

# In safe hands?

**Jerome A. Cohen** says the Chinese government's assurances for due process in its prosecution of Lai Changxing are far from being 'strict, clear and unequivocal', as Canada seemed to believe

Someone will make a movie about Lai Changxing (賴昌星). Books about him in Chinese and English were published long before the Canadian government deported him to mainland China last month after an 11-year legal battle. Lai, allegedly the mastermind of the notorious Yuanhua smuggling and bribery scandal, now faces a prosecution that may end one of the most massive criminal investigations the People's Republic has ever conducted. Hundreds of Lai's associates, family members and Chinese officials have been sent to prison, 14 sentenced to death and eight executed.

Will China's courts sentence Lai to death despite the Chinese government's long-standing, formal diplomatic promise that he will not be? When in 2001 I served as an expert witness for the Canadian government at hearings considering Lai's request for political asylum, I said China would honour this promise in order to maintain its international credibility. I emphasised that "PRC courts have an impeccable record in doing what they are told to do by the nation's highest government and Communist Party institutions".

Would China also live up to its diplomatic pledge that Lai would not be tortured? Here I was less confident. In view of worldwide publicity and mountains of evidence already assembled in convicting Lai's accomplices, I said that it was very unlikely that he would be tortured, like so many Chinese suspects, but that I could not be an insurance company for the Chinese government.

The following year, worries over Lai's post-conviction fate became less hypothetical. While imprisoned as his accomplices, both Lai's brother and his accountant died in unexplained circumstances. No autopsies were performed. The administrative officer chosen by Canada's Ministry of Citizenship and Immigration, who recently conducted the final assessment of the risks Lai might confront if deported, noted these mysterious deaths. She nevertheless concluded that Lai faced no significant risk of unnatural prison death, since such incidents "occur to a very small number of inmates in China" – an amazing statement to those familiar with Chinese justice.

Despite these deaths and evidence of coerced witness testimony, the administrator also stated, rather puzzlingly, that "torture does not appear to have occurred to other Yuanhua accused", presumably since Lai's deceased accomplices failed to testify about what led to their death. Ignoring Lai's potential for revealing secrets that might embarrass party leaders, she concluded that, "on a balance of probabilities" Lai is "unlikely to have his death 'arranged' while incarcerated".

The administrator's 100-plus page opinion is rife with ambivalence. It reflects her struggle to decide whether to end her government's dis-



pute with China by ridding Canada of its infamous visitor or vindicate the country's well-known respect for human rights.

She was favourably influenced by an unusual set of "assurances" recently extracted from China, in addition to China's initial guarantees against Lai's death and torture, although she acknowledged that they "fall short of a thorough monitoring mechanism necessary to ensure an inmate is not mistreated in custody". Her optimism even extended to a devastating 2005 critique of China's criminal process I delivered before the US Congressional-Executive Commission on China, because the "general tone of the article is quite sanguine" about progress then being made towards reform. That critique, she emphasised, "is now some six years old", implying that the situation in China has surely improved.

The sad truth, however, is that, while some legislative reforms have continued, law enforcement practice has become increasingly re-



**The sad truth is that law enforcement practice has become increasingly repressive**

pressive and disdainful of criminal justice rules.

Mr Justice Michel Shore, the judge reviewing the administrator's conclusion, was even more impressed by the additional "assurances". He characterised them as "strict, clear and unequivocal". Most observers might label them "loose, vague and ambiguous". How can the granting of visits to Lai's cell "as swiftly as possible" save him from the fate of his brother and accountant? Who will decide whether Canadian officials' requests to allow Lai to use videoconferencing to contact them is "necessary"?

It is good to know that Lai, unlike other detainees, will be guaranteed the right to unmonitored conversations with his lawyers. But when, how often and for how long?

Moreover, will lawyers be able to freely defend him, gather evidence, learn the prosecutor's case before trial, be given adequate time to prepare for trial and appeal, and allowed to see Lai during post-conviction imprisonment? To what extent can the right of Canadian officials to attend Lai's smuggling trial protect him? What about trial of bribery charges? What if China makes the trial secret? How valuable is the promise that, "if Canada submits a reasonable request", China will allow Lai's independent medical examination? And why is there no guarantee of an independent autopsy if Lai should die in prison?

Most potentially important is the assurance that audio and video tapes will be made of all

Lai's court hearings and pre-trial interrogations and that the identities of all participating officials will be recorded. Yet these safeguards against abuse will be available only for "consultation" under unspecified conditions, with no arrangements for investigating incomplete or misleading materials.

Although previous judges found that Lai's case raised serious legal issues deserving further consideration, because of the "assurances", Mr Justice Shore saw none. Yet he failed to address several key issues raised by Lai's able counsel, and his logic in briskly dismissing some others can only be described as inscrutable. In his view, deportation to China causes Lai no "irreparable harm". After all, Lai's ex-wife and children voluntarily returned, and Lai himself supposedly belied "the alleged risk" by (unsuccessfully) negotiating his conditions for return with visiting Chinese officials.

Thus, with considerable equanimity, the judge, after amply praising Canada's respect for human rights, concluded that "the life of the applicant is in the Chinese government's hands". Fortunately for the judge, but not for Lai, Canadian law permits no appeal from such a decision.

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