Upper Tribunal
(Immigration and Asylum Chamber)

KK and ors (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC)

THE IMMIGRATION ACTS

Heard at Field House
On 6 & 7 July 2010

Determination Promulgated

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Before

MR C M G OCKELTON, VICE PRESIDENT
SENIOR IMMIGRATION JUDGE GLEESON

Between

KK

First Appellant

SP

Second Appellant

SC

Third Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the first and second appellants: *Mr M Mullins*, instructed by Gillman-Smith Lee
For the third appellant: *Ms M Phelan*, instructed by Thompson & Co
For the Respondent: *Mr S Kovats QC*, instructed by the Treasury Solicitor

1. *Law*

(a) *For the purposes of determining whether a person is "of" or "has" a nationality within the meaning of Article 1A(2) of the Refugee Convention, it is convenient to distinguish between cases where a person (i) is (already) of that nationality; (ii) is not of that nationality but is entitled to acquire it; and (iii) is not of that nationality but may be able to acquire it.*

(b) *Cases within (i) and (ii) are cases where the person is "of" or "has" the nationality in question; cases within (iii) are not.*

(c) *For these purposes there is no separate concept of "effective" nationality; the issue is the availability of protection in the country in question.*

(d) *Nationality of any State is a matter for that State's law, constitution and (to a limited extent) practice, proof of any of which is by evidence, the assessment of which is for the court deciding the protection claim.*

(e) *As eligibility for Refugee Convention protection is not a matter of choice, evidence going to a person's status within cases (i) and (ii) has to be on "best efforts" basis, and evidence of the attitude of the State in question to a person who seeks reasons for not being removed to that State may be of very limited relevance.*

2. *Korea*

(a) *The law and the constitution of South Korea (ROK) do not recognise North Korea (DPRK) as a separate State.*

(b) *Under South Korean law, most nationals of North Korea are nationals of South Korea as well, because they acquire that nationality at birth by descent from a (North) Korean parent, and fall therefore within category (i) in 1(a) above.*

(c) *South Korea will make rigorous enquiries to ensure that only those who are its nationals are recognised as such but the evidence does not show that it has a practice of refusing to recognise its nationals who genuinely seek to exercise the rights of South Korean nationals.*

(d) *South Korean law does not generally permit dual nationality (North Korean nationality being ignored for this purpose).*

(e) *South Korean practice appears to presume that those who have been absent from the Korean Peninsula for more than ten years have acquired another nationality displacing their South Korean nationality; such persons therefore move from category (i), in 1(a) above, to category (iii).*

DETERMINATION AND REASONS

Introduction

1. These appeals raise issues about the interaction of the Refugee Convention and national legislation granting or allowing dual nationality, specifically with reference to North Korea and South Korea. This determination makes observations about those issues, and gives Country Guidance (summarised at paragraph 90(2) below) on the circumstances in which North Koreans are nationals of South Korea.

2. The United Nations Convention Relating to the Status of Refugees (The Refugee Convention) provides surrogate international protection for those who are outside their own countries for fear of persecution there. Following amendment in 1967, the main part of the definition of a refugee for the purposes of the Convention in Article 1A is as follows:

> "For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> …
>
> (2) …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.
>
> In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

3. The latter paragraph operates to preserve the nature of international protection as surrogate or of last resort. If a person has nationality of a country where he is not at risk of persecution, it is the protection of that country rather than of the international community that he should seek. In such circumstances the international community of signatories to the Refugee Convention is neither bound by the Convention to offer him protection under it, nor even concerned with him: as a national of a country where he is not at risk of persecution, he ought not to be of any international concern.

4. The phrasing of the references to nationality in Article 1A(2) is in the present tense: "has more than one nationality"; "countries of which he is a national". It may be necessary to draw clear distinctions between three possible situations. The first is where a person *has* nationality of more than one country: that is to say each of the countries in question recognises him as a national. The second is where a person *is entitled to* nationality of a second country: that is to say that recognition of his nationality will depend on an application by him, but on the facts his nationality is a matter of entitlement, not of discretion. The third is where a person *may be able to*

obtain nationality of a second country: that is to say, where it cannot be said that, on application, he would be recognised as a national, but that he might be granted nationality. The difference between the first and the second situation is of status, not of documentation. A person may be a national of a country that has not yet issued him with any documentation evidencing that nationality. Such a person exemplifies the first situation, not the second.

5. The Korean Peninsula is divided into two States, each of which is recognised as such in international law and accordingly has its own citizens. The northern state is the Democratic People's Republic of Korea (which we shall call "North Korea"; some of the sources use the abbreviation "DPRK"). The southern is the Republic of Korea (which we shall call "South Korea"; some of the sources use the abbreviation "ROK"). For historical and political reasons South Korea regards all Koreans, including citizens of North Korea, as citizens of South Korea.

6. The regime in North Korea has attracted widespread disapproval, and citizens of North Korea who have left North Korea may have relatively little difficulty in establishing a well-founded fear of persecution there. The question raised by these appeals is whether South Korea's attitude to them as citizens of South Korea as well deprives them of the status of refugees, unless they can show a risk of persecution in South Korea too.

The appellants

7. The three appellants have a number of features in common. Each of them came to the United Kingdom illegally, and claimed asylum on the basis of nationality of North Korea. In each case, the Secretary of State's starting position was that he did not accept that the claimant was from North Korea. Each of the appellants was the subject of an immigration decision giving notice of intended removal as an illegal entrant. The appellants appealed to Immigration Judges, who found in each case that they were North Korean nationals, but that their nationality also of South Korea (where they had not established that they would be at any risk) prevented them from being refugees and meant that their removal there would not put the United Kingdom in breach of any international obligations. Each of the appellants sought, and obtained, an order for reconsideration. Under the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010, the reconsiderations continue as appeals to this Tribunal.

8. In earlier proceedings in each case, the Asylum and Immigration Tribunal ruled that the Immigration Judge had erred in his approach to the question whether the appellant was properly to be regarded as a national of North Korea. Our task is to re-make the decisions on the appellants' appeals.

9. The first and second appellants are partners, each born in North Korea in 1978. They each suffered family difficulties, and travelled illegally from North Korea into China, the first appellant in 1991 and the second in 1990. They met in China in 1995 and started living together in 2000. They had no status in China and were continually at risk of raids by the authorities looking for North Koreans illegally in

China. Following an incident in the village where they were living, in 2007 they left China, arriving in the United Kingdom on 15 December 2007. They claimed asylum a few days later.

10. Their claims were refused, and each was served on 28 April 2008 with notice of a removal decision. The proposed destination was China. As a result of discussions at the beginning of the hearing before Immigration Judge O'Flynn, the notice of decision was amended, giving China and South Korea as possible removal destinations, and the Immigration Judge accordingly considered the first and second appellants' positions if they were removed to either of those countries.

11. The Immigration Judge made firm and clear findings that the appellants were to be regarded as credible in their claimed histories. There was before him evidence of an expert who had conducted an extensive interview with the first and second appellants and had reached the conclusion that their language and knowledge showed that they had been born and had lived for a while in North Korea, but that they had lived in China for many years. The Immigration Judge found that they were North Korean nationals who had lived as children in North Korea. They had crossed independently into China, the first appellant when he was 13 years old and the second when she was 11 years old, and had lived there illegally, met and formed a relationship, and had continued to live in China until they left for the United Kingdom in 2007. He found that they were at risk of persecution in North Korea as persons who had left illegally and remained outside the country. He found that they could not lawfully be returned to China, because of the risk that from China they would be refouled to North Korea. But he dismissed their appeals for the following reason:

> "6.13 I find, from all the evidence before me, that the appellants do have the option of "more than one nationality". They have the option of South Korea. Importantly, it is clear from the objective material that not only could they avail themselves of the protection of that country (alone, that would not be enough for any number of countries may offer sanctuary) but South Korea will, or may, accept them as citizens. This, it seems to me, is the added ingredient which brings the appellants within Article 1A(2), paragraph 2, of the 1951 Convention. It is for this reason that I would dismiss the asylum appeal. It is of fundamental importance that I add the following. As I have found that the appellants originate from North Korea and that they face a real risk of persecution in both North Korea and China, if, for any reason they do not successfully "pass" the screening procedures for entry to South Korea, then the respondent has an international obligation to accept them as refugees."

12. He dismissed the appeals on all grounds, because he considered that the appellants' removal to South Korea would not breach either the Refugee Convention or Article 3 of the European Convention on Human Rights; and the protection available to them in South Korea disqualified them from humanitarian protection under paragraph 339C of the Statement of Changes in Immigration Rules, HC395.

13. The third appellant was also born in North Korea in 1978. Her mother died in childbirth and she was raised by her father. She and her father left North Korea for

China in 1986 or 1987. They lived there together illegally until her father died in 1994, and she continued thereafter to live on the farm at which her father had worked, and to work there too. She received a share of the profit, which she saved. After living in China illegally for some 20 years, using her savings to pay for her passage and the arrangements for her illegal entry to the United Kingdom, she claimed asylum on 20 May 2008.

14. On 4 July 2008 she was served with notice of a decision to remove her as an illegal entrant. Although the Secretary of State did not at that stage accept that she was of North Korean nationality, the proposed destination was North Korea. (This is a device often adopted by the Secretary of State in cases of disputed nationality, in order to enable the question to come by way of appeal before the Tribunal.) By the time the matter came before Immigration Judge Hodgkinson, it was clear on all sides first, that the respondent accepted that the appellant was of North Korean nationality, and, secondly, that the proposed destinations for removal were China or South Korea.

15. The Immigration Judge specifically found that the appellant had lived illegally in China from about 1987 until 2008. He referred to the punishments in North Korea for those who leave the country illegally or remain outside it. He noted the Secretary of State's disbelief of the appellant's account of her raising money for her journey, but observed that he needed to reach no concluded view on those issues: the appellant could not be returned to China because of the risk of refoulment to North Korea. But he decided that the appellant was, as a North Korean citizen, and despite her long absence from Korea, entitled to South Korean citizenship, and that her removal to South Korea would not breach any international convention. For the same reasons as applied to the first and second appellants, he concluded that the third appellant was not entitled to humanitarian protection under paragraph 339C.

