Asylum and Immigration Tribunal
SC (Double jeopardy – *WC* considered) China CG [2006] UKAIT 00007

THE IMMIGRATION ACTS

Heard at Nottingham
On 10th August 2005

Determination Promulgated

23rd January 2006

Before

MR D K ALLEN (Senior Immigration Judge)
MR A A WILSON (Immigration Judge)

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Weston, instructed by for Paragon Law
For the Respondent: Mr D Hollings-Tennant

DETERMINATION AND REASONS

For a Chinese citizen convicted of a crime in the United Kingdom on return to China there is not a real risk of a breach of protected human rights whether by way of judicial or extra-judicial punishment, even if the crime has a Chinese element. WC (no risk of double punishment) China [2004] UKIAT00253 applied and considered.

1. The Appellant appeals to the Tribunal against a decision of the Secretary of State of 30 July 2003 to deport him and a refusal of asylum made on 25th January 2005.

2. The Appellant's immigration history is briefly as follows. He came to the United Kingdom in March 1998. He was aged approximately 16½ at the time. Several weeks after he arrived in the United Kingdom he was involved together with a number of other ethnic Chinese in a kidnapping and extortion attempt made on other ethnic Chinese in the United Kingdom. He was arrested on 14th June 1998, and convicted on 21st July 1999 for conspiracy to kidnap, conspiracy falsely to

imprison and conspiracy to blackmail. He was sentenced to fourteen years for each of the first two offences and eight years for the third offence to run concurrently and recommended for deportation. Subsequently on 21st March 2001 his sentence was reduced on appeal to one of twelve years.

3. He gave evidence before us as follows. He adopted both his initial statement and the subsequent statement which comprised comments on the Home Office Refusal Letter. He was referred in particular to his belief that there would be a particular interest in him on the part of the state authorities in China because one of the hostages had a relative who was a policeman from China who had been involved in the investigation in conjunction with the United Kingdom police authorities. He said he had got this information from his criminal solicitors and he had heard this during the sessions in the court and there had been mention about the hostages in the court sessions.

4. On cross-examination the Appellant said that he had only been involved with the Snakeheads in the incident of looking after the hostages. This had been for a period of about two weeks and before that and subsequently he had had no other involvement with the Snakeheads. The policeman to whom he had referred was the brother of the hostage's wife. He was not able to remember the name of this person. He was from Fujien.

5. The Appellant still owed money to the Snakeheads. He feared that if he returned to China he could not go to another province in China as he needed to approach the authorities to get identity to live in other places and he would have to get an ID card from the local area. He was asked whether there was any reason in principle why he could not move to another area if he could get these documents and he said he had no relatives or friends in China and the Chinese Government would not be able to protect him. He had not had any friends or relatives in the United Kingdom when he originally arrived.

6. The next witness was Dr Michael Dillon who gave his name and professional address. He is a senior lecturer in the Department of East Asian Studies and founding director of the Centre for Contemporary Chinese Studies at the University of Durham. He had provided a written report dated 5th August 2005 and a copy of his CV. He had been professionally involved in Chinese studies for 37 years. He has frequently been to China, most recently in June 2005.

7. On cross-examination he was asked about the reference at page 3 of his report to it being "highly probable" that the Appellant would be prosecuted with the same offences under the double jeopardy provisions in the Chinese criminal code. He said that it was not possible to produce clear evidence for or against this argument. The nature of Chinese society was such that it lacked openness and there was no system of reporting of cases as in the West. He was asked whether if the Appellant were returned to China, Article 10 of the Chinese penal code would be very important and he said that the Chinese penal code had provisions for re-prosecuting and the authorities would be very likely to use this. He was asked whether it was the case that the Appellant would not be re-prosecuted but prosecuted for a crime committed in China, this being the extorting of money from the hostages' relatives. He could not say. He was not an expert on the distinction. He did say however that anyone returned to China would be in real danger of being

dealt with under the Chinese penal system. He was asked whether the Chinese authorities would be likely to deal with the Appellant under the penal system rather than extrajudicially. He said that they would deal with him but he could not be certain in which way. They would be pragmatic and whatever was appropriate at the time would be employed. Extrajudicial treatment was widely used, more often than making use of the penal code, as it was quicker and simpler and did not require the case to be brought before a court and it could involve up to four years' labour. There would simply be an arrangement between the police and the local authority. He would estimate that this case was relatively severe and might well be brought before the courts, but he had no evidence of that.

