Date: 20050411

Docket: A-191-04

Citation: 2005 FCA 125

CORAM: RICHARD C.J.

SHARLOW J.A.

MALONE J.A.

BETWEEN:

LAI CHEONG SING, TSANG MING NA, LAI CHUN CHUN,

LAI CHUN WAI and LAI MING MING

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Vancouver, British Columbia, on March 14 & 15, 2005.

Judgment delivered at Ottawa, Ontario, on April 11, 2005.

REASONS FOR JUDGMENT BY:
MALONE J.A.

CONCURRED IN BY:
RICHARD C.J.

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REASONS FOR JUDGMENT

I. INTRODUCTION

[1] This is an appeal from a decision of MacKay J. of the Federal Court (the Applications Judge) dated February 3, 2004, and reported as 2004 FC 179. The Applications Judge dismissed the appellants' application for judicial review of their failed Convention refugee claims. These -claims were decided by the Convention Refugee Determination Division of the Immigration and Refugee Board (the Board) in a decision dated May 6, 2002 and released under a notice of decision dated June 21, 2002. The Board heard and dismissed the appellants' claim for Convention refugee status under the *Immigration Act*, R.S.C. 1985, c. I-2 (the former Act).

[2] Arising from the issues raised in the application for judicial review, the Applications Judge certified four questions of general importance for the consideration of this Court pursuant to paragraph 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the new Act), which came into effect on June 28, 2002.

[3] The first three questions deal with the Board's exclusionary finding under Article 1F(*b*) of the *United Nations Convention Relating to the Status of Refugees*, July 28, 1951, Can. T.S. 1969 No. 6 (the Refugee Convention). These concern who has the onus to prove an allegation that a foreign statement was made involuntarily, the content of the Minister of Citizenship and Immigration's (the Minister's) intervention notice and the necessary content of a Board decision dealing with an exclusionary finding. The last question deals with the Board's non-inclusion finding and concerns what triggers a separate assessment of a foreign state's assurance to avoid torture. This appeal will deal with these questions and other collateral issues advanced by the appellants.

II. BACKGROUND FACTS

[4] The appellants are all Chinese citizens. In 1999, in accordance with the *Criminal Procedure Law of China*, Chinese authorities received information from an undisclosed source that large-scale smuggling was taking place in Xiamen, a port city in the south of China. The Chinese authorities assembled a team to investigate this allegation and allegedly discovered a large-scale smuggling operation headed by the appellants Mr. Lai and Ms. Tsang through their Yuan Hua group of companies.

[5] Much of the investigation was done by detaining and interrogating employees of the Yuan Hua companies and various public servants, after which charges were laid against many individuals. A number were convicted and some were executed as a result of their involvement.

[6] In China, no criminal charges are laid if the person accused is not within the jurisdiction of the Chinese courts. 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 arrest warrants in relation to the alleged wrong-doings. The alleged wrong-doings were perceived by Chinese authorities as activities in which Mr. Lai's companies, the Yuan Hua group, were said to be involved.

[7] In August of 1999, upon learning that Chinese authorities were looking for them, the adult appellants (Mr. Lai and Ms. Tsang), accompanied by their three children and a secretary who spoke English, fled Hong Kong and came to Canada, arriving as visitors. In June 2000, Mr. Lai, Ms. Tsang and their three children made a refugee claim in Canada.

[8] The Board heard and decided the appellants' refugee claims under the former Act. The Minister intervened at the hearing, asserting that pursuant to Article 1F(*b*) of the Refugee Convention there were serious reasons for considering that Mr. Lai and Ms. Tsang committed serious non-political crimes outside Canada before being admitted to this country. These crimes included bribery, smuggling, fraud and tax evasion. The Minister therefore argued that they should be excluded from

accessing our refugee determination system. No such assertions were made against the children: Lai Chun Chun, Lai Chun Wai and Lai Ming Ming.

[9] The basis for Mr. Lai's refugee claim is his allegation that he is being targeted by the government of China for refusing to falsely implicate an official in the central government, Mr. Li Ji Zhou, of criminal activity. He says that because of his refusal to cooperate, he is being pursued by means of false charges of activities such as smuggling and bribery, although he has always been an honest businessman. He alleges that his well-founded fear of persecution is based on political opinion as well as his membership in the social group of successful business persons, which he says the government of China often targets.

[10] Ms. Tsang allegedly faces persecution because of her political opinion and because of her relationship to Mr. Lai. It is alleged that the children face persecution as members of the Lai family. The eldest son also alleges he will be persecuted for reasons of political opinion.

[11] If charged with criminal offences in China, the adult appellants argue that they will not get a fair trial because the judicial system is highly politicized and controlled by the central government. They allege that the case against them has already been decided. It is also argued that the children will be persecuted as members of the Lai family.

[12] The Board heard approximately 25 witnesses and conducted hearings over 45 days, which produced 18 volumes of testimony and an additional 47 volumes of exhibits.

