Federal Court  Cour fédérale

Date: 20110721

Docket: IMM-4373-11

Citation: 2011 FC 915

Ottawa, Ontario, July 21, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LAI CHEONG SING

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

I. Overview

[1] The detention of an individual in a society and the reasons for such detention constitute a means by which to analyze the nature of justice or the lack thereof in that society.

[2] Just as a society can be judged by history in its application of the rule of law and due process, so can it also be judged by the evidence of its prison conditions and detention facilities.

[3] The rule of law and due process are the hallmarks of the values which Canada cherishes. Although the cost of such are high, they are no higher than the very values for which Canada strives and holds dear.

[4] For Canada, as per the jurisprudence pleaded, democracy is a constant work in progress for which it strives. Its values, enshrined in its Constitution, with its *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, are a bulwark against a tide of pressure held back mindfully and steadfastly by the executive and legislative branches of government as policy and legislation, respectively (as demonstrated in all of the previous proceedings in this case) and, as nothing more than but simply interpreted by the judicial branch of government. These are the rudiments or the very leitmotif for which Canada stands, not as a cosmetic throw-away for public relations purposes, chosen at a whim as demonstrated in regard to evidence in respect of certain countries, for certain ends, for which the costs are always calculated but the values of which are either ignored or forgotten.

[5] The evidence before the Court demonstrates that China's treatment of Tibetan monks and nuns (whose leader, the Dalai Lama received an honorary Canadian Citizenship as conceived and presented by the executive and legislative branches of this government), that of 2010, recent Nobel Peace Prize winner in detention, Mr. Liu Xiaobo (whose treatment, in his prison cell, in serving an eleven-year sentence for subversion, has only slightly improved after receiving the prize), Falun Gong and certain Christian practitioners and those of other religions, as well as common criminals,

are all subject to similar treatment. They are detained together indiscriminately. All of which is accepted as emanating from recognized governmental and non-governmental sources.

[6] It is for these reasons that Canada requested strict, clear and unequivocal assurances from the Chinese Government in respect of the Applicant, Lai Cheong Sing [Mr. Lai], a fugitive from the Chinese justice system, who has been in Canada since 1999 and who is now under a deportation order. These assurances have now been received. It is assumed that the assurances of the Chinese Government, as per its written promises, will be kept, as the Chinese Government's honour and face is, and will be, bound and kept respectively, by the monitoring for the lifetime of the Applicant and, eventually, in time to come, in the reason for his eventual passing, as to whether it be natural or otherwise, recognizing fully well, the age and current state of health of the Applicant (as per medical monitoring measures, also outlined in the assurances).

[7] In regard to the validity of the assurances of the Chinese Government, a proverb often related in ancient China puts it well.

[8] A child, who, once, wanted to outwit his teacher, asked his teacher, "Is the bird which I have in my hand alive or dead?" The child thought if the teacher answered, "The bird is alive", he would crush the bird; and, if the teacher would say it is dead, he would let it live. The teacher answered with a great understanding for both the child and the bird, "The life of the bird is in your hands, my child".

[9] So it is with the Chinese Government's assurances. The life of the Applicant is in the Chinese Government's hands. The outcome remains to be seen as with the bird. The assurances are

present. A new contractual government to government climate has been created by the assurances. They augur hope for a different way to be taken, in a newly unfolded path to which the Chinese Government's signature has been officially affixed for the commitments undertaken. The future, yet, to be seen by both countries and others, will stand as witness to the outcome.

II. Introduction

[10] The Applicant is a criminal fugitive from the Chinese justice system and has been in Canada since August 1999. The Convention Refugee Determination Division [CRDD] found that the Applicant is excluded from the definition of "Convention refugee" by Article 1F(*b*) of the Refugee Convention and is not a "Convention refugee" (CRDD decision, undisturbed by the Federal Court, Federal Court of Appeal and leave denied by the Supreme Court of Canada [SCC]). The Applicant applied for a limited Pre-Removal Risk Assessment [PRRA] as a person in need of protection on the grounds set out in subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The first PRRA decision was set aside by this Court and sent back for re-determination. On July 7, 2011, a Minister's delegate determined that the Applicant is not a person in need of protection. The Applicant is now scheduled to be removal ready from Canada on July 22, 2011. The Applicant seeks an Order staying his removal from Canada.

