

AJB  
Heard at Field House

XH (Illegal Departure-Risk-  
Return) China CG [2002] UKIAT  
01478

On 12 March 2002

HX27516-2001

**IMMIGRATION APPEAL TRIBUNAL**

Date Determination notified:

10.05.2002

**Before:**

**Mr D K Allen (Chairman)  
Rt Hon The Countess of Mar  
Mr M G Taylor CBE**

**Between**

**XU FONG HU**

**APPELLANT**

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**RESPONDENT**

**DETERMINATION AND REASONS**

1. The appellant is a citizen of China who has been granted leave to appeal to the Tribunal against the determination of an Adjudicator, Mr T Thorne, who dismissed his appeal against the respondent's decision refusing to grant him asylum.
2. The hearing before us took place on 12 March 2002. Mr L Jackson for Nadine Wong & Co. appeared on behalf of the appellant, and Mr A Sheikh of the Home Office Presenting Officer's Unit appeared on behalf of the respondent.
3. Mr Jackson reminded us that the Adjudicator had found that the appellant exited China illegally. He confirmed that the appellant's family was reasonably well off and would be able to pay any fine that he was required to pay on return. It seems that the appellant's statement of 23 August 2001 was the first reference to his parents raising money via a

loan. The Tribunal was referred to paragraph 5 of the grounds concerning the way in which the financing of trips was normally secured. It had not been put to the appellant in the alternative as a question regarding the funding.

4. As regards the question of penalties on return, Mr Jackson took us to the objective evidence on this, which the Adjudicator had rightly found to be somewhat confused. He argued that the program analyst's evidence was of the greatest weight since it had been obtained from a specific source whereas other evidence had been obtained on a visit or did not describe the sources. The appellant as an illegal emigrant would at least be liable to three months detention. On this evidence the question of ability to pay the fine was irrelevant to whether or not he would be imprisoned. Mr Jackson could think of no reason other than the fact that they were legal emigrants with valid passports and the necessary exit permission who had overstayed to explain why a number of the category of people were sentenced to fifteen days or less in detention.
5. He also took us to the news articles at C1 to C2 which indicated a crackdown and an intensifying of the campaign concerning illegal emigration. He also referred us to the report of Dr Burton referred to at paragraph 6.145 of the CIPU Report. He noted that at A5 paragraph 3 of the US State Department Report 2001 delegations were to "model" prisons. In summary it was argued that the evidence concerning punishment for illegal emigrants was contradictory, but there was enough to put the appellant at risk. He should be given the benefit of the doubt.
6. The objective evidence concerning the conditions in prisons and in redirection through labour camps in China was that the treatment the appellant would face would be at least degrading and would probably be inhuman. There were problems with medical care as well as inherent problems in the ways in which prisoners were treated. There was also evidence concerning forced labour at A5 paragraph 2. The reference to repatriation was in essence a reference to repatriation within China and not people who had been abroad, but they were administrative detention centres. In the circumstances even three months detention would be a breach of Article 3 and of Article 8. The evidence from the program analyst was of particular weight as it came from a Chinese source and they generally denied that human rights abuses occurred and were unlikely to exaggerate what would happen to returnees.
7. In his submissions Mr Sheikh argued that on the balance the Adjudicator was correct. The Canadian evidence suggested that the majority of people faced a relatively short time in detention and in relatively good conditions. The evidence of Dr Chin differed, in that he said that they were taken into custody to find out how they were smuggled out so he must be referring to illegal leavers who were

mainly fined. The greater likelihood was that it would be a fine only. It was necessary to consider how seriously this offence was treated and if generally by way of a fine it was not likely to be regarded as a serious criminal offence, and this was relevant to the duration of the sentence.

