Neutral Citation Number: [2012] EWCA Civ 114

Case No: C5/2011/0967, C5/2011/0968, C5/2011/0969

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION & ASYLUM TRIBUNAL) THE UPPER TRIBUNAL I&A CHAMBER
REF: AA/03352/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/02/2012

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division

LORD JUSTICE MCFARLANE
and
LORD JUSTICE DAVIS

- -

Between :

SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
SP (NORTH KOREA) & ORS	**Respondents**

- -
- -

Mr Steven Kovats QC (instructed by **Treasury Solicitor**) for the **Appellant**
Mr Manjit Gill QC and **Mr A Khan** (instructed by **Thompson & Co**) for the **Respondent SC**
Mr Mark Mullins (instructed by **Gillman Smith Lee)** for the **Respondents SP** and **KK**

Hearing date: 18 January 2012

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Judgment

Lord Justice Maurice Kay :

1. The Korean peninsula comprises two states: the Democratic People's Republic of Korea (North Korea) and the Republic of Korea (South Korea). Although both states are members of the United Nations and enjoy widespread international recognition, neither recognises the other. SP, SC and KK (the respondents) are nationals of North Korea. SP and SC each left North Korea for China over 20 years ago. They met in China in 1995 and later became partners. In 2007 they moved from China to the United Kingdom and claimed asylum. KK is not connected to them. She left North Korea with her father in about 1987 when she was still a child. They, too, went to China. She remained there for over 10 years before arriving in the United Kingdom in 2008 and claiming asylum. In all these cases, the asylum claims were rejected by the Secretary of State. It is not disputed that, at all material times, the respondents have had and continue to have a well-founded fear of persecution in the event of their being returned to North Korea. If there is no other country to which they can be safely removed, they are entitled to refugee status and associated human rights claims would also succeed. However, the Secretary of State maintains that they can be safely removed to South Korea. Although none of them has ever been to South Korea, they each acquired South Korean nationality at birth pursuant to provisions in the constitution of South Korea and its nationality law. The case for the respondents is that their South Korean nationality is no longer respected by the government of South Korea and, in reality, they cannot be removed to that country.

2. Following refusal of their asylum claims by the Secretary of State, the respondents appealed. Although the appeals were dismissed by an immigration judge, they were later allowed by the Upper Tribunal (the Tribunal) in a single judgment which has been given country guidance status: *KK and others (Nationality: North Korea) Korea CG [2011] UKUT 92 (IAC).* The Secretary of State now appeals to this Court, permission having been granted by Richards LJ.

The Constitution and Nationality Law of South Korea

3. The Constitution of South Korea gives full expression to the refusal of that country to recognise North Korea. Its provisions include the following:

> "Article 2: Nationality
>
> (1) Nationality in the Republic of Korea is prescribed by law.
>
> (2) It is the duty of the state to protect its citizens residing abroad as prescribed by law.
>
> Article 3: Territory
>
> The territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands."

4. The Nationality Act, Article 2, provides that a person falling into stated categories "shall be a national of the Republic of Korea at birth". The categories are:

> "(1) A person whose father or mother is a national of the Republic of Korea at the time of a person's birth;
>
> (2) A person whose father was a national of the Republic of Korea at the time of the father's death, if the person's father died before the person's birth;
>
> (3) A person who was born in the Republic of Korea, if both of the person's parents are unknown or have no nationality."

Article 12 prohibits dual nationality.

5. It is common ground that, through these provisions, all three respondents acquired South Korean nationality at birth in addition to their North Korean nationality (which is not recognised by South Korea).

6. Another South Korean statute should be mentioned at this stage: the Act on the Protection and Settlement Support of Residents Escaping from North Korea 1997. I shall refer to it as "the Protection Act". On the face of it, it provides assistance for those fleeing North Korea "in all spheres of their lives". Its concern is not with the definition of nationality but with the protection of those who have come to South Korea from North Korea. Article 3 provides that only those who have expressed their intention to be protected by South Korea will be eligible for the prescribed protection. Although it does not limit its benefits to those who move directly from North Korea to South Korea, the Protection Act is designed to deny protection to those who have spent a long time in a third country. Article 9 (4) denies it to:

> "Persons who have earned their living for not less than 10 years in their respective countries of sojourn."