[11] The Respondents oppose this application to stay the execution of the deportation order. The Court agrees with the position of the Respondents only due to the Chinese Government's recent diplomatic assurances to the Canadian executive branch of government. The Applicant did not, in his particular case, establish the necessary criteria to obtain a stay of execution of the deportation order.

[12] In particular, due to the assurances of the Chinese Government, the Applicant has not raised a serious issue with respect to the PRRA decision. The Minister's delegate reasonably determined that, based on extensive review of country condition documents, evidence relating specifically to the Applicant, the diplomatic note and extraordinary written assurances provided by the Government of China to the Government of Canada (which the Canadian government authorities also understand as ensuring that the Applicant lives out his lifespan, neither tortured nor killed; thus, an undertaking for years to come) ensure that the agreement keeps face with its official promises. According to the assurances, the Minister's delegate believes that the Applicant will not be executed or have his death arranged while detained or imprisoned in China, and is not at risk of torture, cruel and unusual punishment or treatment.

[13] With respect to irreparable harm, the Applicant has failed to demonstrate a risk based irreparable harm. His allegation of risk of return to China was extensively considered in his refugee claim before the CRDD, the subsequent judicial reviews and appeals of the CRDD decision and the PRRA determination.

[14] The balance of convenience favours the Minister in view of the statutory mandate to enforce removal orders as soon as reasonably practicable. The Applicant is a fugitive from justice who has been in Canada since 1999.

III. Background

[15] Mr. Lai, a citizen of the People's Republic of China, was born on September 15, 1958.

[16] In early 1999, Chinese authorities received information that a large-scale smuggling operation was taking place in the city of Xiamen in Fujian province. As a result, the Chinese authorities conducted an investigation called the "4-20 Investigation" and discovered a massive smuggling operation allegedly headed by Mr. Lai, his wife, Ming Na Tsang, and the Yuan Hua group of companies.

[17] On August 14, 1999, upon learning that the Chinese authorities were looking for them, the Lai family fled China and travelled to Canada on Hong Kong Special Administrative Region Passports. The Lai family entered Canada as visitors with status.

[18] In June 2000, Mr. Lai and his family made refugee claims at an in-land Citizenship and Immigration Canada [CIC] office in Vancouver. Their refugee claims were referred to the CRDD.

[19] On September 18, 2000, a conditional Departure Order was issued against Mr. Lai.

[20] On June 21, 2002, the CRDD determined that Mr. Lai and his family were not Convention refugees under the former *Immigration Act*, RSC 1985, c I-2, after a lengthy hearing of the refugee claim over a period of 45 days. The CRDD found Mr. Lai excluded from the definition of Convention refugee by Article 1F(*b*) of the United Nations Convention as there are serious grounds for believing that he has committed serious non-political crimes in China of bribery, large scale smuggling, fraud and tax evasion. The CRDD also considered "inclusion" and determined that Mr. Lai did not meet the definition of Convention refugee.

[21] Mr. Lai filed an application for leave and for judicial review of the CRDD decision. On February 3, 2004, Justice Andrew MacKay of the Federal Court upheld the CRDD decision and dismissed Mr. Lai's application for judicial review (2004 FC 179). On April 11, 2005, the Federal Court of Appeal dismissed Mr. Lai's appeal of Justice MacKay's decision (2004 FCA 125). Mr. Lai's application for leave to appeal to the SCC was dismissed on September 1, 2005 (SCC File No. 30988).

[22] On November 10, 2005, Mr. Lai made an application for a PRRA under subsection 97(1) of the *IRPA*.

[23] On March 15, 2006, the PRRA Officer rendered a decision. As this was the first time Mr. Lai had an application for that of a protected person under subsection 97(1) of the *IRPA*, the Minister's delegate considered all of the evidence before the CRDD and Mr. Lai's PRRA submissions. The Minister's delegate refused the PRRA application and determined that Mr. Lai is not a person in need of protection.

[24] Mr. Lai filed an application for leave and for judicial review of the PRRA decision in Federal Court. On June 1, 2006, Justice Carolyn Layden-Stevenson granted the stay of removal pending the outcome of the judicial review application of the PRRA decision (2006 FC 672).

