP IS, IN PRACTICE, AUTOMATIC AND NOT DISCRETIONARY. APPLICANTS ARE FIRST INVESTIGATED UNDER THE "ACT ON THE PROTECTION AND SETTLEMENT SUPPORT OF RESIDENTS ESCAPING FROM NORTH KOREA", BUT ONCE THEY ARE FOUND TO BE GENUINE NORTH KOREANS, THEY ARE AUTOMATICALLY AND IMMEDIATELY GRANTED SOUTH KOREAN CITIZENSHIP.

A1. THE ROK CONSTITUTION AUTOMATICALLY REGARDS NORTH KOREANS AS CITIZENS OF THE REPUBLIC OF KOREA (SOUTH KOREA), WHILE THE "ACT ON THE PROTECTION AND SETTLEMENT SUPPORT OF RESIDENTS ESCAPING FROM NORTH KOREA" GOVERNS THE IMPLEMENTATION PROCEDURE. UNDER THIS ACT, THE APPLICANT CLAIMING TO BE NORTH KOREAN MUST FIRST BE INVESTIGATED, A PROCESS WHICH COULD TAKE SEVERAL MONTHS. ONCE THE CLAIMANT IS DETERMINED TO BE A GENUINE NORTH KOREAN, SOUTH KOREAN CITIZENSHIP IS AUTOMATICALLY AND IMMEDIATELY GRANTED.

A2. ARTICLE 9 OF THE ACT LISTS SEVERAL CATEGORIES OF PEOPLE WHO "MAY NOT BE DETERMINED AS PERSONS SUBJECT TO PROTECTION", INCLUDING INTERNATIONAL CRIMINAL OFFENDERS INVOLVED IN AIRCRAFT HIJACKING, DRUG TRAFFICKING, TERRORISM, ETC, AND OFFENDERS OF SERIOUS CRIMES SUCH AS MURDER. HOWEVER, IN PRACTICE, THE DECISION TO GRANT CITIZENSHIP IS NOT DISCRETIONARY AND NO GENUINE NORTH KOREAN REFUGEE HAS EVER BEEN REFUSED SOUTH KOREAN CITIZENSHIP. (CX95208 *Granting South Korean Citizenship to North Korean Defectors CIR* Preparation Date: 28/5/2004)

50. In 2005 DFAT responded to a request for information on the treatment of North Korean 'defectors' by the South Korean authorities, as follows:

1. Could DFAT please provide clarification and elaboration on DFAT Report No. 362 – RRT Information Request: KOR17187, 11 March 2005, which states as follows:

The 'Act on the Protection and Settlement Support of Residents Escaping from North Korea' provided that North Koreans who lived outside of North Korea for in excess of ten years would not be accepted as refugees unless there were special circumstances. After 30 years in China, a North Korean would usually be regarded as 'settled' by South Korea. Comment: This would not preclude the person from gaining South Korean citizenship, but the person would not be eligible for government financial, employment and settlement assistance.

In particular, does the reference to “not accepted as a refugee” mean that a North Korean who resided illegally in China for in excess of 10 years would not have a legal right to enter and reside in South Korea, or does it simply mean that they would not be classified as a refugee and therefore not entitled to certain government assistance?

Does the reference to “be regarded as ‘settled’” mean, merely settled in an economic sense, or does it imply that the person would be regarded as settled in terms of having legal right of residency in China?

Could DFAT elaborate on the comment in DFAT Report No. 362 that “this would not preclude the person from gaining South Korean citizenship, but the person would not be eligible for government financial, employment and settlement assistance” and provide some verification of this comment.

2. Are there are laws other than the ‘Act on the Protection and Settlement Support of Residents Escaping from North Korea’ that relate to or have an impact in determining the legal right of a North Korean defector to enter and reside in South Korea?

