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# The South Korean Citizenship of North Korean Escapees in Law and Practice

Andrew Wolman\*

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## **Abstract**

The South Korean citizenship status of North Korean escapees has long been a source of confusion outside of Korea and contestation within Korea. The first element of confusion relates to whether all North Korean escapees are formally South Korean citizens. The second element of confusion relates to whether the formal South Korean citizenship will necessarily be recognized by the South Korean government. This article will examine both of these questions. It will argue that according to current Korean laws and jurisprudence most North Korean escapees are indeed South Korean citizens. This article will show that there are in fact only three rare categories of North Korean citizen who are not South Korean citizens: naturalized North Korean nationals of a non-Korean ethnicity; North Korean nationals who have voluntarily taken on the citizenship of a third country, and North Korean nationals who can trace their Korean lineage only through maternal descent prior to June 14, 1998. The article will then examine the practical availability of citizenship rights for North Koreans, and will demonstrate that in some circumstances, South Korean citizenship is rendered ineffective by the lack of a legal entitlement to an entrance permit or documentation of citizenship that would allow the individual to access transportation to South Korea. This article will conclude by recommending that the Act on Protection and Settlement Support should be revised to explicitly clarify that all North Koreans who are South Korean citizens are entitled to receive permission to enter South Korea, from where they can then obtain documentary proof of their South Korean citizenship.

**KeyWords:** Nationality, North Korea, Resettlement, Protection, Citizenship, Refugees

## I . Introduction.

In recent years, the question of whether North Koreans necessarily have South Korean citizenship, which was previously of paltry (and largely academic) interest outside of the Korean peninsula, has gained far greater practical significance.<sup>1</sup> The reason for this development lies in the treatment of North Korean asylum seekers under the Refugee Convention of 1951 ('Refugee Convention').<sup>2</sup> Article 1(A)(2) of the Refugee Convention states that an asylum seeker who is a dual national must fear persecution in both of his or her countries of nationality in order to be considered a refugee.<sup>3</sup> In short, therefore, if a North Korean escapee is deemed by a destination country to also be a South Korean national, then he or she must show a fear of persecution in both North and South Korea in order to receive refugee status. Arguably, if a North Korean escapee has South Korean citizenship but lacks a legal entitlement to enter South Korea, then he or she should not be considered to be a dual national.

Courts around the world have struggled to answer these related questions, and have answered the questions in different ways. Australian cases have consistently found North Korean escapees to be automatically South Korean citizens.<sup>4</sup> In Canada, the courts have been divided. In *Kim v. Canada*, the court found that North Korean escapees did not automatically have South Korean citizenship, but would rather have to apply for such citizenship, with a significant risk of refusal.<sup>5</sup> However, more recently a Canadian tribunal found that a child born to a North Korean citizen is at birth considered a national of South Korea.<sup>6</sup> In *K.K. and Ors*, the U.K. Upper Tribunal (Immigration and Asylum Chamber) found that North Koreans are South Korean citizens, but will be deemed to have forfeited their

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1. For the sake of brevity, the terms 'North Korea' and 'South Korea' will be used in place of 'Democratic People's Republic of Korea' and 'Republic of Korea', respectively.
  2. Convention Relating to the Status of Refugees, Jul. 28, 1951, 189 U.N.T.S. 137.
  3. *Id.* art. 1(A)(2).
  4. *See, e.g.*, Refugee Review Tribunal Case No.0909449 [2010] RRTA 763 (Austl.); Refugee Review Tribunal Case No.1000331 [2010] RRTA 932 (Austl.).
  5. *Kim v. Canada*, [2010] F.C.R. 720 (Can.).
  6. *X (Re)*, 2013 CanLII 76469 (IRB), para. 64 (Can.).

South Korean citizenship if they remain in a third country for over ten years.<sup>7</sup> A French tribunal found a North Korean to be a South Korean citizen, but unable to have that citizenship recognized by the South Korean government (and therefore deserving of refugee status).<sup>8</sup>

This article will attempt to bring some order to this web of conflicting conclusions by outlining a clear and comprehensive answer to the question of whether North Koreans necessarily have South Korean citizenship, and whether North Korean escapees in practice have the ability to assert their South Korean citizenship by, for example, applying for permits allowing legal entry into South Korea. In short, this article will conclude that North Koreans are – with three categories of rare exceptions – South Korean citizens. They are not, however, all entitled to receive entry permits into South Korea when they apply for entry at overseas embassies or consulates, even though in practice the vast majority are permitted to resettle in South Korea.

## II. South Korean Citizenship Status

With some exceptions, it is settled law that North Korean nationals are, from birth, automatically South Korean citizens. This principle was accepted by the South Korean Supreme Court in the 1996 Yi Yongsun case.<sup>9</sup> The South Korean Supreme Court's ruling on this point was later affirmed by the South Korean

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7. KK and ors (Nationality: North Korea) Korea v. Sec'y of State of Home Dep't, [2011] UKUT 92 (IAC) (U.K.).
  8. Cour Nationale du Droit d'Asile [CNDA] [national court of asylum], September 2, 2010, *Mme L.*, n°08018788,C (Fr.).
  9. Constitutional Court [Const. Ct.], 96Nu1221, Nov. 11, 1996 (S. Kor.). Yi was a North Korean national who had lived legally in China for thirty years before coming to South Korea by purchasing a fraudulent Chinese passport. After notifying the South Korean police that she intended to defect, she was transferred to an immigration detention center for deportation to China. She filed suit, claiming to be a South Korean national entitled to stay in South Korea. The South Korea Supreme Court ruled in her favor, concluding that she was automatically a South Korean national because of her North Korean heritage, and should therefore not be deported.

Constitutional Court in the Nationality Act Case.<sup>10</sup> The conclusion that North Korean nationals are automatically South Korean citizens has also been accepted by South Korean government officials<sup>11</sup> and acknowledged by many influential Korean legal scholars.<sup>12</sup> In brief, the reasoning for the South Korean citizenship of North Koreans is as follows.