[25] On April 5, 2007, Justice Yves de Montigny of the Federal Court allowed Mr. Lai's application for judicial review of the PRRA decision. The PRRA decision was set aside and sent back for a re-determination by a new Minister's delegate (2007 FC 361).

[26] In May 2009, Ms. Tsang departed Canada voluntarily and returned to China. All of Mr. Lai's children, Chun-Chun, Chun Wai and Ming Ming also departed Canada in April 2009 and February 2010 and November 26, 2010 respectively. The PRRA applications of Chun-Chun and Chun Wai were declared abandoned.

[27] By decision, dated July 7, 2011, a Minister's delegate refused Mr. Lai's PRRA application and determined that he was not, on a balance of probabilities a person in need of protection, and unlikely to be subjected to cruel, unusual punishment or treatment or torture.

[28] On July 8, 2011, Mr. Lai was served with the PRRA decision and reasons and notified by the Canada Border Services Agency [CBSA] that his removal would take place shortly.

[29] Mr. Lai's removal was scheduled to take place on Tuesday, July 12, 2011; an interim stay was granted until July 22, 2011, at noon (Vancouver time), by Order of Justice Michel Beaudry, dated July 11, 2011.

IV. Issues

[30] To obtain a stay of removal, an applicant must establish all three prongs as set out in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 11 ACWS (3d) 440 (FCA):

A. whether there is a serious question to be determined by the Court;

B. whether an applicant seeking the stay would suffer irreparable harm if the stay were not granted; and

C. whether, on the balance of convenience, an applicant seeking the stay will suffer the greater harm from the refusal to grant the stay.

[31] The test for a stay is conjunctive and an applicant must satisfy each branch of this tri-partite test.

V. Analysis

A. Serious Issue

[32] Mr. Lai has raised the following issues in the underlying judicial review application of the PRRA decision:

a) An apprehension of bias;

b) Minister's delegate's findings regarding the diplomatic assurance and compliance mechanisms were unreasonable.

a) *No Reasonable Apprehension of Bias*

[33] Mr. Lai argues that the decision-maker is not an officer of the PRRA unit but a "Minister's delegate" and, therefore, is not independent from the Minister.

[34] Pursuant to section 6 of the *IRPA*, the Minister of Citizenship and Immigration has delegated PRRA Officers and certain officials of CIC at National Headquarters, including the Director of Case Determination, to make PRRA decisions. The decision-maker in Mr. Lai's PRRA application is the Director, Case Determination of the Case Management Branch at the National

Headquarters of the Department of Citizenship and Immigration (CIC – Instrument of Designation and Delegation, Operational Manual, IL3, Column 52).

[35] The Minister's delegate considered Mr. Lai's submissions on bias and determined that she would be assessing and weighing all of the information before her based on her own independent decision-making with an open mind.

[36] The test for a reasonable apprehension of bias, set out in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, is whether an informed person, viewing the matter realistically, and practically – and having thought the matter through, would conclude, that it is more likely than not, that the Minister's delegate decided Mr. Lai's PRRA fairly.

[37] An informed person, after reading the reasons setting out the delegate's independent analysis, viewing the matter realistically and practically, and having thought the matter through, would conclude that the Minister's delegate decided Mr. Lai's PRRA application fairly; the Minister's delegate considered Mr. Lai's submissions, examined and analyzed the evidence, and had arrived at an independent decision; and, certainly, did not mince words in regard to her reflections on the Chinese legal system as per the evidence before her.

b) *PRRA Findings Were Reasonable*

[38] The standard of review for PRRA decisions when considered in their entirety is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

[39] The nature of the decision of a Minister's delegate warrants significant deference on judicial review. Where there is nothing unreasonable in the PRRA decision, there will be no serious issue for the purposes of a stay application. In this case, the Minister's delegate's decision was reasonable and does not warrant intervention by this Court (*Tharumarasah v Canada (Minister of Citizenship and Immigration)*, 2004 FC 211 at para 6; *Bhalru v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1259 at para 24).