8. The references to C1 and C2 concentrated on the particularly adverse treatment of the smugglers and gang leaders who had been targeted as opposed to the people who were being smuggled.
9. As regards the appellant's ability to pay the fine, the Adjudicator had rejected his credibility concerning the main issues. But the Adjudicator had accepted his evidence that his passport was paid for by his parents and it was his evidence taken with the fact that he had managed to get to the United Kingdom, which must have been paid for, made it more than reasonably likely that he would be able to afford the relatively modest fine required on return to China.
10. By way of reply, Mr Jackson argued that the evidence showed a very significant disparity between the amount paid, as referred to at paragraph 6.103 of the CIPU Report, to get people out of China in contrast to the average national income. No specific challenge had been made to the appellant's account of how he funded his exit from China so that it should be found that he would not have the funds available to pay a fine. In any event the evidence showed that he would not be fined but would be imprisoned.
11. We stated that we would reserve our determination.
12. The Adjudicator disbelieved much of the appellant's evidence. He did not accept that when he left China he was a genuine follower of the Falun Gong movement nor that he was arrested by the authorities because of supposed support for Falun Gong. He did not believe his claim to fear snakeheads on return. He did not mention this in interview and the Adjudicator did not accept his explanation that he did not think it relevant. At interview he said that his parents paid for his release from prison. He also said that they paid for his passport. He did not claim that the payment for those matters was a consequence of loans from snakeheads. The first reference to that is to be found in his statement on 23 August 2001 where he said that his fleeing from China was arranged by his parents through an agent who was harassing and threatening them and that his parents still owed the agent money. The relevance of this issue is in connection with the question of whether if the appellant was fined on return as an illegal emigrant, it would be possible for him to pay that fine. We shall return to this issue shortly. In the view of the Tribunal, on the basis of the evidence he gave at interview, which was not changed until shortly before the hearing and at the hearing, the Adjudicator was entitled to conclude that the appellant's family were reasonably well off and would be able to pay a fine. He did not accept the claimed risk from snakeheads, and it is not an unreasonable inference to draw from that that the Adjudicator must

therefore have concluded that the appellant's trip to the United Kingdom had been financed by other means. In particular in this regard we note from paragraph 6.103 of the CIPU Report that the basic financing of customers trips is usually secured through their family networks rather than through loan sharks, and Dr Chin, an expert, has said that family arrangements account for up to 90% of cases. We bear in mind also that the Adjudicator did not reject the appellant's evidence that his parents paid for his passport. In the light of these findings, we consider that the Adjudicator was entitled to conclude that the appellant's family would be able to pay any fine to which he was subjected. It may be that their ability to pay that fine would be as a consequence of payment raised by a family network rather than by the parents themselves, but we do not consider it an unreasonable inference to draw that the fact that the appellant was in the United Kingdom and that he obtained a passport and that the Adjudicator found that he did not have a risk from snakeheads means that there is an ability in his family either on their own or through a family network to raise significant amounts of money should they be required.

13. We pass on to the question of what the appellant would face on return, which, as Mr Jackson rightly pointed out, is a confused picture. The Adjudicator accepted that the appellant had left China illegally. He noted that opinions are divided as to whether a person in the appellant's position would be punished at all.

14. We have considered the objective evidence on this. Mr Jackson urges that we pay particular attention to the report of a program analyst with Citizenship and Immigration Canada who provided some information regarding the repatriation of 90 Chinese illegal immigrants from Canada to Fuzhou in May 2000. Two CIC officials, two Canada based senior officials and a locally engaged interpreter from the Canadian embassy visited the number two detention centre of public security of Fuzhou in Mawei. The program analyst cited a senior Chinese official in providing the information that he did. We pass over the information concerning persons who leave China legally with a valid Chinese passport since the appellant did not leave legally. The only relevance of this is it is said that persons who leave legally with a valid Chinese passport would be punished with administrative fines of up to the equivalent of \$1,000 Canadian and would receive administrative jail terms of up to a maximum of fifteen days if unable to pay the fine. On the face of it, it is entirely unclear why a person who left China legally with a valid Chinese passport would be punished with a fine at all, and we can only agree with Mr Jackson's surmise that this must be a reference to persons who have though otherwise acted lawfully have nevertheless overstayed their permission to be outside China, and hence the need in the view of the authorities for punishment. It is said that leaving China without exit permission or a passport is a criminal offence punishable up to one year in prison. First time offenders get a short sentence depending on the circumstances of their case, but probably with sentences of three months.

