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WC (no risk of double punishment) China [2004] UKIAT00253

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 24 February 2004

Date Determination notified:

.....15th September 2004.....

Before:

Dr H H Storey (Vice President)
Mr K Drabu (Vice President)
Mr J Perkins (Vice President)

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representatives: Miss N, Atreya of Counsel, instructed by David Gray & Co. Solicitors for the appellant; Mr A. Underwood, QC for Treasury Solicitors for the respondent

DETERMINATION AND REASONS

1. The appellant is a national of the People's Republic of China. He appeals against a decision of Adjudicator, Mr J.R. Aitken, dismissing his appeal against the decision of 14 February 2003 that his deportation would not be contrary to his human rights.

2. There has been delay in Tribunal determination of this appeal. At the end of the first hearing on 24 February 2004 we permitted the appellant's representatives to take steps to obtain further expert evidence. At the end of a hearing on 5 July 2004, the Chairman of this Tribunal granted both parties time to make written submissions. We have now received these and would note that they include a lengthy

letter from the appellant and letters from three other persons. Whilst we are prepared to accept the appellant's letter insofar as it embodies submissions, the other three letters are clearly not submissions and accordingly we have ignored them. Our direction was for further submissions only. Having received final submissions and taken note of the fact that neither party has sought to comment on the substance of each other's submissions, we now turn to give our decision.

3. At one point, when it was anticipated there would be a need for a further hearing date, we raised with the parties whether they would be agreeable to the case proceeding with only two of the three panel members. Both parties agreed that in order to prevent delay the Tribunal could proceed if necessary with two members. However, in the event, we have been able to continue to determine this case as a three member panel.

4. Before proceeding further it is important to summarise the appellant's immigration and appeals history. He entered the UK illegally on approximately 12 November 1995 and claimed asylum on 1 December 1995. His asylum application was refused on 6 August 1996 and no appeal was brought against that decision. On 19 March 1997 he was tried and convicted for kidnapping, false imprisonment and blackmail and was sentenced to three terms of six years imprisonment, to run concurrently. On 8 October 1998 his solicitors made a new application for asylum. That was met with refusal on 29 October 1999 in the form of a decision to make a deportation order by virtue of s.3(5)(a) of the 1971 Act. An appeal was lodged against this decision.

5. This basis of the fresh claim for asylum was twofold. Firstly, since he would be tried and sentenced in China for the same offences as in the UK, he would experience double punishment, and secondly, he could face the death penalty on return to China as a result of the criminal offence he had committed whilst in the UK.

6. The Secretary of State, in refusing the further asylum claim maintained that they did not accept the authorities would know or would come to know of the appellant's criminal history in the UK; that in any event he would receive a fair trial; that China did not impose the death penalty for the types of crimes he committed; and that there was no reason to consider that punishment he would receive was disproportionate.

7. On 16 August 2000 a determination of Adjudicator, Ms A Cheales was promulgated upholding the Secretary of State's certificate and dismissing his appeal against the decision to make a deportation order. Although dismissing the appeal she accepted the possibility of the appellant's prosecution on return to China. Since the decision under appeal was pre-October 2000, human rights matters were not

dealt with in that appeal. Being certified, no further appeal was brought against that that determination.

8. Whilst not accepting a further application for asylum the Secretary of State did decide on 14 February 2003 to consider the appellant's allegation that to remove him to China would be contrary to his human rights.

9. The appellant appealed against this decision on the basis that removal to China would be a breach of his rights under the European Convention on Human Rights. In addition to his fears concerning double jeopardy and disproportionate punishment at the hands of the authorities, he claimed that he would be at risk from snakeheads. He had used their services to get out of China, paying them £14,000 for the trip. His offences in the UK had been committed out of desperation to repay the snakeheads. Now the snakeheads would seek violent retribution for his failure to pay his debt.

