



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/03099/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 December 2018

Decision Promulgated  
On 18 February 2019

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

T L  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the appellant:

Ms K. Burnett of Kesar & Co. Solicitors (Bromley)

For the respondent:

Ms S. Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This appeal considers the laws relating to the admission of citizens of the Democratic People's Republic of Korea ("North Korea") to the Republic of Korea ("South Korea") when a person has committed a serious criminal offence.
2. The background to the appeal was set out in the error of law decision of the Upper Tribunal promulgated on 13 August 2018 (annexed). In summary, the appellant appealed the respondent's decision dated 17 March 2017 to refuse a protection and

human rights claim in the context of deportation proceedings. The respondent made a deportation order after the appellant was convicted and sentenced to seven years' imprisonment for rape.

3. The respondent rejected the appellant's claim to be a North Korean citizen and certified the protection claim under section 72 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). Section 72 of the NIAA 2002 is said to apply for the purpose of the construction and application of Article 33(2) of the Refugee Convention. Where there is any ambiguity, section 72 must be construed in accordance with the Refugee Convention: *EN (Serbia) v SSHD* [2010] 1 QB 633. The effect of the certificate is that the Tribunal must begin substantive deliberation by considering the certificate. If the Tribunal agrees with the rebuttable presumption that the person who has been convicted of a particularly serious crime constitutes a danger to the community of the United Kingdom, it must dismiss the appeal in so far as the appellant relies on a Refugee Convention ground.
4. First-tier Tribunal Judge Broe allowed the appeal in a decision promulgated on 21 December 2017. For the reasons given in the error of law decision the Upper Tribunal set aside the First-tier Tribunal decision. A number of factual findings were preserved. Most importantly, Judge Broe concluded that the appellant was likely to be a North Korean national and would not be entitled to Chinese citizenship. This hearing proceeds on the basis that it is now accepted that the appellant is more likely than not to be a citizen of North Korea and that the only potential country of removal would be South Korea.

## **Legal Framework**

### *Country guidance*

5. The Upper Tribunal considered the issue of admission of North Korean citizens to South Korea in *GP & others (South Korean citizenship) North Korea CG* [2014] UKUT 00391. The headnote summarised the main findings:
  - “(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."

*The Readmission Agreement (2011)*

6. The Upper Tribunal considered the terms of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Korea concerning the Readmission of Persons, which came into force on 01 June 2012 ("the Readmission Agreement"). For the purpose of this appeal, the following provisions of the agreement may be relevant:

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Korea (hereinafter referred to as the “Contracting Parties”),

Based on the friendly relations between the two countries and their peoples,

Intending to effectively counteract illegal immigration into their territories in the spirit of international efforts,

Prompted by the desire to facilitate the readmission into their territories of own nationals who are staying illegally in the territory of the other Contracting Party, in accordance with the general principles of international law, the respective national laws of the two countries, and in the spirit of trust and cooperation, Have agreed as follows:

## SECTION I Readmission of Own Nationals

### ARTICLE 1

1. Each Contracting Party shall readmit persons who do not, or no longer, meet the applicable entry or residence requirements in the territory of the requesting Contracting Party, if proof or prima facie evidence is furnished of the fact that such persons possess the nationality of the requested Contracting Party. 2. Paragraph 1 shall also apply to persons who, after entering the territory of the requesting Contracting Party, have lost the nationality of the requested Contracting Party and have not acquired another nationality or have not at least been promised naturalisation by the requesting Contracting Party.

### ARTICLE 2

1. Proof of nationality shall be deemed furnished through:
- (a) citizenship certificates;
  - (b) passports of any kind (national passports, diplomatic passports, service passports), emergency travel documents; or
  - (c) children’s passports;

In these cases, the person concerned shall be readmitted by the requested Contracting Party without any formalities.

2. Prima facie evidence of nationality shall be deemed furnished through:

- (a) copies of any of the documents proving the nationality of the person concerned as listed in paragraph 1 above;
- (b) driving licences or copies thereof;
- (c) birth certificates or copies thereof;
- (d) results of an interview with the person concerned conducted by the competent diplomatic representatives of the requested Contracting Party; or
- (e) any other document which may help to establish the nationality of the person concerned.

3. The documents listed in paragraphs 1 and 2 above shall suffice as proof or prima facie evidence of nationality even if their period of validity has lapsed.

### ARTICLE 3

1. In the absence of proof as to nationality, readmission shall be governed by a readmission request. Any readmission request is to contain the following information, depending on the availability of documents or the statements of the person concerned to be readmitted:

- (a) an original copy of the fingerprints of the person concerned, his or her gender and claimed date of birth;
- (b) where a copy of fingerprints of the person concerned is not provided as part of the readmission request, the particulars of the person concerned (surname, given names, date of birth, and where possible, place of birth, and the last place of residence in the territory of the requested Contracting Party);
- (c) indication of the means by which prima facie evidence of nationality will be furnished;
- (d) a statement indicating that the person concerned may need assistance, help or care owing to sickness or old age, provided he or she has consented to such statement being made; and
- (e) any protection or security measure which may be necessary in the individual return case.

