IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND **[2019] NZIPT 801589**

RŌPŪ TAKE MANENE, TAKE WHAKAMARU AOTEAROA

Appellant:	**AC (North Korea)**
Before:	A N Molloy (Member)
Counsel for the Appellant:	P Sundar
Counsel for the Respondent:	No Appearance
Dates of Hearing:	17 & 18 October 2019
Date of Decision:	18 November 2019

DECISION

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[1] This is an appeal against a decision of a refugee and protection officer declining to grant refugee status or protected person status to the appellant, a citizen of the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea).

INTRODUCTION

[2] The appellant claims that, having defected from North Korea, he is now at risk of being killed by North Korean agencies in South Korea. He also claims to have a well-founded fear of being persecuted because of the cumulative impact of discrimination he encounters as a North Korean in South Korea. The Tribunal finds the appellant's account to be credible. It finds further that his fear is objectively well-founded, albeit on a different basis to that claimed, and his appeal is allowed.

This is an abridged version of the decision. Some particulars have been removed from or summarised in the decision pursuant to s151 of the Immigration Act 2009. Where this has occurred, it is indicated by square brackets.

[3] To address the statutory issues common to such appeals, the Tribunal will first outline the appellant's account. It will then assess the credibility of the evidence, before making findings of fact upon which the appeal is to be determined. The Tribunal will then outline the law governing such appeals, before assessing the appellant's appeal in light of its findings.

THE APPELLANT'S CASE

[4] The Tribunal heard in person from the appellant and two expert witnesses: one an interpreter, the other a psychologist. It also heard evidence by telephone from two fellow-members of a South Korean non-governmental organisation.

Evidence of the Appellant

[5] The appellant was raised with his younger brother in North Korea, near the border with China. His father held a commercial position of some minor status and his mother was a housewife. After leaving school in his late teens, the appellant completed a tertiary qualification and later found work as an accountant.

[6] Over time, the appellant became curious about the possibility of crossing into China. A friend had done so, found work and made some money. Early one year during the mid-2000s, the appellant left North Korea illegally with his friend. They crossed the heavily guarded Tuman river, by bribing a soldier. He helped them to navigate the traps and hazards placed to deter defectors and showed them where to cross. The appellant and his friend found work in a factory and, later, on a farm.

[7] While the appellant decided to remain in China when his friend returned to North Korea, late in the year he left, he did not last long alone. After returning to his family shortly afterwards, he was arrested early the following year. He later learned that his friend had been caught trying to return to China. Under interrogation, the friend had disclosed the appellant's name. As a result, the appellant was detained, interrogated and tortured. He remained in prison for approximately six months before being brought before a court. He was convicted of illegally crossing the North Korean border. He was given a sentence to reflect the six months he had already served in detention and was released. Following the appellant's conviction, his father lost his employment and has since been reduced to labouring work where he can find it.

[8] After spending some time recuperating from his experience in detention, the appellant decided that he had to leave North Korea permanently. Accompanied by another friend, he again bribed members of the military, which enabled them to cross the river into China (from a different starting point). Armed with his earlier experience, he contacted the farmer for whom he had previously worked. He then began to research how to get to South Korea. An agent told him how much he would have to pay, and he set about earning it in a nearby city, at a restaurant owned by a Korean-Chinese national. Life was not easy, and the appellant was perennially on-edge because of the risk of being identified and returned to North Korea.

[9] Over the next 18 months or so, the appellant earned half of the amount he needed. The broker agreed to accept that sum up front, on the basis that the appellant would pay the rest once he arrived in South Korea. He was one of a group of five people taken into and driven across Vietnam by bus, before being dropped at the Cambodian border. When border guards told the group that they would have to return to China, the appellant became distraught, to the point that one of the guards drew a pistol. The appellant grabbed the barrel, put it against his temple, and told the guard to shoot. The guards were sufficiently unnerved that they relented and allowed the appellant and his companions to pass. They made their way to Phnom Penh by bus, as they had been directed by the agent, and sought assistance at the South Korean Embassy. The journey from China had taken approximately 10 days.

[10] The appellant remained at the embassy for a short time before being flown to South Korea. He spent a period being debriefed by South Korean intelligence and was eventually released to the Hanawon centre, where North Koreans undergo a programme to help them to prepare for life in their new country. He was soon followed by a North Korean woman he had met in Cambodia. They had kept in contact and have been in a relationship ever since. After approximately three months, the appellant was released, provided with an apartment and given a lump sum of KRW3,000,000. He retained some for expenses and used the rest to repay most of what he owed to his agent. His partner joined him soon after and did likewise. The appellant found work as a general labourer.

[11] Like many defectors, the appellant was reticent about becoming too close to other North Koreans, for fear that they may be spies. However, during his journey from North Korea to South Korea, he had encountered several North Korean women who had been trafficked and sold into effective slavery. He was deeply

affected by what he learned of their experiences and developed a desire to help such people escape from China.

[12] The opportunity to do so arose in 2009. At Hanawon the appellant had met another North Korean, AA, who had known the appellant's father in North Korea. By 2009, AA had decided to go to China to help his son, who had also made it out of North Korea. The appellant decided to leave his employment and accompany AA. He learned the route and safe houses used to bring such people out of China. He was able to enter China using his South Korean passport. He would then contact brokers who had helped people to enter China from North Korea. He oversaw the escapees' passage out of China and across Vietnam as far as the border with Cambodia. There, they were passed to other brokers, as he had been. When necessary, border guards or officials were bribed, to circumvent the lack of travel documents.