DFAT replied on 28 November 2005 and provided the following information:

Summary

The Constitution of the Republic of Korea (ROK) states that the ROK’s territory encompasses the Korean peninsula. The Ministry of Unification informs us there is an ‘assumption’ that North Koreans can acquire South Korean citizenship. In certain circumstances, including after an extended period of residence in another country, the process of obtaining citizenship might be more difficult. The term “protection” in the legislation governing citizenship of North Koreans refers only to provision of government financial and other assistance.

In answering questions in reftel, we have drawn on previous advice we provided in October 2004 and March 2005 (reftels). On 25 November, we spoke to an officer of the Settlement Support Division, Ministry of Unification (MOU) for further confirmation and clarification.

2. Article 3 of the Constitution of the Republic of Korea states: “The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands”. On 12 November, 1996 (in decision no. 96 Nu 1221) the ROK Supreme Court made the following ruling: “given that North Korea is part of the ROK’s sovereign territory, holding North Korean citizenship does not adversely affect a person’s right to acquire and hold South Korean citizenship”.

3. Our MOU contact said that, based on the above, there was an assumption that North Koreans would be able to gain citizenship in the South. As the Constitution did not contain rules and regulations for implementation, the Act on the Protection and Settlement Support of Residents Escaping from North Korea (“the Act”; last amended 24 May 2001) was referred to for this purpose. There were three cases in which the procedure whereby North Koreans could obtain citizenship would be “more difficult”.

(i) Members of the “Chokyo” group – people who defected to China around 1960 and legally resided in China (as well as their descendants) – would have to apply for citizenship on the same basis as “other foreigners” (non-Koreans).

(ii) North Koreans who had resided for “a considerable period” (around ten years or more) in another country (see the Act, Article 9(4)) would have to follow different procedures for gaining citizenship, depending on their specific circumstances.

(iii) Terrorists, criminals and others falling into the remaining categories identified in Article 9 of the Act would have to follow a different procedure again to gain citizenship. There had not yet been any such cases (SE25156 para 3 refers).

4. The Ministry of Unification told us in October 2004 that references in the Act to “protection” referred to various kinds of financial and other government assistance (SE25156H). This was confirmed by the official we spoke to on 25 November. He

said admissibility of applications for government financial and other assistance would be decided by the ROK authorities on a case-by-case basis. Persons who might be assessed as ineligible for this assistance included those falling into the categories set out above.

5. Regarding specific questions about advice in SE550181L:

A. The reference to “not accepted as a refugee” means “not classified as a refugee” and therefore not eligible for government financial and other assistance.

B. The MOU’s usage of the term “settled” in a third country was made in the context of Article 9(4). Persons are regarded as “settled” when they have “for a considerable period earned their living in their respective countries of sojourn”.

C. See paras 3 and 4 above. This information was provided by the Ministry of Unification in October 2004 or May 2005 and confirmed on 25 November 2005.

D. As indicated above, there is an assumption that North Koreans are able to acquire citizenship, based on the Supreme Court’s interpretation of the ROK Constitution. The rules and regulations governing implementation are laid down in the Act. As cases are decided on their individual merits, other laws relating to immigration management may come into play depending on the circumstances.

E. This would have to be decided by the ROK authorities, with consideration of the factors outlined above (DFAT 2005, DFAT Report 426: RRT Information Request: KOR17673, 28 November – Attachment 1).

Implementing legislation

51. Article 1 of South Korea’s *Act on the Protection and Settlement Support of Residents Escaping from North Korea* (1997) establishes the purpose of the legislation:

Article 1 (Purpose)

The purpose of this Act is to provide such matters relating to protection and support as are necessary to help North Korean residents escaping from the area north of the Military Demarcation Line (hereinafter referred to as "North Korea") and desiring protection from the Republic of Korea, as quickly as possible to adapt themselves to, and settle down in, all spheres of their lives, including political, economic, social and cultural spheres.

52. Article 4 sets out the Act’s basic principles:

Article 4

(1) The Republic of Korea shall provide persons subject to protection with special protection on the principle of humanitarianism.