In the present case, the Upper Tribunal considered an alternative translation referring to those "who have a living base (or living space) in a certain state for more than 10 years".

7. Notwithstanding the terms of the Constitution and the Nationality Act, the government of South Korea adopts a defensive attitude to those who present as fugitives from North Korea. This is partly because Chinese nationals of North Korean ethnicity often try to present themselves as North Korean nationals with dual South Korean nationality and also because those born in North Korea but who have spent many years in another country (often China) for more than ten years are viewed as likely to have acquired nationality or some form of protection in that other country.

The Refugee Convention

8. The Geneva Convention relating to the Status of Refugees, Article 1A (2), defines a refugee as a person who

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his

> nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country … ”

9. The text then specifically addresses dual nationality:

> "In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

The decision of the Tribunal

10. At the end of its determination, the Tribunal (Mr C M G Ockleton, Vice President, and Senior Immigration Judge Gleeson) summarised their general conclusions about the law as follows (paragraph 90):

> "(a) For the purposes of determining whether a person is 'of' or 'has' a nationality within the meaning of Article 1A(2) of the Refugee Convention, it is convenient to distinguish between cases where a person (i) is (already) of that nationality; (ii) is not of that nationality but is entitled to acquire it; and (iii) is not of that nationality but may be able to acquire it.
>
> (b) Cases within (i) and (ii) are cases where the person is 'of' or 'has' the nationality in question; cases within (iii) are not.
>
> (c) For these purposes there is no separate concept of 'effective' nationality; the issue is the availability of protection in the country in question.
>
> (d) Nationality of any State is a matter for that State's law, constitution and (to a limited extent) practice, proof of any of which is by evidence, the assessment of which is for the court deciding the protection claim.
>
> (e) As eligibility for Convention protection is not a matter of choice, evidence going to a person's status within cases (i) and (ii) has to be on a 'best efforts' basis, and evidence of the attitude of the State in question to a person who seeks reasons for not being removed to that State may be of very limited relevance."

11. The Tribunal then summarised its general conclusions about North and South Korea as follows:

> "(a) The law and constitution of South Korea do not recognise North Korea 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) 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.

(d) South Korean law does not generally permit dual nationality (North Korean nationality being ignored for this purpose).

(e) South Korean practice appears to presume that those who have been absent from the Korean peninsula for more than ten years have acquired another nationality displacing their South Korean nationality; such persons therefore move from category (i) … to category (iii)."

12. Applying these general conclusions to the instant cases, the Tribunal stated (at paragraphs 91-92):

> "The appellants acquired South Korean citizenship at birth, but each of them has been outside Korea for more than ten years. They remain North Korean nationals, but on the evidence before us we are satisfied that South Korea would treat them as persons who had lost their South Korean nationality on the presentation of the acquisition of another nationality. For that reason they have no subsisting or demonstrable entitlement to Korean nationality documents: they would have to re-apply to re-acquire South Korean nationality, and we see no reason to suppose that it would be granted to them as a matter of routine.
>
> The appellants are therefore all persons with one nationality only, that of North Korea. It is common ground that in that case they are refugees. We allow their appeals."

Grounds of appeal

13. On behalf of the Secretary of State, Mr Steven Kovats QC seeks to advance two grounds of appeal. First, he mounts what is essentially a perversity challenge. In his skeleton argument, it is put in these terms:

> "It was irrational for the Tribunal to find as a fact that there was a rule of South Korean law that there was a conclusive presumption that a person who has been absent from the

> Korean peninsula for more than 10 years has acquired the nationality of another State and has in consequence lost his [South Korean] nationality."

14. Secondly, he makes a point about timing. Having referred to the Tribunal's "best efforts" proposition, he submits that it was premature for the Tribunal to make a finding about refugee status in the three appeals before it. In simple terms, unless and until the South Korean authorities have made a decision that an appellant is not a citizen of South Korea, the Tribunal is not in a position to come to such a conclusion itself. In none of the three cases have the South Korean authorities made such a decision.

Ground 1

15. It is now necessary to refer to more of the evidence which underlay the "presumption". The Tribunal had before it a substantial amount of expert evidence adduced on behalf of the appellants. Of particular importance for present purposes were reports from Professor Christoph Bluth, Professor of International Studies at the University of Leeds, and Mr In Ho Song, a lawyer practising in South Korea.

