

1010720 [2011] RRTA 532 (7 July 2011)

DECISION RECORD

RRT CASE NUMBER:	1010720
DIAC REFERENCE(S):	CLF2010/73768
COUNTRY OF REFERENCE:	China (PRC)
TRIBUNAL MEMBER:	Angela Cranston
DATE:	7 July 2011
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant, who claims to be a citizen of China (PRC), arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] April 2009 and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa [in] June 2010. The delegate decided to refuse to grant the visa [in] October 2010 and notified the applicant of the decision and his review rights by letter dated [on the same date].
3. The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicant applied to the Tribunal [in] November 2010 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

6. Under s65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.
7. Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Further criteria for the grant of a Protection (Class XA) visa are set out in Part 866 of Schedule 2 to the Migration Regulations 1994.

Definition of 'refugee'

9. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being

outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

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

person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

17. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.
18. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

19. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
20. In his application, the applicant stated as follows:

My name is [applicant name]. I am of Korean ethnicity and was born in the Jilin Province in china. My grandfather was born in Korea. He fled Korea in 1944 when the Japanese invaded our country. Based on my ethnicity I always considered myself to be Korean rather than Chinese.

China is governed by the Han ethnic group. Although the Chinese government claims it treats minorities equally, the Koran minority in china are discriminated against by both the government and Chinese society. Growing up we were forced to learn and use Chinese. Local officials bullied and alienated us on many occasions. The unemployment rate amongst Koreans is very high due to discriminatory hiring practices. The Chinese government does nothing to stop the discrimination against Koreans.

The Korean population in Yanbian Korean Autonomous Prefecture has had dramatic negative growth since 1996. The percentage of Korean population in the prefecture has dropped from 62.01% in 1952 to its current level of 38.55%. Koreans will lose their autonomy when the population drops under 35% according to Chinese law. Based on what happened in Tibet and the Xinhiang people, we Koreans have learned that minorities in China are not treated equally and we are afraid of what will happen to us when we lose our autonomy.

The Chinese authorities block freedom of information. There was no report in the Chinese media about the massacre of many innocent students during the 1989 Tiananmen prodemocracy movement. I was a high school student during the massacre and I believed it was unjustified.

I was politically opposed to the Chinese government as there was no freedom of expression in China. I believe that the Chinese government should accommodate Democratic People's Republic of Korea (DPRK) refugees because of their predicament in their home country.

I had regular meetings with my Korean friends in which we talked about the plight of DPRK refugees and the human rights situation in China. All of us felt we were being discriminated against by the Chinese government due to our Korean ethnicity. The members of our group, including myself, were all active in helping DPRK refugees. As well, we also expressed our political opinions regarding the discrimination against Koreans in China and the problems facing DPRK refugees on the internet.

I travelled to DPRK in August of 2003. During my visit my tour guide did not allow me to visit the poor areas. However, I still managed to see Koreans who lived in extreme poverty and struggled to survive. I also travelled to the Republic of Korea (ROK) in 2007 and was shocked to see the huge difference in the standard of living between the two countries. It had a great impact on my belief about the idealism of communist countries.

My first contact with DPRK refugees was in 2004. At the time I had a friend, [name], who worked in the visa office of the Yanbian Public Security Bureau. I had another friend, [name], who worked in the Foreign Affairs Office at the PSB. I met [Mr A], who is a Korean priest, through my police friends. Some Korean priests, such as [Mr A], are sympathetic with the plight of DPRK refugees. [Mr A] was authorised by the Red Cross to look for lost relatives in DPRK on behalf of Koreans in China. He gave us some old photographs, books of family trees, address and names. We then authorised a young man from DRPK to locate the missing relatives. Once their identity was confirmed he would then contact us with the Chinese mobile phone that we gave him.

As the ROK government announced that it would accept DPRK refugees, we were able to help refugees cross the Chinese border. Once they crossed into China we helped the refugees stay in Yanji and then they were arranged to travel to Thailand and be accepted into a local refugee camp there. Later they would apply to reside in the ROK or America.

The first refugee border crossing I assisted with was in November of 2004. The river along the Chinese and DPRK border was very shallow. It only took the refugees 3

minutes to cross the border during the night. There was also no check point on the Chinese side of the border. There were two males on that occasion who were brothers. One was named [Mr B] and the other was named [Mr C]. I can provide further details if requested. The DPRK boy we hired had already bribed the DPRK soldiers. We avoided the guard patrols and picked up the two brothers. Then we drove the brothers to Yanji and placed them in a rented apartment. A hired house keeper would come and look after them. They also learned Chinese from TV programs.

In the meantime, I bought fake Chinese identity cards for the brothers.

My police friend issued genuine Chinese passports for them under the names in the fake ID cards that I had provided. After the success of the first mission. I completed an additional 8 missions in which I helped DPRK refugees cross into China.

Unfortunately, in 2008 the activities of my police friend, who worked in the foreign Affairs Office, were discovered by the Chinese authorities. She was dismissed by the PSB and shortly thereafter my friend in the visa office was detained by the Chinese Police and Security Bureau.

During one night in March of 2008, several police officers raided my home and took me to [name] police station where I was detained. They took me into a small interview room. During my interrogation they said they knew everything that I had done. They asked me about my political meetings, and details of the DPRK refugees that I had helped, and my friends who worked for the Police. They threaten to put me into jail for 3-5 years if I did not cooperate. I was very scared during this entire incident. I was afraid for my safety and that I would be sent to prison.

My family helped arrange for my release through our family connections and by paying 30 000 RMB. Before I was let go I was forced to sign a written promise that I would never again attend political meetings for help DPRK refugees in the future.

Chinese authorities have never acknowledged DPRK refugees. Instead, they have cracked down on refugee border crossing activities. Unlike people from other countries, DRPK refugees cannot travel to other countries in a normal way. As well, they flee their own country not only to avoid brutal political oppression but also to survive.

In China it is illegal to assist DPRK refugees. Refugees who are deported face long jail sentences.

They may also be sentenced to death, if they are found guilty of treason

The reason I fled from China was to avoid the political oppression from the Chinese government due to my Korean ethnicity and my political activity in helping DPRK refugees. I decided to flee to another country when my course finished. At the end of my studies I learned that Australia grants protection visas to people in my situation. Therefore, I have directed to apply for a protection visa in Australia.

I am not able to return to DPRK which I consider to be my own country. If I am forced to return to China, then I am afraid that I will be imprisoned by the Chinese authorities because of my past political activity where I helped DPRK refugees. I am also afraid of the discrimination against me by the Chinese government and by Chinese society because of my Korean ethnicity.

21. The applicant appeared before the Tribunal [in] February 2011 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Korean and English languages.
22. The applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
23. The applicant indicated that he may not be able to understand the Korean interpreter. The applicant stated there was information that was in Chinese terminology and the Korean interpreter may not be able to understand. The applicant indicated he may not know if he was using Chinese terminology. The Tribunal indicated the Korean interpreter would be able to tell if he used a word she did not know. The adviser (who spoke Mandarin) was also invited to comment on the interpretation if he was able to do so.
24. The applicant stated he arrived in Australia [in] April 2009. He stated his adviser translated his Mandarin statement into English. He read the application and statement back to him in Mandarin and he thought it was correct.
25. The applicant stated he lived in Yanji from birth until he came to Australia. He had lived at this last address for around 14 years.
26. The applicant stated he could not go back to China because he was afraid of being harmed because of political issues. He stated he was a member of a political organisation named the prosperity and freedom of our ethnicity and the organisation had helped people in Korea. He stated the situation in China was very strict because the Chinese government did not accept refugees from North Korea and many Chinese who had Korean backgrounds were discriminated against in Yangbian.
27. The applicant confirmed he had travelled to North Korea in August 2003. He stated he went to Rajin which was the name of a province in North Korea. He got there without a visa but needed a pass certificate. He stated he followed a tourist company named [agency deleted]:

s.431(2)]. He stated Rajin town was close to Yangbian so if he had a pass certificate he could visit and temporarily live there. He stated he took a bus and crossed the border between Yanji and Hoonchoon. In Hoonchoon there was an immigration office of China. He crossed the border line and entered North Korea and from there went to Rajin. He stated his documents were checked by the Koreans on the border at the immigration office. He stated he crossed by land and there was no water. He stated he was there for 4 days. The Tribunal put to him that in his application he said he was there for one day. He stated that was not true.

28. The applicant stated it was not difficult for people from Yangbian to visit Rajin and a pass certificate was enough.
29. The applicant stated he first had contact with North Korean refugees in November 2004. He stated in November 2004 he went to Hoonchoon and brought refugees to Yanji. He stated he did not help people cross the river. He stated there were two brothers. He stated he knew about the refugees because at least 20 000 to 30 000 were in Yangbian. He stated he became involved after the Korean Church asked him to do it. The Tribunal asked where they passed the border line. He stated [town deleted: s.431(2)]. He stated there was a river and the width was about 2 metres. He stated he could not remember the name, but the river went to the Tooman River. He stated he helped them go to America or South Korea via a third country. He stated usually they went into South Korea via South East Asian countries such as Thailand or Vietnam. He stated the most popular destination was South Korea and in South East Asia, Thailand. He stated in July 2004 South Korea took North Koreans who were in Thailand.
30. The Tribunal asked if he could talk about the typical refugee from North Korea. He then gave a physical description of a thin person. The Tribunal indicated that a large majority of North Korean refugees were made up of a particular person. The applicant asked if the Tribunal was referring to the ethnicity or to their looks. The Tribunal said no. The Tribunal then asked if the two brothers were typical refugees from North Koreans and if so, why. He stated if you looked at them, you could see they were from North Korea. He stated in total he had helped 13 to 14 people. After much discussion, he stated of the people he remembered, 6 were men and 4 female. He also stated he was not sure if he had helped 13 to 14 people. He stated he helped them after the Red Cross and the Korean Church asked him to do it. The Tribunal put to him he had helped more men than women, did that reflect the North Korean refugee population. He stated he did not know. The Tribunal put to him it had studied who was the typical refugee from North Korea. The applicant was unable to describe that person. He stated in 2008 China hosted the Olympic Games and from 2007 the monitoring of refugees from North Korea became strict. The Tribunal directed him back to the question. He stated he could not understand. The Tribunal asked what he thought the Tribunal meant by the word typical. He said by looks or dress. The Tribunal put to him that there was a certain percentage of people coming out of North Korea with the same characteristic. He stated he did not understand. He then stated he thought he had a problem with the interpreter. The Tribunal put to him that it seemed that he did not know what the Tribunal was talking about and he was unable to describe the typical refugee from North Korea. The Tribunal put to him that there was one characteristic that seemed to dominate. The Tribunal put to him that it seemed he was trying to answer the question the best way that he could but he did not know the answer. He then stated he could not understand what the Tribunal was saying. The Tribunal asked why he could not understand. He stated he thought the Tribunal meant 'political' when it stated 'typical' The Tribunal put to him that physically, there was a characteristic he was not stating. He then stated they were short and their face colour was dark. The Tribunal asked

