Upper Tribunal
(Immigration and Asylum Chamber)

YF (double jeopardy - JC confirmed) China CG [2011] UKUT 32 (IAC)

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Promulgated**
On 28 October 2010	
	……

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE ROBERTS

Between

YF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Selway, Solicitor instructed by Halliday Reeves Solicitors
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer

1. *The guidance given by the Tribunal in IC (double jeopardy: Art 10 CL) China CG [2008] UKAIT 00036 is confirmed save for the addition of the words underlined immediately below:*

   "The risk of prosecution or reprosecution will be a question of fact in individual cases but is more likely where (a) there has been a substantial amount of adverse publicity within China about a case; (b) the proposed defendant has significantly embarrassed the Chinese authorities by their actions overseas; (c) the offence is unusually serious. Generally, snakehead cases do not have the significance they have in the West and are regarded as ordinary (but serious) crimes requiring no special treatment; (d) political factors (which may include the importance attached by the Chinese authorities to cracking down on drugs offenders) may increase the likelihood of prosecution or reprosecution; and (e) the Chinese Government is also particularly concerned about corruption of Chinese officialdom."

2. *Reprosecution/double punishment of a returnee through the administrative disciplinary procedure system is extremely unlikely, since for a person to be considered under this system by virtue of an overseas offence the Chinese authorities must have decided his case was not serious enough to justify reprosecuting him through the criminal law system.*

DETERMINATION AND REASONS

1. The appellant is a national of Peoples Republic of China (PRC) or China, born on 8 July 1968. He was born in the Zhe Jiung province near Shanghai. By his own admission he entered the UK illegally in February 2008. In May the same year he was arrested and charged with cultivating cannabis and on 23 July 2008 he was convicted of producing cannabis, then a Class C controlled drug. On 3 October 2008 he was sentenced to 18 months' imprisonment, serving approximately 9 months of that. A pre-sentence report said that the appellant was found in a rented property in Blyth, Northumberland, tending 407 growing plants. The sentencing judge noted that whilst he had no doubt that the appellant had been subjected to exploitation at a serious level and whilst he was sure the appellant was not one of the gang involved in cannabis drug production, nevertheless in his judgment the appellant could have left the premises if he chose to. After serving 9 months he was re-detained under Immigration Act powers. In November 2008 he was informed that he may be subject to automatic deportation under s.32(5) of the UK Borders Act 2007.

2. An application he made for asylum was refused on 3 June and on 9 June 2009 a deportation order was signed. He appealed. In a determination notified on 12 August 2009 a panel comprising Immigration Judge

Zucker and Mr B Yates dismissed his appeal. However his application for reconsideration was successful and on 24 November 2009 Senior Immigration Judge Perkins found that the panel had erred in law "by not having sufficient regard to the evidence before it that pointed to a contrary result [the appellant being at risk of ill-treatment by reason of his involvement in drug offences in the United Kingdom]." SIJ Perkins noted that the question raised before him was whether and/or to what extent the guidance given in JC (double jeopardy: Art 10 CL) China CG [2008] UKAIT 00036 identified particular risks for those involved in drugs offences.

3. Further directions made by the Upper Tribunal resulted in the production of an expert report by Professor Michael Dillon dated 12 April 2010 together with bundles of background documents submitted by both parties. In passing we would observe that although the parties did not adhere to the Tribunal direction to produce a joint bundle, sensibly they have largely avoided duplication.

4. By virtue of legislative changes brought into effect on 15 February 2010 this appeal now falls to be decided by the Upper Tribunal (Immigration and Asylum Chamber). This is not a case in which there is any dispute about the panel's primary findings of fact.

5. Since there was a great deal of reference throughout the hearing to the case of JC, it is as well to give a brief summary of it.

6. JC was a national of PRC, who in 1999 along with 12 other Chinese men was convicted following trial upon indictment of various offences relating to their capture of a group of trafficked individuals from China who had been brought illegally into the United Kingdom by a rival gang. The appellant and the other gang members held the rival gang's hostages for ransom, forcing them to telephone relatives in China and making terrifying threats in telephone conversations with the Chinese relatives. They also ill-treated the hostages at a level which the trial judge described as 'torture'. The sentencing judge's remarks make it clear that JC was one of five men regarded as at the heart of the conspiracy. JC and his co-defendants were convicted of three counts of conspiracy all contrary to s.1(1) of the Criminal Law Act 1977: conspiracy to kidnap; conspiracy falsely to imprison; and conspiracy to extort money from Chinese nationals in the United Kingdom and their Chinese relatives. Several of JC's co-defendants had since been returned to China. There was no evidence that they have come to harm; but again, there was no direct evidence that they had not.

7. The Tribunal in JC had before it written reports from a number of expert witnesses: Professor Cohen, Professor Palmer, Dr Gechlik, Dr Dillon, Dr

Sheehan and Professor Fu Hua Ling (hereafter "Professor Fu"). It also heard oral evidence from several of these experts including Dr Dillon and Professor Fu. Under the subheading "Country Background Evidence" the Tribunal observed:

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

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

"*Article 7 and Article 10 of the Criminal Law (CL)*

1. The power to re-prosecute in Article 10 of the Criminal Law (CL) derives from Article 7 of the CL.

2. Article 7 of the CL provides:

"This Law shall be applicable to any citizen of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China. However, if the maximum punishment to be imposed is fixed-term imprisonment of not more than three years as stipulated in this Law, he may be exempted from the investigation for his criminal responsibility. This Law shall be applicable to any State functionary or serviceman who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China."

3. This provision reflects the personality principle and allows the extra-territorial application of the CL. Because of this application, the CL follows Chinese citizens wherever they go, and Chinese courts always have jurisdiction to punish Chinese citizens who have committed crimes overseas upon their return.

4. Even if a Chinese citizen has already been tried (and punished) in a foreign country, the Chinese government can re-prosecute the relevant citizen upon his return.

Article 10 of the CL provides:

"Any person who commits a crime outside the territory and territorial waters and space of the People's Republic of China, for which according to this Law he should bear criminal responsibility, may still be investigated for his criminal responsibility according to this Law, even if he has already been tried in a foreign country. However, if he has already received

criminal punishment in the foreign country, he may be exempted from punishment or given a mitigated punishment."

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

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

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

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

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

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

conduct has been subjected to adjudication in another country. This provision in the criminal law, is a concrete manifestation of the principle of Chinese sovereignty and a concrete manifestation of the principle of protection in the CL.

According to the provisions of the CL, crimes committed outside the territory of the People's Republic of China should carry criminal responsibility. Most important are the provisions of Article 7 of the CL, under which the provisions of the Criminal Law [of the PRC] are applicable when Chinese citizens, state personnel and members of the armed forces commit offences outside Chinese territory; the provisions of Article 8, under which the provisions of the CL are applicable to foreigners, who outside PRC territory, commit crimes against the PRC state or against its citizens; and other concrete provisions in the criminal law concerning criminal responsibility. In accordance with the basic provisions of PRC criminal law, criminal responsibility should be borne, even if a [case has] already been tried by a foreign court, including where the foreign court has delivered a verdict of not guilty or a verdict of guilty, and also if the foreign court has imposed a criminal punishment or exempted [the offender] from criminal punishment. The PRC is not bound by the foreign judgements, and in accordance with the criminal law of the PRC, the PRC judicial organs may still decide if such conduct constitutes a crime and the punishment to be imposed. The following points should be given attention in such circumstances: the PRC "may" in accordance with the CL determine [criminal responsibility] but does not have to determine [criminal responsibility] – it is that the power to prosecute is retained to the extent that it decides whether it is desirable or not want to again [try the case] in accordance with PRC criminal law and necessarily decide [the case] in accordance with the concrete case and concrete circumstances. For example, where a convicted person has already been tried by a foreign court, and sentenced to a certain punishment, although with reference to the same crime even if the punishment is still a little heavier, but the offender admits guilt, [and] in the enforcement of the sentence shows effective repentance, then the PRC may [decide] not to carry out a determination [of guilt].