(2) Persons subject to protection shall strive to lead a healthy and cultural life by adapting themselves to the free and democratic legal order of the Republic of Korea.

53. Article 2(1) defines the term 'residents escaping from North Korea' to mean:-

..persons who have their residence, lineal ascendants and descendants, spouses, workplaces, and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea;

54. Article 7 provides that:

Any person who has escaped from North Korea and desires to be protected under this Act, shall apply for protection to the head of an overseas diplomatic or consular mission, or the head of any administrative agency (including the commander of a military unit of various levels; hereinafter referred to as the "head of an overseas diplomatic or consular mission, etc.").

and goes on to prescribe the means by which the application will be considered and decided. Article 9 outlines a number of categories of applicants 'who may not be determined as persons subject to protection. These include criminals and, at 9.4, 'Persons who have for a considerable period earned their living in their respective countries of sojourn;

55. The legislation establishes a range of support measures in areas such as identity documentation, recognition of academic and other qualifications, education and vocational training, employment protection through financial incentives to employers, accommodation, pensions, medical treatment and payment of 'settlement money.'
(www.unhcr.org/refworld/pdfid/42d3b26a4.pdf)

FINDINGS AND REASONS

56. A threshold question for the Tribunal is the Applicant's identity and nationality. He claims to have been born in North Korea and to have lived there until he and his family illegally crossed the border into China. He claims that he is a national of North Korea and that he has no other nationality. He submitted photographs said to be of his family together with a Korean language identity document with his protection visa application but there is no other substantiation from any source for his claims about his identity. He claims to have arrived in Australia clandestinely, without a passport, but the fact that there are no entry records for him in the Department's movements database does not provide strong evidentiary support for this claim. His account of the circumstances in which he and a number of other people were smuggled to some point near City X is sufficiently vague as to raise concerns about its plausibility. While I accept that he is of Korean ethnicity and that he speaks Korean with a North Korean accent, this does not conclusively demonstrate the truth of his claims about his nationality. An alternative possibility is that his origins are in the sizeable Korean ethnic minority living in China and that, under another name, he came to Australia (possibly much later than claimed) with a valid Australian visa in a Chinese passport which he has subsequently sold or destroyed.

57. Against these concerns the Applicant was able to provide some circumstantial detail of his claimed life and experiences in North Korea and he has repeated these with a degree of consistency since he lodged his protection visa application. There is nothing in the

information before the Tribunal which directly refutes his claims. On this basis I am prepared to give him the benefit of the doubt by accepting that he is a citizen of North Korea whose name is as stated

58. The Applicant claims that he will be arrested and executed if he returns to North Korea where he is still wanted for opposing the authorities over workplace safety and where he is also regarded as a traitor for leaving the country without permission.
59. The information before the Tribunal provides abundant evidence of the brutal and arbitrary nature of North Korea's totalitarian system of government. The regime has for many years denied to the population even the most basic of human rights and it has ruthlessly suppressed any signs of dissent or opposition. Actions such as those the Applicant claims to have taken to protest against working conditions and, later, leave the country without permission can be expected to result in harsh punishment, with the real possibility that those targeted will suffer lengthy imprisonment or death. I accept that the Applicant's account of these matters is both internally coherent and generally consistent with the country information. I accept that his claims about arguments with his employer and consequent punishment by the authorities are credible.
60. On this basis I accept that the Applicant was targeted for harm by the North Korean authorities for what may well have been interpreted as political opinions opposed to the regime, and that in order to escape further harm he fled the country by crossing into China. I accept there is a real risk that he would suffer serious harm amounting to persecution if he returned to North Korea and, although there is no particular information before the Tribunal regarding his actual political opinion, I am satisfied that the motivation for this harm would be an adverse political opinion imputed to him by the North Korea authorities. I accept that he has a well-founded fear of persecution for a Convention reason should he return to North Korea now or in the reasonably foreseeable future and I am satisfied that he meets the Convention definition of a refugee.