16. The determination of the Tribunal contains lengthy extracts from Professor Bluth's report. I confine myself to these passages:

> "… the manner in which the South Korean authorities approach this 'entitlement' to [South Korean] citizenships has been to adopt a very selective approach to refugees and to discourage defections as much as possible …
>
> In practice, the essential requirements for being accepted as a candidate for citizenship of [South Korea] are that a person can satisfy Article 2 of the Nationality Act and is therefore deemed to be Korean (ie the parents are not Chinese nationals or of other foreign extraction), has lived in Korea and has not been outside the territory of [North Korea] for more than ten years and wishes to become a citizen of [South Korea] …
>
> The South Korean authorities are aware of and used to the fact that many North Koreans do not have any documentation to prove their citizenship or any other part of their biography. Whilst therefore the fact that the appellants do not have such documentation in principle should not prevent them from being accepted as [citizens], in practice the length of their residence in China, their connections to that country … would most likely cause their applications to be refused. These connections to China create a risk that the [South Korean] government will consider that the appellants are Chinese and thus seek to deport [them] to China at the end of the process …
>
> It is not possible to predict the result of an application for refugee status or citizenship in advance with absolute certainty. Nevertheless, it is my considered view that the appellants will

> most likely not be granted either refugee [status] or citizenship by [South Korea]."

Mr In Ho Song stated:

> "… it is almost impossible for North Koreans who have been outside North Korea for more than ten years and applied abroad to get approved entry into South Korea and acquire South Korean citizenship."

17. Mr Kovats submits, correctly in my view, that the practice of the South Korean authorities in "ten years" cases is based on the conflation of Article 9(4) of the Protection Act, which is not a nationality-defining provision, with Article 2 of the Constitution and Article 2 of the Nationality Act, which are the essential nationality-defining provisions. The expert evidence explains the policy reasons underlying this approach – a desire to discourage defections, notwithstanding the provisions of the Constitution, and a concern that some of those presenting as North Koreans may have acquired another nationality during their ten years or more abroad or may not be North Koreans at all but Chinese nationals of North Korean ethnicity.

18. When the Secretary of State had had sight of the expert evidence, she wrote to the South Korean Embassy. We have not seen her letter but from the terms of the subsequent reply it seems to have been a request for "further details of the 1997 Act", *viz* the Protection Act. The reply provided information about South Korea's "policy towards North Korean defectors". It stated that South Korea "in principle accepts all North Korean defectors who, of their own free will, wish to settle" in South Korea (apart from serious criminals). It added:

> "The first and most important criterion in the determination of offering protection and settlement support to North Koreans is to ascertain whether the person in question desires to live in [South Korea]."

Of course, the South Korean authorities do not consider themselves bound by any decision of the Secretary of State or finding of a foreign Tribunal that a person is from North Korea or about his life since leaving North Korea.

19. The other significant evidence before the Tribunal came from the third appellant and her previous and present solicitors who made statements describing their dealings with the South Korean Embassy in London. The previous solicitor had had numerous asylum clients from North Korea. Fourteen had sought assistance from the Embassy. None had been successful in obtaining citizenship or a passport. When reasons for refusal were given they related to absence of documentary evidence of nationality or absence from North Korea for more than ten years. The third appellant had attended the Embassy with her present solicitor. She had no documentary proof of her North Korean nationality. She told the official that the Secretary of State had refused her asylum claim and that an appeal was pending. The official stated that the South Korean government would only entertain her application when her asylum claim in this country had been finally determined and that she should return to the Embassy at that stage.

20. I have set out the summarised conclusions of the Tribunal at paragraphs 10-12, above. It is next necessary to refer to the earlier passages which contain its more detailed findings. In relation to those North Koreans who are not caught by the "ten years" policy, its findings were robust (paragraph 85):

> "… in general, nationals of North Korea who claim asylum can lawfully be the subject of removal directions to South Korea."

They are subjected to a process of examination but this goes no further than may be reasonably required by any State with a natural concern to protect its borders and the integrity of its nationality law (paragraph 75).

