Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 21-23 January 2008

Before

Senior Immigration Judge Warr
Senior Immigration Judge Gleeson
Dr T Okitikpi, non-legal member

Between

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Alastair Mackenzie, Counsel,
instructed by A J Paterson, solicitors

For the Respondent: Ms Samantha Broadfoot, Counsel,
instructed by Treasury Solicitors

1. There is a risk of prosecution or reprosecution under Articles 7 and 10 of the Chinese Criminal Law for overseas offenders returned to China. However, the use of those provisions is discretionary and extremely rare. Absent particular aggravating factors, the risk falls well below the level required to engage international protection under the Refugee Convention, the ECHR, or humanitarian protection. The risk of prosecution or reprosecution will be a question of fact in individual cases but is more likely where (a) there has been a substantial amount of adverse publicity within China about a case; (b) the proposed defendant has significantly embarrassed the Chinese authorities by their actions overseas; (c) the offence is unusually serious. Generally, snakehead cases do not have the significance they have in the West and are regarded as ordinary (but serious) crimes requiring no special treatment;(d) political factors may increase the likelihood of prosecution or reprosecution; and (e) the Chinese Government is also particularly concerned about corruption of Chinese officialdom.

2. Prosecution under Article 7 or 10 is a fresh prosecution. The discretion to prosecute is exercised in the light of the opinion of the Chinese authorities as to whether the foreign jurisdiction dealt properly, and without undue leniency, with the offence. It can no longer be said that there is no information available on the use of that power: the Chinacourt database of cases and the NPC website guidance are maintained directly by the Chinese Government and provides guidance for judges and lawyers on the use of these powers.
3. The burden of proof does not shift to the Secretary of State in double jeopardy cases. The Court of Appeal decision in Adam v Secretary of State for the Home Department [2003] EWCA *Civ 265 is not authority for such a proposition, particularly where the decision to re-prosecute is discretionary.*
4. In the light of our findings above, the decisions in WC (no risk of double punishment) China [2004] UKIAT 00253 and SC *(double jeopardy – WC considered) China CG [2006] UKAIT 00007 are no longer factually accurate and SC should no longer be treated as country guidance.*

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DETERMINATION AND REASONS

Introduction

1. This is the reconsideration, with permission granted to the appellant, of the determination of the Tribunal notified on 30 August 2006 dismissing his appeal against notice of liability to deport to the People's Republic of China (PRC) and the Secretary of State's decision to refuse refugee recognition, humanitarian protection or leave to remain on human rights grounds. The Secretary of State seeks to deport the appellant, on the ground that deportation is conducive to the public good. The appellant is a Chinese national. Paragraph 364 of HC 395 (as amended) is the applicable provision:

> "364. Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority....
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> 380. A deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or the Human Rights Convention."

2. In this case, the sentence was 14 years, of which the appellant served seven before being released on licence. He was given an opportunity to demonstrate that he could rebut the presumption that he was a danger to the community of the United Kingdom, as set out in s.72(6). His rights of appeal against the sentence were exhausted by the time the deportation decision was made.

3. The appellant's solicitors, A J Paterson, responded, contending that the appellant was entitled to a substantive consideration of his asylum application before deportation could properly be contemplated. He remained deeply aggrieved about his conviction and he was still in prison. The letter quoted at length from the report of the appellant's Probation Officer, Ms Ludgam, on 24 April 2005, which is still the most recent assessment of the risk of reoffending before the Tribunal today. The report indicated that the appellant had pursued his education during his sentence and had not been in any trouble in prison. His behaviour had given no cause for concern. Ms Ludgam knew him well and her opinion should be respected as the appellant had been in that particular prison for 17 months by the time she wrote her report.

4. The appellant's solicitors reminded the Secretary of State of the undertaking to give substantive consideration to the asylum application which had been signed by the appellant and the Presenting Officer when the previous asylum appeal was withdrawn on 28 September 2001. They also reminded the Secretary of State of the close links between the appellant and his sister, who was then within a year of being able to apply for indefinite leave to remain in the United Kingdom. They enclosed a medical report on his skin condition, attributing it to torture in China, and noted that the appellant's mental state appeared to be deteriorating under the strain of possible deportation.

5. On 1 August 2005, the Secretary of State refused the asylum claim on the basis of s.72. The decision to make a deportation order was made on 21 September 2004 and the appellant had a right of appeal on the asylum, human rights and deportation elements of that refusal, which he exercised promptly, on 27 September 2004, citing also Articles 3, 5, 6 and 8 ECHR. By this time he had been outside China for over 9 years.

The asylum claim

6. The appellant's asylum claim arises from two separate sequences of events. In 1994, before he came to the United Kingdom, he says he was involved in rural protests in his home village in Fujian; that his sister who was a birth control inspector brought home an abandoned baby and was dismissed from her post; and that his home was destroyed and he was beaten by the local officials during the destruction, while he attempted to defend his home. The appellant's area of Fujian formed part of an area designated for commercial development and many people's land was confiscated for that purpose. Many other families lost their homes and land. The appellant and his sister also attempted to interest authorities in an incident of serious ill-treatment by local police of a school friend of the appellant who had offended the son of a local village. This part of the account is challenged as to credibility by the Secretary of State.

7. What is not in dispute is that in 1999, the appellant and 12 other Chinese men were convicted following trial upon indictment of various offences relating to their capture

of a group of trafficked individuals from China who had been brought illegally into the United Kingdom by a rival gang. Gangs involved in this unlawful migration from China, coupled with extortion and kidnapping for ransom are known as 'snakeheads'. There were other groups of snakehead kidnappers operating in the United Kingdom at around that time and the evidence before the Tribunal identifies at least one other unrelated group who were charged with similar charges, convicted, and of whom six men returned without protest to China.

8. The appellant and the other gang members held the rival gang's hostages for ransom, forcing them to telephone relatives in China and making terrifying threats in telephone conversations with the Chinese relatives. They also ill-treated the hostages at a level which the trial judge described as 'torture'. The sentencing judge's remarks make it clear that the appellant was one of five men regarded as at the heart of the conspiracy. The appellant has always disputed this: he admitted he was present for all of the events underlying the prosecution but claimed that this was accidental and that he had no real involvement. That was not believed and the Tribunal was entitled to prefer the credibility and factual assessment of the trial judge as set out in the sentencing remarks, which was upheld on appeal to the Court of Appeal.

9. The appellant and his co-defendants were convicted of three counts of conspiracy all contrary to s.1 (1) of the Criminal Law Act 1977: conspiracy to kidnap; conspiracy falsely to imprison; and conspiracy to extort money from Chinese nationals in the United Kingdom and their Chinese relatives. Many of the defendants, including this appellant, appealed to the Court of Appeal. The appellant's appeal was unsuccessful; at least one of the others had a sentence reduced on appeal. Several of the appellant's co-defendants have since been returned to China. There is no evidence that they have come to harm; but again, there is no direct evidence that they have not.

S.72 certificate.

10. The Secretary of State certified this appeal under s.72 of the Nationality Asylum and Immigration Act 2002 (particularly serious crime). The effect is that the appellant cannot be considered for asylum or humanitarian protection unless he can rebut the presumptions that he has been convicted of a particularly serious crime (one carrying a sentence of more than two years) and that he remains a danger to the community of the United Kingdom.

11. The appellant cannot dispute that he was indeed convicted of a particularly serious crime. That is a question of fact. He lodged information seeking to show that he was no longer a danger to the community and the Tribunal was required to consider first whether that information successfully rebutted the presumption that a person with a conviction of this kind is a danger to the community and unable to claim asylum or humanitarian protection on that basis.

Tribunal's determination

12. The appeal was heard on 26 July 2006 by Designated Immigration Judge Wilson and Mr M E Innes, a Non-Legal Member, who dismissed it on asylum, immigration and human rights grounds. They did not deal with the question of humanitarian protection.

13. Professor Palmer had been intended to give oral evidence at the hearing, as had been agreed at a CMR and recorded in directions. Instead, he provided a written report on the day of the hearing. The Presenting Officer asked for the hearing to be adjourned for Professor Palmer to attend. Having considered the position, the Tribunal allowed the report into evidence (although it was late) but declined to adjourn. Professor Palmer's report was given such weight as could be ascribed to it in his absence.

14. The Tribunal dealt first with the problems the appellant had before leaving China in 2004/5. The agreed that the account given was clear and detailed, but considered it very strange. They allowed for the delay in hearing factual evidence and the difficulty of persons required to give oral evidence of matters occurring in China some 12 years earlier. Nevertheless, even to the lower standard, they did not accept the appellant's account of his difficulties in China at all. In particular, they considered that a purported arrest warrant which the appellant had supplied (with covering letters from his cousin in the police station hoping it would help with his asylum appeal) was not genuine.

15. The Tribunal then considered the double jeopardy issue under Article 10 of the Chinese Criminal Law (CL). They referred to the country guidance decisions in *WC (no risk of double punishment) China* [2004] UKIAT 00253 and *SC (double jeopardy – WC considered) China CG* [2006] UKAIT 00007, which both held that there was no evidence of any such prosecutions and no risk. Professor Palmer had given evidence in *WC*. They considered the report of Professor Palmer prepared for the present appeal took the matter no further and that the materials on which he relied were outdated secondary analysis rather than primary evidence. They were unable to place much weight on Professor Palmer's evidence.

16. In oral submissions, the appellant's Counsel relied on *Mohammed Adam v Secretary of State for the Home Department* [2003] EWCA Civ 265, a Court of Appeal decision relating to the risk of punishment in Sudan for evasion of military service. There is a suggestion in that decision that the burden of proof shifts to the Secretary of State; the original Tribunal in this appeal did not handle that particularly clearly. We deal further with the *Adam* decision below.

17. The Tribunal then considered the deportation decision against the criteria set out in paragraph 364 as amended in July 2006 with the following presumption:

> "364. Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation…"

The Tribunal set out all the relevant circumstances and concluded that there was nothing in the compassionate circumstances to outweigh the public interest presumption.

18. The Tribunal dealt with s.72, but not first as they were required to do; they erroneously directed themselves that the Article 33(2)/s.72 point did not arise because the appellant had failed to establish his case to the lower standard of proof. They went on to say that had the account been credible, they would have found that the appellant's evidence in rebuttal was insufficient and upheld the certificate.

19. The Tribunal dismissed the asylum, immigration and human rights appeals. They did not deal with humanitarian protection; however, in the light of their indication of

the s.72 decision they would have made, that would plainly have fallen with the asylum claim.

Reconsideration application

20. The appellant challenged the Tribunal's determination, arguing that the evidence on the risk of re-prosecution had not been properly considered, especially in the light of a letter by the Foreign and Commonwealth Office on 15 July 2005 (the 'double jeopardy' letter) which was partially quoted in the then current Country of Origin Information Report for China. The Tribunal had not mentioned that letter in the determination. It appeared to indicate that, contrary to the Tribunal's findings in *WC* and in *SC,* the Secretary of State now accepted that there was at least some risk of re-prosecution in certain circumstances, though not in all cases.

21. The next point concerned the *Adam* decision. The appellant submitted that this decision, cited in his skeleton argument, established a principle that the burden was on the Home Office to show that there was no reasonable likelihood that re-prosecution would in fact be implemented.

22. In relation to Professor Palmer's evidence, the grounds for review contend that the Tribunal's approach was erroneous. Experts were entitled to have regard to just exactly the sort of general materials which the Tribunal had criticised this expert for consulting. Further, the Tribunal had failed to take account of the expert's own involvement with Chinese legal development (set out at paragraph 16 of the report) over 20 years. That was his expert opinion and should have been given weight, especially as it appeared to be supported by the Foreign and Commonwealth Office 'double jeopardy' letter.

23. Under s.72, the appellant argued that the Tribunal should have determined the exclusion issue as a preliminary issue. Lack of credibility in the appellant's account was irrelevant; the question was whether he now constituted a danger to the community. The mere fact of conviction was not enough.

24. In relation to credibility as whole, the appellant made a number of points: the Tribunal had erred in finding that the appellant said he was illiterate and misdirected itself as to his poster writing activities in consequence; it was unclear whether the Tribunal had accepted his claimed leadership rôle, albeit not 'at first blush'; rural protests had been widespread in China at that time and did not appear to require education; the appellant never said he was the only leader of the protest; the respondent had specifically accepted that the appellant was injured trying to prevent his house being destroyed by the authorities and it had not, therefore, been open to the Tribunal to find that there might have been a number of reasons for the injuries noted; the appellant's ability to pay a large sum for his departure despite being a person of modest means had not been put to him or his sister in evidence and the Tribunal should not have relied on it without doing so; the Tribunal failed to consider their evidence regarding a cousin's help with the expenses of the trip; and finally, the veracity of the arrest warrant could not be considered *after* weighing all the other evidence in the round. It should have been considered as part of that exercise, not after it.

25. The appellant invited the Tribunal to order reconsideration.

Reconsideration decision

26. Reconsideration was granted by SIJ Waumsley on 18 September 2006, on all grounds. SIJ Waumsley was just persuaded that all of these grounds taken together merited further consideration, in particular the first and second grounds which related to the Foreign and Commonwealth Office 'double jeopardy' letter.

Material error of law decision

27. At the material error of law hearing before Senior Immigration Judge Gleeson, Mr A Mackenzie represented the appellant and Mr W Khan the Secretary of State. The material error of law reasoning sets out the history of the appeal up to the end of 2006 and continues:

> "…5. On 3 January 2007, this appeal came before me. There were different representatives on that day. I directed that the stage 1 reconsideration be listed before me as soon as possible, with a view to setting up a country guidance hearing on the double jeopardy point, having regard to the Foreign and Commonwealth Office evidence. The appellant undertook to indicate within 14 days whether the credibility issue was pursued; that was not done. The Tribunal's Article 8 ECHR findings and findings under the Immigration Rules are unchallenged, as is the decision regarding general risk on return (outwith the double jeopardy point).
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> 6. I heard submissions from the appellant. He argued that the Tribunal had failed to deal with the Foreign and Commonwealth Office evidence, although it had been on notice that he relied upon it. A response to an information request from the Country of Origin Information Unit quoted part of that letter. The PRC had a statute permitting double jeopardy prosecutions and his evidence had not been properly weighed. The Tribunal had overlooked the *Adam* point; in that decision, exceptionally, Schiemann LJ held that where the new evidence was in the hands of the Home Office throughout, the burden of showing that it could not be relied upon was upon the respondent. He asked the Tribunal to look at paragraphs 45 and 51 of *WC* which deal with the monitoring of returnees. [paragraphs cited]
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> 7. The authorities with which the Tribunal was dealing all refer to lack of evidence for double jeopardy prosecutions of offences committed entirely overseas. That is not the position of this appellant, whose offence was committed in both countries. It was a serious offence. The Secretary of State has only latterly disclosed a paragraph from a letter from the Foreign and Commonwealth Office. The whole letter must now be disclosed. It was not before the Tribunal in *WC* and *SC* and in failing to deal with it at all in their determination, there is no doubt that the Tribunal made a material error of law. The appeal must be reheard."

28. This is that reconsideration.

The issues

29. The agreed questions for reconsideration were –

    (a) The weight to be given to the 'double jeopardy' letter from the Foreign and Commonwealth Office regarding the risk on return of prosecution for an offence for which the returnee had already been convicted and punished in the United Kingdom;

(b) Whether, in the light of that evidence, *WC (no risk of double punishment) China* [2004] UKIAT 00253 and *SC (double jeopardy – WC considered) China CG* [2006] UKAIT 00007, are still good law;
(c) The effect of the Court of Appeal's decision in *Adam v Secretary of State for the Home Department* [2003] EWCA Civ 265;
(d) The weight to be given to the evidence of Professor Palmer;
(e) The respondent's certification of the appeal under s.72 Nationality Asylum and Immigration Act 2002; and
(f) Whether the appellant is a credible witness.

30. Those questions were settled by agreement. In particular, the question of credibility was added to the list of issues for reconsideration after discussion with both Counsel at a 'For Mention Only' hearing. It is relevant to full reconsideration because the credibility of the appellant's account of events in China affects both the issue of internal relocation and our assessment of the likelihood of Article 3 ECHR ill-treatment on return. We have considered credibility as part of our overall assessment of this appeal.

Evidence before the Tribunal on reconsideration

31. The Tribunal received into evidence bundles of documents for each party, together with the Home Office Country of Origin Information Report on the People's Republic of China for 2007 and a bundle of authorities from the Secretary of State. In total, the documents before us number well over 1000 pages. We have had the benefit of significant and detailed expert evidence which has assisted us greatly, together with a mass of useful documentary evidence. The bundle includes written evidence from Professor Jerome A Cohen given to the United States Congressional Executive Committee on China in 2005 and 2006. All of the other experts acknowledged Professor Cohen as the world's leading authority on Chinese law and Professor Cohen's evidence is dealt with as part of the Tribunal's expert evidence review in this determination.

32. We heard oral evidence from the appellant, the sister, and from three experts, two for the appellant and one for the respondent. The respondent's expert, Professor Fu Hualing, provided three written reports: his main report prepared in 2007 (the main report), the report he prepared for the appellant's side in *WC* in 2004 (the *WC* report) and a commentary on the difference between the two reports prepared in January 2008 (the 2008 report). The main report and the 2008 report were prepared on the basis of redacted information which did not contain facts enabling the witness to identify the present appellant and therefore lacked some details of the offences committed.

33. Professor Fu gave oral evidence from the British Embassy in Hong Kong by telephone. He identified himself by producing relevant identity documentation and was examined in chief and in cross-examination over a speaker telephone. The Tribunal was able to ask him some questions. By agreement, Professor Fu was referred to some of the omitted detail and given an opportunity to comment on that factual matrix during his oral evidence.

34. The appellant relied on the evidence of Professor Cohen and four other experts, two of whom gave oral evidence: Dr Michael Dillon (who gave evidence against his written report) and Dr Jackie Sheehan (who provided a main and a supplementary

report). Neither Dr Dillon nor Dr Sheehan has legal training. We received written reports from of Dr Mei Yin Gechlik and Professor Palmer, both experts on Chinese law. All of the experts except Dr Sheehan had taken the trouble to research the use of Articles 7 and 10 although their database access varied. All, having done so, reached the conclusion that these Articles are used by the Chinese courts on occasion, though not frequently. The divergence between the expert evidence goes to the circumstances in which these Articles are used and the likelihood of them being used in respect of the present appellant.

35. We have considered all the documents in the bundles but in particular those to which the parties directed us, and all of the oral evidence before the Tribunal, as well as that recorded at previous hearings. We have taken into account the parties' skeleton arguments and written submissions. We shall summarise the personal and expert evidence before reaching conclusions on the questions set out at the material error of law stage.

The Appellant's Case

36. The appellant provided a chronology to assist us in dealing with the specifics of this appeal. The account as there summarised is this: the appellant comes from a village in Fujian province. His parents, and his older sister, were Christians but the appellant is not. He is in his thirties now and has been raised by his older sister since he was about five years old. When the appellant was about fifteen, his sister became employed as a birth control inspector, tracing and dealing with births in breach of the one-child policy.

37. In 1994, the family's land was confiscated to be used for construction of a Japanese factory, without compensation, following a Government area redevelopment plan. About a month later, the appellant's school friend got into a fight with the village leader's son and was detained by the police, assaulted and released after 18 days. The appellant and his sister went to the local police to complain, unsuccessfully. In August 1994, the sister took home a baby abandoned on the doorstep of the birth control inspectorate; when her bosses found out, she was sacked. In October 1994, the family home was destroyed and the appellant was beaten up by a group of people, apparently in reaction to his sister's informal adoption of the abandoned baby.

38. About a week later, the appellant claims to have organised a protest during a visit by Provincial Governor Chen Guang Yi, during which stones were thrown at his official car. Two days later, the sister was arrested and forced to sign a confession so that the appellant could be arrested for that protest; the authorities threatened to arrest him if she did not sign. The same day, the two of them fled, first to a place in Hu Bei province, then on to Beijing by December 1994. The purported arrest warrant is dated 16 October 1994 and was obtained for them by a cousin who worked at the local Police Station, and who also, when they left, took over care of the baby which was the source of all the sister's troubles.

39. They travelled through Moscow, arriving in the United Kingdom in early January 1995 and making a prompt asylum claim. On 15 March 1995 they received a letter from the cousin, asking whether the arrest warrant had been useful, saying he had passed "Little Sister" on to somebody else, and telling them not to contact him again.

The United Kingdom offences

40. The appellant and his gang members were tried on kidnapping, extortion and conspiracy charges. The appellant was identified as one of five ringleaders of the group. All five of the hostages were tortured: four were kept for just over a week, one for just less than a week. Their relatives in China were telephoned and

> "…deliberately made to hear the torment and sufferings of the poor persons who were at the other end of those phones."

Substantial sums were demanded from the relatives.

41. A considerable amount of thought and planning had gone into the kidnapping, including a detailed telephone schedule, and regular shopping trips for large amounts of food. Mitchell J's sentencing remarks reflected a sense of public outrage in relation to the offences which the appellant was found to have conspired with others to commit. He accepted that

> '…nobody is saying that everybody used violence, but violence was obviously implicit and necessary in the carrying out of these conspiracies. I accept that in certain cases there is no direct involvement in violence to the hostages – in certain cases. You, [the appellant, and defendants 1-4] …without a doubt fall into the top category in this case and demand the highest sentence. …the period of custody that I think appropriate in your cases is 14 years on count 1, 14 years on count 2 and eight years on count 3. It seems to me that they all ought of course to be concurrent…"

42. A substantial sentencing discount was given to those, not including this appellant, who pleaded guilty and thus shortened the trial. All the sentences were also reduced to reflect the difficulties for Chinese-speaking appellants in an English-speaking prison in a country which was not their own and the lack of available visitors during the sentence. The judge continued:

> "It seems to me that it is not a matter for this Court to decide whether or not [the defendants if deported] face execution, or trial again, in China; that is a matter for the Secretary of State and his advisers. In this sort of case, which is organised crime, I have no hesitation – and that one reason is enough in my view – to recommend all of you, where appropriate, for deportation once these sentences have come to an end….
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> After your release you will be subject to supervision on licence until the end of three quarters of the total sentence. You will be liable to be recalled to prison if your licence is revoked, either on the recommendation of the Parole Board or, if it is thought expedient in the public interest, by the Secretary of State."

The present appellant was released at the halfway point in his sentence and, his Counsel accepted by an oversight, has not been supervised on licence. There is, therefore, no evidence but his own (and very little of that) as to how he has conducted himself since his release.

43. In 2005, ahead of the appellant's release from HMP Ashwell, Prison Probation Officer Mel Ludgam prepared a Parole Report, based on one lengthy interview and a number of previous interviews in the last seventeen months of his sentence. For the final interview, the appellant's English was good enough to require no interpreter. There was no detailed account of the index offences available and the appellant's solicitor was unable to provide any. The information which Ms Ludgam had was that:

> "... [The appellant] was seen to be part of an organised Chinese gang called the 'snakeheads' who were trying to take over the business of a rival gang. They were holding the rival gang's group of immigrants to ransom for £12000 each. I understand it was alleged that some violence was used although no weapons were used."

44. That significantly understated the offences. Ms Ludgam recorded that the appellant was aware that victims were threatened with chopping off their arms and so forth if their relatives did not pay, but he claimed not to have seen any violence or been involved. He told her that he was portrayed as a co-instigator because his sister would not give his co-defendants an alibi and that a witness who identified him as being in the kidnap vehicle was mistaken. He claimed never to have met the other nine defendants before and to have been accidentally caught up in the offence. The jury found otherwise. Ms Ludgam noted that the appellant now recognised that some at least of his involvement was wrong; that was a long way from full repentance or recognition of guilt.

45. The report recorded the usual sort of courses attended by the appellant in prison: Basic Skills entry Level 3 in Numeracy; Level 2 in Literacy; OCR Level 1 in Numeracy; and various social and life skills courses, together with Citizenship and Budgeting, Personal Development and Assertiveness; and Decision Making. If he had not taken the courses voluntarily they would have been compulsory after his Sentence Planning Board in December 2005. Copies of the certificates for these courses are in the bundle, along with a letter granting the sister exceptional leave to remain (which enabled her later to achieve indefinite leave to remain in the United Kingdom), and Land Registry Office Copy Entries for the Chinese takeaway restaurant she runs, together with a menu. The sister's asylum statement is before us also.

46. The probation report states that the appellant never tested positive for drugs, was polite and respectful and 'one of the quieter prisoners on the unit'. His sister relocated away from the original gang (she purchased and runs a Chinese restaurant) and would employ him on release if she were allowed to do so. Because of distance, she could not visit much but they spoke almost every day on the telephone. There were no medical problems; he was in good health. There was a 21% risk of reoffending (which was considered to be low) within 2 years; if he re-offended the Prison Probation Officer, Mel Ludgam, considered that:

> 'The risk would appear to be further gang involvement and consequently further very serious offending".

47. Ms Ludgam considered the risk of re-offending to be low, although she acknowledged that this might be contradicted by witness statements or the sentencing judge's view, to neither of which she had access. She considered that if the were allowed to remain in the United Kingdom and released on parole, Multi-Agency Public Protection Arrangements (MAPPA) would be required (this did not happen). The report concluded:

> "6.1 If [the appellant] had been granted leave to remain in this country and home circumstances had been investigated by the home area, with them supporting release, then I would recommend [the appellant] for parole. Clearly, to recommend him for parole in the current circumstances is infeasible."

Appellant's oral evidence

48. The appellant gave oral evidence. He was provided, at his request, with a Mandarin Chinese interpreter. It was not suggested that he could manage without one. He adopted his evidence to date and confirmed that he now had no contact with the other gang members.

49. The appellant was tendered for cross-examination. He confirmed that he still did not consider himself a Christian, though in his village in China he was perceived as one because of his family connections. He had not personally contacted the police station cousin since leaving China and his understanding was that contact had ceased after the March 1995 letter to his sister. Dealing with the problems between his school friend and the village chief's son, the appellant said that he and his sister had attended the higher authority three times to complain; on the third occasion they were told to go away as they were troublemakers. The appellant said for the first time that the village chief was present on the third occasion and they then realised that there was no point pursuing it further as the authorities were in cahoots with the village chief.

50. In relation to the incident with his sister and the baby, the appellant said he had dropped out of school when he was about 13 and thereafter he worked on the family farm until the family lost its land. His sister brought home a very young baby in August 1994. She did not work for long after doing so but during that short period the appellant gave the baby milk, and some rice porridge, and cared for it while his sister was at work.

51. His home area became an Economic Development Zone in March or April 1994. The Government had taken away a lot of people's land and not compensated them. Many people's livelihood was affected. In early October 1994, the appellant's home was destroyed with thirty to forty villagers watching but not daring to intervene. On about 10 October 1994, during the Inauguration Ceremony, the appellant said he protested with others. His account became confused here. There were many posters and he could not really remember the slogans. He personally was trying to protest all his family's ills. His account of organising the protest amounted to mentioning it and others joining in. His sister did not join in; she tried to stop the appellant going to the protest. Someone behind him threw a rock, and his sister thought it was the appellant. Governor Chen Guang Yi got back into his official car and left swiftly. The sister took him home; others were arrested, but he was not. His sister had been arrested two days later and forced to sign a confession that the appellant was at the demonstration. He was unable to explain why they did not just arrest him and ask him to confess.

52. His police station cousin got him the arrest warrant. The wording was –

> "[Appellant], male, residing in this area, is of Han race. His date of birth was [date given]. This person is dissatisfied with the Chinese Communist Party, was violent to the duty personnel, organised unrest. As from 16 October 1994 this person is wanted for arrest."

The appellant insisted that the warrant was genuine and referred the Tribunal to his sister for an account of how she got it.

53. While the two of them were in Hu Bei, the sister worked a little, cooking for people, without a hukou or other appropriate documents. The appellant worked a little on a construction site. It was two days from his home village, by boat, train and coach but

the foreman heard that the police were about to track them down there. They returned to a village in Fujian province where they spent a short time with another Christian friend, while the sister and the police station cousin arranged false passports for them to travel on. There was no re-examination. At the Tribunal's request, the appellant's representative produced the original alleged arrest warrant, in red and white and looking quite fresh.

The sister's oral evidence

54. The sister was outside Court during the appellant's evidence. She adopted her evidence to date and was tendered for cross-examination. She explained that the baby had been very young. Her boss told her to put it back outside for someone else to claim, but nobody did, and at the end of the day she simply took it home. She fed it on milk (there was no mention of rice porridge); she was sacked from her birth control inspection job after a week. During that week not only the appellant but also neighbours cared for the baby. The neighbours helped; the sister was unable, despite repetition of the question, to explain adequately why they would do so given the risk to them. The baby they had called "Little Sister" was not hers. Despite being a birth control inspector, the sister claimed she had no idea what happened to women who had, or adopted, babies when they were not married. It was outside her experience; it simply had not happened before. Nevertheless, she had been insecure about keeping "Little Sister" because of all the things that had happened. When the appellant and his sister fled, they passed "Little Sister" on to the police station cousin. She had not taken any interest in what happened to the baby after that.

55. Timing problems in her evidence about the events of that summer were put to the sister; she said she was dismissed 'a week' after her home was destroyed, but she was dismissed in August and her home destroyed in October. Her response was unsatisfactory. She could not and did not explain the difference of about two months.

56. The sister blamed her former boss and his cronies for the damage to the family home, although it seems it followed on the seizure of the family's land under the area redevelopment plan. The sister said that many people were angry about losing the land and that she had attended the demonstration with the appellant. She did not know if anyone had organised it; her brother certainly had not and she denied vigorously that he had told the Tribunal so. She saw police at the demonstration but it was all rather chaotic. She did not know whether anyone had been arrested on the day. In relation to the forced confession, the witness said that she was threatened that her brother would be arrested if she did not sign a confession strengthening their power to arrest him. That is contradictory; the sister was unable to explain why she would sign a confession in those circumstances, or the point of doing so if they could arrest him without her confession.

57. In Hu Bei she cooked, but the appellant only worked a little because he was in poor health. Her cooking was not paid; they got their keep in return. The sister heard about the police tracing them to the construction site from the man they were staying with. On her account, the police had already been to the construction site asking for the siblings by name.

58. They used false documents to exit China. Their cousin obtained passports in someone else's name for them, with no exit visas (her evidence was that none was needed) and tickets to Moscow in the same names. It cost the cousin RMB 20000 and she had paid it all back since coming to the United Kingdom. Nevertheless, the sister denied buying a false arrest warrant; she insisted it was genuine and that the cousin got it from the rubbish bin at the Police Station. She did not know when exactly.

59. If returned to China, the sister said that her brother would be arrested and could even be executed, by reason both of the offences in China and those in the United Kingdom.

60. There was no re-examination.

Country Background Evidence

People's Republic of China Criminal Law 1997 (CL): Articles 7 and 10 (overseas offences)

61. Articles 7 and 10 of the CL permit the Chinese state to prosecute or re-prosecute Chinese citizens for offences committed abroad ('overseas offences'). Their operation and context is helpfully set out in Professor Fu's main report –

> "*Article 7 and Article 10 of the Criminal Law (CL)*
> 1. The power to re-prosecute in Article 10 of the Criminal Law (CL) derives from Article 7 of the CL.
>
> 2. Article 7 of the CL provides:
>
> > "This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China. However, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility. This Law shall be applicable to any State functionary or serviceman who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China."
>
> 3. This provision reflects the personality principle and allows the extra-territorial application of the CL. Because of this application, the CL follows Chinese citizens wherever they go, and Chinese courts always have jurisdiction to punish Chinese citizens who have committed crimes overseas upon their return.
>
> 4. Even if a Chinese citizen has already been tried (and punished) in a foreign country, Chinese government can re-prosecute the relevant citizen upon his return.
>
> Article 10 of the CL provides:
>
> > "Any person who commits a crime outside the territory and territorial waters and space of the People's Republic of China, for which according to this Law he should bear criminal responsibility, may still be investigated for his criminal responsibility according to this Law, even if he has already been tried in a foreign country. However, if he has already received criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated punishment."

5. The rationale behind Article 10 of the CL is that China, as a sovereign state, refuses to recognize foreign penal judgments unless such recognition arises in accordance with any international agreement which China has signed. The rule against double jeopardy does not apply in China in principle.

6. Importantly, decisions to prosecute or re-prosecute offences committed overseas under both Article 7 and Article 10 are discretionary. Under Article 7, CL normally applies to a crime committed by a Chinese citizen overseas only if the offence is relatively serious (and attracts a maximum sentence of more than three years) unless the offender is a civil servant or a serviceman, in which case all offences may, in theory, be prosecuted.

7. Article 10 is intended to avoid a situation in which a foreign court treats a Chinese offender with undue lenience. The article gives the procuracy the discretion to prosecute or not to prosecute a Chinese citizen who was tried by a foreign court for an offence committed overseas depending on the seriousness of the offence committed and penalties imposed by the foreign courts. The Chinese procuracy *may* re-prosecute the offender for the same offence to compensate for the undue lenience. The same article also authorizes the court to exempt the offender, when re-prosecuted, from any further punishment in China and give only mitigated penalties depending on the seriousness of the overseas offence and the severity of the overseas penalty."

62. Further guidance was available on the website maintained by the National People's Congress (NPC), China's highest parliamentary body and legislative authority. The NPC itself met only once a year but had a Standing Committee working throughout the year. The NPC website guidance on Articles 7 and 10, published in 2002, was as follows –

"May offences committed outside China's territory which have already been adjudicated by a foreign court still be ascertained for criminal responsibility under China's Criminal Law?

According to the provisions of Article 10 of the CL, any person who commits a crime outside PRC territory and according to the Criminal Law of the PRC should bear criminal responsibility, even if she or he has been tried in a foreign country, may still be investigated [for criminal responsibility] according to the Criminal Law of the PRC. China is an independent sovereign state, possessing independent power of criminal jurisdiction. It does not accept the binding force of foreign adjudication, and the power of its jurisdiction over crime cannot be lost just because such criminal conduct has been subjected to adjudication in another country. This provision in the criminal law, is a concrete manifestation of the principle of Chinese sovereignty and a concrete manifestation of the principle of protection in the CL.

According to the provisions of the CL, crimes committed outside the territory of the People's Republic of China should carry criminal responsibility. Most important are the provisions of Article 7 of the CL, under which the provisions of the Criminal Law [of the PRC] are applicable when Chinese citizens, state personnel and members of the armed forces commit offences outside Chinese territory; the provisions of Article 8, under which the provisions of the CL are applicable to foreigners, who outside PRC territory, commit crimes against the PRC state or against its citizens; and other concrete provisions in the criminal law concerning criminal responsibility. In accordance with the basic provisions of PRC criminal law, criminal responsibility should be borne, even if a [case has] already been tried by a foreign court, including where the foreign court has delivered a verdict of not guilty or a verdict of guilty, and also if the foreign court has imposed a criminal punishment or exempted [the offender] from criminal punishment. The PRC is

not bound by the foreign judgements, and in accordance with the criminal law of the PRC, the PRC judicial organs may still decide if such conduct constitutes a crime and the punishment to be imposed. The following points should be given attention in such circumstances: the PRC "may" in accordance with the CL determine [criminal responsibility] but does not have to determine [criminal responsibility] – it is that the power to prosecute is retained to the extent that it decides whether it is desirable or not want to again [try the case] in accordance with PRC criminal law and necessarily decide [the case] in accordance with the concrete case and concrete circumstances. For example, where a convicted person has already been tried by a foreign court, and sentenced to a certain punishment, although with reference to the same crime even if the punishment is still a little heavier, but the offender admits guilt, [and] in the enforcement of the sentence shows effective repentance, then the PRC may [decide] not to carry out a determination [of guilt].

In order to achieve the purpose of effective education and change the [outlook of the] offender, and at the same time to respect foreign law, the Criminal Law also provides that in cases in which there has already been criminal punishment then if the PRC must in accordance with the Criminal Law carry out a fresh trial, then the criminal punishment may be exempted or reduced. In this stipulation, it is important to consider that the offender has already been tried by the foreign court and received criminal punishment, so that when the PRC court handles the case, then in accordance with the concrete circumstances of the case, the court may exempt punishment or reduce punishment. Of course, the provisions of the CL [state] "may" but this is not "should", and if the foreign court's decision is obviously partial, resulting in an abnormally light sentence, the PRC of course may not be bound by the [decision] in which there is exemption or reduction of the criminal punishment. (Dated: April 17, 2002)."

Case reporting in China

63. Much of the information about the Chinese Court case law and reporting system provided by the expert witnesses in this appeal is entirely novel. In particular, and surprisingly in the light of the reputation which the PRC has for secrecy, all the witnesses referred us to at least one, and several to more than one, web-accessible database of decided cases. The website most frequently mentioned was http://www.chinacourt.org/ ('Chinacourt'), which is sponsored by the Supreme People's Court and contains, in its Chinese version, over 25000 cases approved by the Supreme People's Court and edited for publication. Chinacourt is freely available to individuals and researchers all over the world, a significant advance on the position set out in *WC* and in *SC*. It came into existence in the early 21st century, as did the BAILII website in the United Kingdom.

64. Professor Fu also had access to the www.chinalawinfo.com website ('Chinalawinfo') maintained by the Law Faculty of Peking University, a subscription-only site with much better indexed information and more decisions (50,000 and rising).

65. We were told by all the experts of published guidance on the website maintained by the NPC Standing Committee ('the NPC website'), and in particular of what amounts to a practice direction held there since 2002, giving guidance to judges and lawyers on the application of Articles 7 and 10 of the CL.

Expert evidence on double jeopardy prosecution in China

66. We next considered the expert evidence. The trial bundles include two important written reports by Professor Jerome Cohen in 2005 and 2006 for the United States Congressional-Executive Commission on China. All of the other experts acknowledged Professor Cohen as the leading Western authority on the legal system in China. Unfortunately, Professor Cohen's was not called on by the Commission after 20 September 2006 (that appears to have been its most recent sitting) and after September 2006 the Tribunal must seek to establish the present situation and later developments in China from the materials and evidence before us.

A. Professor Cohen's evidence to the United States Congressional-Executive Committee

67. Professor Jerome Cohen is Professor of Law, New York University School of Law; Adjunct Senior Fellow on Asia, Council on Foreign Relations; and 'of Counsel' with Paul, Weiss, Rifkind, Wharton & Garrison. He is a leading expert on the Chinese legal system and the international relations of East Asia. There follows a summary of the written evidence given by Professor Cohen to the United States Congressional-Executive Commission on China on 26 July 2005 and 20 September 2006, which appears in bundle D of the documents before the Tribunal, at pages 33-47.

68. In 2005, Professor Cohen accepted that China had a formal legal system which had made significant progress compared with the situation in 1978. An increasingly robust NPC and its Standing Committee had enacted a huge amount of legislation, supplemented by regulations of the State Council, China's leading executive institution, the central ministries and commissions under that, and the provincial and local People's Congresses and governments. The Supreme People's Court and Supreme People's Procuracy were now vigorous organisations, all being subordinate to the NPC. The Supreme People's Court and the Procuracy had issued large numbers of interpretations and other guidance which are the substantive equivalent of supplementary legislation. There were now many bilateral agreements between the People's Republic of China and other governments: China now adhered to multiple multilateral treaties on international business law and human rights.

69. Professor Cohen described a nationwide Court system with over 3000 basic Courts and almost 200,000 judges, now increasingly recruited from law school graduates. The Supreme People's Court had laboured mightily to mould this group into professionally competent, honest, impartial and independent decision makers. Legal scholarship flourished; there were over 90 law magazines, full of law reform proposals, nationwide internet legal discussions, shelves of legal treatises and teaching materials and self-help books for those who preferred not to use lawyers. The legal developments were led by foreign trade, technology transfer and investment.

70. There was a burgeoning popular awareness of law and 'rights consciousness'. Women, minorities, the disabled and other victims of discrimination invoked China's Administrative Litigation Law and related legislation and farmers used the Courts to stop official land requisitions or financial imposition by local cadres. Urban residents used the law to try to prevent development and seek compensation. Such efforts failed often; legislation was inadequate and internally contradictory between national and local norms. There were still too few able lawyers and they were vulnerable to political pressure or disbarment if they were too bold in the cases they took. Judges

were vulnerable to corruption, political control and the pressures of 'guanxi' (social connections).

71. The weakest point in the new legal structure was the criminal law. No fewer than 68 statutory provisions authorised execution; the Criminal Procedure Law provided few or ineffectual protections; police or prosecutorial investigators needed no authorisation to detain a suspect and there was no bail equivalent for most criminal cases. Access to lawyers was not a given, there was no right to silence, and those who did not confess were frequently subjected to torture although the Chinese Criminal Law expressly prohibited it. On the prospect of further law reform, Professor Cohen said this:

> "Yet we can expect robust law reform efforts to continue in China, even in the field of criminal justice. The PRC is still considering whether or not to ratify the International Covenant on Civil and Political Rights (ICCPR), which it signed in 1998. Ratification would commit the PRC to changes in law and practice in the criminal justice area as profound as those changes in economic law and practice required by the PRC's entry into the WTO. Regardless of ICCPR ratification, the Chinese Government, under strong domestic pressures to eliminate some of the most glaring defects in the CPL [Criminal Procedure Law] and some of the worst distortions of the CPL in practice, has already made clear its determination again to revise the CPL. Although optimists predict that the newly-revised CPL might appear by next year, we should not underestimate the magnitude of the task. A multitude of controversial issues awaits the NPC, and achieving a meaningful reconciliation of the conflicting views of the Ministry of Public Security, the Ministry of State Security, the Ministry of Justice, the Supreme People's Court, the Supreme People's Procuracy, the All China Lawyers Association, influential academic experts and relevant Party organizations will require enormous legislative skill, time and energy.
>
> Pending comprehensive revision of the CPL, the NPC may decide to make certain urgently-needed reforms earlier. For example, should the NPC do something about "re-education through labor" ("laojiao")? It is an administrative punishment that is not authorized by NPC legislation (as now required by other NPC legislation) and that is dispensed by the police, who can send someone to labor camp for three or four years without the participation of lawyers or the approval of the procuracy or the courts. Although the Ministry of Public Security has been waging a public relations and lobbying campaign to retain "laojiao", even conducting limited experiments to allow lawyers into the proceeding in an effort to avoid losing this major sanction, its continuing existence is blatantly inconsistent with the premises of the CPL and the Law on Legislation, as well as perhaps the Constitution itself, as many Chinese judges, officials, lawyers and academic experts have pointed out.
>
> Perhaps we can also expect an expanded role for the courts, and further strengthening of the courts and the legal profession in order to enable the courts to play this expanded role. The Chinese Government is plainly facing a domestic crisis of confidence caused by the failure of its institutions to deal adequately with a rising tide of public grievances relating to environmental pollution, real estate manipulation, unauthorized local financial demands, corruption, discrimination and other official abuses. Increasingly, interest groups, fueled by a shared sense of injustice, are taking to the streets and even rioting. These protests threaten political, economic and social stability and indeed the common people's belief in the legitimacy of Communist rule. Too often, for example, the courts, instead of enforcing national laws against lawless local officials or conflicting local regulations, serve as the instruments of the local elite against the victimized populace. And lawyers brave enough to assist the protesters in their efforts to resort to courts in

order to vindicate their rights are often detained or intimidated by the local police and prosecutors."

72. In further written evidence on 20 September 2006, Professor Cohen returned to that theme. He noted that ICCPR ratification seemed to be on the back burner and that several impressive drafts of a revision to the CPL had not been enacted yet, despite the upcoming 2008 Beijing Olympics. There was a very conservative climate for law reform. However, pressure from practitioners to reform the CPL remained:

> "A large number of Chinese criminal justice experts from the judiciary, the procuracy, the defense bar, the Ministry of Justice, the Ministry of Public Security, the NPC staff and academic life have been making impressive efforts to develop a national consensus on a broad range of understandably contentious issues. Should suspects generally be granted bail during the investigation period instead of languishing in detention as at present? Should they have a right to keep silent and not incriminate themselves? Should a presumption of innocence be confirmed and its implications spelled out? Should defense lawyers be allowed to monitor police interrogations, conduct their own investigation prior to indictment and freely meet detained clients? What steps should be adopted to make defense lawyers available to accused who more often than not go unrepresented? What protections should be enacted to reduce the likelihood that suspects will be tortured and to curb widespread overtime detentions? What measures should be prescribed to strengthen the current insignificant legislative barriers to arbitrary search and seizure? Should all illegally-obtained evidence be excluded from trials? Should plea bargaining be fostered? Should prosecution witnesses be required to appear at trial in order to make meaningful the existing right to cross-examine one's accusers? What kind of appellate review should replace the current perfunctory procedure? None of these issues, which have long cried out for legislative resolution, is likely to be dealt with by the NPC in the near future.
>
> Nor does the NPC seem ready to abolish the notorious, supposedly "non-criminal", administrative punishment of "re-education through labor" (RETL), which allows the police unilaterally to ship people off to three or even four years of confinement in circumstances that are similar to those of the conventional criminal punishment of "reform through labor". Two or three years ago, many Chinese reformers, even within the Ministry of Public Security (MPS), seemed confident that the NPC was about to abolish or at least substantially revise RETL. There was widespread agreement among the experts that its continuing existence undermines the significance of the Criminal Procedure Law (CPL), since it allows the police to circumvent the protections of the CPL, including review by the procuracy and the courts, and nevertheless to send people to long periods of what is, for all intents and purposes, criminal punishment. But the apparent opposition of the Central Party Political-Legal Committee and the leadership of the MPS, which believes that it continues to need this weapon to help quell social unrest, has been sufficient to block adoption of the draft legislation that now lies dormant in the NPC."

73. Professor Cohen noted that the Supreme People's Court was trying to sustain the momentum for law reform and in January 2007 had taken back from the provincial High Courts the responsibility for final review of all death penalty cases. 300-400 new Supreme People's Court judges were being recruited to deal with death penalty reviews. Each new interpretation issued by the NPC after January 2007 had to be filed with the NPC's Standing Committee, which had the power to amend it. Since July 1 2006, all death penalty appeals required a formal Court hearing. Standards for the application of the death penalty were in preparation which would call for the imposition of the death penalty only subject to new and detailed conditions.

Restraints and pressures on trial lawyers in sensitive cases had increased and the Party's rôle in criminal investigations had become more visible.

74. Professor Cohen's report concluded with a consideration of the immediate future and what the United States should do in relation to the Chinese legal system as a whole –

> "This is a gloomy time in China for the administration of criminal justice and related legislative and judicial reform. The NPC seems to be frozen in this area, and the only significant systemic reform – the SPC's effort to improve procedures in death penalty cases – is moving slowly and toward an uncertain outcome. In too many cases, the police operate with reckless disregard for existing criminal procedures, and in making their decisions courts are the helpless tool of Party and government leaders and the objects of other distorting influences. Although the nation's leaders continue to use the abstract rhetoric of the "rule of law", they increasingly emphasize that the Western-style laws, institutions and procedures that the Party has introduced since 1978 are not to be applied in a Western manner. They want the legal system to repress the rising tide of social unrest generated by China's rapid success rather than effectively process the new disputes and grievances that are being brought to it for solution. This in itself has added to social instability. The failure of the highly-touted "socialist rule of law" to meet popular needs and its frequent use as an instrument of repression have fueled feelings of frustration that are being transformed into what has accurately been called "rightful resistance."

75. Unfortunately, the Congressional-Executive Committee does not appear to have taken evidence after September 2006; thereafter, we rely on the other evidence before the Tribunal.

B. Professor Palmer's report

76. Professor Michael J E Palmer, LLB (Cantab) BSc (Econ) MA LLD (London) is a senior Professor of Law with the School of Oriental and African Studies at the University of London (SOAS), and in 2006 was joint head of its LLM Course on 'Modern Chinese Law'. He has knowledge of Chinese law, society and custom; in the past he has given expert evidence in various court proceedings (including *WC* and *SC*) and tribunal hearings in which matters of Chinese law have been at issue in England, Hong Kong and the United States. He is currently on sabbatical from SOAS. He speaks and reads Mandarin Chinese. From 1990-1993, Professor Palmer was seconded to Hong Kong as a fulltime advisor on Chinese law in the Hong Kong Attorney General's Chambers. He was Secretary to, and a member of, the Hong Kong Governor's Working Party on legal aspects of civil and commercial relations between Hong Kong and the mainland People's Republic of China. In 1999, he was a member of a Special Mission of the United Nations High Commissioner for Human Rights (UNHCHR), which visited the PRC to advise what changes to the law were necessary to enable it to accede to the International Covenant on Civil and Political Rights (which China had signed the previous year).

77. Professor Palmer visited a number of "Reform through Labour", "Re-education through Labour" and other correctional institutions during the course of regular official visits to the PRC. He has worked with the Lord Chancellor's Fellowship Programme for Young Chinese Lawyers, the Great-Britain–China Centre, the PRC

Supreme People's Court Training Programme for Young Chinese Judges, and the British Council's EU-China Legal and Judicial Co-operation Programme.

78. Professor Palmer's report showed reasonable, if not full, knowledge of the nature and character of the appellant's criminal past. He set out the text of the 1997 People's Republic of China Criminal Law (CL) Articles 239 and 318 (kidnapping and people smuggling offences). Under Article 239, kidnapping for blackmail carries a sentence of 10 years to life in prison, plus fines and/or property confiscation. Higher penalties are contemplated where a kidnap victim is a child, or dies. Under Article 318 (people smuggling) an ordinary smuggler is liable to sentence of 2-7 years and a fine; where the defendant is a ringleader or the offence has aggravating features, the sentence is 7 years to life. If both offences are committed, multiple offence provisions apply. Transporting people over the border entails a sentence up to 5 years, with 5-10 years for repeat offences, unsafe transport vehicles, huge profits or other exceptionally serious circumstances. In the light of the appellant's organised crime offence, Professor Palmer considered that a sentence at the higher end of the scale, life imprisonment, would have been imposed, and that the Chinese authorities would regard 14 years as unduly light. That comment was not sourced but we have regard to the expertise which Professor Palmer has accrued over the years.

79. The report then dealt with Articles 7 and 10 of the Criminal Law, which allow re-prosecution of overseas offences. In particular, we are here concerned with Article 10, which permits re-prosecution even where the offender was convicted and sentenced abroad:

> "10. There is, however, an absence of reported cases of re-prosecution under Article 10 of the revised Criminal Law of the PRC, 1997. This reflects, in my view, not an absence of such cases but, rather, a problem of reporting – reflecting in part the problem of the secrecy that pervades important areas in the operation of the legal system in the PRC. Secretiveness is part of a general approach to law and governance in the PRC, and the failure of the PRC government to acknowledge and deal with the SARS epidemic reflected, continued close control over and censorship of the media by the PRC authorities. Legal reforms in the PRC have prompted the Chinese legal system to become a little more open and transparent than it was two decades ago. However, secrecy continues to be a critically important feature of the operation of the Chinese legal system. Very important is the secretive nature of the workings of the court adjudication committee, despite its active involvement in trial decision-making."

80. Professor Palmer cited two recent North American articles in relation to judicial training and precedent in China:

> "11…Discussing sources of law with reference to the role of the courts under the heading "The Emergence of Case Law", one of the leading authorities on Chinese law in North America, Stanley Lubman, has recently pointed to the particular and limited role given to "case law" in the PRC:
>
> > Chinese doctrine firmly rejects the doctrine of precedent (panli), denying any binding force to judicial decisions. Although the prior cases may be considered instructive examples (anli), they are not binding and are not supposed to be considered a source of law. In practice the Supreme People's Court has been publishing decisions in its Gazette since 1985 for their "reference and educational value". Most of the lower-court decisions were carefully chosen and substantially

re-written in order to transmit to the lower court [Supreme People's] Court's views of the issues involved.

Other reports of decisions circulate to the lower courts through internal channels, but only the most "mature" and "representative" are selected for open publication (LUBMAN, Stanley [1999) Bird in a Cage: Legal Reform in China after Mao, Stanford, Calif: Stanford University Press, at pp. 284-5).

12. Discussing sources of law with reference to contract law, a politically much less sensitive area than criminal justice, another leading authority on Chinese law in North America, Pitman Potter, has more recently pointed to the particular and limited role given to case analysis in the PRC:

> The formalism evident in Chinese official legal culture remains a dominant characteristic of judicial decision making. Collections of judicial decisions to be used in judicial training programs give primary emphasis to uniformity and consistency in judicial decisions. As well, the process of case analysis begins with a review of statutory provisions, which themselves reflect the instrumentalist character of state law and regulation. Little attention is paid to close analysis of pertinent facts, or to the subtleties of fact cum law analysis. Thus the importance of formalistic compliance with state law is instilled in judicial decision makers from early on (POTTER, Pitman B. [2001] The Chinese Legal System: Globalisation and Local Legal Culture, Routledge: London & New York at p. 54)."

It is clear that there are collections of decisions available to Chinese researchers and for judicial training, and that they are used in judicial training programmes with the emphasis on judicial uniformity and consistency.

81. Professor Palmer emphasised how small decision collections were in relation to the vast number of cases heard across China. No statistics are provided; these, we now understand, are not readily obtainable outside China. A Chinese source, Liu Nanping, described by Professor Palmer as 'the leading academic authority on sources of PRC law' stated that:

> "Most of the cases reported in the [Supreme People's Court] Gazette are from decisions of lower courts which reach the Supreme Court through "the internal reporting channel". Traditionally, every lower court, particularly every higher provincial court, is supposed to submit to the Supreme Court those of its decisions which involve either important or complex issues … these submissions are not required by law, nor do decisions reach the court by way of law or review.
>
> The Court does not simply publish verbatim what it regards as the important opinions of lower courts, Instead, the Court, after selecting desirable cases will substantially edit or rewrite most of the selected cases in order to make them understood and followed the way the Court wants…
>
> One cautionary note is that the decisions eventually published in the Gazette constitute no more than a fraction of the cases the Court transmits to the lower courts as guidance in their decisions. Besides the open channel of publication in the Gazette, the Court continues to use a traditional "internal channel" …[Decisions published] are also mostly not the Court's own decisions, but are selected from lower court opinions and edited and rewritten by the Court … the internal channel is more likely to be used to relay cases that are less significant … [but] … sometimes cases selected … for special purposes are also sent through the internal channel …(LIU Nanping [1991] " 'Legal Precedents' with

Chinese characteristics: Published Cases in the Gazette of the Supreme People's Court," Journal of Chinese Law, Vol. 5, pp. 107-129, at pp. 115-116)."

82. Professor Palmer explained that Chinese judicial decision making was not transparent; judgments provided only minimal information as to reasoning, with the supporting materials (notes of judicial discussions, replies to enquiries by superior courts and/or the Political and Legal Committee of the Communist Party) retained on the 'internal volume' of the case file and not subject to disclosure. The Communist Party's Political and Legal Committee appointed and removed judges as necessary and might intervene in or determine the outcome of a particular case. He explained the NPC website guidance, and in his opinion, the purpose of that document for those working in the criminal justice system was to guide actual practice. Professor Palmer considered that the NPC website guidance would not have been given to those working in the criminal justice system if it were not intended to guide actual practice.

83. The report next considered the death penalty, repeating the emphasis on the secrecy of Chinese legal proceedings. Professor Palmer referred to an Amnesty International report of March 2004, reporting the extensive use of the death penalty in the 'strike hard' campaigns. The following excerpt from that report is helpful:

> "...Luo Gan, a politburo standing committee member and director of the Central Committee for the Management of Public Security, has urged security organs to "[...] continue to adhere to the 'strike hard' principles" in on-going security work. Luo Gan also called for the campaign to be extended for another year on 18 July 2003, (6) although it is unclear whether this resulted in an actual policy decision for the campaign to continue on a national level. Xiao Yang, president of the Supreme People's Court, also called in December 2003 for the campaign to continue in response to continually rising levels of crime in China.
>
> > "Any crime which the law regards as serious should certainly receive serious penalties, and any crime which is punishable by the death penalty according to the law, should certainly receive the death penalty. This will ensure the healthy progress of strike hard".
>
> Hu Jintao, former Secretary of the Standing Committee of the CCP Central Political Bureau (Legal Daily 4 May 1996), now President of the People's Republic of China and Chairman of the CCP.
>
> According to official national statistics, the conviction rate for all crimes for the five years from 1998 to 2002 was 99.1%. An almost 'perfect' conviction rate is deeply worrisome in the context of factors demonstrated in this document, such as increased detentions and arrests, torture to extort confessions, restricted access to legal representation, the absence of a presumption of innocence, extreme pressure on the police, Procuratorate and courts to secure convictions during "strike hard", and courts passing guilty verdicts through a sense of political obligation and a desire to maintain resolve rather than rigor. Under such circumstances, miscarriages of justice are inevitable, and it is possible that people are executed 'in error' on an almost daily basis ..."

84. Professor Palmer's opinion was that there was a risk to a person such as this appellant:

> "...although it is impossible to say to what extent he is at risk, and even though the offences for which he has been convicted in [the United Kingdom] do not carry the death penalty."

85. Professor Palmer next considered prison conditions. His analysis distinguished helpfully between laogai (reform through labour) and laojiao (re-education through labour). Laodong gaizao, commonly abbreviated to laogai, was a penalty intended for serious offences where the appellant failed to recognise his crime and repent it. For lesser offences, laodong jiaoyan, abbreviated to laojiao, was an administrative penalty without trial which could be imposed by the police, of up to 4 years in a labour camp. Previous powers to impose unlimited laojiao had been curtailed by the higher courts and 4 years was now the maximum period.

86. Information as to the operation of laogai and laojiao was hard to obtain because of the political sensitivities of the Communist Party, censorship and State secrets law. The institutions which Professor Palmer had been able to visit were carefully prepared model institutions. Conditions in them were very Spartan, the atmosphere oppressive and the prisoners fearful, but he saw no obvious signs of maltreatment in those particular detention facilities. Other evidence indicated that prison conditions could be extremely poor and breach international standards, in particular –

    (a) the books of Harry Wu: "Bitter Winds: A Memoir of My Years in China's Gulag" (1994) and "Troublemaker: One Man's Crusade Against China's Cruelty" (1996));
    (b) a report on a laogai camp in Western Sichuan province by James Cox of Global Network (Prison Camp or Death Camp, February 8 1999);
    (c) the 2001 Amnesty International report based on a petition smuggled out by prisoners at Hunan No 1 Prison in Central China , reporting appalling conditions there;
    (d) the Hong Kong information centre for Human Rights and Democracy report of December 2001 reporting an outbreak of tuberculosis in Liaoning's Tieling Prison which killed 57 prisoners and unsympathetic attitudes to outbreaks of tuberculosis and Hepatitis B at Eastern Zhejiang Province's no 1 prison in October 2001; and
    (e) from Labour Rights Now, an independent human rights group for employment and human rights issues, a report on the maltreatment of Trade Union activists in Hunan Province No 1 Prison.

87. Professor Palmer considered these reports strongly suggestive of unacceptable prison conditions and treatment throughout China. Finally, Professor Palmer referred to the 2005 report of Manfred Nowak, the UNHCR Special Rapporteur on torture and other cruel inhuman and degrading treatment or punishment, as follows –

> "The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment undertook a visit to China from 20 November to 2 December 2005, at the invitation of the Government. He expresses his appreciation to the Government for the full cooperation it provided him throughout the visit. The report contains a study of the legal and factual aspects regarding the situation of torture or ill-treatment in China.
>
> The Special Rapporteur bases his finding on a thorough analysis of the legal framework, individual communications and on written information from and interviews with a wide array of sources, including Government officials, non-governmental organizations, lawyers, victims and witnesses, as well as from on-site inspections of detention facilities. Accordingly, he recommends a number of measures to be adopted by the Government in order to comply with its commitment to prevent and suppress acts of torture and other forms of ill-treatment.

> Though on the decline, particularly in urban areas, the Special Rapporteur believes that torture remains widespread in China. He welcomes the willingness of the Government to acknowledge the pervasiveness of torture in the criminal justice system and the various efforts undertaken in recent years at the central and provincial levels to combat torture and ill treatment. In the opinion of the Special Rapporteur, these measures have contributed to a steady decline of torture practices over recent years.
>
> Many factors contribute to the continuing practice of torture in China. They include rules of evidence that create incentives for interrogators to obtain confessions through torture, the excessive length of time that criminal suspects are held in police custody without judicial control, the absence of a legal culture based on the presumption of innocence (including the absence of an effective right to remain silent), and restricted rights and access of defence counsel. The situation is aggravated by the lack of self-generating and/or self-sustaining social and political institutions including: a free and investigatory press, citizen-based independent human rights monitoring organizations, independent commissions visiting places of detention, and independent, fair and accessible courts and prosecutors.
>
> While the basic conditions in the detention facilities seem to be generally satisfactory, the Special Rapporteur was struck by the strictness of prison discipline and a palpable level of fear and self-censorship when talking to detainees.
>
> The criminal justice system and its strong focus on admission of culpability, confessions and re-education is particularly disturbing in relation to political crimes and the administrative detention system of "Re-education through Labour". The combination of deprivation of liberty as a sanction for the peaceful exercise of freedom of expression, assembly and religion, with measures of re-education through coercion, humiliation and punishment aimed at admission of guilt and altering the personality of detainees up to the point of breaking their will, constitutes a form of inhuman or degrading treatment or punishment, which is incompatible with the core values of any democratic society based upon a culture of human rights (Commission on Human Rights, E/CN.4/2006/6/Add.6; 10 March 2006)".

88. That concluded the evidence of Professor Palmer. We have not had the opportunity to examine him orally. That is regrettable: in March 2007, his chambers website records that Professor Palmer was made an Honorary Professor at the People's University Law School in Beijing. That would have given him increased database access (see Professor Fu's evidence) but we do not have a later report from Professor Palmer prepared with that access.

C. Dr Gechlik's report

89. Dr Mei-Ying Gechlik, LLM, JSD, MBA (Finance) (née Veron Mei-Ying Hung) is a law lecturer and Microsoft Rule of Law Fellow at Stanford University Law School. She teaches two courses: Introduction to the Chinese Legal System and Chinese Law and Business. Her undergraduate degree was awarded by Hong Kong University and she holds postgraduate qualifications from Washington College of Law, Stanford University Law School and the University of Pennsylvania. She is a member of the Bar in England and Wales, Hong Kong, and in the United States in both New York and the District of Columbia. She also was a visiting Professor at the People's University of Beijing.

90. Dr Gechlik is Chinese, born in Hong Kong where she lived for almost 30 years before relocating to the United States. She has married in America and has a daughter. The

rest of her family, mother, siblings, their spouses and all their children, are Hong Kong residents. Dr Gechlik speaks fluent Mandarin Chinese and Cantonese Chinese, and she reads newspapers and magazines from Hong Kong and mainland China every day. Since her childhood, she has made regular visits to mainland China to visit relatives or research the Chinese legal system; she has observed court trials and interviewed hundreds of judges, officials, professors, attorneys, and litigants.

91. Like Professor Palmer, Dr Gechlik was appointed by the UNHCHR in 2001, to advise on implementing human rights technical cooperation programs in China, including presenting a paper to a conference of senior Chinese officials in Beijing, explaining why laojiao breached not only international but Chinese legal principles and urging abolition of the system, or at least reform. The paper was later published in the Columbia Journal of Transnational Law. After this project, Dr Gechlik was twice appointed by the UNHCHR to work with Chinese officials to discuss Chinese prison reform. She presented a paper on training of prison staff in China and also served as an expert consultant accompanying a Chinese delegation to Switzerland for discussions on prison reform and prison visits there. The Chinese authorities invited Dr Gechlik to help with training on the theme "China: WTO and Judicial Review". The training was delivered to legislative affairs officials from China's provinces and to the State Council, the country's highest executive organ.

92. Dr Gechlik testified before United States Congressional Committees on topics including human rights, legal reform, and political reform in China and has published widely on these specialist areas. Unfortunately we have not had the opportunity of hearing from Dr Gechlik in oral evidence but it is clear that she has significant expertise with which to assist the Tribunal.

93. Dr Gechlik's report first considered internal re-prosecution of Chinese citizens who had not left China. Unfortunately, that throws no light on these proceedings. Dr Gechlik next dealt with the interpretation of Articles 10 and 7. There was no system of precedent in Chinese law and the reasoning parts of Chinese judgments were relatively short. However, judges of the SPC often wrote articles or books to discuss legal issues which, although not legally binding were considered persuasive and reflective of how law was applied in judicial practice. These publications were read closely to understand judicial analysis. Dr Gechlik quoted at length from a useful article written by two SPC judges and a Professor from the National Judges' College in China, dealing with 'China's theory and practice on ne bis in idem'. The article concerned the application of Article 10 CL and, after concluding that ne bis in idem as a doctrine was inapplicable to re-prosecution for overseas crimes, set out the operation of Article 10 as a species of negative recognition of overseas judgements –

> "…Article 10 of CL 1997 stipulates that any person who commits a crime outside the territory and territorial waters and space of the People's Republic of China, for which according to this law he should bear criminal responsibility, may still be investigated for his criminal responsibility according to this law, even if he has already been tried in a foreign country; but if he has already received criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated punishment. …. Clearly, this provision is aimed at protecting the State sovereignty and safeguarding the interests of the State, as well as national citizens. Therefore, some scholars hold that it is unreasonable for Chinese judges to recognize the criminal judgments made by foreign courts. In their opinion, such foreign criminal judgments are considered as a type of fact and only have consultative use. Actually, this opinion is doctrinally not persuasive in our

view. Taking a comprehensive view of the Article 10 of the CL 1997, which provides that a criminal who has already received criminal punishment in the foreign country may be exempted from punishment or given a mitigated punishment, one can find that Article 10 of the CL 1997 does not purely exclude the recognition of foreign criminal judgments. On the contrary, this is still a kind of recognition that can be treated as negative recognition. Although such kind of recognition does not affect or restrict the State power of criminal punishment, the results of the trial by national courts are still affected by the nature of the execution of foreign criminal judgments. Similar provisions exist in the criminal legislation of other countries such as Japan. Therefore, it cannot be concluded that Article 10 of the CL 1997 directly excludes the principle of ne bis in idem."

94. Dr Gechlik considered it significant that when the article was republished in Chinese in 2006, the authors added two more sentences at the end of the passage above –

> "Of course, the regulation in Article 10 of the Criminal Law is conservative. In judicial practice, this provision is not often used in specific cases."

95. The authors considered whether Article 10 should be abolished:

> "… From a state sovereignty point of view, immediate abolition of Article 10 of the Criminal Law is not likely appropriate. Consideration must be given to both the protection of human rights and the maintenance of state sovereignty, and it might be reasonable to revise Article 10 of the CL 1997 from the doctrine of negative recognition to the doctrine of positive recognition. The so-called doctrine of positive recognition stipulates that criminal judgments handed down by foreign courts must be recognized by courts in China, except when the judgment is apparently partial for some unlawful reasons."

96. The authors offered no explanation as to what was meant by 'apparently partial for some unlawful reasons' but Dr Gechlik argued that its natural meaning was 'unlawful in Chinese law'. Article 81(2) of the Criminal Law excluded serious offenders in some cases from parole –

> "81(2) No parole shall be granted to recidivists or criminals who are sentenced to more than 10 years of imprisonment or life imprisonment for crimes of violence such as homicide, explosion, robbery, rape and kidnap."

97. Dr Gechlik argued that the decision to release the appellant after only 7 years of a 14 year sentence would likely be considered unlawful in Chinese terms, entailing a risk of Article 10 re-prosecution on return. Article 142(2) of Criminal Procedure Law stipulates that:

> "142(2) With respect to a case that is minor and the offender need not be given criminal punishment or need be exempted from it according to the Criminal Law, the People's Procuratorate may decide not to initiate a prosecution."

98. Dr Gechlik considered that Article 142 would not avail the present appellant as his offence was not minor and that accordingly the Procuratorate lacked discretion as to whether to initiate an overseas offences prosecution under Article 7 or Article 10 CL. She undertook an extensive internet search to try to find examples of the use of Article 10 of the Criminal Law. Strikingly, she could not find any. In particular, Dr Gechlik searched Chinacourt, which then contained 23100 criminal judgments

reviewed and rewritten by the Supreme People's Court for the guidance of Chinese lawyers and judges. She could find no Article 10 cases at all on that database.

99. Dr Gechlik acknowledged that improvements in transparency had been made by the Chinese Courts especially since China joined the WTO in 2001. However, she considered that the transparency remained incomplete (giving an example of a public pronouncement relating to disclosure of Patent Court decisions which had only been complied with in about 30% of cases). It was possible that unreported cases were considered to involve State secrets or individual privacy. Elsewhere in her research, Dr Gechlik did find three possible Article 10 examples, which at best, could be described as inconclusive. Finally, Dr Gechlik considered the possibility of laojiao (the administrative penalty of re-education through labour). The police had a wide discretion and Dr Gechlik considered that they were likely to use it if the appellant were not otherwise prosecuted. The problem was particularly serious in rural areas or lower levels of government where respect for the law was scant.

100. There had been considerable public criticism of the laojiao system in the press and the Chinese Government was considering reforming it. In January 2007, the China Daily published an article entitled "End Legal Black Hole" inviting its repeal:

> "Rushing an immature draft into law is not in our interest. But we cannot afford any more foot-dragging on this one. We badly need a substitute for the re-education-through-labor mechanism.
>
> Through its existence since 1957, re-education-through-labor institutions have contributed to maintaining order and preventing crime. The system's inadequate concern for civil rights as well as lack of jurisprudence protection have made it increasingly out of step with the country's progress in protecting human rights.
>
> Re-education through labor is a Chinese invention that applies to minor law violations that do not constitute crimes or qualify for criminal punishment.
>
> Since police authorities can independently decide to send a citizen for such re-education and the terms of re-education can be as long as four years, there have been legitimate worries as well as examples of abuse.
>
> Although the re-education system was designed for minor offenses that do not deserve penalties prescribed in the Criminal Law, re-education through labor can be more severe than what the law stipulates for crimes. This is a major injustice that has to be resolved.
>
> The largely unrestrained latitude of the police in deciding the term of re-education, the lack of oversight, and absence of clearly defined procedures make suspects of minor offenses vulnerable. Some would rather face trial and serve a criminal sentence than be sent to re-education.
>
> We strongly hope the widely anticipated draft can appear before the national lawmakers as scheduled. It is an imperative legislative task.
>
> Disagreements are no reason for keeping it from legislative scrutiny. The NPC Standing Committee is the best place to address different opinions."

101. The article reinforced the message that laojiao related only to minor offences. This, on any view, was not a minor offence. That completed the evidence of Dr Gechlik. Again, the Tribunal did not have the advantage of hearing her oral evidence.

D. Dr Dillon's reports and oral evidence

102. Dr. Michael Dillon BA PhD (Chinese Studies) FRHistS was Senior Lecturer in Chinese History at the Department of East Asian Studies, University of Durham when he prepared his report on 8 August 2007. His primary research interest was the Muslim minorities of north-western China, particularly the Hui and the Uyghurs. Dr Dillon reads Chinese fluently and speaks Mandarin. In addition, he had some knowledge of other Chinese languages and of the languages of some of China's ethnic minorities. Dr Dillon had been teaching and researching on the PRC for over thirty years, and his expertise was based both on the written materials available (the Chinese press and other reports from China) and on interviews and information obtained during regular academic visits over that long period, some independent, and some in cooperation with the Chinese Academy of Social Sciences and Chinese universities. Dr Dillon had made research visits to many regions of China including the remote regions of Gansu, Ningxia and Xinjiang in the north-west.

103. Dr Dillon's most recent visit to the PRC was in July 2005. Thereafter, he kept up-to-date via various organisations such as Minority Rights Group, whose conference he addressed in New York in July 2006. Dr Dillon had been preparing reports for British courts for returned asylum seekers and other Chinese nationals since 2004.

104. Dr Dillon explained that the modern Chinese legal system dated back only to 1978, after the previous Soviet-style model used since 1949 collapsed and during the opening up of China to the West, when a system of lawyers and Courts was constructed on the Western model. He drew heavily on Professor Cohen's reports, which we have already considered, and on the UNHCHR Special Rapporteur report of Professor Nowak. Dr Dillon noted international concerns about the Chinese legal system, in particular torture, detention in conditions not meeting international norms, and the number of death sentences (albeit hard to compute given the lack of organised information provided by the Chinese Government). Dr Dillon described the court system in China:

> "The court system in China has four levels. The Supreme People's Court which sits in Beijing is the highest judicial organ in China and is formally responsible to the National People's Congress (NPC) and its Standing Committee. It tries the most significant cases, hears appeals against the decisions of lower-level courts and supervises the operation of local courts and special courts. The second tier consists of approximately thirty Higher Courts which sit in provincial and autonomous region capitals and in the major cities which have been accorded independent municipal status.
>
> The third tier courts are the 400 or so Intermediate People's Courts which are based in the administrative centres of prefectures, certain other towns and the districts of larger cities. Basic or primary-level People's Courts, of which there are over 3000, are the lowest level courts and sit in all counties and in many cities. They have the authority to establish People's Tribunals to handle local cases and it is estimated that there are as many as 20,000 such tribunals. Intermediate People's Courts try criminal cases and have jurisdiction in cases carrying the death sentence subject to appeal to the Higher Court."

From that summary it appeared that criminal cases belonged at least in the Intermediate People's Courts (in administrative centres, nominated towns and districts in larger cities), rather than in the People's Tribunals in rural areas which dealt with less serious offences.

105. In relation to prison conditions, Dr Dillon referred to many of the same texts as Professor Palmer: Harry Wu "Laogai: the Chinese Gulag" Boulder: Westview, 1992; Harry Wu (with Carolyn Wakeman) "Bitter Winds: a memoir of my years in China's Gulag" New York: John Wiley, 1994; Jean-Luc Domenach "Chine: l'archipel oublié" Paris: Fayard, 1992 and he drew similar conclusions as to the history of China's prison camps. All of these books antedate the westernisation which Professor Fu described as having accelerated in the late 1990s. However, their historical accuracy is widely accepted.

106. On the openness of the criminal process as a whole, Dr Dillon stated:

> "Although there have been many changes in the Chinese media since the 1980s, the State still exercises a great deal of control, particularly over matters which are judged to have an impact on national security. Serious and organised crime and its consequences fall into this category. Court cases are not routinely reported in the press in the way that they are in the West. They are only reported in the national and provincial level daily press when they are deemed to be of political significance and the government intends that a lesson should be drawn from them. There are often more detailed reports in the local daily and evening press and on local television stations, so a resident or visitor might have access to this information. Many, if not most, trials are effectively held in camera.
>
> Local newspapers have always been formally classified as neibu (internal) rather than gongkai (open or public). These are classifications that have applied to all publications within the PRC since 1949 and reflect the military and clandestine political background of the regime. Although these designations are not adhered to as rigidly as they were, the option of declaring that documents are restricted is still open to the regime. Neibu approximates to "classified" or "restricted" in western concepts of document availability and although local newspapers are on sale publicly in the areas that they serve and have regularly made their way abroad, high profile cases, notably the case of Rebiya Kadeer, have demonstrated that the government views information in them as "State secrets". Collecting such newspapers to send out of China or publicising their contents outside China could be regarded as an offence. The transmission of "State secrets" to foreigners is considered to be a serious crime punishable by long terms of imprisonment. It should be noted that the south-eastern coastal province of Fujian from which many asylum seekers originate is an especially sensitive area in military and political terms, not only because of the recent history of illegal emigration, but also because it faces the island of Taiwan which has been in political (and occasionally military) conflict with China since 1949.
>
> The authorities publicise the fact that individuals are charged with offences such as sending unauthorised material abroad by the selective reporting of such cases both in the press and on television.
>
> There is considerable local variation in the application of legislation, up to and including the death penalty and the fact that there are agreements at national government level does not guarantee that the provisions of such agreements will be carried out at the local level. There is no provision for the monitoring of such agreements by western governments or NGOs.
>
> There has been no attempt by the government of the PRC to make the criminal process more transparent and it would be fair to conclude that the processes of decision-making in the police, the procuracy and the courts are deliberately concealed from public view."

107. In relation to the specific risk of overseas offences prosecution in any one case, Dr Dillon's opinion was that it was most likely where the accused was deemed to pose a

particular threat to social order in China; where the authorities wished to make a public example of an individual or a group of individuals; or where the case was considered to tarnish the image of China. Trial and sentence in such cases were likely to be publicised in the media (which was State-controlled), specifically in local television news, in which case there would be no written record available. It was likely that the authorities would not wish to publicise them outside China. Where extorting telephone calls were made to relatives in China, such that part of the commission of the offence occurred within China, Dr Dillon considered that this might persuade the authorities that an overseas offences prosecution was more justified than in other cases.

108. In relation to the NPC website guidance, Dr Dillon considered that it reflected current political attitudes in China, consistent with a growing nationalism which had become apparent since the late 1970s:

> "It is difficult to see what evidence the Home Office could adduce to support the claim that Article 10 is not likely to be put into practice, or that it is only likely to be put into practice in limited circumstances, since it is impossible to gain access to reliable data on this matter."

109. Dr Dillon considered the Foreign and Commonwealth Office 'double jeopardy' letter to be of little assistance:

> "The confirmation that the FCO are unable to monitor Chinese citizens when they have returned to China is clearly accurate. Guarantees made by the police, legal or government authorities in China on re-prosecution or the treatment of returnees cannot be verified. There is no reason why the Chinese government should consider itself to be obliged to inform Western courts or governments about a re-prosecution. The presumption of the Chinese political system is one of secrecy or at least confidentiality. This is not restricted to the legal system: information is considered to be privileged and publication abroad of any material deemed sensitive is only approved when there is political advantage in doing so. Although there is considerably more openness now than there was twenty or thirty years ago, this attitude has not changed fundamentally."

110. On return, the appellant could expect to be monitored by the Chinese authorities:

> "He would certainly belong to the category of person that the police would wish to monitor on the grounds that he would be likely to re-offend. It is possible, although unlikely, that he would be simply able to get on with his life. The authorities would wish to monitor him in some way but the precise method of supervision would depend on local conditions and local attitudes. The options available would include surveillance, re-prosecution or sending him to a laojiao camp, which would not require formal prosecution. It is not possible to know what has happened to convicted criminals who have been deported to China as that information is not openly available.
>
> This risk is increased by the fact that the victims were Chinese nationals in the UK. Even if this crime has not been reported in the official media in China, news would have spread through unofficial channels and the authorities may well feel obliged to prosecute to demonstrate their concern for their own nationals abroad."

111. Those statements are not sourced. Dr Dillon did not feel able to state with confidence the likely sentence for this appellant on return. The information simply was not available outside China. Organised crime had a long history in China and Fujian was known as a centre of people trafficking, since it faced the island of Taiwan.

He thought that, dependent on the status of the officer involved, the involvement of a police officer might increase the risk of overseas offences prosecution under either Article 7 or 10 CL. Such evidence as existed of overseas offences prosecution was anecdotal and Dr Dillon was unable to be more specific. He had never heard of a civil law right for the victims of kidnap-related crimes to bring proceedings themselves.

112. Dr Dillon did not consider laojiao to be a likely approach because of the seriousness of the appellant's crimes. Prison conditions varied between model prisons which met Western standards, and poor conditions elsewhere, but there was consistency in the reports of poor conditions, ill-treatment and brutality in prisons and laojiao facilities. He considered that the arrest warrant which the appellant had produced looked authentic for its date and the charges in it were in line with the appellant's account. The appellant's account of his original 1994 difficulties was plausible.

113. Dr Dillon explained that the hukou system of personal identification was currently being reformed and was no longer an effective tool of social control. Its application was now erratic –

> "The hukou system of household registration which was designed to control the rural areas and restrict the migration of peasants to the cities has come under great pressure since the growth of migrant labour in the 1980s and 1990s. It is currently being reformed and, in advance of these reforms, it is being implemented more leniently in some areas than others. The evidence suggests however that it is still being enforced in a draconian fashion in some rural areas where it suits the interests of local officialdom. Many people are relocating to other parts of China, mainly the cities, some legally but others illegally."

114. Dr Dillon gave oral evidence to the Tribunal, and adopted that report. He had read Dr Gechlik, Dr Sheehan and Professor Fu's reports and maintained his own position after reading them. He was aware of Professor Fu and of Professor Cohen, whom he described as an extremely well-known academic in the United States. Dr Gechlik was not known to him; Dr Dillon commented in his oral evidence that a very large number of people had been granted the honorary title of Visiting Professor at the People's University of Beijing.

115. Dr Dillon was asked supplementary questions about Professor Fu's commentary on the differences between the *WC* report and his main 2007 report. Dr Dillon agreed with the earlier report but disputed the 2007 analysis. In particular, he considered that the Chinese authorities were particularly concerned about organised crime at present and remained secretive and unwilling to publicise the outcome of criminal cases. In relation to the effectiveness of hukou, Dr Dillon agreed that there were 80-120,000,000 migrant workers in China, some of whom did have hukou registration where they worked, and some did not. There had been a huge migration, making it difficult for the authorities to maintain the system. There was a strong lobby both from the police and from the Public Security Bureau to retain it and moves in other places to abolish it. Although its effectiveness was patchy, hukou could not be ruled out as a factor when considering internal relocation.

116. In cross-examination, Dr Dillon was asked to confirm that the Article 10 re-prosecution power was discretionary, not mandatory. He referred to the NPC website guidance. He had not analysed the relevant statutory provisions himself; he was not a lawyer. He was not entirely sure that discretionary and mandatory were

useful or sensible concepts in the Chinese context. The Courts had Article 10 available and if they wanted to use it, they would do so.

117. Torture still existed but he was aware that the Chinese President was very much against it and senior figures in the Chinese Government did not consider torture to be a good idea any longer. Dr Dillon stated that:

> 'It is perfectly clear to me that a large group of modernising lawyers are pushing for practical abolition of torture and are being heard in Government at present'.

118. Overall, the trend was one of improvement. There was great support for modernisers within the legal system in China and awareness in political and legal circles of the concerns of the West and of the UN. A lot of change had occurred when China was negotiating to join the World Trade Organisation in the period 1986-2001, the accession having been approved in 2001. Dr Dillon accepted that there had been changes in criminal justice practice since 2003/4 but the Government remained the same. Any real change was wishful thinking. There was no extradition Treaty between the United Kingdom and China, nor with the United States.

119. International cooperation on criminal matters was generally not available, although China sought it, because of international concerns about China's use of the death penalty, particularly for cases not involving any violent crime. The written procedures might be changing, especially as many Chinese lawyers had been trained abroad, but Chinese patriotism and national pride made it very reluctant to be dictated to by foreigners in the interpretation of its legal system and the changes were more apparent than real. Normally these matters were not made public and if China were reasonably sure a matter would come to foreign attention, it would be likely to deal with it quietly. China was desperately trying to keep closed any information on prisons and the prison camp system.

120. Dr Dillon confirmed the distinction between laogai and laojiao and that kidnapping offences were likely to be tried by one of the 400 Intermediate People's Courts in larger urban centres. Serious crimes were more likely to be punished by laogai than laojiao. Laogai prisons were well away from major urban areas and the prying eyes of foreign journalists and academics. Dr Dillon observed that the Special Rapporteur had been well aware of only being shown the star prisons, and even those were not particularly good.

121. There was certainly a move towards more reporting of Chinese Court judgements in the media, either because they had political impact (for example, trials of alleged separatists in other countries) or by journalists who had acquired a reputation for reporting despite the risks. Dr Dillon had not been able to find a single published reference to Article 10 CL on the Chinacourt database or elsewhere on the internet; he had researched a number of databases but not kept a record of which ones he had used.

122. There had been a significant change in availability of court reports in China over the last ten years, due in part to improvements in technology. Dr Dillon accepted that Chinacourt had on it 23100 criminal judgements or thereabouts. That was a drop in the ocean. (By way of comparison, the principal public websites for United Kingdom judicial decisions date back to the same period, the late 1990s and the open

access website of the British and Irish Legal Information Institute was available only from 2000).

123. Dr Dillon was not a lawyer and had no knowledge of technical issues relating to the distinctions between complete and inchoate offences. There were powerful domestic reasons not to publish outside China details of overseas offences prosecutions. It was put to Dr Dillon that this was contradictory, if the purpose of prosecuting overseas offences were to deter Chinese nationals from offending outside China. His response was that if the Government perceived that its political interests were served by publicising the effect of Article 7 or 10 prosecutions outside China they would do so; he accepted that his evidence on this point was completely hypothetical. He had read through the six overseas offence cases identified by Professor Fu; they demonstrated that overseas offences prosecution was possible when the Chinese authorities considered it necessary, sometimes for political rather than legal reasons, as for example in the Kuwaiti case (relations between Kuwait and the PRC had been difficult at that time).

124. Dr Dillon was aware that the Chinese Embassy in London collected information on the Chinese community in London and on offences connected with that community. There was also police cooperation; British police officers had been seconded to the British Embassy in Beijing to help the British Government to deal with trafficked individuals and the trafficking gangs. It was unlikely to be a formal arrangement, given the lack of an extradition Treaty. Anyone thought likely to re-offend would at least be monitored.

125. Dr Dillon was asked what would be on a person's hukou files. He said that the hukou was held by the local Public Security Bureau and its contents were not available to locals, still less to foreigners. His understanding was that it included who lived in the house, their names, relationships, and jobs, and from accounts he had read he understood that it would also include details of criminal convictions and other matters which the police might consider to be antisocial activities. He had never personally seen a hukou or Public Security Bureau file. If a person's name had been drawn to the attention of the authorities, for example as a result of local public order disturbances, he would expect that to be on the Public Security Bureau file. Similarly, he would expect arrests to be recorded.

126. Dr Dillon accepted that it was now not unusual for people to work illegally in the big cities. People did migrate around China for work and for 20-25 years it had been known that many people would 'go black'; there was a shadow world of people not known to the authorities, working without hukou, and in some cities there was a thriving black market. Dr Dillon was aware of the Chinese authorities' focus on corruption; he had been involved with the case of a corrupt official whom the authorities would have liked to reach overseas. Corruption was a very longstanding problem. It was possible that there was now less focus on people trafficking; he referred to his previous evidence about liaison between the British police seconded to the Beijing British Embassy and local police. If a major case occurred, it would become more high profile.

127. In answer to questions from the Tribunal, Dr Dillon said that members of the Communist Party were very close to local businessmen and the legality of payments to them was often in question. There was a relationship between the Party and

Government on the one hand, and between the Party and local business on the other. Many Party members were now involved in business themselves.

128. For a Chinese national returning from abroad, re-entry would be very complex. People were picked up at immigration and questioned; he had experienced it himself. The immigration authorities at the point of re-entry would be able to check with the Public Security Bureau in a person's home area and might be requested to return him to the home area to be dealt with there. There might be a short period of detention in Beijing while they worked out which Court was most appropriate; Beijing would be delighted to get rid of a defendant to another area but might consider that a Chinese individual returning from abroad had useful information to give them first as to what was happening to Chinese nationals outside China.

129. Dr Dillon was aware of a certain number of Article 7 and Article 10 cases but considered that he did not properly understand the Chinese authorities' motivation; he was not certain that it was deterrence, more a question of national pride and patriotism. If an overseas prosecution case were dealt with in Beijing, NGOs and Governmental organisations from abroad could probably track it. However, re-prosecution in Fujian province by a lower level Court would render it extremely difficult to find out what happened. Torture was less likely in Beijing than in Fujian.

130. In re-examination, Dr Dillon confirmed his strong agreement with the 2004 Fu report, especially at paragraphs 13-14 where Professor Fu stated that Fujian province would interrogate under duress or even torture. He could have written those paragraphs himself.

E. Dr Sheehan's reports and oral evidence

131. Dr Jackie Sheehan, BA, PhD is Associate Professor in Contemporary Chinese Studies in the School of Contemporary Chinese Studies, University of Nottingham. She studied at Cambridge for her undergraduate degree and SOAS for her doctorate. Her specialist area is the People's Republic of China (PRC) since 1949, in particular the development of autonomous social organizations in the PRC and the legal and political treatment they receive, the Chinese Communist Party Government's responses to grassroots political initiatives, opposition and dissent, and contemporary Chinese concepts of and legal protection for civil, political, social and economic rights. She visits China two to three times a year and both reads and speaks Mandarin Chinese. Dr Sheehan prepared her report with the benefit of the reports of both Professor Palmer and Dr Dillon. Broadly, she agreed with both reports, commenting that in her opinion the most likely penalty would be life imprisonment or possibly death –

> "It is my strongly held view that it is not safe to assume from the absence of known examples of re-prosecution that it does not in fact take place in the PRC, or even that it is rare. Far too few cases of any kind are known to outsiders to make this a reasonable deduction." [Paragraph 6]

132. Dr Sheehan considered that the NPC website announcement would have been placed there for guidance and to indicate that Articles 7 and 10 might be used in appropriate circumstances. The Chinese authorities' approach to the power to mitigate prosecution in Article 10 could perhaps be gauged by considering their approach to a similar power in Article 18 in relation to deaf-mute and blind citizens.

In the case of Jin Ruchao, who was deaf-mute, and who was prosecuted for causing the deaths of 108 people by setting off four bombs within an hour (by taking taxis between the sites), he was convicted on the basis of his own confession and those of three corroborative witnesses who all admitted to supplying him with explosives. All four were executed. Mitigation was not always applied, especially in a high-profile case.

133. Dr Sheehan endorsed Professor Palmer's opinion that the most likely penalty if this prosecution had occurred in China instead of the United Kingdom would have been life imprisonment. Although she spent some time in her report on the possibility of the death penalty, at its highest she considered that it 'cannot be completely ruled out' but that life imprisonment was a much more likely outcome. She also agreed that the offence was probably too serious for laojiao. Dr Sheehan's opinion was that punishment of people traffickers was harsher than for those trafficked–

> "10. The emphasis of the PRC authorities in dealing with snakehead cases has for some years now been on harsher punishment for those involved in organizing people-smuggling rather than for those actually migrating. The trend was noted in a 2001 report by Dr Pierre Picquart for the European Commission on Chinese illegal immigration, which referred to sharply increased sentences, up to life imprisonment, for snakeheads and their accomplices, with the death penalty always applied in cases where migrants had died while being smuggled abroad. The Canadian Immigration and Refugee Board provides similar evidence in a slightly older report which cites Chinese press sources to confirm that "the primary targets of the public security authorities are the organizers or 'snakeheads'". The state-run Xinhua News Agency similarly reported that: "The [senior Public Security Ministry] official said that the fight against snakeheads is the most important part of the battle and that they need to be given harsh penalties in accordance with the law", while interviews conducted by Canadian diplomatic staff with PSB officials in Fujian also confirmed that "penalties for smuggling … seem to increase in severity the greater the involvement of the accused with the organization of smuggling."

134. Dr Sheehan considered that the Chinese authorities would consider 14 years very lenient for such a crime and further, that release after only 7 years of what Western authorities consider 'good behaviour' would add to that impression –

> "12. Chinese law does provide for early release from prison sentences in certain circumstances, though it is far from being the norm for convicted prisoners to be released approximately halfway through their sentence simply for avoiding further offending, obeying prison rules and cooperating with rehabilitation programmes where available, as is common in the UK. Chinese law and practice sets the bar for "good behaviour" somewhat higher, in Article 78 of the Criminal Law of 1997, requiring prisoners to inform on or prevent other major criminal activity, risk their lives coming to the aid of others, produce significant inventions or technological innovations, perform "remarkable actions" in combating natural disasters or major accidents, or "make other major contributions to the country or society." Even where such a reduction of sentence is granted, the prisoner must serve more than half the original sentence, or at least 10 years in cases of life imprisonment. The release of [this appellant] after serving only seven years of his sentence would increase the impression of UK leniency in the eyes of the Chinese authorities."

135. The lack of any confession would make the offence worse in Chinese eyes and increase the risk of torture –

"13…Even where eye-witness testimony of guilt is available to the prosecution, a confession by the defendant is still seen as important in legitimizing conviction and punishment. Police and prosecutors put pressure on defendants through the practice of "leniency for those who confess, severity for those who resist" (*tanbai congkuan, kangju congyan*). It is also well documented that torture is frequently used within the Chinese legal system to obtain confessions. Confessions obtained by torture are still admissible as evidence in the Chinese courts, provided they are not the sole evidence on which a conviction rests. …

14. The Chinese authorities deny that the use of torture is systematic there, but they do admit that it is widespread. A September 2000 report from the Standing Committee of the National People's Congress based on inspection tours of six provincial-level administrations to assess how the revised Criminal Procedure Law was working in practice, found major flaws in its operation in three main areas: officials' disregard for detention time limits; defence counsel being prevented from performing their professional duties in criminal cases; and widespread use of torture, which had reached "epidemic proportions". Statements by top national officials such as the Minister for Public Security confirm the prevalence of torture, as do frequent reports in China's domestic state-controlled media. "China's top police official has acknowledged that law enforcement officials routinely use torture to obtain confessions", and that cases of death or injury from torture are covered up "so as not to 'tarnish the reputation of the security organs'". It should be noted that the definition of torture used in the PRC is not the same as that enshrined in the UN CAT to which China is a signatory, since it only refers to treatment resulting in permanent injury or disability or the death of a detainee. There is also some ambiguity in Chinese regulations against torture of detainees by "officials" as to who exactly should be classed as an "official". This loophole allows some categories of staff to commit acts of torture with impunity."

136. Dr Sheehan noted that a person would need to come to the attention of the Chinese authorities on return before there would be a risk, but considered that where an overseas Chinese national was deported, that would be axiomatic as

"18… The UK authorities will presumably need to apply to the Chinese embassy for a passport in his name, and computerised records systems have been in use at every international border crossing into the PRC, including even the more remote land borders with Central Asia, for at least 12 years. Since [the appellant] left China, the domestic police (who are not responsible for border security) have begun developing China's first national police computer network, which would also make it more difficult for him to evade notice. …"

137. Dr Sheehan considered that the risk in the appellant's home area would be increased if he were related to a member of the Chinese Public Security Bureau–

"18… In the Chinese system decisions to prosecute and charges are generally decided by the police, rather than by the less-powerful Procuratorate, and the police can exercise significant influence over trials, e.g. by declaring a particular case "major or complex", resulting in a reduction in the suspect's rights and harsher punishment on conviction."

138. If the appellant's account of his history in his home area were true, Dr Sheehan considered it likely to put him at increased risk as a troublemaker. The facts were consistent with what she knew of what happened in the rural areas, particularly Fujian province:

> "19. … Disputes over changes in land use, inadequate compensation to farmers and/or corrupt diversion of compensation funds have become extremely common since the early 1990s, and now represent one of the most frequent causes of public protest in China. As Fujian was a pioneer province in economic reforms, one would expect these pressures to have been felt there earlier than e.g. in some of the interior provinces. It can be assumed that many more such incidents occur than are ever heard about outside China, although since they are now occasionally filmed or photographed on mobile phones, sometimes extreme examples such as the fatal shooting of three villagers in Dongzhou township, Shanwei, Guangdong province, in December 2005 are reported in e.g. Hong Kong."

139. Dr Sheehan gave oral evidence. She had read Professor Fu's evidence but maintained her position. She was asked some supplemental questions by the appellant's Counsel. Dr Sheehan stated that there were over 4 million criminal cases annually in the Chinese Courts, as set out in China Daily, a state controlled English Language newspaper based on reports from the Xinhua news agency, an official Chinese Government Department. The published criminal conviction figures did not include minor public order offences. She accepted that use of torture was declining in major cities such as Beijing, Shanghai and Guangdong, but it remained a major problem because of the pressure on police forces to get confessions and wrap cases up quickly. The use of torture was a criminal offence and always had been (provided it was physical torture with lasting consequences). Judges liked confessions and punishment by imprisonment was considered not really legitimate without a confession. She did not deal with re-education through labour (laojiao).

140. Dr Sheehan referred to the NPC website guidance, which she considered quite a strong statement of China's right to retry overseas offenders. China was enacting enormous amounts of new law and there was tremendous legal debate; there were many books, of which only this one had been chosen; the placing of that excerpt for general access was a statement in itself. Most databases on Chinese legal decisions were fairly recent and the majority were subscription-only or inaccessible, unless one were a member of the Law Department of a Chinese University which had an institutional subscription. Chinacourt, although public, held less than 25000 records for a period in which there were over 26 million criminal cases, and was highly selective. Only 20-35% of all prisoners were released early from prison; they were eligible after half the term but it was hard to say how that worked in practice. Sometimes there was a political motive and people might be released very early then. Dr Sheehan felt unable to give any general guidance; it was possible that all prisoners were released half way through their sentences, or that some might still be serving their entire sentences. Time off for good behaviour in China required something positive such as help with conviction, an invention, or heroism, rather than simply not getting into further trouble.

141. In cross-examination, Dr Sheehan was asked further questions about the NPC statement. The CL was sparely drafted with no examples; this excerpt from a published book gave both examples and criteria. She did not consider that its publication indicated that there would be any increased use of Article 10. Nothing should be read into it other than that the law remained in force and some guidance was given as to how it might be applied. Similar excerpts had been published for other provisions of the Criminal Law and Dr Sheehan considered it to be an attempt to fill in some of the unanswered questions with which one was left after reading the CL. Her view of Article 10 after reading it, and the NPC guidance, was that its application was discretionary.

142. It was her understanding that an Article 10 prosecution was a fresh prosecution, which would require evidence but not necessarily the United Kingdom evidence underlying the British conviction. Where there was insufficient evidence in China, a request could be made through diplomatic channels for access to the United Kingdom information. It was her understanding that during the trial of JC, the Fujian police were in direct contact with the British police. She did not know of any situation where such contact occurred without diplomatic intervention; it was simply outside her expertise.

143. Dr Sheehan concurred with Professor Fu's premise that there were special procedures for foreign-related cases and that the rôle of Article 10 was diminishing because of the need for China to be assured of international cooperation, especially with the Olympics approaching. She was aware of some bilateral agreements between China and Western countries (specifically Spain and France) where information could be transferred. She gave an example from 2003/4 of a person who was extradited from Thailand with an undertaking not to execute him, then executed. There had been no recent high profile cases of multiple deaths involving snakehead gangs since the Morecambe cockle pickers in 2004.

144. Dr Sheehan considered that appeals of the type considered in this appeal fell to be treated as high profile because of the organised crime element involved with snakehead abductions and extortion. She knew of no media reports in China about the particular case; she considered that they would not have extended further than the local papers in Fujian province. Chinese people outside Fujian would not have access to those accounts. It was put to Dr Sheehan that the Government's interest in organised crime related to corruption amongst civil servants, rather than the present type of case. She disagreed; the Government was capable of interest in more than one topic and they remained interested in those who organised people smuggling. They were much less interested in the customers of such people.

145. Dr Sheehan did not have access to the Peking Law Faculty website. She was aware that there were publicly available and subscription only databases but had confined her own research to printed material, in particular in relation to Article 18, for which she used a report in the South China Morning Post which she had in her office; the deaf-mute case had interested her, but she had not sought out any other Article 18 cases for comparison. Dr Sheehan confirmed that anyone in the position of Professor Fu, working in Hong Kong (now part of China) and for a Chinese University, belonging to the Chinese Faculty of Social Sciences would have access to parts of the Chinese system which she did not, whether legal, academic or governmental.

146. Dr Sheehan was then asked about the border procedures. She has crossed into and out of China many times. Her experience was that the border police used computerised systems into which passport data was manually entered, taking quite a long time: name, date of birth, address, the usual information. That would then bring up any visa information but not hukou information. Police records were gradually being added to computerised databases but she had not seen evidence of linkage between the local police data and that of the border police. They were still separate. When Harry Wu, the author of 'Troublemaker' and 'Bitter Winds' returned to China he was detained at the border, and had to be extricated with the help of the United States Government (Wu was a naturalised American citizen when he returned

to China). Wu's situation was unusual since he had become very well-known, and his case high profile, because he wrote books in the West. The Chinese authorities knew about him already and were prepared for his return.

147. Dr Sheehan reminded the Tribunal that reports by Mary Robinson and Manfred Nowak (the UNHCHR Special Rapporteur) had mentioned self-censoring and palpable levels of fear. The main risk in this appeal, in her opinion, related not to the claimed public order offences in Fujian, but was of Article 10 CL re-prosecution for the people smuggling and kidnap offences. Dr Sheehan considered it very improbable that the sister's account of not understanding the risks of taking home a baby from the birth control clinic (see below) was true; any rural Chinese woman would know that to take in an abandoned baby invited scandal and complications, in particular the risk of compromising your entitlement to a natural child under the one child policy. There were very many abandoned babies in orphanages in China who would never be adopted, precisely for that reason. A birth inspector such as this appellant's sister would certainly know that.

148. Dr Sheehan was asked about changes in the interrogation procedure: Professor Cohen's report indicated that the Chinese Government had implemented a system of simultaneous audio-video recording of the interrogation of criminal suspects (by 1 October 2007); in Beijing, Shanghai, Guangdong and Jiangsu, more and more Public Security Bureaux had implemented it for homicide cases. Dr Sheehan considered that the introduction of audio-visual recording of hearings was too recent for any assessment of its operation.

149. In answer to questions from the Tribunal, Dr Sheehan said that if there were no police interest in this appellant in his home province, a person with a foreign-connected case would likely be tried at the Intermediate Court not in Beijing. However, if Fujian province wanted to try him, he could be forcibly transferred there even for an offence outside Fujian; if a serious penalty (such as the death penalty, whether or not suspended) were imposed, the case might well be transferred back to the higher levels in Beijing. Torture would only occur if there was a prosecution in China requiring a confession to be obtained.

150. It was true that since the mid-1980s the Supreme People's Court had published a range of judicial decisions, initially in its Gazette and now also on Chinacourt. There was debate within China as to whether a system of precedent was being constructed. The decisions which were published were heavily edited and could not be cited in legal argument but decisions published in the Gazette were treated as guidance for the purpose of shaping the jurisprudence of the lower courts. She could not assist the Tribunal as to the selection method used by the Gazette/Chinacourt or the University databases when deciding what to publish. Dr Sheehan did not agree that putting a case on a public database or in the Gazette would make an example of the person convicted. Members of organised crime syndicates did not read such publications; the Chinese media had an express public education function and if you were seeking to influence the general public, the press and broadcast media were where you would expect to find publication. Publication on University websites or in the Gazette or on Chinacourt would be for the guidance of judges and lawyers.

F. Professor Fu's reports and oral evidence

151. Professor Fu Hua Ling, LLB, MA, JD is an Associate Professor at Hong Kong University. Professor Fu gave his evidence in English over the telephone from the British Embassy in Hong Kong. As an 'insider' in Chinese terms, he had access both to the Chinacourt database and to the better organised and more extensive Peking University database, as well as his own knowledge. His undergraduate degree was awarded by the South-Western University of Political Science and Law in Chongqing. Thereafter, he took his Masters at Toronto University and his Doctorate at Osgoode Hall Law School, also in Toronto. He is currently Associate Professor at Hong Kong University and a Visiting Professor at Washington University Law; his taught courses include constitutional law, criminal law, criminology, cross-border legal relations between Hong Kong and Mainland China, human rights in China, People's Republic of China legal system, and introduction to Chinese law. He is also a practising lawyer in Hong Kong, and an editor of the Hong Kong Law Journal (Chinese Law) since 2003. He has published widely, both books and articles, and undertaken consultancy for the Asian Foundation (on legal aid projects in China in 2005), the Danish Centre for Human Rights (a criminal justice research project in Guangzhou University in 2005), the Foreign and Commonwealth Office (evaluating six of its rule of law projects in the mainland and Hong Kong in 2007), and the Raoul Wallenberg Institute (advising on its police and prosecution cooperation project in the Haidian District of Beijing in 2005 and 2007) .

152. We considered Professor Fu reports sequentially. In 2004, in his written evidence for the appellant in *WC,* Professor Fu cited two instances of re-prosecution involving hijackers who had hijacked Chinese aircraft flying from China to Taiwan. He went on to consider the risk of re-prosecution for this appellant:

> "Illegal immigration is an embarrassment to China, and the Chinese authorities have been using criminal law extensively as an instrument of deterrence. [The appellant] was an illegal immigrant and committed a very serious criminal offence in the UK, the combined effect of these factors make a prosecution more likely upon [this appellant's] return to China. The national authority and/or authorities in Fujian are likely to have been aware of [this appellant's] case given his frequent contact with his family in Fujian. Since the local authorities have already shown interest in [the appellant's] case, the risk of prosecution in China increases drastically. [The appellant] is likely to be detained and prosecuted even without any notification by the Chinese Embassy in the UK."

153. Professor Fu referred to prolonged detentions, overcrowding and unsanitary conditions, noting that according to official reports only 15.1% (369) of the detention centre in China achieved the country's own minimum standards. The *WC* Tribunal did not place a great deal of weight on his evidence as he had not had access to much information about the offences. Professor Fu did not give evidence in *SC.*

154. In his 2007 main report, Professor Fu set out Article 10 of the CL. China asserted sovereignty over Chinese people overseas, even those who had adopted another nationality. Offences committed abroad therefore engaged Chinese law. China had few international agreements requiring it to recognise foreign penal judgements:

> "5. The rationale behind Article 10 of the CL is that China, as a sovereign state, refuses to recognize foreign penal judgments unless such recognition arises in accordance with any international agreement which China has signed. The rule against double jeopardy does not apply in China in principle.

6. Importantly, decisions to prosecute or re-prosecute offences committed overseas under both Article 7 and Article 10 are discretionary. Under Article 7, [CL] normally applies to a crime committed by a Chinese citizen overseas only if the offence is relatively serious (and attracts a maximum sentence of more than three years) unless the offender is a civil servant or a serviceman, in which case all offences may, in theory, be prosecuted.

7. Article 10 is intended to avoid a situation in which a foreign court treats a Chinese offender with undue lenience. The article gives the procuracy the discretion to prosecute or not to prosecute a Chinese citizen who was tried by a foreign court for an offence committed overseas depending on the seriousness of the offence committed and penalties imposed by the foreign courts. The Chinese procuracy may re-prosecute the offender for the same offence to compensate for the undue lenience. The same article also authorizes the court to exempt the offender, when re-prosecuted, from any further punishment in China and give only mitigated penalties depending on the seriousness of the overseas offence and the severity of the overseas penalty."

155. The requirement to prosecute imposed by Articles 141-142 of the Criminal Procedure Law was modified by Article 15 of that statute, which exempts from mandatory investigation:

"15. (6) if other laws provide an exemption from investigation of criminal responsibility."

Professor Fu considered that Articles 7 and 10 of the CL constituted such an exemption, since their operation was discretionary.

156. The mechanism of Article 10 gave rise to a new criminal prosecution which must be proved in all its elements to the relevant standard. Professor Fu considered that the difficulty of collecting evidence from abroad would be a substantial disincentive to the police in most cases in entering into Article 10 prosecutions. The Chinese Court was permitted to take account of the foreign sentence, but not to infer from or apply any evidence which was before the foreign Court. A special procedure for 'foreign-related cases' was set out in interpretation guidance in two documents both entitled "Interpretation of the Supreme People's Court on Several Questions Concerning the Implementation of the Criminal Procedure Law of the People's Republic of China" and issued on 20 December 1996 (Article 291) and 29 June 1998 (Article 313).

157. In practice, it was often indispensable for the Chinese criminal justice organs to seek assistance of the foreign jurisdiction while gathering evidence for re-prosecution (witness statements, expert conclusions, confession statements made by the defendant, exhibits and documentary evidence). Overseas offences prosecution under Article 7 or Article 10 was most likely when the Chinese victims of the offence had also returned to China and could provide direct evidence. Crime was a serious social problem; the police were overloaded and an ordinary criminal offence committed 7 years ago was unlikely to attract serious police attention unless the victims or their representatives could exert strong influence. A police relative or friend was not enough; serious local influence was needed.

158. Professor Fu considered that the rôle of Article 10 was diminishing; China needed international cooperation and increasingly was moving to accept international norms in order to secure it. In the Spanish extradition agreement, China agreed not to seek repatriation of political offenders or to impose the death penalty. In the Bulgarian Treaty on mutual legal assistance, China agreed that extradition could be declined where a person had been convicted or acquitted on the same charge in Bulgaria. The

more bilateral agreements were signed, the less use would be made of Article 10 in his opinion. Professor Fu identified only one example of a factually similar overseas offence prosecution: Xiang, who was prosecuted in China (under Article 7 as he had not been prosecuted in Yugoslavia) for a completed rather than an inchoate offence of kidnapping and extortion. Xiang was sentenced to 14 years laogai (prison). He appeared to have been acting independently not with a gang, and to have kidnapped only one person.

159. Professor Fu was asked to comment on the NPC website guidance from 2002. He said it was an extract of a book, 'Xingfa Wenda (Zongze)' (Questions and Answers about Criminal Law (General Provisions), published and edited in 2001 by the Legislative Affairs Commission of the Standing Committee of the NPC. There were other excerpts from the same book on the NPC website. Publication, he considered, was intended to restate the meaning of Article 10 of the CL, to support popularisation of law (pufa), and for ease of reference. The publication of this chapter neither enhanced nor diminished the effect of Article 10.

160. The CL was in a process of fundamental change. The focus had shifted and continued to shift from the circumstances of the offence to its legal elements. Special circumstances might warrant prosecution but even then, Chinese Courts would undertake a balancing exercise, between harm to China's international image and the facts of the case.

161. Professor Fu's written assessment of the likelihood of re-prosecution for this particular appellant, including factors which would increase or decrease that likelihood, was prepared on the basis that the offences were inchoate. An inchoate offence was an attempt or a conspiracy or an incitement to commit an offence, which fell short of commission of the offence. There was an error of fact underlying this part of Professor Fu's opinion with which he dealt in his oral evidence. Overall, Professor Fu considered the present crime to be a rather ordinary one. There was nothing in it to attract special official attention. China's criminal law had moved away from a focus on the status of the person who committed the offence to a more objective view, 'gradually abandoning the practice of scrutinizing the motivation and personal status of offenders in determining liability and sentence'. Political offences remained an exception, but only for cases with out of the ordinary features. Taking part in rural protests would not have that effect; it was too ordinary and low-level. Professor Fu did not consider it likely that the police still had any knowledge about or interest in a demonstration 14 years earlier, when so many were then taking place.

162. Professor Fu considered the likely sentence should re-prosecution occur. Article 239 of the CL says that:

> "239 Whoever kidnaps another person for the purpose of extorting money or property or kidnaps another person as a hostage shall be sentenced to fixed term imprisonment of not less than 10 years or life imprisonment and also to a fine or confiscation of property; if he causes death to the kidnapped person or kills the kidnapped person he shall be sentenced to death and also to confiscation of property."

The penalty for kidnapping and extortion could therefore range between 10 years and death, depending on the circumstances. The seven years already served might be taken into account. Reduction of sentence was commonly used in China's prison sentence with about 20-35% of inmates receiving reduction of their prison terms and

early release (conditional or unconditional) for good performance after half the term had been served.

163. Re-education through labour (laojiao) was used for minor offences and the rehabilitation of drug addicts. Its legality was controversial; many Chinese academics and policy makers considered it unconstitutional and illegal. It was unlikely to be imposed in a foreign-related case for a serious offence, as here.

164. In order to work legally in the cities, a person should have an identification document issued through the police force in his local area (the hukou). In practice, the hukou was less significant than in the past: Professor Fu noted that almost 10% of China's working population worked away from their home areas without a proper hukou (100 million of a total of 1,330 million). They were not monitored by the authorities; although they lacked the legal right to be in the cities where they lived, they remained, nevertheless, for as long as they wished. Hukou now mainly functioned as a means of delivery of education and medical care for hukou holders rather than as an effective mechanism of social control.

165. Professor Fu's noted that the power of the police to monitor special groups of potential criminals was also much reduced:

> "50. Traditionally, police paid special attention to special groups of population, including people with a serious crime record. Under the Regulation on Targeted People Management issued on 21 March 1989 and amended on 25 May 1998, "residents suspected of serious criminal activities" including "people suspected of having violated citizens' physical and personal rights through activities such as murder, rape, bodily injury, and trafficking of women and children" are put into the blacklist of targeted people of the local police and subjected to police surveillance. *However, as Fei-Ling Wang noted, given the high mobility of people in contemporary China, police control over targeted people has become much more difficult and less effective.* Additionally, according to Wang, factors such as "the changed social environment in China, which has led to the public increasingly despising secret dossiers, informants, intolerance, and persecution by association and suspicion" were considered by the police to be another significant reason undermining the effectiveness of the police in monitoring the targeted population. There is no longer an effective legal mechanism to monitor a person who is in the criminal process. *Virtually, anyone can vanish in Chinese cities without being traced (even by the authorities) if he or she wishes to do so." [Emphasis added]*

166. Professor Fu set out the limitation period for various types of criminal offence in Chinese law:

(a) For offences carrying a maximum prison term of five years, the limitation period was also five years;
(b) for 10 year sentences, it was 10 years;
(c) for fixed term imprisonment in excess of 10 years, the limitation period was 15 years; and
(d) for offences carrying a possible sentence of life imprisonment or death, it was 20 years.

For potential capital or life sentence offences, if prosecution were considered necessary outside the 20-year limitation period, the Supreme People's Procuratorate would be asked to examine and approve any proposed prosecution.

167. Professor Fu agreed with the other experts that re-education through labour or laojiao was extremely unlikely given the serious nature of the offence. Laojiao was used for minor offences, and as a means of social control. Further, this was a case with a foreign element and the Chinese authorities were reluctant to impose laojiao on cases occurring abroad, or on foreigners, because of the international implications. The main report ended with a proper summary of the duties of an expert witness.

168. Professor Fu's January 2008 commentary explained the change in his expert view between 2004 (the report in *WC* for the appellant) and 2007 (the report for the respondent in the present appeal). He had not been able to look at the *WC* report when preparing the main report because he had lost a number of old files in a computer crash. He had been provided with another electronic copy to refresh his memory. His explanation was accompanied by copious footnotes, sourcing the information on which Professor Fu relied to explain his modified opinion: he explored four areas of difference between the two reports:

(a) In the *WC* report (paragraph 12) Professor Fu's opinion had been that there was too little reporting of such prosecutions to enable a view to be formed as to when the Chinese authorities would use Article 10. In the main report (paragraph 21) he discussed evidential difficulties and the reluctance of the Chinese police to pursue matters which required foreign evidence to found the prosecution. The *WC* report had been written against the background of a number of high-profile cases in 2004 in the West, and no information from China. Professor Fu's explanation for the change in his view was a combination of more information (the evolution of Chinese law and available databases) and more time to consider his opinion in the intervening four years.

(b) In the *WC* report (again at paragraph 12) Professor Fu's opinion was that Article 10 re-prosecution was very likely because of the Chinese authorities' focus on illegal immigration. In 2007 (paragraph 23) he regarded it as an ordinary crime and, since the police were overloaded, considered it unlikely they would pursue the appellant. In his explanation for the difference, Professor Fu set out a chain of illegal migration deaths which had made it top of the Chinese authorities' agenda in 2004. In the meantime, interest had died down and the Chinese authorities were now very much more interested in their own corruption problem rather than migration issues which were much more of a problem for the host countries. They were having severe difficulties in getting corrupt officials returned from abroad and the attitude of the Chinese authorities had changed:

> "To show its determination to combat the ever deteriorating situation of official corruption, in recent years the Chinese government has started to strengthen its cooperation with the international community in the hope of having greater chance to get back the fugitive corrupt officials. To secure the cooperation with foreign countries, and the western developed countries in particular, China has no choice but to accept certain international norms, such as, as I mentioned in my Opinion on the present case, the political offences exception and the death penalty exception. China has been insistent on not having an express death penalty exclusion clause in any document it signed with foreign countries. However, its attitude began to change in November 2005 when it signed its first

bilateral extradition treaty that has an express death penalty exception clause with Spain. Thereafter, it also signed two similar agreements with France and Australia respectively in March and September of 2007. The above mentioned agreements apply to all criminal offences and are not limited to corruption.

As a result of the enhanced international cooperation in criminal matters, China has also agreed to comply with the rule against double jeopardy where there are bi-lateral treaties in place. It is therefore increasingly unlikely that China will re-prosecute offences that have occurred overseas in general, and inchoate offences in particular."

(c) In paragraph 14 of the *WC* report, Professor Fu opined that *WC* would be likely to confess under duress or even torture. In the main report in 2007 (paragraph 22) his opinion was more sanguine, observing that the Civil Procedure Law stated clearly that a mere confession was insufficient to convict an appellant –

"There have been important changes in the criminal justice practice since 2003/04. There was a new government and a new Minister of Public Security, which initiated a series of police reforms in response to a number of high-profile police scandals. In 2003, media exposures of police scandals were unprecedented in both quantity and quality. The public outcry was overwhelming and these were rare occasions in China in which public opinions led directly to government action. The reform under the new Minister was the most systemic in China since 1978, targeting particularly torture and unlawful detention. The reform was regarded as largely successful in reducing the incidents of torture during interrogation. While torture has always been a criminal offence in China, it is much less likely for police to use torture during interrogation after 2003/04 than before 2003/04. See Fu Hualing, "Zhou Yongkang and Recent Police Reform in China" (2005) *Australian and New Zealand Journal of Criminology*."

(d) Finally, Professor Fu commented on the change in his view of the risk of laojiao. He set out the levels of public protest and some legislative moves to limit laojiao. He did not consider the present appeal to be a situation where laojiao would be appropriate due to the serious nature of the index event.

169. Professor Fu gave oral evidence. He confirmed that his view now accorded with that set out in the main report and the 2008 report, which expanded and qualified the views he had expressed in 2004 in the *WC* report. He confirmed that he had seen, and had with him, a copy of Dr Dillon's report. He was then tendered for cross-examination by the appellant's Counsel.

170. Professor Fu was unaware of the article, 'China's theory and practice on ne bis in idem' but agreed with its conclusion, and that of Dr Gechlik, that Article 10 was used sometimes, but not often. Chinese law did not recognise national boundaries, either for change of nationality or legal responsibility for criminal acts committed outside China. Professor Fu was asked whether he would have considered the risk to be the same for a person in the present appellant's position, had he been asked in 2004; he drew the (incorrect) distinction that *WC* had committed a completed offence and the present appellant was involved only in an inchoate offence. The punishment was very different for a committed offence. He agreed with the other experts that publication on the National People's Congress website had no particular significance;

the law was the law and the Article 10 guidance only served to inform, not to indicate any increase or decrease of actual re-prosecution.

171. In relation to secrecy, Professor Fu confirmed his opinion that the Chinese courts increasingly publicised criminal cases which were not politically sensitive, meaning that they did not involve national security law. All the courts had websites now, though the country court websites were poorly maintained. The likelihood of online reporting depended on where the trial took place. Professor Fu told the Tribunal that lawyers preferred to use the University databases such as Chinalawinfo, which were better indexed and contained more decisions, rather than the SPC website Chinacourt:

> "Most of the resources we get now are not from the Court website, but from an unofficial database from the university law school websites which are more systematic. They have the centralised resources to do it in the universities. They have the resources to build a really big database of Chinese decisions, 50,000 cases now on the website Chinalawinfo.com maintained by Peking University Law School. Last time I looked it was 50,000, and it is getting bigger all the time. I do not know how frequently they add cases but I know that they collect cases, classify them and put them there. There are less than 1 million criminal cases a year in China, about 700000, there are 7 million cases in Chinese Courts overall per year with criminal cases about 10%. The Chinalawinfo website database is a drop in the ocean? Yes, and I do not know their premise of case selection.
> You have mentioned a number of cases in your main report from the Chinalawinfo website? Yes. Did you check city court websites? Yes, we checked the Supreme People's Court, larger city courts but not the county courts."

Chinalawinfo was the most comprehensive online database, containing government regulations, all the judicial decisions given by the courts, and full copies of all case reports.

172. Professor Fu explained that he had not checked the county court websites, partly because they were poorly updated, but also because the county courts were the most basic level of court and would have little to add. There was a controversy between Professor Fu and the other witnesses as to the number of criminal cases in China each year. His opinion, which we accepted, was that of 7 million cases in the Chinese courts each year, only 700,000 were criminal cases. That figure originates from the government news agency Xinhua. It was surprising; but the evidence was properly sourced by a practitioner in daily contact with the relevant materials and we preferred it to the estimates provided by the appellant's witnesses, whose research was much less careful and thorough.

173. Article 10 was unique. Professor Fu was aware of a total of between 10 and 20 cases in the past 10 years where a similar ability to prosecute Chinese who committed crimes in Hong Kong had been used. The discretion to prosecute an overseas offence under Articles 7 and 10 CL was for the prosecutor to exercise on a case by case basis. Professor Fu explained that although torture had reduced in frequency, it still could not be ruled out. At this point in his evidence, it was apparent that Professor Fu's perception of the appellant as probably being a poor man committing ordinary crimes and the offences as being inchoate was operating on his perception of the likely outcome. The redacted information which the Secretary of State provided to Professor Fu excluded the details of the offence, the brother-sister relationship, and

the overall gravity of the offences. Mr Mackenzie wished to ask more detailed questions about the precise details of this offence.

174. The Tribunal adjourned to discuss with the representatives how much more information it was appropriate to provide to Professor Fu about the gravity of the offence and its particular circumstances, and how that was to be managed, given that he was testifying over an international telephone line. We then reconnected the telephone call and an agreed version of the facts underlying this conviction was put to Professor Fu. He indicated straight away that he needed to consider the situation carefully. He considered that a completed kidnap would require more serious punishment and would be more likely to be investigated. The more serious the crime, in his opinion, the more likely it became that the authorities would indeed take an interest in the appellant. However, he considered that the police would still have difficulty obtaining the information they needed to mount a prosecution. If the Chinese authorities successfully requested the United Kingdom material through diplomatic channels, then in his opinion properly certified copies of the witness statements, the evidence in the case, the record of prosecution and the judgment would be accepted as part of the Chinese police investigation to build a case for a fresh overseas offences prosecution under Article 10 CL. He considered that the police would remain reluctant to engage in such a complex process without very strong motivation, especially given the high conviction rate expected for any prosecution (over 90%).

175. In relation to laojiao, Professor Fu maintained his position; it was retained on the statute book in China to enable the authorities to deal with things like the recurrence of mass movements such as Falun Gong. It was a routine law enforcement tool. In re-examination, Professor Fu said that re-prosecution had no deterrent value, as the reporting of cases was for lawyers, not the public. In answer to a question from the Tribunal, Professor Fu said that the court was under a statutory requirement to consider the sentence imposed abroad and shorten the Chinese sentence accordingly.

176. Professor Fu was asked to explain the reporting system in more detail. He said that that the Supreme People's Court would appoint judges in local Courts as their correspondents, who would report interesting cases to the Supreme Court for publication. The Supreme People's Court would then choose from these the most interesting, edit and publish them as guideline cases so that the Courts throughout China could look at those cases for guidance if they needed it. There were millions and millions of criminal cases in the system; those which were reported were the more interesting, which were considered important and engaged public law issues.

Documents

1. The Foreign and Commonwealth Office 'double jeopardy' letter

177. On 15 July 2005, in response to an enquiry from the Country of Origin Information unit of the Home Office, the Research Analysts of the North Asia and Pacific Research Group of the Foreign and Commonwealth Office (based in London) wrote setting out the position in Chinese law in relation to Articles 10 and 7 of the 1997 Chinese Criminal Code:

> "Following our recent correspondence, I am confirming our understanding that the concept of double jeopardy is addressed in Chinese law.

> Article 10 of the 1997 Criminal Code of the PRC states that "If any person commits a crime outside the territory of the PRC for which according to this Law he would bear criminal responsibility, he may still be dealt with according to this Law, even if he has already been tried in a foreign country. However, if he has already received criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated sentence."
>
> Article 7 states "This law is applicable to any citizen of the PRC who commits a crime outside the territory of the PRC that is specified in this Law. However, if for that crime this Law prescribes a maximum punishment of fixed-term imprisonment of not more than three years, he may not be dealt with."
>
> The circumstances under which an individual would be punished in China for a crime committed in a foreign country, for which he had already been punished in that country, are unstipulated. The Chinese authorities are more likely to take this action if the crime had received a lot of publicity in China, if the victims were well-connected in China, if there were a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of [sic]. Our Embassy in Beijing is unaware of such instances. The specific inclusion in the Criminal Law of 'exemptions' from second punishment in China for crimes committed abroad suggests that the authorities would not take further action against ordinary criminal offences.
>
> I can also confirm that we have no means of monitoring Chinese citizens once they have returned to China."

178. The 'double jeopardy' letter was broadly in line with the evidence of Professor Fu. It was partially cited at paragraph 10.14 of the 3 December 2007 Country of Origin Information Report on China prepared by the respondent.

2. The arrest warrant and the Foreign and Commonwealth Office response

179. There was doubt about the weight to be attached to the claimed arrest warrant. We reminded ourselves of the guidance given in *Tanveer Ahmed* [2002] UKIAT 00439*:*

> "39. In summary the principles set out in this determination are:
>
> 1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
>
> 2. The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
>
> 3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2."

180. The Tribunal must assess the reliability of this arrest warrant on the oral and physical evidence before it, which may be summarised thus: the photocopy of the arrest warrant in the hearing bundle was improved at our hearing by the production of what the appellant said was the original. The document produced was a red and white piece of paper which the experts agreed resembled a Chinese arrest warrant.

On the appellant's own account, it was never served, being allegedly retrieved by the appellant's police station relative from a wastepaper bin and is completely clean, unmarked and uncrumpled despite the passage of approximately fourteen years since its creation. The 'arrest warrant' text was not very detailed, consisting only of the appellant's name and an assertion that he is not sympathetic to the aims of the Communist Party. Obviously, if the appellant and his sister had a relative in the police station, that relative could easily have filled in an arrest warrant form to send to the United Kingdom (hence his letter asking whether it had been useful).

181. Paragraph 36.05 of the December 2007 Country of Origin Information Report on China sets out the conclusion of the Canadian IRB of 8 September 2005 that forged documents of all kinds were easily available. Paragraph 11.08 dealt with service of arrest warrants on family members (apparently a common practice) again relying on a response from the Canadian IRB, on 1 June 2004.

182. On 12 November 2007, in answer to a request from the Treasury Solicitor regarding authenticating Chinese arrest warrants, the Foreign and Commonwealth Office wrote to the AIT stating that Chinese arrest warrants are produced in a standard format (name, date of birth, offence and so forth) (the 'arrest warrant' letter). They all look very similar, on paper with a printed three-character red header and a stamp from the prosecutor's office which issued the warrant:

> "However, a warrant which meets these criteria isn't necessarily authentic. There is no technical verification system, such as a watermark or bar code, making them relatively easy to forge. It would therefore be very difficult for an independent academic expert to give an opinion on the authenticity of a warrant, beyond commenting that the format appeared to be standard.
>
> A more reliable way of checking would be through the prosecutor's office which issued the warrant. That office would be able to verify it by checking the warrant number against their records. However, this would require a Formal Mutual Legal Assistance request."

183. Unfortunately, that verification method is of no practical assistance to the Tribunal. If such checks were made, the Fujian police would then be on notice that a person with this appellant's claimed old history of rural revolt intended to return to the area. Ms Broadfoot recognised that it would be irresponsible of the Secretary of State and contrary to Home Office policy to increase the risk to the appellant in that way. Having seen the warrant and heard conflicting accounts from the appellant and the sister regarding events surrounding, we do not consider that we have received a credible account of an arrest warrant being issued, let alone served. We place no weight on the alleged arrest warrant as probative or otherwise of the original offence.

3. Home Office Country of Origin Information Report on China 2007

184. The material in the Country of Origin Information Report dates back to 2004 and has been consistently so recorded in all recent People's Republic of China Country of Origin Information Reports. The relevant passages in the current report begin at paragraph 29.08 and 29.13. Paragraph 29.08 confirms that Fujian is the main source of overseas migration from China, powered by economic growth (and presumably compulsory purchase, as here alleged) in Fujian. There was also a robust tradition of

outward migration from Fujian, and to a lesser extent from Guangdong, Zhejiang, and recently from north-eastern provinces:

"CHINESE MIGRANTS

29.08 As reported by Ronald Skeldon of the University of Sussex, writing on Chinese migration in April 2004:

> "... any simple correlation between the total population of China and the number of Chinese overseas is deceptive, because the majority of the latter trace their roots to a very few regions within China. The three southern coastal provinces of Guangdong, Fujian, and Zhejiang have dominated the emigration, and within those provinces, a limited number of districts and even villages. These areas were marginal to the Chinese state and weak in terms of their resource base. However, most importantly, these areas were the earliest and most intensively affected by the seaborne expansion of European colonial powers, which linked them to a wider global system. Furthermore, in contrasting numbers of Chinese overseas with the base population of China, Chinese ethnicity must not be confused with Chinese migration, because many of the Chinese overseas were born outside China in the lands chosen by their parents and grandparents."
> ...

29.12 As reported by in the *Guardian* newspaper on 7 February 2004, "People from Fujian have a long history of seeking their fortune overseas. In extreme cases some villages have 80% of families with someone living overseas."

SNAKEHEADS (PEOPLE SMUGGLERS)

29.13 As reported by Channel News Asia on the 13 February 2004:

> "The network of snakeheads, or human smugglers, operating in China's Fujian province is 'huge', meeting demand from locals attracted by the potential of earning 10 times an average Chinese wage in Europe, according to a report. 'Many snakeheads belong to one family, and others are friends,' a man who worked as a snakehead for 10 years told the *China Daily*. 'They cooperate with each other, take charge of different areas of human smuggling, and get rich by sharing money from the stowaways.' The issue has been thrown into the spotlight by the drowning of 19 presumed Chinese picking cockles a week ago in Britain's Morecambe Bay. Fifteen of them are believed to be from Fuqing city in Fujian, natives of which have a long history of illegally entering other countries." ...

29.15 According to Dr Frank N. Pieke in his paper entitled *Chinese Globalization and Migration to Europe*, published on 9 March 2004:

> "American research (Chin 1999; Zhang and Chin 2000) on Chinese human smugglers has revealed that snakeheads are not triad-like criminal organizations that can be countered by conventional law-enforcement methods aimed at eliminating the organization's leadership. Rather, snakeheads are independent and highly specialized entrepreneurs enmeshed in loose networks, only cooperating on specific consignments. Consequently, countering snakeheads should focus on spoiling their market, both by raising the risks and costs of their operations and by taking away the demand for their services. The key issue then becomes how many Fujianese a country should admit under a program of migration

to make a sufficient number of snakeheads abandon their trade for something less risky and more profitable."

29.16 As reported by the US State Department (USSD) Report 2006, published on 6 March 2007, "When arrested and brought to court, human smugglers received five to ten-year jail sentences and fines up to $6,000 (RMB 48,000). In very serious cases, courts imposed life imprisonment or the death penalty". As reported by CEME (Cooperative Efforts to Manage Emigration), which brought together the findings of week-long visit to Fujian undertaken in June 2004, "Persons convicted of organizing smuggling or trafficking can be fined or, if convicted, sentenced to 2, 5, 10 years or life imprisonment." "

185. That was the Secretary of State's published position on snakeheads and smuggling; that Fujian was the leading source of smugglers and migrants, and that snakehead gangs were a form of private enterprise without links to the triads, operating in a rather loose structure for personal gain.

Respondent's submissions on the appellant's case and the background evidence

186. For the Secretary of State, Ms Broadfoot prepared a skeleton argument and also written closing submissions. The closing submissions were prepared overnight after the oral evidence had closed, superseding and incorporating the skeleton argument. After summarising the bundles and evidence before us, the history of the appeal, and the issues, Ms Broadfoot turned first to the s.72 certificate. S.72 was the statutory implementation of the Refugee Convention exclusion from non-refoulement (Article 33(2)), setting up a rebuttable presumption that the appellant is excluded from refugee protection. On these facts, the appellant had committed a "serious offence" and the only evidence to show that he was not dangerous was the 2005 Parole Report. The Parole Report was not sufficient to rebut the presumption of dangerousness, she argued: Ms Ludgam, who prepared it, did not have access to all the relevant material and was unaware of the seriousness of the offences, the identification of the appellant as a ringleader by the sentencing judge, or that he had been given a sentence at the highest end of the scale. Further, the report was now three years out of date. In her submission, the Ludgam Parole Report did not begin to rebut the presumption and should be disregarded. The s.72 certificate should be upheld: the appellant was not entitled to the protection of the Refugee Convention and his asylum appeal should be dismissed. The s.72 certificate was also fatal to any humanitarian protection claim.

187. The next issue was credibility. The respondent accepted that credibility remained in issue. Ms Broadfoot proceeded on the basis that there was an error of law by the previous Tribunal on credibility (*DK (Serbia) and others* [2006] EWCA Civ 1747). The respondent reminded the Tribunal of the credibility approach set out in *Karanakaran v SSHD* [2000] EWCA Civ 11, [2000] Imm AR 271, [2000] INLR 122, [2000] 3 All ER 449. The Tribunal:

"…must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present). Similarly, if an applicant contends that relevant matters did not happen, the decision-maker should not exclude the possibility that they did not happen (although believing that they probably did) unless it has no real doubt that they did in fact happen."

188. The extension of the *Karanakaran* test to Article 3 ECHR had been approved in *MT (Algeria) & Ors v Secretary of State for the Home Department* [2007] EWCA Civ 808:

> "We would accept that the correct approach to the application of the *Chahal* test is that described in *Karanakaran*. The decision-maker should take a holistic approach; it should take account of all the relevant evidence and risk factors, giving to each matter such weight as it warrants, bearing in mind its importance in the context of the case and the extent to which it has been satisfactorily proved. It will be proper to exclude from consideration those matters which it can safely discard because it has no real doubt that they did not occur. The decision-maker should also take account of the absence of satisfactory information relating to matters of importance. If no evidence or information can be discovered on a matter of importance, its absence will be relevant to the assessment of future risk."

189. The respondent's letter of refusal, to that standard, accepted that the altercation in April/May 1994 between the appellant's friend and the son of a local bigwig might have occurred and that recourse to the local police had been fruitless; that on 2 October 1994 his home had been attacked by persons connected with his sister's former employer because she had complained of her dismissal; that his shoulder injury was consistent with defending his home on that occasion (and with a number of other potential causes); and that on 10 October 1994 a local protest took place.

190. Having heard the oral evidence, the respondent now submitted that the protest account should be treated as wholly unreliable in view of the conflict between the evidence of the appellant and his sister, and the vagueness of his evidence about it. On any view, the appellant was not the organiser of that protest and the significance ascribed to it had varied with the passage of time from a 'fracas' in his original statement, to a violent demonstration in his second statement, and finally, in his oral evidence, to a brief demonstration which did not last long and dispersed when the officials drove off the crowd, with no violence and only one stone thrower (indeed, possibly only one stone thrown, not by the appellant). The appellant's participation on the latest account seemed minimal.

191. Ms Broadfoot argued that the sister's account of her dismissal should not be believed. It was simply nonsensical. Save for the destruction of his home as part of a land scheme, none of the claimed events in Fujian should be believed. If that were accepted, then the appellant and his sister were of no interest to the Fujian police, either in 1994 or now, 14 years later. The arrest warrant could not be genuine even if the paper was right (particularly since the police cousin had apparently discovered it in a rubbish bin at the police station). The appellant and his sister were simply economic migrants when they came to the United Kingdom, perhaps prompted by the 1994 land seizures in Fujian province.

192. The appeal would therefore have to stand or fall, Ms Broadfoot submitted, on the double jeopardy issue and/or the Refugee Convention or Article 3 risk on return in relation to the 1994 events. Dealing first with the double jeopardy risk of an overseas offences prosecution under Article 10 CL, Ms Broadfoot argued that the Tribunal should prefer the overwhelming evidence of all but one of the experts that Article 10 CL was discretionary, discounting the contrary view of Dr Gechlik, whose evidence could not be tested in cross-examination and whose report had omitted reference to the crucial provision of Article 141 (the mandatory prosecution provision) identified

at paragraph 8 of Professor Fu's report. Ms Broadfoot also observed that Dr Gechlik, who had notice of Professor Fu's later report, had not contradicted his observations as to the effect of the Article 141 exemption.

193. Ms Broadfoot submitted that the primary issue for the Tribunal was whether there existed a real risk of re-prosecution of the appellant in China for crimes arising out of the same set of facts for which he had been convicted and sentenced in the United Kingdom, and if so, whether there was a real risk of Article 3 ECHR being breached in the course of such prosecution, including any investigation by the Chinese police.

194. The Secretary of State accepted that the Tribunal should take as its starting point the fact that overseas offences prosecutions, either prosecution (Article 7) or re-prosecution and double punishment (Article 10) were legally possible in Chinese law. However the Tribunal should then go on to consider the likelihood, if at all, of either occurring. The assessment of that likelihood was dependent upon the evidence before it (*MT (Algeria) & Ors v Secretary of State for the Home Department* [2007] EWCA Civ 808).

195. The Court of Appeal's decision in *Adam v SSHD* [2003] EWCA Civ 265 was of only limited assistance. The penalty for military service was an ordinary criminal penalty, the existence of which had been set out in the Secretary of State's Country of Origin Report. The Secretary of State in *Adam*, having stated in her country report that such a penalty would be applied, therefore bore the burden of showing that in the particular factual circumstances of the *Adam* case, there was nevertheless no real risk of it being applied on return. Here, in contrast, there was discretion in the relevant statutory provision and it was for the appellant to show that it would in fact be applied to him. If the matter were to be appealed further, the Secretary of State reserved her position on whether the *Adam* decision, with its apparent shift in the burden of proof to the respondent, was good law.

196. Ms Broadfoot reminded the Tribunal of the evidence of Professor Fu, inviting us to prefer that to the evidence of the other experts, in particular with reference to the secrecy question. She noted that the other experts had both denied that there had been any significant announcements or changes in 1994, whereas both Professor Fu and Professor Cohen identified important changes and announcements on the reduction in the use of torture at that time.

197. There was much more information available now regarding the operation of the Chinese legal system. Professor Fu had been an impressive witness, knowledgeable and open in his evidence, giving spontaneous answers and when more of the detail of the crime was put to him he had considered it openly, agreeing that certain of those factors would probably increase the risk of an overseas offences prosecution under Article 10 CL. Further, Professor Fu had better resource access than the other experts: he accessed the database of Peking Law School which contains double the number of cases on the Supreme People's Court's website (which was generally accessible) as well as the main city court databases. Dr Sheehan accepted that he was more like an 'insider' than an 'outsider' (where this was defined by reference to access to information). Professor Fu's evidence had increased in depth over time; that was to his credit and his evidence should be given greater weight than that of Dr Dillon, Dr Sheehan, Professor Palmer or Dr Gechlik both because it was better sourced, and

because he was prepared to reconsider his opinion over time and in the light of changes in circumstances..

198. The Secretary of State did not accept that the appellant, if re-prosecuted, would be found guilty, convicted, and sentenced to an additional period in prison. Even if he were found guilty and imprisoned, prison conditions in China, although harsh, did not reach the Article 3 ECHR standard. (*Batayav v Secretary of State for the Home Department* [2005] EWCA Civ 366, *TC (One Child policy – Prison Conditions) China* [2004] 00138). Professor Nowak had considered the conditions in the prisons he inspected to be generally satisfactory in terms of food, medicine and hygiene. Any sentence would be proportionate and would have regard to the sentence already served; Professor Fu's evidence on that was clear. There was no real risk of laojiao being imposed.

199. In relation to the 1994 events, they also did not give rise to a real risk. Millions and millions of people had been involved in the rural protests. For example, in 2004, ten years after the appellant's alleged activities, there were 74000 protests involving 3.5 million people. If, despite her submissions, the Tribunal considered there was a real risk on this basis in the appellant's home area, he could relocate internally; 100 million Chinese were living in the cities without hukou. The appellant was young and adaptable and could do the same if he had to; that was neither *Robinson* unreasonable nor unduly harsh.

200. In her oral submissions, Ms Broadfoot dealt first with the question of s.72. She accepted that the date of hearing was the appropriate date for assessment of risk and that the appellant had put forward materials in rebuttal which the Tribunal would need to evaluate. However, weight would also need to be given to the very serious nature of the crime. Save for the discount for his national origin, the trial judge had clearly considered that the appellant should be sentenced at the highest level available for that offence. There was no material after July 2005 to assist the Tribunal and Ms Ludgam's report had clearly been prepared without a full understanding of the nature of the offences. The appellant had not shown remorse or understanding of the seriousness of his offence.

201. In this case, argued Ms Broadfoot, the appellant had not come close to rebutting the presumption. Although describing the likelihood of reoffending as low in 2005 (without full knowledge of the facts underlying the offences), Ms Ludgam had indicated that if the appellant re-offended it would be to commit another gang-related offence, a serious danger to the community and in that case the dangerousness test was met. If the Tribunal were unsure, or a more recent report would have been helpful, that counted against the appellant because the burden of rebutting the presumption was on him. Ms Broadfoot relied on the decision on Article 33(2), cessation and Article 1C (5) in *SB* (cessation and exclusion) Haiti [2005] UKIAT 00036, at paragraphs 44 and 52-95. Mr Justice Ouseley (then the President of the Immigration Appeal Tribunal) held that no question of balance arose in determining whether Article 33.2 applied or in relation to s.72; dangerousness was not a question of balance. The decisive provision was in s.34 of the 2001 Act.

202. The Secretary of State continued to challenge credibility as to the 1994 events, though not as to the events in the United Kingdom. For the reasons set out in the closing submissions, Ms Broadfoot argued that the Tribunal should conclude that at

its highest, the protest was small, brief, insignificant and appellant's participation minimal. The account of the sister's baby was frankly incredible and inconsistent. The sister, a single woman and a birth control inspector, would have been well aware of the risks. A single woman taking home a child would invite scandal and social isolation. Having grown fond of the child it was most unlikely that she would have taken no interest in what happened to it after they left China. There would be no outstanding interest in these two people in Fujian province for reasons connected with the 1994 events. The appellant would not be at risk on return to China because of the lack of credibility of his 1994 account; if the events did not occur, there would be no record of them in his home area or on his hukou and no reason at all for increased risk on return.

203. The arrest warrant was no such thing, even on the appellant's account: it had never got beyond the police station wastepaper bin. Such documents were easily forged and the Secretary of State could not seek to authenticate it without increasing the risk to the appellant to an unacceptable level. In the second Foreign and Commonwealth Office letter dated 12 November 2007 the Secretary of State had investigated the possibility of authenticating the arrest warrant, stating that the most reliable way to do so would be through the Prosecutor's Office which issued the warrant and this would require a formal mutual assistance request and arguably put the appellant at risk. Ms Broadfoot accepted that this was not an option; it would be contrary to the Secretary of State's policy to increase the risk to the appellant in that way.

204. The next question was the risk of double jeopardy. Article 7 CL should be distinguished; overseas offences prosecutions under Article 7 CL related to a crime where there had been no foreign prosecution and thus no question of double jeopardy. The double jeopardy risk arose out of Article 10 CL. All the experts, and all the current evidence before the Tribunal indicated that China not only had, but occasionally used, this power to re-prosecute. All save Dr Gechlik agreed that the power was discretionary (and Dr Gechlik had not responded to Professor Fu's observation that she had overlooked the crucial provision of Article 141 CL). The Tribunal should accept and prefer the expert evidence of Professor Fu that both provisions were discretionary.

205. Ms Broadfoot referred to her written submissions in relation to *BB* and to *MT Algeria*. It was the Secretary of State's submission that the lack of reported examples of overseas offences prosecution was highly significant. Professor Fu found only six, three for Article 7 and three for Article 10, despite a wide internet search of relevant websites. The Secretary of State had identified 14 defendants in two similar crimes, all of whom were recommended for deportation and six of whom had been deported in 2003/4 at the height of the international snakehead kidnapping furore. There had been sufficient time for re-prosecutions to have occurred and been reported but all these experts, who had been searching for years, had found no such evidence and nor had the defendants' legal advisers been informed of any.

206. The *Adam* decision should be distinguished: in *Adam,* it was the evidential burden not the legal burden which passed to the Home Office. Desertion from the army was an offence certain whereas here the Tribunal was dealing with a discretionary offence, the fundamental distinction being that it was for the appellant to show a real risk that the Chinese authorities will re-prosecute under Article 10 CL.

The existence of that discretionary power did not shift the burden of proof to the respondent as in *Adam,* where the Country of Origin Information Report had taken a stance from which the Secretary of State's representative sought to depart on the particular facts of that appeal.

207. Ms Broadfoot contended that Professor Fu had resolved the conflict between his report in *WC* and in the present appeal. Much of his evidence was not challenged, for example the requirement under Article 10 for a fresh prosecution; the special procedure for foreign-related cases under Articles 10 and 7 ; and that the Chinese authorities would need the assistance of the British authorities to prosecute, making Article 10 re-prosecution less likely. If such re-prosecution occurred, diplomatic channels would be used to request the evidence, making it likely that the Foreign and Commonwealth Office would have been aware of any other re-prosecutions arising out of these events. No such request had reached them and it was reasonable to assume that Article 10 had not been triggered for any of the six offenders who went home voluntarily.

208. Ms Broadfoot asked the Tribunal to accept that the present offences, although unpleasant, were ordinary offences less likely to entail overseas offences prosecution, especially since, on the credibility findings she sought, there was no adverse history in Fujian. Snakehead crime was not necessarily politically significant, although Professor Fu had accepted that a central figure in the kidnap was at greater risk of re-prosecution. A completed kidnap was more serious than an inchoate or incomplete offence, but on any view, overseas offences prosecutions were vanishingly rare.

209. As regarded secrecy, Ms Broadfoot submitted that the Tribunal should give significant weight to Professor Fu's levels of knowledge and access, which were much better (and better used) than those of the other witnesses. His account of the structure of the Chinese legal system and of the number of reported cases should be preferred. There was a range of sentence possibilities from total exemption to 10 years for inchoate offences, and a 10-year minimum for a committed offence. The only analogous example was an Article 7 prosecution of a similar range of offences, in which the Chinese Courts had imposed the same sentence of 14 years, despite the lack of any confession. On that basis the Chinese legal system was unlikely to regard the 14 years to which the present appellant had been sentenced as unduly lenient, reducing further the likelihood that they would bother with all of the complications required for re-prosecution. Laojiao was most unlikely, as all the witnesses had agreed in the end. It was essentially a tool for public order and social control, not for this kind of offence.

210. There was a black market in hukou-free labour in all the large cities of China. Millions of workers managed to arrange their lives without a hukou, which was largely a device for delivering education and social services now. The appellant, should there be any risk in his home area (which the Secretary of State did not accept) was at liberty to relocate to a large city and begin again there.

211. In addition to her closing statement, Ms Broadfoot reminded the Tribunal of the statements of Professor Cohen to the Congressional-Executive Commission on China in 2005 and 2006, emphasising progress (albeit with a long way to go). Dr Dillon had accepted that an unpublished decision did not make an example of someone, but he had argued that 'making an example' was more likely to be in the local papers

rather than legal websites, which were for lawyers and judges. It depended whom one wanted to warn off. His view overall was very negative and in particular, he had been defensive and in places inconsistent in his approach to loss of face and the bilateral treaties.

212. Dr Sheehan's evidence was of only limited assistance. Her brief Curriculum Vitae did not really meet the expert standard and as a whole, her report was based on rather old information (2000-2001). Her evidence about the border police and the computerised record systems was of interest. Ms Broadfoot asked the Tribunal to substitute a decision dismissing the appeal outright.

Appellant's submissions on the appellant's case and the background evidence (Mr Mackenzie)

213. For the appellant, Mr Mackenzie prepared an amended skeleton argument and also made submissions. In his skeleton argument, he set out the appellant's reconsideration arguments and summarised the Tribunal's task as follows:

> 2. Although the SSHD has disputed some aspects of the Appellant's account, much of what has happened to him, both before and after his arrival in the UK, is not in dispute. The principal focus of the hearing is therefore on the risk of the following if [this appellant] is returned to China:
>
> > i. Breach of the Refugee Convention and/or Articles 2, 3, 5, 6 and/or 8 ECHR on account of his involvement in rural protests before leaving China;
> >
> > ii. Breach of Articles 3, 5 and/or 6 ECHR as a result of the risk of double punishment in China for the offence of which he was convicted in the UK.
>
> 3. Points previously pursued before the Tribunal relating to his illegal departure from China and his relationship with his sister were not subject to an application for reconsideration and the Appellant recognises that they cannot be pursued now.

214. Mr Mackenzie reminded the Tribunal that the Chinese authorities do not recognise naturalisation to other nationalities: they continued to regard Chinese citizens overseas as being subject to Chinese punishment standards, even where, like Harry Wu, they have acquired another nationality. The appellant relied on a Canadian decision, *R v Min Chen* 2006 CarswellOnt 4073, the Ontario Superior Court of Justice considered the position of a Chinese national who had been convicted of murder in Canada. Mr Mackenzie acknowledged the paucity of evidence of re-prosecutions under Article 10, as opposed to prosecutions under Article 7. He argued, following *Adam v SSHD* [2003] EWCA (Civ) 265 and *Modinos v Republic of Cyprus* ECtHR 22/04/1993 16 EHRR 485, (i) that the burden was on the Secretary of State to show that there were no double jeopardy prosecutions under Article 10 CL; and (ii) that the total secrecy of Chinese jurisprudence meant that the Secretary of State could never do so.

215. In the event of an overseas offences re-prosecution, Mr Mackenzie contended that the evidence showed that the cumulative effect of the continuing use of torture to obtain speedy confessions, inadequate access to lawyers, lack of a presumption of innocence or a right to silence, and lack of 'independent, fair and accessible courts and prosecutors' which emerged from the expert evidence entitled the appellant to international protection. Should the appellant maintain his denial that he committed

the offence, Mr Mackenzie argued that torture was virtually certain, and more so outside the largest cities. He relied upon Article 6 ECHR in relation to the trial process and the Secretary of State's OGN at 3.13 on the question of prison conditions.

216. Mr Mackenzie submitted that if not re-prosecuted, the appellant would be liable to the administrative penalty of laojiao (re-education through labour) for which he could receive up to 3 years detention without trial. Finally, Mr Mackenzie's skeleton argument dealt with the question of internal relocation and hukou. He directed the Tribunal to the US State Department Report for 2006 (published March 2007) which stated that –

> "The system of national household registration (hukou) underwent further change during the year, as the country accumulated a more mobile labor force. Rural residents continued to migrate to the cities, where the per capita disposable income was more than quadruple the rural per capita cash income. Nonetheless, many could not officially change their residence or workplace within the country. Government and work unit permission were often required before moving to a new city. Most cities had annual quotas for the number of new temporary residence permits that would be issued, and all workers, including university graduates, had to compete for a limited number of such permits. It was particularly difficult for peasants from rural areas to obtain household registration in economically more developed urban areas.
>
> The household registration system added to the difficulties rural residents faced in changing to urban residency, even when they have already relocated to urban areas and found employment. There remained a floating population of between 100 and 150 million economic migrants who lacked official residence status in cities. Without official residence status, it was difficult or impossible to gain full access to social services, including education. Furthermore, law and society generally limited migrant workers to types of work considered least desirable by local residents, and such workers had little recourse when subjected to abuse by employers and officials. Some major cities maintained programs to provide migrant workers and their children access to public education and other social services free of charge, but migrants in some locations reported that it is difficult to qualify for these benefits in practice. Many cities and provinces continued experiments aimed at abolishing the distinction between urban and rural residents in household registration documents."

217. Mr Mackenzie argued that Professor Fu's report was partial, placing insufficient weight on the evidence of Professor Cohen and the documents set out above. Properly analysed, he contended that the risk of persecution or ill-treatment would extend wherever the Appellant went in China. The appellant would find it very difficult to relocate because of hukou, and if he did, he would be known across the country as a dissident and/or a convicted criminal.

218. In his oral submissions, Mr Mackenzie expanded his arguments to take account of the evidence the Tribunal had heard. In relation to the s.72 point, Mr Mackenzie accepted the Secretary of State's analysis that the crime was 'particularly serious' but argued that as at the date of hearing the Article 33(2) dangerousness test could be rebutted. Serious offence alone was not probative and this part of the test was essential. As at the date of hearing, the appellant had been out of prison for three years and had committed no further offences despite the unfortunate lack of

probation supervision. The Secretary of State had not suggested that the appellant was lying when he said he had remained out of trouble since being released.

219. The appellant remained on licence. His conduct in prison had been excellent. He had not been considered suitable for courses in ATS (Advanced Thinking Skills) or Victim Awareness due to his perceived low risk of reconviction. He had completed the set courses on Citizenship and Budgeting, Personal Development and Assertiveness, and Decision Making. The high dangerousness threshold which *SB* Haiti entailed was simply not made out, and there was no evidence before the Tribunal that the appellant constituted any ongoing risk to the public.

220. On the double jeopardy question, all the experts now accepted that Articles 7 and 10 were used, though not often. The Tribunal's previous position that Article 10 prosecutions never occurred was now unsustainable. The question was whether they would be used for this type of case. Mr Mackenzie asked the Tribunal to prefer the evidence of the appellant's witnesses, in particular Dr Gechlik, a Chinese national who had practised law in China. It was unclear whether Professor Fu had ever had a Chinese, as opposed to a Hong Kong, practice. Even though the Chinese Government was making progress in the right direction, that must be considered against its previous catastrophic human rights position. *WC* and *SC* were no longer good law on the present evidence. The 2002 article by three senior judges was clear confirmation of the existence of re-prosecution in some cases, though less clear when it would be appropriate. The appellant's experts all agreed with the position Professor Fu had taken in *WC,* but not with his revised view in 2007/8. He asked the Tribunal to prefer the evidence of Dr Sheehan and Dr Dillon that the Chinese state remained interested in snakehead activities abroad as well as in political corruption at home.

221. The reference in Professor Fu's report to re-prosecution being 'highly unlikely' was unsustainable given the mistaken impression under which he had been labouring. In his oral evidence, Professor Fu had accepted that where an appellant was a central figure in a snakehead kidnap plot that would be more serious both in terms of punishment and in terms of investigation. Mr Mackenzie reminded the Tribunal that Professor Fu had not been aware that there was a link between *WC* and this appellant. Professor Fu's opinion had been that 14 years would have been particularly severe for an inchoate kidnap offence, but his opinion was shot through with references to inchoate offences whereas this appellant had been a ringleader in a completed offence. The error was natural given the redacted facts with which Professor Fu had been presented.

222. The Article 7 prosecution of Xiang, the only example given by the experts which was similar to this appellant's case, was nevertheless distinguishable. Xiang was not prosecuted in Yugoslavia and had only one victim. There was no indication that he had been involved in organised crime. He received a sentence of 14 years for a completed offence. The NPC website guidance was at least an indication of current Government policy. All the experts agreed that the publication of this guidance was neutral, just an announcement of Government policy. Mr Mackenzie relied on the December 2007 Country of Origin Information Report cited above. It was difficult to verify Chinese Government data. In particular, he relied on the March 2007 US State Department Report which listed penalties for people smuggling (five to ten year jail sentences and fines, with life imprisonment or death in 'very serious cases').

There was insufficient evidence to justify Professor Fu's change of opinion, he argued.

223. Mr Mackenzie reminded the Tribunal that the appellant had not admitted his guilt, although he admitted to having been present when the events took place and aware of what was going on; he had appealed his conviction (unsuccessfully as to conviction and sentence). It was reasonable to assume that he would continue to deny guilt, so that any investigation would have to involve interrogation. Despite the best intentions of the Chinese Government, torture had not been eradicated and remained widespread. The Fu report did not deal properly with the findings of the Special Rapporteur, Dr Nowak, or with the Amnesty International evidence cited in the Country of Origin Information Report. In 2004, in the *WC* report, Professor Fu had been firmly of the view that *WC* would be tortured but in the main report in these proceedings Professor Fu now considered the risk of torture well below the level of risk which engaged the various international protection conventions. The evidence of the other witnesses should be preferred on this issue.

224. It was not the appellant's case that he would definitely be re-prosecuted: Article 10 was discretionary. On a proper reading of Dr Gechlik's report, Mr Mackenzie argued that she was saying no more than that. The Canadian Courts appeared to have accepted the risk of re-prosecution in the child murder case. In SC, the Tribunal characterised the evidence of Dr Dillon as essentially speculative, but that was not the proper approach to expert evidence; experts were entitled to give opinions based on their own experience and understanding on matters outside common human experience. He reminded the Tribunal about the observations on analysis of evidence in *Karanakaran* and *Kaja* (paragraph 27).

225. Schiemann LJ in *Adam* had found that the existence of an extant law was likely to create a real risk of its use in an individual case, with all that entailed, unless there existed clear evidence to the contrary. Mr Mackenzie accepted that Professor Fu's main report arguably did discharge the evidential burden of proof on the respondent but, he contended, this case turned on the workings of the Chinese judicial system and whichever way the evidential burden pointed, on the facts the answer would have to be the same. Plainly, the burden was not on the appellant in relation to the country guidance elements of establishing the categories of persons who would be at risk; that was a shared burden.

226. Mr Mackenzie commended the Secretary of State's decision to provide an expert of her own, following the advice given by the Court of Appeal in *AH (Sudan) & Ors v Secretary of State for the Home Department* [2007] EWCA Civ 297:

> "55. …But it is the Secretary of State who is likely to have the most comprehensive knowledge of conditions in foreign countries, not least through diplomatic and consular channels, and if decisions with the enhanced status of Country Guidance cases are to be made about those countries it might seem appropriate for the Secretary of State directly to contribute that knowledge."

227. Mr Mackenzie reminded the Tribunal that the Foreign and Commonwealth Office letters could not be treated as evidence written in tablets of stone (*LP* (LTTE area, Tamils, Colombo, risk?) Sri Lanka CG [2007] UKAIT 00076 at paragraph 45), particularly as it was unsourced. They required the same scrutiny as any other expert evidence:

> "45. As to evidence, such as the letters from the British High Commission, it is true to say that High Commissions and Embassies come within the auspices of the Foreign and Commonwealth Office. That, like the respondent, is an arm of the executive. In this case the evidence in the letters has been obtained at the specific request of the respondent. Little is known about the information-gathering process, where the raw data came from, or the extent to which it has been filtered. It is also unclear whether more than one source was consulted and, whether competing views were sought. That all goes to how much weight can properly be put on the evidence. Immigration judges should be slow to find bad faith on either side, even though they must approach the evidence with an open and enquiring mind as to the appropriate weight to be put upon it. We comment further on the BHC material later in this decision."

228. The high point of the Secretary of State's case was that some of the other co-defendants had been returned without apparent difficulty, but Mr Mackenzie reminded the Tribunal that the Foreign and Commonwealth Office had confirmed that they had no way of monitoring returnees and unless the Chinese police sought assistance, there was in practice no way of knowing whether any of those defendants had been re-prosecuted. The relative scarcity of reported examples would be significant only if it could be shown that Western observers would know of re-prosecutions which took place, but because of lack of transparency in the system, Mr Mackenzie suggested that the evidence was that they would not have that information. Professor Fu had agreed that there remained little reporting of re-prosecutions, despite his better access to Chinese sources. He had also agreed that the appellant, on the particular facts, would be at increased risk. The examples Professor Fu had given related to Hong Kong Chinese being prosecuted on the mainland, or mainland Chinese offenders prosecuted in Hong Kong and were not Article 10 cases. He had not been able to assist the Tribunal as to what would happen if a case did come to light.

229. Mr Mackenzie reminded the Tribunal also of the difficulty in compiling local press reports without being accused of violating Chinese state secrecy laws. Information which was freely available in China might not be available outside China; to take local newspapers abroad was sometimes a criminal offence. Amnesty International gave an example in its December 2004 article "China: human rights defenders at risk" where two documents faxed overseas, one by Xinhua, China's official news agency which were publicly available in China were later classified as Chinese state secrets and the offender prosecuted. That example was also reported in Professor Cohen's evidence to the Congressional-Executive Committee. There was no bilateral Treaty with the United Kingdom to protect the appellant. The hostages' relatives were still in China and the prosecutions in the public domain. It would not be very difficult for the Chinese authorities to mount a prosecution on those facts and the offence was serious.

230. Professor Fu in his oral evidence had accepted that 14 years was not particularly harsh for such offences in China; Dr Sheehan and Dr Dillon thought the appellant would be sentenced to life imprisonment. It was of course possible that the Chinese authorities might be satisfied by the United Kingdom sentence, but much more likely that they would not. Article 10 prosecution remained a possibility in appropriate cases and following the oral evidence of Professor Fu, Mr Mackenzie submitted that all the witnesses had agreed that on the facts of the appellant's case there was a heightened risk to him.

231. The appellant would not receive a fair trial. There was ample evidence to support a finding that few if any of the standards of a fair trial existed in China, including at paragraphs 10.05-10.06 of the current Country of Origin Information Report, in particular the presumption of guilt, the very high conviction rate, the absence of any right to silence, the lack of procedure rules, and the intimidation of defence lawyers. Professor Cohen, the Special Rapporteur, and the US State Department Report had all dealt with this issue. At paragraph 11.03 of the Country of Origin Information Report, the report quoted the US State Department Report indicating that there was no system of bail and that pre-trial detention could be up to 7 months. The Special Rapporteur had made similar points and Dr Dillon relied on his report, which included evidence of flagrant procedural interference.

232. Although the evidence (in particular Professor Cohen's reports) indicated that the Chinese authorities intended to introduce audio-visual recording of hearings, there was as yet no evidence of that occurring and the Tribunal should be very slow to conclude that the intention to introduce a system of recording could have any significant impact on the likelihood of interrogation and torture.

233. In 1994, in the context of China-wide rural protests, the appellant had described an escalating sequence of problems between himself and local officials, culminating in destruction of his home; that account was consistent with what happened in Chinese villages around that time. Although there were some discrepancies, they should not affect the Tribunal's assessment of credibility: the appellant's evidence and that of his sister had been remarkably consistent over a long period, almost 14 years. There was no reason why the local police should not still remember this appellant today. The appellant did not claim to have paid for the arrest warrant and the police cousin's question whether it had been 'useful' was not enough to demolish its credibility. Mr Mackenzie reminded the Tribunal that the cousin had said in the same letter that the appellant should neither return to Fujian nor even reply to the letter. The cousin was clearly worried.

234. Mr Mackenzie reminded the Tribunal that the Secretary of State's skeleton argument accepted that Chinese prison conditions were generally harsh and 'sometimes' degrading. The Special Rapporteur found prison conditions 'generally satisfactory' but was aware of visiting the best prisons, and even then of self-censorship and fear. The Special Rapporteur's requests were honoured (paragraph 9 of the Nowak report), but at paragraph 10 of Professor Nowak's report, he had recorded that security and intelligence officials had attempted to restrict his access, and that potential informants were intimidated, placed under surveillance or instructed not to meet him. That was not a wholly open attitude on the part of the Chinese authorities.

235. Re-education through labour or laojiao remained very controversial with strong pro- and anti-abolition factions within China. Nevertheless, it remained available to the authorities: its use was arbitrary, punishing those whom the authorities considered displayed criminal tendencies even if not criminally liable. Mr Mackenzie suggested that laojiao would be the fall-back position if the appellant were not prosecuted. Dr Gechlik had considered re-education through labour likely, but Professor Fu's opinion was that the police might be reluctant (paragraph 48, main report). Professor Cohen's evidence in 2006 was that the Ministry of Public Security was keen to retain it. Use of laojiao, if it occurred, involved flagrant breach of Articles

5 and 6 ECHR and the treatment of offenders under laojiao was no better than those in the prison system. The Tribunal should assess the appellant's offender profile; Mr Mackenzie argued that it was extremely unlikely that he would just be allowed to get on with his life.

236. Finally, on the question of internal relocation, Mr Mackenzie relied on his skeleton argument. The hukou system would prevent him relocating and information would reach Fujian, such that people would be sent to pick him up. There had not been any vast change in the hukou system (see the evidence of other academics to the Congressional-Executive Committee in December 2005). Professor Fu's opinion was that the appellant could vanish within the larger Chinese cities but it would be difficult for him to work without registering and the appellant should not be expected to commit an offence in order to exercise his internal relocation option.

237. In conclusion, Mr Mackenzie asked the Tribunal to substitute a decision allowing the appellant's appeal.

Overseas offences prosecutions (including re-prosecutions) in China

238. With the exception of Professor Cohen whose evidence to the Congressional-Executive Committee is reviewed on a different basis, all of the experts were asked if possible to provide examples of overseas offences prosecutions under either Article 10 (re-prosecution) or Article 7 (prosecution). We summarise below the examples provided. We excluded the Article 18 CL example Dr Sheehan provided; Article 18 is an internal Chinese prosecution exemption on an entirely different basis, and the single instance upon which she relied involved a bombing campaign where there had been a great many deaths. Dr Sheehan made no attempt to discover whether it was typical of the application of Article 18. Disappointingly, Professor Palmer, Dr Dillon and Dr Sheehan were unable to identify any examples of the use of Articles 7 and 10 at all.

239. In *WC,* the Tribunal was given the following possible examples:

"47. Now, however, evidence has been adduced to the effect that there have been re-prosecutions. Extending the net to cover both points raised before the Adjudicator and since, it appears there are five possible candidates for case examples.

(1) The possible case of three people who had returned to China after having served sentence in Hong Kong pre-1997 and it was suspected they were considered not to have served enough imprisonment and may have been imprisoned or sent to a re-education camp. This possible case was considered by the Adjudicator at paragraph 25 where he observed that in his oral testimony Professor Palmer accepted he did not know whether in fact the convictions in this case were for other offences committed in China. It was not, therefore, a concrete case.

(2) The possible case of Mr Chen Xiangui said by Professor Palmer in his July 22, 2003 statement to have been convicted of offences in which he caused financial losses to a Chinese company in Kuwait, and to have been sentenced by the court in Kuwait to a term of imprisonment, as his conduct was considered to have had an adverse impact on China's reputation abroad, the Jintong Xiaon (Sichuan) Basic Leave Court deciding to reconvict him for those offences under Chinese law and for him to serve an additional three years imprisonment. However, before the Tribunal the Professor conceded that he was mistaken in describing this as a re-prosecution case.

(3) The possible case of Wu Xun who committed burglary in Japan and was tried and sentenced to eleven years' imprisonment in Shanghai even though under Japanese law the maximum penalty for the offence was only seven years. This case was also cited in Professor Palmer's 2 July 2003 letter. However, his own words in that letters were that: "It seems that he was not tried in Japan, although this is not altogether clear form (sic) the report". If he was not as it seemed tried in Japan, then this was not a case of re-prosecution or double punishment. In his evidence before the Tribunal the Professor confirmed this was not a case in point.

48. Professor Hu [sic] documented two further cases involving Mainland hijackers who had been repatriated from Taiwan to the Mainland.

(4) A Chinese couple, Luo Changua and Wing Yuing hijacked a flight from Mainland China to Taiwan in 1993. They were convicted of hijacking in Taiwan and sentenced to nine and seven years' imprisonment respectively. They were repatriated to the Mainland in 1999 and upon their return were sentenced to a further fifteen and ten years' imprisonment respectively by a local court on the mainland.

(5) Huang Shugeng hijacked a flight to Taiwan also in 1993. He was convicted and sentenced, in Taiwan, Huang was repatriated to the Mainland in 1997. Upon his repatriation, he was reconvicted of hijacking and sentence to twenty years imprisonment.

49. We do not consider upon proper analysis these latter two cases exemplify the use of re-prosecution or double punishment of persons convicted in foreign courts. Even though there does exist an extradition agreement between PRC and Taiwan under Article 2(2) of the Golden Gate Agreement, and even though for limited purposes Taiwan is regarded by the international community as a separate country (i.e. by the World Trade Organisation), the PRC most emphatically does not recognise Taiwan as a separate state and in particular does not recognise the Taiwanese courts. Accordingly, we agree with Mr Underwood's final written submission that the hijackings were of flights of Chinese aircraft flying from China, and accordingly were not regarded by the Chinese authorities as constituting offences taking place outside Chinese territory as a matter of law.

240. In the present appeal, only Professor Fu and Dr Gechlik were able to identify a handful of examples. In relation to Article 7 (prosecution where there have been no overseas proceedings for a foreign offence), the following examples were identified:

A*rticle 7 Prosecutions*

a) In 1996, Chinese citizen Chen Xiangui worked for a Chinese construction company in Kuwait but became unhappy with the working and living conditions. According to the judgment, he incited workers to assault the managers, damaged property and caused disorder in the workplace. Chen was prosecuted, in China, for organising others in disrupting social order and causing substantial economic loss to the company. The court emphasized the aggravating factor of negative international impact that case might have and sentenced Chen to 2 years' imprisonment. (This case was also mentioned in *WC*).

b) In 2001, Chinese citizen Yao Ping, a caretaker of a Chinese monk who accompanied the monk to Nepal to work in a temple there, was prosecuted in China for theft from the monk during his work in the Nepalese monastery, of a notebook computer, video camera, a DVD player and a watch belonging to the monk. In convicting Yao, the court balanced the aggravating factor of "undesirable impact to the Buddhist community and internationally" that Yao's crime had created with the fact that Yao

had returned all the stolen goods. The court finally sentenced Yao to 5 years' imprisonment and a fine of 1,500 RMB for theft.

c) In 2002, Chinese resident Xiang Jianhua was prosecuted in China for conspiracy with another Chinese citizen Chen Guanping to kidnap and falsely imprison Chinese resident Shen Hong, the offence being carried out in Yugoslavia, including instructing two other Chinese citizens to open bank accounts in false names in Wenzhou and Beijing to receive the ransom money. Shen was assaulted during the course of detention. Xiang's co-defendant telephoned Shen's family several times, threatening to kill Shen and demanding ransom in the amount of two million RMB, which was paid by Shen's father. The Yugoslavian Courts did not prosecute Xiang; he was returned to China (it is unclear how), prosecuted and tried under Article 7 of the CL, convicted of kidnapping and sentenced to 14 years' imprisonment, deprivation of political rights for 4 years and a fine of 300,000 RMB. Xiang appealed against the decision; the appeal was dismissed on 9 October 2003.

Article 10 Prosecutions

a) In 1990, Ning Hong was convicted of causing serious injury to another Chinese citizen in Kuwait in 1990 and sentenced to imprisonment (the term is unknown). A few months later, Iraq invaded Kuwait. The prison was attacked. Ning escaped and returned to China. After his return, he was identified by the person he attacked. The victim called the police and Ning was subsequently arrested, re-prosecuted, and re-convicted for the same offence in China (Professor Fu)

b) In June 1996, the Shandong PSB was considering investigating the criminal responsibility of a returned Chinese citizen (Yao Weiye) who had committed a crime and been tried and punished by a court in Ukraine. However, the prison term the citizen had served overseas might be taken into account by the Chinese authorities as a mitigating factor in determining his punishment. There is no further information as to how this case was handled eventually but the question of re-prosecution was at least considered. (Professor Fu and Dr Gechlik)

c) In July 2001, a news article identified the case of LIN Xuecheng, convicted in the United States of smuggling more than 60 illegal immigrants to the United States, tried, and sentenced to 30 months imprisonment. He served his sentence and returned to China; upon his return, he was arrested by the local Procuratorate. Again, the final outcome of this case is unknown. (Dr Gechlik);

d) In September 2007, a mainland Chinese citizen, surname Shi, a convicted arsonist who had been sentenced to 9 months' imprisonment in the United States and then deported with a warning as to his mental illness from the United States authorities to the Chinese authorities was given lenient treatment by the Border police. (Professor Fu)

e) In February 2007, a news article reported that a Mr. Yang was convicted of trafficking illegal drugs to Japan and was sentenced to five years imprisonment. He was released in late February 2007 and deported to China by the Japanese authorities. Immediately upon his return, he was "handled in accordance with relevant legal rules" by the authorities at the Shanghai border. It is not known whether that included re-prosecution. (Dr Gechlik)

241. The Tribunal notes that the examples given are extremely sparse. The only one which is at all similar to the offence of this appellant is that of Xiang prosecuted in 2002 under Article 7 for kidnapping and extortion. He, like the present appellant,

received a sentence of 14 years imprisonment. If that is so, the sentence given to this appellant may well not be regarded as disproportionate by the Chinese authorities.

Removal of Chinese snakehead defendants (some convicted with the appellant and some for factually similar offences)

242. The Tribunal, with the help of the Secretary of State, has analysed what occurred after the release of a number of snakehead defendants tried and convicted in London. We have details of eight removals and two who were not removed, from two or possibly three unconnected groups of offences.

243. Three from the same offender group as the appellant have been removed (one of these was described by the trial judge as a ringleader, as was the appellant). Two more defendants probably from the same offender group, who were sentenced with the appellant, were also removed. A further five individuals were sentenced to 15 years. They were from an offender group convicted in September 1997 (two years earlier) of the same offences: conspiracy to kidnap, blackmail and false imprisonment. At the end of their sentences, the 1997 offender group individuals raised no objection to removal and were removed.

244. *WC* and SC have not been removed. *WC*'s offences of kidnapping, false imprisonment and blackmail attracted three concurrent sentences of 6 years. He was probably not part of either appellant's offender group, or the September 1997 group. SC was probably part of the appellant's offender group: he was convicted and sentenced on the same date as the appellant, and his Court of Appeal hearing was the same day as this appellant's unsuccessful appeal.

245. Of the eight removed, at least five voluntarily, there has been no indication whatsoever of difficulty on return. The Tribunal notes that the Foreign and Commonwealth Office is unable to monitor returns, but all eight were legally represented and had there been any re-prosecution, the Tribunal considers it likely that representations would have been made or there would have been publicity outside China. This analysis tends to confirm Professor Fu's view that the snakehead cases are regarded by the PRC as commonplace and, provided they are considered to have been dealt with properly abroad, are unlikely to attract further interest on return once the foreign sentence has been served.

General conclusions on the background evidence and expert reports, set against the issues identified

1. *WC* and *SC*

246. *WC* was heard on 24 February 2004 and the information on which its guidance is based is at least four years old. The appellant in *WC* did not satisfy the Tribunal that he was at risk of re-prosecution. So far as material to the present appeal, the Tribunal concluded as follows:

> "41. It is plain that Chinese law does allow for the possibility of double punishment. Article 7 of the CL applies the criminal law to any citizen of the PRC who commits a prescribed crime outside the territory (and territorial waters) of the PRC. It is equally clear however, that its application is not mandated. ...

42. It is not in dispute in this case that under Chinese law the offences which the appellant committed in the UK would be regarded as serious. In China, as already noted, the offences of kidnapping, false imprisonment and blackmail carry sentences of ten years or more. …

45. At the date of hearing the position was this. Both Professor Palmer and Mr Becquelin as well as UNHCR accepted that there had been no cases of prosecution where a person has been prosecuted abroad. Since Professor Palmer also accepted that there had been persons convicted abroad who had returned, this in our view was a very significant piece of evidence. …

60. Our principal conclusions are as follows. Firstly, although we have to consider evidence not all of which was before the Adjudicator, we do not consider that the appellant has established that on return he faces a real risk of re-prosecution or double punishment for offences committed in the UK. Secondly, although we do accept he would be apprehended by the authorities on return and would face conviction and punishment for illegal exit, we do not consider that this would result in treatment contrary to Article 3 or a flagrant denial of any other fundamental human rights. "

247. In *SC,* the Tribunal reconsidered and affirmed its approach in *WC* that on return to China, a Chinese citizen convicted of a crime in the United Kingdom was not at real risk of a breach of protected human rights whether by way of judicial or extra-judicial punishment, even if the crime had a Chinese element. After considering expert evidence from the same experts from whom we also have heard, and the international law framework, the Tribunal in *SC* concluded as follows:

"44. We cannot ignore the absence of evidence in this case. It is clear that experts such as Dr Dillon visit China regularly and read local newspapers and listen to local radio, yet he, like Professor Palmer who gave evidence in *WC* can point to no examples of re-prosecution where a person has been prosecuted abroad. Dr Dillon made the point that there was a distinction between there not being evidence of re-prosecutions and accepting or not accepting that there had been no cases of prosecutions, and we agree that there is a distinction there. But we have to be concerned with evidence of a real risk as opposed to speculation in coming to our conclusions. Much has been made of both the general attitude of the Chinese authorities to human rights, the secretive nature of that society and the control exercised over the media, in seeking to persuade us that the absence of evidence should be regarded as unsurprising and not stand in the way of the case being made out. *In this regard however we consider it is also relevant to bear in mind the absence of any evidence concerning the co-conspirators of the Appellant who have been returned to China over the last twenty months or so and the absence of any indication as to what their fate may be.* Dr Dillon no doubt properly raised the question as to whether there was proof that they were all right, but he is not a lawyer, and that ignores the obvious point that the burden of proof is on the Appellant.

45. In coming to our conclusions we do not ignore the profile of this case and the fact that there was clear cooperation between the Chinese and the United Kingdom authorities. Nor do we ignore the point of distinction that we have identified above at paragraph 34 between this case and the facts of *WC*. We also bear in mind the evidence concerning the preparedness of the Chinese state to act in defiance, if it may so properly be described, of the provisions of the CL in cases which it deems to be appropriate, and the apparent compliance of the Chinese courts with such an approach. These are clearly matters of significance which cannot properly be ignored, and in this regard we also bear in mind the points made concerning extrajudicial punishments such as labour camps which exist as a further option, it seems, to the

authorities. But in the end we are not persuaded that the Appellant has shown a real risk of re-prosecution in China with regard to the offences for which he was convicted in the United Kingdom or prosecution for any other reason. …the facts in the evidence in this case are not such as to show a real risk to this Appellant on return of breach of Articles 3, 4, 5 and 6 of the Human Rights Convention. …

47. We agree with the Tribunal in *WC* that the ne bis in idem principle (i.e. the principle precluding retrial or re-punishment for an offence for which the person has already been finally convicted or acquitted) does not yet constitute a peremptory norm prohibiting the punishment of a person twice in two different states for the same offence. We do not however consider that if the appellant were sentenced to up to five years imprisonment in China on return (on the basis taken by the Tribunal at paragraph 35 in *WC)* even taken with the evidence of prison conditions in China, [that] would give rise to a real risk of breach of his human rights. The risk alluded to in paragraph 37 of *WC* of the appellant being made a public example of seems to us to be unnecessarily speculative, bearing mind the absence of any hard evidence before us of a 'strike hard' approach such as that referred to in that paragraph. ”

[Emphasis added]

248. That was the framework against which the expert and country background evidence was reviewed. It was clear from the evidence we heard that the previous position that there was no evidence whatsoever of overseas offences prosecutions was no longer sustainable. However, the significance of the evidence before the Tribunal was another matter: the Tribunal heard and read a very much wider range of evidence than that available in *WC* or in *SC*. We heard afresh from the appellant and his sister; they were unable to assist us with the general risk on return, since neither of them had lived in China for almost 14 years. Their evidence went only to the credibility of the appellant's account, the assessment of paragraph 364 of the Immigration Rules, and whether he could rebut the s.72 dangerousness presumption and claim asylum or humanitarian protection.

2. Double jeopardy: assessing the experts and their evidence

249. We next consider what weight to attach to the expert evidence we heard. We reminded ourselves of the guidance in *LP* and bore in mind all of the evidence before us, written and oral:

“37. As Collins J said in *Slimani*, experts can vary in their independence and expertise to a very large degree. Some are well known as reliable, others perhaps equally well known as unreliable. In the centre ground comes the majority. It is the task of the Tribunal to decide what evidence they accept and what weight they can put upon the evidence they receive. … In fact, in this jurisdiction, experts are not merely the providers of raw data but they can be the interpreters of it as well. Their interpretation, and any opinion based on that interpretation, can only be as good as the raw data itself. By that we mean not only the quality of the data, but the selection or filtering, of it.

38. We agree with the concept of the expert as a filter of evidence. A real problem arises in this jurisdiction from the use of the word "expert". In this context an "expert" is merely a witness giving factual, hearsay and opinion evidence. No witness is prohibited from doing that. The question is not therefore the admissibility of the evidence (as it would be in the criminal and civil courts) but the weight to be given to it. The task for us is therefore to decide, simply, how much weight is to be put on the conclusions and/or the filtered evidence that is put before us. The fact that it is demonstrably wrong may

help to assess it. However, the fact that it is not demonstrably wrong does not engender reliance upon it, whether or not the person giving the evidence is, or claims to be an "expert". Additionally, in order to accept an expert as a competent and reliable filter mechanism it is necessary to trust the expert and to have confidence that he or she has filtered the evidence objectively and independently, not partially. The extent to which that trust can be established may depend on a number of factors including the reputation of the expert, and any established track record. It may also depend on the quality of the sources and whether there is a variety of sources. ...The age of the source material and the number of sources is also important. An expert may not have any track record with the Tribunal, in which case particular care is needed in assessing the weight to be put on the evidence, and any opinion said to be derived from it."

250. The evidence of Professor Cohen stood unchallenged as international expertise on Chinese legal reforms. However, it did not take us past 2006. In 2005, he was very hopeful about Chinese legal reforms; in 2006, rather more pessimistic. Reforms existed in draft form but appeared to be on the back burner in reality. There was pressure towards reform from academics and practitioners, and growing public rights awareness, but also considerable resistance by the Chinese authorities to lose powers of social control, in particular laojiao.

251. In relation to Professor Palmer's evidence, we had some sympathy with the original Tribunal's assessment in *WC* and in *SC* that he had merely regurgitated older materials without adding his own expertise. Professor Palmer is an eminent man with significant connections and experience. His report was useful for the materials it assembled (in particular the observations of Liu Nanping) and in general the evidence on sources of law in China, and his literature survey on torture and laogai (Chinese prison experiences). In common with the other experts, he drew heavily on the report of the UNHCHR Special Rapporteur, Professor Nowak. However, given Professor Palmer's enhanced access as an Honorary Professor at Beijing University, we would have hoped for more specific assistance on the Article 10 issue. We noted his views but, as the original Tribunal did, we did consider that they advanced our knowledge of Chinese prosecution of overseas offenders much beyond that set out in his evidence in *WC*.

252. The next expert was Dr Gechlik. She retained strong links with China despite living in the United States and, as the appellant's Counsel observed, she was entitled to practise in Hong Kong, where she was born. She has helped train prison staff and legislative affairs officials, and accompanied a Chinese delegation to Switzerland to discuss prison reform. She retained a wide family connection to mainland China and Hong Kong. Dr Gechlik presented the evidence from the American article written by two Supreme People's Court judges and a Professor from the National Judges' College, with its interesting Chinese language addition assessing the use of Articles 7 and 10 as 'conservative' and 'not often used in specific cases'. Like Professor Cohen, Dr Gechlik recorded strong pressure from the Chinese judiciary and legal profession for the reform of Article 10 CL to move from negative recognition to positive recognition of foreign judgements, and also a proposal further to reform laojiao. Dr Gechlik lacked the full internet access available to Professor Fu although her access to newspapers and magazines was extensive, by reason of her family links to China. She was unable to trace a single instance of overseas offences prosecution.

253. Dr Dillon was not a lawyer. He had not been to China since July 2005 and was unable to tell the Tribunal which websites he had used for an internet search for

examples of overseas offences prosecutions. He drew heavily on Professor Cohen's report and that of the UNHCHR Special Rapporteur, Professor Nowak. His summary of the court system in China was succinct and useful, placing criminal cases in at least the Intermediate People's Courts where the rule of law is rather better than in the rural People's Courts. His literature survey encompassed the same books identified by Professor Palmer, for the same reasons, but all the books identified antedate the westernisation which Professor Fu described as having accelerated in the late 1990s. However, their historical accuracy was not in dispute. Limited improvements to availability of case reports and death penalty trials were not emphasised in Dr Dillon's report.

254. Dr Dillon considered that re-prosecution was most likely where the accused was deemed to pose a particular threat to social order in China; where the authorities wished to make a public example of an individual or a group of individuals; or where the case was considered to tarnish the image of China. If the authorities wished to make an example of someone, he considered that publicity for the decision and the punishment would be strictly in the regional court's local media. He asserted that there was simply no reliable data to support the NPC website guidance, which was indicative of a growing Chinese nationalism. In effect, his non-lawyer's perception was that China was more likely to re-prosecution now than before. He was unaware of the evidence presented by Professor Cohen, Professor Palmer and Dr Gechlik of the judicial, legal, and social pressures to restrict and eventually abolish its use. He agreed with the other experts that laojiao was not likely. He was unable to assist us on the likely sentence. The information simply was not available outside China.

255. Dr Dillon was also unable to give much assistance on the question whether re-prosecution under Articles 7 and 10 was mandatory or discretionary, or whether an offence was completed or inchoate. He thought it probably made less difference in Chinese law than in United Kingdom law. The question whether Articles 7 and 10 are mandatory or discretionary is, however, crucial to the question whether *Adam* is on all fours with the facts of this appeal.

256. Dr Dillon was aware of the anti-torture movement from modernisers within China, but like the other experts, was unable to say that it had yet had the desired effect. Despite so many of its lawyers and judges being overseas-trained, Chinese patriotism and national pride made it reluctant to be influenced by foreign views of its legal system and he considered the changes to be more apparent than real. He did not consider that it was likely that publication on the growing internet databases maintained by Chinacourt and others was to make an example of the defendant; local or national published media would be used for that, and the databases were a technical resource for lawyers and judges. To his knowledge there were links between the Chinese Embassy and China, and between the United Kingdom and Chinese governments on the diplomatic level, despite there being no international agreements.

257. Dr Dillon considered, as did Professor Fu, that there might be less interest in straightforward people trafficking now, with the focus being more on corrupt officials.

258. The next witness was Dr Sheehan. Her report is in essence a commentary on the reports of Professor Palmer and Dr Dillon. Her example of the deaf-mute assassin

prosecuted under Article 18 was not on all fours, either as to gravity (108 deaths) or as to the nature of the Article 18 protection, which was that the authorities had a discretion in appropriate cases not to prosecute a deaf or mute person. All the experts agreed that the death sentence was mandatory where death had resulted from the crime; it was not a likely case for clemency and Dr Sheehan had not performed any kind of literature survey to determine whether it was typical. Like the other witnesses, she considered that torture remained a serious risk if an investigation of the appellant's crimes was undertaken. She considered the NPC website guidance quite a strong statement of intent in her written report; however in her oral evidence she accepted that it was merely a restatement, not indicating any increased risk of the provisions being used.

259. There was a divergence between her written report and her oral evidence in relation to the likelihood of early release. Her final position was that she simply did not know. She endorsed Dr Dillon's opinion that the case was likely to be tried in an Intermediate Court not a rural People's Court or in a City Court. She had no access to the University websites and had undertaken no internet research at all.

260. Dr Sheehan considered that the sentence imposed, 14 years, was not outside the range of sentences which the Chinese Courts would have imposed, though the appellant would not have been paroled at less than 10 years in China. A Chinese life sentence was about 10 years and convicts were paroled at the halfway point only for high-level good behaviour. The authorities might consider that the United Kingdom sentence was sufficient; however, they also might consider, where an appellant had not pleaded guilty and was held to have used violence, that these should have been treated as aggravating factors. In view of the rather limited nature of Dr Sheehan's researches, the Tribunal does not place great weight on her analysis of the legal system, which was derived from the other two reports and the work of Professor Cohen. Nor did we derive much assistance from her evidence on the likely penalty.

261. We then turned to Professor Fu's evidence. Initially, we were concerned by the evolution from his opinion in *WC* (which Dr Dillon agreed with entirely and said he could have written himself) to the main report for this appeal. We read the 2008 report with some caution. However, having heard the oral evidence of Professor Fu and understood the care with which he researched the Chinese databases, we are satisfied that he is a careful and reliable witness with much greater practical knowledge and database access than the other witnesses. There is a difficulty in Professor Fu's written reports which all, because of the severe redaction of facts against which his opinion was written, erred in considering the offence as an inchoate offence when it had been completed. However, when this was put to him, Professor Fu's reaction was careful and cogently reasoned. We are satisfied that we can rely on his evidence.

262. Professor Fu explained the databases available. We do not need to repeat that evidence here. He considered that 14 years was neither extreme nor lenient for a completed kidnap with extortion. He agreed with the other witnesses that laojiao was out of the question and laogai used only rarely. He did not consider this was one of the rare cases where re-prosecution would be undertaken, though given the altered nature of the factual matrix, he considered there to be more risk of official interest than he originally thought. We were particularly struck by his dismissive reaction to snakehead kidnappings in general as rather ordinary crimes of which there were very

many, not especially interesting to the authorities. That is not the Western perception but given the significant people-trafficking industry out of China (Fujian in particular) the Chinese view is different. If there were a re-prosecution, Professor Fu considered that the assistance of the British authorities would be required for evidence. The police would be reluctant to bother unless they could get good evidence, given that they were expected to produce a conviction rate in excess of 90%. If investigated, torture could not be ruled out and the penalty would be ordinary incarceration (laogai) not laojiao.

In what circumstances will re-prosecution occur?

263. Much of the appellant's argument is directed at establishing the purpose of the NPC website publication and whether the experts agreed or disagreed that there were occasional prosecutions. Neither seems to us now to be really in dispute. The question we need to address is what distinguishes those cases where re-prosecution takes place from those where it does not. In oral evidence, all the experts agreed that the NPC website publication was a clarification and reassertion of the law, rather than a change in policy. Submissions in relation to the risk of re-prosecution relied on the NPC website restatement, the lack of any evidence that re-prosecutions did not occur, and the 'complete lack of transparency' in the Chinese legal system. We note that there were very few examples available, and that the only factually similar case was of a prosecution for an unpunished crime (under Article 7), not a double jeopardy case. Save as to sentencing, that does not really assist us in assessing the likelihood of a second trial and punishment under Article 10 CL.

264. We considered the Canadian *Min Chen* decision. That was a murder case: all the witnesses in the present appeal agreed that where there had been death, the death penalty was likely. In the Canadian case, the Agreed Statement of Facts included the concession by the Canadian authorities that:

> '... if he is deported he faces arrest and trial under Chinese law for this crime. He will receive an indeterminate sentence until the state determines he is fit to return to society, on Counsel's submission. There is a high level of certainty that he will receive additional time with his liberty restricted as a result of this crime, a fact that can be considered in determining the issue I have to deal with today, although there is an element of uncertainty with respect to what will happen in the future.'

265. The question whether Min Chen would be re-prosecuted was not fully argued before the Canadian court; further, this was a very high profile child abduction and murder case in Canada. The Tribunal derived little assistance from that decision.

266. After noting the Tribunal's approach in *WC* and in *SC,* Mr Mackenzie relied on obiter dicta in *FL and others* (Rule 30: extension of time?) China [2005] UKAIT 00180 that it was open to an Adjudicator to consider that double punishment was a risk in at least some cases. That misstates what the Tribunal decided in *FL* (which was not a country guidance case on the double jeopardy point):

> "26. On the evidence relating to re-prosecution and the risk to the second Appellant if he were returned to China, the evidence was more complex and more voluminous. The Adjudicator clearly looked at it with some care. Whilst taking seriously the evidence of breaches of human rights including executions in China, she noted that the risk of re-prosecution appeared to be more theoretical than real. In her determination, she pointed out that in the materials before her there was "not one cited case on detention or

prosecution on a returning Chinese citizen on account of any criminal or other offence that citizen may have committed abroad".

27. It appears to us that the evidence before the Adjudicator on this issue might well have been sufficient to enable her to reach a conclusion different from that which she did reach: but we are entirely unpersuaded by the grounds of appeal or by anything Mrs Sood said to us that the conclusion that she did reach was a conclusion which materially erred in law. Indeed, in the course of her submissions, Mrs Sood very frankly and properly said that her position was that the Adjudicator could have reached a different conclusion. We especially asked her whether she had said "could" or "should" and she emphasised "could". That, as we say, may well be so; but it does not amount to an allegation of error of law. For this and the other reasons given above, our conclusion is that in the second Appellant's case the Adjudicator made no material error of law and we order that the Adjudicator's determination shall stand."

267. That decision does not, therefore, differ from the approach in *WC* and *SC*. The appellant in his skeleton argument warned the Tribunal not to dismiss the opinion of respectable experts as speculation (*Karanakaran v SSHD* [2000] 3 All ER 449 at 472). We have no intention of doing so and will give to the expert evidence the weight which it can properly bear. All of the experts from whom we heard are distinguished; some had prepared more thoroughly than others; some were better placed to access the new databases than others. We accept that they all agreed that Article 10 is sometimes used.

268. The appellant also relied on the decision of the Court of Appeal in *Mohamed Adam v SSHD* [2003] EWCA (Civ) 265 which was not cited either in *WC* or in *SC*. He contended that in the light of that decision, the evidential burden of proving that there was no real risk of a potentially persecutory law being applied rested on the respondent. The relevant passage, set out in full, from the decision of Schiemann LJ is as follows:

12. Miss Plimmer submits that the approach of the IAT in paragraph 16 of their determination is not supportable. The Country Assessment states in paragraph 5.69 that "the penalty for refusing to perform military service is a fine and up to three years imprisonment..." This document was produced by the Home Office and placed before the adjudicator by their representative. In those circumstances to place a burden on the appellant to show that there is a real risk that this penalty would be imposed on him is unfair. I agree. It may well be that circumstances can arise when a law is shown to be never enforced in which case there would be no real risk to a citizen that he would be imprisoned pursuant to it. But, for my part, I do not consider that it was open to the IAT to conclude from the evidence before it that the present was such a case.

The appellant, relying largely on Home Office evidence, showed that:

i) he was a member of a community suspected of supporting the opposition and regarded by the Government as legitimate targets for life threatening activities;

ii) there was a real risk that he would be discovered as having evaded military service;

iii) the penalty for refusing to perform military service is a fine and up to three years imprisonment;

iv) arbitrary as well as justified arrest and detention by security forces was common;

v) in practice the security forces torture and beat suspected opponents of the government;

vi) conditions in prisons are life-threatening.

14. In the light of the Country Assessment it seems to me that the evidential burden passed to the Home Office. If it was going to be part of the Home Office case that there is no real risk that the penalties prescribed by law would be exacted then they should have produced the relevant evidence in advance so that the appellant might know what case he had to meet. The statement in paragraph 5.69 of the Assessment that a deserter will usually be re-conscripted does not meet the point – particularly when the appellant is a member of a persecuted minority and might thus be expected to be a candidate for the unusual. To expect him to do more than point to the law is in my judgment unfair and unrealistic – c.f. *Modinos v Republic of Cyprus* ECtHR 22/04/1993 16 EHRR 485. "

269. Again, the point made is different from that which we consider here. In the *Adam* decision, the Home Office evidence was in the appellant's favour and Schiemann LJ observed that where the appellant had made his case based on evidence prepared by the Home Office, if the Secretary of State wished to assert the contrary position, he should have given proper notice of her intention to do so. That is a perfectly reasonable position but it does not amount to authority that the burden always shifts in favour of the Secretary of State in double jeopardy cases, as the skeleton argument contends.

270. *Modinos v Republic of Cyprus* ECtHR 22/04/1993 16 EHRR 485 is a case concerning whether a provision in Cypriot law criminalising homosexual acts in private between consenting adults remains in force, despite being in conflict with Article 15 of the Cypriot Constitution and Article 8 ECHR. It does not assist us greatly with the point in issue here.

Prison conditions

271. In relation to prison conditions, even the Secretary of State admits that they are 'harsh'. The evidence in the Secretary of State's OGN (paragraph 3.13) is that conditions in Chinese prisons are poor in general, and extremely Spartan even in model prisons:

" 3.13 Prison conditions ...

3.13.11 Conclusion. Whilst prison conditions in China are poor with overcrowding, and abuse by prison officials being a particular problem, conditions are unlikely to reach the Article 3 threshold. Therefore even where claimants can demonstrate a real risk of imprisonment on return to China a grant of Humanitarian Protection will not generally be appropriate. However, the individual factors of each case should be considered to determine whether detention will cause a particular individual in his particular circumstances to suffer treatment contrary to Article 3, relevant factors being the likely length of detention the likely type of detention facility and the individual's age and state of health. Where in an individual case treatment does reach the Article 3 threshold a grant of Humanitarian Protection will be appropriate."

272. Whilst the Tribunal has received evidence from the experts about prison conditions, it is not a question on which this appeal turns. For the reasons we explain at the end of this decision, we have found that the appellant would not be at

risk of double jeopardy reprosecution under Article 10 CL if returned to China. The UNHCHR Special Rapporteur, Professor Manfred Nowak, was satisfied that the prisons he saw met international norms. There was evidence of much lower standards in the past, in particular in Professor Palmer's literature survey and the books of Harry Wu, but there was also evidence of changes in the criminal justice system and modernisation within the Chinese legal system. We concluded that there was insufficient evidence before us of the current conditions in the majority of Chinese prisons to oust the guidance given in *WC* about prison conditions. That issue will need to be considered in detail in another appeal.

Summary of findings and general guidance

273. In the light of all the evidence and materials before the Tribunal, we give the following general guidance.

The Chinese legal system

(1) The Chinese Court system comprises four tiers: the Supreme People's Court in Beijing, which is the highest judicial organ, responsible to the National People's Congress and its Standing Committee, and which hears appeals from the lower Courts, supervising their operation, now including automatic reviews of all death sentences passed by the lower courts, with oral argument; approximately 30 Higher Courts (the City Courts) in provincial, municipal and regional capitals; about 400 Intermediate Courts based in administrative centres, towns, and larger cities and which try criminal cases, with exclusive primary level jurisdiction in capital cases, subject to review by the Supreme People's Court; and approximately 3000 People's Courts which try minor matters in all Chinese towns and cities. People's Courts can establish People's Tribunals (which are not regarded as Courts) to handle local cases.

(2) Judicial databases in China have followed much the same evolution as in the United Kingdom. Since the late 1990s, the Supreme People's Court has sponsored a database, Chinacourt which now contains about 25000 selected decisions, either from the SPC or referred by the lower Courts (approved, rewritten and with an appropriate headnote through an SPC reviewing Committee). The database contains selected cases and not all cases; the reported cases, as on the United Kingdom BAILII and other databases, represent the decisions which are considered to be of interest and not the vast majority of decisions. Reporting in these databases is for technical reasons not to 'make an example' of a particular individual.

(3) Chinese Universities maintain fuller databases with more cases and better indexing, in particular Chinalawinfo (Peking University Law School) which holds 50,000 decisions. They are available to members of the University and by subscription to the professions but not otherwise.

(4) If the authorities wish to make an example, that would be done by journalistic reports in the local and national printed and broadcast media but these publications are hard to access outside China. Only one witness spoke of such a report and that related to a different discretionary provision, Article 18 CL.

(5) The NPC website maintained by its Standing Committee publishes excerpts from textbooks written by SPC judges to give guidance on the application of rather sparsely written Chinese Criminal Law and Criminal Procedure Rules and has done so for Articles 7 and 10 CL.

(6) There is pressure in the legal profession, supported by articles written by judges and one in particular by two Supreme People's Court judges and a member of the Judicial Training College, to remove Article 10 from the statute book but it has not yet succeeded. A similar movement to reduce or abolish torture, which was and remains unlawful, has had only limited effect in the larger cities; the pressure on police to obtain convictions in the 90% levels very quickly means that they are still likely to torture to obtain confessions.

(7) Chinese border guards have computerised systems into which passport data is entered manually (name, date of birth, address and the usual information) which brings up information as to entry and exit visas, but is not yet linked into the hukou system.

Overseas offences prosecutions under Articles 7 and 10 CL

(8) Articles 7 and 10 deal with prosecutions for offences committed overseas ('overseas offences') and are discretionary in their application. Both are used, but very rarely. Article 7 permits prosecution of an overseas offence which was not the subject of a foreign prosecution. Article 10 permits re-prosecution even where the offender was prosecuted, convicted, and punished abroad. The experts were able to identify only a handful of instances of overseas offences prosecutions over a 17 year period, three involving Article 7 and five involving Article 10. Of the three Article 7 cases, one involved factually similar offences and attracted a sentence of 14 years. The others attracted sentences of 2 and 5 years respectively, and a fine. Of the five Article 10 cases, four of them did not indicate whether investigation had led to prosecution. The other, in 1990, had a political element and involved a man who had escaped from the sentence he was serving in Kuwait before completing it. He was re-prosecuted and re-sentenced to laogai in China but the term is not known.

(9) International agreements with a growing number of countries restrict or remove overseas offences prosecution for offences committed in those countries. There is no such agreement with the United Kingdom.

(10) Prosecution under Article 7 or 10 is a fresh prosecution. For both Articles, the Chinese authorities have a discretion whether to prosecute, which will be exercised in the light of their opinion as to whether the foreign jurisdiction dealt properly, and without undue leniency, with the offence. It can no longer be said that there is no information available on the use of that power: the Chinacourt database of cases and the NPC website guidance comes directly from the Chinese Government and provides guidance on the use of these powers.

(11) The procuracy and police are reluctant to prosecute in most cases because of evidential difficulties in establishing the necessary elements of the

offence without access to the overseas proceedings and evidence. Where there is no agreement between the two Governments, the case can be pursued only where either there are sufficient witnesses and evidence in China, or where the evidence used in a foreign jurisdiction can be obtained by diplomatic channels.

(12) Foreign judgements are not recognised but, where available, evidence obtained and used to in overseas prosecutions may be used as the basis of a fresh investigation in China. Torture during such an investigation cannot be ruled out, though it is less likely in the higher courts than in People's Courts. Western governments are reluctant to cooperate in furnishing the evidence required from their own records because of China's record on the death penalty.

(13) The Foreign and Commonwealth Office cannot monitor Chinese citizens who are returned to China, save negatively; in the case of re-prosecution, they would be likely to be aware of diplomatic requests for the United Kingdom evidence.

Laogai and laojiao

(14) Laodong gaizao, commonly abbreviated to laogai (reform through labour) and laodong jiaoyan, abbreviated to laojiao (re-education through labour) are distinct concepts.

(15) Laogai equates to imprisonment after conviction and is reserved for more serious criminal cases. There are international concerns about China's trial system and prison conditions but it will be appropriate to review those in another determination where there is a greater likelihood of trial and imprisonment. China's reform efforts are proceeding but they are not yet at a level where the West can have confidence that all appropriate international norms (in particular Articles 5 and 6 ECHR) are met.

(16) Laojiao is much more controversial. It is an administrative penalty, originally limitless but now restricted to four years maximum, where for lesser offences a person may be incarcerated in prison-like conditions at the behest of any official or police officer (or even a child's school). There is a powerful movement against it within China. Its use is declining. All the experts except Dr Sheehan agreed that re-prosecution or prosecution under Articles 7 or 10 for a serious offence would not be dealt with under laojiao.

(17) The Tribunal is satisfied that there is a double jeopardy risk under Article 10 CL, but that absent particular aggravating factors, the risk falls well below the level required to engage international protection under the Refugee Convention, the ECHR, or humanitarian protection.

(18) Merely to have committed a crime overseas, been sentenced and punished for it will not be enough to entail a prosecution under Article 10 CL; nor under Article 7 CL is it sufficient to have escaped punishment for an overseas offence.

(19) The risk of prosecution or re-prosecution will be a question of fact in individual cases but is more likely where:

(a) there has been a substantial amount of adverse publicity within China about a case;
(b) the proposed defendant has significantly embarrassed the Chinese authorities by their actions overseas;
(c) where the offence is unusually serious. Generally, snakehead cases in China do not have the significance they have in the West and are regarded as ordinary (but serous) crimes requiring no special treatment;
(d) political factors may increase the likelihood of prosecution or re-prosecution;
(e) the Chinese Government is also particularly concerned about corruption of Chinese officialdom.

Application of the general conclusions to the appellant's case and decision

274. We turn now to consider this appeal.

The s.72 certificate

275. We are required to consider s. 72 first, to determine whether the appellant has rebutted the statutory presumption that he remains a danger to the United Kingdom community. As set out in the Immigration Rules (HC 395 (as amended)) at paragraph 339D, the commission of a serious crime also takes the appellant outside the humanitarian protection provisions of the Refugee Qualifications Directive:

> **"**339D. A person is excluded from a grant of humanitarian protection under paragraph 339C (iv) where the Secretary of State is satisfied that:
>
> (i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;**"**

276. In *SB* (cessation and exclusion) Haiti [2005] UKIAT 00036 Ouseley J considered s.72 (2) and the 'dangerousness requirement' –

> "65. Plainly the effect of section 72(2), if applicable, is to put beyond argument the existence of a particularly serious crime, and the fact that the crime for which a sentence of three years was passed preceded the Act does not affect the application of the Act to it.
> ...
> 67. If the specific definition of "a particularly serious offence" in section 72(2) includes offences which would not otherwise have been within the scope of Article 33(2), section 72(2) alters the law to that extent but in its effect is qualified by the rebuttable presumption as to dangerousness in subsection (6). Except to the extent that that alters the burden of proof, the dangerousness requirement would have to be satisfied conformably with the Convention thresholds. This ought to lead to the same result as before, except where the change in the burden of proof, if it is a change, would affect the outcome.
>
> 68. This provision does not have many of the objectionable features of retrospective changes to the law. It does not change the character of past transactions or arrangements;

nor does it criminalise past conduct or increase the criminal penalties. But it changes the potential asylum consequences of a past criminal act and its sentence; it may affect a decision as to whether an appeal against sentence should be launched. ..."

277. In the present case, the appellant did appeal his sentence, unsuccessfully. The appellant's representatives accept that as he has served half of a fourteen-year sentence for conspiracy to kidnap, conspiracy to extort and conspiracy falsely to imprison, all contrary to s.1(1) of the Criminal Law Act 1977, that the Secretary of State has shown that the appellant committed a serious offence as defined by s.72. There remains the question of whether the dangerousness element has been satisfied. The evidence in this respect is that of the Ms Ludgam, his parole officer who knew the appellant for 17 months before his release. He was released in 2005 and has been on licence since then. We remind ourselves that the parole officer's report was not based on full information as to the offences in which the appellant was involved. She noted that there was a low risk of reoffending but that if the appellant did re-offend it would be serious, gang-related offences. She was concerned, even on the limited facts available to her, that he should not be released unless the supervision of a probation officer was available. That was not done. We have no later report, and no evidence at all as to what the appellant has been doing since release, save that he has not apparently been arrested again.

278. The original Tribunal did not consider s.72. They regarded credibility as determinative, which was an error of law. At paragraph 43, however, they stated that had they engaged with Article 33(2) (and by implication s.72) they would have upheld the certificate. They did so on the basis of the sentencing judge's remarks, Ms Ludgam's report, and other information about the appellant's current position (considered under paragraph 364, on which there is no challenge in this reconsideration). They noted Counsel's assertion in those proceedings, as here, that there was a lack of evidence that the appellant was a danger to the community but took into account the serious nature of the offence. That was the basis on which they would have upheld the certificate.

279. We have considered s.72. The appellant was found to be one of the prime movers in a particularly nasty kidnap and extortion offence. He has not admitted his central rôle in the offence, and neither the trial judge in the criminal proceedings, the original Tribunal, or this Tribunal, considered him to be a witness of truth. The burden is on the appellant to show that he is not a danger to the community. His evidence to that effect consists of the usual certificates of various low-level qualifications obtained in prison, and then nothing at all for three years after that. The appellant has been on notice that the Tribunal would have wished to see up-to-date evidence on risk since the original determination in August 2006. There is still nothing. Under s.72, the appellant cannot show that he is no longer a danger to the public and, apart from his educational certificates in prison and a well-meaning but ill-informed Parole Report, has made no attempt to do so. We know absolutely nothing about what he has done while on licence, save that he was not arrested for it.

280. We uphold the s.72 certificate. The appellant cannot therefore rely on the refoulement provisions of the Refugee Convention or on humanitarian protection.

Credibility and findings of fact

281. Having heard the appellant and his sister give evidence, and considered the credibility of their account, we find that we are even more concerned about their account of the 1994 events. The country materials record enormous numbers of rural protests at that time (about 3.5 million individuals a year) and the Secretary of State has accepted that the injuries the appellant sustained may well have been sustained defending his home from destruction. Their conflicting accounts of his rôle in the alleged demonstration fatally damaged the credibility of that part of the account, as the Tribunal held in 2006, and the evidence before us did not ameliorate that position. The appellant has not satisfied us to any standard that he was a writer of posters or a leader of a demonstration, or even that he threw a stone at a Government official. At best, he may have been present at a small demonstration but even that is doubtful.

282. The account of the family's difficulties with the local police and the sister's employer simply beggars belief. Beginning with the sister, as a birth control inspector she would have known the risks quite well; her evidence to the contrary was not credible. The account of what they did with the baby "Little Sister" was inconsistent and neither of them showed any interest in the child after leaving China. As regards the alleged confession, on the appellant's account there was no need; he had been seen in the demonstration. Further, the threat by which the sister said that the authorities intended to extort a confession with which to arrest her brother was that if she did not confess they would arrest him. This part of the account is nonsensical and we do not believe it. It is much more likely, as the Tribunal held, that these two people are economic migrants. There was no error in the Tribunal's credibility assessment in relation to the 1994 events.

283. There is an additional point as far as the alleged 1994 offences are concerned. They appear to be time barred based on Professor Fu's evidence as to limitation periods for Chinese criminal offences. Although the United Kingdom offences are among those serious enough to engage the 20-year limitation period, and are in time, having been committed less than 15 years ago, the alleged 1994 offences, since there was no evidence that they were capable of entailing life imprisonment or a death sentence, appear to be outside the limitation period. There is a discretion to extend it but these offences are very low-level, even if they occurred. It is most unlikely indeed that they are the type of offence where the authorities would extend the limitation period to enable prosecution so long after the events occurred.

Paragraph 364

284. We have reviewed the paragraph 364 assessment at paragraph 56 of the determination. His Counsel's presentation of him as a young man in bad company was dramatically at odds with the trial judge's view of him as one of the instigators of the kidnap, extortion and blackmail for which he was imprisoned.

285. At the date of hearing the appellant was a 30-year old man who had entered the United Kingdom without leave and been given temporary admission pending determination of his asylum appeal, and who had committed a serious offence for which he had been punished. There was no record of his ever having been lawfully employed in the United Kingdom (nor, on his account, in China), although he may have worked illegally in a Chinese takeaway in Cambridge for about three years before committing this offence. His sister had a restaurant; however, he did not work

there. He was reasonably fit and healthy, and there was no reason why he should not adapt to living in China again.

286. The Tribunal was entitled to find, as it did, that the public interest in deportation was not outweighed by the appellant's rather limited engagement with the United Kingdom or any feature of his personal circumstances.

Double jeopardy and Article 10 re-prosecution

287. The risk on return under Articles 3, 5, 6, and 8 ECHR arose, if at all, from the Article 10 CL risk. The appellant would not be subject to Article 7 CL; he was prosecuted and punished. As to the Article 10 risk, although the appellant was a ringleader of a snakehead group, but he took part in what the Chinese state currently regards as a very common offence. Others who offended at that time were returned, some willingly, some not. All were legally represented and none of their representatives subsequently indicated that they came to harm on return. There had been no request through diplomatic channels for their trial documents by the Chinese authorities. There had been no international or local publicity, good or bad, identified in relation to these offences.

288. We reminded ourselves that the burden of proof of a real risk of a breach of a protected ECHR right remained on the appellant: the shifting burden of proof in *Adam,* if it existed, related to a situation where there was certainty of prosecution and a statement in the Country of Origin Information Report or otherwise by the respondent to that effect, such that it was for the respondent to provide evidence contradicting her own published material. That was not at all the same as a general duty on the Secretary of State to disprove the risk in all cases.

289. If the Chinese authorities were to take a positive interest in this appellant on return, there was no certainty that it would go as far as prosecution. Four of the five Article 10 examples provided by the experts appeared to have fizzled out without prosecution. The only example which was factually similar to that of the appellant, the Article 7 prosecution of Xiang, resulted in the same sentence. Despite vigorous attempts by the appellant's experts and his Counsel to persuade us to the contrary, the appellant had not satisfied the Tribunal that the Chinese authorities would consider the United Kingdom proceedings so disproportionate that there was a real risk of a fresh prosecution, especially given that there had been a prosecution, conviction, and sentence.

290. We considered the weight to be given to Professor Palmer's evidence above. We have taken it into account but we agree that it is based on older material than that available to the experts who gave oral evidence and that it takes matters little further than his evidence to the *WC* Tribunal.

291. Overall, when examined in the light of the country situation in China and the guidance in this decision, taking into account the credible part of this appellant's account after his arrival in the United Kingdom, none of the errors in this determination entitled the appellant to have his appeal allowed. Accordingly, on the facts of this appeal, we substituted a fresh decision dismissing the appeal.

Continuing applicability of existing country guidance cases

292. The Foreign and Commonwealth Office 'double jeopardy' letter and the evidence before us altered the position as the Tribunal understood it in *WC* and *SC*. In the light of our findings above, the decisions in *WC (no risk of double punishment) China* [2004] UKIAT 00253 and *SC (double jeopardy – WC considered) China CG* [2006] UKAIT 00007 are no longer factually accurate and SC should no longer be treated as country guidance.

Funding decision

293. The appellant applied for payment of costs from the Community Legal Service Fund under s.103D of the Nationality, Immigration and Asylum Act 2002 as amended by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. Reconsideration was granted on the basis of arguable errors of law in this determination. Nothing in these proceedings indicates that the reconsideration application was not properly made. The Tribunal orders that the appellant's costs be paid from the Community Legal Service Fund.

DECISION

The original Tribunal made a material error of law. The following decision is substituted:

1. **The appellant is not a refugee as defined by the Geneva Convention and the Refugee or Person in Need of International Protection (Qualification) Regulations 2006;**

2. **The appellant is not entitled to humanitarian protection as defined in those Regulations;**

3. **The appeal is dismissed on human rights grounds; and**

4. **The Tribunal orders that the appellant's costs be paid from the Community Legal Service Fund.**

Signed Dated: 12 May 2008
Senior Immigration Judge Gleeson

SCHEDULE

COUNTRY BACKGROUND DOCUMENTS

Date	**Description**
1991	Nanping, Liu: "Legal Precedents" With Chinese Characters: Published Cases in the Gazette of the Supreme People's Court, *Journal of Chinese Law, Volume 5 (1991)* 107
1995	
27 May	Agreement between the People's Republic of China and the Republic of Bulgaria on Mutual Legal Assistance in Criminal Matters
1997	Nanping, Liu: Judicial Interpretation in China: Opinions of the Supreme People's Court (*Excerpt, Sweet and Maxwell)*
2003	Dr Mei Y Gechlik: "Improving Human Rights in China: Should Re-Education Through Labour be Abolished?" *Columbia Journal of Transnational Law*
2004	
8 April	Report of Professor Fu in *WC* Case
27 May	Agreement between the People's Republic of China and the Republic of Colombia on Mutual Legal Assistance on Criminal Matters.
December	Amnesty International: "Human Rights Defenders at Risk"
2005	
17 June	London `Times' article `Thugs kill farmers for their land'
26 July	United States Congressional-Executive Commission on China: Written evidence of Professor Jerome Cohen: "China's Legal System in Transition"
2 September	US Congressional-Executive Committee: "China's Household Registration (hukou) System: Discrimination and Reforms"
10 October	BBC News: "China village democracy skin deep"
14 November	Extradition agreement between People's Republic of China and the Kingdom of Spain
29 November	Home Office Operational Guidance Note on China
3 December	Guardian newspaper article : "Torture Still Widespread in China"
2006	
1 January	International Herald Tribune: "In rural China, a time bomb is ticking"
8 March	OHCHR Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, "Mission to China" (Advanced Edited Version)
10 March	US State Department Report on China for 2005
10 March	UN Economic and Social Council Report on China
27 March	Human Rights in China: "Rural Land Activists Detained after Petitioning over Corruption"

11 May	BBC News Online: "China's 'reforming' work programme"
14 May	Toronto Star newspaper article: "Is child Killer here to stay?"
19 June	AsiaNews.it article: `Beijing threatens lawyers: `Don't help anti-Government protestors'
18 July	Amnesty International report `People's Republic of China' `Human rights Defenders at Risk' (with update)
20 September	US Congressional-Executive Commission on China: Professor Jerome Cohen (written evidence): "Human rights and the Rule of Law in China"
20 November	Home Office Operational Guidance Note: China
2007	
1 March	China Daily article: "End Legal Black Hole"
6 March	US State Department Report: Human Rights Practices – China
15 March 2007	UN General Assembly Report on implementation of General Assembly resolution 60/251, only in so far as it relates to China (pages 1-3 and 21-26),
29 June	ABC News Australia: "Chinese deportee tells of torture"
8 August	Dr Michael Dillon: Expert witness report on JC
7 September	Dr Jackie Sheehan: Country Expert Report in the case of JC
11 September	Dr Mei Y Gechlik (nee Veron Mei-Ying Hung): Expert witness report re JC
30 October	Professor Fu Hualing, Expert Report (Double Jeopardy), with Curriculum Vitae and annexes
12 November	Letter from Foreign and Commonwealth Office
3 December	Home Office Country of Origin Report: China
6 December	Guardian report: "Chinese police stage huge gang crackdown"
2008	
14 January	Respondent's Skeleton Argument
17 January	Dr Jackie Sheehan: "Remarks in addition to the Country Expert Report on JC" and appendices with translations
17 January	Comment of Professor Fu on *WC* report