071283924 [2007] RRTA 98 (29 May 2007)

DECISION RECORD

RRT CASE NUMBER:	071283924
DIAC REFERENCE(S):	CLF2001/28636 CLF2004/56249 CLF2007/19897
COUNTRY OF REFERENCE:	Korea, Dem Peoples Rep of
TRIBUNAL MEMBER:	Antoinette Younes
DATE DECISION SIGNED:	29 May 2007
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

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

The applicant, who claims to be a citizen of Korea, Dem Peoples Rep, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. He was granted a temporary protection visa and he applied for a further protection visa. The delegate decided to refuse to grant a further protection visa and the applicant was granted a Return visa. In a letter, which was obtained by the Tribunal from the applicant in response to a s.424A letter, the Department advised the applicant that the Minister had decided that it was in the public interest to allow him to apply again for a protection visa. The applicant lodged a further application for a protection visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights by letter..

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

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.

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 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).

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

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.

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.

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.

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)). The expression "serious harm" includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase "for reasons of" serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant's fear of persecution for a Convention reason must be a "well-founded" fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a "well-founded fear" of persecution under the Convention if they have genuine fear founded upon a "real chance" of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A "real chance" is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

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.

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.

Convention cessation - Article 1C

The definition of a refugee in Article 1A of the Convention needs to be read in the context of the succeeding sections of Article 1, including section C, which sets out the circumstances in which the Convention ceases to apply to a person who has previously been recognised as a refugee under Article 1A.

Paragraphs (5) and (6) of Article 1C provide for cessation of refugee status due to changed circumstances in the refugees country. Article 1C(5) applies to nationals who, because the circumstances in connection with which they were recognised as refugees have ceased to exist, can no longer continue to refuse to avail themselves of the protection of their country of nationality. Article 1C(6) applies to stateless refugees who, because the circumstances in connection with which they were recognised as refugees have ceased to exist, are able to return to the country of their former habitual residence.

Thus, Articles 1A(2) and 1C(5) and (6) turn upon the same basic notion: protection is afforded to persons in relevant need, that is, persons who have a well-founded fear of being persecuted, for Convention reasons, in the country or countries in respect of which they have a right or ability to access: *NBGM v MIMA* (2006)231 ALR 380at [44] citing *NBGM v MIMIA* (2004) 84 ALD 40 per Emmett J.

If a non-citizen, before entering Australia, suffered persecution or had a well-founded fear of it in their country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will probably continue to be one to whom Australia has protection obligations:

If a non-citizen, before entering Australia, suffered persecution or had a well-founded fear of it in their country, unless there have been real and ameliorative changes that are unlikely to be reversed in the reasonably foreseeable future, then the person will probably continue to be one to whom Australia has protection obligations: *MIMIA v QAAH* of 2004(2006) 231 ALR 340 at [39]; see also *Chanat* 391, 399 and 406.

Protection obligations

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

person to whom Australia has protection obligations, even if they might satisfy the Convention definition of "refugee", because of the availability of protection in another country.

In December 1999 the *Border Protection Legislation Amendment Act* 1999 introduced statutory qualifications to Australia's protection obligations in circumstances where protection was available in a country other than Australia. According to the Second Reading Speech, the amendments to the Act were aimed at ensuring "*that only those who most need [Australia's] assistance - those with no other country to turn to are able to enter [Australia's] protection system*" (Hansard, Senate, 25 November 1999, pp.10668-9). The amendments included new provisions of s.36: specifically subsections (3)-(7), which are applicable to all protection visa applications made on or after 16 December 1999.

The substantive amendments to s.36 of the Act are contained in subsections (3), (4) and (5), which 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.

Section 36(3) thus defines those persons to whom Australia is taken not to have protection obligations. It applies in relation to any country apart from Australia, including countries of which the non-citizen is a national, other than a country where the applicant has a well-founded fear of being persecuted for a Convention reason, or a country that the applicant has a well-founded fear would return him or her to another country where he or she would be persecuted for a Convention reason. In short, under these provisions, Australia does not owe protection obligations to a person who:

- has a right to enter and reside in any other country - whether permanently or temporarily; and
- has not taken all possible steps to avail him/herself of that right; and
- does not have a well-founded fear of Convention based persecution in that country; and
- does not have a well-founded fear of *refoulement* from the other country to a country where they have a well-founded fear of Convention based persecution.

