1001549 [2010] RRTA 843 (21 September 2010)

RRT CASE NUMBER:	1001549
DIAC REFERENCE:	CLF2009/140055
COUNTRIES OF REFERENCE:	Democratic People's Republic of Korea Republic of Korea
TRIBUNAL MEMBER:	James Silva
DATE:	21 September 2010
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal sets aside the decision refusing to grant the applicants protection visas and substitutes a decision that their protection visa application is not valid and cannot be considered

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).

2. The applicants claim to be citizens of the Democratic People's Republic of Korea and to have arrived in Australia on or about [date deleted under s.431(2) of the *Migration Act 1958* as this information would identify the applicant] October 2009. They applied to the Department of Immigration and Citizenship for Protection (Class XA) visas [in] October 2009. The delegate decided to refuse to grant the visas [in] February 2010 and notified the applicants of the decision and their review rights by letter [on the same date].

3. The delegate refused the visa application on the basis that the applicants are not persons to whom Australia has protection obligations under the Refugees Convention because, as North Korean citizens, they have effective protection in South Korea.

4. The applicants applied to the Tribunal [in] March 2010 for review of the delegate's decisions.

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 applicants have made a valid application for review under s.412 of the Act.

6. The critical issue that arises in this case is whether the protection visa application was a valid application. If not, the delegate, and the Tribunal on review, is unable to consider it. The question has arisen because information obtained by the Tribunal during the course of the review suggested that the applicants may have dual nationality.

RELEVANT LAW

Validity of the protection visa application

7. Section 46(1)(d) of the Act relevantly provides that, subject to certain other requirements, an application for a visa is valid only if it is not prevented by s.91P (non-citizens with access to protection from third countries).

8. Section 91P provides that if Subdivision AK applies to a non-citizen at a particular time, the application is not a valid application. Section 91N relevantly specifies that Subdivision AK applies to a non-citizen at a particular time, if at that time the non-citizen is a national of 2 or more countries: s.91N(1). For the purposes of this provision, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country: s.91N(6). The Minister has a personal discretion pursuant to s.91Q to determine by written notice that s.91P does not apply to a non-citizen for a period of 7 working days after the notice is given, if satisfied that it is in the public interest to do so.

9. Subsection 47(1) of the Act provides that the Minister "is to consider a valid application for a visa". Subsection (3) provides that "to avoid doubt, the Minister is not to consider an application that is not a valid application". Section 65(1) of the Act provides for the power of the Minister to grant or to refuse to grant a visa after the Minister has considered a valid

application for the visa. A decision to refuse to grant a protection visa is an RRT-reviewable decision: s.411(1)(c). Section 415(1) of the Act provides that the Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision. It follows that if a protection visa application is not valid the Tribunal can consider the review application, but cannot make a decision on the merits of the visa application: *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486; see also *SZGME v MIAC* (2008) 168 FCR 487 per Black CJ and Allsop J at [30]

Criteria for the grant of a protection visa

10. 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.

11. 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).

12. 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.

Protection Obligations

13. Section 36(2)(a) is qualified by subsections 36(3), (4) and (5) of the Act. These provisions were introduced at the same time as Subdivision AK and, while they do not operate in the same way, they were evidently intended to serve the same broad purpose. They provide as follows:

> *Protection obligations*
>
> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> > (a) a country will return the non-citizen to another country; and
> >
> > (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country.

14. This means that where a non-citizen in Australia has a right to enter and reside in a third country, that person will not be owed protection obligations in Australia if he or she has not availed himself or herself of that right unless the conditions prescribed in either s.36(4) or (5) are satisfied, in which case the s.36(3) preclusion will not apply.

15. The Full Federal Court has held that the term 'right' in s.36(3) refers to a legally enforceable right: *MIMA v Applicant C* (2001) FCR 154. Gummow J has suggested in *obiter dicta* that the 'right' referred to in s.36(3) is a right in the Hohfeldian sense, with a correlative duty of the relevant country, owed under its municipal law to the applicant personally, which must be shown to exist by acceptable evidence: see *MIMIA v Al Khafaji* (2004) 208 ALR 201 at [19]-[20].

16. In determining whether these provisions apply, relevant considerations will be: whether the applicant has a legally enforceable right to enter and reside in a third country either temporarily or permanently; whether he or she has taken all possible steps to avail himself or herself of that right; whether he or she has a well-founded fear of being persecuted for a Convention reason in the third country itself; and whether there is a risk that the third country will return the applicant to another country where he or she has a well-founded fear of being persecuted for a Convention reason.

Definition of 'refugee'

17. 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.

18. 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.

19. 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.

20. There are four key elements to the Convention definition.

- First, an applicant must be outside his or her country.

- 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)).

- 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.

- 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.

21. 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.

22. 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

CLAIMS AND EVIDENCE

23. The Tribunal has before it the Department's file relating to the applicants. 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. The critical question that ultimately emerged in this case is whether the applicants are prevented by Subdivision AK of the Act from making the present protection visa application. However, the delegate's decision was made on the basis of s.36(3), and the review (namely the first hearing session) initially focused on that issue. Accordingly, the Tribunal took extensive evidence relating to whether the applicants are persons to whom Australia has protection obligations, including evidence relating to their status in South Korea for the purposes of s.36(3).

Primary application

24. The applicants are the applicant mother ('the applicant') and her 2 daughters, [ages deleted: s.431(2)] at the time of this decision.

Primary applicant

25. According to information on the protection visa application form, the applicant mother is a [age deleted: s.431(2)] woman born in [Location A], North Korean. She speaks, reads and writes only Korean.

26. She claims to have lived in [address deleted: s.431(2)] through to January 2009. From 1976 to 1992, she worked in a steel and metal company ([name deleted: s.431(2)]), earning Won 50 per month. She did not work from 1992, after marrying and having children.

27. The applicant mother married [in] October 1992. Her husband, [name and date of birth deleted: s.431(2)] remains in Korea. Her parents and 2 sisters are also there.

28. The applicant claims to have North Korean citizenship. She has never held a valid travel document. She left North Korea [in] January 2009 (together with her children, [ages deleted: s.431(2)]), and China [in] October 2009. She claims to have arrived in Sydney [in] October 2009, but gives no further details. They used false PRC passports, details of which are unknown.

29. The applicant's refugee claims are, in summary:

- There is great hardship in North Korea. The applicant made beer at home for sale, to support her family.

- The police found out. They accused the applicant of diverting food products to make beer and of consuming alcohol, and acting against State policy. She states that there are strict controls on food products in North Korea and 'we are not allowed to consume alcohol.'

- The police took the applicant to the local police station where they interrogated and tortured her. She suffered an injury to her lower back, and was unable to stand. The police released her after 3 days, warning her not to repeat the offence.

- They called on the applicant regularly after this, including 3 times during December (2008?), so she decided to leave home to avoid possible future detention and torture.

- The applicant travelled with her 2 daughters, crossing at the [details deleted: s.431(2)].

- After arriving in China, they walked until they found a house. The occupant, a Korean-speaking woman, allowed them to overnight there, and then took them to another person's home. This person, an old lady, let the applicant stay there longer, and paid her RMB 600 a month to look after her.

- The woman received visits from a priest and also went to religious gatherings. The priest offered to help the applicant and her daughters leave China, after hearing of their problems in North Korea. He introduced them to a person who arranged false passports and tickets. This person accompanied the applicant and her daughters to Australia. Before passing through immigration, this person took the applicant's and her daughters' false passports and air tickets.

