Neutral Citation Number: [2009] EWCA Civ 81

Case No: C5/2008/1755/AITRF

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2009

Before:

LORD JUSTICE WARD
LORD JUSTICE SCOTT BAKER
and
LADY JUSTICE SMITH

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Between:

J C (China)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Alasdair Mackenzie (instructed by **Messrs TRP**) for the **Appellant**
Samantha Broadfoot (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date: 20 January 2009

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Judgment

Lord Justice Scott Baker:

1. The issue in this appeal from the Asylum and Immigration Tribunal ("the AIT") is whether the AIT was entitled to conclude that the appellant, who had been involved in a people smuggling (snakehead) gang and had been prosecuted, convicted and served his sentence in this country, was at real risk of prosecution for the same offence if returned to China.

2. The Secretary of State had given notice of a decision to deport him to the People's Republic of China. The appellant is a Chinese national. Deportation was on the basis it would be to the public good.

3. Paragraphs 364 and 380 of HC 395 (as amended) provide:

> "364. Subject to paragraph 380, while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority. ...
>
> 380. A deportation order will not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the Convention and Protocol relating to the Status of Refugees or the Human Rights Convention."

4. The appellant's contention was that, because of the risk he would be prosecuted in China, the United Kingdom would be in breach of articles 3, 5 and 6 of the ECHR if he was deported. His article 8 claim was not pursued before the tribunal.

5. The decision of the AIT under appeal was a full reconsideration. The decision is also a 'Country Guidance' case. The new country guidance from this decision is that the decisions in *WC (no risk of double punishment)(China)* [2004] UKIAT 00253 and *SC (Double-jeopardy – WC considered) China CG* [2006] UKIAT 00007 are no longer to be treated as country guidance on the double-jeopardy question. The position following the present case before the tribunal is that there is considered to be some risk of re-prosecution but not such that it amounts to a real risk in most cases.

The facts

6. The appellant and his sister arrived in the United Kingdom on 7 January 1995 and claimed asylum six days later on the basis of events claimed to have occurred in China. This was rejected by the tribunal and has not been pursued in this appeal.

7. On 15 June 1998, when the asylum claim remained undetermined, the appellant was arrested and charged with conspiracy to kidnap and other offences relating to the unlawful imprisonment by a snakehead gang of a number of Chinese citizens who had been smuggled into the United Kingdom by a rival gang. The appellant and other gang members then held the hostages to ransom, forcing them to telephone relatives in China and making terrifying threats during those telephone calls.

8. The appellant was a key player in the gang. He was convicted and sentenced to 14 years imprisonment. He served seven years and was then transferred to immigration detention. He is presently on immigration bail.

9. Articles 7 and 10 of the People's Republic of China Criminal Law 1997 permits the Chinese state to prosecute or re-prosecute Chinese citizens for offences committed abroad. Article 7 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."

And Article 10:

> "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."

10. The tribunal summarised the following general conclusions that are relevant to the present appeal. It was satisfied that there was a double jeopardy risk under Article 10 CL but that, absent particular aggravating factors, the risk fell well below the level required to engage international protection under the Refugee Convention, the ECHR, or humanitarian protection.

11. Merely to have committed a crime overseas, been sentenced and punished for it is not enough to entail a prosecution under Article 10 CL; nor under Article 7 CL is it sufficient to have escaped punishment for an overseas offence.

12. The risk of prosecution or re-prosecution is a question of fact in individual cases but it is more likely to exist 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 his actions overseas;
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> (c) the offence is unusually serious. Generally, snakehead cases in China do not have the significance they have in the West and are regarded as ordinary (but serious) crimes requiring no special treatment;
>
> (d) there are political factors. These may increase the likelihood of prosecution or re-prosecution;
>
> (e) there is corruption of Chinese officialdom; the Chinese government is particularly concerned about this.

13. Mr Alasdair Mackenzie, who has appeared for the appellant, accepts these conclusions with one qualification. He disputes the finding that snakehead cases in China do not have the significance that they have in the West and are regarded as ordinary (but serious) crimes requiring no special treatment, and the consequent finding that the appellant does not fall within one of the categories of person potentially at risk of re-prosecution. The outcome of this appeal turns not on the law but on whether the tribunal was entitled to reach the conclusion that it did on the facts.

14. The tribunal expressed its conclusions on the risk of re-prosecution in these terms:

> "The risk on return under articles 3, 5, 6 and 8 ECHR arose, if at all, from Article 10 CL risk. The appellant would not be subject to Article 7 CL, as he was prosecuted and punished. As to Article 10 risk, although the appellant was a ringleader of a snakehead group, (but) he took no part in what the Chinese state currently regards as a very common offence. Others who offended at that time were returned, some willingly, some not. All were legally represented and none of their representatives subsequently indicated that they came to harm on return. There had been no request through diplomatic channels for their trial documents by the Chinese authorities. There had been no international or local publicity, good or bad, identified in relation to these offences."

