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Refugee Status for North Korean Dual Nationals: A Study of Recent Cases from New Zealand

Abstract: In recent years, asylum tribunals in the West have normally concluded that North Korean asylum seekers are also South Korean nationals, and therefore must show a well-founded fear of persecution in both North and South Korea in order to be considered refugees. This has predictably presented a challenge for North Koreans seeking asylum in the West. In most cases, it has led to denials of protection. There are, however, some exceptions. In a pair of recent cases, North Korean asylum seekers have been granted refugee status and asylum in New Zealand, despite their acknowledged South Korean nationality and prior settlement in the South. After a review of the general challenges faced by North Korean asylum seekers, this article examines each case in detail, drawing out the reasoning underlying the Tribunals' decisions and exploring the implication for future applicants.

1. Introduction

Over the past twenty-five years, tens of thousands of North Koreans have fled their homeland, seeking freedom from the brutal repression and desperate poverty that characterises life under the Kim dynasty.¹ This exodus has continued until today, although the numbers of escapees decreased when Kim Jong Un took over in 2012,² and fell even further in 2020, when borders became less passable as countries responded to Covid-19.³

Many North Korean escapees live precariously in Northeast China, where conditions can be challenging, and repatriation is a constant threat. Others decide to travel further afield, and traverse China to other countries, such as Thailand or Vietnam. From these countries, they can approach South Korean embassy officials who will, after a short investigation, facilitate resettlement in South Korea.⁴ Once settled in the South, North Koreans are given a range of

¹ Andrei Lankov, *Bitter Taste of Paradise: North Korean Refugees in South Korea*, 6 J. OF E. ASIAN STUD. 105,109 (2006).

² Teodora Gyupchanova, *Why fewer and fewer North Korean defectors are making it to South Korea*, NK NEWS (Feb. 27, 2020), <https://www.nknews.org/2020/02/why-fewer-and-fewer-north-korean-defectors-are-making-it-to-south-korea/>.

³ Colin Zwirko, *North Korean defectors arriving in the South drop by 78% in 2020 — a record low*, NK NEWS (Jan. 20, 2021), <https://www.nknews.org/2021/01/north-korean-defectors-arriving-in-the-south-drop-by-78-in-2020-a-record-low/> (noting a decrease from 1,047 North Koreans resettling in South Korea in 2019 to 229 resettlements in 2020).

⁴ Some also choose resettlement in the United States when they arrive in Southeast Asia. especially in the United States, which offers refugee status and resettlement assistance to escapees who have not previously settled in the South. North Korean Human Rights Act, HR 4011, § 302(B) (2004). While never high, the number of North Korean escapees who have opted for resettlement in the USA has dropped to a trickle in recent years, with a total of eight arrivals in fiscal years 2018-20. Robert King, *Number of North Korean Defectors Drops to Lowest Level in Two Decades*, CSIS Commentary (Jan. 27, 2021), <https://www.csis.org/analysis/number-north-korean-defectors-drops-lowest-level-two-decades>.

assistance, including housing, financial support, and educational subsidies.⁵ They are also treated as South Korean citizens: under South Korea's Nationality Act, Koreans born anywhere on the peninsula are South Korean nationals from birth, although North Koreans are unable to access their rights as citizens until they reach the South.⁶ As of March 2021, 33,783 North Korean escapees have resettled in South Korea.⁷

While most North Korean escapees settle permanently in South Korea, a minority do not find security or satisfaction in the South, and instead choose to seek asylum in Western nations.⁸ There are a wide variety of push and pull factors that contribute to this choice. Many hope to escape the poverty, social isolation, and employment discrimination that are commonly faced by North Koreans in the South, while others are attracted to a perception that educational opportunities will be more attractive outside of Korea.⁹ After an overview of the legal issues involved, this paper will examine the legal treatment of North Korean asylum seekers in one of these destination countries: New Zealand.

Refugee Status for North Koreans in the West

Throughout the 2000s, jurisprudence related to the protection of North Korean asylum seekers in the West was confused and inconsistent.¹⁰ In some places, North Korean escapees were rejected because of their presumed South Korean nationality,¹¹ or their perceived right to

⁵ ROK Ministry of Unification, https://www.unikorea.go.kr/eng_unikorea/whatwedo/support/. This support is in principle dependent on the recipient's qualification under the 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.).

⁶ Nationality Act Case, 12-2 KCCR 167, 97Hun-Ka12 [Kor Const Ct] (31 Aug 2000). *See generally*, Andrew Wolman, 4(2) *The South Korean Citizenship of North Korean Escapees in Law and Practice*, KLRI JOURNAL OF LAW AND LEGISLATION 225 (2014); Eric Yong-Joong Lee, *Human Rights Protections of North Koreans in a Third Country: A Legal Approach*, 4 J. KOR. 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. OF INTL. 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").

⁷ ROK Ministry of Unification, https://www.unikorea.go.kr/eng_unikorea/reactions/statistics/defectors.