- The applicant fears that the DPRK authorities will kill her and her daughters if they return to North Korea. They will be motivated to do this because the applicants left North Korea without permission.

- The applicant states that she also fears for her husband's safety. They have had no contact since she left North Korea, as they do not have a telephone there.

Secondary applicants

30. The applicant daughters are [ages deleted: s.431(2)], and state that they do not have refugee claims of their own.

Department interview

31. The applicant (that is, the applicant mother without her daughters) attended a Department interview [in] January 2010. The Tribunal has listened to the recording of the interview, which is on the Department file. The applicant provided the following further information:

- The applicant said that she and her daughters lived in [Location A] up to [a date in] January 2009, when they left for North Korea.

- Her husband works in the [coalmine details deleted: s.431(2)], as a cable car operator.

- She escaped North Korea with the help of a border guard, whom she promised to pay back later. The sum was around RMB 500 per person.

- She worked from 1976 to 1992 in the coal mining industry, as a person monitoring electricity consumption. After marrying, she stopped work because work conditions were poor. There was no alternative but to start a private business, although there was no prospect of her getting permission to do so.

- The applicant made and sold alcohol, and the government was opposed to this because it was considered misuse of a staple product and could exacerbate shortages.

- Although the police warned her about making alcohol, she resumed her business because she had no alternative. They eventually confiscated her equipment, forcing her to stop.

- The applicant left North Korea because she could not make a living there, and her family might starve. Her husband earned anyway between 500 and 1,000 won a month, and sometimes nothing at all.

- She and her daughters crossed the [details deleted: s.431(2)] [in] January 2009, with the help of a soldier. She did not tell anyone about their departure.

- The applicant said that they travelled by bus from [location deleted: s.431(2)] to Beijing, a journey of about 15 hours.

- The applicant has no idea what kind of travel document she used to enter Australia. She said that, on arrival in Australia, the escort took her and her daughters' passports. They never held them.

- The applicant said that she has never visited South Korea, and has no connections there.

- In response to the delegate's advice that the South Korean constitution provides that North Koreans are citizens of that country, the applicant replied that she had heard of this. She said that while she was in North Korea, a neighbour whose son had gone to South Korea was deported (sent into exile) as punishment. She heard of another family that was similarly deported because the husband had gone to South Korea. Asked whether she had supporting evidence, the applicant said that these were things that she had heard, although she once witnessed the deportation of a family in April 2005, for unknown reasons.

- The applicant said that she believed that North Korea had spies in South Korea, and that this would put her at risk of persecution.

- The delegate discussed with the applicant country information indicating that North Korea considered defection a crime. The information suggested that the DPRK authorities punished families by keeping them under surveillance and reducing their work prospects, but the defector's ultimate destination did not appear to matter.

- The applicant emphasised that she cannot go to South Korea because her parents are still alive and the DPRK authorities will find out that she has defected. They may 'deport' her parents to an unknown place. In response to the delegate's comment that her defection will already be known to the DPRK authorities, the applicant said that they will not deport her family if they do not know where she is. (She did not give the source for this comment.)

- The delegate put to the applicant that she already has ROK citizenship, and that South Korean has settled many North Koreans (some 11,700). The applicant repeated that she does not wish to go there because her parents remain in North Korea, and because she does not trust the South Korean authorities.

32. The applicants' (then) representative [name deleted: s.431(2)] asked the delegate to consider carefully the situation for defectors, and in particular for the families of defectors who end up in South Korea (as opposed to other countries).

33. The delegate found that the applicants have effective protection in South Korea under both common law and s.36(3) of the Migration Act, and that Australia therefore is taken not to have protection obligations towards them.

34. Relevantly for the current decision, the delegate made the following findings about nationality:

> Reliable and independent country information states that according to the South Korean Constitution and the Nationality Act, North Korean citizens are *de jure* South Korean citizens.[1] [The Tribunal includes the delegate's references in its footnotes below.]
>
> The applicants all claim to have been born and hold North Korean citizenship and consequently I find they are *de jure* South Korean citizens having been born within the specific geographic boundaries for such citizenship.[2]

35. The delegate went on to consider a number of practical issues, which the Tribunal sets out below, as they could be taken to qualify the view expressed above about the applicants' South Korean citizenship

- She commented, in terms of 'the support package for North Korean citizens who are *de jure* South Korean citizens', that the Act on the Protection and Settlement Support of Residents Escaping from North Korea and the support package it contains 'appl[y] to all North Koreans expressing a desire to be protected by South Korea'.

- Her later observations about South Korean citizenship varied slightly from the findings set out in the previous paragraph:

> Reliable country information indicates that no North Korean citizen would be denied South Korean citizenship and that South Korean citizenship co-exists with North Korean citizenship at time of birth.[3] The decision to grant South Korean citizenship is not discretionary and no genuine refugee has ever been refused South Korean citizenship.[4]
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> [The delegate then discusses the process for a North Korean to enter South Korea, as being the same regardless of where the application is made and…] in practice South

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[1] *Country of Origin Information Report, Democratic People's Republic of Korea,* 15 September 2008; CX95924: US Committee for Refugees, World Survey 2004 – *South Korea;* CX218435: *NORTH KOREA: Human Rights Watch Report North Korea 2009*, Human Rights Watch (HRW), 2009.
[2] CX192424: *Human Rights Watch World Report North Korea 2008*, Human Rights Watch, 31 January 2008.
[3] *Country of Origin Information Report, Democratic People's Republic of Korea,* 15 September 2008
[4] *Country Reports on Human Rights Practices – 2007, Korea, Republic of*, US State Department, March 11, 2008.

> Korean citizenship for North Koreans has been almost automatic.[5] [The delegate then looks at aspects of establishing a person's identity and bona fides.]

- The delegate found 'that the applicants are North Korean citizens and as such concurrently hold South Korean citizenship'. She did not address whether the applicants fell within the scope of s.91N of the Act, but, as noted above, found that Australia was taken not to have protection obligations towards them.

Review application

36. The review application contains no new information or claims.

Tribunal hearing, [in] April 2010 and [in] June 2010

37. The applicants attended a Tribunal hearing over 2 sessions [in] April 2010 and [in] June 2010, conducted with the assistance of an accredited interpreter in Korean/English.

- All the applicants attended the first session. The Tribunal took evidence for the main part from the applicant mother ('the applicant'), in the absence of the other applicants. It later took evidence from all the applicants together. The applicants' representative, [Mr A], accompanied them to the first session. This covered the applicant's claimed nationality and their experiences in North Korea and China; the primary applicant's claims against North Korea and why she believed that effective protection was not available in South Korea; and, in passing, the possibility that all the applicants may have dual nationality.

- The Tribunal formally adjourned the first session. Following further research, it wrote to the applicants [in] June 2010 to convey information about DPRK and ROK nationality laws, and to invite them to a resumed hearing session to discuss these issues. (For details of the correspondence, see below.)

- Only the applicant mother appeared at the second session, accompanied by the newly appointed representative [name deleted: s.431(2)], from the same firm as [Mr A]. This session focused on the issues raised in the Tribunal's letter, namely that country research appeared to indicate that the applicants had dual nationality and, in the absence of the Minister's written notice, appeared not to have made valid applications. In the course of this exchange, the applicant mother provided some further evidence about the applicants' trip to Australia and underscored in particular their wish not to have anything to do with South Korea.

