

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 21 May 2002
Dictated :22 May 2002

Determination Promulgated
25.07.2002.....

Before:-

**Miss K Eshun - Chairman
Lady Bonham-Carter**

between

The Secretary of State for the Home Department

Appellant

and

Shu Qing LI

Respondent

DETERMINATION AND REASONS

Representation

For the Appellant: Mr D Ekagha, Home Office Presenting Officer
For the Respondent: No appearance by or on behalf of the Respondent

1. The Appellant, the Secretary of State for the Home Department, appeals with leave of the Tribunal against the determination of an Adjudicator (Mr R D Lewis) allowing the Article 3 human rights appeal of the Respondent, a citizen of China, after dismissing his asylum appeal.

2. In this case the Appellant entered the United Kingdom on 3 April 2000 and claimed asylum at the port of entry on that date.
3. The Appellant's claim to asylum is his fear of military service because he is the only son of his parents. At interview he had said that he had reached the age for conscription and had received an order to report for duty. He did not want to serve because he had been told that people who joined the military service in 1998 had been sent to Tibet and of the ten who joined, eight died due to the lack of oxygen in the high altitudes of that country. His moral objection to serving was that he was the only son and his parents did not want anything to happen to him. He was due to join the army on 16 January, but did not do so, and his parents were then detained and released about a week later. He considered that the punishment he would receive for draft evasion would be about three years at least, although it could be as much as six years.
4. The Adjudicator took into account the objective evidence which says that conscription is compulsory for male citizens in China between the ages of 18 and 22. The army takes its pick of the 18 year olds and places the remainder on the reserve, that those remain liable for call up until the age of 22. Conscientious objection is not recognised and desertion and draft avoidance has become more common in recent times. He also took account of the objective evidence which states that Chinese prisons are unpleasant places.
5. He also took account of the objective evidence that the Chinese government accepts the repatriation of citizens who have entered other countries or territories illegally. Returnees are generally fined. Those who have been repatriated a second time, typically are sent to a labour camp in addition to being fined. First offenders, of leaving without an exit permit and Chinese passport, are typically given a sentence of three months. Detention is normal until the trial is over. There is, however, a range of opinion on penalties. Most agree on around the 5,000 Yuan mark (£350) for the first offence, with one expert saying such fines are rarely imposed in practice anyway, with another expert saying that usually two days' detention is imposed instead and added that the fine for a second offence is between 200 and 500 Yuan (£15 to £40).
6. The Adjudicator found the Appellant a credible witness and accepted much of his story. However, he found that the Appellant did not avoid military service on grounds of conscience. He avoided the draft because he did not want to serve in Tibet and because he was an only son. Fear of punishment for draft evasion does not, in itself, constitute persecution. A draft evader may be a refugee if his punishment would be disproportionately severe for a Convention reason. In this case the Appellant said he could face imprisonment for up to three years with additional time for the time he was absent. This is a severe punishment that would be served in harsh conditions but it is a penalty

that is imposed on all draft evaders and not disproportionately on the Appellant for a Convention reason.

7. The Adjudicator was therefore satisfied that the Respondent did not have a well-founded fear of persecution when he left his country nor that there is a real risk that he would be persecuted for a Convention reason should he be returned to China.
8. However, in allowing the appeal under Article 3 of the 1950 Convention, the Adjudicator stated in paragraph 35 as follows:

“In this case I am satisfied that although the Appellant is not a refugee within the meaning of the 1952 Convention, his rights under the 1950 Convention are engaged. If he were a simple returnee then it is likely that he would receive no more than a fine. But he is not a simple returnee. He is a draft evader and I consider there is a real possibility that if he returned to China those details would be rapidly established and he would be detained in circumstances described by the State Department as harsh and frequently degrading. In those circumstances I am satisfied that there is a real risk that should the Appellant be returned to China, the United Kingdom would be in breach of its obligations under Article 3 of the 1950 Convention.”