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

sentence, the PRC of course may not be bound by the [decision] in which there is exemption or reduction of the criminal punishment. (Dated: April 17, 2002)".

8. The Tribunal in JC went on to say about case reporting in China:

> "63. Much of the information about the Chinese Court case law and reporting system provided by the expert witnesses in this appeal is entirely novel. In particular, and surprisingly in the light of the reputation which the PRC has for secrecy, all the witnesses referred us to at least one, and several to more than one, web-accessible database of decided cases. The website most frequently mentioned was http://www.chinacourt.org/ ('Chinacourt'), which is sponsored by the Supreme People's Court and contains, in its Chinese version, over 25,000 cases approved by the Supreme People's Court and edited for publication. Chinacourt is freely available to individuals and researchers all over the world, a significant advance on the position set out in WC and in SC. It came into existence in the early 21st century, as did the BAILII website in the United Kingdom.
>
> 64. Professor Fu also had access to the www.chinalawinfo.com website ('Chinalawinfo') maintained by the Law Faculty of Peking University, a subscription-only site with much better indexed information and more decisions (50,000 and rising).
>
> 65. We were told by all the experts of published guidance on the website maintained by the NPC Standing Committee ('the NPC website'), and in particular of what amounts to a practice direction held there since 2002, giving guidance to judges and lawyers on the application of Articles 7 and 10 of the CL[Criminal Law]."

At para 122, when noting Dr Dillon's evidence the Tribunal stated:

> "122. There had been a significant change in availability of court reports in China over the last ten years, due in part to improvements in technology. Dr Dillon accepted that Chinacourt had on it 23,100 criminal judgements or thereabouts. That was a drop in the ocean. (By way of comparison, the principal public websites for United Kingdom judicial decisions date back to the same period, the late 1990s and the open access website of the British and Irish Legal Information Institute was available only from 2000)."

At para 129 it added:

> "Dr Dillon was aware of a certain number of Article 7 and Article 10 [see para 7 above] cases but considered that he did not properly understand the Chinese authorities' motivation; he was not certain that it was deterrence, more a question of national pride and patriotism. If an overseas prosecution case were dealt with in Beijing, NGOs and Governmental organisations from abroad could probably track it.

However, re-prosecution in Fujian province by a lower level Court would render it extremely difficult to find out what happened. Torture was less likely in Beijing than in Fujian."

9. The Tribunal referred in its decision to what it referred to as the Foreign and Commonwealth Office (FCO) 'double jeopardy' letter, which it described thus:

> "177. On 15 July 2005, in response to an enquiry from the Country of Origin Information unit of the Home Office, the Research Analysts of the North Asia and Pacific Research Group of the Foreign and Commonwealth Office (based in London) wrote setting out the position in Chinese law in relation to Articles 10 and 7 of the 1997 Chinese Criminal Code and adding:
>
> > 'Following our recent correspondence, I am confirming our understanding that the concept of double jeopardy is addressed in Chinese law.
> >
> > Article 10 of the 1997 Criminal Code of the PRC states that [see above para 7]…Article 7 states [see above para 7]…'
>
> The circumstances under which an individual would be punished in China for a crime committed in a foreign country, for which he had already been punished in that country, are unstipulated. The Chinese authorities are more likely to take this action if the crime had received a lot of publicity in China, if the victims were well-connected in China, if there were a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of [sic]. Our Embassy in Beijing is unaware of such instances. The specific inclusion in the Criminal Law of 'exemptions' from second punishment in China for crimes committed abroad suggests that the authorities would not take further action against ordinary criminal offences.
>
> I can also confirm that we have no means of monitoring Chinese citizens once they have returned to China."

10. Having noted that none of the 5 cases identified in WC had turned out on closer analysis to be genuine double jeopardy cases, at para 240 the Tribunal then referred to the following examples identified by Professor Wu and Dr Gechlik:

> "A*rticle 7 Prosecutions*
>
> a) In 1996, Chinese citizen Chen Xiangui worked for a Chinese construction company in Kuwait but became unhappy with the working and living conditions. According to the judgment, he incited workers to assault the managers, damaged property and caused disorder in the workplace. Chen was prosecuted, in China, for organising others in disrupting social order and causing

substantial economic loss to the company. The court emphasized the aggravating factor of negative international impact that case might have and sentenced Chen to 2 years' imprisonment. (This case was also mentioned in WC).

b) In 2001, Chinese citizen Yao Ping, a caretaker of a Chinese monk who accompanied the monk to Nepal to work in a temple there, was prosecuted in China for theft from the monk during his work in the Nepalese monastery, of a notebook computer, video camera, a DVD player and a watch belonging to the monk. In convicting Yao, the court balanced the aggravating factor of "undesirable impact to the Buddhist community and internationally" that Yao's crime had created with the fact that Yao had returned all the stolen goods. The court finally sentenced Yao to 5 years' imprisonment and a fine of 1,500 RMB for theft.

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

Article 10 Prosecutions

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

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

question of re-prosecution was at least considered. (Professor Fu and Dr Gechlik)

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

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

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

11. Having assessed the evidence the Tribunal's conclusions in JC were summarised in a head note to the reported decision as follows:

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

2. Prosecution under Article 7 or 10 is a fresh prosecution. The discretion to prosecute is exercised in the light of the opinion of the Chinese authorities as to whether the foreign jurisdiction dealt properly, and without undue leniency, with the offence. It can no longer be said that there is no information available on the use of

that power: the Chinacourt database of cases and the NPC website guidance are maintained directly by the Chinese Government and provides guidance for judges and lawyers on the use of these powers.

3. The burden of proof does not shift to the Secretary of State in double jeopardy cases. The Court of Appeal decision in Adam v Secretary of State for the Home Department [2003] EWCA Civ 265 is not authority for such a proposition, particularly where the decision to re-prosecute is discretionary.

4. In the light of our findings above, the decisions in WC (no risk of double punishment) China CG [2004] UKAIT 00253 and SC (Double jeopardy? WC considered) China CG [2006] UKAIT 00007 and are no longer to be treated as country guidance on the double jeopardy question."

The Tribunal in JC also considered the question of whether there was a risk of persecution/double punishment for returning Chinese nationals through the Chinese administrative or disciplinary procedure system especially in the form of laojiao (education through labour). It observed that all the experts (save for Dr Sheehan) were adamant that laojiao was not a likely approach to cases involving serious criminal offences; the system nationally was applied to minor law violations: see paras 100-112, 120, 163, 167(d), 175, 254, 262, 273 (14-16).

12. The further evidence before the Tribunal in this case is itemised in the Appendix. Here we shall confine ourselves to highlighting the evidence of Dr Dillon, further information supplied by the respondent in response to Tribunal directions and an article by Professor Jianlin of China University of Political Science and Law entitled "China: the application of criminal procedural principles in discipline procedure in China".

Dr Dillon

Written report

13. As just stated Dr Dillon was one of several experts who gave evidence to the Tribunal in JC. His report for this case was dated 12 April 2010. In it he notes that his most recent visit to China was in May 2009 as Visiting Professor in Contemporary Chinese Studies at Tsinghua University, Beijing. His report emphasised three interrelated points. First, that the Chinese legal system is very much a closed system, trials are rarely open to the public and the reporting of trials and sentences is the exception rather than the rule and is subject to censorship and political control in the media. Second, as a result it is extremely difficult to glean reliable statistics on court decisions, sentences and executions. Third, it is also extremely difficult for those in the West to follow up the cases of

individuals who have been returned to China to ascertain how they have been dealt with by the Chinese legal system. Further, given the nature of the Chinese political system it would not be possible to have confidence in any assurances given by government officials about the likely treatment of an individual such as the appellant.

