

# NORTH KOREAN ASYLUM SEEKERS IN THE WEST: IS DUAL NATIONALITY DISPOSITIVE?

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## ABSTRACT

Since at least 2013, Western courts judging refugee cases have accepted that North Koreans are, with rare exceptions, considered to be South Korean nationals under South Korean law. This Article explores the implications of this holding. Given this dual nationality, are North Koreans necessarily refused refugee status because they can be protected in South Korea? Or are there still routes to refugee status that may be available? This Article finds that North Koreans continue to have potential paths forward in their search for refugee status in the West. There are, broadly speaking, four different types of protection arguments evident in the jurisprudence from major host states. These are: (1) that an asylum seeker possesses a well-founded fear of persecution in South Korea as well as North Korea; (2) that South Korean nationality does not provide a right to enter the country, and should therefore be disregarded; (3) that South Korean nationality should not be recognized because it is not bestowed in a manner consistent with international norms; and (4) that an individual asylum seeker falls into an exceptional category whereby he or she lacks South Korean nationality. Each of these arguments has proved successful in certain cases, at least provisionally.

## INTRODUCTION

At first glance, many observers would suppose that North Korean escapees could easily qualify for asylum in the West. After all, North Korea is ruled by a brutal regime which engages in torture, arbitrary imprisonment, and political executions.<sup>1</sup> In fact, North Koreans seeking asylum face a considerable barrier: dual nationality. North Koreans are considered to be South Korean nationals pursuant to South Korean domestic law.<sup>2</sup> This means that, pursuant to Article 1(2) of the Refugee Convention, they must demonstrate a well-founded fear of persecution in South Korea as well as North Korea in order to be considered refugees.<sup>3</sup> This would, presumably, be a tall task. It is normally easy to show a fear of persecution in North Korea because (amongst many other possible

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1. See generally KOREA INSTITUTE FOR NATIONAL UNIFICATION (KINU), WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2020 (2021) [hereinafter *KINU 2020*]; U.N. Hum. Rts. Council, Comm. of Inquiry on Human Rights in the DPRK, Rep. of the Detailed Findings of the Comm. of Inquiry on Human Rights in the DPRK, U.N. Doc. A/HRC/25/CRP.1 (2014).

2. See Andrew Wolman, *The South Korean Citizenship of North Korean Escapees in Law and Practice*, 4 KLRI J. L. & LEGIS. 226 (2014).

3. Convention Relating to the Status of Refugees art. 1(2), July 25, 1951, 189 U.N.T.S. 137. The United States is an exception: Congress has statutorily mandated that North Korean escapees shall not be considered South Korean nationals for the purposes of refugee determination. See North Korean Human Rights Act, H.R. 4011, 108th Cong. § 302(B) (2004).

reasons) the Kim regime imputes adverse political views to unauthorised emigrants and punishes returnees harshly.<sup>4</sup> However, South Korea is a prosperous and free country which provides considerable support and benefits to North Koreans upon their arrival. Commentators have, therefore, naturally assumed that North Koreans' dual nationality would make it impossible for them to find asylum in the West.<sup>5</sup>

This Article questions whether dual nationality is in fact dispositive. In short: do plausible legal arguments still exist for North Koreans to gain asylum in an environment where they are also considered South Korean nationals, and if so, have these arguments been successful? This Article addresses these questions for the first time in the academic literature through an analysis of published asylum appeals from eight Western countries that have historically received significant numbers of asylum claims from North Koreans: the UK, Belgium, France, Germany, the Netherlands, Canada, New Zealand and Australia. There are four different types of arguments that have been put forward. First, and most commonly, that a North Korean escapee in fact has a well-founded fear of persecution in South Korea as well as North Korea. Second, that South Korean nationality does not provide a right to enter the country and should therefore be disregarded for refugee determination purposes. Third, that South Korean nationality should not be recognized because it is not bestowed in a manner consistent with international norms. Finally, that a particular asylum seeker falls into an exceptional category whereby he or she lacks South Korean nationality.<sup>6</sup> All of these arguments have been met with at least provisional success in select cases. While the number of North Koreans finding asylum in the West has certainly fallen considerably since 2013 (when their dual nationality became universally acknowledged), plausible paths to protection still exist, although they are heavily dependent on the facts of the case and the jurisdiction where asylum is being claimed.<sup>7</sup>

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4. See Jung-hyun Cho, *Protection of North Korean Escapees under International Law: Their Refugee Status*, 1 J. PEACE & UNIFICATION 2, 31 (2011).

5. See, e.g., JAMES BURT, EUROPEAN ALLIANCE FOR HUMAN RIGHTS IN NORTH KOREA, A CASE FOR CLARIFICATION: EUROPEAN ASYLUM POLICY AND NORTH KOREAN REFUGEES 18 (2015) (South Korean nationality "would disqualify North Koreans from claiming international protection"); Sheena Greitens, *The Geopolitics of Citizenship: Evidence from North Korean Claims to Membership in the South*, 26 J. KOR. STUD. 117, 123 ("in claiming North Koreans as citizens, the ROK remove their grounds for claiming asylum/refugee status in most other countries."); JEEWON MIN, NUMBERS SHOW FEWER NORTH KOREANS ADMITTED: DUAL NATIONALITY AND REFUGEE STATUS, IOM-MRTC ISSUE BRIEF NO. 2018/07 10 (2018) (formerly welcoming destination countries "now consider [North Koreans] ineligible for refugee status for their dual nationalities.").

6. This article does not focus on avenues for complementary protection (i.e., protection outside the scope of the Refugee Convention) for which standards often differ considerably in different countries. However, as discussed briefly in the conclusion section, alternative forms of protection have at time also been successfully invoked by North Korean escapees.

7. According to UNHCR figures, in 2012 there were a total of 1,126 North Korean refugees

## II. NORTH KOREAN REFUGEES IN THE WEST

Ever since the authoritarian Kim family took over North Korea, there have been cases of North Koreans fleeing to seek asylum elsewhere. Between the end of the Korean War and the late 1990s, the number of North Korean escapees was relatively low, however, and most settled in South Korea.<sup>8</sup> While there were isolated instances of North Koreans seeking refuge in Germany and other Western countries, case numbers were minimal.<sup>9</sup>

However, in the wake of the catastrophic famine spanning from 1994 through 1998, living conditions in North Korea deteriorated, and the number of North Koreans fleeing their country rose dramatically.<sup>10</sup> This exodus continues to the present day, although the number of escapees has diminished since 2012, as Kim Jong Un has tightened borders,<sup>11</sup> and further plummeted in 2020 when borders around the world tightened due to the Covid-19 pandemic.<sup>12</sup>

Many of these North Korean escapees survive on the margins of Chinese

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and people in refugee-like situations. This figure decreased to 753 by 2020. *Refugee Data Finder*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download?url=q21PzZ> [<https://perma.cc/RFH2-YBAX>]. These figures do not include North Koreans in South Korea, who are not considered as refugees under South Korean law.

8. Prior to 1994, a total of 641 North Korean escapees had settled in the South. An additional 305 North Koreans arrived between 1994 and the end of 1998. Andrei Lankov, *Bitter Taste of Paradise: North Korean Refugees in South Korea*, 6 J. E. ASIAN STUD. 105, 108 (2006) [hereinafter *Lankov, Bitter Taste*].

9. Of particular note are a wave of twenty-one North Korean students who sought asylum in West Germany in 1959. Ben Osborn, *The S-Bahn from Pyongyang: Berlin's North Korean History*, EXBERLINER (Nov. 8, 2019), <https://www.exberliner.com/features/history/the-s-bahn-from-pyongyang/> [<https://perma.cc/N8XQ-P597>]. Several North Korean students and workers in Eastern Europe also escaped to the West around the fall of the Berlin Wall in 1989. *Two North Korean Students Defect to Seoul through Berlin Wall*, UPI (Nov. 16, 1989), <https://www.upi.com/Archives/1989/11/16/Two-North-Korean-students-defect-to-Seoul-through-Berlin-Wall/8406627195600/> [<https://perma.cc/5EPP-RYTL>]. By 1999, however, UNHCR recorded only a total of ten North Korean refugees (or people in a refugee-like situation) at a global level. *Refugee Data Finder*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download?url=V93zbA> [<https://perma.cc/9M6P-3BDX>]. These numbers do not include North Koreans in South Korea.

10. See Lankov, *Bitter Taste*, *supra* note 8, at 109.

11. 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/> [<https://perma.cc/UMC7-GPVP>].

