Heard at: Field House with Video link with IAA Manchester
On 24 February 2005

LJ (Prison conditions-no risk) China [2005] UKIAT 00099

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

10th May 2005

Before:

Dr H H Storey (Vice President)
Mr C H Bennett
Ms P L Ravenscroft

Between

APPELLANT

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

RESPONDENT

DETERMINATION AND REASONS

1. Li Hong Jie (Mr L) was born on 9 January 1980. He is a national of China. He arrived in the United Kingdom on 29 March 2000. He subsequently (the papers do not indicate the precise date) claimed asylum. The substance of his claim as put to the Secretary of State (at interview on 27 June 2000) was to the following effect.

   (a) He had lived Tan Tou in the province of Fujian. His solicitor had lived at Show Wu – also in the province of Fujian. Show Wu had been c.20 km from Tan Tou.

   (b) In c.June 1999, family planning officers had visited his sister and had required her to produce documentary evidence showing that she had been sterilised. She had been unable to produce a document to that effect. She had

therefore been told that she was required to pay a fine. He had been unwilling to pay the fine. The officials had then stated that they would move her refrigerator in lieu of payment.

(c) He (Mr L) had been present at the time. Strong words had been spoken. One of the family planning officials had kicked him. He had seized the leg of one of the officials. That official had fallen and struck his head. The other officials had gone to assist. His sister had told him (Mr L) to make his escape.

(d) He had hidden with friends for "several months" in Show Wu. He had feared that he might be found. He had heard that another man who had come to the attention of the family planning official had been seriously maltreated – so badly that he (that man) had suffered a serious injury to his kidneys. He had also been informed that, if arrested, he might be sentenced to three years imprisonment. He had therefore decided to leave China.

(e) His father had raised the necessary money. A false passport (in the name of Chen Chang Hwei) had been obtained by making a corrupt payment. He had travelled via Russia and Azerbaijan. From Azerbaijan, he had travelled (by air) to the United Kingdom.

(f) He believed that he was still "wanted" in China. The brother-in-law of the official whose leg he had seized and who had fallen, had been a member of an organisation named "110". The "110" organisation was more powerful than the police. The police and the "110" were looking for him.

(g) His father had attempted to resolve matters with the authorities. But they had been "angry and unreasonable".

(h) He had no criminal convictions in China. Nor had he been a member of a political party. Apart from his grandfather's brother, who had been exiled to the North of China in c.1984 – 1986, no members of his family had been involved in political activity or had faced persecution.

At the conclusion of his interview, Mr L requested that he be permitted to remain for three years. He then indicated:

> "Then my record would be clear, in China – it is written off after three years – and I would be able to return to my father."

2. On 22 November 2000, the Secretary of State refused Mr L's application. In consequence, on 15 October 2001, Mr L was refused leave to enter the United Kingdom. The notice of the decision indicated that it was proposed to give directions for his removal to China.

3. On 18 October 2001, Immigration Advisory Service (IAS) gave notice of appeal and served a Statement of Additional Grounds under s.74 of the Immigration and Asylum Act 1999 on Mr L's behalf. In them, they asserted (in summary) that the removal of Mr L, in consequence of his having been refused leave to enter, would involve the United Kingdom in breaches of its obligations under:

   (a) the 1951 Refugee Convention, and

   (b) Arts.3, 4, 6, 9, 10 and 11 of the European Convention on Human Rights.

4. On 17 November 2003, IAS informed the Secretary of State that it was no longer representing Mr L.

5. Mr L's appeal was heard by an Adjudicator, J S Fountain esq, on 20 February 2004. Neither Mr L nor any representative of the Secretary of State was present at the hearing. The hearing was a "first hearing". The reply form (ADJ62) to the standard form directions had not been returned. There was no explanation before Mr Fountain or Mr L's absence. He concluded that he was bound by Rule 44(1) of the Immigration and Asylum (Procedure) Rules 2003 to determine the appeal in Mr L's absence.

6. By his determination (promulgated on 16 March 2004) Mr Fountain dismissed Mr L's appeal on "asylum" grounds but allowed it on "human rights" grounds. He concluded:

   (a) ".... the scenario set by [Mr L] in his evidence is plausible (see para.16.3),

   (b) Mr L was at risk to a sentence of imprisonment for assaulting the family planning official and for having left China unlawfully, and that

   (c) (in reliance on paragraph 5.44 of the then current Country Assessment (October 2003), there was a real risk that he would be subjected to inhuman or degrading treatment or punishment on return to China by reason of the conditions obtaining in Chinese prisons.