14. Commenting on the expert evidence given to the Tribunal in JC Dr Dillon took issue with Professor Fu's evidence concerning the availability of case reports through the Chinese Courts' database. The only substantial database covering legal cases of which Dr Dillon was aware was that by the Law Department at Beijing University. It was subscription only and was indicative of the drive towards transparency advocated by academic lawyers rather than by the judiciary or government.

15. Addressing the letter of 15 July 2005 by the FCO setting out its understanding of the Chinese law and practice on re-prosecution, Dr Dillon said this made clear that the circumstances under which an individual would be punished in China for a crime committed in a foreign country, for which he had already been punished in that country are unstipulated. However, it was possible to say that re-prosecution was more likely if: (i) the crime had been publicised in China, (ii) if the accused were well-connected or (iii) if there was a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of. The appellant's case would fall into the third category because he was a drug offender and the Chinese authorities currently took a hard line towards such crimes as exemplified by its execution of foreigners in drugs cases in spite of pressure from the international community. It was also pertinent, Dr Dillon's report stated, that the FCO letter confirmed they had no means of monitoring Chinese citizens once they have returned to China.

16. Dr Dillon stated that in China drugs offences had been "politicised". This could be gleaned from two trends. The first, already mentioned, was the choice by the regime to make public the execution of Chinese citizens found guilty of drugs-related offences to coincide with International Anti-Drug Day. The other was the recently publicised cases of executions for drugs-related offences of foreigners (with no previous connections to the PRC). He cited the execution of 4 Japanese in April 2009 for smuggling drugs in north-east China and the execution of a Briton, Akmal Sheikh on 29 December 2009 despite protests from the FCO and credible evidence that he was mentally ill. In April 2010 a South African national, Janice Linden, had been sentenced to death. These cases illustrated the draconian attitude being taken by the Chinese authorities to the smuggling of narcotics and the clear determination by

the Chinese authorities to assert the primacy of its own court and legal system, in spite of international criticism.

17. All this entailed for the appellant, stated Dr Dillon, that he would face a real risk of re-prosecution in China and that the UK government would not be in a position to monitor his fate or seek reassurances that he would not be re-prosecuted. He would be detained, either in a prison or a labour camp, and a sentence for his execution was a real risk.

Oral Evidence

18. In his evidence to us Dr Dillon said that he had no doubt that the Chinese authorities held a detailed database of court cases and sentences, but this was not publicly available. His own check of the Chinacourt database had only found coverage of judgment debtors. There were academic subscriptions using databases but these held details of only a small proportion of the criminal cases dealt with by the Chinese courts annually. When he had spoken with Chinese academics and lawyers about this lack of transparency he had found them reluctant to discuss it, which reflected a general defensiveness in response to outside criticisms of China.

19. Asked whether the publicity given within China to the execution of foreigners was initiated by the Chinese authorities or was rather a response to international media coverage, he said it was the latter. At the same time he did consider that the Chinese authorities used such publicity in order to deter foreigners from such behaviour and to reassert to the international community their nationalist interpretation of Chinese law. Similarly, in relation to their publicising of the execution of Chinese citizens for drug crimes, they did this for its deterrent effect.

20. Dr Dillon said that the Chinese authorities had not faced a serious drugs problem until the 1980s and its reaction since then had been heavy-handed. He was not aware of any particular regional variation in prosecutions: in all provinces, for example, there had been executions.

21. Asked what he thought would happen to the appellant on return, Dr Dillon said he would be handed over by the airport officials to the local police.

22. It was important to remember, said Dr Dillon, that someone like the appellant would not necessarily be dealt with through the court system; he could be dealt with administratively and in this way detained and sent to a labour camp. He believed that whether the authorities decided to deal with someone like the appellant judicially or administratively his particular circumstances would be examined. Notice would be taken of

such matters as whether he had a local "track record" as an offender. But because drugs were involved the approach would be politically driven.

23. Asked by the Tribunal whether it was significant that there had been no known cases of re-prosecution for some time, Dr Dillon said that it could not be assumed that persons returned to China, having committed a crime in another country, would contact friends or relatives or lawyers there upon their return to let them know they were all right. Many Chinese abroad believed in keeping a low profile. When Westerners had tried to find out the whereabouts of persons who had disappeared, it could be very had to find out where they were as illustrated by the events following the award of the Nobel Prize very recently to Liu Xiaobo.

24. In the light of the clarification by UKBA that details of persons convicted of criminal offences in the UK were sent by the Prison Service to the Chinese embassy under a bilateral agreement, Dr Dillon said he assumed that the Chinese Embassy would convey that information to the authorities in China.

25. In cross-examination Mrs Pettersen asked Dr Dillon what his response was to the observation at para 287 of JC that the FCO had confirmed that there had been no requests by the Chinese government for information concerning returned Chinese citizens who had been convicted of crimes in the UK. Dr Dillon said it would be wrong to infer from that that nothing had happened, only that nothing was heard of. The fact that Arts 10 & 7 of the Chinese Criminal Law envisaged such requests did not mean the Chinese authorities would stick to formalities.

26. Dr Dillon said that within China publicity of court cases (e.g. involving re-prosecution) would not necessarily be at a national level, coverage could occur in a local paper and the local press was not monitored by anyone. Asked how significant it was that of the 5 examples of re-prosecution cases that had been identified by the experts in JC only 1 was found to be actual, Dr Dillon said he did not think that re-prosecutions would necessarily be publicised or if publicised, publicised nationally. More particularly, one could not infer from the absence of any known cases of re-prosecution of drug trafficking that such cases did not happen.

27. Dr Dillon accepted that the Chinese authorities appeared to want to publicise its severe punishment of drug offenders, but it did not follow they would want to publicise re-prosecutions. It all depended on whether the authorities saw "political mileage" in publicity. Just because no cases were known did not mean there was not a significant

risk of re-prosecution. For example, very few of the estimated numbers of persons executed in China had received any publicity of their cases. There was no tradition of independent reporting; the media is very highly controlled.

28. Asked by the Tribunal whether he believed the Chinese authorities viewed various types of drugs offences differently, e.g. ones involving "soft" and "hard" drugs, Dr Dillon said he was not aware of the Chinese authorities making the same distinctions, as had many Western countries in relation to marijuana. They lumped all narcotics together. He could not assist the Tribunal with information about likely maximum or typical sentences for different types of drugs offences except by reference to the Amnesty International Report about the likely amounts of different drugs that could lead to the death penalty. He thought it likely that persons caught in possession of small amounts of marijuana would be dealt with through the education-through-labour system rather than through the courts but that in any event was not, he said, the appellant's case: his involved cultivation.

Information on returns of Chinese foreign nationals to China

29. In advance of the hearing the Tribunal asked the respondent to provide information as to the method and route of return of deportees to China and the likely response that the Home Office/Foreign Office would give to a request from the Chinese authorities for information on a person so deported for being, or suspected (by the Chinese authorities) for other reasons, of being a criminal in the United Kingdom (whether convicted of a criminal offence in the United Kingdom or otherwise)". In a letter dated 26 October Ms Holmes on behalf of the respondent replied as follows:

> "UKBA does not routinely disclose the fact that a subject has committed a crime in the UK. However, it should be noted that because the UK has signed a bilateral agreement with China, the Prison Service would in any case disclose this information to the Chinese authorities…see http://pso.hmprisonserice.gov.uk/PSO 4630-immigration-and-foreign-nationals.doc...
>
> If a Chinese prisoner is to be returned emergency travel documents are applied for via the Chinese Embassy in London.
>
> I can confirm that returns to China are via scheduled flights. The main destinations are Beijing and Shanghai – but other destinations used less frequently are Kunning, Guangshou, Chengdu, Nanking, Xiamen and Fuzhou. The use of escorts will depend on the attitude of the subjects and also the nature of the crime committed. I can confirm that escorts can also be used for subjects who have not been convicted of a crime.