12. The number of escapees reaching South Korea decreased to 229 in 2020 from 1,047 the previous year. 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/> [<https://perma.cc/BB5M-FLA2>].

society, where they often face exploitation and the threat of repatriation.<sup>13</sup> A few have requested resettlement in the United States<sup>14</sup> or proceeded directly to a Western country to request asylum.<sup>15</sup> The vast majority, however, have traversed China via “underground railroad” to Southeast Asian countries, from where South Korean embassy officials assist in their resettlement in South Korea. Upon arrival south, North Korean asylum seekers are given resettlement assistance, including housing, financial support, and educational subsidies.<sup>16</sup> They receive a passport and are treated as citizens. As of March 2021, a total of 33,783 North Korean escapees have been resettled in South Korea.<sup>17</sup>

Once settled in South Korea, North Korean escapees continue to face a range of challenges. In many cases they encounter discrimination and resentment from the local population and difficulties entering the highly competitive South Korean job market.<sup>18</sup> A minority of North Koreans in South Korea have proven unable to find security or satisfaction and have instead chosen to seek asylum in Western nations in a form of “secondary migration.”<sup>19</sup> The reasons for this choice are

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13. See generally Andrea Rakushin Lee, *The Challenges of North Korean Refugees in China*, THE ASIA DIALOGUE (Apr. 3, 2018), <https://theasiadialogue.com/2018/04/03/the-challenges-of-north-korean-refugees-in-china/> [<https://perma.cc/UG8L-E7KX>].

14. The United States refugee status and resettlement assistance to escapees who have not previously settled in the South. North Korean Human Rights Act, H.R. 4011, 108th Cong. § 302(B) (2004). Very few North Koreans choose this option: 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> [<https://perma.cc/X4VL-VZU3>].

15. Directly seeking asylum in the West is rare, however, for logistical reasons. It is normally only a feasible route for those escaping from, for example, overseas labor sites, embassies, or shipping vessels, rather than those crossing the Chinese land border, which is the most common route for escape. See 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/> [<https://perma.cc/A99G-VD3P>]; KINU 2020, *supra* note 1, at 540.

16. *Settlement Support for North Korean Defectors*, REPUBLIC OF KOREA MINISTRY OF UNIFICATION, [https://www.unikorea.go.kr/eng\\_unikorea/whatwedo/support/](https://www.unikorea.go.kr/eng_unikorea/whatwedo/support/) [<https://perma.cc/72SV-VY9L>].

17. Policy on North Korean Defectors, REPUBLIC OF KOREA MINISTRY OF UNIFICATION, [https://www.unikorea.go.kr/eng\\_unikorea/relations/statistics/defectors/](https://www.unikorea.go.kr/eng_unikorea/relations/statistics/defectors/) [<https://perma.cc/LCZ6-Q7YD>].

18. Jiyoung Sung and Myong-Hyun Go, *Resettling in South Korea: Challenges for Young North Korean Refugees*, ASAN INST. FOR POL'Y STUD. (Aug. 8, 2014); *Survey: North Korean Refugees Report Discrimination, Lower Earnings*, THE HANKYOREH (Feb. 10, 2015), [http://english.hani.co.kr/arti/english\\_edition/e\\_northkorea/677750.html](http://english.hani.co.kr/arti/english_edition/e_northkorea/677750.html) [<https://perma.cc/44SL-84W4>].

19. See e.g., Jay Jiyoung Song & Markus Bell, *North Korean Secondary Asylum in the UK*, 7 MIGRATION STUD. 160, 160 (2019); Jin Woong Kang, *Human Rights and Refugee Statute of the North Korean Diaspora*, 9 N. KOR. REV. 4, 5 (2013) (“one in three North Korean escapees is heading to countries other than South Korea, and many escapees want to defect to Western

varied and include poverty, social isolation, resentment at discrimination against North Koreans, and a desire for better educational opportunities for their children.<sup>20</sup>

### III. DUAL NATIONALITY AND NORTH KOREAN ESCAPEES: LEGAL BACKGROUND

According to South Korea's Nationality Act, an individual is a Korean national if their "father or mother is a national of the Republic of Korea at the time of a person's birth."<sup>21</sup> Republic of Korea (South Korean) nationality descends from the *Chosun* nationality that applied throughout the Korean peninsula prior to 1948.<sup>22</sup> The co-existence of North Korean nationality would not affect this determination, as North Korea is not recognized as a separate country in South Korea.<sup>23</sup> This means that North Koreans are normally considered South Korean nationals from birth. There are, however, three exceptional circumstances where North Koreans would not be South Korean nationals, namely: (1) North Korean nationals of a non-Korean ethnicity (i.e., immigrants to North Korea and their descendants); (2) North Korean nationals who have voluntarily taken on the citizenship of a third country; and (3) North Korean nationals who can trace their Korean lineage only through maternal descent prior to June 14, 1998.<sup>24</sup> These exceptions have been recognized by South Korean courts,<sup>25</sup> the South Korean government,<sup>26</sup> and a great majority of legal scholars.<sup>27</sup>

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countries, such as the United States and the United Kingdom"); Byung-Ho Chung, *North Korean Refugees as Penetrant Transnational Migrants*, 43 URB. ANTHRO. 329, 332 (2014) (noting that "nearly 10% of North Korean migrants in South Korea have re-migrated to other countries.").

20. Kyungja Jung et al., *The Onward Migration of North Korean Refugees to Australia: In Search of Cosmopolitan Habitus*, 9 COSMOPOLITAN CIV. SOC. J., 1, 4 (2017); see Lankov, *Bitter Taste*, *supra* note 8.

21. Gukjeokbeob [South Korea Nationality Act], Act. No. 16, Dec. 20, 1948, art. 2, *amended by* Act. No. 10275, May 4, 2010.

22. Yi Yonsun Case, Constitutional Court [Const. Ct.], 96Nu1221, Nov. 11, 1996 (S. Kor.); see generally Chulwoo Lee, *South Korea: The Transformation of Citizenship and the State-Nation Nexus*, 40 J. CONTEMP. ASIA 230, 234 (2010).

23. See Nationality Act Case, Constitutional Court [Const. Ct.], 97Hun-Ka12, Aug. 31, 2000 (S. Kor.).

24. Wolman, *supra* note 2, at 234. This final exception results from the fact that while North Korea always permitted the transmission of nationality by maternal lineage, prior to 1998 South Korean nationality could only be transmitted by the paternal line.

25. Yi Yonsun Case, *supra* note 22; Nationality Act Case, *supra* note 23.

26. According to the Minister of Diplomacy and Trade, "our country does not recognize the nationality of North Korea. Therefore, a resident of North Korea can be considered as having our nationality." Nationality Act Case, *supra* note 23.

27. See, e.g., Eric Yong-Joong Lee, *Human Rights Protections of North Koreans in a Third Country: A Legal Approach*, 4 J. OF KOREAN L. 155, 169 (2004); In Seop Chung et al., *The Treatment of Stateless Persons and Reduction of Statelessness: Policy Suggestions for the Republic*

Prior to 2013, the existence of dual South-North Korean nationality was not always well understood in the West, and South Korean nationality was sometimes ignored or dismissed in refugee determination decisions.<sup>28</sup> In part, this was due to ambiguity on the part of South Korean government officials who, at times, mistakenly stated that North Korean escapees had to “acquire” or “apply for” South Korean nationality, when in fact they simply had to apply for their existing South Korean nationality to be recognised.<sup>29</sup> Significant numbers of North Koreans were granted asylum in the UK, Canada, and elsewhere.<sup>30</sup>

By 2013, however, the dual nationality of North Korean asylum seekers seemed to have become well understood in all of the destination countries reviewed in this Article.<sup>31</sup> In a number of countries, clarification on the dual nationality was provided by the issuance of country guidance<sup>32</sup> or the publicization of new correspondence with South Korean officials.<sup>33</sup> The number of North Koreans applying for asylum in the West decreased, as did the total number of North Korean refugees. Under the modern approach, dual nationality is well accepted: as one German court recently stated, “it has not only been the unanimous case law of German administrative courts but also of the asylum courts of other host countries in the world that North Koreans . . . automatically

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*of Korea*, 13 KOREA REV. OF INT'L STUD. 7, 22 (2010); Patricia Goedde, *Determining Refugee Status for North Korean Refugees under International and Domestic Laws*, 11 SUNGKYUN J. OF E. ASIA STUD. 143, 153 (2011).