[13] The appellant made that journey several times over the next three or four years and estimates that he assisted more than 50 such people. He barely covered his expenses and was supported by his wife throughout this period.

[14] Not long after the appellant began travelling to China, he was contacted by South Korean intelligence agents. He believes they must have been monitoring his telephone calls and his travel, because they were aware of his movements and his contact with people in China. They asked him to help gather intelligence about North Korea. The appellant agreed and was provided with sophisticated recording equipment. However, when he approached a contact in North Korea he was told that such an endeavour was too dangerous. He reported back to the South Korean agents, who asked him to gather what other intelligence he could, such as the nature of rumours circulating in North Korea, or market prices for basic commodities.

[15] There were no mobile telephone networks available to the public in North Korea. Contact was restricted to areas close to the Chinese border, where it was occasionally possible to capitalise on internet providers from China. However, the North Korean authorities were alert to the practice and anyone using a mobile telephone had to be careful. The appellant did not want to frighten his contacts, so he would try to elicit whatever information he could during his conversations without being too obvious. He would then pass on any information gathered.

[16] The birth of the appellant's first child in 2011 made him re-evaluate the risks he was taking. He decided that he could not continue to travel to China and only

made perhaps one or two more trips. Once it became apparent that he had ceased these activities, South Korean intelligence stopped contacting him.

[17] When the appellant's partner became pregnant again in 2012, they began to think about where they wanted to raise their children. Although they had managed to find accommodation and employment, they found it difficult to integrate socially in South Korea. They felt readily identifiable as North Korean and perceived that South Korean people looked down on them.

[18] One of several contacts the appellant spoke to told him he could get visas in Canada. He was told to book a package tour to Canada for the family, which he did. He was directed to leave the tour before the end and lodge a refugee claim on the false basis that they had travelled direct from North Korea. The appellant did not know what a refugee claim was but followed the directions he had been given. Unsurprisingly, the plan unravelled when it became apparent that they had not come directly from North Korea. The claim for refugee status failed. The appellant went through an appeal process to try to explain himself but met with no further success.

[19] By the time the family had to leave Canada in late 2014, the appellant's second child had been born. Returning to South Korea with no money or resources, the family settled in a tiny apartment. The appellant found work immediately in a restaurant and within approximately six months they were able to afford a slightly larger apartment. His partner had by then commenced a course aimed at qualifying as a healthcare assistant.

[20] Once back in South Korea, the appellant resumed his activities for a non-government organisation called "[XYZ organisation]". He first became associated with it in Canada, in 2012, when he met its founder, BB, also a North Korean defector. [Withheld].

[21] In mid-2015 the appellant saw an advertisement for a position at a food outlet in a market. He applied, was interviewed and was awarded the position. Over time he earned the confidence of his employer to the extent that the employer opened another branch elsewhere, leaving the appellant in charge of three staff. He remained in that employment until he left South Korea to come to New Zealand in mid-2018, by which time his partner had given birth to their third child.

[22] As for the appellant's family in North Korea, life became very difficult for his parents after his defection. After his father lost his job, his parents have survived

on money the appellant sends through a broker in North Korea. In the meantime, the appellant's brother has also made defected and made his way to South Korea. Meeting his brother again after more than a decade was an emotional experience for the appellant. They have remained in contact and his brother continues to visit the appellant's family in the appellant's absence.

[23] Throughout the appellant's time in South Korea, his mental health has fluctuated. He has seen various psychiatrists, who have prescribed medication to help him to cope. His levels of anxiety increased markedly from early in 2018, when he received the first of a series of anonymous threats by telephone. The first caller purported to know who the appellant was and accused him of being a traitor. The appellant paid little regard to the call. He decided that, given he was in South Korea, there was probably little to worry about.

[24] However, the first call was followed by a second, about a month later. When the caller threatened to kill him, the appellant became frightened. He undertook a complicated process to change his name and his Social Security number in South Korea, hoping to avoid further contact. Around the middle of the year, however, he received the first of two text messages which again accused him of being a traitor and of treason and threatened to kill him.

[25] The appellant became very distressed. After discussing his circumstances with his wife, he arranged to travel to New Zealand, where he claimed refugee and protected person status on arrival.

[26] After interviewing the appellant in September 2018, a refugee and protection officer of the Refugee Status Branch (now the Refugee Status Unit) issued a decision in April 2019, declining his claim for refugee and protected person status. It is from that decision that the appellant appeals.

Evidence of Jennifer Shin

[27] Ms Shin is a member of the New Zealand Society of translators and interpreters and has been engaged in that field in New Zealand since 1997. She has knowledge of both South Korean and North Korean dialects and provided a statement offering comment and context in connection with some aspects of the evidence that had caused concern to the Refugee Status Branch when it declined the appellant's application for refugee and protected person status.

[28] Ms Shin explained that the structure of Korean language is very different from European languages, particularly in terms of grammar. Various complexities

can arise when translated into English. In addition, since the separation of North and South Korea in the 1950s, the language has evolved differently, and both states now have distinct dialects. She believes that this may have contributed to some ambiguities in translations that had concerned the Refugee Status Branch.

Evidence of BB, Director of XYZ Organisation

[29] BB provided a statement in support of the appellant and gave oral evidence before the Tribunal, by telephone.

[30] BB was born in China but raised in North Korea from the time he was a young child. After being falsely accused of being a South Korean spy, he served three years in a detention camp. He left North Korea in the early part of this century, arrived in South Korea shortly after and has since forged a profile as a defender of human rights. He is the director of XYZ organisation, the non-governmental organisation described above. He has also lobbied the United Nations and various Western governments to agitate for information to be provided by North Korea about the identity and welfare of people held in political detention camps.