   He quoted paragraph 5.44 in the following terms:

> "The US State Department Report for Year 2001 states that conditions in both the prison system and the administrative detention facilities are 'harsh and frequently degrading'. Facilities are often overcrowded, with poor sanitation and of a poor constructional quality. Prisoners often rely upon food and medicine supplements from relatives, with a very low standard of medical care available. Prison discipline relies upon guards appointing 'cell bosses' with many attendant abuses."

7. The Secretary of State gave notice of appeal against Mr Fountain's determination. Permission to appeal was granted by Miss K Eshun (Vice President) by a determination dated 23 June 2004. In granting permission to appeal, Miss Eshun wrote as follows:

> "[Mr Fountain] dismissed [Mr L's] asylum appeal. However, he allowed the appeal under Art.3 of the ECHR (paragraph 17.2) on the basis that [Mr L] will face a prison sentence in China and that the prison conditions are such that he is likely to be subjected to degrading treatment sufficiently serious to engage Art.3… I am granting leave so that the Tribunal can consider whether prison conditions in China reach the threshold of Art.3."

8. Because Mr Fountain's appeal was promulgated on 16 March 2004 (i.e. after 8 June 2003), the provisions of s.101(1) of the Nationality, Immigration and Asylum Act 2002 apply to this appeal. That means that, if the Secretary of State's appeal is to succeed, he must establish that there is an error of law in Mr Fountain's determination.

9. Notice of the time and place of the hearing of the appeal was sent to Mr L by first class post, at 7 Tonge Moor Road, Bolton, Lancashire, BL2 2DH, the address which had been given for him in the notice of appeal against the Secretary of State's decision, his last known address. Regrettably, the date on which the notice was sent has (quite plainly) been wrongly stated as being "19/2/4". That cannot be correct – because (as indicated above) Miss Eshun's grant of leave was not made until 23 June 2004 and the hearing before Mr Fountain took place on 20 February 2004. Nor can it, as a matter of reality, have been 19 February 2005 – because that day was a Saturday and we are aware the Tribunal staff do not work on Saturdays. The file cover shows that, after the grant of leave by Miss Eshun, (the file) was sent to the Tribunal Listing Section on 7 July 2004 and to HH (which we understand to be "Hearing Hold" on 19 July 2004). Our conclusion is that the date of issue given on the file copy is an error for 19 July 2004. In these circumstances, we are satisfied

that the notice of the time and place of the hearing had been properly served on Mr L.

10. When the appeal was called on for hearing, neither Mr L nor any person on his behalf appeared. There was no explanation for his absence. Because we were satisfied that:

    (a) the date, time and place of the hearing had been sent to Mr L at his last known address, and

    (b) there was no explanation, and therefore no satisfactory explanation, for his absence,

    we were required by the mandatory, provisions of Rule 44 of the Immigration Asylum and Appeals (Procedure) Rules 2003 to determine this appeal in Mr L's absence.

11. With very greatest of respect to him, we are satisfied that Mr Fountain's determination is vitiated by the following errors in law.

    (a) He did not make clear factual findings – at least, by reference to the correct standard of proof (reasonable likelihood) in relation to Mr L's evidence as to the events which occurred in China. What he wrote (paragraph 16.3) was as follows:

        > "Accordingly based on the background evidence it can be seen that the scenario set by [Mr L] in his evidence is plausible." [emphasis added].

        He did not go on (expressly) to conclude that the account passed the test of reasonable likelihood. Whether an account is "plausible" is not the same as whether it is reasonably likely to be true.

