ZC & Others (Risk - illegal exit – loan sharks) China CG [2009] UKAIT 00028

Asylum and Immigration Tribunal

THE IMMIGRATION ACTS

Heard at Field House
On 27 February 2009

Before

Senior Immigration Judge Kekić

Between

ZC
JW
YW

Appellants

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant:	**Mr B Bedford, Counsel instructed by Sultan Lloyd Solicitors**
For the Respondent:	**Mr N Smart, Home Office Presenting Officer**

(1) Individuals returning to China after having made unsuccessful claims for asylum are not reasonably likely to be imprisoned or subjected to administrative detention for having left China unlawfully; LJ (China – Prison Conditions) China [2005] UKIAT 00099 upheld. Those able to provide the authorities with information on loan sharks or snake heads are even less likely to be at risk of prosecution.

(2) The evidence does not establish that failed asylum seekers indebted to loan sharks will come to harm on return to China; the information on loan sharks in HL (Risk – Return – Snakeheads) China CG [2002] UKIAT 03683 is still applicable.

DETERMINATION AND REASONS

© CROWN COPYRIGHT 2009

1. This is the reconsideration of the appeals of the appellants, a family unit of mother and twin children born on 11 August 1968 and 9 October 1991 respectively. All are citizens of China.

2. The appellants claim to have left China via Beijing airport for Holland in March 2008. They then arrived illegally in the UK on an unspecified date in April. They claimed asylum on 27 June 2008. Their applications were refused on 17 July 2008 and a decision to remove them from the UK was made on the same date.

3. The appellants gave notice of appeal under s. 82(1) of the Nationality, Immigration and Asylum Act 2002 on 4 August 2008.

4. The appeals came before Immigration Judge Pacey at Birmingham on 19 September 2008. She heard oral evidence from the first appellant and in a determination promulgated on 29 September allowed the appeals. The Immigration Judge found that the appellants were members of a particular social group, that they would be at risk from loan sharks in their home area due to gambling debts incurred by the first appellant's husband, that they could internally relocate but that because the background material indicated that illegal exit was punishable by imprisonment, *"this might happen to the first appellant"* and the appeals therefore had to succeed on asylum grounds.

5. Reconsideration was sought by the respondent and ordered by Senior Immigration Judge Chalkley on 8 October 2008.

6. On 9 January 2009 Senior Immigration Judge Ward heard the first stage of the reconsideration. She found that the panel had made a material error of law and adjourned for a second stage reconsideration. Her reasons for so finding are set out below:

REASONS FOR THE DECISION THAT THERE IS A MATERIAL ERROR OF LAW IN THE DETERMINATION

1. The Appellant and her two dependent children sought asylum in the United Kingdom by an application dated 27 June 2008. The Respondent refused the application on the basis that there was a sufficiency of protection for the Appellants from the loan sharks they feared on return to China. The Appellants appealed to the Tribunal and by a determination dated 27 September 2008, Immigration Judge Pacey allowed their appeals. The Respondent sought a reconsideration order which was granted by a senior immigration judge on 8 October 2008.

2. Representation
At the hearing before me the Appellants were represented by Mr Pipe of Counsel and the Respondent was represented by Miss Karunatilake, Home Office Presenting Officer.

3. Submissions.
Miss Karunatilake relied on all her grounds in the application for reconsideration. I summarise them briefly as follows. The immigration judge had found in the course of his determination that the Appellants could relocate internally in order to be free from risk of harm at the hands of the loan sharks. Notwithstanding this clear finding of internal relocation, the judge went on to allow the appeal. This was an error. The judge had then gone on apparently to allow the appeal on the basis that, as an illegal emigrant, the

Appellant would be at risk of receiving a sentence of about three months and therefore the appeal should be allowed. However the judge had failed entirely to consider whether the short period involved would amount to persecution for a Convention reason. There was no consideration of whether this would give rise to treatment which would cross the threshold required for Article 3 of the Human Rights Convention either. The grounds also submitted that the immigration judge had failed to have regard to the principles established by the Tribunal in the case of LJ China but this was not an issue which Miss Karuntilake actively pursued during her submissions.

4. Mr Pipe, on behalf of the Appellants, referred to his Rule 30 Reply. There was no challenge to the immigration judge's credibility findings. The findings were that the Appellant came within the definition of a particular social group, was at risk and there was an absence of sufficient protection. The only challenge in the grounds for reconsideration was in regard to the question of internal relocation. The immigration judge had made a sustainable finding that, because of the likelihood of the Appellant being imprisoned for illegal emigration upon return, relocation would not in the circumstances be a reasonable option. The immigration judge had referred to the most recent objective evidence before her. The immigration judge did not find that such imprisonment would in itself constitute persecutory treatment but that it rendered relocation unreasonable. Looking at the heading under which this matter was considered in the determination, it was clearly part of her consideration on internal relocation.