how else he would describe them. He stated they were thin. The Tribunal then stated on its information the typical refugee was a female. He stated he did not think so. The Tribunal put to him that women made up about 80% of the North Korean refugees in China. He stated no, he was not sure if it was correct or whether the information was from a female organisation. He stated women were sold to China by people traffickers but males lived in the country and did hard labour and the statistics did not cover the male population. He stated he thought the information was from a Chinese female organisation and as far as he knew, it was not correct. He stated he thought including children it was half and half for the 30 000 refugees in China. He stated the statistics in China covered the female population sold to China but did not cover the males who were doing hard jobs on farms. He stated he thought there were less females sold to China than males and there were many boy beggars in the street and hard working males on farms. He stated he thought there were less North Korean females sold to China than males.

31. The applicant confirmed that as a result of his activities the police came to his house. He stated he was detained for 7 hours. He stated that was because of his political organisation and he was helping refugees. He stated he was released because his father paid a fine of 30 000 rmb and he guaranteed he would not run the organisation or help refugees again.
32. The Tribunal asked what he thought would happen if he returned to China. He stated that recently there were increased tensions in the Korean peninsula and the situation was strict. He stated the worse it became, the more the Chinese government cracked down. The Tribunal asked if anything had happened to him after he was released but before he departed China. He stated on four occasions the police came and checked if he was there. He stated they did that because they were checking if he was running the political organisation or helping refugees.
33. The Tribunal asked why it took him so long to apply for asylum in Australia. He stated at first he did not know there was a protection visa. He stated he did not know because he could not speak English and did not know the system. The Tribunal asked if a migration agent helped him come to Australia. He stated in 2008 they made a visa called the 570 visa (a student visa) and he left China looking for freedom in Australia. The Tribunal put to him if he left looking for freedom why he did not apply for asylum earlier. He stated when he came he did not know about the protection visa. He stated there was a migration agent in China who helped with his student visa. The Tribunal put to him that the Department had written about his student visa case to an agent called [Mr D] in Australia. He stated the agent in China collected documents and sent it to the agent in Australia. He stated he met the agent in Yangbin in China. The Tribunal asked if the agent in [street deleted: s.431(2)] was helping with his student visa, why he did not talk to him about his protection visa. He stated he visited him and asked about how he could stay and he said he could go to graduate school or learn about Falun Gong. He stated he thought he was not trust worthy. The Tribunal asked why he did not seek other options at that time. He stated he had a family at home, and it was impossible for him to go to graduate school. He also stated he did not believe in Falun Gong. He stated he was looking for other options and visited Chinese and Korean agencies. He stated if you looked in Chinese magazines, they advertised you could apply for a protection visa. The Tribunal again asked why it took him so long to apply. He stated he was not aware of that, second, if his application was not successful his family in China would face difficulty. He also stated decisions as to whether he could or could not obtain protection would not be decided overnight. He stated when he first arrived he did not mean to stay. He stated he was planning on going to another country and then he realised there was a protection visa.

34. The Tribunal again asked what he thought was going to happen if he went back. He stated he would be caught and would be under arrest because the situation in China concerning North Korean refugees was getting difficult. He stated someone had been sentenced to 7 – 9 years prison for helping Korean refugees. The Tribunal put to him that had not happened to him, he had been released. He stated the situation was getting difficult. He stated he would continue to help them. The Tribunal put to him that the Chinese may find that helping North Koreans was against Chinese law and the penalty would be the same for everyone that broke the law. The Tribunal stated it may find it was a criminal act and the Chinese government may be legitimately able to prosecute those who contravened the law, that is it may be prosecution and not persecution and may not be convention related. He stated he only helped people who were already in China for humanitarian purposes. He stated he wondered why the Chinese would not accept refugees who were recognised as refugees internationally. He stated he felt he now knew what freedom was and the refugees had the right to experience democracy and freedom.
35. The Tribunal again put to him that it may find that the Chinese government had a legitimate right to keep its borders secure and that a legitimate law may have been broken. The Tribunal indicated that if the Chinese government applied that law to everyone, then those who broke the law may not be refugees. The applicant stated his actions were related to political opinion and minorities were persecuted. The Tribunal asked how he was persecuted for being a Korean. He stated emotionally, economically and culturally. He stated there was a spiritual mountain which used to be managed by Yanbin but in 2005 the management went to Jilin and this was how they were threatened emotionally. He stated the companies in Yangbin were being merged with China and there was no money for Yangbin and there was also a problem with the population, that is the Korean population was decreasing and the rate had decreased from 62% in 1952 to 38% and if the population did not account for more than 35% then the population may lose control. The Tribunal indicated this may not mean that he was suffering persecution.
36. The adviser stated the names should be Tumen River, Liangshui, Hexinbillage and Hun Chun. He stated the applicant had only helped on a small scale and only provided humanitarian assistance and he attended meeting expressing his political opinions which included anti-government views. The adviser stated he was not sure whether the applicant had been involved in human trafficking but what he had done was out of a sense of justice and he had been authorised by the church to look for North Koreans. He also compared the Korean/Chinese situation with Tibet.
37. The Tribunal indicated that the applicant had delayed his departure from China, he had delayed his application and had not been able to indicate that the typical North Korean refugee was a woman and that this may lead the Tribunal to find it did not accept that he had been helping North Koreans. The Tribunal also indicated that even if it accepted he had helped North Koreans, the Tribunal needed to think about whether it was convention related.
38. The agent stated he was also persecuted for his attendance at the political meeting.
39. The Tribunal asked the applicant if the political meetings were formed to help the refugees. He stated yes.
40. The applicant stated his father had died last month and he was not able to go back to China. He stated he had not seen his wife or child for more than one and a half years. He stated they were being investigated by the Chinese authorities. The Tribunal put to him that DFAT had

stated if he was under investigation, he would not be able to leave China on his own passport and it was likely he would be on an alert list. He stated he came on a student visa so maybe the investigation was not that great. The Tribunal put to him his student visa was Australian and had nothing to do with his exiting China. He stated there was a possibility that they had not done a strict investigation.

41. At the hearing, the Tribunal received the following statement from the applicant's adviser dated [in] February 2011:

Summary of his claims

His of Korean ethnicity and was born in China. His grandfather was born in Korea and fled Korea in 1944 when the Japanese invaded Korea. He considered himself Korean.

The Chinese government does nothing to stop the discrimination against Koreans. He believes that minorities in China are not treated equally and is afraid of what will happened to us when Korean Chinese lose their autonomy.

He was politically opposed to the Chinese government as there was no freedom of expression in China. He believes that the Chinese government should accommodate Democratic People's Republic of Korea (DPRK) refugees because of their predicament in their home country.

He had regular meetings with his Korean friends. They felt being discriminated against by the Chinese government due to their Korean ethnicity. They expressed political opinions regarding the discrimination against Koreans in China and the problems facing DPRK refugees on the internet.

His first contact with DPRK refugees was in 2004. He assisted the refugees who were later accepted into a local refugee camp while they were in his hometown.

In March of 2008, several police officers raided his home and took me to a local police station where he was detained. He was asked about this political meetings, the details of the DPRK refugees that he had helped and he friends who were involved. He was very scared during this entire incident. He was afraid for his safety.

His family helped arrange for his release through their connections and paid penalty. He was forced to sign a written promise that he would never again attend political meetings or help DPRK refugees in the future.

He fled from China was to avoid the political oppression from the Chinese government. ...

Language issues

On [date] August 2010, the applicant attended an interview at the DIAC Sydney office in relation to his protection visa application. I was also present as his representative.

Although born in China, the applicant's native language is Korean as his education was in the Korean language. We had requested a Korean interpreter of Chinese background. Unfortunately there was no such interpreter available at the interview. At the beginning of the interview our client expressed his concern to the officer.

On a number of occasions, the Korean interpreter of South Korean background had great difficulties in understanding the applicant's expression. The case officer had to ask me for assistance. The officer and the applicant were not able to communicate efficiently as a result. For instance the interpreter did not understand what Houkou (Household Registration book). The applicant had found some misinterpretations after listening to the audio record.

Legal departure

In the refusal letter, DIAC concluded that given the security measures that are detailed in the following country information, legal departure indicates that the applicant was not of adverse interest to the authorities.

In a recent RRT decision 1008465 (2011) RRTA 26 (11 January 2011) the applicant claimed that she did not have any problems leaving China even though she had been imprisoned for 12 years and was constantly harassed by the authorities after being released. The Tribunal accepted her claims and remitted the matter for reconsideration with the direction that the applicant satisfies s36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the refugees Convention.

It indicates that the relevant country information about legal departure may be inaccurate. The information accepted by the Tribunal shows that some people of adverse interest to the Chinese authorities are still able to depart legally.

Political Opinions

The applicant claims in his statement that he used to attend regular political gathering with his fellow Korean friends expression different political opinions. This was also one of the reasons for which the authorities persecuted him. However the delegate did not mention these activities either at the interview or in the refusal letter.

Delay in lodging Protection visa application.

The refusal letter states a delay in making a protection visa application can be considered to indicate the claims are not well founded. However the applicant claims that he did not become aware of this visa until early last year when he was thinking to travel to another country before his visa was about to expire.

Well founded fear

The applicant claims in his statement that he had attended regular political gatherings and helped North Korean refugees in the past. DIAC also acknowledged that Chinese citizens can face legal difficulties for assisting North Korean Refugees. The applicant has well founded fear for his safety as people

could be sentenced up to 10 years in prison for providing humanitarian assistance. Please see attached copy of news article.