The right to which s.36(3) refers is not merely a right to enter. It must be a right to enter and reside (*WAGH v MIMIA* (2003) 131 FCR 269 per Hill J at [64]). "*Reside*" in its usual dictionary sense means "*to dwell permanently or for a considerable time; have one's abode for a time*". *(The Macquarie Dictionary*, revised 3rd edition). Justice Wilcox has observed (in a different context) that there is a number of decisions, arising in various contexts, relating to the legal concept of residence *(Hafza v D-G of Social Security* (1985) 6 FCR 444 at 449-50). He stated that *as a general concept* it includes two elements: physical presence in a particular place and the intention to treat that place as home, at least for the time being, but that the application of the general concept to any particular case must depend upon the wording, and underlying purposes, of the particular statute in relation to which the question arises. Having regard to the wording and

underlying purposes of s.36(3), the relevant right in this context obviously involves physical presence but does not require permanency and probably does not require an intention of the kind referred to by Justice Wilcox.

Section 36(3) makes it clear that the right to reside can be permanent or temporary. The word "right" in s.36(3) means a legally enforceable right to enter and reside in a country (*Applicant C v MIMA* [2001] FCA 229 (Carr J, 12 March 2001) at [28]. Current authority indicates that the right referred to in s.36(3) must be an existing right, and not a past or lapsed right, or a potential right or an expectancy.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department's files relating to the applicant (CLF2007/19897, CLF2004/56249, CLF2001/28636). The Tribunal also has had regard to the material referred to in the delegate's decisions, and other material available to it from a range of sources.

In support of the application for a protection visa, the applicant provided a Statutory Declaration (CLF2007/19897), referring to his Statutory Declaration provided earlier on, in which he claimed that:

- He is a national of North Korea and he was born in [place], North Korea. He cannot return to North Korea as he fears persecution on the basis of his and his father's political opinions. Both of his parents are deceased and he has no close relatives in North Korea, apart from [relatives] who were living in [city] whilst he was in North Korea. Because of strict government control, frequent contact was not possible. In [year], he entered a primary school in [place] and he completed four years of education.

- His father had political views that differed from and were in conflict with those held by the local North Korean authority. As a consequence, his father was beaten, tortured, threatened and detained for over a month. His mother received severe punishment because of his father's political "*outbursts and statements which were viewed by condemnation and anti-government*". In [year], his parents died as a result of the continuous beatings and torture by the local authority.

- As a result of his parents' political stance, the government "*effectively*" denied him the rightful amount of food and he suffered from starvation. The poor living conditions continued and became severe. He had to escape in order to survive.

- On [date], he went to China illegally by crossing the border via [place]. Initially he received some assistance from ethnic Korean/Chinese and in return he did labouring jobs. He remained in China for about [timeframe], until [month] [year]. From time to time, he heard about incidents of the Chinese authorities arresting North Korean escapees and returning them to North Korea, which he feared mostly.

- In early [month] [year], he thought it would be too risky for him to stay in China. He feared that if captured by the Chinese authorities, without any doubt, he would be sent back to North Korea where he would face the death penalty.

- He met a South Korean [worker] who worked on a [venue]. The [worker] assisted him to escape to Australia. On [month] [year], he arrived near [city]. He got off the [transport] discreetly and a few days later he travelled to [city].

- The Department acknowledged his North Korean identity and granted him a temporary protection visa, until [date].

- He continues to fear persecution in North Korea because he had escaped from North Korea. As far as he knows, there has been no change in human rights issues in North Korea. If he were to return, he would be persecuted.

- He has heard that South Korea accepts North Korean defectors. He fears returning to South Korea. Based on informal discussion, he has heard that North Korean defectors/traitors are subject to terrorist attacks by North Korean agents living in South Korea. He is terrified. If he were to go to South Korea, he would be attacked mercilessly as a result of the "*principle of guilt by association*". He fears that his identity would be published and he would be branded "*grouped and branded together as the North Korean defectors*", regarded by the North Korean regime as a national disgrace and traitors who deserve to be massacred.

- Even though North Korean defectors have the right to enter and reside in South Korea, they would be under a real threat of terrorist attacks by North Korean agents/their associates who operate in South Korea. There is therefore a real chance that he would be harmed in South Korea.

- He also fears that his [relatives] in North Korea would be held responsible for his escape from North Korea. The "*principle of guilt by association*" means that his [relatives] could be severely harmed. He becomes suicidal when he thinks about this possibility. He cannot return to North Korea as there has not been real change in the regime.

CLF2004/56249

This file contains the application for a protection visa lodged later, including the supporting Statutory Declaration. In the application for a protection visa, the applicant advised that he was unable to provide any documents in support as he had escaped from North Korea. In submissions, the applicant's representative summarised the claims. The delegate decided not to grant the applicant a protection visa. The applicant was however granted a Return visa.