38. Below is a consolidated summary of the evidence given over the 2 sessions.

39. The applicants confirmed at the outset that they had no identity papers or documents. They have had no contact with family or anyone else in North Korea since leaving there in January 2009. The primary applicant said that she left her DPRK identity card at home in North Korea. At the Tribunal's request, she attempted to recall and draw the features of her card. She did so with difficulty. She said that she had not studied it well, and could recall only vaguely that it included an emblem with a factory and rays of sunshine. She was unsure whether the ID number was recorded at the top or the bottom of the card, but settled for the bottom.

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[5] CX160556: Country Information Report no. 06/43

North Korea

40. The applicant (the applicant mother, giving evidence alone) said that she feared persecution in North Korea because she and her daughters had left without permission, and will therefore face persecution if they return there.

41. The applicant gave her address in [Location A] of Musan City. She said that she lived there together with her husband and 2 daughters (the other 2 applicants). The applicant said that her husband was a labourer in a [mine details deleted: s.431(2)], later stating that he is a supervisor for [position details deleted: s.431(2)].

42. The applicant said that her parents also live in Musan. Her father is retired, but grows beans, corn and other staples on some land in the nearby mountains, to supplement his family's diet. The applicant has 2 sisters living in the city. The applicant said that her home had been some 30 to 40 minutes walk from the Chinese border. The applicant said that she has had no contact with anyone in North Korea since leaving that country.

43. The Tribunal told the applicant that it had read the statement attached to the protection visa application and listened to her Department interview, and asked if she had anything to add to her account of her experiences, including the police detention. The applicant had nothing to add. In response to the Tribunal's queries, she said that she brewed alcohol and sold it from her home. Some people bought bulk quantities for sale in the markets. She said that the police arrested and detained her sometime in November or December 2008.

- The Tribunal asked the applicant a number of questions about North Korea, focused in particular on the experience of her school-age children.

- The applicant said that her daughters attended [name deleted: s.431(2)] High School. She had considerable difficulty describing its location in [Location A], and its relationship to any other landmarks.

- The applicant said that her daughters had gone to a kindergarten first, but had to stop because there was a food shortage. She said that they went to 2 schools, one senior and one less senior. As the Tribunal tried to get a picture of the childrens' education, the applicant recalled that they first went to kindergarten for 1 year, then elementary school for 4 years and then high school for 6 years.

- The Tribunal asked the applicant about school uniforms and badges or emblems that the children wore to school. The applicant said that, when she went to school, a uniform was required. The applicant did not think that her daughters had uniforms in elementary school, and recalled that there was a blue uniform from high school, although she could not remember when this started. She thought that the children had been measured for school shoes at the end of elementary schools, though these had not eventuated.

- The Tribunal asked about badges and other insignia or paraphernalia. The applicant replied that parents had to buy a flag and badges, but she was very vague as to what these involved. The Tribunal expressed surprise that she did not recall these more easily. The applicant recalled, again with difficulty, that there was a decorative badge with a flame appearing on the top. She thought that it had the motto '[motto deleted: s.431(2)]' on it. She drew this for the Tribunal. She commented that these were previously given out free, but parents had to buy them nowadays.

- The applicant said that her daughters joined the youth organization – she knew it by the name North Korean Youth Organisation. When the Tribunal asked if it was connected to anyone's name, she said that there was none, but that Kim Il Sung had established it on 6 June. In response to further questions, the applicant said that students usually join on 16 February each year, or on Kim Il Jung's birthday on 15 April. She said that they can also join on 6 June, which is the date on which Kim Il Sung founded the organization.

44. The applicant described her and her daughters' departure from North Korea. She said that her husband had arrived home some time earlier in the day, and was resting after having drunk alcohol. She and her daughters left the home around 5 or 6 in the afternoon, without his knowledge and without saying goodbye. A military doctor helped them escape, by taking them to a road that led to a river crossing. The full moon gave DPRK border guards good visibility, so they had to wait until the early hours of the morning to make the crossing. They did so at 4:20 am, walking across [details deleted: s431(2)].

45. The applicant said that on arrival in China, she and her daughters called on several homes but were turned away. In the third home, a Chinese woman took them in. The applicant later explained that she was a PRC national of Korean background. They lived in a third floor apartment in Yeongil (Yanji in Chinese), with the 3 applicants sharing a large room with the elderly woman.

46. The applicant said that a priest regularly visited the woman, and decided to help the applicant and her daughters leave China. The applicant said that she did not know his name, although she guessed at a name like '[name]', though she saw him on many occasions. She said that he made all the arrangements for the family's travel documents and tickets, and then introduced the family to the escort who accompanied them to Australia. The Tribunal asked if the family had contacted the priest or his friends, to let them know of her arrival and to thank them. The applicant replied that she has no way of contacting them. She initially thought that they might know how to reach her, having brought her to Australia, but she has heard nothing.

47. At the end of the first session, the Tribunal asked the applicants if they recalled the details of their arrival in Australia. The applicant said that they entered Australia [in] October 2009, in the morning, on a flight from China. The applicant said her family travelled by bus to Beijing, and she believed that they caught a flight from there. She did not have further details. The secondary applicants said they had no details, as they just followed their escort. The Tribunal flagged that it did not believe that the applicants were trying very hard to assist. The applicant said that she had never travelled before, and simply did not notice her surroundings.

48. The Tribunal returned to this issue at the second session, and advised the applicant that the vague evidence it had received to date could cause it to doubt that the applicants had recently fled North Korea, as claimed. It could indicate that the applicants were ethnic Koreans from China or North Koreans who had in fact settled in South Korea; it could also indicate that they were not recent arrivals in Australia, as claimed.

49. The applicant gave a few further details about the journey. The pastor in Yangji drove the applicants to Yangji and handed them over to their escort, known only as '[Mr B]' They went together by bus to Beijing. [Mr B] handled their travel documents and tickets, and the applicant had no clue what these were. They went on a direct flight from Beijing to Sydney, arriving early on a Sunday morning. Their escort took them to a place about an hour's drive away, and the following morning dropped them off at the Department, instructing them to claim that they are from North Korea. The applicant said that they arrived on a Sunday,

presumably [on a date in] October 2009, in the morning. The applicant said that they had only carry-on luggage, and had no further details or identification.

The secondary applicants

50. The Tribunal took evidence from the secondary applicants, in the presence of all the applicants. The primary applicant did not suggest any questions, and the other applicants did not wish to raise any matters. In response to the Tribunal's questions about their lives in North Korea, they gave the following information:

- The second-named applicant named some songs that she knew from school in North Korea, and at the Tribunal's request, gave the words of a song devoted to Kim Jong Il.
- Both secondary applicants recognized photographs of Kim Jong Il and Kim Song Il, and named their dates of birth (although the second-named applicant) was unsure of Kim Jong Il's year of birth).
- The third-named applicant described their departure from their home in [Location A], and their journey to the crossing [details deleted: s.431(2)], in terms very similar to those of the primary applicant.
- The Tribunal noted that both of the secondary applicants already appeared from their gestures and responses to have a good understanding of English. They replied (in Korean) that it was modest, but that they were currently studying.
- The Tribunal also observed that the second-named applicant wore spectacle frames that looked fashionable and perhaps expensive, and asked where these were from. She replied that they came from China and said, cautiously, that she had obtained them some months before leaving China.

Possible dual nationality

51. As noted above, the Tribunal drew to the attention of the applicants and [Mr A] at the first session the possibility that the applicants were dual nationals – DPRK citizens in accordance with the laws of that country, and ROK citizens according to its constitution and laws. It noted that if this were correct, it may be required to find that they were subject to s.91N of the Act and that their visa applications were invalid. The applicants and [Mr A] did not respond substantively to this observation. The Tribunal advised that it was seeking more information about this and would let the applicants know of any developments.

