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Song Dae Ri, Chang Il Ri, Claimant(s)

Immigration & Refugee Board of Canada (Refugee Protection Division)

Milliner Member

Heard: October 9, 2002; February 5, 2003

Judgment: September 12, 2003

Docket: TA2-15547, TA2-19913

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Counsel: Robert J. Moorhouse for Claimants
Selwyn Pieters - Refugee Protection Officer

Subject: Immigration

Aliens, immigration and citizenship --- Exclusion and removal — Inadmissible classes — War crimes or crimes against humanity

Claimants alleged well-founded fear of persecution, principal claimant on grounds of political opinion, and minor claimant on grounds of membership in particular social group, namely, family of North Korean defectors — Principal claimant had worked at high-level positions in North Korean government — Principal claimant had travelled and made statements to staff at North Korean embassy in Beijing and to other North Korean officials about free market advantages and economic development of South Korea — Principal claimant's statements constituted severe offence in North Korea, and he was accused of multiple crimes centering on treasonous activities and thoughts — Principal claimant stated that trigger event that prompted his defection was witnessing maltreatment of North Korean nationals who escaped to China in search of asylum only to be recaptured and returned to North Korea — Principal and minor claimants brought applications for Convention refugee status and for status as persons in need of

protection — Minor claimant granted Convention refugee status; application by principal claimant dismissed — Serious possibility existed that both claimants would be persecuted if they returned to North Korea, and there was serious possibility of risk to their lives and of torture — Principal claimant, however, was excluded under Article 1F(a) of Convention Relating to the Status of Refugees, 1951 — There were serious reasons for considering that principal claimant had committed crimes against humanity through his long-standing membership in government of North Korea — Documentary evidence clearly showed that government of North Korea committed activities constituting crimes against humanity in widespread and systematic fashion in order to achieve political objectives — While principle claimant may not have personally committed atrocities, it was established on balance of probabilities that he was aware of such activities and did not withdraw himself from government at first safe opportunity — Principal claimant waited ten years until his own well-being was threatened — Principal claimant was complicit and met principles of personal and knowing participation and shared common purpose.

Aliens, immigration and citizenship --- Convention refugees — Elements of Convention refugee status — Grounds — Membership in particular social group

Claimants alleged well-founded fear of persecution, principal claimant on grounds of political opinion, and minor claimant on grounds of membership in particular social group, namely, family of North Korean defectors — Principal claimant had worked at high-level positions in North Korean government — Principal claimant had travelled and made statements to staff at North Korean embassy in Beijing and to other North Korean officials about free market advantages and economic development of South Korea — Principal claimant's statements constituted severe offence in North Korea, and he was accused of multiple crimes centering on treasonous activities and thoughts — Principal and minor claimants brought applications for Convention refugee status and for status as persons in need of protection — Minor claimant granted Convention refugee status; application by principal claimant dismissed — Principal claimant was excluded under Article 1F(a) of Convention Relating to the Status of Refugees, 1951 — There were serious reasons for considering that principal claimant had committed crimes against humanity through his long-standing membership in government of North Korea — Minor claimant's claim was based on his father's claim — Best interests of child had to be considered, and minor claimant met definition of Convention refugee in that there was serious possibility that he would be persecuted if he was returned to North Korea — Board heard testimony that minor claimant's mother and grandfather had been killed by North Koreans, and Board did not dispute that evidence despite lack of corroborating evidence — Minor claimant's only relatives were his maternal grandparents in Japan, where minor claimant had no right of residence or citizenship — Grandparents had apparently betrayed their daughter to North Korean authorities, and they could not be considered suitable guardians — Father's actions in voicing anti-North Korean government opinions, knowledge by North Korean government that claimants were in Canada and had refugee claims, and publication of those facts in South Korean press

placed minor claimant in untenable position with regard to return to North Korea — Documentary evidence showed that families of political dissidents were dealt severe punishment in North Korea.

Aliens, immigration and citizenship --- Convention refugees — Credibility

Claimants alleged well-founded fear of persecution, principal claimant on grounds of political opinion, and minor claimant on grounds of membership in particular social group, namely, family of North Korean defectors — Principal claimant had worked at high-level positions in North Korean government — Principal claimant had travelled and made statements to staff at North Korean embassy in Beijing and to other North Korean officials about free market advantages and economic development of South Korea — Principal claimant's statements constituted severe offence in North Korea, and he was accused of multiple crimes centering on treasonous activities and thoughts — Principal and minor claimants brought applications for Convention refugee status and for status as persons in need of protection — Principal claimant testified that his wife and his father had been killed by North Korean government, although there was no mention of this in his Personal Information Form ("PIF") — Minor claimant granted Convention refugee status; application by principal claimant dismissed — Given large number of very material omissions in principal claimant's PIF, his credibility was at very least compromised — There was no corroborative documentation before Board to show that claimants' specific relatives were dead or being held hostage — However, given strength of documentary evidence showing atrocious lengths to which North Korean government went to suppress dissent, Board was not prepared to find that principal claimant was lying about fate of his relatives — Serious possibility existed that both claimants would be persecuted if they returned to North Korea, and there was serious possibility of risk to their lives and of torture — Principal claimant, however, was excluded under Article 1F(a) of Convention Relating to the Status of Refugees, 1951 — There were serious reasons for considering that principal claimant had committed crimes against humanity through his long-standing membership in government of North Korea.