CLF2001/28636

Relevantly, this file contains documents relating to the first application for a protection visa. The applicant provided, *inter alia*, a Statutory Declaration setting out his claims, generally consistent with the later claims (folios 20-23). The Tribunal notes however that in the Statutory Declaration, the applicant does not mention the relatives. The applicant was interviewed by a Departmental officer. Relevantly, it is noted by the officer that during the interview, the "*interpreter noted a very strong North Korean accent*" (folio 74). The applicant reiterated his fear of returning to both North Korea and China.

Material provided to the Tribunal

Upon lodging the application for review, the applicant's representative provided a copy of the delegate's Decision and written submissions. In refusing to grant a further protection visa, the delegate accepted that the applicant had a well-founded fear of being persecuted if he returned to China but found that he had a right to enter and reside in South Korea.

In summary, the advisor submitted that:

- The applicant claims to have escaped from North Korea several years ago. North Koreans who have lived outside North Korea for more than ten years are normally regarded by South Korea as settled and as such they are not normally accepted as refugees except in *'special circumstances'*. This raises an issue as to whether the applicant has a legally enforceable right to enter and reside in South Korea.

- The applicant claims that if he were to return to South Korea, he would suffer considerable psychological harm by residing in a place that is in close geographical proximity to the oppressor, North Korea. From a "*psychologist's point of view it is not unreasonable to suggest that a separation from the oppressor in this case would make a significant contribution to maintaining sanity, that is relevant to the concept of effective protection*".

- The applicant fears that potential residence in South Korea may cause significant harm to [relatives] in North Korea. This claim may be "*weak, but is significant to the review applicant himself*".

HEARING

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.

The applicant was represented in relation to the review by his registered migration agent.

The Tribunal advised the applicant that there appears to be some issues in relation to the validity of the application for a protection visa that was lodged recently. The Tribunal told the applicant that it is unclear based on the Departmental files how he was allowed to lodge the further application for a protection visa, given the fact that he had lodged a further application for a protection visa previously. The applicant told the Tribunal when he came to Australia on [date]. He confirmed that he lodged an application for a protection visa some years later, subsequent to which he was granted a temporary protection visa. The applicant confirmed that he lodged a further application for a protection visa a few years later and that his agent was acting for him at that time. The Tribunal asked the applicant if he was aware of the outcome of the further application for a protection visa that was previously lodged, and the applicant stated that he was not sure if Departmental officers had lost some of his papers. He stated that neither he nor his adviser knew of the outcome of the further application for a protection visa lodged. The applicant told the Tribunal that he was sent a letter by the Department telling him that the Minister had permitted him to lodge a further application for a protection visa. The Tribunal asked for a copy of that letter to be faxed to the Tribunal on that day. The Tribunal indicated to the applicant that if the Tribunal was not satisfied that the further application for a protection visa lodged recently, this raises issues as to whether the Tribunal could indeed, consider the substantive aspect of his claims. The Tribunal advised the applicant that it would, however, proceed on the basis that the applicant has been granted permission by the Minister to allow him to lodge a further application for a protection visa.

The Tribunal advised the applicant that the Tribunal has some doubts about his nationality, given that he has not provided any documentary evidence in support of his claim that he is from North Korea. The Tribunal advised the applicant however, that given the fact that the Department had

accepted that he is North Korean and although the Tribunal is not bound by any findings made by the Department, the Tribunal has decided to give him the benefit of the doubt at this stage and proceed to assess his claims on the basis that he is a North Korean national who fled to China. The Tribunal advised the applicant that on the basis of the available information, the Tribunal would probably be satisfied that he is unable to return to either North Korea or to China, assuming that he is a North Korean national. The Tribunal advised the applicant that the remaining question is whether he could return to South Korea.

The Tribunal discussed with the applicant s.36(3) of the *Migration Act* and explained to the applicant that generally-speaking Australia does not owe protection obligations to a person who has a right to enter and reside in any other country, whether permanently or temporarily, unless, among other things, the applicant has a well-founded fear of Convention-based persecution in that country. The Tribunal explained to the applicant that the South Korean law allows a North Korean national to enter and reside in South Korea. The Tribunal referred to the South Korean *Act on the Protection and Settlement Support of Residents Escaping from North Korea*. The Tribunal explained to the applicant that in accordance with that Act, it would appear that he does have the right to enter and reside in South Korea, and as such the Tribunal needed to explore whether he has a well-founded fear of persecution in relation to South Korea.