5. At the end of the submissions I reserved my decision which I now give together with my reasons.

6. Material error of law

I am satisfied that a material error of law has been demonstrated with regard to the determination of the immigration judge. While it is clear from the determination that the immigration judge accepted the account of the First Appellant and found her to be credible, she also found in paragraph 41 that there would not be a sufficiency of protection in her home area. The immigration judge then went on, in paragraph 42, to look at the question of internal relocation. She had considerable reservations regarding the credibility of the reasons given by the First Appellant for not being able to relocate elsewhere in China. She set out those reasons in paragraphs 42 to 46. She clearly concluded that the evidence pointed to the First Appellant being able to relocate to another part of the country. However she then went on in the final paragraph of the determination, paragraph 47 to state as follows:

"however, I note and accept, again from the objective evidence, namely the COI… that illegal emigration is subject to a sentence of up to one year in prison, with first offenders probably receiving a sentence of about three months. It is reasonable to suppose, therefore, that, on the balance of probabilities, this might happen to the first appellant. Since the appeals of the second and third appellant stand or fall with that of the first appellant, their appeals must be allowed on this basis"

7. While the submission made by Mr Pipe may be correct - namely that paragraph 47 contained the reasoning of the judge as to why internal relocation was not possible, (as opposed to being a conclusion that the risk of imprisonment as an illegal emigrant was considered by the judge to be treatment amounting to persecution for the purposes of the Refugee Convention) nevertheless there is an absence of reasoning to indicate how the judge concluded that the internal relocation, which she had accepted was reasonably available in the preceding paragraphs, would nevertheless not be a reasonable option on account of the risk of a three-month prison sentence on return. There was no consideration by the judge at all of whether there was a real risk that the Appellant would be imprisoned; nor was there any consideration by the judge as to whether that course of events, were

there to be a real risk that it would befall the Appellant, would render internal relocation unreasonable for this Appellant.

8. The Tribunal must be slow to overturn a decision in favour of an Appellant without good reason. Furthermore, it is important to remember the guidance given by the Court of Appeal in R (Iran) [2005] EWCA Civ 982. Although given prior to the commencement of the current reconsideration procedure, it is nevertheless instructive. Adjusting the terminology to meet the current Tribunal structure and reconsideration process, the following principles are relevant. The Tribunal must be satisfied that the correction of an error would have made a material difference to the outcome or fairness of the proceedings. Furthermore, a decision should not be set aside for inadequacy of reasons unless the judge failed to identify and record the matters that were critical to his decision on material issues in such a way that the Tribunal, on a reconsideration, is unable to understand why he reached that decision. However, with this in mind, I am satisfied that the judge has not properly considered the matter of internal relocation and there is an absence of reasoning to show how she arrived at her decision to reject internal relocation and allow the appeal.

9. I therefore set aside the decision of the immigration judge.

10. Further conduct of this appeal
The next matter for consideration is whether this appeal that should be sent back to the original hearing centre for a second stage reconsideration. Miss Karunatilake submitted that there was no need for there to be any fresh evidence or fresh findings of fact, and, therefore, it was not appropriate to send the matter back for a second stage reconsideration. She submitted that I should review the evidence and substitute my own decision. Mr Pipe submitted that it was necessary to send the matter back to the hearing centre for a second stage reconsideration on the basis that further evidence would be needed with regard to the issue of relocation.

11. I have concluded that it is not necessary for the matter to be remitted to the original hearing centre but it is appropriate to permit the parties' representatives an opportunity to make submissions to me on the matter of internal relocation. The matter of internal relocation was clearly the matter of evidence and submissions at the original hearing and I see no reason for additional evidence to be called unless that evidence is new evidence which was not reasonably available at the hearing before Immigration Judge Pacey.

12. I adjourn this matter to be listed here at Field House (before me if possible) for a second stage reconsideration, limited to submissions on the existing evidence regarding internal relocation and, where relevant, any new evidence not reasonably available at the time of the previous hearing. If any such fresh evidence is to be produced, it must be filed and served in line with the directions I now give, together with an explanation/evidence regarding why it was not reasonably available at the hearing before Immigration Judge Pacey.

7. The appeals then came before this Tribunal on 27 February 2009.

Appellant's claim

8. The appellants' claims can be summarised in the following way. The appellants fear persecution from loan sharks referred to as Big Ear Holes from whom their fisherman husband/father had borrowed money to fund his gambling habit. In February 2008 strange men started to call at their house and threatened to burn it down if the debt was not repaid. The police did not offer any help when the incident was reported to them and although the appellants managed to evade the men for

some weeks by refusing to answer the door to them, they forced their way into the house in early March, smashed the furniture, beat the first appellant and placed a burning cigarette on her son's arm. The appellants initially took refuge with a relative in the same town for three days and then with another relative in Guangzhou, further away. During their absence their home was burnt down and they assume the loan sharks were responsible. The relative in Guangzhou then found an agent and paid for the appellants to travel to the UK. They left by air from Beijing. The agent took away their Chinese passports and they spent two weeks in Holland before travelling by lorry to the UK.