28. *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], Feb. 29, 2000 (Austl.). Prior to 2008, UK Operational Guidance Note on North Korea did not mention the issue of dual nationality. UNITED KINGDOM HOME OFF., OPERATIONAL GUIDANCE NOTE: NORTH KOREA (Dec. 19 2006), <http://www.refworld.org/docid/46029cbe2.html> [<https://perma.cc/8G9F-J6YY>].

29. Wolman, *supra* note 2.

30. In 2012, there were 619 North Korean refugees in the UK; 138 in Germany, 119 in Canada, and smaller contingents in many other Western countries. Refugee Data Finder, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics> [<https://perma.cc/HT62-KS8M>] (these figures include both refugees and those in refugee-like situations).

31. Canada was the last country to accept that North Koreans are South Korean nationals, in a Refugee Appeals Division judgment from July, 2013. *See X (Re)*, 2013 CanLII 76469, ¶¶ 61-62 (CA I.R.B.) (Can.). *See generally* Seunghwan Kim, *Lack of State Protection or Fear of Persecution? Determining the Refugee Status of North Koreans in Canada*, 28 INTL. J. REF. L. 85 (2016) [hereinafter *Lack of State Protection*].

32. IMMIGRATION AND REFUGEE BD. OF CANADA, JURISPRUDENTIAL GUIDES - DECISION TB4-05778 ¶ 76 (June 27, 2016).

33. *See X (Re)*, 2016 CanLII 73070 ¶ 76 (CA I.R.B.) (Can.) (citing letter from South Korean embassy confirming that “North Korean-born persons are deemed nationals of the Republic of Korea.”); 0909118 [2010] RRTA 1054, ¶ 37 (Nov. 24, 2010) (Aust.) (citing letter from South Korean Ministry of Foreign Affairs and Trade, that “citizens of the DPRK are treated as citizens of the ROK automatically by virtue of their residence on the Korean peninsula.”).

possess South Korean citizenship.”<sup>34</sup>

Interpretation of the complexities of South Korean nationality law was also rendered unnecessary around this same time by increased cooperation between South Korean authorities and destination states with respect to fingerprint sharing.<sup>35</sup> South Korean authorities had long maintained a fingerprint database of North Korean settlers. Refugee determination officers now began to share asylum seekers’ fingerprints with the South Korean government, with the result being that, in the large majority of cases, asylum seekers were confirmed as having in fact already settled in South Korea before choosing to seek asylum elsewhere.<sup>36</sup> Thus, where there was a match, the claimant could be presumed to be a South Korean national—*de facto* as well as *de jure*. With fingerprint matching in place, many individuals who had previously been accepted as refugees had their refugee status revoked for misleading the authorities on issues of nationality.<sup>37</sup>

#### IV. PATHS TO PROTECTION

Despite the barrier of dual nationality, North Korean asylum cases have continued to arise in Western courts, albeit in far smaller numbers.<sup>38</sup> These cases involve new arrivals and earlier arrivals whose cases were reopened when their previous settlement in South Korea was uncovered through fingerprint checks.

34. Verwaltungsgericht Freiburg [VGF] [Freiburg Administrative Court], decision of Aug. 3, 2020, A 9 K 9336/17 (Ger.).

35. See Andrew Wolman & Guobin Li, *Saeteomin Asylum Seekers: The Law & Policy Response*, 27 INTL. J. REF. L. 327 (2015); Jeewon Min & Sarah Son, *Credibility Evidence, Documentary Information and Case Assessment in North Korean Escapee Asylum Claims in Canada and the United Kingdom* 7 (MRTC Working Paper Series No. 2019-02, 2019).

36. See, e.g., Sujin Cho, *Talbukjae nameun je 3gukhaeng gyeongyuji?* [*The South is a Place of Transit for a Third Country for North Korean Defectors?*] Donga Ilbo (Oct. 15, 2013), <http://news.donga.com/3/all/20131015/58216537/1> [<https://perma.cc/3D3J-6AJD>]; Raad voor Vreemdelingen-betwistingen nr. 167-364 van 10 mei 2016 in de zaak RvV X / IV (Belg.) (vast majority of North Korean asylum seekers in Belgium had previously settled in South Korea). In some countries, it has also been reported that significant numbers of asylum seekers claiming to be North Korean are in fact (ethnically Korean) Chinese nationals. See Jiyong Song, *Twenty Years’ Evolution of North Korean Migration, 1994–2014: A Human Security Perspective*, 2 ASIA & PAC. POL’Y. STUD. 399, 408 (2015); KINU 2020, *supra* note 1, at 545.

37. See, e.g., Raad voor Vreemdelingen-betwistingen nr. 106 220 van 2 juli 2013 in de zaak RvV X / IV (Belg.); Verwaltungsgericht Köln Urt. V. 26.06.2012, Az.: 14 K 4133/10.A (Ger.); Bak v. Canada (Citizenship and Immigration), [2021] CanLII 11767 (FC) (Can.).

38. In 2019, there were 117 North Korean asylum seekers, down from 1,023 in 2012. *Refugee Data Finder*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download/?url=q21PzZ> [<https://perma.cc/7C8K-N34S>]. In part, this is likely due to a tightening of the North Korean border under Kim Jong Un, which is shown in lower numbers of escapees making it to South Korea as well. It may also be a reflection of improved conditions for North Koreans in South Korea, or a perception among North Koreans living in the South that they are no longer able to easily find secondary asylum in the West.

In some instances, North Korean asylum claims have been successful. According to the United Nations High Commissioner for Refugees (UNHCR), from 2013 to 2020, 127 North Korean asylum seekers were awarded refugee status (along with another 156 who were given complementary protection), while 1,162 North Koreans had their claim rejected.<sup>39</sup> While North Koreans were accepted at a far greater rate prior to 2013,<sup>40</sup> this still represents an acceptance rate that is significantly higher than that of individuals classified by UNHCR as South Korean nationals (who presumably lack dual North Korean nationality).<sup>41</sup> In this section, I will further explore these cases by examining the arguments used in them and the circumstances in which the arguments have been successful.

#### *A. Persecution in South Korea*

According to the Refugee Convention, dual nationals can still qualify as refugees if they can demonstrate a well-founded fear of persecution in each of their countries of nationality. As such, it has become common for North Korean asylum seekers to claim a fear of persecution in South Korea, as well as North Korea. With respect to North Korean escapees, there have been four grounds to fear persecution that have been prominently put forward: discrimination; threat to personal safety; threat to safety of one's family; and direct persecution by South Korean authorities, often based on political opinion.<sup>42</sup> Each of these arguments will be examined in turn.

As an initial matter, however, it is worth noting that the first three of these arguments do not rest on a claim that the South Korean state is intentionally persecuting North Koreans. Such a claim would, in many cases, be implausible, as South Korean authorities are quite supportive of North Korean settlers and their successful integration into South Korean society, which is assisted by a significant range of support services. Rather, asylum claimants argue that the South Korean government is unable to prevent such persecution being perpetrated by other actors. This is referred to as the "protection theory" which holds that persecution can exist if, for whatever reason and despite the best of intentions, the State cannot "reduce the risk of persecutory harm arising from unlawful

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39. *Refugee Data Finder*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download/?url=qUG3g1> [<https://perma.cc/YF94-WYD6>].

40. From 2005-2012, 1,213 North Koreans were given refugee status and 130 given complementary protection, while 888 North Koreans had their claim rejected. *Refugee Data Finder*, United Nations High Comm'r for Refugees, <https://www.unhcr.org/refugee-statistics/download/?url=b27TVk> [<https://perma.cc/CMQ4-5EU8>].

41. During 2013-2022, there have only been 65 South Korean refugees recognised and none given complementary protection, with 960 South Korean nationals experiencing rejection. *Refugee Data Finder*, U.N. HIGH COMM'R FOR REFUGEES, <https://www.unhcr.org/refugee-statistics/download/?url=I1pgy9> [<https://perma.cc/M7ZU-FAB9>].