⁸ *See, e.g.*, Jay Jiyoung Song & Markus Bell, *North Korean Secondary Asylum in the UK*, 7(2) MIGRATION STUD., 160 (2019); Byung-Ho Chung, *North Korean Refugees as Penetrant Transnational Migrants*, 43(4) URBAN ANTHROPOLOGY, 329-32 (2014) (noting that 'nearly 10% of North Korean migrants in South Korea have re-migrated to other countries'). A small number of North Koreans also directly seek asylum in Western countries without first settling in South Korea. Andrei Lankov, *Why some North Korean defectors choose not to live in the South*, NK NEWS (Feb. 20, 2018), <https://www.nknews.org/2018/02/why-some-north-korean-defectors-choose-not-to-live-in-the-south/>.

⁹ Kyungja Jung et al., *The onward migration of North Korean refugees to Australia: in search of cosmopolitan habitus*, 9(3) COSMOPOLITAN CIV. SOC. J. 1, 4 (2017); Lankov, *id.*; Jin Woong Kang, *Human Rights and Refugee Status of the North Korean Diaspora*, 9 N. KOR. REV. 4, 5 (2013).

¹⁰ Andrew Wolman, *Dual Nationality and North Korean Asylum Seekers*, 24 INTL. J. REF. L. 793 (2012).

¹¹ *See, e.g.*, Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], Sep. 29, 2005, 1 B 98.05 (Ger.). Cour nationale du droit d'asile [CNDA], 8017005 636547, *Mme K. veuve L.*, Dec. 23, 2009 (Fr).

enter South Korea.¹² In many other instances, however, North Korean escapees were viewed as lacking existing South Korean nationality, and were therefore granted refugee status.¹³ Return to North Korea was, of course, unthinkable. By 2012, there were 619 North Korean refugees in the UK; 138 in Germany, 119 in Canada, and smaller contingents in several other Western countries.¹⁴

Around this time, two developments occurred, which combined to make it far more difficult for North Koreans to successfully apply for asylum in the West. First, asylum officers and tribunals increasingly adopted an understanding of South Korean citizenship as in fact applying to North Koreans, from birth.¹⁵ In some countries, this was due to additional information from the South Korean government itself. For example, in May 2013, the South Korean embassy in Ottawa wrote to Canadian immigration officials that “North Korean-born persons are deemed nationals of the Republic of Korea.”¹⁶ Dutch authorities likewise received a letter in September 2014 from the Korean Ministry of Foreign Affairs, stating that North Korean escapees possessed South Korean nationality that could never be taken away, even if an escapee was found to be a spy from the North.¹⁷ Some scholars have argued that South Korean citizenship should not always be treated as ‘effective’ in the asylum context because North Koreans may not always have a right to enter South Korea (despite their formal South Korean citizenship).¹⁸ However, such arguments have been rejected by tribunals in Canada,¹⁹ Australia,²⁰ and the UK.²¹

¹² See, e.g., RRT Case No. N05/50475 [2005] RRTA 387 [Refugee Review Tribunal], Feb. 24, 2005 (Austl.); RRT Case No. 071283924 [2007] RRTA 98 [Refugee Review Tribunal], May 29, 2007 (Austl.).

¹³ See, e.g., *Kim v Canada*, [2010] FC 720 (Can.); Cour nationale du droit d'asile [CNDA], 640897/08021356, *Mlle H*, Dec. 14, 2009 (Fr.); RRT Case No. 00/31605 [2000] RRTA 225 [Refugee Review Tribunal], February 29, 2000 (Austl.).

¹⁴ UNHCR Refugee Data Finder (2017), <https://www.unhcr.org/refugee-statistics> (these figures include both refugees and those in refugee-like situations).

¹⁵ See, e.g., *Migrationsöverdomstolen [MD]* [Migration Court of Appeals] 2015-12-16 p. 22 UM 5147-14 (Swed.); *X (Re)*, 2013 CanLII 76469. ¶¶61-2 (CA IRB) (Can.); *GP and ors (South Korean citizenship) North Korea CG* [2014] UKUT 391 (IAC) (U.K.); *Verwaltungsgericht Freiburg [VGF]* [Freiburg Administrative Court], Aug. 3, 2020, A 9 K 9336/17 (Ger.) (concluding that it is universally held by asylum courts in Germany and other destination countries that North Koreans possess South Korean nationality).

¹⁶ Immigration and Refugee Board of Canada, Jurisprudential Guides - Decision TB4-05778 (June 27, 2016), para. 76.

¹⁷ See, *Rechtbank Den Haag [RBDHA]* 16 July 2015, ECLI: 2015: 8340 (Neth.), para. 3.

¹⁸ Wolman, *Dual Nationality*, *supra* note 10; Chulwoo Lee, *The Law and Politics of Citizenship in Divided Korea*, 6 YONSEI L. J. 3, 25-6 (2015); Seunghwan Kim, *Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada*, 28(1) INTL. J. REF. L. 85 (2016).