9. A faxed letter from the relative in Guangzhou has been adduced dated 20 August 2008 which seeks to corroborate the claim that the first appellant's husband borrowed money and that this relative arranged for the appellants to travel to the UK (pp 4-7; appellant's bundle).

Respondent's refusal

10. The Secretary of State appeared to accept that the first appellant's husband owed money to loan sharks but she found that a sufficiency of protection would be available on return to China. She also noted that the appellants had faced no problems when living with relatives away from their home in Hainan (a small island in the south of the country) and therefore concluded that internal relocation was a viable option.

11. The Secretary of State concluded that removal would not place the UK in breach of its obligations under either Convention.

Reconsideration hearing

12. No oral evidence was called at the hearing before me and the appellants did not attend. The proceedings were conducted via video link with the AIT centre in Birmingham. I asked the representatives to address me both on the issue highlighted by Senior Immigration Judge Ward in her 'pink form' (i.e. internal relocation) as well as on the issue of whether the appellants would face a real risk of imprisonment on their return, as Senior Immigration Judge Ward raised this as a matter of concern in paragraph 7 of her reasons for finding that the Immigration Judge had made an error of law.

Submissions

13. Mr Bedford opened the case for the appellants. He submitted that it would be unduly harsh for the appellants to return and face imprisonment for exiting China illegally. He submitted that it was irrelevant that the reason for imprisonment would be unconnected to the asylum claim. He submitted that whilst it was for the Tribunal to decide whether there was a risk of imprisonment, the Country of Origin Information Report (COIR) noted that most first time offenders would receive prison sentences of three months (paragraph 35.03). He submitted that the prison conditions were harsh and degrading (COIR: paragraphs 12.01-12.05). Both the second and third appellants were currently under 18; their situation also had to be considered. As their father's whereabouts were unknown, they would be left to fend

for themselves if only the first appellant were to be imprisoned on return. Paragraphs 27.14-27.22 (COIR) referred to the position of children.

14. Mr Smart in his submissions referred me to the Tribunal decision in LJ (China – Prison Conditions) China [2005] UKIAT 00099. He submitted that according to guidance given in that determination, there was no reasonable degree of likelihood that the appellants would be imprisoned for having left China unlawfully. He submitted that that determination was very pertinent to the case at hand. He pointed out that according to the extract from the US State Department report cited in the COI report, imprisonment for illegal exit was not an inevitable result and there were alternatives such as fines. He referred me to the case of TT (Risk – return – snakeheads) China CG [2002] UKIAT 04937 and argued that although this case mainly dealt with snakeheads and people smuggling, it gave useful guidance about how loan sharks operated (paragraphs 24 and 26) and noted the dearth of evidence as to the fate of those with outstanding debts upon return (paragraphs 37 and 53). There was also some reference in HL (Risk –Return - Snakeheads) China CG [2002] UKIAT 03683 to violence being meted out by loan sharks to those who could repay their debts but chose not to do so (paragraph 13). Mr Smart argued that the loan sharks would be more likely to pursue the appellant's cousin in Guangzhou, a wealthy businessman, than the appellant. Even if that were not the case, the appellant could relocate and there was no evidence to support the claim that the loan sharks would be able to trace her wherever she went. If she registered in a new area there was no evidence to indicate that the authorities would pass on her details to these unlawful groups. It was unclear from her evidence whether the loan sharks in her area had influence only with the local government.

15. Mr Smart submitted that with regard to imprisonment for departing illegally, there was no evidence that returnees were routinely prosecuted. Had they been so treated, one would expect organisations such as Amnesty International or Human Rights Watch to have reported on it.

16. With regard to the submissions made as to the separation of the first appellant from her children if she alone were to be imprisoned, that would not amount to a flagrant denial of her Article 8 rights as separation would be temporary and not permanent as envisaged in EM (Lebanon) [2008] UKHL 64. Moreover both the second and the third appellants who were twins were approaching their 18th birthdays. Should the appellant be prosecuted, this would not amount to persecution. Nor would prison conditions amount to an Article 3 breach. Any term of imprisonment would not impact on her ability to subsequently relocate and relocation would not be unduly harsh.

17. In reply Mr Bedford submitted that the case of TT was of no relevance as it addressed the issue of snakeheads. Article 3 did not need to be breached in order to make relocation unduly harsh. LJ was not a country guidance case and the Practice Directions did not permit citation of *"any old case".* The weight to be placed on LJ was diminished in any event because the appellant had failed to attend the hearing and the case was decided in his absence. Moreover it was not concerned with the issue of internal relocation. There was evidence about prosecutions for illegal exit; this was cited in the COI report. The US State Department report of 2007 post dated LJ as did the New York Times report of 2006.