[31] BB [withheld] corroborated the appellant's account in confirming that they met when he travelled to Canada in 2012, seeking donations for his organisation. Since the appellant's return to South Korea from Canada in 2014, he has volunteered for XYZ organisation. BB spoke of the difficulties experienced by North Koreans who settle in the South. They tend to be poor and they are subjected to severe discrimination because they look and sound different. He stated that there is increasing resentment in the South about the cost of resettlement borne by the taxpayer.

[32] Propaganda flows both ways across the border, and many North Koreans living in South Korea are the subject of threats in various guises. These can be very frightening. BB was not aware of threats made to employees or volunteers of XYZ organisation but had heard of quite a few other people having been lured back to China with the promise of reuniting with family from North Korea, only to be abducted and repatriated. [Withheld].

[33] BB has received direct threats but stated that people such as himself, who have a high profile and would be publicly identified as targets by the North, tend to be well protected by the South Korean police because of the embarrassment that might be caused should they come to harm. However, there have been casualties. He referred to a South Korean pastor, Patrick Kim, who had attracted

a degree of notoriety helping Christian coverts escape North Korea. He was killed in 2011 in a Chinese town near the border of North Korea, probably by poisonous dart.

[34] In BB's view, people without a high profile would struggle to obtain protection. The police used to allocate one police officer to 30 defectors, but the ratio is now much higher. He believes that the police would not listen if the appellant were to complain to them or would ask him for hard evidence. He is aware of one case when the police said that one text would not enable them to do anything and he does not believe the police would really be able to protect anyone.

Evidence of AA, Deputy Director of XYZ Organisation

[35] AA also provided a statement in support of the appellant's appeal, and joined the appeal hearing by telephone. He left North Korea illegally in 2008 because he had proselytised as a Christian in North Korea. After his departure, his wife and daughter were sent to prison camps.

[36] AA and the appellant met in South Korea, during orientation at Hanawon. It became apparent that he knew the appellant's father because they were from the same town. He and the appellant worked together as "brokers", travelling to China to bring North Korean defectors to South Korea, including AA's son, who escaped and followed his father to China.

[37] AA confirmed that he has received many threats by text over a long period, from as long ago as 2009. He is not aware of anyone being harmed, other than high-profile people.

Evidence of Ted Wotherspoon, Psychologist

[38] Mr Wotherspoon practises as a psychologist in Auckland, having been registered as such for more than 40 years. For the past eight years he has worked with refugees. Many have manifested post-traumatic stress disorder (PTSD) and associated mental health issues such as depression and anxiety. He has specific experience in treating patients who have been tortured, albeit not from North Korea.

[39] In August 2019, counsel for the appellant instructed Mr Wotherspoon to address the appellant's psychological and emotional state, and to assess the likely impact upon his mental health should he be required to return to South Korea. To

that end, he met with the appellant for three 90-minute sessions, all with the assistance of an interpreter. He described the appellant as friendly and cooperative but stated that he "frequently struggled to maintain control of his emotions, particularly when recounting the experiences of torture and noting safety issues for his family in South Korea".

[40] When Mr Wotherspoon and the appellant first met, the appellant was taking medication to address difficulty sleeping, depression, headaches, palpitations and anxiety. Mr Wotherspoon has seen a letter from the general practitioner caring for the appellant in New Zealand, indicating that the appellant had been treated by a psychiatrist while he was still in South Korea, for PTSD. He explored the diagnosis of PTSD carefully, through close questioning, repeated over the various sessions. In his opinion, the appellant continues to experience symptoms consistent with PTSD. He displays alterations in cognition and mood that are associated with trauma. He has intrusive dreams about traumatic events and intense and prolonged psychological stress experienced as acute flashbacks. He experiences dissociative episodes during which he is removed from reality and is effectively returning to a particular event.

[41] The appellant's recollection of what happened to him during his incarceration in a North Korean prison was clear and consistent and his emotional state during these sessions was entirely consistent with his claim to have been mistreated but revisiting his experiences "had the effect of re-traumatising him".

[42] Mr Wotherspoon noted the appellant's persistent negative emotional state, including fear, anger, horror and diminished interest in activities once important to him, difficulty concentrating and sleeping and difficulty experiencing positive emotions. He appeared bewildered by what is happening to him and conveyed a sense of helplessness and hopelessness about aspects of his future, including concerns about the welfare and safety of his family in South Korea.

[43] If the appellant were to remain in New Zealand, Mr Wotherspoon would seek to explore appropriate counselling services. He referred to a relatively new approach, the aim of which would be to promote what Mr Wotherspoon described as post-traumatic growth, with a focus on a degree of hope. His intention would be to help the appellant to begin to cope with his symptoms. This would include continued access to medication but would also involve a focus on obtaining or maintaining employment, that would occupy his time and provide him with social opportunities. He would also seek to help him improve his sleep, with the combined impact of these strategies ultimately leading the symptoms to subside.

[44] Further aspects of Mr Wotherspoon's evidence are traversed in the assessment of the appellant's appeal, below.

Material and Submissions Received

[45] The Tribunal has been provided with a wide range of material relating to the appeal. Much of it appears on the Refugee Status Branch file relating to the appellant's unsuccessful claim, copies of which have been made available to the Tribunal and to the appellant.