¹⁹ Immigration and Refugee Board of Canada, Jurisprudential Guide Decision – TB4-05788e, para. 77 (June 27, 2016).

²⁰ *SZOAU v. Minister for Immigration and Citizenship* [20120] FCAFC 33 (Austl.).

²¹ *KK and ors (Nationality: North Korea) Korea v. Sec’y of State of Home Dep’t*, [2011] UKUT 92 (IAC) (U.K.); *GP and ors*, *supra* note 15 The concept of ‘effective nationality’ was recently rejected in New Zealand as well, in a judgment which involved an applicant from Venezuela but cited favorably to *KK & Ors and GP & Ors. AC (Venezuela)* [2019] NZIPT 801438 (N.Z.)

Second, asylum officials around the world increasingly began coordinating with South Korean authorities during asylum determination procedures, most notably by asking South Korean officials to compare asylum seekers' fingerprint data with the database of North Koreans who had previously settled in the South.²² In many cases, there was a match.²³ For these individuals, there was no need to rely on expert interpretation of South Korea's nationality law: it was obvious that the asylum seeker was also a South Korean citizen and was recognised as such by the South Korean government.

The end result of these two developments has been that North Korean escapees are now normally required to prove a well-founded fear of persecution in both North and South Korea in order to qualify for refugee status.²⁴ This has often proven a tall order, as South Korea is generally viewed as a free and prosperous country. In fact, it is included on the list of 'safe' countries of origins prepared by immigration authorities in the UK (in 2010) and Canada (2013), which in practice means that asylum seekers from those countries are likely to receive swift refusals.²⁵ While there have been instances of South Koreans receiving asylum in the West in recent years, such cases are rare, and usually involve individuals in specific situations that are unlikely to apply to North Korean escapees.²⁶

With this challenging backdrop, North Koreans asylum seekers have, in recent years, often faced rejection in the West.²⁷ In fact, many North Koreans saw their previous refugee status removed due to new biometric evidence of their South Korean nationality.²⁸ Accordingly, the total number of recognised North Korean refugees has fallen significantly since 2012.²⁹ New Zealand tribunals, however, have proven to be an exception. Instead of

²² Andrew Wolman & Guobin Li, *Saeteomin Asylum Seekers: The Law & Policy Response*, (2015) 27 INTL. J. REF. L. 327-47.

²³ See, eg, GP and ors, *supra* note 15; Flygtningenævnet [Refugee Appeals Board] sydk/2015/2 (1 July 2015) (Den.); Raad voor Vreemdelingen-betwistingen nr. 167 364 van 10 mei 2016 in de zaak RvV X / IV (Belg.) (noting that collaboration with South Korean authorities on biometric data shows that the vast majority of North Korean asylum seekers in Belgium had previously settled in South Korea).

²⁴ This requirement stems from article 1A(2) of the Refugee Convention, which states that: "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." Convention Relating to the Status of Refugees, July 25, 1951, 189 U.N.T.S. 137.

²⁵ Wolman & Li, *supra* note 22 at 343-44.

²⁶ See, e.g., 071843748 [2008] RRTA 37 (20 February 2008) (Austl.) (refugee for conscientious objector to mandatory military service); Cour nationale du droit d'asile [CNDA], 17020701, *M. J.*, Oct. 5, 2017 (Fr.) (persecution of homosexuals during mandatory military service); AB (South Korea) [2013] NZIPT 800294 (Aug. 9, 2013) (N.Z.) (refugee status for South Korean who faced persecution for his praise of the North Korean authorities).

²⁷ Jeewon Min, Numbers Show Fewer North Koreans Admitted: Dual Nationality and Refugee Status, IOM-MRTC Issue Brief No. 2018-07 (2018).

²⁸ Jeewon Min & Sarah Son, Credibility Evidence, Documentary Information and Case Assessment in North Korean Escapee Asylum Claims in Canada and the United Kingdom, MRTC Working Paper Series No. 2019-02 (2019), p. 36.

²⁹ In 2012, there were a total of 1,126 North Korean refugees and people in refugee like situations. By 2020, this figure had decreased to 753. UNHCR Refugee Data Finder, <https://www.unhcr.org/refugee->

closing their doors, a pair of recent cases from New Zealand have shown a willingness to grant asylum to North Korean escapees to South Korea, even where their South Korean nationality is undisputed.³⁰ These cases broach a number of interesting issues, and potentially offer a path forward for North Koreans looking for a ‘last haven’ in the West. For the remainder of this paper, I will analyse each case.