    (b) Let it now be assumed that Mr Fountain's conclusion that Mr L's evidence was "plausible" is to be treated as being a conclusion that it was reasonably likely to be true. That conclusion was not open to him on the evidence before him. There was no positive evidence before Mr Fountain that Mr L's sister had any children – let alone that she had more than one child. The only evidence before him was that contained in the notes of interview. All that Mr L had stated at interview was that his sister had been required to produce a document to vouch that she had been sterilised and that she did not do so. There was no evidence before Mr Fountain to support the proposition, and we are not satisfied, that it was the practice of the family planning authorities in Fujian in c.1999 (or at any other time) either to impose fines on women who were

unable to produce, on demand, documents vouching that they had been sterilised or to seize the personal effects of women who had been required to produce such documents and had failed to do so. The account given by Mr L did not indicate whether the demand for the document, the failure to produce it, the imposition of the fine and the attempted seizure of the refrigerator had all taken place on the same day or whether there had been any, and if so what, lapse of time between those various things occurring. Paragraph 6.353 of the Country Assessment (October 2003) – the edition which was before Mr Fountain – indicated as follows.

> "For differing reasons, most authorities agree that Fujian province is <u>lax in implementing the birth control policies</u>. The authorities work by incentive schemes rather than coercion, with forced abortion and sterilisation no longer tolerated and efforts to increase the professionalism of family planning workers. Enforcement of sanctions has proved effective; one third of families have three children or more."

The sources of information contained in that paragraph (6.353) are identified as being reports from the Canadian Immigration and Refuge Board in June 1999 and March 2000. The information is, we are satisfied, contemporaneous if the event asserted by Mr L. What is stated in that paragraph renders it the less likely that what Mr L stated had occurred. Although Mr Fountain referred to the contents of paragraph 6.353, we are satisfied, that in reaching his conclusion that Mr L's evidence was "plausible", the fail will give any weight to that paragraph.

(c) In reaching his conclusion that Mr L's evidence was <u>plausible</u> and the conclusion which we <u>assume</u> him to have made, namely that it was reasonably likely to be true, Mr Fountain gave no consideration to the fact that Mr L had not attended the hearing and had given no explanation (let alone a satisfactory explanation) for his absence. He had therefore not had the opportunity of observing Mr L or hearing him give his evidence – let alone observing how he dealt with any questions aimed at elucidating his evidence or testing its validity (we have in mind that the Secretary of State was not represented at the hearing – but that would not have prevented Mr Fountain, or any other Adjudicator, from asking appropriate questions of Mr L to elucidate his account or to test it). If Mr L had genuinely been in fear either of persecution or ill-treatment on his return, it is to be

expected that he would have attended the hearing and given oral evidence. His failure to do so, in the absence of a good reason, ought to have been considered and taken into account by Mr Fountain. He should have considered whether it was appropriate to discount Mr L's evidence on account of his absence. But he did not do so.

(d) Mr Fountain's conclusions that Mr L was reasonably likely to be subjected to degrading treatment in prison in China was based on his conclusion that he (Mr L) would be imprisoned on his return (either on account of his having assaulted the family planning official) or because he had left China without lawful authority – and the extract from the Country Assessment (paragraph 5.44) which we have set out above. The relevant part of the extract from the Country Assessment was the first sentence i.e. the indication that the US State Department Report had indicated that the conditions in the prisons and administrative detention facilities were "harsh and frequently degrading". Mr Fountain's logic, in reality, leads to this result, namely that no Chinese national who left China unlawfully and/or who had been involved in a minor assault on an official of the family planning authority. 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. We do not consider that such a conclusion, or Mr Fountain's conclusion in this particular case, was properly open to him or that he could reasonably have reached that conclusion on the basis of the above extract from the October 2003 Country Assessment. Before reaching such a conclusion, it would have been 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 is <u>likely to be imposed</u> on the individual concerned (in this case, Mr L) for the offence or offences in respect of which it is said that he is at risk to imprisonment,

Both in China generally and in Fujian (Mr L's home province). Mr Fountain did not consider the length of sentence (if a prison sentence was imposed at all) which was reasonably likely to be imposed on Mr L for his offence or offences and if so whether a prisoner serving a sentence of that length of time for offences of the nature of which he had been convicted is reasonably likely to be subjected to degrading treatment in either China generally or in Fujian or any other part of China where for any such sentence was reasonably likely to be imposed or served. In relation to this, it was said by the Tribunal in **TC (One Child Policy – Prison Conditions) China [2004] UKIAT 00138**, as to which, see below, is of assistance as indicating the approach to be adopted in cases involving the risk of human of degrading treatment or punishment in person's in China. That determination had not been promulgated at the time when Mr Fountain gave his determination. We do therefore cite that determination, in this context, as indicated because Mr Fountain did not refer to that determination or follow the approach adopted in it, he erred in law. The importance of that determination in this context is that it indicates the approach which could be adopted in this category of case.