[46] Various other materials have since been provided. On 7 August 2019, counsel for the appellant forwarded a letter dated 5 August 2019 from a general practitioner caring for the appellant. In her opinion, the appellant was "struggling with anxiety and insomnia". She commenced a treatment plan to address the appellant's symptoms, which he reported to be "tolerable" when he was taking medication.

[47] On 20 September 2019, the appellant lodged the report dated 13 September 2019 from Mr Wotherspoon, and a statement dated 20 September 2019 from AA, together with a certified translation.

[48] Counsel lodged opening submissions and supporting country information on 15 October 2019, along with the following documents:

(a) an updated statement from the appellant dated 14 October 2019;

(b) a statement from Ms Shin, dated 14 October 2019;

(c) a certified translation of an email to counsel for the appellant, dated 11 September 2019, from CC, the appellant's brother, confirming [withheld], in a very broad sense, basic details of the appellants account, including the negative impact of the threats received by the appellant on the appellants mental health; and

(d) copies of the biodata pages from the South Korean passports of AA, BB, and CC.

[49] On the day of the appeal hearing, counsel lodged an updated copy of Mr Wotherspoon's report, bearing several minor but relevant corrections.

[50] On 25 October 2019, counsel forwarded a copy of an academic article concerning community mental health services in Korea.

ASSESSMENT

[51] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

(a) a refugee under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention" or "the Convention") (section 129); and

(b) a protected person under the 1984 *Convention Against Torture* (section 130); and

(c) a protected person under the 1966 *International Covenant on Civil and Political Rights* ("the ICCPR") (section 131).

[52] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That in turn requires the Tribunal to determine whether the appellant's account is credible.

Credibility

[53] In summary, the Tribunal finds the appellant to be a credible witness. The relevant aspects of his account were relayed consistently and in detail and he has produced additional testimony from supporting witnesses whose evidence is consistent with his claims. His account is also plausible in light of country information available in respect of North Korea, relevant passages of which are outlined below.

[54] The Tribunal has also had the benefit of hearing from Mr Wotherspoon. While he is in no position to state that the appellant was mistreated while in detention in North Korea, his professional opinion is that the appellant's presentation is consistent with his claims to have been mistreated, and with his claim to be in fear for his life because of threats advanced by telephone and text. Again, Mr Wotherspoon's evidence was detailed and nuanced. The Tribunal accepts that he has relevant expertise and is satisfied that it is appropriate to afford weight to his evidence.

[55] As to the appellant's identity, he has produced various documents substantiating his claim to have arrived in South Korea as a North Korean national. These include a copy of the appellant's North Korean refugee registration

certificate, issued under Article 8 of South Korea's North Korean Refugees Protection and Settlement Support Act 1997, a further copy of that certificate issued under the appellant's changed name and copies of the appellant's South Korean resident registration cards (again, issued under his former and his current names). He has also produced copies of two South Korean passports that declare him to be a national of South Korea.

[56] As to the threats made against him, the appellant has produced certified copies of translations of the text messages he received in mid-2018.

[57] In reaching its conclusion as to the appellant's credibility, the Tribunal has not overlooked the fact that he made a false refugee claim in Canada in 2012. Conversely, he has admitted as much. In the context of the findings already outlined, the appellant's actions in 2012 do not outweigh the remainder of the evidence before the Tribunal.

Summary of the facts as found

[58] The Tribunal therefore finds that the appellant is a South Korean citizen, born in North Korea. He left North Korea illegally with a friend in the hope of an adventure of sorts and in the hope of earning some money. His venture came to the attention of the North Korean authorities and he was eventually charged and convicted of illegal departure from North Korea. The appellant spent approximately six months detained in a prison where he was interrogated and, repeatedly, seriously mistreated.

[59] It is accepted that the appellant left North Korea, again illegally, and that he arrived in South Korea after approximately 18 months. He entered a relationship with his partner, also formerly a national of North Korea and now a citizen of South Korea, with whom he has three children. On several occasions, between approximately 2009-2012, he travelled from South Korea to China, where he assisted North Korean nationals in their endeavour to enter South Korea, via Vietnam and Cambodia. He received sufficient payment for those efforts to cover his expenses and living costs.

[60] The appellant travelled to Canada in 2012, where he made a false claim for refugee status. It was unsuccessful. He returned to South Korea where, between 2014 and 2018, he assisted XYZ organisation, a non-governmental organisation. He was approached by South Korean intelligence agents, to whom he was periodically able to pass general information gleaned from telephone conversations with contacts in North Korea.

[61] In 2018, the appellant began to receive threats by mobile telephone, through voice and text. The author(s) of the threats is/are unknown but they almost certainly derive from an agent of the state of North Korea. The stress of these calls has adversely affected the appellant's mental health, which was already fragile due to the prolonged mistreatment he experienced while in detention in North Korea in 2005. He is diagnosed with PTSD, anxiety and depression.

[62] It is on this basis that the appellant's claim is to be assessed.

The Refugee Convention

[63] Section 129(1) of the Act provides that:

> A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.

[64] Article 1A(2) of the Refugee Convention provides that a refugee is a 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.

[65] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[66] For the purposes of refugee determination, "being persecuted" requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection – see *DS (Iran)* [2016] NZIPT 800788 at [114]–[130] and [177]–[183].

[67] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration*

and Ethnic Affairs (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

[68] While of North Korean origin, the appellant is now also a citizen of South Korea. The significance of possessing dual nationality is that Article 1A(2) of the Refugee Convention provides that the appellant must establish a well-founded fear of being persecuted in each country, and the appeal is therefore assessed on that basis.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to North Korea?

