



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/07301/2010

THE IMMIGRATION ACTS

**Heard at Field House
On 12th December 2014**

**Decision & Reasons
Promulgated
On 23rd February 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

**MR KYUNG HO KIM
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr G O'Ceallaigh, Counsel

For the Respondent: Mr M Shilliday, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of North Korea who was born on 5th January 1983. He has no siblings and was raised by his mother after his father passed away when he was aged 7. The Appellant and his partner (now his wife) left North Korea and escaped to China in 2006. Using what they believed to be fake passports and with the assistance of an agent the Appellant left Beijing on 18th October 2007 arriving in the UK on 20th October 2007. On 22nd October 2007 the Appellant claimed asylum in the UK.

2. The Secretary of State refused the Appellant's application for asylum in a detailed Notice for Refusal dated 16th December 2009. The factual history relating to the Appellant's claim is set out in considerable detail within that Notice of Refusal at paragraph 6. The basis of the Secretary of State's refusal is set out at paragraph 16 therein where it was considered that under the Constitution of South Korea, as a national of North Korea that the Appellant is entitled to claim citizenship in South Korea and that even if that were not the case the Appellant will be able to seek legal residency in South Korea. The Secretary of State's Notice of Refusal considered that it would be reasonable to expect the Appellant to relocate to South Korea.
3. The immigration history of this matter is lengthy and extensive. Firstly it is accepted by the Secretary of State that it took over two years for the Notice of Refusal to be issued. The Appellant has two children. The eldest now aged 8 arrived here as a baby and the youngest who is aged 5 has been here all her life. The Appellant appealed the Notice of Refusal and the appeal came before Immigration Judge Chana sitting at Hatton Cross on 2nd September 2010. In a determination promulgated on 13th September 2010 the Appellant's appeal was dismissed under the Refugee Convention and on human rights grounds pursuant to Articles 2 and 3 of the European Convention of Human Rights and the Appellant was found not to be in need of humanitarian protection. It was noted in paragraph 57 of the determination that there was no application before the First-tier Tribunal Judge pursuant to Article 8 of the European Convention of Human Rights.
4. On 5th October 2010 Grounds of Appeal were submitted to the Upper Tribunal. Those grounds contended:-
 - (i) That there had been a failure by the First-tier Tribunal Judge to make findings on material matters;
 - (ii) that the judge had materially misdirected himself in law;
 - (iii) that the judge had failed to give reasons or any adequate reasons for a material finding; and
 - (iv) that there had been a material mistake of fact made by the judge as to whether or not there had been a theft by the Appellant of an antique bowl and the material mistake of fact affected the Immigration Judge's view of the Appellant's credibility.
5. On 15th October 2010 permission to appeal to the First-tier Tribunal was granted by Senior Immigration Judge Nichols. In granting permission Judge Nichols considered that it was arguable that the judge had failed to take into account expert evidence before her as to the issues of the risk to the Appellant's family in South Korea from the North Korean government and spies who have infiltrated the area and secondly as to whether or not the Appellant would in fact be granted protection in South Korea. Further it was arguable that the judge had failed to have due regard to the expert

evidence submitted by the Appellant in respect of the likelihood that he would be entitled to South Korean citizenship and that it was also arguable that the judge may have made a mistake of fact in relation to the account the Appellant gave as to his background.

6. On 26th August 2011 Senior Immigration Judge McKee gave directions in this matter. It is interesting to note that Judge McKee starts his directions by stating "it is regrettable that a year has gone by since Judge Chana heard the appeal."

Judge McKee noted that an addendum report of objective evidence had been served by the Appellant dated 2nd March 2011 and that if an error of law was found the report by Christopher Bluth on North Korea could be considered by the Upper Tribunal in the event that an error of law was found. Further the directions stated that should that be established the Tribunal would also be amenable for hearing further oral evidence from the Appellant if his representatives think it necessary and that it would be appropriate for the Tribunal to consider *KK and Others (Nationality: North Korea) CG [2011] UKUT 92 (IAC)*.