8. He was asked whether he thought that the Chinese penal code with regard to double jeopardy would be likely to be used to make a public example of someone. He thought that it would. He said that the Chinese authorities did not apply the same weight to the code as a Western country would do and it would be used if it suited political expediency or alternatively might be ignored. The fact that the same sort of terminology as in Western legal systems was employed did not mean that it was applied in the same way as in the West.

9. He was referred to the fact that there was no evidence of re-prosecution cases coming out of China. He said that this was a real problem. There had been big changes in Chinese society in the last 30 years but it remained very secretive. There were not reports in the press as here and the absence of reports could not be assumed to mean an absence of cases. In local papers he had seen in China there were selected reports of court proceedings but there was no reason to think that all court cases were reported. Amnesty International and other non-governmental organisations suggested that there was not full or frank reporting of court proceedings and therefore a lack of evidence did not mean that there were no re-prosecutions. He was asked why they would not report it if there was evidence they could use the penal code to make a public example of someone. In reply he argued that they could use it and not that they would use it. Reports in local papers or radio were not usually made available in English and to people abroad and the Chinese concept of state secrecy was very wide. He was asked whether there would be a public record of the court process if they were re-prosecuted and he said there would be a court record but not a public record.

10. He was referred to page 7 of his report and the reference to death sentences being regularly reported by the local press, radio and television, and it was suggested that these would be a potential source of evidence of re-prosecutions. He said that he thought the issue was that the reporting was not free and independent and it would only be reported if seen as in the interests of the state and its local institutions. Records of broadcasts by local stations could be checked with regard to re-prosecutions but he had not seen any evidence of such in these records. However, one again, he said, no evidence did not mean it did not happen. There was very selective reporting of court proceedings.

11. He was asked why there would not be a report if it was in the state's interest if they were making a public example of somebody by way of re-prosecution. He said that it was in the state's interests to report on a case where someone was involved with a Snakehead gang so as to deter others. He was asked whether therefore it was the case that in a case like this it would be reported as an instance of re-

prosecution. He said it might be, but he was not aware that it had been. The fact that a case was not reported did not mean that a person had not been re-prosecuted.

12. He was referred to the fact that seven other people with similar records had been deported to China and he was given the opportunity to read the documentation concerning these people. It was put to him that there was no evidence of any harm occurring to them. Dr Dillon questioned whether there was any evidence that no harm had been caused to them. He referred to the fact that Chinese society was secretive and the lack of a report did not mean that there was not a problem. Enquiries could be made but it would be difficult and records were not made public. Where people had approached the police they had generally got nowhere in seeking information about people who had been through the judicial system.

13. He was asked where therefore organisations such as Amnesty International got their information from and in particular the figures and he said he did not speak for them but it seemed to be from talking to them and Human Rights Watch that there was a variety of sources including reports in China or translated from local media and individuals who made representations to them but they would not be helped by the Chinese authorities. He did not think that the families could be contacted by Amnesty International though it could be the other way around. A family would be in a very difficult position if they approached such an organisation.

14. With regard to the reference to "endangering state security" at page 7 of his report and whether the Appellant would fall foul of this, Dr Dillon considered it likely that he was involved with criminal activities which had an international dimension. It was not definite. China was now trying to deal with the Snakehead gangs and trying to crack down on organised crime. There was a high level of police links between the United Kingdom and China including a senior officer involved in liaison work at the British Embassy in Beijing.

15. He was asked whether he had any comments on the ideological right to a re-trial if there was a political element to the case, which had been referred to. He did not entirely understand what this meant. Issues in China which were thought to present China in a bad light were likely to be dealt with more seriously. The Chinese Government wanted to protect China's image and a court case putting China in a bad light would be treated seriously. It was put to him that that would be the case if there were a re-prosecution in this case and he said it would not be a concern in China at all and there was no feeling that they needed to adhere to international human rights standards and the Chinese population would probably not be concerned either.