History

16. The Korean Peninsula has a long history of civilisation and culture. The three kingdoms into which the peninsula was divided from the first century AD were essentially unified by the mid-seventh Century and subsequently governed as a single entity by the Koryo dynasty (from which the name Korea is derived) and the Choson dynasty from 1392 to 1910. Following the conclusion of the Russo-Japanese war in 1905, Japan forced Korea into a treaty under which Korea became a colony of Japan.

17. The defeat of Japan in the Second World War led to the division of the Korean Peninsula into separate occupation zones, divided by the line of latitude at 38 degrees. The northern half was occupied by Soviet forces and the southern half by United States forces. The United States founded the Republic of Korea on 15 August 1948; the Soviet-backed Democratic People's Republic of Korea was founded on 9 September 1948. The new leader of North Korea led an invasion of the South in 1950, in an attempt to unify the peninsula under Soviet-backed communist rule. The ensuing war involved the forces of a number of other countries. An armistice was signed in 1953: South Korea agreed to abide by its terms, but was not formally

a party to it. The peninsula remains divided between North Korea and South Korea: between them the border has been described as "one of the most heavily militarised places in the world".

18. Both North Korea and South Korea joined the United Nations in August 1991, and are recognised as separate independent states by the majority of other states, although North Korea is not recognised by Japan or South Korea, and South Korea is not recognised by North Korea.

19. The constitution of South Korea, adopted in 1948, has been amended a number of times. The version before us is that of October 29 1987. The relevant provisions are those in Articles 2 and 3:

> "Article 2: Nationality
>
> (1) Nationality in the Republic of Korea is prescribed by law.
>
> (2) It is the duty of the state to protect citizens residing abroad as prescribed by law.
>
> Article 3: Territory
>
> The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands."

20. Article 3 is the emanation of South Korea's non-recognition of North Korea. South Korea's constitution treats the whole of the peninsula as part of South Korea.

South Korean legislation on citizenship and nationality

21. The Nationality Act of South Korea is before us in translation as most recently amended on 14 March 2008. With one reservation, it is not suggested that it would be misleading to read and apply the provisions as they appear from that translation. The Act provides in Article 2 that a person falling in any of the following categories "shall be a national of the Republic of Korea at birth":

> "1. A person whose father or mother is a national of the Republic of Korea at the time of a person's birth;
>
> 2. A person whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth;
>
> 3. A person who was born in the Republic of Korea, if both of the person's parents are unknown or have no nationality."

22. There are provisions for acquisition of nationality by acknowledgement and by naturalisation.

23. There are also provisions prohibiting dual nationality, and requiring a person who has dual nationality before attaining the age of majority to choose one of the nationalities at that time; a person who voluntarily attains nationality of a foreign country automatically loses his South Korean nationality; but a person who acquires a foreign nationality by marriage, adoption or acknowledgement may choose to remain a national of South Korea.

24. This, we think, is a sufficient summary of Articles 10 and 12-15. The reservation is, however, that having or acquiring citizenship of North Korea does not engage these provisions. That is because South Korea's non-recognition of North Korea as a state entails also its non-recognition of North Korean citizenship. A person who under the Nationality Act is a national of South Korea is not regarded as having acquired a foreign nationality if he is also a national of North Korea. Such is apparent from the constitutional position, and appears also to have been recognised by the Constitutional Court of Korea in at least two cases, of which we were able to obtain an English translation of one, case number 97Hun-Ka12. At paragraph B(2) of the judgement, we find this:

> "Our Constitution has stated since the Founding Constitution, the territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands. …
>
> The Supreme Court has ruled accordingly that North Korea is part of the Korean peninsula and therefore subject to the sovereignty of the Republic of Korea, and therefore that North Korean residency should not interfere with the acquisition of the nationality of the Republic of Korea. Therefore, the provisional ordinance on nationality (South Korean Provisional Government Act Number 11, May 11, 1948) stated in Article 2(1) that a person born to a Korean father shall acquire the nationality of *Chosun* [which we understand in the context to mean generic Korean]. Then, the Founding Constitution, in Article 3, stated that the qualifications of nationality of the Republic of Korea should be proscribed by statute, and in Article 100, stated that all current laws and rules were effective unless they violated the constitution. So, the Supreme Court ruled that a person born to a Korean father even though he or she had already acquired a North Korean nationality according to the North Korean law, acquired the nationality of *Chosun* according to the provisional ordinance and then became a national of the Republic of Korea upon the promulgation of the Founding Constitution on July 17, 1948 (Kong 1996 Ha, 3602, 96Nu1221, Supreme Court, November 12, 1996)."

25. The Nationality Act contains a further relevant provision, Article 20:

> "Adjudication of nationality
>
> (1) Where it is unclear whether a person has attained or is holding nationality of the Republic of Korea, the minister of justice may determine such fact upon review.
>
> (2) Procedures for screening and determination, and other necessary matters under paragraph (1) shall be determined by Presidential Decree."

26. We have also been shown an English translation of the Act on the Protection and Settlement Support of Residents Escaping from North Korea, a South Korean statute of 1997, subsequently amended ("the 1997 Act"). It appeared at the hearing that the version we had was not the most up-to-date, but nobody has suggested that more recent amendments are in any way material to the issue we have to consider. The 1997 Act replaced an earlier Act on the protection of North Korean repatriates. Article 1 of the Act gives its purpose:

> "The purpose of this Act is to provide such matters relating to protection and support as are necessary to help North Korean residents escaping from the area north of the Military Demarcation Line (hereinafter referred to as "North Korea") and desiring

protection from the Republic of Korea, as quickly as possible to adapt themselves to, and settle down in, all spheres of their lives, including political, economic, social and cultural spheres."

27. As Article 1 suggests, the Act sets up systems for providing support in a number of areas to those who are covered by it. We do not need to set out those provisions. We do, however, need to set out the provisions of the Act that determine those entitled to its benefits.

"**Article 2 (Definitions)**

For the purposes of this Act,

1. the term "residents escaping from North Korea" means persons who have their residence, lineal ascendants and descendants, spouses, workplaces and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea;
2. the term "persons subject to protection" means residents escaping from North Korea who are provided protection and support pursuant to this Act;

…

Article 3 (Scope of Application)

This Act shall apply to residents escaping from North Korea who have expressed their intention to be protected by the Republic of Korea.

…

Article 5 (Criteria for Protection, etc.)

(1) The criteria for the provision of the protection and support for persons subject to protection shall reasonably be determined in consideration of their age, members of a family, school education, personal career, self-supporting ability, health conditions and personal possessions.

(2) The protection and settlement support prescribed in this Act shall, as a matter of principle, be provided on the basis of respective individuals….

…

Article 6 (Consultative Council on Residents Escaping from North Korea)

(1) There shall be established under the Ministry of Unification the Consultative Council on Residents Escaping from North Korea (hereinafter referred to as the "Consultative Council") to deliberate on and coordinate policies on residents escaping from North Korea and to deliberate on such matters relating to their protection and settlement support….

…

Article 7 (Application for Protection, etc.)

(1) Any person who has escaped from North Korea and desires to be protected under this Act, shall apply for protection to the head of an overseas diplomatic or consular mission, or the head of any administrative agency (including the commander of a military unit of various levels; hereinafter referred to as the "head of an overseas diplomatic or consular mission, etc.").

(2) The head of an overseas diplomatic or consular mission, etc. who receives such an application for protection as prescribed in paragraph (1) above shall without delay inform the Minister of Unification and the Director General of the National Intelligence Service via the head of the central administrative agency to which he belongs of the fact.

…

Article 8 (Decision on Protection, etc.)

(1) The Minister of National Unification shall, when he receives such a notice as prescribed in Article 7 (3), decide on the admissibility of the application for protection following the deliberations of the Consultative Council: *Provided*, That in the case of a person who is likely to affect national security to a considerable extent, the Director General of the National Intelligence Service shall decide on the admissibility of the application, and inform or notify the Minister of Unification and the protection applicant of the decision without delay.

(2) Where the Minister of Unification has decided on the admissibility of an application pursuant to the provisions of the text of paragraph (1) above, he shall without delay inform the head of an overseas diplomatic or consular mission, etc. via the head of the relevant central administrative agency of the decision, and the head of an overseas diplomatic or consular mission, etc. informed as such shall without delay notify the applicant of the decision.

Article 9 (Criteria for Protection Decision)

In determining whether or not to provide protection pursuant to the provisions of the text of Article 8 (1), such persons as prescribed in any of the following subparagraphs may not be determined as persons subject to protection:

1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.
2. Offenders of non-political, serious crimes such as murder, etc.;
3. Suspects of disguised escape;
4. Persons who have for a considerable period earned their living in their respective countries of sojourn; and
5. Such other persons as prescribed by the Presidential Decree as unfit for the designation as persons subject to protection.

…

Article 27 (Suspension and Termination of Protection)

(1) The Minister of Unification may, where a person subject to protection is involved in any of the following subparagraphs, suspend or terminate protection and settlement support subject to the deliberations of the Consultative Council:

1. In cases where he is sentenced to imprisonment with or without prison labor for not less than one year and his sentence is made irrevocable;
2. In cases where he intentionally provides false information contrary to the interest of the State;
3. In cases where he is judicially declared dead or missing;

4. In cases where he attempts to go back to North Korea;
5. In cases where he violates this Act or an order issued under this Act; or
6. Such other cases as coming under grounds prescribed by the Presidential Decree.

(2) The local government head may request the Minister of Unification via the Minister of Government Administration and Home Affairs the suspension or termination of protection of or settlement support for persons subject to protection as prescribed in paragraph (1) above or the curtailment or extension of the period thereof as prescribed in the proviso of Article 5 (3).

(3) The Minister of Unification shall, where he suspends or terminates protection and settlement support as prescribed in paragraph (1) above or curtails or extends the period thereof as prescribed in the proviso of Article 5 (3), specify the grounds and notify them to the person subject to protection involved, and inform the Minister of Government Administration and Home Affairs and the local government head of the fact."