Australia's protection obligations to the Applicant

61. Although I am satisfied that the Applicant meets the definition of a refugee under Article 1A of the Convention it is necessary to consider further whether Australia has protection obligations to him.
62. As put to the Applicant at the hearing there is information before the Tribunal which indicates that North Korean citizens are entitled to the citizenship of the Republic of Korea (ROK). This is based in Article 3 of the South Korean Constitution which defines the territory of the Republic of Korea as the Korean Peninsula and its adjacent islands, as well as in legislation on the protection and settlement of people 'escaping' from North Korea. The information indicates that claimants must satisfy the ROK authorities that they are genuinely from North Korea. Once a claimant is found to be a genuine North Korean, the decision to grant citizenship is in practice automatic and not discretionary and no genuine North Korean refugee has ever been refused ROK citizenship. Over 15,000 North Koreans have been settled in the ROK, with 2809 settled during 2008. Various assistance measures, including a financial package, may be provided to help claimants adjust to life in the ROK.
63. This information indicates, on its face, that the Applicant as a North Korean citizen has a right to enter and reside permanently in South Korea. If this is the case, and the Applicant has not taken all possible steps to avail himself of that right, then the provisions of s.36(3)

will be enlivened and (subject to the qualifications in ss36(4) and (5)) the Applicant will not be owed protection obligations by Australia.

64. The information also indicates that the right of North Koreans to enter and reside permanently in South Korea is one which is more than simply a potential right. As noted, it arises through a provision of the South Korean Constitution under which those, like the Applicant, who were born in North Korea are held to have been born in the territory of the Republic of Korea. The territory of the Republic of Korea is defined as the Korean peninsula and its adjoining islands, and no distinction is made in Article 3 between those born south of the Military Demarcation Line which presently divides the two countries or those born north of it. The information indicates that the South Korean authorities have, unsurprisingly, developed administrative procedures to deal with North Korean citizens who wish to avail themselves of their right of entry and residence. These involve screening procedures to determine whether those claiming the right genuinely are from North Korea. The nature of the Constitutional provision, and its later support by the Republic of Korea Supreme Court, indicates that these procedures simply recognise an already existing right rather than conferring the right once an applicant's bona fides have been established. In either case, however, the record clearly indicates that those who can demonstrate to the authorities that their origins lie in North Korea are able to access the right to enter and reside permanently in South Korea. As noted, no person found to be genuinely from North Korea has been denied citizenship in South Korea.
65. It is asserted on behalf of the Applicant that he does not, in fact, have a legally enforceable right to enter and reside permanently in South Korea because he lacks the requisite intention to live there or seek the protection of the South Korean authorities. This claim is based in a reading of the South Korean *Act on the Protection and Settlement Support of Residents Escaping from North Korea 1997* and, in particular, Article 2(1) which defines 'residents escaping from North Korea' and Article 3 which specifies that the Act applies to 'residents escaping from North Korea who have expressed their intention to be protected by the Republic of Korea.' A closer reading of this part of the legislation, however, reveals that it is not concerned with the question of the acquisition of South Korean citizenship by those escaping from North Korea. Nor, despite the repeated use of the term 'protection,' is it directly concerned with protecting people from persecution in a Convention sense. Rather, it is specifically directed to the provision of economic, social and other forms of support to North Koreans when they take up residence in the country and it elaborates this assistance in some detail. This is the meaning of 'protection' in the Act. Thus, while the Applicant may well refrain from expressing an intention to be protected by the Republic of Korea (because he does not, in fact, wish to be so protected) I am not satisfied that the result would be more than that he might be found not to be eligible to receive the various forms of practical assistance designed to help him settle into his new surroundings. I am not satisfied that the provisions of the Act mean that any failure on his part to express an intention to be protected by the Republic of Korea would remove his right to enter and reside permanently there or would mean that he could not do so.
66. The Applicant claims, and I accept, that he has not approached a South Korean diplomatic or consular mission or done anything else to enquire about or arrange entry and residence in South Korea. If, as says, he does not wish to enter and reside in South Korea it appears unlikely (to say the least) that he would wish to do so. This is not to say, however, that it is not in his power to take such steps. Unless or until he does so he will clearly not be able to travel to South Korea, enter the country or take up residence there but this does not mean that

he does not have the right to do so. I am satisfied that he does have such a right and that it is not dependent on any expression by him of a desire to be protected by South Korea. I am also satisfied that he has not taken all possible steps to avail himself of this right.