Further evidence

The applicant was unable to travel back to China to attend the funeral of his father who has recently passed away. This evidence supports his claims which have been made based on fear of persecution in China.

The Presbyterian church of Korea has provided a letter to certify his political activities and support his visa application. Please see the attached copy.

42. Also received was the following dated [in] February 2011:

We enclose for your reference several photos and a CD described below.

[The applicant]'s photographs taken during his trip to DPRK between [date] August 2003 and [date] August 2003

[The applicant]'s family photo

[The applicant]'s video clips during the same trip to DPRK

News articles in relation to the Chinese citizens who have been persecuted for helping DPRK refugees.

[The applicant] claims he has provided humanitarian assistance to DPRK refugees. The Chinese government considers all North Koreans economic migrants rather than refugees. Therefore his humanitarian activities are deemed as human smuggling across the border in China and he could face long term imprisonment if returned. The attached are articles reporting the predicament of the Chinese citizens who have similar experiences like [the applicant]'s.

[The applicant]'s claims not only include his humanitarian activities but also his political activities prior to coming to Australia in attending the political meetings and posting anti-government articles on the internet. He claims he was persecuted partly for his political activities.

In the article attached – USCIRF Commemorates North Korea Refugee Day, urges international action to protect North Korean Asylum Seekers in China dated (no date), the US commission on International Religious Freedom (USCIRF) believes the Chinese government has failed to comply with its obligations under the 1951 Refugee Convention. Since 2008, the Chinese government has intensified its campaign against North Korean refugees, harassing religious communities that assist refugees and offering rewards to those who turn over asylum seekers to authorities. The government also reportedly arrested individuals who organised food, shelter, transportation and other assistance to North Koreans. In August 2009, a court in Erlianhaote, Inner Mongolia, sentenced Protestant house church leaders Li Ming-shun and Zhang Yong-hu to 10 and seven years

imprisonment respectively and imposed substantial fines for their efforts to assist North Korean refugees.

China is a party to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, however, there is no Chinese law that provides for the protection of North Korean asylum seekers. The government does cooperate with the UNHCR regarding some asylum cases...

We ask the Tribunal to consider whether [the applicant]'s was innocent for providing humanitarian aid under the circumstances and whether he can be classified as a refugee as defined in Article 1 of the Convention.

43. Following the hearing, the Tribunal sent the following [in] March 2011:

You are invited to provide comments on the following information in writing:

As discussed at hearing, please find enclosed country information in relation to helping North Koreans to cross the border into China. The information relates to the penalties imposed as well as whether those from a Korean background are treated differently to the rest of the Chinese population.

While no Chinese laws dealing exclusively with people smuggling could be located, the *Criminal Law of the People's Republic of China* (amended March 14, 1997) deals with issues of people smuggling (and trafficking) in relation to the movement of people across the national border^[1] People smuggling and trafficking are dealt with in Articles 318-321 of Section Three (Crimes of Disrupting Administration of the Border) in Chapter Six (Crimes of Disrupting the Order of Social Administration); the legislation does not refer specifically to North Koreans.

Penalties for transporting people across the border vary depending on a range of factors. Penalties are most serious (from two years up to life imprisonment) where a person is a ringleader, where people were harmed in the border crossing or where people were deprived of their personal freedoms in the border crossing, among other circumstances. Shorter terms of imprisonment (up to 10 years) are imposed on those involved in the transportation of people across the border illegally. Penalties of around five years imprisonment are imposed people who provide fake and altered exit and entry documents, including passports. Excerpts of the law appear below.

Article 318. Whoever organizes people to secretly cross the national boundary (border) shall be sentenced to not less than two years and not more than seven years of fixed- term imprisonment and a fine; or not less than seven years of fixed-term imprisonment or to life imprisonment, and may in addition be sentenced to a fine or confiscation of property for any of the following situations:

- (1) ringleader who organizes people to secretly cross the national boundary (border);

^[1] 'China', n.d., *Bali Process* website, <http://www.baliprocess.net/index.asp?PageID=2145832088> - Accessed 10 March 2011 ; *Criminal Law of the People's Republic of China*, Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997, <http://www.baliprocess.net/Files/Legislation/A-C/ChinaCriminalLaw.pdf> - Accessed 10 March 2011

- (2) repeatedly organizing people to secretly cross the national boundary (border) or organizing a large number of people to secretly cross the national boundary (border);
- (3) causing serious injuries and deaths to the people being organized;
- (4) depriving or restricting personal freedom of the people being organized;
- (5) resisting investigation by violent or threatening methods;
- (6) obtaining huge amounts of illegal income;
- (7) other exceptionally serious circumstances.

...

Article 320. Whoever provides fake and altered exit and entry documents such as passports and visas, or sells exit and entry documents such as passports and visas, shall be sentenced to not more than five years of fixed-term imprisonment, and may in addition be sentenced to a fine; and when the circumstances are serious, not less than five years of fixed-term imprisonment, and may in addition be sentenced to a fine.

Article 321. Whoever transports people secretly across the national boundary (border) shall be sentenced to not more than five years of fixed-term imprisonment and criminal detention or control, and may in addition be sentenced to a fine; or not less than five years and not more than 10 years of fixed-term imprisonment and a fine for any of the following situations:

- (1) repeatedly involving in transporting activities or transporting a large number of people;
- (2) using transportation means such as ships and vehicles that do not meet essential safety conditions and that are sufficient to cause serious consequences;
- (3) obtaining huge amount [sic] of illegal income;
- (4) other exceptionally serious circumstances^[2]

Assisting North Koreans in China

The Regulations on Examination and Approval of Permanent Residence of Aliens in China (1994) address issues associated with aiding people who are illegally residing in China. The *Criminal Law of the People's Republic of China* does not appear to deal with this issue. Under the Regulations, Article 45 imposes fines for people who provide accommodation to aliens who do not hold valid travel documents and Article 49 imposes fines or detention for people who assist aliens to stay in China illegally. The Regulations are formulated in accordance with Article 33 of *The Law of the People's Republic of China on Control of the Entry and Exit of Aliens*

Article 45 Anyone who is held responsible for, in violation of the provisions of Chapter IV of these Rules, the failure to go through the registration procedure for getting accommodation or to submit a report to the public security organ for lodging registration, or for providing accommodation to an alien who does not hold any valid certificate, may be given a warning or punished with a fine of 50 to 500 yuan.

...

^[2] *Criminal Law of the People's Republic of China*, Adopted by the Second Session of the Fifth National People's Congress on July 1, 1979 and amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997, <http://www.baliprocess.net/Files/Legislation/A-C/ChinaCriminalLaw.pdf> - Accessed 10 March 2011

Article 47 Aliens who forge, alter, use other than their own, transfer or traffic in visas or other certificates may, in addition to the revocation or confiscation of the original visas or other certificates with confiscation of their illegal gains, be punished with a fine of 1000 to 10000 yuan, or held in detention of 3 to 10 days, and also concurrently be ordered to leave the country within a specified time limits, and, where the circumstances are serious enough to constitute a crime, be investigated for the criminal responsibility.

Article 49 Penalties such as fines and detention provided for in this Chapter shall also be applicable to persons who are held responsible for assisting aliens to enter or leave the country illegally, causing aliens to reside or stay in China illegally, engaging or employing aliens who seek jobs without permission, or facilitating aliens without valid travel certificates in their entry into areas not open to aliens.^[3]

The longest period of detention described in the Articles above is 10 days for aliens who do not comply with requirements, and the wording of Article 49 suggests this would be the maximum penalty for those assisting aliens in breach of the Regulations. Nevertheless, a 2007 *New York Times* article, without citing the relevant law, states that prison sentences of one to two years are imposed on people who assist North Koreans:

China has also increased its punishments for its own citizens who are caught helping North Koreans. The penalty used to be a fine, but now it is jail for a year or two — or for a decade or more if someone smuggles escapees to South Korea.^[4]

China's enforcement of penalties against those who assist North Koreans has varied over time. A 2007 Congressional Research Service Report notes that Chinese officials had previously tolerated 'the inflows of refugees and the activities of foreign NGOs so long as such activities were carried out quietly'. This position shifted around the early 2000s, as 'Chinese authorities began cracking down on the North Korean refugee population and those who assisted them'^[5] A 2006 report by the International Crisis Group (ICG) presented a similar assessment and provides detail on the fines imposed for assisting North Koreans in China:

There is a consensus among missionaries, aid workers, and NGOs that Beijing has steadily increased the pressure on North Korean asylum seekers and those helping them. It implemented a system of rewards for turning in North Koreans and fines for supporting them. Aid workers quoted rewards as high as \$400 and fines as high as \$3,600 but recent reports cite rewards of \$630.^[6]

^[3] *Regulations on Examination and Approval of Permanent Residence of Aliens in China* 1994, <http://www.china.org.cn/english/LivinginChina/184914.htm> - Accessed 10 March 2011

^[4] Kristof, N.D. 2007, 'Escape from North Korea', *New York Times*, 4 June, <http://query.nytimes.com/gst/fullpage.html?res=9C05E5DE1130F937A35755C0A9619C8B63> – Accessed 11 March 2011

^[5] Margesson, R., Chanlett-Avery, E. & Bruno, A. 2007, *CRS Report for Congress: North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options*, 26 September, p. 11, 13 <http://www.fas.org/sgp/crs/row/RL34189.pdf> - Accessed 20 October 2010; Human Rights Watch 2002, *The Invisible Exodus: North Koreans in the People's Republic of China*, 19 November, <http://www.unhcr.org/refworld/country,,HRW,,PRK,4562d8cf2,3e3141740,0.html> – Accessed 9 March 2011 Attachment 6; Ming Liu 2003, 'China and the North Korean Crisis: Facing Test and Transition', *Pacific Affairs*, Vol. 76, No. 3, p.353

^[6] International Crisis Group 2006, *Perilous Journeys: The Plight of North Koreans in China and Beyond*, 26 October, <http://www.crisisgroup.org/~media/Files/asia/north-east-asia/north->

While the Criminal Law and the Regulation appear to be the main instruments through which penalties can be applied to those who assist North Koreans in China, the existence of other relevant laws and regulations cannot be ruled out.