The Tribunal asked the applicant why he does not wish to return to South Korea. The applicant stated that he has relatives who live in North Korea and if he were to return to South Korea the relatives would suffer harm. The Tribunal asked the applicant when he last saw his relatives and the applicant stated that he last saw them in [year], shortly after the death of his parents. He confirmed that he was not 100% certain if his relatives are still alive or not. He stated however, that considering their age, he would not be surprised if they were still alive. He stated that his relatives have children, a matter which he knew whilst he was in North Korea. The Tribunal indicated to the applicant that he has not previously claimed that his relatives had children. The applicant explained that he thought when he was asked the question about his relatives, it would be assumed that they had children. The Tribunal indicated that it would further consider his explanations.

The Tribunal noted that during an interview with a Departmental officer, he made no mention of having relatives in North Korea. The applicant stated that he was not asked and he thought that he was asked about siblings rather than relatives. The Tribunal indicated that it would further consider his explanations. The applicant stated that his parents died when he was very young. He stated that after their death he lived in Province A. The applicant stated that subsequent to his parents' death he lived at the same address as the one where he was living prior to their death. He stated that he lived at that address until he left for China. He confirmed that he was certain that he had lived at that address. The Tribunal told the applicant that when he was interviewed by the Departmental officer, he stated that he grew up elsewhere which would appear to contradict his evidence that he lived at the address that he had provided to the Tribunal. The applicant denied ever saying that he had lived elsewhere. He stated that he would not have been allowed to go elsewhere. He said his parents were considered to be counter-revolutionaries and as such he would not have been allowed to go elsewhere. He said the North Korean government would not have looked after him. He stated that he was given a small ration that kept him alive and he also received help from neighbours. The Tribunal indicated that it would further consider the persuasiveness of his explanation in relation to the inconsistency. The applicant stated that he cannot explain why it is documented that he had stated that he had grown up elsewhere. He said that this is not what he told the officer. The Tribunal indicated that it would consider his explanations further.

The Tribunal asked the applicant what he thought would happen to his relatives and their children if he were to go to South Korea. The applicant stated that the North Korean government defines family as including relatives. He said if one member of the family is in trouble, this would adversely affect other members of the family. He said they would not be able to lead a normal life. He said they would be defined as 'counter-revolutionary'. He said his return to South Korea would affect the lives of his relatives and their children. He stated that if his relatives and their children were to run into difficulties with the North Korean government, the impact would be far greater because of his behaviour. He said this would impact on their schooling and/or higher education as well as the military service. The Tribunal put to the applicant that the Tribunal needed to consider whether there is a real chance of serious harm occurring on those bases. The Tribunal indicated that it would consider further those claims.

The Tribunal asked the applicant what other reasons he had for not wanting to return to South Korea. He said he has settled in Australia most of his life which has been good. He stated that the most important reason is his concern about his relatives and their children. The Tribunal asked the applicant about his claim that even though North Korean defectors have the right to enter and reside in South Korea, they would be under a real threat of terrorist attacks by North Korean agents and/or their associates who operate in South Korea. The applicant stated that what he meant by that claim was that it is possible that this would occur to him. He said the South Korean government does not arrest North Korean spies. The Tribunal asked the applicant on what basis he is saying that and the applicant stated that he has read newspaper articles and there does not appear to be any mention of the South Korean government arresting North Korean spies. The Tribunal indicated that it would further consider those claims.

The Tribunal indicated to the applicant that on the basis of the material before it, it would appear that he does have the right to enter and reside in South Korea, a matter that appears to have been acknowledged by his advisor and himself. The Tribunal indicated that there does not appear to be any reason why he cannot enter and reside in South Korea, even if one were to assume that he left North Korea when he said he did.

The Tribunal asked the applicant about his claim that if he were to go to South Korea he would be attacked mercilessly as a result of the "*principle of guilt by association*". The applicant referred to incidents in relation to two North Koreans who had settled in South Korea and subsequently went to the United States of America. He said he read on the internet that they had been threatened. The Tribunal advised that it would consider further how much weight to be placed on this material. The Tribunal asked the applicant about his claim that he would be grouped and branded as the North Korean defectors. The applicant stated that he speaks Korean differently which would be obvious in South Korea. He said he would be discriminated against on the basis of being North Korean. He stated that he would be discriminated against in relation to wage equality. The Tribunal advised that it would consider carefully his claims. The Tribunal asked the applicant about the claim that from a *"psychologist's point of view it is not unreasonable to suggest that a separation from the oppressor in this case would make a significant contribution to maintaining sanity, that is relevant to the concept of a protection"*. The Tribunal advised the applicant that without a report from a psychologist, and/or a psychiatrist, the Tribunal needed to further consider those comments.