[40] As held by Justice Yvon Pinard in *Weerasinghe v MCI*, (January 22, 2004) IMM-10240-03, in order for a Court to substitute its assessment of risk for that of previous decision-makers, an applicant must provide clear and convincing evidence which would suggest that the Court ought to engage in this exercise. The same logic applies to a Minister's delegate. Mr. Lai has not provided clear and convincing evidence of error and, therefore, has not raised a serious issue. Mr. Lai is ultimately asking this Court to substitute its opinion on risk for that of the Minister's delegate. Absent compelling evidence due to the Chinese Government's specific assurances accepted by the Minister's delegate as valid, the Court will not do so.

[41] In assessing the application, the Minister's delegate has set out how she considered the evidence and the conclusions that she drew from it. Her reasons are clear and also indicate that she did not fetter her discretion. She unmitigatedly described the Chinese legal system in regard to the matter in very clear and unequivocal terms, excerpts of which are quoted and discussed below.

[42] Mr. Lai argues that the serious issue raised in the underlying judicial review application is whether the Minister's delegate's findings are reasonable regarding the mechanisms to ensure

compliance with the diplomatic assurances that the Applicant will not be tortured and whether those mechanisms are adequate.

[43] The Minister's delegate considered and weighed all of the evidence before her; she considered the issue of whether it is more likely than not that Mr. Lai would be subjected to torture or mistreatment in China. The Minister's delegate referred to the expert evidence as well as country condition documents. She found that the Chinese authorities in this case would not find it necessary or desirable to subject Mr. Lai to torture after his return to China.

[44] In her reasons, the Minister's delegate, herself, specifically, made the following findings regarding the assurances against torture:

i. **Assurances against torture contained in March 2011 would not be adequate in circumstances where authorities would otherwise rely heavily on the practice of torture as the United Nations Special Rapporteur has indicated that only assurances that include invasive monitoring and apply to a whole prison population would be sufficient; however, Mr. Lai does not find himself in circumstances where authorities would otherwise rely on the practice of torture;**

ii. **Criminal Procedure in China is flawed by Canadian and international standards, but has improved significantly since the changes to criminal procedure of the late 1990s. In Mr. Lai's case the March 2011 specific assurances provide some additional safeguards which will help to ensure that Mr. Lai is treated in a manner that would not shock the conscience of Canadians;** (It is recognized by the Court that

Mr. Lai's brother Lai Shui Quiang, and his accountant, Chen Zencheng, died in prison of unexplained causes.)

iii. **A life sentence for Mr. Lai would not shock the conscience of Canadians, be degrading to human dignity or be disproportionate to a valid social aim and consequently would not amount to cruel and unusual punishment. Reported prison conditions, in and of themselves, do not amount to cruel and unusual treatment or punishment;** (The Minister's delegate was reflecting on the Chinese Government's assurances in this regard.)

iv. **Mr. Lai is unlikely to be tortured because he does not belong to a vulnerable group, because disincentives to torture exist in Chinese law, because torture does not appear to have occurred to other Yuan Hua group accused and because of the late stage of the investigation of his crimes. Mr. Lai is also unlikely to have his death "arranged" while detained/incarcerated;**

v. **Mr. Lai will not be executed should he be returned to China and is unlikely to have his death arranged while detained or in prison. On a balance of probabilities, Mr. Lai is unlikely to be subjected to cruel, unusual punishment or treatment, or tortured.**

[45] The US Department of State - 2010 Human Rights Report: China, is subsequently quoted in the reasons of the Minister's delegate at page 59:

> Conditions in penal institutions for both political prisoners and criminal offenders were generally harsh and often degrading. Prisoners and detainees were regularly housed in overcrowded conditions with poor sanitation. Inadequate prison capacity remained a problem in some areas. Food often was inadequate and of poor quality, and many detainees relied on supplemental food and medicines provided by relatives. Some prominent dissidents were not allowed to receive such goods.

> Adequate, timely medical care for prisoners remained a serious problem, despite official assurances that prisoners have the right to prompt medical treatment. Article 53 of the Prison Law mandates that a prison shall be ventilated, allow for natural light, and be clean and warm. However, in many cases there were inadequate provisions for sanitation, ventilation, heating, lighting, basic and emergency medical care, and access to potable water.
>
> Forced labor remained a serious problem in penal institutions. Many prisoners and detainees in penal and RTL [re-education through labour] facilities were required to work, often with no remuneration. Information about prisons, including associated labor camps and factories, was considered a state secret.