42. In some cases, multiple types of potential persecution are put forward; with the argument that the cumulative effect is to produce a serious harm. *See e.g.*, X (Re), 2020 CanLII 62452 (CA I.R.B. (Can.); AC (North Korea) [2019] NZIPT 801589 (18 November 2019) (N.Z.).



interference by non-state agents.”<sup>43</sup> The protection theory of persecution is well accepted in most of the world, although France, Germany, and a few other countries have traditionally required that the state itself be the agent of persecution.<sup>44</sup>

### 1. *Discrimination in South Korea*

It is well-documented that North Koreans can face considerable prejudice and discrimination in South Korean society.<sup>45</sup> For some, employment discrimination can make it difficult for North Korean escapees to earn an adequate income.<sup>46</sup> From the perspective of the Refugee Convention, however, the question is whether this discrimination, which clearly seems to be based on a protected ground (nationality or membership in a particular social group), reaches the level of persecution. In many cases, courts have ruled that discrimination against North Koreans, while indisputably existing, does not lead to serious harm that can be characterised as persecution.<sup>47</sup> This conclusion was also accepted in the 2016 UK country guidance, which stated that “[f]ormer 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 protection.”<sup>48</sup>

However, such dismissals are not universal. In the New Zealand case of *AL*, an asylum claim centred on persecution through discrimination was met with success.<sup>49</sup> Here, the appellant had suffered discrimination in the employment market, along with romantic disappointment and even physical assault on account of his North Korean background.<sup>50</sup> This adversely affected his mental health and caused him to become suicidal.<sup>51</sup> After a rejection at first instance, the tribunal found in the appellant’s favour on appeal and awarded refugee status.<sup>52</sup> The court

43. *AL (South Korea)* [2016] NZIPT 800858, ¶ 56 (19 May 2016) (N.Z.).

44. JAMES HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 306 (2nd ed. 2014).

45. Sung & Go, *supra* note 18.

46. Tara Oh, *The Integration of North Korean Defectors in South Korea: Problems and Prospects*, 15 INT’L. J. KOR. STUD. 151, 158 (2011).

47. See, e.g., *Hong v. Canada (Citizenship and Immigration)*, [2017] F.C. 913 (Can.); *X (Re)*, 2015 CanLII 105649 (Can. I.R.B.) (holding that acts of discrimination “do not amount to persecution, as they did not constitute a denial of a fundamental human right or amount to serious harm, even when considered cumulatively.”); N05/50475 [2005] RRTA 387 (24 February 2005) (Austl.); Raad voor Vreemdelingen-betwistingen [Council of Alien Disputes], Dec. 20, 2013, nr. 116 260 (Belg.).

48. United Kingdom Home Office, *Country Information and Guidance North Korea: Opposition to the Regime* (2016), at § 3.1.4 (UK). Guidance withdrawn on July 15, 2021.

49. *AL (South Korea)* [2016] NZIPT 800858, ¶¶ 126, 132 (19 May 2016) (N.Z.).

50. *Id.* ¶¶ 13, 17.

51. *Id.* ¶¶ 18.

52. *Id.* ¶¶ 8-18.

found that the appellant's right to work and non-discrimination rights had been violated by discriminatory treatment and that, while the financial effects of future employment discrimination could not be characterised as a serious harm, the appellant's precarious state of mental health meant that future incidents of employment discrimination would likely lead to serious psychological harm.<sup>53</sup>

This emphasis on psychological vulnerability also played a role in the Canadian court's decision *Kim v. Canada (Citizenship and Immigration)*.<sup>54</sup> In this case—which involved complementary protection rather than refugee recognition—the claimant had faced discrimination at a youth shelter, in the job search process, and during employment, leading to suicidal thoughts.<sup>55</sup> His initial application to stay in Canada was denied in-part due to insufficient evidence that he would face hardship in South Korea.<sup>56</sup> On judicial review, the court overturned the denial and requested reconsideration because the refugee officer had failed to meaningfully engage with “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.”<sup>57</sup>

## 2. Threat to Personal Safety

Another claim often made by North Korean asylum seekers is that if they are returned to South Korea their presence would become known to North Korean agents active there, and that this could put them in danger of political assassination or kidnapping by the Kim regime. According to this argument, South Korean authorities are unable to effectively protect North Korean asylum seekers from harm, and therefore they face persecution in both North and South Korea.

There certainly is a long history of prominent North Korean escapees being targeted for abduction or assassination by North Korean authorities, both in South Korea and elsewhere.<sup>58</sup> North Korea targeted a number of individuals during Kim Jong Il's time in power, including the 1997 assassination of Lee Han-young, nephew of one of Kim Jong Il's former wives, as well as the attempted assassinations in 2009 of Hwang Jang Yop, former senior member of North Korea's Workers' Party, and of prominent dissident Park Sang Hak in 2011.<sup>59</sup>

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53. *Id.* ¶ 89.

54. *Kim v. Canada*, 2020 CanLII 581 (Can. F.C.).

55. *Id.* ¶¶ 66-70.

56. *Id.* ¶¶ 31-34.

57. *Id.* ¶ 88.

58. See generally Go Myong-Hyun, *Kidnapping as Foreign Policy: North Korea's History of State Sponsored Abductions*, ASIAN INST. FOR POL'Y STUD. (Apr. 11, 2018) <https://en.asaninst.org/contents/kidnapping-as-foreign-policy-north-koreas-history-of-state-sponsored-abductions/> [<https://perma.cc/A3P4-EAXC>].

59. Mark Willacy, *N Korean Assassin Nabbed with Poison Needle*, ABC News (Sep. 16, 2011), [www.abc.net.au/news/2011-09-16/north-korea-spy-claim/2903122](http://www.abc.net.au/news/2011-09-16/north-korea-spy-claim/2903122) [<https://perma.cc/J48L-AHYX>].

There have been no published reports of defectors being physically targeted in South Korea since Kim Jong Un took over in 2012, although death threats have been made against North Korean escapees involved in sending balloons with anti-Kim propaganda over the border.<sup>60</sup>

The case law has so far mostly rejected claims of persecution via personal threat. In *AC*, a New Zealand tribunal dismissed this argument despite the claimant having assisted other escapees, provided information to South Korean agents, and worked with a defector NGO, concluding that he had “no real profile.”<sup>61</sup> In *Park v. Barr*, a U.S. court approved a finding that, even if the claimant were targeted for harm, South Korean authorities would be willing and able to protect him.<sup>62</sup> A Canadian case similarly found that South Korea’s mechanism for identifying North Korean informants and assassins was “functioning quite well,” and that in fact North Korean agents are active all around the world.<sup>63</sup> In one German case from 2020, the court dismissed the persecution claim while laying out specific circumstances in which it might be found valid, namely where claimants are former government or military officials, or other individuals in whom the North Korean authorities might have particular interest for activities that go beyond illegal emigration.<sup>64</sup>

However, these types of arguments have on a few occasions seen at least provisional success. In a recent Canadian case, the appellant claimed that she had acted as a spy on behalf of South Korean authorities, and that she (and her family) had therefore been targeted by North Korean agents while in South Korea.<sup>65</sup> While her asylum claim had been dismissed at first instance on credibility grounds, this dismissal was overturned on appeal and remanded for reconsideration, with the court acknowledging the possibility of persecution in the particular circumstances experienced by the claimant.<sup>66</sup> Fear of retaliation by North Korean agents also played a role in a Canadian court’s grant of refugee status in 2020.<sup>67</sup>

Meanwhile, in the *AC* appeals judgment from New Zealand, the claimant reported that he had received a series of anonymous phone calls and text

60. *Despite Threats, Activist Sends “The Interview” DVDs to North Korea*, REUTERS (Apr. 8, 2015), <https://www.reuters.com/article/northkorea-southkorea-leaflets-idUSL4N0X529020150408> [<https://perma.cc/QQ39-WTCH>].

61. *AC* (North Korea) [2019] NZIPT 801589, ¶¶ [76-77] (N.Z.).

62. *Park v. Barr*, 799 F. App’x 974, 976 (9th Cir. 2020).

63. *X* (Re), 2018 CanLII 101173, ¶ 34 (CA I.R.B.).

64. *VG Freiburg* [VGF] [Administrative Court of Freiburg] Jan. 15, 2020, A 9 K 3079/19, [http://lrw.juris.de/cgi-bin/laender\\_rechtsprechung/document.py?Gericht=bw&nr=30299](http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=30299) (Ger.).

65. *X* (Re), 2018 CanLII 143942 (CA I.R.B.) (Can.).

66. *Id.* ¶ 10.