According to Article 2(1) of the South Korean Constitution, “nationality in the Republic of Korea shall be prescribed by Act.”<sup>13</sup> Since December 1948, the Nationality Act has regulated the possession of nationality.<sup>14</sup> The Nationality Act

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10. Constitutional Court [Const. Ct.], 97Heonga12, Aug. 31, 2000 (S. Kor.).
  11. According to a submission by the Minister of Diplomacy and Trade in the Nationality Act Case “Our country does not recognize the nationality of North Korea. Therefore, a resident of North Korea can be considered as having our nationality” *Id.*; *See also* Jae-Chul Sim, *On Legal Status of North Korean Defectors Residing in Third Countries*, 49 LIFE & HUM. RTS. N. KOR. 7, 16 (2008) (“In principle, North Korean defectors out of North Korean territories shall be regarded as ROK nationals.”). At the time, Jae-Chul Sim was a Public Prosecutor in the Unification Legal Affairs Division of the Ministry of Justice, although he specified that his article should not be considered the official South Korean position.
  12. *See, e.g.*, Eric Yong-Joong Lee, *Human Rights Protections of North Koreans in a Third Country: A Legal Approach*, 4 J. KOREAN L. 155, 169 (2004) (“South Korea regards [North Korean escapees] directly as its own nationals”); In Seop Chung et al., *The Treatment of Stateless Persons and Reduction of Statelessness: Policy Suggestions for the Republic of Korea*, 13 KOREA REV. INT’L. STUD. 7, 22 (2010) (“the dominant scholarly opinion regard North Korean territory as a part of the territory of the Republic of Korea, and therefore all North Korean people as nationals of the Republic of Korea”); Young-kwan Choi, *Situation and Status of the Externally Displaced North Koreans and the Issue of Protecting Human Rights*, in NATIONAL HUMAN RIGHTS COMMISSION OF KOREA 151, 155 (2005) (“The South Korean constitution defines the externally displaced North Koreans living overseas as Korean citizens”); Jung-Sun Park & Paul Chang, *Contention in the Construction of a Global Community: The Case of the Overseas Korean Act*, 10 J. KOREAN STUD. 1, 4 (2005) (“With respect to citizenship, North and South Koreans are, in theory, simultaneously citizens of both North and South Korea because both states claim governmental power over the entire Korean peninsula.”).
  13. 1948 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 2(1) (July 17, 1948) (S. Kor.).
  14. Gukjeokbeob [South Korea Nationality Act], Act. No. 16, Dec. 20, 1948, *amended by* Act. No. 10275, May 4, 2010.

has been revised on a number of occasions, but has never directly addressed the issue of North Korean nationals.<sup>15</sup> The Nationality Act currently provides for South Korean nationality “at birth” for:

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.<sup>16</sup>

While the very limited *jus soli* provision in Article 2(3) is rarely invoked, this clause would by its terms grant South Korean nationality to those born of unknown or stateless parents in North Korea because Article 3 of the South Korean Constitution states that the “territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.”<sup>17</sup> Article 3 of the South Korean Constitution is interpreted to cover the area controlled by both North Korea and South Korea.<sup>18</sup>

The more common way to acquire South Korean nationality is through descent. Prior to the founding of South Korea in 1948, Koreans possessed – according to the South Korean Supreme Court – *Chosun* nationality.<sup>19</sup> While there is a lack of clarity as to the exact legal nature of *Chosun* nationality, it has been interpreted as equivalent to subjecthood under the *Taehanjeguk* (Empire of Korea) that

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15. During the 1998 revisions to the Nationality Act, the Ministry of Justice reportedly stated that a provision on North Koreans’ nationality was deliberately excluded because North Koreans are already South Korean citizens under South Korean law. See Jae-Chun Won, *North Korean Human Rights and the Failure of Protection: The Plight of North Koreans in Flight*, in *NORTHEAST ASIAN PERSPECTIVES ON INTERNATIONAL LAW* 141, 154 (Seokwoo Lee & Hee Eun Lee eds., 2013). (citing Dong-Hyun Seok, *Revision of Korean Nationality Law: The Direction of Revising the Korean Nationality Law*, 4 *SEOUL INT’L L. RES.* 25 (1997)).

16. South Korea Nationality Act, *supra* note 14, art. 2. Prior to June 14, 1998, the Nationality Act only provided for South Korean nationality through paternal descent.

17. 1948 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 3 (July 17, 1948) (S. Kor.).

18. South Korea Supreme Court, Sep. 28, 1961, 4249 Haeng Sang 48.

19. Yi Yongsun Case, *supra* note 9.

ruled Korea immediately prior to Japanese annexation.<sup>20</sup> Two important points regarding *Chosun* nationality are quite clear, however. First, *Chosun* nationality was possessed equally by residents of the entire Korean peninsula, including the area currently governed by both North Korea and South Korea. Second, *Chosun* nationality was, at least at the time of South Korea's founding, acquired through paternal descent. Prior to the establishment of South Korea in the U.S.-occupied Southern part of the Korean peninsula, the U.S. Army Military Government enacted the Provisional Ordinance on Nationality, which stated in Article 2(1) that a person born to a Korean father shall acquire the nationality of *Chosun*.<sup>21</sup>

Thus, at the time of the establishment of South Korea, individuals of paternal Korean descent throughout the peninsula were *Chosun* nationals. Then, upon the founding of South Korea, *Chosun* nationality was converted into South Korean nationality through the action of then-Article 100 of South Korea's founding Constitution, which clarified that then-current law and ordinances in force remained effective unless they violated the Constitution.<sup>22</sup> This meant that all individuals of Korean paternal descent (anywhere on the Korean peninsula) who were born before 1948 automatically gained South Korean nationality at the establishment of the South Korean state. Between 1948 and 1998, the paternal descendants of these individuals also automatically became South Korean nationals, whether they were born on the north or south side of the Korean peninsula, due to the *jus sanguinis* provisions in Article 2(1) or Article 2(2) of the South Korean Nationality Act. In 1998, revisions to the Nationality Act made South Korean citizenship automatic at birth when either the father or mother is a Korean national.

The remaining element of the analysis then involves the question of whether the acquisition of North Korean nationality results in the loss of South Korean nationality, given that until 2011 South Korea in all cases prohibited the possession of dual nationality (as it still does in many circumstances).<sup>23</sup> The South Korean Supreme Court answered in the 1996 Yi Yongsun case that the prohibition

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20. See Chulwoo Lee, *South Korea: The Transformation of Citizenship and the State-Nation Nexus*, 40 J. CONTEMP. ASIA 230, 234 (2010). Prior to the establishment of the Empire of Korea, the term *Chosun* was used to designate Korea from 1392 to 1897.

21. [South Korean Provisional Government Act], Act. No. 11, May 11, 1948 (S. Kor.).

22. 1948 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 100 (July 17, 1948) (S. Kor.). (currently, art. 5 of the Addenda to the Constitution).