Cases considered by Milliner Member:

Adjei v. Canada (Minister of Employment & Immigration) (1989), 7 Imm. L.R. (2d) 169, 57 D.L.R. (4th) 153, 132 N.R. 24, 1989 CarswellNat 40, 1989 CarswellNat 628, [1989] 2 F.C. 680 (Fed. C.A.) — followed

Arica v. Canada (Minister of Employment & Immigration) (1995), 182 N.R. 392, 1995 CarswellNat 132 (Fed. C.A.) — considered

Arica v. Canada (Minister of Employment & Immigration) (1995), 198 N.R. 239 (note) (S.C.C.)
— referred to

Basseghi v. Canada (Minister of Citizenship & Immigration) (1994), 1994 CarswellNat 2175
(Fed. T.D.) — referred to

Bazargan v. Canada (Minister of Employment & Immigration) (1996), (sub nom. Bazargan v.
Ministre de l'Emploi & de l'Immigration) 205 N.R. 282, (sub nom. Bazargan v. Ministre de
l'Emploi & de l'Immigration) 119 F.T.R. 240 (note), 1996 CarswellNat 1898 (Fed. C.A.) —
referred to

Castillejos v. Canada (Minister of Citizenship & Immigration) (1994), 1994 CarswellNat 2128
(Fed. T.D.) — referred to

Heer v. Canada (Minister of Employment & Immigration) (April 13, 1988), Doc. A-474-87 (Fed.
C.A.) — considered

Huerta v. Canada (Minister of Employment & Immigration) (1993), (sub nom. Huerta v.
Ministre de l'Emploi & de l'Immigration) 157 N.R. 225, 1993 CarswellNat 297 (Fed. C.A.) —
referred to

Mohammad v. Canada (Minister of Citizenship & Immigration) (1995), (sub nom. Mohammad
v. Canada (Ministre de la Citoyenneté & de l'Immigration)) 115 F.T.R. 161, 1995 CarswellNat
1405 (Fed. T.D.) — referred to

Penate v. Canada (Minister of Employment & Immigration) (1993), 71 F.T.R. 171, [1994] 2 F.C.
79, 1993 CarswellNat 249, 1993 CarswellNat 249F (Fed. T.D.) — followed

Ramirez v. Canada (Minister of Employment & Immigration) (1992), 89 D.L.R. (4th) 173, [1992] 2 F.C. 306, 135 N.R. 390, 1992 CarswellNat 94, 1992 CarswellNat 94F (Fed. C.A.) — followed

Sivakumar v. Canada (Minister of Employment & Immigration) (1993), 163 N.R. 197, [1994] 1 F.C. 433, 1993 CarswellNat 242, 1993 CarswellNat 242F (Fed. C.A.) — referred to

Sumaida v. Canada (Minister of Citizenship & Immigration) (2000), 2000 CarswellNat 23, 3 Imm. L.R. (3d) 169, 183 D.L.R. (4th) 713, 252 N.R. 380, [2000] 3 F.C. 66, 2000 CarswellNat 1751, 179 F.T.R. 148 (Fed. C.A.) — referred to

Statutes considered:

Immigration Act, R.S.C. 1985, c. I-2

s. 65(3) — referred to

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Generally — referred to

s. 97(1)(a) — referred to

s. 97(1)(b) — referred to

s. 98 — referred to

s. 159(1)(h) — referred to

Treaties considered:

Convention Relating to the Status of Refugees, 1951, C.T.S. 1969/6; 189 U.N.T.S. 150

Generally — referred to

Article 1F(a) — considered

Protocol Relating to the Status of Refugees, 1967, C.T.S. 1969/29; 606 U.N.T.S. 267

Generally — referred to

Rome Statute of the International Criminal Court, 1998, U.N. Doc. A/CONF. 183/9

Article 7 ¶ 1 — considered

APPLICATIONS by principal and minor claimants for Convention refugee status and for status as persons in need of protection.

Milliner Member:

1 On October 9, 2002 and February 5, 2003, the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) heard the claims of Song Dae Ri, age thirty-six, hereinafter referred to as the principal claimant, and his son, Chang Il Ri, age five, hereinafter referred to as the minor claimant, to be Convention refugees. The claimants are citizens of the Democratic People's Republic of Korea (DPRK), hereinafter referred to as North Korea, and base their claims to a well-founded fear of persecution on the grounds of political opinion in the case of the principal claimant, and on membership in a particular social group, namely, family of North Korean defectors, in the case of the minor claimant. In addition, they claim to be persons in need of protection as defined in Sections 97(1)(a) and 97(1)(b) of the Immigration and Refugee Protection Act (IRPA). The principal claimant was appointed as Designated Representative for his minor son.

2 Although these claims were brought to the attention of the Minister's Counsel on three occasions, the Minister's Counsel declined to participate.[FN1]

3 Although oral representations were received from Counsel and the Refugee Protection Officer (RPO) at the conclusion of the first sitting, based on the translation of documentation received at the end of the first sitting,[FN2] the hearing was reconvened at another date, and written representations were received from both the RPO and Counsel after the second sitting. All representations have been considered in the preparation of these reasons.

4 In Counsel's written representations, he made several references to faulty interpretation. If Counsel wished to impugn the hearing room interpreters assigned to both sittings, it was open to him to present a formal objection during the hearing or at its conclusion, and not wait to raise the issue in written representations long after the hearing. It is to the second sitting interpreter's credit that she brought to the hearing room the tools she needed to perform her translation duties. In my opinion, in the few areas in which there may have been some misunderstanding, a rephrasing of the question was sufficient to provide clarification.