2. Where a person is to be readmitted in accordance with Article 1(2), the readmission request shall be filed within twelve (12) months after the competent authority of the requesting Contracting Party has learned that person's loss of nationality. If the person concerned lost the nationality of the requested Contracting Party prior to the entry into force of this Agreement, this time limit shall begin to run upon the entry into force of this Agreement.

3. If there are doubts about the prima facie evidence of nationality, within three (3) days after the readmission request is received, representatives of the requested Contracting Party in the territory of the requesting Contracting Party shall interview the person.

4. The requested Contracting Party shall reply to a readmission request without undue delay, and in any event within a maximum period of twenty (20) working days. This time limit shall begin to run on the date of receipt of the readmission request by the competent authority of the requested Contracting Party. Upon expiry of this time limit the readmission shall be deemed to have been agreed to. Upon agreement to the readmission, the person concerned may be immediately returned to the territory of the requested Contracting Party, who will provide the relevant travel document. The requested Contracting Party may consult with the requesting Contracting Party about the number of the persons to be returned within a certain period of time.

5. Upon agreement to the readmission, the requested Contracting Party will at the same time provide the requesting Contracting Party with particulars of the person to be readmitted (surname, given names, and resident registration number or its equivalent).

6. Upon agreement to the readmission, the requested Contracting Party will provide the person to be readmitted with the relevant travel document to be allowed to be readmitted to the territory of the requested Contracting Party if required. The competent authority of the requested Contracting Party will provide the relevant travel document within a maximum of five (5) working days of receipt of a request from the competent authority of the requesting Contracting Party. The validity period of the relevant travel document will be a minimum of twenty (20) working days.

7. The competent authority of the requesting Contracting Party shall inform the competent authority of the requested Contracting Party without any undue delay of the date of return of the person concerned, at the latest three (3) working days prior to the scheduled return.

#### ARTICLE 4

The requesting Contracting Party shall allow the re-entry into its territory without particular formalities of any person readmitted by the requested Contracting Party if it is established, within a period of three (3) months after the readmission of the person concerned into the territory of the requested Contracting Party, that the requirements for readmission by the requested Contracting Party under Article 1 were not met.

*The Protection and Settlement Act (1997)*

7. In *GP & Others* the Upper Tribunal also considered the terms of the North Korean Refugees Protection and Settlement Support Act 1997 ("The Protection and Settlement Act"). The Upper Tribunal made clear that this provision was distinct from the Refugee Act 11298/2012, which incorporated the provisions of the Refugee Convention into South Korean law from July 2013. The evidence showed that the South Korean authorities did not consider the Refugee Act to be relevant to the status of North Korean migrants, who are considered to be South Korean by birth and are therefore not "outside the country of their nationality" for the purpose of Article 1A(2) of the Refugee Convention [21]. It is clear from the findings made in *GP & Others* that the "protection procedure" discussed in that case is a separate procedure arising from the provisions of The Protection and Settlement Act specifically relating to North Koreans and is distinct from protection procedures under the Refugee Convention. The following sections of The Protection and Settlement Act may be relevant:

**Article 1 (Purpose)**

The purpose of this Act is to specify such matters relating to protection and support as are necessary to help North Korean residents defecting from the area north of the Military Demarcation Line (hereinafter referred to as "North Korea") and desiring protection from the Republic of Korea, to adapt themselves to, and settle down as quickly as possible in, all spheres of their life, namely, political, economic, social and cultural life.

**Article 2 (Definitions)**

For the purpose of this Act,

1. "Defecting North Korean residents" mean persons who have their residence, lineal descendants, spouses and workplaces in North Korea and who have not acquired any foreign nationality after defecting from North Korea.
2. "Protected persons" mean defecting North Korea residents who are provided care and support pursuant to this Act.
3. "Settlement support facilities" mean facilities set up and operated to provide protection of and settlement support for protected persons pursuant to the provision of Article 10, Paragraph 1.
4. "Protection money or articles" mean money or goods paid, delivered or lent to protected persons pursuant to this Act

**Article 3 (Scope of Application)**

This Act shall apply to defecting North Korean residents who have expressed their intention to be protected by the Republic of Korea.

**Article 4 (Basic Principles)**

1. The Republic of Korea shall provide protected persons with special care on the basis of humanitarianism.
2. Protected persons shall strive to lead a healthy and cultural life by adapting themselves to the free and democratic legal order of the Republic of Korea.

**Article 5 (Criteria for Protection, etc.)**

- (1) The criteria for the provision of the care of and support for protected persons shall reasonably be determined in consideration of their age, composition of the household, school education, personal career, self-supporting ability, health conditions and personal possessions.
- (2) The protection and settlement support stipulated under this Act shall, as a matter of principle, be provided on the basis of the individual, but may, where deemed necessary, be given on the basis of the household.
- (3) Protected persons shall be provided with care for one year at settlement support facilities and for two years at the place of residence. However, where there exist special grounds, the respective period of protection may be curtailed or extended following the deliberations by the Consultative Council on Defecting North Korean Residents as stipulated under the provision of Article 6.

.....

