

Tom Lantos Human Rights Commission

Hearing

on

South Korean Refugee Policy and the New Administration

June 24, 2022- 9:30 a.m. – 11:30 a.m. EDT

Virtual, via Cisco WebEx

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Reforming South Korea’s law and institution concerning the arriving North Korean escapees

I. Introduction

In 2014, the UN Commission of Inquiry on human rights in the Democratic People’s Republic of Korea found that the gravity, scale and nature of human rights violations in North Korea reveal “a state that does not have any parallel in the contemporary world.” Despite the tight control and severe punishment imposed by their own government, thousands of North Koreans have escaped abroad, risking forced repatriation by China through which most of them make their way to South Korea, Europe and the United States.

Over 33,000 North Korean refugees have made their way to South Korea, mostly since the late 1990s. The flight from a totalitarian regime to a liberal democracy is risky but rewarding as they enjoy democracy, human rights and the standard of life beyond their wildest dreams in North Korea.

But sadly, the human rights plight of the North Korean escapees does not end with their escape from North Korea or from China (and Russia) that forcibly repatriate them to North Korea in violation of the principle of non-*refoulement* under the UN Refugee Convention and Torture Convention—the principle that no one should be returned to a country where they face persecution or torture.

Even in South Korea, where the vast majority of the North Korean escapees are permanently settled, they are not safe from serious human rights violations such as prolonged administrative detention and treatment that would qualify as torture under international law as well as outright forced repatriation to North Korea after their initial arrival in South Korea.

From October 2012 to April 2013, Yu Ga-Ryeo (유가려), a Chinese national of Korean ethnicity, was detained for six months and coerced to testify that her brother, Yu Woo-Sung (유우성), is a North Korean spy. Since then, Mr. Yu has been acquitted of the espionage charges against him while the intelligence officers and prosecutors who made the false accusation have been tried and convicted for abuse of power while the government has been ordered to pay compensation to Mr. Yu's family.

On November 7, 2019, two North Koreans who had arrived in South Korea by sea five days earlier were blindfolded and driven to a location unknown to them under the escort of a special police squad. When they were finally led off the vehicle and had their blindfold removed, they reportedly collapsed to their knees in terror at the sight before them. They found themselves at the Joint Security Area (JSA), an inter-Korean contact point along the so-called "Demilitarized Zone (DMZ)" separating North and South Korea. Standing before the two North Korean escapees were North Korean officials who would take them into custody.

When the incident became known to the public, totally by accident, the South Korean government claimed that the two had murdered over a dozen shipmates before escaping to South Korea and that they did not genuinely intend to defect.

II. The legal conundrum of the North Korean escapees in South Korea

There are two interrelated legal issues that make possible such egregious human rights violations against the North Korean escapees in South Korea.

First, while the South Korean courts have consistently held that North Koreans are entitled to the South Korean citizenship despite the absence of any mention in South Korean's nationality law, the North Koreans in practice have at best an uncertain legal status under the South Korean law.

Contrary to the popular belief, the North Korean escapees who have expressed the will to be protected by South Korea are not automatically given the South Korean citizenship upon their arrival in South Korea. To be a full-fledged citizen in South Korea, one needs a family registrar. For an average South Korean, a family registrar is created upon birth, but for a North Korean escapee, a family registrar will be created only for a "protected person" with the recommendation of the minister of unification.

By law, such protection can be denied to North Korean escapees if they are felons, spies or pose serious threats to national security. If the South Korean authorities deny the protected status for any of these reasons, the North Korean escapee in effect becomes a stateless person in a legal limbo.

Ironically, their legal status can be worse than that of foreign nationals who are entitled to the due process rights, consular protection as well as the right to seek asylum and the principle of *non-refoulement*.

The second issue concerns the legal basis and oversight of the interrogation/detention process for North Korean escapees. Because North Korean escapees are essentially beyond the pale of the law until they are granted the protective status, they are not afforded the minimum due process like the right to an attorney, the right to remain silent and the *habeas corpus* right to be brought before a judge.

It does not help that the interrogation facilities and process were first developed in the early post-armistice period since 1953 as counter-espionage measures overseen first by the military intelligence and later by the civilian intelligence. To this date, the National Intelligence Service not only oversees the interrogation of the North Korean escapees but also determines the length of their detention and runs the physical facility for the interrogation and detention.

Until the mid-1990s, the detention and interrogation of North Korean escapees relied on administrative decrees without any statutory basis. Even now, it is in essence an immigration process overseen by intelligence agents. Because it is not a formal criminal process, the North Korean escapees lack the rights accorded to criminal suspects and can be removed without lengthy refugee or extradition proceedings.