52. At the second session, the applicant had little to say about the issue of dual nationality, beyond asserting that she did not wish to go to South Korea or have its citizenship. The Tribunal explained that the Australian law required it, in assessing whether or not the applicants have dual nationality, to refer solely to the laws of each respective country. The Tribunal agreed with the representative to allow further time for submissions after the hearing.

Effective protection in South Korea

53. The Tribunal explained the operation of sections 36(3) to (56) of the Act, and alerted the applicants to its preliminary view that (even if they are not South Korean nationals) they appeared to have a right to enter and reside in that country. The applicants and [Mr A] did not comment substantively on this.

54. The Tribunal questioned whether the applicants had taken 'all possible steps' to exercise such rights in South Korea. The primary applicant said that she did not wish to do so, 'it is not my plan' She linked this with her concerns about the welfare of her parents, who remain in North Korea. The Tribunal explained that it was required to consider whether the applicant had a well-founded fear of Convention-related persecution in South Korea or a risk of being returned to North Korea, and that this did not rest on the applicant's preferences or wishes.

55. Returning to the question of her concerns about her parents in North Korea, the applicant spoke in quite animated terms that, even if she were to be welcomed in South Korea, this would be paramount to a death sentence for her parents. She had heard of cases where North Koreans had gone to South Korea, and the DPRK authorities had punished their families harshly. She cited one instance of a DPRK official escaping to South Korea. The DPRK authorities denounced him as a traitor and deported (sent into exile, an unknown destination) his 9 and 2 year old children. She said that there were some 300,000 or so North Koreans in China. They were routinely sent back, sent to labour camps and ultimately released only to escape again. She said that the treatment of family members who went to South Korea was completely different, and much harsher At the second session, the applicant again stressed that, while North Koreans might leave that country to seek bare essentials or an improved life in China or other countries, the DPRK authorities were rumored to target the families of those who went to South Korea, because that had an added political dimension.

56. The Tribunal said that it had not found any country information to indicate that family members were treated differently according to the destination of defectors. The issue before it was whether the applicants had a well-founded fear of Convention-related persecution. The Tribunal had some doubts as to whether subjective fears arising from South Korea's proximity to North Korea or from speculation about possible DPRK targeting of family members left in that country did amount to Convention-related persecution. Furthermore, country information suggested that it was the act of defection that caused DPRK consternation. There seemed to be no clear independent evidence that the DPRK authorities targeted the families of defectors on the basis of their destination. Although the Tribunal was cautious in drawing conclusions from the lack of information, there were at least 11,000 DPRK refugees in South Korea so it seemed surprising that reports of such discriminatory treatment, if true, were not well-known.

57. [Mr A] said that the applicant's had a genuine, subjective fear of going to South Korea, because of the DPRK authorities' feared discriminatory reaction if they found out, as well as a concern as to whether the ROK was really an appropriate and safe location. The Tribunal reminded the applicants of its task, to assess whether they have a well-founded fear of persecution in that country (South Korea). Although they may prefer to stay in Australia than go to South Korea, and even if they may face some discrimination or stigma as North Koreans, the Tribunal doubted that any of these factors established a real chance of persecutory harm.

58. The Tribunal impressed upon the applicant at the second session, that it found her and the other applicants' account of their journey to Australia to be unforthcoming and unsatisfactory, and that the available evidence caused it to have serious doubts about their identities, their nationality and the circumstances of their arrival in Australia. It gave by way of example that their evidence could be consistent with that of long-term Korean ethnics from China who knew about life in North Korea; North Koreans who had already settled in South Korea; or people who were not recent arrivals in Australia at all.

59. At the end of the second session, the Tribunal agreed to receive any further submissions by [a date in] July 2010. The representative advised [in] July 2010 that she did not wish to make any submissions on the issue of dual nationality, but that she would like additional time to provide material relating to North Korea's human rights record. The Tribunal received no further submissions. [In] September 2010, in response to the Tribunal's follow-up call, the representative advised: 'Having examined the matter further we do not wish to make further submissions.'.

The Tribunal's letter [in] June 2010

60. The Tribunal's letter [in] June 2010 invited the applicants to a resumed hearing session, and explained its purpose in the following terms:

> You are invited to attend a further hearing before the Tribunal to discuss the issue of whether your visa application is valid. If the Tribunal accepts that you have North Korean nationality, recent research indicates that you also have South Korean nationality according to South Korean law. In that case, it would appear that your protection visa application is invalid.

61. Attached to the Tribunal's hearing invitation letter was information concerning its recent research, suggesting that they had dual nationality. The Tribunal advised:

> If the Tribunal finds that you had the nationality of both North Korea and South Korea at the time your visa application was lodged it may conclude that your protection visa application is not valid because the Minister did not give written notice allowing you to make it. In such a case, the Tribunal would set aside the decision refusing to grant you a protection visa and substitute instead a decision that your protection visa application was not valid.

62. As noted above [38 and 53], only the applicant mother attended the second hearing. She had little to say about the issue of dual nationality.

Information from other sources

Nationality: Democratic People's Republic of Korea (DPRK)

63. As noted above, the Tribunal undertook further research, including on the laws regarding nationality in the DPRK. On 16 April 2010, Dr Hee Doo Son, Research Fellow, Korea Legislation Research Institute, advised the Tribunal that the *1963 DPRK Nationality Act*[6] translated by William Wetherall is currently effective.

64. On 10 May 2010, Dr Son provided further information[7], which may be summarised as follows:

- Citizenship is based on the *DPRK Nationality Act* but is not specifically defined. The *DPRK Nationality Act* determines the conditions to be a citizen.
- There are three relevant Articles contained in the *DPRK Nationality Act* regarding the 'possession' of DPRK nationality:

  Article 2

[6] Wetherill. W 2008, *1963 DPRK Nationality Act*, Yosha Research 1 September 2008. Reference 4.
[7] Son, Hee Doo 2010, Email to RRT Country Advice: *Re: Seeking Advice – North Korean Nationality Law*, 10 May. Reference 5.

- Those who are Koreans, who possessed the nationality of Korea before the founding of the Republic, and their children, and who do not abandon that nationality
- Those who are citizens of another country or are stateless and who have acquired the nationality of the Republic in accordance with legal procedures.

Article 5

- Those who were born between citizens of the Republic
- Those who were born between a citizen of the Republic and a citizen of another country or a stateless person, who reside in the territory of the Republic
- Those who were born between stateless persons who reside in the territory of the Republic
- Those who were born in the territory of the Republic but whose parents cannot be confirmed.

Article 6

- A stateless person or a citizen of another country, can only acquire DPRK nationality by petition to the Presidium of the Supreme People' Assembly. Details of specific requirements could not be located.

- Under Articles 9, 12 and 13, DPRK nationality may be lost. However, apart from Article 15, there are no concrete conditions set out in the Act about how this may occur.
- Under Article 15 a person may only lose or abandon their DPRK nationality by making a petition to the DPRK People's Assembly. Unless renunciation is officially granted, a person will continue to be considered a citizen of the DPRK.
- Nationals of the Republic of Korea do not automatically have DPRK nationality by virtue of their birth on the Korean Peninsula. They would need to meet the conditions set by the *DPRK Nationality Act*, in particular Article 2.

