IN THE COURT OF APPEAL OF NEW ZEALAND

CA167/02

BETWEEN	ANGUO JIAO Appellant
AND	REFUGEE STATUS APPEALS AUTHORITY First Respondent
AND	ATTORNEY-GENERAL Second Respondent

Hearing: 21 July 2003

Coram: Keith J
Tipping J
Glazebrook J

Appearances: P F Chambers for the Appellant
First Respondent abides the decision of the Court
I C Carter for the Second Respondent

Judgment: 31 July 2003

JUDGMENT OF THE COURT DELIVERED BY KEITH J

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The role of the benefit of the doubt in refugee appeals

[1] What approach is the Refugee Status Appeals Authority to take when deciding appeals brought by applicants for refugee status? Under the immigration legislation, appellants have "the responsibility … to establish the claim". What does that responsibility involve and in particular in what circumstances, if any, are

appellants entitled to the benefit of the doubt in the process of establishing their claims to be refugees?

[2] A refugee is defined in article 1A(2) of the 1951 Convention on the Status of Refugees as a person who

> owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it. (The English text of the Convention is in the sixth schedule to the Immigration Act 1987)

[3] The determination that a person is a refugee involves two matters – the finding of facts and the making of an assessment based on those facts. What, as a matter of fact, has happened to the claimant or more generally in the claimant's country of nationality or residence for the claimant to be fearful of persecution in the event of return to that country; and, on those facts as found, is the fear of persecution for one or other of the five stated reasons well-founded?

[4] The questions set out in para [1] arise in this appeal from a decision of Potter J in the High Court refusing an application for judicial review (*Jiao v Refugee Status Appeals Authority* [2002] NZAR 845). In that application the appellant challenges the validity of the decision of the Authority rejecting his appeal.

[5] The critical statutory direction relating to the appeal to the Authority is given by s129P(1) of the Immigration Act:

> **129P Procedure on appeal**
>
> (1) It is the responsibility of an appellant to establish the claim, and the appellant must ensure that all information, evidence, and submissions that the appellant wishes to have considered in support of the appeal are provided to the Authority before it makes its decision on the appeal

[6] That direction parallels the direction governing the initial decision, to be made by officials, on the claim:

129G How claim made and handled

…

(5) It is the responsibility of the claimant to establish the claim, and the claimant must ensure that all information, evidence, and submissions that the claimant wishes to have considered in support of the claim are provided to the refugee status officer before the officer makes a determination on the claim.

[7] The obligations placed on the claimant by those provisions are to be contrasted with the permissive statements of the powers of the refugee status officers and the Authority in s129G(6) and s129P(2):

> For the purpose of determining a claim, an officer [the Authority]—
>
> (a) May seek information from any source; but
>
> (b) Is not obliged to seek any information, evidence, or submissions further to that provided by the claimant [appellant]; and
>
> (c) May determine the claim on the basis of the information, evidence, and submissions provided by the claimant [appellant].

[8] It does not of course follow from the discretions conferred on the officer and the Authority and from the contrast with the duties imposed by the other provisions on the applicant and appellant that the officer and the Authority need never use those discretions to seek information. The Authority has decided over 6000 cases since it was established in 1991. Over that time, it has no doubt built up considerable institutional knowledge. Its librarians, according to its latest annual report, provide country information to its members, refugee status officers and lawyers. The members and officers do in practice draw on such information as indeed is to be seen in the present case. And circumstances may require them to consider whether to exercise those powers in respect of specific matters arising in a particular case.

The refugee status application and appeal fail

[9] Anguo Jiao, the appellant, a citizen of the People's Republic of China, came to New Zealand on a visitor's permit which ran for thirteen weeks from 28 July 1996. Within that period, on 22 October 1996, he applied for refugee status. The Refugee Status Branch interview was held on 22 May 2000. On 19 June 2000 the officer who interviewed him sent him an eight page report of the interview including

some questions and a request for a medical report. On 24 July 2000 his barrister responded to the questions and provided the medical report.

