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Heard at Field House

On 1st July 2002

WC (Illegal Departure- Failed Asylum Seeker) China CG [2002]UKIAT 03295

CC/01822/2002

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IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:
29TH JULY 2002
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Before:

Mr J Barnes (Chairman)
Mr C Thursby
Mrs A J F Cross de Chavannes

Between:

WEN YING CHEN

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

Representation:
For the Appellant: Mr A Slatter of Counsel, instructed by Central London Law Centre
For the Respondent: Miss C Cooper, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a citizen of China, born on 4th August 1973. She claims to have arrived in the United Kingdom on 10th August 1998 and she was certainly here by 17th August 1998 when she claimed asylum. After interview, her asylum application was refused for the reasons set out in a letter dated 29th January 2001. On 7th February 2001, directions were given for her removal to China as an illegal

entrant after refusal of her asylum application. She appealed on asylum grounds only, but at the subsequent hearing before an Adjudicator (Mr Warren L Grant) on 12th February 2002 that claim was expanded to include arguments of breach of her human rights under Articles 2, 3 and 8 of the European Convention. The Adjudicator did not address the arguments in respect of Article 8. Leave to appeal to the Tribunal was given in respect only of the failure to address the Article 8 submissions.

2. Mr Slatter attempted before us to widen the grounds of appeal, but we see no basis on which that can properly be done. We do not sit in judgement on our fellow Vice Presidents who have considered the bases of appeal, and there is no reason to think that there was any flaw in the approach of the Vice President who granted leave in deciding that there was no arguable issue in relation to credibility findings or certain procedural matters which were raised in the grounds of appeal. We have therefore been concerned only to deal with the question of whether the return of the Appellant to China would lead to a breach of her human rights under Article 8 of the Convention.

3. This claim was not advanced before us by any reference to any current family life enjoyed by her in the United Kingdom. Mr Slatter's submission was that her treatment as a returned failed asylum seeker who may illegally have left China was such that it would amount to an interference with her right to private life under Article 8(1) and that, although he conceded the removal was in pursuance of a legitimate purpose under Article 8(2), it was his argument that it would be disproportionate to do so.

4. Mr Slatter sought to make his submissions on the very broad basis, as he finally accepted when pressed by us on the point, that it would be in breach of the human rights of any failed asylum seeker who had illegally left China to return them. We are therefore concerned with a proposition in the broadest possible terms on his part. It was a substantial part of his argument that if the Appellant were in any way exposed to imprisonment in China, that would inevitably lead to a breach of her right to private life. He accepted that any such breach would have to be of such gravity as virtually to destroy that right, and in the light of the starred Tribunal decision in Devaseelan, that is undoubtedly correct.

5. He sought to refer us to passages in the Country Information and Policy Unit (CIPU) Assessment of April 2002 and to passages in the current US State Department Report dealing with the questions of prison conditions and torture in China in very broad-brush terms. We do not dispute that there may be instances of torture during detention or that prison conditions in China are generally harsh. In our judgement, however, Mr Slatter has to demonstrate to us on the background evidence that there is a reasonable likelihood that this Appellant might suffer such treatment were she to be returned to a point which would very nearly equate to treatment in breach of her human rights under Article 3 of the European Convention.

6. We accept Miss Cooper's submissions to us that the proper approach to this is to look at the specific background evidence dealing with the situation of returnees who have departed illegally from China to see what is likely to happen to them on

return. This is dealt with initially at paragraphs 6.154 onwards in the CIPU assessment, and is the most comprehensive treatment of any to which we have been referred. Paragraphs 6.154 and 6.155 are as follows:

> "6.154 The government accepts the repatriation of citizens who have entered other countries or territories illegally. Returnees generally are fined. Those who have been repatriated a second time typically are sent to labour camp in addition to being fined again. Those who are identified as people smugglers ('*snakeheads*') are liable to criminal prosecution.
>
> 6.155 The main conclusion of the Political Counsellor's fact-finding report with regards to returning is:
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> '*There is evidence of wilful deception of foreign governments as to sanctions against returned illegal immigrants. Much touted policies of prison sentences and extensive re-education programs are apparently most not implemented. Rather we have become aware of preferential economic policies and business loans made available to returnees by local governments. We are assured that children under 16 returned to China would not be subject to incarceration under any circumstances.*'

7. This is very much in line with what is said earlier in dealing with people smugglers at paragraphs 6.109 onwards in the CIPU assessment. We note that at paragraph 6.115 it is recorded that the act of exiting mainland China without permission is an offence and if this is the only unlawful act committed by the immigrant then they are punished under Article 14 of the Law of the People's Republic of China on the Exit and Entry of Citizens (1986). The prescribed penalties for this offence are that they "*may be given a warning, or placed in detention for not more than 10 days by a public security organ*". Paragraph 6.116 points out that there are certain overlapping provisions under which it is possible for fines to be levied and that the rate may depend upon where they have come from. At paragraph 6.117 it is said "*one expert noted that the Chinese government does not generally mistreat returnees unless the person has been deported to China more than once. If a returnee is held to be involved in the smuggling operation, then they are subject to the criminal procedure law*." There is also further, at paragraph 6.120, reference to the Chinese governments, both at provincial and at state level, having been publicly committed to combating '*snakehead*' operations and it is clear from this material that the Appellant, if now returned, stands only in the situation at worst of being someone who left illegally and not being concerned in some smuggling operation as such.

8. At paragraph 6.161 onwards, there is a review of the varying views of several experts in Chinese matters. It shows that there is a range of opinion amongst those experts, one of whom says that the offence may lead to administrative sentence of three months, but most of the experts agree that for a first offence only a fine is likely to be imposed with one expert saying that such fines are rarely imposed in practice anyway and another saying that usually two days detention is imposed instead and then referring to a very low fine for a second offence. At paragraph 6.164 it is reported that all the experts are agreed that there are no long-term repercussions for returnees or any evidence that they are treated differently depending on where they are returned to.

9. Given all that background information as to what might happen if it is accepted that this Appellant left illegally, and for the purposes of this determination we are prepared to make that assumption, it does not seem to us that the treatment referred to is such as would lead to any breach of the Appellant's human rights at all. We have to look at this on the basis of what is reasonably likely to happen to the Appellant on her return and not what may possibly apply either to her or to the whole range of those who are charged with serious offences under the Chinese Criminal Calendar.

10. It is in that respect that it is our view that Mr Slatter has not put forward the matter on the correct basis, but that we prefer Ms Cooper's approach of specific consideration of the case with which we are dealing.

11. For the reasons, as we say, we do not accept that there would be any breach of the Appellant's human rights at all by returning her at this stage so that Article 8(1) would not be breached. If we are wrong in that respect, however, we are satisfied that the nature of the treatment referred to is such that removal would not be disproportionate having regard to the public interest in the maintenance of an effective immigration policy and the removal of those aliens who have no right otherwise to be in the United Kingdom.

12. For the above reasons, this appeal is dismissed.

J Barnes
Vice President