Canada - Haven or Hideout? The case of Lai Changxing

(*Remarks prepared for delivery at the Council on Foreign Relations*)

by David Matas

Lai Changxing left Hong Kong for Canada August 14, 1999 on hearing through his contacts in government that he was about to be arrested for bribery and smuggling. After he left, in October 22nd, 1999, the Government of China issued an arrest warrant for him. He became China's number one fugitive. Canada deported Lai to China on July 22nd, 2011, almost twelve years after he left Hong Kong. This twelve year delay, was it a haven Canada gave to a person fleeing the risk of grave human rights violations or was it a hideout Canada gave to a criminal fugitive?

Mr. Lai made a refugee claim in Canada and then, on the eve of the hearing of his claim set for July 3, 2001, switched lawyers. I became his new lawyer and remain his lawyer to this day. My answer to the question I posed, you will not be surprised to hear, is that Canada gave a haven to a person fleeing the risk of grave human rights violations not a hideout Canada gave to a criminal fugitive. I give that answer not only in defence of Mr. Lai but also in defence of Canada. Canada, if anything, removed Mr. Lai too soon. Canada cannot be faulted for the twelve year delay in removing Mr. Lai to China.

Twelve years is not the normal processing time for refugee claims in Canada. The case of Mr. Lai took far longer than usual for reasons which had to do with the strength of his case and the weaknesses in human rights protection in China. The fault for the delays lies primarily not with Canada but with China.

The hearing of the claim took place over five months with forty-five days of testimony. His refugee claim was rejected on May 6, 2002.

Mr. Lai sought judicial review of his claim in Federal Court and a stay of enforcement of his removal order pending the judicial review Court determination. The granting of a stay requires the meeting of tripartite test - that the case raises a serious issue, that removal would cause irreparable harm, and that the balance of convenience favours the applicant. Madam Justice Layden-Stevenson on June 1, 2006 granted a stay.[1]

1 2006 FC 672

Federal Court judicial review decisions from immigration related decisions require leave of the Court for a hearing. If leave is denied, Federal Court proceedings conclude. There is no appeal from a denial of leave. If Mr. Lai had been denied leave, he would have left Canada far more quickly than he did.

Mr. Lai was granted leave but then denied judicial review, by Mr. Justice MacKay. An appeal from the Federal Court to the Federal Court of Appeal is also a two step process. For there to be an appeal, the Federal Court judge who hears the judicial review must certify that the case raises a serious question of general importance. Without such a certification, here too, the case is at an end. There is no appeal from a denial of certification. Federal Court decisions certifying questions for the Court of Appeal are few and far between, a handful each year.

In the year 2010, there were 7,709 leave applications in immigration and refugee cases. 1,256 or 16 % were granted leave. 22 cases or .3% of the leave applications had certified questions[2]. While not every case commenced in 2010 had a decision on leave or, if leave was granted, a decision on certification during the same year, these figures are representative of multi-year trends.

So the Lai case was far from typical for delays in the Canadian legal system. On the contrary, it was most unusual.

Mr. Justice MacKay certified four questions. Every one of them was tied in some way to defects in the China legal system, either its widespread use of torture to elicit confessions or its related practice of arresting and interrogating first under incommunicado detention, and then charging later, typically with a confession in hand.

Though Mr. Lai was the subject of an arrest warrant since October 1999 and has been considered for twelve years China's number one fugitive, Mr. Lai has not yet formally been charged with or accused of any crime. The authorities were following the usual practice and awaiting his arrest and interrogation before charging him.

The questions Mr. Justice MacKay certified were these:

"1. In a refugee exclusion case based on Article 1F(b) of the Refugee Convention

a) Where the Minister relies upon interrogation statements produced abroad by foreign government agencies, must the Minister establish those statements were voluntary when made, particularly where

2 These statistics are available at the Federal Court website. The leave application and granting numbers are found in the statistics section. The certified questions cases are found in a component dealing specifically with certified questions.

there is some evidence of a lack of voluntariness of one or more of the statements, and evidence of torture sometimes used in obtaining statements from persons detained is included in information on general country conditions?

b) Is the Minister required to give notice in advance of a hearing, of specific criminal acts alleged against the claimant, or is it sufficient if evidence at the subsequent hearing reveals specifics of criminal acts allegedly committed by the claimant?

c) Is the Refugee Division required to state in its decision the specifics of criminal acts committed by the claimant?

2. Does the decision of the Supreme Court in *Suresh v. M.C.I.*, 2002 SCC 1, [2002] 1 S.C.R. 3, providing for separate assessment of a foreign state's assurance to avoid torture of returned nationals, apply where there is some evidence of generalized resort to torture in the foreign state, or only where there is evidence reasonably indicating resort to torture in similar cases?"

Article 1F of the Refugee Convention provides:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) he has committed a serious nonpolitical crime outside the country of refuge prior to his admission to that country as a refugee;"

The Convention Refugee Determination Division of the Immigration and Refugee Board found that Mr. Lai fell within the parameters of this provision. The Board found that there were serious reasons for considering that Mr. Lai had committed a serious nonpolitical crime outside the country of Canada prior to his admission to Canada. They did not though make a finding what that crime was.

The Supreme Court of Canada in the case of *Suresh* wrote:

"A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the

behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter."[3]

The reason the fourth question arose is that the Government of China, in its eagerness to get Mr. Lai back to China and into its hands, produced assurances pre-emptively in 2001, promising the Government of Canada neither to execute nor to torture Mr. Lai. The assurances against execution became necessary because the Supreme Court of Canada earlier that year had interpreted the Canadian Charter of Rights and Freedoms to prevent removal to the death penalty, with an undefined proviso for exceptional circumstances.

The Canadian need for assurances against the death penalty applies to all countries. It applies to the United States. The law was developed in cases with American death penalty fugitives, cases I litigated on behalf of Amnesty International at the Supreme Court of Canada, the cases of Ng[4] and Kindler,[5] Burns and Rafay.[6] In the earlier two cases, the Courts held assurances were not necessary. In the later cases, ten years later, I asked the Supreme Court of Canada not to follow its previous decision and hold that assurances were now necessary, a submission the Court accepted. Burns and Rafay were later extradited to the United States after the United States gave Canada assurances that the death penalty would not be sought nor imposed against either Burns or Rafay.

When the Federal Court grants and denies leave, it does not give reasons. The test for granting leave is that the applicant has raised an arguable issue. One can only speculate on what the Federal Court considered arguable in the Lai case when it granted leave. A reasonable guess is that the issues the Court identified as serious questions of general importance for the purpose of certification were also issues the Court considered arguable for the purpose of leave. So the twin Chinese practices of torture of suspects and charging only after arrest and interrogation stood at the heart of the court procedures which generated delays.

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3 Paragraph 124

4 *Reference Re Ng Extradition (Can.)* [1991] 2 S.C.R. 858

5 *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779

6 *United States v. Burns* [2001] 1 S.C.R. 283

One can see the concern about Chinese abusive practices from the specifics of the questions certified. The first question was predicated on a Court finding that there was

> "some evidence of a lack of voluntariness of one or more of the statements, and evidence of torture sometimes used in obtaining statements from persons detained ... included in information on general country conditions"

The second finding - of evidence of torture sometimes used in obtaining statements from persons detained included in information on general country conditions - needs no explanation. Country condition information about China is replete with evidence of torture. The United States Department of State Country Report on Human Rights for China calls torture of suspects "chronic".

The first finding though "some evidence of a lack of voluntariness of one or more of the statements" does require explanation. What the Court was referring to there was, in part, the sad case of Tao Mi.

The Minister of Citizenship and Immigration, in the refugee claim before the Immigration and Refugee Board, produced a signed declaration of Tao Mi implicating Mr. Lai in criminality. Tao Mi later provided evidence to Canadian lawyer Clive Ansley in Shanghai that her declaration was elicited through mistreatment. Mr. Lai provided this information to the Board confidentially.

Tao Mi told Clive Ansley this:

> "In September of 1999, while my twoyearold son watched, I was taken away from my home in Xiamen by five to six investigators. I asked 'why?'. Their response was: 'You are a criminal suspect.' I said 'I want a lawyer'. Their response was: 'You are not allowed to hire a lawyer'. From October of 1999 to October of 2000, I was under house arrest. During this time, I was taken away by '4.20' investigators three times. They detained me in a hotel. On the first occasion, my detention lasted two or three days. On the second occasion, I was detained five or six days. The third time they took me away, I was detained for more than two months. For the entire period of all these detentions, my family did not know where I was and I was not allowed to contact anyone.
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> In the hotel, I was place under surveillance 24 hours per day. I was not allowed to be close to windows, I could only take a walk in the corridor within 10 meters of my room; the door of the bathroom had to be open while I was using the toilet or taking a bath; while sleeping at night, to make sure that I couldn't escape, I was not allowed to wear anything but brassiere and underwear, and my hands and feet were handcuffed to chairs....

> I was threatened by the investigators several times. Before the Spring Festival, I asked them to let me go home and celebrate the festival with my family. The answer was: "In your case, you will be put into jail for at least 10 years. Forget about going home...
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> I was too frightened to insist on telling only what I knew to be true at that time, and to resist agreeing with some of the things they insisted were true...
>
> If the police or the investigators discover that I have signed such an affidavit, I am dead."

The 4.20 investigation team is the name of the team established to investigate the crimes of Mr. Lai. It is named after the date of its establishment, the 20th day of the fourth month or April 20th. The year of establishment was 1999.

After the Board and the Government of Canada received this information, the Government of Canada, in spite of its commitment to confidentiality, asked the Government of China to bring Tao Mi to the Canadian consulate in Shanghai. At the consulate, an R.C.M.P. officer interrogated her, without notice to counsel for Mr. Lai and in the presence of a Chinese security official, in an attempt to have her abandon her testimony given to Clive Ansley. Tao Mi immediately thereafter disappeared. She has yet to reappear. Mr. Justice MacKay in Federal Court wrote:

> "That interrogation by the R.C.M.P. officer, undertaken without advice to the applicants' counsel, was in my view, an extraordinary undertaking, unfair in its process,..."

Mr. Justice de Montigny, in a later court proceeding involving Mr. Lai, wrote:
"Like my colleague Justice MacKay, I think this way of proceeding was most inappropriate to say the least."

For anyone familiar with Communism, all one had to do is read the statements of witnesses and suspects the Chinese Government gave to the Government of Canada to produce against Mr. Lai at his refugee claim to realize that they were elicited through mistreatment. In tenor, they were replicas of the statements found in Arthur Koestler's "Darkness of Noon", full of contrition, acknowledgements of the wisdom of the Party and the State, promises to act in the future for the greater good of all. No one, other than a Communist Party ideologue, talks the way these statements read.

The reference in the certified questions to the absence of notice of the charges against Mr. Lai before his refugee claim began and the absence even in the conclusions of the Board of reference to specific criminal offences is directly tied to the failure of the Government of China to provide such information. Mr. Lai had, to be sure, allegations thrown at him of bribery and smuggling. But bribing whom, bribing when, bribing where, bribing how? Smuggling what, smuggling when, smuggling where, smuggling how? These questions were left unanswered both in the Ministerial notice to intervene to

seek the exclusion of Mr. Lai from refugee protection on the basis that there were serious reasons for considering that he had committed a serious nonpolitical crime and in the decision of the Board excluding Mr. Lai from refugee protection on the same basis.

Lest anyone think that the Chinese practice of arresting and interrogating first and charging later is perfectly all right, I remind you of the International Covenant on Civil and Political Rights Article 14 which provides:

> "3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> > (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;"

China signed this Covenant in 1998. Thirteen years have now passed without ratification. This, I suppose, is typical of Communism—promise everything, do nothing. A specific reason for the failure to ratify may well be that the Party/State neither wants to change its practice of arresting and interrogating first, charging later, nor be held to account for maintaining this abusive practice.

Mr. Lai lost both at the Federal Court and Court of Appeal. At the Court of Appeal, the answer to the first three questions was no. The fourth question turned out to be unnecessary to decide. So the Court declined to answer it.

To be a Convention refugee, a claimant must establish a nexus between a well founded fear of persecution and one of five listed reasons - race, religion, nationality, political opinion or membership in a social group. Because the Board made a finding of no nexus and that finding was upheld on review and appeal, the answer to the fourth question could not determine the outcome of the appeal.

Mr. Justice MacKay, though he commented adversely on the way Tao Mi had been treated, found that reliance by the Board on her original statement produced by the Chinese authorities to the Government of Canada and by the Government of Canada to the Board was unnecessary for the Board conclusions. So that reliance did not undermine the Board decision. Mr. Justice MacKay further found that, though Mr. Lai was not given notice of what was alleged against him and the Board made no specific findings of criminal activity in its decision, the fact that the Minister of Citizenship and Immigration, in the evidence presented to the Board, provided details of allegations of criminal activity was sufficient. The Federal Court, by answering no to the first three certified question, affirmed this reasoning of Mr. Justice MacKay.

Mr. Lai applied to the Supreme Court of Canada for leave to appeal the decision of the Court of Appeal. Leave was denied.

The decisions of the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada were all unfavourable to Mr. Lai. However, the fact that Mr. Lai got as far as the Court of Appeal is a credit to the Canadian courts and a testimonial to the failings of the Chinese legal regime.

In the system in place at the time Mr. Lai made his refugee claim, the Immigration and Refugee Board determined only whether Mr. Lai was entitled to the protection of the Refugee Convention. The system has since changed to expand the jurisdiction of the Board to consider as well whether a claimant is entitled to protection under the Convention against Torture from deportation to torture. However, the Board at the time of Mr. Lai's claim made no such determination. That determination remained to be made by an official of the Minister of Citizenship and Immigration under a process called pre-removal risk assessment.

Mr. Lai then applied for pre-removal risk assessment, and was found on May 11, 2006 not to be at risk. That determination was also challenged in Federal Court.

Again here leave was granted. Again here questions were certified. So here too we are dealing with the tiny .3% of Federal Court cases which jump these two hurdles. The chance of one person jumping these two hurdles twice is infinitesimal. Any charge that Canada is providing a hideout to criminal fugitives by pointing to the Lai case ignores how unrepresentative the Lai case is.

This time Mr. Lai succeeded in Federal Court. Mr. Justice de Montigny in a decision dated April 5, 2007 overturned the pre-removal risk assessment decision of the Minister and ordered it be redone.[7]

By looking at the certified questions we can see here too that the difficulties the case posed were, for the most part, human rights violations in the Chinese legal system. The certified questions were these:

> "1. Where the Minister takes a public position on preremoval risk to an applicant before a pre-removal risk assessment application is decided, is there a reasonable apprehension that the Minister's decision on preremoval risk assessment application will be biased?
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> 2. What is the appropriate standard of review for the interpretation of a diplomatic note providing assurances against the death penalty or the infliction of torture or other cruel or unusual treatment?

7 2007 FC 361

> 3. Is it appropriate to rely on assurances against torture in assessing an applicant's risk under section 97 of the IRPA, when there are credible reports that torture prevails in the country where the applicant is to be removed? If so, under what circumstances?
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> 4. If there is a risk of torture in an individual case, what are the requirements that an assurance against torture should fulfil to make that risk less likely than not? Should the assurance provide for monitoring to allow for verification of compliance for that assurance to be found reliable? In the absence of a monitoring mechanism, is the notoriety of the person to be removed a relevant, and a sufficient, consideration for the PRRA officer in determining whether it is more likely than not that the assuring state will adhere to the diplomatic assurance?"

The first question had a uniquely Canadian context. The other three related to China, specifically to the diplomatic assurances that China gave and whether they were adequate.

An argument of reasonable apprehension of bias arose because the Minister intervened in Mr. Lai's refugee claim and submitted not just that he was a criminal but also that the diplomatic assurances China gave were reliable and sufficient to protect Mr. Lai from risk of persecution on return. The Minister then went on to determine, in pre-removal risk assessment, whether the assurances were reliable and sufficient to protect Mr. Lai from risk to life, torture or cruel and unusual treatment or punishment on return.

Mr. Justice de Montigny found no reasonable apprehension of bias on the basis that different officials of the Department of Citizenship and Immigration were involved in the intervention at Mr. Lai's refugee claim and in the pre-removal risk assessment decision. He found though that the assurances were deficient, because there was no mechanism in place to assess compliance with the assurances.

Even though Mr. Lai at the Federal Court lost on the argument of bias, he succeeded overall. He could not and in any case did not want to appeal the decision of the Federal Court. The Minister, who could have appealed, decided not to do so. Instead the Government of Canada went about renegotiating the assurances.

The new assurances, dated March 341, 2010, provided:

> "... The Canadian side can know where LAI Changxing is detained. At the request of the Canadian side, the Chinese side will arrange, as swiftly as possible, visits by Canadian embassy or consular officials resident in China

> to LAI's place of detention, including living quarters, and the Canadian officials can meet with him. An interpreter chosen solely by the Canadian side can accompany the Canadian officials.
> 3. During LAI Changxing's detention and at the request of the Canadian side, the Chinese side will, if necessary, provide videoconferencing facilities so that LAI Changxing can contact Canadian embassy or consular officials resident in China.
> 4. Under the Code of Criminal Procedure and the Act Concerning Attorneys of the People's Republic of China, LAI Changxing has the right to commission a lawyer licensed to practice law in China to defend him. He also has the right to refuse to be defended by a lawyer so commissioned and to choose another lawyer. LAI Changxing has the right to meet with his lawyer without being monitored.
> 5. When 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.
> 6. After LAI Changxing returns [to China] for his trial, the Chinese judicial authorities will make synchronized audio and video recordings of the court hearings and pretrial interrogations and record the identities of all court officials present at LAI's trial and all pretrial interrogators. Upon request, the Canadian side will be able to consult the relevant audio and video recordings (and other information).
> 7. Under the Prisons Act and the Detention Centre Regulations of the People's Republic of China, all detainees receive the necessary medical examinations. If the Canadian side submits a reasonable request, the Chinese side will allow an independent medical establishment legally qualified [to operate] in China to examine LAI medically. Because medical examination reports are private, the Canadian side may see the contents of the medical examination report with LAI's consent..."

The Minister then redetermined the preremoval risk assessment application of Mr. Lai, relying on these assurances. The Minister's delegate found that Mr. Lai would not be, on return, at risk to life or at risk of torture or cruel and unusual treatment or punishment. This determination too was challenged in Federal Court. Mr. Lai again applied for a stay, this time unsuccessfully. Mr. Justice Shore on July 21, 2011 denied a stay. The Court found Mr. Lai did not present a serious issue to the Court and did not face irreparable harm on return. Mr. Lai was removed the next day.

The judicial review proceeding though continues. The leave application is still pending. Mr. Lai faces now the argument of mootness. However, the application can still have value to him because it could determine the meaning of ambiguous provisions in the diplomatic assurances.

In its denial of stay of enforcement of removal pending the judicial review challenging the pre-removal risk assessment decision, the Federal Court, I believe, erred. The finding of no serious issue is unpersuasive in light of the fact that the questions posed by Mr. Justice de Montigny as serious questions of general importance for the purpose of appeal to the Federal Court of Appeal remained unanswered. As well, the finding of the absence of irreparable harm is linked to the finding of no serious issue.

In general, I would say that the Canadian legal system, by keeping Mr. Lai in Canada for twelve years determining whether he would safe from torture, cruel and unusual treatment or punishment and arbitrary execution on return, kept him in Canada not long enough, rather than too long. The legal issues that needed to be canvassed were not adequately considered before Mr. Lai was removed.

The twelve year delay though did have a consequence, one not just for Mr. Lai but for anyone facing removal to torture. The Canadian courts and ultimately the Government of Canada accepted that diplomatic assurances that a person will not be tortured have no value unless there is in place a mechanism to monitor compliance with the assurances.

In my view, the mechanism fashioned by the revised assurances for Mr. Lai are inadequate. For instance, the assurances allow a Government of Canada representative to attend open hearings of Mr. Lai's criminal case, but not closed hearings. To take another example, the assurances allow an independent medical professional to examine Mr. Lai, but say nothing about allowing such an examination of his corpse, should he die in prison.

Yet, the Government of China budged from its original position and did establish a mechanism for monitoring compliance with the assurances which it had not originally provided. The protracted litigation on the Lai case was not just wheel spinning. The wheels got traction; both the Canadian and Chinese legal systems moved.

With the Lai case, protection against deportation to torture has been enhanced, not only for deportation to China, but also, because of the precedential value of the case, against deportation to torture worldwide. Even if this protection is still not what it should be, this enhancement alone justifies the twelve year legal battle.

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