10. In addition to other material, the Adjudicator had before him two reports from a Professor M. Palmer, a statement from Mr N. Becquelin dated 11 June 2003, a letter from Mr Li Qain, a letter from Mr Li Qian's lawyers and a medical report on Mr Qian.

11. In his oral testimony the appellant outlined how he and another Chinese national he met in the UK (Li Qian) attempted with one other to extort money in order to repay debts to the snakeheads. After arrest and imprisonment Li Qian had returned to China. There he had been ill-treated by the police, detained and was to be prosecuted for the offences he committed in the UK.

12. The Adjudicator did not find the appellant credible in most respects, did not find the Li Qian material reliable and did not consider that Professor Palmer's evidence demonstrated a real as opposed to a speculative risk that the appellant would face re-prosecution or double punishment or disproportionate punishment or administrative detention in a re-education camp as an alternative to prosecution. He held that, apart from politically motivated incidents of torture, the Chinese prison and detention regime albeit harsh could not be said to be contrary to Article 3. He accepted there was a serious risk of prosecution for illegal exit, but considered this would result in no more than a fine or a few weeks in detention in default. If any period in a re-education camp were imposed, it was on Professor Palmer's own evidence a Spartan facility rather than an inhuman one.

13. As regards risk from non-state actors, the Adjudicator accepted that the appellant entered into an arrangement with snakehead gangs to pay them for facilitating his illegal departure to the UK. However, he

did not accept these groups would seek retribution since "it would be very bad for business if one failed to get a person a permanent place in a foreign country then attacked him on return". He did not consider the Professor Palmer's evidence to the contrary was sound.

14. The grounds of appeal were lengthy but essentially consisted of six main submissions. Firstly it was submitted that the Adjudicator failed to take adequate account of the Home Office's own China Extended Bulletin 1/200-3 stating that the "Chinese government will [not may] prosecute any returnee they suspect of having committed a serious offence under the Criminal Code irrespective of whether the offence was committed in PRC or abroad". Secondly it was argued that, having accepted Professor Palmer's "eminent expertise", the Adjudicator has failed to deal adequately or at all with his expert assessment confirming the above. Furthermore Professor Palmer, in contrast to his earlier evidence, had now found one documented case of double jeopardy, thereby adding further reason not to accept the Adjudicator's assessment. Thirdly, the grounds contended, in assessing risk on return the Adjudicator not only applied too stringent a test (wrongly requiring "convincing evidence" that the appellant show he would be "singled out"); he also disregarded the evidence that the criminal justice system in China is highly political and secretive. Fourthly, the grounds argued that in relation to prison conditions, the Adjudicator wrongly failed to evaluate the evidence of Nicholas Becquelin, an expert on prison conditions in China whose view was that they were extremely poor and corrupt and that torture in prison was endemic and was not confined to political cases. Mr Becquelin also considered that the appellant would be re-prosecuted, would not receive legal representation and after conviction could face the death penalty. Fifthly, the grounds argued, the Adjudicator failed to take proper account of Professor Palmer's evidence that the appellant would face up to four years detention in a re-education camp whether or not he was re-prosecuted in conditions which would be "oppressive" and therefore contrary to Article 3. Sixthly, it was submitted that the Adjudicator failed to consider that the penalty for illegal exit was likely, according to Professor Palmer and the CIPU Assessment at paragraph 6.9, to result in a year or more of re-education through labour.

15. Other submissions included that the Adjudicator overlooked that the Chinese authorities would perceive the appellant rightly or wrongly as having a political opinion against the PRC, overlooked that because of his criminal history the appellant would be unable to secure employment and wrongly evaluated the Li Qian materials.

16. At the first hearing we heard evidence from Professor Michael Palmer who is Professor of Law at the School of Oriental and African Studies (SOAS), London.