16. With regard to the reference in his report at page 9 to "exemption from punishment or mitigated punishment being possible" he said that this was not speculation. He had studied Article 10 in the original and in translation and the word "keyi" was a very loose word and it was as he had said in his report. He was asked how, where there was no evidence of re-prosecutions, he could say that this case would not be remitted. He said he was not saying that, just that that was the wording of Article 10 and he assumed the word was used deliberately. He was asked whether the Appellant would be able to benefit from a possible exemption under Article 10 and

he said he did not think so. He thought this was a case that would be dealt with rather severely as it would be seen as damaging China's image abroad.

17. He was referred to paragraphs 44 and 45 in the Tribunal determination in ***WC [2004] UKIAT 00253***. With regard to paragraph 45, he found it quite surprising that Professor Palmer had accepted that there had been persons convicted abroad who had returned. In his view there was no evidence of prosecutions but that did not mean there had not been any. He would be surprised if Monsieur Becquelin accepted there had been no cases of prosecution. There was no evidence.

18. It was put to him with regard to the reference to anecdotal evidence that such evidence was subjective and unreliable. He said it was not necessarily unreliable or untrustworthy but there was a lack of documentary evidence and it was necessary to have recourse to informal discussions and there was no reason to assume that the authorities would not apply Article 10. He was also asked about paragraph 4 at page 10 of his report and it was suggested to him that Article 239 would apply and it would not be a case of the death penalty. Dr Dillon thought this reflected the wording of the penal code and that was applied. It was not necessarily seen by the Chinese courts as limiting their action. The courts were subject to political pressures unlike the West. If there was a political campaign such as the kind he had referred to, it was likely to override the penal code. It was therefore not a reference to the penal code but to that sentence outside the penal code. The authorities were not restricted by the penal code and they would use the death penalty if they thought the case merited it so Article 10 could apply and they could seek to re-prosecute.

19. We asked Dr Dillon whether there was anything in the penal code relevant to the fact that the Appellant was under 18 when the crime was committed. He said he was not aware of anything and he was aware of people under 18 having been executed in the past.

20. On re-examination Ms Weston asked Dr Dillon how important the whole issue of re-prosecution was, if adherence to the terms of the code could be manipulated or ignored according to the circumstances. He said that it was quite likely that such a person would be dealt with in some way by the Chinese authorities and that it could be a formal re-prosecution in the courts or they could be dealt with by extrajudicial measures such as re-education. The Fujian authorities could decide to make an example of him. He was asked whether there were anomalies in that there was reporting of executions and a figure cited by NGOs in contrast to the lack of reporting with regard to the situation which could face deportees such as the Appellant. He said that he read the papers and listened to the radio and watched television and it was clear that reporting was very limited and that cases before the courts were not reported, however they were reported if they were political. He gave an example of short detentions of 20,000 to 30,000 people and one instance which had been done essentially for political reasons as a consequence of part of a Qusay Independence Movement and the numbers arose from information from emigres from the region.

21. As regards the current view of the Chinese authorities on the Snakeheads he said they were very concerned and that their response was indicative of a clamp down being in prospect. They were determined to control the gangs, though they had not

yet found a system to do so and they would be likely to want to clamp down more fully on gangs in the future.

22. In his submissions Mr Hollings-Tennant relied on the reasons for refusal letter. Credibility was not a major factor. He referred to the absence of evidence of any re-prosecutions and the lack of any clear understanding as to how the Chinese authorities would apply Article 10 of the penal code. It was accepted that there was a lack of evidence and there was secrecy in China, but Dr Dillon had said that if this sort of re-prosecution were reported, it would be most likely to be found in a local newspaper or radio in China and yet he read the local newspapers and listened to the local radio, but still there was no evidence produced of re-prosecutions. There was a theoretical risk and no more. He referred to the Tribunal determination in **WC** at paragraphs 44 and 45. There were cases of people who had returned to China who had been involved in the same crime and there was no evidence as to what had happened to them. He took us to several examples of cases of people who had been convicted at the same time as the Appellant and had been returned going back to September 2003 but there was no indication of any problems experienced by them. The Foreign Office had attempted to find out what had happened but had experienced problems in this regard. The expert referred to a public example being made but if so, why had it not been done with the returnees already. The sentence had been served in the United Kingdom. Although there was evidence of extrajudicial punishment, it was not for this or similar cases and so there was no real risk of this. There were examples to be found for example in the US State Department Report of arbitrary detentions and it was emphasised that reports were available for examples of executions. The lack of evidence demonstrated the lack of real risk.