Is there any evidence that those who are from a Korean background and who live in China are treated differently to the rest of the Chinese population if they are convicted of either crime?

China views all North Koreans fleeing North Korea without appropriate travel documents as economic migrants and not refugees.^[7] No evidence was found that people from a Korean background who live in China are treated differently to the rest of the Chinese population if they are convicted of smuggling or found to have assisted North Koreans who are living illegally in China. Nonetheless, no reports were found of Han Chinese being arrested/fined/detained for either situation and the majority of reports concern South Koreans. It is possible, however, that this absence of reporting may be a function of the lesser involvement of Han Chinese in assisting North Koreans as opposed to an indication of more lenient treatment by Chinese authorities.

When considering reports of arrests, it is useful to contextualise the sources of support provided to North Koreans. The majority of China's population of Korean descent (between one to two million people) live near the border with North Korea.^[8] Given the location of this community, their cultural and linguistic ties and the history of support provided by North Koreans to Korean-Chinese during the Cultural Revolution, it is largely from within this group of people that North Koreans have received assistance.^[9] South Korean missionaries and activists also provide support. Since the mid-2000s, brokers have become more prominent players in the cross-border movement of North Koreans (often through China to South Korea). Some of these brokers are North Koreans who have made it to South Korea and who assist friends and family on an ad-hoc basis and a smaller proportion can be described as full-time professionals.^[10]

[korea/erilous_journeys___the_plight_of_north_koreans_in_china_and_beyond.ashx](#) - Accessed 5 November 2010

^[7] Mikyoung Kim, 2007, *Political Construction of Human Rights: North Korean Refugees in China*, Conference Papers - American Political Science Association Annual Meeting, pp. 10-13.

^[8] Lankov, A. 2004, 'North Korean Refugees in Northeast China', *Asian Survey*, Vol. 44, Issue 6, 856-73 ; Margesson, R., Chanlett-Avery, E. & Bruno, A. 2007, *CRS Report for Congress: North Korean Refugees in China and Human Rights Issues: International Response and U.S. Policy Options*, 26 September, <http://www.fas.org/spp/crs/row/RL34189.pdf> - Accessed 20 October 2010

^[9] Lee, Keumsoon. 2006. *The Border-Crossing North Koreans: Current Situations and Future Prospects*, Studies Series 06-05, Seoul: Korea Institute for National Unification, http://www.kinu.or.kr/servlet/Download?num=16&fno=16&bid=DATA05&callback=http://www.kinu.or.kr/report/report_04_01.jsp&ses= - Accessed 5 November 2010; Mikyoung Kim, 2007, *Political Construction of Human Rights: North Korean Refugees in China*, Conference Papers - American Political Science Association Annual Meeting

^[10] Chang, Yoonok, Haggard, S. & Noland, M. 2008, *Migration Experiences of North Korean Refugees: Survey Evidence from China*, Peterson Institute Working Paper Series, March, p.7 <http://www.iie.com/publications/wp/wp08-4.pdf> - Accessed 5 November 2010; International Crisis Group 2006, *Perilous Journeys: The Plight of North Koreans in China and Beyond*, 26 October, [http://www.crisisgroup.org/~media/Files/asia/north-east-asia/north-korea/erilous_journeys___the_plight_of_north_koreans_in_china_and_beyond.ashx](http://www.crisisgroup.org/~/media/Files/asia/north-east-asia/north-korea/erilous_journeys___the_plight_of_north_koreans_in_china_and_beyond.ashx) - Accessed 5 November 2010 – Attachment 8; Lankov, A. 2006, 'Bitter taste of paradise: North Korean refugees in South Korea'

The following reported incidents of the arrest and detention of people assisting North Koreans were located, these reports show that terms of imprisonment have ranged from a few months to five years while sentences of up to nine years have been imposed. South Koreans, Korean-Chinese and Americans feature in the reports and no references were found to Han Chinese being arrested, however as noted above, this may be a function of their lesser involvement in assisting North Koreans.

- May 2001 – Four humanitarian workers from a South Korean Buddhist organisation were arrested and detained for 50 days, accused of espionage and expelled from China.^[11]
- Late 2001 – Chun Ki-won, a South Korean Christian, who had reportedly helped 170 North Koreans escape to South Korea was arrested. Following a ‘global campaign to secure his release’, he was released after having spent eight months in gaol and paying a fine.^[12]
- June 2002 – Four missionaries (nationality not indicated but this story is presented in a discussion focusing on South Korean humanitarian and religious workers) were arrested on charges of having assisted ‘illegal defectors’ This is described in the report as ‘the first known indictments of those helping refugees’.^[13]
- July 2001 – Three men were reportedly being held “‘under suspicion of organizing illegal border trespassing’”.^[14]
- December 2002 – South Korean Reverend Choi Bong-II (Ch’oe Pong-il), who is of Korean-American background, was arrested and charged with people smuggling for assisting North Korean refugees; he was sentenced to nine years imprisonment. Choi was released after serving almost two years in prison and returned to South Korea in September 2004. Choi was arrested with 12 Chinese nationals (ethnic Koreans); however no information is available on the penalties issued to them.^[15]
- Late 2002 – South Korean businessman BJ Kim, who worked as a broker to assist North Koreans to travel to South Korea, was arrested in China. Mr Kim served around 15 months in a Chinese prison and on his return to South Korea was imprisoned for four months for forging South Korean documents.^[16]

Journal of East Asian Studies, 1 January

<http://www.thefreelibrary.com/Bitter+taste+of+paradise%3A+North+Korean+refugees+in+South+Korea.-a0143160740> - Accessed 10 February 2011

^[11] Human Rights Watch 2002, *The Invisible Exodus: North Koreans in the People’s Republic of China*, 19 November, <http://www.unhcr.org/refworld/country,,HRW,,PRK,4562d8cf2,3e3141740,0.html> – Accessed 9 March 2011

^[12] Carnes, T. 2002, ‘Fleeing North Korea’, *Christianity Today*, 7 October

^[13] Human Rights Watch 2002, *The Invisible Exodus: North Koreans in the People’s Republic of China*, 19 November, <http://www.unhcr.org/refworld/country,,HRW,,PRK,4562d8cf2,3e3141740,0.html> – Accessed 9 March 2011

^[14] Human Rights Watch 2002, *The Invisible Exodus: North Koreans in the People’s Republic of China*, 19 November, <http://www.unhcr.org/refworld/country,,HRW,,PRK,4562d8cf2,3e3141740,0.html> – Accessed 9 March 2011

^[15] Lee, D.S. 2004, ‘North Korean Human Rights: A Story of Apathy, Victims, and International Law’, *Stanford Journal of East Asian Affairs*, Vol. 4, No. 2, <http://www.stanford.edu/group/sjeaa/journal42/korea1.pdf> - Accessed 11 March 2011 – Attachment 16; Lankov, A. 2004, ‘North Korean Refugees in Northeast China’, *Asian Survey*, Vol. 44, Issue 6, pp 856-73 – Attachment 10; ‘North Korean Refugees in China’ 2008, *LawyerIntl.com* website, <http://www.lawyerintl.com/law-articles/2173-North%20Korean%20Refugees%20in%20China> – Accessed 9 March 2011

^[16] International Crisis Group 2006, *Perilous Journeys: The Plight of North Koreans in China and Beyond*, 26 October, http://www.crisisgroup.org/~media/Files/asia/north-east-asia/north-korea/erilous_journeys___the_plight_of_north_koreans_in_china_and_beyond.ashx - Accessed 5 November 2010

- January 2003 – A freelance South Korean photographer for the *New York Times* was imprisoned for taking photographs of North Korean refugees attempting to leave North Korea. No further information was located on the outcome of this matter.^[17]
- May 2003 – South Korean citizen Choi Yong-hun was sentenced to five years in prison for assisting North Koreans to flee through China to South Korea.^[18]
- 2003 – American citizen (Steve Kim) of South Korean descent was arrested and charged with assisting North Koreans to illegally cross the national border. Mr Kim served four years in prison and was released in 2007.^[19]
- May 2005 – American citizen Phillip Buck was detained for assisting North Koreans in China. In an article that appears to have been written in 2008 and is published on an international law website, it is stated that he was ‘currently’ detained but no formal charges had been made public.^[20]
- Aug/Sept 2007 – A North Korean who had obtained South Korean citizenship was detained for four months for having guided other North Koreans across the border.^[21]
- November 2007 – A North Korean who had obtained South Korean citizenship was arrested near the Mongolian border for assisting North Koreans to leave China. No further information about this case was located.^[22]
- April 2009 – Two Chinese Christians (described as Protestant house church leaders by the US Commission on International Religious Freedom) were arrested assisting North Koreans to cross the China/Mongolia border. The female (Li Mingshun) was sentenced to ten years as the organiser and her male colleague (Zhang Youghu) was sentenced to seven years imprisonment for organising the transportation into inner Mongolia. One article (supplied by the applicant) notes that Li Mingshun is a ‘Chinese-Korean’.^[23]

It is of note that two recent articles were located of other jurisdictions considering asylum claims from Chinese citizens on the basis of having assisted North Koreans. Summaries appear below.