[10] On 19 June 2001 the Refugee Status Branch issued its decision. (We sought and had no explanation of the period of over four years from application to decision. We simply note it here.) It found that Mr Jiao was not a refugee within the meaning of article 1A(2) of the 1951 Convention and declined refugee status. The careful and detailed set of reasons for the decision addresses in particular Mr Jiao's fear of reprisals from the work unit leader in the factory in which he worked (a work leader who, he said, had embezzled factory funds) because of industrial action in which he was involved, his activities in relation to the pro-democracy movement in 1989, and his fear of persecution as a result of a serious head injury he suffered at the hands, he said, of his unit leader.

[11] Those three matters were also the subject of Mr Jiao's appeal to the Authority which was heard on 6 November 2001 and rejected by the Authority's decision of 17 December 2001. It is that decision which is the subject of the application for judicial review and the present appeal.

[12] The Authority held that there was no real chance of the former unit leader causing him serious harm or indeed any harm on his return to China; the appellant faced no real chance of persecution from the relevant state authority by reason of his past participation in political protests; and he would not be at risk of discrimination amounting to persecution as a result of his speech defect caused by his head injury. The Authority has used from the outset the test of a "real chance" rather than "well-founded", following the decision of the High Court of Australia in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 389, 397-398, 407, 429; cf 412-413. As the judgments in that case show, courts in different jurisdictions have used yet other expressions. Since that particular matter does not directly arise in this case we do not add to the discussion, except to make one point about the judgment captured in those expressions.

[13] That judgment is to be made on the basis of facts which have been determined. It involves assessment or evaluation. In a related situation, in

considering whether a person whose extradition was being sought "might, if returned, be detained or restricted in his personal liberty by reason of his … political opinions", Lord Diplock speaking for the House of Lords said that it led only to confusion to speak of "balance of probabilities" in that context:

> It is a convenient and trite phrase to indicate the degree of certitude which the evidence must have induced in the mind of the court as to the existence of facts, so as to entitle the court to treat them as data capable of giving rise to legal consequences. But the phrase is inappropriate when applied not to ascertaining what has already happened but to prophesying what, if it happens at all, can only happen in the future. There is no general rule of English law that when a court is required, either by statute or at common law, to take account of what may happen in the future and to base legal consequences on the likelihood of its happening, it must ignore any possibility of something happening merely because the odds on its happening are fractionally less than evens. (*Fernandez v Government of Singapore* [1971] 2 All ER 691, 696)

[14] Cooke P similarly said that the answer to the question whether disclosure of official information "would be likely to prejudice" certain interests "must be largely a matter of judgment" and that a reference to onus of proof is "not fully apt" (*Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 391 *l*42 – 392 *l*2, see also McMullin J (404 *l*54 – 405 *l*1) and Casey J (411 *ll*10 - 19)). And more recently, Tipping J, speaking for a five-Judge Court, said that in the process of classifying documents and other matters as "objectionable" under censorship legislation there is no question of an onus or standard of proof arising. The question to be determined "can be characterised as one of assessment, judgment or opinion. It is not one of objective fact. Such a question … is not sensibly amenable to a standard or onus of proof" (*Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para [34]).

The High Court review fails

[15] The grounds for review have narrowed and also moved in the course of this litigation. The statement of claim contended that the decision was invalid

> in that it is so unreasonable that no reasonable decision-maker could make such a decision and/or is based on irrelevant considerations and/or has failed to take account of relevant considerations and/or was made otherwise than in accordance with law and/or constitutes an abuse of the decision making process of the Refugee Status Appeals Authority

for one or more of 13 reasons which it then set out. Of those reasons it is only the first which Potter J addresses in her judgment:

> The decision has been made on the incorrect presumption that the plaintiff is required to prove his claim to refugee status, based on a legal error by the defendant in interpretation of sections 129P(1) and (2) of the Immigration Act 1987 and contrary to the High Court decision in *T v Refugee Status Appeals Authority* [2001] NZAR 749.

[16] That incorrect presumption, the statement of claim continued, is prevalent in certain passages of the Authority's decision in which it reasons that there was "no evidence" supporting particular contentions made by the appellant.