They reminded themselves that the burden of proof of a real risk of a breach of a protected ECHR right remained on the appellant.

15. The tribunal said that if the Chinese authorities were to take a positive interest in this appellant on return there was no certainty it would go as far as prosecution. Four of the five Article 10 examples provided by the experts appeared to have fizzled out without prosecution. The only example which was factually similar to that of the appellant was the Article 7 prosecution of one Xiang, which resulted in the same sentence. Despite vigorous attempts by the appellant's experts and his counsel to persuade the tribunal to the contrary, the appellant had not satisfied them that the Chinese authorities would consider the United Kingdom proceedings so disproportionate that there was a real risk of a fresh prosecution, especially given that there had been a prosecution, conviction and sentence.

16. The tribunal's written determination and reasons is dated 4½ months after the hearing took place. It extends over 80 pages and 273 paragraphs and is somewhat discursive. The tribunal heard evidence from three experts; two were called by the appellant and one by the respondent. The respondent's expert was Professor Fu Hualing (to whom I shall refer as Professor Fu). He had provided three written reports. His main report had been prepared in 2007. He also produced a 2004 report that had been prepared for an earlier country guidance case, and a 2008 report commenting on the difference between his two earlier reports. His reports relating to the present case were prepared on the basis of redacted information, so he was unaware of facts enabling him to identify the appellant and he lacked some details about the offences the appellant had committed. During the course of his evidence there was an adjournment to enable him to be better informed of some of the omitted detail.

17. The appellant relied on the evidence of Dr Dillon and Dr Sheehan who gave oral evidence, transcripts of evidence Professor Cohen had given to a Congressional Committee in the United States and two other witnesses who gave written evidence on Chinese law. The relevant area of dispute was on the use to which Articles 7 and 10 are put and the likelihood of their being used in the case of the appellant.

18. The tribunal was satisfied that Professor Fu was a careful and reliable witness with much greater practical knowledge and database access than the other witnesses. He had researched the Chinese databases with care and they were satisfied they could rely on his evidence. They added:

> "we were particularly struck by his dismissive reaction to snakehead kidnappings in general as rather ordinary crimes of which there were very many, not especially interesting to the authorities. That is not the western perception but given the significant people-trafficking industry out of China (Fujian in particular) the Chinese view is different. If there were a re-prosecution, Professor Fu considered that the assistance of the British authorities would be required for evidence, given that they were expected to produce a conviction rate in excess of 90%. If investigated, torture could not be ruled out and the penalty would be incarceration (laogai) not laojiao."

19. The main thrust of Mr Mackenzie's argument is that the tribunal misinterpreted or misunderstood Professor Fu's evidence. Professor Fu's opinion he submitted about the appellant's crime, was based on an error of fact. His written assessment of the likelihood of re-prosecution was on the basis that the offence was inchoate i.e. an attempt or a conspiracy or incitement to commit the offence falling short of the actual commission of the offence. However, it seems to me that the tribunal was well aware of this error (para 161) and the professor dealt with it in his oral evidence after he was more fully apprised of the facts. The tribunal said at para 174 that he considered a completed kidnap would require more serious punishment and would be more likely to be investigated. The more serious the crime, in his opinion, the more likely it became that the authorities would take an interest in the appellant. However he considered that the police would still have difficulty in obtaining the information they needed to mount a prosecution, and they would be reluctant to engage in such a complex process (which would include obtaining properly certified copies of the witness statements, the evidence in the case, the record of the prosecution and the judgement), especially as a conviction rate of over 90% was expected.

20. It is necessary to look with a little care at Professor Fu's evidence and how it unfolded. The starting point is his report of 30th of October 2007. He was asked to consider the likelihood of a re-prosecution. He said at para 26 that not every crime committed in foreign countries will necessarily tarnish China's international image. Courts tended to approach the issue of international image in a case specific manner. He went on:

> "27. In the case at hand, there may be nothing specific about tarnishing China's image. It was an ordinary crime against another ordinary Chinese resident. There is no reason arising from these facts to attract a special official attention."
>
> "28. As with circumstances of the crime, the personal status of the person who committed a crime was once equally, if not more, important, as the crime itself. Again, China's criminal law has changed a lot in de-personalising crime, gradually abandoning the practice of scrutinising the motivation and personal status of offenders in determining liability and sentence. But personal background remains important in some circumstances. In prosecuting political dissidents for inciting the overthrow of government, for instance, what has been said is often less important than who said it."