2. *AL* (South Korea)

The appellant in *AL* was born and raised in North Korea. Upon his father’s death, his family’s economic conditions deteriorated, and he eventually fled to South Korea, arriving in 2003.³¹ The appellant’s life in the South proved difficult. He was unable to find settled employment, which he attributed to discrimination over his North Korean background. He later enrolled in university, graduating with a bachelor’s degree. He then applied to over 50 jobs, but only received one interview and no job offers. The appellant also attributed these failures to discrimination over his origins in the North.³²

Over time, the appellant became lonely and isolated. He suffered when his girlfriend’s parents refused to consent to their marriage because he was North Korean. He also was the victim of a physical assault when a person at his church punched him without warning as they were discussing North Korea. The appellant tried talking to government officers about his problems, but received little assistance. He became suicidal and took steps towards ending his life on two occasions, before pulling back at the last minute. Eventually, he came to New Zealand and applied for refugee status, which was denied at the first level.³³

The Immigration and Protection Tribunal reversed on appeal, awarding him refugee status in a thorough and progressive decision. The tribunal first tackled the question of credibility. Credibility is an incredibly important (and challenging) issue in the asylum application context, and final decision often depends on the extent to which appellants are believed.³⁴ This is especially so with respect to asylum seekers from North Korea, a country whose near-complete opacity can make it difficult to confirm or refute claims.³⁵ In a number of cases from other jurisdictions, North Koreans have had their credibility doubted, resulting in a denial of asylum.³⁶

statistics/download/?url=q21PzZ. These numbers do not include North Koreans in South Korea, who are not legally considered to be refugees.

³⁰ *AL* (South Korea) [2016] NZIPT 800858 (19 May 2016) (N.Z.); *AC* (South Korea) [2019] NZIPT 801589 (18 November 2019) (N.Z.).

³¹ *Id.* ¶ 5-7.

³² *Id.* ¶ 8-12.

³³ *Id.* ¶ 13-18.

³⁴ See, Rebecca Dowd et al, *Filling Gaps and Verifying Facts: Assumptions and Credibility Assessment in the Australian Refugee Review Tribunal*, 30 INTL. J. REF. L. 71 (2018); Tone Maia Liodden, *Who Is a Refugee? Uncertainty and Discretion in Asylum Decisions*, INTL. J. REF. L. (2021), 6.

³⁵ There is a widespread belief that many of the asylum seekers claiming to be North Korean are actually Chinese nationals of Korean ethnicity from Northeast China. See generally, LANKOV, *supra* note 8 (estimating that a third of North Korean asylum seekers fall into this category); Min & Son, *supra* note 28, at 11-12 (citing study showing that 258 of the 415 asylum applications from ostensibly North Korean claimants received by the UK in 2007 were suspected of actually being from Chinese nationals).

³⁶ See, e.g., *Jeon v. Canada* (Citizenship and Immigration), 2019 FC 1429 (2019) (Can.); *Cho v. Canada* (Citizenship and Immigration), 2019 FC 398 (Can.).

Here, however, the appellant’s account was accepted “in its entirety”.³⁷ According to the Tribunal, the appellant’s statements in his application were consistent with prior statements, generally consistent with available country of origin information on discrimination against North Koreans in South Korea, and were in important ways supported by documentary evidence.³⁸ His poor mental state was confirmed medical report upon examination by a doctor.

This acceptance of the appellant’s account opened the door for an examination of the question of whether – given that account – the appellant possessed a well-founded fear of persecution in both of his countries of nationality: North Korea and South Korea. The discussion with respect to North Korea was unsurprisingly brief. After a review of accounts of severe punishments meted out by North Korean authorities to repatriated escapees, including imprisonment and execution, the Tribunal found that the appellant would indeed face a grave risk of persecution if returned to North Korea, and that such persecution would be due to the North Korean authorities imputing a negative political opinion to him.³⁹

The discussion of potential persecution in South Korea was lengthier, and involved an interesting analysis of economic and social rights violations in the refugee context. The Tribunal first examined whether the appellant would be likely to have his human rights violated if returned to South Korea. While dismissing any risk of further physical assaults as speculative, it accepted that he could be expected to “encounter continuing discrimination in finding employment in both his chosen profession and in his trade”.⁴⁰ This finding was based on his prior experiences, as viewed through the lens of country of origin information detailing workplace discrimination encountered by North Koreans in the South. The Tribunal concluded that this would amount to a violation of the non-discrimination and right to work provisions guaranteed by article 2(2) and article 6 of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).⁴¹

The Tribunal then went on to examine the more challenging question of whether the level of harm that the appellant would suffer from such discrimination would be severe enough to constitute persecution. After all, this was not a case of ‘economic proscription’, alleging destitution stemming from a complete denial of the right to work.⁴² Rather, the appellant would likely be able to find casual employment, outside of his chosen profession, and would qualify for social security. However, the Tribunal concluded that while mere financial hardship stemming from workplace discrimination would not qualify as serious harm, in this case the

³⁷ AL, *supra* note 30 ¶ 27.

³⁸ *Id.* ¶ 26.

³⁹ *Id.* ¶ 61-66. In addition to ‘political opinion’, the other grounds for persecution enumerated in the Refugee Convention include race, religion, nationality, and membership of a particular social group. Refugee Convention, *supra* note 24, art. 1(A)(2).