[17] The written submissions prepared for the High Court hearing similarly emphasised the alleged incorrect presumption that the appellant was required to prove his claim to refugee status. That presumption was said to be based on a legal error by the Authority in its interpretation of s129P(1) and (2) of the Immigration Act and to be contrary to the High Court decision in *T's* case. The submissions developed the point by reference to the passages in the Authority's decision which were said to be flawed because of that error of approach. The expression the "benefit of the doubt" does not however enter into that part of the submissions. It does not in fact appear until the very end of the submission:

> 36. To conclude, I submit, where the appellant is proven credible by the defendant, as the plaintiff was in this case, where the appellant has been candid in his testimony, as the plaintiff was in this case, where it is reasonable for the appellant to conclude as he has in this case that he has a genuine well founded fear of persecution and there is an absence of evidence to the contrary, *he should have been given the benefit of the doubt by the defendant*, instead of concluding as it did contrary to the plaintiff's evidence.
>
> 37. To do otherwise is to place, I submit, an unsustainable onus upon the plaintiff that may appear consistent with the statement "Section 129P(1) and (2) Immigration Act 1987 states it is the appellant's responsibility to prove the claim to refugee status", but is clearly inconsistent with meaning and intention of 129P of the Act. That, I submit, is exactly what Durie J was warning the defendant against, in his decision *T v Refugee Status Appeals Authority* [2001] NZAR 749. (emphasis added)

[18] One response to para 36 is that it is of course for the Authority to determine whether the appellant has a "well-founded fear of persecution" on one of the Convention grounds; it is not enough for the appellant simply to assert that fear.

That paragraph also suggests that the benefit of the doubt applies to the Authority's assessment of whether the fear of persecution is well-founded and not simply to the Authority's determination of fact, a matter to which we return.

[19] In her judgment, Potter J addresses the submission in para 37 (para [17] above) and the first ground presented by the statement of claim (para [15] above). She worded the ground in this way:

> [T]he Authority made an error of law in proceeding on the basis that a refugee status claimant bears the onus of proving his or her claim in the appeal process. (para [1])

[20] She considered the position as it was before refugee legislation was enacted in 1999, the meaning and effect of that legislation, and *T's* case. She concluded that the Authority had not erred in law in proceeding in the way it did. She disagreed with the interpretation adopted in *T* in which Durie J had said, obiter:

> [23] What then is meant by "the responsibility of an appellant to establish the claim" in s 129P(1)? First, as I have mentioned, the reference is not to a burden of proving the claim. I think it confuses when an inquisitorial body substitutes words more at home in a Court and for that reason alone I think it is unwise, in this instance, to substitute for words that the legislature itself has chosen. But more than that, in looking at the scheme as a whole, I think the responsibility referred to in the subsection can be no more than a responsibility to establish what the claim is. The provision cannot by itself deprive the Authority of its role as a Commission of Inquiry with all the attendant duties to fully inquire into such claims as are presented to it.
>
> [24] I am reinforced in that conclusion by looking at the words that follow and then the subsection as a whole, or the section as a whole for that matter. The succeeding words, though linked by a distinguishing conjunction, do not ascend to the more refined world of onus and standards of proof. They remain grounded with the paraphernalia of supporting material.

[21] All that we need say on those matters is that we agree with the interpretation adopted by Potter J essentially for the reasons she gave. It follows that we disagree with the interpretation given in *T's* case. Applicants at the initial stage and appellants before the Authority have the responsibility, to use Parliament's words, to establish their claims to refugee status. That proposition of law is however to be read with the discussion in the next section of this judgment. As Durie J indicates the process is not to be seen as identical to the regular court process for determining disputed facts.

The responsibility to establish the claim and the benefit of the doubt

[22] Before us, Mr Chambers (who had also appeared before the Authority and the High Court) did not attempt to make the broader argument about the alleged error in requiring the appellant to prove his claim to refugee status. Rather, as indicated, he now placed the emphasis on the alleged failure by the Authority to afford to the appellant "the benefit of the doubt" in support of his claim.