23. He also maintained that there was a degree of speculation in the expert's report about the double jeopardy risk for the Appellant. The words "highly probable" could not be borne out as there was no evidence of such cases. The anecdotal evidence referred to was unsupported and unreliable. The burden of proof had not been discharged. China would be unlikely to cooperate with the UK authorities by providing travel documentation and then causing returnees to disappear. There had been no approach by the families of other returnees even if there were concerns. It would be speculation either way. We now had further evidence about Chinese prison conditions. There was no reason to think that the Appellant would get a further ten years.

24. In the course of her submissions Ms Weston highlighted two general points. The first was that the risks extended beyond the letter of Chinese Law and it was not therefore simply a question of a risk of re-prosecution. The rule of law did not apply in the same way as was the case in the West and it could not safely be predicted how the law would be applied.

25. Her second general point was with regard to Mr Hollings-Tennant's submissions on the lack of evidence. She argued that this was not strictly true. There were matters referred to in the determination of Mr P J M Hollingworth, [now reported on reconsideration: FL and others (Rule 30: extension of time?) [2005] UKAIT 00180], which the Tribunal had had reason to consider on the previous day and which had been found to contain no error of law. There were also the examples to be found at

paragraph 47 in ***WC***. She also emphasised that human rights issues only were before us.

26. With regard to the applicable legal framework, Ms Weston commended the analysis in ***WC*** to us. It drew on the available sources of human rights law, and, as a reported case it was appropriate for it to be followed. She also made the point that it was clear that, as could be seen from paragraph 36 in that determination, prison conditions in China had properly been taken into account.

27. Thereafter she referred us to the content of various paragraphs in Mr Hollingsworth's determination in ***FL and others*** referred to above. Paragraph 44 dealt with the distinction between that and ***WC*** and why the latter case did not apply. Paragraph 45 dealt with the question of risk of extrajudicial action. In both instances the findings were supported by Dr Dillon's evidence. It was clear that the word "may" in Article 10 of the Chinese penal code was highly unlikely to avail the Appellant. There was clear evidence of re-punishment by the Chinese authorities.

28. Dr Dillon had given more detailed evidence with regard to extrajudicial punishment and this supported paragraphs 47 and 48 in ***FL and others***. The Chinese authorities did not consider themselves to be bound by the penal code when they were seeking to re-punish and they would make use of extrajudicial punishments such as re-education. The Tribunal was asked by the Secretary of State to imply from the absence of evidence as to what had happened to the deportees that the Appellant would be safe. The Secretary of State however had failed to provide evidence as to what had happened to them, and in accordance with the principles set out in ***Karanakaran*** and ***Kaya***, it would be appropriate to give a positive role to uncertainty in favour of the Appellant. There was no system for ascertaining what had happened to them so no weight could be attached to the effect of their returns. Dr Dillon's evidence in this regard was also relevant in that he made it clear that China did not allow external scrutiny of its treatment of individuals.

29. Ms Weston also referred to various points in the objective evidence bundle. This was indicative of the general behaviour of the Chinese authorities. It was not generally contentious but she wished to emphasise the points set out at paragraphs 5.29, 5.30, 5.34, 5.52 to 5.58 of the Country Report. With regard to the point concerning the specific number of executions identified and the lack of information about re-prosecutions, it was the case that there would be far fewer deportees to China who had been convicted of very serious crimes than the number of executions generally in China. Paragraph 5.7 onwards dealt with prison conditions and 5.89 with arbitrary arrest and re-education. The arbitrary nature of the response of the Chinese authorities was emphasised. The evidence of the expert should have weight attached to it.

