

**0803018 [2008] RRTA 337 (18 September 2008)**

**DECISION RECORD**

**RRT CASE NUMBER:** 0803018

**DIAC REFERENCE(S):** [file references]

**COUNTRY OF REFERENCE:** Korea, Republic Of

**TRIBUNAL MEMBER:** Kira Raif

**DATE DECISION SIGNED:** 18 September 2008

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first and second named applicants, who claim to be citizens of the Republic of Korea, arrived in Australia on [date]. The third named applicant was born in Australia in [month, year]. The applicants applied to the Department of Immigration and Citizenship for Protection (Class XA) visas on [date]. The delegate decided to refuse to grant the visas on [date] and notified the applicants of the decision and their review rights by letter dated [date]
3. The delegate refused the visa application on the basis that the first named applicant (the applicant) was not a person to whom Australia has protection obligations under the Refugees Convention. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s. 411(1)(c) of the Act.
4. The applicants applied to the Tribunal on [date] for review of the delegate's decision. When making the application for review, the applicant stated that he informed the delegate of a change of address in [month, year] and that the notification of the decision was sent to his old address and he was unaware of it. The applicant enclosed a copy of his letter to DIAC in which he had recorded his new address. The DIAC electronic records indicate that this correspondence was received by the Department. On the basis of this evidence, the Tribunal accepts that the applicant had informed the Minister, for the purpose of s. 53 of the Act, that he intended to reside at another address. The Tribunal finds that the delegate's decision was sent to an address, other than the last address given to the Minister by the applicant under subsection 53 (1) or (2) of the Act. Accordingly, the Tribunal finds that the Minister failed to comply with r. 2.16(1)(c) and did not notify the applicant of the decision in the prescribed way as required by s. 66 of the Act. The Tribunal finds that the time for review did not begin to run and the applicants have made a valid application for review under s.412 of the Act.

### **RELEVANT LAW**

5. 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.
6. Section 36(2) of the Act, as in force before 1 October 2001, provided that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention). (Amendments to s.36(2) introduced on 1 October 2001 do not apply to the present applications.)
7. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994. Under cl.866.211 of Schedule 2 to the Regulations, a criterion to be satisfied at the time of application is that the applicant claims to be a person to whom Australia has protection obligations and either (a) makes specific claims

under the Convention or (b) claims to be a member of the same family unit as a person who is an applicant and has made Convention claims. Reflecting s.36(2) of the Act, a criterion to be satisfied at the time of decision is that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Convention: cl.866.221. Clause 866.222 provides an alternative 'time of decision' criterion for an applicant whose application relies on membership of the family and that is that (a) the Minister is satisfied that the applicant is 'a member of the same family unit' as an applicant who has made Convention claims and (b) that person has been granted a protection visa. Thus, under those provisions, family members are derivatively entitled to a protection visa on the alternative basis that they are members of the same family unit as an applicant who is found to be a refugee: *Munkayilar v MIMA* (1998) 49 ALD 588 at 592-593, *Mijoljevic v MIMA* [1999] FCA 834 at [14]-[18], *Dranichnikov v MIMA* (2001) 109 FCR 397 at [22]-[23], *MIMA v Shtjefni* [2001] FCA 1323 at [17]. However, all applicants must satisfy the remaining criteria.

### **Definition of 'refugee'**

8. 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.
9. 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.
10. 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. These provisions were inserted on 1 October 2001 and apply to all protection visa applications not finalised before that date.
11. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
12. 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.

13. 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.
14. 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.
15. 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.
16. 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.
17. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

## **CLAIMS AND EVIDENCE**

18. The documentary material before the Tribunal is contained in Tribunal case file 0803018. The Tribunal does not have before it the Departmental case file and has no record of the applicants’ application.

### **Primary application**

19. According to the decision record, the first named applicant made specific claims in his application while his spouse and child did not make specific claims but were included as members of the family unit. It is noted that the applicant entered Australia on a passport of the Republic of Korea and that another passport was issued to him in Sydney in [month, year]. According to the primary decision, the applicant made the following claims in his application:
  - he is unable to continue a normal life in Korea as he has always been involved with Anti-government movements. He has been actively involved in Pro-Democratic and Pro-Democratic Labour movements

- he became a target of the secret police and was threatened not to participate in pro-labour activities
- during the Labour movement in [year] he escaped several times. He was never convicted of any crime in Korea, but he was captured and tortured
- he survived for [stated period of time] in hiding and he then decided to escape the secret surveillance of the Korean police and came to Australia
- if he returns to Korea, he fears that he will be continuously supervised and threatened because of his past involvement in anti-government and pro labour movements. He would be harmed by the secret police and persecuted by the Korean government. His name is still on the 'black list' and he will be targeted
- The Korean government will not protect him and he will be punished under security laws.

20. On [date] the delegate wrote to the applicant requesting him to provide further information. The delegate also noted that the applicant delayed making the application for [number of] years, which appeared to be inconsistent with his claimed fear of persecution. The delegate noted that the applicant had never been arrested or detained prior to his departure from Korea and that he had been able to obtain a passport and depart from the country, indicating that he was of no interest to the authorities.