Nationality: Republic of Korea (ROK)

65. The Tribunal also undertook research into ROK nationality according to its laws, and in particular how this applies in relation to DPRK nationals (in other words, whether it means that DPRK nationals legally have ROK nationality from birth).

66. The Republic of Korea (ROK, South Korean) Constitution contains the following relevant articles. They are taken to establish the constitutional principle that ROK nationality law applies to all of the Korean peninsula.

Article 2 [Nationality]
(1) Nationality in the Republic of Korea is prescribed by law.
(2) It is the duty of the State to protect citizens residing abroad as prescribed by law.

Article 3 [Territory]
The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.

67. The UK Home Office, in its Country of Origin Report *Democratic People's Republic of Korea*[8], summarises Article 2 of the most recent version of the ROK nationality law, which provides for the 'Attainment of Nationality by Birth', as follows.

> Article 2 of the RoK Constitution refers to nationality, and states that "Nationality in the Republic of Korea shall be prescribed by Act". (Constitutional Court of Korea, undated[9]). The legal basis of RoK nationality is therefore set out in the Nationality Act (the Act), first promulgated in 1948 soon after the creation of the country. The Act has been amended on a number of occasions, most recently in March 2008 [The UK report sets out the full text of the Nationality Law, which is not relevant to this decision.] Articles 1 and 2 define the purpose of the Act and attainment of nationality by birth, respectively:
>
> > "Article 1…The purpose of this Act is to prescribe requirements to become a national of the Republic of Korea. [This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]
> >
> > Article 2 … (1) A person falling under any of the following subparagraphs shall be a national of the Republic of Korea at birth:
> >
> > > "1. A person whose father or mother is a national of the Republic of Korea at the time of the person's birth;
> > >
> > > 2. A person whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth; and
> > >
> > > 3. A person who was born in the Republic of Korea, if both of the person's parents are unknown or have no nationality.
> >
> > "(2) An abandoned child found in the Republic of Korea shall be considered as born in the Republic of Korea. [This Article Wholly Amended by Act No. 8892, Mar. 14, 2008]" (Korea Legislation Research Institute (KLRI), undated)[10]

68. The Constitution and the Nationality Act, read together, therefore indicate that persons whose parents are ROK nationals and, in certain circumstances those born in the ROK, (the Republic of Korea being defined in the Constitution to mean the entire Korean peninsula) have ROK nationality at birth.

69. On 23 March 2010, the Tribunal contacted Professor Chulwoo Lee, Professor of Sociolegal Studies, Yonsei Law School, Seoul, regarding the application of South Korean Law to individuals born in North Korea – specifically in relation to the *Constitution, Nationality Act* and the *Protection and Act on the Settlement Support of Residents escaping from North Korea*.

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[8] Country of Origin Information Report, reissued on 21 July 2009 – para. 28.14.

[9] The UK Home Office report reference is: The Constitutional Court of Korea, www.ccourt.go.kr/home/english/ Constitution of the Republic of Korea, undated http://www.ccourt.go.kr/home/english/welcome/republic.jsp Date accessed 2 September 2008.

[10] The UK Home Office report reference is: Korea Legislation Research Institute, www.klri.re.kr, Nationality Act, March 2008 (full text in Annex B), English translation obtained by the FCO, August 2008

70. On 27 March 2010, Professor Lee provided a copy of a legal opinion[11] that he had earlier prepared on the status of North Koreans under ROK law. Professor Lee's opinion does not take account of the "safe third country" rule that Australia or any other country might have in its asylum law, although it contains some reference to asylum-law-related issues, such as nationality and statelessness. Professor Lee's advice can be summarized as follows:

- The South Korean government unilaterally recognizes North Korean citizens as nationals of the Republic of Korea in light of its interpretation of the *Constitution of the Republic of Korea* and the *Nationality Act*.
- "A North Korean is not granted South Korean citizenship. S/he is already a national (citizen) of the Republic of Korea under the law of the Republic of Korea."
- A person must have his/her nationality ascertained in order to live effectively as a citizen of the Republic of Korea. There are three ways for a North Korean to have his/her nationality of the Republic of Korea ascertained:
    1. One may apply for "protection" under the *Act on the Protection and Settlement Support of Residents Escaping from North Korea.* (APSSR)
    2. One may apply for nationality adjudication, a determination procedure operated by the Ministry of Justice under the *Nationality Act*.
    3. One may bring an action in court for a declaratory judgment that s/he is a national of the Republic of Korea.
- Article 9(1) of the *Act on the Protection and Settlement Support of Residents Escaping from North Korea* enumerates types of persons who may not be granted "protection". These include
    - persons who have maintained a base of living in a foreign state for over 10 years (Article 9(1)(iv)); and
    - persons who made an application after one year since s/he had entered South Korea (Article 9(1)(v)).
- It is possible to have the nationality of the Republic of Korea unilaterally imposed upon a citizen of North Korean who refuses to be treated as a national of the Republic of Korea.

Consideration of dual DPRK and ROK nationality in other jurisdictions

71. The Tribunal also researched the approaches of other jurisdictions. Although the Tribunal's task is to assess whether the applicant falls within the scope of s.91N(1) and s.91N(6) of the Act, other approaches may assist in interpreting the laws of both countries and whether they amount to dual nationality for DPRK citizens.

72. In the United States, the *North Korean Human Rights Act* (NKHRA) of 2004, provides that North Koreans are eligible to apply for US refugee and asylum consideration and are not pre-emptively disqualified by any prospective claim to citizenship they may have under the South Korean constitution. The Tribunal's summary, with references, follows:

[11] Lee, C. 2010, Opinion Some Questions Relating to the Nationality of North Korean Citizens under the Law of South Korea', 27 March. Reference 2.

> The *North Korean Human Rights Act* (NKHRA) of 2004[12] was passed on 18 October 2004 to demonstrate the United States (US) commitment to freedom at home and abroad. The NKHRA has three main objectives: to promote the human rights of North Koreans; to assist North Koreans in need and to protect North Korean refugees. Under the NKHRA North Koreans are eligible to apply for US refugee and asylum consideration and are not pre-emptively disqualified by any prospective claim to citizenship they may have under the South Korean constitution.
>
> The NKHRA gave a clear direction as to how the issue of dual nationality of North Korean defectors was to be addressed. Prior to enactment of the NKHRA, North Koreans were ineligible for asylum in the United States because of a provision in the South Korean constitution giving them South Korean citizenship.
>
> Under Section 302 of the NKHRA, for the purposes of eligibility for refugee status under US Immigration law, a national of the Democratic People's Republic of Korea shall not be considered a national of the Republic of Korea. It further states that North Koreans were not to be barred from consideration of refugee or asylum eligibility simply '*on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of the Korea*'[13]
>
> It should be noted that the NKHRA only offers US asylum to those individuals has not prior to applying in the US has not yet sought and been processed in South Korea.[14]

73. The Tribunal takes this information to indicate that the US authorities also interpret DPRK and ROK legislation to mean that DPRK citizens have the nationality of both countries.

ROK nationality and North Koreans

74. The delegate's decision refers to DPRK citizens as having concurrent *de jure* ROK nationality, yet also mentions 'the decision to grant South Korean citizenship' and that no genuine [DPRK] refugee ever having been refused ROK citizenship. The latter comments suggest that ROK nationality is potential rather than current. The delegate appears to have based her view on various bits of country information at least some of which, as noted recently by Nicholls FM in *SZOAU v MIMA & Anor*, [15] is unclear or contradictory. Furthermore, the Tribunal has in other recent cases involving North Korean cases received submissions that raise questions about the correct meaning of the ROK legislation as it affects North Koreans. The Tribunal therefore considers it appropriate to set out relevant material.

