Federal Court  Cour fédérale

Date: 20130131

Docket: T-811-12

Citation: 2013 FC 104

Ottawa, Ontario, January 31, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HAN LIN ZENG

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review pursuant to subsection 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 in respect of a request to the Prime Minister of Canada by letter dated 27 February 2012 to express concern to the Chinese government regarding the criminal proceedings taking place against the Applicant in China. The Applicant is requesting an order of *mandamus* to direct the Prime Minister of Canada, the Minister of Foreign Affairs or the Minister of Citizenship, Immigration and Multiculturalism to make a decision in regards to his request.

BACKGROUND

[2] The Applicant is a citizen of China. He is not, and has never been, a citizen or permanent resident of Canada. He came to Canada as a visitor on 4 November 1999 after a failed business transaction in China resulted in two charges of contract fraud being issued against him.

[3] The Applicant claimed refugee status in Canada on 12 January 2004 after being arrested for overstaying his visa. The basis for his refugee claim was the pending criminal charges against him, which he alleged would result in an unfair trial, torture, inhuman prison conditions and the death penalty if he was removed to China.

[4] On 16 May 2007, the Refugee Protection Division of the Immigration and Refugee Board refused the Applicant's refugee claim and found that he was excluded from refugee protection because there were serious reasons to believe that he had committed a serious non-political crime prior to his entry into Canada.

[5] Leave was granted for the Applicant to have the RPD's decision judicially reviewed. Justice John O'Keefe refused the application (see *Zeng v Canada (Minister of Citizenship and Immigration)*, 2008 FC 956). Justice O'Keefe specifically found that section 7 of the Charter was not engaged by the decision to exclude the Applicant from refugee protection.

[6] The Applicant then applied for a Pre-Removal Risk Assessment (PRRA), and on 31 March 2010 a PRRA officer determined that the Applicant was not at risk in China. The Applicant sought judicial review of that decision; the application was granted by consent and the PRRA was considered by a different officer on 21 January 2011. Again the PRRA officer concluded that the

Applicant was not at risk. In particular, the PRRA officer concluded that there was no evidence the Applicant would be a victim of a predetermined verdict, the prison conditions he would be exposed to in China would not constitute cruel and unusual punishment, and the Applicant would not face the risk of the death penalty.

[7] On 10 February 2011, the Applicant filed an application for leave and judicial review of the second PRRA application, which was dismissed. He filed a motion for a stay of his removal on 14 February 2011, which was dismissed on 16 February 2011. Applicant's counsel wrote to the Chief Justice of the Federal Court requesting reconsideration of the decision dismissing the stay motion; the Court advised the Applicant within a matter of hours that it would not reconsider the stay motion.

[8] The Applicant was removed from Canada on 16 February 2011 and his application for leave and judicial review of the second PRRA decision was dismissed on 11 April 2011.

[9] Upon his return to China, the Applicant was tried and convicted of contract fraud. The Applicant says that during his detention prior to trial he was denied contact with his family and medication for his diabetes, and he only had limited contact with his counsel. He was only given notice of the date and the trial and the evidence that would be used against him nine days before the trial began. The Applicant says that none of the witnesses were available for cross-examination, and that one of the witnesses recanted his testimony after the trial.

[10] The Applicant has also produced a letter titled "Legal Opinion" written by 21 legal scholars in China. It is available on page 48 of the Applicant's Record. This letter refers to a variety of

factors which purportedly demonstrate the Applicant's innocence, the ultimate conclusion being that there is no legitimate legal basis for the finding that the Applicant committed contract fraud.

[11] On 20 January 2012, the Applicant was convicted and sentenced to fifteen years in prison by the Chengdu City Intermediate People's Court of Sichuan Province. On 21 January 2012, he appealed his conviction to the Sichuan Higher People's Court; this appeal was dismissed on 13 February 2012. The Applicant filed a further appeal to the Beijing Supreme People's Court on 22 May 2012.

[12] On 27 February 2012, Daniel Kingwell, the Applicant's former counsel, sent a letter to Prime Minister Stephen Harper asking the Canadian government to express concern to the Chinese government about the criminal proceedings against the Applicant. This letter is found on page 59 of the Applicant's Record. The letter asserts that the Applicant is being denied his basic human rights. Mr. Kingwell states that the following has occurred:

- Denial of contact with family;
- Denial of medical treatment;
- Denial of counsel;
- Short notice of trial;
- Closed trial;
- Closed decision;
- Unlawful decision;
- Suppression of professors' opinion;
- Obstruction of appeal;
- Recanting of prosecution witness testimony.