17. Professor Palmer explained how after he gave written and oral evidence before the Adjudicator he had written to say he had found an important and relevant case of double punishment on an official PRC judicial website. In this case a Mr Chen Xiangui had been convicted of offences in which he had caused financial losses to a Chinese company in Kuwait and being 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 Jintung Xian (Sichuan) Basic Level Court decided to reconvict him for these offences under Chinese law and for this man therefore to serve an additional three years imprisonment. Professor Palmer also cited another case in which a Chinese citizen named Wu Xun 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.

18. In oral evidence before the Tribunal Professor Palmer accepted that he has misread the internet report on the Chen Xiangui case and that it was not a case of double jeopardy: it was an Article 7 not an Article 10 case; both of the trials concerned took place in China. He apologised to the court for his mistake caused by the need for speed in preparing his report. He accepted that the Japan case of Wu Xun was also not a case of re-prosecution and additional punishment: this man was not tried in Japan. The Professor said it had not been his intention to mislead the court by failing to correct what he had stated previously; the report was done rather in a hurry.

19. Despite accepting that the position was thus as he had stated it before, that there were no known cases of re-prosecution or double punishment in China for persons who had been convicted and sentenced abroad, Professor Palmer maintained his view that the appellant would be at risk of re-prosecution and double punishment. The trial in the UK was the first of this kind: because of the link with snakeheads, there was a very strong possibility the authorities would re-prosecute. The 1997 Criminal Law had been amended to increase the provision for exercise of extra-territorial jurisdiction.

20. In addition to the written and oral evidence we also received from the appellant's representatives a report from Professor Fu Hua Ling, an Associate Professor of Law at the University of Hong Kong.

21. Professor Fu cited two cases of re-prosecution involving hijackers who had hijacked Chinese aircraft flying from China to Taiwan.

22. Professor Fu went on to consider the issue of risk of re-prosecution.

> "Illegal immigration is an embarrassment to China, and the Chinese authorities have been using criminal law extensively as an instrument of deterrence. Chen 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 Chen's return to China. The national authority and/or authorities in Fujian are likely to have been aware of Chen's case given his frequent contact with his family in Fujian. Since the local authorities have already shown interest in Mr Chen's case, the risk of prosecution in China increases drastically. Chen is likely to be detained and prosecuted even without any notification by the Chinese Embassy in the UK.

23. In relation to detention facilities, 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.

Our Assessment

24. What we have to decide in this case is whether the decision of the Secretary of State was contrary to the appellant's human rights. Article 3 is in issue, as are Articles 4, 5 ands 6. However in respect of non-Article 3 rights we bear in mind the requirement confirmed by the judgment of the House of Lords in Ullah [2004] UKHL 26 17 June 2004 that only a "flagrant denial" of these can render an expulsion decision unlawful.

25. We should next clarify that although the grounds of appeal raised tangential concerns about the Adjudicator's assessment of the appellant's credibility and the reliability of the Li Qian materials, these were not advanced with any force and in any event we are fully satisfied that the Adjudicator was entitled to find that except in limited respects the appellant had not given a credible account. The Adjudicator at paragraphs 23 and 24 gave sustainable reasons for finding, in view of the lack of further contact with the Li Qian lawyer and the ease with which false documentation is obtained in China, that he could not accept that Li Qian had been detained and treated as alleged. We note that the CIPU Report of April 2003 confirms the ease with which false documents can be procured, especially in Fujian province: paragraphs 6.A.238 to 6.A.286. It may be that during the course of Habeas Corpus proceedings Treasury Counsel indicated that enquiries were being made about the fate of Li Qian, but the onus of

proof in this appeal is on the appellant. In view of the Adjudicator's adverse credibility findings there is no basis either for accepting the appellant's claims that the authorities in China have visited his family to investigate his involvement in a UK kidnapping.