15. At the entrance to the detention facility which the Canadian Officials saw, there was a huge sign stating that in 1999 47 groups of deportees went through that facility for a total of 4,698 persons, and that 3,174 were sentenced to 15 days or less of detention. It is said that the remaining 1,524 persons were referred to the judicial system where their cases were reviewed and the maximum sentence of one year meted out. It is far from clear how that can be said to be explained in the light of the earlier statement that most first time offenders would receive probably sentences of three months. Mr Jackson argued that we should accept that the people who were sentenced to 15 days or less were legal emigrants. We take it that this is on the basis that their sentences were said to be 15 days or less and that was a figure said to be the maximum for people who left China legally with valid Chinese passports. We do not consider that that is a necessary inference. It probably does not have to be necessary however, and it is perhaps more appropriately assessed on the basis whether or not there is a real likelihood that that is the case. Even on this basis, in absence of any indication otherwise of the numbers of persons who are punished for having left China legally with a valid Chinese passport, we do not find ourselves in a position to agree with Mr Jackson on this point. Particularly in the light of the clear disparity between the claim on the one hand that first time offenders would probably get three months and the fact that all the people other than the fifteen days or less got the maximum sentence of one year, we find the evidence to be sufficiently unclear that we consider that it is reasonably likely that at least some of those people who obtained 15 days or less sentence were people who were illegal as opposed to legal emigrants.
16. In any event it has to be seen in the context of the objective evidence as a whole. A telephone interview with Dr Ko-Lin Chin, who is an Associate Professor at the School of Criminal Justice at Rutgers University Newark, said that migrants who return to China are normally taken to the border patrol education camp in Fujian province where they are interrogated by Chinese authorities to find out how they were smuggled out of the country and then given a fine between the equivalent of \$1,800 to \$3,600 Canadian. Those who pay the fine are released immediately and those who cannot pay are sent to “re-education through labour” custody for up to a year.
17. In collaboration with the Canadian embassy in Beijing, the research directorate composed a series of questions on the treatment of returnees to Beijing based diplomatic officials from four countries, Canada, Australia, Japan and the United States. These four officials were asked the following question: “What are the normal penalties in practise for returnees (fines- amount, detention – length)?
18. The first official, Dr Charles Burton, a political councillor of the Canadian Embassy, said that fines are rarely imposed in practice and would only be imposed if foreign attention is raised. The Chinese

Central Authorities will put pressure on local authorities to levy fines or force imprisonment in those two circumstances, if the individual has hurt the “national pride” or if there is willingness from Beijing to implement the law on exit administration.

19. Dr Grahame Nieman, First Secretary, Immigration – Compliance, Australian Embassy, said that the standard fine is the equivalent of \$900 Canadian. He said that local authorities are usually soft on fines unless there is strong pressure coming either from Beijing or other foreign governments. He referred to recidivists from Nanning who were initially sentenced under various pressures to a three year term and an eight year term but whose convictions were later suspended.
20. Mr Morio Matsumoto, Councillor and Director of the Consulate Affairs Office of the Japanese Embassy said that the standard fines are the equivalent of \$900 Canadian and returnees are normally detained for 4 or 5 days.
21. Mr Thomas J Smiley, Country Immigration Assistant Attaché US Immigration of Naturalisation Service, US Embassy, said that the normal penalty for a first offence is two days of detention and no fine and for a second offence a fine of \$200 - \$500 Yuan (equivalent of \$36 – \$90 Canadian).
22. Mr Jackson also referred us to the translation of two articles from the Fuzhou Ribao of 28 September 1999 referring to a crackdown on illegal immigration activities including the following measures that all organisers and transporters will be liable to criminal charges and all illegal emigrants will be liable to the charge of illegal crossing of borders. It is said that under this new judgement criteria, suspects caught in illegal emigration activities will not only be subject to police detention and fine but liable to criminal charges that could result in a set term imprisonment. There is also reference at C2 to a crack down on organised emigration crimes and targeting gang leaders and indicating that hard smugglers and serious offenders and criminals who have caused injuries or loss of life and those who have used violence to resist coastguards will be punished relentlessly. Repeated illegal emigrants and those who collectively put out to sea to emigrate illegally abroad and are caught and repatriated will be charged for illegally crossing borders and on those who defy the campaign by committing those crimes during the crackdown period, the court will impose the heaviest punishment allowed by the applicable laws.
23. It is right to point out as Mr Jackson does that it is only the report of the program analyst which is sourced directly from Chinese authority. However that is to our mind no more than a minor factor in assessing its weight in relation to the other information provided by Dr Chin and by the four diplomatic officials. We take all this into account together with the newspaper reports to which we have just referred. We find it significant that the essential tenor of the views of the four diplomatic

officials is that imprisonment is rare and if it happens it is for a very short period and that the normal penalty is more likely to be a fine. There is no evidence that the appellant is a recidivist. In our view, considering the objective evidence as a whole, we consider that the greatest likelihood that the appellant would face on return is that he would be at risk of being fined. As we have found above, we consider that his family would be in the position to enable payment of a fine at the sort of levels that are spoken of in the objective evidence to be paid. Accordingly we consider that he does not face a real risk of imprisonment for more than perhaps a short period of two to five days, and, although the objective evidence indicates harsh prison conditions in China, we do not consider that detention for such a short period gives rise to a real risk of treatment amounting to breach of his Article 3 or Article 8 rights.

24. As a consequence we dismiss this appeal.

**D K Allen  
Chairman**