[13] On 29 February 2012, the Executive Correspondence Officer for the Office of the Prime Minister responded to Mr. Kingwell's letter, stating that his comments have been reviewed and sent to the Minister of Foreign Affairs and the Minister of Citizenship, Immigration and Multiculturalism, so that they be made aware of the Applicant's continuing interest in this matter.

[14] On 5 March 2012, seven days after sending the initial letter to the Prime Minister's Officer, the Applicant filed an application seeking an order of mandamus to compel a response to Mr. Kingwell's letter. The Applicant states that there have been no communications from the two Ministers or the Office of the Prime Minister since the letter dated 29 February 2012 and, considering the urgency of his matter, he seeks to compel a response by way of an order of *mandamus*.

ISSUES

[15] The Applicant raises the following issue in this application:

i. Has the Applicant met all the conditions for an issuance of *mandamus*?

[16] The Respondent raises the following preliminary issue to the issue raised by the Applicant:

i. Is the exercise of this prerogative power reviewable?

ARGUMENTS

The Applicant

[17] The Applicant submits that the conditions precedent for a writ of *mandamus* were set out in *Conille v Canada (Minister of Citizenship and Immigration)*, [1999] 2 FC 33 (TD) as being:

a. There is a public legal duty to act;

b. The duty must be owed to the Applicant;

c. There is a clear right to the performance of the duty and, in particular:

1. The Applicant has satisfied all conditions precedent giving rise to the duty;

2. There was a prior demand for performance of the duty, a reasonable time to comply with the demand, and a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay; and

d. There is no other adequate remedy.

Public Legal Duty to Act

[18] The Applicant points out that Canada has signed and ratified the *International Covenant on Civil and Political Rights*, Can TS 1976 No 47 (ICCPR). Article 7 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Further, the United Nations Human Rights Committee General Comment No. 20, October 3, 1992 states as follows:

> In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.

[19] The Applicant submits that as a result of his refoulement he has suffered cruel, inhuman and degrading treatment and punishment in China. He further submits that an unfair trial leading to a fifteen year prison sentence where he is being denied medical treatment for his diabetes is arbitrary punishment and cruel, inhuman and degrading treatment.

[20] Article 14 of the ICCPR says:

> 1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and

public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

> 5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

[21] The Applicant states that, in his case, all the provisions in the above noted Article have been violated in one way or another, as detailed in the letter from Mr. Kingwell. He submits that Canada has an obligation not to allow someone to be subject to cruel, inhuman or degrading treatment or punishment, and has a duty to the Applicant to step in and mitigate the breach of this Article.

[22] The Applicant also submits that section 7 of the *Charter of Rights and Freedoms* [Charter] provides a guarantee of life, liberty and security of the person that applies to non-Canadians who face the risk of cruel, inhuman or degrading treatment or punishment if returned abroad (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*], *United States of America v Burns*, 2001 SCC 7 [*Burns*]). The Applicant states that he is owed the protection of section 7 of the Charter, and his return to China entitles him to ask the Canadian government to seek to mitigate the violation of his rights.

Duty to the Applicant

[23] The Applicant points out that Canada has also signed and ratified the *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 UN GAOR Supp. (No 16) at 59, UN Doc. A/6316 (1966), 999 UNTS 302, entered into force March 23, 1976. It provides as follows:

Article I

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

Article 2

Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

[…]

Article 4

1. Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.

2. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

Article 5

1. The Committee shall consider communications received under the present Protocol in the light of all written information made available to it by the individual and by the State Party concerned.

2. The Committee shall not consider any communication from an individual unless it has ascertained that:

(a) The same matter is not being examined under another procedure of international investigation or settlement;

(b) The individual has exhausted all available domestic remedies. This shall not be the rule where the application of the remedies is unreasonably prolonged.

> 3. The Committee shall hold closed meetings when examining communications under the present Protocol.
>
> 4. The Committee shall forward its views to the State Party concerned and to the individual.
>
> […]

[24] Based on the above, the Applicant submits that Canada is accountable internationally to the Applicant for his return to cruel, inhuman or degrading treatment or punishment. Canada has a duty to mitigate the harm to the Applicant by making the efforts requested in the letter of Mr. Kingwell. Further, the Applicant submits that he is owed a duty under section 7 of the Charter, as previously discussed.