**Article 7 (Application for Protection)**

- (1) Any Person who has defected from North Korea and desires to be protected under this Act shall apply for protection to the head of an overseas diplomatic or consular mission (including the commander of a military unit of different levels. This shall hereinafter be referred to as "head of an overseas diplomatic or consular mission, etc.").
- (2) The head of an overseas diplomatic or consular mission, etc. who receives such an application for protection as stipulated under the provision of Paragraph 2 shall without delay inform the fact to the Minister of National Unification and the Director of the Agency for National Security Planning via the head of the central administrative agency to which he belongs.
- (3) The Director of the Agency for National Security Planning notified pursuant to the provision of Paragraph 2 shall take provisional protective measures or other necessary steps and shall without delay inform the Minister of National Unification of the result.

**Article 8 (Decision on Protection, etc.)**

- (1) The Minister of National Unification shall, when he receives such a notice as stipulated under the provision of Article 7, Paragraph 3, decide on the admissibility of the application for protection following the deliberations of the Consultative Council. However, in the case of a person who is likely to attest national security to a considerable extent, the Director of the Agency for National Security Planning shall decide on the admissibility of the application, and inform or notify the Minister of National Unification and the protection applicant of the decision without delay.
- (2) Where the Minister of National Unification has decided on the admissibility of an application pursuant to the provision of the text of Paragraph 1, he shall without delay inform the head of an overseas diplomatic or consular mission, etc. via the relevant central administrative agency of the decision, and the head of an overseas diplomatic and consular mission, etc. informed as such shall without delay notify the applicant of the decision.



**Article 9 (Criteria for a Protection Decision)**

In determining whether or not to provide protection pursuant to the provision of the text of Article 8, Paragraph 1, such persons as stipulated in the following Subparagraphs may not be determined as protected persons.

1. International criminal offenders involved in aircraft hijacking, drug trafficking, terrorism or genocide, etc.
2. Offenders of nonpolitical, serious crimes such as murder, etc.
3. Suspects of disguised defection
4. Persons who have for a considerable period earned their living in their respective country of domicile; and
5. Such other persons as recognized by the Presidential Decree as unfit for the designation as protected persons.

**Decision and reasons**

8. The appellant appealed the respondent's decision dated 17 March 2017 to refuse a protection and human rights claim in the context of deportation proceedings. Following changes made to Part V of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002") by the Immigration Act 2014 ("IA 2014"), the appellant can only appeal on the ground that his removal would breach the United Kingdom's obligations under the Refugee Convention or that his removal would be unlawful under section 6 of the Human Rights Act 1998.

*Refugee Convention*

9. The respondent certified the protection claim under the Refugee Convention with reference to section 72 of the NIAA 2002. The effect of the certificate is that there is a rebuttable statutory presumption that the person is a danger to the community. The Tribunal must begin substantive deliberation by considering the certificate. If the Tribunal, after having considered evidence in rebuttal, agrees with the presumption that the person is a danger to the community then it must dismiss the appeal in so far as the appellant relies on Refugee Convention grounds.
10. First-tier Tribunal Judge Broe heard from the appellant and considered the evidence put forward to rebut the statutory presumption that he is a danger to the community. He considered the assessment in the OASys report. Based on this evidence he concluded "the appellant has not rebutted the presumption" [26]. That finding is not challenged. The Upper Tribunal found that the judge erred by going on to consider the exceptions to deportation under section 33 of the UK Borders Act 2007 ("UKBA 2007"). A certificate made under section 72 NIAA 2002 applies to all appeals brought on protection grounds whether they involve a deportation decision or not. The judge found that the appellant failed to rebut the statutory presumption that he is a danger to the community. Section 72(10)(b) states that the Tribunal must dismiss the appeal in so far as it is brought on Refugee Convention grounds. Accordingly, the Refugee Convention element of the appeal is dismissed.

*Human Rights*

11. The parties agreed that the appeal is narrowed solely to human rights grounds.
12. No arguments were put forward to suggest that the appellant would be at risk of Article 3 ill-treatment in South Korea either as a North Korean citizen or during the protection procedure process. The Tribunal in *GP & Others* made clear that there is no such risk. The parties agreed that the country guidance in *GP & Others* remained relevant, but did not deal with the specific issue raised in this case, which is whether a person with a serious criminal conviction could be removed to South Korea under the Readmission Agreement and/or the protection procedure for North Koreans under the Protection and Settlement Act.
13. On behalf of the appellant, Ms Bennett relied on the expert opinion of Professor Christoph Bluth and argued that Article 9(2) of the Protection and Settlement Act indicated that the appellant would not be admitted under the protection procedure because he had committed a serious criminal offence. If the appellant would not be admitted by South Korea then the only other country of removal would be North Korea. Removal to North Korea would amount to a breach of Article 3.
14. On behalf of the respondent, Ms Cunha argued that the appellant could rely on the readmission and protection procedure, which would determine his admissibility to South Korea.
15. Ms Bennett pointed to a Home Office Monthly Progress Report to Detainees dated 24 January 2018, which stated that the appellant's fingerprints were sent for checks "with Korea" and had come back with "negative results". The evidence is somewhat vague, but it is reasonable to infer that the only checks that the respondent is likely to have made would be with the South Korean authorities because no attempt would be made to remove the appellant to North Korea. Given that the appellant was not born in South Korea and does not claim to have ever lived there, it is unsurprising that the South Korean authorities have no record of him. However, *GP & Others* makes clear that the South Korean government considers North Koreans as nationals of South Korea.
16. The Readmission Agreement makes bilateral arrangements between the UK and the South Korean governments for the readmission of their nationals. The Readmission Agreement applies to all nationals of South Korea. The Readmission Agreement requires proof or *prima facie* evidence of nationality. In this case the appellant could not provide official documentation as evidence of South Korean nationality. Article 2(2)(d) is likely to apply whereby his nationality would have been determined by way of an interview conducted by the competent diplomatic representative of South Korea ("the requested Contracting Party").
17. Article 3 of the Readmission Agreement provides, in the absence of proof of nationality, that readmission shall be governed by a readmission request. It is unclear