9. Mr Ekagha referred the Tribunal to paragraph 4.81 of the Home Office CIPU Report of April 2002 on China. He submitted that the attitude of the Chinese government is that a draft evader can buy himself out with a fine, which means that he does not have to go to prison. This indicates that there will be no risk of torture in prison. He also submitted that military service is compulsory for all men between 18 to 22 years old. The Appellant is now 23 years old and is therefore outside the qualifying age.
10. Mr Ekagha also drew our attention to paragraph 6.154 in the CIPU Report on returnees. This states that the government accepts the repatriation of citizens who have entered other countries or territories illegally, returnees generally are fined. The Tribunal is aware that the Adjudicator took this evidence into account in his consideration of the Respondent's appeal.
11. In this case there was no appearance by or on behalf of the Respondent. His representatives submitted a written submission on his behalf and a bundle of documents and requested that the appeal be determined on the basis of the papers.
12. One of the grounds of appeal by the Appellant was that the Adjudicator gave no reasons for his conclusion that the Respondent would be likely to be imprisoned for draft evasion or that such imprisonment would expose the Respondent to a real risk of cruel, inhuman or degrading treatment. Given that the high threshold set for Article 3 claims where

the responsibility for the infliction of harm is on the receiving state rather than the contracting state (**Bensaid v UK**), the Secretary of State would contend that the evidence available to the Adjudicator does not demonstrate a real risk of cruel or inhuman degrading treatment in this particular case.

13. The grounds of appeal further submitted that given the close correlation between Article 3 and asylum claims, the Tribunal in **Kacaj** found that an appeal which failed on asylum grounds would rarely succeed under Article 3 on the same facts. The Adjudicator gave insufficient reasons for his decision that this case is one of the rare exceptions. Therefore the Adjudicator's decision is flawed. Leave was granted on the basis of these grounds.
14. We note from the Respondent's submission that he disagrees with the submission that the Adjudicator gave no reason for his conclusion that the Respondent would be likely to be imprisoned for draft evasion. It was submitted that reasons were given in paragraphs 30 and 35 of the determination. We disagree. In paragraph 30 the Adjudicator appears to accept the Respondent's evidence that he could face imprisonment for up to three years with additional time for the time he was absent, without stating why this is likely to happen to this Respondent.
15. On our reading of paragraph 35, it appears to us that the Adjudicator allowed the appeal under Article 3 by reason of the conditions in which the Respondent would be detained, which have been described by the State Department as harsh and frequently degrading. The Tribunal are of the view that the Adjudicator failed to address the specific import of Article 3; that is the infliction of harm by the receiving state, in this case China, such as to constitute cruel, inhuman or degrading treatment. There was no evidence before the Adjudicator as to what type of ill-treatment the Appellant might be at risk of. Prison conditions in China may be far from ideal; but, as stated by Mr Justice Collins in **Fazilat [2000] UKIAT 00973**, the Court of Strasbourg has recognised that it is not for signatories to the Convention to impose the standards of the Convention on all the world. Recognition has to be had to the situation in individual countries and to the standards that are accepted and expected in those countries. In the circumstances we do not find that the prison conditions in China, on their own, give rise to a breach of Article 3 of the ECHR.
16. Furthermore, we would agree that given the close correlation between Article 3 and asylum claims, and the Tribunal's finding in **Kacaj** that an appeal which failed on asylum grounds would rarely succeed under Article 3 on the same facts, the Adjudicator's decision to allow this appeal under Article 3 was flawed, more particularly in the light of his findings in relation to the asylum appeal.
17. Turning now to the submissions made by Mr Ekagha, there is no reason for us not to find, in the absence of the evidence to the contrary, that

now that the respondent has reached the age of 23, he is outside the age of military service, and furthermore, he can buy himself out by paying a fine. This means that the respondent does not have to go to prison and therefore there will be no risk of torture.

18. Accordingly, the Appellant's appeal is allowed.

**MISS K ESHUN
CHAIRMAN**