[46] There are no special institutions for political or religious prisoners. Nowhere does the country condition information suggest otherwise. Political prisoners and those interned for religious practice and common criminals are all housed in the same institutions.

[47] The sourcing of the US Department of State Report is indicated in the Overview to the Country Reports. That Overview states:

> The Department of State prepared this report using information from U.S. embassies and consulates abroad, foreign government officials, nongovernmental and international organizations, and published reports. The initial drafts of the individual country reports were prepared by U.S. diplomatic missions abroad, drawing on information they gathered throughout the year from a variety of sources, including government officials, jurists, the armed forces, journalists, human rights monitors, academics, and labor activists. This information gathering can be hazardous, and U.S. Foreign Service personnel regularly go to great lengths, under trying and sometimes dangerous conditions, to investigate reports of human rights abuse, monitor elections, and come to the aid of individuals at risk, such as political dissidents and human rights defenders whose rights are threatened by their governments.
>
> Once the initial drafts of the individual country reports were completed, the Bureau of Democracy, Human Rights and Labor, in cooperation with other Department of State offices, worked to corroborate, analyze, and edit the reports, drawing on their own sources of information. These sources included reports provided by U.S. and other human rights groups, foreign government officials, representatives from the United Nations and other international and regional organizations and institutions, experts from academia, and the media. Bureau officers also consulted experts on worker rights, refugee issues, military and police topics, women's issues, and legal

> matters, among may others. The guiding principle was to ensure that all information was assessed objectively, thoroughly, and fairly.

(http://www.state.gov/g/drl/rls/hrrpt/2010/frontmatter/154328.htm).

[48] The US Department of State Report then is multi-sourced. The authors of the US Report would have taken into account the UN Report. The Report of the UN Special Rapporteur, in contrast, is single-sourced. The UN Special Rapporteur was reporting only what he saw on his pre-arranged visits to ten facilities. The UN Special Rapporteur was not reporting on prison conditions generally but only on that which he was shown; thus, what he specifically "found" at the ten facilities to which he had made pre-arranged visits. The Minister's delegate preferred single source information (Decision at p 58). Yet, nevertheless, the assurances in themselves are a counterweight on which the Minister's delegate reflected in her decision.

[49] As is discussed in the written material of the Applicant, the detention facilities and treatment of prisoners of the following groups are similar to the treatment of common criminals: Tibetan monks and nuns, the current, 2010, Nobel Peace Prize winner, Falun Gong practitioners, Christians and other religious practitioners. External monitoring of Chinese detention facilities is not permitted except through pre-arranged visits, and China does not publish information in respect of its detention facilities. Prisoners, once released, are reticent to speak of prison conditions while in China for fear of revictimization. No evidence indicates that there are separate detention facilities for any of the groups listed. All prisoners are housed together indiscriminately, and, therefore, all, are subject to the same conditions.

[50] Based on a review of country condition documents, the Minister's delegate found that certain vulnerable groups were disproportionately affected with respect to incidents of torture in detention which is not uniform across the prison population. These vulnerable groups or "typology of victims of alleged torture and ill-treatment" were identified by the Special Rapporteur on torture as Tibetans, Uighurs, political dissidents, human rights defenders, Falun Gong practitioners, sex workers, and other persons (HIV/AIDS infected persons and members of religious groups) (Decision at pp 63-64; Excerpt from Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment, Decision at p 69-71).

[51] The Minister's delegate also assessed the treatment and torture of "common criminals", since Mr. Lai does not fall into one of the "vulnerable groups". The Minister's delegate found that, during times of police crack downs on crime, there are increased reports of torture to coerce confessions. The Minister's delegate also found that the main motivation behind torture of criminals appears to be at the investigation stage to force a confession instead of obtaining other types of evidence (Decision at p 67).