Country information

[69] Little space need be devoted to this aspect of the appeal. The environment in North Korea is encapsulated in the report of the United Nations General Assembly, *Situation of Human Rights in the Democratic People's Republic of Korea*, 26 September 2016) A/71/402 at [11]:

> The human rights situation in the Democratic People's Republic of Korea was most comprehensively addressed by the commission of inquiry on human rights in the Democratic People's Republic of Korea. In its report, issued in February 2014, the commission concluded that "systematic, widespread and gross violations of human rights have been, and are being, committed by the Democratic People's Republic of Korea, its institutions and officials", and that many of them may "constitute crimes against humanity" (A/HRC/25/CRP.1, para. 1211). The commission highlighted six categories of human rights violations: violations of the freedoms of thought, expression and religion; discrimination on the basis of State-assigned social class, gender and disability; violations of the freedom of movement and residence, including the freedom to leave one's own country; violations of the right to food and related aspects of the right to life; arbitrary detention, torture, executions, enforced disappearance and political prison camps; and enforced disappearance of persons from other countries, including through abduction.

[70] There is no evidence that conditions have improved. A contemporary report records that the North Korean government executes political prisoners and opponents of the government, government officials and others accused of "anti-state" or "anti-nation" crimes, which include plotting to overthrow the state; acts of terrorism and treason. It cites non-governmental organisation and press reports indicating that border guards have orders to shoot to kill individuals leaving the country without permission and records that the government executes "forcibly returned asylum seekers": United States Department of State *2018 Country*

Reports on Human Rights Practices: Democratic People's Republic of Korea (13 March 2019) (the DOS report) at p2.

[71] With respect to the appellant, the Tribunal has accepted that, having left North Korea illegally in 2005, he was detained and tortured on return. The lingering impact of his mistreatment is assessed below but, suffice to say, it amounted to serious harm in breach of his right to be free from torture and free from cruel, inhuman and degrading treatment under Article 7 of the ICCPR.

[72] Given the country information outlined, there is no reason to believe that the appellant's experience would be significantly different if he were to return there now. He would be at risk of being arbitrarily detained and, while in detention, subjected to cruel, inhuman or degrading treatment, or of being executed. The risk of serious harm is neither remote nor speculative.

[73] The appellant has a well-founded fear of being persecuted in North Korea. It arises because he would be perceived to be a traitor to the state, having left illegally. The state would impute to him an adverse political opinion and his predicament arises for a Convention reason.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to South Korea?

[74] The appellant's claim to be at risk of being persecuted in South Korea is formulated in various guises, each of which will be addressed below.

Whether there is a risk of physical harm

[75] First, the appellant claims to be at risk from the North Korean agents who have been threatening him. There is country information confirming that the North Korean government has targeted and killed its former nationals, in South Korea and in third countries. However, the victims were individuals with high profiles, whose deaths were likely to receive high publicity.

[76] It is submitted on behalf of the appellant that he has acquired such a profile, having assisted in the passage of North Koreans from China, having provided rudimentary information to the South Korean intelligence service, and because of his contributions to XYZ organisation.

[77] The Tribunal does not accept that submission. There are said to be some 30,000 former North Korean citizens now living in South Korea. Most, like the

appellant, have no real profile. While contact of the threatening nature described by the appellant is undoubtedly frightening, it is also relatively commonplace, unlike instances of targeted harm. The deputy director of XYZ organisation stated that he had been receiving such calls since 2009, without ill-effect.

[78] The real efficacy of such a tactic is that it is easily implemented and can have a negative psychological impact, as exemplified by the appellant's experience. However, the Tribunal is not satisfied that receiving such calls is indicative that he is at risk of actual, physical harm. No attempt was made to harm him between February 2018, when the first such call was received, and his departure from South Korea more than six months later. While the Tribunal accepts that he is genuinely fearful, the risk of serious physical harm is not objectively well-founded.

Whether there is discrimination rising to the level of serious harm

[79] Second, the appellant claims to be at risk of serious harm arising from the level of discrimination to which he will be subjected upon return.

[80] Similar issues were addressed by a different panel of the Tribunal in *AL (South Korea)* [2016] NZIPT 800858. There, as here, the appellant had been recognised in South Korea as a protected person under South Korea's North Korean Refugees Protection and Settlement Support Act 1997. That Act aims to provide for such protection and support as is necessary to help residents who defect from North Korea to adapt to "political, economic, social and cultural" life in South Korea. It provides for the establishment of facilities to provide care and settlement support (Article 10), social adaptation education (Article 15), vocational training (Article 16), employment-related support (Article 17), accommodation support (Article 20) and the payment of a settlement fund (Article 21).

[81] Notwithstanding that considerable level of support, integration from North into South Korean society is fraught with difficulty, both practical and psychological. As one report noted, North Koreans are readily recognisable in South Korea. Having endured a life of poor nutrition and medical care, they are "sicker and poorer" than their counterparts from South Korea. Defectors face social stereotyping and "an array of prejudices about Northerners that developed during the decades when both sides demonised each other": International Crisis Group *Strangers at Home, North Koreans in the South* (14 July 2011) at pp 11 and 17.