28. In the light of the evidence already tendered in these appeals, to which we refer in more detail below, the Secretary of State had contacted the South Korean embassy in order to obtain further details of the administration of the 1997 Act. Shortly before the hearing, when no reply had been received, the Secretary of State sought an adjournment, which we refused. As it happens, a reply was received almost immediately thereafter, as follows:

> "The Embassy of the Republic of Korea to the United Kingdom of Great Britain and Northern Ireland presents its compliments to the Foreign and Commonwealth Office and has the honour of informing the latter of the Republic of Korea's Policy towards North Korean defectors.
>
> 1. The Government of the Republic of Korea, in principle, accepts all North Korean defectors, who, of their own free will, wish to resettle in the Republic of Korea. However, their application may be rejected in exceptional circumstances; for example, applicants who, once the screening process is complete, are determined to be or have been spies, drug dealers, terrorists, or other serious criminals may have their asylum claims rejected.
> 2. The first and most important criterion in the determination of offering protection and settlement support to North Koreans is to ascertain whether the person in question desires to live in the Republic of Korea. This is clearly articulated in the "Act on the Protection and Settlement Support of Residents Escaping from North Korea". As such, the protection of the Government of the Republic of Korea for North Koreans does not apply to those North Koreans who wish to seek asylum in a country other than the Republic of Korea.
> 3. When a North Korean expresses his or her wish to resettle in the Republic of Korea, there will be a screening process in order to verify whether the person in question is a genuine North Korean.
> 4. Once screening is complete and the asylum claimant is verified as being North Korean, a further determination takes place to see whether he or she is entitled to receive a settlement package under the domestic law of the Republic of Korea. A typical settlement package comprises accommodation, financial support, remedial

education and job training. Claimants who have lived for a considerable period in other countries may be excluded from receiving a settlement package.

The Embassy of the Republic of Korea avails itself of this opportunity to renew the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland the assurances of its highest consideration."

29. One feature of the 1997 Act and the letter from the Embassy is very clear: neither of them refer in terms to South Korean nationality. Those who are or may be entitled to the benefits of the Act are those who come from North Korea, who wish to be protected by South Korea, and who have not acquired the nationality of any other country. It would therefore appear that the Nationality Act and the 1997 Act are dealing with separate but related issues. The Nationality Act lays down provisions under which, because South Korea ignores the division of the peninsula, many nationals of North Korea are also nationals of South Korea. The 1997 Act provides benefits for those who come from North Korea to South Korea for protection purposes, whether or not they are nationals of South Korea or, indeed, of North Korea.

30. Further, it goes almost without saying that the benefits provided by the 1997 Act are not available to all nationals of South Korea, nor even to all nationals of South Korea resident of that country. They are available to a group of people, many of whom may be nationals of South Korea, but all of whom have a North Korean background. South Korean nationality does not provide a right to benefits under the 1997 Act, and failure to attain benefits under that Act would not therefore appear to demonstrate that an applicant is not, or is not accepted as being, of South Korean nationality. And the fact that a person succeeds in demonstrating his entitlement to benefits under the 1997 Act does not show that he is a South Korean national: it merely shows that he has a North Korean background and seeks the protection of South Korea.

31. If that were the end of the matter, determination of these appeals would pose little difficulty. If the appellants are nationals of South Korea, there is no proper basis for supposing that they cannot be returned there whether or not they may additionally be entitled to the benefits under the 1997 Act. If they are nationals only of North Korea, they are entitled to refugee status whilst they are in the United Kingdom; their return to South Korea would be subject to their application under the 1997 Act and their acceptance by South Korea.

Expert evidence

32. The appellants adduce written evidence from a number of sources which, it is said, shows that that is not the right way to look at the question.

33. Professor Christopher Bluth, Professor of International Studies at the University of Leeds, has connections at various levels with the South Korean government, and with those working with North Korean refugees. He was asked to consider whether the appellants are entitled to South Korean citizenship, to consider the procedures

by which persons claiming to be North Korean can enter South Korea, and the treatment of North Koreans in South Korea.

34. In relation to citizenship, Professor Bluth states in his written evidence that "in principle, there is an entitlement in law to citizenship of the Republic of Korea for a North Korean". But he adds:

> "Importantly, in relation to North Koreans that have escaped from or defected from the DPRK, the implementation of this principle is in practice regulated by the Act on Protection. This is despite the fact that in principle there is no relationship between the entitlement to nationality and the Act on Protection. In other words, were a North Korean to make an application to the government of the ROK (either in country or through an embassy) such application would be dealt with by reference to the Act on Protection rather than simply applying the Nationality Act."

35. He then refers to the exclusions in Article 2 and Article 9 of the Act on Protection, and offers a commentary on Article 9(4). Taking into account Professor Bluth's endnote with some additional comments on translation, what he says is as follows. There is no definition in the Act of the phrase "earned their living". In fact, the Korean version, literally translated, would read "the person who has a living base (living space) in a certain state for more than ten years". In practice, Professor Bluth says, anybody who has lived outside North Korea for more than ten years is treated as a person who has become established in another country and will not be accepted as a person entitled to protection or even as a South Korean citizen. In his elaboration of this theme, Professor Bluth occasionally goes beyond his brief. At two points he purports to determine the refugee status of the appellants, and he also speculates on the possible consequences of the appellants not being found by the Korean authorities to be Korean. But it is right to set out the relevant parts of Professor Bluth's opinion in full.

> "5.2.1 South Korean policy towards North Korean refugees/defectors reflects a profound contradiction between the principles of the constitution and the law, which it cannot overtly renounce, and on the other hand, practice. Put another way, the government of the Republic of Korea cannot publicly reject the notion of 'one Korea' even though it might in many ways be more appropriate to recognise the fact that North Korea is another country whose inhabitants happen to speak the Korean language and its citizens by virtue of their culture and socialisation have nothing in common with South Koreans. Consequently the manner in which the South Korean authorities approach this 'entitlement' to ROK citizenships has been to adopt a very selective approach to refugees and discourage defections as much as possible. This contradiction is usually maintained by stealth, but sometimes finds its way into public statements. In response to an incident in 1999 when a number of North Korean refugees were returned to North Korea by the Chinese authorities, the then Minister of Unification Lim Tong-won responded to the public outcry in South Korea by stating that "the government is ready to accept all North Koreans, if they want to emigrate to the South… It is the basic principle of the Seoul government to welcome all North Korean refugees…" The statement was immediately 'clarified' by an official from the Ministry of Unification to the effect that these remarks referred to "a group of North Koreans who had wrapped up all the

necessary procedures for entry into South Korea with the nation's overseas embassies."

5.2.2 As Andrei Lankov has noted, this statement in practice excluded almost all the refugees in China, because they have no valid passports and cannot gain access to the South Korean embassy in Beijing or other South Korean consulates in China. In the event that North Korean refugees manage to contact a South Korean consulate they are normally denied assistance. In fact, Prof. Lankov has found hundreds of reports in the South Korean press of North Koreans who were unconditionally denied support by South Korean consulates in China and stated that he had 'never seen a single report about a defector whose escape was seriously assisted by the China-based diplomatic staff unless such a person was a very high-ranking individual'. As a consequence the number of North Korean defectors that are eventually accepted remains relatively small. They often escape to South Korea assisted by professional smugglers (known as 'brokers'), usually via a third country in South East Asia where they can obtain a ticket and travel document from the local South Korean consulates. However, even then the policy of the South Korean government remains to discourage refugees and not all 'North Korean defectors' will be accepted as such.

5.2.3 The appellants will of course have the relative advantage of being in the United Kingdom and will therefore most likely be able to get access to the South Korean embassy. However, for reasons which are outlined below, even should they wish to make an application to the embassy and were able to gain access, the embassy and the unification ministry have already signalled quite unmistakeably that in such a case they will not provide assistance.

5.3.1 The South Korean government feels it has to accept North Korean refugees because of the constitution. However, it wants to discourage defections. This is based on two factors. First of all the defector issue is a serious irritant in relations with North Korea and China and especially the Kim Dae-jung and Roh Moo-hyun governments wanted to avoid exacerbating such irritations in their relations with North Korea. Secondly, there is some resentment in South Korea regarding the costs of providing for refugees (even though the total amount is not a great amount for South Korea) and North Korean refugees do not integrate very well with the rest of South Korean society. Consequently the policy is to do everything possible to discourage North Korean refugees/defectors from coming to South Korea unless they have valuable intelligence to offer.

5.4.1 Even though in principle persons born in the DPRK have a right to the citizenship of the ROK, this right has to be exercised by following certain procedures and is subject to acceptance by the authorities of the ROK which can refuse to grant citizenship under certain conditions. It is necessary for a person to make an application to be granted nationality. If it is granted, then a person would also be eligible to apply for a South Korean passport.

5.4.2 In practice, the essential requirements for being accepted as a candidate for citizenship of the Republic of Korea are that a person can satisfy Article 2 of the Nationality Act and therefore is deemed to be Korean (i.e. the parents are not Chinese nationals or of other foreign extraction), has lived in Korea and

has not been outside the territory of the DPRK for more than ten years, and wishes to become a citizen of the ROK.

5.4.3 In principle, once a person is recognised as 'Korean', there is no discretion to refuse or grant ROK citizenship. However, in practice, acceptance of all persons claiming to be North Korean refugees/migrants is not automatic.

5.4.4 The South Korean government will not accept and admit the appellants to South Korea as a matter of course. In order to take advantage for their entitlement to ROK citizenship, North Korean refugees have to enter a South Korean consulate or embassy to seek permission to enter the Republic of Korea. They must request protection and their request will be communicated to the Minister of Unification and the Director of the National Intelligence Service in Seoul without delay. Candidates will be interviewed by trained officials from the Ministry of Foreign Affairs and Trade to determine whether or not they are North Korean citizens, and whether the account of their life and their circumstances is credible. All details with respect to their identity and their account will be checked and verified. If they are accepted as North Korean refugees and there are no reasons to deny permission to enter the Republic of Korea, they will be granted permission to enter the ROK. In your appellant's case this stage would take place at the South Korean embassy.