21. The applicant replied through a letter dated [date] in which he stated that when he was in Seoul, he had been actively and extremely involved in the Pro-Democratic and Pro-Democratic Labour Movement. At that time, Korea was suffering from brutal dictatorship, political corruption and labour issues which made the lives of normal citizens 'absolutely uncomfortable' Therefore the Chairman of Korean General Federation made a decision to go on a complete strike under the agreement of the Chairman of National Labour, intending to have Democratic Labour destroy the old political power, to guarantee the right of living and guarantee human rights. The applicant states that they knew that they could not live in Korea if Pro-Democratic and Pro-Democratic Labour Movements went wrong. The applicant states that there was a nationwide labour movement on and after [date] and during the labour movement he escaped several times but he was captured and suffered from inhumane tortures. He managed to survive for [stated period of time] in a hidden place "without even breathing in loudly". Finally he decided to escape the secret surveillance of the Korean police and leave Korea for Australia where he has been residing for the past [number of] years. He states that he did not realise that he was able to apply for the protection visa until recently time when he watched TV and secured information to apply for it. He said that he never wants to recall his previous time and suffering and agony in Korea. He has not been legally convicted in Korea but he has a great fear to return to Korea as he was unable to live as a normal citizen because of participation in Pro-Democratic and Pro-Labour movements and he was subsequently taken to the police and tortured. The applicant stated that he was in contact with some colleagues who could supply written evidence of his involvement. He states that he wished to remain in Australia as a protection visa holder.

22. In [month, year] the delegate decided to refuse to grant the visa to the applicant. The delegate referred to the applicant's claims and noted that he had not provided specific details of his involvement or of the events. The delegate noted that the applicant had provided some declarations from colleagues confirming his involvement in the anti-government and Pro-

Labour movements which also lacked in detail. The delegate noted that the applicant had been issued passports in [month, year] and also in [month, year] and that he departed the country legally, which may indicate that he was of no interest to the authorities. The delegate referred to the relevant country information and the delay in the protection visa application.

### **Application for review**

23. The applicant sought review of the delegate's decision on [date] When applying for review, he referred to the issue of notification, as discussed above. He also stated that he had more material to support his claim as a refugee and when he receives documents from Korea, he would submit the information to the Tribunal.
24. The applicant subsequently provided to the Tribunal copies of some of the materials relating to his primary application. The applicant provided copies of some of the delegate's correspondence to him and a copy of his letter to the delegate dated [date]. He also provided some identical declarations from third parties who state that the applicant was actively involved in the anti-government and pro-labour movements during [year] and was taken to the police and tortured badly due to his active involvement in the movements. It is stated that the applicant's name was on the blacklist and that he had to live in hiding for more than [stated period of time] and that he eventually could depart Korea for Australia. It is stated that legally the applicant has never been convicted but he was under extreme pressure from the Korean secret police not to participate in the movements.
25. The Tribunal wrote to the applicant on [date] pursuant to s 424A of the Act inviting his comments on, and response to, the information which the Tribunal considered may be a reason or part of the reason for affirming the decision under review. The Tribunal referred to the applicants' immigration history and the delay in making the application for the protection visa. This was said to be relevant as it may indicate that the applicant did not have a genuine fear of persecution when in Korea or after arriving in Australia The Tribunal also noted that the applicant claimed that he had not been arrested or charged in Korea and also that he had approached the Korean authorities in Australia to renew his passport. This was said to be relevant as it may indicate that he was of no interest to the Korean authorities. The Tribunal also wrote to the applicant pursuant to s. 424. The Tribunal informed the applicant that it did not have the Department's file concerning his protection visa application and invited the applicant to provide a copy of his application and any material he had previously submitted, if available, as well as any other information he wished the Tribunal to consider.
26. The applicant replied on [date] by providing a statement to the Tribunal. The applicant states that he believes that a refugee is "only not to be able to live in their own countries" [sic] but is one who cannot live in their country due to war or natural disaster and a refugee should also be considered for people who cannot do any social activities and be involved in public life in their own countries. The applicant states that he was released as he did not contact the political criminals or communists and he was not associated with the communist ideology but he was labelled not to be employed by Korean employers.
27. The applicant states that the reason he was able to obtain the passport is because he was supposed to be called a 'red activist' if he was pro-North Korean within the current division of the two Korean countries. He could obtain a passport as he was not involved in the Labour movement with the negative communist thinking. He did not think of his own benefit but he was standing for the comfort of the labourers and disadvantaged people. He states that all people have the right to live well and not only the authorities or politicians in power and

people should have a right to minimum wage, living expenses and superannuation. They requested correct working hours, human rights and wages. He acted as a leader of the Labour Movement who never thought that the employer or the government were the enemy. He states that he is still on the black list which will never be taken off until he dies.