23. See Nora Hui-Jung Kim, *Flexible Yet Inflexible: Development of Dual Citizenship in South Korea*, 18 J. KOREAN STUD. 7 (2013).

on dual nationality has no effect on a North Korean national's possession of South Korean nationality.<sup>24</sup> This is because North Korea is not recognized as a sovereign entity by the laws and constitution of South Korea, and thus North Korean citizenship has no legal significance.<sup>25</sup> This non-recognition is mutual; according to the 1991 Basic Agreement on Reconciliation, Non-aggression, and Exchanges and Cooperation, inter-Korean relations are clarified as "not being a relationship as between states."<sup>26</sup> The South Korean Constitutional Court has affirmed this holding.<sup>27</sup>

A few caveats should be added to the above conclusion. First, it is worth noting that a small minority of Korean scholars, generally of a left-wing political orientation, would disagree with the South Korean Supreme Court's and South Korean Constitutional Court's conclusions, and argue that a proper reading of the South Korean Constitution and statutory framework leads to the conclusion that North Korean nationals are in fact not nationals of South Korea. These scholars claim that North Korea should properly be seen as a separate state, with its nationality respected as an alternative to South Korean nationality. As Jang-Hie Lee writes:

In interpreting the constitution geared towards a peaceful unification of the Korean peninsula, the constitution views the current relationship as a peaceful coexistence and recognizes North Korea as a de-facto state and recognizes the current administration. As a result, the citizens of North Korea cannot be recognized as citizens of South Korea...<sup>28</sup>

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24. Yi Yongsun Case, *supra* note 9.

25. According to an earlier decisions of the South Korea Supreme Court, "[t]he North region is a part of the Korean Peninsula which belongs to the Republic of Korea [as affirmed in Article 3 of the Constitution], so only the sovereignty of the Republic of Korea is valid in that region, and any other politics of sovereignty against the sovereignty of the Republic of Korea cannot be admitted in legal theory." Supreme Court [S. Ct.], 4249 Haeng Sang 48, Sept. 28, 1961 (S. Kor.).

26. Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between South and North, N. Kor.-S. Kor., Dec. 13, 1991.

27. Nationality Act Case, *supra* note 10.

28. Jang-Hie Lee, *Understanding North Korean Human Rights Issues in the Aspect of International Law, and a Strategic Approach*, in NATIONAL HUMAN RIGHTS COMMISSION OF KOREA 69, 76 (2005).

This perspective, however, is not accepted by South Korean courts, the South Korean government, or mainstream legal scholars.

Second, it is true that on some occasions, South Korean authorities have made statements referring to North Korean escapees “acquiring” South Korean nationality or being “eligible for” South Korean nationality.<sup>29</sup> These statements have led to some confusion.<sup>30</sup> They may be based on a mistranslation of legal terminology or a conflation of the process of acquiring South Korean nationality and the process of acquiring documentation of South Korean nationality. More likely, however, they result from diplomatic attempts to avoid the awkward conclusion that by refusing to provide the documentation necessary for some North Korean nationals to legally enter South Korea, the South Korean government is violating its own Constitution, specifically the Article 2(2) duty “to protect citizens residing abroad as prescribed by law”<sup>31</sup> as well as its commitments under international law, specifically art 12(4) of the International Covenant on Civil and Political Rights, which states that “[n]o one shall be

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29. See, e.g., Australia: Refugee Review Tribunal, *Korea: 1. Could DFAT please provide clarification and elaboration on DFAT Report No. 362. 2. Are there are laws other than the "Act on the Protection and Settlement Support of Residents Escaping from North Korea" that relate to or have an impact in determining the legal right of a North Korean defector to enter and reside in South Korea?* (Nov. 28, 2005), available at <http://www.refworld.org/docid/4b6fe26cd.html> (citing a Ministry of Unification source’s statement that “there is an ‘assumption’ that North Koreans can acquire South Korean citizenship”); Immigration and Refugee Board of Canada, *Democratic People's Republic of Korea/Republic of Korea: The situation of citizens of the Democratic People's Republic of Korea (North Korea) who approach embassies of the Republic of Korea (South Korea) in Canada or in other countries to request citizenship; whether North Koreans are automatically accepted as South Korean citizens and, if not, how this is determined; citizenship procedures; method to establish North Korean identity; whether North Korean applicants are provided assistance to allow them to travel to South Korea* (3 June 2008), available at <http://www.refworld.org/docid/48d2237ec.html> (citing a South Korean embassy official as stating that North Korean nationals are not automatically South Korean citizens, but must first apply and undergo a “citizenship process”).

30. They have also been cited in Canada to support the proposition that North Korean escapees are not automatically South Korean citizens. *Kim v. Canada*, *supra* note 5, paras. 15-19.

31. 1948 DAEHAN MINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 2(2) (July 17, 1948) (S. Kor.).

arbitrarily deprived of the right to enter his own country.”<sup>32</sup>

Third, it must be emphasized that South Korean citizenship is purely formal prior to a North Korean national’s arrival in South Korea. North Koreans are not able to get proof of South Korean citizenship prior to arriving in South Korea, and they are (with a few exceptions) not given travel papers allowing entry to South Korea while they are in China. While most North Koreans (who do not fall into the citizenship exceptions detailed below) are given entrance permits and flights to Seoul when they approach South Korean embassies and consulates outside of China, some are not; namely members of the *Chogyo* group, who have lived legally in China for over ten years, and, some evidence suggests, North Korean escapees who ask South Korean authorities for resettlement while in a developed country with a strong refugee protection system and do not qualify for protection and support under South Korean law.<sup>33</sup>

### III. Exceptions to the Rule

There are three exceptions to the general rule that North Koreans possess South Korean citizenship: naturalized North Korean nationals of a non-Korean ethnicity, North Korean nationals who have voluntarily taken on the citizenship of a third country, and North Korean nationals who can trace their Korean lineage only through maternal descent prior to June 14, 1998. Each of these cases will be discussed in turn.

While the vast majority of North Korean residents are descended from ethnic Koreans with a long history of family registration in the Korean peninsula, there has been a small amount of immigration into North Korea both before and after its founding. These individuals can be divided into four groups: first, ethnic Koreans who returned to North Korea after its founding, mainly from Japan;<sup>34</sup> second, ethnic Japanese nationals who accompanied their ethnic Korean

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32. International Covenant on Civil and Political Rights, art. 12(4), Dec. 16, 1966, 99 U.N.T.S. 171.

33. *See infra*, section IV.

34. Over 90,000 ethnic Koreans emigrated from Japan to North Korea in the period from 1959 to 1984. *See* Tessa Morris-Suzuki, *The Forgotten Japanese in North Korea: Beyond the Politics of Abduction*, ASIA-PACIFIC J., vol. 43-2-09, Oct. 26, 2009. Similarly, some ethnic Koreans who settled on Russia’s Sakhalin Island when it was part of Japan also emigrated to North Korea during the Cold War era. *See* Andrei Lankov, *Koreans in Sakhalin*, KOREA TIMES (Jan. 19, 2012, 17:13 PM), [https://www.koreatimes.co.kr/www/news/opinion/2014/07/165\\_103201.html](https://www.koreatimes.co.kr/www/news/opinion/2014/07/165_103201.html).