5.4.5 This is not yet full acceptance of their status or their North Korean nationality, which will be subject to a more in-depth review and interviews once they have arrived in South Korea. Decisions on whether to grant protection or not will be made on a case-by-case basis depending on the ultimate approval of the Minister of Unification. When a North Korean arrives in South Korea, they are initially detained at an Institute of National Intelligence in Sindaebang (south Seoul) also known as the Government Joint Interrogation Centre. After extensive interviews and background checks a decision will be made whether they are to be recognised as persons entitled to protection and citizenship. Those detained in Sindaebang have no recourse to South Korean courts. Typical periods of detention are 1 to 3 months and I am aware of the case of one person who has been detained for three years without the case being resolved. There is no provision in ROK law for this detention, rather it is a matter of state practice. There is also no possibility for the individual to have recourse to any legal process to complain about detention. In practice everyone is detained until their application is determined.

Persons whose applications are rejected on the basis that they are deemed to be Chinese-Korean can (and have been) deported to China.

…

5.4.6 Assuming, however, that the person is successful at the second stage, thereafter, North Korean refugees seeking citizenship and residence in South Korea usually have to undergo a debriefing by the Ministry of Unification and attend classes to prepare them for life in South Korea for 60-75 days (known as *Hanawon*) – at a centre in Anseong. Residence at this centre is compulsory and can be deemed a form of quasi-detention. At the end of this time they have to sign a document applying for citizenship of the ROK.

5.4.7 The authorities of the Republic of Korea will disregard any determination made by the UK government as to the status, citizenship or origins of the appellants. They will make their own determination on the basis of in-depth interviews. South Korean specialists will be able to determine the authenticity of their regional accent, any information about their childhood and up-bringing, geographical, cultural and social references etc. They will be very concerned to ensure that no Chinese citizens of Korean descent are granted citizenship on the basis of a claim to be a North Korean.

5.4.8 The South Korean authorities are aware of and used to the fact that many North Korean do not have any documentation to prove their citizenship or any other part of their biography. Whilst therefore the fact that the appellants do not have such documentation in principle should not prevent them from being accepted as a citizen, in practice the length of their residence in China, their connections to that country, and would most likely cause their application to be refused [sic]. These connections to China create a risk that the ROK government will consider that the appellants are Chinese and thus seek to deport her [sic] to China at the end of the process with the potential consequences that I have outlined above.

5.4.9 The Act on Protection defines who is entitled to protection under the act. Specific exclusions exist for person who have acquired another foreign nationality after leaving North Korea (Article 2), criminals, terrorists and spies (Article 9) and persons who have earned their living for not less than ten years in their respective countries of sojourn (Article 9). The term 'earned their living' does not exist in the Korean version of the Act and according to officials in the Ministry of Unification Article 9 is interpreted to apply to anyone who has lived outside the DPRK for more than 10 years.

Indeed, I asked the relevant office at the Ministry of Foreign Affairs and Trade directly: 'Does the ROK government have any discretion to refuse to grant or recognise ROK nationality for a person born in the territory controlled by the DPRK, and if so in what circumstances?' The answer given by the official was 'yes' with reference to article 9 of the Act on the Protection and Settlement Support of Residents Escaping from North Korea.

5.4.10 South Korean officials and specialists have refused to make a judgement on whether or not the Act constitutes a legal limitation on the constitutional rights of a North Korean person. Instead they refer to practice. The policy of the South Korean government has been to discourage defections and limit the number of North Koreans seeking protection in the South, without violating the constitution. The main reason for this policy is to avoid hostile reactions from the North Korean government. But the South Korean government would also be concerned about large numbers of North Koreans arriving in the South. They would pose a security risk (because they are targets for North Korean agents, or they might include North Korean agents), they constitute a financial burden on the state and large numbers of North Koreans who don't integrate well with the South Korean population could threaten social cohesion.

5.4.11 Moreover, the ROK government does not want to accept Chinese citizens of Korean ethnicity and any undesirable elements. This is why they have

adopted the view that persons residing outside the DPRK for more than ten years do not qualify for ROK citizenship and do not have to be accepted. The UK Border Agency has interpreted both the ROK constitution and the Act literally. While this interpretation is correct according to the manner in which the law is phrased, this is not how it is interpreted by the authorities of the Republic of Korea and the manner in which it is implemented differs from a strict reading of the law. It is my view that the South Korean authorities do in practice treat the matters set out in Article 9 of the Protection and Settlement Act as being criteria for the acquisition of citizenship, not just the eligibility for "special protection", even though that does not appear to be the correct reading of the legislative provisions.

5.4.12 The Act on Protection is interpreted as giving the government the right to decide who can be admitted to the country and derive the benefits of citizenship. From my conversations with Korean specialists (such as Ambassador Prof. Kim Woo-sung, Prof Lim Eul-chul and Dr. Kim Chang-su), it is clear that in South Korea there is a different culture with respect to the meaning of law and the implementation of law cannot easily be separated from its political purposes or the political context which is more important than the wording of the law itself.

6.1 It is not possible to predict the result of an application for refugee status or citizenship in advance with absolute certainty. Nevertheless, it is my considered view that the appellants will most likely not be granted either refugee or citizenship by the Republic of Korea.

There are three different reasons for this view.

6.1.1 Consider the statements from the South Korean embassy (Mr Ahn Young-alp's conversation with Ms. Lee (§6 of the Determination of the Tribunal) and a fax previously received from the embassy in response to similar question. Although it states that any person can be considered, the sub-text is clear. If a person makes it clear that they do not wish to reside in South Korea this will be a reason to deny refuge. It is also clear the Act on Protection applies only to those who have expressed their intention to be protected by the Republic of Korea (§3).

6.1.2 These statements clearly reflect the guidance that consuls receive from the South Korean government, as Mr. Choi Kang-sok from the Inter-Korean Policy Division at the Ministry of Foreign Affairs and Trade of the Republic of Korea confirmed. He stated that they will only admit persons who wish to live in South Korea. If a person indicates at any stage that they do not want to come to South Korea the process is terminated. This is a delicate issue because an official will not state categorically that persons will be 'rejected'. First of all Mr. Choi indicated that they respect the decision of the United Kingdom as to whether or not to grant asylum or residence to a North Korean refugee, but this has no bearing on their own decisions. Then I questioned Mr. Choi at length as what would happen if a North Korean person were to apply for protection with a view to apply for citizenship and in the course of the interview revealed that they did not really wish to live in South Korea. His answer was that 'they would respect their wish', meaning that they would not be admitted to South Korea regardless of any decision by the British

government. Repeated questioning from different perspectives on my part did not change this answer and made it clear that under such circumstances it was the firm policy of the South Korean government that such persons would not be admitted to the Republic of Korea and the entire process would be concluded at this point.

I obtained a similar response from Jo Jae-sop at the Ministry of Unification. He stated clearly that the policy of the South Korean government was that North Korean refugees would only be accepted in South Korea if they wished to live there and that their wish must be respected. He confirmed that the South Korean government would not comply with a request by the UK government that a person should be sent to South Korea against their wishes and stated that this sort of thing has never happened in the past.

I asked the same question again twice and Mr. Jo confirmed that the government of the Republic of Korea would resist any effort by the government of the United Kingdom to remove any persons claiming to be from North Korea who did not wish to come to South Korea.

6.1.3 There are many reasons why North Koreans would not want to apply for RoK citizenship. North Koreans are brought up to believe that South Korea is their enemy in a civil war, that life in South Korea is a living hell and that North Koreans are discriminated against and ostracized from society. It should not be inferred that their claims of North Korean origin are untrue.

6.1.4 It must be noted that the fax also makes it clear that the South Korean embassy will not accept the British government's determination that the appellants are North Korean. Conversations with South Korean officials in Seoul (without revealing the identity of the appellants or details of the case) confirm the impression given in the embassy fax that the South Korean authorities will not be inclined to accept that the appellants are North Korean citizens and are therefore entitled to protection of the government of the Republic of Korea. The fact that they have lived outside the DPRK for more than 10 years is a critical factor in this determination.

6.1.5 Daniel Pinkston, senior analyst of the International Crisis Group based in Seoul, stated in correspondence with me regarding this case:

6.1.6 "Yes, the 10-year rule applies. The ROK govt. assumption is that the NK defector has settled in another country by that time. Of course, the reality is that most countries in Asia do not grant them citizenship, and they are essentially "stateless" … the ROK government has a way out and does not automatically have to accept refugees after 10 years have passed."

6.1.7 I have even more authoritative sources for this view. I made enquiries in Seoul with the Ministry of Unification section in charge of North Korean refugees. The answer that I received should be accepted as a true and accurate statement of the policy of the government of the Republic of Korea:

"The Korean government does not accept such persons as refugees if they have lived outside the DPRK for more than ten years. It is not based on law or regulations, it is a kind of policy. Our government is judging that if they have

lived outside the DPRK for more than ten years, we don't need to accept them."

6.1.8 The generic facts of the case under consideration have been discussed with the South Korean embassy in London, the officials in charge of North Korean refugees in the Ministry of Foreign Affairs and Trade in Seoul, and a consultant for the Ministry of Unification (without revealing the identity of the appellants or the details of the case). In each case the answer was the same, namely a strong signal that the appellants are unlikely to be accepted as a person entitled to the citizenship and protection of the Republic of Korea. The reason is that the appellants have been outside North Korea for more than ten years.

Finally, and for the reasons I have stated above there is a risk in this case that the ROK government will find that the appellants are Chinese."

36. In accordance with his instructions, Professor Bluth then considers the position of North Koreans in South Korea. He records the benefits received by North Koreans under the Act on Protection, but asserts that North Koreans in South Korea are subject to severe discrimination. He does not indicate the size of the North Korean population of South Korea, although he indicates that "since 2000 the vast majority of North Korean refugees have come from the northern provinces of the DPRK and have been mostly manual workers or farmers with a very poor level of education", which does not indicate to us that the appellants will not readily form part of that majority.