28. The applicant also provided to the Tribunal a copy of his passport and copies of some documents from his primary application, which are discussed above.
29. The applicants appeared before the Tribunal on [date] to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages. The oral evidence before the Tribunal is summarised below.
30. The applicant confirmed that his spouse and child had not made any separate claims and that they relied on his claims.
31. The applicant said that he has [number of] siblings in Korea and [number of other relatives] in Australia. His parents had passed away. The applicant said that before coming to Australia, he worked as a [Occupation A] and he did a lot of other jobs. In the [number of] years before coming to Australia, he worked in [Occupation A] and in a [type of] shop on a part-time basis. The last job he had before coming to Australia was a full-time [type of] job where he worked as a labourer. He did this job from [year] to [year] on a full-time basis and he attended the job every day, [number of] days a week. He stopped this job right before he came to Australia at the end of [month, year].
32. The applicant said that since coming to Australia, [information deleted in accordance with section 431 as it may identify the applicant] and they heard that they could apply for a [type of] visa. They applied for that visa in [month, year] and that application was later withdrawn. At the time his wife was told by the officer of the Department of Immigration that their case did not fall into the category but it was accepted because the migration agent insisted on lodging the application. The applicant confirmed that he then applied for [another type of] visa and sought review of that decision with MIRO and the IRT.
33. The Tribunal asked the applicant why he went through these applications instead of applying for the protection visa if he left Korea to avoid persecution. The applicant said that at the time he did not think of applying for the protection visa. Also, the migration agents he visited did not give him that information, he was told that because [information deleted in accordance with section 431 as it may identify the applicant], he could try this avenue and he followed their advice. He said that it was the same with the second visa application as a migration agent told him to do that. At the time he did not know about protection visas and, honestly, he did not want to apply for the protection visa at the time. The Tribunal asked the applicant why he did not want to apply for the protection visa. The applicant said that the reason was that he did not want to show his weakness to other people, he did not want to reveal it. The Tribunal noted that it was hard to accept that if the applicant spoke to a migration agent about his problems in Korea, nobody would have informed him about protection visas. The applicant said that it was not that they did not recommend a protection visa to him but that he did not want to reveal his situation, so they advised him about other ways.
34. The Tribunal asked the applicant why he did not reveal his situation to obtain protection in Australia if he escaped Korea to avoid persecution. The applicant said that he thought that if he revealed his situation, it can be known and can give him some disadvantage and he was concerned about that. Even now he does not feel good in his heart. The Tribunal asked the

applicant what disadvantage he was fearful of if he revealed his situation to the Immigration department or his migration agent. The applicant said that he did not know much about Australia His English was not perfect at the time. He came to learn English and he started to work and he thought that everywhere was the same and he thought that such relation will exist.

35. The Tribunal noted that it was concerned that the applicant came to Australia in [year] but he did not apply for the protection visa until [year] and did not pursue review until [year], almost [number of] years later. The Tribunal noted that if the applicant did suffer persecution in Korea as he claimed, he could have taken steps to apply for the visa earlier. The Tribunal asked the applicant how it could be satisfied that the applicant had a genuine fear of persecution when he left Korea The applicant said that he was applying for other visas and could not apply for this at the same time. The Tribunal noted that the applicant could have applied for the protection visa at the same time as another visa and also that it had been [number of] years after his arrival in Australia when he made his first application. The applicant said that the reason for a gap from the time of his arrival to his first application was because he went to see a lawyer or a migration agent and they told him that there was no suitable visa for him. The applicant said that he sought advice from a lawyer. The Tribunal informed the applicant that if he sought advice from a solicitor, he did not need to disclose the content of that advice to the Tribunal.
36. The Tribunal asked the applicant why he did not seek review of the decision on his protection visa for [number of] years. The applicant said that he was not notified of the decision. The Tribunal asked the applicant if he did not consider it odd that there was no decision made for [number of] years. The Tribunal asked the applicant if he made inquiries with Immigration about the decision. The applicant said that he rang the Department to make the inquiry and he was told that he had to wait and it was the same with the previous applications. The applicant said that he rang the Department [number of] years after he made the application. Because of his English, he asked another person to call and this person told him that he had to wait. The Tribunal noted that it was hard to accept that if the applicant rang the Department considerable time after his application was refused, he would be told to wait and not be informed of the refusal. The applicant said that they did not receive any notice from the Department about the refusal of the visa. They rang but they were not told that it was refused. Maybe it was because they could not find the information.
37. The Tribunal asked the applicant how he found out in [year] that his application was refused. The applicant said that in the middle of [month, year] he moved to a new place. Strangely, even though he did not inform the Department of his new address, he received mail from a service related to DIAC. Somebody read the letter to him and it advised him that he had to apply for another visa. He rang Immigration and was told that his application was refused. The Tribunal asked the applicant why he did not apply for review until [year] if he was told in [earlier year] that his application was refused. The applicant said that they went to the Department and he told them that they did not have any notice of the decision. He asked DIAC to mail the decision letter and he was told that the copy of the letter was not there but that he could apply for review. The Tribunal again asked why he waited until [year] to apply for review. He said that he kept calling Immigration and asked them to find the documents but he was told that there were no documents and later he was told to apply for review and he did.
38. The Tribunal asked the applicant why he left Korea and came to Australia. The applicant said that at the time he could not find any job, no matter how hard he tried after the incident. He



had been caught and suffered and had hardship and he wanted to go anywhere, to any country and he saw Australia as a possible country. The Tribunal asked the applicant to talk about the incident. The applicant said that it was what he was doing with his friends. In Korea, the war and demonstrations never end. At that time he participated with his friends from the [Educational Institute B] as a demonstrator in the democratic movement and he was one of the four leaders. He drove the strike of the group and because of that he was persecuted and called in and investigated. He said that this occurred in [year], but he could not remember the exact date. At the time there was a national strike in Korea as the labourers were exploited and had low income. He had a lot of thoughts and tried to leave the country but these were not realised for a while.