Conditions Precedent to the Duty

[25] The Applicant submits that the only condition precedent to the duty owed to the Applicant is a prior demand, which was made in the letter of Mr. Kingwell.

Reasonable Time

[26] Although the request for action was made fairly recently, the Applicant submits that the matter is urgent. The Applicant's conviction is presently going through the appeal process in China, and the Applicant submits that it is important that one of the Ministers react to China before the appeal process has been exhausted. The Applicant also needs proper medical treatment as soon as possible.

Implied or Express Refusal

[27] Although there has been no express refusal, the Applicant submits that the delay in response is an effective refusal in light of the urgency of the matter and the impending appeal deadlines in China.

[28] Based on the above, the Applicant requests that an order of *mandamus* be issued requiring the Prime Minister to express concern to the Chinese authorities regarding the ongoing criminal proceedings against the Applicant. The Applicant does not request costs.

The Respondent

Exercise of Prerogative Power Not Reviewable Absent a Charter Violation

[29] The Respondent submits that the Canadian government has already responded to Mr. Kingwell's letter. Specifically, by letter dated 29 February 2012, an Executive Correspondence Officer acknowledged receipt of the letter, and advised that the comments had been reviewed and forwarded to the Minister of Foreign Affairs and the Minister of Citizenship, Immigration and Multiculturalism so that they could be made aware of the Applicant's continuing interest in the matter.

[30] The Applicant has not provided any evidence to indicate an obligation on the government of Canada to respond to any letter sent to the Office of the Prime Minister. The Respondent submits that, given the Applicant has already received a response to the letter dated 27 February 2012, his application for a writ of *mandamus* to compel a response should be dismissed outright, with costs.

[31] Rather than simply seeking a response to the 27 February 2012 letter, what the Applicant's written submissions demonstrate is that he is truly seeking a writ of *mandamus* to compel the Canadian government to make representations to the Chinese government concerning the ongoing criminal proceedings against him in China.

[32] The Respondent submits that the power of the courts to review the exercise of a prerogative power is limited. Unless there has been a breach of the Charter or other constitutional norms, the government's exercise of its prerogative powers is not reviewable (*Canada (Prime Minister) v Khadr*, 2010 SCC 3 [*Khadr*] at paragraph 35).

i) No Breach of the Charter by the Canadian Government

[33] An applicant seeking a Charter remedy must prove, on a balance of probabilities, that a Charter violation has occurred. To establish a breach of his section 7 rights under the Charter, the Applicant must demonstrate that there has been a denial of his liberty and security of the person by Canadian officials and that this deprivation is not in accordance with the principles of fundamental justice (*Khadr* at paragraphs 21-22). The Applicant has not provided any evidence that there has been a Charter violation by Canadian officials.

[34] The Respondent states that the Applicant's deportation fully accorded with the principles of fundamental justice. The Applicant availed himself of the full panoply of review processes available to him in relation to his refugee claim and removal, and the various decisions were judicially determined to have been decided fairly. There was no evidence that he might face the death penalty or torture upon his return to China; nor has he alleged that he currently faces either of these risks. It was determined in relation to his motion for a stay of removal that his removal would not violate

section 7 of the Charter. Canadian officials were entitled to act on this Court's determination and remove the Applicant from Canada, which they did.

[35] Additionally, the Supreme Court of Canada determined in *Lake v Canada (Minister of Justice)*, 2008 SCC 23 at paragraph 48 that removal of a person to a lengthy prison sentence is not a breach of section 7 of the Charter. Consequently, the Respondent submits that the Applicant's removal was in accordance with the principles of fundamental justice.

ii) No Basis for Post-Deportation Application of the Charter

[36] To support his allegation of a Charter violation, the Applicant relies on the decisions in *Burns* and *Suresh*. The Respondent submits that both these cases differ significantly from the present case. In both cases, there was *prima facie* evidence that the person concerned would face the death penalty or a risk of torture upon extradition or deportation, respectively. In both cases, the person concerned was under the control of Canadian officials at the time that the remedy was sought. In both cases, assurances could provide effective protection against the prospective Charter breaches and it remained within the government's discretion at to whether or not further steps should be taken.