^[17] Lee, D.S. 2004, ‘North Korean Human Rights: A Story of Apathy, Victims, and International Law, Stanford Journal of East Asian Affairs, Vol. 4, No. 2, <http://www.stanford.edu/group/sjeaa/journal42/korea1.pdf> - Accessed 11 March 2011

^[18] ‘North Korean Refugees in China’ 2008, *LawyerIntl.com* website, <http://www.lawyerintl.com/law-articles/2173-North%20Korean%20Refugees%20in%20China> – Accessed 9 March 2011 – Attachment 17

^[19] US Committee for Refugees and Immigrants 2008, ‘China’, *World Refugee Survey 2008*, http://www.uscrrfugees.org/2010Website/5_Resources/5_5_Refugee_Warehousing/5_5_4_Archived_World_Refugee_Surveys/5_5_4_6_World_Refugee_Survey_2008/Country%20Updates/Algeria%20to%20Congo-Brazzaville.pdf – Accessed 11 March 2011

^[20] ‘North Korean Refugees in China’ 2008, *LawyerIntl.com* website, <http://www.lawyerintl.com/law-articles/2173-North%20Korean%20Refugees%20in%20China> – Accessed 9 March 2011

^[21] US Committee for Refugees and Immigrants 2008, ‘China’, *World Refugee Survey 2008*, http://www.uscrrfugees.org/2010Website/5_Resources/5_5_Refugee_Warehousing/5_5_4_Archived_World_Refugee_Surveys/5_5_4_6_World_Refugee_Survey_2008/Country%20Updates/Algeria%20to%20Congo-Brazzaville.pdf – Accessed 11 March 2011

^[22] ‘Urgent – NK Activist to be Tried by China’ 2007, *Life Funds for North Korean Refugees* website, <http://www.northkoreanrefugees.com/2007-11-yootrial.htm> - Accessed 10 March 2011

^[23] ‘USCIRF Commemorates North Korea Refugee Day, Urges International Action to Protect North Korean Asylum Seekers in China’ 2010, *US Commission on International Religious Freedom* website, 23 September, <http://www.uscirf.gov/news-room/press-releases/3345-9232010-uscirf-commemorates-north-korea-refugee-day-urges-international-action-to-protect.html> - Accessed 11 March 2011; ‘Chinese Christian imprisoned for assisting North Korean refugees with escape’ 2009, *Examiner.com*, 1 October; ‘Lawyers to Defend Rights of N. Korean Refugees in China’ 2009, *The Gospel Herald*, 8 July, <http://www.gospelherald.net/article/mcat/45455/lawyers-to-defend-rights-of-n-korean-refugees-in-china.htm> - Accessed 11 March 2011

- February 2011 – An unconfirmed report was located of a South Korean court recognising a Korean-Chinese man as a refugee on the grounds that he was likely to be subjected to criminal punishment if he were to return to China because he had provided food and transportation to North Korean defectors in China.^[24]
- September 2010 – Two cases were brought before the Second US Circuit Court of Appeals involving claims for asylum by two Chinese citizens who provided assistance to North Koreans in China. The court has asked the Board of Immigration Appeal to determine whether actions taken against those who assist North Korean refugees constitute punishment for expression of political opinion.^[25]

This is relevant because the Tribunal may find that whilst the *Criminal Law of the People's Republic of China* imposes penalties for the unauthorised movement of people across the national border; the legislation does not refer specifically to North Koreans and that penalties for moving people across the border vary depending on a range of factors. Penalties are most serious (from two years to life imprisonment) where a person is a ringleader, where people were harmed in the border crossing or where people were deprived of their personal freedoms in the border crossing, among other circumstances. Shorter terms of imprisonment (up to 10 years) are imposed on those involved in the transportation of people across the border illegally. Penalties of around five years imprisonment are imposed on people who provide fake and altered exit and entry documents, including passports.

The *Regulations on Examination and Approval of Permanent Residence of Aliens in China 1994* imposes penalties for assisting people who are illegally residing in China. The *Criminal Law of the People's Republic of China* does not appear to deal with this issue. Under the Regulations, Article 45 imposes fines for people who provide accommodation to aliens who do not hold valid travel documents and Article 49 imposes fines or detention for people who assist aliens to stay in China illegally.

The Tribunal may also find that no evidence was found that people from a Korean background and who live in China are treated differently to the rest of the Chinese population if they are convicted of smuggling or penalised for assisting North Koreans in China. That said, no reports were found of Han Chinese being arrested, fined or detained for either situation; the majority of reports relate to the arrest and imprisonment of South Koreans.

44. The Tribunal received the following response:

I am writing on behalf of [the applicant] who would like to provide comments on the information contained in the Tribunal letter dated [date] March 2011.

^[24] 'First court decision bestowing refugee status on a Korean-Chinese' 2011, *GlobalPost*, 20 February, <http://www.globalpost.com/webblog/south-korea/first-court-decision-bestowing-refugee-status-korean-chinese> - Accessed 10 March 2011

^[25] Hamblett, M. 2010, 'Chinese Nationals' Aid to North Korean Refugees Raises Asylum Issue', *Law.com* website, 24 September, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202472428002> – Accessed 9 March 2011

[The applicant] indicates that he is unable to find published information showing those who are from a Korean background and who live in China are treated differently to the rest of the Chinese population if they are convicted of either crime. As the Tribunal indicated, no reports were found of Han Chinese being arrested, fined or detained for assisting North Koreans in China. Therefore it is hard for [the applicant] to provide evidence in this regard. However, he personally believes his people are discriminated in many aspects in China for their Korean background.

Meanwhile he also did some research on the cases that were brought before the Second US Circuit Court of Appeals involving claims for asylum by two Chinese citizens who provided assistance to North Koreans in China. These people are from the same province in which [the applicant] lived. They had similar experience and in addition [the applicant] attended regular political gatherings for which he was allegedly persecuted.

The 2nd Circuit has asked the board to determine whether actions taken against those who assist North Korean refugees constitute punishment for expression of political opinion. In *Jin v. Holder*, 093472-ag, Judge Dennis Jacob remanded the case and said "the board failed to consider a number of relevant facts, including whether China has a law barring assistance to North Koreans"

Brookings-Bern Project on internal Displacement has published an article titled "Legal Grounds for Protection of North Korean Refugees". In the article, the author says "Because China has no refugee adjudication process to determine who is a refugee and gives the UN High Commissioner for Refugees (UNHCR) limited or no access to North Koreans crossing into China, it has not been possible to ascertain how many North Koreans are seeking asylum in China because of a well-founded fear of political or other persecution... To date, China has not enacted legislation to codify these obligations even though it has been a party to the Refugee Convention since 1982, a party to the Torture Convention since 1988, and a member of the Executive Committee of the High Commissioner for Refugees' Program (ExCom) since 1958. " We have enclosed it to this letter for your reference.

In this case, [the applicant] insists that the motive of his assistance to North Korean refugees was totally based on his political opinions. There is a connection between the political gathering he attended and his alleged persecution. The trip to DPRK in 2003 evidenced by the photos and video clips adds weight to the credibility of his statement. The letter from the Somang Church (The Presbyterian Church of Korea) also supports his claim.

Therefore we ask the Tribunal to take consideration of all the available evidence and make an impartial decision.

45. The Tribunal held a further hearing [in] June 2011 with the assistance of a NAATI Level 3 accredited Korean interpreter.
46. The applicant stated he could not return to China because he would be arrested and possibly convicted because he had helped refugees from North Korea.
47. The Tribunal asked when he held his meetings. He stated the meetings were called the people freedom and prosperity which was a kind of political group. He stated his first meeting was held in 2003. He stated he joined in July. The Tribunal asked why he joined in July. He stated when a Korean pastor came to educate them about the concept of freedom that was when he learned about the situation and the pastor sought his help for refugees from North Korean. The Tribunal asked when they did that. He stated that in thought that was in July as well, that was when he participated in the church and when he heard about the situation in North Korea. He stated he personally did not participate, he just met the pastor of that church. The Tribunal asked where he met him. He stated he met him in a hotel. The Tribunal put to him that his evidence was that as a result of meeting a pastor in a hotel, he then decided to go to the meetings. He agreed. He stated the first request the pastor asked was to find the pastor's cousin who was believed to reside in North Korea. He stated the Pastor brought along a family register and an address of the home town of the person and photos of the old town. The applicant stated he got the river crosser to go back to North Korea and search the old town and by doing so he was able to locate the person. He stated he talked to the river crosser in September when he gave him the register, the address and the photos. The Tribunal asked how he picked the river crosser. He stated he was a friend of a member of the group. He stated the river crosser came back [in] December after locating the person in question. The applicant stated the river crosser was not a member of the group and was North Korean. He stated in 2004 the pastor officially asked if he could look after North Koreans when they fled from North Korea. The Tribunal asked what happened to the cousin. He stated in November 2004 that was the first North Korean he helped and that was that cousin. The Tribunal put to him that it thought he had first helped two brothers. He said yes. The Tribunal put to him that he had previously said he first helped two brothers and had not said they were related to the pastor. He stated the Tribunal did not ask for the relationship between the brothers and the pastor. The Tribunal asked for the names of the brothers. He stated [name deleted: s.431(2)] and the other one was [name deleted: s.431(2)]. He stated the same name could be phonetically pronounced differently in the Chinese community and in the Korean community. The Tribunal indicated that the last time the Tribunal had asked for their names, he had not wanted to state their names, then that their last names were Lee and then that their last names were Kim. He stated he was involved in many different instances and the first time he was asked he wasn't clear headed however he had now had time to think about it and these were the names. The Tribunal put to him that in his statement he said one was named [Mr B] and the other was named [Mr C]. He stated that was how they were pronounced in Chinese. The Tribunal put to him that if he had referred to them by one name in the statement, why would he not continue to use that name. He stated there were two names, one in Korean and one in Chinese. The Tribunal put to him that he had included their names in their statement but had been reluctant to tell their names to the Tribunal. He stated he had used their names in his application, but when he came to the Tribunal, he worried about their privacy and was reluctant to give out that information. He stated he was still reluctant but the Tribunal had given him a second chance. He also stated he had been told the

Tribunal was independent from the Department. The Tribunal also put to him that he may not have been consistent because he was not telling the truth. He stated that was not the case.