39. The Tribunal asked the applicant to explain his involvement in the democratic movement or the Labour movement. The applicant said that there were four of them who could be called leaders or instigators of the movement. They were on the front line and because of that they were chased and disadvantaged in their life activities but he had some time as a result. The Tribunal asked the applicant how he became involved in this movement and why. He said that he was one of the labourers and was living on the salary provided by the company. He became involved because he wanted to get out of this low income and he wanted to escape and to lead a life that is a good and humane life.
40. The Tribunal asked the applicant if he had any other involvement in the Labour Movement or the Democratic movement aside from the incident in [year]. The applicant said that the incident in [year] was the biggest involvement that he has had. In the [specific decade] there was a democratic involvement but he did not play a leading role, he was a follower. The Tribunal asked the applicant whether he has had any other involvement in anti-government activities. He said that he was not involved in any anti-government movement because once one is involved in anti-government movement, one could be jailed. The Tribunal asked the applicant whether he claimed that his involvement was as a follower in [specific decade] and as a leader in [year]. He agreed. The Tribunal asked the applicant whether he had any other involvement in other movements or in any other activities of these movements. The applicant said that at the time he was young and did not have much ability to judge but people gathered together among the young and the intellectuals and to be able to get involved in the movement one needed a lot of study. He went through a lot of study and there were a lot of steps to take, which are hard to explain.
41. The Tribunal again asked the applicant whether he had participated in any other activities of the movements and whether his fear was the result of the incident in [year] or of other activities. The applicant said that that was all that caused him fear. The applicant agreed that the only incident that caused him to fear persecution was his participation as a leader in [year].
42. The Tribunal asked the applicant to describe the incident in [year] as a result of which he became the target of the authorities. The applicant said that at the time there was a [large] union that was leading the strike. The captain of the union would meet with company managers and they would meet with them and ask them to improve labour conditions, working hours, salary, human rights, retirement policies and to avoid mistreatment. They tried to discuss these matters so that the company would accept their proposals. For these conditions to be met, they had to sacrifice themselves. The Tribunal again asked the applicant to speak about the incident. The applicant said that from the labourers' perspective, the managers do not provide sufficient protection and they could not afford many things. The Tribunal once again asked the applicant to speak of the incident. The applicant said that once

one became involved in a demonstration as a leader, that in itself was a sufficient target for the authorities and a person is targeted in whatever they do. They could not win over the powerful people at a grass root level.

43. The Tribunal noted that the applicant was giving broad information about labour rights but the Tribunal had repeatedly asked the applicant to give specific information about the incident in [year] and his involvement in that incident and he was not responding to the Tribunal's question. The applicant said that for demonstrations to achieve the goal, they needed to get a lot of people's help and employ a lot of people for the movement. While he was involved, he was thinking whether they were doing it to be together with the people or had communist ideas. The government viewed these people as communists and that is why when one leads that kind of movement, one is misunderstood and subjected to persecution.
44. The Tribunal asked the applicant what happened when he came to the attention of the authorities. The applicant said that the school he attended and his boarding room were searched and his home town was also searched. They investigated the applicant to establish whether it was a democratic movement or a communist movement. After that he was told to attend a police station and to see high position people in the company who interviewed him. If they found something, they would call him back for investigation. The Tribunal asked the applicant if he was detained. He said that he was once detained for [number of] days for an interview, he thought it happened in [month] or [month, year] The applicant said that he was not charged because the most important thing they looked for was ideology, whether he had democratic or communist ideology and because they found that he did not have any communist ideology, he was released. The Tribunal asked the applicant why he thought he continued to be of any interest to the authorities if he was released and not charged. The applicant said that if one is in the leader position, even after that, he would still be under their watch. They would keep their eyes on him because they think that this person can turn to any other ideology in the future.
45. The Tribunal noted that the applicant referred to being investigated by his company leaders and asked him if he continued to work in the same place. The applicant said that he could not continue to work there. He quit and was looking for some places and there was an opportunity to come to Australia and he did.
46. The Tribunal noted that in his application the applicant referred to being in hiding. The Tribunal invited the applicant to speak about that. The applicant said that what he meant by hiding was not that he was confined in one place but that they were looking for him and chased him and he felt that it was annoying and what he meant is that he tried to avoid that. The Tribunal noted that hiding does not normally mean being annoyed about being chased but has a certain meaning. The Tribunal asked the applicant what he meant when he claimed that he was in hiding. The applicant said that when they asked a person to come for investigation and interrogate the person, it is possible that the person would be tortured. He dreaded that so much that he was moving from here to there. The Tribunal referred the applicant to his statement and also statements from third parties, copies of which he provided to the Tribunal, which refer to him being in a hidden place for more than [stated period of time]. The Tribunal noted that it was different to what the applicant claimed in his oral evidence. The applicant said that it was not possible to say exactly the same thing and also the statements were made some time ago. The Tribunal noted that the applicant either was in hiding or he was not and it was not dependent on when the statements were made. The applicant said that it was true that he was hiding at the time but he did not know how it was written differently. It happened twenty years ago. The Tribunal noted that the applicant

initially claimed in his oral evidence that he was not in hiding, he later said that he was moving from one place to another and he now claimed that he was not in hiding. The applicant said that he claimed that he was hiding, he was living in hiding.