30. Ms Weston also referred us to evidence in the State Department Report concerning the Snakeheads at page 229, and argued that the Appellant would be likely to be seen as in the debt collector category. His age would be irrelevant. There was very little in the Country Report on double jeopardy. The latest State Department Report was silent on the cases but it was relevant to the Chinese authorities whether an individual was seen to be involved with trafficking. With regard to the arbitrary arrests and detentions set out at page 10 of the report, these were all politically

oriented and this was why their existence had been discovered so this was not adverse to the Appellant.

Determination and Reasons

31. The essential issue in this case, as encapsulated by Ms Weston in her outline submissions, is whether there is a real risk that if returned to China the Appellant would face adverse treatment by the Chinese authorities by way of judicial or extrajudicial punishment such as to give rise to breach of his rights under Articles 3, 4, 5 and 6 of the Human Rights Convention.

32. We start our consideration by setting out relevant provisions of the Chinese Criminal Law. Article 10 states as follows:

> "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 the law he should bear criminal responsibility, may still be investigated for criminal responsibility according to this law, even if she or 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 mitigated punishment."

33. Article 239 of the Code states as follows:

> "Those kidnapping others with the purpose of blackmailing or kidnapping others as hostages are to be sentenced to ten years or more in prison or to be given life sentences, in addition to fines or confiscation of their property. Kidnappers causing the death of their hostages or killing their hostages are to be sentenced to death and their property confiscated."

34. The issue of double jeopardy in China was recently considered by the Immigration Appeal Tribunal in ***WC [2004] UKIAT 00253***. Ms Weston attached a good deal of weight to the exposition by the Tribunal in that determination of the legal position, and also commended to us the analysis and application of it by the Adjudicator, Mr P J M Hollingworth in ***FL and others*** to which we have referred above. In ***WC*** the Tribunal concluded at paragraph 50 that a close examination of the cases cited did not bear out the contention that the Chinese authorities enforced re-prosecutions and double punishment in the context of offences wholly committed abroad. As the case before the Tribunal concerned an Appellant who, unlike the Appellant before us, had committed kidnapping, false imprisonment and blackmail offences solely in the United Kingdom, there is, we accept, a clear point of differentiation.

35. There was a good deal of argument before us concerning the lack of evidence of re-prosecutions. Mr Hollings-Tennant argued that there was no evidence of re-prosecutions, and re-prosecutions could not be inferred from the general conduct of the Chinese state and its approach to human rights. Dr Dillon in his evidence both oral and written stated that the absence of evidence could not be seen as in any sense determinative. He referred to the secretive nature of Chinese society and the lack of publicity generally attaching to court decisions other than when it was in the

interests of the authorities for them to be published, as supportive of this point. At paragraph 3 of his report he nevertheless states that the double jeopardy provisions in the Chinese criminal code suggest that prosecution for the same offences on the Appellant's return is highly probable. This does not to our mind sit well with his evidence which for example can be found at page 9 of the report that there does not appear to be any reliable publicly available data on the frequency with which the Chinese authorities apply the double jeopardy rule, and at paragraph 10 of his report he states that there is no reliable data on which to base an opinion as to how likely it is that a returnee will be prosecuted for a crime for which he had already been sentenced in the United Kingdom. He is only able to refer to anecdotal evidence to suggest that it is applied. He goes on to state that in his professional opinion the rule is likely to be applied in this case given that the Appellant is well-known to the authorities as a result of the publicity given to the case in both the United Kingdom and China and the pressure on the Chinese Government from the international community to curb the activities on the Snakehead gangs. He also refers to the amount of evidence on the file concerning the Appellant and his associates as a person convicted by a British court.

36. We have to say that we regard this evidence as essentially speculative. Mr Hollings-Tennant properly reminded us that the burden of proof is on the Appellant. He also made the relevant point that there are a number of cases of people who were convicted at the same time as the Appellant of essentially the same offences who have been returned to China in one case as relatively long ago as October 2003 without there being any indication as to what has happened to them. Enquiries the Home Office was directed to have made concerning any possible indication as to their whereabouts have not met with success. We do not agree with Ms Weston that it is appropriate however to interpret such a factor favourably to the Appellant. It is consistent with the general lack of evidence in this regard but that is an essential difficulty that the Appellant's case has to surmount if it is to succeed.