7. On 13th October 2011 the appeal came before Deputy Upper Tribunal Judge Harries to determine whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. Judge Harries accepted the submission that the First-tier Tribunal Judge's credibility findings were tainted by errors of fact and gave directions that the hearing was to be resumed on a date to be fixed with a view to the decision being re-made on all issues and at that stage the authority of *KK and Others* would be considered.
8. It is on that basis that the appeal comes before me for re-hearing. The Appellant appears by his instructed Counsel Mr O'Ceallaigh. Mr O'Ceallaigh is extremely familiar with this matter. He is the author of the Grounds of Appeal to the Upper Tribunal and he appeared on the hearing to determine whether or not there was a material error of law in the decision of the First-tier Tribunal Judge. The Secretary of State appears by her Home Office Presenting Officer Mr Shilliday. It is appropriate to mention two other factors. Firstly it is normal when an Upper Tribunal Judge makes an error of law that that judge will then go on to consider either at the original hearing or on a re-hearing the reconsideration of the matter. The administration acknowledge that in this instant case they have confused Deputy Upper Tribunal Judge Harries with myself. This is acknowledged as well by both Mr O'Ceallaigh and Mr Shilliday. Both legal representatives are of the view that it is perfectly appropriate for me to rehear the matter and the appeal will proceed therefore on that basis. The second issue which is of concern to me is the length of time this matter has taken to come before the Tribunal. From the date the Appellant claimed asylum for this matter to reach the Upper Tribunal has taken over seven years. The Appellant arrived here with his wife and young baby. He now comes before the Upper Tribunal on the re-hearing of this appeal having been resident in this country for over seven years, with an 8 year

old child who has been at nursery and school in the UK and has lived virtually all his life here and with a 5 year old child who knows of no other life other than that in the UK. Such delays are completely unacceptable. Article 8 is now raised before the Upper Tribunal and this is accepted by Mr Shilliday. It is against that background that this appeal now comes before me for reconsideration.

The Law

9. The law is now to be found in two authorities. *KK and Others (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC)*. That case is authority for the following propositions

- “(a) The law and the constitution of South Korea (ROK) do not recognise North Korea (DPRK) as a separate State.
- (b) Under South Korean law, most nationals of North Korea are nationals of South Korea as well, because they acquire that nationality at birth by descent from a (North) Korean parent, and fall therefore within category (i) in 1(a) above.
- (c) South Korea will make rigorous enquiries to ensure that only those who are its nationals are recognised as such but the evidence does not show that it has a practice of refusing to recognise its nationals who genuinely seek to exercise the rights of South Korean nationals.”

10. That authority was further considered by *GP and Others (South Korean Citizenship) North Korea CG [2014] UKUT 00391 (IAC)*. That case determined

- “(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."

Evidence

11. The Appellant confirms and adopts his witness statements including his additional witness statement dated 5th December 2014. The Appellant's wife Wha Kim further confirms and adopts her witness statements including her additional witness statement of 2nd December 2014. Neither Mr O'Ceallaigh in requesting further evidence-in-chief nor Mr Shilliday on behalf of the Secretary of State seeks to challenge these witness statements or put further questions to the Appellants.

Submissions/Discussions

12. Mr O'Ceallaigh starts his submissions by relying on the fact that the Appellant's claim both as a refugee and pursuant to Article 3 of the European Convention of Human Rights are dealt with in the current country guidance authorities and that the report of Dr Andrew Mason dated 13th April 2012 confirms that the Appellant has scars consistent or highly consistent with his account of torture and that Dr Mason has considered that it would be hard to conceive of a way in which some of the injuries could have been caused other than the manner described and by torture.
13. He further submits the question whether the Appellant can lawfully be returned to South Korea must include whether such return is compliant with the Refugee Convention and Article 3 ECHR in circumstances where that would place the Appellant's mother at risk in North Korea and submits that returning the Appellant to South Korea in the current circumstances would or might result in the death of his mother and that therefore amounts to persecutory treatment, or exposes him to a risk of persecution for a Convention reason or amounts to ill-treatment for the purpose of Article 3. He relies on the expert evidence submitted and in particular referenced that since February 2010 the North Korean government has been engaged in a sustained campaign to clamp down on refugees and that it is targeting families of defectors and is conducting house to house surveys to verify the people registered at an address actually live there. He points out that the objective evidence states that families unable to explain the absence of individuals are subject to arrest and possibly severe punishment including execution. He submits in such circumstances that the Appellant's mother would be exposed to considerable risk and further the objective evidence indicates that there are spies from North Korea operating within South Korea and that the family unit would be exposed to such spies on return when they come to seek citizenship and residence following a de-briefing by the Ministry of Unification.
14. So far as the Appellant's claim pursuant to Article 8 is concerned he points out that this case pre-dates the July 2012 amendments and the incorporation of Article 8 claims within the Immigration Rules. He points out that the Appellant's children have been in the UK for some seven years one having entered at the age of 1 having been born in China and the other having spent the whole of her life in the UK. He submits the whole