Summary of the Claimant's Allegations

5 Two lengthy detailed narratives were submitted for the purpose of these claims. The first was part of the Personal Information Form (PIF),[FN3] and the second was a direct translation[FN4] of the principal claimant's original Korean handwritten statement which the claimant produced at the end of the first sitting.[FN5]

Narrative #1

6 In the narrative attached to his PIF, the principal claimant writes that he worked at various high level positions in the North Korean government. When he travelled out of North Korea on various business trips, he learned of a world different from that in which he had previously believed. He began to talk of free market advantages and of economic developments in South Korea. The problem was that he made such statements to his staff at the Embassy of North Korea in Beijing, People's Republic of China (hereinafter referred to as China), and to other North Korean officials. Such statements are a severe offence and dangerous for high ranking officials like the principal claimant. As a result, he has been accused of multiple crimes all centering on treasonous activities and thoughts. He fears that, if he returns to North Korea, he will be executed for his betrayal. The principal claimant explained in great detail his argument against North Korean government policy and that of North Korea's "Great Leader," and he outlined how strict the North Korean security watch was when he was posted to Beijing, China. The "trigger" event prompting the principal claimant's defection was witnessing the maltreatment of North Korean nationals who had escaped to China in search of asylum only to be recaptured and returned to North Korea.

7 The principal claimant decided to escape to save himself and his son. Since coming to Canada, he was offered asylum by the South Korean government but declined the offer, fearing he would be used by South Korea as a political pawn. Moreover, his family in North Korea would be in danger if it became known he had gone to South Korea.

Narrative #2

8 The principal claimant's handwritten statement is not clearly written. Many words are scratched out and small notes are inserted in the text and added on the side. The translator of the statement found the last part illegible and was unable to translate it.

9 This second statement or narrative, which is actually the original draft from which the narrative attached to the PIF was drawn, speaks in detail of the principal claimant's perceived treachery against North Korea but uses different wording and includes an accusation of his alleged guilt in "leaking confidential military and state information to the president of Daebap, China".[FN6] He does mention the risk to his relatives and speaks of the contempt of North Korean officialdom towards Americans and North Korea's goal to eradicate every last American. He refers to "other things" which he did not include in an apparent effort to shorten his statement.

Determination

10 The standard of proof with respect to the well-foundedness of the claimants' fear is set out in Adjei.[FN7] Although the panel finds that some of the principal claimant's behaviour and actions tend to negate his stated subjective fear, based on a preponderance of the evidence, I am still satisfied that there is a serious possibility that both the claimants would be persecuted, should they return to North Korea and that there is a serious possibility of risk to their lives and of a danger of torture as outlined in Sections 97(1)(a) and 97(1)(b) of the IRPA. However, the panel excludes the principal claimant under Article 1F(a) of the United Nations Convention on the Status of Refugees, namely, Crimes against Humanity.

Issues

11 The issues identified at the outset of the hearing were identity; credibility; subjective fear, namely, delay in claiming and destruction of documents; and objective basis. The principal claimant was put on notice that Exclusion under Article 1F(a) of the United Nations Convention would be an issue despite the non-participation of Minister's Counsel.[FN8]

Analysis

Identity

12 The identity of both claimants was established by documentation filed.[FN9] There was no official document establishing the father/son relationship between the two claimants (for example, a birth certificate). However, the child himself was able to establish that the principal claimant was his father, and he was able to establish his relationship to his mother through identifying accompanying photographs.[FN10]

13 Some documentary evidence was produced that names Ri Song Dae as chairman of the North Korean External Economic Affairs Commission,[FN11] but it was determined that this individual was older than the principal claimant and that they were not in fact the same individual.

14 The principal claimant's claim to residence in China was also established by documentation filed.[FN12]

Exclusion, Article 1F(a)

15 This section is applicable solely to the principal claimant.

Persons Considered not to be Deserving of International Protection

16 Article 1F of the 1951 Convention reads, in part, as follows:[FN13]

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

Definition of Crimes against Humanity

17 Crimes against humanity may be committed in war and in times of peace and must be committed in a widespread systematic fashion.[FN14] The perpetrator of a crime against humanity may be an individual acting either for or independently of the State. In making a decision to exclude the principal claimant under Article 1F(a) of the United Nations Convention (Crimes against Humanity), I have looked at the acts committed by the perpetrators, i.e., the North Korean government of which the principal claimant was an official, the principal claimant's knowledge of the acts, his sharing in the common purpose of the acts, and whether the acts constituted crimes against humanity.[FN15]

18 This definition of Crimes against Humanity is excerpted from the Charter of the International Military Tribunal.

Crimes against humanity: namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan.[FN16]

Article 7 of the Rome Statute of the International Court, signed July 17, 1998, defines crimes against humanity as follows:

1. For the purpose of this statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(emphasis added)

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character internationally causing great suffering, or serious injury to body or mental or physical health.

Complicity

19 Even if a claimant has not physically committed a crime, but has helped in some way, he may be considered to be an accomplice, thus sharing responsibility for the crime, and may be subject to being excluded from being a Convention refugee or a person in need of protection. The exclusion clauses do not suggest that a complicit person has to have the power to take steps to prevent the occurrence of atrocities as put forth by Counsel in his representations. The whole point of leaving at the first opportunity is precisely because he does not have the power to stop the atrocities. An accomplice is as culpable as the actual perpetrator. I am guided by the decision of the Federal Court in *Penate* in which Madame Justice Reed comments on the meaning of a "shared common purpose":

As I understand the jurisprudence, it is that a person who is a member of the persecuting group and who has knowledge that activities are being committed by the group and who neither takes steps to prevent them occurring (if he has the power to do so) nor disengages himself from the group at the earliest opportunity (consistent with the safety of himself) but who lends his active support to the group will be considered to be an accomplice. A shared common purpose will be considered to exist.[FN17] (emphasis added).

The following factors have been considered: method of recruitment, nature of the organization, the principal claimant's rank, his knowledge of atrocities, opportunity to leave the organization, and the period of time spent in the organization.