37. Professor Guy Goodwin-Gill is Professor of International Refugee Law in the University of Oxford. He was asked a number of questions on behalf of the third appellant, some of which do not appear to be germane to the issues we have to decide. It is, we think, fair to say that Professor Goodwin-Gill's expressed opinions on the other issues do not advance the matter very much. He says that North Korea and South Korea are separate States, which is common ground before us and which, for the reasons we have given earlier in this determination, cannot properly be the subject of dispute. Paragraphs 13-50 of his opinion, covering some 14 pages, lead to the following conclusion about the meaning of Article 1A of the Refugee Convention:

> "In my Opinion, the express words of the second paragraph of Article 1A(2) of the 1951 Convention do not permit an interpretation which would require the asylum seeker to take steps to obtain a possible second nationality. On the other hand, an asylum seeker who is recognised as possessing another nationality is obliged, in the absence of a well-founded fear of persecution in that other country, to take steps to avail himself or herself of its protection."

38. We have no difficulty at all in accepting that conclusion. We would note, however, that in the case where an individual actually has (as distinct from able to obtain) more than one nationality, we see no basis for treating either or any one of his nationalities as subsidiary to the others for the purposes of refugee status determination. We look again briefly at this issue below, under the heading "effective nationality".

39. Professor Goodwin-Gill then goes on to attempt to determine the third appellant's nationality, albeit, as he accepts, without access to the relevant statutory materials. The next question and answer are as follows:

> "4. Does [the third appellant], as a person who has not yet been recognised as a South Korean citizen, fit within the reasoning of the Tribunal in MA (disputed nationality) Ethiopia [2008] UKIAT 00032?
>
> 56. Taking account of the approach described above, the framework of analysis adopted in MA appears to have departed, in my Opinion, from the text of the treaty to be interpreted, and to have introduced concepts such as *de jure* nationality and "real risk of denial" which are unnecessary to the application of Article 1A(2)."

40. We deal with MA below; it should be noted here that the description of the third appellant as a person who has "not yet been recognised as a South Korean citizen" is not the subject of any comment by Professor Goodwin-Gill, although it is clear that it does not readily fit the dichotomy identified by him in his paragraph 49, which we have set out above.

41. The starting point for the fifth question is Article 4(3)(e) of the Qualification Directive, 2004/83/EC. That requires states of the European Union to take account of "whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship". Professor Goodwin-Gill points out that the Qualification Directive is to be interpreted in accordance with the Refugee Convention, and suggests that Article 4(3)(e) should therefore be read as though the words "of which he is a citizen" appeared, instead of "where he could assert citizenship". Nothing in the present appeal turns on this issue, although we should note that Article 4 is primarily concerned with the grant of international protection within the European Union, under the Directive, which may not be exactly congruent with the recognition of refugee status under the Convention.

42. The final question is whether the inclusion of South Korea in the Asylum (Designated States) Order 2010 is consistent with the Convention: Professor Goodwin-Gill does not answer this question, but instead makes observations on North Korean asylum seekers, whom he conjectures to be the only individuals to whom this provision is likely to apply.

Evidence about process at the South Korean Embassy

43. We turn now to evidence relating to the dealings of the third appellant, and those similarly situated, with the South Korean Embassy in London.

44. Balvinder Samra, a solicitor employed by Thompson & Co. (who formerly acted for the third appellant) says that the firm has represented approximately 70 asylum applicants from North Korea over "the last 1-2 years" (the statement is neither signed nor dated). In 14 cases there has been an application for assistance from the South Korean Embassy in the United Kingdom. None of the 14 has been successful

in obtaining citizenship or a passport. Some have been given reasons, such as that they have been unable to provide documentary evidence of nationality, or that they would not be entitled to South Korean citizenship as they have been absent from North Korea for over ten years. The Embassy official dealing with the matter generally refuses to give either his or her own name or written confirmation of the decision. Balvinder Samra is not aware that any of Thompson & Co.'s clients have been recognised as South Korean citizens.

45. The third appellant herself and Alexander Finch, a trainee solicitor employed by Thompson & Co., have signed witness statements describing what happened when they went to the South Korean embassy in London on 16 January 2009. The third appellant states that she indicated at the reception desk that she wanted to make an application for South Korean citizenship. She was told to wait; in due course an official arrived and spoke to Mr Finch in English before going away, apparently to take advice. She was then told that South Korea was not prepared to give her citizenship unless her asylum application with the UK government was finished.

46. Mr Finch states that he told the official that the third appellant's instructions to the firm were that she was a North Korean national; she was an asylum claimant and had no durable status in the United Kingdom. Her asylum claim had been refused, but she had an appeal pending. She did not have any documentary proof of her North Korean nationality. He records the official's communication of the decision as follows:

> "9. The position of the South Korean government was that they were prepared to entertain her application only when her claim for asylum had been finally refused by the UK government. The application process takes a long time, as the data would have to be collected by the embassy, but then sent to headquarters in South Korea for a final decision. [The third appellant] should return when her asylum appeal was finally determined."

47. Mr Finch then asked the official some questions. Those which elicited substantive answers are as follows:

> "Q: Have you received applications for protection from North Korean asylum-seekers in this position previously, and are such applications accepted?
>
> A: Not 100% of the time. It will be established whether they genuinely are from North Korea, and South Korean authorities do exercise some choice about who is accepted. If they have committed crimes then they will not necessarily be accepted.
>
> …
>
> Q: Where a person who has no evidence that they are North Korean, what is the chances that they would be admitted, and how would the Republic of Korea determine their origin? For example, how would she be distinguished from a Chinese Korean?
>
> A: An extensive investigation would be carried out. North Koreans have a distinctive culture and way of life. Korean intelligence is aware of the position of North Koreans

in China and we would be able to question her to determine her case if there is no documentary evidence."

48. Siew See Lee, a barrister employed by Gillman-Smith Lee, who represent the first and second appellants, made a witness statement which we may summarise in the words of the Immigration Judge who determined their appeals:

> "On 11 June 08, Ms Lee received a telephone call from Mr Young Alp Ahn, Consul General of the South Korean Embassy. He stated that, if the applicant is a genuine PRK defector and he wants to resettle in South Korea, the South Korean government is open to accept him. However, the personal preference and wish of the PRK defector must be respected. If he wishes to settle in a third country his choice should be respected. The process for resettlement takes a long time. The South Korean authorities do not accept anyone with criminal records. Other factors taken into consideration are the length of stay in a third country which would affect whether the applicant can still be classified as a PRK defector. The South Korean authorities are also concerned about spies from the PRK and, therefore, a thorough background investigation must be carried out."

Evidence from South Korean Lawyers

49. There are two letters from In ho Song of the Somyoung Law Firm in Seoul. In the first, dated 12 March 2010, the opinion is given that Article 19 of the 1997 Act enables defectors from North Korea to acquire South Korean citizenship without the strict acquisition process that the citizenship law requires. It is nevertheless necessary for the applicant to prove North Korean nationality. In ho Song confirms that the grant of South Korean citizenship to nationals of North Korea is not discretionary:

> "It is not discretionary since, in principle, North Korean defectors can acquire citizenship when he was confirmed and verified that he is a North Korean citizen. North Korean defectors can acquire South Korean citizenship by verification of his North Korean status without special requirements."

50. Article 9 of the 1997 Act is not a criterion for decision on citizenship: it is a criterion going only to special protection.

> "[E]ven if North Korean defectors fail to receive protection approval, it is possible for them to acquire South Korean citizenship through acquisition process if they petition for South Korean citizenship after entering South Korea. The Article 19 of the Special Protection Act for North Korean defectors directly allows North Korean defectors to create their family relation registration in South Korea with permission from Seoul Family Court without particular acquisition process such acquisition by recognition, acquisition by naturalisation. At this moment, according to literal interpretation of the Special Protection Act for North Korean defectors Seoul Family Court should grant North Korean defectors South Korean citizenship when confirmed of North Korean status even if they fail to get approval for protection in the Special Protection Act for North Korean defectors."

51. The letter ends with a question put on behalf of the appellants, and the answer as follows:

> "Is he [that is, In ho Song] aware of specific cases where South Korean citizenship has been refused to a citizen of North Korea?
>
> As far as I know, there is no case that the court refused North Korean defectors to acquire South Korean citizenship when they are confirmed of their North Korean status."

52. The second letter is dated June 4 2010. It evidently follows further communications with its author, because it begins by asking him to confirm that proceedings in the Family Court for the acquisition of citizenship as described in the first letter cannot be initiated by an applicant himself: there needs to be a reference by the Minister of Unification. The author of the letter says that "in the light of practices until now" he will confirm that "the Minister of Unification is likely not to refer North Koreans refused protection under the 1997 Act to the Family Court". Other than by way of the Family Court, the author of the letter confirms, as required, that "the only recourse for a North Korean refused protection under the Act" is to apply to the Minister of Justice. In answer to a question about how many cases have been refused protection under the Act of Protection but have been granted citizenship, In ho Song says that the precise figure is classified as confidential. He knows of two or three cases. He then goes on to deal, apparently on a request, with the particular circumstances of the first and second appellants. He confirms, as requested, that they will not be eligible for protection under the 1997 Act. He says this:

> "It is also important to know what policy the Minister of Justice has for granting citizenship to North Korean citizens who have been outside North Korea for more than ten years.
>
> Its official stance is that once proven to be a North Korean defector, the grant is applicable. However, as I have explained in the last report, it is extremely difficult in that in practice it demands strict proof of having North Korean citizenship."

53. We may comment that neither the phrase "extremely difficult" nor the sentiment seems to appear in any "previous report" that we have seen.

