TC (One child policy – prison conditions) China [2004] UKIAT 00138

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing : 27 February 2004

Date Determination notified:

10 June 2004

Before:

Dr H H Storey (Chairman)
Mr C Thursby

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation
Ms J. Rothwell, Counsel, instructed by Christine Lee & Co. for the appellant;
Mr M. Raj, Home Office Presenting Officer, for the respondent

DETERMINATION AND REASONS

1. The appellant, a national of China, appeals against a determination of an Adjudicator, Mr S.S. Chohan, dismissing his appeal against the decision refusing leave to remain under the Human Rights Act.

2. The Adjudicator accepted that the appellant, who had four children, had been fined 30,000 Yen for breaching the One Child policy. He had been beaten by the police. Officials had damaged his house and taken his furniture. In the course of his encounter with the police he had hit a police officer. Being unable to pay the amount of the fine, he had gone into hiding and eventually left China illegally. However, like the

Adjudicator (Miss A. Cheales) who had dismissed his earlier asylum appeal based on the same facts, he did not consider that the appellant would face a real risk of serious harm on return. His reasons appear to have been four-fold. Firstly, he noted that the appellant's wife who had remained in China, had not been detained and harassed in any way. Secondly, he found that breaches of the One Child policy were looked upon as breaches of administrative policy, which would not attract more than fines and confiscation of property. Thirdly, despite a report from Professor Palmer to the contrary, he did not consider it was reasonably likely that the appellant would face imprisonment or sterilisation for his failure to pay the fine imposed on him in respect of breaches of the One Child Policy. Finally, although accepting that the appellant had hit a police officer, he did not consider it would result in his being arrested or detained. He went on:

> "Even if I were to accept that the appellant would be imprisoned on return on either a charge of assault of a police officer or under the One Child policy then any ill-treatment which he may receive has not been shown to be reasonably likely to amount to his being killed or to amount to such a degree of severity as to amount to inhuman or degrading treatment which would bring it within the scope of Article 3."

3. This was the Adjudicator's decision on Article 3. In respect of Article 8 he accepted that the appellant since his arrival in 1998 had established a private life in the UK. He also accepted that the appellant had applied for a work permit and a decision was awaited. However, since he considered that the appellant could return to China and apply for entry clearance from there, he did not consider his removal would be disproportionate.

4. We have some difficulties with the Adjudicator's treatment of Article 3. We can find no basis in the objective evidence for the Adjudicator's assessment that the appellant would not be arrested and detained for assaulting a police officer. His reference in the passage quoted above to "any ill-treatment..." misunderstands the fact that "ill-treatment" is one of the synonyms used by the European Court of Hunan Rights to describe treatment contrary to Article 3.

5. However, it does not seem to us that these shortcomings undermined the Adjudicator's principal conclusions. Dealing first with disciplinary measures for breaches of the One Child policy, the Adjudicator's assessment was consonant with the October 2003 CIPU Report, which describes disciplinary measures against those who violate the One Child policy as being relatively limited in scope. Such measures are

said to include fines, withholding of social services, demotion and other administrative punishments that sometimes result in loss of employment.

> 'Levels of fines vary by region. The highest noted is in Shanghai where the fine for violating birth quotas is three times the combined annual salary of the parents. Unpaid fines have sometimes resulted in confiscation of destruction of homes and personal property by local authorities (6.346).'

6. In addition the Adjudicator took into account the circumstances specific to the appellant's case. The fact that the appellant's wife had not met with adverse consequences since his departure was rightly treated by the Adjudicator as a strong indication that the authorities were not continuing to pursue his family for violation of the One Child Policy. We note that on the appellant's own account officials had already taken furniture from his home away, so this was not a case where the state had yet to obtain any reparation. If nevertheless there would upon the appellant's return be a renewed requirement placed on him to pay the fine, we do not consider, even if it would amount to a significant proportion of a person's annual wage, that it could be considered to be so disproportionate as to give rise to a violation of Article 3.

7. We recognise that Professor Palmer's report expresses an opinion about the operation of the One Child Policy to different effect. However, over the past ten years of so the courts and Tribunal in this country and abroad have considered the implication of the One Child policy in considerable depth and in the light of a comprehensive examination of objective country materials. Unlike Professor Palmer, they have had to evaluate these matters by reference to specific legal tests contained with the 1951 Refugee Convention and international human rights treaties and to consider in particular whether persons adversely affected by this policy face a real risk of serious harm. Professor Palmer's evaluation does not establish that, in China there has been or is in relation to the One Child Policy, a consistent pattern of gross, flagrant or mass violations of the human rights of persons who have breached the policy. Following the Court of Appeal judgment in Harari [2003] EWCA Civ 807, it cannot therefore be said that a real risk of serious harm has been established.