67. *X* (Re), 2020 CanLII 62452 ¶ 15 (CA I.R.B.) (Can.) (“RAD is persuaded by the Counsel’s submissions which cites documentary evidence from various credible sources which confirm the extent of N. Korea’s activities against people in S. Korea they view as being enemies, and the inadequate state protection available to persons with the profile of the Principal Appellant.”).

messages accusing him of being a traitor to North Korea and threatening to kill him.<sup>68</sup> The tribunal found that he did not face any physical risk. However, the tribunal found that such threats (if they were to recur upon being returned to South Korea) would have a particularly harmful effect on the claimant's already fragile mental health and would in fact qualify as persecution, taking into account the poor mental health services and high suicide rate in South Korea.<sup>69</sup>

### 3. Threats to the Safety of One's Family

A related argument is that sending a North Korean escapee to South Korea would put that person's relatives who remain in North Korea at risk of persecution. The harm committed toward one's family member can constitute a form of persecution if such harm is likely to cause serious psychological harm to the asylum seeker.<sup>70</sup> Potential familial harm has been deemed serious enough to warrant refugee status in certain other instances.<sup>71</sup> In practice, however, such claims are often overlooked: a UNHCR audit revealed a "lack of appreciation that the fear of what might happen to a family member can be persecutory to the main applicant."<sup>72</sup>

In the Korean context, it is widely acknowledged that escaping North Korea can pose a threat to the security of one's family remaining in North Korea.<sup>73</sup> According to the Korea Institute for National Unification, the regime at one point announced "that three generations of that family would be wiped out (punished) if any family member defected . . . ."<sup>74</sup> One key question, however, is whether returning an escapee to South Korea would in fact materially increase the likelihood that the individual's family remaining in North Korea would be harmed. To an extent, this would be fact-dependent. If the North Korean authorities are already aware of an individual's escape, or if the individual has no surviving family, then returning to South Korea would make no difference. However, in other cases, returning to South Korea may in fact increase the risk for two reasons: first, it is widely believed that there are large numbers of North Korean spies active in South Korea<sup>75</sup> who could be expected to report back on

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68. AC (North Korea) [2019] NZIPT 801589, ¶¶ [23-24] (N.Z.).

69. *Id.* ¶¶ 87-92, 97.

70. HATHAWAY & FOSTER, *supra* note 44, at 219.

71. *See, e.g.*, FM (FGM) Sudan v. Sec'y of State for the Home Dep't CG [2007] UKAIT 60 ¶ 161 (UK); *Abay v. Ashcroft*, 368 F.3d 634, 636 (6th Cir. 2004).

72. U.N. HIGH COMM'R FOR REFUGEES, *UNTOLD STORIES: FAMILIES IN THE ASYLUM PROCESS*, 30 (2013).

73. KINU 2020, *supra* note 1, at 560 ("Since Kim Jong Un came to power, the surveillance and punishment of defectors have been tightened, along with the surveillance and punishment of defectors' families."). *See also* Sewon Kim, *North Korea Sends 30 Pyongyang Families of Missing Overseas Workers Into Internal Exile*, RADIO FREE ASIA (July 10, 2020), <https://www.rfa.org/english/news/korea/internal-exile-07102020123718.html> [<https://perma.cc/X27S-VQR8>].

74. KINU 2020, *supra* note 1, at 543.

75. Cristina Maza, *North Korea Officials Infiltrated South Korea to Intimidate Defectors*,

new arrivals in the community; second, South Korea keeps records of North Korean settlers that may be susceptible to North Korean hacking, as in fact occurred in 2018.<sup>76</sup>

The argument of familial risk has been made on numerous occasions and has been addressed most thoroughly in a series of cases from the Netherlands.<sup>77</sup> Here, tribunals have acknowledged that North Korean spies are active in South Korea and that escapees' family members can face a range of negative consequences.<sup>78</sup> However, tribunals do not accept the existence of a generalised risk that warrants protection but instead have held that each case must be judged on an individual basis as to risk of detection and potential consequences. In particular, the tribunals have relied upon correspondence with the South Korean Ministry of Foreign Affairs to hold that families of value or high-ranking in North Korea are more likely to suffer severe consequences than are the families of ordinary escapees.<sup>79</sup> In most cases, this has led to a denial of protection.<sup>80</sup> However, one 2015 case was remanded for reconsideration because the finding that the claimants were not sufficiently valuable was not well justified, as both had previously been arrested by North Korean agents—one for selling information to South Korea, and the other for selling information to China.<sup>81</sup>

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NEWSWEEK (Oct. 31, 2017), <https://www.newsweek.com/north-korea-officials-infiltrated-south-korea-intimidate-defectors-697626> [<https://perma.cc/3C8P-DQ3W>].

76. Tom Embury-Dennis, *North Korea: Hackers Leak Names, Birthdays and Addresses of Nearly 1,000 Defectors*, INDEPENDENT (Dec. 28, 2018), <https://www.independent.co.uk/news/world/asia/north-korea-hackers-defectors-south-cyber-attack-hana-centre-a8701646.html> [<https://perma.cc/R4FX-E9VY>]. Information on thousands of defectors was also allegedly leaked by South Korean authorities in 2003. Jae-Myoung Lee, *Petition: Defector Personal Information Leaked to North*, THE DONG-A ILBO (Oct. 28, 2005), <https://www.donga.com/en/List/article/all/20051028/244185/1/Petition-Defector-Personal-information-Leaked-to-North> [<https://perma.cc/6SCH-8LGH>].

77. See RBDHA 19 juni 2013, ECLI:NL:RBDHA:2013:7804 (Neth.); RBDHA 15 mei 2014, ECLI:NL:RBDHA:2014:6450 (Neth.); ABRvS 4 juni 2015, ECLI:NL:RVS:2015:1849 (Neth.); RBDHA 16 juli 2015, ECLI:NL:RBDHA:2015:8340 (Neth.); RBDHA 23 juli 2015, ECLI:NL:RBDHA:2015:8614 (Neth.); RBDHA 7 dec 2015, ECLI:NL:RBDHA:2015:13935 (Neth.); RBDHA 20 dec 2017, ECLI:NL:RBDHA:2017:16017 (Neth.).

78. RBDHA 23 juli 2015, ECLI:NL:RBDHA:2015:8614 ¶ 13 (Neth.) ¶ 13; RBDHA 15 mei 2014, ECLI:NL:RBDHA:2014:6450 ¶ 16 (Neth.).

79. See, e.g., RBDHA 23 juli 2015, ECLI:NL:RBDHA:2015:8614 (Neth.) ¶ 12; RBDHA 16 juli 2015, ECLI:NL:RBDHA:2015:8340 (Neth.) ¶ 11; RBDHA 15 mei 2014, ECLI:NL:RBDHA:2014:6450 (Neth.) ¶ 16.

80. RBDHA 15 mei 2014, ECLI:NL:RBDHA:2014:6450 (Neth.); RBDHA 23 juli 2015, ECLI:NL:RBDHA:2015:8614 (Neth.); RBDHA 7 dec 2015, ECLI:NL:RBDHA:2015:13935 (Neth.); RBDHA 20 dec 2017, ECLI:NL:RBDHA:2017:16017 (Neth.).

81. RBDHA 16 juli 2015, ECLI:NL:RBDHA:2015:8340 ¶¶ 13-15 (Neth.).

#### 4. *Direct Persecution by the South Korean Government*

Claims centered on direct persecution by the South Korean government have been less common. A few types of claims have recurred, however. First, there are claims of persecution by the South Korean National Intelligence Service (NIS) or rogue elements within it.<sup>82</sup> There is a certain plausibility to such claims due to the steady stream of scandals in which the NIS has recently been implicated, most relevantly the forging of documents in order to frame a North Korean escapee as a Northern spy.<sup>83</sup> In a recent Canadian case, the North Korean claimant stated that he had received specific threats from NIS agents in South Korea. The court accepted that a “wide variety of human right oriented concerns with respect to the NIS have continued to be reported” and awarded refugee status.<sup>84</sup>

Second, there have been claims alleging political persecution against North Koreans, generally focused on the repressive effects of South Korea’s National Security Law (NSL).<sup>85</sup> In an early Australian case, an asylum seeker alleged that he would face persecution under the NSL due to his continued activity assisting other North Koreans to escape and his contact with family members in the North.<sup>86</sup> Australia granted refugee protection, concluding that there was a real chance of persecution, especially given evidence that the NSL was sometimes applied in an arbitrary manner.<sup>87</sup> Similarly, in a 2013 New Zealand case, a South Korean claimant who made pro-North Korean statements online was given asylum in New Zealand based on a fear of persecutory application of the NSL.<sup>88</sup> While the claimant in this case was not originally from North Korea, this does highlight a potentially viable argument for the small minority of North Korean escapees who end up adopting a pro-North Korean political stance.<sup>89</sup> Of course, in recent years, the converse argument might be more plausible: that South Korean persecution is a real fear due to a claimant’s political activism *against*

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82. X (Re), 2020 CanLII 62452, ¶¶ 7-12 (CA I.R.B.) (Can.); Cho v. Canada (Citizenship and Immigration), [2019] F.C. 398 (CanLII), ¶¶ 11-12.