26. Having said that we do accept, (as it seems to us did the Adjudicator) that the authorities in China would know about his UK criminal history. Originally this was disputed by the Secretary of State. However, Mr Underwood has not sought to maintain that position. In our view he was prudent not to do so since, if for no other reason, the fact that the Chinese authorities have visited the appellant in prison on several occasions since the Home Office entered into correspondence with the Chinese Embassy regarding his travel document position in October 1997, was a strong indication that checks will have been made with the authorities back in China to ascertain his identity so that in turn the authorities there would have been informed of his UK history.

27. The further written submissions to the Tribunal from Miss Atreya urged the Tribunal to apply the principles set out in the starred Tribunal determination in Devaseelan [2002] UKIAT 00702 and so accept (as the Adjudicator in this case did not) the finding of the Adjudicator who dealt with the earlier asylum appeal (Ms Cheales) that the appellant "may face prosecution were he to return to China ...". We see no merit in this submission. For one thing Ms Cheale's conclusions were equivocal as earlier she had stated that it was not clear he would receive any punishment at all. For another she failed to explain on the basis of what evidence she reached this conclusion and in any event the issue of re-prosecution and double punishment was a general country issue in respect of which he was presented with far more evidence. Accordingly we consider that the Adjudicator did not err in failing to take the previous Adjudicator's findings on the double punishment issue as his starting-point, in view of "the level of new material".

28. Much emphasis has been placed in the grounds on the Adjudicator's alleged failure to take any or adequate account of the expert witnesses. However, so far as Mr Becquelin's evidence is concerned, the Adjudicator made several references to it, see in particular paragraphs 25, 26, 28, and we wholly reject the argument that he did not take adequate account of it.

29. The grounds also argue that having accepted Professor Palmer as an "eminent" expert, it was not open to the Adjudicator to reject certain aspects of the Professor's evidence. However, in our judgment this submission misunderstands how the Adjudicator approached the experts' evidence. In places he drew directly on their evidence to support his own conclusions. He was not, however, prepared to

accept their opinions where these were not supported by any independent sources or case examples. That in our view was a justifiable approach. Indeed, over questions of fact on which country experts themselves confront (in Professor Palmer's words) a "dearth" of evidence, it would be quite wrong for an Adjudicator to avoid reaching his or her own conclusions based on the evidence as a whole. The same applies to us, insofar as we now have to assess the further expert evidence of Professor Fu.

30. One matter which made us less ready to accept the body of expert evidence in general, is that there are indications that all three were not briefed with total accuracy about the facts of the appellant's case. Professor Palmer in one of his reports referred to the appellant committing his crimes "in the context of people smuggling and/or illegal immigration"; but there was no evidence for that.

The issue of risk from snakeheads

31. Although this issue was raised before the Adjudicator it has not been raised in the grounds of appeal to the Tribunal. For the avoidance of doubt, however, we would note that we consider the Adjudicator gave sound reasons for concluding that the appellant would not face a real risk from snakehead gangs. The money he owed them was for their promise to facilitate his illegal exit and onward journey to the UK. The Adjudicator took into account that Professor Palmer's view was that snakeheads would seek revenge, but correctly noted that it was the view of most commentators that it would be "bad for business" if the gang should seek to harm him for failure to pay when his very presence in China illustrated their failure to deliver on their side of the contract. That finding was based directly on the Home Office Extended Bulletin of August 2002 at paragraph 6.10. Additionally the Adjudicator's assessment of risk from snakeheads was entirely in line with Tribunal cases dealing with this topic: see Lui [2002] UKIAT 03683 and C [2003] 00009.

The issue of risk from the authorities : assuming re-prosecution

32. Turning to the issue of risk from the authorities, we consider it will simplify matters if we explain first of all that had we accepted that the appellant would face a real risk of re-prosecution for his UK offences, we would have allowed the appeal on Article 3 grounds.