[37] In the present case, the risk of the death penalty or torture is not alleged. The Applicant is also not presently under the control of the Canadian government. The Respondent submits that it would be a significant expansion on the decisions in *Burns* and *Suresh* to suggest that these decisions apply where there was no violation of section 7 of the Charter at the time of deportation; after-the-fact knowledge of alleged trial unfairness in the criminal proceedings in China does not make Canada a party to that alleged unfairness. There could be no Charter breach in respect of the

Applicant's complaints of post-deportation conduct by Chinese officials, such as a lack of access to medical care and contact with his family, as the Charter does not apply to matters outside Parliament's authority.

[38] In *R v Hape*, 2007 SCC 26 [*Hape*], the Supreme Court of Canada set out a two-part test for determining if a foreign activity falls under subsection 32(1) of the Charter and is therefore subject to Charter protection. The first part of the test is that the conduct at issue must be that of a Canadian state actor (*Hape*, at paragraph 113) – it clearly is not in this case. The Applicant has advanced unsubstantiated complaints of lack of medical treatment and trial unfairness, experienced entirely at the hands of the Chinese government. There has been no participation in the alleged treatment by any Canadian state actors.

[39] There is also no nexus between the alleged post-deportation breaches and Canada. In order to advance a section 7 right, one must establish a nexus to Canada by being present in Canada, by there being criminal proceedings in Canada, or by Canadian citizenship (*Slahi v Canada (Minister of Justice)*, 2009 FC 160, aff'd 2009 FCA 259 [*Slahi*] at paragraphs 47-48). In *Slahi*, Mr. Slahi had spent time in Canada as a permanent resident, but this was an insufficient nexus to bring him within the protection of section 7 of the Charter (*Slahi*, at paragraphs 39-48).

[40] In the present case, the alleged breaches result from the Applicant's detention in China, by Chinese authorities as a result of Chinese legal proceedings. Thus, even if there has been a refusal of medical treatment or trial unfairness as alleged by the Applicant, which have not been established, the Respondent submits there is no nexus to Canada.

iii) No Evidence Establishing the Alleged Violation(s) of the Charter

[41] Even if the Applicant's proposed expansion of the principles in *Burns* and *Suresh* could be established, the Respondent submits that the Applicant has failed to provide any sworn or admissible evidence in support of his allegations. The "evidence" he has included with this application is almost entirely inadmissible double hearsay. The Respondent submits that the Applicant has not proven, on a balance of probabilities, that he has been subjected to cruel, inhuman or degrading treatment or punishment by Chinese officials.

[42] The only sworn evidence is a three-paragraph affidavit by Ms. Wu, the Applicant's daughter-in-law. The only substantive evidence in the affidavit is that the Applicant is a Chinese national now in detention in China and that the Applicant's lawyer has advised her that a second appeal from the Applicant's conviction is being prepared. None of the alleged section 7 breaches have been put into evidence through Ms. Wu or any other witness.

[43] One of the documents submitted by the Applicant is a petition signed by a "panel of Chinese legal experts." However, there is no direct evidence from any of these "legal experts," nor is there any evidence of their credentials, their expertise, how they came to know of the Applicant's case, whether they were paid to provide the opinion given, what evidence they reviewed in relation to the Applicant's case or how they obtained it. The Respondent says that in the evidentiary vacuum provided by the Applicant, no such testing or weighing of the evidence is possible.

[44] The Respondent also points out that in the letter written to the Prime Minister, reference is made to a letter written by the Applicant to his family "pleading for medication, a blanket, and a lawyer." This letter, purported to have been written by the Applicant and apparently alleging denial

of medical treatment, has not been put into evidence in this proceeding. The letter to the Prime Minister also makes reference to alleged denials of counsel during the Applicant's criminal trial, yet no evidence has been provided from the lawyer representing the Applicant in his criminal proceedings in China to confirm any of these alleged denials. Moreover, no evidence has been provided by the author of the letter attesting to how he obtained the information about the Applicant with respect to the alleged breaches described in his letter and his belief therein.

[45] The Respondent submits that the Applicant has entirely failed to meet his burden of proof. Given the evidentiary vacuum, no Charter breach can be made out. Absent a Charter breach, this Court has no jurisdiction to review, comment on, or give any direction with respect to the Crown's prerogative over foreign affairs.

