



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/06323/2010

THE IMMIGRATION ACTS

Heard at Field House
On 12 February 2016

Decision sent to parties on:
On 19 February 2016

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

CHUNG MIN KIM
JI HYE CHUNG
Y K (A MINOR)
[NO ANONYMITY ORDER]

Respondent

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal on 2 June 2010, allowing the claimants' appeal against her decision to refuse him leave to remain on asylum and/or human rights grounds. The second and third appellants are the principal claimant's wife and daughter.

Background

2. The claimants are citizens of the Democratic People's Republic of Korea (North Korea) and the First-tier Tribunal found that they could not lawfully be returned to

the Republic of Korea (South Korea) because they were not entitled to South Korean citizenship.

3. The claimants left North Korea for China on 30 August 2001. In China, the principal claimant, his wife and daughter lived with the wife's cousin, who ran a restaurant. The wife helped at the restaurant by washing dishes. The principal claimant secured work on a pig farm, living on the farm and returning to see his wife and daughter every 3 months. After 6 years, with the cousin's help, they found an agent who arranged passage for them to the United Kingdom via Hong Kong. The family entered the United Kingdom on 16 November 2007, using passports to which they were not entitled. They all claimed asylum the day after they arrived in the United Kingdom, on 17 November 2007.
4. The claimants are therefore persons who have been outside the Korean peninsula for more than 10 years. They have been in the United Kingdom for over 8 years.

First-tier Tribunal decision

5. The First-tier Tribunal found that the claimant had given a credible account of anti-Government statements by his wife in North Korea after the death of their son during North Korean military service, that the claimant's father and two brothers had been killed in front of him during the Korean war in the 1950s by South Korean soldiers, and that he had no genuine wish to go to South Korea. The judge concluded that the claimant and his family would be at risk of persecution or serious harm if returned there.
6. The judge then considered the alternative of return to South Korea:

"47. I have considered the possibility of relocation to South Korea. ... It seems it was the wife's cousin who was looking at that possibility (the [claimant] spending time at the pig farm and only seeing his family every 3 months). Bearing in mind the precarious situation of the [claimant] and his family in China, where they could have been deported back to North Korea where there would be likelihood of persecution including execution as a result of the illegal exit, the wife's cousin may have considered an opportunity to go to South Korea might have been a better option. ... I find that this [claimant] would have great difficulty in even pretending that he had the will or desire to live in South Korea.

48. He is not an automatic citizen of South Korea. He is entitled to make an application for citizenship and he is not a person already with dual nationality. ... The success of an application cannot be guaranteed. It would appear that he is likely to fail the process of obtaining citizenship by not having the will and desire to live in South Korea for genuine, understandable and reasonable considerations. I find he is not *de jure* a national of South Korea and that he is a person owing to a well-founded fear of persecution in the country of origin for reasons of, *inter alia*, political opinion, is outside the country of his nationality and is unable or owing to such fear unwilling to avail himself of the protection of that country. Since he does not have any other nationality by right, he consequently fulfils the definition of a refugee. It would neither be safe nor reasonable to remove him to South Korea where he is at real risk of refoulement to North Korea."

7. That was the basis on which the appeal was allowed under the Refugee Convention, and under Articles 2 and 3 ECHR. The appeal was not allowed or considered under Article 8 ECHR.

Permission to appeal

8. The Secretary of State sought permission to appeal. She did not challenge the conclusion that the claimant was at risk in North Korea but considered that he was also a South Korean citizen. She contended that the First-tier Tribunal had not given any valid or adequate reasons why the claimant would not be accepted into South Korea or entitled to South Korean citizenship.
9. Permission to appeal was granted on that basis by Senior Immigration Judge Freeman, who considered that it would be desirable for the judge's conclusions to be reviewed in the light of what was then a forthcoming country guidance case on the issue.
10. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal proceedings

11. On 4 July 2011, following the decision of the Upper Tribunal in *KK and others* (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC), directions were sent to the parties, requiring them to provide written submissions on the effect of the *KK* guidance on this appeal, including any reasoned objections to the appeal being determined without a further oral hearing. Similar directions were sent on 21 September 2012.
12. The Secretary of State did not respond to those directions.
13. On 11 October 2012, Bolton and District Citizens Advice Bureau responded for the claimants, stating that they had not seen the directions until after the expiry of the time limits set therein and would submit *KK* representations within the next 7 working days. They asked for the appeal to be heard by video link at the Manchester Hearing Centre. A hearing was set for 31 October 2012 but was adjourned. No submissions were received from the claimant or any representative instructed by him.
14. On 24 November 2014, the Upper Tribunal sent to the parties a further Case Management Order and Directions, seeking submissions on the effect on the claimant's appeal of the new country guidance decision in *GP & Others* (South Korean citizenship) North Korea CG [2014] UKUT 391 (IAC). There was no response. A similar order was sent out on 12 January 2016.
15. The Secretary of State did not respond to either of those orders.
16. The CAB Bolton responded. They sent a letter dated 18 January 2016 stating that 'we can confirm we no longer represent the above named client. We have not been

representing the client for a number of years. We are also unaware if the client has any alternative representation.'