⁴⁰ *Id.* ¶ 85. It is well accepted in New Zealand and elsewhere that violations of economic and social rights can in principle constitute persecution. *See, e.g.*, James Hathaway & Michelle Foster, *The Law of Refugee Status* (2nd ed. 2014) 228 (“Refugee jurisprudence thus now sensibly recognizes that the risk of violation of socio-economic rights may be understood to amount to a risk of serious harm”); BG (Fiji) (NZ IPT, 2012), ¶ 90 (N.Z.).

⁴¹ AL, *supra* note 30 ¶ 85. Article 2(2) prohibits discrimination in the protection of economic, social and cultural rights, while article 6 protects the right to work. International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/21/2200 (Dec. 16, 1966), arts 2(2) & 6.

⁴² Hathaway & Foster, *supra* note 40 at 253.

appellant's particularly precarious state of mental health would mean that future incidents of discrimination in accessing employment would be likely to lead to serious psychological harm.⁴³ Claims of a well-founded fear of mental harm are frequently made by refugee claimants, and it is well accepted that serious psychological harm can constitute persecution.⁴⁴ Nevertheless, the finding that workplace discrimination against North Koreans within South Korea can be severe enough to constitute persecution is unusual: published cases in other countries have normally rejected the argument that discrimination against North Koreans in the South reaches a level of severity requiring international protection.⁴⁵

Finally, the Tribunal went on to conclude that "because of the nature of the discrimination, the state is simply unable to do anything about it".⁴⁶ This makes sense in the context of the 'protection theory', which holds that there has been a failure of home state protection if, for whatever reason and despite the best of intentions, the State cannot "reduce the risk of persecutory harm arising from unlawful interference by non-state agents".⁴⁷ Finally, the Tribunal found that the persecution faced by the appellant due to his North Korean origin has a nexus to two of the grounds covered in the Refugee Convention, namely that North Koreans in living South Korea constitute a particular 'social group' as well as a 'nationality'.⁴⁸

While all refugee cases turn on their own facts, one might have expected the Tribunal's decision to provide an easier path for other North Korean escapees looking for asylum outside of South Korea. The *AL* Tribunal in fact stated that the "appellant's predicament is typical of the integration of many North Korean defectors to South Korea".⁴⁹ In *AC*, however, the case was distinguished.

3. *AC (North Korea)*

The appellant in *AC* grew up in North Korea, near the border with China. In the mid-2000s, he crossed the border illicitly, in order to find work. When he returned home, he was arrested by the North Korean authorities, and imprisoned for around six months. His father also lost his employment. The appellant soon decided to leave North Korea permanently, and crossed the border to China, where he worked in a restaurant in order to earn enough to pay the smuggling fee to Southeast Asia.⁵⁰ After about eighteen months, he joined a group crossing China into Vietnam. Upon reaching the Cambodian border, officers detected him and

⁴³ *AL*, *supra* note 30 ¶ 89

⁴⁴ *See, e.g.*, *Fisher v Immigration and Naturalization Service*, 37 F 3d 1371 (9th Cir. 1994) (USA); *R v Secretary of State for the Home Department; ex parte Sasitharan* [1998] Imm AR 487 (UK).

⁴⁵ *See, e.g.*, N05/50475 [2005] RRTA 387, *supra* note 12 ("Applicant's description at the hearing of his claimed psychological harm lacked specificity"); GP and ors, *supra* note 15 ¶ 127: (former North Koreans may have difficulty in adjusting to South Korea and there may be some discrimination in social integration, employment and housing, but not at a level which requires international protection).

⁴⁶ *AL*, *supra* note 30 ¶ 85.

⁴⁷ *Id.*, ¶ 56. The Tribunal contrasts the 'protection theory' with the 'accountability theory', which holds that there is a failure of home state protection only where that state is in some way accountable for the persecutory harm, and not where it simply unable to prevent such harm from occurring. It asserts that the 'protection theory' is well accepted in New Zealand, and constitutes an increasingly settled position in other nations, as well. *Id.*, ¶ 49-56.

⁴⁸ *Id.*, ¶ 91.

⁴⁹ *Id.*, ¶ 82.

⁵⁰ *Id.*, ¶ 5-8.

threatened to deport him to China. The appellant seized the border officer's gun and pressed the barrel to his temple, asking the officer to shoot him instead of sending him back. The appellant was allowed to proceed, and soon made it to the South Korean embassy in Phnom Penh, from where he was transferred to South Korea.⁵¹

In 2009, the appellant started working with an acquaintance to help other North Korean escapees in China to reach safety. He made several trips to China over the next three or four years, helping around fifty escapees to reach Vietnam. He was approached by South Korean agents at this time, asking him to help gather intelligence about North Korea, which he did. He made barely enough money to cover expenses from these trips.⁵²

With his wife pregnant, the appellant decided to stop his voyages to China. South Korean agents stopped contacting him.⁵³ While the appellant was able to find employment, he felt that South Koreans looked down on him for his North Korean roots, and was unable to integrate socially. The family booked a package tour to Canada and filed a refugee claim there, falsely stating that they had come directly from North Korea. The Canadian authorities denied his claim, and in 2014 he returned to South Korea.⁵⁴