75. The Tribunal has had regard to reports from DFAT on the status of North Koreans in South Korea. Importantly, the questions posed to DFAT concerned the critical issue of whether the non-citizen held a presently existing right to enter and reside in South Korea, regardless of how that right arose or was expressed, for the purpose of s.36(3) of the Act. In that context, citizenship was clearly relevant, but neither the questions posed nor DFAT's advices were focused on the distinction between a person already had citizenship or only a right to obtain

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[12] *North Korean Human Rights Act of 2004* [United States of America], Public Law 108–333 (108th Congress), 18 October 2004
[13] Kim J 2008, *North Korean Human Rights and Refugee Resettlement in the United States: A Slow and Quite Progress*, SAIS U.S-Korea Yearbook 2008
[14] Carrinski A, *The Other North Korean Dilemma: Evaluating U.S Law Towards North Korean Refugees*, 31 Suffolk Trans-national Law Review 647 2007-2008
[15] [2010] FMCA 606.

or to be granted citizenship. They therefore did not directly address the critical question posed by s.91N.

76. The language of North Koreans being 'granted' North Korean citizenship is found in numerous sources. An example is an advice from Refworld, prepared by the Immigration and Refugee Board of Canada[16], which states:

> […] North Koreans must demonstrate that they possess the 'will and desire' to live in [South] Korea, and must present themselves to an embassy or consulate of the Republic of Korea to request protection (ibid.) Following this, **the citizenship process begins** (ibid.)
>
> The Embassy Official noted that **certain persons are not eligible for South Korean citizenship**; 'bogus' defectors, persons who have resided in a third country for an extended period of time; and international criminals such as persons who have committed murder, aircraft hijacking, drug trafficking or terrorism. (Tribunal emphasis added.)

77. The Tribunal notes that reports from DFAT on the status of North Koreans in South Korea sometimes contain similar references. Significantly, however, the questions posed to DFAT concerned the critical issue of whether the non-citizen held a presently existing right to enter and reside in South Korea, regardless of how that right arose or was expressed, for the purpose of s.36(3) of the Act. In that context, citizenship was clearly relevant, but neither the questions posed nor DFAT's advices were focused on the distinction between a person already had citizenship or only a right to obtain or to be granted citizenship. They therefore did not directly address the critical question posed by s.91N.

78. In 2004, DFAT provided the following advice in response to the question – 'Is the granting of South Korean citizenship to North Korean defectors automatic or, in practice, is it discretionary?' The Tribunal considers it appropriate to set this out in full, together with DFAT's report from 2005, because they contain potentially conflicting indications that need to be understood in context.

> 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 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

[16] Document ZZZ102858,E, dated 3 June 2008.

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)

79. In 2005, DFAT responded to a request for further information on and clarification of 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 [Korean authorities] inform 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 [Korean authorities] 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. [Korean authorities] 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. [Korean authorities] 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. [Korean authorities]’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 [Korean authorities] 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).

Legal submissions in similar cases – the application of section 91N of the Act

80. As noted elsewhere, the Tribunal (the current and other Members) has before it a number of cases involving applicants claiming to be from North Korea. In some of these matters, the applicants or representatives presented a submission dated 16 August 2010, prepared by Brendan Ferguson of Allens Arthur Robinson on behalf of RACS. In other matters, this submission was cross-referenced.

81. These submissions include the following arguments:

- Section 91N does not apply to North Korean nationals applying for a protection visa in Australia because South Korean law cannot be said to unilaterally impose South Korean nationality upon North Korean nationals. A North Korean national will not be considered a national of South Korea unless they have undergone a process that involves voluntarily approaching an embassy, expressing a will to enter and reside there, and completing a procedure that includes up to 6 months detention in South Korea. Unless they have obtained South Korean nationality through that process, they will not be a national of two or more countries.

- *alternatively*, if North Korean nationals are also nationals of South Korea, the theoretical nationality that South Korean law purports to confer cannot be considered effective nationality as required under Subdivision AK. Subdivision AK applies only to a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to enter and reside in the third country. The theoretical nationality said to be conferred on North Korean nationals prior to the completion of the specified process does not provide North Korean nationals with a right to enter or reside in South Korea, and nor does it afford effective protection from persecution.

    - The submission notes that s.91M sets out the purpose of Subdivision AK - that it is aimed at non-citizens 'who can avail [themselves] of protection from a third country, because of nationality or some other right to re-enter and reside in the third country …' It contends that this means that for the purposes of subdivision AK, 'nationality' must be effective in that it must allow a non-citizen to avail himself or herself of protection from persecution by providing a right to enter and reside in a third country. It cites Lee J in *WAGH v MIMIA*[17], describing s.91M as 'a statement of policy made by Parliament to assist construction of that subdivision.'

- *alternatively*, if North Korean nationals are also nationals of South Korea, Subdivision AK cannot prevent a North Korean from lodging a valid protection visa application, because this would result in Australia breaching its non-refoulement obligations under Article 33(1) of the Convention: such an applicant would have a well-founded fear of

[17] (2003) 131 FCR 269 at 277.

persecution in both countries and therefore Australia will still owe protection obligations.

82. The Tribunal discussed with the applicants at the hearing country information relating to other issues, such as whether the primary applicant has a well-founded fear of Convention-related persecution in North Korea; their legal rights to enter and reside in South Korea; and whether they have in that country a well-founded fear of Convention-related persecution of refoulement to North Korea. However, given the finding below that the protection visa application is not valid, it is unnecessary for the Tribunal to summarise that country information in this decision.

FINDINGS AND REASONS

83. The Tribunal has concerns about the applicants' credibility, including the identities that they have used, the duration of their stay in China and their circumstances there, and the events leading up to their presentation at the Department in October 2009.

84. The Tribunal found the applicants' account of their escape from North Korea, their experiences in China and their lack of detail about their travel to Australia to be rehearsed and very limited in scope. The applicants appeared to have a reasonable knowledge of North Korea. However, the Tribunal does not believe that they have given a complete and honest account of the duration of their circumstances in China; of their financial situation in that country; or of their arrival in Australia. For instance, it found unimpressive the applicants' inability to recall any meaningful details about their flight to Australia or the passports that their escort presented at the border. It does not accept that the applicants have genuinely tried to cooperate with the Department or the Tribunal in enquiring into these matters.

85. The Tribunal is mindful that people who have used the services of people smugglers may be reluctant to divulge their contacts or their precise means of entry into Australia. It is also conscious that persons who have escaped from North Korea who have remaining relatives in that country may be genuinely concerned about their welfare. However, the Tribunal is concerned that in this instance, the Tribunal considers that the applicants' reluctance to assist went beyond any such considerations.

86. The Tribunal accepts that the applicants have North Korean nationality, as claimed. Although they have no DPRK travel or other documentation, the Tribunal notes that they appear to speak with North Korean accents (which is consistent with, though not conclusive of their claimed nationality); their demonstrated familiarity with aspects of life in North Korea that appeared generally consistent with published material from a range of sources (such as photographs of key figures and familiarity with common songs); and the consistency of the applicants' accounts with each others' evidence.

87. The Tribunal has had regard to the advice of Dr Hee Doo Son [para 63] which confirms the accuracy of the translated *1963 DPRK Nationality Act* that is before the Tribunal. The applicants have not claimed, and there is nothing in the DPRK legislation or elsewhere to suggest that at the time of application they had lost their North Korean nationality.