[23] An approach involving the benefit of the doubt is to be seen against the characteristics of the process established to assess claims to refugee status. We begin with the very widely accepted principle of law that claimants must prove the facts that they assert. As we have seen, Parliament states essentially that proposition in respect of both the initial application and the appeal in s129G and s129P of the Act. It has avoided the words "onus" or "burden", by using "responsibility", and uses "establish" rather than "prove" but the provisions are consistent with established principle. The role of that principle in the resolution of refugee claims was recognised early in the life of the 1951 Convention which came into force in 1954. In 1960, Dr Paul Weis, at the time Legal Adviser to the UN High Commissioner for Refugees, in an article cited by the Authority in its recent discussion of the burden of proof and related matters in *Refugee Appeal No 72668/01* [2002] NZAR 649 began with the proposition that

> The burden of proof is, according to general principles of law, on the applicant: "ei incumbit probatio qui dicit non qui negat", "actori incumbit onus probandi". ("The Concept of Refugee in International Law" (1960) 87 Journal du Droit International (Clunet) 928, 986)

A Commission of the Institut de Droit International has this year stated the basic principle for international litigation in the same terms:

> The basic principle relating to evidence and proof is *actori incumbit probatio*, i.e. the claimant must prove the assertion of facts that he makes. … (*Annuaire de l'Instiut de Droit International – Session de Bruges* Vol 70-1 (2003) 393)

[24] Dr Weis moved from the general principle to recognise the particular features of refugee determinations:

> The normal rules of evidence are, however, difficult to apply in proceedings for the determination of refugee status. The applicant may call witnesses in support of his statements and he may sometimes be able to present documentary evidence. But it follows from the very situation in which he finds himself as an exile, that he will rarely be in a position to submit conclusive evidence. It will essentially be a question whether his submissions [declaration in the French text of the article] are credible and, in the circumstances, plausible. The principle "in dubio pro reo" should be applied mutatis mutandis, ie, where there is, in the absence of conclusive evidence, doubt about the facts the applicant alleges, he should be given the benefit of the doubt.

[25] He supported that emphasis on the particular character of refugee determinations by quoting from a decision of a Bavarian Administrative Court:

> It must also be taken into consideration that the persons concerned are invariably in considerable difficulties if called upon to submit satisfactory proof. This unfavourable procedural situation calls for considerable understanding when the factual statements of the appellants are examined. Proof submitted in accordance with … the Asylum Ordinance must therefore always be examined with the greatest care, and be made use of to the maximum extent possible and necessary.
>
> The special nature of the circumstances which caused the individual to flee from his country makes it particularly difficult to prove the reasons for the granting of asylum. It is therefore necessary for the Courts to act generously in the evaluation of such evidence, provided only that the statements appear logical and plausible.

[26] Such an approach to proof of facts, taking account of the difficulties faced by a litigant, can be found elsewhere in the law, for instance where relevant information is in the control of the other party (eg *R v Inland Revenue Commissioner, ex parte T C Coombs and Co* [1991] 2 AC 283, 300 F-H). The present situation is somewhat similar in that there can in general be no question of the applicant or for that matter the Authority seeking information particular to the applicant from the government of the State from which the applicant is seeking refuge.

[27] The need for that generous approach is reinforced by the consideration that the applicant's right to life may be put at risk if the refugee status is declined, a matter emphasised by this Court in *Butler v Attorney-General* [1999] NZAR 205, 211.

[28] It is in that broader and practical context that the expression "the benefit of the doubt" has come to be used. In particular, it is to be found in the *Handbook on*

Procedures and Criteria for determining Refugee Status (issued in 1979 and re-edited in 1992) of the Office of the UN High Commissioner for Refugees which we quote at some length because of the recognised role both of the High Commissioner and the *Handbook*. Under the heading Establishing the Facts, the *Handbook* says this:

> **(1) Principles and methods**
>
> 195. The relevant facts of the individual case will have to be furnished in the first place by the applicant himself. It will then be up to the person charged with determining his status (the examiner) to assess the validity of any evidence and the credibility of the applicant's statements.
>
> 196. It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, *he should, unless there are good reasons to the contrary, be given the benefit of the doubt*.
>
> 197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.
>
> …
>
> **(2) Benefit of the doubt**
>
> 203. After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), it is hardly possible for a refugee to "prove" every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. *It is therefore frequently necessary to give the applicant the benefit of the doubt.*
>
> 204. The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. The applicant's statements must be coherent and plausible, and must not run counter to generally known facts.