Recruitment

20 The principal claimant testified that his father-in-law had some influence in his obtaining his employment with the North Korean government. There is no persuasive evidence before the panel that the principal claimant's participation in the Government of North Korea since 1991 was anything other than voluntary. According to his testimony, he engaged in trade and importing. He testified that he sold various commodities between China and Japan, for example, mushrooms, notebooks, metals, and contributed his profit to North Korea. In other words, he sold these Chinese-produced materials to Japan to earn foreign currency for North Korea. He said his work was appreciated by the North Korean government, and this appreciation translated into his appointment as a diplomat in the North Korean Embassy in Beijing, China in August 2000.[FN18] I find that, on a balance of probabilities, the principal claimant joined the North Korean government willingly and voluntarily.

21 In his representations, Counsel submits that the principal claimant was recruited after leaving university to work in the service of his government and did not have the luxury, as we do in Canada, of making his own choice as to whether he wished to work for his government. I must respectfully disagree with Counsel. The principal claimant at no time gave any indication that he

was in any way forced, compelled, or coerced into accepting his job with the North Korean government. He did not even complain that he did not wish to do his three years of military service, but instead rather dispassionately outlined his military duties. What he did say about his education and employment was that he received his university education free but had to study hard and pass the test. He also stated that the work that he did "was appreciated" by the North Korean government and that was why he received the diplomatic posting to Beijing, China. I do not find that the principal claimant was employed under duress by the North Korean government. Counsel also submits that the principal claimant was not employed in the military, the judiciary, or the internal security forces. However, it is naive to think that the large amount of money raised by the principal claimant for the North Korean government would not be channeled to any of those branches of government service, and the Government of North Korea as an entity, including all its branches, is responsible for the starvation of the masses and other human rights abuses.

Position in the Organization

22 The principal claimant must have personal and knowing participation.[FN19] Personal and knowing participation can be direct or indirect and does not require formal membership in the group concerned.[FN20]

23 The evidence supports a finding that the principal claimant was a formal or official high-ranking member of the North Korean government, a government that he worked for over a ten-year period. He testified that he started as an assistant manager and ended up in the North Korean Diplomatic Service with his posting to the North Korean Embassy in Beijing, China. In addition to his diplomatic posting, the principal claimant was chief representative of the Japanese Trading Company Apuro in Beijing.[FN21] Orally, he referred to himself as President of Apuro.[FN22] Counsel submitted that the principal claimant's position could best be described as a trade official and that he was in no way a senior diplomat, and in his written representations, he refers to the principal claimant as only a "mid-level functionary," a puzzling comment given Counsel's acknowledgement in his written representations that the principal claimant did admit he was in a highly responsible position. Counsel believes that the principal claimant was incorrectly described as a high ranking diplomat by the South Korean press in Toronto, Ontario.[FN23] Counsel goes on to say that no information was presented to suggest that the principal claimant was a prominent North Korean diplomat. I must respectfully disagree with Counsel's comments. The principal claimant's own evidence points to his being a higher echelon diplomat. For example, in his PIF narrative he states:

I worked at various positions in high levels of government ...[FN24]

In the same PIF narrative, he refers to his "staff" and he refers to "high-ranked Government Officials like myself." [FN25] Further on, he refers to himself as a "high official appointed by the

Great Leader." [FN26] Still further, he equates himself with "high-ranked officials in North Korea," as a "government official posted in a foreign country," and as a "North Korean high-ranking government Official." [FN27] In his handwritten statement, the principal claimant refers to himself as a "government official in a heavily responsible post." [FN28] During questioning by Counsel, the principal claimant stated that he was in the group of higher positions (later clarified by him as the highest position in the North Korean Embassy in China) and that as such, was entitled to a separate apartment within the North Korean Embassy in Beijing, China. [FN29] Furthermore, he testified that he had a connection to the current leader of North Korea in that the principal claimant's father-in-law was a drinking friend of the former dictator of North Korea, Kim Il Sun, who was the father of the current North Korean leader, Kim Jong Il. [FN30] A further indication of the principal claimant's rank in the North Korean government is his statement that he had access to confidential military and state information. [FN31] He is not a mere bystander. The more important his position in the North Korean government organization, the more likely is his complicity. [FN32] The principal claimant certainly did not suffer with the masses. He attended prestigious learning institutes, landed a government job, and married into a family with close ties to the North Korean leadership.

24 Based on all the evidence, it is my finding that the principal claimant was a high-level North Korean government official with weighty responsibilities. He represented North Korean trade interests in both China and Japan. Thus there exists a shared common purpose with and personal and knowing participation in the dictatorship that rules North Korea, a government with a very poor human rights record. [FN33]

25 The principal claimant was asked bluntly if he was a North Korean spy, and although he responded in the negative, he appeared to be amused, responding with a laugh. The question is a legitimate and relevant one since the documentary evidence reports that North Korean spies in China are sometimes disguised as trade officials and diplomats. [FN34] However, there is no persuasive evidence to show that the principal claimant before me is a spy, and the making of such a finding would be based on pure speculation.

Knowledge of Atrocities

26 The principal claimant did not attempt to deny knowledge of atrocities committed by his government. In his PIF narrative, he writes of his knowledge of the North Korean policy to support military growth and its goal to unify the two Koreas by military force. [FN35] He acknowledged he was aware of the severe treatment meted out to those deemed guilty of crimes of political conscience. He acknowledged he was aware of the treatment meted out by North Korean security forces to those North Koreans who seek asylum in China and are returned to North Korea. He writes that it is well known that such escapees are treated "brutally." [FN36] In his handwritten statement, he writes of his knowledge of the North Korean idea of hatred toward

humanity, of threats of war, and of hunger and cold. He writes of his awareness of the serious maltreatment of dissidents in detention centres.[FN37] During the second sitting, he was specifically asked of his awareness of severe prison conditions, and specifically, if he possessed that knowledge while he was still in North Korea. He responded affirmatively, adding that many individuals were detained (in North Korea) due to political issues after the Korean War. He stated that such a system of detention was in place while he was a government official, that it was still there, and that they (the North Korean government) control the people by this rule. He exhibited in his testimony rather detailed knowledge of North Korean detention facilities and where the largest were located.