17. The claimants are under a duty to keep in touch with their representatives and to keep their address for service updated.

Discussion

18. It is time for these proceedings to be concluded. The facts are clear: the claimants left North Korea in 2001 and entered the United Kingdom in November 2007. They are at risk in North Korea. They do not wish to go to South Korea.
19. In regard to South Korean citizenship, the Upper Tribunal's country guidance in *GP* was as follows:

“(1) The Upper Tribunal's country guidance in *KK and others (Nationality: North Korea) Korea CG* [2011] UKUT 92 (IAC) stands, with the exception of paragraphs 2(d) and 2(e) thereof. Paragraphs (2), (3) and (4) of this guidance replace that given in paragraphs 2(d) and 2(e) respectively of *KK*.

(2) South Korean law makes limited provision for dual nationality under the Overseas Koreans Act and the Nationality Act (as amended).

(3) All North Korean citizens are also citizens of South Korea. While absence from the Korean Peninsula for more than 10 years may entail fuller enquiries as to whether a person has acquired another nationality or right of residence before a travel document is issued, upon return to South Korea all persons from the Korean Peninsula are treated as returning South Korean citizens.

(4) There is no evidence that North Koreans returned to South Korea are sent back to North Korea or anywhere else, even if they fail the 'protection' procedure, and however long they have been outside the Korean Peninsula.

(5) The process of returning North Koreans to South Korea is now set out in the United Kingdom-South Korea Readmission Agreement (the Readmission Agreement) entered into between the two countries on 10 December 2011. At present, the issue of emergency travel documents under the Readmission Agreement is confined to those for whom documents and/or fingerprint evidence establish that they are already known to South Korea as citizens, or who have registered as such with the South Korean Embassy in the United Kingdom.

(6) Applying *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289, North Koreans outside the Korean Peninsula who object to return to South Korea must cooperate with the United Kingdom authorities in seeking to establish whether they can avail themselves of the protection of another country, in particular South Korea. Unless they can demonstrate that in all of the countries where they are entitled to citizenship they have a well-founded fear of persecution for a Refugee Convention reason, they are not refugees.

(7) If they are not refugees, it remains open to such persons to seek to establish individual factors creating a risk for them in South Korea which would engage the United Kingdom's international obligations under the EU Qualification Directive or the ECHR.

(8) There is no risk of refoulement of any North Korean to North Korea from South Korea, whether directly or via China. South Korea does not return anyone to North Korea at all and it does not return North Koreans to China. In a small number of cases, Chinese nationals have been returned to China. A small number of persons identified by the South Korean authorities as North Korean intelligence agents have been prosecuted in South Korea. There is no evidence that they were subsequently required to leave South Korea.

(9) Once the 'protection' procedure has been completed, North Korean migrants have the same rights as other South Korean citizens save that they are not required to perform military service for South Korea. They have access to resettlement assistance, including housing, training and financial assistance. 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."

20. Paragraphs (3), (4) and (8) of that guidance are determinative of this appeal. There is no risk of refoulement from South Korea to North Korea and the claimants are already South Korean citizens. The ECHR claims under Articles 2 and 3 on the facts must stand or fall with the Refugee Convention claim and there is no Article 8 claim in these proceedings.
21. Even if there were an Article 8 ECHR claim, no evidence before me indicates any strong connection between these parties and the United Kingdom. All of the private life they will have acquired has been built up while they were here unlawfully and section 117B(4)(b) requires me to give little weight to such private life. Their family life will have been conducted between the three of them and will be unaffected by returning them to South Korea.
22. On 9 February 2016, the Upper Tribunal sent to the appellant a further hearing notice for a hearing date on Monday 21 March 2016. That hearing is hereby vacated: I consider that the appellant has had more than sufficient opportunity already to respond and put his case and that nothing will be served by a further oral hearing.

DECISION

23. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision.

I remake the decision by dismissing the appeal on all grounds.

Date: 12 February 2016

Signed: Judith AJC Gleeson
Upper Tribunal Judge Gleeson