No Case for *Mandamus*

i) Test for *Mandamus*

[46] The criteria for issuance of a writ of *mandamus* were set out by the Federal Court of Appeal in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA), aff'd [1994] 3 SCR 1100. All of the criteria set out in paragraph 45 of that decision must be satisfied before the Court will issue an order of *mandamus*. In particular, the Respondent submits that the following criteria have not been met in the present case:

1. There must be a public legal duty to act…
2. The duty must be owed to the applicant…
3. There is a clear right to performance of that duty, in particular:
    (a) the applicant has satisfied all conditions precedent giving rise to the duty…

> (b) there was (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can be either expressed or implied, e.g. unreasonable delay…
>
> […]
>
> 6. The order sought will be of some practical value or effect…
>
> […]
>
> 8. On a "balance of convenience" an order in the nature of mandamus should (or should not) issue.

ii) No Public Legal Duty to Act

[47] As set out above, the Respondent submits that the Applicant is trying to compel something that falls squarely within the Crown's prerogative power over foreign affairs, and is not reviewable (*Khadr*, at paragraph 35). The Applicant propounds the existence of a duty to mitigate alleged harm, but the lawful deportation of the Applicant from Canada provides no foundation for establishing a mandatory public legal duty to act. While the government undoubtedly has the discretion to make representations in such circumstances, there is no legal principle requiring it to do so.

[48] There are two hurdles the Applicant must clear before he can pass the first requirement for *mandamus*. First, he must show that the Canadian government breached his section 7 Charter rights. Second, he must demonstrate that the remedy sought is not precluded by the fact that it touches on the Crown's prerogative power over foreign affairs.

[49] For the reasons already discussed, the Applicant has not demonstrated a Charter breach by Canadian officials. Given that no other actions were taken by Canadian officials and the Charter was not breached, there is no foundation for establishing the requisite legal duty.

[50] Further, the remedy the Applicant seeks necessarily intrudes on the Crown's prerogative over foreign affairs. Even the limited remedy sought in the notice of application – an order compelling a response to the request – intrudes on the Crown's prerogative over foreign affairs, as a decision on whether or not to make representations is an exercise of the prerogative over foreign relations (*Khadr*, at paragraph 35).

[51] Courts have a narrow power to "review and intervene on matters of foreign affairs to ensure the constitutionality of executive action" (*Khadr*, at paragraph 38). As previously discussed, if there is no constitutional infringement then the Court must not intervene.

[52] As in *Khadr*, the Applicant is not under the control of the Canadian government, the likelihood that the proposed remedy would be effective is unclear, and the impact on Canadian foreign relations cannot be properly assessed by the Court. The record gives a necessarily incomplete view of the range of considerations currently faced by the government in assessing the Applicant's request. Even in *Khadr*, where Canada was found to have actively participated in the violation of the section 7 Charter rights of a Canadian citizen, the Supreme Court still declined to give direction as to the diplomatic steps required by Canada.

[53] Thus, even if the Applicant had established a breach of the Charter, which he has not, the Respondent submits that an intrusion into the Crown's foreign affairs prerogative in these circumstances would not be appropriate.

[54] The Respondent submits that having failed to demonstrate a public legal duty to act, the Applicant has failed to make out a claim for *mandamus*.

iii) No Duty Owed to the Applicant

[55] The Applicant purports to rely on ICCPR to establish that Canada owes a public legal duty to him. Article 2(1) of the ICCPR expressly limits Canada's obligations to individuals present within its territorial jurisdiction. The Applicant patently does not come within this class of individuals. Moreover, all the duties that Canada did owe to him when he was in Canadian territory were met through the deportation process. Thus, the Applicant submits there is no duty to act owed to the Applicant under the ICCPR.

iv) No Right to Performance of Alleged Duty

[56] In *Conille*, above, the Court noted that three requirements must be met if a delay is to be considered unreasonable. These are stated at paragraph 23:

> (1) the delay in question has been longer than the nature of the process required, prima facie;
>
> (2) the applicant and his counsel are not responsible for the delay; and
>
> (3) the authority responsible for the delay has not provided satisfactory justification.