21. Next, the Tribunal addressed the "ten years" policy under the heading: "A special problem". It is this part of the determination which Mr Kovats submits was the source of the legal error for which he contends. The relevant passages are set out in paragraphs 86-88 in the following terms:

> "The weight of the evidence before us was to the effect that a North Korean national who was absent from Korea for more than ten years would not be able to obtain the indicia of South Korean nationality, despite his acquisition of that nationality by birth. Such a person falls in a distinct category … The statements to this effect appear to be in flat contradiction to South Korean nationality law and are difficult to explain. The most likely explanation is, as hinted at by Professor Bluth and his sources, that there is a presumption that a person who has been in some other country or countries for so long must have acquired a right to be there. It appears to us on the evidence that after ten years the South Korean authorities must apply some sort of presumption of the acquisition of another citizenship, which would, in accordance with the terms of the South Korean Nationality Act, deprive the individual in question of his South Korean nationality, or at any rate place upon him an additional burden of proof, which in practice may be impossible to discharge. We accept that this is a hypothesis on our part; but we must do what we can with the evidence before us.
>
> On that basis, the effect is that a person who was a national of South Korea by birth, and who has no South Korean documents, may lose his South Korean nationality by the presumption of having acquired another, and, as a result, will not be able to acquire South Korean documents on the basis of entitlement to them. Instead he will in practice become a person who merely can apply for South Korean nationality and, … for the purposes of the Refugee Convention, not a national of South Korea. He passes from the first of our three categories to the third.
>
> We are not persuaded that we should connect this aspect of the evidence with generalised assertions that the South Korean

> authorities apply the [Protection] Act to the determination of nationality. Those are assertions which we do not think it would be right to accept. The distinction between nationality and the acceptance of those leaving North Korea, irrespective of their nationality, is quite clear from the South Korean legislation. But so is the provision for loss of South Korean nationality on the acquisition of another non-Korean nationality and, as we have said, we think that the latter provision is the proper basis of the 'ten year rule' which appears to be applied in practice."

The perversity or irrationality for which Mr Kovats contends relates to the deployment of the concept of presumption. He submits that the evidence did not support that.

22. It is correct that the evidence of the expert witnesses did not include mention of a "presumption". Mr Manjit Gill QC, supported by Mr Mark Mullins, submits that the references to "presumption" in the determination are simply incidental and that the essential finding is contained in the first sentence of the above passages and that, as the second sentence relates, that was firmly based on the evidence of Professor Bluth and Mr In Ho Song.

23. In my judgment, this submission is correct. The subsequent passages are not the essential finding. Properly deconstructed, they are an attempt to explain the essential finding in familiar legal terms, relating it to the provisions of the South Korean Constitution and the Nationality Act. It seems to me that "presumption" was not being used by the Tribunal as a term of art. This is apparent from the language – that "presumption" was "hinted at" by Professor Bluth and it was "some sort of presumption" or "hypothesis". It may also be that the "ten years" has been influenced by the provision of Article 9(4) of the Protection Act but it does not follow that the South Korean authorities are directly applying Article 9(4) as if it was part of South Korea's basic nationality law. What they are doing, it seems to me as it seemed to the Tribunal, is keeping in mind the South Korean prohibition of dual nationality and addressing the reasonable possibility that a person who has left North Korea at least ten years earlier may have acquired another nationality in the meantime. How likely that is need not be quantified in this jurisdiction. What matters is that, as rationally found by the Tribunal, in practice, a ten year absence from North Korea will be treated by the authorities in a manner equivalent to one who has lost his South Korean nationality as a result of acquiring another nationality. Although a particular applicant may not in fact have acquired another nationality or even a right of residence in another country, it is plain that the South Korean authorities do not take a mere assertion to that effect at face value. The evidence did not permit an estimate of the percentage prospects of success for a successful application. However, Professor Bluth considered that applications by persons such as these appellants are "most likely not to be granted"; Mr In Ho Song considered a favourable outcome to be "almost impossible"; and the evidence from an experienced British legal adviser related a total lack of success. None of this evidence was contradicted. In these circumstances, I do not believe that the essential finding of the Tribunal can be characterised as perverse or irrational.

Ground 2

24. The second ground of appeal is more difficult. It is predicated on the fact that, as at the date of hearing in the Tribunal and indeed now, the South Korean authorities have not rejected the nationality claims of any of the appellants. The most specific evidence is that, in relation to the third appellant, she was told by the Embassy to return when her asylum claim in this country has been finally determined.