The Tribunal referred to the claim that as he has left North Korea in [year], and that North Koreans who have lived outside North Korea for more than 10 years are normally regarded by South Korea as settled and as such they are not normally accepted by the South Korean government as refugees, except in special circumstances. The Tribunal advised the applicant that even, if the Tribunal were to accept that he did depart North Korea in [year], on the basis of the

available information, there is a question as to whether he would not be allowed to enter and reside in South Korea on that basis alone. The Tribunal indicated that if he had left North Korea in [year], this does not mean that he does not have the legal right to enter and reside in South Korea.

At the end of the hearing the applicant read out a statement that he had prepared to the Tribunal. The applicant summarised his background. He said that he lived in China like a beggar and that he was homeless. He said in Australia he has been given an ID by the Australian authorities and he can live in Australia. He said that North Korea is a communist regime with no human rights. There are no rights of the press. He gave an example of a neighbour who was intoxicated and he complained about this Communist regime. The applicant said the neighbour later went missing. The applicant told the Tribunal that there are more than 200,000 North Koreans living in China. He said they escaped to get food. He said that betrayal of the North Korean regime is considered to be the biggest offence by the regime. He said the sentence for escaping is grave. He said it would include torture and labour work. He said his life would be in danger if he were to return to North Korea. He said that if one member of a family gets into trouble in North Korea, all members of the family are adversely affected. He said he is very concerned about his relatives who are struggling and could be branded as counter-revolutionary. He said there are North Korean spies in South Korea and there would be consequences for his relatives.

Oral submissions of the advisor

The advisor told the Tribunal that he is North Korean himself. He said there are many underground activities in South Korea watching defectors. He said they try to attack those defectors in some way.

Section 424A letter

The Tribunal sent a s.424A letter to the applicant raising concerns about the validity of the recent application for a protection visa, as there was no evidence in any of the Departmental files that the applicant had left the migration zone (Australia) since lodging his previous protection visa application, or that the Minister has exercised the power under subsection 48B(1). Subsequently, the applicant provided a letter evidencing Ministerial intervention (folio 48, RRT file).

FINDINGS AND REASONS

On the basis of the available information, the Tribunal is satisfied that the application for a protection visa lodged recently is valid and therefore the Tribunal has authority to deal with the merits of the application.

Although the applicant has previously been recognised by Australia as a refugee, the question for the Tribunal is whether it is satisfied that the applicant has a presently existing well-founded fear of being persecuted, for Convention reasons in relation to North Korea (and South Korea) and is thereby entitled to continuing protection.

In summary, the applicant claims that he is a North Korean national who lived in China for some years. He claims to fear harm from the North Korean authorities if he were to return to North Korea. He claims that he cannot avail himself of the right of North Korean nationals to enter and reside in South Korea because he fears harm in South Korea.

There is no evidence before the Tribunal which conclusively identifies the applicant. During an interview with a Departmental officer, the "*interpreter noted a very strong North Korean*

accent". The Tribunal notes that the applicant has been 'accepted' by the Department as being a national of North Korea. On the basis of the available information and whilst the Tribunal has some doubt, the Tribunal is satisfied that the applicant is a North Korean national.

In relation to North Korea, the US Department, *Country Reports on Human Rights Practices - 2006* - Released by the Bureau of Democracy, Human Rights, and Labor on March 6, 2007, provides the following summary:

> *The Democratic People's Republic of Korea (DPRK or North Korea) is a dictatorship under the absolute rule of Kim Jong-il, general secretary of the Korean Workers' Party (KWP) and chairman of the National Defense Commission, the "highest office of state." The country has an estimated population of 22.7 million. Kim's father, the late Kim Il-sung, remains "eternal president." Elections held in August 2003 were not free or fair. There was no civilian control of the security forces, and members of the security forces committed numerous serious human rights abuses.*
>
> *The government's human rights record remained poor, and the regime continued to commit numerous serious abuses. The regime subjected citizens to rigid controls over many aspects of their lives. Citizens did not have the right to change their government. There continued to be reports of extrajudicial killings, disappearances, and arbitrary detention, including of political prisoners. Prison conditions were harsh and life-threatening, and torture reportedly was common. Pregnant female prisoners reportedly underwent forced abortions, and in other cases babies reportedly were killed upon birth in prisons. The judiciary was not independent and did not provide fair trials. Citizens were denied freedom of speech, the press, assembly, and association, and the government attempted to control all information. The government restricted freedom of religion, citizens' movement, and worker rights. There continued to be reports of severe punishment of some repatriated refugees. There were widespread reports of trafficking in women and girls among refugees and workers crossing the border into China.*
>
> *…..The law provides for the "freedom to reside in or travel to any place"; however, the government did not respect these rights in practice. During the year the government continued to attempt to control internal travel. Numerous reports suggested that internal travel rules were relaxed to allow citizens to search for food, conduct local market activities, or engage in enterprise-to-enterprise business activities.*
>
> *….. The law criminalizes defection and attempted defection, including the attempt to gain entry to a foreign diplomatic facility for the purpose of seeking political asylum. Individuals who cross the border with the purpose of defecting or seeking asylum in a third country are subject to a minimum of five years of "labor correction." In "serious" cases defectors or asylum seekers are subject to indefinite terms of imprisonment and forced labor, confiscation of property, or death. Many would-be refugees who were returned involuntarily were imprisoned under harsh conditions (see section 1.a. and 1.c.). Some sources indicated that the harshest treatment was reserved for those who had extensive contact with foreigners. In March China reported it repatriated a North Korean asylum seeker known as Kim Chun-hee, despite requests from the international community to treat her humanely. Kim's whereabouts remained unknown. In October Chinese police arrested and deported to North Korea nine relatives of South Korean POWs; one NGO reported that the nine were likely in prison in the DPRK, but their whereabouts were unknown.*

Reports from defectors indicated that the regime was differentiating between persons who crossed the border in search of food, who might be sentenced only to a few months of forced labor or in some cases merely issued a warning, and persons who crossed repeatedly or for political purposes, who were sometimes sentenced to heavy punishments. The law stipulates a sentence of up to two years of "labor correction" for the crime of illegally crossing the border. According to the UN special rapporteur's August 2005 report, there was a new policy to enable persons leaving the country for nonpolitical reasons to return with the promise of a pardon under the penal code. Other NGO reports indicated that North Koreans returning from China were often able to bribe North Korean border guards into letting them freely pass across the border. Several NGOs operating in the region confirmed that punishments seemed to be less severe than in the past. During the year a North Korean who fled the country in 2004 reported that repatriated North Koreans generally were sentenced to six months of hard labor at a labor training camp and then released. He reported that, in certain cases, such as when defectors were accused of denouncing the DPRK, punishments could be harsher.

In consideration of the evidence as a whole, the Tribunal accepts that the applicant cannot return to North Korea and that he has a well-founded fear of persecution in relation to that country. The Tribunal is satisfied that there is a real chance that he would be persecuted for being a defector and that he would be imputed with anti-regime political opinions.

As a North Korean national, there is an issue as to whether he could return to South Korea or China. As noted above, s.36(2)(a) is qualified by subsections (3) to (5) which set out circumstances in which Australia is taken not to have protection obligations. These provisions call for consideration of whether an applicant has access to protection in any country apart from Australia. In effect, they provide that Australia is taken not to have protection obligations to non-citizens who have not taken all possible steps to avail themselves of a right to enter and reside in a country where they do not have a well-founded fear of being persecuted for a Convention reason or of being returned to another country where they will be persecuted for a Convention reason. Accordingly, an applicant may be found not to be a person to whom Australia has protection obligations, even if they might satisfy the Convention definition of “refugee”, because of the availability of protection in another country.

There is a question as to whether the applicant can return to China for the purposes of s.36(3) of the Act. In consideration of the evidence as a whole, the Tribunal is satisfied that as a North Korean national and despite living in China for the claimed years, the applicant does not have the right to enter and reside in China as he would have been unlawful; there is no evidence before the Tribunal that the applicant resided legally in China during the years he spent there, and no other evidence of any right to enter or reside there. Given these conclusions, the Tribunal finds that s.36(3) of the Act does not apply to the applicant in relation to China.

There remains an issue as to whether the applicant has a legally enforceable right to enter and reside in South Korea.

A summary of the South Korean *Act on the Protection and Settlement Support of Residents Escaping from North Korea* 1997 (Act No.5259 – Issuance & Publication date 13/1/97) is:

Law 5259 of January 13, 1997 enacts the Act on the Protection and Settlement Support of Residents Escaping from the North Korea. Provides a person having seceded from the

North Korea, who is supposed to be protected as a national of the Republic of Korea on the basis of humanism under the conditions prescribed by this Act with special protection; provides the provisions on the protection standard, protection decision and support with regard to the person to be protected; establishes the Council of Measures for the Residents Escaping from the North Korea; obliges the Minister of the National Unification Board and the Director of the National Security Planning Agency to establish and operate the facilities for supporting the settlement of a person to be protected; approves the academic ability and qualification which a person had acquired in the North Korea or a foreign country, and allows the person mentioned to receive an education of accommodating him/herself to a new society, vocational training and employment service; and allows the Minister of the National Unification Board to commission the chairman of the local government, etc. to deal with matters on the protection and support. (33 articles; pp.69-77) (http://www.glin.gov/view.action?glinID=55061).