[57] The Respondent submits that, in this case, there is simply no issue relating to delay, as there is no legal duty to act owed to the Applicant and thus no right to performance of that duty. However, even if a duty was owed, the "delay" in processing the Applicant's request would nonetheless be reasonable. The Prime Minister's Officer responded two days after the request was

made. Even if the Court found a duty to provide a further response, the time that has passed since the first response is not *prima facie* longer than reasonably required by the nature of the process. Given that there has been no unreasonable delay in replying to the Applicant's request, there can be no subsequent implied refusal by the Respondent.

v) Order Sought has no Practical Value or Effect

[58] As previously stated, the Respondent asserts that the Applicant already received a response by way of the 29 February 2012 letter from the Executive Correspondence Officer. In any event, as the Canadian government is under no duty to make the requested representations, a compelled response to the letter in which he requests the Canadian government to do so could simply say "no." Such a response would have no practice value or effect.

[59] Moreover, the Respondent reiterates that the Applicant is a Chinese national under the control of Chinese officials. This is unlike those cases where the Canadian government seeks assurances prior to extraditing or deporting an individual. In the circumstances of the present case, even if the Canadian government decided to exercise its discretion to make representations to the Chinese authorities, the likelihood that any representations would be effective in affecting the fairness of the proceeding against the Applicant is unclear.

vi) Balance of Convenience Favours Declining the Remedy

[60] As previously discussed, the Respondent submits that even directing the Crown to provide a further response to the 27 February 2012 letter would inappropriately impinge on matters of foreign affairs. The Applicant, a Chinese national, is in effect asking the government of Canada to intervene

in his criminal proceedings in China. To set a precedent by granting such a remedy in the absence of a Charter breach or a duty owed would erode the deference currently owed to the foreign affairs prerogative and the expertise of the executive to make decisions about foreign policy. The Respondent submits that public policy, the limitations of the Court's institutional competence, and the need to respect the Crown's prerogative over foreign affairs dictate that the balance of convenience favours the Respondent.

Conclusion

[61] For all the above reasons, the Respondent submits that the Applicant has failed to meet any of the criteria that must be satisfied before the Court will issue a writ of *mandamus*. The Applicant is not entitled to the remedy sought in his application for judicial review and this application should be dismissed with costs.

ANALYSIS

[62] This application must fail for a number of reasons.

[63] First of all, the Applicant is seeking *mandamus* to order the Prime Minister of Canada, the Minister of Foreign Affairs or the Minister of Citizenship, Immigration and Multiculturalism to "answer the request of the applicant that the Prime Minister express concern to Chinese authorities regarding the criminal proceedings against the applicant."

[64] The Applicant's "request" to the Canadian government is found in Mr. Kingwell's letter of 27 February 2012. The request reads as follows:

> We are writing you to request that the Canadian government express concern to Chinese authorities regarding the ongoing criminal proceedings against Han Lin Zeng.

[65] The letter contains no request to "answer the request." The letter asks the government of Canada to express concerns to Chinese authorities, not to reply and confirm to the Applicant whether or not it was prepared to do this. In so far as Mr. Kingwell's letter required any response, it was contained in the prompt reply from the Prime Minister's office of 29 February 2012:

> Please be assured that your comments have been reviewed. I have taken the liberty of forwarding your correspondence to the Honourable John Baird, Minister of Foreign Affairs, and to the Honourable Jason Kenney, Minister of Citizenship, Immigration, and Multiculturalism, so that they may be made aware of your continuing interest in this matter.

[66] There can be no public duty to act (in this case for the government to "answer the request") where there has been no request for an answer. The Applicant argues that, by implication, Mr. Kingwell's letter requests that the government reply to let him know whether or not there will be an approach to the Chinese authorities on his behalf. In my view, however, the letter simply reminds the Prime Minister of what he has publicly said on the issue, and urges him to express concern on behalf of the Applicant. The Applicant is told that his letter has been reviewed and passed on to the relevant Ministers. There is no implicit request for anything else.

[67] There is a variety of other reasons why *mandamus* is not available on these facts. But, fundamentally, I do not see how the government of Canada can be ordered to do something that the Applicant did not request it to do. Had the Applicant wanted a further response from the one set out in Mr. Kingwell's letter, there was nothing to stop him initiating some kind of follow-up. There is no evidence before me that such a follow-up has been attempted.

[68] If the Applicant is, in reality, seeking *mandamus* to compel the government to make representations on his behalf to Chinese officials (which he denies is part of his request), this is not requested in this application and there is no public duty on the government to act in this way.