25. The leading authority on this issue is *MA (Ethiopia) v Secretary of State for the Home Department* [2009] EWCA Civ 289, in which Elias LJ stated (at paragraphs 49-53):

> "… this is a highly unusual case in which it became apparent during the hearing before the AIT that the outcome depended upon whether the Ethiopian authorities would allow the appellant to return to Ethiopia. I do not accept the appellant's submission that the AIT simply had to determine this question to the usual standard of proof. It is a question which can, at least in this case, be put to the test. There is no reason why the appellant should not herself make a formal application to the embassy to seek to obtain the relevant documents. If she were refused, or she came up against a brick wall and there was a failure to respond to the request within a reasonable period such that a refusal could properly be inferred, the issue would arise why she had been refused. Again, reasons might be given for the refusal. Speculation by the AIT about the embassy's likely response, and reliance upon expert evidence designed to assist them to speculate in a more informed manner about that question, would not be necessary.
>
> In my judgment, where the essential issue before the AIT is whether some will or will not be returned, the Tribunal should in the normal case require the appellant to act *bona fide* and take all reasonably practicable steps to seek to obtain the requisite documents to enable her to return. There may be cases where it would be unreasonable to require this, such as if disclosure of identity might put the applicant at risk, or perhaps third parties … That is not this case however. There is no reason why the appellant should not herself visit the embassy to seek to obtain the relevant papers …
>
> … there is no risk to the appellant in this approach … The real risk test is adopted in asylum cases because of the difficulty of predicting what will happen in the future in another country, and because the consequences of reaching the wrong decision will often be so serious for the applicant. That is not the case here … Furthermore, this approach to the issue of return is entirely consistent with the well-established principle that, before an applicant for asylum can claim the protection of a surrogate state, he or she must first take all steps to secure protection from the home state …

Any other approach leads, in my view, to absurd results."

26. There was plainly a difference in the factual position as between *MA (Ethiopia)* and the present case. There the applicant had not acted in good faith but had falsely represented to the Ethiopian Embassy that she was Eritrean. Here, the third appellant made an application to the Embassy in good faith. I have referred to the evidence about that. So far as the first and second appellants are concerned, their legal adviser communicated with the South Korean Embassy and was told that the South Korean government is open to the acceptance of genuine North Korean defectors but that a number of factors are taken into account, including the wish of the person in question to settle in a third country and the length of stay in a third country "which would affect whether the applicant can still be classified as a [North Korean] defector". The submissions on behalf of the Secretary of State do not invite any differentiation as between the three appellants.

27. In reality, the issue between the parties in relation to this ground of appeal is whether, as the Secretary of State contends, the appellants are in substantially the same position as *MA (Ethiopia)* or whether, as is submitted on their behalf, they are (to borrow from Elias LJ) "up against a brick wall".

28. The Tribunal found that the appellants originated from North Korea. Their accounts of departure from North Korea more than twenty years ago with long periods of residence in China before arriving in the United Kingdom were accepted by the Tribunal and those findings are not challenged by the Secretary of State. Having claimed asylum and having had their claims refused by the Secretary of State, they have pursued their statutory appeals with the assistance of specialist legal advice. Although the third appellant's dealings with the South Korean Embassy have gone a little further than those of the first and second appellants, it is apparent that in none of the three cases has the Embassy manifested a readiness to acknowledge the appellants' claims to nationality. In the case of the third appellant, she and her solicitor have been told that no real consideration will be given to her case before her asylum claim has been finally determined. The first and second appellants have been told that time spent in a third country "would affect whether the applicant can still be classified as a [North Korean] defector". This is all of a piece with the uncontradicted expert evidence about the prospects of the appellants being recognized as North Korean defectors with retained South Korean nationality being most unlikely or almost impossible.

29. Two points arise from this. First, in terms of *MA (Ethiopia)*, the appellants have acted *bona fide* and taken all reasonably practicable steps to seek to obtain the requisite documents to enable them to be recognized as nationals of South Korea. Secondly, they instituted appeals which, in principle, fell to be determined in accordance with all the circumstances at the time of the hearing in the Tribunal. It seems to me that, in the light of all this, the Tribunal was entitled to reach the conclusions it reached at the time when it reached them. Mr Manjit Gill makes a further point which also has some significance. Faced with these cases, the Secretary of State did little on a diplomatic level to try to force the issue with the Embassy. On the evidence, all that was done was to write a last minute letter which, in the event, asked the wrong question, focusing on the Protection Act. No adjournment was sought. This approach left the Tribunal to determine the cases on the material before it which, in my judgment, justified the conclusions. They were, in *MA (Ethiopia)* terms, "brick wall" cases

which the appellants were entitled to have determined in the light of current circumstances.