(3) Summary

205. The process of ascertaining and evaluating the facts can therefore be summarized as follows:

(a) The applicant should:

(i) Tell the truth and assist the examiner to the full in establishing the facts of his case.

(ii) Make an effort to support his statements by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary he must make an effort to procure additional evidence.

(iii) Supply all pertinent information concerning himself and his past experience in as much detail as is necessary to enable the examiner to establish the relevant facts. He should be asked to give a coherent explanation of all the reasons invoked in support of his application for refugee status and he should answer any questions put to him.

(b) The examiner should:

(i) Ensure that the applicant presents his case as fully as possible and with all available evidence.

(ii) Assess the applicant's credibility and evaluate the evidence *(if necessary giving the applicant the benefit of the doubt),* in order to establish the objective and the subjective elements of the case.

(iii) Relate these elements to the relevant criteria of the 1951 Convention, in order to arrive at a correct conclusion as to the applicant's refugee status. (emphasis added)

[29] To return to a point made earlier (paras [13] and [14]), we would stress that this process, up to the very last paragraph, is all about establishing the facts – the heading to this part of the *Handbook*. It is not about the later evaluation stage of deciding whether the applicant's fear is "well-founded", to use the Convention's wording, or a "real chance", to use the Authority's.

[30] As is confirmed by the *Handbook*, the expression "the benefit of the doubt" is plainly a useful one in this context. The New Zealand Authority has used it from its earliest days (eg *Refugee Appeal No 9/91* of 27 August 1991). Essentially the same result as is achieved by it as would no doubt also be delivered by the generous approach adopted by the Bavarian Court (para [25] above). But the expression is well entrenched and nothing is to be gained by casting doubt on it. That is particularly so given that it is used in the *Handbook* prepared by the UNHCR, a body which has a critical role in facilitating and promoting the uniform understanding and

operation of the Convention, a matter which arises over increasing areas of New Zealand law (see eg the comparable role of another international body considered in *Chief Executive of New Zealand Customs Service v Rakaia Engineering and Contracting Ltd* [2002] 3 NZLR 24, para [34]). What may be said, however, is that the phrase should not get in the way of the proper consideration of the evidence bearing on disputed facts, including a weighing of the possible availability of other evidence supporting or questioning that given by the claimant. As the United States Court of Appeals for the Second Circuit recently said, while "credible testimony may be enough depending on the circumstances", applicants should "make an effort to support [their] statements by any available means and give a satisfactory explanation for any lack of evidence" (quoting the UNHCR *Handbook* para 205(a)(ii) in para [28] above); *Moussa Diallo v Immigration and Naturalization Service* 232 F 3rd 279, 286 (2nd Cir 2000). That UNHCR passage goes on to say that "If necessary [the applicant] must make an effort to procure additional evidence".

[31] Is it a reviewable error for the Authority to fail to give an appellant the benefit of the doubt generally or in the particular circumstances of this case? We begin with the proposition that the appellant, to quote the Act once again, has the responsibility to establish his claim to refugee status. Next, the 1951 Convention does not itself lay down procedures for the determination of refugee status. The UNHCR *Handbook* recognises that (para 189). What can be said about the legal obligations of the State parties implicit in the Convention has already been set out above : general principle requires the applicant to establish the claim, and the particular difficulties faced by refugee claimants in making out their claims justify a generous approach to the determination of the claim. Such generosity is also to be seen operating in a different sense in the tests of "well-founded" or "a real chance" : those tests do not require, for instance, a showing that persecution is more probable than not. But we recall that that is a distinct matter of evaluation (against a rather low threshold) in respect of which talk of onus or standards of proof is inappropriate.

[32] Were a decision-maker to deny the particular difficulties of refugee claimants and to insist on proof that it was impossible for the applicant to provide there might well be an argument that the decision-making process was fundamentally flawed, and that it did not meet the obligations of States in respect of that process, implicit in

the Convention, especially given its vital humanitarian purpose. To insist on such proof by claimants might properly be seen as requiring action by them which would not fall within their "responsibility" under the Act nor, in the circumstances, within the basic generally accepted principle that claimants must prove the facts they assert. In such an extreme case the legislation, read with the Convention (glossed by general principle, qualified by the relative situations of the claimant and the Authority), might well be seen as breached.