[69] The Applicant illegally overstayed his visitor's visa and had to be arrested by Canadian authorities. He then availed himself of the full range of protections that Canada affords to anyone who fears returning to their home country, including judicial review by this Court. Before he was returned to China, the Applicant's case was fully reviewed by immigration authorities and by the Federal Court, and he was granted due process. His removal was entirely legitimate and in accordance with Canadian law. It involved no breach of any Charter or other right by Canadian officials, and took place in accordance with the principles of fundamental justice.

[70] What the Applicant is attempting to do is secure to himself Charter and other rights under Canadian law as a foreign national in China. The basis for this claim is that he came to Canada, availed himself of Canadian protections, and was then deported back to China. I know of no legal authority that gives the Applicant legal rights in Canada in this situation. Justice O'Keefe has already ruled that section 7 of the Charter was not directly engaged by the exclusion of the Applicant from refugee protection. See *Zeng*, above, at paragraphs 69-74.

[71] The Applicant is no different from any other foreign national living in his own country and facing legal proceedings in that country. He has no legal claim on Canada. *Burns* and *Suresh* have no application here because those were pre-deportation cases, and the individuals concerned were under the control of Canada at the time they sought relief from the Court. Also, there is no Canadian state actor in this case who has participated in, or condoned, any mistreatment the Applicant may have suffered at the hands of Chinese officials. See *Hape*, above.

[72] As the Respondent points out, in *Slahi*, above, Justice Edmond Blanchard made it clear that in order to advance a section 7 Charter right, an applicant must establish a nexus to Canada by being present in Canada, by there being criminal proceedings in Canada, or by Canadian citizenship. The Applicant's only connection with Canada is that he came here as a visitor, remained here illegally and then took full advantage of our refugee protection system, and was then legally deported back to China. At present, he has no connection with Canada.

[73] In addition, there is no acceptable evidence before me that the Applicant is being treated by Chinese officials in a way that would breach a Charter right, did any such right exist. The Applicant has not proven, on a balance of probabilities, that he has been subjected to cruel, inhuman or degrading treatment or punishment by Chinese authorities. The only sworn direct evidence I have before me on point is contained in the affidavit of Ms. Wu, the Applicant's daughter-in-law, and she tells us nothing about any breaches of due process or bad treatment by the Chinese authorities. The Applicant seeks to overcome this difficulty by suggesting that the quality of the evidence required to establish human rights violations against him in China is not required when all he is asking is that he receive a reply to his 27 February 2012 request. However, in my view, the request for a reply does not in itself engage any Charter rights on these facts.

[74] All of this means that, irrespective of whether the Applicant is seeking to compel a further answer to his letter from the Canadian government, or to compel the Canadian government to act by making representations to Chinese officials on his behalf, the Applicant has established no public legal duty to act and no Charter violation by Canadian state actors. Anything which Canada may choose to do on his behalf lies squarely within the Crown prerogative over foreign affairs and, in

this regard, where there is no constitutional or Charter infringement, the Court cannot intervene. See *Khadr*, above, at paragraphs 35-37.

[75] Nor, in my view, is the Applicant assisted by his attempts to invoke IRPA or the ICCPL. The Applicant has been legally deported back to China and is no longer subject to IRPA; and the ICCPL only applies to Canada with respect to "individuals within its territory and subject to its jurisdiction…" which the Applicant clearly is not. There is no evidence to suggest that the Applicant was not afforded his full rights under the ICCPL while he was within Canada's territory and jurisdiction. In any event, the Applicant claims that all he is asserting in this application is a right of reply to his letter from the government of Canada. I do not see how this alleged right engages IRPA, ICCPL, the Charter, or the Canadian constitution.

[76] In summary, the Applicant's failure to request the specific reply he wishes to have the Court order the government to now give him is itself sufficient grounds to refuse *mandamus*. In addition, the Applicant has established no Charter or constitutional violation by Canadian authorities, and Canada's decision to do anything about the Applicant's situation in China falls clearly within the Crown prerogative and none of the exceptions to non-interference by the Court (breach of Charter or constitution, breach of statute, or breach of legitimate expectations) have been established.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-811-12
STYLE OF CAUSE:	**HAN LIN ZENG**
	- and -
	THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	January 14, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	January 31, 2013

APPEARANCES:

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Sharlene Telles-Langdon Beth Tait-Milne	**RESPONDENT**

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