33. That is not simply because Mr Underwood on behalf of the respondent raised no challenge to the expert evidence dealing with prison conditions. In leading cases the Tribunal has not accepted that prison conditions in China generally reach the high threshold of treatment contrary to Article 3: see e.g. the very recent case of TC (One Child policy – Prison Conditions) China [2004] 00138. Hence Mr

Underwood's concession on its own would not have been determinative. Rather we would have allowed the appeal by virtue of the fact that the appellant would face a combination of three risks: double jeopardy/double punishment (i.e. being tried and punished twice for the same offence); adverse prison conditions and identification as a public example. The concept of prohibition of inhuman and degrading treatment or punishment within Article 3 of the European Convention on Human Rights is constructed by reference to the fundamental human rights it exists to protect. These include Article 6, which guarantees the right to a fair trial and Article 4(1) of the Seventh Protocol to the ECHR, which prohibits the bringing of a prosecution for the same offence, although Article 4(2) permits the original proceedings to be reopened in certain circumstances. On a dynamic interpretation it can also be seen to reflect emerging norms of international law among which is that contained in Article 14(7) of the UN International Covenant on Civil and Political Rights which states:

> "No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country".

34. The same right is set out in broadly similar terms in the Charter of Fundamental Rights of the European Union (2000) Article 50.

35. However, we cannot agree with Miss Atreya that international human rights law on double jeopardy straightforwardly applies the Article 14(7) requirement to punishment for offences committed in another state. Whilst Article 14(7) certainly applies the ne bis in idem principle to offences adjudicated twice in a given state, it is not settled that it applies to the jurisdictions of two or more states (the Human Rights Committee did not so apply it in A, P v Italy (204/86), albeit more recently the Rome Statute of the International Criminal Court prohibits a state from trying someone for the same crime for which he has been tried by the International Court and vice versa). However, even if the ne bis in idem principle does not yet constitute a peremptory norm prohibiting being punished twice in two different states for the same offence, we do consider that the extent to which it would be overridden in this case (if re-prosecution occurred) would make the punishment disproportionate. That is because the evidence as to Chinese law and practice in relation to the offence of kidnapping, is that it can carry a sentence of up to ten years or more. Even allowing for full account being taken by the Chinese authorities for the period the appellant has already served in the UK in prison, that leaves a likelihood of around four further years of imprisonment. In our view such a punishment,

being additional to one already imposed, would be a disproportionate punishment within the meaning of Article 3 of the ECHR.

36. In reaching this conclusion we have treated as a relevant factor that, even if falling short of serious harm, prison conditions in China are adverse and would involve far greater hardship than that experienced by the appellant in the UK.

37. We have also treated as a relevant factor that **if** the Chinese authorities were to have proceeded to the point where they re-prosecuted him, it was reasonably likely , not simply that a conviction would follow, but that the Chinese authorities would wish to make a public example of the appellant (albeit he claimed to be a victim) by virtue of the snakehead connection. In our view that is a reasonable inference from the evidence we have of the Chinese "strike hard" approach. We have no concrete evidence as to how persons who are punished as an example are treated in prison but we are also prepared to accept that the appellant's position (if re-prosecuted and reconvicted) would not necessarily be the same as that of an ordinary prisoner.

38. Whilst none of these risk factors on their own would have been sufficient in our view to establish treatment and punishment contrary to Article 3, we do think that cumulatively they would. Plainly too we would have also been persuaded that there had been a flagrant denial of the appellant's rights under Articles 4, 5 and 6.

39. However, absent a real risk of re-prosecution for the UK offences, then in our judgment the only relevant issues would be the treatment and or punishment he would receive as a person who has violated exit laws and possibly as a failed asylum seeker.

<u>The re-prosecution issue</u>

40. The Adjudicator did not accept that the appellant would face a real risk of re-prosecution. As already noted, we do not accept that in reaching this conclusion he failed to take adequate account of the evidence before him from Mr Becquelin and Professor Palmer or from the CIPU Assessment. In any event, we now have further evidence from Professor Palmer to consider as well as a report from Professor Fu and must assess matters for ourselves in this fuller light.