> I can confirm that, whilst the number of Foreign National Prisoners returned to their country of origin, including China is known (in 2009 over 5500 were deported or removed to over 150 countries), such country specific information is not disclosed. The details of all removals and voluntary Departures by Nationality can be located in the Control of Immigration Statistics http://rds.homeoffice.gov.uk/rds/pdfs10/hosb1510supptabs.xis. I have attached to this letter pages from the Home Office research and statistics website, which is in the public domain, which indicates how many FNPs as a whole have been removed…".

30. In an accompanying document headed "Removals and voluntary departures (1) by destination (2) and type, nationals of China, January 2004 to March 2010 the sub-headed "Removals and voluntary departures, nationals of China" shows that in 2009 and Jan-March 2010 respectively there were 2,725 and 920 removals including 980 and 335 "enforced removals and notified voluntary departures" respectively.

Chinese administrative/disciplinary system

31. In support of his submission that Chinese nationals who had been convicted in the UK could face further punishment for the same offences in China through the administrative as well as the criminal justice system, Mr Selway adduced an article by Professor Jianlin of China University of Political Science and Law entitled "China: the application of criminal procedural principles in discipline procedure in China". This article analyses the concept of Chinese disciplinary procedure, emphasising that as a control method discipline is used extensively in Chinese social life and that disciplinary regulations have multi-level power sources. Disciplinary regulation, the Professor explains, is as important as the law and Chinese law strictly distinguishes the concepts of illegality and crime:

> "In social legal ideologies, there is a clear difference between the concept of a disciplinary violation and a law violation. Although the range of disciplinary regulation and that of law overlap, we are under the impression that the disciplinary regulation deals with slight internal social orders, while the state laws deal with social order as a whole. The phrase "following the discipline and obeying the law" widely used by people explains the situation."

32. Most disciplinary procedures are secret. The modes of punishment do not extend to restrictions or deprivation of freedom. Persons have been punished through the criminal system can also be the subject of disciplinary punishments. At p.19 it is stated:

> "Prohibition of double jeopardy is not provided for in the criminal procedure as a definite principle, let alone in the disciplinary procedures,

> which are less important…It is worthy of note that the prohibition of double jeopardy is embodied in some disciplinary procedure regulations. For example, in Clause 54 of the disciplinary Regulations of the PLA, no-one shall be liable to be tried or punished again for a breach of discipline for which he has already been finally punished in accordance with the regulations. "

Submissions

33. Mrs Pettersen said that whilst the evidence did suggest the Chinese government treated drugs offences as serious matters, there was no evidence of any re-prosecution of drug offenders from abroad. Since JC was heard in January 2008 there had not been any report of re-prosecutions of any returned Chinese citizens, whether drug offenders or other types of offenders and regardless of how serious the offence. For the appellant to succeed it was not enough to show there was a possibility he might face re-prosecution, which might be suggested by one or two documented cases (which in any case were not to be found); he had to show a real risk. Whilst the Chinese legal system may be closed and secretive, it defied commonsense to suggest that if there had been a significant pattern of re-prosecutions, international observers would not have heard about it. Amnesty International's Reports revealed a close monitoring of what was happening in China. They had been able to highlight and estimate the numbers of executions, including of drug traffickers, Chinese and foreign, but nothing had come to light about re-prosecutions.

34. Mrs Pettersen said there was no need to modify the guidance given in JC. The existing set of indicators would potentially apply to those convicted in the UK of drug offences in certain circumstances, but drugs-related offences should not be made a distinct category. For example, if someone had been convicted of trafficking in heroin and part of the evidence was that he had bribed Chinese officials, there may be a real risk. The absence of evidence of re-prosecutions was a weighty indicator. The Chinese authorities clearly believed in using publicity to deter, yet there was no signal being sent out by them concerning returned drug offenders. Dr Dillon had failed to come up with any cases. It was true there was no monitoring of returned Chinese nationals by the UK government, but it was highly unlikely that if such persons had met problems, this would not have come to light, particularly given the significant number of removals now being made to China, as documented in statistics provided to the Tribunal.

35. As regards the appellant, the fact of the matter is that his offence and sentence of 18 months was relatively minor; it was not credible that the Chinese authorities would perceive it as a high value offence or as one involving organised crime. The judge's sentencing remarks did not

suggest he was involved in supply and portrayed him as someone akin to a forced labourer. He would not be of interest to the Chinese authorities. They had known about his offence since July 2008, yet had done nothing. At most they might decide to monitor his conduct to see he was not continuing to be involved in drugs, but he would not be prosecuted or administratively punished.

36. Mr Selway's submissions built on his skeleton arguments. His main points were as follows. There were various features of the Chinese system – in particular its hardline approach to crime, its strict political control of the courts and the justice system, the fact that it continued to engage in extrajudicial killings, torture and other human rights abuses of its citizens, its inscrutability and lack of transparency – that made it very dangerous to infer merely from a lack of evidence that re-prosecutions did not happen. JC made no mention of drugs-related offence, which was an odd omission given China's hardline attitude to them. Very considerable weight should be attached to the view of Amnesty International (AI) that re-prosecutions and executions were a "distinct possibility". Very considerable weight should also be attached to Dr Dillon's evidence to similar effect. Even the Chinese Supreme Court which now had more oversight over death penalty cases did not have the authority to issue new decisions It could only send the case back, where it could go back round the system again.

37. It was important to keep in mind, submitted Mr Selway, Dr Dillon's evidence that risk to a returned offender had to be considered not just in terms of re-prosecution through the court system but through fresh punishment via the administrative system, education-through-labour etc. There would be no fair hearing.

38. The evidence from Dr Dillon concerning databases of Chinese court cases showed that although the government clearly kept such databases, they were internal. What was disclosed publicly through academic channels was only a narrow selection and reflected only what the Chinese leadership wanted the public to know about.

39. Mr Selway asked us to revisit one of the key findings in JC. The Tribunal's conclusions in that case were against the weight of the expert guidance. Despite the fact that four of the experts involved in that case had identified a real risk of re-prosecution, the Tribunal had gone with the opinion of the sole one who thought re-prosecution unlikely. The Tribunal had been unduly influenced by the facts of the case before them, where it had little choice to find as they did.

40. Mr Selway said it was wrong of Mrs Pettersen to expect that the Chinese authorities would have requested to have the evidence in the appellant's

drugs case yet, if ever. It was naïve, submitted Mr Selway, to assume that the Chinese authorities would follow the letter of their own law relating to re-prosecutions so that they sought to obtain evidence from the UK. They would be able to extract a confession from the appellant under torture. They are dismissive of Western justice. When it came to drugs, they would have in mind that their own drugs laws prohibit marijuana. They would see the appellant's offence which involved him in helping run a cannabis farm where he tended over 400 plants, as certain to yield in excess of the 5 kg amount specified in their law as attracting the death penalty. Their corpus of legislation made very clear that all citizens were under a duty to be on their guard against narcotics and those involved in their production. Their concern about the "Golden Triangle" of drug-trafficking had resulted in a hard-line policy that would mean that it would be mandatory that any returned drugs offenders would be investigated and punished further.