In any event LJ was not binding. The Immigration Judge's decision to allow the appeals should be upheld.

18. At the conclusion of the hearing I reserved my determination which I now give with reasons.

Findings and conclusions

19. I bear in mind that the burden is on the appellants to make out their case to the lower standard and that I am able to take into account facts and evidence as at the date of the hearing. No fresh evidence has been adduced apart from two Tribunal decisions submitted by Mr Smart (cited in paragraph 13 above), one of which was referred to in the respondent's grounds for review.

20. I consider two issues: that of the viability of internal relocation and that of the likelihood of prosecution for illegal exit from China. It should be noted that the Immigration Judge made no specific finding on whether the appellants left China illegally and that the screening interview with the first appellant indicates that they left China by air and that their passports were taken from them by the agent. This would suggest that they left China on their own passports and that they then entered the UK without travel documents. The background material indicates that the identity of all citizens leaving by air is verified by way of computer checks (paragraph 35.02; COIR) so it appears unlikely that illegal departure would have occurred if a citizen left via the airport at Beijing as the appellants did. However as submissions were not made on this matter and as it may be inferred from her conclusions in paragraph 47 that the Immigration Judge found that the appellants left clandestinely, I proceed on the basis that the appellants *did* depart illegally.

21. The appellants have submitted no background material to support the claim that they would be prosecuted for illegally exiting China and rely entirely upon the section on exit and entry procedures in the Country of Origin Information Report June 2008, provided by the respondent, to support their assertions on this point. Indeed I was not referred by Mr Bedford to any of the background material in the appellant's bundle. Mr Smart confirmed that although a December COI report had recently been published, it contained nothing different in this respect to that contained in the June report. The COI has this to say about Chinese law on illegal exiting, taken from a UNHCR source:

*Article 322 of the Criminal Law covers the penalties for illegal emigration. It states, "Whoever violates the laws and regulations controlling secret crossing of the national boundary (border), **and when the circumstances are serious**, shall be sentenced to not more than one year of fixed-term imprisonment and criminal detention **or control**" (35.03: added emphasis).*

22. It then cites various other sources:

As reported by the Canadian IRB on 9 August 2000, "Leaving China without exit permission or a passport is a criminal offence in China punishable of [sic] up to one year in prison. Only repeat offenders would get a sentence approaching the maximum. Most first time offenders would get a short sentence, depending on the circumstances of their case but probably with sentences of 3 months."

23. There is then information taken again from UNHCR on financial penalties for returnees. Articles 52 and 53 are relevant and state:

"Article 52. In imposing a fine, the amount of the fine shall be determined according to the circumstances of the crime.

Article 53. A fine is to be paid in a lump sum or in instalments within the period specified in the judgment.

Upon the expiration of the period, one who has not paid is to be compelled to pay. Where the person sentenced is unable to pay the fine in full, the people's court may collect whenever he is found in possession of executable property.

If a person truly has difficulties in paying because he has suffered irresistible calamity, consideration may be given according to the circumstances to granting him a reduction or exemption." (35.04).

24. On 11 June 2006 the New York Times reported:

"There is some dispute about what happens to those who are repatriated to China, in part because there have been so few… A Department of Homeland Security spokesman told me, 'We have no reports of people who have been sent back to China being persecuted.' Others, though, are not so sanguine. Two years ago, Richard Posner, a judge on the U.S. Court of Appeals for the Seventh Circuit, vacated a deportation order for a Chinese youth because the immigration judge did not consider the evidence – numerous human rights reports from both U.S. and British organizations – that the asylum seeker might well be sent to jail or a labor camp if returned to China. Posner was concerned that the Chinese youth might be tortured upon his return, though he also conceded that 'the treatment of repatriated Chinese by their government is to a considerable extent a mystery.' Indeed, one Chinese legal scholar I spoke with, Daniel Yu, said that while there is a law on the books in China that calls for a short jail sentence if a person leaves the country illegally, more than likely whatever punishment there might be is at the discretion of local officials." (35.05, cited in COIR)

25. The USSD Report 2007 noted:

"The law neither provides for a citizen's right to repatriate nor otherwise addresses exile. The government continued to refuse re-entry to numerous citizens who were considered dissidents, Falun Gong activists, or troublemakers. Although some dissidents living abroad were allowed to return, dissidents released on medical parole and allowed to leave the country often were effectively exiled. Activists residing abroad were imprisoned upon their return to the country.

"MPS officials stated that repatriated victims of trafficking no longer faced fines or other punishment upon their return. However, authorities acknowledged that some victims continued to be sentenced or fined because of corruption among police, provisions allowing for the imposition of fines on persons travelling without proper documentation, and the difficulty in identifying victims." (35.06; cited in COIR).