from the limited information provided in the Monthly Progress Report whether the Secretary of State made a formal readmission application to the South Korean authorities. Although there is an indication that a copy of the appellant's fingerprints may have been sent to the South Korean authorities, no action appears to have been taken, according to Article 2(2)(d) and Article 3(3) of the Readmission Agreement, for a diplomatic representative of the South Korean authorities to interview the appellant. It is unclear from the evidence whether the Secretary of State has taken any formal steps under the Readmission Agreement to establish whether the South Korean authorities might accept the appellant as a national.

18. Pursuant to the Court of Appeal decision in *MA (Ethiopia) v SSHD* [2009] EWCA Civ 289 the appellant's representative sent correspondence to the South Korean embassy on 03 October 2018. The correspondence did not ask about his admission under the Readmission Agreement, but focused on whether he would be permitted to enter and reside in South Korea under the protection procedure outlined in the Protection and Settlement Act given that (i) he had been outside South Korea for more than 10 years; and (ii) he had been convicted of a serious crime in the United Kingdom. At the date of the hearing, there had been no response from the South Korean embassy.
19. The Tribunal in *GP & Others* acknowledged Professor Bluth's expert knowledge of South Korea. In that case his evidence appeared to be focused on the likelihood of admission under the Protection and Settlement Act rather than the Readmission Agreement. In his opinion the South Korean authorities would not accept people who had been outside South Korea for a period of 10 years who did not express an intention to be protected by South Korea. After having considered all the evidence before it, including the terms of the Readmission Agreement, the Upper Tribunal found that the fact that a person had been outside South Korea for a period of over 10 years did not affect the likelihood of admission unless they had acquired another nationality [125]. It mattered not whether a person expressed an intention to be protected under Article 3 of the Protection and Settlement Act because the Readmission Agreement provided a mechanism for return "which is not dependent on the genuineness of the individual's wish to live in South Korea" [104]. Professor Bluth's evidence in that case did not touch on whether the authorities might refuse admission under Article 9 of the Protection and Settlement Act on public interest grounds. The only mention of Article 9 appears to be in the summary of the evidence given by Dr Hwang in Appendix C of the decision where it was noted that one of the potential exclusions from admission under the Protection and Settlement Act is serious criminal convictions [100-103].
20. Professor Bluth has written two reports in this case. The first report is dated 20 November 2017. Much of the first report relates to questions that have already been determined such as the appellant's likely nationality and risk on return to North Korea or China. Section 5 of the report discusses the attitude of the South Korean authorities towards admission under the protection procedure. Professor Bluth explains that there is a difference between statements of principle and the practice of the South Korean authorities illustrated by information he has obtained from various

contacts. He explains why the South Korean authorities are reluctant to encourage too many defections from North Korea and are wary about infiltration by North Korean government agents. He repeats his opinion that those who do not express a genuine intention to live in South Korea and those who have been outside South Korea for more than 10 years are likely to be refused admission under the protection procedure.

21. Professor Bluth states, even if the South Korean authorities accept that there is a *prima facie* case to indicate that a person is North Korean and might be eligible for admission to South Korea, the application will be subject to in-depth consideration and decisions will be made on a case-by-case basis with the ultimate approval of the Minister of Unification. The South Korean authorities retain discretion to check that a person has not acquired status elsewhere and is not a criminal or a North Korean government agent.
22. At [5.4.23] Professor Bluth discusses the Readmission Agreement. He states that the agreement applies to people who have already been in South Korea as implied by the term 'readmission'. He states:

"5.4.23 ..... The clear and unambiguous understanding in Seoul is that the agreement applies to persons who have already been in South Korean (sic) and who have already been accepted as eligible for South Korean citizenship. This issue is determined by fingerprint evidence, on the basis that persons who have gone through the process of vetting by the National Intelligence Service have been fingerprinted. When asked what would happen if the Korean Embassy was given the details of North Korean refugees for whom there were no fingerprints who did not want to come to South Korea or become citizens of the Republic of Korea, the answer was that these persons would not be admitted and would have to remain in the United Kingdom or move to a third country.