Mr Fountain does not appear to have placed any weight on Mr L's own evidence that after three years his record would be "clear in China", that his offence would be "written off" and that he would be able to return in safety. Whilst that was simply Mr L's opinion, as Mr Fountain was willing to accept Mr L's evidence as to the events in China at face value (and without being seen or hear him give his evidence), it is, to say the least, surprising that he made no mention of this aspect of his evidence. Our conclusion above is not based on this point.

12. As Mr Fountain's determination is vitiated by the above errors in law, we must ourselves determine this appeal on the basis of the evidence put before us – and by reference to the facts, matters and circumstances currently obtaining.

13. We are not satisfied of the truth or accuracy of what Mr L stated at interview. Nor are we able to place any significant weight on it. We reach those conclusions for the following reasons.

    (a) Mr L did not attend the hearing before us. There was no explanation for his absence. Nor, as we have indicated, did he attend the hearing before Mr Fountain. There was no explanation for his absence then. If he had genuinely been in fear, either of persecution or being subjected to a serious breach of his human rights on return to China, it is to

be expected that he would have attended the hearings before Mr Fountain and before us – and would have kept the Immigration Appellate Authority aware of his address (if he moved from place to place).

(b) For the reasons which we have given in paragraph 11(b), we are not satisfied that the account of which Mr L gave accords with known fact the evidence relating to the family or the planning policy and the manner in which it was operated in Fujian in c.1999.

14. Because we are not satisfied of the truth or accuracy of what Mr L stated at interview and because we are unable to place any weight on what he stated, we are not satisfied that there is a reasonable likelihood that he is of interest to the authorities in China on account of the matters which he stated had caused him to leave or that he will be persecuted or subjected to inhuman or degrading treatment or punishment on his return on that account.

15. We are not satisfied that, if returned to China now, there is a reasonable likelihood that Mr L would be imprisoned or, if imprisoned, that he would be imprisoned in circumstances which would involve his being subjected to inhuman or degrading treatment or punishment on account of his having left China unlawfully. We reach that conclusion for the following reasons.

(a) No positive evidence was placed before us to support the proposition, and we are not satisfied, that any persons either whose history and circumstances were comparable with those of Mr L (or those which he asserted to be his) and who have been returned to China within the past 12 months have been 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 subjected to inhuman or degrading treatment or punishment on that account, it is to be expected that report of that having occurred in other cases 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 by the Canadian Immigration and Refugee Board Reports and the Country Assessment. No such reports were placed before us. We are therefore not satisfied that any such thing has happened in any comparable cases in such numbers or with such frequency as to indicate that there is a reasonable likelihood of that occurring in Mr L's case.

(b) The Canadian Immigration and Refugee Board (9 August 2000) is cited in paragraph 6.187 of the Country Assessment in the following terms.

"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."

The same report also stated (see paragraph 6.188 of the Country Assessment) as follows:

"The detention centre [in Fuzhou] is a rectangular, four story building with a large enclosed courtyard. It can accommodate a maximum of 100 detainees. The cells are all around the building with recreation facilities such as ping pong table in the courtyard. On the first floor, there are several rooms for questioning deportees. Those rooms are fairly small with a plexiglass divider separating the detainee and the interviewer. We recognized one of the deportees of the previous day being questioned as we walked by. Each cell can accommodate up to 10-12 people. The cells are large rectangular rooms with an elevated floor on each side where mattresses are set at night and rolled up during the day. Each cell has it's own bathroom, television, and window. From what we could see most of the inmates were sleeping, watching television or playing cards. A larger room is used as a cafeteria and "re-education" room. The whole determination centre is very clean and the living conditions did not appear to be particularly harsh, almost comparable to the equivalent in Canada." (Based on information supplied by a Programe Analyst with Citizenship and Immigration Canada – CIC and related to the repatriation of 90 Chinese illegal emigrants from Canada to Fuzhou in May 2000)."