41. The appellant was almost certain to be found guilty, on re-prosecution; the courts had a 99% conviction rate. The view that higher courts could correct "misjudged cases" was fanciful.

42. In relation to the appellant, what would matter to the Chinese authorities was that he had been convicted of an offence in the UK which carried a maximum of 14 years' imprisonment yet he had only been sentenced to 18 months and of this he had only served half that period. They would be certain to see the sentence as unduly lenient, especially since under their own law he would have been likely to receive the death penalty. In China to be convicted of production of drugs, possession of the same is implied, as one is the de facto 'owner' of the same for the purposes of the law.

Background Evidence

Drugs

43. According to the USSD 2010 International Narcotics Control Strategy Report, March 2010, the PRC subscribes to "the four Prohibitions" which include (1) disruption of trafficking organisations, by attacking the source stemming the flow of drugs entering China, (2) strict enforcement of all relevant laws and regulations, (3) treatment of drug users by determining root causes of drugs use and empowering communities to address their particular drug problems, and (4) actively co-operating with other countries and international drug organisations.

44. Achievement of progress with these 4 goals is made difficult for China by a number of factors, including its physical proximity to major narcotics-producing areas in Asia – Southeast Asia's "Golden Triangle"

and Southwest Asia's "Golden Crescent". The Chinese government reported an increase of drug users within China from 955,000 in 1997 to 1,126,700 in 2009. Other published reports state that China may have as many as 15 million drug abusers; drug abuse has become more prevalent among China's youth in large and mid-sized cities.

45. In the AI Report, 'China: Annual execution spree looms on UN anti-drugs day', dated 25 June 2004, it is stated that possession of defined quantities of drugs triggers a potential death sentence. This assessment is restated in the AI letter written to the appellant's solicitors on 17 March 2010 as follows:

> "China's drug laws are particularly draconian. For example, the death penalty can be applied to people convicted of trafficking or being in possession of 1 kg of heroin, 50g of cocaine or 5 kg of cannabis resin. It can also be applied for precisely defined quantities of 'designer drugs' such as ecstasy etc."

In the same letter AI states that it:

> "does not actually know for certain whether someone who has been convicted and sentenced abroad has indeed faced prosecution and been sentenced again upon being returned to China. However, the legal mechanisms are certainly in place for this to happen, and with drug crimes being such a major focus of the Chinese police and judiciary at the moment, it is a distinct possibility that this could happen and a distinct possibility that the persons could be executed if the quantities of drugs involved match or exceed the quantities above."

46. Shedding light on why China had adopted a "Strike Hard" policy towards drug offences, the USSD Report, 2010 states:

> "The [PRC] continues to face problems of drug production and trafficking, which contribute to its status as an important drug transit country in the international drug trafficking area. China is a major manufacturer of 'dual use' chemicals, primarily used for licit products, but also used for illicit drugs like methamphetamine. Organised crime diverts legitimately manufacturer chemicals, especially ephedrine and pseudoephedrine from large chemical industries throughout China to produce illicit drugs. In addition to domestic drug production problems, China's proximity to the Golden Triangle, North Korea, and the Golden Crescent facilitates the trafficking of drugs such as heroin and opium. PRC authorities view drug trafficking as a major threat to China's national security, economy and stability".

47. The same report furnishes the following statistics for 2008: public security agencies in China recorded 61,900 drug-related criminal cases, uncovered 1,565 drug trafficking groups, destroyed 244 clandestine

laboratories and arrested 73,400 drug suspects. Totals seized were 4.33 tons of heroin, 1.38 tons of opium, 6.15 tons of "ice" and tablets, 5.27 tons of ketamine in that process. The number of suspects charged with drugs-related crimes and prosecuted were 50,307.

China anti-drugs laws

48. The current anti-drugs laws in China are those adopted at the 31st Meeting of the Standing Committee of the Tenth National People's Congress of the PRC, 29 Dec 2007, which came into effect on 1 June 2008. Articles 2, 19, 59 and 60 are particularly important.

Article 2 of the Criminal Law provides that:

> "For the purposes of this law, narcotic drugs include opium, heroin, methylaniline (ice), morphine, marijuana, cocaine and other narcotic and psychotropic substances that are addictive and are kept under control according to State regulations."

Article 19 provides that:

> "The State exercises control over the cultivation of the mother plants of the narcotics drugs for medical use. Illegal cultivation of the plants of the opium poppy, cocoa, marijuana and of the other mother plants that may be used for refining or processing narcotic drugs that are kept under control according to State regulations is prohibited. Smuggling, trafficking in, transporting, carrying or possessing of the seeds or seedlings of the mother plants of narcotic drugs which are not inactivated is prohibited."

Article 59 assigns criminal and other responsibility as follows:

> "Where a person commits any of the following acts which constitute a crime, he shall be investigated for criminal responsibility according to the law; if the case is not serious enough to constitute a crime, a penalty for administration of public security shall be imposed on him according to law: (1) smuggling, selling, transporting or manufacturing narcotic drugs; (2) illegally possessing narcotic drugs; (3) illegally cultivating the mother plants of narcotic drugs; (4) illegally trafficking in, transporting, carrying or possessing the seeds or seedlings of the mother plants of narcotic drugs, which are not inactivated; (5) illegally importing the methods for manufacturing narcotic or psychotropic substances or the chemical materials that can easily be transferred into narcotic drugs; (6) compelling, or instigating another person to ingest or inject drugs, or luring or inveigling him into doing so; or (7) providing narcotic drugs to another person."

Article 60 stipulates that:

> "Where a person commits any of the following acts, which constitutes a crime, he shall be investigated for criminal responsibility according to law: if the case is not serious enough to constitute a crime, a penalty for administration of public security shall be imposed on him according to the law..."

Death Penalty and Executions

49. Under the Criminal Law of the PRC, Article 48 mandates that:

> "The death penalty shall only be applied to criminals who have committed extremely serious crimes".

Article 61 provides that: "When sentencing a criminal, a punishment shall be meted out on the basis of the facts, nature and circumstances of the crime, the degree of harm done to society and the relevant provisions of this law."

50. The Asian Harm Reduction Network (AHRN) in its News Digest of 26 June 2009, states that in 2008 China was one of 28 countries that implemented the death penalty. 16 countries in Asia (including China) applied the death penalty for drug-related offences.

51. The FCO in its report on China dated 17 March 2010 notes that China executes more people than any other country. It refers to AI figures on known executions showing China as being responsible in 2008 for 1,718 executions compared with a worldwide total of 2,390. It adds that the real number is believed to be much higher, estimates ranging from 2,000 to 10,000. China retains the death penalty for 68 crimes. It is said that two recent procedural reforms (the holding of all death penalty appeals in open court; since 2007 the review by the Supreme People's Court (SPC) of all death sentences) may have led to a reduction in executions, but this has proved impossible to verify.

52. The International Drugs Policy Consortium in the IHRA Global overview for 2010 states that the country's tough counter-narcotics efforts and policies make it likely that a "sizeable portion" of those executed each year are drug offenders. The IHRA Report also cited Zhong Jun, Vice President of the SPC, claiming that the courts handled 14,282 drug-related cases between Jan and May 2009, registering 6,379 convictions with severe penalties ranging from imprisonment to capital punishment. Drug offences capable of resulting in executions include manufacture, planting, transportation and sale and relapsing drug use. China is the only Member State identified in the report as having the death penalty for drug offences.