48. The Tribunal put to him that at the stage he started to attend the meetings, he had not been to North Korea. He said he first went to North Korea in August 2003. The Tribunal put to him that if he had not been to North Korea, then what did the pastor say to convince him to attend the meetings. He stated there were a lot of North Koreans where he lived and he saw them. The Tribunal asked why he went to the meetings even before going to North Korea. He stated he did not know how to help and when the pastor talked about it that was an eye opener for him. The Tribunal asked why the pastor could not have authorised the river crosser himself. He stated it was not sensible because the river crosser was North Korean and the pastor was South Korean. The applicant said he was the mediator. The Tribunal put to him that in his statement he said that [Mr A] was authorised by the Red Cross to look for lost relatives on behalf of North Koreans in China. He stated it was the South Korean Red Cross. The Tribunal asked why the pastor would ask him to look for his cousin if his job was to look for people for the Red Cross. He stated the pastor could not go to North Korea to look for people. He stated the Pastor could not look for North Koreans in North Korea. The Tribunal put to him that his meeting the Pastor did not seem to be the principal reason he became involved with refugees from North Korea, that is he first went to North Korea and later he had police friends and met [Mr A] who was a Korean priest in 2004 through them. He stated they had the meeting at the hotel. The Tribunal asked when. After some time, he stated he had the meeting in September but he could not remember the year. The Tribunal asked if he had the meeting before or after he went to North Korea. He stated after. The Tribunal put to him that he had stated he started having meetings in July 2003. He stated it was the interpreters fault, he stated he met the pastor in July and he attended the meeting in September but he could not remember when, after he came back from North Korea.
49. The Tribunal asked who attended the meetings. He stated he met the Pastor in July. The Tribunal stated he said in July 2003 the pastor came along and told him about the situation. He stated that was when he first met him but that was not when he participated in the meetings. The Tribunal put to him he had stated he first went in July 2003. He then stated he met the Pastor in July and went to the meetings in September 2003. The Tribunal again asked who attended the meetings. He stated himself and the members of the group. He stated there were 5 members and the Tribunal had to promise not to reveal their names. The Tribunal asked if the people he mentioned in his statement were members of his group. He stated he had not revealed their names, only their family name. He stated there were 5 members, they were Kims, [surname deleted: s.431(2)], and [surname deleted: s.431(2)]. The Tribunal asked what was discussed at the meetings. He stated they talked about what they could do for their people in China. The Tribunal asked what that meant in practical terms. He stated they talked about what they could do for their freedom as a minority group, their population, their economy and how to help refugees. When asked if they did anything else other than talk, he stated they would upload an article on the internet as to how to fight for freedom for their people and how to help refugees. He also stated the group helped North Korean refugees, that is guide them to Yanbian City, and give them identities and passports so they get out of the China safely and go to South Korea.
50. The Tribunal put to him that there were two members in his statement that he had not identified as being members of his group. He stated they were also members. The Tribunal asked why he had not said that earlier. He stated he said they were members. The Tribunal again asked how many people were in the group. He stated he met 8 people in 2004 and he

believed there more that he had not met. He stated when he went to the meeting there was 5 members but at different meetings there were other people, the membership could change. The Tribunal put to him that if he was in a group doing something that was not lawful and was not endorsed by the Chinese government, why would he risk people coming in and out of the group. He stated he was not the leader of the group, he was only a participant and if they did not need him, he would not go. The Tribunal asked what happened to the members of the group. He stated one member was not contactable any more, the other was fired. He stated other than that he did not know because he was in Australia. The Tribunal put to him he had mentioned one of them was detained. He stated he said the person was not contactable. He stated he was arrested in August and was in custody in March. He then stated he was in custody in March. The Tribunal put to him his police friend was dismissed and his friend in the visa office was detained. He said the person was not contactable.

51. The adviser stated that the family name 'Jing' was in Mandarin and could be spelt as 'Kim' in Korean. He then asked the interpreter to comment on the name because he thought Koreans could recognise the characters but not the pronunciation. The applicant agreed. He stated he was talking to a Chinese speaker when he wrote the statement and was talking through a Korean interpreter when he speaking to the Tribunal.
52. The interpreter stated she only had Korean language.
53. The Tribunal put to the applicant information pursuant to section 424AA. The Tribunal indicated that he had stated it took him a long time to apply for protection because he did not know however his tourist visa application file indicated he had an agent and the Tribunal may find he did have opportunities to ascertain his migration options. The Tribunal then held a short adjournment.
54. Upon return, the applicant stated he thought there were translation issues. The Tribunal asked him to identify the issues. He stated sometimes the interpreter did not understand what he had said and sometimes he did not understand what the interpreter had said. The Tribunal indicated it had said at the beginning of the hearing that if he did not understand what the interpreter had said he should tell the Tribunal. The Tribunal indicated it did not recall him raising interpretation issues throughout the hearing and the Tribunal thought the interpreter had only stated that she could not understand him on one occasion and he had repeated what he had said. The Tribunal indicated that if he had not raised issues throughout the hearing, then it was wondering why he had waited until the end to raise interpretation as an issue The applicant stated he did not have problems with the interpreting if the Tribunal could understand the differences between the names in Korean and Chinese. He confirmed that this was the interpretation issue he was talking about.
55. The Tribunal again repeated the tourist visa information pursuant to section 424AA. The applicant stated he held a visa in Australia to study and he didn't want to work with [Mr D] because he cost a lot of money. [Mr D] also stated that the applicant could only stay in Australia by studying and completing IELTS.
56. The applicant stated when his father passed away, he was unable to say goodbye because he was in Australia.
57. The adviser stated the applicant never said the brothers were related to the Pastor. The interpreter she would not have said anything she had not heard.

58. The Tribunal put to the applicant that his adviser has stated that the brothers were not the Pastor's cousins. He stated he said the cousin of people, that is cousin referred to people who got lost during the Korean War.
59. The interpreter then stated the applicant had used the word 'cousin' generally.

Country Information

Entry for a Chinese national into North Korea

60. The city of Rajin is now more commonly referred to as Rason (the name changed in 2004), and prior to that it was known as Rajin-Sonborg. Rason is a contraction of Rajin-Sonorg. Rajin (or Rason) is located in the Kwanbuk region of North Korea and is part of the Rajin-Sonborg Economic Special Zone. This special economic zone designation was established in the early 1990s to promote economic development in the region due to a steady level of trade with China and the presence of a strategic port and harbour. While investment initially lagged, in recent years there have been renewed efforts by both North Koreans and Chinese investment companies to develop the area.
61. A 1996 New York Times article described the appearance of Rajin, stating that the city is located approximately 9 miles from Sonborg. Rajin's streets at the time were largely unpaved, very few cars were observed and many residents live in duplicated six-story concrete apartments with balconies. The population is listed as in the tens of thousands, which is close to the figure estimated by the applicant.
62. The 2010 article by Scott Snyder, entitled *Rajin-Sonborg: A Strategic Choice for China in Its Relations with Pyongyang* reports on the history of Rajin, relations with China, and efforts to develop cross border trade in the area. The article reports that in 2008, North Korea was Jilin Province's fourth largest trading partner with official volumes listed to be \$770 million. This activity indicates substantial cross-border relations and activities making it likely that Chinese travelled to Rajin in significant numbers.
63. The February 2010 article *Chinese Businesses Pour into N.Korea's Rajin-Sonborg* refers to improved border transiting conditions in recent years and notes that Chinese citizens have been visiting the area since the 1990s. While the article does not refer to specific documentation requirements, it says many past controls have recently been eliminated, including long waiting times at borders and restrictions on activities for Chinese going to the Rajin area.
64. A common border crossing point in the areas mentioned by the applicant is the Quanhe-Wonjong border crossing. A 2005 article by the East Asia Forum on economic development in Rajin stated that negotiations were under way between Hunchun (China) local government officials and North Korean to upgrade the dirt road to Rajin. Subsequent reports state the road was still not paved by 2010. The article also stated that the North Koreans built a large customs facility at Wonjong to handle Chinese goods coming over the border going to port facilities in Rajin. Several reports indicate that the North Koreans are currently working to encourage Chinese and other foreign investment in Rajin to improve infrastructure and generate income.
65. Several sources indicate that between 2000 and 2004 Chinese tourists travelled to Rajin to visit the Emperor Hotel and the attached Orakjang Casino, which opened in 2000. It was

constructed by a Hong Kong property developer. The hotel and casino was a popular Chinese tourist destination until a North Korean official was found guilty of gambling with public funds and the casino was closed.

66. The Tumen River runs along border between China and North Korea in the area specified by the applicant. The applicant claims he crossed by land and that there was 'no water'. It is unclear how the applicant entered North Korea without crossing the Tumen River. It is possible that drought reduced the amount of water in the river. Please see previous Figure 2 which shows the location of the Tumen River and the border.
67. No information was located about a tourist agency named Yenben Guerly, however, there are several Chinese tourist companies offering travel arrangements for Chinese to visit North Korea.

Documentation

68. No source could be located specifically listing the required documentation for a Chinese to cross the border into China in the vicinity of Hunchun in 2003. However, two sources indicate that is likely that a Chinese tourist visiting Rajin for a short visit could enter using only a Chinese identity document, such as a Hukou and that a passport and visa were not required.
69. According to a 2006 International Crisis Group report on North Korea and Chinese relations, the normal procedures for Chinese tourists intending to visit North Korea involved applying for a visa at North Korean embassies or consulates. These applications usually had to have an invitation from a North Korean entity attached. However the report states that there were exceptions for Chinese visiting the Rajin-Sonbong special economic zone; for short visits copies of Chinese identification cards were sufficient.
70. Tim Johnson is a journalist who has travelled in North Korea and who is a knowledgeable source. He reported in 2006 on completing a journey to Rajin that: 'For decades, North Korea has been the easiest foreign destination for the Chinese. Until last year, they didn't even need passports. This statement indicates that it is likely that a Chinese identity card, such as a Hukou, was sufficient documentation for Chinese tourist to enter North Korea for a short visit to Rajin in 2003'.

North Korean refugees

71. The migratory route from North Korea's northern regions into China's bordering Jilin Province, where the city of Yanji is located, and then travel through China into Thailand, followed by resettlement in either the Republic of Korea (ROK) or the United States, is confirmed by numerous country information sources. H. Tanaka, writing for the Migration Information Source website in 2008, describes the route in general terms:
72. The presence of the tens, if not hundreds of thousands, of North Korean refugees in China is one of the most overlooked refugee problems in the world. North Korea's 1,400-mile long border with China makes unauthorized travel across the Yalu and Tumen rivers a particularly attractive way out of North Korea.
73. North Koreans who make it to China generally stay in the northeastern provinces of Jilin, Heilongjiang, and Liaoning. For some North Koreans, China has become a country of

destination, though most only consider it a point of transit.

According to a recent survey conducted by the US Committee for Human Rights in North Korea, most North Korean defectors intend to stay only temporarily in China and later reside permanently in South Korea. However, the survey found that 83 percent of defectors in China resided there for at least two years...