Back in South Korea, the appellant found work, eventually managing three staff at a food outlet. He also participated in human rights activities with an NGO led by another North Korean escapee.⁵⁵ During his time in South Korea, the appellant's mental health fluctuated, and he was prescribed medication by various psychiatrists. In late 2018, the appellant started to receive anonymous phone calls and text messages, accusing him of being a traitor and threatening to kill him. He became very frightened, and travelled to New Zealand, where he filed an asylum claim, which was denied at first instance.⁵⁶

On appeal, the *AC* Tribunal first examined the question of credibility. As in *AL*, the appellant was found to be credible. His story was consistent with available country of origin information, he provided documents substantiating elements of his story, and a psychiatrist provided expert testimony that the appellant's presentation was consistent with his claimed mistreatment. The Tribunal acknowledged that the appellant had previously filed a false refugee claim, but found this to be outweighed by other evidence of truthfulness.⁵⁷

The Tribunal then went on to examine the appellant's refugee status. As in *AL*, the court first examined whether the appellant had a well-founded fear of persecution in North Korea. The answer was clearly yes, again on grounds of imputed political opinion. According to the Tribunal, the appellant would be viewed as a traitor if sent back to North Korea, and would face a serious risk of cruel, inhuman or degrading treatment, or execution.⁵⁸

The Tribunal then analysed potential persecution in South Korea. First, it questioned the appellant's claim that he would face potential physical harm from North Korean agents. This is a claim that is relatively commonly made by North Korean asylum seekers in Western

⁵¹ *Id.*, ¶ 9-10

⁵² *Id.*, ¶ 13

⁵³ *Id.*, ¶ 16

⁵⁴ *Id.*, ¶ 17-9

⁵⁵ *Id.*, ¶ 19-20

⁵⁶ *Id.*, ¶ 23-26.

⁵⁷ *Id.*, ¶ 57.

⁵⁸ *Id.*, ¶ 73.

countries, usually unsuccessfully, at least where the asylum seeker is not considered ‘high-profile’.⁵⁹ The *AC* Tribunal found that the appellant had no real profile, and thus his risk of serious physical harm was not objectively well-founded.⁶⁰

Next, the Tribunal went on to ask whether the appellant would face discrimination reaching the level of serious harm if returned to South Korea, as was the case in *AL*. The Tribunal found that he would not. It asserted that while the appellant may face discrimination, such discrimination would be unlikely to lead to serious harm. Unlike the appellant in *AL*, the appellant in *AC* had never had difficulty finding and keeping skilled work, was engaged with South Korean social networks, and had a “robust and meaningful relationship” with his partner.⁶¹ Thus, the Tribunal distinguished *AL* without overturning it, keeping the door open for future North Korean asylum seekers to equate discrimination with persecution where they have particular vulnerabilities.

Finally, the Tribunal questioned whether there was a risk that the anonymous phone threats that the appellant had previously received would lead to serious mental harm if they were to recur upon the appellant’s return to South Korea. The Tribunal answered in the affirmative, finding that such harm would constitute cruel, inhuman and degrading treatment in violation of article 7 of the International Covenant on Civil and Political Rights.

Three considerations contributed to this finding. First, the Tribunal found the appellant to be particularly susceptible to mental harm, because he had developed PTSD, depression and anxiety as a result of his experiences escaping North Korea.⁶² Second, the Tribunal found that since 2018, the anonymous phone calls and messages that he had received had caused his mental health to deteriorate sufficiently that renewed threats would likely cause him to self-harm or be suicidal.⁶³ Third, South Korea lacked “integrated mental health services” and possessed a very high suicide rate, with North Korean escapees being particularly susceptible to mental illness.⁶⁴ In this case, the Tribunal’s dim view of the South Korean mental health system was consistent with other recent New Zealand case law, namely the *AT* case, which granted humanitarian protection to South Korean asylum seekers in part due to fears over their mental health treatment if forced to return to South Korea.⁶⁵

The Tribunal then asserted that the South Korean government would be unable to prevent mental harm from occurring, and that the resultant harm would constitute persecution

⁵⁹ See, e.g., Verwaltungsgericht Freiburg *supra* note 15, para. 37 (if they are not former North Korean military members of high-ranking officials of the North Korean Communist Party, then they are sufficiently safe from attacks and stalking by North Korean agents and spies in South Korea). For an exceptional case where this argument was accepted, see *X (Re)*, 2020 CanLII 62452 (CA IRB) (Can.) (refugee status granted in part because appellants were targets of North Korean agents in Seoul).

⁶⁰ *AC*, *supra* note 30 ¶ 75-8.

⁶¹ *Id.*, ¶ 85-6.

⁶² *Id.*, ¶ 92.

⁶³ *Id.*, ¶ 100.

⁶⁴ *Id.*, ¶ 87-90.