47. The Tribunal noted that the applicant claimed in the beginning of the hearing that he continued to attend his work [number of] days a week until he came to Australia. The Tribunal asked the applicant how it could be said that he was in hiding. The applicant became hesitant and said that because he was related to it and also he was a labourer, the company and the public authorities called him in but he could not attend everything. The Tribunal again asked the applicant how he was in hiding for more than [stated period of time] if he continued to attend work on a daily basis. The applicant did not respond. He then said that it was not easy to answer that question and hard to understand unless somebody understands the situation. Even though he attended his work, he could still be hidden from the search. The Tribunal noted that it was hard to understand how he could be hidden from the search while attending work on a daily basis. The applicant said that one has to deal with it situation by situation. Not only him but others could escape from the search as there was a network of people who could exchange information For example, if he was on the way to work and somebody could tell him that there was a police officer and he would not go to work.
48. The Tribunal noted that it had to consider whether the applicant's claims made in his protection visa application were genuine and whether he was being truthful in his claims. The Tribunal also had to consider whether the documents the applicant provided in his application were genuine and accurately reflected his situation in Korea. The Tribunal invited the applicant's comments. The applicant said that the documents he provided with the application and his evidence is all true because it would be very hard to make a story that did not exist to look like it did exist. Also, he believes in God. It would be easier if he made the statement yesterday and was asked questions today but this incident happened more than [number of] years ago and the papers he submitted were written many years back and it is hard for him to say accurately what happened but what he said is true and the documents he provided were also true. The Tribunal noted that the applicant provided documents to the Tribunal right before the hearing and not a long time ago and if he felt that the documents were inaccurate, he could have made the necessary corrections. The applicant said that he handed in the documents because he was asked by the Tribunal to submit any additional documents. He said that may be his mistake was that he did not refer to his previous documents when submitting these because he relied on his memory.
49. The Tribunal asked the applicant to speak about his claim that he was blacklisted by the authorities. The applicant said that when one is involved in a labour movement or a democratic movement, the leaders are blacklisted. The Tribunal asked the applicant how he thought the blacklisting would affect him if he were to return to Korea. The applicant said that it would be very hard to live in Korea with the blacklist because, firstly, he would not be employed by any public office. Even if one has talent and ability, there will be no opportunity to use that ability He saw the definition of refugee but he thinks that if someone cannot live as a human being, then one is a refugee.
50. The Tribunal noted that the country information suggested that Korea has changed since the [decade] and those who had been involved in anti-government and labour movements in the [decade] have been elected to public office and positions of power. The applicant said that this is not describing the general situation but an exception. Those who now hold the public office with past involvement in the democratic movement are exceptional people and are different to ordinary people like him. Ordinary people would still be watched. The Tribunal

noted that according to the country information, Korea was now a democratic country that protects labour rights, trade unions and democratic activities such as those the applicant claims to have been involved in in the [decade]. The applicant said that he was sure that the country information would present the country in a positive way but in reality, even though he does not want to speak badly of Korea, it would be hard if he had to go back. He has been living here for [number of] years and it would be hard for him to lead his life in Korea because he spent his youth here and is settled in Australia and his child goes to school here. Even if the Korean government accepts them, it would be hard because his child does not speak Korean. He has been living here for [number of] years with difficulties. The Tribunal noted that while it accepted that the applicant may face difficulties resettling in Korea, it had to consider whether he would face persecution as a result of one of the Convention grounds for him to be found a refugee.

51. The Tribunal asked the applicant why he approached the Korean authorities in Australia to obtain the passport if he claims to have been on the blacklist and to have left Korea to avoid persecution. The applicant said that even with the same persecution there are different people and some can apply for the passport while others cannot. He was found not to have been involved in the communist movement but a democratic movement, so he could get his passport. Also, sometimes the Korean government thinks that those on the list can cause them trouble so they are keen for people to live elsewhere. The Tribunal noted that its concern was not with the fact that the applicant was able to get the passport but that he approached the authorities to obtain one, even though he claims to have been in hiding from the authorities, blacklisted and fearful of persecution. The applicant said that he had nothing to lose. He went to the office and thought that if they issued the passport, he could come out and if they did not issue it, he could not come out. He does not know if they were joking but the person who had given him the passport told him to go and not to come back. The passport was not issued easily and there was some consideration. The Tribunal noted that given that the applicant spent more than [stated period of time] avoiding the authorities, it was odd that he would voluntarily approach the authorities to obtain the passport. The applicant said that it did not look likely that the passport was issued but at the time he had to make a choice to live or die. He had to get out of the country and had nothing to lose, so he made the decision to apply for the passport. He did not know how they issued the passport to him.
52. The Tribunal noted that the applicant's passport was renewed in [year], after the applicant had lived in Australia for a number of years, so it was not a matter of life and death and his need to leave the country. The applicant said that he had already obtained his passport in Korea and it is the duty of the Consulate in Australia to renew the passport. He thought that because he already had the passport issued, it would not be a problem to have the passport renewed. He thought that if he was already outside of Korea, he would not have difficulties getting the passport. The Tribunal noted that if the applicant was fearful of the Korean authorities, it would seem that he would not go out of his way to notify the authorities of his whereabouts. The applicant said that the situation in Korea is different and the mindset of Korean people is different and may be hard to understand. Even in adverse situations, they try to take a risk and be brave, so that even though he was uneasy about going to the authorities, they needed to get the passport and he had to do it. The Tribunal asked the applicant why he needed the passport. He said that if he did something like renewing his business, he needed his passport.
53. The applicant said that while he has lived in Australia for [number of] years, his life was full of hardship, mainly because he did not have a permanent visa and because of that he could