spouses when they returned to North Korea,<sup>35</sup> third, Chinese immigrants or, more commonly, the descendants of Chinese immigrants, many of whose ancestors emigrated to Korea during the late nineteenth century;<sup>36</sup> and fourth, an extremely small number of immigrants from elsewhere in the world (including some defectors and abductees). The first group – ethnic Koreans who migrated to North Korea from Japan (and their descendants) – would generally be considered South Korean nationals (and given protection by South Korea when they escape). These individual’s ancestors have roots in the Korean peninsula, and in principle, they would be in the same position as those ethnic Koreans still living in Japan, who are considered South Korean nationals so long as they have not accepted Japanese nationality. This brings up the one caveat: those ethnic Korean returnees who had naturalized to Japanese citizenship prior to going to North Korea (as some reportedly had<sup>37</sup>) would not be considered South Korean nationals, as they would have lost their South Korean nationality at the time of naturalization due to the South Korean prohibition on voluntarily attaining the nationality of another country.<sup>38</sup>

On the other hand, ethnic Japanese or Chinese immigrants and their descendants (or the very rare North Korean immigrants of other nationality) would not be South Korean nationals because they do not have ancestors from Korea. From the perspective of South Korean law, it would be irrelevant whether or not these individuals have naturalized to North Korean citizenship, as is permitted by North Korean nationality law.<sup>39</sup> It is difficult to ascertain how many

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35. An estimated 6,730 ethnic Japanese individuals, mainly spouses of returning Koreans, migrated to North Korea between 1959 and 1984. Morris-Suzuki, *supra* note 34.

36. There are an estimated 5,000 Chinese immigrants remaining in North Korea, mostly living in Pyongyang and Sinuiju, although they often work in China. Liang Chen, *Ethnic Chinese in North Korea Find Themselves Caught Between Two Worlds*, GLOBAL TIMES (July 11, 2013, 19:48:01PM), <http://www.globaltimes.cn/content/795550.shtml>.

37. Morris-Suzuki, *supra* note 34.

38. South Korea Nationality Act, *supra* note 14, art. 15(1) (“A national of a foreign country who has voluntarily attained the nationality of a foreign country shall lose the nationality of the Republic of Korea at the time of attainment of the foreign nationality.”)

39. [North Korea Nationality Law], Act. No. 52, Oct. 9, 1963, art. 15, amended by Act. No. 483, Feb. 26, 1999 (S. Kor.) (“Applications regarding the acquisition or loss of the Republic’s citizenship shall be decided by the decision of the Presidium of the Supreme People’s Assembly.”).

(if any) of the ethnic Japanese spouses and immigrants from other countries have naturalized to become North Korean citizens, which requires the approval of the Presidium of the Supreme People's Assembly. Most of the Chinese immigrants and their descendants have not become North Korean nationals (unless they also have a North Korean national parent), and retain their Chinese nationality.

The second exception is North Korean nationals who have voluntarily taken up a second nationality prior to coming to South Korea. South Korean nationality is automatically forfeited upon voluntary acquisition of a foreign state nationality under Article 15(1) of the Nationality Act.<sup>40</sup> No express consent of the South Korean government is required for this to occur. They would in most cases continue to be North Korean nationals, however, because North Korean nationality is apparently not automatically forfeited upon accepting another nationality, but rather would only be relinquished by making a petition to the North Korean People's Assembly.<sup>41</sup> North Korean nationals who have voluntarily taken up a second nationality may petition the South Korean Minister of Justice to have their nationality reinstated, however, pursuant to Article 9(1) of the South Korea Nationality Act.<sup>42</sup> If successful, reinstatement of South Korean nationality must in most cases be followed by renunciation of the other nationality within a year.<sup>43</sup>

It should be stressed that the above exception only applies to individuals who voluntarily take a second nationality. Those born with a second nationality would be considered dual nationals, although the South Korean Ministry of Justice could ask them to renounce their second nationality once they reach the age of 22.<sup>44</sup> If

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40. South Korea Nationality Act, *supra* note 14, art. 15(1) ("A national of a foreign country who has voluntarily attained the nationality of a foreign country shall lose the nationality of the Republic of Korea at the time of attainment of the foreign nationality.") This provision was not affected by the 2011 revisions that legitimized dual nationality in certain other circumstances.

41. North Korea Nationality Law, *supra* note 39.

42. South Korea Nationality Act, *supra* note 14, art. 9(1). Nationality will not be reinstated for a person who has inflicted harm on the State or society; whose conduct is disorderly; who renounced South Korean nationality in order to avoid South Korean military service, or for whom the Minister of Justice decides reinstatement would be inappropriate for purposes of national security, sustainment of order, or public welfare. *Id.*, art. 9(2).

43. *Id.* art. 10.

44. *Id.* arts. 12(1), 14-2(1).

they refused, they could lose their South Korean nationality.<sup>45</sup>

The final group of North Korean nationals that would not be considered South Korean nationals are those individuals who can trace their Korean lineage only through maternal descent prior to June 14, 1998. On that date, a revised South Korea Nationality Act permitted South Korean nationality by maternal or paternal descent, as consistent with Article 9 of the 1984 Convention on the Elimination of all Forms of Discrimination against Women, to which the South Korean government had recently withdrawn a reservation.<sup>46</sup>

In practice, this exception will most often cover individuals born before June 14, 1998 to a North Korean mother and a foreign (generally Chinese) father. This is due to the fact that prior to June 14, 1998, the South Korean nationality law only recognized the passing of nationality by patriarchal *jus sanguinis*.<sup>47</sup> This rule is subject to a potential exception: when identifying the identity of the father is deemed impossible, as is sometimes the case where the mother and father were not legally married, then South Korean nationality will be recognized.<sup>48</sup>

In some (but not all) cases, individuals born of a North Korean national mother and a non-Korean father before 1998 will still be North Korean nationals, as the North Korean nationality law did not contain a similarly discriminatory

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45. Id. art. 14-2(4).

46. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 8, 1979, 1249 U.N.T.S. 13.

47. The 1998 Nationality Act revisions changing the patriarchal nature of South Korean nationality came about in part due to pressure from a legal case involving a North Korean national. The appellant, Gim Gwangho, had a North Korean national father who had already taken Chinese citizenship at the time of the appellant's birth, and was therefore not considered an South Korean national. The appellant's mother was a North Korean national. When Gim received a deportation order, he filed suit, alleging that the patriarchalism of South Korean nationality law was unconstitutional. Before the questions could be heard by the Constitutional Court, the National Assembly revised the Nationality Act to allow for the passage of nationality by maternal descent. See Chulwoo Lee, 'Us' and 'Them' in Korean Law: The Creation, Accommodation, and Exclusion of Outsiders in Korea, in East Asian Law: Universal Norms and Local Cultures 105 (Lucie Cheng, Arthur Rosett, & Margaret Woo eds., 2003). The case was later heard by the South Korea Constitutional Court, as the previously mentioned Nationality Act Case. Nationality Act Case, supra note 10.