[82] In *AL (South Korea)* the Tribunal cited a report which concluded that prejudice and negative stereotyping of those from the North is widespread and entrenched in the South: J Sung and M Go "Resettling in South Korea: Challenges for Young North Korean Refugees" *Asan Institute for Policy Studies* (8 August 2014). The authors of that report postulate that, if anything, this is worsening. With the passage of time since the ceasefire in 1954, fewer South Koreans express a "degree of closeness" towards the North Korean people. This is probably because, after more than half a century of separation, younger people do not consider North Koreans to be part of the same nation. As a result, North Korean refugees are exposed to "mistrust, unfair treatment, ostracism and discrimination, even outright hostility", all of which undermines their ability to resettle (at pp10-11).

[83] Many defectors are ill-equipped to cope with new-found independence and choice, which can be "overwhelming". These difficulties are compounded by cultural conflict in workplaces in the form of differences in language, as those from the north have a distinctive accent and, as Ms Shin stated, their vocabulary and grammar is different. Together with difficulties in interpersonal communication, this has a negative impact on their ability to cope with the demands of a competitive employment market, where a significant proportion remain unemployed or confined to low skilled work: see J Sung and M Go, above.

[84] The Tribunal in *AL (South Korea)* found, at [89], that the particular vulnerabilities of that appellant meant that the general societal discrimination, ostracism and occasional workplace discrimination he would prospectively experience would, for him, amount to degrading treatment, in breach of his internationally recognised human right to be free from such treatment.

[85] Counsel submits that the appellant's circumstances are akin to those of the appellant in *AL (South Korea)*. However, the very specific factors relevant to that appeal differ from the circumstances of the present appellant in various significant respects. The present appellant has never had difficulty finding or keeping work involving a degree of skill, which has made him a valued and trusted employee. He has had some level of engagement with social networks such as XYZ organisation and, perhaps most significantly, he has a robust and meaningful relationship with his partner. Together they have three children who are South Korean (by birth or, in the case of the middle child, by upbringing).

[86] The appellant in *AL (South Korea)* lacked all these characteristics. While none of them mean that the present appellant will be immune from discrimination

because of his North Korean origin, they do mean that, for him, the level of harm caused will not rise sufficiently to meet the level of “being persecuted”.

Whether the threats amount to cruel, inhuman or degrading treatment

[87] The third aspect of the appeal revolves around the appellant’s mental health. It is submitted that there is a lack of integrated mental health services available in South Korea and that this will be to the appellant’s detriment upon his return.

[88] In that regard, the International Crisis Group report observes that, culturally, “Koreans tend to suppress and tolerate mental health problems rather than get treatment” at p11. It also states that there are insufficient facilities and systems for identifying and treating disorders. In this respect it echoed a 2006 report stating that, while Korea had sufficient mental health professionals, mental health services are not sufficiently integrated in the country’s primary health care system. This perpetuates a high level of social stigma around mental illness: World Health Organisation *WHO-AIMS Report on Mental Health System in Republic of Korea: A Report of the Assessment of the Mental Health System in Republic of Korea using the World Health Organization – Assessment Instrument for Mental Health Systems* (2006) at p25.

[89] This accords with the impressions Mr Wotherspoon had gleaned from South Korean clients he has treated in the past (although they did not have a refugee background). While he did not claim to be an expert on the services available in South Korea, his understanding was that mental health difficulties are not well understood or holistically treated there.

[90] It is fair to assume that such difficulties may be heightened for former North Korean nationals. According to the International Crisis Group report, one study found that nearly 30 per cent of defectors have PTSD, while another identified it among “at least half of those tested”, p11. Various studies also suggest high rates of depression, though the true extent of the problem is unclear (at pp11-12). The International Crisis Group report notes that many defectors do not know how to access treatment even if they understand that they need it.

[91] While all of this is relevant to the appellant’s circumstances if he were to return to South Korea, in truth his difficulties are more directly felt.

[92] The Tribunal has accepted that the appellant is a defector from North Korea. It has also accepted that, having previously left North Korea and returned,

he was detained and subjected to torture for a prolonged period while in detention. In the wake of that experience, the appellant has developed PTSD, depression and anxiety. While these disorders have long been manifest, he has managed to cope with them for much of his adult life. His ability to do so has no doubt been contributed to by the social support of his partner and the protective factor of his children, his ability to find and retain employment and his access to medication.

[93] Since early 2018, the balance has altered. He has received a series of anonymous threats to harm or kill him.

[94] Most people would find it inherently unsettling to receive such threats, the purpose of which is presumably to frighten the recipient and to undermine their psychological wellbeing.

[95] However, the precise impact will depend upon the individual. For example, AA stated that he has received such threats periodically for some years, yet he did not suggest that he was unduly affected. For others, the impact may be profoundly different. The Tribunal is satisfied that the appellant is such a person.

[96] The Tribunal accepts that the onset of the threats at the beginning of 2018 was followed by a marked decline in the appellant's mental health. The threats have exacerbated the symptoms of his PTSD. In Mr Wotherspoon's view it is entirely plausible that receiving further threats of the nature he described could retraumatise the appellant. This would reactivate the symptoms of his PTSD and his mental health would decline rapidly. He would experience dissociative episodes where he is again experiencing the trauma of the mistreatment to which he was subjected. Irrespective of whether there was any objective risk to the appellant's safety, his fear would be subjectively genuine. Given the levels of distress and hopelessness noted, Mr Wotherspoon was inclined to take seriously the appellant's prior expression of suicidal intent, and he regarded the risk that the appellant might self-harm as palpable.

[97] To place that risk within the context of South Korea in general, according to the International Crisis Group report, suicide was the fourth highest cause of death in South Korea. During the period between 1990-2006, when the rate of suicide declined by 20 percent across the OECD, it increased by 170 per cent in South Korea. By 2009, it was the highest in the OECD.

