

The lives of the two North Korean defectors who have been forcefully repatriated from South Korea must be protected

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NKDB News (11.11.2019) – <http://bit.ly/2RhgYMq> – An act that should never have happened in South Korea has unfolded. According to media reports, the South Korean government handed over two North Koreans to DPRK officials at the border village of Panmunjom in the DMZ at 15:10 on November 7th, 2019. It is the South's very first deportation of North Korean defectors who have expressed their intent to remain in the Republic of Korea.

The South Korean government revealed that the two North Korean fishermen in their 20s crossed the maritime border (NLL) and were seized by the South Korean navy on November 2nd, 2019. While being interrogated by the ROK's authorities, the two young men expressed their intention to defect to South Korea. According to the South's investigators, the two fishermen killed 16 fellow crew members aboard a squid fishing vessel on North Korea's East Coast before fleeing to South Korean waters.

The South Korean government mentioned the following grounds

for sending them back to the DPRK: they are serious criminals and thus denied the rights to be protected under the law, they pose a threat to the safety of South Koreans if they were to be granted entry, and that criminals are not recognized as refugees under international refugee law.

However, the announcement and the reasons for the deportation provided by the South Korean government fail to comply with every law that pertains to the essence of this issue including the South Korean Constitution, North Korean Refugees Protection and Settlement Support Act (hereinafter “North Korean Refugees Support Act”), and all past Supreme Court decisions; and can be defined as a crime against humanity.

Article 3 of South Korea’s Constitution stipulates that “the territory of the Republic of Korea (South Korea) shall consist of the Korean peninsula and its adjacent islands,” recognizing the North Korean region as its territory. Past Supreme Court decisions recognize all North Korean citizens and North Korean defectors who have entered South Korea as South Korean citizens.

Despite such legal basis, and the fact that the two North Koreans entered the South, sought protection from the South Korean government, and refused to return to the North by expressing their intent to defect to ROK, the authorities nevertheless deported the two North Koreans. The South Korean government stated the reasons below to explain their justification of the deportation.

- First, offenders of serious crimes are exempted from

protection pursuant to the North Korean Refugees Support Act, thus it was justifiable that they were deported.

- Second, serious criminals are also not recognized as refugees under international refugee law. It is justifiable that they are deported to keep the lives and safety of South Koreans.
- Third, the unprecedented nature of this case and the absence of relevant regulations have led South Korean government bodies to make a joint decision.
- Fourth, this case was not disclosed to the public and was mistakenly uncovered by the media. If the case remained undisclosed, it would have likely remained low-profile.

The claims by the South Korean government can be deemed to have breached the Constitution, relevant laws, Supreme Court decisions, and even humanity for the following reasons:

First, it is stated in Article 1 of North Korean Refugees Support Act that “the purpose of this Act is to provide for matters relating to protection and support as necessary to help North Korean residents escaping from the area north of the Military Demarcation Line who desire to be protected by the Republic of Korea, as swiftly as possible to adapt themselves to, and settle down in, all spheres of their lives, including political, economic, social and cultural spheres.” Just as the Article clearly states that North Korean residents who seek protection from South Korea are subject to the Act, the two young North Koreans who sought protection from South Korea are duly subject to the Act.

Article 2 of the same Act also stipulates that North Korean refugees refer to “persons who have their residence, lineal

ascendants and descendants, spouses, workplaces, etc. in the area north of the Military Demarcation Line ("North Korea"), and who have not acquired any foreign nationality after escaping from North Korea." Pursuant to the Act, they are North Korean refugees.

When the South Korean government locates and holds custody of a person claiming to be a North Korean refugee, it is the South Korean National Intelligent Service (NIS) that determines the person's status as a resident of North Korea, hence a North Korean refugee (once verified as a resident of North Korea, the person is automatically recognized as a North Korean refugee regardless of the purpose of or reason for defection, escape route, identity, and past acts or records.) The NIS's North Korean Defector Protection Center conducts an investigation and once determined as a resident of North Korea, the person is deemed a citizen of South Korea.

There is currently no single legal basis including the Constitution, laws, and Supreme Court decisions that provides basis for the South Korean government to deport a South Korean citizen to North Korea. North Korean residents or refugees are deemed South Korean citizens, and hence cannot be sent back to North Korea. If done so, this is a grave breach of the Constitution and relevant laws.

The information compiled through the investigation at the NIS's North Korean Defector Protection Center are sent to the Ministry of Unification to use it to review and determine whether the North Korean refugee is now eligible for special protection and support from the government.

The South Korean government announced that it has confirmed that the two fishermen were residents of North Korea. In other words, the government deported North Korean refugees against their will.

Article 2 Section 2 states that “the person eligible for protection” refers to a resident escaping from North Korea who is provided with protection and support pursuant to this Act. According to Article 8 (Decision on Protection) and Article 9 (Criteria for Protection), the person intending to receive government support (financial support for settlement, social integration education, shelter, medical service, education, employment, living support, etc.) must first be recognized as “the person eligible for protection.” Hence, this Act is only to decide whether the North Korean refugee is eligible to receive the government benefits. It does not decide on whether the person shall be deported or not.

The decision on whether the person is eligible for protection is under the authority of the Minister of Unification after review by the Consultative Council. However, if the North Korean refugee is deemed as a significant threat to national security, the Director of the National Intelligence Service shall decide on his or her protective status and immediately report to the Minister of Unification and the North Korean applicant respectively.

According to Article 9, the government may not decide to provide protection to the following persons:

1. International criminal offenders involved in aircraft

- hijacking, drug trafficking, terrorism or genocide, etc.;
2. Offenders of nonpolitical and serious crimes, such as murder;
 3. Suspects of disguised escape;
 4. Persons who have earned their living for at least ten years in their respective countries of sojourn;
 5. Persons who have applied for protection when three years elapsed since their entry into the Republic of Korea;
 6. Other persons prescribed by Presidential Decree as unfit for the designation as persons eligible for protection.

The government announced that the two North Koreans apply to the second item and hence they are ineligible for protection. In addition, it added that as the two men were significant threats to the security of people in South Korea, it is only right that they shall be deported.

If it is true that the two North Koreans were offenders of serious crimes as announced by the government, they may not be provided protection pursuant to the Act. As such, the documents that led to this decision by the Minister of Unification and the Consultative Council should be verified. Nonetheless, even if they were deemed to be ineligible for protection, it simply means that their potential government benefits have been stripped away, and in no way does it serve as the basis to make a decision for deportation.

According to the 2019 report on the parliamentary inspection of the administration, three North Korean refugees have been denied legal protection over the past five years as a result of them having committed serious nonpolitical or transnational crimes. The report on the protection decision submitted to the

legislature by the Ministry of Unification on October 20, 2019, showed that a total of 137 North Korean refugees have been deemed ineligible for protection over the past five years, and among them was a bounty hunter aiming to arrest North Korean defectors, and two murderers.

People ineligible for protection are thus given other forms of protection and support from the government and society specific to their needs, but they are not subject to deportation. Which is why until now, there has never been a public announcement of the government forcefully repatriating North Koreans back to North Korea. In fact, while there have been quite a large number of North Korean refugees who have been denied protection pursuant to the Act, not a single person has been deported.

Pursuant to the Enforcement Decree of the Act, any person who is likely to affect national security to the considerable extent prescribed in the provision to Article 8 (1) of the Act shall be any of the following persons.

1. A person who has committed a crime concerning insurrection or crime concerning foreign aggression defined in the Criminal Act; a crime of insurrection, crime of benefitting the enemy, or crime of unlawful use of secret codes defined in the Military Criminal Act; or any other crime falling under the National Security Act (excluding Article 10) or the Military Secret Protection Act; or a person who initially intended to commit any of the aforesaid crimes but has expressed his/her will to renounce such intention;
2. A person deemed essential for national security by the Director of the National Intelligence Service among

persons actively engaged in protecting the North Korean regime in the Workers' Party; the Cabinet; the armed forces; the Ministry of People's Security; or the Ministry of State Security of North Korea;

3. A spouse or relative of the person of supreme power in North Korea;
4. A person with important intelligence in advanced science or other special and professional fields closely related to national security.

The government has yet to disclose when and by whom the decision that led to the status of ineligibility for protection of the two North Korean nationals was made. According to the government statements, other than the fact that they are fishermen, no particular information pertaining to their personal identity has been announced which makes it unlikely that the Director of National Intelligence Service would be the one to make the decision for protection. There is no additional information that would show that these North Koreans would affect national security. Assuming that what the South Korean government announced about the two men is all true, they are simply offenders of criminal law, not threats to national security. In this case then, the decision maker for such matters on protection should have been made by the Minister of Unification. The Consultative Council under the Ministry of Unification normally holds the review meeting once a month, and hence it is highly likely that the normal process was not applied to the two North Koreans. If this was the case, the two men were deported without due procedures as required by law.

When North Koreans are found by the South Korean government at sea (usually on fishing vessels that have drifted away or crossed the border for fishing) and they express their intent

to go back to North Korea, the government respects their will and sends them back without the procedures required for decision on protection. Although the two fishermen in this case refused to go back, the same process as those wishing to go back was undertaken. Because the two fishermen escaped from North Korea, their repatriation will only place their lives in greater danger.

In conclusion, first, the South Korean government has no authority to deport North Koreans against their will even if they are deemed offenders of serious crimes or threats to the national security. While North Koreans eligible for protection can receive various social government benefits, those who have been decided as ineligible for protection only receive a resident registration card. The only difference is that once they start living in South Korea, their living conditions may be more difficult than other North Korean defectors who receive protection. Since the two Koreas have been divided, several hundreds of North Korean defectors have integrated into Korean society without these protection benefits.

Second, the government claims that the two seized North Koreans are offenders of serious crimes and thus not recognized as refugees under international refugee law. Once North Koreans are confirmed to be residents of North Korea by the NIS, whether they have left for political reasons or for survival, they automatically become North Korean refugees regardless of the reason.

North Korean defectors who wish to voluntarily return to North Korea should be sent back on humanitarian grounds. If they wish to reside in South Korea then their eligibility for protective status should be reviewed and if they are eligible

they can live in South Korea and receive the relevant benefits, and those who are considered eligible are unable to receive governmental benefits (some are able to receive partial governmental benefits), and live their lives in difficulty by their own accord in South Korea.

As North Koreans (including North Korean defectors in South Korea) are deemed citizens of South Korea pursuant to the Constitution, relevant laws, and Supreme Court decisions, they are not subject to the general refugee status review. The general refugee status review is for people of other nationalities. As North Koreans are citizens of South Korea, the refugee status review does not apply to them. North Koreans may be subject to refugee review and obtain refugee status in China and elsewhere but not in South Korea. The claim by the South Korean government that they are not recognized as refugees under international law because they are serious criminals and that they were sent back for this reason, cannot be established. To put it simply, North Korean "refugees" are not legally defined as refugees under South Korean law and are legally considered as South Korean citizens with full rights and protections including legal due process provided to other South Korean citizens.

If the two North Koreans are criminals and as such present a great threat to the safety of South Koreans, as claimed by the ROK government, they must be put under trial pursuant to South Korean law. The crimes that occurred in North Korea and in the South can be investigated and punished pursuant to current law, and this has been the norm. Although there may be restrictions in verifying facts for crimes that occurred in North Korea, the South's prosecution, police, and the Court have the basis to put them under trial and punish them accordingly. Hence, the forced deportation for such reasons

cannot be justified. If there are limitations to the legal system, the emergence of such North Koreans should only lay the foundation for improved regulations, not the basis for forced deportation.

Third, the government claimed that the absence of appropriate regulations and the fact that this is an unprecedented case led government bodies to hold joint meetings for the decision. The method of investigation, method of granting legal status, the authority to review and decide on protection related to North Koreans who have entered the South are already clearly laid out in the North Korean Refugees Support Act. As the Constitution and Supreme Court decisions deem North Korean residents as South Korean citizens, there has been no need to put in place regulations that allow the forced deportation of North Koreans who refuse to be deported back to the North. Such regulations do not need to exist which is why this case is unprecedented.

If this has been the first case of forced deportation as announced by the government, it means that the past government and authorities have duly performed their duties related to North Korean residents in compliance with the law and the current government and related decision makers have not. It implies that they have committed crimes against the North Koreans who have every right to undergo fair and appropriate procedures for defection.

If the government officials made the deportation decision through joint meetings, then the meeting minutes must be disclosed. If breaches of laws are found in the processes, they must be held accountable.

There have been many cases of North Korean residents being sent back through Panmunjom, but it is yet factually unclear if their intent to go back had been confirmed in an objective manner. If the media did not reveal this case of the two fishermen, it is likely that this case would have never been disclosed publicly. For all other cases of North Korean residents who allegedly have voluntarily went back to the North, objective verification is called for.

The following measures are urged in light of this recent case:

- 1. The protection of the lives of the two North Korean deportees must become top priority.** Considering the charges made against them, North Korea's legal system and its past punishment practices, the lives of the two deportees will be in grave danger. The South Korean government, the UN, international organizations, and domestic and international human rights activists, and the media must make continued efforts to reach out to the North Korean authorities and check the safety of the two people. The attention of the international community is called for to ensure their human rights are not infringed in the process of investigation, detention, and punishment by the North Korean government.
- 2. South Korea needs to put in place appropriate processes to confirm the intent of the repatriated North Korean residents was voluntary or not.** Past voluntary repatriations were only checked and decided by the government, and hence it is necessary for additional neutral parties such as international human rights

organizations including the UN Human Rights Office in Seoul to engage and verify the voluntary intent of the people being sent back.

- 3. Special investigation and legislative inspection of the administration to this case must be taken.** It is highly likely that this case has breached the Constitution and relevant laws to a serious extent and will lead to adverse consequences for North Korean residents and defectors in and outside of Korea. This case calls for a strict investigation of the relevant government agencies and officials involved in this matter. As it is the government being put under investigation, matters related to their accountability and their breach of law must be investigated through an appointed special prosecutor. Legislative inspection of the administration is also necessary for the overall investigation of what happened.

The forced deportation of the two North Koreans will be the first human rights infringement case to be recorded by the Database Center for North Korean Human Rights in its North Korean Human Rights Archives which currently holds approximately 120,000 records of human rights abuses and personal files, in which the South Korean government has become the perpetrator.

North Koreans have the same right to life as anybody else. I call for the South Korean government, the National Assembly, international organizations, civil groups, and human rights organizations to make sincere and concerted efforts to protect the rights of the deportees and prevent such unfortunate events from happening in the future.