37. In any event Ms Weston argued that examples of cases provided to the Tribunal in ***WC*** by Professor Michael Palmer of the School of Oriental and African Studies of London University indicated that, contrary to Mr Hollings-Tennant's submissions, there were examples of re-prosecutions. The Tribunal in ***WC*** did not find the examples given of assistance to it since it was concerned with re-prosecution and double punishment in the context of offences wholly committed abroad as was the case before it. It is argued however that, as was also considered by Mr Hollingworth in ***FL and others***, certain of these examples are of relevance to the particular situation before us which is essentially the situation that was before Mr Hollingworth.

38. The first case considered by the IAT in ***WC*** concerned three people who had returned to China after serving sentences in Hong Kong before 1997 who were considered not to have served enough imprisonment and may have been imprisoned or sent to a re-education camp. It seems however that Professor Palmer accepted that he did not know whether in fact the convictions in that case were for other offences committed in China. That case would therefore appear to be of little relevance to the appeal before us.

39. The second example was a case of a man said by Professor Palmer in an earlier statement to have been convicted of offences in which he caused financial losses to a Chinese company in Kuwait and to have been sentenced by the court in Kuwait to a term of imprisonment as his conduct was considered to have had an adverse impact on China's reputation abroad and he was reconvicted and required to serve a further three years of imprisonment. However in his oral evidence before the Tribunal Professor Palmer accepted that he had misread the report on this case and it was in fact a case falling under Article 7 of the Chinese Law rather than Article 10 in that both of the trials concerned took place in China.

40. The next example concerned a person who committed burglary in Japan and was tried and sentenced to eleven years' imprisonment in Shanghai although the maximum penalty for the offence in Japanese Law was only seven years. However Professor Palmer concluded that it seemed that this man was not tried in Japan and therefore it was not a case of re-prosecution or double punishment. Mr Hollingworth in his determination made the point that it illustrated that the Chinese authorities did not take into account the maximum penalty in the country where the offence was committed.

41. There were two further cases before the Tribunal provided by Professor Fu Hua Ling, an associate professor of law at the University of Hong Kong. The first of these concerned a Chinese couple who hijacked a flight from mainland China to Taiwan in 1993 and were convicted of hijacking in Taiwan and sentenced to nine and seven years' imprisonment respectively, and on repatriation to the mainland in 1999 were sentenced to a further fifteen and ten years' imprisonment respectively. The other case involved essentially similar facts involving a man who was convicted and sentenced for hijacking a plane from China to Taiwan in 1993, repatriated to the mainland in 1997 and re-convicted and sentenced to twenty years' imprisonment.

42. The Tribunal in ***WC*** made the point at paragraph 49 of its determination that, bearing in mind that the People's Republic of China does not recognise Taiwan as a separate state and in particular does not recognise the Taiwanese courts, these cases had to be regarded as hijackings of flights of Chinese aircraft flying from China and therefore were not regarded by the Chinese authorities as constituting offences taking place outside Chinese territory as a matter of law. Mr Hollingworth in his determination made the point that these cases show that where the Chinese Government is of the opinion that insufficient punishment has been handed down in respect of an offence to be regarded as perpetrated on the mainland of China, further substantial punishment will follow.

43. We do not regard any of these cases as being of particular relevance to the case before us. None of them involves a case of the kind with which we are concerned for the reasons set out in our analysis of those cases. The Taiwan cases in our view indicate no more than China taking a view of the appropriate sentence to be awarded in cases of hijacking rather than taking a view concerning the appropriate level of punishment laid down by the Taiwanese court which of course it did not recognise and does not recognise. In the Kuwait case, as we have seen, both trials took place in China and it is therefore not a double jeopardy case.