Diplomatic assurances

a) *Torture*

[52] The Minister's delegate accepts that the diplomatic assurances, even as renegotiated, would not be sufficient in themselves to remove the likelihood of torture. She writes: "these assurances do fall short of a thorough monitoring mechanism necessary to ensure an inmate is not mistreated in custody where those in authority are determined to do the inmate harm" (Decision at p 39). She later

writes that it is the access of Canadian officials to the cell of the Applicant promised in the diplomatic assurances, that "would mitigate any risk of abuse" [Emphasis added] (Decision at p 51).

[53] In regard to torture, the delegate finds, on a balance of probabilities, it is unlikely to occur. She makes this finding not based on the assurances alone, but based on other evidence as well. Nonetheless, assurances form part of the consideration. The assurances in her view do not ensure that there will be no abuse, but they do significantly mitigate the risk of abuse.

[54] The above issue was raised in a certified question by Justice de Montigny: "If there is a risk of torture in an individual case, what are the requirements that an assurance against torture should fulfill to make that risk less likely than not?" As one can see, one answer the Minister's delegate gave to that question was cell visits. Cell visits then do diminish the risk of torture recognizing the word, honour and face of the Chinese Government is on the line.

b) *The Death Penalty and Fair Trial*

The assurance of Court attendance

[55] The Minister's delegate relied on the assurances for the procedural safeguards which the Chinese Government provided. She wrote: "these assurances are most valuable in terms of the procedural safeguards they provide Mr. Lai ... I note that criminal procedures, similar to the commitment on death penalty, are more easily verifiable as compared to whether or not torture has taken place" (Decision at p 40).

[56] The notion that criminal procedures or the death penalty are easily verifiable is difficult to ascertain. The death penalty and criminal procedure assurances suffer from the fact that the courts in China are not public and Canada cannot do otherwise but solely rely on these rare exceptional assurances that have the commitment of the Chinese Government.

[57] It is recognized that a judgment by the Supreme Court of China, that a person sentenced to death, is not issued as a public document; nor is the actual execution of the sentence. The country condition information shows that death penalty statistics in China are shrouded in secrecy. Many non-governmental organizations and governments have called on China to make available death penalty statistics. Such calls would be unnecessary if Supreme Court death sentences were issued in public documents. If they were public documents, death penalty statistics could be calculated simply by tabulating Supreme Court judgments.

[58] According to the Minister's delegate, the assurances provide "[p]ermission for a Canadian Embassy or Consular official to be present at his hearing" (Decision at p 50). What the assurances actually specify is that "[w]hen the court holds open hearings of LAI Changxing's criminal case of alleged smuggling under the *Code of Criminal Procedure* and the *Criminal Code* of the People's Republic of China, the Canadian side may send embassy or consular officials resident in China to attend the hearings" (Decision at p 14).

[59] The Minister's delegate accepts the argument that a monitoring mechanism for torture is necessary because torture happens behind closed doors.

[60] The revised assurances from the Government of China do not say that Canadian embassy or consular officials will be given permission to attend the trial of Mr. Lai, but only that these officials will be given permission to attend "open hearings" of the criminal case of Mr. Lai. The Government of China could declare the trial of Mr. Lai closed, deny access to Canadian officials and respect the assurances; however, the assurances, received as valid by the Minister's delegate are accepted as substantial in that the Chinese Government, according to the Minister's delegate's decision, will allow the necessary monitoring of Mr. Lai while he is in detention (Decision at p 14).

[61] The Minister's delegates writes: "there is the possibility that Mr. Lai's case could be characterized as a "state secrets" case" but fails to draw the consequence from that conclusion that Canadian officials would not be able to rely on the assurances to sit in on his trial (Decision at p 53).

The assurance of access to a lawyer

[62] A primary challenge Mr. Lai faces in respect of a fair trial in China is finding a lawyer willing, and able, to take instructions from him. He can find a lawyer; however, that lawyer will be instructed by the Communist Party and not Mr. Lai. Without the Chinese Government's assurances, if a lawyer, bold enough to take the position that Mr. Lai would want him to take, would find himself in a potential precarious situation; and, again, it is only due to reliance on the specific assurances that the Minister's delegate does find adequacy, recognizing the significant nature of the Chinese Government's specific commitment to Canadian Government authorities in this regard.