26. Contained in the respondent's bundle but not referred to by either part is a September 1999 report from the IRB which was last updated on 18 July 2007 (D1-13). One of the issues considered within that report (which also deals with snakeheads) is whether loan sharks extort or threaten returnees. It cites extracts

from two book length studies devoted to illegal emigration from Fujian province published by Dr Chin, associate professor at the School of Criminal Justice, Rutgers University-Newark and Dr Kwong, chair of the Asian American Studies Programme at Hunter College, City University of New York. Whilst the report largely deals with snakeheads, it does also provide some helpful information on illegal emigration and though focusing on the situation in Fujian, it can be seen a providing an indication of how the authorities behave.

27. It is not suggested by either expert that corruption affects the level of state protection for returnees (D4). Dr Chin notes that there is no evidence of harassment of returnees or of their families by debt collectors. He gives an example of a "big snakehead" who was threatened by a group of clients who had been unsuccessful in reaching their destination and secured a 50% refund of their down payment. Dr Chin states that:

"snakeheads have no reasons to harass those smuggled Chinese who have returned to China…snakeheads are now even willing to pay the fines for the deportees, mainly to make sure that the deportees will not tell the Chinese authorities the identities of the snakeheads" (D4).

28. The same document reports that Jim Fisher, co-ordinator for the Asian Organised Crime Unit at the Criminal Intelligence Service Canada, RCMP Headquarters in Ottawa, stated that he was not aware of reports of loan sharks pursuing returnees or their families (D5).

29. The report also cites the Regulations Concerning Implementation of Law on Exit and Entry of PRC Citizens (1994). Article 25 provides:

"Citizens who have obtained Exit and Entry Documents by illegal means such as making up stories, providing false evidence or paying a bribe, in case of less serious situations, will receive warning or be detained for no more than 5 days. In case of serious situation related to a crime, offenders have to bear criminal responsibility according to the related articles in the Criminal Law of the PRC and National People's Congress Standing Committee supplementary Regulations concerning heavy penalty on the criminal offence of organisation and transportation of people across the border/frontier" (D6).

30. Details are then provided of penalties and of what constitutes a serious offence and it is plain that the harshest penalties of lengthy imprisonment and heavy fines are directed at those who arrange the illegal departure and profit from it (D7-11). Clause 5 of the Regulations state:

"Those departing the country illegally will be detained for a period less tan 15 days by the police or have to pay a fine between 1000 to 5000 RMB. On top of the detention in serious cases, they will be imprisoned or detained for a period under 2 years as well as having to pay a fine" (D8).

31. The starting point is therefore the provisions of the Chinese criminal law set out in the above paragraphs. As can be seen, imprisonment is not an automatic outcome of conviction; circumstances are taken into account and *"control"* or fines are an option. There is evidence which indicate that *"serious circumstances"* relate only to those who profit from smuggling people across the border, and nothing to indicate

that prosecutions against 'ordinary' citizens who depart illegally are routinely undertaken. The IRB information relied upon by the appellant is nine years old and the basis on which the conclusion was reached is not known; possibly it is no more than a summation of Chinese law. Mr Bedford submitted that because it continued to be included in the COI report it followed that it was still pertinent today. However I reject that submission. Its conclusion simply shows that the UK Border Agency has had regard to all available evidence on various matters with the aim of providing a balanced summary. The view of the Chinese legal scholar cited in the New York Times article (see paragraph 23) supports the finding that prosecutions and imprisonment are far from automatic and routine. He maintains that penalties are enforced according to the discretion of local officials. Given that the appellants have no adverse history with the authorities and that their actions were prompted by the fear of unscrupulous gangs whom the authorities have been trying to control, it is not reasonably likely that a harsh approach would be taken towards a woman with two children.

32. The Time report of November 2004 (contained at pp. 153-155 of the appellant's bundle) notes that *'shadow bankers'* do not in fact charge interest rates much higher than the banks and for that reason the authorities have little interest in cracking down on loan sharks (p. 154), However a more recent report in the respondent's bundle reports on more than twenty loan sharks being arrested in Guangdong in 2005 for loaning money to gamblers (E1).

33. Mr Bedford objected to the reliance placed by the respondent on LJ (China – Prison Conditions) China [2005] UKIAT 00099, which he argued was not reported and hence not permitted under the Practice Directions, however I find no merit in his protestations. The relevant sections of the Practice Directions state:

17.3 Reported determinations will receive a neutral citation number in the form [2005] UKAIT 00000 and will be widely available (including being available on the Tribunal's website). They will be anonymised and will be cited by the neutral citation number.

18.2 A reported determination of the Tribunal or of the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal or the IAT that determined the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:

(a) relates to the country guidance issue in question; and
(b) depends upon the same or similar evidence.