21. Mr Mackenzie submits that there is no reference here to organised crime and Professor Fu had not been told the crucial details of the appellant's case; he did not know the kind of offences with which he was dealing. When Professor Fu gave oral evidence, after there had been a short adjournment for him to be apprised of more details of the case, he was asked whether any of the following would increase the risk of re-prosecution:

- actual kidnapping

- several victims
- the victims being made to ring relatives in China from whom money was demanded
- the kidnappers being said to be a snakehead gang
- the appellant being a central figure in the plot
- the appellant claiming not to have been involved but being found guilty.

He replied that procedurally the main issue was evidence. If the appellant came back to China and was reported to the police, the issue would be where to get the evidence. Further, the police could investigate on their own or a formal request for evidence could be made through diplomatic channels. He added:

> "if he is a central figure could be an issue - could increase the possibility of a prosecution. But refusal to confess is not really a serious issue now."

22. Earlier (before the adjournment to be further apprised of the facts) Professor Fu had been asked about the reference in his statement to an 'ordinary' crime and it was put to him there was no particular basis for him to take the view that this was an 'ordinary' crime. His answer was: "no, I presume I guessed because he was poor and from the countryside but I don't have the facts."

23. In my view Mr Mackenzie is trying to read too much into Professor Fu's reference to an 'ordinary' crime. It seems to me plain that this description was used in his written statement in contradistinction to a crime that would tarnish China's international image. The high-water mark of Professor Fu's evidence from the appellant's point of view was his acceptance that in terms of punishment in China a completed kidnap would be recognised as more serious than an incomplete one and that: "the more serious it gets, the likelier it is that they would investigate."

24. The appellant's difficulty with Professor Fu's evidence seems to me to be this. Whilst he accepted that the more serious the offence the greater the risk of re-prosecution, it was never put to him that organised crime crossed the threshold into the category of case that tarnished China's image. That category, it seems to me, relates essentially to matters such as corrupt officials.

25. 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. The question for this court is whether there was an error of law on the part of the tribunal.

26. The experts who gave evidence classified crime in different ways. These were: 'gang related' or 'organised' crime, corruption by officials and 'ordinary' crime. Whilst there was some evidence to put the appellant's offences into the gang related or organised category, what the appellant was involved in was a snakehead gang and not, for example, the Triads. Professor Fu's evidence, which the tribunal

pointed out accorded with that of Dr Dillon, was that the concern for illegal immigration died down quietly after the Chinese cockle pickers case in 2004 and was gradually replaced by increasing concern about corruption -- a large number of corrupt officials fleeing overseas with their assets.

27. The tribunal had not only the evidence of Professor Fu that they accepted, but also the following:

- there was no evidence that the Chinese authorities had expressed any interest whatever in the appellant or that they had sought any of the papers or evidence relating to his case.

- there was no evidence of any media reports in China about the appellant's case. Professor Fu said that the role of Article 10 was diminishing with the increasing need for China to be assured of international cooperation. Britain and China are not currently parties to an extradition treaty.

- the sentence of 14 years imprisonment (albeit the appellant only served half) was not so lenient as to be likely to activate the interest of the Chinese authorities.

- offenders from the same snakehead group as the appellant, and others from a different group who had committed similar offences two years before (in 1997), had been removed to China without any evidence of re-prosecution or adverse publicity. At least five had returned voluntarily and the tribunal concluded that had there been any re-prosecution or adverse publicity this would have been apparent.

- four of the five Article 10 examples provided by the experts had fizzled out without prosecution.

28. Our attention was drawn to the observations of Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at para 30. She reminded ordinary appellate courts to approach appeals from expert tribunals with an appropriate degree of caution, because it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. Their decision should be respected unless it is quite clear that they have misdirected themselves in law.

29. The tribunal heard and considered a wealth of evidence. They made it clear that they were impressed by and relied on Professor Fu. They were entitled to conclude that the risk of re-prosecution was low and, importantly, not of such a level as to put the appellant at risk of his human rights being breached.

30. I should make it clear that this appeal was argued solely on the basis of the level of risk of re-prosecution. The court did not consider the nature of any possible human rights breaches that might occur. As the tribunal put it at para 287, the risk on return under articles 3, 5 6 and 8 of the ECHR arose, if at all, from the article 10 CL risk.

31. In my judgment the tribunal made no error of law. The decision was not perverse and the tribunal made no error in assessing the facts. As Miss Broadfoot, for the Secretary of State, puts it, it was a matter of judgment for the tribunal whether the risk had reached the level of risk where the human rights framework was engaged. I would accordingly dismiss the appeal.

Lady Justice Smith:

32. I agree.

Lord Justice Ward:

33. I also agree.