The benefit of the doubt in this case

[33] But that, for two reasons, is not our case. The first is that at no point in the course of a hearing which lasted the best part of a day, in respect of which no complaint of unfairness is made and which, so far as Mr Chambers is concerned, ended with him saying that there were no other matters which he wanted to raise, did he identify a particular aspect of his client's appeal to which the Authority should apply the benefit of the doubt. As this Court said in *Butler v Attorney-General* [1999] NZAR 205, 215, it cannot be an error of law for a tribunal considering a matter which is properly before it to fail to rule on some particular aspect of the matter if that matter is not raised with it by the interested party and if it does not stand out as requiring decision.

[34] That leads to the second reason why this argument must fail. In the process of decision-making in this case, the benefit of the doubt does not stand out as requiring application. In the passages of the decision which the appellant challenges the Authority expresses no doubt about the particular factual matters in issue in the judicial review application. There was accordingly, in the Authority's mind, no room for any benefit of the doubt to operate in respect of the challenged passages. The alleged failure has no reality in the record.

[35] That is sufficient to dispose of the appeal, for it is not for the court on a judicial review application to examine the factual findings on any broad basis. (This is not a case where the "no evidence" ground is available or where the refusal or the admission of evidence demonstrates that the Authority has misinterpreted the scope of its power.) We do however go on to demonstrate further the lack of reality of the

argument of alleged failure by reference to one of the impugned findings. The Authority held that there was no real chance of H, the appellant's former unit manager, causing him harm or indeed any harm on return:

> a) The appellant stated that the principal source of persecution which he feared on his return was H's animosity towards him. In this regard the following points are relevant:
>
> i) There is no evidence that H's embezzlement has actually been discovered.
>
> ii) H is still employed but in a different enterprise. He has moved from the factory where he and the appellant worked as this has been closed down.
>
> iii) The appellant himself has never done anything to implicate H in the embezzlement during the six intervening years and at the time refrained from exposing him to the authorities. He has never acted against H's interests, indeed, by virtue of his inaction the appellant could be said to have supported H.
>
> iv) There is no evidence that H still bears any animosity towards the appellant. There is no reason why H should wish to harm the appellant now. None of his family have been contacted or threatened by H or his influential father. It is pure speculation to suggest that the occasional visits by the PSB to his parents were at H's instigation.
>
> The Authority concludes that there is no reason for H to continue to harbor animosity towards the appellant some five years after the embezzlement. There is no real chance of H causing him serious harm or indeed any harm on return.

[36] On subpara i) Mr Chambers took us to evidence about the audits which the appellant said were undertaken in the factory. That evidence is all about possibilities. It does not contradict the proposition that "there is *no* evidence that H's embezzlement has *actually* been discovered". Further, the transcript of the evidence shows the Authority testing the bases for the appellant's fears relating to the unit leader. For instance

> Ms Baddeley: … You haven't done anything for six years. Why would he be worried about you now?
>
> Interpreter: Because if I return, I don't know what have they done to the company accounts. If they started checking I still have to tell them the truth.
>
> Ms Baddeley: Well, they didn't check all the time you were there. Why are they going to start checking now, six years later?

Interpreter: I think that during my absence they might well have checked the accounts, audited the accounts, and there is a different figure, so when I return they will still question me and ask me.

Ms Baddeley: Well they might well have accused him of doing this, because he's been moved to another factory.

Interpreter: No, they won't. I'm the person who was in charge.

Ms Baddeley: So if they did and you tell them it was [H]'s fault, what will he do?

Interpreter: He would get someone beating me up until I said that I would never do that, that I didn't do it, I wouldn't –

Ms Baddeley: Who will?

Interpreter: The …. (*inaudible*). The PSB who investigating me.

Ms Baddeley: Well are you saying – what will the grounds for the PSB arresting you?

Interpreter: Because the previous two account of accusations hasn't finalized about my involvement in the student parade and my involvement in organizing the workers' protest. If I return now, there will be a third account for them to accuse me, this embezzlement of the company money.

Ms Baddeley: But you don't know about that, do you? Whether they even found out that there's been an embezzlement.

Interpreter: Sooner or later they will.

Ms Baddeley: But – but six years have gone now.