48. E-mail from Kyu Geun Cha, Attorney, Jeon, Cha & Lee (Nov. 12, 2013, 21:05 KST) (on file with author). In fact, many marriages between North Korean women and Chinese men were not legally registered, due to the irregular status of the North Korean escapee.

preference for paternal descent. Rather, Article 4 of the 1963 North Korean nationality law stated that children of one North Korean national parent and one non-North Korean national parent are North Korean citizens when both parents were residing in North Korea at the time of the birth, while Article 5 of the 1963 North Korean nationality law stated that the nationality of a child of one North Korean national parent and one non-North Korean national parent residing abroad “shall be determined by the agreement of his parents.”<sup>49</sup>

#### **IV. Effectiveness of South Korean Citizenship**

Of course, South Korean citizenship can only be considered practically meaningful if it is effective, as well as being formally present. At the very least, effective citizenship must convey an entitlement – and a practical ability – to enter the country of one’s citizenship. This section will examine whether North Koreans, who as previously discussed are in all but very rare cases South Korean citizens, can be said to possess the entitlement and ability to enter South Korea, thus rendering effective their formal citizenship.<sup>50</sup>

North Korean escapees usually leave their country by crossing the border into China. Once in China (or once their visa expires, for those who come legally), the North Korean escapees are considered irregular economic migrants, and are under a constant threat of repatriation to North Korea, as well as exploitation by human traffickers and others in Northeast China.<sup>51</sup> While in China, South Korean authorities are almost always unable (or unwilling) to help North Korean nationals reach South Korea. There are some isolated exceptions to this rule where the South Korean government has requested Chinese permission for the transfer of a North Korean escapee who has entered a South Korean diplomatic or consular compound. These requests have eventually been granted after a very long wait (between one and three years). Generally, however, South Korean authorities will reject assistance to North Korean escapees who approach them while in China.

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49. North Korea Nationality Law, *supra* note 39, arts. 4, 5.

50. As a perhaps obvious starting point, it should be noted that North Koreans in North Korea are in practice unable to directly travel to South Korea or obtain South Korean resident registration cards or passports. This section will therefore focus on procedures and entitlements of North Koreans outside of North Korea.

51. See U.N. Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, ¶¶ 435-77, A/HRC/25/63 (Feb. 7, 2014).

Thus, in order to reach South Korea, North Korean escapees have three choices with different legal consequences for receiving permission to enter South Korea. First, they can (directly or indirectly) approach a South Korean embassy or consulate outside of China and Russia, and request protection and settlement support. Second, they can request protection from Russian authorities. Third, they can travel independently to South Korea. Each of these options will be discussed in turn.

The vast majority of North Korean escapees choose the first option, undertaking an expensive and dangerous journey to (usually) Southeast Asia or Mongolia and either directly approaching a South Korean embassy or consular official to request protection or approaching local authorities in a country such as Thailand where officials have a good track record of delivering North Korean escapees to South Korean authorities (after a period of detention).<sup>52</sup> This voyage is generally undertaken with the assistance of brokers, and the escapee risks repatriation to North Korea when caught in China. Even after the North Korean escapees cross over the border to Myanmar, Laos, or Vietnam, the risks of exploitation and repatriation exist. Most notoriously, in May 2013, nine young North Korean escapees were publicly repatriated from Laos to China, and from China to North Korea, an incident that was widely condemned in South Korea and elsewhere.<sup>53</sup>

Usually, however, North Korean escapees that successfully contact South Korean embassy or consular personnel and declare their wish to settle in South Korea are flown to South Korea, where they are allowed to settle down and live as ordinary citizens. First, however, applicants are subject to investigation under the Act on Protection and Settlement Support of Residents Escaping from North Korea ('Act on Protection and Settlement Support') to see if they qualify for a flight to South Korea.<sup>54</sup> This investigation is generally managed by the Ministry

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52. The most popular destination point for North Korean escapees who want to obtain protection from the South Korean authorities is Thailand, where a reported 2,500 North Korean escapees went in 2010. Korea Institute for National Unification, White Paper on Human Rights in North Korea 465 (2013).

53. Jethro Mullen, Outcry over Young North Korean Refugees Handed Back to Regime by Laos, CNN (June 3, 2012), <http://edition.cnn.com/2013/05/31/world/asia/laos-north-korea-refugees/>.

54. Bukhan yitaljumin boho mit jungchak jiwoneh gwanhan beobyul [Act on the Protection and Settlement Support of Residents Escaping from North Korea], Act No. 5259, Jan. 13, 1997, amended by Act No. 10188, Mar. 26, 2010 (S. Kor.) [hereinafter Act on Protection and Settlement Support].

of Foreign Affairs but in special circumstances protection decisions are made in Seoul by the Consultative Council on Residents Escaping from North Korea<sup>55</sup> or the Director of the National Intelligence Service (when national security is likely to be affected to a considerable extent).<sup>56</sup>

The investigation currently takes roughly a month, during which period South Korean nationality remains basically ineffective; the escapees are not given any temporary South Korean identification card or other proof of nationality. At times, the delay in reaching South Korea after North Korean escapees request protection can be much longer than a month, however, depending on political considerations in the host country. There have been frequent complaints from civil society organizations that the procedures for investigating and ensuring the safety of North Korean escapees vary considerably in the different embassies, and that in some cases the South Korean embassy personnel have failed to sufficiently protect North Korean escapees. In reaction to the Laos repatriation incident, however, the South Korean Ministry of Foreign Affairs established a new division in September 2013 to coordinate policy on North Korean escapee issues, and distributed a revised manual on North Korean escapee protocol to the various embassies and consulates.<sup>57</sup>

There is some ambiguity as to the legal and practical requirements to qualify for resettlement in South Korea. The Act on Protection and Settlement Support never explicitly states that permission to legally enter South Korea (and free transportation to South Korea) is an element of protection, but many commentators have concluded that this is the case.<sup>58</sup>

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55. The Consultative Council on Residents Escaping from North Korea is made up of representatives of the Ministry of Justice, Ministry of Unification, Ministry of Foreign Affairs, National Intelligence Service, and National Police Agency. It is chaired by the Vice Minister for Unification.

56. Act on Protection and Settlement Support, *supra* note 54, art. 8(1).

57. Interview with Jimin Kim, Director, Nat'l Cmty. External Cooperation Team, South Korea Ministry of Foreign Affairs, in Seoul (Oct. 29, 2013).

58. Chulwoo Lee, *supra* note 20, at 232 (protection is “a series of measures ranging from admission into a diplomatic mission and into South Korea to various forms of socio-economic support provided in South Korea.”); Refugee Review Tribunal Case No.1000331 [2010] RRTA 932, para. 56 (Austl.) (citing a report from Pil Kyu Hwang stating that the only legal avenue for a North Korean escapee to enter South Korea is by applying for ‘protection’); KK and ors (Nationality: North Korea), *supra* note 7, para. 35 (citing a report by Christoph Bluth stating that “[t]he Act on Protection is interpreted as giving the government the right to decide who can be admitted to the country”).

However, other South Korean government authorities and commentators have stated that all or almost all South Korean nationals will be sent to South Korea.<sup>59</sup> As a matter of law, transportation to South Korea should be interpreted as a form of protection, and North Korean escapees who fit within the criteria of the Act on Protection and Settlement Support are entitled to receive this benefit. There is no prohibition on resettling North Korean escapees who fall outside the terms of the Act, though, and in practice NGO and government sources agree that at least in recent years, North Korean nationals who do not fall within the terms of the Act on Protection and Settlement Support have normally been resettled in South Korea, at least when not doing so would put them at risk of repatriation to North Korea.<sup>60</sup> However, those resettled individuals that do not fit within the criteria of the Act on Protection and Settlement Support do not receive any of the various forms of settlement support upon arrival.<sup>61</sup> The following paragraphs will outline

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59. Jae-Chun Won, *supra* note 15, at 158 (“as long as they successfully enter the compound of the foreign mission of South Korea, almost all are brought to South Korea.”) Jeong-Hwan Kim at the Ministry of Justice stated that all North Korean escapees who are South Korean nationals would be resettled in South Korea. Interview with Jeong-Hwan Kim, Public Prosecutor, South Korea Ministry of Justice, Unification Legal Affairs Div., in Gwacheon (Nov. 18, 2013).
60. In interviews with NGO representatives and government officials, I was consistently informed that genuine North Korean escapees outside of China are not in practice refused transit to South Korea. E-mail from Kay Seok, Korea Country Representative, Nat’l Democratic Inst (Nov. 25, 2013, 20:27 KST) (on file with author); *See also* Interview with Jeong-Hwan Kim, *supra* note 59.
61. Pursuant to the Act on Protection and Settlement Support, resettling North Koreans receive both financial support and access to targeted services. While the amount of support varies by household size, as of 2012, a single-person household received 3 million won upon leaving Hanawon and an additional 3 million won in quarterly installments. Additional monetary support is given to vulnerable groups such as seniors, the mentally or physically challenged, people in need of long-term medical treatment, and children of single-parent families, and financial incentives are also available for those who undergo vocational training, obtain certificates of qualification, or continue to work at the same job for more than six months. North Korean settlers are also provided with housing in an area of their choice, subject to availability in different regions. As a means of promoting the employment of DPRK settlers, employers receive subsidies of 50% of a DPRK settler’s salary (below a certain limit). Young DPRK settlers can also enjoy tuition exemptions at public universities and fifty percent tuition discounts at private universities. In addition, DPRK settlers can access a range of services from regional adaptation centers, including vocational training, counselling, health services, and living assistance. KOREA INSTITUTE FOR NATIONAL UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 179-95 (2013).

the legal requirements for protection under the Act on Protection and Settlement Support, while also noting current discretionary resettlement practice.

Article 2(1) of the Act on Protection and Settlement Support specifies that in order to receive protection and support, applicants must qualify as “residents escaping from North Korea,” which means “persons who have their residence, lineal ascendants and descendants, spouses, workplaces, etc. in the area north of the Military Demarcation Line (hereinafter referred to as ‘North Korea’) and who have not acquired any foreign nationality after escaping from North Korea.”<sup>62</sup> This clause is interpreted liberally by the South Korean authorities regarding locations of ascendants, descendants, spouses and workplaces; even those who work outside of North Korea (i.e., diplomats or migrant laborers) or have family elsewhere (i.e., already in South Korea) are regularly granted protection and settlement support.

On the other hand, individuals who have voluntarily acquired a second nationality after escaping and individuals that are not of Korean ethnicity will generally be denied all forms of protection (and as mentioned, would not be considered South Korean nationals). The children of North Korean escapees who have one Korean parent and one Chinese parent normally have involuntarily acquired *de jure* Chinese citizenship, even though many of them were not registered by their parents, meaning they cannot exercise their rights as a Chinese citizen. These individuals are not covered by the terms of the Act on Protection and Settlement Support, but they are customarily resettled in South Korea as long as they are under the age of 19, with decisions on older dual nationals made on a case by case basis. However, these individuals will not be eligible to receive settlement benefits upon arrival.<sup>63</sup> The ineligibility of children of North Korean women and Chinese men for settlement benefits has been a politically sensitive issue in recent years.

Regarding place of residence, this clause is not used to exclude North Korean escapees who have been residing temporarily in a third country for work or other reasons, but (along with Article 9(4)) is used to deny South Korean resettlement to members of the *Chogyo* group, who emigrated from North Korea to China in

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62. Act on Protection and Settlement Support, *supra* note 54, art. 2(1).

63. See Seoul Administrative Court [Admin. Ct.], 2008GuHap211, Oct. 24 2008 (S. Kor.) (stating that the applicant would have been denied settlement support if his father was Chinese, as the South Korean authorities claimed, but that in fact his mother was married to a North Korean national while she was residing in China, so paternity should be assigned to the mother’s legal husband and the applicant therefore qualifies for settlement support).

the 1950s and 1960s, and their descendants, who live in China legally (usually as permanent residents).<sup>64</sup> In some cases it can be quite difficult for South Korean authorities to differentiate between *Chogyo* (who are South Korean nationals but are denied protection), *Chosonjok* (ethnic Koreans who migrated to China prior to 1945 and are Chinese nationals but not South Korean nationals), *Hwagyo* (Chinese nationals who have lived in North Korea for generations but are not South Korean nationals) and more recent ethnically Korean North Korean escapees (many of whom have lived for several years in China prior to applying for protection).

Second, the Act on Protection and Settlement Support contains six exclusion clauses in Article 9, which states, in part:

- (1) In determining whether to provide protection pursuant to the main sentence of Article 8(1), any of the following persons may not be designated as persons eligible for protection:
  1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.;
  2. Offenders of nonpolitical, serious crimes such as murder, etc.;
  3. Suspects of disguised escape;
  4. Persons who have earned their living for not less than ten years in their respective countries of sojourn;
  5. Persons who have applied for protection when one year elapsed since their entry into the Republic of Korea;
  6. Other persons prescribed by Presidential Decree as unfit for the designation as persons eligible for protection.<sup>65</sup>

Thus, under Articles 9(1)(1) and 9(1)(2), North Korean escapees with criminal backgrounds deemed sufficiently serious by the South Korean authorities do not qualify for protection under the Act on Protection and Settlement Support. This category includes crimes of violence such as murder and sexual assault, as well as drug crimes and human trafficking. According to MOU and MOJ, however, these individuals are in fact resettled in South Korea. However, individuals with serious criminal records do not receive settlement support; as of October 2013,

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64. Estimates of the size of this group range from 5,000 to 10,000 individuals. See Andrei Lankov, *Smuggler's Paradise*, KOREA TIMES (Oct. 14, 2007, 20:28 PM), [https://www.koreatimes.co.kr/www/news/opinion/2014/04/165\\_11883.html](https://www.koreatimes.co.kr/www/news/opinion/2014/04/165_11883.html).