5.4.24 The manner in which the agreement has operated so far is that persons whose fingerprints have not been identified have been rejected. This means that the agreement cannot be used for persons who have never yet been admitted to the Republic of Korea. But it also means that all those North Korean migrants who have applied for asylum and whom the UK government seeks to deport to South Korea will not be accepted if they have not already been to South Korean (sic) and granted status there. This will equally apply to persons claiming to be North Korean in other countries."

23. The source of the information contained at [5.4.23] is unclear. The footnote state "Communication with Kwang Ho-chun, 21 December 2012" but this fails to explain who the source is. It is also out of date. It is difficult to place weight on this assertion without knowledge of the source's position in order to assess the reliability of the information.
24. The second report is dated 14 June 2018. It was prepared in response to the Secretary of State's grounds of appeal. Professor Bluth makes clear that he is not a legal expert but is a country expert with knowledge of the practices of the South Korean

government. Professor Bluth repeats the assertion that the Readmission Agreement only applies to those who are already known to the South Korean authorities and refers to “recent case law” to support this proposition. The case law referred to in the footnote cites a First-tier Tribunal reference number. No further information is provided. The citation of a First-tier Tribunal decision is not precedent and does not establish any binding principles.

25. Professor Bluth goes on to outline anecdotal evidence from his own experience of dealing with North Korean asylum cases. He says that in every case he has been involved with where a North Korean went to the South Korean Embassy in the United Kingdom they have “been sent away empty-handed”. The report goes on to state that in 2009 the South Korean government “changed its rules and now will not provide support to any person claiming to be North Korean who has applied for refugee status in another country as this is considered that they wish to establish themselves in another country and acquire the nationality of that country, thereby giving up their Korean nationality”. Again, the source of this information is unclear. The footnote cites an article from the Korea Herald dated 15 September 2010, which predates the Readmission Agreement. It is unclear what “rules” this aspect of the report is referring to. Finally, Professor Bluth points out that Article 9 of the Protection and Settlement Act makes clear that an application for settlement under the protection procedure can be refused if a person has committed a serious criminal offence. Although the Secretary of State now accepts that the appellant is likely to be North Korean, it does not follow that the South Korean authorities will take the same view.

### Conclusion

26. The Readmission Agreement is a bilateral mechanism for the United Kingdom and South Korean governments to return people who are accepted to be *prima facie* nationals. Nothing on the face of the wording of the agreement confines its application solely to those who have already resided in South Korea or who are already registered with the South Korean authorities. The wording of the agreement makes clear that further enquiries can be conducted by an official of the “requested Contracting Party” to assess whether the relevant country, in this case South Korea, is satisfied that the person should be admitted.
27. Professor Bluth is correct to point out that it is within the realm of South Korean law, and at the discretion of the South Korean authorities, whether a North Korean national qualifies for admission under the Protection and Settlement Act. It would be open to the South Korean authorities to take a different view of the appellant’s nationality. Even if the South Korean authorities accept that the appellant is a North Korean national it is a matter for them whether he should be excluded from settlement under Article 9 of the Protection and Settlement Act because he has been convicted of a serious criminal offence in the UK. Clearly there could be grounds upon which the South Korean authorities might decide to refuse settlement given the serious nature of the offence.

28. The difficulty is in the way in which this case has been put. The arguments put forward with reference to the expert evidence assume that if there are grounds to believe that the appellant may be refused admission, either under the terms of the Readmission Agreement, or could be refused settlement on grounds of his criminal conviction under the Protection and Settlement Act, then he cannot be removed and this would give rise to a breach of his human rights.
29. However, the appellant can only appeal on the ground that his removal would be unlawful under section 6 of the Human Rights Act 1998. The wording of section 84 of the NIAA 2002 presupposes a theoretical removal from the UK. It is now accepted that the only prospect of removal is to South Korea. It is upon this basis that the human rights claim must be assessed. There is no suggestion that the conditions the appellant might face on return to South Korea would amount to a breach of his human rights. Indeed, the Tribunal in *GP & Others* made clear findings that the conditions involved in the protection procedure would not amount to a breach of human rights [117]. The Tribunal also recognised that removal is not possible until such time as a South Korean travel document is issued under the Readmission Agreement [108].
30. No evidence was put forward relating to the appellant's ties to the UK or his personal circumstances to indicate that there are 'very compelling circumstances' to outweigh the undoubted public interest in deportation under Article 8 given that the appellant was sentenced to a period of seven years' imprisonment for a serious offence: see paragraph 398 immigration rules and section 117C(6) NIAA 2002. The sole argument is that the appellant is not likely to be admitted to South Korea.
31. The evidence before me indicates that the Secretary of State may have sent fingerprints to the South Korean authorities but it is unclear whether a formal request was made under the Readmission Agreement. Professor Bluth's evidence goes to the assessment that is likely to be undertaken by the South Korean authorities under the Protection and Settlement Act. In his opinion, it is unlikely that the South Korean authorities would agree to admit the appellant. Whether there is, as a matter of fact, a practical obstacle to the appellant's removal to South Korea is yet to be determined.
32. I am bound to follow the Court of Appeal decision in *HF (Iraq) & Others v SSHD* [2014] 1 WLR 1329, which considered whether practical obstacles to return might give rise to protection issues.

