

Surrogate Protection in Canada and Potential Nationality in South Korea: Does a North Korean Asylum-Seeker have a “genuine link” to South Korea?¹

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Abstract

The article examines recent increase in the number of North Korean refugees in Canada with data and decisions from the Immigration and Refugee Board in Canada (IRB) under the *Access to Information Act*. The key factor of the change in the IRB decisions lies in understanding of a North Korean’s potential status as a South Korean national in the Constitution; the definition of the *Refugee Convention* excludes persons with dual or multiple nationality from international refugee protection. On June 3, 2008 the IRB clarified the legal meaning of the South Korean citizenship for North Koreans in Responses to Information Requests (RIRs) after an interview with a South Korean official. The RIRs has made a significant impact on positive decisions. The paper further argues that it should be considered whether a North Korean asylum seeker has a “genuine link” to South Korea as an element of nationality in the refugee determination processes.

¹ The author would like to thank Theresa Etmanski for comments on the article.

1. Introduction

Migration of North Koreans has been extended beyond China or South Korea to the United Kingdom, Germany, the United State, Canada, and other parts of world.² This transnational migration beyond the Korean peninsula and neighboring countries is a recent phenomenon. In

² The UNHCR table below indicates that North Koreans have migrated to other part of world and more and more they have been accepted as refugees, although it does not accurately reflect the number of North Korean refugees. “Refugees Originated from Dem. People’s Rep. of Korea (Periodicity: Years, Applied time Period: from 1994 to 2011),” *UNHCR Statistical Online Population Data*, online: United Nations High Commission for Refugees (UNHCR) <<http://apps.who.int/globalatlas/dataQuery/reportData.asp?rptType=1>>.

	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Australia			1	1	2	2	3	4	4	3	3	6	8	15	14	15	25	29
Belgium										0		0	0	7	9	13	22	31
Cambodia		2	3															
Canada	2	1	1		2		0	0		3	4	4	4	4	4	4	23	64
Denmark							2	2	7	7	7	7	7	8	8	9	9	14
France		1	1		3													
Germany							0	0	225	258	276	193	239	204	180	156	146	193
Ireland								1	5	5	5	5	5	6	6	6	6	5
Israel														2	2	2	2	1
Kazakhstan																	0	
Kyrgyzstan													2	5	6	7	3	2
Luxembourg															0	0		
Mexico												1	1	1	1	1	1	1
Netherlands							3	7	9	14	15	18	20	27	29	31	32	36
New Zealand								1	1	1	1	1	0	1	1	1	1	
Norway						3	3	3	3	3	3	4	5	9	13	14	14	14
Poland																		1
Russian Federation													0		6	10	14	18
Singapore		1	1															
Spain																		1
Sweden									2	2	2	6	7	7	7	8	8	9
Switzerland								1	2	1	1	1	6	6	6	4	4	4
Thailand						4	0											
United Kingdom of Great Britain and Northern Ireland										0	17	33	64	281	570	574	581	603
United States of America					2	2	2			7	9	9	30	22	23	25	25	25
Uzbekistan	1	2	4						1	0								
Yemen															1	1	1	1

South Korea itself, the number of North Korean migrants has rapidly risen since 2000, and in 2011 2,706 North Korean entered South Korea. As of December 2011, the total population of North Korean migrants reaches 23,095.³ Among receiving countries, the United Kingdom (UK) is the most favorable country for North Korean asylum seekers. According to the UNHCR Statistics, the UK accepts 603 North Koreans as refugees in 2011 following 581 in 2010, 574 in 2009, 570 in 2008, 281 in 2007, 64 in 2006, 33 in 2005 and 17 in 2004.⁴ After the UK, Germany shows relatively a higher number of North Korean refugees. In 2011 193 North Koreans were admitted as refugees, and similar figures were reflected from 2002 to 2010.⁵ From 2002 Germany received quite a number of North Koreans, 225 in 2002, while other countries remained at a single digit level in the same year. Although the United States enacted the North Korean Human Rights Act and extended it from 2008 to 2012, only 94 North Koreans out of 238 resettlement applicants arrived the US under the U.S. Refugee Admissions Program from 2005 to 2010, as of March 29, 2010.⁶

In Canada, 175 North Koreans were admitted as refugees from 2000 to 2011. This year only, from January to September, Canada has accepted 183 North Koreans out of 544 applicants on the

³ Ministry of Unification, *북한이탈주민 관련 추이* [The Relevant trends in residents escaping from North Korea], online: 통계청 [Statistics Korea] <http://www.index.go.kr/egams/stts/jsp/potal/stts/PO_STTS_IdxMain.jsp?idx_cd=1694&bbs=INDX_001>.

⁴ UNHCR, *supra* note 2.

⁵ *Ibid.*

⁶ United States Government Accountability Office (GAO), *Humanitarian Assistance: Status of North Korean Refugee Resettlement and Asylum in the United States*, Report to Congressional Requesters, GAO-10-691 (Washington: GAO, 2010) at 12.

basis of the IRB database according to Voice of America news.⁷ The total number is still lower compared to the UK or Germany, but Canada is becoming a country which makes more positive decisions for North Korean asylum seekers. The number of North Korean refugees in Canada has recently increased from seven in 2008 to sixty six in 2009, while the one in the U.S. had decreased from thirty-eight in 2008 to eighteen in 2009.⁸ What brought this recent change about in Canada? How does the Immigration and Refugee Board in Canada (IRB) make increasingly favorable decisions about North Korean asylum seekers? Are they associated to South Korean laws and procedures regarding admissions of North Koreans? Or is it related to interpretation of a refugee definition in Canadian law or international law? What are the possibilities of having South Korean citizenship handled in case law or IRB decisions? This essay explores what factors of refugee determination processes could lead to a rise in positive decisions for North Korean claimants, after offering detailed data on changing number of North Korean refugees in Canada. It takes into account country information, legal interpretation in international law and Canadian law, case law in Canada, and South Korean laws and procedures.

The research methods are as follows. In December 2010, I visited the Federal Court registrar to gather legal documents and exhibits for the case, *Kim v. Canada* (2010) F.C.J. 870. On

⁷ Youngkwon Kim, “캐나다, 올해 탈북자 183 명 난민 인정” [This Year, Canada Admitted 183 North Korean defectors], *VOA* (2 December 2012), online: Voice of America Group <<http://www.voakorea.com/content/article/1553406.html#>>.

⁸ Jinhui Lee, “캐나다 탈북자 26 명 난민지위 신청” [26 North Korean Defectors Have Applied for the Refugee Status in Canada], *RFA* (12 July 2007), online: Radio Free Asia <http://www.rfa.org/korean/in_focus/canada_26defectors_refugee_applied-20070712.html>; United States Government Accountability Office, *supra* note 6 at 49.

March 21, 2011 I requested statistics and information of North Korean refugees in Canada to the IRB under the *Access to Information Act*. On April 8, 2011, I received a response letter from Debora Eisl, a Director of Access to Information and Privacy at the IRB. After interactions with Kathy Btoulay, an analyst at the IRB, my request was narrowed down. On June 30, 2011, the IRB mailed a 289 page information package, after deleting personal information in IRB decisions pursuant to Article 19(1) of *Access to Information Act*.

2. Statistics on North Korean Refugees in Canada

In 2000 the first North Korean clamant was granted refugee status when four claims were submitted.⁹ No North Korean applicants were admitted as refugees in 1997, 1998, 1999, 2001, 2002, 2004, and 2006: for example, in 1998 six cases were rejected and one case was abandoned out of the total seven claims.¹⁰ In 2004 all two claims were turned down by the IRB. In 2003,¹¹ 2005, and 2007 only one person was admitted. Table 1 below is made up of the IRB information taken from both the Radio Free Asia, a non-profit broadcasting organization, and the Canadian Council for Refugees (CCR), a non-profit organization.¹² In particular, the data from 1997 to 2006 are based on information from the Radio Free Asia.¹³ The rest of the data from 2007 to 2011 are from the CCR, which was originally offered by Sean Rehaag's Access to Information request to the IRB.¹⁴

Table 1 Admissions of North Koreans as Refugees in Canada

⁹ Lee, *Ibid*.

¹⁰ *Ibid*.

¹¹ In 2003 one was accepted out of five claims: one was rejected and three were abandoned.

¹² Lee *supra* note 8.

¹³ *Ibid*.

¹⁴ Sean Rehaag, "Troubling Patterns in Canadian Refugee Adjudication" (2008) 39 *Ottawa Law Review* 335 at 342.

	The Number of Finalized Claims	The Number of Positive Decision (Accepted)	Grant Rate (%)
1997	0	0	
1998	7	0	0
1999	10	0	0
2000	4	1	25
2001	6	0	0
2002	1	0	0
2003	5	1	20
2004	2	0	0
2005	1	1	100
2006	0	0	0
2007	1	1	100
2008	4	3	75
2009	36	32	88.89
2010	20	19	95
2011	175	117	90.7

The first admission of a North Korean as a refugee in 2000 did not lead to dramatic increase until 2009. The number of North Koreans who were granted refugee status in 2005 and 2007 was one each year.¹⁵ A recent surge began in 2009. In 2009, 32 cases out of 36 North Korean claims were officially recognized as refugees with an approval rate of 88.89 percent.¹⁶ In 2010 19 out of 20 claims were successful (a grant rate of 95 percent)¹⁷ including one expedited positive decision.¹⁸ Finally, in 2011 the number of cases reached 117 out of 175 claims after 46 cases were withdrawn and abandoned.¹⁹ Notably, it is evident from grant rates that decisions have been in favor of North Korean applicants since 2005 as shown in Figure 1.

¹⁵ United States Government Accountability Office, *supra* note 6 at 49.

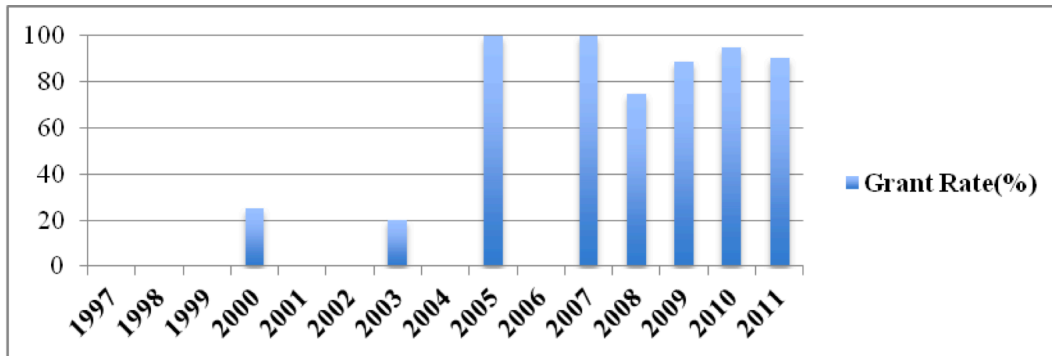
¹⁶ Sean Rehaag, *2009 Refugee Claim Data & IRB Member Grant Rates* (29 March 2010), online: Canadian Council for Refugees <<http://ccrweb.ca/documents/rehaagdatamarch10.htm>>.

¹⁷ Sean Rehaag, *2010 Refugee Claim Data & IRB Member Grant Rates* (1 March 2011), online: Canadian Council for Refugees <<http://ccrweb.ca/en/2010-refugee-claim-data>>.

¹⁸ The fast-track expedited process is used where claims can be decided without a hearing, but limited to claims from particular countries or certain kinds of claims. If the Refugee Protection Officer (RPO) recommends about a claim after an interview and the recommendation is approved, the claim is referred to a member of the refugee protection division (RPD) for a decision without a hearing, Immigration and Refugee Board of Canada, *Process for Making a Claim for Refugee Protection*, online: IRB <<http://www.irb-cisr.gc.ca/Eng/brdcom/references/procedures/proc/rpdspr/Pages/rpd.aspx>>.

¹⁹ Sean Rehaag, *2011 Refugee Claim Data & IRB Member Grant Rates* (12 March 2012), online: Canadian Council for Refugees <<http://ccrweb.ca/en/2011-refugee-claim-data>>.

Figure 1 Grant Rates



In fact, the actual number of North Korean individuals, who have been admitted as refugees, is higher than the number as seen above in Table 1. For example, in 2009, 66 North Korean individuals were accepted as refugees in Canada consisting of 32 principal claimants and 34 partners and children.²⁰ The IRB database failed to count accompanying partners and dependent children, as Sean Rehaag points out it after his request for access to information.²¹ It only adds up the number of decisions for principal applicants.

Table 2 The Individual Number of Refugee Claims and Admissions of North Koreans in Canada

North Koreans Applying for a Humanitarian Protection Status in Canada for Calendar Years 2000 to 2009											
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Individuals filed	n/a	n/a	n/a	3	0	1	26	113	31	43	217
Individuals granted	n/a	n/a	n/a	1	0	1	0	1	7	66	76

Source: Office of the Director General, Refugees Branch, Citizenship and Immigration Canada.²²

Table 2 above demonstrates the total number of individual admission decisions, which count accompanying partners and dependent children. The United States Government Accountability

²⁰ Rehaag, *supra* note 16; United States Government Accountability Office, *supra* note 6 at 49.

²¹ Rehaag, *supra* note 14 at 342.

²² United States Government Accountability Office, *supra* note 6 at 49.

Office (GAO) obtained this data from the Citizenship and Immigration Canada (CIC).²³ Figure 2 below compares the number of admitted principal applicants (the number of successful cases) and the total number of individuals, who were granted refugee protection.

Figure 2 Admissions of North Koreans as Refugees in Canada: The Number of Cases and Individuals²⁴

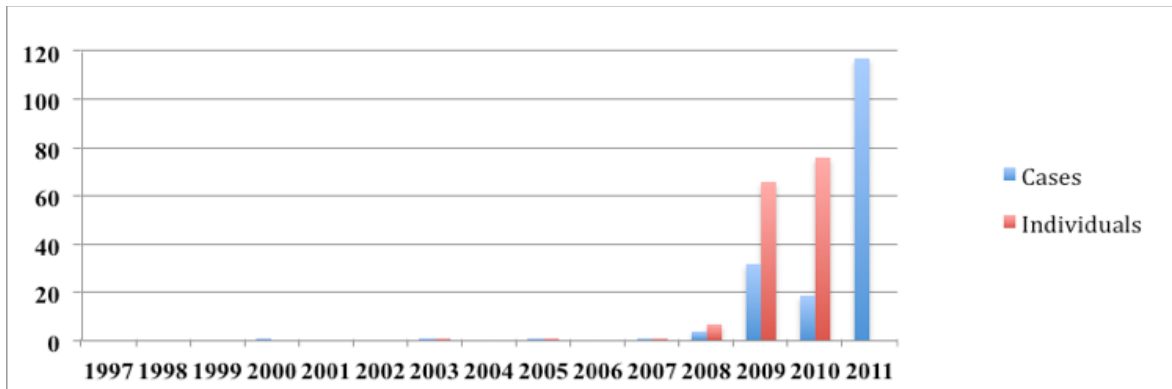


Figure 2 shows that the total admissions of North Koreans for refugee protection are on the increase regardless of the decreasing number of cases. In 2010 ten more North Koreans were accepted as refugees totaling 76 compared to 66 in 2009, while the number of cases dropped from 32 to 19 (Table 2). It is worth noticing that overall admissions of North Koreans are on the rise in Canada compared to the United States, which enacted the North Korean Human Rights Act in 2004 and reauthorized the Act in 2008.²⁵ The number in Canada rose from 7 in 2008 to 66 in 2009, while the number in the US declined to 18 in 2009 from 38 in 2008.²⁶

Jack Kim, a representative in *Hanvoice*,²⁷ considers the reason for this surge to be a sudden increase in applications from North Koreans. 130 North Koreans have applied for refugee status in

²³ Huijeong Yang, “캐나다 탈북자 난민 인정 10 배↑” [10 times more North Korean defectors admitted as refugees in Canada ↑], *RFA* (29 January 2010), online: Radio Free Asia <http://www.rfa.org/korean/in_focus/human_rights_defector/defector_canada-01292010171404.html>.

²⁴ The graph does not include the 2011 statistic of the number of *individual* admission.

²⁵ The North Korean Human Right Act prioritizes refugee settlement processes for North Koreans.

²⁶ Lee, *supra* note 8; United States Government Accountability Office, *supra* note 6 at 49.

²⁷ *Hanvoice* is a non-profit corporation based in Toronto, Ontario.

Canada since the end of 2006.²⁸ Youngsil Kim, a minister in a Korean church in Ontario, also describes it as a result of a large number of North Koreans arriving in Canada after December 2006.²⁹ At the same time, the processing time took longer than average 14 months after 2006, Stephan Malepart, a spokesman of the IRB said.³⁰ More than any other factors, there are two important sources that should not be overlooked. They are the Responses to Information Requests (RIRs), issued by the IRB in 2008, and *Canada (Minister of Citizenship and Immigration) v. Williams*, [2005] F.C.A. 126, a decision of the Federal Court of Appeal in 2005. I argue that these two sources have contributed to the increasing acceptance rates of North Koreans by the IRB, which will be discussed further in the following sections.

In short, Canada has been accepting more North Korean refugees than before. In 2011 the number of cases including only principal clamant refugee reached 117.³¹ As of June 30, 2011, 27 North Koreans including spouses and children were admitted to Canada according to the information provided by the IRB under the *Access to Information Act* (13 positive cases with 2 negative and 3 abandoned ones).³² It is expected that the IRB will make favorable decisions to North Korean asylum seekers on the basis of recent change of legal interpretations in South Korea and Canada.

3. Dual or Multiple Nationality and “Theoretical Protection”

An important legal question is whether the availability of South Korean citizenship obstructs North Koreans from seeking asylum in other countries. This question is associated to “theoretical

²⁸ Yang, *supra* note 23.

²⁹ Lee, *supra* note 8.

³⁰ Sugyeong Lee, “탈북자들, 캐나다 난민 신청 급증” [North Korean Defectors, A Sudden Increase in Applications for Refugee Status], *RFA* (25 March 2008), online: Radio Free Asia <http://www.rfa.org/korean/in_focus/canada_defector-20080325.html>.

³¹ Rehaag, *supra* note 19.

³² The last decision among the data was made on March 25, 2011.

protection”³³ of Article 3 of the South Korean Constitution, and a legal case, which recognizes a North Korean national as a South Korean citizen based on the Article 3. It may be problematic for North Korean refugee claimants since asylum seekers with dual or multiple nationality are not considered to meet the scope of the definition of refugee.

A refugee is defined in Article 1 A (2) of the *United Nations Convention Relating to Status of Refugees* (hereinafter ‘*Refugee Convention*’), which entered into force in 1951.³⁴ The *Refugee Convention* 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 [...]” After this definition, Article 1 A (2), paragraph 2 is followed in a “self-explanatory”³⁵ sentence:

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.

Paragraph 2 intends to exclude persons with dual or multiple nationality from international refugee protection if they are able to avail themselves of protection of all of the countries of which they are nationals.³⁶ It is expressly stated that “national protection takes precedence over

³³ International Crisis Group, “Perilous Journeys: The Plight of North Koreans in China and Beyond Crisis Group,” *Asia Report N°122* (26 October 2006) at para 26.

³⁴ The 1951 Convention relating to the Status of Refugees entered into force on April 22, 1954 and the 1967 Protocol on October 4, 1967. The definition of Article 1A(2) is as follows: “[a]s a result of events occurring before 1 January 1951 and 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; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events [...]”

³⁵ United Nations High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, HCR/IP/4/Eng/REV.1, UNHCR, 1979 at para 106.

³⁶ *Ibid* at para 106.

international protection” in the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (hereinafter ‘UNHCR Handbook’).³⁷

Canada has the same legal interpretation on dual or multiple nationality as a party to the *Refugee Convention*. On June 4, 1969 Canada ratified the *Refugee Convention* and the *Protocol Relating to the Status of Refugees* entering into force in 1967.³⁸ The definition of a Convention refugee is incorporated in section 96 of the Immigration and Refugee Protection Act:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Section 96(a) of the *Immigration and Refugee Protection Act (IRPA)* requires the Convention refugee to be “outside *each of their countries* and is unable or, [...] unwilling to avail themselves of the protection of *each of those countries* [Italics added].” In order to meet the definition of a Convention refugee, the person must have no alternative protection from each of the countries where he or she has dual or multiple nationality. Also, *Canada v. Ward*³⁹ established the principle of surrogacy: international refugee protection is “surrogate or substitute” upon failure of national protection.⁴⁰ In other words, in cases of dual or multiple nationality state protection is deemed available unless a person seeks state protection of each of the countries of which he or she is a national.

³⁷ *Ibid.*

³⁸ As of 1 April 2011, the total number of state parties to the 1951 Convention is 144 and the one to the 1967 Protocol is 145. United Nations High Commission for Refugees, “States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocols,” online: UNHCR <<http://www.unhcr.org/3b73b0d63.html>>.

³⁹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (CanLII).

⁴⁰ In *Ward* the Court quotes James Hathaway in the Law of Refugee Status that “the refugee scheme as ‘surrogate or substitute protection,’ [and it is] activated only upon failure of national protection.”

The next question is: does “theoretical protection” for North Koreans from Article 3 of the South Korean Constitution guarantee North-South Korea dual nationality? Article 3 states that “[t]he territory of the Republic of Korea shall consist of the Korean peninsula and its adjacent islands.” It is historically interpreted that the entire Korean peninsula comprises the territory of the Republic of Korea (ROK), and only the ROK has a legitimate government on the Korean peninsula. On November 12, 1996 the Supreme Court of South Korea confirmed this historical interpretation, and upheld the decision of the Court of Appeal. As shown in the decision, North Korea is part of the Korean peninsula, and sovereignty from an illegitimate organization is not recognized due to a conflict with state sovereignty of the Republic of Korea. The Court concluded that a plaintiff, who is a national of North Korea with a Foreign Resident Card from China, is a South Korean citizen.⁴¹

However, the practical implications of Article 3 of the Constitution are different in the determination procedure to be recognized as a South Korean citizen. To explore how the “theoretical protection” has been brought to a practical level in South Korea, it is crucial to take two statutes into consideration: Nationality Act⁴² and Act on the Protection and Settlement Support of Residents Escaping from North Korea (hereinafter, ‘Act on the Protection and Settlement Support’). The two statutes play a practical role of determining South Korean nationality of North Koreans according to substantial and procedural rules. It is noticeable that there have existed cases in which a North Korean is not admitted as a South Korean citizen. Often, they become *de facto* stateless, as In Seop Chung, Chulwoo Lee, Ho Tae Lee, and Jung Hae Park point it out in an article, “The Treatment of Stateless Persons and the Reduction of Statelessness,” which will be introduced in the

⁴¹ Supreme Ct. of Korea, 96Nu1221, 12 Nov. 1996.

⁴² 국적법[Nationality Act], Act No. 5431, Wholly Amended 13 Dec. 1997 (Enacted 3 Dec. 1948), online: La France en Corée <http://www.ambafrance-kr.org/IMG/pdf_Nationality_Act_May_2010.pdf>.

later section.⁴³ The article explains technical and fundamental reasons why some cases have been denied protection from the South Korean government.

The United Nations High Commissioner for Refugees (UNHCR) views that most North Koreans are excluded from refugee status on the basis of dual nationality in accordance with Article 1 A (2), paragraph 2 of the *Refugee Convention*.⁴⁴ An extension of South Korean nationality to all North Koreans in effect negatively affects North Korean claims to international protection.⁴⁵ The UNHCR clarifies that although North Koreans may avail themselves of “theoretical protection” from South Korea, in the practical level it is almost impossible to ask protection from the South Korean government in China or transit countries.⁴⁶ Section 5 explains why some North Koreans fail to seek protection from the South Korean government under the two statutes.

4. Responses to Information Requests (RIRs)⁴⁷

Responses to Information Requests (RIRs) is one of the products of the research program under the structure of the IRB to satisfy the information need of the Refugee Protection Division in the processes of refugee determination.⁴⁸ The Research Directorate uses open information in public, oral sources, or expert information to respond to the queries that are submitted.⁴⁹ The RIRs, issued by the IRB on June 3, 2008, has made a significant impact on positive decisions for North

⁴³ In Seop Chung, Chulwoo Lee, Ho Taeg Lee, and Jung Hae Park, “The Treatment of Stateless Persons and the Reduction of Stateless: Policy Suggestions for the Republic of Korea” (2010) 13 *Korea Review of International Studies* 7, at 7-30.

⁴⁴ International Crisis Group, *supra* note 33 at 35.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Immigration and Refugee Board of Canada, “Responses to Information Requests (RIRs)” ZZZ102858.E (3 June 2008), online: IRB <http://www.irb-cisr.gc.ca:8080/RIR_RDI/RIR_RDI.aspx?id=451933&l=e>.

⁴⁸ Immigration and Refugee Board of Canada, “Research Program,” (28 Feb. 2012) online: IRB <<http://www.irb-cisr.gc.ca/Eng/resrec/respro/Pages/index.aspx>>.

⁴⁹ European Country of Origin Information Network, “Source Description: Immigration and Refugee Board of Canada (IRB),” online: ecoinet <<http://www.ecoi.net/index.php?id=0&command=help&about=assessment&source=2>>; Austrian Red Cross/ACCORD, “Source Descriptions Navigation Guides” (September 2004), online: Accord <<http://www.coi-training.net/content/doc/en-COI%20Manual%20Annex.pdf>>.

Korean cases. It clarifies a legal meaning of South Korean citizenship for North Koreans through an interview with a South Korean official. The RIRs includes the situations of North Koreans seeking protection from South Korean embassies in Canada or other countries. Also, it answers whether North Koreans are automatically admitted as citizens in South Korea together with information on procedures and ways to acquire citizenship.

The RIR cites the United States (US) Department of State's Country Reports on Human Rights Practices for 2007, and New York Times (as of February 19, 2007), which indicate that Article 2⁵⁰ and 3 of the South Korean Constitution give North Koreans entitlement to nationality. Agence France-Press (as of March 28, 2008) and the 2008 Human Rights Watch report are also used as reference material. However, it is clear that it will not lead to automatic South Korean nationality. Above all, the main source of the RIRs is an interview with an official from the South Korean embassy in Ottawa. On May 20, 2008 the interview was made by the Research Directorate of the IRB. It has led to the most important change in the IRB decision in favor of North Korean cases although a refugee is determined by a case-by-case adjudication process. Three primary points are summarized as follows:

First, North Koreans in a third country could receive temporary protection and assistance from the South Korean government to enter South Korea. Upon their arrival in South Korea, they undergo the procedure to be determined for protection. This information was from the 2005 Unification Paper, a publication from the Ministry of Unification in South Korea, which was referred by an official.

Second, the official from the South Korean Embassy clarified that North Koreans do not automatically acquire South Korean citizenship. North Koreans must establish that they have the

⁵⁰ Article 2 is as follows: "(1) Nationality in the Republic of Korea shall be prescribed by Act. (2) It shall be the duty of the State to protect citizens residing abroad as prescribed by Act." *The Constitution of the Republic of Korea*, 17 July 1948, online: Constitutional Court of Korea <http://english.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf>.

“will and desire” to reside in South Korea and show themselves to the South Korean embassy or consulate to apply for protection. In this process, the following categories of persons are excluded from acquisition of citizenship: “bogus defectors,” a person who lived in a third country for a considerable period of time, and a person who has committed crimes such as “murder, aircraft hijacking, drug trafficking or terrorism.”⁵¹

Third, the South Korean government investigates the identification of North Koreans, and an official interview with a North Korean is required in the determination procedure. Identity documents like North Korean citizenship cards and driver’s licenses are helpful in demonstrating North Korean identity.

5. Laws on South Korean Nationality for North Koreans

5.1 The Act on Protection and Settlement Support

The Act on the Protection and Settlement Support of Residents Escaping from North Korea was enacted in 1997. The Act replaced the Act on the Protection of North Korean Defectors, which was passed in June 1993.⁵² Originally, there was “the Special Law on the Protection of Those who Contributed to the Country or of Defectors from North Korea” (enacted in 1962) and “the Special Compensation Law for Brave Soldiers Defecting from North Korea” (1978).⁵³

The purpose of the Act on the Protection and Settlement Support is to provide protection and support to “North Korean residents escaping from the area north of the Military Demarcation line and desiring protection from the Republic of Korea, as quickly as possible to adapt themselves to, and settle down in, all sphere of their lives, including political, economic, social and cultural

⁵¹ Immigration and Refugee Board of Canada, *supra* note 47.

⁵² Yoon Young Kim, *Making National Subjects: Education and Adaptation among North Korean Immigrants in South Korea* (DPhil thesis, University of Hawaii, 2009) [unpublished] at 134-135.

⁵³ *Ibid* at 134.

spheres” (Article 1).⁵⁴ The Act defines “residents escaping from North Korea” as “persons who have their residence, lineal ascendants and descendants, spouses, workplaces, and so on in North Korea, and who have not acquired any foreign nationality after escaping from North Korea” (Article 2). North Koreans, who have already obtained nationality from other countries, are excluded from the protection.

The law is designed to support the settlement of North Koreans in South Korea, and those who are recognized as “residents escaping from North Korea” are able to receive subsidies and housing support. It also contains the procedure to decide who will be under special protection of the South Korean government on the basis of the principle of humanitarianism (Article 3), and regulates administrative registration processes.

The application of the Act is only limited to residents escaping North Korea who “have expressed their intention to be protected by the Republic of Korea” (Article 3). This is consistent with the RIRs, which listed an applicant’s “will or desire” to live in South Korea as a requirement. The IRB decisions also have reviewed this element in assessing eligibility for South Korean citizenship for North Koreans. It is required to demonstrate that he or she intends to have protection by South Korea.

Personal presence is needed to submit application. Article 7 of the Act states that a North Korean, who “desires to be protected under the Act, shall apply for it in person to the head of an overseas diplomatic or consular mission, or the head of any administrative agency.”⁵⁵ It is the same with the RIRs’ information that an applicant’s presence to an embassy or consulate is necessary to request for protection of South Korea. But there are exceptions in which a person can apply for protection without personal presence. Three exceptional cases are listed in Article 10 of the

⁵⁴ Act on the Protection and Settlement Support of Residents Escaping from North Korea, 13 January 1997, Act No. 5259, online: UNHCR Refworld <<http://www.unhcr.org/refworld/pdfid/42d3b26a4.pdf>>.

⁵⁵ *Ibid.*

Presidential Decree (No. 23488), enacted in 1997 and last amended in 2012. The Presidential Decree supplements Article 7 of the Act on the Protection and Settlement Support. These are cases where a mentally or physically disabled applicant applies, a family member applies on behalf of other family members, or there is emergency need.

The Minister of Unification determines on the admissibility of the applications with the deliberations of the Consultative Council (Article 8). In the case of a person who is likely to have an effect on national security to a substantial degree, the Director General of the National Intelligence Service decides on the admissibility.⁵⁶ Also, the Act specifies the criteria for whom to be excluded protection by the Minister of National Unification in Article 9. The following subparagraphs in Article 9 are the categories:

Article 9 (Criteria for Protection Decision)

(1) In determining whether or not to provide protection pursuant to the provisions of the text of Article 8(1), such persons as prescribed in any of the following subparagraphs may not be not determined as persons subject to protection:

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 escape;
4. Persons who have for more than ten years earned their living in their respective countries of sojourn; and
5. Persons who do not apply within one year of their arrival⁵⁷
6. Such other persons as prescribed by the Presidential Decree as unfit for the designation as persons subject to protection.

The person, who resided in other countries for more than 10 years, may be excluded from admissions. In January 2007, the length of a stay in other countries was changed from “a

⁵⁶ “Article 8 (Decision on Protection, etc.) (1) The Minister of National Unification Shall, when he receives such a notice as prescribed in Article 7(3), decide on the admissibility of the application for protection following the deliberations of the Consultative Council: Provided, That in the case of a person who is likely to affect national security to a considerable extent, the Director General of the National Intelligence Service shall decide on the admissibility of the application [...]” *Ibid.*

⁵⁷ In January 2009 the one-year filing deadline after the applicant’s arrival was added to subparagraph 5 of Article 9(1).

considerable period of time”⁵⁸ to “more than ten years” in subparagraph 4 of Article 9(1). In unavoidable circumstances where the applicant was seized or detained against his or her will, where the applicant made an extended stay in a detention center, or where it was not possible to have ordinary or stable life in seclusion or on flight in countries of sojourn, a long period of a stay over 10 years does not prevent a person from being eligible for protection.⁵⁹ In other words, subparagraph 4 does not apply to exceptional cases (Article 16 of the Presidential Decree). It also does not apply to equivalent circumstances that are approved by the Minister of Unification.⁶⁰

In February 2008, subparagraph 6 was added to Article 9(1) of the Act on the Protection and Settlement Support. The persons, who are “unfit for the designation as persons subject to protection” as prescribed by the Presidential Decree, may be denied protection. The Presidential Decree lists the persons as unqualified for protection in Article 16(1).

1. The person, who is likely to cause politically and diplomatically great difficulty to the Republic of Korea;
2. The person, who committed violent acts causing substantial harm to personal safety of others, or who damaged [resettlement support] facilities during the period of temporary protection pursuant to Article 12 of the Act on the Protection and Settlement Support;
3. The person, who obtained the legitimate residence status in third countries after he or she had departed from North Korea⁶¹

Article 16(1) considers political and diplomatic national interests, security concerns, and legal residence status in other countries to determine unqualified applicants for protection.

In short, the Act on the Protection and Settlement Support empowers the Minister of National Unification to determine admissions with the Consultative Council (Article 8). North Korean applicants, who do not fall into the scope of the definition, are not admitted as South Korean citizens. Since the Act was enacted in 1997, the definition of “residents escaping from

⁵⁸ This phrase, “a considerable period of time,” had been used since 2001.

⁵⁹ These are listed in subparagraph 1-3 in Article 16(2) of the Presidential Decree.

⁶⁰ It is stated in subparagraph 4 of Article 16(2) of the Presidential Decree.

⁶¹ It is my work to translate Article 16(1) of the Presidential Decree into English.

North Korea” has been more specified and narrowed down by amendments. This explains how an official in the South Korean embassy could offer accurate information to the IRB despite an ambiguous and controversial understanding of the Article 3 of the South Korean Constitution.

5.2 Nationality Act

Although the *Act on the Protection and Settlement Support* explicitly excludes certain categories of North Korean applicants from protection, it does not necessarily suggest that persons of the categories are not North Koreans, according to Chung et al.⁶² They are able to apply for nationality adjudication under Article 20 of the *Nationality Act*, if they denied protection.⁶³ This adjudication procedure is designed for all kinds of cases “where it is unclear whether a person has attained or is holding the nationality of the Republic of Korea” (Article 20).⁶⁴ The decision is made in a form of either determinable or undeterminable.⁶⁵ It is also possible to reapply for a nationality adjudication procedure even where it was declared that nationality was “undeterminable.”⁶⁶

Recently, the majority using this procedure are the individuals who assert the identity of North Koreans.⁶⁷ On the basis of the information (as of June 2009) from the Ministry of Justice, Chung et al. argues that six out of forty three individuals, who applied for nationality adjudication in 2008, had been declined protection under Act on the Protection and Settlement Support.⁶⁸ One difference is that this nationality adjudication procedure is only limited to those who are in South

⁶² Chung, Lee, Lee and Park, *supra* note 43 at 25.

⁶³ *Ibid* at 24.

⁶⁴ “Article 20 (Adjudication of Nationality)

(1) Where it is unclear whether a person has attained or is holding the nationality of the Republic of Korea, the Minister of Justice may determine such fact upon review.

(2) Procedures for screening and determination under paragraph (1) and other necessary matters shall be determined by Presidential Decree.

[This Article Wholly Amended by Act No. 8892, Mar. 14, 2008].” Nationality Act.

⁶⁵ Chung, Lee, Lee and Park, *supra* note 43 at 24.

⁶⁶ *Ibid*.

⁶⁷ *Ibid*.

⁶⁸ *Ibid* at 25.

Korea while the Act on Protection and Settlement Support allows North Koreans in other countries as well to apply for protection.⁶⁹ The Minister of Justice determines on his or her nationality of South Korea upon review of whether he or she is a North Korean.⁷⁰

Chung et al. introduces that there are several types of North Koreans, who are likely to have a negative decision in nationality adjudication.⁷¹ *First*, they are North Koreans, who entered South Korea with forged Chinese identity documents, or escapees from North Korea, who have Chinese (*hwagyŏ* in Korean)⁷² mother or father or who married to a Chinese (*hwagyŏ*).⁷³ *Second*, *Jogyo* is likely to be denied Korean nationality. They are North Korean nationals who live abroad for a lengthy period time with a North Korean identity card and an alien resident document issued by the Chinese government.⁷⁴ *Third*, children, who were born to North Korean undocumented migrants in other countries and do not have identity cards, could remain without protection. Particularly, the nationality adjudication procedure will be difficult for the children whose parents are not recognized as a North Korean or who were separated from their parents.⁷⁵ *Finally*, North Koreans, who have obtained Chinese citizenship, may not be recognized.

In summary, North Koreans, who have been refused protection under the *Act on the Protection and Settlement Support* or who are not eligible for protection under the Act, can apply for nationality adjudication. Despite the nationality adjudication procedure, certain categories of North Koreans are not recognized as a North Korean and as a result of the failure they are likely to remain *de facto* stateless as Chung et al. (24) explains it.

⁶⁹ *Ibid* at 24.

⁷⁰ *Ibid*. The Act empowers the Minister of Justice to determine on protection (Article 20).

⁷¹ *Ibid* at 26.

⁷² *Hwagyŏ* in Korean refers to “ethnic Chinese settlers” in Korea. Nora Hui-Jung Kim, “South Korea’s Immigrant Incorporation Strategy,” *Asia Pacific Memo #127* (31 January 2012), online: UBC Institute Asian Research <<http://www.asiapacificmemo.ca/south-korea-immigrant-incorporation-strategy>> accessed 23 Apr. 2012.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

6. “Potential Countries of Nationality”: *Kim v. Canada*⁷⁶

Ward establishes the principle of surrogacy that international refugee protection is preconditioned by no alternative state protection available to an asylum seeker. As mentioned earlier in section 3, an asylum seeker with dual or multiple nationality cannot be protected as a refugee in international law or Canadian law. The next legal question to settle is whether this principle is applicable to cases where an asylum seeker has *potential* nationality in a country other than the country of his or her current nationality: is the potential nationality regarded as dual or multiple nationality? This is directly linked to North Korean asylum cases if it is assumed that South Korea grants potential nationality to North Koreans.

In *Canada v. Williams*, the Federal Court of Appeal deals with an issue whether s. 96(a) of the *IRPA* embraces “potential countries of nationality.”⁷⁷ Section 96(a) of *IRPA* was discussed in section 3. The Court states that the Federal Court erred in finding that “potential countries of nationality” are not within the scope of countries of dual or multiple nationality. Such an interpretation of section 96(a) is inconsistent with the principle of surrogacy, which prevents forum shopping, since Article 1A(2) of the *Refugee Convention* has to be interpreted in a restrictive manner.⁷⁸ The Court opens a possibility to interpret that “each of their countries of nationalities” in 96(a) of the *IRPA* includes a potential country of nationality.⁷⁹ In other words, refugee protection can be denied due to the principle of surrogacy, if an asylum seeker has a potential status as a national of other countries. However, it does not mean that every potential nationality is counted as dual or multiple nationality: *Williams* provides a test.

⁷⁶ *Kim v. Canada (Minister of Citizenship and Immigration)*, [2010] F.C.J. No. 870.

⁷⁷ *Canada (Minister of Citizenship and Immigration) v. Williams*, [2005] F.C.A. 126 at para 10.

⁷⁸ *Ibid* at paras. 22-25.

⁷⁹ *Ibid* at para. 20; *Ibid* at para. 25.

Before going into *Williams*' test, it is noteworthy that a potential nationality is distinguishable from a pre-existing one.⁸⁰ *Bouianova v. Canada* provides an example of a pre-existing nationality. It involves a refugee claimant, who was born in the former U.S.S.R. and had lived in Latvia for 14 years before she came to Canada.⁸¹ She claimed that she would be persecuted for discrimination against Russians in Latvia upon return. The Court holds that she could have a Russian citizenship by "merely asking for recognition of a pre-existing status," and the Russian officials have no discretion on this matter pursuant to the Russian law.⁸² It cannot be said that she does not have a country of nationality because acquisition of citizenship can be completed by "a mere formality."⁸³ The pre-existing status as a citizen can be considered dual or multiple nationality.

Unlike the pre-existing status potential nationality needs to be examined because it does not necessarily lead to automatic acquisition of citizenship. *Katkova v. Canada* is a good comparison with *Bouianova*. In this case, a Jewish applicant must take an administrative step to acquire citizenship in accordance with the Law of Return in Israel. Also, the Jewish applicant's desire to live in Israel is an requirement to be a citizen while in *Bouianova* the desire to reside in Russia is not a precondition for citizenship.⁸⁴ The Law of Return in Israel grants the Israeli Minister of the Interior discretionary power to deny applications for citizenship, especially for the matter of public health or national security.⁸⁵ In *Katkova*, the applicant does not want to live in Israel so that she does not satisfy the requirement of Israeli citizenship. The case was returned to the Board for redetermination with a question to be answered whether *all* Jewish refugee applicants should be considered having another country of citizenship. The answer can be given by applying *Williams* test to every individual case.

⁸⁰ *Katkova v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C.J. No. 549 at para 2.

⁸¹ *Tatiana Bouianova v. Canada (Minister of Employment and Immigration)*, [1993] 67 F.T.R. 74 at 2.

⁸² *Katkova v. Canada* (quoting *Tatiana Bouianova v. Canada*).

⁸³ *Tatiana Bouianova v. Canada* at para. 8.

⁸⁴ *Ibid* at 3.

⁸⁵ *Ibid* at 7.

The Court in *Williams* examines whether an applicant’s potential nationality is considered his or her “nationality of countries” under the refugee definition. The test is whether acquisition of citizenship is within the claimant’s control. The Court embraces Justice Rothstein’s wordings from *Bouianova v. Canada* and rephrases it:

“The true test [...] is the following: *if it is within the control of the applicant to acquire the country with respect to which he has no well-founded of persecution, the claim for refugee status will be denied.*⁸⁶ [...] While words such as ‘acquisition of citizenship in a non-discretionary manner’ or ‘by mere formalities’ have been used, the test is better phrased in terms of ‘power within the control of the applicant’ for it encompasses all sorts of situations [...] [Italic added].”⁸⁷

The test makes it possible to give thought to the applicant’s situations in a concrete and comprehensive manner rather than just asking whether citizenship is acquired “in a non-discretionary manner” or it can be achieved “by mere formalities.”

Canada v. Williams has an important meaning to North Korean cases. In 2010 *Williams* played a crucial role to *Kim v. Canada (Minister of Citizenship and Immigration)*.⁸⁸ It was a case where North Korean mother with her minor son was denied refugee status by the IRB on October 26, 2009. The IRB explained that the evidence of an automatic award of citizenship outweighs the evidence of “the will and desire” to live in South Korea.⁸⁹ It went on to state that all the person needs to do is to ask for protection from the South Korean government. It means that acquisition of the citizenship is “within the control of the applicant,” which meets the criteria of the test in

⁸⁶ In *Bouianova v. Canada* Rothstein J. states that “[i]n my view the status of statelessness is not one that is optional for an applicant. The condition of nothing having a country of nationality must be one that is beyond the power of the applicant to control” at par. 12. *William* uses Rothstein J.’s wordings to construct a test at par. 22.

⁸⁷ *Ibid.*

⁸⁸ *Kim v. Canada (Minister of Citizenship and Immigration)*, [2010] F.C.J. No. 870.

⁸⁹ The Refugee Protection Division in Immigration and Refugee Board of Canada, “Notice of Decision,” IRB File Number: VA9-00192/VA-00193 (26 Oct. 2009) at para. 21.

Williams.⁹⁰ The IRB concluded that South Korea is a potential country of nationality, and suffices “a country of nationality” in sections 96 and 97 of the *IRPA*.⁹¹

In *Kim*, the Federal Court holds that the IRB erred in considering evidence of whether North Korean is granted an automatic citizenship from South Korea.⁹² The Court cites *Canada v. Hua Ma* in which it held that unbearable burden should not be imposed to a refugee claimant concerning the matter of acquisition of citizenship.⁹³ The case of *Ma* suggested that while an application for citizenship is within the control of a claimant, acquisition of citizenship can still be within the control of the government.⁹⁴ The Court in *Kim* states that it is not clear whether the acquisition of South Korean citizenship is within the applicant’s control.⁹⁵ It concludes that this question should be answered with “an examination of the laws, jurisprudence, practice and politics” of South Korea.⁹⁶ The case was returned for redetermination.

Acquisition of the South Korean nationality is not a pre-existing right for North Koreans although Article 2 or 3 of the Constitution protect such an entitlement in the theoretical level. South Korean nationality may give a potential status to North Koreans, but it cannot say that award of South Korean citizenship is within a North Korean applicant’s control. As explained earlier in section 5, *the Act on the Protection and Settlement Support* requires an applicant to intend to reside in South Korea in similar to the Law of Return in *Katkova*. The Minister of Unification has discretion to exclude certain types of persons from protection of South Korea such as North Koreans who live outside North Korea for more than ten years or international criminal offenders. The Director General of the National Intelligence Service can also preclude the persons who are a danger to

⁹⁰ *Ibid* at para. 22.

⁹¹ *Ibid* at para. 23.

⁹² *Kim v. Canada*, *supra* note 76 at para 18.

⁹³ *Ibid* at para. 7; *Canada (Minister of Citizenship and Immigration) v. Hua Ma*, 2009 FC 779 (CanLII) at para. 119.

⁹⁴ *Ibid* at para. 7.

⁹⁵ *Ibid* at para. 19.

⁹⁶ *Ibid* at para. 8.

national security. Evidently, not every North Korean refugee case is subsumed under the category of dual nationality in section 96(a) of IRPA.

Furthermore, the Court in *Katkova* adds one more factor to assess actual nationality. It asserts that there should be “a genuine link between the person and the state” to constitute nationality.⁹⁷ The Court cites it from the *Nottebohm* case, which was decided in 1955 by the International Court of Justice (ICJ). ICJ considered “a genuine link” an element of nationality in the case.⁹⁸ A range of components of a genuine connection are listed: “centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children his habitual residence” as well as his habitual residence, not to mention that of actual nationality based on factual affiliations between the person and the state.⁹⁹ *Katkova* questions “whether the mere fact of being Jewish creates a ‘genuine link’ between any Jewish person and the State of Israel.”¹⁰⁰ The Court could not find that the applicant has a bond with the Israeli state to a certain extent. “[The applicant] has never set foot on Israeli soil. The only connection she has Israel is that she is a Jew.”¹⁰¹ The Law of Return does not suggest that “every Jew should return to Israel.”¹⁰² Similarly, the *Act on the Protection and Settlement Support* does not imply that every North Korean should “return” to South Korea. This gives a thought to a relationship between any North Korean person and the State of South Korea, which is often assumed to be closely linked to each other. In fact, most of North Koreans, who fled to other countries, have never been to South Korea. The only relationship to South Korea is that he or she is a Korean.

⁹⁷ *Katkova v. Canada*, *supra* note 80 at 6.

⁹⁸ Oliver J. Lissitzyn, “Nottenbohm Case (Liechtenstein v. Guatemala)” (1955) 49 *AJIL* 396, at 399-400.

⁹⁹ *Ibid.*

¹⁰⁰ *Katkova v. Canada*, *supra* note 80 at 6.

¹⁰¹ *Ibid* at 6.

¹⁰² *Ibid* at 2.

7. IRB Decisions on North Koreans

The RIRs, issued by the IRB on June 3, 2008, has played a pivotal role in the decisions of the IRB and contributed to increasing admissions of North Korean refugees in Canada, particularly in 2009 in Canada. The following two IRB decisions, which were made before and after June 3, 2008, reflect the change of the RIRs leading to a different conclusion. In both cases, the determinative factor is whether to acquire automatic citizenship in South Korea. One is a negative decision on April 29, 2008 and the other one is a positive decision on August 27, 2008. Both decisions were held in Toronto, Ontario.

The negative decision relied on information of country document that “the vast majority of North Korean defectors resettle in South Korea which accepts them.”¹⁰³ The country document was an article, “Perilous Journeys: The Plight of North Koreans in China and Beyond Asia,” which is written by International Crisis Group in October, 2006.¹⁰⁴ The article reads that “the constitution acknowledges their right to citizenship” and 95 per cent of North Korean migrants resettle in South Korea.¹⁰⁵ This directed the IRB to the reasoning that application for South Korean citizenship is “a mere formality,” and the South Korean authority does not have discretion to deny the application.¹⁰⁶ The IRB cited *Bouianova v. Canada*, instead of a recent 2005 case, *Williams: Bouianova* states that if making an application to be a citizen is “a mere formality” and the officials have no discretion to deny it, it cannot be said that the applicant does not have a country of nationality to provide them protection.¹⁰⁷ As a result, the application for protection of Canada was denied for the reason of the applicant’s “right to citizenship and protection in the Republic of Korea.”¹⁰⁸

¹⁰³ Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA7-15242 (29 April 2008).

¹⁰⁴ International Crisis Group, *supra* note 33 at para. 26.

¹⁰⁵ *Ibid.*

¹⁰⁶ Immigration and Refugee Board of Canada, *supra* note 103.

¹⁰⁷ *Tatiana Bouianova v. Canada*, *supra* note 81; *Katkova v. Canada*, *supra* note 80.

¹⁰⁸ Immigration and Refugee Board of Canada, *supra* note 103.

About four months later, the IRB Panel made an opposite decision that awarded a refugee status to a North Korean applicant and her son.¹⁰⁹ It was after the new RIRs was released. The determining issue was also whether they have a right to South Korean citizenship. In the decision, the IRB cited *Williams v. Canada*: the test is whether acquisition of the citizenship of a country is within the control of an applicant. The IRB viewed that admissions of North Koreans to citizens were discretionary to the South Korean government on the basis of the RIRs. Since the applicant stayed outside North Korea for about four years,¹¹⁰ and is lack of “will or desire” to reside in South Korea, she could not satisfy a prerequisite to be a South Korean citizen.¹¹¹ The applicant claimed that her relatives in North Korea would be treated like traitors if she entered South Korea. The IRB concluded that: “[p]ower is not within the control of the female claimant. Therefore, the claimants are not obligated to seek South Korea’s protection before they seek Canada’s.”¹¹² The two cases reflect the change of the RIRs in favor of North Korean applicants.

Along with the RIRs, *Williams* is a good legal case for positive decisions. The IRB decisions, which are dated August 27, 2008,¹¹³ January 28, 2009,¹¹⁴ October 13, 2010,¹¹⁵ January 19, 2011,¹¹⁶ February 9, 2011¹¹⁷ and February 23, 2011, used *Williams*’s test.¹¹⁸ Many of the cases recognized that the South Korean government has discretion and obtaining citizenship is not in the control of the applicant’s power. The IRB reviewed the information that the South Korean government examines

¹⁰⁹ Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA6-12919 & TA6-12920 (27 August 2008).

¹¹⁰ The RIRs informs that “persons who have resided in a third country for a extended period of time” can be precluded from having the South Korean citizenship. Immigration and Refugee Board of Canada, *supra* note 47).

¹¹¹ The claimant stayed in China for two years and in Canada for two years.

¹¹² Immigration and Refugee Board of Canada, *supra* note 109.

¹¹³ *Ibid.*

¹¹⁴ Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA-13018 & TA6-13019 (28 January 2009).

¹¹⁵ Immigration and Refugee Board of Canada, “Reasons and Decision” RPD File No.: TB0-04641 (13 October 2010).

¹¹⁶ Immigration and Refugee Board of Canada, “Reasons and Decision” RPD File No.: TB0-07557 & TB0-07558 & TB-07559 & TB0-07560 (19 January 2011).

¹¹⁷ Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TB0-03577 & TB0-03578 (9 February 2011).

¹¹⁸ Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA9-21214 & TA9-21215 & TA9-21216 & TA9-21217 (23 February 2011).

applications with questions: first, whether an applicant is a genuine North Korean defector; second, whether the applicant has carried out a significant crime; and whether the applicant has resided in a third country for a lengthy period of time.

Besides, *Katkova v. Canada* was cited in two other cases: one positive (January 28, 2009) and one negative decision (April 29, 2008). The positive IRB decision quoted from *Katkova* that “someone cannot be compelled to live in a country if he or she does not wish to do so.”¹¹⁹ Equally, a North Korean applicant cannot be forced to live in South Korea regardless his will. On the other hand, in a negative decision the IRB emphasized “a genuine link” between the State and an applicant. The IRB determined “a genuine link” based on the fact of whether North Koreans has a right to the South Korean citizenship, in addition to cultural and linguistic commonality. It states that “there must be a genuine connection or link with that country. It has been established above that the claimant has a right to citizenship in South Korea.”¹²⁰ Nevertheless, the case was not successful because the IRB panel depended on the old country document, “Perilous Journey [...]” It is partially because the decision came before the new RIRs was put out. When the IRB questioned why the female applicant came to Canada instead of South Korea, it did not take into account the fact that she “has never set foot on [South Korean] soil. The only connection she has is that she is a [Korean].”¹²¹ The IRB failed to regard her repeated concern that North Koreans in South Korea would be put in danger if two Koreas were unified, and find out whether she had relatives in South Korea, or how her family members would be treated in North Korea if she chose to live in South Korea.

To summarize, the 2008 RIRs and *Williams v. Canada* (2005) have made a significant impact on positive IRB decisions towards North Korean applicants in Canada. This change was not

¹¹⁹ Immigration and Refugee Board of Canada, *supra* note 114 at 2.

¹²⁰ Immigration and Refugee Board of Canada, “Reasons and Decision,” RPD File No.: TA7-15242 (29 Apr. 2008) at 5.

¹²¹ Immigration and Refugee Board of Canada, *supra* note at 6.

possible without accurate understanding of the changing South Korean laws and cases, legal interpretation of dual or multiple nationality in the refugee definition in Canadian law and international law, and the recent historical development of case law in Canada.

8. Conclusion

The Korean peninsula has been divided into North and South Korea for 67 years, and the partition also has separated people, places, systems, and ideas despite commonalities. “Crossed the Border of Heaven,” a series of documentary films, introduces stories about North Korean border crossers, who did not choose to go to South Korea due to their different beliefs and values.¹²² One of the stories is about two sisters who were brought together in China for the first time after a separation of ten years. The older sister had left North Korea and settled in South Korea. After a decade’s interval, the younger one refused to go to South Korea with her sister because of her strong belief that she should not abandon her homeland to defend socialism. She has never been to South Korea. With tears, the older sister had to see off her teenage sibling returning to North Korea where she did not even have her parents. It has been pointed out that North Koreans are hardly recognized as refugees under the international refugee regime due to a potential status as a South Korean national. In fact, acquisition of citizenship requires an intention to reside in South Korea. Recently, the RIRs made it clear that South Korean nationality is not an automatic citizenship for North Koreans. Before falling into the dichotomic pretext between South Korea and North Korea, it needs to be asked whether the person and South Korea could possibly have “a genuine link” in the refugee determination.

¹²² Jung In Taek, *천국의 국경을 넘다* [Crossed the Border of Heaven], (Seoul: Chosun Ilbo, 2008) Film.