family including the children have no links with South Korea and the children would be effectively exiled. He submits that the Appellant's claim should be allowed both on asylum and under the European Convention of Human Rights.

15. Mr Shilliday responds by pointing out that following the country guidance authorities it is clear that the Appellant is not a refugee because it is possible to return him to South Korea. The Secretary of State's position is that if South Korea refused to accept him then the Appellant would be a refugee. So far as the risk of return affecting his family is concerned to the extent that it is alleged it constitutes a breach of Article 3 of ECHR he asked me to find that there are no authorities to support such a contention.
16. He does acknowledge that the Appellant has a strong claim pursuant to Article 8 of the European Convention of Human Rights and he does not take the point that the Appellant is here unlawfully but he asks me to give little weight to the Appellant's private life pointing out that the Appellant and his family could reintegrate into South Korean society. He submits that the position regarding the eldest child falls to be considered under Section 19 of the Immigration Act 2014 and that the Appellant would be returning to a country where he speaks the language and that it is appropriate to apply a reasonableness test as to whether or not he should return. He asked me to refuse the appeal.

Findings

17. It is always necessary to look at the evidence in the round. This Appellant arrived in the United Kingdom over seven years ago and through a series of delays none of which were of the Appellant's making it is only now that the Appellant's appeal for re-hearing of this matter comes before the Upper Tribunal. It is impossible not to look at this case in the context of such delays and the effects that that has upon the whole family. The Appellant's case in many ways is completely different to that that it was when he arrived some seven years ago. At that time neither of the country guidance authorities were published, the 2014 Immigration Act had not come into effect and importantly one child has now spent seven years in this country and the other five years and so far as both those children are concerned living in the UK is the only life that they have ever known. It does not mean that they can succeed under the Immigration Rules but that their case is meritorious of due and proper consideration under Article 8 of the European Convention of Human Rights. Mr Shilliday on behalf of the Secretary of State is candid enough to acknowledge that such claim is a strong one.
18. It is against that background that I have to look at this appeal and to give due and proper consideration to the objective evidence. It is clear from the guidance given in *GP* that there is no evidence that North Koreans who are returned to South Korea are sent back to North Korea even if they fail the protection procedure and that it is difficult to establish that an

Appellant is entitled to succeed on asylum grounds. Mr O’Ceallaigh seeks to rely on the fact that the objective evidence indicates the presence of North Korean spies in South Korea; the willingness of North Korean spies to identify dissidents/refugees and the willingness of North Korean spies to murder refugees or their family members in North Korea in retaliation for the “treachery” of fleeing.