44. We cannot ignore the absence of evidence in this case. It is clear that experts such as Dr Dillon visit China regularly and read local newspapers and listen to local radio, yet he, like Professor Palmer who gave evidence in ***WC*** can point to no examples of re-prosecution where a person has been prosecuted abroad. Dr Dillon made the point that there was a distinction between there not being evidence of re-prosecutions and accepting or not accepting that there had been no cases of prosecutions, and we agree that there is a distinction there. But we have to be concerned with evidence of a real risk as opposed to speculation in coming to our conclusions. Much has been made of both the general attitude of the Chinese authorities to human rights, the secretive nature of that society and the control exercised over the media, in seeking to persuade us that the absence of evidence should be regarded as unsurprising and not stand in the way of the case being made out. In this regard however we consider it is also relevant to bear in mind the absence of any evidence concerning the co-conspirators of the Appellant who have been returned to China over the last twenty months or so and the absence of any indication as to what their fate may be. Dr Dillon no doubt properly raised the question as to whether there was proof that they were all right, but he is not a lawyer, and that ignores the obvious point that the burden of proof is on the Appellant.

45. In coming to our conclusions we do not ignore the profile of this case and the fact that there was clear cooperation between the Chinese and the United Kingdom authorities. Nor do we ignore the point of distinction that we have identified above at paragraph 34 between this case and the facts of ***WC***. We also bear in mind the evidence concerning the preparedness of the Chinese state to act in defiance, if it may so properly be described, of the provisions of the criminal code in cases which it deems to be appropriate, and the apparent compliance of the Chinese courts with such an approach. These are clearly matters of significance which cannot properly be ignored, and in this regard we also bear in mind the points made concerning extrajudicial punishments such as labour camps which exist as a further option, it seems, to the authorities. But in the end we are not persuaded that the Appellant has shown a real risk of re-prosecution in China with regard to the offences for which he was convicted in the United Kingdom or prosecution for any other reason. Though we do not doubt the expertise or probity of Dr Dillon, we consider that his report with regard to risk in this case is essentially speculative. At one point in his evidence to us he used the phrase that he would “argue” as follows, and we do not consider that argument is appropriate for an expert witness, whose role is to present the facts dispassionately and given an opinion supported by evidence. No doubt in an expert report there may have to be an element of speculation, but we have to deal with a burden of proof and a standard of proof that have been clearly set down as requiring a real risk to be shown by the appellant, and in our view the facts in the evidence in this case are not such as to show a real risk to this Appellant on return of breach of Articles 3, 4, 5 and 6 of the Human Rights Convention.

46. We were invited by Ms Weston in her outline submissions and in her oral submissions to us to take as our starting point the legal position as set out by the Tribunal in ***WC*** at paragraphs 32 to 38 concerning the view it would have taken if it had accepted that the Appellant would face a real risk of re-prosecution in that case. Essentially the Tribunal was of the view that cumulatively on account of the

risks of double jeopardy/double punishment, adverse prison conditions and identification as a public example, the Appellant in that case would have faced a real risk of breach of his Article 3 rights. In those paragraphs the Tribunal valuably set out the relevant provisions of international human rights law concerning double punishment, contained in such documents as Article 4(1) of the Seventh Protocol to the ECHR, Article 14(7) of the UN International Covenant on Civil and Political Rights and Article 50 of the Charter of Fundamental Rights of the European Union (2000). Though it is not strictly necessary in the light of our findings above to set out our conclusions on this alternative situation, it may be helpful if we do so.

47. We agree with the Tribunal in ***WC*** that the ne bis in idem principle (i.e. the principle precluding retrial or repunishment for an offence for which the person has already been finally convicted or acquitted) does not yet constitute a peremptory norm prohibiting the punishment of a person twice in two different states for the same offence. We do not however consider that if the appellant were sentenced to up to five years imprisonment in China on return (on the basis taken by the Tribunal at paragraph 35 in ***WC***; even taken with the evidence of prison conditions in China, would give rise to a real risk of breach of his human rights. The risk alluded to in paragraph 37 of ***WC*** of the appellant being made a public example of seems to us to be unnecessarily speculative, bearing mind the absence of any hard evidence before us of a 'strike hard' approach such as that referred to in that paragraph.

48. We were not addressed on the deportation appeal. No doubt that was because in the view of both representatives that appeal could not succeed if we were of the view that we have come to concerning the Article 3 claim and that it would succeed or perhaps become irrelevant if we were in the Appellant's favour in that regard. For the sake of completeness we conclude that the Appellant has not shown that the decision to make a deportation order is in any way wrong. This appeal is dismissed on all grounds.

Mr D K Allen
Senior Immigration Judge