[98] Mr Wotherspoon agreed that the appellant's family may have been a protective element against self-harm in the past. However, in his view, that protective element could diminish to the point that it is no longer adequate.

[99] By way of analogy, he considered the appellant's actions at the Cambodian border, while making his way to South Korea. When faced with possible return to North Korea, the appellant had begged the border guards to shoot him. Given that they had drawn firearms at the time, that was no idle gesture, but was likely a response to a triggering event akin to further threats.

[100] If the appellant was to return to South Korea, there is a real chance that his return will become apparent to the wider North Korean community and that he will receive further threats. Because of his history as a victim of torture and given the combination of disorders with which he has to cope, receiving ongoing anonymous threats of the type he received in 2018 would be likely to increase his anxiety, trigger his PTSD, lead to flashbacks and cause his general mental health to deteriorate markedly. It is foreseeable that these would lead him to self-harm or suicide.

[101] For this appellant, such threats would amount to cruel, inhuman and degrading treatment in breach of his right to be free from such by virtue of Article 7 of the ICCPR. For him, the serious harm arises not from the possibility that the threats will be carried out, but from the impact they have upon his mental health. The state of South Korea is, in truth, incapable of protecting the appellant from such threats and nor is he likely to avoid them by relocating within South Korea.

[102] Objectively, on the facts as found, there is a real chance of the appellant being persecuted if returned to South Korea.

Is there a Convention reason for the persecution?

[103] The appellant is at risk of being persecuted because of his North Korean nationality and because his action in leaving North Korea illegally causes the state of North Korea to impute to him an adverse political opinion. There is a Convention reason for the persecution.

Conclusion on Inclusion under Article 1A(2) of the Refugee Convention

[104] For the reasons given, the Tribunal finds that the appellant has a well-founded fear of being persecuted in both North Korea and South Korea, for reason of his political opinion and nationality. He is entitled to be recognised as a refugee under section 129 of the Act.

Exclusion

[105] It is trite that the Refugee Convention generally extends protection to those at risk of being persecuted for a Convention reason. As the New Zealand Supreme Court observed in *Attorney General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [1]:

> There are, however, persons who are excluded by the Convention from receiving its protection because there are serious reasons for considering they committed specified criminal acts before arriving in the country in which they seek refuge.

[106] The parameters of exclusion are outlined in Article 1F of the Refugee Convention, which states that:

> F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

[107] Article 1F seeks to maintain of "the credibility of the protection system", by the exclusion of those undeserving of protection as refugees: Case C-57/09 and C-101/09 *Bundesrepublik Deutschland v B and D* [2010] ECR I-10979. As UNHCR states, in the *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* HCR/GIP/03/05 (4 September 2003):

> 2. The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts....

[108] On the face of this appeal, Article 1F(b) may be engaged because the appellant's evidence was that, on 9 or 10 occasions between 2009 and 2012, he entered China to assist former nationals of North Korea to leave China and enter Vietnam, to reach South Korea via its Embassy in Cambodia.

[109] The Tribunal has not considered the criminal codes of China or Vietnam. For present purposes, however, it assumes that the appellant may have committed offences in both of those countries. While the people assisted by the

appellant had already entered China unlawfully, he helped them to leave China unlawfully, and to enter Vietnam, again unlawfully. He agreed that, on occasion, he had bribed border officials in one or both of those countries to circumvent the lack of necessary travel documents for the people accompanying him. It may also be that the appellant has committed acts akin to people-smuggling, similar to the offence created in New Zealand under section 98C of the Crimes Act 1961.

[110] Ordinarily, the Tribunal would need to examine whether there were serious reasons for considering that the appellant had committed such offences outside New Zealand, and to assess whether the offences were properly characterised as "serious" crimes, in terms of Article 1F(b).

[111] No such analysis is required here, for the simple reason that, even assuming all other elements of Article 1F(b) were established, the offending cannot be characterised as "non-political".

Meaning of "non-political crime"

[112] One of the purposes of excluding those who have committed a serious non-political crime from the surrogate protection offered by the Refugee Convention is "to ensure those who commit serious non-political crimes do not avoid legitimate prosecution by availing themselves of Convention protection" *Attorney General v Tamil X* at [82].

[113] The Supreme Court examined the origin of the political crimes exception and linked it to extradition law, which developed through provisions included in bilateral extradition treaties because states wanted a degree of flexibility when presented with a request by another state for extradition to enforce its criminal law, which "might be seen as a pretext for persecution of a political dissident by an unfair trial and/or excessive punishment": *Attorney General v Tamil X* at [85]. This exception reflected a "respect felt" for those seeking refuge from "dictatorships".

[114] While noting that origin, the Supreme Court also observed that there is nothing in the text of the Refugee Convention to indicate that the reference to non-political crime in Article 1F(b) is to be understood in the same way as in extradition law. Nor does the Refugee Convention contain any definition of when a serious crime is "non-political" (at [87]).

[115] The Supreme Court obtained "valuable guidance" on whether a crime is political in the sense intended by Article 1F(b), from the following passage from

Goodwin-Gill and McAdam: G Goodwin-Gill and J McAdam *The Refugee in International Law* (Oxford University Press, Oxford, 2007) at p177:

> The nature and purpose of the offence require examination, including whether it was committed out of genuine political motives or merely for personal reasons or gain, whether it was directed towards a modification of the political organization or the very structure of the State, and whether there is a close and direct causal link between the crime committed and its alleged political purpose and object. The political element should in principle outweigh the common law character of the offence, which may not be the case if the acts committed are grossly disproportionate to the objective, or are of an atrocious or barbarous nature.