53. Several background sources refer to the fact (already noted by us) that in recent years the Chinese authorities have used 26 June, the UN's International Day Against Drug Abuse and Illicit Drug Trafficking, as an opportunity to make a high-profile public example of drug offenders. The New Zealand Drug Foundation records that in 2001 more than 50 people were publicly executed for drug crimes at mass rallies, at least one of which was broadcast on state TV. In 2002 the same event was marked by 64 public executions in rallies across the countries:

> "While the typical application of capital punishment is for trafficking, cultivating, manufacturing and importing/exporting, the definition of capital narcotics crimes is not limited to these offences".

54. According to the AHRN Digest, China has marked the 26 June with executions since the early 1990s. An AHRN Report for 2007, entitled "The Death Penalty for Drug Offences: Violation of International Human Rights Law", reports a UN human rights monitor report that in 2004 'dozens of people were executed on 26 June'. The same report states that A1 recorded 55 executions for drug offences in the 2 week period leading up to 26 June in 2005. The report refers to Chinese media reporting multiple death sentences being pronounced and executions being carried out on or around 26 June 2008.

Treatment of Foreign Criminals

55. Various sources refer to recent prosecutions and execution in China of foreigners.

56. On 29 December 2009 the British national Akmal Sheikh was executed in Urumqi, Xinjiang following his conviction for drug smuggling.

57. On 6 April 2010, China executed a 65 year old Japanese who had been caught illegally carrying more than 1.5 kg of "stimulant drugs" in September 2006.

58. On 20 July 2010 BBC News report that 3 Japanese citizens had been executed in Liaching province, in China for trying to smuggle the drug methamphetamine. On the same day a Philippine news agency reported that there were 66 Filipinos facing the death penalty in China for illegally bringing in huge amounts of heroin and other narcotics, 8 of whom had already been executed.

Double Jeopardy Cases

59. As already stated in JC the Tribunal found, having analysed a great deal of evidence and the researches of several experts, that only one case was a genuine double jeopardy or a reprosecution case. There was also the case of Mr Yong described in para 240(e) of JC. He was convicted of trafficking illegal drugs to Japan and was sentenced to 5 years' imprisonment. On release in late February 2007 he was "handled in accordance with relevant legal rules" by the authorities at the Shanghai border. Dr Gechlik did not know whether that included re-prosecution.

Our assessment

60. In remaking the decision we must take into account the evidence as a whole, applying the lower standard of proof.

Dr Dillon

61. Unlike the Tribunal in JC we have not had the benefit of evidence from several experts, which would have given us the ability to compare their position. However, since in relative terms not that much time has passed since JC, we do not think that has handicapped our task. Like the Tribunal in JC we have found the evidence of Dr Dillon of considerable assistance but have noted that he is not an expert in the Chinese criminal law and many of his observations on the issue of double jeopardy are based on his own general views about the Chinese political system and state policies. It is very understandable that he should wish to re-emphasise the point he made in JC that lack of evidence of reprosecutions must not be equated with conclusive proof that they do not or will not happen. At the same time, we have not found persuasive his suggestion that they could be happening secretly, since there are strong reasons for considering that the Chinese authorities attach significant importance to the notion of deterrence of criminality through publicity and are also concerned to show the international community that they are tough on narcotic drugs. In addition, whilst we accept that much is still not known about the workings of the Chinese criminal justice system, efforts to ensure secrecy have not prevented international observers such as Amnesty International from compiling a very significant body of data about such matters as to the numbers of persons executed and numbers imprisoned.

62. We think Dr Dillon must be right in suggesting that the lack of any official monitoring by the UK (and seemingly other countries) of what happens to returned Chinese offenders should also be a relevant consideration. But we cannot agree with him that we can infer from that that double jeopardy could be visited upon returned nationals without international observers knowing about it. In our judgement it is extremely unlikely that offenders forcibly returned to China would not

be in a position to alert international observers, via their friends or family, in the event that they found themselves facing further legal punishment for the same offence(s) from the Chinese authorities on return. It is common sense that when they knew when they were to be flown back they would notify a friend or family or a legal representative in the UK beforehand and arrange to contact them after return. In most cases it is also likely they will be able to inform family or friends back in China when they are due to return and to where. This is the age of the mobile phone and the internet and the Chinese people have these technologies in large number. Even though there is evidence that the Chinese authorities seek from time to time to control such forms of communication Dr Dillon agreed that normally mobile phone communication to and from China was straightforward. The notion therefore that there are likely to be a significant number of returning offenders who are then secretly removed from circulation and subjected to serious punishment is in our view not tenable. We consider there would be reports finding their way to organisations such as AIJ noting that such and such a returned offender failed to notify his contact as arranged or that friends/family awaiting their return after airport processing were unable to trace them.

63. In addition, as we shall come to in a moment, even if we were highly persuaded by the views of an expert on this subject, the effect of that on the guidance we give still turns very much on our need to assess risk according to specific legal criteria: see below para 60.

Revisiting country guidance

64. Mr Selway, drawing on the evidence of Dr Dillon, sought in parts of his submissions to argue that the guidance given in JC was wrong at the time (and was still wrong). We reject that contention.

65. We would first of all note that JC was expressly approved by the Court of Appeal in JC (China) [2009] EWCA Civ 81, notwithstanding their Lordships being well aware that on several matters the Tribunal had preferred the evidence of Professor Fu over that of the other experts (including Dr Dillon): see paras 15-18.

66. Second we would observe that the Tribunal in JC reached its conclusions on the subject of the risk of reprosecutions on the basis of an assessment of the evidence as a whole, not simply that from the experts. Further, of course experts, (Professor Fu included) are not concerned with or expert in the criteria that judges have to apply in deciding issues of real risk under the Refugee Convention, the Qualification Directive or the Human Rights Act. That dovetails with the point made by Scott Baker LJ in JC (China) at para 25 when he wrote:

> "The question is not, as Ward LJ pointed out in argument, whether there is an increased risk of prosecution but whether the level of risk is such that returning the appellant would put him at real risk of his human rights being breached…"

67. There is a further matter. As we have seen, Mr Selway has sought to identify further evidence to hand since JC, with particular emphasis on the oral and written evidence of Dr Dillon. This further evidence has clearly been collected and adduced with a view to establishing that reprosecutions (especially for drugs offences) are much more of a risk than JC considered. Whilst it is extremely helpful to the Tribunal that such evidence has been produced, it has plainly not been collected as part of an attempt to collect all relevant evidence on the issue – i.e. evidence pointing against as well as for the view that reprosecutions were (and are) more of a real risk than JC found they were. It is presented as the evidence in support of one view. That poses a particular problem. As the Tribunal observed in TK (Tamils, LP updated) Sri Lanka CG [2009] UKAIT 00049 at para 13(ii):

> "Secondly, all parties should understand that when a case is set down to review existing country guidance, the latter is to be taken as a starting-point. The Tribunal has not ruled out that in some cases there could be a challenge to the historic validity of Tribunal country guidance (although such would require the production of evidence pointing both towards and against the accuracy of that guidance at the relevant time: see AM & AM (Armed conflict; risk categories) CG Somalia [2008] UKAIT 00091; but that will be rare. .."

68. In the absence of evidence pointing against the accuracy of JC at the time it was heard we do not consider that there is any proper basis for revisiting its historic validity. The only question before us, then, is whether evidence now to hand demonstrates that events since JC justify the Tribunal taking a different view of the position now.

The availability of Chinese case law

69. We do not consider it helpful to reach any definitive conclusions on the issue raised by Dr Dillon as to whether or not the Chinacourts website contains the range of decisions which JC indicated that it did. If Dr Dillon is right in what he said to us (that Chinacourts does not contain any criminal cases), then he appears to have changed his mind since the evidence he gave in JC (at para 122). But in any event, it seems agreed on all sides that through a combination of government and academic websites, some accessible to the outside world, some not (or only indirectly so), it is increasingly possible for international observers to

gain a better picture of Chinese jurisprudence, at least as represented by the cases that the government is prepared to make known.