not be with his mother when she passed away. All others he knows in a similar situation obtained permanent residence at the end. In America, if someone stays for more than 10 years and had not been out of the country, there is a way for them to get a visa and live there but in his case, he has lived here for a long time and is self-sufficient. He hopes that his case can be considered from a humanitarian perspective and he would be allowed to stay in this country. He has lived in Australia and has Australian friends. He has not caused any problems or harm to anybody in Australia. His life could be compared to a life of a refugee because he cannot do anything without a permanent visa. He had been taken advantage of but he was never critical. He has the ability and the qualifications to live in Australia. The Tribunal again noted that its consideration was limited to whether or not he was a refugee and did not extend to consideration of humanitarian considerations.

### **Information from other sources**

54. During the years 1972-1987 the country was ruled by the authoritarian and often repressive presidents Park and Chun who used the 1972 constitution to stay in power. The opposition throughout these years called for the destruction of the authoritarian 1972 Constitution and for greater liberalism and democracy. They held many large scale demonstrations, involving a large section of the population, which the government met with periodic repression and periods of martial law. This period came to an end in 1987 when the government agreed to all the opposition demands including the drafting of a new constitution and democratic presidential elections.

55. Since the drafting of the 1987 Constitution, there have been three democratic presidential elections, two of which have been won by ex-dissident politicians (Kim Young-Sam in 1993 and Kim Dae-Jung in 1998) who were themselves arrested and jailed during the rule of President Park (1980-1987). The extent to which the era of military rule has been repudiated is shown by the 1996 trial and conviction of two ex-Presidents (Chun and Roh) who were associated with military rule in the 1980s (Crowel and Shameen 1996). Other reports note that people who were dissidents during the period of military rule are able to resume other occupations as well become members of parliament (Watanabe 1992; Hoon 1992). As Lee and Glasure (1995) state:

Democracy finally arrived in South Korea in the late 1980s at the end of the 'third wave' of democratization, overcoming 30 years of direct or indirect control of the political process by the military and soldiers-turned-politicians. ... This transition has also created an environment in which citizens can freely express opinions and feelings about sensitive issues, including political legitimacy and corruption, with little fear of political retaliation. (p.367)

56. Amnesty International in 1998 gave the following summary of the change that has taken place:

Until the early 1990s South Korea was run by authoritarian military governments and human rights violations were widespread. From 1961 until his assassination in 1979 General Park Chung-hee was President. In 1979 martial law was declared and power was seized by General Chun Doo-hwan who cracked down on pro-democracy protesters, culminating in the Kwangju massacre in May 1980 in which at least 200 people were killed. Chun Doo-hwan became President in August 1980 and held this position until 1987 when mass public protests led him to amend the Constitution and call a direct Presidential election.

Since 1988 democracy in South Korea has allowed greater freedom for the media, human rights groups, trade unions, lawyers and others seeking to protect and enhance human rights. During this period human rights protection improved but problems remain. ... Political

prisoners have benefited from better legal protection, but the National Security Law continues to be used to detain people for non-violent political offences. Sentences for national security offences are generally shorter than they were in the past, but South Korea remains one of the few countries in Asia which allows the arrest of hundreds of political prisoners each year, many of whom are held for their peaceful political views or activities.

Former political prisoner and human rights advocate Kim Dae-jung took office as President in February 1998. Amnesty International has welcomed his initial proposals for human rights reforms and hopes they will be fully implemented.<sup>1</sup>

57. Trade unions are permitted and their position has improved since the 1980s. In 1998 Human Rights Watch noted some positive changes

President Kim Dae Jung is taking some steps to promote improved labour rights, for example by establishing tripartite dialogue with government, business and unions, and granting legal status to the teachers' union ...<sup>2</sup>

58. The US Country Reports on Human Rights Practices, 2007, released by the Bureau of Democracy, Human Rights, and Labor on March 11, 2008 states that

The Republic of Korea (Korea or ROK) is a constitutional democracy governed by a president and a unicameral legislature. The country has a population of approximately 48 million. Multiple candidates ran in presidential elections held in December that were free and fair. The civilian authorities generally maintained effective control of the security forces.

59. It further states that the law provides for freedom of speech and of the press, and the government generally respected these rights in practice. An independent press, an effective judiciary, and a functioning democratic political system combined to ensure freedom of speech and of the press. However, under the NSL the government may limit the expression of ideas that authorities consider Communist or pro-DPRK.