19. It has to be remembered that this is an Appellant who left North Korea some seven years ago. If the Appellant’s absence alone was to be such as to expose family members to harm and risk then this would undoubtedly have taken place many years ago. I am not satisfied that there is evidence before me that shows that if the Appellant were to return to South Korea whether he or his wife would even apply a lower burden of proof be at risk of being exposed to alleged spies from North Korea or would further be at risk to exposing his mother to retaliatory revenge for having left the country by the North Korean’s authorities. The Appellant it seems to me is in no different position to any Appellant who has left North Korea where there is no specific evidence that such retaliation will take place. In fact because the Appellant left such a long time ago there is probably an even greater likelihood for the reasons set out above that his family members would not be at risk. In such circumstances, having considered all the facts, the objective evidence, the up-to-date authorities, the skeleton arguments and the submission of both legal representatives I am satisfied that the Appellant does not have a well-founded fear of persecution for a Convention reason in that he could be returned to live within South Korea along with family members. The Appellant’s appeals on asylum ground and pursuant to Article 3 of the European Convention of Human Rights are dismissed. Further the Appellant is not in need of humanitarian protection for all the above reasons.
20. However this appeal succeeds pursuant to Article 8 of the European Convention of Human Rights. It would clearly have been much more difficult for the appeal to succeed had the Appellant’s claim for asylum been dealt with promptly on his arrival in the UK. This Appellant has been seeking asylum in the United Kingdom for more than seven years. He has two children one of whom was born in the United Kingdom and has lived here for approximately six years and both children are entirely integrated I am satisfied into UK society. I acknowledge the submissions made both orally and by way of skeleton argument regarding the Appellant’s Article 8 claim by Counsel. Where a child has spent between seven and eight years in the United Kingdom in the absence of countervailing features I am satisfied that removal is disproportionate. This premise is supported by the authorities of *E-A (Nigeria) [2011] UKUT 00315 (IAC)*, *SC (Zimbabwe) [2012] UKUT 00056 (IAC)*, and *EM (Zimbabwe) [2011] UKUT 98 (IAC)*. These cases expand upon the original premise set down in *LD (Zimbabwe) [2010] UKUT 278 (IAC)* which confirm the principle that the welfare of the child as a primary consideration in cases when a child had resided in the UK for seven years normally required regularisation of the immigration position of the family as a whole.

21. I am provided with extensive documentation relating to the progress that the children have made in the UK including the children's reports from respectively Burlington Infant and Nursery School and from Davies Lane Primary School. Up-to-date report cards are also produced and it is clear that the children are progressing extremely well in the UK. To all intents and purposes these children only know one existence namely that as children within the UK. I am satisfied that their best interests clearly require that the family should not be uprooted and transferred to South Korea. The family has no links of any kind with South Korea which are cultural or familial and no member of the Appellant's family has, I am advised, ever been to South Korea.
22. The introduction of the amendment to part 5 of the Nationality, Immigration and Asylum Act 2002 by way of Section 19 of the Immigration Act 2014 and the introduction of Section 117B by way of providing statutory public considerations applicable in all Article 8 cases effectively codified the approach that the judiciary were expected to take prior to the introduction of the Statute. I acknowledge that the maintenance of effective immigration control is in the public interest and that little weight should be given to private life established by a person at a time when the person's immigration status is precarious. The appellant's status in this case has been precarious for a considerable number of years due to the failings not of the Appellants but of the appropriate authorities to deal with their appeals. These are factors to be considered in the proportionality assessment as well as those set out in *Zoumbas v The Secretary of State for the Home Department [2013] UKSC 74* where the Supreme Court acknowledged that the best interests of a child are an integral part of the proportionality assessment under Article 8 but that in making that assessment the best interests of a child must be a primary consideration, although not always the only consideration; and the child's best interests do not of themselves have the status of the paramount consideration.
23. I have given due consideration to the principles set out in *Zoumbas* and I have applied not just on the children's behalf but on the whole family's behalf including the Appellant all the varied factors that it is necessary to consider when making an assessment under Article 8. These stem back to the original principles set out in *Razgar*. In applying all those principles I am satisfied that this is an Appellant whose claim must succeed under Article 8 and consequently the appeal is allowed.

Notice of Decision

The Appellant's appeal on asylum grounds is dismissed.

The Appellant is not in need of humanitarian protection.

The Appellant's appeal pursuant to Article 3 of the European Convention of Human Rights is dismissed.

The Appellant's appeal pursuant to Article 8 of the European Convention of Human Rights is allowed.

The First-tier Tribunal did not make an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. No application is made to vary that order and none is made.

Signed

Date **12th December 2014**

Deputy Upper Tribunal Judge D N Harris

**TO THE RESPONDENT
FEE AWARD**

No application made for a fee award and none is made.

Signed

Date **12th December 2014**

Deputy Upper Tribunal Judge D N Harris