41. It is plain that Chinese law does allow for the possibility of double punishment. Article 7 of the Chinese Criminal Law 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. Where the offence has been punished abroad there is discretion. Article 10 states:

> "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 the law he should bear criminal responsibility, may still be investigated for criminal responsibly according to this Law, even if she or 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 mitigated punishment".

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.

43. It is true there was before the Adjudicator a Home Office China Extended Bulletin 1/2003 stating that the "Chinese government **will** prosecute any returnee who they suspect of having committed a serious offence under the Criminal Code irrespective of whether the offence was committed in PRC or abroad" (emphasis added). However, this statement was not sourced and it is not obvious to us that its basis was anything more than the fact that Chinese criminal law provides for double punishment.

44. It is also true that Professor Palmer, Mr Jacquelin and now Professor Fu all agreed that the double punishment provision exists not just formally but is applied in practice to returnees who have committed serious offences abroad. The fact that each in some measure is an expert on Chinese law and practice carries considerable weight. But, like the Adjudicator, we have to bear in mind that in order to be satisfied that return would cause a breach of Article 3 or a flagrant denial of non-Article 3 rights by virtue of re-prosecution and double punishment, we have to find it reasonably likely that this risk is real, not merely theoretical or fanciful. In this regard we consider that it is right to examine the evidential basis for these experts' belief that re-prosecution would occur in this type of case.

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.

46. In this connection we would point out that we see nothing wrong with the Adjudicator make reference to needing a "convincing reason" for

the appellant not being "singled out". Use of the word "convincing" was unfortunate, but it is clear from the determination as a whole that he did not intend by it to apply a different standard of proof treatment than that which he correctly set out in paragraph 13. Requiring in order to establish persecution proof that the authorities would "single out" a person can in other contexts constitute an error of law. Here, however, the Adjudicator was simply making the point that in light of the singular absence of evidence of any re-prosecutions there was no valid reason to think the appellant would be treated differently from other returnees known to have convictions in other states.

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 word 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 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.

50. In our judgment a close examination of all the cases cited does not bear out that the Chinese authorities do enforce re-prosecutions and double punishment in the context of offences wholly committed abroad. Matters remain very much as they stood when the Adjudicator considered this case. Indeed as time has moved on the lack of any example since the revised law was issued in 1997 has become even more striking. There is still no known example of the use by the Chinese authorities of re-prosecution in respect of offences committed in a different state. Accordingly, we consider that the Adjudicator was quite entitled to conclude that the evidence did not demonstrate there

was a real risk to this appellant of re-prosecution. Bringing matters up to date, that is also our conclusion.

51. Miss Atreya has highlighted the point emphasised in Professor Palmer's evidence that the Chinese have heavily limited external monitoring of its legal system and so we should not expect reporting of re-prosecutions. She urged us to draw an inference that re-prosecution occurred based on what was known, namely that there is no doctrine of precedent in Chinese law. However, even though there is no doctrine of precedent, the Supreme People's Court has been publishing decisions in its Gazette since 1985 for their "reference and education value": see article cited in the appellant's latest submissions by S Lubman [1999] Bird in a cage: Legal Reform in China after Mao, Stanford, Calif: Stanford University Press at p. 284-285. Despite this, there is no published case of re-prosecution for offences committed in another state. Since the Chinese authorities have published some details of several of the cases analysed earlier, there seems no good reason to assume they would want to be secretive about re-prosecution cases.

The issue of extrajudicial punishment

52. Miss Atreya contended that the Adjudicator wrongly disregarded Professor Palmer's opinion that, even if not subject to re-prosecution, the appellant would face up to four years of administrative detention in a re-education through labour camp. However, given that the Professor was (and still remains) unable to adduce evidence of any returnees so treated in view of offences committed abroad, we consider the Adjudicator was quite right to discount this as a real risk.

53. It is not in dispute that administrative detention by way of "re-education by labour" may be imposed by government officials extra-judicially (see paragraph 5.37 CIPU April 2003); but, very simply, it was not established it would be applied in this case.