[13] Much evidence was introduced on behalf of the Minister, principally provided by authorities in China. The testimony of Chinese officials, the records of investigation reports, and the convictions of others said to have been engaged in illegal activities with Mr. Lai and Ms. Tsang in China and Hong Kong was supported in part by the testimony and reports provided by expert witnesses. These expert witnesses provided evidence concerning the Chinese justice system, including criminal law, criminal prosecutions and penal sanctions.

[14] In addition to the testimony of Mr. Lai, his wife, and eldest child, the appellants presented expert evidence on the political and judicial systems in China as well as published information about conditions in that country dealing with the torture of prisoners.

[15] In a 294 page decision dated May 6, 2002, the Board determined that Mr. Lai and Ms. Tsang were "clearly only fugitives from justice, and nothing else". In particular, the Board found that neither Mr. Lai nor Ms. Tsang were trustworthy or credible witnesses.

[16] The Board ultimately concluded that the adult appellants were each excluded from the definition of Convention refugee pursuant to Article 1 F(*b*). The panel also determined that they were not included in the definition of Convention refugee as found in subsection 2(1) of the former Act. The persecution they claimed to fear was not found to be reasonable or related to the grounds set out in the Convention

refugee definition since there was no nexus between the persecution they claimed to fear and the grounds they claimed as a basis for their fear (see paragraphs 9 and 10 above).

[17] As for the children, the Board determined that their derivative claim, based on family group, could not be sustained where the claim of their parents did not come within the definition of Convention refugee.

III. STANDARD OF REVIEW

[18] This is an appeal from the decision of the Applications Judge who judicially reviewed the Board's decision. As this is an appeal of a lower court and not the judicial review of an administrative decision maker, the principles outlined in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 apply and questions of law are to be reviewed on a correctness standard, while questions of fact or mixed fact and law are to be reviewed on a standard of palpable and overriding error.

[19] This Court must also assess the standard of review selected by the Applications Judge on a correctness standard, as it is a question of law (*Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paragraph 43). In the event of an error in the standard of review chosen and applied, this Court must correct the error, substitute the appropriate standard of review, and assess or remit the Board's decision on that basis (see *Davies v. Canada (Attorney General)*, 2005 FCA 41, [2005] F.C.J. No. 188 (QL) at paragraph 8; and *Wyeth-Ayerst Canada Inc. v. Canada (Attorney General)* (2003), 305 N.R. 317, 2003 FCA 257 at paragraphs 8 and 9).

IV. THE ROADMAP

[20] For ease of analysis, I will first deal with the Article 1F(*b*) exclusionary finding of the Board, followed by an analysis of its finding of non-inclusion with respect to the definition of Convention refugee. Exclusion involves a consideration of the appellant's past activities, which may deny them a finding of inclusion in the definition of Convention refugee. On the inclusion question, the definition of Convention refugee looks to the future in order to determine whether or not the appellants have a well-founded fear of persecution based on a Convention ground.

V. ANALYSIS

A. The Exclusionary Provision - Article 1F(*b*) of the Refugee Convention

i) Purpose and Effect of Article 1F(*b*) of the Refugee Convention

[21] The analysis must commence with the definition of Convention refugee found in subsection 2(1) of the former Act, which refers to the Refugee Convention and means any person who:

(*a*) by reason of a well-founded fear of persecution for reasons of race, religion, nationality,	*a*) qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa

membership in a particular social group or political opinion,	nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*i*) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, ...	(*i*) soit se trouve hors du pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de ce pays, ...
but does not include any person to whom the Convention does not apply pursuant to section E or F of Article 1 thereof ...	Sont exclues de la présente définition les personnes soustraites à l'application de la Convention par les sections E ou F de l'article premier de celle-ci ...

[22] This subsection excludes from the definition of Convention refugee any person to which section F of Article 1 of the Refugee Convention applies. The relevant portion of that section reads as follows:

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ...	F. Les dispositions de cette Convention ne seront pas 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;
[Emphasis Added.]	[Je souligne.]

While various purposes for Article 1F have been identified by this Court, the primary purpose of this Article is to ensure that perpetrators of serious non-political crimes are not entitled to international protection in the country in which they are seeking asylum (see Décary J.A. in *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 761, 2003 FCA 178 at paragraphs 118 and 119). The effect of a board finding that this Article is applicable to a claimant is that the claimant is excluded from accessing the Canadian refugee determination process and cannot therefore be found to be a Convention refugee.

[23] In the recent decision of this Court in *Xie v. Canada (Minister of Citizenship and Immigration)* (2004), 243 D.L.R. (4th) 385, 2004 FCA 250 at paragraph 23, leave to appeal to S.C.C. refused, S.C.C. Bulletin, 2005, p. 444, it was established that an 'exclusion' hearing under Article 1F(*b*) is not in the nature of a criminal trial where guilt or innocence must be proven by the Minister beyond a reasonable doubt. Rather, the onus upon the Minister is to establish, based on the

evidence presented to the Board, that there are "serious reasons for considering" that Mr. Lai and Ms. Tsang committed serious non-political crimes in China prior to their arrival in Canada.

[24] Furthermore, pursuant to subsection 68(3) of the former Act, the Board is not bound by any legal or technical rules of evidence. However, in order to receive and base a decision on evidence adduced before it, that subsection requires that the Board receive and consider evidence that is credible or trustworthy in the circumstances of the case. It reads as follows:

(3) The Refugee Division is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings and considered credible or trustworthy in the circumstances of the case.	(3) La section du statut n'est pas liée par les règles légales ou techniques de présentation de la preuve. Elle peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

The requirements of subsection 68(3) of the former Act continue essentially unchanged in the new Act at paragraphs 170(*g*) and (*h*).

[25] Overall, the Board must assess and weigh the evidence that it has accepted as credible or trustworthy in the circumstances and determine whether or not the threshold test of "serious reasons for considering" has been met with regard to the serious non-political crimes alleged (see *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 at 309, 311 (C.A.)). The standard of evidence to be applied to this threshold test is higher than a mere suspicion but lower than proof on the civil balance of probabilities standard (see *Zrig* at paragraph 174; and *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 at 312-14 (C.A.)).

ii) Certified Question #1(*a*) - Voluntariness

[26] Certified Question #1(*a*) reads as follows:

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 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?

[27] At the commencement of the Board hearing, the Minister adduced documentary evidence in an attempt to provide the Board with serious reasons for considering that Mr. Lai and Ms. Tsang had committed the serious non-political crimes of smuggling, bribery, fraud and tax evasion outside Canada prior to their

admission to Canada. The Minister's evidence included written statements taken by Chinese authorities in their criminal investigation of the Yuan Hua smuggling scheme headed by Mr. Lai and Ms. Tsang. The Minister also adduced much evidence to show the foreign statements were credible or trustworthy in the circumstances of the case.

[28] Counsel for the appellants objected to the admission into evidence of these foreign statements on the basis that they were involuntary, alleging they may have been obtained by improper means such as torture. The Board conditionally allowed the foreign statements to be referred to during the hearing and indicated that it would rule on whether they were admissible after it had heard all the evidence in the claims. The Minister argues that this provided the appellants the opportunity to establish their allegation that the foreign statements were involuntary.

[29] The Minister's witnesses included: the lead investigator in the cigarette smuggling investigation, the prosecutor of Mr. Li Ji Zhou (who was convicted of accepting bribes from Mr. Lai), the prosecutor of the nineteen accused in the Yuan Hua cigarette smuggling case, and a defence counsel for an accused in the Yuan Hua oil smuggling prosecution. All were found to be credible by the Board. These witnesses testified that the statements they either took personally or reviewed in their respective roles were not taken through mistreatment. The Minister's expert in Chinese procedural law, Dr. Jerome Cohen, an American law professor, also testified that if statements are proved to be obtained by torture before Chinese Courts, they are not used in deciding the case.

[30] In support of their allegation that the statements were involuntary, the appellants adduced general country condition reports of torture in China. The appellants also called Sheng Xue, a woman who wrote a book about Mr. Lai primarily based on his statements to her, and she testified that two individuals related to the investigation had been deprived of sleep. However, the Board found that she gave vague, second hand testimony and give it little weight.

[31] After the hearing concluded, but prior to the release of the decision, counsel for the appellants made a written application to admit the unsigned statement of a former employee of Yuan Hua in Xiamen. That unsigned statement was adduced before the Board with two affidavits, including one from a Canadian lawyer living in Shanghai, further alleging that the foreign statements were obtained through torture. In reply, the Minister argued that the unsigned statement was not credible or trustworthy because by not being signed, it was unreliable.

[32] The Board determined that the unsigned statement was to be given very little weight. In assessing her statement and the conditions under which it apparently was made, the Board ultimately preferred the evidence provided by the Minister to that provided by the appellants.

[33] Having concluded that both the appellants' and the Minister's foreign statements were admissible and had probative value, the Board noted that the next issue facing it was what weight to give the foreign statements. Considering all of the evidence before it, the Board concluded that the appellants had not established that the foreign statements were obtained through mistreatment or torture.

[34] Both the appellants and the Minister acknowledge that the onus is always on the Minister to establish the exclusionary claim. However, according to the appellants, this onus required the Minister to prove that these foreign interrogation statements were voluntary; and by ignoring this requirement, the Board made a legal error.

[35] The Applications Judge held that the Board's determination on the admissibility and weight to be given to the evidence presented, including the statements, was clearly within the capacity and the statutory authority of the Board and was not patently unreasonable. He also determined that while the onus was on the Minister to establish that the appellants should be excluded, the panel did not err by not requiring the Minister to establish the voluntary nature of the statements produced from interrogations in China. Rather, it was sufficient for the Board to accept and prefer the Minister's evidence regarding voluntariness over the evidence presented by the appellants. He further noted that evidence of country conditions did not specifically address the disputed statements and therefore they did not provide a sufficient basis for concluding that the statements were not given voluntarily.

[36] In both the extradition and criminal law context, signed foreign statements taken in accordance with foreign procedural law are not inadmissible on the ground that the foreign procedural requirements are different than Canadian procedural requirements if the admission would not make the trial unfair (see *R. v. Harrer*, [1995] 3 S.C.R. 562 at paragraph 15). Further, as a general rule of international law, enforcement processes on foreign soil are governed by the laws and codes of the foreign jurisdictions, precluding the application of domestic laws or procedural codes (see *R. v. Terry,* [1996] 2 S.C.R. 207 at paragraph 23). A process in a foreign state is not unjust simply because it differs from the Canadian process (see *Canada v. Schmidt,* [1987] 1 S.C.R. 500 at 522-23).

[37] The role of the Board pursuant to subsection 68(3) is twofold. First, it is empowered to receive evidence without being bound by any legal or technical rules of evidence. Second, it may base its ultimate decision on that version of the evidence it considers credible or trustworthy overall; having weighed both the various pieces of documentary evidence which it has admitted and the oral testimony that it has heard.

[38] In order for the Board to admit interrogation statements produced abroad by foreign government agencies, the Minister need only provide general evidence as to the credible or trustworthy nature of the statements offered. In reaching its ultimate decision, the Board may also take into consideration specific evidence presented by the Minister or a claimant as to the voluntariness or involuntariness of a particular statement. This weighing of competing evidence is clearly within the Board's authority. The legal or technical rules normally associated with the criminal process when dealing with the voluntariness of a particular statement simply do not apply. As stated in *Xie* (see paragraph 23 above), an exclusion hearing under Article 1F is not in the nature of a criminal trial.

[39] In the present appeal, it was open to the Board to receive, prefer and base its decision on the Minister's expert witnesses and other witnesses from China. The thrust of their evidence was that while the Chinese justice system is different in its processes and procedures from that of Canada, it is rooted in the need for truthful evidence.

[40] Furthermore, from a review of the record, there was little evidence about the involuntariness of any statement, except for the unsigned statement, which for reasons earlier recited (see paragraph 33 above), the Board gave little weight.

[41] In any event, there was other credible or trustworthy evidence on which the Board could rely. First of all, the disputed statements on their face generally stated that they were given voluntarily. In addition, evidence by both video and transcript of several persons tried in China indicated that their statements were voluntarily given. Finally, the witnesses from China, which included a lead investigator, various prosecutors, and an expert on the Chinese criminal law processes, all affirmed that they knew of no instance in the massive investigation and prosecution of the Yaun Hua companies in which statements given were not voluntary.

[42] On the other hand, the very general evidence offered by the appellants about torture by Chinese investigators was not specific and certainly not specific to the statements offered by the Minister in this appeal. I agree with the Applications Judge that the evidence of country conditions presented to the Board does not support the conclusion that the disputed statements, which were taken under Chinese interrogation procedures, were not credible or trustworthy.

[43] Here, the Board properly applied subsection 68(3) of the former Act and proceeded to admit and weigh evidence that it considered credible or trustworthy in the circumstances of the case. Since the Board applied the appropriate legal standard, its determinations on admissibility and the weight to be accorded to the evidence accepted are entitled to great deference, as these are generally findings of fact or mixed fact and law that fall squarely within the Board's expertise. The Applications Judge was therefore correct in noting that he could only intervene if he was persuaded that the Board's determinations were patently unreasonable. Accordingly, there is no basis on which this Court should interfere with the Applications Judge's finding that the Board's assessment as to the voluntariness of and weight to be given to the disputed statements was not patently unreasonable.

iii) Certified Question #1(*b*) - Adequacy of Notice

[44] Certified Question #1(*b*) reads as follows:

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

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?

[45] The appellants' argument on this issue centres on their allegation that they never knew the case that they had to meet because the Minister's notice of intent to participate was overly broad. It only stated that the Minister was of the opinion that "Mr. Lai has committed serious non-political crimes, including but not limited to offences such as smuggling, fraud, tax evasion and bribery".

[46] They further allege that this defect was not cured by charges emanating from China because there were no formal charges laid against the adult appellants. The sole Chinese legal documents issued against the appellants were arrest warrants, in which the space provided for reasons for arrest was left blank.

[47] In the absence of charges, the appellants assert that they were entitled to notice of the specific crimes alleged against them for which exclusion was sought, in order to be able to adequately prepare their case. They further argue that the notice should have been detailed enough so that the person against whom the allegations were made would be able to identify the relevant transaction. The absence of proper notice, in their view, violated the duty of fairness that was owed to them.

[48] In response, the Minister asserts that the notice is sufficient if it identifies the sub-clause of Article 1F upon which the exclusion opinion is based, accompanied by a brief reference to the facts and law on which the Minister relied in order to form that opinion (see *Arica v. Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392 at paragraph 9).

[49] The general framework of analysis with respect to the triggering of the exclusionary clause under the former Act, including the notice requirement, was set out in section 9 of the *Convention Refugee Determination Division Rules*, S.O.R./93-45 (the former Rules). Subsection 9(1) of the former Rules required that the Minister specify the parts of section E or F that were relevant to the claim and briefly set out the law and facts on which he intended to rely. Under the new Act, which came into effect June 28, 2002, subsection 25(3) of the *Refugee Protection Division Rules*, S.O.R./2002-228 (the new Rules) is now the equivalent subsection. It requires the Minister to state in the notice the facts and law on which he relies if he believes that section E or F of Article 1 applies to the claim.

[50] The Applications Judge determined that the essential requirement for the Minister's notice was the identification of the Article 1F sub-clause that forms the basis of the intervention. He also found that the adult appellants were advised that they were considered excluded in relation to their commission of the serious non-political crimes of smuggling, fraud, tax evasion and bribery and that their exclusion was based on the information disclosed in their Personal Information Forms. Finally, he noted that the requirements in an exclusionary intervention are not the equivalent of the disclosure requirements in a criminal prosecution, because the purposes of the two processes and legislation are very different. In this case, he found that the Minister's notice of intent to participate met the requirements under the Act.

[51] The question of whether the Minister provided adequate notice is a question of procedural fairness to which a correctness standard applies (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539 at paragraph 100). I am fully satisfied that the notice provided by the Minister met the requirements as set out in the former Rules and that the Minister is not required to provide notice of the specific criminal acts alleged against the claimant.

[52] The Minister is not obliged to provide particulars at the standard that might be required, for example, in a criminal indictment. The Minister is however required to adduce credible or trustworthy evidence at the hearing that is relevant to the

[53] Finally, a word is also in order about the new Act and the new Rules. The Minister is now required to give notice to the claimant in advance of a hearing in accordance with section 25 of the new Rules. The Minister must also comply with section 29 of these Rules, which generally requires that claimants be provided with documents to be relied on by the Minister not later than 20 days before the hearing.

iv) Certified Question #1(*c*) - Specifics Required in the Board's Reasons

[54] Certified Question #1(*c*) reads as follows:

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

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

[55] The appellants argue that the Board made no finding specific enough to meet the requirements of Article 1F(*b*) since the Board made no determination that implicated either of the adult appellants in any specific act of smuggling or bribery. In essence, they allege that the Board made a legal error in determining that there were serious reasons for considering that the adult appellants were involved in a smuggling operation absent a conclusion with respect to a specific act of smuggling or bribery.

[56] One of the purposes of Article 1F(*b*) is to protect the integrity of the refugee determination system of the receiving state by screening out serious ordinary criminals because of their criminal activities in a foreign state (see *Zrig* at paragraphs 118 and 119). The Article 1F(*b*) hearing process excludes a claimant when there are serious reasons for considering that a serious non-political criminal activity has taken place. Therefore, the Minister is not required to prove a particular criminal offence beyond a reasonable doubt. Accordingly, the Board is not required to set out and determine all of the specifics or elements of the crime committed. This issue was recently addressed by this Court in *Zrig*, where Justice Nadon stated at paragraph 94:

In order to exclude persons covered by Article 1F(a) and (*b*), it will be necessary to show that there are "serious reasons for considering" that the serious crimes identified were committed, but it will not be necessary to attribute any one specifically to the claimant.

[57] It is also worthwhile to note that this position is consistent with international jurisprudence on this same point. In particular, in *Ovcharuk v. Minister of Immigration and Multicultural Affairs* (1998), 158 A.L.R. 289 at 301, Branson J.A. of the Federal Court of Australia held:

... the terms of Article 1F(*b*) suggest against a requirement that every element of an identified offence must be able to be identified and particularized before the article may be relied upon.

[58] The Applications Judge found that the Board's conclusion met the legal requirements of the Act and Article 1F(*b*) without spelling out in the findings the details of the criminal activities. The Applications Judge therefore determined that Certified Question #1(*c*) should be answered in the negative.

[59] In my analysis, this question raises an issue of procedural fairness to which a correctness standard of review applies. Based on the established jurisprudence (see paragraphs 56 and 57 above) the Board is not required to state in its decision the specifics of the criminal acts committed by the appellants. Accordingly, the Board made no legal error in determining that there were serious reasons for considering that the adult appellants were involved in alleged activities without coming to a conclusion with respect to specific acts. In turn, the Applications Judge made no error in concluding that the Board's reasons met the requirements of Article 1F(*b*).

v) Collateral Issues with respect to Exclusion - Serious Non-Political Crime

[60] Before leaving the exclusionary analysis, it would now be convenient to address a collateral issue raised by the adult appellants as to whether the crimes alleged against them are either serious or political.

[61] Excluding a claimant from accessing the refugee determination system through the application of Article 1F(*b*), requires a determination by the Board that there are serious reasons for considering that a claimant has committed a serious non-political crime. Before the Board, the adult appellants denied committing any crimes and professed their innocence in relation to the allegations of bribery and smuggling. Their position was that the alleged crimes were political, in the sense that they had a well-founded fear that the political authorities were using the legal system to persecute them. With respect to the issue of seriousness, the appellants' position was that the Board erred in law by considering Canadian criminal law in relation to the allegations of bribery and not the criminal law of China.

[62] Whether a crime is political for the purposes of Article 1F(*b*) is determined by the motivation of the offender at the time the crime was committed. Tremblay-Lamer J., at paragraph 88 of her reasons in *Zrig v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 F.C. 559 (and undisturbed by the this Court on this point), cites with approval the majority of the House of Lords in *T. v. Secretary of State for the Home Department*, [1996] 2 All E.R. 865 at 899:

A crime is a political crime for the purposes of Article 1F(b) of the [Refugee Convention] if, and only if:

(1) it is committed for a political purpose, that is to say, with the object of overthrowing or subverting or changing the government of a state or inducing it to change its policy; and

(2) there is a sufficiently close and direct link between the crime and the alleged political purpose.

[63] In essence, a crime either is or is not political when committed and its character cannot depend on the consequences that the offender may afterwards suffer

if he is returned to the state in which the crime was committed (see Lord Mustill in *T. v. Secretary of State for the Home Department* at 882). In *Gil v. Canada (Minister of Employment and Immigration*, [1995] 1 F.C. 508 at 517 (C.A.), Hugessen J.A. noted that the *Extradition Act* in force at that time (R.S.C. 1985, c. E-23, s. 21) drew a distinction between a political crime and the political motive of the prosecution. However, he went on to conclude that in the refugee context, the Convention definition in Article 1F(*b*) speaks only of the crime itself. Therefore, for the purposes of an Article 1F(*b*) exclusionary finding, when a crime is not accompanied by any stated or identifiable political motive, it is, in fact, a non-political crime.

[64] In my view, the Board made no error in concluding that it is the motivation of the claimants when the alleged crime was committed that is important. In the present appeal, the Board correctly concluded that there was no nexus between the alleged crimes and any political motive. Instead, the adult appellants' motive was one of personal gain and the crimes should not be viewed as political.

[65] The adult appellants also allege that the relevant criminal law for the purpose of the exclusionary clause must be the criminal law of a country outside of the country of refuge (i.e. China). Unlike Canadian law, where an accused does not need to have received a benefit from an official to commit the offence of bribery, under Chinese law the crime of bribery requires that an actual illegitimate benefit be conferred. The appellants argue that since no such benefit was proven, a serious crime could not have been committed.

[66] While the appellants made lengthy submissions with respect to the alleged bribery charges, it is not necessary to deal with that issue in this appeal. This is because no submissions were made disputing the Board's finding that the alleged smuggling in the circumstances of this case was a serious non-political crime, given the scale of the operation and the length of time over which the activities occurred. Therefore, even if the bribery allegations are disregarded, in my view, the adult appellants can still be excluded from the Convention refugee definition on the basis of the smuggling allegations made against them.

[67] Based on the credible or trustworthy evidence presented, the Board determined that there were serious reasons for considering that Mr. Lai and Ms. Tsang committed the serious non-political crime of smuggling.

[68] The Applications Judge applied a reasonableness standard of review to the Board's application of Article 1F(*b*) to the facts before it. In my view, he was correct to do so. The determination of a serious non-political crime is a question of mixed fact and law with significant factual components. The Board also has relative expertise in determining these issues, particularly with respect to whether or not an alleged crime is political in the circumstances.

[69] On questions of mixed fact and law, this Court is to review the decision of the Applications Judge on a standard of palpable and overriding error. On my review of his reasons, the Applications Judge made no palpable or overriding error when he concluded that the Board's finding with respect to the serious non-political nature of the alleged crimes was reasonable.

B. Inclusion - The Appellant's Inclusion Claim

i) Requirement to Consider the Inclusion Claim

[70] Having determined that the Applications Judge did not err in finding that the Board's conclusions on the exclusionary question were reasonable, the adult appellants are excluded from the definition of Convention refugee. The recent decision of this Court in *Xie* has determined that once excluded under Article 1F(*b*), claimants are not entitled to have their inclusionary claims determined. However, the present facts are distinguishable from those in *Xie* because in this appeal the children's actions were not subject to Article 1F(*b*)and their derivative claims must be determined. Accordingly, it was proper for the Board to proceed to conduct an inclusionary analysis with respect to all five of the appellants in order to determine if the children's derivative claims could be successful.

ii) Definition of Convention Refugee

[71] For an inclusion claim, the onus is on the appellants to show that they have a well-founded fear of persecution and that their fear is based on a Convention ground (the nexus). Mr. Lai and Ms. Tsang both contend that the persecution they fear is the imposition of the death penalty in China, and if imprisoned, that they also fear torture.

[72] The Minister adduced evidence to show that the fear expressed by the adult appellants was not well-founded, including a Diplomatic Note from the Government of China to the Government of Canada providing assurances that neither of the adult appellants would be subject to the death penalty or torture.

[73] The Board then examined all the evidence on the allegation of torture and determined that the Diplomatic Note was credible or trustworthy and provided the most probative evidence as to whether the adult appellants would be executed or mistreated while in custody if returned to China. The Board was satisfied, on a balance of probabilities, that Mr. Lai and Ms. Tsang would not be subject to the death penalty or torture if they were returned to China and convicted of any crimes committed before their repatriation.

[74] Based on all the evidence before it, the Board concluded that the appellants' fear of persecution by the imposition of the death penalty and torture in China was not well-founded. The Board fully recognized and held, referring to this Court's decision in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 at 683-84 (C.A.), that the standard required for the ultimate decision is that of a serious possibility or reasonable possibility of persecution. The Board applied this standard to its ultimate inclusionary decision by concluding that there is nothing more than a mere possibility that the adult appellants, if imprisoned in China, would suffer any mistreatment there that could be construed as persecutory.

[75] Considering the Supreme Court of Canada case of *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Board also determined that there was no nexus between the fears expressed by Mr. Lai and Ms. Tsang and any ground set out in the definition of Convention refugee. The Board determined that they were fugitives from justice and nothing more. Therefore, in my analysis, regardless of the

Board's determination of their well-founded fear of persecution, Mr. Lai and Ms. Tsang could not be included in the Convention refugee definition without proving a nexus to a Convention ground.

[76] The Applications Judge determined that it was reasonable for the Board to find the Diplomatic Note credible or trustworthy in light of its knowledge of the evidence as a whole. He also reviewed the Board's application of the reasonable possibility standard to the appellants' claimed fear of persecution and the Board's conclusion that they had not met that standard.

[77] The Applications Judge determined that the general inclusionary issues were questions of mixed fact and law and he applied a standard of reasonableness to the findings of the Board. The appellants do not specifically take issue with that determination and I am of the opinion that the Applications Judge was correct in doing so.

iii) Collateral Issue #1 with respect to Inclusion - Political Opinion

[78] Before leaving the subject of inclusion, there are several collateral issues raised by the appellants that must be dealt with. The first is that of political opinion.

[79] The appellants assert that the political opinion ground contained in the Convention refugee definition is not limited to the real or perceived political opinion of the claimant. They argue that where a potential prosecution is politically manipulated by the state, then a person subject to such a prosecution can be a refugee by reason of political opinion. Essentially, the appellants claim a well-founded fear based on their belief that the criminal process in China has been and would continue to be politically manipulated against them, and that these acts and opinions of the Chinese government therefore fall within the political opinion ground set out in the Convention refugee definition.

[80] The Minister argues that the political opinion ground in the Convention refugee definition must be the actual or imputed political opinion of the refugee claimant and not that of the alleged persecutor. In support of this position, the Minister relies on the actual wording of the Convention refugee definition, the context in which the words political opinion are found, and the judicial consideration of those words by both the Supreme Court of Canada and this Court (see *Ward* at 747, and *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 at 550 (C.A.)).

[81] The Board determined that the Chinese authorities were not seeking the adult appellants because of their actual or perceived political opinions and that the Chinese government does not see them as involved in political acts or as having a political opinion different from that of the government. The Board also found that the actions of the Chinese authorities do not have a political opinion as their core motive.

[82] The Applications Judge ultimately endorsed the Board's finding that, with respect to inclusion, the appellants could not fear persecution for reasons of political opinion since there was no evidence that the alleged crimes in this case were political.

[83] I also seriously doubt that the political opinion ground contained in the Convention refugee definition can be read to include the political opinion of the persecutor towards the claimant's situation, as alleged by the appellants, since the other Convention grounds - race, religion, nationality, and membership in a particular social group - refer to characteristics possessed by the individual claimant. The key words in the Convention refugee definition are that the person must have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion (see *Zolfagharkhani* at 550). While the situation should be approached from the perspective of the persecutor, it is the claimant's political opinion, or the political opinion ascribed to the claimant by his or her government, that must lie at the root of the persecution (see *Ward* at 747).

[84] In my view, the Board properly applied the jurisprudence on political opinion with respect to the definition of Convention refugee. Additionally, the Board went on to make a finding of fact that the actions of the Chinese authorities did not have a political opinion as their core motive. Therefore, the Applications Judge made no palpable or overriding error in finding that the Board's conclusion that appellants failed to establish a nexus between a well-founded fear and the Convention ground of political opinion was reasonable.

iv) Collateral Issue #2 with respect to Inclusion - Social Group

[85] Mr. Lai further asserts a well-founded fear of persecution by reason of membership in the social group characterized as prominent successful Chinese businessmen. He argues that there is no requirement that all members of a social group have to be at risk for there to be a well-founded fear of persecution by reason of membership in that group, it is enough if some of them are at risk.

[86] Mr. Lai also alleges that the Board ignored crucial expert evidence suggesting that all prominent successful Chinese businessmen in Mr. Lai's position were targeted. One of the expert witnesses called by the appellants was R.L., who testified for one day about the grey economic zones that prevail throughout China, including Xiamen. Under this scheme, local governments attract business and investment by charging lower taxes than the rates established by the central government authority in Beijing. These lesser taxes were often not remitted to the central government, which eventually lead to a crackdown on both local importers and local authorities.

[87] The explanation offered by R.L. for some of Mr. Lai's problems with the government of China was that he is but one of many local importers caught up in the power and money struggle between Xiamen and Beijing.

[88] The Board, in its review of the evidence, makes no reference to the expert report of R.L. or his testimony. The appellants assert that whether this crucial evidence on the issue of nexus was ignored, overlooked or forgotten by the Board, it was unfair to disregard the relevant testimony of an expert witness.

[89] The Applications Judge did not deal specifically with this omission of evidence, but he did in his reasons note that the appellants contest many underlying conclusions of the panel including the admissibility and weight of evidence, and numerous other factors on which the Board's ultimate conclusions were based.

[90] In my analysis, the fact that not all of the evidence presented by the appellants' witnesses was referred to in the Board's reasons does not indicate that the Board did not take that evidence into account in reaching its conclusions. Nothing having been shown to the contrary, the Board is assumed to have weighed and considered R.L.'s evidence (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.) (QL)). As the Board's findings were supported by the evidence, there is no reason to believe that appellants witnesses were ignored, overlooked or forgotten.

v) Certified Question #2 - Diplomatic Assurances

[91] Certified Question #2 reads as follows:

Does the decision of the Supreme Court in *Suresh v. M.C.I.*, [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?

[92] The case of *Suresh* involved a Minister's danger opinion with respect to a Convention refugee that would result in his removal to his country of nationality where he claimed he would be tortured. However, our case is not a decision of the Minister that could result in removal, but is an inclusion decision by the Board determining the issue of whether or not the appellants are Convention refugees.

[93] In assessing the well-founded fear of a claimant, the decision of *Suresh* does provide useful guidance on when foreign government assurances come into play and the matters to be considered when assessing the value of the assurances. However, in this appeal the Board correctly determined that there was no nexus between the fears expressed by Mr. Lai and Ms. Tsang and the definition of Convention refugee. Since it is imperative that nexus be established to come within that definition, and nexus was not established in this case, whatever the answer to Certified Question #2 may be, will not be determinative of this appeal.

[94] In my analysis, the panel should decline to answer this question as any answer is academic to the inclusion issue. This, of course, is not the end of the review process for the appellants. The next proceeding is the "Pre-Removal Risk Assessment" under section 112 of the new Act, where the question of torture and diplomatic assurances can be fully canvassed along with any new and relevant evidence that may become available. It is also noteworthy that the appellants may also apply to the Minister to stay in Canada on humanitarian and compassionate grounds pursuant to the principles set out in subsection 25(1) of the new Act. The Board's decision in the present appeal does not fetter the Minister's discretion in any way when he considers an application under section 112 or on humanitarian and compassionate grounds.

VI. ANSWERS TO CERTIFIED QUESTIONS

[95] In summary, I would answer the certified questions as follows.

Certified Question #1(*a*)

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 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?

Answer

No. The Minister has the onus to provide credible or trustworthy evidence on which the Board can determine whether a claimant should be excluded from the Convention refugee definition. The Board is not bound by any legal or technical rules of evidence and, in any proceedings before it, it may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances of the case. Statements obtained by torture or other cruel, inhumane or degrading treatment or punishment are neither credible or trustworthy.

In this case the Minister adduced evidence to show that the foreign statements were credible or trustworthy, including evidence that the statements were given willingly and in accordance with the procedural requirements of Chinese law. There was also before the Board evidence of general country conditions indicating that torture occurs and is not always controlled by the authorities, as well as vague hearsay statements. Based on the entire body of evidence presented, and in the absence of specific evidence that the foreign statements offered by the Minister were obtained by torture, the Board was entitled to admit those statements and conclude that they were obtained voluntarily.

Certified Question #1(*b*)

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

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?

Answer

No. The Minister is not required to provide notice of the specific criminal acts alleged against a claimant. Pursuant to section 9 of the former Rules, the Minister is required to specify the parts of Article 1F that are relevant to the claim and to set out briefly the law and facts on which he relies. The Minister is not obliged to provide particulars at the standard that might be required, for example, in a criminal indictment. The notice in this case contained sufficient information to the meet the statutory requirement.

The Minister is required to adduce credible or trustworthy evidence at the hearing that is relevant to the questions raised by the exclusionary ground, which is whether there are serious reasons for considering whether a claimant has committed a serious non-political crime outside Canada prior to arrival in this country.

Under the new Act, the Minister is now required to give notice in advance of a hearing in accordance with section 25 of the new Rules. He must also comply with section 29 of the new Rules, which generally require that a claimant be provided with the documents to be relied on by the Minister not later than 20 days before the hearing.

Certified Question #1(*c*)

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

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

Answer

No. The Board is not required to state in its decision the specifics of the criminal acts committed by a claimant.

Certified Question #2

Does the decision of the Supreme Court in *Suresh v. M.C.I.*, [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?

Answer

The Panel declines to answer this question on the basis of the analysis earlier articulated in these reasons for judgment.

VII. CONCLUSION

[96] I would dismiss the appeal.

"B. Malone"

J.A.

"I agree

J. Richard C.J."

"I agree

K. Sharlow J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

Appeal from an Order of the Federal Court dated March 19, 2004, Court File No. IMM-3194-02

DOCKET:	A-191-04
STYLE OF CAUSE:	Lai Cheong Sing et al v. The Minister of Citizenship and Immigration
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	March 14 & 15, 2005
REASONS FOR JUDGMENT BY:	Malone J.A.
CONCURRED IN BY:	Richard C.J.
	Sharlow J.A.
DATED:	April 11, 2005

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