34. It is therefore clear that all the cases relied upon by Mr Smart are reported and therefore permissible under the terms of the Practice Directions. Further, Mr Bedford's submission that LJ should be given less weight than any other Tribunal decision because the appellant in that case did not attend his hearing has no basis. There is nothing before me to support his submission that the guidance it provides is undermined by the absence of the appellant or a representative. It should be noted in any event that the relevance of LJ to the case at hand does not focus in any way on adverse credibility findings made in respect of that appellant's claim. The findings relied upon by Mr Smart all pertain to the risk of return for those who

exited China illegally and those findings were based wholly on background evidence and not on the appellant's account (this may be plainly seen from paragraphs 14 and 15 of that decision).

35. The case of LJ took note of the IRB information of 2000 but concluded that:

"The evidence adduced in this appeal did not support the conclusion that an individual returned to China, after making an unsuccessful claim to asylum in the United Kingdom, was reasonably likely to be

(a) imprisoned or subjected to administrative detention on his return for having left China unlawfully, and

(b) whilst imprisoned or being detained on that account, subjected to Art. 3 maltreatment.

Such a conclusion could not properly be based on the general statement in the US State Department Report to the effect that conditions in Chinese prisons and administrative detention facilities were "harsh and frequently degrading". To support such a conclusion, clear evidence would be required from bodies such as Amnesty International, Human Rights Watch or the Canadian Immigration and Refugee Board to the effect that other persons whose histories and circumstances were reasonably comparable with those of the individual concerned had, on their return in the comparatively recent past, been imprisoned or detained and subjected to such maltreatment in sufficient numbers and/or with sufficient frequency. Such evidence as there was pointed in the opposite direction.

36. Specifically with regard to illegal exit and prosecution for that the Tribunal held that the Adjudicator's decision to allow the appeal relying on limited evidence (such as Immigration Judge Pacey has done) would have meant that:

"no Chinese national who left China unlawfully …could be removed to China by the United Kingdom without the United Kingdom being in breach of its obligations under Art.3 of the ECHR"

and that this was a conclusion not properly open to him. Before such a decision could have been reached it was necessary to have significantly more detailed evidence as to:

"1. the frequency with which prisoners in China are subjected to degrading treatment and/or the numbers or percentages of prisoners in any one year who are subjected to such treatment,

2. the history, circumstances and lengths of sentences – and the nature of the offences of which they have been convicted – of the prisoners who have been subjected to degrading treatment whilst in custody in China, and

3. the length of any sentence of imprisonment (as opposed to the maximum sentence) which was likely to be imposed on the individual concerned …

both in China generally and in…(one's) home province)" (paragraph 15).

37. The Tribunal found that LJ would not face imprisonment on account of his having left China unlawfully return because:

"No positive evidence was placed before us to support the proposition, and we are not satisfied, that any persons…who have been returned to China within the past 12 months have been persecuted, tortured or subjected to inhuman or degrading treatment or punishment for having left China unlawfully either at all or in such numbers or with such

frequency as to indicate that there is a reasonable likelihood of any of those things happening to him (Mr L). If persons who were returned were reasonably likely to be persecuted, tortured or subjected to inhuman or degrading treatment or punishment on that account, it is to be expected that reports of that having occurred in other cases would have come to the attention of bodies such as Amnesty International, Human Rights Watch – and have been included either in the US State Department Report, the Canadian Immigration and Refugee Board Reports or the Country Assessment. No such reports were placed before us. We are therefore not satisfied that any such things have happened in any comparable cases in such numbers or with such frequency as to indicate that there is a reasonable likelihood of their occurring in Mr L's case" (paragraph 15a).

38. Mr Bedford seized upon the reference to the past 12 months to argue that the Tribunal's findings were restricted to the lack of evidence over that period and that fresh evidence was now available which was not before the Tribunal. However there is nothing significant in that fresh evidence to support the submission that the situation has changed in any way since the decision in LJ was promulgated.

39. Mr Bedford referred to the New York Times article of 2006 and the US State Department report of 2007. Both are summarised above at paragraphs 23 and 24. I can find nothing in the newspaper article to support the submission that prosecutions of returnees who exited illegally routinely occur or even that there is a real risk of such an event taking place. The concerns of one US judge can hardly be said to amount to evidence of that and indeed the US Department for Homeland Security in 2006 had no knowledge of any such treatment. The US State Department report also contains nothing to support Mr Bedford's submissions. It refers to the imprisonment of activists on return but the appellants are not activists of any kind. There is also reference to the fining and imprisonment of victims of trafficking but the appellants do not fall into that category either. Despite my requests for any further or up to date evidence to justify such a submission, Mr Bedford was unable to refer me to anything other than the 2000 IRB report. That of course was taken into account in LJ at paragraph 15b.