Such prolonged administrative detention of North Korean escapees without judicial control is a blatant violation of the right to personal liberty. The condition of secret and *incommunicado* detention may even arise to enforced disappearance and the ill-treatment amount to torture under international law. And the forced repatriation of North Korean escapees to North Korea where they face torture, enforced disappearance and executions violates South Korea's obligations under international law.

I am not trying to downplay the risk of North Korean infiltration or espionage. Pyongyang has sent its agents disguised as North Korean refugees in the past and will in all likelihood continue to do so. However, the current system does not take into account the greatly reduced level of active hostilities with North Korea, the massive increase in the inflow of North Korean escapees and South Korea's democratization since the 1990s.

III. The political machination against North Korean escapees in South Korea

While the ambiguous legal status of the North Korean escapees in South Korea's domestic legal order and the extralegal nature of their initial detention/interrogation by the

intelligence services enable various human rights violations and abuses, there are specific political reasons that such violations and abuses occur.

Under the past authoritarian regimes and even under the post-democratization governments, the intelligence services have been notorious for accusing, sometimes knowingly and deliberately, innocent persons, including South Korean citizens as well as North Korean defectors, of being communist spies.

Unfortunately, individual intelligence officers, either out of personal ambition, professional zeal or unscrupulousness, have incentives to wrongly accuse North Korean escapees of being Pyongyang's agents and the escapees with little legal protection during the initial interrogation and detention in South Korea are particularly vulnerable.

Sadly, such abuses have a long history. In August 1974, Kim Kwan-Seop (김관섭), a North Korean military officer, who fled south by swimming for 7 hours endured months of severe torture by the South Korean intelligence agents as a suspected North Korean assassin. Why? Because just 11 days prior to his arrival a North Korean agent had made a failed attempt on the South Korean president's life. Kim Kwan-Seop was detained in a military intelligence holding center for 3 years and 6 months without any charges ever being brought against him.

Worse yet, a far more sinister form of abuse reared its head under the previous progressive government of President Moon Jae-In, a former human rights lawyer. President Moon made the improvement of the inter-Korean relationship the cornerstone of his presidency, but his policy has been criticized as unprincipled appeasement of a hereditary dictator with few tangible results.

Indeed, the Moon government enacted a law banning the unauthorized sending of not only leaflets but also USBs and books to North Korea after Pyongyang threatened retaliation. When the North Korean navy executed Lee Dae-Jun (이대준), an unarmed South Korean citizen that drifted into North Korean-controlled waters, reportedly as part of its brutal COVID-19 quarantine measure in September 2020, the Moon administration did its best to direct the blame away from Pyongyang, even making an incredulous claim that he tried to defect to North Korea.

It is not clear why the Moon government decided to forcibly return the two North Korean escapees to North Korea on November 7, 2019, just five days after their arrival, but there have been speculations that it was part of a charm offensive to induce Kim Jong-Un to attend an ASEAN-South Korea summit meeting in Busan later that month. If that is indeed the case, it was all in vain as Kim failed to show up in Busan.

It is ironic and remarkable that the ambitious, unscrupulous intelligence agents and unprincipled pro-appeasement politicians, who occupy polar opposites in the political spectrum,

both abused the precarious legal position of the North Korean defectors and unchecked detention/interrogation powers to their political advantage.

For seven decades, South Korean presidents have sworn to observe the Constitution and promote the freedom and welfare of the people. For seven decades, they have fallen short when it comes to the North Korean escapees arriving in South Korea.

Unfortunately, this is not the first or only instance where the political expedience has trumped a principled stance on universal human rights in the inter-Korean relationship. With respect to the prisoners of war (POWs) and civilian abductees held in North Korea which number in at least tens of thousands, the South Korean government and military bureaucracy conveniently chose to forget about them or blame them for disloyalty while their family members in South Korea have been subjected to surveillance and social marginalization as potential Fifth Columnists. The South Korean government even denied for decades the existence of South Korean POWs captured and sent to North Korea during the Vietnam War despite receiving information about at least 18 soldiers, marines and civilian contractors from the US authorities in the early 1970s.

IV. The political environment for reform

During the conservative governments of Presidents Lee Myung-Bak (2008-2013) and Park Geun-Hye (2013-2017), the scandalous treatment of Yu Ga-Ryeo to extract statements against her brother led to the progressive lawyers and groups to call for reform of the detention/interrogation system. The then-opposition lawmakers of the Democratic Party introduced reform bills in the National Assembly. One activist even presciently warned that the intelligence service could forcibly repatriate a North Korean escapee to North Korea under the existing legal regime.

However, after Moon Jae-In was elected president in 2017, the progressive camp stopped pushing for reform even though it now had the mandate to do so. Instead, after the forced repatriation of two North Korean escapees in November 2019 provoked a public outcry, it was the conservative lawmakers in the opposition that introduced a reform bill in the National Assembly.