27 The North Korean government is one of the most repressive regimes in the world. It brings misery to its people through dictatorial control and subjugation of its people. The documentary evidence abounds with examples of the atrocities perpetrated on the people by this government - for example, widespread famine and malnutrition, millions dying from starvation and disease while the government and military remain well-fed.[FN38] The principal claimant testified as to the numbers, "two and a half million die from starvation." [FN39] The North Korean government commits serious human rights abuses including extrajudicial killings and disappearances. The Penal Code is draconian - one can incur capital punishment just for listening to foreign broadcasts.[FN40] It is abundantly clear that the principal claimant had personal knowledge of the atrocities committed by the North Korean government. He does not need to have direct involvement to be complicit.[FN41]

Opportunity to Leave/Length of Time in Organization

28 The evidence supports a finding that the principal claimant failed to dissociate himself from the North Korean government at the first opportunity. He began to work for the government of North Korea in October 1991 and continued to work for that government until August 2001. He willingly worked for this government for almost a full ten years despite his knowledge and avowed disapproval of North Korean government policy. Notwithstanding the security detail assigned to him over that ten-year period, there were clearly opportunities to leave, given his international travel to both Japan and China in pursuit of his business duties. He testified that he learned about a better way of life while out of the country on his various business trips. He claimed in his PIF narrative that witnessing the maltreatment of returned North Korean asylum seekers was the "final triggering event" that led him to defect. He was not asked why he did not use the power of his position as a North Korean government representative to order the security detail to treat the detained asylum seekers more humanely or to be released, or in any way express his disapproval of how the detainees were being treated. However, that event, which occurred on a return trip from Beijing, China, back to North Korea, occurred in September 2000, but he still did not leave until August 2001. When he did finally leave, he was able to obtain a false South Korean passport for travel purposes. In addition, the principal claimant's testimony

reveals that he left not because of his opposition to North Korean government policy and atrocities, but because he was about to be exposed or denounced through his own foolishness, i.e., he stated that when under the influence of alcohol, he made a mistake of revealing too much information about what he had seen, and about what he thought, and that he was being accused of disloyalty for purchasing commodities (wheat) other than those he should have purchased on behalf of the North Korean government (rice and corn). Later in his testimony, the principal claimant contradicted his earlier statement that witnessing the maltreatment of the North Korean escapees or asylum seekers was the trigger event prompting his leaving for Canada, saying that it was the beginning. The principal claimant was not asked why this specific event does not appear in his original handwritten Korean language statement. Therefore, no negative inference is attached to its appearance in the PIF narrative. I find that on a balance of probabilities, the principal claimant failed to disassociate himself from North Korean government abuses at the first available opportunity. His leaving North Korean government service when he did is highly suggestive of leaving in an attempt to avoid the consequences of his alcohol-fueled loose lips.

Nature of the Organization

29 Much has been written already of the brutal repressive nature of the North Korean regime. In addition to the examples mentioned from the United States Department of State Reports, Amnesty International reports on the humanitarian crisis in North Korea, including public executions and death penalty applications to peaceful political activities.[FN42] The documentary evidence presented by both Counsel and the RPO for this hearing cites in sometimes extremely graphic language many, many examples of the atrocities perpetrated by this repressive government.[FN43] For example,

While Kim Jong-il eats pizza and develops nuclear weapons, his children are starving. Famine is sweeping North Korea as its regime pours cash into its atomic program.[FN44]

The documentary evidence shows that the North Korean government has developed nuclear capability and is a threat to the peace and stability of the world.[FN45]

30 I find that the documentary evidence cited indicates that the North Korean government commits gross human rights violations in a systematic and widespread fashion against the civilian population. In addition, I find that the brutal actions of the North Korean government are totally out of proportion to any legitimate political objective.

31 In summary, I find that there are serious reasons for considering that the principal claimant has committed crimes against humanity by virtue of his long-standing membership in the Government of North Korea. I find that the North Korean government has a limited and brutal purpose, i. e., to use any means, including violence, to achieve its political objectives. The documentary evidence clearly shows that the North Korean government is responsible for

activities that constitute crimes against humanity. It commits these crimes in a widespread and systematic fashion. While the principal claimant may not have personally committed any atrocities, I believe that, on a balance of probabilities, he was aware of the North Korean government's excesses, did not withdraw himself from that government at the first safe time to do so, but, in fact, waited ten years until his own well-being was threatened. Thus, he is complicit and clearly meets the principles established in Ramirez[FN46] of personal and knowing participation and shared common purpose.

32 In his representations, Counsel wrote that the test for exclusion had not been met and it was precisely for that reason that the Minister's Counsel chose not to participate in the hearing. With all due respect to Counsel's opinion, it is the Member's decision to make, not his. Even if the Minister's Counsel had the opportunity to read the transcript of the first sitting, Minister's Counsel was not present at either sitting and, thus, is not in a position to either form an opinion or make a decision on exclusion. The Federal Court of Appeal has held that the IRB has the authority to make a determination with respect to exclusion based on the evidence presented, with or without the Minister's intervention.

The fact that the Minister does not appear in the hearing, either because he does not wish to do so or because he is not entitled to notice under Rule 9 (3), does not alter the right of the Board to render a determination on the issue of exclusion.[FN47]

Inclusion

Credibility

33 I considered the principal claimant's evidence in its entirety. I took into consideration his age, his level of education (university) and sophistication (international trader/diplomat), cultural differences, stress of the hearing room setting, and testimony received through the filter of an interpreter, any of which may impact on the manner in which testimony was delivered.