30. It follows from this analysis that I detect no legal error in the determination of the Tribunal as asserted in the second ground of appeal. At this stage it is pertinent to refer to the possibility that, at some further date, the South Korean authorities, possibly as a result of pressure from the United Kingdom government, will acknowledge the retained South Korean nationality of one or more of the appellants. At that stage, if it were to materialise, consideration would have to be given to the continuity of refugee status. The Refugee Convention, Article IC provides:

> "This Convention shall cease to apply to any to any person falling under the terms of section A if:
>
> (1) He has voluntarily reavailed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily reacquired it; …
>
> (5) He can no longer, because of circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.
>
> Provided that this paragraph shall not apply to a refugee falling under section A(i) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality."

31. In the present cases, these appellants have never been at risk of persecution with South Korea. The only issue is acknowledged nationality. Mr Manjit Gill concedes that circumstances may arise in which refugee status falls to be revisited. At the moment, however, the appellants are not in a position to avail themselves of the protection of South Korea and they were and are entitled to have their claims determined in accordance with the present evidence.

Conclusion

32. It follows from what I have said that I would dismiss the Secretary of State's appeals, no legal error having been identified in the determination of the Tribunal. I should add that Mr Manjit Gill also sought to run an alternative argument in his skeleton argument. It is to the effect that, in international law, South Korea is not entitled to claim North Koreans as its own nationals simply by reference to its refusal to recognize North Korea. If this is right, no question of South Korean nationality arises and the appellants are entitled to refugee status because of their well-founded fear of persecution in North Korea. In the circumstances, it is not necessary to address this new point which, notwithstanding its implications, was only briefly canvassed in the 23 page skeleton argument.

Lord Justice Mcfarlane:

33. I agree.

Lord Justice Davis:

34. I agree and add only a few words.

35. The unchallenged evidence clearly showed that, under South Korean Law, nationality is distinct from protection: and that under the terms of the Nationality Act those living abroad for over 10 years (who have not acquired dual nationality) are not thereby deprived of their South Korean nationality, even if they are deprived of the right to assistance in the form of protection. Given the Tribunal's findings as to the relevant Korean Law, and given that these appellants have not acquired dual nationality, the statement of the Tribunal in paragraph 73 of its determination lends initial support to Mr Kovats' argument. That says:

> "In the absence of clear evidence tending to show that North Koreans who actually seek to settle in South Korea will not be recognised as South Korean nationals in accordance with national law, we have no reason to suppose that South Korea will not comply with its own law and its international obligations such cases."

36. Accordingly, there being no clear – or indeed any – evidence in support of the presumption which the Tribunal purported to identify in the second part of paragraph 86 of its determination, and it having been held that South Korea can be expected to comply with its own law and international obligations, one can see the prima facie force of the argument that the decision was flawed.

37. However, I think that in paragraphs 86 and following the Tribunal was moving away from generalised conclusions as to compliance by South Korea with its law to the specific situation of those North Koreans who have been absent from Korea for more than 10 years. In my view, Mr Manjit Gill QC was right to say that the key finding of the Tribunal was contained in the first sentence of paragraph 86. The remainder of that paragraph, in so far as it seeks to give an explanation for that position by invoking a presumption, was an unnecessary gloss. What the Tribunal was in fundamentals holding was that, whatever the legalities *should be* with regard to those North Koreans who have resided elsewhere for 10 years without obtaining dual nationality, the position *in practice* is that they are no longer acknowledged by South Korea as Korean nationals. That was borne out by the evidence adduced.

38. As to the second ground of appeal, there is of course an oddness in a case of this kind in requiring asylum seekers to state to the South Korean Embassy that they wish to return to South Korea – which, it is said, the Embassy apparently considers is required - when the reality (apparent to all from their having claimed asylum in the first place) is that they do not so wish. But that cannot be determinative of the matter at all.

39. I think, however, that these particular cases, on the evidence adduced before the Tribunal, can be identified as "brick wall" cases. The Tribunal was entitled so to conclude.

40. Accordingly, and for the much fuller reasons given Maurice Kay LJ with whose judgment I agree, I also would dismiss these appeals.