60. The Report states, with respect to worker rights, that the law provides workers with the right to associate freely. The 2006 Act on the Establishment and Operation of Public Officials' Trade Unions allows public servants to organise unions; however, government unions protested the law because certain groups of government officials are barred from collective bargaining. In 2006 the Ministry of Labor (MOL) approved a request from the Federation of Government Employees to establish a legal union. The law provides for the workers' right to collective bargaining and collective action, and workers exercised these rights in practice. This law also empowers workers to file complaints of unfair labor practices against employers who interfere with union organising or who discriminate against union members... There is no independent system of labor courts. Semijudicial agencies such as the Central and Local Labor Relation Commissions mediate or arbitrate labor disputes based on the Trade Union and Labor Relation Adjustment Act.

## **FINDINGS AND REASONS**

61. Although the Tribunal does not have a copy of the Department's file or the application, according to the primary decision, only the first named applicant had made claims and other applicants were included as members of the family unit but did not make separate claims.

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<sup>1</sup> Amnesty International, 1998, *Republic of Korea (South Korea) : Long-Term Prisoners Still Held under the National Security Law*, 'Background information about the Republic of Korea' ASA 25/15/98 May p.2 1996

<sup>2</sup> Human Rights Watch, 1998, *Bearing the Brunt of the Asian Economic Crisis: The Impact on Labor Rights and Migrant Workers in Asia*, Vol. 7, No. 14, November

This information was confirmed by the applicant at the hearing. Accordingly, the Tribunal has assessed the first named applicant against the requirements in s. 36(2)(a) and other applicants against the requirements in s. 36(2)(b).

62. Further, it is not apparent from the material before it whether the applicant had provided adequate information on the application to render it a valid application. The Tribunal notes that the delegate had considered the application and had made a decision on the basis of the information provided by the applicant, which suggests that the applicant had provided adequate information which the delegate considered to be sufficient for making a valid application. The Tribunal is also mindful that the applicant had subsequently provided information in his correspondence of [date] and that the decision record discloses adequate information about the harm that the applicant claims to have feared and the reasons for his fear. On the basis of this material, the Tribunal finds that the applicant has provided sufficient information in his application to have made a valid application.
63. The applicant travelled to Australia on a valid passport of the Republic of Korea (Korea) and claims to be a national of the Republic of Korea. The Tribunal accepts that the applicant is a national of South Korea and has assessed his claims against South Korea as his country of nationality.
64. The Tribunal found the applicant not to be a witness of credibility. His evidence became evasive when the Tribunal questioned the applicant about the events in Korea which he claims gave rise to persecution, such as his involvement in the Labour movement and the harm he faced, as well as his subsequent hiding. These concerns are addressed in more detail below.
65. The applicant claimed in oral evidence that his fear of persecution arises from one incident in [year] when he was a leader in a Labour Movement and participated in a demonstration. He said that he also participated in the movement in the [decade] as a follower but his claims arise from the one incident in [year]. However, when the Tribunal questioned the applicant about the event, the applicant had been unable to provide any meaningful details, instead referring to the ideology of the Labour Movement. He repeatedly failed to provide detailed information about the incident in [year] in response to Tribunal's questions. The Tribunal is of the view that if the applicant had been the leader of this activity in [year], he would be able to provide some description of the event other than recite the broad policies of the Labour Movement. The Tribunal does not accept that the applicant acted as a leader of a demonstration or any other activity in [year].
66. The applicant claimed in his written evidence, a copy of which he provided to the Tribunal, that he spent more than [stated period of time] in hiding before leaving Korea. He provided statements from third parties attesting to that fact and he also claimed in oral evidence that he was evading the authorities. When questioned about hiding in oral evidence, the applicant initially claimed that he was annoyed at being watched, so he moved from here to there. However, the applicant also claimed in oral evidence that he continued to attend work [number of] days a week until he left Korea. When the Tribunal pointed out that it appeared inconsistent that the applicant would be in hiding while continuing to attend work, the applicant became evasive and claimed that the statements were made a long time ago. The Tribunal is of the view that the applicant may be expected to recall the incident of such significance as spending more than [period of time] in hiding, particularly if that was part of the reason for his departure from Korea. The Tribunal does not accept that the effluxion of

time since the incident offers a reasonable explanation for the applicant's inability to recall whether or not he spent more than [stated period of time] in hiding.