34 Generally, I found the main points of the principal claimant's story credible. For example, I believe his employment history, I believe that he made statements condemning the North Korean government, and I believe him when he said he was "fed up" with conditions in North Korea. However, there were major omissions from his story, sufficient in number and serious enough that they could not be overlooked. In assessing the seriousness of the omissions, I am mindful that the principal claimant swore to the accuracy of his PIF, and was represented by Counsel experienced in presenting refugee claims. There is no suggestion that the interpretation of the PIF was in any way incompetent.

Omissions

35 1. The principal claimant testified that his wife who accompanied him to Canada was subsequently enticed out of Canada by her parents in Japan and then kidnapped to North Korea. She had two children there from a former marriage.

36 The principal claimant alleges that his wife was killed by the North Korean government in April 2002 which precedes the signing of his PIF on July 30, 2002, but is not included in it. In addition, he was given an opportunity to amend his PIF at the outset of the hearing and took advantage of that opportunity, but still did not include anything about the death of his wife. He blamed his lack of English and stated he did not recall the PIF indicating that she was alive. Later, he gave the explanation that he did not know if he needed to include that his wife was dead.

37 2. The principal claimant also testified that the North Korean government had killed his father because of his (the principal claimant's) actions. He did not include that fact in his PIF and gave the same explanation for the omission that he gave regarding the death of his wife. He gave the date of learning of the deaths as May 2002, prior to the signing of his PIF on July 30, 2002.

38 3. The principal claimant omitted from his PIF narrative that relatives were being held hostage in North Korea and may be in camps. He gave the number of people being held hostage but did not explain the omission. When pressed, he said that he had thought of his side of the family only, and that the hostages were on his wife's side. When put to the principal claimant that he had not mentioned any hostages in his PIF narrative, he continued to fail to address the omission.

39 4. The principal claimant omitted from his PIF narrative that his wife attempted suicide in Toronto, Ontario, by putting glass in her mouth. He said she had threatened suicide when he told her not to go back to Japan despite the pressure being put on her from her parents who he says swore at her over the telephone and asked her if she was insane. Before leaving Canada, she wrote a bizarre letter to her son and a Certificate of Divorce on Agreement in which she agrees to cede custody of the minor claimant to the principal claimant.[FN48] She left Canada on December 6, 2001, four months after her arrival.

40 5. The principal claimant stated that his father-in-law was the one who informed on him to the North Korean authorities but this information is omitted from his story. This is tremendously important information because it speaks directly to the principal claimant's position in the eyes of his persecutors.

41 6. He omitted from his original handwritten statement any notion of "trigger incidents." His oral evidence regarding "trigger incidents" was inconsistent with that to be found in his PIF narrative, as mentioned earlier in these reasons.

42 7. The principal claimant testified that his wife actually went to Taiwan from Canada (before being taken to Pyongyang, North Korea, and killed) and that she made a statement to the press from twenty to thirty countries that she would be caught by the North Koreans and killed in North Korea. This information is similarly missing from the principal claimant's two stories (PIF and handwritten statement). The principal claimant was asked if he could produce any press articles featuring his wife's comments. He gave two explanations for his inability to do so, firstly that he could not "focus" to get the information, and secondly, that it did not happen in Canada or Korea and he has no relatives in Taiwan. I do not find his explanation satisfactory because he testified that reporters from twenty to thirty different countries interviewed his wife. He was focussed enough to produce press articles from the local South Korean media.[FN49] If he were having trouble focussing, perhaps his Counsel could have attempted to get copies of the articles from foreign media outlets of at least one of those twenty to thirty countries.

43 8. The principal claimant alleged that his mother died when he was an infant, but his PIF gives the impression that his mother is still alive.[FN50] He blamed the omission on his lack of understanding of English, but the PIF, which is clear in its request for deceased dates, was translated to him. The principal claimant's handwritten statement very clearly indicates his parents (plural) are alive.

44 Ultimately by way of explanation for the omissions, the principal claimant referred to the line in his handwritten statement which reads:

There are lots of things to write, but I am going to shorten it here.[FN51]

In my opinion, writing such a statement cannot absolve him of his responsibility to include important material in his PIF.[FN52] Question 37 of the PIF enjoins the principal claimant to include all significant incidents. How much more effort would it have taken to include in his PIF the news that his wife and father had been killed and that other relatives had been taken hostage. In Counsel's original oral representations, he submitted that certain events came to the principal claimant's memory while talking at the hearing. It defies credibility that the principal claimant would just happen to think of that critical information during the hearing and that it would come as a surprise to Counsel.

45 Given the large number of PIF omissions of very important material information, I find that the principal claimant's credibility is at the very least compromised. There is no corroborative documentation before the panel to show that his specific relatives are either dead or being held hostage, but given the strength of the documentary evidence showing the atrocious lengths to which the North Korean government will go to suppress dissent, I am not prepared to make the finding that the principal claimant is, in fact, lying about the fate of his relatives. At the outset of the hearing, during a brief conversation with the minor claimant with respect to the

appointing of a Designated Representative, the boy said his mother was dead.

Delay

46 The principal claimant arrived in Canada on August 22, 2001, but failed to make a refugee claim until December 18, 2001. He stated he arrived first in Vancouver, British Columbia, where he stayed five days, then flew to Toronto, Ontario. He explained that when he first came, it was not with the intent to live here. He talked to some immigration consultants within fifteen days of coming to Canada but was afraid to reveal he was from North Korea out of fear for his relatives' safety. He stated that although he came to seek asylum, he was not aware of refugee matters and did not know he could file a claim at the airport. He feared his case would be published in the press. That fear was realized when local Toronto South Koreans who, on the pretext of helping him, released his information to the press,[FN53] and searched his apartment while he was at the South Korean Consulate in Toronto, Ontario. He claims he has remained in hiding in Toronto, Ontario, coming out only to shop and take his child to school.