⁶⁵ *AT (South Korea)* [2019] NZIPT 504341 (27 February 2019) (N.Z.), para 57 (noting that “the Korean mental health services are significantly poorer than those available here”)

on grounds of either (North Korean) nationality or because the appellant's escape would cause the North Korean government to impute an adverse political opinion.⁶⁶

Having established that the appellant faced a well-founded fear of persecution in both North and South Korea (and was therefore a refugee), the next question faced by the Tribunal was whether he should be excluded from protection pursuant to article 1(f) of the Refugee Convention, which states that the provisions of the Refugee Convention shall not apply to, *inter alia*, a refugee who "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."⁶⁷ The exclusion clause in *AC* was drawn into question because the appellant had, presumably, violated immigration laws when helping North Korean escapees transit to Vietnam. He may also have violated people-smuggling laws.⁶⁸ However, the Tribunal found that such crimes did not qualify as 'non-political' because the appellant's motivation "arose out of a particular political context", his methods were proportionate to his political end, and he did not cause harm to people or property.⁶⁹

4. Conclusion

In recent years, North Korean escapees have faced an uphill battle applying for asylum in the West, and in many cases have been refused protection.⁷⁰ *AL* and *AC* thus stand out for their verdicts, as well as their reasoning. In particular, they show a willingness to provide protection against potential persecution that results in psychological harm, and an acknowledgement that some claimants may be particularly susceptible to such harm. The cases can also be read alongside other recent cases from New Zealand that have granted protection to claimants involved in North Korean affairs. In *AB*, for example, a South Korean political activist who was viewed as pro-North Korean was granted asylum status by New Zealand authorities.⁷¹ Meanwhile, in *ES*, New Zealand provided protection (pursuant to the non-

⁶⁶ *AC*, *supra* note 30 ¶ 101-3. The latter ground – imputed political opinion – would make sense if one viewed the harm coming primarily from threatening communications from North Korean agents, while the former ground – nationality – would make sense if the harm was coming principally from discrimination within South Korea. The imputed political opinion grounds would thus be more consistent with the rest of the Tribunal's ruling.

⁶⁷ *Id.*, ¶ 106.

⁶⁸ *Id.*, ¶ 108-9. In fact, there is evidence that some North Koreans are active in trafficking their co-nationals in China. KOREA INSTITUTE FOR NATIONAL UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2020 (2021), p. 565.

⁶⁹ *AC*, *supra* note 30 ¶ 123. The Tribunal did not broach the question of whether such crimes would qualify as 'serious' or not.

⁷⁰ For some exceptional cases where protection was granted, *see* *X (Re)*, 2020 CanLII 62452, *supra* note 59; *A 9 K 9336/17 (Ger.)*, *supra* note 59; *CNDA 17 mars 2011 Mlle K. no. 09020156 C+ (Fr.)*. *See also*, *Kim v. Canada (Citizenship and Immigration)*, 2020 FC 581 (Can.) (requesting reconsideration of an asylum denial for a North Korean escapee because, *inter alia*, the officer at the first instance failed to meaningfully engage with "the relevant country conditions that demonstrated a pattern of discrimination against North Korean defectors [and] the Applicant's hardship in relation to his mental health condition and high suicide rates in South Korea"). Of course, it is likely that other North Koreans have successfully applied for asylum at the first instance; my review of the case law has been confined to appellate decisions, which are more likely to be published and publicly available, and is not global in scope.

⁷¹ *AB (South Korea) [2013] NZIPT 800294 (9 August 2013) (N.Z.)*. While this precise situation may not often arise with North Korean escapees (who seldom protest in favour of the North Korean regime), it does show a willingness to accept that South Korea may not always be a safe country of origin.

refoulement provisions of the Convention against Torture) to a Chinese national who sought asylum because he had been involved in helping North Koreans to flee from the border region.⁷²

New Zealand's acceptance of North Korean asylum seekers even after they have settled in South Korea may seem somewhat unexpected, given the current anti-refugee atmosphere that exists throughout the West. However, there are a number of reasons why New Zealand makes sense as a relative safe haven. New Zealand receives few asylum seekers each year, due in part to its geographic isolation, and accepts a relatively high proportion of claimants.⁷³ Although its refugee policies can be criticised on certain accounts, it is normally seen as a welcoming country for asylum seekers.⁷⁴ In particular, New Zealand has been lauded for showing leadership in accepting refugee claims based on the violation of socio-economic rights.⁷⁵

Within this relatively welcoming context, it is not entirely surprising that North Korean escapees are deemed to merit protection despite their South Korean nationality. North Korean escapees epitomise the 'good refugee', having fled a despotic regime that curtails personal freedom, tortures dissidents, and generally prohibits Christian worship.⁷⁶ In general, North Korean escapees lack the loaded baggage of perceived criminality and terrorism that refugees from other regions are sometimes burdened with.⁷⁷ Indeed, a 'racist' preference for Asian refugees (and against those from Africa and the Middle East) pervaded New Zealand's refugee resettlement policy throughout the 2010s.⁷⁸ When other countries have threatened to deport North Korean escapees back to South Korea (or have actually done so), the reaction in the

⁷² ES (China) [2019] NZIPT 801466 (7 June 2019) (N.Z.).