(A full translated version of the Act is found at *http://www.unhcr.org/home*).

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

In the course of the hearing, the Tribunal discussed with the applicant the *Act on the Protection and Settlement Support of Residents Escaping from North Korea* and in particular the claim that North Koreans who have lived outside North Korea for more than ten years are normally regarded by South Korea as settled and as such they are not normally accepted as refugees except in *'special circumstances'*. Whilst the Tribunal appreciates that Article 9(4) provides that "*Persons who have for a considerable period of time earned their living in their respective countries of sojourn", "****may not be determined*** *as persons subject to protection"*, the legislation does not unequivocally say that such persons are not subject to protection. There is no evidence before the Tribunal that the applicant, and despite his alleged departure from North Korea in the 1990s, would not be granted protection by the South Korean authorities. The Tribunal also notes that this point was not disputed in the course of the hearing by the applicant or his advisor.

In CX95208 (*Granting South Korean Citizenship to North Korean Defectors CIR* Preparation Date: 28/5/2004), it is noted that whilst Article 9 lists several categories of people who may not be determined as persons subject to protection, "*in practice, the decision to grant citizenship is not discretionary and no genuine North Korean refugee has ever been refused South Korean citizenship*".

In the US Department of State Report**,** Korea, Republic of, *Country Reports on Human Rights Practices - 2006*, (Released by the Bureau of Democracy, Human Rights, and Labor March 6, 2007), it is noted that the South Korean government "*continued its longstanding policy of accepting refugees from North Korea, who are entitled to citizenship in the ROK. The government resettled 2,023 North Koreans during the year, resulting in a total of approximately 9,800 North Koreans resettled in the country*".

In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant as a North Korean national has the right to enter and reside in South Korea. On the basis of the available information, the Tribunal is satisfied that the applicant has not taken all possible steps to avail himself of the right to enter and reside in South Korea. The question is also whether he has a well-founded fear of persecution in relation to South Korea. The applicant has claimed to fear persecution in South Korea on the following bases:

- harm to his [relatives] and/or their children in North Korea (such as discrimination) as a result of his defection and 'guilt by association'; he fears that potential residence in South Korea may cause significant harm to the [relatives] in North Korea; the claim may be "*weak, but is significant to the review applicant himself*";
- threat by North Korean spies operating in South Korea - he would be attacked mercilessly as a result of the "*principle of guilt by association*"; he is terrified that if he were to go to South Korea, he would be attacked mercilessly as a result of the "*principle of guilt by association*". He fears that his identity would be published and he would be branded "*grouped and branded together as the North Korean defectors*", regarded by the North Korean regime as a national disgrace and traitors who deserve to be massacred.
- if he were to return to South Korea, he would suffer considerable psychological harm by residing in a place that is in close geographical proximity to the oppressor, North Korea. From a "*psychologist's point of view it is not unreasonable to suggest that a separation from the oppressor in this case would make a significant contribution to maintaining sanity, that is relevant to the concept of effective protection*".

In written submissions provided to the Tribunal, the advisor noted that the applicant escaped North Korea in [year]. In the course of the hearing, the applicant gave evidence that he last saw his relatives in [year], shortly after the death of his parents. He confirmed that he was not 100% certain if his relatives are still alive or not. He stated however, that considering their age he would not be surprised if they were still alive. He stated that his relatives have children, a matter which he knew whilst he was in North Korea. The Tribunal notes that there were a number of inconsistencies in the applicant's evidence in relation to this issue, however, the Tribunal considers them to be minor and the applicant provided plausible explanations. Consequently, the Tribunal has not relied on those inconsistencies in an adverse manner to the applicant.