Now that the conservatives are back in power under President Yoon Suk-Yeol, will two camps simply reverse sides again in another act of political cynicism? Fortunately, two factors raise hopes for the reform.

First, the conservatives have witnessed and learnt how the existing system can be abused while they were in the opposition under the Moon government and see the need for institutional

reform. Having criticized President Moon for the forced repatriation of two North Korean escapees in November 2019, the new Yoon administration has made moves to re-investigate the 2019 forced repatriation of two North Korean defectors and the 2020 killing of Lee Dae-Jun. President Yoon incidentally has also pledged to reform the intelligence service to focus on external information gathering rather than internal surveillance.

Second, the progressives are now in the opposition and are likely to revert to their traditional political stance that the role and power of the intelligence service should be curbed. The Democratic Party still has a sizeable majority in the National Assembly which will not change at least until the next parliamentary election in April 2024.

V. The proposal for a legal reform

My organization, the Transitional Justice Working Group (TJWG), obviously believes that the legal reform is necessary—regardless of who is in power. TJWG has already made a number of concrete policy recommendations in other areas based on universal human rights principles, including: *inter alia* the creation of a government fact-finding commission on the POW issue; the transfer of the South Korean government's North Korean human rights documentation function from the unification ministry to the justice ministry; and a negotiated release of POWs, abductees and political prisoners in North Korea in return for humanitarian assistance. When Fabián Salvioli, the UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence visited South Korea last week, we successfully asked him to publicly raise the issue of the POWs and abductees.

So if the political window for the reform opens, what specific changes should be made with respect to the North Korean escapees in South Korea?

First, with respect to the legal status of the North Korean escapees arriving in South Korea, the law must clarify that North Korean escapees are entitled to South Korean citizenship as a matter of right, provided that they freely express a permanent allegiance to the Republic of Korea (South Korea).

While attempts to infiltrate South Korea as agents of the North Korean state would be grounds for disqualification, alleged past criminal activities prior to entering South Korea cannot and should not be. Such previous criminal offenses must be addressed in South Korean courts as would be the case for any other South Korean citizens.

North Koreans who arrive in South Korea by sea must be allowed to freely express in writing and before an independent judicial authority their desire either to be returned to North Korea if they had drifted to South Korea by accident or to settle in South Korea if that is what

they intend. In the latter case, the expression of a permanent allegiance to the Republic of Korea must be respected. Independent judicial oversight is necessary for such important decisions.

Second, the primary authority for the interrogation of North Korean escapees as well as their detention facility should be transferred from the intelligence service to the ministry of justice. While it may be necessary for the intelligence agents to be involved in the interrogation of North Korean escapees, there is little justification for the intelligence service to oversee the entire process. The intelligence agents may take part in the interviews and take a more proactive role when there is probable cause to suspect espionage. The justice ministry already handles the processing of foreign migrants and asylum-seekers and their detention centers.

Third, the process for the interrogation and detention of North Korean escapees should be clearly defined in law. The existing law detailing the processing of foreign migrants and asylum-seekers can be incorporated in the law for North Korean escapees. In particular, due process guarantees accorded to criminal suspects, the duration and judicial review of prolonged administrative detention and the principle of non-*refoulement* must be codified by an act of the National Assembly.

VI. Conclusion

As explained above, the existing legal system for North Korean escapees arriving in South Korea is in need of fundamental repair. This is necessary to prevent future human rights violations against North Korean defectors by the South Korean authorities. It requires a rethink of North Korean escapees as people fleeing persecution who are entitled to full South Korean citizenship rather than pawns in the political game with North Korea.

The South Korean authorities also need to come clean about the past human rights violations against North Korean escapees. The intelligence agents responsible for the Yu Woo-Sung case have been convicted or are currently on trial while his family has won compensation claims against the government in court. Others have also sued the government seeking compensation, but courts have dismissed most of their claims as time-barred or lacking evidence. The government should conduct inquiries into these cases and provide compensation if the abuses are found to have occurred.

The South Korean government should also review the forced repatriation of two North Korean escapees in November 2019. There can be no excuse for sending back the North Koreans who sought refuge and expressed their intent to live in South Korea to their certain deaths in North Korea. A full inquiry should be conducted and those responsible for this monstrous decision should be held accountable. The South Korean government should also make public the

name of the two North Korean escapees, inquire North Korea about their fate and whereabouts and call for their rights to be respected. If South Korea does not respect the principle of non-*refoulement*, it would be difficult for us to insist upon China and Russia to do the same.

The North Korean escapees have suffered enough first in their country of birth and later in China and other transit states. The least that South Korea which in theory views North Koreans as its full-fledged citizens under its constitution can do is to avoid compounding their sufferings and to guarantee their human rights.