"89. The question which then potentially arises is how someone will be treated who is forcibly returned without the appropriate document. The Upper Tribunal concluded that this would not happen because the Secretary of State had stated that in practice she would not return anyone to Iraq who did not have the relevant identity documentation. It was suggested that this was her "policy" but in fact this is something of a misnomer: the policy was effectively forced upon her. Her evidence, as recorded

by the Upper Tribunal, was that "without the necessary documentation there was no guarantee that they would be accepted by the Iraqi authorities in Baghdad."

90. It was for this reason that the Upper Tribunal considered that the issue was now academic: with the appropriate documentation, the appellants would not be at risk on return from ill-treatment arising out of detention; without it, they would not be returned. It was of course within their control which category they fell into.

...

95. Mr Fordham submits that ... the Upper Tribunal ... could not simply rely on an assurance from the Secretary of State that the appellants would not be returned. Whilst it is true that the individual would not be at risk whilst the Secretary of State's policy was in place, nonetheless the Tribunal was obliged to ask itself the hypothetical question whether there would be a real risk of ill treatment constituting either a breach of Article 3 or entitling the appellants to humanitarian protection. The appellants were entitled to have their position determined not least because it affected their status, and hence their rights, whilst they remained in the United Kingdom.

96. Moreover, Mr Fordham submitted that the fact that they could secure safe return by obtaining the relevant documents was not to the point. It was immaterial to the Tribunal's decision that the appellants may only be at risk because of their refusal to co-operate. That is similarly the position with certain sur place cases, such as those where an asylum seeker deliberately participates in activities in the UK which are designed to catch the attention of the home state and thereby place him at risk on return. If there is a real risk of serious harm on return, the applicant should be granted asylum even though he has by his own actions deliberately chosen to bring that risk upon himself, perhaps specifically to secure asylum.

97. I agree with Mr Fordham that if the reason for the Upper Tribunal declining to deal with the matter was simply that the Secretary of State had a policy not to return persons who could be returned but would be at risk of ill treatment in their home state, that would constitute an error of law, essentially for the reasons elucidated in JI.

98. However, Mr Eadie submits that this is a misrepresentation of the true position. His contention is that, properly analysed, the practice of not returning those without the appropriate travel documents is not a voluntary policy of the Secretary of State at all. The lack of documentation creates an impediment to return which the Secretary of State cannot circumvent. Iraq will not receive anyone from the UK without the relevant travel document. If an unsuccessful applicant for asylum refuses to co-operate to obtain the laissez passer document, he is in precisely the same situation as any other failed asylum seeker whom the Secretary of State is unable to return for one reason or another. The assurance of the Secretary of State that she would not return someone to Iraq without the relevant documents is of no special significance; it simply reflects realities. The general position of someone who cannot be returned, whether because he cannot obtain the requisite documents or for some other reason, is that he may be detained or granted temporary admission pursuant to section 67 of the Nationality, Immigration and Asylum Act 2002, provided at least there remains a possibility of his being returned at some stage in the future: see *R (on the application of AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310. As Lord Justice Sedley pointed out in that case, the condition of someone with that status is harsh, although being granted temporary admission does at least allow the unsuccessful asylum-seeker to be free of actual detention.

99. Mr Eadie submits that these appellants are precisely in the situation of any other failed asylum seekers who would not be at risk in their own state but cannot for technical reasons be returned home. The existence of such technical difficulties does not entitle them to humanitarian protection. Article 8(3) of the Qualification Directive makes that plain where, as here, relocation is an option, and it is a fortiori the case where they are not at risk in their home area. Moreover, they can hardly be in any better position than any other asylum seeker who cannot be returned for technical reasons given that the technical difficulty stems from a deliberate refusal to co-operate.

100. Mr Eadie says that this is not like *Ji* or the *sur place* cases where, if returned, the appellants would potentially face ill-treatment meeting Article 3 standards. They can only be returned with the necessary documentation, and if and when the impediment caused by lack of the relevant documentation is overcome, they will be safe on return.

101. In my judgment, this analysis is correct. I accept, as Mr Fordham submits, that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what would happen on return if that is simply not possible for one reason or another. Section 67 of the 2002 Act envisages that there may be practical difficulties impeding or delaying making removal arrangements, but those difficulties do not alter the fact that the failed asylum seeker would be safe in his own country and therefore is in no need of refugee or humanitarian protection. I agree with the Secretary of State that the *sur place* cases are distinguishable because there the applicant could be returned and would be at risk if he were to be returned. They are not impediment to return cases.” (emphasis added)