The Tribunal asked the applicant what he thought would happen to his relatives and their children if he were to go to South Korea. The applicant stated that the North Korean government defines family as including relatives. He said if one member of the family is in trouble, this would adversely affect other members of the family. He said they would not be able to lead a normal life. He said they would be defined as 'counter-revolutionary'. He said his return to South Korea would affect the lives of his relatives and their children. He stated that if his relatives and their children were to run into difficulties with the North Korean government, the impact would be far greater because of his behaviour. He said this would impact on their schooling and/or higher education as well as the military service. Given the applicant's claim that he escaped North Korea in [year] and that he saw his relatives in [year], shortly after the death of his parents, the Tribunal finds that firstly, it is entirely speculative on the applicant's part

that his relatives and/or their children are alive. The Tribunal finds that the applicant, without any evidence, is assuming that his relatives and/or their children are alive. Furthermore, there is no evidence before the Tribunal that if they are alive, they have suffered any harm by the North Korean authorities as a result of any imputed anti-regime political opinions resulting from their "*guilt by association*" by virtue of the applicant's family being branded anti-revolutionary and/or the applicant's defection to China. The Tribunal appreciates that central to the applicant claim is that if he were to go to South Korea, they would suffer. On the basis of the available information and in consideration of the evidence as a whole, the Tribunal rejects that there is a real chance of any serious harm occurring in the reasonably foreseeable future to his relatives and/or their children in North Korea as a result of his defection and 'guilt by association', or his residence in South Korea, or any other Convention-related ground. The Tribunal also notes the concession made on behalf of the applicant that the claim relating to the relatives may be "*weak, but is significant to the review applicant himself*". Whilst the applicant in the course of the hearing, reiterated that this is an important claim to him, for the reasons stated above, the Tribunal finds that the applicant does not have a well-founded fear of persecution on this basis.

The applicant claims that there is a threat by North Korean spies operating in South Korea, that he would be attacked mercilessly as a result of the "*principle of guilt by association*". He fears that his identity would be published and he would be branded "*grouped and branded together as the North Korean defectors*", regarded by the North Korean regime as a national disgrace and traitors who deserve to be massacred. In the course of the hearing, the applicant said that he would be under a real threat of terrorist attacks by North Korean agents and/or their associates who operate in South Korea. The applicant stated that it is possible that this would occur to him; he said the South Korean government does not arrest North Korean spies. The Tribunal asked the applicant on what basis he is saying that and the applicant stated that he has read newspaper articles and there does not appear to be any mention of the South Korean government arresting North Korean spies. There are reports of North Korean spies entering South Korea (US Committee, *Refugees World Survey 2004 South Korea*, dated May 2004), however, the same report refers to the acceptance and good treatment of North Koreans in South Korea; they are deemed under the South Korean constitution as South Koreans; the South Korean government "*gives refugees the right to work, as well as national insurance…*" US Committee, *Refugees World Survey 2004 South Korea*, *ibid*). In consideration of the evidence as a whole, the Tribunal finds that the applicant's fear of harm based on North Korean spies in South Korea, is remote, leading the Tribunal to find that he does not have a well-founded fear of persecution on this basis.

In relation to the claim that if he were to return to South Korea, he would suffer considerable psychological harm by residing in a place that is in close geographical proximity to the oppressor, North Korea. From a "*psychologist's point of view it is not unreasonable to suggest that a separation from the oppressor in this case would make a significant contribution to maintaining sanity, that is relevant to the concept of effective protection"*. Without any expert evidence, the Tribunal is not satisfied that there is a real chance that the applicant would suffer any psychological harm on this basis.

The Tribunal accepts that if the applicant were to go to South Korea, he may experience difficulties in adjusting, in finding accommodation and employment, however, in consideration of the evidence as a whole, the Tribunal finds that any such difficulties do not amount to persecution. As far as his desire to remain in Australia, the Tribunal does not consider this to be relevant to its assessment of the applicant's refugee claims.

In consideration of the evidence as a whole, the Tribunal does not accept that there is a real chance of serious harm as contemplated by the Act, occurring to the applicant in the reasonably foreseeable future if he were to go to South Korea. In consideration of the evidence as a whole, the Tribunal finds that the applicant does not have a well-founded fear of persecution in relation to South Korea.

In sum, the Tribunal has considered the applicant's claims independently and cumulatively. In consideration of the evidence as a whole, the Tribunal accepts that the applicant cannot return to North Korea and that he has a well-founded fear of persecution in relation to that country. The Tribunal is satisfied that there is a real chance that he would be persecuted for being a defector and that he would be imputed with anti-regime political opinions. In consideration of the evidence as a whole, the Tribunal is satisfied that as a North Korean national and despite living in China for the claimed years, the applicant does not have the right to enter and reside in China. In consideration of the evidence as a whole, the Tribunal is satisfied that the applicant as a North Korean national has the right to enter and reside in South Korea. On the basis of the available information, the Tribunal is satisfied that the applicant has not taken all possible steps to avail himself of the right to enter and reside in South Korea, a country where he does not have a well-founded fear of being persecuted for a Convention reason.

CONCLUSIONS

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a) for a protection visa.

DECISION

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

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

Sealing officer's ID: PRIKSA