Determining Refugee Status for North Korean Escapees under International and Domestic Laws

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ABSTRACT

This article asks how the Refugee Convention applies to North Korean escapees, specifically whether North Koreans who leave their country without government permission qualify as refugees in the first instance, and whether refugee status is negated by the fact that the South Korean Constitution confers South Korean nationality to anyone born on the Korean Peninsula, which thus gives dual nationality to North Koreans. This article addresses how states and other actors interpret the Refugee Convention in handling North Koreans settling or seeking asylum in various jurisdictions and probes how the availability of South Korean dual nationality can complicate the determination of refugee status for North Koreans globally.

Keywords: Refugee Convention, North Korea, refugee law, asylum

Introduction

As of 2011, approximately 20,000 North Koreans have settled in South Korea.² Estimates on the number of North Koreans living illegally in China range reportedly between 50,000 and 300,000, with realistic estimates being closer to the lower end.³ Despite crackdowns along the North Korean border by both the North Korean and Chinese governments, North Koreans continue to leave their homeland in large part to escape the famine and poverty plaguing many families in North Korea (Democratic People’s Republic of Korea, or DPRK).⁴ Those who flee from North Korea fall prey not only to the physical risks associated with crossing borders illegally, such as trafficking and repatriation, but to the gaps and realities of international law the longer they reside outside their homeland. Once North Koreans cross the Sino-DPRK border in search of better living conditions, they enter a realm of uncertainty regarding their legal status. North Koreans who have escaped North Korea but have not found legal residence in South Korea or in another state must deal with their ambiguous legal status worldwide. International refugee law traditionally exists to protect stateless citizens, yet North Koreans are rarely protected within the framework of international refugee law. This article addresses the puzzling and peculiar fate of North Korean escapees within the refugee rights framework.

While North Koreans who escape their country are often referred to as refugees in the media, in reality it has been very difficult to apply refugee protection to them as provided under the 1951 Convention relating to the Status of Refugees
(Refugee Convention) and the 1967 Protocol relating to the Status of Refugees (Optional Protocol). Originally intended to protect the rights of refugees, a strict reading of the Refugee Convention has often ended up impeding the recognition of North Korean escapees as refugees. This is not altogether surprising given the inherent tension between international refugee protection and states’ priorities in regulating immigration. While the predicament of North Korean escapees is consistent with patterns worldwide for other refugees who find little receptivity from other states, what is distinctive here is the availability of South Korea as a host state and concomitant nationality, and the further restrictions this entails under refugee law. North Korean escapees are funneled into a category of dual nationality which makes it difficult for them to avail themselves of the Refugee Convention. On the one hand, this institutional streaming makes it easier for North Koreans to settle in South Korea, yet on the other, it makes it extremely challenging for them to contest South Korean settlement procedures or to seek asylum elsewhere.

This article asks how the Refugee Convention applies to North Korean escapees. More specifically, the article addresses two issues. The first is whether North Koreans who leave their country without government permission qualify as refugees in the first instance, and the second is whether refugee status is negated by the fact that the South Korean Constitution confers South Korean nationality to anyone born on the Korean Peninsula, which thus gives dual nationality to North Koreans. After a brief discussion introducing the framework of refugee law in relation to human rights, it addresses how states and other actors interpret the Refugee Convention in handling North Koreans residing or trying to settle or seek asylum in various jurisdictions (e.g., China, Thailand, South Korea, the United States, and the United Kingdom), and probes how the availability of South Korean dual nationality can complicate the determination of refugee status for North Koreans globally.

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5 While these are not the only countries in which North Koreans transit through, seek asylum, or ultimately settle, they serve as a representative sample of the settlement opportunities available to them. This article is structured to follow the general migratory pattern and experiences of North Korean escapees who first reside in China, then transit to a third country, such as Thailand, before going to South Korea. The examples of the United Kingdom and the United States illustrate asylum-seeking options for those who choose not to settle in South Korea.