The issue of punishment for illegal exit

54. The grounds of appeal contended that even if it were concluded there was no real risk of re-prosecution for offences committed in other states, the appellant would still experience serious harm by virtue of having left China illegally, contrary to Chinese law. We have already noted that it was now agreed between the parties that upon return the appellant would be apprehended by the authorities. It was further accepted that as a result the authorities would come to know he had committed in China the offence of illegal exit. Before the Adjudicator it was submitted by reference to the expert evidence, that of Professor Palmer in particular, that in consequence the appellant would face up to a year or more re-education through labour for non-payment of the

fine. However, the Adjudicator considered that in the context of the objective evidence read as a whole, Professor Palmer's analysis of this scenario was purely speculative. The Adjudicator stated that :

> "The background material I have seen indicates that this will be treated leniently, usually a fine or a few weeks detention in default, rising to year's imprisonment for a repeat offender or organiser. Non payment of a fine may result in a year of re-education through labour. Professor Palmer has seen such a camp and whilst he suspected it was a model of its description was of a Spartan facility rather than an inhuman one."

55. In the grounds it is argued that this conclusion had no evidential basis. However it was based directly on the Home Office Country Assessment for April 2003 and on Professor Palmer's own evidence. Plainly the appellant was not a repeat offender or "organiser". It is argued that the Adjudicator was wrong to assume the appellant could avoid being a non-payer. However, no evidence was adduced to show that the appellant had no financial means whatsoever and, in the absence of such evidence, we are not prepared to accept that the appellant has discharged the onus on him to prove he would fall into the category of a non payer.

56. In any event, Professor Palmer did not identify any source to support his opinion that detention in re-education through labour camps for a first offender would be more than one year. Even if the period in question were a little more than one year, we do not see that it would be disproportionate, even bearing in mind that conditions in such institutions are adverse. Although Professor Palmer did at one point in earlier written evidence describe conditions in labour camps as "very oppressive", he did accept before the Adjudicator that they were Spartan and less than inhumane and he did not seek to challenge that assessment in his subsequent response to the Adjudicator's determination. The Extended Bulletin of August 2002 identified clear evidence that no harsh punishment was imposed: see paragraphs 6.1-6.9. Although we have accepted earlier that if we had found he would be re-prosecuted for his serious offences abroad, he could face further risk by virtue of being rendered a public example, we cannot see that there would be an equivalent risk in relation to an everyday and relatively minor offence.

57. In her grounds Miss Atreya has suggested that merely as a failed asylum seeker the appellant would be at risk because he would be perceived wrongly to have a political opinion against the PRC. However, we do not consider that the objective evidence demonstrates

that failed asylum seekers per se face a real risk of serious harm on return to China. Furthermore, in the case of this appellant it is accepted that, by virtue of Embassy contact with him in the UK, his personal history would be known to the authorities. That personal history contained nothing to indicate he had political hostility to the PRC.

58. Miss Atreya has contended that it was reasonably foreseeable that upon return to China the appellant will be unable to secure employment. In our view this contention is unduly speculative and is difficult to square with the fact that the Chinese economy is said to be expanding at a fast rate and with a huge and busy black-market sector.

59. We have noted that Miss Atreya's submissions raise criticisms of the fact that the Home Office made contact with the Chinese authorities whilst his appeal was still pending. As far as we can tell, the appellant did not have a pending asylum appeal when contact was first made in October 1997; and as far as we are aware the Home Office duty of confidentiality only arises in the context of an appeal under the Refugee Convention. (It was too late when it was sought to make a fresh asylum claim). However, even if we are wrong about this, these criticisms are a matter between the appellant and the Home Office and do not bear on the issues we have been tasked with deciding in this case.

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.

61. For the above reasons this appeal is dismissed.

H.H. STOREY
VICE PRESIDENT