Dual nationality

88. For the reasons that follow, the Tribunal finds that, as North Korean nationals, the applicants had South Korean nationality at the time of application and continue to do so, according to the laws of South Korea.

Interpretation of section 91N

89. The Tribunal considers that s.91N(1) and s.91N(6) apply to persons with the nationality of one or more countries, in each instance to be assessed with sole reference to the laws of the individual countries. The applicants made no submissions concerning the interpretation and application of s.91N(1) of the Act.

90. The Tribunal notes, however, that questions about the legal interpretation of s.91N(1) of the Act (specifically, the meaning of 'nationality') and of South Korean citizenship law, have been raised in similar cases. They are prominent in the Allens Arthur Robinson opinion of 16 August 2010 [paras 64-65]. The Tribunal notes also the arguments that have raised the related issue of 'effective nationality' in the context of s.36(3) (the applicants' right to enter and reside in South Korea), because these arguments linked that right with the issue of citizenship.

91. **The meaning of 'nationality' in s.91N:** The submission dated 16 August 2010 argues that while s.91N(6) requires the Tribunal to determine nationality solely by reference to the law of the relevant country (ie. South Korea), it must be interpreted in the context of Australian domestic law and should therefore be construed as 'effective nationality, as required in *Jong Kim Koe v MIMA*[18] (1997) 74 FCR 508 and *Lay Kon Tji v MIEA*[19] The submission and the accompanying expert opinion of Mr Pillkyu Hwang rely heavily on the premise that it is not enough for a particular North Korean to have the 'theoretical nationality' of South Korea, but rather that s/he must have 'effective nationality'.

92. The Tribunal considers that the term 'nationality' in Subdivision AK does not mean 'effective nationality' Section 91N(6) expressly requires that, for the purpose of s.91N(1), nationality must be determined solely by reference to the law of the relevant country, and not by reference to any assessment of the effectiveness of such nationality. Furthermore, the legislative history indicates that s.91N(6) and its equivalent in s.36(6) were enacted as a response to *Jong Kim Koe*, and leave no room for the concept of 'effective nationality'. The Supplementary Explanatory Memorandum to Border Protection Legislation Amendment Bill 1999 describes ss.36(6) and 91N(6) as "a legislative definition of 'nationality' which is the term used in the Refugees Convention and international law generally to cover a person's 'nationality' or 'citizenship', [to ensure] that nationality is determined solely with reference to the domestic law of the country in question, and not in relation to assessments made in Australia as to the effectiveness of a nationality held by a protection visa applicant."

93. The Tribunal acknowledges that s.91M is intended to assist in the construction of Subdivision AK. However, the subdivision draws a clear distinction between dual nationality (s.91N(1)), which must be determined solely by reference to the law of the relevant country, and a right to enter and reside, however that right arose or is expressed (s.91N(2)). The Tribunal does not

[18] (1997) 74 FCR 508.
[19] (1998) 158 ALR 681

accept that s.91M or the observations of Lee J in *WAGH v MIMIA*[20] lead to a conclusion that is contrary to the ordinary meaning of s.91N(1) and (6).

94. The Tribunal notes that the submission dated [in] August 2010, and the accompanying opinion from Mr Hwang, focus not on citizenship/nationality as such, but rather the applicant's right to enter and reside in South Korea. The conflation of these 2 concepts – nationality and 'effective nationality' – is also evident in other opinions. This probably arises in large part because the initial focus of the Tribunal's enquiries, and indeed the focus of past consideration of the rights of North Koreans vis-à-vis South Korea in other cases was on whether they had a right to enter and reside in that country for the purposes of s.36(3), and their citizenship status was a preliminary consideration in resolving this. However, in the Tribunal's view, these rights are not identical or coterminous. The concept of a right to enter and reside plays no part in s.91N(1) – although it does play a part in ss.36(3) and s.91N(2), and it would be relevant to any consideration of the Minister's discretionary power in s.91Q(1).

95. **Australia's Convention Obligations:** The opinion [in] August 2010 contends that, even if 'nationality' in s.91N does not mean 'effective nationality', and a North Korean also has South Korean nationality, Subdivision AK cannot have the effect of preventing a North Korean from lodging a valid protection visa application, because this would result in Australia breaching its non-refoulement obligations under Article 33(1).

96. The Tribunal does not consider that Subdivision AK has this effect. So far as s.91N(1) is concerned, it applies to a dual national, irrespective of his or her circumstances in the relevant countries. Unlike the provisions of s.36(3) to (5), it contains no express statutory qualification or exception on the basis of a well-founded fear of persecution or refoulement. However, this does not necessarily mean that Subdivision AK prevents a North Korea/South Korean dual national from lodging a protection visa application, where this would result in Australia breaching its non-refoulement obligations. Section 91Q gives the Minister a personal discretion in the public interest to determine that s.91P does not apply to an application made within a specified period. Section 91Q(2) makes it clear that the matters that may be considered for that purpose include information that raises the possibility that the non-citizen might not be able to avail himself or herself of protection from the countries in question.

97. As a result, the statutory mechanism for protecting a dual national who may be at risk of Convention-related persecution lies solely with the Minister. The Tribunal has no power to treat as valid a protection visa application made by a dual national, unless there is a Ministerial determination under s.91Q.

South Korean nationality

98. As noted above [paras70ff], the ROK Constitution defines the territory of the Republic of Korea as the entire Korean peninsula (Article 3) and states that ROK nationality is prescribed by law (Article 2). The Nationality Act of 1948 stipulates that certain persons have ROK nationality, based on their ancestry (parentage) or place of birth.

99. The Tribunal places weight on the expert opinion of Professor Lee, which it considers recent, relevant and authoritative. As was recently observed by Nicholls FM in *SZOAU v MIMA &*

[20] (2003) 131 FCR 269 at 277

Anor,[21] some of the information that has been provided to the Tribunal in relation to the status of North Koreans in South Korea in the past has been confusing and contradictory. It was for the purpose of clarifying the position that Professor Lee's opinion was sought. He concludes that a person who is a North Korean also has South Korean nationality.

100. The Tribunal finds that the applicant had South Korean nationality at the time of application, according to South Korean law, for the reasons that follow. The Tribunal relies on the information set out above [paragraphs 69-76], which was set out in its letter [in] June 2010 and which the Tribunal discussed at the second hearing session. The applicant mother's father was born in North Korea, according to her protection visa application, and the secondary applicants' father was likewise born there. According to Article 2 of the ROK Nationality Act, this means that all the applicants have ROK nationality.

101. Professor Lee indicates clearly that a North Korean is already a national (citizen) of the Republic of Korea under the law of the Republic of Korea, and therefore does not 'acquire' it. Significantly, his opinion addresses and clarifies several related issues that appear to have been the subject of conflicting advice in the past.

102. Professor Lee's opinion on these issues, and the Tribunal's comments in light of that opinion, follow: -

- A North Korean has South Korean citizenship by operation of South Korean law. The Tribunal places weight on Professor Lee's opinion that "A North Korean is not granted South Korean citizenship. S/he is already a national (citizen) of the Republic of Korea under the law of the Republic of Korea."

    - The Tribunal notes that there are some apparently conflicting views[22], for instance: "At law […], South Korean citizenship is automatically conferred upon those who can establish their North Korean nationality and the decision to grant citizenship is not discretionary." This appears to suggest that ROK citizenship is conferred only when North Korean nationality has been shown.