54. In ho Song goes on to deal with the procedure for applying for protection and citizenship. He says that where a North Korean applies for protection from outside South Korea, the application has to be transmitted through the Minister of Foreign Affairs and Trade to the Minister of Unification, who is charged with making all decisions on granting protection. In the case of an application for nationality, however, there is no regulation in the 1997 Act: the appropriate protections are in the Nationality Act. There is no special procedure but the application will go through the Minister of Foreign Affairs and Trade to the Minister of Justice, who will make a decision. Although there is an obligation under the Protection Act to transmit applications to the relevant minister in South Korea, there is no such obligation under the Nationality Act; but In ho Song's conclusion is that, in the case of a protection application, if the diplomatic office does not cooperate, there is no other way to send it to the country.

55. The person posing questions to In ho Song suggests that the procedure at the South Korean Embassy in Canada appears to parallel that in London, in that North Koreans are not automatically accepted as South Korean citizens: they must demonstrate that they possess the "will and desire" to live in South Korea. In reply, In ho song says that the procedure from abroad is more complicated than applying from within South Korea, because of the need to secure the cooperation of the embassy in forwarding the application (whether for protection or for nationality) to the relevant minister.

> "Officially, there is no different policy towards North Koreans applying for citizenship from abroad. However, as explained in the last email, diplomatic officers are controlling the number of the entry of North Koreans into South Korea, who are expected to get approved protection, because of the increasing number of application for entry into South Korea by North Koreans since 2005 and the shortage of the temporary facility in housing support for them. Therefore, a person who are expected to be refused protection will be refused of even entering into the country.
>
> In that sense, in UK and Canada embassies, the consuls might have taken a position that as person refused protection was not a candidate for South Korean citizenship.
>
> In strict legal perspective, it is a wrong interpretation which is against the Protection Act, the Nationality Act, and the Constitution. However, since the authorities and particularly diplomatic offices are operating in such a way, a person refused protection applying from abroad cannot submit the application forms to the Minister of Unification or, in case of the nationality decision, to the Minister of Justice, because of the interference of the diplomatic offices. Moreover, even if North Koreans manage to submit the application form, it is almost impossible for them to acquire South Korean citizenship for the strict approaches of each office. Therefore, it is almost impossible for North Koreans who have been outside North Korea for more than ten years and applied abroad to get approved entry into South Korea and acquire South Korean citizenship."

56. In ho Song goes on to say that he agrees with Professor Bluth's report, but adds:

> "However, there are also politicians (including member of national assembly) who try to adopt the North Korean defectors more openly. They want to press the authorities concerned (especially the Minister of Foreign Affairs and Trade), but did not get satisfactory results yet. In conclusion, as I said in the previous answers, it is almost impossible for the North Korean defectors who have lived in certain state for more than ten years to acquire South Korean citizenship."

57. In ho Song concludes by giving his opinion about rights of appeal. There is no specific provision allowing a person refused protection or naturalisation to appeal against the decision. It would be possible to "file general administrative litigation", but In ho Song is unable to find any "precedents". There is only a very limited possibility of reviewing the exercise of the governmental discretion. The right of appeal can be exercised from abroad, but only in the case of a decision that has actually been made: therefore, if the embassy refuses to accept the application at all, there is no possibility of an appeal.

Authorities

58. We were referred to a number of authorities, from various jurisdictions. Amongst them were Stepanov v SSHD [2001] 01 TH 02850, MA (Ethiopia) [2008] UKAIT 00032 and [2009] EWCA Civ 289; Jong Kim Koe v Minister for Immigration [1997] FCA 306, SRPP v Minister for Immigration [2000] AATA 878, NBLC v Minister for Immigration [2005] FCA 1052, NAGV v Minister for Immigration [2005] HCA 6 and MZXLT v Minister for Immigration [2007] FMCA 799 from Australia, Katkova v Canada [1997] 40 Imm LR (2d) 216 and Williams v Canada [2005] 3 FCR 429 from Canada, and the Nottebohm Case [1955] ICJ 4 in the International Court of Justice. We defer discussion of the relevant authorities to the next section of this judgement.

Discussion

(i) Foreign Nationality

59. Whether a person is a national of any particular state is a matter for the law of that state. So far as we are aware, that proposition is uncontroversial. If authority for it is sought, it is to be found in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, and in the judgement of the ICJ in the Nottebohm Case at [20]. It follows that the question whether the appellants, or any other individuals, are nationals of South Korea is a matter determined in accordance with the provisions of South Korean law. In a court of any part of the United Kingdom, South Korean law is foreign law and is a matter of fact, to be proved by evidence. In such cases it is appropriate for the court to receive evidence from experts, but it is for the court, not the experts, to make the decision. It follows that, in taking account of all the evidence before it, the court is entitled to reject the opinion of an expert, as Finkelstein J, applying similar principles in Australian law, did in Lay Kon Tji v MIEA (1998) 158 ALR 681, cited in SRPP at [93].

60. The evidence, whether in the form of experts' reports or not, may deal with questions of practice and other issues, as well as questions of law. In SRPP, the court had at [104] to consider an assertion that what were apparently provisions of Portuguese law might be overridden by provisions of the Portuguese Constitution. At a different level, it may be that clear evidence as to national practice may be of importance in determining the content of provisions of national law. On the other hand, evidence of practice, in order to be relevant in this context, is likely to need to be of generality comparable to that of legal rules. In particular, and bearing in mind the possibility of the manipulation or selection of evidence by a person who seeks to remain in a country where he is claiming asylum, it is, we think, very unlikely that the experience of one or a small number of individuals will be sufficient to show that the legal rules are not what they appear to be.

61. The power of each State to determine under its own law who are its nationals extends not merely to the making of legal rules, but to their application on the facts of individual cases. A State may be expected to examine with some care the facts upon which any claim to its nationality is based. That will be particularly the case

where a claimant comes from another State and does not have documentation derived from the authorities of the State whose nationality he claims. That there should be detailed and rigorous investigation of claims to nationality is a matter of no surprise.

(ii) "Effectiveness" of nationality

62. We heard a number of submissions on the notion of "effectiveness" of nationality. It is suggested on behalf of the appellants that in order for a nationality, particularly a second nationality, to count for the purposes of the Refugee Convention, that nationality must be "effective".

63. There is a full and informative treatment of the issue in Jong Kim Koe. The applicant, who was from East Timor, claimed asylum in Australia. It was argued on behalf of the government that as he was also a national of Portugal, he was not entitled to refugee status. The Refugee Review Tribunal accepted that argument, but, on judicial review, the Federal Court of Australia set the Tribunal's decision aside, holding that it had erred in law by taking into account only the fact of nationality, without looking at its content.

64. In its commentary on Article 1A(2), the UNHCR Handbook says at paragraph 107:

> "In examining the case of an applicant with dual or multiple nationality, it is necessary, however, to distinguish between the possession of a nationality in the legal sense and the availability of protection by the country concerned. There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals. In such circumstances, the possession of the second nationality would not be inconsistent with refugee status. As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of a reply within reasonable time may be considered a refusal."

65. The Court considered a passage from James C. Hathaway, The Law of Refugee Status at [59], and noted that:

> "What is involved here is the proper construction of Article 1A(2) of the Refugees [sic] Convention. To interpret 'nationality' for the purposes of Article 1A(2) as something of a 'merely formal' character (to use the language of Professor Hathaway), instead of something effective from the viewpoint of a putative refugee, would be liable to frustrate rather than advance the humanitarian objects of the Refugees Convention. Nor would such a construction advance, in any practical way, another object of the Refugees Convention, namely the precedence of national protection over international protection. That precedence has no obvious relevance where national protection is not effective; as the UNHCR Handbook puts it….
>
> Given the objects of the Convention, it can hardly have been intended that a person who seeks international protection to which, but for a second nationality he or she would clearly be entitled, would, as a consequence of a formal but relevantly ineffective nationality, be denied international protection and, not being a 'refugee',

could be sent back to the country in which he or she feared, and had a real chance of, being persecuted."

66. As the closing words reveal, the risk in this case was that the appellant, having failed to establish that he was a refugee, because of his Portuguese nationality, would thereupon be returned to East Timor. The reasons for that, it appears, were that there was some evidence (which, in the Court's view, the Tribunal should have taken into account) that Portugal either would not recognise him as a national, or would require him to go to Portugal to establish his nationality, leaving it unclear what might happen to him then if Portugal refused to recognise him as a national.

67. Consideration of this issue is likely to require us to go further than was merited by the submissions before us. We would make three observations. The first is that, in principle, an Australian court might properly decide that it was persuaded that the applicant had Portuguese nationality, and might allow him to be removed there, knowing that if Portugal did not accept him as a national Portugal could not return him to a country of nationality in which he feared persecution for a Convention reason. Those considerations might be different if the country of return was not a party to the Refugee Convention or some other convention of equivalent nature. Secondly, it is clear that the issue is the availability of protection. If an individual has protection available to him from a country of which he is a national, the Refugee Convention is not engaged. That is not the same as saying that a person of dual nationality is not a refugee. Such ought to be obvious. What is less obvious, but clear from Jong Kim Koe, is that a country of nationality which is not itself a country of persecution may nevertheless be a country in which the applicant has a "valid reason based on well-founded fear" for not availing himself of its protection. If the result of his availing himself of the protection of that country is that he will find himself (for one reason or another) returned to the country in which he fears persecution, that would appear to be such a reason. Thirdly, the individual occasions when a country will not accept the return of its own nationals must be very rare and, as Jong Kim Koe also makes clear, the prospect of such treatment is a matter to be established on the individual facts of the case. If it were ever to be shown that a country had a general practice of not receiving its own nationals, there would be likely to be pressure through diplomatic channels, and perhaps litigation at the Hague.

(iii) Proof of nationality or the lack of it

68. As we have suggested above, it is possible that the courts of one country might decide that an applicant was a citizen of another country, but the other country might not recognise the applicant's citizenship. Thus, questions of the "effectiveness" of nationality are very closely linked to questions about what an applicant ought to do in order to secure evidence or acceptance of his nationality of the other country.