[63] This case has been highly politicized, generating many statements over the years by Chinese political leaders. These statements have assumed the guilt of Mr. Lai. The political leaders of China

consider Mr. Lai to be the country's number one fugitive and, it is assumed that all the evidence will be brought forward due to the assurances given to the Canadian executive branch which is deemed acceptable to the Minister's delegate.

[64] The reasoning of the Minister's delegate that Mr. Lai would get a fair trial is predicated on a conclusion of his guilt. The Minister's delegate reasons: "I acknowledge that politically-directed verdicts can be a problem in China but in Mr. Lai's case there would appear to be no need for the government/the "Party" to direct a verdict. The evidence of criminality, as accumulated by the 4-20 investigators is significant" [Emphasis added] (Decision at p 52).

[65] The response of the Minister's delegate to the submissions of counsel, that a lawyer for Mr. Lai in China will not be able, at trial, for political reasons, to raise the defenses Mr. Lai wishes to raise, is the following. She writes: "if Mr. Lai is returned to China he will most likely be convicted of bribery and smuggling" (Decision at p 52). Although the notion that only the innocent need fair trials is untenable, it is again, due to the extraordinary assurances in this specific case that it is acceptable to the Minister's delegate, on account of the Chinese Government's commitments on this core issue.

[66] This Court did review the Minister's delegate's reasons in their entirety with a view to understanding what the Minister's delegate decided. The Federal Court of Appeal emphasized this point recently in *Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151, [2007] FCR 490:

> [15] Although trite, it is also important to emphasize that a reviewing court should be realistic in determining if a tribunal's reasons meet the legal standard of

> adequacy. Reasons should be read in their entirety, not parsed closely, clause by clause, for possible errors or omissions; they should be read with a view to understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression.

B. Irreparable Harm

[67] In order to satisfy the second branch of the *Toth* test, the onus is on an applicant to establish the existence of risk of harm that is not speculative or based on a series of possibilities. An applicant must satisfy the Court that the harm will occur if the relief sought is not granted (*Molnar v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 325 at para 15; *Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931 at para 7).

[68] Mr. Lai has failed to establish that he will suffer irreparable harm if he were returned to China. He argues the following irreparable harm:

a) The serious issues raised in the underlying PRRA judicial review application is linked to the irreparable harm; and

b) The same allegations of risk of harm put forth in his PRRA application.

a) *No Serious Issue to Establish Irreparable Harm*

[69] Mr. Lai links his "irreparable harm" argument to having established a serious issue in regard to risk, and as he has not established a serious issue, his irreparable harm argument fails due to the specific assurances which, to the Minister's delegate, are assurance enough as they are interpreted as safeguards.

[70] Irreparable harm does not automatically follow that of a serious issue, if a serious issue is established in the case of a PRRA judicial review application. In *Onojaefe*, the Court held that the simple presence of a serious issue arising out of a risk assessment in a PRRA is not automatically determinative of the issue of irreparable harm. The serious issue identified may not necessarily meet the test for irreparable harm, and deference is owed to the Minister's delegate, trier of fact, with respect to risk (*Onojaefe v MCI* (May 10, 2006) IMM-2294-06 at paras 13-16).

[71] Even if this Court were to find there is a serious issue to be tried, the Court would then have to consider whether that serious issue raises clear and convincing evidence (not speculative based on a series of possibilities) that Mr. Lai would suffer irreparable harm if removed to China at this time. None of the issues, due to the Chinese Government assurances, raised by Mr. Lai, amount to clear and convincing proof of risk necessary to support the "irreparable harm" portion of the tri-partite test for a stay.

b) *Alleged Risk of Return to China*

[72] With respect to the alleged risk of return to China, Mr. Lai has made the same allegations of risk in his refugee claim before the CRDD and PRRA application. The CRDD finding was upheld by the Federal Court and the Federal Court of Appeal. The SCC denied Mr. Lai's application for leave. This Court has held that an applicant's narrative that the CRDD has found to be not credible, cannot then serve as the basis for an argument supporting irreparable harm. Mr. Lai has provided no evidence in support of his stay motion that he would now be at risk upon return to China, due to the specific assurances provided (*Molnar*, above, at para 15; *Akyol*, above, at para 7; *Nalliah v Canada (Solicitor General)*, 2004 FC 1649, [2005] 3 FCR 210 at para 27).