67. When these concerns were raised with the applicant, he provided a new explanation by stating that he was still in hiding while attending work and that there was a network of people who would inform him of the danger. This explanation appears to have been offered by the applicant in response to the Tribunal concerns. The Tribunal considers the applicant's statement in his submission of [date] that he "managed to survive for [stated period] in a hidden place without even breathing in loudly" to be inconsistent with his claim in oral evidence that he continued to attend work but was reliant on informers to warn him of the danger. The Tribunal finds that the applicant has been untruthful with respect to this aspect of his evidence. The Tribunal rejects the applicant's claim that he spent more than [stated period of time] in hiding before leaving Korea.
68. The applicant had provided to the Tribunal a copy of his passport, which indicates that it was renewed by the Korean authorities in Australia. The Tribunal finds it significant that the applicant had approached the Korean authorities in Australia in order to renew his passport, despite his claimed avoidance of the authorities in Korea and his fear of persecution by the authorities. The Tribunal is of the view that the applicant's approach to the authorities is inconsistent with the applicant's claimed desire to avoid the authorities in Korea and his spending more than [stated period of time] in hiding. The applicant explained that he needed the passport to renew his business and decided to take a risk. However, the Tribunal is of the view that if the applicant was genuinely fearful of the authorities and intended to evade the authorities, he would not approach the authorities for the renewal of his passport, even if it was needed for business purposes. The Tribunal does not accept that the applicant had a genuine fear of persecution while in Australia
69. The Tribunal has considered the applicant's migration history. The Tribunal notes that the applicant had entered Australia in [year] and had not applied for protection until [month, year] The Tribunal considers it significant that the applicant had made several applications for various visas in which he claims to have been represented and he stated in oral evidence that he spoke to an officer of DIAC with respect to the [type] visa application and was advised that this application had no prospect of success. Thus, the Tribunal is of the view that if the applicant had any intention of seeking protection in Australia – or if he was genuinely fearful of persecution in Korea – he would have taken steps to seek protection earlier. The applicant claims that he was unaware of the protection visa regime but also that he did not want to disclose his personal details and appear weak. The Tribunal is of the view that if the applicant was genuinely fearful of persecution, he would be less concerned about showing weakness than about seeking protection from persecution. Instead, the applicant remained in Australia unlawfully for a number of years before making his first application and then he sought various other visas before applying for the protection visa [number of] years after his arrival in Australia. In these circumstances, the Tribunal does not accept that the applicant had a genuine fear of persecution when he left Korea or when he arrived in Australia.
70. The Tribunal finds that if the applicant was genuinely of any interest to the authorities and if he had suffered persecution (arrest, detention and torture) that he claimed resulted in his hiding and being forced to leave Korea, the applicant would have taken steps to seek protection at an earlier opportunity and he would not have voluntarily approached the Korean authorities in Australia. For these reasons also the Tribunal rejects the applicant's description of events in Korea claimed in his protection visa application



71. As the Tribunal rejects the applicant's claim and has found the applicant to be untruthful with respect to his evidence, the Tribunal also rejects the statements from third parties which the applicant provided in support of his application.
72. The combination of these reasons causes the Tribunal to reject the applicant's claims. The Tribunal rejects the applicant's claim that he was involved in any democratic, labour or anti-government movement or that he was a leader of the movement or of a particular event in [year]. The Tribunal does not accept that the applicant came to the adverse attention of the authorities, that he was detained, tortured or subsequently investigated. The Tribunal does not accept that the applicant became a target of the secret police, that he was monitored by the police or that he could not find employment as a result of his activities. The Tribunal does not accept that the applicant spent more than [stated period of time] in hiding or that he left Korea to avoid persecution from the authorities.
73. The Tribunal finds that there is no real chance that the applicant will be persecuted for a Convention reason if the applicant were to return to the Republic of Korea now or in the reasonably foreseeable future as a result of his past activities in Korea.
74. The Tribunal has also had regard to the country information concerning the present situation in Korea. The information cited above indicates that Korea has a democratically elected government, that there are pro-democracy activists and those engaged in the protection of workers' rights. It also indicates that some people who may have been targeted in the past for their anti-government or other activities have been elected to power and are able to express their opinions. The Tribunal finds that the applicant will be able to do social activities and be involved in public life if he were to return to Korea. The Tribunal finds that if the applicant were to return to Korea and engage in political discourse or activities for the protection of workers' rights or in other social activities and public life, he will not be persecuted for such activities. The Tribunal finds that there is no real chance that the applicant will be persecuted for his political opinion (express or imputed) or for any other Convention reason if he were to return to Korea now or in the reasonably foreseeable future.
75. The applicant argues that he had spent [number of] years in Australia, that he is settled in Australia and will have difficulty resettling in Korea, that he is a good person and can make a contribution to Australia. He also argues that his child does not speak Korean and may find it difficult to resettle in Korea. The Tribunal accepts that the applicant and his family may find it difficult to resettle in Korea. However, the Tribunal does not accept that any difficulty that the applicant and his family may face stems from any Convention ground, nor that it amounts to persecution.
76. Having considered all of the applicant's claims singularly and cumulatively, the Tribunal finds that there is no real chance that the applicant will face persecution for any Convention reason if he were to return to Korea now or in the reasonably foreseeable future.

## **CONCLUSIONS**

77. The Tribunal is not satisfied that the first named applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the first named applicant does not satisfy the criterion set out in s.36(2) for a protection visa.
78. The other applicants applied on the basis of their membership of the first named applicant's family. The fate of their applications depends on the outcome of the first named applicant's

application. As the first named applicant does not satisfy the criterion set out in s.36(2) and cannot be granted a protection visa, it follows that the other applicants cannot satisfy the relevant criterion set out in cl.866.222(b) and cannot be granted the visa.

## **DECISION**

79. The Tribunal affirms the decisions not to grant the applicants Protection (Class XA) visas.

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 Officers ID: PRRTIR