33. I see no reason why these principles should not apply to human rights issues as well. The question that the Tribunal must consider is whether theoretical removal to South Korea would be unlawful under section 6 of the Human Rights Act 1998. For the reasons given at [29-30] above I conclude that removal would not be unlawful on human rights grounds.
34. The evidence indicates potential impediments to the appellant’s removal to South Korea, but there is no evidence to show that the South Korean authorities have, as a matter of fact, refused to admit the appellant. The Secretary of State accepts the First-tier Tribunal finding that the appellant is likely to be a North Korean national, but this is a fairly recent development. It is unclear exactly what steps the Secretary of State has taken to arrange for his removal under the Readmission Agreement although there is some suggestion that his fingerprints were sent to the South Korean authorities. At this stage, there is insufficient evidence before the Upper Tribunal to conclude that the appellant cannot be removed in practice or to show that any uncertainty in the appellant’s status has caused sufficient detriment to give rise to a potential human rights claim. If, after further prompt investigation, the Secretary of State takes the view that there are practical impediments to the appellant being removed because the South Korean authorities refuse to admit him under the Readmission Agreement, then he will need to take a view as to whether it is appropriate to grant leave to remain under relevant policies or outside the rules.



35. The appeal under the Refugee Convention must be dismissed because the appellant failed to rebut the presumption that he is a danger to the community.
36. The appeal brought on human rights grounds is dismissed because the proposed removal to South Korea would not be unlawful under section 6 of the Human Rights Act 1998.

### DECISION

The appeal is dismissed on Refugee Convention and Human Rights grounds

Signed  Date 12 February 2019  
Upper Tribunal Judge Canavan

## **ANNEX**



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

Appeal Number: PA/03099/2017

### **THE IMMIGRATION ACTS**

**Heard at Field House  
On 18 June 2018**

**Decision Promulgated**

.....

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**T L**

**(ANONYMITY DIRECTION MADE)**

**Respondent**

#### **Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

#### **Representation:**

For the appellant:

Miss Z. Ahmad, Senior Home Office Presenting Officer

For the respondent:

Ms K. Bennett of Kesar & Co. Solicitors (Bromley)

## **DECISION AND REASONS**

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal, but technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.
2. The appellant appealed the respondent's decision dated 17 March 2017 to refuse a protection and human rights claim in the context of deportation proceedings. The appellant claimed to be a national of North Korea although he spent most of his life in China. He said that after his parents died he was forced to beg and thief for a gang master. He says that he was brought to the UK by smugglers in 2000, when he was only 18 years old. He was forced to work. On 15 November 2013 the appellant was convicted of rape and sentenced to seven years' imprisonment. The Secretary of State did not accept that the appellant was a national of North Korea as claimed. The appellant said his father was Chinese, so it was likely that he could obtain citizenship by descent. The respondent rejected the appellant's claim that he would be at risk in China because of his involvement with the Falun Gong. Even if he was a North Korean national, it was likely that he could be removed to South Korea: see *GP & Others (South Korean citizenship) North Korea* [2014] UKUT 391.
3. The respondent certified the Refugee Convention claim with reference to section 72 of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"). The consequence of the certificate is that a First-tier Tribunal judge must start by considering whether the presumption that the person has been convicted of a particularly serious crime and constitutes a danger to the community has been rebutted. If the Tribunal finds that the presumption has not been rebutted it must dismiss the appeal in relation the Refugee Convention ground.
4. First-tier Tribunal Judge Broe ("the judge") allowed the appeal in a decision promulgated on 21 December 2017. The judge began his assessment by considering section 72 of the NIAA 2002 [23-24]. He considered the OASYs report, which assessed the appellant to be a high risk of harm in the community. He continued to deny the offence and lacked motivation to complete any offence focussed work [25]. The judge concluded:

"26. Against that background I am satisfied that the appellant has not rebutted the presumption and that the automatic deportation provisions of the UK Borders Act 2007 apply. I note however that s.32(4) and (5) are subject to the exception provided in s.33(2) where removal would breach convention rights or the UK's obligations under the Refugee Convention."
5. The judge went on to find that he could only place limited weight on the appellant's evidence, which had been inconsistent and was therefore unreliable. He went on to consider the report prepared by Professor Bluth. He noted that his evidence was of assistance to the Upper Tribunal in *GP & Others* [28]. He attached "considerable

weight” to Professor Bluth’s report. He accepted Professor Bluth’s reasons for concluding that the appellant is likely to be North Korean [29]. He also accepted Professor Bluth’s finding that the appellant would not be entitled to Chinese citizenship and concluded that the appellant could not be returned to China [30]. The sole issue was whether the appellant could be returned to South Korea.

6. The Secretary of State does not seek to challenge the judge’s finding relating to the appellant’s nationality. It is therefore accepted that he is likely to be a North Korean national. Nor has the judge’s finding that the appellant could not be removed to China because of the risk of refoulement to North Korea been challenged. The sole focus of the grounds of appeal is whether, in the alternative, the appellant might be accepted in South Korea.
7. The Secretary of State appeals the First-tier Tribunal decision on the following grounds:
  - (i) The judge erred in failing to follow the country guidance decision in *GP & Others*. The conclusions in Professor Bluth’s expert report were contrary to the findings in *GP & others*. The judge failed to give adequate reasons to explain why the evidence justified a departure from the country guidance.
  - (ii) The second ground, as originally pleaded, was not clearly particularised. Miss Ahmad clarified the ground at the hearing. She argued that the judge erred in allowing the appeal on Refugee Convention grounds when he had found that the appellant had not rebutted the presumption that he is a serious criminal who constitutes a danger to the community under section 72.