69. The applicant's own endeavours are obviously relevant. We must look in some detail at MA in the Court of Appeal. The appellant was born in Ethiopia to parents

of Eritrean ethnicity, and her nationality was a matter of some doubt. The headnote to the determination of the Asylum and Immigration Tribunal is as follows:

> "In any case of disputed nationality the first question to be considered should be: 'Is the person *de jure* a national of the country concerned?'. This question is to be answered by examining whether the person fulfils the nationality law requirements of his or her country. Matters such as the text of nationality laws, expert evidence, relevant documentation, the appellant's own testimony, agreement between the parties and Foreign Office letters may all legitimately inform the assessment. In deciding the answer to be given, it may be relevant to examine evidence of what the authorities in the appellant's country of origin have done in respect of his or her nationality.
>
> If it is concluded that the person is *de jure* a national of the country concerned, then the next question to be considered is purely factual, i.e. 'Is it reasonably likely that the authorities of the state concerned will accept the person, if returned, as one of its own nationals?'."

70. It will be recalled that Professor Goodwin-Gill, asked about the situation of the third appellant by reference to that determination, criticised the Tribunal's decision on the ground that it introduced "concepts such as *de jure* nationality and "real risk of denial" which are unnecessary to the application of Article 1A(2)".

71. It is perhaps surprising that, giving his expert opinion in March 2010, Professor Goodwin-Gill was apparently unaware of the decision of the Court of Appeal in the same case, handed down on 2 April 2009, to which he would otherwise certainly have made reference. The first judgement was given by Elias LJ; Stanley Burnton LJ described his reasons as "in substance the same" and Mummery LJ agreed with both judgements. At [41] – [43], Elias LJ said this:

> "41. I would accept that the use of the concepts of *de jure* and *de facto* nationality did not of itself involve any error of law, and indeed, as I have said, it was understandable that the Tribunal should approach the matter in this way, since that is how this court analysed matters in the factually similar case of EB [2007] EWCA Civ 809. In so doing the AIT was simply, in my view, adopting convenient shorthand descriptions. *De jure* nationality was what the appellant was entitled to as a matter of law; *de facto* nationality was the status she would actually be afforded by the Ethiopian state. I accept the submission of Ms Giovannetti [counsel for the Secretary of State] that the Tribunal was doing no more than saying that if someone like the appellant has *de jure* nationality, then the onus will be on her to show that she would be denied that status in a manner constituting persecution on Convention grounds. In my judgment, the language used by the AIT was not erecting, or intending to erect, any fresh conceptual legal analysis.
>
> 42. Having said that, I do not think that it is either necessary or desirable for these concepts to be employed as they were. The issue in asylum cases is always whether the applicant has a well founded fear of persecution on return, and she will have that well founded fear if there is a real risk that she will face persecution. In this case the issue was perceived to be whether she would face the risk of being denied her status as a national, it being assumed that this would, if established, constitute persecution to the requisite standard. To have recourse

to concepts of *de jure* and *de facto* nationality is likely to obscure rather than to illuminate that question. Indeed, it may have been the reason why this experienced body applied the wrong test for the standard of proof. That particular error in turn, as is conceded by the Secretary of State, meant that the analysis of what the AIT called the "hypothetical question", namely how she would have been treated if returned to Ethiopia, was wrong in law. I consider below the relevance, if any, of that error.

43. I also accept, as Ms Giovannetti concedes, that the Tribunal should have dealt with the question of Ethiopia's attitude to return as part of its assessment whether there was a real risk of persecution. It is true that the Tribunal will not generally be concerned about the process of removal; it must determine asylum status without regard to that issue, which is a matter for the Secretary of State. So the fact that it may, for example, prove to be impossible in practice to return someone seeking asylum has no relevance to the determination of their refugee status. But where the applicant contends that the denial of the right to return is part of the persecution itself, the Tribunal must engage with that question."

72. Stanley Burnton LJ's conclusions on the process of determination where there are arguments about the practical availability of the rights relating to nationality were as follows:

"78. There was debate before us as to the standard of proof to be applied in a case in which a person contends that he is unable to obtain in this country the passport or emergency travel document that is her right as a national of her country of origin. In my judgment, it is not the "real risk" test.

The "real risk" test applies to the question whether the fear is well-founded: it is well-founded if there is a real risk of persecution. Thus a person who is unwilling to return owing to a fear that is so justified is entitled to refugee status. Inability to return is not qualified in the Convention by the words "owing to such fear", and like the majority of the Court of Appeal in *Adan, Nooh, Lazarevic and Radivojevic* I see good reason why it is not. Inability to return can and should be proved in the ordinary way, on the balance of probabilities.

79. There are, as Miss Giovannetti submitted, good reasons other than the wording of the Convention for this conclusion. Most importantly is the nature of the risk. If a person is returned when there is a real risk of persecutory ill treatment on his return, that risk may eventuate with commensurately serious consequences. To require a person here to take reasonable steps to apply for a passport or travel document, or to establish her nationality, involves no risk of harm at all. I take into account that there may be cases in which the application to the foreign embassy may put relatives or friends who are in the country of origin at risk of harm. If there is a real risk that they will suffer harm as a result of such an application, it would not be reasonable for the person claiming asylum to have to make it. The present is not such a case.

80. Secondly, the application of a "real risk" test leads to absurdity. It would mean that a person could establish that he could not return to his country of origin by showing that a significant number of persons in a similar position had been refused a travel document, even if the majority had obtained one and been able to return without fear of ill treatment.

81. The third reason why the "real risk" test is inappropriate is that it is easy for the facts in issue to be proved. The person claiming asylum can give evidence of her application to her embassy or consulate, including any application made in person and of the refusal or other response (or lack of it) of her embassy. Her solicitors can write to the embassy on her behalf and produce the correspondence. By contrast, it may be difficult for a person here to prove what is happening in her country of origin, let alone what may happen to her in the future if she returns.

82. The fourth reason is that if leave to remain is refused on the ground that the applicant can and should obtain her foreign passport and recognition of her nationality, and it turns out that she cannot, she can make a fresh claim based on the refusal.

83. Lastly, refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her Embassy, or refuses or fails to take reasonable steps to obtain recognition and evidence of her nationality."

73. An appellant is seeking a right to stay in the United Kingdom, not seeking to facilitate removal to another country. There is therefore a certain artificiality in enquiring what an appellant's position would be if he or she presented himself to the authorities of another country as a person wishing to enter and settle in it as a national. But it is that enquiry which must be undertaken. In relation to the evidence in the present appeals, we note that it is said that the South Korean authorities are unwilling to consider applications while an individual has an asylum claim or appeal outstanding, and may be unwilling to consider certain applications unless a person shows a wish to settle in South Korea. Those are factors on which in principle an appellant cannot rely, for the purposes of showing that he or she is not entitled to nationality or to documents evidencing nationality. This means that the evidence in the present case, relating to the experience of those who do not seek to settle in South Korea, is of very little relevance. The question is what attitude the South Korean authorities would take to a person who wanted recognition of South Korean nationality, not to a person who was trying to show that it was unavailable, and evidence of the latter should not be taken to be evidence of the former. In the absence of clear evidence tending to show that North Koreans who actually seek to settle in South Korea will not be recognised as South Korean nationals in accordance with national law, we have no reason to suppose that South Korea will not comply with its own law and its international obligations in such cases.

(iv) North Koreans and South Korean Nationality

74. We have no hesitation in finding as a fact, on the evidence before us, that the general position is that North Korean nationals are nationals of South Korea. More precisely, because South Korean nationality is acquired at birth under the legislative provisions to which we have referred, by those born to parents of South Korean nationality, and because South Korea has never recognised the separate existence of North Korea but regards the whole of the Korean Peninsula as its own

territory, the general position is that all members of all ancestral North Korean families are, like all members of ancestral South Korean families, South Korean nationals. In particular, there is no doubt in our mind, on the basis of the facts found by the Immigration Judges, that each of the appellants obtained South Korean nationality, under the provisions of South Korean law, at his or her birth.

75. Nationality of South Korea so obtained by birth under the provisions of the South Korean Nationality Act is automatic; it is not subject to discretionary grant. But of course it does not follow that any person who cares to apply for documents evidencing South Korean citizenship will be granted them: South Korea is entitled to, and on the evidence will, conduct a rigorous investigation to ensure that the applicant has South Korean nationality as he claims. The evidence before us has referred to such examinations. Bearing in mind what we have said in paragraph 73 about the evidence before us, we do not consider that anything that we have heard suggests that the examinations go any further than would be proper in the circumstances, or that they are in general used to deny the rights of citizenship to those entitled to it. Indeed, the clear evidence is that South Korea's constitutional claim to the Korean Peninsula entails its treatment of North Korean nationals as its own; and although the 1997 Act does not deal specifically with nationality, the existence of it makes clear South Korea's continuing attitude to such issues. That South Korea would do anything to deny the recognition of nationality to those who can demonstrate that they are its nationals because of their North Korean background would be contrary to the evidence before us.

76. Neither South Korea nor any other State is obliged to recognise determinations as to its own nationality made in or by any other State. The assertion before us that South Korea would not regard itself bound by the determinations of this Tribunal are no more than statements of the general, and obvious position. But we know no reason to suppose that determination of nationality by South Korea follows anything other than a rational process. South Korea will not regard itself as bound by determinations of fact made by the Tribunal, but it will no doubt have regard to evidence similar to or the same as that relied on by the appellants before us. That evidence was such as to persuade the Immigration Judges that the claimants were very clearly of North Korean ancestry and citizenship. It included, in the case of the first and second appellants, evidence of an expert which was, we think we may say, compelling.

77. It would clearly be difficult for the appellants, who have based their cases on their being North Korean nationals, and have collected evidence of such strength to support that case, now to show that the evidence was such that when properly and rationally assessed by the South Korean authorities, it would not be regarded as establishing their North Korean nationality. For our part, we see no reason to suppose that there is anything in the appellants' cases that would cause any person charged with determining the issue to reach a view other than that at their birth they were each nationals of South Korea.

