



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: AA/09869/2014**

**Appeal
AA/09870/2014**

THE IMMIGRATION ACTS

**Heard at Field House
On 4th August 2015**

**Decision and Reasons
Promulgated
On 14th August 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

S-I L
(ANONYMITY DIRECTION MADE)

First Appellant

S-J L
(ANONYMITY DIRECTIO MADE)

Second Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr K Abdar, Kesar & Co, solicitors

For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, precluding publication of any information regarding the proceedings which would be likely to lead members of the public identifying the appellants and preserving the anonymity direction

made at first instance because both of the appellants are in minority and there is no public interest in identifying them.

2 This is an appeal by both appellants against the decision of First Tier Tribunal Judge Lingam, promulgated on 26 February 2015 which dismissed both appellants' appeals on asylum grounds.

Background

3 The appellants are brothers. The first appellant was born on 30 August 2000. The second appellant was born on 14 September 2002. They are both nationals of North Korea.

4 On 31 October 2014, the respondent refused both appellants' applications for asylum. The respondent granted discretionary leave to remain to the first appellant until 20 April 2017 and to the second appellant until 30 August 2018 (or alternatively, until contact is made with their family). The respondent accepts the appellants set out a credible claim but believes that the appellants both have a viable option of internal relocation. Relying on KK and ors (Nationality: North Korea) Korea CG [2011] UKUT 00092 (IAC), the respondent believes that the appellants can safely relocate to South Korea.

The Judge's Decision

5 The appellants both appealed to the First Tier Tribunal under Section 83(1) of the Nationality, Immigration and Asylum Act 2002. First Tier Tribunal Judge Lingam ("the judge") dismissed the appellants' appeal against the respondent's decision finding that the appellants could safely relocate to South Korea.

6 Grounds of appeal were lodged and on 23 March 2015, First Tier Tribunal Judge Cruthers gave permission to appeal, stating *inter alia*:

"...the judge should have considered whether it was reasonable to expect these appellants to relocate to South Korea. And arguable that the judge did not factor in any test of "reasonableness""

The Hearing

7 Mr Abdar, for both appellants, submitted that the judge erred in law because the judge did not apply a test of reasonableness and did not consider whether or not it would be unduly harsh for both of the appellants as children to relocate to South Korea in February 2015. Mr Abdar argued that the judge had conflated the test for internal relocation with the test for protection from persecution. He argued that Section 55 of the Borders, Citizenship and Immigration Act 2009 should have formed part of the consideration of reasonableness because, at today's date, the first appellant is 14 years old and the second appellant is only 12 years

old. He accepted that the country guidance cases of KK and others (Nationality: North Korea) Korea CG [2011] UKUT 00092 (IAC) and GP and others (South Korean citizenship) North Korea CG [2014] UKUT 391 (IAC) must be considered, but argued that the only conclusion that could be reached is that sending a 12 year old and a 14 year old, both North Korean nationals, to South Korea where they have no family and no network of support is both unduly harsh and unreasonable.

8 Mr Jarvis for the respondent argued that the findings made by the judge between [24] and [27] were findings which were directed at the question of reasonableness and that those findings addressed whether or not internal relocation to South Korea would be unduly harsh; whilst he accepted that at [27] the judge specifically refers to "*the threshold of persecution for a refugee convention reason*" instead of the test of reasonableness and harshness, he argued that the country guidance case law was against the appellants, that the appellants were not to be left in a war zone but would be taken to a country which would screen and support children who South Korea regard as their own nationals.

Analysis

9 In GP and others (South Korean citizenship) North Korea CG [2014] UKUT 391 (IAC), 28 August 2014 it was held that (i) The UT's country guidance in KK and others (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC) stood, with the exception of paragraphs 2(d) and 2(e) thereof. Paragraphs (2), (3) and (4) of this guidance replaced that given in paragraphs 2(d) and 2(e) respectively of KK; (ii) South Korean law made limited provision for dual nationality under the Overseas Koreans Act and the Nationality Act (as amended); (iii) All North Korean citizens were also citizens of South Korea. While absence from the Korean Peninsula for more than 10 years might entail fuller enquiries as to whether a person had acquired another nationality or right of residence before a travel document was issued, upon return to South Korea all persons from the Korean Peninsula were treated as returning South Korean citizens; (iv) There was no evidence that North Koreans returned to South Korea were sent back to North Korea or anywhere else, even if they failed the 'protection' procedure, and however long they had been outside the Korean Peninsula; (v) The process of returning North Koreans to South Korea was 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 was confined to those for whom documents and/or fingerprint evidence established that they were already known to South Korea as citizens, or who had registered as such with the South Korean Embassy in the United Kingdom. (vi) Applyin MA (Ethiopia) v Secretary of State for the Home Department [2009] EWCA Civ 289, North Koreans outside the Korean Peninsula who objected to return to South Korea must cooperate with the United Kingdom authorities in seeking to establish whether they could avail themselves of the protection of another country, in particular South Korea.