Removals to China

70. Mrs Petterson sought to supplement her main arguments as to why reprosecution/double punishment of returned Chinese nationals was likely to be a rare by reference to the fact that there were no known cases despite a significant number of returns to China of Chinese nationals who had committed crimes in the UK. However, in our opinion the statistics she produced afford us only very limited help in establishing how many returns there have been of such persons. For one thing they do not identify the numbers of enforced removals. For another they do not identify how many of those removed had committed criminal offences in the UK (the respondent's letter of 26 October 2010 states that whilst the number of Foreign National Prisoners returned to their country of origin is known country specific information about such person is not disclosed. Further, they give us no information about the nature of the crimes involved, as to whether they were relatively serious or not.

Chinese knowledge of overseas offenders

71. As we have seen, by virtue of the fact that the UK has a bilateral agreement with China, information that a national of China has committed a crime in the UK is disclosed to the Chinese authorities by the UK, although it is the Prison Service, not UKBA, that does this. If a Chinese prisoner is to be returned, emergency travel documents re applied for via the Chinese Embassy in London. Accordingly we consider that it can safely be assumed that in the case of a national of China who is removed from the UK having committed a criminal offence whilst here, the Chinese authorities will come to learn both of the fact of his or her return and of the basic facts about the crime concerned.

The degree of risk of reprosecutions

72. We remind ourselves of Scott-Baker LJ's observations cited earlier at para 66.

73. As regards reprosecutions generally, there are competing considerations.

74. On the one hand, it is extremely difficult to obtain comprehensive information about the Chinese system of criminal justice and how it treats offenders. There is no official publication of the number of offenders who suffer the death penalty for example. And, as just noted, the case law of the courts is only selectively presented or known. In

addition, there is no official or organised monitoring of returned Chinese nationals by the UK or other Western countries. There is also evidence that the Chinese government is keen to assert to the international community that it continues to attach primacy to its national law. We do not doubt Dr Dillon's statement that the Chinese system of government remains very much a closed, secretive one.

75. On the other hand, JC established that up to January 2008 cases of reprosecution were rare. And in the period of two and three quarters years since there have been no cases that have come to light.

76. The fact that there are competing considerations has led to the view being taken that (1) reprosecution cannot be ruled out as a possible step the Chinese authorities might take in respect of a returned Chinese national who has been convicted abroad; but (2) the degree of likelihood of that risk being real as distinct from remote will vary depending on a number of factors. It is convenient to reiterate how the FCO letter of 15 July 2005 and then the Tribunal in JC summarised matters. The FCO letter stated:

> "The circumstances under which an individual would be punished in China for a crime committed in a foreign country, for which he had already been punished in that country, are unstipulated. The Chinese authorities are more likely to take this action if the crime had received a lot of publicity in China, if the victims were well-connected in China, if there were a political angle to the original crime or if the crimes were of a particular type that the authorities wanted to make an example of [sic]. Our Embassy in Beijing is unaware of such instances. The specific inclusion in the Criminal Law of 'exemptions' from second punishment in China for crimes committed abroad suggests that the authorities would not take further action against ordinary criminal offences."

77. The head note to the Tribunal decision in JC stated:

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

reprosecution; and (e) the Chinese Government is also particularly concerned about corruption of Chinese officialdom.

2. Prosecution under Article 7 or 10 is a fresh prosecution. The discretion to prosecute is exercised in the light of the opinion of the Chinese authorities as to whether the foreign jurisdiction dealt properly, and without undue leniency, with the offence. It can no longer be said that there is no information available on the use of that power: the Chinacourt database of cases and the NPC website guidance are maintained directly by the Chinese Government and provides guidance for judges and lawyers on the use of these powers."

78. As regards the FCO letter, both Dr Dillon in evidence and Mr Selway in submissions sought at different junctures to suggest that its summary was incomplete or inadequate, although both also sought to rely on its statement that the circumstances under which an individual would be punished in China for a crime committed in a foreign country for which he has already been punished there were "unstipulated" as demonstrating that the risk of such punishment was at large. However, as is clear from the FCO text, the reference to "unstipulated" is intended as a description of the Chinese statute; and the letter goes on to identify specific factors that would increase the risk of the statute been applied.

79. Having considered the FCO letter alongside a great deal of other evidence the Tribunal in JC followed a similar approach although formulating the factors it thought most relevant somewhat differently.

80. Having examined the further evidence presented to us by both parties for this case we would observe that in it we have identified references to a wider number of factors as being potentially relevant. They include:

- whether the offence is a very serious one (ordinary or very common offences appear not be of interest);

- whether the Chinese authorities are likely to perceive the overseas punishment as unduly lenient by their own standards;

- whether they consider there has been an admission of guilt accompanied by effective repentance;

- whether there has been any international publicity;

- whether there has been any indication of Chinese concerns expressed through diplomatic channels;

- what the time period is since the prosecution in another country;

- what difficulties are likely to be involved for the Chinese police/prosecuting authorities in obtaining the evidence in the case (either – as envisaged in the statute - from the overseas country involved or by other means), particularly bearing in mind that they are expected to achieve a conviction rate of 99%;

- whether there are any Chinese nationals who were the victims of the relevant crimes;

- whether any such Chinese victims could exert influence in China or were well-connected;

- whether there is any political angle or any active interest on the part of the Chinese authorities to make an example in public (this will depend a great deal on what issues those authorities wish to highlight at any particular time).

81. As regards reprosecution for drug offences in particular, Amnesty International has stated that it considers this a "distinct possibility" and Dr Dillon appears to consider that the appellant's case is an illustration that in certain cases there can be a real risk of reprosecution for a drug offender. We also know that China adopts a draconian approach to serious drug offenders and has regularly carried out executions often in public settings on June 26 each year.

82. Whilst the further evidence we have had leads us to think that in dealing with any case of reprosecution it will be valuable to bear in mind the above non-exhaustive list of factors, we do not see that this gives rise to any need to modify the guidance given in JC, which is, and was always intended to be flexibly understood and applied.

83. As regards Mr Selway's submission that we should supplement the guidance in JC so as to specify drug offenders, we see sense in that. That is largely because we agree with him (and Dr Dillon) that in current-day China the issue of punishment of drug offenders has been politicised by the Chinese authorities. But since the category specified in (d) of the JC guidance – "political factors" is clearly a wider category, the need to our supplement it can be limited to adding in parentheses the following"(which may include the importance attached by the Chinese authorities to cracking down on drugs offenders)".

84. However, given that there have not been any known cases of reprosecution of drug offenders that are truly "double jeopardy" cases, this indicates to us that real risk of a drug offender suffering double

jeopardy is only likely to exist in cases where factors (a), (b) and (c) are also present.

85. It also seems to us particularly unlikely that such reprosecutions would arise unless the Chinese authorities wanted to make a point to the international community as to their treatment of their own nationals. Despite Dr Dillon's somewhat equivocal evidence on the issue of whether the Chinese authorities use domestic publicity for deterrent purposes, it seems to us that they do and that the executions carried out on 26 June each year demonstrate that. But that in our view appears to bear out Professor Fu's view that increasingly the Chinese authorities are less inclined to apply their "double jeopardy" laws. It may be, of course, that there have simply not been potential cases, although it would appear to us likely that among the number of Chinese nationals who have gone overseas and then returned there will have been those who have been punished for drug offences overseas and that the Chinese authorities will know of them. If the Chinese authorities were to use double jeopardy in a drugs case, therefore, it seems to us that it would be for the purpose of sending out a message to the international community as to how tough China is on drugs compared with the overseas country concerned. We do not think they would contemplate such a step except in a very serious cases or cases involving drug trafficking on a very significant scale where factors (a), (b) and (c) are also present.