65. Act on Protection and Settlement Support, *supra* note 54, art. 9(1).

sixteen individuals have been denied support for this reason (most commonly due to their involvement in drug crimes).<sup>66</sup>

Article 9(1)(3) excludes individuals who are “suspects of disguised escape.” This somewhat awkward formulation refers to those who are suspected of being North Korean spies or agents. Again, however, such suspicion does not result in a refusal to resettle. According to MOJ, even individuals strongly suspected of being spies are still transported to South Korea, as long as they are genuine North Korean nationals.<sup>67</sup> Upon arrival in Seoul, they are subject to further investigation by MOJ and the National Intelligence Service, and to criminal punishment if found guilty of espionage or related crimes.

The Article 9(1)(4) exclusion clause denies protection and settlement support to North Korean escapees who have lived outside of North Korea for more than ten years. This provision, which originally lacked explicit exceptions, in fact covers a large number of applicants, as it is relatively common for North Korean escapees to settle for long periods of time in Northeast China before eventually deciding to continue on to South Korea. After criticism of its overbroad scope, however, this exclusion provision was narrowed by the Presidential Decree accompanying the most recent revisions, which state in Article 16 that a stay of over ten years in a foreign country does not prevent a person from being eligible for protection in unavoidable circumstances, such as where the applicant was seized or detained against his or her will, was subjected to an extended stay in a detention center, or was not able to have an ordinary or stable life in the countries of flight or sojourn.<sup>68</sup> In practice, this clause is interpreted relatively liberally, especially as regards South Korean resettlement. If an individual genuinely escaped North Korea and lacks secure legal status in China, then the South Korean government will very likely determine that they were in some way forcibly prevented from seeking South Korean assistance, whether by lack of sufficient money to transit to a third country, or due to the actions of Chinese authorities, an employer, or a family member. However, members of the *Chogyo* group, who have lived legally in China for over ten years, will generally not be resettled in South Korea or given settlement support.

The Article 9(1)(5) exclusion, which regulates the maximum time period for

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66. E-mail from Hae Kyung Kim, South Korea Ministry of Unification (Nov. 12, 2013, 17:08 KST) (on file with author); Interview with Jimin Kim, *supra* note 57.

67. Interview with Jeong-Hwan Kim, *supra* note 59.

68. Geunro gijunbeob sihaengryung [Enforcement Decree of the Labor Standards Act], Presidential Decree No. 23488, Mar. 27, 1997, *as amended* (S. Kor.).

application for benefits upon arrival in South Korea, is not relevant outside of South Korea (it should be recalled that the Act on Protection and Settlement Support is also used to determine eligibility for benefits for North Korean escapees who manage to come to South Korea on their own).

The Article 9(1)(6) exclusion has been elaborated upon in Article 16(1) of the Presidential Decree to provide for the exclusion of persons who (1) are likely to cause South Korea great political and diplomatic difficulty; (2) committed violent acts harming other people's personal safety or damaged resettlement support facilities or (3) obtained legitimate residence status in third countries after having departed North Korea.<sup>69</sup> Jimin Kim, who is the director of the office dealing with North Korean escapees at the South Korean Ministry of Foreign Affairs, has stated that he is not aware of this clause ever being used to deny protection to a North Korean escapee.<sup>70</sup> It is certainly possible, however, that Article 16(1)(3) would be used to decline travel assistance and settlement support to an individual who received formal refugee status in a third country.

Finally, it is worth noting that Article 3 of the Act on Protection and Settlement Support states that the Act "shall apply to residents escaping from North Korea who have expressed their intention to be protected by the Republic of Korea."<sup>71</sup> Similarly, Article 7 outlines the protection process for North Korean escapees who "desire to be protected under this Act."<sup>72</sup> There is a lack of clarity as to whether this 'will and desire' factor is taken into account when determining eligibility to enter South Korea. When asked, Jimin Kim from the South Korean Ministry of Foreign Affairs stated that 'will and desire' was never a relevant factor in his investigations.<sup>73</sup> Hae Kyung Kim from the Ministry of Unification has also stated that a North Korean escapee who had previously filed an unsuccessful asylum claim elsewhere would be assessed under the same procedures as any other North Korean escapee.<sup>74</sup>

To sum up, according to the best available evidence, current practice in determining eligibility for resettlement is as follows. If a North Korean escapee qualifies for protection under the Act on Protection and Settlement Support, then she will be resettled in South Korea when she approaches a South Korean

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69. *Id.*

70. Interview with Jimin Kim, *supra* note 57.

71. Act on Protection and Settlement Support, *supra* note 54, art. 3.

72. *Id.* art. 7.

73. Interview with Jimin Kim, *supra* note 57.

74. E-mail from Hae Kyung Kim, *supra* note 66.

embassy or consulate outside of China. Where a North Korean escapee does not qualify for protection under the Act on Protection and Settlement Support, then the South Korean authorities will resettle her in South Korea anyhow, provided she is a South Korean national, if there is any chance that not doing so would lead to her being repatriated to North Korea. In practice, this means that *Chogyo* who have a stable legal status in China will normally be turned away, as they can return to China without risk of being repatriated to North Korea. In addition, North Korean escapees who ask South Korean authorities for resettlement in a developed country with a strong refugee protection system may get (at least preliminarily) rejected if they do not qualify for protection under the Act on Protection and Settlement Support, because the South Korean authorities are confident that the developed country will not repatriate them to North Korea (or China). There are anecdotal examples of such refusals in the United Kingdom,<sup>75</sup> and there have been statements implying a refusal to resettle those who fail to qualify under the Act on Protection and Settlement Support from the South Korean embassy in Canada.<sup>76</sup> However, it is likely that in these circumstances, the South Korean government would eventually resettle any genuine North Korean escapee who is a South Korean national if that person is refused asylum or if the host country makes a request through diplomatic channels.

Although most North Korean escapees follow the aforementioned route to Southeast Asia or Mongolia, a small number instead travel to Russia (or, more commonly, escape from timber camps and construction sites within Russia where they are sent by the North Korean government as migrant workers), and declare their intention of seeking refugee status to the Russian authorities. Russian authorities will in theory then refer their cases to the United Nations High Commission for Refugees ('UNHCR') to process their refugee status determination.<sup>77</sup> When referred to UNHCR and found by UNHCR to be refugees, the North Korean escapees will have the choice of receiving asylum in Russia, South Korea, or a third country (the United States is willing to resettle North Korean escapees, as is Japan for North Korean escapees that previously lived in

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75. *KK and ors* (Nationality: North Korea), *supra* note 7, paras. 44-48 (citing reports from four U.K. lawyers regarding the South Korean embassy's refusal to resettle North Korean escapees).