⁷³ Over the past decade (from 2011-2021), the number of asylum claims filed per year has ranged from 287 to 510 per year, while the acceptance rate has ranged from 21.1% to 36.% each year. New Zealand Immigration, Refugee and Protection Statistics Pack (March 2021), at <https://www.immigration.govt.nz/documents/statistics/statistics-refugee-and-protection.pdf>. New Zealand also runs an active refugee resettlement programme. *Id.*

⁷⁴ See Samuel Osborne, *World's Most and Least Welcoming Countries for Migrants*, INDEPENDENT (Aug. 23, 2017), <https://www.independent.co.uk/news/world/politics/world-welcoming-migrant-countries-least-most-uk-refugee-crisis-us-australia-eastern-europe-a7908766.html> (New Zealand tied with Iceland as the countries most accepting to migrants).

⁷⁵ Michelle Foster, "Economic Migrant or Person in Need of Protection? Socio-Economic Rights and Persecution in International Refugee Law" in Bruce Burson and David James Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff, 2016) 229, 248.

⁷⁶ Regarding the concept of the 'good refugee', see Yen Le Espiritu, "The Vietnam War and the 'Good Refugee'" in Cindy I-Fen Cheng, (ed) *The Routledge Handbook of Asian American Studies* (Routledge, 2016).

⁷⁷ See, e.g., Jane Junn, *From Coolie to Model Minority: U.S. Immigration Policy and the Construction of Racial Identity*, 4(2) DU BOIS REV. 355 (2007) 355.

⁷⁸ Christine Graham-McLay, *Under Pressure, New Zealand Ends a Refugee Policy Branded Racist*, NEW YORK TIMES (4 October 2019).

popular media has actually been quite negative.⁷⁹ Even conservative news outlets that are normally known for their anti-immigration stance have reacted in horror to the potential rejection of North Koreans.⁸⁰

This is not to say that New Zealand will necessarily provide protection to all North Korean escapees. The favourable verdicts in *AL* and *AC* may, of course, be seen as dependent on particular facts presented by each appellant. Indeed, in one other recent New Zealand case involving North Korean asylum seekers there was a decidedly mixed verdict: one appellant was given refugee status and three others were denied protection.⁸¹ Nor do these cases necessarily signify that other countries will be receptive to North Korean asylum seekers' claims based on a fear of persecution in South Korea. In a number of cases from other countries, arguments based on South Korean discrimination have been firmly rejected.⁸² Despite the fact that most countries operate under the international legal framework of the Refugee Convention, there is still great variation in refugee law jurisprudence around the world, and national culture still matters in refugee determination.⁸³ Nevertheless, the decisions in *AL* and *AC* can provide at least a glimmer of hope to North Korean escapees who wish to restart their lives outside of South Korea.

⁷⁹ See, e.g., Anthony Furey, *DON'T DEPORT US: North Korean defectors plead their case*, TORONTO SUN, September 3, 2019, <https://torontosun.com/news/national/dont-deport-us-north-korean-defectors-plead-their-case>; Michael Havis, *UK leaves hundreds of North Koreans facing deportation as asylum REFUSED*, DAILY EXPRESS, March 22, 2018, <https://www.express.co.uk/news/world/935682/north-korea-asylum-deportation-refusal-UK-statistics>.

⁸⁰ See, eg., Ariel Zilber, *If they send me back, I'm a dead man': Canada REJECTS asylum request from late North Korean ruler Kim Jong-il's bodyguard who says Pyongyang will try to kidnap him if he is deported to South Korea*, DAILY MAIL, September 2, 2020, <https://www.dailymail.co.uk/news/article-8691319/Canada-REJECTS-asylum-request-late-North-Korean-ruler-Kim-Jong-ils-bodyguard.html>.

⁸¹ AB (North & South Korea) [2015] NZIPT 800642 (15 January 2015) (N.Z.). The reasoning behind this decision is unknown, however, as this case was withheld from publication in order to avoid identifying the applicants.

⁸² *Hong v. Canada*, [2017] F.C. 913 (Can.); N05/50475 [2005] RRTA 387, *supra* note 12 (“discrimination alleged by applicant was not “of nature or degree that amounts to serious harm”). See also, U.K. Home Office, Country Information and Guidance on North Korea: Opposition to the Regime, 2016-2, sec. 3.1.4 (U.K.) (“former North Koreans may have difficulty in adjusting to life in South Korea and there may be some discrimination in social integration, employment and housing, but this is not at a level which requires international protect”).

⁸³ Guy Goodwin-Gill, “The Search for the One, True Meaning...” in Guy Goodwin-Gill and Hélène Lambert (eds) *The Limits of Transnational Law* (Cambridge Univ. Press, 2010) 204, 204-214.