Unless they could demonstrate that in all of the countries where they were entitled to citizenship they had a well-founded fear of persecution for a Refugee Convention reason, they were not refugees; (vii) If they were not refugees, it remained 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; (viii) There was no risk of refoulement of any North Korean to North Korea from South Korea, whether directly or via China. South Korea did not return anyone to North Korea at all and it did not return North Koreans to China. In a small number of cases, Chinese nationals had been returned to China. A small number of persons identified by the South Korean authorities as North Korean intelligence agents had been prosecuted in South Korea. There was no evidence that they were subsequently required to leave South Korea; and (ix) Once the 'protection' procedure had been completed, North Korean migrants had the same rights as other South Korean citizens save that they were not required to perform military service for South Korea. They had 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 required international protection.

10 Paragraph 3390 of the Immigration Rules states:

“(i) The Secretary of State will not make:

(a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or

(b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return. “

11 In SSHD v AH (Sudan) and Others 2007 UKHL 49 the House of Lords pointed out that the test to determine whether internal relocation was available was the test set out in Januzi v SSHD 2006 UKHL 5, namely that the decision maker should decide whether, taking account of all relevant circumstances pertaining to the claimant and his or her country it would be reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him or her to do so. The test was one of great

generality. In applying the test enquiry had to be directed to the situation of the particular claimant; very little was excluded from consideration other than the standard of rights protection which a claimant would enjoy in the country where refuge was sought.

12 The judge considered internal relocation between [22] and [27] of the decision. The judge summarised her findings in the final sentence of [27] and there, states that the facts she has considered are “...*general welfare complaints that do not go far enough to cross the threshold of persecution for a refugee convention reason*”. The judge clearly states that the test that she has applied relates to “*the threshold of persecution*” and is not a test of reasonableness, nor a consideration of whether or not internal relocation would be unduly harsh. I therefore find that the decision is tainted by a material error of law because the wrong test has been applied.

13 The undisputed facts of this case are that both of the appellants are minors and that they are brothers. The respondent accepts that their parents were arrested in China and were handed over to the North Korean authorities and cannot now be traced. It is beyond dispute that both appellants are healthy.

14 GP considers the ability of North Koreans to relocate to South Korea. At headnote 3 of the rubric, it finds that “*all North Korean citizens are also citizens of South Korea*”. It also finds that there is no forced return from South Korea to North Korea. It finds that there is access to resettlement assistance including housing, training and financial assistance but “*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*”.

15 If the appellants were adults, then return to South Korea would be reasonable, but I remind myself of the case of ST. I consider hypothetical return at today’s date. This case comes down to a simple question of whether or not it is reasonable for two children aged 12 and 14 who are separated from their parents to relocate to South Korea, where the case law tells me there is discrimination in social integration, employment and housing.

16 The appellants left North Korea in 2008 and travelled to China. They fled from China at the end of 2013 and arrived in the UK on 1 January 2014. They are now settled with foster parents and are doing well at school. They are children who, on the account which is accepted by the respondent, have endured hardships, poverty, bewilderment and forced separation from their parents. On the account which is accepted by the respondent, the most settled period in their young lives, since 2008, has been the period from 1 January 2014.

17 It is not disputed that North Koreans face societal discrimination in South Korea. Hypothetical removal would take both children from the

environment and routines in which they are now settled (and in which they are now comfortable) and place them through a further period of upheaval with removal to another strange country (even if that is a country which is prepared to welcome them) where they will be made the subject of enquiry and they will face uncertainty whilst attempts are made to resettle them once again. They will face the apprehension of attempting to integrate into an education system, where the background materials indicate they will face discrimination.

18 The simple question is whether or not it is reasonable to force that period of upheaval, uncertainty and the distress of separation from foster parents and friends on two children whose histories indicate vulnerabilities are close to the surface.

19 The conclusion that I reach is that it would both be unduly harsh and unreasonable in the unusual circumstances of these cases to force these two children to repeat the distress of separation and the distress of uncertainty which has already been a repeated feature of their young lives.

Conclusion

20 I therefore find that in the unusual circumstances of this case that internal relocation to South Korea is not a viable option for either of these appellants because, with their accepted history, it would be unreasonable to force further disruption upon them.

Decision

21 The decision of First Tier Tribunal Judge Lingam promulgated on 26 February 2015 contains a material error of law. I therefore set it aside.

22 I remake the decision.

23 Both appeals are allowed on asylum grounds.

Signed

Date 7 August 2015

Deputy Upper Tribunal Judge Doyle