Unable to request a refugee-determination status process from UNHCR [in China], North Koreans in China are obliged to either storm a foreign embassy or consulate in China, or travel to a third country that allows UNHCR to determine refugee status for North Koreans...

74. North Koreans in Other Countries

Southeast Asia and Mongolia

While the 6,000-mile trek is dangerous, the precarious nature of living in China as an unauthorized economic migrant has pushed many North Korean defectors and members of their families to hire brokers to smuggle them into Southeast Asian countries such as Thailand and Vietnam, where they can legally access UNHCR offices; some also go to Mongolia, which is closer geographically than countries in Southeast Asia. Driven by a strong desire to be reunited with family members in South Korea, word of mouth about the relative success in using brokers to reach Southeast Asia has contributed to the expansion of these lucrative underground networks.

Thailand, known among smugglers for having looser border controls and higher chances of sending North Koreans to South Korea, is a more popular destination than Vietnam, Laos, or Burma.

Moreover, even if arrested and charged as illegal immigrants, North Korean defectors in Thailand still have access to UNHCR's refugee-status determination process and are likely to be resettled to South Korea...

The United States

The United States passed the North Korean Human Rights Act in 2004, stating that "North Koreans are not barred from eligibility for refugee status or asylum in the United States on account of any legal right to citizenship they may enjoy under the Constitution of the Republic of Korea."..

75. Though it does not impose any quota on the number of North Korean refugees, the United States, fearing North Korean spy activities, remains cautious about resettling a large number of refugees on security grounds. Since the passage of the law, the country has resettled 37 North Korean refugees: nine were admitted in fiscal year (FY) 2006, 22 in FY 2007, and six in FY 2008 (as of December 31, 2007).
76. According to the summary of a paper written by Yoon, Bang-Soon "Sex-Trafficking and Human Rights of North Korean Women Defectors" and presented at the annual meeting of the International Studies Association 48th Annual Convention, Hilton Chicago, CHICAGO, IL, USA, Feb 28, 2007, data concerning North Korean defectors and human rights compiled by governments and NGOs both in and outside South Korea commonly indicate three characteristics: first, the feminization phenomenon of North Korean defectors, namely, the

great majority of recent defectors (over 70%) are women; second, sex trafficking is the most common social problem experienced by North Korean women defectors in the northeastern region of China; and third, gender-specific human rights violations are common both in China and in North Korea.

77. According to an article that appeared in Asia Times Online on 20 July 2007, South Korean government data show that in 2006 the number of North Korean refugees who arrived in the South was 2,019. Among them, women accounted for 1,533, or 76%.

Koreans in China

78. There are 55 different minorities scattered throughout 60% of China. From the 2000 census, 18 minorities numbered more than one million – the ethnic Korean population was estimated at some 1.9 million (0.16% of the population) (*The Far East and Australasia 2004* 2003, Europa Publications, 35th ed., London, pp.168-169, 197).

The government's portal site to China states that the largest concentration of Koreans is in the Yanbian Korean Autonomous Prefecture in east Jilin Province. Another community of Koreans is in Changbai Korean Autonomous County in southeastern Jilin. Other Koreans live in Liaoning and Heilongjiang provinces in the northeast of China. A March 2006 newspaper article states that the proportion of ethnic Koreans in Yanbian had fallen to an estimated 33% by the end of 2005. It cites a *Heilongjiang Daily* survey that ethnic Koreans from Jilin, Heilongjiang and Liaoning are increasingly moving to other areas of China where Korean companies have been established ('The Korean ethnic minority' (undated), china.org.cn website <http://www.china.org.cn/e-groups/shaoshu/shao-2-korean.htm> – Accessed 23 October 2006; Immigration and Refugee Board of Canada 1999, CHN31919.E – *China: Follow-up to CHN31735.E of 20 April 1999 on treatment of the ethnic Korean minority and information on the Korean Workers' Association or other Korean labour organizations (1997-1999)*, 6 May; 'The End for China's Autonomous Korean Region?' 2006, *Chosun Ibo*, 11 March).

Under the Chinese Constitution all minority nationalities are equal and discrimination against them is prohibited. The Constitution states that regional autonomy is practiced where minorities live in concentrated communities. Sources, however, indicate that some minorities face discrimination. One source also noted that the Korean regions of China "have enjoyed an unusual degree of stability, economic growth, education, prosperity, and urbanization" (*Constitution of the People's Republic of China*, Adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on 4 December 1982, as amended at the First Session of the Seventh National People's Congress on 12 April 1988, and again at the First Session of the Seventh National People's Congress on 29 March 1993, UNHCR website, Article 4 <http://www.unhcr.org/home/RSDLEGAL/3ddbce974.pdf> – Accessed 23 October 2006 – Immigration and Refugee Board of Canada 2000, CHN33895.E – *China: Language of instruction in Heilongjiang Province, in particular for ethnic minorities such as Koreans*, 7 March).

The US State Department has reported that Chinese government policy provides preferential treatment to recognised minorities in birth planning, university admission, access to loans and employment. Nevertheless, in practice, Han culture often discriminated against minorities. A Europa publication noted that racial, religious and linguistic problems, such as in Muslim Xinjiang and Buddhist Tibet, have resulted in several anti-Chinese uprisings (US Department

of State 2006, 'National/Racial/Ethnic Minorities' in *Country Reports on Human Rights Practices for 2005 – China*, 8 March; *The Far East and Australasia 2004* 2003, Europa Publications, 35th ed., London, p.168).

On ethnic Koreans the US State Department wrote in a China profile:

[66] Established communities of ethnic Koreans in China do not experience active, officially sanctioned persecution. Korean language and culture co-exist with Chinese language and culture, and protection for them is written into local law in heavily Korean areas. More than one million ethnic Koreans live as Chinese citizens in the northeastern provinces of Heilongjiang, Jilin, and Liaoning. In the Yanbian Korean Autonomous Prefecture (*in Jilin Province*) the signs are bilingual and ethnic Koreans operate their own newspapers and radio stations. In urban areas where minorities are concentrated, they participate in local street committees and there are minorities at various levels of city and provincial government.

[67] Ethnic Korean parents are free to send their children either to mainstream schools or to those that feature primary and secondary curricula in Korean. While students who attend ethnic Korean schools may suffer some disadvantages and face discrimination, the central government offers minorities a preferential policy for university admission, as well as larger stipends than those given the Han majority. Additionally, Korean couples, as minorities, generally are allowed two or more children.

[68] In the Yanbian Autonomous Korean Prefecture in Jilin Province, Catholic and Protestant churches, including Korean-language Protestant churches with close ties to churches in South Korea, have numerous adherents. Korean Protestant churches also operate openly in Liaoning Province and a seminary near Chenyang (*Liaoning Province*) trains ethnic Korean Protestant ministers (US Department of State 2004, *China: Profile of Asylum Claims and Country Conditions*, June, paras.66-68 <http://www.pards.org/chinareportjune2004.doc> – Accessed 2 November 2005).

A source cited by a Canadian government group in May 1999 stated:

Ethnic Koreans in China tend to be significantly more prosperous and much better educated than the Han majority. There are no reports of ethnic conflict between Koreans and Han and the former enjoy preferential policies, particularly in admission to educational institutions. Surveys that I have undertaken in China indicate that Koreans are the ethnic minority most respected by Han. There are a disproportionate number of high ranking PRC officials of Korean descent, including many generals of the People's Liberation Army (Immigration and Refugee Board of Canada 1999, *CHN31919.E – China: Follow-up to CHN31735.E of 20 April 1999 on treatment of the ethnic Korean minority and information on the Korean Workers' Association or other Korean labour organizations (1997-1999)*, 6 May).

In its human rights report for 2005 US State Department also reported that:

...But even in the Yanbian Korean Autonomous Prefecture of Jilin Province, which the government recognized as the most "harmonious" ethnic area, there is a perceived ceiling in career advancement for ethnic Koreans (US Department of State 2006, 'National/Racial/Ethnic Minorities' in *Country Reports on Human Rights Practices for 2005 – China*, 8 March).

Little information was found in the sources consulted on disadvantages faced by ethnic Koreans in Jilin who are Chinese citizens. The US State Department has reported that there is a perceived ceiling in career advancement in Jilin for ethnic Koreans. Other country information indicates that after 1910 the Japanese forced Korean migration in China. Although most ethnic Koreans live in the Yanbian Korean Autonomous Prefecture of Jilin province many have moved to other cities around China.

In its human rights report for the year 2006 the US State Department states that:

According to the 2000 census, the population of the country's 55 officially recognized ethnic minorities totaled 106.4 million, or 8.4 percent of the total population. Additionally some citizens identified themselves as members of unrecognized ethnic minorities. Most minority groups resided in areas they traditionally inhabited. Government policy provides members of recognized minorities with preferential treatment in birth planning, university admission, access to loans, and employment. In May 2005 new regulations designed to enhance minority preferences in education became effective. Nonetheless, in practice the majority Han culture often discriminated against minorities. Most minorities in border regions were less educated, and job discrimination in favor of Han migrants remained a serious problem even in state-owned enterprises. In June the Xinjiang Production and Construction Corps announced that it would recruit 840 employees from the Xinjiang Uighur Autonomous Region, designating nearly all of the job openings for Han Chinese. Racial discrimination was the source of deep resentment in some areas, such as Xinjiang, Inner Mongolia, and Tibet. As part of the government's emphasis on building a "harmonious society," the government downplayed racism against minorities and tension among different ethnic groups. But even in the Yanbian Korean Autonomous Prefecture of Jilin Province, which the government recognized as the most "harmonious" ethnic area, there is a perceived ceiling in career advancement for ethnic Koreans (US Department of State 2007, 'National/Racial/Ethnic Minorities' in *Country Reports on Human Rights Practices for 2006 – China*, 6 March).