40. What is interesting and flies in the face of Mr Bedford's submissions is the reference in an earlier US State Department report cited in LJ. Cited in paragraph 6.190 of what was then known as the CIPU report, the Tribunal notes that in 2003 the US State Department indicated:

"that first offenders for illegal emigration, on repatriation, sometimes faced fines and that after a second repatriation "could be sentenced to re-education through labour ".

41. As with LJ, the appellants in the present case have no criminal convictions in China and there is therefore:

"*no basis for thinking, and we are not satisfied, that he would be sentenced to a substantial term of imprisonment for unlawful emigration…there appears to be a substantial chance that no more severe sanction than a fine would be imposed"* (paragraph 15c).

42. The evidence does not support the proposition that those unable to pay fines are imprisoned. I have already referred to Articles 52 and 53 in paragraph 22 above and indeed this matter was also addressed in LJ (paragraph 15d) where the Tribunal found that:

"there is no indication, that imprisonment for those unable to pay is either the normal course or reasonably likely to be imposed".

43. Mr Bedford made other arguments which need to be addressed. He stated that if the appellants were prosecuted and imprisoned, the description of prison conditions as *"harsh and degrading"* meant that their Article 3 rights would be breached. I have found that there is no real risk of imprisonment for the appellants on account of their illegal departure. However, even assuming that I am wrong and that the first appellant were to be imprisoned, the evidence does not support the claim that her Article 3 rights would be breached. The description of prison conditions cited by Mr Bedford is taken from the COI report (paragraph 12.04) but is an extract from the US State Department report of 2007 which found that *"Conditions in penal institutions for both political prisoners and common criminals generally were harsh and degrading".* The same description was used in the documentary evidence considered in LJ (paragraph 15d) yet the Tribunal held that the conditions did not amount to a subjection of inhuman or degrading treatment or punishment. It noted the variation of prison conditions in China and it cited the case of TC (One Child Policy – Prison Conditions) China [2004] UKAIT 00138 in which the Tribunal found that the evidence had failed to:

"demonstrate a consistent pattern of gross, flagrant or mass violations of the human rights of prisoners. If there was such a consistent pattern, we would expect to find more evidence than there is of the scale and frequency of human rights abuses against prisoners in China." (paragraph 12; TC).

44. There is also evidence in the June 2008 COI report that the Chinese government is in the process of building 120 large-scale modern prisons and that as of mid 2004 30 had been completed (paragraph 12.01). Further, the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, published on 10 March 2006, stated:

> *"The Special Rapporteur visited a total of 10 detention facilities… In general, the Special Rapporteur found that although the specific conditions of the facilities varied, in terms of basic conditions, such as food, medicine and hygiene, they were generally satisfactory"* (paragraph 12.03).

45. For these reasons I find that the evidence does not support a finding that if imprisoned, the appellant's Article 3 rights would be breached. In the circumstances Mr Bedford's submission, that if the first appellant were imprisoned, her minor children would be left to fend for themselves, goes no further. In any event I find no reason why the appellant's relatives either in Hainan or in Guangzhou would be unable to offer support. It must also be borne in mind that both children are fast approaching their 18th birthdays and that their situation differs radically from the much younger children whose plight is addressed in the sections of the COIR Mr Bedford referred me to. They would not be orphans who were abandoned (paragraphs 27.14-15), they have received an education and they have no disabilities (27.16). there is no risk of abduction for the purpose of selling them to foreigners who want to adopt as it is unlikely a prospective parent would want children aged almost 18 (27.17 and 27.22). As they have relatives in China who could no doubt assist them, they would not be abandoned street children (27.18).

46. Coming now to the issue of internal relocation, I find that the appellants have produced no evidence to suggest that the loan sharks in Hainan have a network which extends throughout China. It must be borne in mind that Hainan is an island in the south of the country and given the size of China and its population, it is very unlikely that the appellants would be located wherever they went. No reasons have been advanced for why relocation would be unduly harsh for the appellants. They are indeed more fortunate than a lot of appellants as they have a wealthy relative in Guangzhou who was generous with financial assistance in the past and who could no doubt assist them again. Even if he could not, the appellants are fit and healthy and there is no reason why they would be unable to relocate to another part of China. The authorities cited do not support the contention that the loan sharks would pursue the appellants. In the case of TT, which whilst dealing mainly with snakeheads also addressed loan sharks, the Tribunal held that:

"even if money was owed by the Appellant to Snakeheads or loan sharks there is indeed a lack of evidence that the Appellant would be actually pursued for the debt particularly in the circumstances of this case. The Adjudicator found that the Appellant did owe money to Snakeheads. We find ourselves in agreement with Mr Yuen that he was probably using the expression "Snakeheads" in the generic sense and was incorporating the possibility that money was also owed to a loan shark" (paragraph 39).