67. In this context I have also considered the Applicant's second reason for claiming that he does not have a right to South Korean citizenship. This is that he may be excluded from doing so by the terms of Article 9.4 of the Act because he has for a considerable period of time earned his living in his country of sojourn (i.e. Australia) I note that the wording of this part of the Act, on one reading at least, does not appear to exclude such persons from protection but to suggest only that a lengthy period spent in a country of sojourn may have that effect. The information before the Tribunal suggests no more than that such cases may present difficulties in deciding questions of protection. More importantly, however, the Act does not deal with citizenship but with practical measures of support ('protection) to be provided to North Koreans to help them settle in South Korea and the record indicates that no person found to be from North Korea has been denied South Korean citizenship.

Fear of harm in South Korea

68. At the hearing the Applicant claimed that if he went to South Korea he would be at risk from North Korean agents operating there and that his identity as a North Korean would become known through his neighbours. As put to him, however, the information before the Tribunal indicates only one case in which a North Korean living in South Korea may have been assassinated by North Korean agents – the 1997 shooting of Lee Han Yong. This case had unusual aspects in that Lee was a person who had embarrassed the North Korean regime and drawn attention to himself by publishing writings about his experiences and connections with the leadership. There is nothing in the information before the Tribunal to suggest any relevant parallels with the case of the Applicant, who left North Korea many years ago and who never held any prominent position there. I am not satisfied there is a real chance that the Applicant would be targeted for harm by North Korean agents if he were to take up residence in South Korea.
69. The Applicant also claims that, as a person from North Korea, he would face discrimination and hostility from the South Korean population if he were to live there. I have considered the information provided by him on this point and I accept that he might well experience some degree of suspicion and discrimination. I also accept that he could well experience some difficulties in adjusting to the environment and culture of South Korea, although it is somewhat difficult to believe these challenges would be greater than those he has faced in adapting to Australian conditions over many years. I note in this context that the Applicant is ethnically Korean, speaks the Korean language and is familiar with at least the traditional aspects of Korean culture.
70. Having considered all the information before the Tribunal on this issue I am not satisfied that, individually or cumulatively, any difficulties the Applicant could be expected to face in adjusting to life in South Korea could be said to constitute serious harm amounting to persecution. In the context of s.36(4) I am not satisfied that he would have a well-founded fear of persecution in South Korea for a Convention reason.
71. Finally, in the context of s.36(5) there is nothing in the information before the Tribunal to suggest there is any chance whatsoever that the Applicant would be returned by South Korea to North Korea or to any other country where he would suffer persecution for a Convention reason.

Summary

72. In the light of all the information before the Tribunal I accept that the Applicant has a well-founded fear of harm in North Korea for the Convention reason of his imputed political opinion. He cannot return there and there is nothing to indicate that he has any right to return to China, where he lived for a number of years. I am satisfied that as a person who was born in North Korea he has an existing legally enforceable right to enter and reside permanently in South Korea as a citizen of that country but that he has not taken all possible steps to avail himself of this right. I am not satisfied that he has a well-founded fear of being persecuted for a Convention reason in South Korea, or that he would be returned by South Korea to another country where he would suffer persecution for a Convention reason.

CONCLUSIONS

73. The Tribunal is not satisfied that the Applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the Applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

74. The Tribunal affirms the decision not to grant the Applicant a Protection (Class XA) visa.

<p>I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the <i>Migration Act 1958</i>. PRRRNM</p>
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