8. There remains in this case, however, the question of whether the appellant's assault of a police officer would result in his receiving treatment contrary to Article 3. We have already indicated that we think the Adjudicator was wrong to reason that this assault would not

have rendered the appellant liable to arrest and detention. However even assuming arrest and detention as a consequence, it does not seem to us that these measures in themselves would constitute a breach of Article 3. In the first place, the Chinese authorities were as much entitled as any state authorities to arrest and detain a person for an offence of assault on a police officer.

9. Secondly, we do not consider that the resultant pre-trial detention, the sentence and the post-trial detention the appellant would receive would give rise to serious harm to the appellant.

10. Miss Rothwell sought to persuade us otherwise. She drew our attention to Amnesty International materials and (again) to Professor Palmer's report which warned of the dangers of sentencing to a labour camp (for re-education) and of abusive prison conditions.

11. However, insofar as the appellant may face imprisonment for his assault on a government official, we do not consider that the objective evidence considered as a whole demonstrates that such imprisonment would give rise to a real risk of serious harm. It is correct that conditions in both the prison system and the administrative detention system facilities are described by the US State Department Report for 2001 as "harsh and frequently degrading". The CIPU Report for October 2003 at paragraph 5.44 states that:

> 'Facilities are often over-crowded with poor sanitation and of 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. Forced labour is common. (see also 6.164).'

12. 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.

13. Turning to the Article 8 grounds of appeal, we do not think in respect of a claim based on the right to respect for private life that the same force attaches to the need to remain in the UK to continue private life as can attach to the need to continue family life in the UK. Furthermore, the appellant's private life relationships and his working history in the UK have been built up in his full knowledge that his immigration status has been precarious. We do not consider it can be seriously argued that it would amount to interference (or a disproportionate interference) in his right to respect for private life to expect him to apply from abroad for entry clearance. Although the Adjudicator made loose reference to the appellant awaiting the outcome of a work permit application, it is clear that as a matter of fact the appellant has never had valid leave to remain in the UK and thus any application by him for approved employment can only be considered by the Secretary of State as a matter of discretion outside the Immigration Rules.

14. In any event, even assuming the decision to refuse him leave to remain amounted to an interference with his right to respect for private life, the Adjudicator did not err in concluding he would have the viable option of applying from abroad for entry clearance.

15. Ms Rothwell sought to persuade us that to expect the appellant to make an entry clearance application from China would be erroneous since there was real likelihood the appellant would be forced upon return to serve some period of imprisonment. However, where a period for delay in an entry clearance application is caused by the appellant's being punished under national law for breaking that law, we do not consider that this normally constitutes an exceptional circumstance justifying a person in not being required to return to his own country. It is in the interests of the state in pursuit of the legitimate aim of maintaining effective immigration control to acknowledge and respect the right of other states to require performance by their citizens of legal obligations imposed on them by national law. There may be cases where a legal obligation imposed by a state is itself so oppressive or abusive that its citizens are entitled to disregard them, but that has not been shown in this case. In calculating periods of delay, the Secretary of State is entitled in cases such as this to disregard the period of time during which the appellant serves his sentence of (likely) imprisonment.

16. For completeness we should mention that the grounds also raised the issue of practical difficulties to the appellant being returned to China due to documentation problems with the Chinese authorities. However, we do not see that any such difficulties advance the Article 8 case of this appellant. If the appellant cannot be returned because of difficulties in agreeing valid travel documents with the Chinese authorities, then the appellant will not face return and so will not be faced with any imminent threat to his human rights : see [2003] UKIAT 00016 L (Ethiopia). If on the other hand (and, as now seems established by evidence of recent changes in policy as regards the return of Chinese nationals to China) the appellant would receive valid travel documents and so be eligible for return, then the question of risks arising from such a return is then reduced to the very question examined earlier in this decision : would the appellant be at risk of violation of Articles 3 and 8 of the Human Rights Convention.

17. In relation to this question, we are satisfied that despite some shortcomings in the Adjudicator's determination, the Adjudicator very properly concluded that there would be no real risk to this appellant of serious harm.

18. For the above reasons this appeal is dismissed.

H.H. STOREY
VICE PRESIDENT