83. See generally Steven Borowiec, *The Spy Who Wasn't a Spy: A Tale of Two Koreas*, L.A. TIMES (May 17, 2016), <http://www.latimes.com/world/asia/la-fg-south-korea-spy-20160517-snap-story.html> [<https://perma.cc/E4JU-RGQY>]; see also Aidan Foster-Carter, *Are Seoul's Spooks Out of Control?*, WSJ (Aug. 11, 2014), <https://www.wsj.com/articles/BL-KRTB-6351> [<https://perma.cc/VCX2-S9CA>].

84. X (Re), 2020 CanLII 62452, ¶ 8 (CA I.R.B.) (Can.).

85. See generally Diane Draft, *South Korea's National Security Law: A Tool of Oppression in an Insecure World*, 24 WIS. INT'L L. J. 627 (2006).

86. N94/06109 [1996] RRTA 3118 (Austl.).

87. *Id.*

88. *AB (South Korea)* [2013] NZIPT 800294 (N.Z.).

89. See generally Benjamin Haas, “Forever Strangers”: *The North Korean Defectors Who Want to Go Back*, THE GUARDIAN (Apr. 26, 2018), <https://www.theguardian.com/world/2018/apr/26/forever-strangers-the-north-korean-defectors-who-want-to-go-back> [<https://perma.cc/5DU5-EUM6>] (describing arrest of North Korean escapee under NSL for sending rice to North Korean officials).

North Korea. As one might expect, North Korean escapees often have strong negative feelings about the Kim regime, and some have alleged that the Moon Jae In administration has violated their human rights by prohibiting them from disseminating certain forms of anti-Kim propaganda in its efforts to promote peaceful relations with the North.<sup>90</sup>

Finally, although it has not been successful in the cases surveyed in this Article, it is worth noting a last plausible argument: the security detention and subsequent three-month mandatory “retraining” at the Hanawon Centre that North Koreans face upon initial entry to South Korea is a form of arbitrary detention that constitutes persecution on the basis of nationality and social group. This would be a tough argument: major human rights actors have suggested improvements to the Hanawon detention system but have seldom condemned it outright. However, there have certainly been objections to this type of detention among North Koreans, some of whom have brought domestic lawsuits against the South Korean government, alleging that their detention constitutes a human rights violation.<sup>91</sup> This arbitrary detention argument was put forth (and rejected) in the UK case of GP and others.<sup>92</sup>

### *B. Ineffective South Korean Nationality*

Another argument that has been used by North Korean asylum seekers is that even if they do formally possess South Korean nationality, that nationality should be seen as “ineffective” and not recognized for purposes of refugee determination because in practice it does not provide a right to actually enter and reside in South Korea. Most commonly, claimants argue that they lack the right to enter South Korea because they fall into one of the Article 9 exceptions of the Protection Act.<sup>93</sup> The Protection Act stipulates that South Korea will provide “protection” to North Korean escapees, with the exception of five categories of people for whom protection will be denied, namely:

1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc;
2. Offenders of non-political, serious crimes such as murder, etc;
3. Suspects of disguised escape;

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90. Hyonhee Shin, *Defectors Say South Korea Investigations Threaten N. Korean “Underground Railroad”*, REUTERS (Aug. 12, 2020), <https://www.reuters.com/article/us-northkorea-southkorea-defectors-idUSKCN2572X8> [<https://perma.cc/K3CS-4WUU>].

91. KINU, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2014 594 (Ctr. for N. Kor. Hum. Rts. Stud., KINU ed., 2014).

92. GP and others (South Korean citizenship) North Korea v. Sec’y of State for the Home Dep’t CG [2014] UKUT 391 (IAC) ¶ 114 (UK) (“there is no evidence of any abuse or harm during the *Hanawon* phase; . . . the purpose of the training offered is benign; and . . . substantial housing, training and employment grants are made available once the *Hanawon* phase is complete . . .”).

93. Act on the Protection and Settlement Support of Residents Escaping from North Korea (ROK), Act No. 6474, partial revision, May 24, 2001 (S.Kor.).

4. Persons who have for a considerable period earned their living in their respective countries of sojourn; and
5. Such other persons as prescribed by the Presidential Decree as unfit for the designation as persons subject to protection.<sup>94</sup>

Prior to 2013, however, there was a lack of clarity as to what “protection” meant. While it certainly refers to the resettlement benefits that North Koreans receive upon arriving in South Korea, some claimed that the right to enter South Korea from foreign states, as facilitated by South Korean embassy officials, was also an element of protection.<sup>95</sup>

Given this lack of clarity, some argued that, when a claimant falls into one of the Article 9 exceptions of the Protection Act, South Korean nationality status should be presumed ineffective because the claimant would lack the right to enter South Korea.<sup>96</sup> A number of tribunals in civil law jurisdictions have embraced this analysis, at times leading to successful claims. For example, in the French case of M.G., a North Korean asylum seeker who had spent over ten years outside of North Korea, thus potentially falling into the fourth exception of the Protection Act, was given refugee status.<sup>97</sup> The same presumption was embraced in a recent German case, where the tribunal chose to grant refugee status to an individual who had already lived for seventeen years in Germany at the time of his application.<sup>98</sup>

In one controversial case from the Netherlands, the court ruled that the State had the burden of proving that a North Korean claimant would not be denied

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94. *Id.* art. 9.

95. *See* Chung et al., *supra* note 27, at 24 (“While ‘protection’ in principle refers to the package of resettlement benefits available to North Korean escapees settling in the South, in practice it seems clear that protection is interpreted as a much broader concept, covering various measures ranging from admission to a diplomatic mission and then to South Korea, to providing economic, social and educational benefits on Korean territory.”); Refugee Review Tribunal Case No. 1000331 [2010] RRTA 932, ¶ 56 [Austl.] (citing a report that South Korean citizenship does not convey an automatic right to enter the country, and that the only legal avenue for a North Korean escapee to enter South Korea is by applying for protection); *see also* KK & Ors (Nationality: North Korea) Korea v. Secretary of State for the Home Department CG [2011] UKUT 92 (IAC).

96. *See* Andrew Wolman, *North Korean Asylum Seekers and Dual Nationality*, 24 INTL. J. REF. L., 793 (2012) [hereinafter *North Korean Asylum Seekers*]; *Lack of State Protection*, *supra* note 31.

97. *See* CNDA May 6, 2016 M.G. No 09001713 C (Fr.). In an earlier French case also involving a North Korean asylum seeker who had spent over ten years outside the country, the court initially demanded that the claimant approach the South Korean embassy within two months to seek recognition as a South Korean national. She did, was rejected, and was duly granted refugee status. *See also* CNDA, Sept. 2, 2010, Mme L., no 08018788 C (Fr.).

98. Verwaltungsgericht Freiburg [VGF] [Freiburg Administrative Court], decision of Aug. 3, 2020, A 9 K 9336/17 (Ger.).



entry to South Korea due to being a suspected spy.<sup>99</sup> This ruling prompted a reaction from the Dutch authorities, who faced the challenging task of showing whether South Korean officials would consider a given escapee to be a spy or not. Later in 2014, Dutch officials requested and received clarification from the Korean Ministry of Foreign Affairs that North Korean escapees would be treated as South Korean nationals, even if they were found to be spies during the investigation process that accompanies their transfer to South Korea.<sup>100</sup> Subsequent courts cited this letter in finding South Korean nationality to be effective.<sup>101</sup>

Other courts, especially in the common law world, have firmly rejected this type of effective nationality analysis.<sup>102</sup> In Australia, resorting to effective nationality analysis was statutorily rejected in 1999,<sup>103</sup> a rejection that was upheld with respect to North Korean escapees in 2012.<sup>104</sup> In the UK, effective nationality analysis was rejected in principle in both *KK & Ors* and *GP & Ors*.<sup>105</sup> In the latter case, the tribunal perhaps needlessly went on to assert that South Korean nationality was in any case entirely effective, as North Koreans were permitted to enter South Korea even where they fell into one of the Protection Act exceptions.<sup>106</sup> Canada later issued jurisprudential guidance that similarly asserted that South Korean nationality is, in practice, effective.<sup>107</sup>

99. ABRvS 18 juli 2014, ECLI:NL:RVS:2014:2815 (Neth.).

100. RBDHA 16 juli 2015, ECLI:NL:RBDHA:2015:8340, ¶ 3 (Neth.) (describing correspondence).

101. *Id.*; ABRvS 4 juni 2015, ECLI:NL:RVS:2015:1849, 74, ¶¶ 2, 2.1 (Neth.).

102. *See* *KK & Ors* (Nationality: North Korea) *Korea v. Secretary of State for the Home Department* CG [2011] UKUT 92 (IAC) (“there is no separate concept of ‘effective’ nationality.”).

103. Border Protection Legislation Amendment Act 1999, (cth) sch 1, item 70 (Austl.).

104. *SZOAU v. Minister for Immigration and Citizenship* [2012] FCAFC 33 (Austl.). Although New Zealand courts have previously embraced ‘effective nationality’ analyses, the use of the concept has recently been rejected in a case citing favourably to *KK & Ors* and *GP & Ors*. *See* *AC* (Venezuela) [2019] NZIPT 801438, ¶¶ 89-90 (N.Z.).

105. *KK & Ors* (Nationality: North Korea) *Korea v. Secretary of State for the Home Department* CG [2011] UKUT 92 ¶ 82 (IAC) (“for the purposes of the Refugee Convention, where a person already has a nationality (even if he has no documents to that effect) that is the end of the matter: he is a national of the country concerned.”); *GP & Ors* (South Korean citizenship), *North Korea v. Sec’y of State for the Home Dep’t* CG [2014] UKUT 3 ¶ 101 (IAC) (“there is no separate question of ‘effective’ nationality and the issue is the availability of protection in the receiving State.”). For further analysis of effective nationality in *KK & Ors*, see *North Korean Asylum Seekers*, *supra* note 96, at 806-09.

106. *GP & Ors* (South Korean citizenship), *North Korea v. Sec’y of State for the Home Dep’t* CG [2014] UKUT 3 ¶ 125 (IAC) (“expert and country evidence indicates that in practice South Korea will not reject any returning person from the Korean Peninsula unless they have acquired another nationality since leaving the Korean Peninsula.”).

107. *See* Immigration and Refugee Board of Canada, Jurisprudential Guide Decision – TB4-05778e, ¶ 77 (June 27, 2016) (“there are no issues with [North Korean escapees] entering South Korea.”).

The factual assertion that the Protection Act does not regulate the right to enter South Korea has seemed to be largely accurate for many years and was accepted by the South Korean government in 2014.<sup>108</sup> However, it has recently been drawn into question. In November 2019, South Korean forces captured a fishing boat in South Korean waters with two North Korean fishermen aboard.<sup>109</sup> Upon investigation, they found that the men had murdered 16 of their fellow crew members before crossing the sea border. The two men were rapidly sent back to North Korea. This was the first reported instance of South Korea sending North Korean escapees back to the North against their will and led to a public outcry.<sup>110</sup>

In order to justify the expulsion, South Korean authorities stated that the North Koreans fell into one of the Article 9 exceptions to the Protection Act due to their commission of serious crimes.<sup>111</sup> While one should perhaps not read too much into the statement, as the incident was clearly of an exceptional nature, it does seem to acknowledge that North Koreans who fall into the Article 9 exceptions of the Protection Act lack the right to stay in South Korea, and indeed risk deportation to North Korea. In addition to highlighting the potential ineffectiveness of South Korean nationality, the incident also draws into question whether South Korea is a permissible destination to return North Koreans, at least when they fall into an Article 9 exception. After all, North Korea engages in capital punishment, along with myriad other human rights abuses of detainees, and it is a violation of the Refugee Convention's non-refoulement obligations to send an asylum seeker to a third country which then expels that person to a place of persecution.<sup>112</sup> In fact, the two deported fishermen have reportedly been executed.<sup>113</sup>

### C. Non-Opposability of South Korean Nationality

It may also be possible for North Korean asylum seekers to argue that, while they may be South Korean nationals as a matter of South Korean domestic law, that nationality does not need to be recognized (or, perhaps, must not be

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108. RBDHA 16 juli 2015, ECLI:NL:RBDHA:2015:8340 ¶ 7 (Neth.).

109. Kyu-Chang Lee, *Legal Issues Concerning the Expulsion of North Koreans on Murder Charges and Tasks Ahead*, KOREA INST. FOR NAT'L UNIFICATION: ONLINE SERIES 1-2 (Nov. 11, 2019), <https://www.kinu.or.kr/pyxis-api/1/digital-files/72ca54ae-94c1-4926-9e4f-88009a696ceb> [https://perma.cc/Q46E-BLSR].

110. Eon-Kyun Park, *Deportation of North Korean Fishermen by the Republic of Korea*, 7 KOREAN YB. INT'L, L. 263, 263 (2020).

111. Kyu-Chang Lee, *supra* note 109, at 2.

112. See Michigan Guidelines on Protection Elsewhere, 28 MICH. J. INT. L. 207, ¶ 6 (2007) ("Art. 33 prohibits indirect *refoulement* of the kind that occurs when a refugee is sent to a state in which there is a foreseeable risk of subsequent *refoulement*.").

113. Seulkee Jang, *N. Korea Appears to have Executed Two Men Forcibly Repatriated by S. Korea to N. Korea in 2019*, DAILY NK (May 18, 2021), <https://www.dailynk.com/english/north-korea-appears-executed-two-men-forcibly-repatriated-south-korea-north-korea-2019/> [https://perma.cc/ZZH2-LDJB].

recognized) by third states. This could, perhaps, rely on the well-known principle associated with the International Court of Justices's (ICJ) *Nottebohm* decision that a nationality, that is valid under domestic law, need not be recognized under international law if there is no "genuine connection" between the individual and the country concerned.<sup>114</sup> The barriers to this argument are significant, however. While there have been a few refugee cases that have embraced the *Nottebohm* principle,<sup>115</sup> the large majority of academic opinion holds that it should be restricted to the diplomatic protection context in which it was laid out.<sup>116</sup> Even if a court accepted the principle, it is questionable whether North Koreans would be seen as lacking a genuine link to South Korea (that is to say, the Republic of Korea, which claims to be the successor state to their ancestral home).<sup>117</sup>

In the 2011 case of *Mlle K*, the French National Court of Asylum used a somewhat different approach to find that, even if North Koreans possess South Korean nationality under South Korean domestic law, that nationality should be disregarded for purposes of refugee status determination.<sup>118</sup> In short, the court concluded that South Korea could not, through imposition of nationality, deprive foreign individuals of a refugee status that they would otherwise possess.<sup>119</sup> The court's reasoning did not rely on any purported lack of "genuine links," but rather seems focused on the idea that South Korean nationality should be considered illegitimate because it is a form of collective involuntary naturalization.<sup>120</sup> This is consistent with an "abuse of rights" analysis.<sup>121</sup>

#### *D. Exceptional Lack of South Korean Nationality*

There are three exceptional circumstances in which North Korean nationals would not be considered South Korean nationals by South Korean authorities: (1)

114. *Nottebohm Case (Liechtenstein v. Guatemala)*, Judgment, 1955 I.C.J. Rep. 4, 23 (Apr. 6).

115. See *Katkova v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C. 216 ¶ 22 (Can.); *Matter of Fatoumata Toure*, No. A24 876 244 (BIA June 26, 1990). Hathaway and Foster also note that nationality must be evaluated according to the 'genuine links' principle laid out in *Nottebohm*. HATHAWAY & FOSTER, *supra* note 44, at 56.

116. See ALFRED MICHAEL BOLL, *MULTIPLE NATIONALITY AND INTERNATIONAL LAW* 110-13 (2007); see also Peter Spiro, *Nottebohm and "Genuine Link": Anatomy of a Jurisprudential Illusion*, (INVESTMENT MIGRATION WORKING PAPERS, IMC-RP 16, 2019).

117. For an argument that there is no genuine link between North Koreans and South Korea, see Cho, *supra* note 4, at 62-63.

118. CNDA 17 mars 2011 Mlle K. no. 09020156 C+ (Fr.).

119. *Id.*

120. Anne Peters, *Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty and Fair Principles of Jurisdiction*, 53 GERM. YB. INT'L. L. 623, 692 (2010) ("Collective naturalizations are in conformity with international law only if there is 'an element of voluntariness on the part of the individual acquiring' the new nationality, which 'must not be conferred against the will of the individual.'").

121. See generally Robert Sloane, *Breaking the Genuine Link: The Contemporary International Regulation of Nationality*, 50 HARV. INT'L. L.J. 1, 60 (2009).

when North Korean nationals are not of Korean descent (i.e. immigrants and their descendants); (2) when North Korean nationals have voluntarily taken on the citizenship of a third country; and (3) when North Korean nationals can trace their Korean lineage only through maternal descent prior to June 14, 1998 (the date that South Korean domestic nationality law was reformed in order to treat men and women equally in line with that country's international commitments under the Convention on the Elimination of Discrimination against Women).<sup>122</sup> The first of these exceptions has not arisen in the cases reviewed, as immigration to North Korea is unsurprisingly rare.

In *KK & Ors*, the UK Upper Tribunal relied upon the second exception.<sup>123</sup> In this case, the appellants had all lived in China for over ten years before applying for asylum. The court found that they would not be allowed entry to South Korea, but the reasoning explicitly rejected an effective nationality analysis.<sup>124</sup> Rather, the court found that South Korean authorities presumptively concluded that appellants, who had spent over ten years in another country, had lost their South Korean nationality through the acquisition of a second (non-North Korean) nationality.<sup>125</sup> This result was later approved by the Court of Appeal, which emphasized that the relevant point was not whether or not the appellants had actually acquired Chinese nationality, but rather whether they would be treated as having done so by South Korean authorities.<sup>126</sup>

The third exception has been put forth by North Korean claimants in Denmark and Australia. In the Danish case, the claimant's assertion that his father was Chinese, and that he therefore lacked South Korean citizenship, was summarily rejected on credibility grounds.<sup>127</sup> The Australian cases of *SZQYM* and *SZQYN* also involved claims from North Korean escapees that were rejected by immigration officers on grounds of dual South Korean nationality.<sup>128</sup> The (unrelated) claimants filed for judicial review, stating that they were born prior to 1998 and that their fathers had been born in China prior to the 1948 passage of the South Korean Nationality Act. Thus, they argued, neither they nor their fathers qualify as South Korean nationals. The Australian refugee authorities agreed that if, in fact, the claimants' fathers had been born in China, then the appellants would not be South Korean nationals.<sup>129</sup>

Hearing the appeals together, the primary judge expressed uncertainty as to

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122. Wolman, *supra* note 2, at 237.

123. *KK & Ors (Nationality: North Korea) Korea v. Secretary of State for the Home Department* CG [2011] UKUT 92 (IAC).

124. *See Id.*

125. *Id.* ¶ 86. For criticism of this reasoning, see *North Korean Asylum Seekers*, *supra* note 96; see generally *Lack of State Protection*, *supra* note 31, at 809.

126. *Secretary of State for the Home Department v. SP (North Korea)* [2012] EWCA Civ 114.

127. Danish Refugee Appeals Board, sydk/2015/1 (July 2015) (Den.) (no official decision reporters exist; navigate to <https://fln.dk/Global/Soegeresultater>; search for "Nordkorea" and select the matter regarding the North Korean applicant decided in July of 2015).

128. *SZQYM v Minister for Immigration* [2012] FMCA 1116 (Austl.).

129. *Id.* ¶ 26.

whether it is actually correct that the appellants would lack South Korean nationality in these circumstances, but without expert testimony to rely on, he accepted the law as such.<sup>130</sup> However, he was not satisfied that either of the fathers had indeed been born outside the Korean peninsula (due to certain ambiguities and credibility issues in the applications) and, therefore held that the applicants had not established that they lacked South Korea citizenship.<sup>131</sup>

On appeal, the Federal Court overturned the judgment on grounds of burden of proof, concluding that the Court must find a lack of South Korean nationality unless the Court was convinced on a balance of probabilities that their fathers were born on the peninsula.<sup>132</sup> The Minister for Immigration was then asked to reconsider the appellants' protection applications. The claims were once again denied, and the denial was once again appealed. This time, the claimants' appeals were initially dismissed by the Federal Circuit Court on credibility grounds.<sup>133</sup> However, the full Federal Court overturned the dismissal, this time due to the lower court's misinterpretation of key expert evidence. Over a decade after the initial applications, the claimants still await final decision on their protection visas.<sup>134</sup> As is so often the case in North Korean—and other—refugee cases, credibility has emerged as the key issue.<sup>135</sup> Yet the cases do show the possibility of courts recognising exceptions to dual nationality, even if claimants face significant challenges in proving that they fall within those exceptions.

## V. CONCLUSION

There is no doubt that possession of South Korean nationality makes it difficult for North Korean escapees to gain recognition as refugees. However, it is not always dispositive. Paths to refugee status still exist, at least in some cases. Claimants have argued—with occasional success—that they fall into one of the exceptional categories lacking South Korean nationality, or that their South Korean nationality should be disregarded for the purposes of refugee

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130. *Id.* ¶ 27. The judge was probably wise to admit uncertainty. The question of who qualifies as an 'initial citizen' of the Republic of Korea in 1948 is complex, and more information would be needed to make any determination. However, it is generally true that ethnic Koreans living in China (*Choseonjok*) are not considered Korean citizens today, because they are deemed to have lost Korean citizenship when they became Chinese citizens in 1949. See Jong Chol An, *Who Are the First Koreans? The First Korean Nationality Law (1948) and Its Limits*, in BAKS PAPERS 16, 34 (Adam Cathcart & Morgan Potts eds., 2015).

131. *SZQYM v Minister for Immigration* [2012] FMCA 1116 ¶¶ 70-72 (Austl.).

132. *SZQYM v Minister for Immigration and Citizenship* [2014] FCA 427 ¶ 57 (Austl.) (the primary judge held that the appellants need to satisfy the Court that their fathers had not been born on the peninsula in order to be found to lack South Korean nationality.).

133. *SZQYN v Minister For Home Affairs & Anor* [2019] FCCA 489 (Austl.); *SZQYM & Anor v Minister For Home Affairs & Anor* [2019] FCCA 490 (Austl.).

134. *SZQYM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 779, ¶¶ 2-3 (Austl.).

135. See generally *Min & Son*, *supra* note 35.

determination. Others have argued, again with occasional success, that they should be considered refugees due to a well-founded fear of persecution in both North and South Korea. Such arguments are contingent on the facts of the particular case and the credibility of the claimant. The arguments do not appear to be equally viable in all countries surveyed. Courts in New Zealand, for example, seem particularly likely to find a threat of persecution in South Korea. Meanwhile, civil law jurisdictions appear more receptive to claims of ineffective South Korean nationality than are common law jurisdictions such as the U.K., Canada, and Australia.

Of course, the Refugee Convention is not the only legal mechanism to access protection: complementary protection is available in Western countries under various provisions of domestic and international law. While beyond the scope of this Article, it is worth noting that a significant number of claimants have argued that expulsion to South Korea would not be in the best interests of a particular child, and that they therefore merit humanitarian protection. These arguments have been met with some success in recent Canadian cases.<sup>136</sup> Others have attempted to claim protection under the Convention against Torture (CAT), International Covenant on Civil and Political Rights (ICCPR), and European Convention of Human Rights (ECHR), albeit with little success in reported judgments.<sup>137</sup>

Reports also suggest that in certain countries, some North Koreans have been allowed to remain in their destinations despite serious questions about their identity due to an unwillingness (or inability) of the host country to send them back to South Korea.<sup>138</sup> In fact, there is little public pressure to deport North Koreans, even if they do have South Korean nationality. At the end of the day, one can only have sympathy for those who have fled one of the most oppressive regimes on earth, traversed an “underground railway” through China that is full of threats and danger, and arrived in South Korea, only to find themselves so insecure or discontented that they choose to seek asylum elsewhere. Whatever the legal justification, one hopes that Western societies can find a place for them to restart their lives.

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136. These arguments have met with some success in Canada. *See Lee v. Canada* (Citizenship and Immigration) [2020] F.C. 504, ¶ 65 (Can.) (overturning and remanding a denial of protection because of threat of bullying in South Korea); *Jeong v. Canada* (Citizenship and Immigration) [2019] F.C. 582, ¶¶ 39, 61 (Can.) (visa denial overturned due to a failure to assess the parenting implications of the mother’s potential psychological symptoms upon return); *Shin v. Canada* (Citizenship and Immigration) [2018] F.C. 1274, ¶¶ 10, 24 (Can.) (finding officer erred in best interests of the child analysis by failing to consider the effects on the children of adult applicants’ increased risk of suicide).

137. *See Cha v. Barr*, 815 Fed. Appx. 212 (9th Cir. 2020) (protection under torture convention denied); 7 juli 2020, ECLI:NL:RBDHA:2020:6124 (Neth.) (protection under ECHR denied); AB (North & South Korea) [2015] NZIPT 800642 (Jan. 15 2015) (N.Z.) (CAT and ICCPR protection denied).

138. Min & Son, *supra* note 35, at 13.