Interpreter: Because I wasn't there, so they couldn't find me to ask for explanations. Once I return they will bring out this old account …. (*inaudible*). As my parents have told me over the phone that the PSB visited them and asked them to persuade me to go back ….. what happened before but they would not do anything to me. So I think that I could never get away from this investigation sooner or later. If I return they will –

[37] The Authority similarly tested the other possible grounds for a well-founded fear, in its questioning of the appellant, in exchanges with Mr Chambers and in its reasons. We give just one example of an exchange and a related passage of the decision:

Mr Chambers: I submit that based on the information we now have before us, that it's very likely that there are yearly audits

at the factory. If there are concerns that [H] has been embezzling, it is entirely likely that an audit would divulge that there is money that has been misappropriated in some form. It's also conceivable that as a consequence of that, the managers that deal with the accounts at the factory would be questioned in relation to it; and Ma'am, I'd submit it's not inconceivable that [H], given the evidence from Mr Jiao that his head injury was caused as a consequence of [H] having made allegations to the PSB about his involvement with Tiananmen Square and the protest of the workers and lack of wages, would also quite readily use Mr Jiao as a scapegoat for any investigation that may have resulted from his embezzlement of funds.

Ms Baddeley: I find it hard to accept that the authorities would be interested, as you will know, as you will have picked up, because of his previous involvement with Tiananmen Square and/or with the workers' protest.

Mr Chambers: Certainly Ma'am, I appreciate that, and I would agree with you entirely. However, this is a situation in which they were the initial complaints that were laid back in 1996 to get the PSB involved to have Mr Jiao questioned by the police.

[38] The Authority's decision included this passage

Being the subject of an investigation is part of a legitimate prosecution procedure. It is not persecutorial. The appellant argues that the persecution would arise from the PSB's attribution to him of an adverse political opinion because of his past activities in 1989 and 1995 which would result in them persecuting him during the course of their investigations. The Authority does not accept the PSB will be interested in the appellant because of his political activities for the following reasons:

(i) Counsel referred to the Amnesty International Report 2001 which reported that steel workers were injured in a large demonstration protesting against the failure of their employer to pay back wages. The same report noted that the Chinese government continued to repress those it deemed to be a threat to political stability and public order. When asked, the appellant said that the PSB had not harassed or contacted others who took part in 1995 protests which he attended. He was a mere participant not a leader. Given that the PSB have not taken any action against other participants in the demonstration, the Authority does not accept there is a real chance that the PSB will persecute him on return to China because of this demonstration over six years ago.

(ii) The issue of previous involvement in the 1989 pro-democracy movement has frequently been considered by this Authority. Country information shows that the authorities in China are no longer interested in anyone involved in 1989 protests except a few high profile dissidents. The appellant himself conceded that this was

> not a serious concern for him. He stated that his principal fear of persecution arose from the danger of his being implicated in H's embezzlement.
>
> (iii) The appellant suggested that the request from the Chinese Embassy that he provide a document concerning his refugee application from the NZIS showed that he was at risk of persecution from the Chinese authorities because they suspect he has applied for refugee status. There is no evidence to suggest that returned asylum seekers such as the appellant who have no significant history of political involvement are persecuted on return to China.
>
> The Authority concludes that the appellant faces no real chance of persecution from the PSB by reason of his past participation in political protests.

[39] To repeat, it is for the Authority to make such findings of fact and evaluation. There is no general appeal from the Authority to the Courts. We can see no error of law or of approach in the reasoning process it followed. The benefit of the doubt notion simply had no role to play in respect of the factual matters in dispute nor on the facts as found by the Authority.

Result

[40] It follows that the appeal fails.

[41] The application for judicial review was originally brought solely against the Authority. The statement of defence was in fact filed in the name of the Attorney-General. At the hearing before us, counsel accepted that it was more appropriate for such proceedings to be brought against both the Authority (with it abiding the decision of the Court) and the Attorney-General and we have accordingly added the latter as a party. The second respondent is entitled to costs of $6,000 and reasonable costs and disbursements to be fixed by the Registrar in the absence of agreement.

Solicitors:
R S Wood, Auckland for the Appellant
Crown Law Office, Wellington for the Second Respondent