Paragraph 6.189 indicates that what was stated in the above extract was considered still to be accurate in April 2003. Paragraph 6.190 cites the US State Department Report 2003 as indicating that first offenders for illegal emigration, on repatriation, sometimes faced fines and that after a second repatriation "could be sentenced to re-education labour through". Paragraph 6.182 gives no support to the proposition that those <u>unable</u> to pay fines are imprisoned. It quotes Art.3 of the Chinese Criminal Code in the following terms:

"The fine is to be paid in a lump sum or in instalments in the period specified in the judgment.

Upon the exploration 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 [sic] property.

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

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

(c) What we say in paragraph 16 (below) applies.

16. Let it now be supposed that, contrary to our conclusion above, there is a reasonable likelihood that Mr L will be prosecuted, convicted and sentenced to a term of imprisonment for assaulting the official of the family planning authority. We are not satisfied that either, for that alone or that taken in conjunction with any liability which he may have for punishment as a person who left China unlawfully, Mr L is reasonably likely to be subjected to inhuman or degrading treatment or punishment. Our reasons for reaching that conclusion are as follows.

(a) What we have said in paragraphs 11(b) and (d) and 15 applies.

(b) In **TC (One Child Policy – Prison Conditions) China** (above), the Tribunal considered the risk of a person returned to China being subjected to inhuman or degrading treatment or punishment where that individual had assaulted a police officer (in connection with the family planning policy) and left China unlawfully. Having set out paragraph 5.44 of the October 2003 Country Assessment the Tribunal notes (paragraph 12) as follows:

"Similar conditions are found in the systems which exist for administrative detention. This same report refers elsewhere to concerns about the torture and mistreatment of detainees (6.1), although it also

records steps taken to improve police practices and introduce further legal reforms. At 6.8 it is stated that an Amnesty International (AI) report of February 2001 alleged that torture is widespread and systematic in PRC. Further paragraphs record ongoing AI concerns. However, we note that the AI report does not indicate what proportion of prisoners in China are estimated as experiencing ill-treatment. Given that China is one of the most populated countries in the world, this constitutes a significant lacuna. We come back to the need, in order to be satisfied there is a real risk, for the objective evidence considered as a whole 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."

The Tribunal therefore concluded that, even though there was a risk that the appellant would be imprisoned on return, his return would not involve the United Kingdom in a breach of its obligations under Art.3.

(c) Paragraph 5.64 of the Country Assessment (October 2004) contains the following extract from the Dui Hua Foundation's newsletter (Autumn 2003).

"On September 15, 2003, The Dui Hua Foundation's executive director John Kamm was given a comprehensive tour of Xiamen Prison in Fujian Province, accompanied by representatives of the Ministry of Justice and the Fujian Province Prison Administration Bureau. This was the first full tour of a prison by a foreigner-Kamm viewed all sections, including the rarely visited solitary confinement cells-since the government declared the official end to the SARS crisis. The visit also marked the first time a foreigner was granted access to Xiamen Prison. Established in 1998, Xiamen Prison is a provincial-level "Civilized and Modern Prison," meaning that it is considered among the best in the province. It occupies a 16-acre site in the Dongan District of Xiamen Municipality. Its 2,000 inmates are housed in three cell blocks and are watched over by approximately 200 prison staff. Sixteen prisoners occupy each cell. There are 10 cells per section and six sections per cell block. Xiamen Prison only houses prisoners sentenced to fixed terms… Medical care in the prison's clinic is provided free of charge.

> There is 20,000-volume library and a prison newspaper to which prisoners can contribute articles. Each cell has a TV that is turned on for one hour each evening."

Paragraph 5.62 indicates that there are other, comparable prisons, in China. We do not assume that the sentence which Mr L would serve (making the above assumption) would be served in the Xiamen Prison. We do not assume that the sentence which Mr L would serve (making the above assumption) would be served in the Xiamen Prison or in any comparable prison. The existence of prisons of that kind in China (and in Fujian) demonstrates that what was stated in the US State Department Report (2001) paragraph 5.44 of October 2003 Country Assessment (repeated in paragraph 5.57 of the October 2004 edition) is not of universal application. It gives no support to the proposition that there is a consistent pattern of gross, flagrant or mass violations of the human rights of prisoners.

17. In the light of the foregoing, we do not agree with Mr Fountain's conclusions. The Secretary of State's appeal against Mr Fountain's determination is therefore allowed.

CHARLES BENNETT