47. and:

"It is however noteworthy that it does not appear to be the Appellant's claim that he has experienced such treatment whilst in this country. As Mr Davidson rightly submitted if the Appellant was not being pursued here for any debt then it would be unlikely that he would be pursued by Snakeheads upon return…" (paragraph 40)..

"there is evidence to indicate that individuals and their families or guarantors in certain circumstances in China may be at risk, that Snakeheads are violent and ruthless towards those who they believe can repay their debts but fail to do so" (paragraph 47).

"The evidence does not satisfy us that those who cannot pay because they have returned to China would meet with similar treatment" (paragraph 48).

48. The country guidance case of HL also provides helpful guidance on those fearing loan sharks. Whilst Mr Bedford was right to argue that LJ and TT were not CG cases, HL is and contains similar findings as were made in TT (paragraph 53). In HL the Tribunal held:

"Quite simply the totality of the evidence does not establish that a returning failed asylum seeker who is indebted to snakeheads or loan sharks will come to harm on return to China. If this had happened to returning failed asylum seekers from the United Kingdom or other countries it is likely that relevant evidence would have become available" (paragraph 12).

"*In this appeal we do not need to consider or make specific findings in relation to what might happen to an individual who owes money to snakeheads or loan sharks, remains in the United Kingdom and does not for whatever reason make the required payments. Suffice it to say that there is evidence before us to indicate that such individuals and their families or guarantors in China may be at risk. There are strong indications that the snakeheads are violent and ruthless, at least towards those who can pay but do not do so.*

This does not mean that they will be equally ruthless towards those who cannot pay because they have been returned to China"[1] (paragraph 13).

"The principal reason for our conclusion that the Appellant would not be at risk on return is the lack of any country information to indicate that she would be at risk. Nevertheless, logic also supports this conclusion. The snakeheads and loan sharks are violent and unscrupulous, but they are running what is likely to be a highly profitable business and would prefer to avoid actions which might damage that business. Violent or other persecutory action against those who are returned to China would be unlikely to result in the recovery of much money, but would be likely to discourage future customers. Amongst the press reports submitted by Mr Yuen are reports of snakeheads going to great lengths to build spectacular houses to show to potential customers, as an indication of the sort of accommodation and lifestyle they can expect if they travel to a western country. If the snakeheads or loan sharks go to these lengths it is not likely that they would risk deterring potential customers by taking hostile action against those who are returned, usually through no fault of their own. Clearly it is a different matter to ensure that those who remain abroad and are able to pay continue to pay for fear of what might happen to then or their relatives at home" (paragraph 15).

49. There is no evidence before me which would justify departing from those findings and indeed the finding in paragraph 13 is supported by Dr Chin's report which confirms that if someone was returned to China, the snakeheads from whom he had borrowed funds would not expect the fee to be re-paid (D2).

50. With respect to the issue of the appellants registering with the authorities in another part of the country under the *hukou* system, there is no evidence before me to suggest that the authorities would pass on their details to unlawfully operating groups. The evidence also makes it plain that since the late 1990s the government has relaxed restrictions on permits for migrants and that urban resident permits can also be obtained by rural migrants (pp. 157-172; appellant's bundle).

51. In conclusion therefore I find that the appellants would not face a real risk of prosecution for departing China illegally if returned, that even if the first appellant or all the appellants were imprisoned, the conditions are not such as to amount to a breach of Article 3, that the second and third appellants would not be left to fend for themselves if only the first appellant was imprisoned and that any separation resulting from that would be temporary and that internal relocation either before or after the term of imprisonment (if one occurred) would be a viable option.

Decision

52. The original Tribunal was found to have made a material error of law. The decision to allow the appeals is set aside and substituted with the following decision.

53. The appeals are dismissed.

Costs order

54. The appellants seek a costs order in respect of the reconsideration. As there was a reasonable prospect of success when reconsideration was ordered, it is ordered that the costs be paid out of the relevant fund.

Dr R Kekić

Senior Immigration Judge

Appendix: Background materials

1.	28.09.99	Immigration and Refugee Board of Canada (IRB); Country of Origin Research. Extended Response to Information Request
2.	29.03.03	Congressional Executive Commission on China; *China's Household Registration System. Sustained Reform needed to protect China's rural migrants*
3.	15.11.04	Time online; China's Shadow Banks
4.	31.05.05	China View: *Guangdong police arrest 20 loan sharks*
5.	20.09.06	US Congressional Executive Commission on China; Annual Report 2006
6.	11.01.07	Human Rights Watch; World Report for 2006: China
5.	11.03.08	US State Department report for 2007; China
6.	06.05.08	Freedom House; *The world's most repressive societies: China*
7.	01.06.08	UK Border Agency; Country of Origin Information Report: China
8.	Undated	Amnesty International report for 2008: China
9.	Undated	Amnesty International; *China: internal migrants: discrimination and abuse. The human cost of an economic miracle*