[73] Furthermore, it is apparent that Mr. Lai has been negotiating his return to China with the Chinese authorities. This willingness to engage in negotiations to return to China belies the alleged risk of return to China.

C. Balance of Convenience

[74] The balance of convenience in this case favours the Respondents. The Minister of Public Safety and Emergency Preparedness is mandated by statute to enforce the removal order as soon as reasonably practicable. Mr. Lai is also under a statutory obligation to leave Canada immediately once the removal is enforceable (subsection 48(2) of the *IRPA*).

[75] The *IRPA* (s 48) requires that the Minister of the Public Safety and Emergency Preparedness enforce a removal order as soon as is reasonably practicable (*Akyol*, above, at para 12). Only in exceptional circumstances will a person's interests outweigh the public interest. As the Federal Court of Appeal in *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148, [2005] 4 FCR 210, recently explained: "[i]f the administration of immigration law is to be credible, the prompt removal of those ordered deported must be the rule, and the grant of a stay pending the disposition of legal proceedings, the exception" (Decision at para 47).

[76] Mr. Lai arrived in Canada in August 1999 and has remained here since. He has had full access to Canada's immigration processes and has been found to be excluded from the definition of "Convention refugee" and is "not a person in need of protection". The CRDD conducted an extensive hearing into his refugee claim and concluded on June 21, 2001 that he was excluded from the definition of "Convention refugee" by Article 1F(*b*) of the Refugee Convention for there are

serious reasons for considering that he committed the serious non-political crimes of large scale bribery and smuggling outside Canada before he was admitted to Canada. The CRDD decision was upheld by the Federal Court on March 19, 2004 and the Federal Court of Appeal on April 11, 2005, with leave to appeal dismissed by the SCC on September 1, 2005. Mr. Lai submitted his PRRA application to the Minister of Citizenship and Immigration. The Minister's delegate carefully considered his application and provided a thorough, well-reasoned PRRA decision on July 7, 2011.

[77] In Mr. Lai's situation, his family members, who accompanied him to Canada, have already returned to China voluntarily.

[78] A stay of removal is an "exceptional remedy". In *Tesoro*, above, Justice John Maxwell Evans heard a stay of removal in the Federal Court of Appeal and held that if he had determined that the removal of this serious criminal would cause "irreparable harm" for reason of family separation (which he did not find), then he would have dismissed the stay for having failed the arm of the "balance of convenience test" for prompt removal must be the rule, and the granting of a stay, the exception. Justice Evans held:

> [47] … if I had determined that Mr. Tesoro's removal would cause irreparable harm, on the ground that the effects of family separation were more than mere inconveniences, I would have located the harm at the less serious end of the range, and concluded that, on the balance of convenience, it was outweighed by the public interest in the prompt removal from Canada of those found to be inadmissible for serious criminality. If the administration of immigration law is to be credible, the prompt removal of those ordered deported must be the rule, and the grant of a stay pending the disposition of legal proceedings, the exception.

[79] Mr. Lai is a common criminal fugitive from the Chinese justice system who has had full access to Canada's immigration processes over the last eleven years and has been found not to be at

risk if removed to China on the basis of extraordinary assurances received and held as valid by the Minister's delegate; therefore, the balance of convenience does not favour further delaying his removal, but favours removing him at this time (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at paras 21-22).

VI. Conclusion

[80] Due to the Chinese Government's assurances and the reasons for acceptance of those assurances by the Minister's delegate, Mr. Lai has failed to satisfy any of the three criteria of the *Toth* test required for an order to stay the execution of a valid deportation order issued against him, the stay is dismissed.

ORDER

THIS COURT ORDERS that the Applicant's motion for a stay be dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4373-11
STYLE OF CAUSE:	LAI CHEONG SING v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINSITER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HELD VIA TELECONFERENCE ON JULY 21, 2011 FROM OTTAWA, ONTARIO AND VANCOUVER, B.C.

REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	July 21, 2011

ORAL AND WRITTEN REPRESENTATIONS BY:

David Matas	FOR THE APPLICANT
Helen Park Jan Brongers	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

David Matas, Solicitor Winnipeg, Manitoba	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENTS