Date: 20040203

Docket: IMM-3194-02

Citation: 2004 FC 179

BETWEEN:

LAI CHEONG SING,

TSANG MING NA,

LAI CHUN CHUN,

LAI CHUN WAI,

LAI MING MING

Applicants

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

MacKAY J.

Introduction

[1] The applicants, Lai Cheong Sing, his wife Tsang Ming Na and their three children arrived in Canada from China and later they applied to be accepted as Convention refugees. Their applications were rejected by a panel of the Convention Refugee Determination Division ("CRDD"), acting under the *Immigration Act*, R.S.C. 1985 c. I-2, as amended (the "former *Act*").

[2] Each of the parents was found to be excluded from the definition of refugee by reason of Article I F(b) of the United Nations Convention on Refugees, incorporated by the statute as a part of the definition, and each of the members of the Lai family was found not to be included in the definition of refugee, because the fear they claimed, if returned to China, was not persecution by reason of a ground specified in the definition.

[3] These reasons concern my determination that their application for judicial review of the decision by the CRDD panel should now be dismissed by separate order after counsel for the parties have opportunity to propose any question

for certification for consideration by the Court of Appeal, pursuant to paragraph 74(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*").

The Background

[4] The applicants seek judicial review of, and an order setting aside, a decision dated May 6, 2002, released under a notice of decision dated June 21, 2002, by a CRDD panel which denied the applicants' claims to be Convention refugees as defined by the former *Act*. That *Act* was replaced by *IRPA* on June 28, 2002, after the decision in question. The application for leave and for judicial review, filed on June 28, 2002, is heard pursuant to s. 190 *IRPA* in accord with that *Act*.

[5] The applicants are Lai Cheong Sing ("Mr. Lai"), his wife Tsang Ming Na ("Ms. Tsang"), and their three children, Lai Chun Chun, Lai Chun Wai and Lai Ming Ming. All are citizens of the People's Republic of China who arrived in Canada in August 1999 and claimed refugee status in June 2000, ten months after their arrival. While awaiting consideration of their claims, Mr. Lai was detained pending an admissibility hearing. He was subsequently released from detention under conditions for release whereby he and his wife were subject to a form of "house arrest", a situation which has continued.

[6] The applicant, Lai Cheong Sing had claimed refugee status on the basis of fear of persecution for reasons of political opinion and for reasons of his membership in a particular social group, i.e. successful Chinese businessmen. His wife, Ms. Tsang based her claim on fear of persecution on political grounds and on her membership in a particular social group, Lai's family. Lai Chun Wai claimed to fear persecution on the grounds of political opinion and membership in a particular social group, the Lai family, and the other two children claimed to fear persecution on grounds of membership in a particular social group, the Lai family.

[7] At the hearing before the panel, the respondent Minister intervened after giving notice that in his opinion, Article 1 F(b) of the U.N. Convention Relating to the Status of Refugees was at issue in this case. Much evidence was introduced on behalf of the Minister, principally provided by authorities in China. Testimony of Chinese officials and records of investigation reports and of convictions of others, said to have been engaged in illegal activities with Mr. Lai and Ms. Tsang in China and Hong Kong before they came to Canada, was supported in part by expert witnesses' testimony and reports concerning the justice system, including criminal law, prosecutions and penal sanctions in China. For the applicants, in addition to testimony of Mr. Lai, his wife and eldest child, testimony of others, including experts' evidence on the political and judicial systems in China was presented, with much published information about conditions in that country, some of it concerning the smuggling and other unlawful activities of Mr. Lai's companies, reported to be the largest such activities in China.

[8] The Minister alleged that there were serious grounds to believe that Mr. Lai and Ms. Tsang had committed serious non-political crimes before coming to Canada, including bribery, smuggling, fraud and tax evasion, and that they were excluded from refugee status by Article 1 F(b). The Minister also sought findings, and the panel agreed, that Mr. Lai, his wife, and each of their three children are not

included in the definition of Convention refugee as found in the former *Act* (and now in s. 96 of *IRPA*). The persecution they claimed to fear was found not related to grounds set out in that definition. In other words, there is no nexus between the persecution they claimed to fear and the grounds they claimed as a basis for their fear, i.e. political opinion in the cases of Mr. Lai, Ms. Tsang and their eldest child, Lai Chun Wai, and membership in particular social groups for each member of the family. Specifically, the bases of the claim to refugee status by the members of the family were their fear of persecution, in the case of:

(i) Mr. Lai, for reasons of political opinion and membership in a particular social group, successful Chinese businessmen;

(ii) Ms. Tsang, for reasons of political opinion and membership in a particular social group, the Lai family;

(iii) Lai Chun Chun and Lai Ming Ming, for reasons of membership in a particular social group, the Lai family;

(iv) Lai Chun Wai, for reasons of political opinion and membership in a particular social group, the Lai family.

[9] In respect of these various claims, the panel found that Mr. Lai and Ms. Tsang were each excluded from the definition of Convention refugee, pursuant to Article 1 F(b). Further, it determined neither Mr. Lai nor Ms. Tsang and none of their children is included in the definition of Convention refugee as found in the former *Act* (now found in ss. 96 and 98, *IRPA*).

[10] The parties portray this case in very different ways. The applicants say that as a result of one of various possible scenarios of political intrigue in which Mr. Lai refused to participate, he and his wife and his companies have been wrongly accused of major commercial crimes, particularly smuggling on a very large scale, involving billions of dollars worth of goods. It is urged for the applicants, that statements of major political figures in China, including the President and the Prime Minister, and by the government press, indicate clearly that political leaders have made up their minds about the guilt of Mr. Lai in particular, in advance of any charges being laid. Moreover, it is urged that the Chinese legal system, including the courts, is unable to ignore political assessments and pressures of government, and the detention, and conviction with serious penalties for Mr. Lai and Ms. Tsang upon their return to China is a foregone conclusion. It is urged that the widely known perspective of political leaders about Mr. Lai and his wife makes this case one where there is persecution for reasons of political opinion.

[11] The applicants express the essence of their case in two ways in written submissions. In the initial Public Representations of the Applicants, the case is described thus, at para. 22:

Though this is a big, long case, there is a simple issue at its core. Major political figures in China, including the President and Prime Minister have made up their minds about the guilt of the Lais, and have publicly incessantly proclaimed that guilt, in advance of any charges being laid. The Chinese legal system bows to the dictates of

the Communist Party and the political leaders in major cases. The Lais are certain to be found guilty. The result of their criminal trials in China is pre-ordained. This case is a compelling political refugee case simply because of the combination of the political pronouncements against the Lais and inability of the Chinese legal system to ignore those sorts of pronouncements. . . .

Later, in the Reply of the Applicants to the Further Memorandum of the Respondent, at para. 23:

. . . Their case remains that the 4.20 team investigation was triggered by a denunciation/report, that the 4.20 team were directed by their political masters to seek out evidence against Mr. Lai and his group of companies because of this report, that the report itself had no evidentiary value and the author was never interviewed or even identified to the 4.20 team, and that the 4.20 sought to prove its case by confession statements. None of this contradicted by any finding of the Board.

[12] For the respondent, it is urged that, as found by the CRDD panel, this case concerns common criminal fugitives from the Chinese justice system and nothing more. The fear of persecution claimed is nothing more than fear of prosecution for serious non-political crimes under laws of general application in China.

The Issues

[13] The ultimate findings of the panel are contested by the applicants, that is the findings that each of Mr. Lai and Ms. Tsang are excluded from persons recognized as refugees by reason of Article 1 F(b) of the Refugee Convention, and that each of them, and all of their children, are not included within the definition of refugees because the fear they claim is not of persecution for a Convention reason. They contest also the panel's findings that the evidence of Mr. Lai and Ms. Tsang is generally not credible. In addition, the applicants contest many underlying conclusions of the panel, about admissibility and weight of evidence, and about numerous factors on which the panel's ultimate conclusions are based. Where these issues have significance for the panel's ultimate conclusions, I seek to deal with them in relation to the ultimate conclusion to which they relate.

The Panel: findings on exclusion

[14] The panel's ultimate findings in relation to exclusion were that there are serious reasons for considering that Mr. Lai and Ms. Tsang had committed the serious non-political crime of smuggling, and that Mr. Lai had committed the serious non-political crime of bribery, outside Canada prior to their admission to this country. On this basis, the panel found each of Mr. Lai and Ms. Tsang excluded from the definition of Convention refugee pursuant to s-s. 2(2) and Article 1 F(b) of the Schedule to the former *Act*, i.e. Article 1 F(b) of the International Convention.

[15] That provision of the Convention continues to apply under *IRPA* (s. 98 and the Schedule) and it reads:

F. The provisions of this Convention shall not apply to	F. Les dispositions de cette Convention ne seront pas

any person with respect to whom there are serious reasons for considering that:	applicables aux personnes dont on aura des raisons sérieuses de penser:
. . .	. . .
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;	b) Qu'elles ont commis un crime grave de droit commun en dehors du pays d'accueil avant d'y être admises comme réfugiés;

[16] Several objections are raised by the applicants to the findings of the panel on exclusion. These I deal with in turn after a brief description of some of the differences in the laws of China and Canada which underlie the applicants' submissions.

Differences in legal systems

[17] The following differences in the legal regimes of the two countries are accepted by the parties. In China, no criminal charges are laid if the person accused is not within the jurisdiction of the Chinese courts, and in this case, no charges have yet been laid in China against Mr. Lai and Ms. Tsang since they had left China before the investigation of alleged wrongs had been completed. They are, however, wanted on the equivalent of warrants for arrest in relation to alleged wrong-doings. In this case, the wrong-doings were perceived by Chinese authorities as activities in which Mr. Lai's companies, the Yuan Hua group, were said to be involved. Initiated on the basis of a report, said to be false by Mr. Lai, by a citizen whose identity was not officially acknowledged, a special investigative team, ultimately numbering some hundreds of investigators, was appointed to find evidence of wrong-doing by Mr. Lai, his companies and many public servants. Much of the investigation was done by detaining and interrogating employees of the Yuan Hua companies and public servants after which charges were laid against many persons. A number were convicted; some were sentenced to be executed and some of these were so dispatched.

[18] The process of investigation and prosecution is very different in the two countries and many of the aspects of fairness and justice we take for granted, are not part of the Chinese process for administering justice. The differences reflect different cultural values of the two countries, particularly, the applicants say, in the place of the administration of justice within the structure of government. The measure of independence from direction by political leaders of the state for investigators, prosecutors and judges, that we consider essential for our society, are not the same in China, where the Party and the executive government are said by the applicants to dominate much of the social order, including the criminal courts. Largely because of this difference, the applicants' claim to fear persecution on the basis of political opinion, not their own, but that of the Chinese government.

Documentary evidence of smuggling and bribery

[19] Much of the documentary evidence before the panel about alleged offences in China consisted of reports of interrogations, and resulting documentation and criminal trial records, including convictions and reports of some executions. Because of the process of investigation and interrogation of detained persons in China, the applicants urge that the reports and documents, including judicial decisions, based upon them, should not have been admitted by the panel, or if admitted, should be given no weight because it is evidence obtained by torture or cruel and inhuman treatment. That argument is buttressed, so the applicants claim, by general evidence of country conditions which report continuing use of terror and detention in the investigation in China of activities considered against the public interest, by evidence of experts called on behalf of the applicants, by an affidavit which avers that a statement given to Chinese investigators by another was false, by evidence from one related proceeding in China where the accused was interrogated over a long period of time, in excess of that specifically allowed under Chinese law, and by an unsigned report of one person, T.M., a former employee of Yuan Hua companies, who had earlier given a statement to Chinese investigators.

[20] In respect of the general evidence of country conditions and for the evidence of experts on behalf of the applicants, the panel, for reasons stated, preferred the evidence of expert witnesses called on behalf of the respondent Minister to general opinions of the applicants' experts or general reports of country conditions in the absence of evidence relating most of the documentary evidence before it to specific torture or degrading treatment of those from whom the evidence was obtained. The interrogation report taken over an extended period of time led to an interview of the person concerned, then detained in China, by a Canadian immigration officer in the presence of Chinese authorities, and the report of that interview was that the matters earlier admitted to Chinese investigators were confirmed by the individual concerned and were said by him to have been admitted voluntarily.

[21] As for the evidence from and concerning a former employee, T.M., there was an investigatory statement produced after detention and persecution, a videotape of her later responding to questions and indicating her original statement was true and voluntary, and there was additional evidence tendered and accepted by the panel after scheduled hearings were completed. The first of the post hearing evidence was an unsigned report of comments made by one T.M. to a Canadian lawyer and his secretary in China, a report that was to have been the basis for a sworn affidavit but ultimately was not. That unsigned report, exhibited to an affidavit of the Canadian lawyer, if believed, would have cast doubt on the original statement of T.M. Thereafter, the respondent Minister arranged for interrogation of T.M. in China by an R.C.M.P. liaison officer, obviously with cooperation of Chinese officials, and in the presence of a Chinese security officer from an agency that might have earlier detained and interrogated T.M. 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, and ultimately unnecessary, since, though given some weight by the panel in assessing Ms. Tsang's involvement with Yuan Hua companies, it was not the only such evidence relied upon.

[22] In its decision, the panel commented (p. 262) on the submissions concerning admissibility of documents, particularly those emanating from the government of China and from those under its jurisdiction as well as a document of the applicants to which the Minister had objected. The panel concludes its discussion thus:

. . . After reviewing the materials in question, we do not find any of the exhibits of the claimants or the Minister's counsel to be inadmissible. This includes all materials filed after the close of the hearing. The issue is what weight the evidence merits.

[23] That conclusion is consistent with the lawful discretion of the panel to consider and determine what evidence is admissible in any case. That discretion is now set out for the Refugee Protection Division, in paragraphs 170(g), (h) and (i) of *IRPA*. Unless the Court is persuaded that the panel's assessment is patently unreasonable, which is not the case here, there is no basis for it to intervene.

[24] I agree with submissions of counsel for the applicants that evidence obtained by torture, or other means precluded by the International Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, ought not to be relied upon by a panel considering a refugee application. In this case, the panel did consider the evidence objected to by the applicants, but only after considering the matter and concluding that there was not credible evidence that interrogation statements in issue resulted from torture or from degrading treatment of persons under investigation in China.

[25] As a general ruling, that determination about the admissibility of statements, court records and exhibits, in this case, was clearly within the capacity and the statutory authority of the panel. Only if it were persuaded that the panel's determinations on admissibility, or indeed on the weight of evidence, are patently unreasonable, would the Court intervene.

The onus of proof to support exclusion

[26] The parties agree that the onus is on the Minister to establish that the applicants should be excluded. That onus, the applicants urge requires the Minister to establish that all the interrogation statements submitted here as evidence were voluntary, a requirement the panel ignored. Moreover, the applicants say that in this case, having properly acknowledged where the onus lies, the panel, by its decision, erroneously placed the burden on them to establish the involuntariness of statements. With reference to alleged mistreatment or torture of detainees, the panel stated in its Reasons (pp. 233 - 234):

On the issues of mistreatment and torture of detainees, taking all the evidence into account, both on country conditions and that of the probative witnesses at the hearing, we conclude that while mistreatment of detainees occurs in China, it has not been established on a balance of probabilities that it occurred in regard to any specific statement or confession obtained by the . . . Investigation team or for the Li Ji Zhou trial.

[27] The latter concern, about the panel's consideration of onus, is also raised by the claimants in relation to the panel's determination concerning inclusion, after consideration of the evidence and arguments in regard to possibility of imposition of the death penalty upon trial in China of the applicants, Mr. Lai and Ms. Tsang, that:

We find on a balance of probabilities that the government of China will honour the terms of Note No. 085/01 concerning the non-imposition of the death penalty on Mr. Lai and Ms. Tsang should they return to China and be convicted of any crimes committed before their repatriation. (Reasons pp. 184-185).

[28] As for the first of these concerns, that the onus on the respondent includes the need to establish the voluntary nature of statements produced from interrogations in China, I am not persuaded the panel erred by not requiring this. The panel accepted and preferred evidence of expert witnesses on behalf of the Minister and witnesses from China, that the justice system in China, while in a state of flux and different in process from that in this country, was not a system which was based on fabricated evidence. Moreover, there was little evidence before the panel about the lack of voluntariness of any of the statements before it, except for the unsigned report of a statement by T.M. to the Canadian lawyer in China, to which the panel, for reasons stated, gave little weight. At the same time, the questioned statements on their face generally stated they were given voluntarily, evidence by transcript and video of a few persons tried in China indicated their statements were voluntary, and witnesses from China, a lead investigator, a prosecutor and an expert on Chinese criminal law process, all affirmed they knew of no instance in the large scale investigation and prosecutions concerning activities of the Yuan Hua companies, in which statements given were not voluntary. Evidence of country conditions generally, without specific comment on the statements produced in this trial would not provide a basis on which the panel should have questioned all statements from interrogation in China. Those were evidentiary documents in the Chinese justice process and argument, without specific evidence, that they should not be considered or given weight is not in itself a basis for finding the panel erred in considering them without insisting on proof by the Minister in each case that the statement introduced was given voluntarily.

[29] With regard to the two quoted passages from the panel's decision, these appear in the context of assessing the evidence before the panel. In my view, the references to "balance of probabilities" in each case refers to a finding of credible evidence rather than to the onus of proof of the parties. In relation to exclusion, the panel clearly acknowledged the onus of proof was on the Minister to establish there are serious reasons to find the applicants should be excluded. In relation to inclusion, the panel clearly recognized the onus of proof was on the claimants to establish credible evidence of a reasonable fear of persecution for a Convention reason.

[30] The panel's references to a balance of probabilities referring to particular evidence issues before it, not to its ultimate decisions, in my opinion, do not indicate error on its part in applying the onus of proof to be met by the parties.

Adequacy of notice and of findings

[31] The applicants urge that notice of the basis of exclusion, at least the specifics of alleged criminal activities, was never clear to them, the notice was vague,

and they were uncertain what was alleged against them. While the panel noted this concern, it made no ruling on the notice. Moreover, in its findings of exclusion the panel stated that on the evidence there were serious reasons for considering that "Mr. Lai was involved in a large scale smuggling operation . . ." and that "Ms. Tsang . . . was involved in large scale smuggling operations . . ." without, it is said, any specific act of smuggling that the panel had serious reason to believe the Lai's committed.

[32] In my opinion, the notice of the intention of the Minister to intervene in the hearing of the applicants' claim to be refugees met the essential requirement of indicating the basis of intervention, in relation to Article 1 F(b), and further they were advised by the notice that Mr. Lai and Ms. Tsang were considered excluded in relation to their commission of serious non-political crimes of smuggling, fraud, tax evasion, and bribery. The opinion that they be excluded was stated to be based on their Personal Information Forms which acknowledged they were wanted for arrest by Chinese authorities for a matter investigated by a Chinese special team.

[33] That notice clearly met the requirements of *IRPA*. I do not suggest that those requirements are equivalent to the disclosure requirements of the prosecution's case under the *Criminal Code*, but the purposes of those two Canadian statutes are very different. The nature and detail of the criminal activities which the respondent claimed serious reasons to believe the applicants had committed were revealed by the evidence adduced by the Minister, from investigatory statements, decisions and other documentary evidence from proceedings in China, from expert witnesses and from Chinese legal officials who testified before the panel.

[34] I am satisfied the notice of intent to intervene met the requirements under *IRPA*. Moreover, I am satisfied that the panel's determinations about serious reasons for considering the Lais committed serious non-political crimes of smuggling, and of bribery in the case of Mr. Lai, met requirements of *IRPA* and of Article 1 F(b), without spelling out in that finding the details of the criminal activities, e.g. the time, place, methods, goods or people affected, which were included in the many documents filed and the testimony of Chinese officials who were witnesses before the panel.

Non-political crimes

[35] The applicants submit the panel erred in law by its determination that the crimes which it was alleged were committed by the applicants, Mr. Lai and Ms. Tsang, were non-political within the meaning of that term in Article 1 F(b) without considering their submission that in this case, the crimes alleged were political because of the positions taken and opinions expressed by China's leaders and public authorities about the guilt of the applicants.

[36] The panel did not accept the argument that the alleged crimes in this case should be considered political for the purpose of Article 1 F(b) because of an obvious political animus against Mr. Lai and given the alleged shortcomings of relations between the Chinese political and judicial systems. The panel accepted the Minister's argument that Article 1 F(b) does not require an examination of the offence from the point of view of the prosecutor stating:

It is the motivation of the claimant when the crime was committed that is important.

Here, the applicants claimed no political purpose for their activities. Rather, the claim is that the purposes or motives of the alleged persecutor, the government of China as represented by its leaders, may form the basis for political crimes, regardless of the applicants' beliefs.

[37] The applicants' claim may be novel, but I am persuaded that "non-political crime" within Article 1 F(b) would include such a claim in an exceptional case where the evidence would support such a finding. In my opinion, as noted below, the same interpretation should be given to the word "political" within Article 1 F(b) and in the general definition of refugee in s. 96 of *IRPA* where "political opinion" may be that claimed by the refugee claimant or that perceived by the alleged persecutor.

[38] Yet it is clear that the panel's determination to accept the Minister's submissions was written in the context of this case and its comment should be read in that context. On the evidence before it, the panel concluded that the applicants' activities were not political, they were intended for their own personal benefit. There was evidence of expert witnesses for the Minister and of Chinese officials, as well as the record of numerous prosecutions and convictions in China as a result of investigations of activities of Yuan Hua companies, that the justice system in China, at least in relation to criminal laws of general application, was sufficiently independent of political pressures to administer the general law in the cases of the applicants, should they return to China, in the same manner as it applied to other cases.

[39] I am not persuaded that the panel erred in its determination not to accept the applicants' submissions that the crimes alleged in this case were political. There was ample evidence before the panel to support its conclusion that the applicants' portrayal of the subservience of the criminal law process to the political leadership in China, a key element of the applicants' claim, was not established. That finding on the evidence, a question of mixed fact and law was reasonable. Thus, in this case, there is no basis to intervene in relation to the panel's conclusions that the crimes alleged in this case, smuggling and bribery, were non-political crimes.

Were the crimes alleged "serious"?

[40] The panel's determinations that in each case the crimes alleged, smuggling by Mr. Lai and Ms. Tsang, and bribery by Mr. Lai, were "serious crimes" within Article 1 F(b) is disputed by the applicants. They submit the evidence of specific details in regard to one alleged smuggling scheme simply do not support a conclusion that smuggling was done, that the evidence of illegal benefit to the applicant Mr. Lai, a necessary element of bribery in Chinese law, was not here established by the two instances referred to by the panel's decision. But that review of the evidence before the panel ignores other evidence accepted by the panel, from investigatory statements and records of court convictions in other cases, and from testimony of Chinese officials of other instances of smuggling and bribery in the operations of Yuan Hua companies.

[41] Further, the panel's findings concerning "serious crimes" were made with reference to comparisons of Canadian criminal and customs laws with criminal laws of China, the penalties that may be assigned under both systems including possible execution in China in serious cases, and the numerous allegations of offences that were raised as a result of investigations of Huan Yua companies. Those findings that the activities alleged were "serious crimes" were also made in light of jurisprudence, including other decisions of CRDD panels.

[42] Those determinations of mixed fact and law, in light of the evidence and authorities examined by the panel, were reasonable in my opinion and they provide no ground for the Court to intervene.

The panel's conclusions on exclusion

[43] Many objections about the panel's conclusions that Mr. Lai and Ms. Tsang are excluded from the definition of Convention refugees under Article 1 F(b) concern decisions of the panel about admissibility and weight of evidence, and about subsidiary decisions, giving rise to differences between the parties, upon which the ultimate decisions are based. The ultimate determinations concern questions of mixed fact and law. There are no serious errors of fact that would warrant intervention of the Court under subparagraph 18.4(d) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended. The decisions reached on the ultimate determinations of exclusion, in my opinion, are reasonable in light of the evidence before the panel, and there is no basis for the Court to intervene in regard to those findings.

The panel's findings on inclusion

[44] The applicants Mr. Lai and Ms. Tsang claim to be Convention refugees on the basis of fear of persecution by reason of political opinion and membership in a particular social group, i.e., respectively, successful Chinese businessmen, and a member of the Lai family. His elder son, Lai Chun Wai claims refugee status in relation to political opinion and membership in a social group, the Lai family. The other two children claim to fear persecution for reasons of their membership in the Lai family.

[45] In its decision, the panel rejected each of these claims. It found no reasonable risk of persecution of Mr. Lai and Ms. Tsang, and their children, if they were to return to China, in the sense of the Convention, or in particular because of the possible imposition of the death penalty, or of torture, cruel or degrading treatment or punishment. There was no reasonable risk of persecution for reasons set out by the Convention. Rather, their fears concerned prosecution under criminal laws of general application in China.

The possible penalty of execution, or of torture or degrading treatment

[46] In regard to the threat of execution, the Minister adduced a diplomatic note from the Chinese government (Note No. 085/01), which stated in part:

Lai Changxing is the chief criminal suspect of the mega smuggling case in Xiamen of China's Fujian Province. He fled to Canada after the case was detected. It is of great

importance for China's efforts to fight against corruption and smuggling to have him repatriated to China for a trial by the competent Chinese judicial departments.

The Chinese side has noted the judicial practice of Canada relating to death penalty in repatriating criminal suspects. In view of this, the Chinese government undertakes that after his repatriation to China, the Chinese appropriate criminal court will not sentence Lai Changxing to death for all the crimes he may have committed before his repatriation. The Supreme People's Court, the highest judicial organ in China, has decided to that effect and the appropriate criminal court in charge of the alleged smuggling and bribery case will be adequately informed of this decision and will abide by it.

In accordance with the above decision and Article 199 of the *Criminal Procedure Law of the People's Republic of China* which stipulates that "death sentences shall be subject to approval by the Supreme People's Court", the appropriate criminal court will not sentence him to death and even if it does, the verdict will not be approved by the Supreme People's Court, therefore, he will not be executed in any case if returned to China.

At the same time, China is a state party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the provisions of the relevant Chinese laws, during the period of investigation and trial of Lai after his repatriation and, if convicted, during his term of imprisonment, Lai will not be subject to torture and other cruel, inhuman or degrading treatment or punishment.

Zeng Mingna, Lai's wife, is also a suspect involved in the same smuggling case. She fled with Lai to Canada. If Zeng is repatriated to China, the above-mentioned commitments will be equally applicable to her.

[47] The panel heard evidence from a senior officer of Canada's diplomatic service concerning the significance of diplomatic notes generally, and his opinion of this note in particular. As well it had the opinions of expert witnesses concerning China and its legal system, whose views it relied upon. The panel concluded, with regard to this note (Reasons, pp. 184-5):

We find on the balance of probabilities that the government of China will honour the terms of Note No. 085/01 concerning the non-imposition of the death penalty on Mr. Lai and Ms. Tsang should they return to China and be convicted of any crimes committed before their repatriation. We also find on the balance of probabilities that the government of China will honour the terms of Note No. 085/01 that Mr. Lai and Ms. Tsang will not be subject to torture and other cruel, inhuman or degrading treatment or punishment if they are convicted of any crimes committed before their repatriation.

[48] As earlier noted in discussion of the onus of proof in considering findings on exclusion, the applicants urge that this statement is in error in referring to the balance of probabilities for no such onus of proof lies on the applicants. I have dealt with this previously and indicated that in its context the statement of the panel refers

to its perception of credible evidence of the intent of the Chinese government, not to the onus of proof to be borne by the applicants.

[49] The applicants also raise two other objections to the panel's acceptance of the note: first concerning the panel's interpretation of the note as holding out similar assurances for both Mr. Lai and Ms. Tsang, and second, an allegation that the panel ought to have considered and referred to earlier misleading tactics of Chinese investigators who came to Canada, claiming visas as visiting businessmen when their sole purpose was to meet Mr. Lai and try to get him to return to China. In my opinion the panel's interpretation of the note was reasonable, and its conclusion on the trust to be accorded to the note was made in light of its knowledge of the evidence as a whole, including the clumsy efforts of Chinese investigators to come unknown to Canada and seek to deal with Mr. Lai here, whether or not that evidence was specifically related as a factor considered in reaching its conclusion. Neither of these criticisms warrants this Court's intervention, in my opinion.

[50] In two other aspects, the applicants claim the panel erred in its assessment of the diplomatic note. In their view, the Supreme Court of Canada directed in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, that a separate and more careful assessment of a foreign state's assurance to avoid torture or degrading treatment of those detained should be made than in the case of a similar assurance to avoid imposition of the death penalty. In my opinion, *Suresh, supra* does not direct such a difference in assessment where there is not persuasive evidence that reasonably indicates torture or degrading treatment in similar cases. Here there is much evidence at large but little, apart from the unsigned report of T.M.'s comments to a Canadian lawyer, that indicated that torture or degrading treatment was inflicted on those interrogated even under detention or those prosecuted for activities involving the Yuan Hua companies.

[51] This second basis for contesting the panel's reliance upon the diplomatic note was the failure, alleged by the applicants to consider the conduct of the state (China) as prosecutor in the case concerning Mr. Lai and Ms. Tsang, for here, as in *Canada (Minister of Justice) v. Pacificador*, (2002) 60 O.R. (3d) 685 (C.A.), (Leave to appeal refused S.C.C. Bulletin 2002, p. 286), the conduct of prosecutors in this case was said by the applicant to be unacceptable and the foreign government's assurance of proper treatment of the applicants if they were returned to China was a matter for the courts not the government. I am not persuaded that the decision in *Pacificador, supra*, important though it may be in extradition proceedings, is analogous to this case. This is not extradition and the decision does not concern deportation of the applicants. Moreover, here there is no basis for finding that state prosecutors in China have done other than comply with Chinese criminal law of general application. Moreover, the assurances in this case, contained in the diplomatic note, include assurance by both the executive government and the Supreme People's Court of China.

[52] Here, the panel on the evidence before it, including the diplomatic note, reasonably found that there was no evidence that would support a conclusion that the applicants would face torture or degrading treatment upon their return to China. That provides no ground for this Court to intervene.

The basis of the panel's findings on inclusion

[53] The panel found no basis for the claims of Mr. Lai and Ms. Tsang to fear persecution for reasons of political opinion because it found they had none and claimed none. Their claim that the political opinion of concern to them was that of the state, voiced by its leaders, that they should be punished, was dependant on evidence that the criminal courts in China, in administering the general criminal law, were subject to direction of political leaders. While some evidence of country conditions suggested that in relation to certain persons detained for other reasons than those typically within the criminal law, there was no evidence that the alleged crimes in this case were political in any sense other than the state's interest in prosecuting general criminal activities.

[54] The claim of Mr. Lai to fear persecution because of his membership in a particular social group, successful businessmen in China, was not established, for the evidence before the panel was that business and businessmen were encouraged in China and were not the focus of any persecutory action.

[55] The claim of Lai Chun Wai to fear persecution arose because two members of Ms. Tsang's family in China had been convicted and imprisoned for a crime of harbouring or abetting a fugitive from justice in China, i.e., Ms. Tsang, to whom at the request of Lai Chun Wai they had sent money to assist the Lais in Canada, particularly with respect to legal fees. It was urged on his behalf that he feared he would be persecuted for this reason if he returned to China. There was not evidence he would be similarly treated; and if he were, that would be subject to another law of general application in China. That would not be a matter of persecution but merely of prosecution.

[56] Since both Mr. Lai and Ms. Tsang were excluded from the definition of refugee and were not included in that definition as persons fearing persecution for reasons of political opinion, and in Mr. Lai's case he was not included for reasons of his membership in the class of successful businessmen in China, the claim of Ms. Tsang and her three children to fear persecution because of their membership in the Lai family, was not a fear within the definition of Convention refugee for there was no evidence of persecution of the Lai family for Convention reasons.

[57] In my opinion, the panel's findings that none of the claims of the members of the family were within the definition of Convention refugee, concerning a question of mixed fact and law in each case, was reasonably supportable on the evidence before the panel. Those findings do not warrant the Court's intervention.

Credibility

[58] The panel found that both Mr. Lai and Ms. Tsang were generally not credible, for reasons the panel set out. Those findings were somewhat inconsistently followed by the panel, in particular by its reference to the evidence of Mr. Lai himself as one of its best sources for its conclusions about his activities of bribery. The

findings that they were generally not credible is contested, but none of the panel's findings turn on its determination of credibility, even though it did not accept the applicants' evidence as they hoped. Rather, those findings were based on other contrary evidence presented to the panel from other sources than the Lais.

[59] Despite its finding of a general lack of credibility of the principal applicants, the panel specifically declined to make a finding requested by the Minister that there was no credible basis for the applicants' claims. That determination is not questioned in this application.

[60] Since the panel's determinations do not turn on issues of credibility of the applicants, I make no ruling in relation to the panel's findings on credibility.

Conclusion

[61] For the reasons set out, an order will issue dismissing the application of the applicants for judicial review.

[62] As I undertook at the conclusion of the hearing, these reasons are filed and I invite counsel for the parties to consult and to advise the Court about any question they may agree upon, or failing agreement, any question either may propose, for consideration as a serious question of general importance to be certified for consideration of the Court of Appeal, under paragraph 74(d) of *IRPA*. Any questions agreed upon or separately submitted should be forwarded to the Registry of the Court in Vancouver on or before February 17, 2004. If questions are not agreed upon, a party opposing any suggested question shall have until February 23, 2004 to make submissions about the question. The Court, upon considering written submissions, shall determine whether one or more questions will be certified and the order formally dismissing this application will then issue, including any certified question.

"W. Andrew MacKay"

J.F.C.

Ottawa, Ontario

February 3, 2004

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

PLACE OF HEARING:	Vancouver, British Columbia
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REASONS FOR ORDER OF	MacKAY J.
DATED:	Tuesday, February 3, 2004

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