47 The principal claimant was in this country illegally (on a South Korean passport) and, as a diplomat, would reasonably be expected to know that he is obligated to present himself to the Canadian authorities without delay to explain his presence in the country and to present his claim.[FN54] I do not believe he was ignorant of refugee and asylum matters. In Heer, the Federal Court of Appeal recognized that delay in claiming refugee status "is an important factor which the Board is entitled to consider in weighing a claim for refugee status." [FN55] Delay points to a lack of subjective fear of persecution,[FN56] the reasoning being that someone who was truly fearful would claim refugee status at the first opportunity.[FN57] While delay in making a refugee claim is not a decisive factor in itself, it is a relevant element which the tribunal may take into account in assessing the statements, actions, and deeds of a claimant.[FN58] The panel finds that the principal claimant has provided a reasonable explanation for delay in claiming in this case and no negative inference is drawn.

48 Despite the number of credibility concerns surrounding critical omissions, I still believe that the claimant has made statements against North Korea, and given the strength of the documentary evidence, those statements alone would be sufficient to render him an object of intense persecution if he were to be returned to North Korea, having defected. There is sufficient remaining credible evidence to establish a well-founded fear of persecution by reason of his political opinion.

Minor Claimant, Chang Il Ri

49 The minor claimant's claim is based on that of his father's claim. In making a determination in this minor's claim, I have been guided by the Chairperson's Guidelines[FN59]

which state that the best interests of the child must be taken into consideration. I am satisfied that this child meets the definition of Convention refugee in that there is a serious possibility that he would be persecuted if he is returned to North Korea. I have heard testimony that his mother and his grandfather have been killed by the North Koreans and I am not prepared to dispute that evidence despite the fact that his father omitted such incidents from his PIF narrative and despite the lack of corroborating evidence. His only living relatives would appear to be his maternal grandparents who live in Japan where the minor claimant has no right of residence or citizenship. Furthermore, these people cannot be determined to be suitable guardians if they are prepared to betray their own daughter, the child's mother, to the North Korean authorities. The documentary evidence with respect to the treatment of the families of North Korean dissidents is just too strong. I find that his father's actions in voicing anti-North Korean government opinions, the mere knowledge by the North Korean government that the claimants are in Canada and have made refugee claims, and the publication of same in the South Korean press, have placed this young child in an untenable position vis à vis his return to North Korea.

50 The documentary evidence shows that about 50,000 political prisoners and their families (emphasis added) are incarcerated in the Hoeryang Camp, North Korea's largest concentration camp for political prisoners.[FN60] The same documentary evidence shows that this camp includes those engaged in anti-regime activities and their families (emphasis added). Malnutrition is widespread and those who try to escape are publicly executed. Of particular note is the following passage:

The first thing that the security guards are taught upon being assigned to the concentration camp is that "political prisoners are our enemies and reactionaries whose families must be wiped out for three generations."

(emphasis added).[FN61]

Once someone is denounced as a political prisoner in North Korea, even his or her family members are locked up in a concentration camp without trial.[FN62]

Further documentary evidence shows that the Eighteenth Administrative Camp has a section for family members of political criminals, "people who were to be separated from society." [FN63]

Conclusion

51 The same criteria applied in the Convention refugee context are applied to Sections 97(1)(a) and 97(1)(b) of the IRPA. Even in cases when the principal claimant faces a clear risk to life of cruel and unusual punishment, the exclusion grounds will operate (Section 98 of the IRPA).

52 While I find that, on a balance of probabilities, he would face execution on return to North Korea either for treason or extrajudicially, it is my finding that the principal claimant is not deserving of Canada's protection according to the IRPA. There are other Canadian remedies still available to him outside the purview of the IRPA that will allow the principal claimant to remain in Canada.

53 The panel determines that the principal claimant does fall within the parameters of Article 1F(a) of the United Nations Convention. The test is "serious reasons to consider" which is less than "on a balance of probabilities." I find that there are serious reasons to consider that the principal claimant was complicit in the North Korean government crimes against humanity described in these reasons. Song Dae Ri is excluded and the Refugee Protection Division rejects his claim.

54 For all of the reasons stated above, and after careful consideration of all the evidence, I conclude that the minor claimant faces a serious possibility of persecution in North Korea by reason of his membership in a particular social group, namely, family of North Korean defectors.

55 Therefore, the Refugee Protection Division determines that Chang Il Ri whose claim is based on his father's circumstances, is a Convention refugee, and therefore, accepts his claim. However, Song Dae Ri is excluded and the Refugee Protection Division rejects his claim.

Exhibit M-3, Letter from A. Barlow, Hearings Officer, November 12, 2002.

Exhibit M-4, Letter from A. Barlow, Hearings Officer, February 4, 2003.

Exhibit C-7, Democratic People's Republic of Korea Service Passport, Issued July 24, 2000 to O Sun Ae, Mother of Minor Claimant, p. 5 of Passport, Accompanying Person.

Order accordingly.

FN1. Exhibit M-2, Letter from A. Barlow, Hearings Officer, October 8, 2002.

FN2. Exhibit R-6, Letter to Counsel Robert J. Moorhouse from RPO S. Pieters, October 25, 2002.

FN3. Exhibit C-1, Personal Information Form, signed July 30, 2002.

FN4. Exhibit R-4, Translation of Handwritten Statement of Song Dae Ri, October 23, 2002.

FN5. Exhibit C-5, Handwritten Statement of Song Dae Ri, Produced at Hearing October 9, 2002.

FN6. *Supra*, footnote #4.

FN7. *Adjei v. Canada (Minister of Employment & Immigration)*, [1989] 2 F.C. 680 (Fed. C.A.), at 683.

FN8. Exhibit R-10, Letter to Counsel, January 6, 2003.

FN9. Exhibit C-4, Democratic People's Republic of Korea Service Passport, Issued July 24, 2000 to Ri Song-Dae.

FN10. Exhibit C-7, Photographs Accompanying Handwritten Certificate of Divorce.

FN11. Exhibit R-8, p. 1.

FN12. Exhibit C-4, People's Republic of China Foreigners Residence Permit, Date of Issue, November 21, 2000.

FN13. Office of the United Nations High Commissioner 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, reedited Geneva, January 1992, Annex II, Chapter IV, Section B, Interpretation of Terms, p. 35.

FN14. *Sivakumar v. Canada (Minister of Employment & Immigration)* (1993), [1994] 1 F.C. 433 (Fed. C.A.).

FN15. *Ibid.*

FN16. *Supra*, footnote # 13, Annex IV, p. 88, Article 6(c).

FN17. *Penate v. Canada (Minister of Employment & Immigration)* (1993), [1994] 2 F.C. 79 (Fed. T.D.), at 84-85.

FN18. *Supra*, footnote # 3, p. 4, q. 18 (3).

FN19. *Ramirez v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306 (Fed. C.A.).

FN20. *Bazargan v. Canada (Minister of Employment & Immigration)* [1996 CarswellNat 1898

(Fed. C.A.)], (F. C. A., no. A-400-95), Marceau, Décary, Chevalier, September 18, 1996.

FN21. Supra, footnote # 3, q. 18(4).

FN22. Exhibit R-5, Transcript of October 9, 2002 Sitting, p. 33.

FN23. Exhibit C-11, Letter from Counsel, January 29, 2003.

FN24. Supra, footnote # 3, Narrative, p. 1.

FN25. Ibid.

FN26. Ibid., p. 2.

FN27. Ibid., p. 3.

FN28. Supra, footnote # 4.

FN29. Supra, footnote # 22, p. 39.

FN30. Ibid., p. 85.

FN31. Supra, footnote # 4, par. 5.

FN32. *Mohammad v. Canada (Minister of Citizenship & Immigration)* [1995 CarswellNat 1405 (Fed. T.D.)] (F.C.T.D., no. IMM-4227-94), Nadon, October 25, 1995.

FN33. Exhibit R-2, RPO Disclosure Package of Democratic People's Republic of Korea, October 10, 2002, item 1, United States Department of State Country Reports on Human Rights Practices - 2001, p. 1.

FN34. Supra, footnote # 11, p. 5.12.2.

FN35. Supra, footnote # 3, p. 2.

FN36. Ibid., p. 5.

FN37. Supra, footnote # 4, p. 2.

FN38. Supra, footnote # 33. Exhibit C-9, The Invisible Exodus, Summary, p. 2.

FN39. *Supra*, footnote # 22, pp. 35 and 44.

FN40. *Supra*, footnote # 33, p. 2.

FN41. *Sumaida v. Canada (Minister of Citizenship & Immigration)*, [2000] 3 F.C. 66, 3 Imm. L.R. (3d) 169 (Fed. C.A.).

FN42. *Supra*, footnote # 11, p. 2.5.1, Amnesty International Report, 2002.

FN43. Exhibits R-2, R-7, R-8, C-5, C-9.

FN44. *Supra*, footnote # 11, Section 3, p. 3.3.1, Sunday Telegraph, (London), January 12, 2003.

FN45. *Ibid.*, p. 52, United Press, December 2002, Deadly Adversary Kim Jong Il.

FN46. *Ramirez v. Canada (Minister of Employment & Immigration)*, [1992] 2 F.C. 306 (Fed. C.A.).

FN47. *Arica v. Canada (Minister of Employment & Immigration)* (1995), 182 N.R. 392 (Fed. C.A.), leave to appeal to S.C.C. refused (1995), 198 N.R. 239 (note) (S.C.C.).

FN48. Exhibit C-7, Certificate of Divorce on Agreement, November 16, 2001; Letter of son Chang Il, November 13, 2001. Both signed by Oh, Soon Ae.

FN49. Exhibit C-6, items 1-2, Korea Times Daily Articles.

FN50. *Supra*, footnote # 3, p. 3, q. 15 (4).

FN51. *Supra*, footnote # 4, Translation of Handwritten Statement of Song Dae Ri, par. 6.

FN52. *Basseghi v. Canada (Minister of Citizenship & Immigration)* [1994 CarswellNat 2175 (Fed. T.D.)] (F.C.T.D., no. IMM-2227-94), Teitelbaum, December 6, 1994.

FN53. *Supra*, footnote # 49.

FN54. *Supra*, footnote # 13, Annex II, p. 57, Article 31.

FN55. *Heer v. Canada (Minister of Employment & Immigration)* (April 13, 1988), Doc. A-474-87 (Fed. C.A.), Heald, Marceau, Lacombe.

FN56. *Castillejos v. Canada (Minister of Citizenship & Immigration)* [1994 CarswellNat 2128 (Fed. T.D.)], (F.C.T.D., no. IMM-1950-94), Cullen, December 20, 1994, p. 4.

FN57. James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) p. 53.

FN58. *Huerta v. Canada (Minister of Employment & Immigration)* (1993), 157 N.R. 225 (Fed. C.A.).

FN59. *Child Refugee Claimants: Procedural and Evidentiary Issues, Guidelines Issued by the Chairperson Pursuant to Section 65 (3) of the Immigration Act, IRB, Ottawa, Canada, in effect September 30, 1996, as continued in effect by the Chairperson on June 28, 2002 under the authority found in Section 159(1)(h) of the Immigration and Refugee Protection Act.*

FN60. *Supra*, footnote # 11, Section 5, p.5.4.1.

FN61. *Ibid.*, p.5.4.2.

FN62. *Ibid.*, p. 5.4.3.

FN63. *Ibid.*, Section 2, p. 2.4.27.

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