[116] The Supreme Court held that the manner in which the “context, methods, motivation and proportionality of a crime relate to a claimant’s political objectives” are important in determining whether a serious crime committed by an appellant was of a political nature (at [90]). It continued:

> This requires an exercise of judgment on whether, in all the circumstances, the character of the offending is predominantly political or is rather that of an ordinary common law crime.

[117] This essentially mirrors the view taken by the Tribunal and its predecessor, the Refugee Status Appeals Authority, since the 1990s. See, for example, *Refugee Appeal No 29/91* (17 February 1992).

Assessment

[118] The appellant’s actions were undertaken in a particular context. He is a national of North Korea, whose citizens expose themselves to the risk of arbitrary criminal sanction and severe physical mistreatment if they attempt to leave North Korea without permission from the state. Permission is not easily obtained.

[119] It is also apparent that North Korean refugees and asylum seekers living illegally in China are vulnerable to trafficking and, if discovered by the Chinese authorities, are liable to be forcibly returned to North Korea “where they are subject to harsh punishment, including forced labour in labour camps … or death”; see *Trafficking in Persons Report: Democratic People’s Republic of Korea* (covering April 2018 to March 2019) (20 June 2019).

[120] Other articles indicate that China appears to have a policy aimed at deterring North Koreans from crossing the border. The Chinese government forcibly returns North Korean refugees “to face torture, forced labour, sexual abuse, and worse”: S Richardson “China Detains 7 More North Korean Refugees” *Human Rights Watch* (4 April 2018).

[121] The appellant's motivation arose from his own experience. Having left North Korea once as a young man, he was detained and tortured even after he had returned of his own volition. Having endured that indignity, he took the drastic step of leaving the country of his birth, his parents and his only sibling, knowing that he could never return and that he may never see his family members again.

[122] The appellant's actions were not aimed at the movement of people *per se*. He sought to assist citizens of North Korea who, if detected by the Chinese authorities, would almost inevitably be returned to face serious mistreatment in North Korea. Their act of departing is seen as an inherently political act. He was not acting as a general broker to enable clients to seek asylum in any some indeterminate Western nation. He was helping North Koreans undertake the same journey he had undertaken, with a view to relocating to South Korea, where they are already regarded as citizens. His first endeavour to that end was undertaken in support of AA, the deputy-director of XYZ organisation, with whom he had been through orientation at Hanawon. AA had been forced to flee North Korea, where his wife and daughter were subsequently sent to labour camps. He had travelled to China to escort his son, who had escaped.

[123] As to the consequences of the appellant's actions, the Tribunal does not seek to trivialising the actions of those who circumvent the efforts of any independent state to control its border. However, there is no evidence that the appellant's actions caused damage to property or harm to people, civilian or otherwise. His motivation arose out of a particular political context. His methods were proportionate to the political end that he embraced.

Conclusion on Exclusion Under Article 1F(b)

[124] The Tribunal is not satisfied that there are serious reasons for considering that the appellant "has committed a serious non-political crime outside [New Zealand] prior to his admission to [New Zealand] as a refugee" because any crime he committed was of a political kind.

[125] Accordingly, the appellant is not excluded from the protection of the Refugee Convention under Article 1F(b) of that Convention.

Conclusion on Whether the Appellant is a Refugee

[126] The appellant has a well-founded fear of being persecuted for a Convention reason if he is returned to North Korea, or to South Korea. He is entitled to be recognised as a refugee under section 129 of the Act.

The Convention Against Torture and the ICCPR

[127] Section 130(1) of the Act provides that:

> A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

[128] Section 131 of the Act provides that:

> (1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
>
> ...
>
> (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.

Conclusion on Claims under Convention Against Torture and ICCPR

[129] The appellant is recognised as a refugee. Under section 129(2) of the Act (the exceptions to which do not apply) he cannot be deported from New Zealand. This is in accordance with New Zealand's *non-refoulement* obligation under Article 33 of the Refugee Convention.

[130] Accordingly, there are no substantial grounds for believing that he would be in danger of being subjected to torture if deported from New Zealand. Nor are there grounds for believing that he would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.

[131] The appellant does not require protection under the *Convention Against Torture* or under the ICPPR. The appellant is not a protected person within the meaning of either section 130(1) or section 131(1) of the Act.

CONCLUSION

[132] For the foregoing reasons, the Tribunal finds that the appellant:

(a) is a refugee within the meaning of the Refugee Convention;

(b) is not a protected person within the meaning of the *Convention Against Torture*;

(c) is not a protected person within the meaning of the *International Covenant on Civil and Political Rights*.

[133] The appeal is allowed.

Order as to Depersonalised Research Copy

[134] Pursuant to clause 19 of Schedule 2 of the Immigration Act 2009, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellant's name and any particulars likely to lead to the identification of the appellant.

Order as to Abridgement of Parts of Research Copy

[135] The disclosure of parts of this decision beyond the parties (and those to whom disclosure is permitted by section 151(2)) would tend to identify the appellant and/or be likely to endanger the safety of the appellant or others.

[136] Pursuant to clause 19 of Schedule 2 of the Act, the Tribunal orders that, until further order, parts of paragraphs [20], [31], [32] and [48(c)] are to be withheld from the research copy of this decision.

"A N Molloy"
A N Molloy
Member

Certified to be the Research Copy released for publication.

A N Molloy
Member