    - The Tribunal prefers the opinion of Professor Lee, because to the extent that Mr Hwang's view differs, this arises from his focus on the procedures to establish a person's identity and place of origin, and the practical effect of these, rather than the legal issue of nationality.

    - The Tribunal is satisfied, on the basis of Professor Less's opinion, that the applicants had dual DPRK and ROK nationality at the time of application, and that they therefore come within the scope of s.91N(1) of the Act.

- Both Professor Lee and Mr Hwang note that a person claiming to be a North Korean must have their identity and nationality ascertained, in order to live effectively as a citizen in South Korea. Mr Hwang identifies one means to do so – by a protection application under the APSSR – whereas Professor Lee states that there are 2 further means to have nationality recognised, through administrative determination ('nationality adjudication') or through a declaratory judgement.

[21] [2010] FMCA 606.
[22] Mr Pillkyu Hwang's comment in his opinion dated 27 February 2010.

- On the basis of Professor Lee's opinion, the Tribunal finds that these are procedures to confirm a presently existing nationality, and give effect to the rights that flow from this.

- Certain persons (including those who have lived in a foreign state for more than 10 years) may not be eligible for 'protection'.

  - Country information indicates that the APSSR is a settlement assistance package that South Korea offers to North Korean defectors. As noted above, the protection application procedure is just one of 3 avenues that a North Korean can use to have his or her existing South Korean citizenship confirmed. The Tribunal therefore concludes: (a) citizenship and 'protection' (settlement assistance) are separate; (b) a North Korean does not have to rely on the APSSR procedures to have his/her South Korean nationality confirmed; and (c) a North Korean's ineligibility for APSSR assistance (if for instance, s/he has lived abroad for many years) has no effect on the person's citizenship under ROK law or their ability to have this citizenship confirmed by other means.

103. The Tribunal has carefully considered the closely related question of whether the applicants had South Korean citizenship at the time of application, in particular given the seemingly conflicting opinions on whether this is a current or potential status.

- Confusion has arisen by the mention in some sources of the need for a North Korean to 'obtain' South Korean citizenship, For instance, the ROK Embassy official in Ottawa (who was cited in the 2008 Canadian IRB report [para 78] refers to 'the citizenship process' beginning once a person presents to an ROK mission. The 2005 DFAT report [para 81] refers to 'an assumption that North Koreans would be able to gain citizenship in the South' and a person's 'right to acquire this' Relevantly, these appear to be at odds with earlier DFAT advice, in 2004, that South Korean citizenship is 'automatic and not discretionary' A closer reading of both the Canadian advice and the 2005 DFAT report indicates that they have conflated 2 issues – citizenship/nationality on the one hand, and eligibility for the APSSR assistance package ('protection') on the other. Both reports go on to identify the groups to be excluded from the APSSR assistance package, and the reports implicitly equate this with citizenship. The Tribunal is satisfied, on the basis of Professor Lee's advice and in the context of all the available information, that North Koreans have South Korean citizenship and that, even for those who are ineligible for settlement assistance (for instance, on the basis of prolonged periods in third countries), there are alternative procedures for them to have their existing South Korean citizenship confirmed.

- The Canadian advice also refers to the requirement that North Koreans express the 'will and desire' to live in South Korea. This appears at face value to parallel the situation that the Federal Magistrates Court addressed in relation to Israel's Law of Return in *MZXLT v MIAC*[23] It could in turn indicate that, in order for the applicants to activate their potential rights in relation to South Korea (not just any rights to enter and reside, but also arguably the 'right' to obtain citizenship), they first express a wish to be granted South Korean nationality. For the reasons given above, the Tribunal does not accept that the Canadian report supports this conclusion in relation to ROK citizenship. Based on the text of the

[23] *MZXLT v MIAC* [2007] FMCA 799.

South Korean laws, and the experts' opinions, the Tribunal finds that the applicants' South Korean citizenship existed at the time of application, and was not contingent on any further acts or desires.

- Some commentators, including Professor Lee and Mr Hwang, contend that North Koreans have, in effect, only 'theoretical' ROK nationality. Mr Hwang goes further, to state that South Korean citizenship is a theoretical construct and political declaration only, and that it has little relevance to 'nationality' or 'citizenship' as normally understood.

    - They highlight the obstacles that North Koreans may face in having the South Korean authorities recognise his or her citizenship, for instance, the need for investigations while in detention. Indeed, Professor Lee gives as one example that the South Korean justification for not granting protection (ie. settlement assistance) to all North Koreans – on the grounds that 'they are expatriate North Koreans (*chogyo*) and not escapees [is] an explanation which is equally at variance with the constitutional principle that all North Koreans are ROK citizens'. In other words, while North Koreans have 'theoretical' or legal ROK nationality, there is tension between this formal position and their actual treatment.

    - Mr Hwang concludes that this 'theoretical' South Korean citizenship does not confer on the person the right to enter and reside in South Korea (in other words, 'effective nationality'), and cites other purported examples of where North Koreans are not treated identically to other ROK citizens.

    - In the Tribunal's view, the ROK process of investigating a North Korean's identity and nationality is simply a means of confirming their existing, (concurrent) South Korean nationality. The circumstances of the investigation – such as its length and complexity, and whether it involves detention – do not affect the Tribunal's assessment.

    - For the reasons given above, the Tribunal must determine only whether the applicants have South Korean nationality, and it is not permitted to make an assessment of the effectiveness of that nationality, in the sense discussed in *Jong Kim Koe*. Professor Lee's and other commentators' observations and concerns – that a North Korean must still establish a means of entering South Korea, that South Korean law does not apply to North Koreans outside its territory and other instances where North Koreans receive different treatment from other ROK nationals – even if correct, do not go to the issue of the applicants' nationality under South Korean law.

Conclusions

104. The Tribunal finds that the applicants were at the time of application nationals of 2 countries, North Korea and South Korea, and are subject to Subdivision AK of Division 3 of Part 2 of the Act: s.91N(1) and (6). They are therefore prevented from making a valid application for a protection visa: s.91P. This prohibition does not apply if the Minister has given written notice that s.91P does not apply and a visa application is made in the following 7 days: s.91Q(1). There is no evidence that the Minister has given such written notice in this case.

105. Accordingly, the Tribunal finds that the protection visa application dated [in] October 2009 is not valid.

Australia's protection obligations

106. The decision under review was based on the delegate's finding that Australia is taken not to have protection obligations towards the applicants pursuant to s.36(3)-(6) of the Act. As set out in the claims and evidence above, this formed a substantial part of the exchanges during this review, before the Tribunal had formed the view that the protection visa application may not be valid.

107. In view of its findings as to the applicants' dual nationality, the Tribunal is unable to consider these substantive issues. However, the Tribunal notes the applicants' main contention that s.36(3) would not apply to them because they have a well-founded fear of Convention-related persecution in South Korea: s.36(4). Based on the evidence before it in this particular case, the Tribunal would not necessarily have reached that conclusion, even if it had found the visa application to be valid. As noted above, it also has some concerns that the applicants have not been honest and forthcoming in their dealings with the Department and the Tribunal. However, whether it is in the public interest to permit them to make a protection visa application, if they request this opportunity, is a matter that is solely for the Minister.

CONCLUSIONS

108. For the reasons given above the Tribunal finds that the applicants' protection visa application is not valid and that the Tribunal has no power to consider it.

DECISION

109. The Tribunal sets aside the decision refusing to grant the applicants protection visas and substitutes a decision that their protection visa application is not valid and cannot be considered.