The administrative justice system

86. It will be apparent from the above that we have not accepted the submission of Mr Selway that even if a national of Chinese convicted of crimes overseas would not face reprosecution/double punishment through the Chinese criminal justice system he could face its equivalent through the Chinese administrative/disciplinary system.

87. We are bound to say first of all that we found Mr Selway's submission on this matter somewhat surprising given that it was not supported by Dr Dillon and indeed we know from the evidence Dr Dillon gave to the Tribunal in JC that he (like the other experts save for Dr Sheehan) considered that this system was unlikely to be applied in foreign-related cases. Certainly the evidence of Dr Dillon in JC was that the laojiao system applies to minor law violations and that serious crimes were more likely to be punished by the laogai system (see JC, paras 112,120, 254, 273(14-16; see also paras 100, 163, 167(d), 175, 262)).

88. Secondly, we did not find the evidence submitted by Mr Selway concerning the Chinese disciplinary procedure system very helpful. The article by Professor Jianlin contains a number of passages that are difficult to understand and it does not make clear the role played in this

procedure by the laojiao (re-education through labour) system. Whereas this article describes disciplinary punishments as not extending to restriction or deprivation of liberty, we know from the COIS for January 2010 at para 12.19-20 that Article 9 of the Law of Administrative Penalty states that "Different types of administrative penalty may be created by law. Administrative penalty involving restriction of freedom of person shall only be created by law": we do not know whether there is any such law that covers laojiao, although paras 12.11-17 of the same COIS would suggest not. However, taking this article on its face it would appear to confirm that (except when they are used as a complement) disciplinary procedures are normally applied to types of illegal conduct that are less serious than those that are subject to criminal prosecution and punishment. The same article appears to suggest that insofar as "double jeopardy" principles are applied in China they are less present in the disciplinary procedure system and this system even contains some provisions prohibiting double jeopardy.

89. We accept of course that this parallel system of justice is very important in China and may be particularly relevant when considering cases in which the risk on return is related to likely punishments facing a person in China for violations committed in China. But in the context of reprosecution/double punishment we do not see use of this system as a real risk, since if an overseas offence is not seen as serious enough for the Chinese authorities to pursue through their criminal justice system with a view to double punishment, it is even less likely they would pursue an adverse interest through the administrative/disciplinary procedure system.

The Appellant

90. As already noted, the appellant is in his early 40s. On 23 July 2008 he was convicted of producing cannabis, then a Class C controlled drug. He was sentenced to 18 months' imprisonment, serving approximately 9 months of that. A pre-sentence report said that the appellant was found in a rented property in Blyth, Northumberland, tending 407 growing plants. The sentencing judge noted that whilst he had no doubt that the appellant had been subjected to exploitation at a serious level and whilst he was sure the appellant was not one of the gang involved in cannabis drug production, nevertheless in his judgment the appellant could have left the premises if he chose to. On 11 December 2009 the appellant was interviewed by the Chinese Embassy at the behest of UKBA. It is also accepted by Mrs Petterson that the Prison Service will have notified the Chinese Embassy of the appellant's conviction (in accordance with standard policy relating to foreign offenders).

91. We accept from the background evidence that on return the immigration authorities re likely to identify from their records that the appellant was convicted in the UK of a drugs offence together with the basic particulars of the charge, sentence etc. We also accept that it is likely that the Chinese immigration authorities, having established this much, will pass the appellant on to the local police.

92. However, once in the hands of the local police, we do not consider that anything more is likely to happen than that the appellant will be asked questions to establish where he is living and who are his family. There is no evidence to suggest he has any record in China as a criminal or administrative/disciplinary procedure offender. We consider that records kept by the authorities (and available to the local police) will show what his overseas offence was and what the punishment was (and, we will assume) the period of time he actually served in prison. We are entirely satisfied that nothing in the appellant's details will cause the Chinese authorities, at a local, provincial or centralised level, to consider reprosecuting the appellant. We accept as Mr Selway has pointed out, that cultivation is included as one of the methods of drug-offending that can attract the most serious penalties. We also accept that the appellant was seemingly involved in a cannabis factory, not simply in a domestic setting. However, even though the Chinese authorities do not adopt the same formal differentiation used in the UK and many other countries (in different ways) between "hard" and "soft" drugs, there is nothing to indicate that they would see relatively small-scale industrial cultivation of cannabis as near the serious end of the drug-offending spectrum, or as, in consequence, unusually serious. Not being unusually serious, the appellant's offences would not attract criminal reprosecution or double punishment. They would be even less likely to be considered by the authorities as suitable for reprosecution/double punishment through the disciplinary procedure system.

93. We accept that the appellant is likely to be asked whether he has any Chinese criminal record, but on the facts of this case that is not the case. We are prepared to accept that once they learn of his overseas offence they may require him to report to them for a period of time so to keep a check on his movements. But we do not consider that the evidence establishes that the local police would go further than routine questioning and monitoring of this kind. We do not think that these requirements could be described as serious harm or persecution, since he would be allowed to continue of his way and remain at liberty subject only to light monitoring requirements to report or the like.

94. The appellant would not be at risk on return.

95. For the above reasons:

96. The panel materially erred in law and their determination is set aside.

97. The decision we re-make is to dismiss the appellant's appeal.

Date

Senior Immigration Judge Storey
Judge of the Upper Tribunal

APPENDIX: LIST OF DOCUMENTATION CONSIDERED

Item	Document	Date
1	UK Border Agency, "Removals and voluntary departures, nationals of China, January 2004 to March 2010"	October 2010
2	Wikipedia, "Capital Punishment in the People's Republic of China"	20 July 2010
3	International Drug Policy Consortium commentary on the International Harm Reduction Association report, "The Death Penalty for Drugs Offences: Global Overview 2010"	24 May 2010
4	BBC, "China executes Japanese smugglers"	9 April 2010
5	Amnesty International letter, "Conviction of Drug Offences in the People's Republic of China"	17 March 2010
6	Foreign and Commonwealth Office, "Annual Report on Human Rights 2009 – Countries of Concern: China"	17 March 2010
7	U.S. Department of State, "2009 Human Rights Report: China (includes Tibet, Hong Kong and Macau)"	11 March 2010
8	U.S. Department of State, "2010 International Narcotics Control Strategy Report (INCSR): China"	1 March 2010
9	Radio Free Europe, "China urges judges to limit death penalty"	10 February 2010
10	Inquirer.net, "53 Filipinas on China Death Row over drugs"	11 January 2010
11	UK Border Agency, "Country of Origin Information Report: China"	8 January 2010
12	International Harm Reduction Association, "The Death Penalty for Drugs Offences: Global Overview 2010"	2010
13	UK Border Agency, "Operational Guidance Note: China"	10 June 2009
14	Prison Service Order 4630, "Immigration and Foreign Nationals in Prison"	11 January 2008
15	Anti-Drug Law of the Peoples Republic of China, Order No. 79	29 December 2007
16	UK Border Agency, "Country of Origin Information Report: China"	3 December 2007
17	International Harm Reduction Association, "The Death	2007

Item	Document	Date
	Penalty for Drugs Offences: A Violation of International Human Rights Law"	
18	CNN, "Condemnation as China executes Briton for drug smuggling"	Undated
19	New Zealand Drug Foundation, "The Ultimate Price: The Death Penalty for Drugs Offences"	Undated
20	Professor Bian Jianlin, "China: The Application of Criminal Procedural Principles in Discipline Procedure in China"	Undated