### **Decision and reasons**

8. I take the second ground first. The judge’s finding at [26] discloses a clear error of law. Section 72(1) of the NIAA 2002 makes clear that the provision applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention. Section 72(1)(b) states that if the Tribunal agrees that the presumption applies, having given the appellant an opportunity for rebuttal, it must dismiss the appeal in so far as it relies on the ground that the decision would breach the United Kingdom’s obligations under the Refugee Convention.
9. The exception to deportation contained in section 33(2)(b) of the UK Borders Act 2007 (“the UKBA 2007”) is not a separate step in the process. The question of whether the exception to deportation contained in section 33(2)(b) applies is subject to the findings regarding the section 72 certificate. The certificate determines whether the United Kingdom’s obligations under the Refugee Convention would be breached. Article 33(2) of the Refugee Convention allows a signatory state to remove a refugee if they have been convicted by a final judgment of a particularly serious crime and they constitute danger to the community of that country. Having found that the appellant failed to rebut the presumption that he was a danger to the community, the

judge was obliged by operation of statute to dismiss the appeal in so far as the appellant relied on Refugee Convention grounds.

10. Although it was open to the judge to give weight to the expert opinion of Professor Bluth, if he was going to rely on the evidence to allow the appeal, it was necessary to at least engage with the issues raised in the country guidance decision in *GP & Others*. The judge's brief statement that he had been "guided by the findings in GP" was insufficient given the Upper Tribunal's conclusion that most North Koreans would be recognised as citizens in South Korea.
11. It is at least arguable that the country guidance did not make findings on the specific point arising in this appeal, which is whether the appellant's criminal conviction might prevent his admission to South Korea with reference to Article 9 of the North Korean Refugees Protection and Settlement Support Act 1997 ("the Protection and Settlement Act"). The Upper Tribunal in *GP & Others* considered one aspect of the provision and concluded that more than 10 years' residence outside the country would not lead to rejection of a person returning to South Korea. But the Upper Tribunal did not appear to consider the issue of serious criminal convictions.
12. Professor Bluth's report explained in some detail why, in his opinion, the appellant would not be admitted to South Korea. However, some analysis was needed given that some aspects of the report conflicted with the findings in *GP & Others*. For example, at paragraph 5.4.13 Professor Bluth continued to assert that the South Korean government takes the view that anyone who has lived outside the country for more than 10 years without claiming South Korean citizenship would not be accepted. This is contrary to the findings made in *GP & Others*. If the judge was to prefer the evidence of Professor Bluth he needed to give adequate reasons to explain why. In accepting the expert evidence without putting it in the context of relevant country guidance the judge failed to take into account a relevant consideration.
13. It might also be arguable that the appellant may not have the necessary documents to satisfy the readmission agreement procedure. The judge failed to deal with this issue at all. The Upper Tribunal in *GP & Others* reaffirmed the principles outlined by the Court of Appeal in *MA (Ethiopia) v SSHD* [2009] EWCA Civ 289. Professor Bluth acknowledged that the appellant might be interviewed by the South Korean embassy, but no consideration was given to whether the appellant had made out his claim that he would be rejected. While the judge was entitled to consider and give weight to Professor Bluth's evidence, I conclude that his failure to analyse the expert evidence with reference to the issues raised in the country guidance also amounts to an error of law.
14. Both parties suggested that remittal would be appropriate if the Upper Tribunal were to find an error of law in the First-tier Tribunal decision. However, remaking rather than remitting will constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary (see paragraph 7.3 Practice Statement, 23/09/12). This is not a case where it is appropriate to remit the

appeal for a fresh hearing. The judge made important findings of fact that have not been challenged and which should be preserved. It is appropriate to list the appeal for a resumed hearing, at which the Upper Tribunal can consider the outstanding issues relating to the possibility of return to South Korea in more detail and in the proper context of the relevant country guidance.


### **Directions**

15. The Tribunal is conscious of the fact that the appellant remains in detention. However, the appeal will be listed for a resumed hearing on the first available date **after six weeks** to allow time for the appellant to make enquiries with the South Korean embassy regarding his admission in accordance with the principles outlined in *MA (Ethiopia)* if he is so advised. There is no evidence to suggest that the appellant would have anything to fear from the South Korean authorities, but he may have everything to gain if Professor Bluth's opinion is correct.
16. Permission is given for any further evidence relied upon by the parties to be served at least **seven days** before the next hearing.
17. If the appellant's representatives consider that it might be necessary for him to give evidence, they should notify the Upper Tribunal (and the respondent) at least **14 days** before the hearing, including any request for an interpreter.
18. If further expert evidence is to be adduced, or it is intended to call an expert to deal with any outstanding issues, the appellant's representatives should notify the Upper Tribunal (and the respondent) at least **14 days** before the hearing.
19. Both parties are at liberty to apply to amend the directions.

### **DECISION**

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and the appeal will be listed for a resumed hearing

Signed   
Upper Tribunal Judge Canavan

Date 09 August 2018