76. Immigration and Refugee Board of Canada, *supra* note 29.

77. In practice, local authorities in Siberia would be extremely unlikely to follow this procedure, and there are many cases of North Korean escapees living irregularly on the margins of Russian society as well as North Korean asylum seekers being repatriated to North Korea.

Japan).

Once North Korean escapees are flown to South Korea (whether from Russia or elsewhere in the world), their South Korean nationality can be said to become effective. Thus, while they are subject to continued investigation upon their arrival, they are at this point recognized as South Korean nationals and are not at risk of deportation if it is later found that they fall within one of the exclusion clauses of Article 9 of the Act on Protection and Settlement Support. When such discoveries are made, the North Korean escapees will, however, lose their access to social and monetary support. If they are found to be North Korean agents or spies, they will be subject to imprisonment pursuant to South Korean criminal law, after which they will be given the choice of staying in South Korea or returning to North Korea.<sup>78</sup> Deportation (to China) would be a possibility only where investigation later reveals that the individual was a Chinese national but not a North Korean (or South Korean) national.

Finally, it is worth noting that a very small number of North Korean nationals come to South Korea each year without the assistance of the South Korean embassy or consular personnel. This is usually done either by boat (from China) or by airplane. If a North Korean national arrives at a South Korean airport or seaport and credibly declares his or her identity, she will be allowed entry. However, it would be very hard (if not impossible) for a North Korean escapee to legally board a South Korea-bound airplane or ferry because she will not possess a passport or other appropriate documentation. South Korean entrance visas are also necessary for those entering with Chinese passports, unless they travel to Jeju Island, which is a visa-free zone for Chinese nationals. There have, however, been some cases of North Korean nationals flying to South Korea with fraudulent Chinese passports. Direct land crossing from North Korea to South Korea is virtually impossible because of the heavily fortified nature of the North-South border, and while direct sea crossings from North Korea to South Korea occasionally occur (whether by accident or on purpose) they are also very rare.

Some (but not all) of the North Korean nationals that arrive independently in South Korea are eligible to apply for settlement support under the Act on Protection and Settlement Support. If these individuals are successful, they receive the same level of material support as those who were assisted in coming over to South Korea. These individuals will receive their resident registration number showing proof of South Korean citizenship upon successful application for settlement support.

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78. Interview with Jeong-Hwan Kim, *supra* note 59.

Many of those that arrive in South Korea independently do not qualify for settlement support however, because they fall into one of the exceptions in Article 9 of the Act on Protection and Settlement Support (such as, most commonly, having lived in China for over ten years). These individuals are able to petition to have their citizenship affirmed by the Ministry of Justice through nationality adjudication under Article 20 of the Nationality Act.<sup>79</sup> While Article 20 nationality adjudication is available for anyone that wants to have their Korean nationality affirmed, in practice most applicants are North Korean escapees.<sup>80</sup> Nationality adjudication is only available for individuals who are physically present in South Korea (unlike protection under the Act on Protection and Settlement Support). The Article 20 process leads either to a finding that an individual is a South Korean citizen or a finding that she has an ‘undeterminable’ nationality. While the success rate for applicants is high, a finding of ‘undeterminable’ nationality may result in an individual becoming *de facto* stateless.<sup>81</sup> It should be emphasized that the Article 20 procedure will not examine extraneous issues such as criminal history, time spent outside of North Korea, or possible North Korean allegiance.

## V. Conclusion

Despite occasional confusion among the world’s courts and contestation within Korea, the formal South Korean citizenship status of North Koreans is quite clear. North Koreans are, from birth, South Korean citizens, with the exception of three rare categories: naturalized North Korean nationals of a non-Korean ethnicity, North Korean nationals who have voluntarily taken on the citizenship of a third country, and North Korean nationals who can trace their Korean lineage only through maternal descent prior to June 14, 1998.

The practical effectiveness of that citizenship is less clear. North Koreans will be allowed to enter South Korea when they present themselves at a Korean airport or seaport, and will be able to assert their citizenship through an Article 20 petition. In reality, however, such arrivals are rare, given South Korea’s physical situation and the strict prohibition on international transit without a visa in the destination country that is enforced by airlines and ferry companies. Most North

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79. South Korea Nationality Act, *supra* note 14, art. 20(1) (“Where it is unclear whether a person has attained or is holding the nationality of the Republic of Korea, the Minister of Justice may determine such fact upon review”).

80. *See* In Seop Chung, *supra* note 12, at 24.

81. *Id.* at 25.

Korean escapees instead request South Korean diplomatic or consular authorities to give them the appropriate documentation allowing them to legally travel to South Korea. As discussed in this article, the best evidence is that an entrance permit (and an airplane ticket) is generally given to North Korean escapees outside of China, with the exception of *Chogyo*, and a possible exception in developed countries where repatriation to North Korea is not a real risk.<sup>82</sup>

Supplying such documentation is not a legal requirement, however. While the Act on Protection and Settlement Support is vague on the issue, it is perhaps best interpreted as requiring South Korean officials to assist in resettlement to South Korea. However, the Act excludes several categories, such as North Koreans who have spent over ten years in a third country, and North Koreans with a serious criminal record. It would be preferable if the Act were amended to clarify that all North Korean escapees are entitled to receive a permit to enter South Korea, from where they could later apply for official documentation of their South Korean citizenship. This entitlement could be made independent of the entitlement to settlement support (which could still exclude those with a serious criminal record, etc.) and could also be made independent of the entitlement to free transport to South Korea as facilitated by South Korean embassy or consular personnel, which could be restricted to North Korean escapees outside of China. These clarifications would make the Act on Protection and Settlement Support more consistent with international law (specifically Article 12(4) of the International Covenant on Civil and Political Rights, which provides for the right to enter one's own country), without leading to major changes in the current state of Korean government practice. While direct access to South Korea from China would still no doubt be blocked, it would be clear that the roadblock was due to the Chinese authorities' unwillingness to allow North Koreans to board international flights or ferries, and not the reluctance of the South Korean authorities to give them entrance permits. This type of statutory clarification would also assist North Korean escapees (and their advocates) in becoming more aware of their rights and status under South Korean law, and would allow foreign observers to develop more appropriate refugee policies for North Korean asylum seekers that maintain compliance with the Refugee Convention. North Korean asylum seekers that maintain compliance with the Refugee Convention.

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82. It should be noted that North Korean settlers are not eligible to receive a South Korean registration number allowing full recognition as a South Korean citizen until the time of their departure from the Hanawon resettlement facility. KOREA INSTITUTE FOR NATIONAL UNIFICATION, *supra* note 61, at 179.

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