(v) The right to acquire nationality

78. For the reasons we have given, we have reached the conclusion that the appellants, and the vast majority of nationals of North Korea, acquire South Korean nationality at birth. There is, therefore, no subsequent process by which they obtain that nationality. They may obtain the documents evidencing it, but that does not affect their juridical status as South Korean nationals. And the process by which they obtain documentation is not itself the acquisition of nationality. A person acquiring South Korean nationality by birth may have, if he is a national of North Korea, no documents evidencing his South Korean nationality, but he is for present purposes and for all purposes we can envisage, from his birth in law a national of South Korea. He has South Korean nationality: he does not have merely a right to obtain South Korean nationality.

79. At the beginning of this determination we drew attention to three possible scenarios in the interpretation of the multiple nationality provisions in Article 1A(2) of the Refugee Convention. A person may have the nationality in question; or he may not have it but be entitled to have it; or he may be a potential beneficiary of a discretion to grant him the nationality in question. The appellants fall within the first category in relation to South Korea, and it is therefore not strictly necessary to consider the others. In the light of the submissions we heard, however, it is right to give our views briefly. We have little doubt that, where a person's acquisition of nationality depends on the exercise of a discretion by the State whose nationality he seeks to acquire, he cannot be regarded without more as for the purposes of the Refugee Convention having the nationality in question.

80. If support for that view is required, it can be found in the Israel Law of Return Cases, MZXLT, NAGV and Katkova. The Law of Return, passed by the Knesset in 1950, gave all Jews a right to emigrate to Israel, but does not make even those Jews who seek to settle in Israel nationals of Israel by that very act: there are provisions initially for the grant of visas and then for the determination of whether nationality is to be granted. The finding of McKeown J in Katkova was that

> "the Law of Return confers a wide discretion on the Israeli Minister of the Interior to reject applications for citizenship".

As a result, courts have found (though not in every case, as discussion in Katkova makes clear) that a person who may be able to obtain nationality of Israel under the Law of Return is not to be regarded as being a national of Israel. Similarly, we can see no general basis for treating persons as nationals of a state of which they are not presently nationals, and of which they have presently no entitlement to nationality.

81. On the other hand, there may be cases where the acquisition of a nationality not yet obtained is a matter not of discretion but of entitlement and of mere formality. Russian nationality was capable of being acquired by right by the claimants in Bouianova v MEI (1993) 67 FTR 74 and Zdanov v MEI (1994) 81 FTR 246. These were Canadian cases where the claimants were individuals who claimed to be

stateless but, as Rothstein J said in Bouianova at [76] (as cited by McKeown J in Katkova):

> "In my view, the applicant, by simply making a request and submitting her passport to be stamped, becomes a citizen of Russia. On the evidence before me, there is no discretion by the Russian officials to refuse her Russian citizenship. I do not think the necessity of making an application, which in these circumstances is nothing more than a mere formality, means that a person does not have a country of nationality just because they choose not to make such an application."

82. In summary, for the purposes of the Refugee Convention, where a person already has a nationality (even if he has no documents to that effect) that is the end of the matter: he is a national of the country concerned. If he is entitled to nationality, subject only to his making an application for it, he is also to be regarded as a national of the country concerned. But if he is not a national and may be refused nationality, he is not to be treated as being a national of the country concerned. Subject to questions as to the "effectiveness" of nationality, the same principle applies to entitlement to a second nationality as to entitlement to a first.

83. We should say that we regard that summary as consistent with authority, including Bradshaw [1994] Imm AR 359, and MA. In both of those cases there is more than a suggestion (in Bradshaw it is stated as a rule) that in order to establish a claim not to have a particular nationality, a person ought to apply, using his or her best endeavours, to obtain nationality of a country with which he or she is associated. But it seems to us that that must be a matter of evidence rather than of legal principle. For example, if the evidence is that nationality will be acquired on application, a decision maker ought to be entitled without more to treat the person as a national of the country in question, for the purposes of the Refugee Convention. If, on the other hand, there is evidence that the grant of nationality is a matter of discretion, it is not easy to see why a refugee claimant should be regarded, to his disadvantage, as having a nationality that he does not possess and may never possess. There may be borderline cases, and we would with respect strongly endorse what was said by Stanley Burnton LJ in MA at [83], as set out above.

(vi) North Koreans in South Korea

84. The evidence before us does not give any good reason for concluding that the return of a North Korean, as a citizen of South Korea, to South Korea would expose him to risk of persecution or breach any of the other international obligations of the United Kingdom. A North Korean re-settling in South Korea may under certain circumstances be entitled to the benefits of the 1997 Act, but, even if he is not, the circumstances under which North Koreans live in South Korea are not shown to amount to persecution or other ill-treatment. That was also the conclusion of an Australian tribunal whose decision was examined in the Federal Court in NBLC. There is evidence of some societal discrimination and other difficulties but not treatment reaching the threshold of persecution under the Refugee Convention, serious harm under the Directive 2004/83/EC, or ill-treatment contrary to Article 3 of the European Convention on Human Rights.

85. It follows that, in general, nationals of North Korea who claim asylum can lawfully be the subject of removal directions to South Korea.

(vii) A special problem: absence for ten years

86. The weight of the evidence before us was to the effect that a North Korean national who was absent from Korea for more than ten years would not be able to obtain the *indicia* of South Korean nationality, despite his acquisition of that nationality by birth. Such a person falls in a distinct category, identified in the written evidence of Professor Bluth (his paragraphs 5.4.11, 6.1.5 and 6.1.7, citing at least two, possibly three sources), and In ho Song (paragraph 55 above). The statements to this effect appear to be in flat contradiction to South Korean nationality law, and are difficult to explain. The most likely explanation is, as hinted at by Professor Bluth and his sources, that there is a presumption that a person who has been in some other country or countries for so long must have acquired a right to be there. It appears to us on the evidence that after ten years the South Korean authorities must apply some sort of presumption of the acquisition of another citizenship, which would, in accordance with the terms of the South Korean Nationality Act, deprive the individual in question of his South Korean nationality, or at any rate place upon him an additional burden of proof, which in practice it may be impossible to discharge. We accept that this is a hypothesis on our part: but we must do what we can with the evidence before us.

87. On that basis, the effect is that a person who was a national of South Korea by birth, and who has no South Korean documents, may lose his South Korean nationality by the presumption of having acquired another, and, as a result, will not be able to acquire South Korean documents on the basis of entitlement to them. Instead, he will in practice become a person who merely can apply for South Korean nationality and, as we have explained above, for the purposes of the Refugee Convention, not a national of South Korea. He passes from the first of our three categories to the third.

88. We are not persuaded that we should connect this aspect of the evidence with generalised assertions that the South Korean authorities apply the 1997 Act to the determination of nationality. Those are assertions which we do not think it would be right to accept. The distinction between nationality and the acceptance of those leaving North Korea, irrespective of nationality, is quite clear in the South Korean legislation. But so is the provision for loss of South Korean nationality on the acquisition of another non-Korean nationality and, as we have said, we think that the latter provision is the proper basis of the "ten-year rule" which appears to be applied in practice.

Current tension between North Korea and South Korea

89. In the period following the hearing of this appeal, there was an escalation in tension between North Korea and South Korea. We gave consideration to whether we ought to hear further submissions. We decided that no further submissions were necessary, for the following reasons. First, they could not affect the outcome of

these appeals. Secondly, there is not the slightest suggestion that any current tensions have affected the attitude of the South Korean authorities to individuals from North Korea, in particular those who have left North Korea for fear of persecution for a Convention reason or for other reasons connected with distaste for the North Korean regime. There is thus no basis for supposing that the most recent events in the Korean Peninsula cast any doubt on either our general or our particular conclusions.

General conclusions

90. We summarise our general conclusions as follows.

(1) Law

(a) For the purposes of determining whether a person is "of" or "has" a nationality within the meaning of Article 1A(2) of the Refugee Convention, it is convenient to distinguish between cases where a person (i) is (already) of that nationality; (ii) is not of that nationality but is entitled to acquire it; and (iii) is not of that nationality but may be able to acquire it.

(b) Cases within (i) and (ii) are cases where the person is "of" or "has" the nationality in question; cases within (iii) are not.

(c) For these purposes there is no separate concept of "effective" nationality; the issue is the availability of protection in the country in question.

(d) Nationality of any State is a matter for that State's law, constitution and (to a limited extent) practice, proof of any of which is by evidence, the assessment of which is for the court deciding the protection claim.

(e) As eligibility for Refugee Convention protection is not a matter of choice, evidence going to a person's status within cases (i) and (ii) has to be on "best efforts" basis, and evidence of the attitude of the State in question to a person who seeks reasons for not being removed to that State may be of very limited relevance.

(2) Korea

(a) The law and the constitution of South Korea (ROK) do not recognise North Korea (DPRK) as a separate State.

(b) Under South Korean law, most nationals of North Korea are nationals of South Korea as well, because they acquire that nationality at birth by descent from a (North) Korean parent, and fall therefore within category (i) in 1(a) above.

(c) South Korea will make rigorous enquiries to ensure that only those who are its nationals are recognised as such but the evidence does not show

that it has a practice of refusing to recognise its nationals who genuinely seek to exercise the rights of South Korean nationals.

(d) South Korean law does not generally permit dual nationality (North Korean nationality being ignored for this purpose).

(e) South Korean practice appears to presume that those who have been absent from the Korean Peninsula for more than ten years have acquired another nationality displacing their South Korean nationality; such persons therefore move from category (i), in 1(a) above, to category (iii).

Conclusion on these appeals

91. The appellants acquired South Korean citizenship at birth, but each of them has been outside Korea for more than ten years. They remain North Korean nationals, but on the evidence before us we are satisfied that South Korea would treat them as persons who had lost their South Korean nationality on the presumption of the acquisition of another nationality. For that reason they have no subsisting or demonstrable entitlement to South Korean nationality documents: they would have to apply to re-acquire South Korean nationality, and we see no reason to suppose that it would be granted to them as a matter of routine.

92. The appellants are therefore all persons with one nationality only, that of North Korea. It is common ground that in that case they are refugees. We allow their appeals.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL,
IMMIGRATION AND ASYLUM CHAMBER