According to the 2000 census some 1.9 million ethnic Koreans live in Jilin, Heilongjiang and Liaoning provinces. The largest concentration of ethnic Koreans lives in the Yanbian Korean Autonomous Prefecture in eastern Jilin province. Another Korean community lives in Changbai Korean Autonomous County in south-eastern Jilin. Si Joong Kim, an economics professor at Yeungnam University in South Korea, writes that Koreans rank thirteenth in population of ethnic minorities in China (National Bureau of Statistics of China (undated), '2-10 Geographic Distribution of Ethnic Minorities in *China Statistical Yearbook 2007*, China Statistics Press – <http://www.stats.gov.cn/tjsj/ndsj/2007/indexeh.htm> – Accessed 24 April 2008 ; 'The Korean ethnic minority' (undated), *People's Daily Online*, People's Daily website <http://english.peopledaily.com.cn/data/minorities/Korean.html> – Accessed 28 April 2008); Kim, Si Joong, 'The Economic Status and Role of Ethnic Koreans in China' in Bergsten, Fred C. and Choi, Inbom (eds) 2003, *The Korean Diaspora in the World Economy*, January, Peterson Institute of International Economics website, p.102 http://www.petersoninstitute.org/publications/chapters_preview/365/6iie3586.pdf).

Jin Woong Kang, a PhD candidate at the University of Minnesota, states in an article published in *Studies in Ethnicity and Nationalism* that after 1910 Korean migration in China was a forced migration which was part of Japanese ambition to establish the Greater East Asian Co-prosperity Sphere. Japan's policy of forced migration was reinforced once it had occupied Manchuria (Kang, Jin Woong 2008, 'The Dual National Identity of the Korean Minority in China: The Politics of Nation and Race and the Imagination of Ethnicity', *Studies in Ethnicity and Nationalism*, Vol. 8, No. 1, p.104).

Kim writes that in 1945, 20% (at most) of Koreans residing in China had Chinese citizenship. Most of the remaining ethnic Koreans, those who had decided not to return to Korea, had obtained Chinese citizenship by 1952 under the Chinese Communist Party's policy towards ethnic Koreans (Kim, Si Joong, 'The Economic Status and Role of Ethnic Koreans in China' in Bergsten, Fred C. and Choi, Inbom (eds) 2003, *The Korean Diaspora in the World Economy*, January, Peterson Institute of International Economics website, p.103,108-109 http://www.petersoninstitute.org/publications/chapters_preview/365/6iie3586.pdf).

On granting Chinese citizenship to ethnic Koreans post 1945 see also: Choe, Hyun 2006, 'National Identity and Citizenship in the People's Republic of China and the Republic of Korea', *Journal of Historical Sociology*, Vol. 19, No. 1 March, p.99 <http://www.blackwell-synergy.com/doi/pdf/10.1111/j.1467-6443.2006.00270.x> – Accessed 24 April 2008).

Kim also comments that ethnic Koreans have moved to many cities around China. In some cities they will be able to maintain ethnic Korean education and culture. However, governments in cities with a small number of temporary ethnic Korean populations do not provide any preferential treatment for them (Kim, Si Joong, 'The Economic Status and Role of Ethnic Koreans in China' in Bergsten, Fred C. and Choi, Inbom (eds) 2003, *The Korean Diaspora in the World Economy*, January, Peterson Institute of International Economics website, pp.121-122 http://www.petersoninstitute.org/publications/chapters_preview/365/6iie3586.pdf).

Interpretation

79. According to Wikipedia, Jin (**Chinese:** 金; **pinyin:** *Jīn*; **Cantonese Yale:** Gum) is a Chinese family name. It literally means "gold". The surname is also used in **Vietnam** and **Korea**, where it is romanized as Kim.

FINDINGS AND REASONS

80. In the absence of evidence to the contrary, the Tribunal accepts that the applicant is a Chinese National.

Whether the applicant went to North Korea

81. In his application, the applicant stated he went to North Korea for one day however at hearing, he stated he was there for four. When this was put to him, he stated that was not true. The Tribunal has considered whether it accepts that the applicant did go to North Korea in 2003. Several sources of information indicate that it is possible that, in 2003, a Chinese national of Korean heritage was able to travel into North Korea as a tourist, stay for four days, and return. The city locations that the applicant named on the Chinese side of the border are co-located. The destination in North Korea where the applicant stayed, Rajin, is within driving distance (approximately 67km¹) from Hunchun and it was a popular destination for Chinese tourists at the time. Several sources indicate that North Korea generally allowed Chinese tourists to enter into North Korea using only a Chinese identity document prior to 2004. Several sources also indicate that a sizeable Chinese community of Korean heritage (850,000 members) is located in this border area of China and North Korea, and cross-border travel and business has been conducted for years with some ease. Given this information, the Tribunal accepts that it is plausible that the applicant went to North Korea in 2003. In

¹ 'Distance from Rajin and Hunchun' 2000, Microsoft Encarta Interactive World Atlas 2000.

addition, given that the applicant was able to provide sufficient detail at hearing which was largely consistent with the country information, then the Tribunal accepts the applicant has been there.

Whether the applicant helped North Korean refugees

82. The Tribunal accepts that the applicant is from Jilin Province and that he may have had some contact with North Korean refugees in Jilin Province however the Tribunal has some difficulties accepting the applicant's evidence that he attended meetings, uploaded articles onto the internet and helped North Korean refugees once they were in China. That is because at hearing, the applicant stated his first meeting was held in July 2003 and then August 2003 which was before he went to North Korea however the applicant subsequently stated that his first meeting was after he went to North Korea and in September but he could not remember the year. When this was put to him, he stated that it must have been the interpreter's fault, however the Tribunal is satisfied that its follow up questions (why did he go to the meetings even before going to North Korea) which the applicant answered (he did not know how to help and when the pastor talked about it that was an eye opener for him) would have alerted the applicant to an interpretation error at that stage if indeed one existed. The Tribunal is satisfied that given the accredited level of the interpreter and the flow of the dialogue at that stage of the hearing that there was no interpreter fault. The applicant's final statement in relation to when he first went to the meetings was that he met the Pastor in July and then went to the meetings in September 2003 which was after he went to North Korea. Given this, the Tribunal finds that the applicant's evidence in relation to when he first went to the meetings has continued to change in relation to whether he went to the meetings before or after he went to North Korea. In addition, his written statement seems to suggest that it was his trip to the Republic of Korea that had a great impact on his beliefs about the idealism of communist countries and that it was this rather than the Korean pastor who moved him to act. If this had in fact been the case, then the Tribunal assumes he would have been able to state that at hearing and not that it was the pastor's talk that was the eye opener for him. In addition, his original testimony was that there were 5 members of the group however he subsequently changed his evidence and stated that the membership could change and that he was only a participant and not the leader. The Tribunal finds it unlikely that the applicant would be a member of a fluctuating group of unknown people that were involved in what essentially was unlawful activity. In addition, the applicant stated at the second hearing that he first helped one person cross but when it was put to him that he had previously told the Tribunal that he was involved in helping two brothers, he agreed. Whilst the Tribunal accepts that the applicant stated that these brothers were named 'Kim' which according to searches conducted by the Tribunal can also be translated as 'Jung' in Mandarin, the Tribunal remains concerned that his original evidence at the second hearing was that he first helped one rather than two people. In addition, when asked at the first hearing on many occasions and in many different ways how to describe the typical North Korean refugee, he was unable to do so. Whilst the applicant stated at one stage that he thought there was a problem with the interpreter, the Tribunal does not consider that this is the case given that his answers were articulate and on point but failed to mention that the majority of North Korean refugees were women. He also departed China over one year after he was allegedly detained and travelled on his own passport. He also took over one year to lodge his application after his arrival in Australia [in] April 2009. The delay in travel and lodging an application and travelling on his own passport is not, in the Tribunal's view, consistent with someone who fears persecution. Whilst the applicant suggested at hearing that his delay in applying was because he did not know the protection visa process, the Tribunal does not accept this given that his alleged

reason for leaving China was to look for freedom in Australia and he had opportunities to ascertain his visa options that did not involve relying on his skills. In reaching its finding, the Tribunal has considered the letter that the applicant states is from [name deleted: s.431(2)] however given the changing nature of the applicant's evidence the Tribunal gives greater weight to the view it has formed of the credibility of the applicant's own evidence than to this letter he has produced in purported corroboration of his claims.

83. Given its above findings, the Tribunal is not convinced that the applicant was involved in a group that allegedly met to assist North Koreans into China nor that he helped North Koreans into China. It follows that because the Tribunal is not convinced that he was involved in this group that allegedly also expressed political opinions and uploaded articles onto the internet the Tribunal is not satisfied that the applicant engaged in these activities also.
84. It follows that the Tribunal is not convinced that the applicant was detained for seven hours in March 2008 and then released by paying 30 000RMB especially when the other people who were allegedly caught at the same time for being involved in the applicant's same operations were allegedly dismissed or detained and the country information before the Tribunal suggests that the Chinese authorities have begun cracking down on people who assisted the North Korean refugee population. Whilst the applicant subsequently stated that he did not know whether his friend from the visa office was detained or not because he was not contactable, the applicant stated in his written statement that his friend in the visa office was detained. He also stated at hearing that his statement had been read back to him in Mandarin and he thought it was correct.
85. The Tribunal also considers that the applicant's knowledge of North Koreans may have been obtained simply because he resided in Jilin where he would have been exposed to North Koreans or information about them.
86. In summary, the Tribunal is not satisfied that the applicant was involved in a group that allegedly met to assist North Koreans into China and where he expressed political views and uploaded articles, nor that he was detained, nor that he and his family were monitored.
87. The applicant has also claimed that Chinese Koreans face emotional, economic and cultural problems. He stated there was a spiritual mountain which used to be managed by Yanbin but in 2005 the management went to Jilin and this was how they were threatened emotionally. He also stated the companies in Yangbin were being merged with China and there was no money for Yangbin and that the Korean population was decreasing and the rate had decreased from 62% in 1952 to 38% and if the population did not account for more than 35% then the population may lose control. However, the applicant's failure to seek recognition as a refugee until June 2010 more than 14 months after he arrived in Australia does not indicate to the Tribunal that the applicant is convinced he will face serious harm for any of these reasons. Neither is the Tribunal satisfied that the treatment he might face in the reasonably foreseeable future as a result of these emotional, economic and cultural problems could be identified as 'serious harm,' examples of which are identified in s91R(2).
88. The Tribunal is not satisfied that the applicant has engaged in the claimed activities or that he suffered the alleged harm. Given this, it is not satisfied he will engage in those same activities in the future. 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

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