Date: 20090122

Docket: IMM-5102-08

Citation: 2009 FC 54

BETWEEN:

DEBIS ALEXANDER BARRERA MORALES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

LEMIEUX J.

Introduction

[1] On Thursday, January 8, 2009, I granted a stay of the Applicant's removal to Nicaragua scheduled for Monday, January 12, 2009.The Applicant is a 32 year old citizen of that country. These are my reasons for issuing the stay.

[2] He came to Canada with his family in September 1996 at the age of 14. They fled because they were in opposition to the Sandinista Government of Daniel Ortega. He, his parents and two siblings were recognized as Convention Refugees on January 22, 1997. He is not a permanent

resident of Canada because of his mother's and his own criminality. He has been in a common law relationship for several years; the couple have three young children aged 4 years, 2 ½ years and 5 months old.

[3] The underlying application to which the Applicant's stay application is grafted is the September 8, 2008 decision (served on the Applicant November 5, 2008) of the Minister's Delegate, Julie Stock (the Delegate), who pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act* (the *Act*), determined he constituted a danger to the public in Canada, recognizing, however, that an individual convicted of a serious criminal offence is not, on its own, a sufficient foundation for a danger opinion as well as applying the jurisprudence of this Court the expression "danger to the public" found in paragraph 115(2)(a) of the *Act* means a present or future danger. She added: "Thus the circumstances of each case must be examined to determine whether there is sufficient evidence on which to formulate the opinion that the individual is a potential re-offender whose presence in Canada poses an unacceptable risk to the public."

[4] Because he is a Convention Refugee, if he is not determined to be a danger to the public in Canada, the Applicant cannot be sent to Nicaragua and is entitled to remain in Canada.

[5] Paragraph 115 of the *Act* reads:

Immigration and Refugee Protection Act (2001, c. 27)		*Loi sur l'immigration et la protection des réfugiés* (2001, ch. 27)
Protection		Principe
115. (1) A protected person or a person		115. (1) Ne peut être renvoyée dans un

who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.		pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions		Exclusion
(2) Subsection (1) does not apply in the case of a person		(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or		a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.		b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.
Removal of refugee		Renvoi de réfugié
(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.		(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)e), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.
[Emphasis mine.]		[Je souligne.]

[6] Counsel for the Applicant did not argue before me the Delegate had erred in identifying the proper test to assess danger to the public nor did he argue that she erred in the required process which she had to undertake to reach a decision namely:

- First, a determination that the Applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(a) of the *Act* (which was conceded by his counsel);

- Second, an assessment of the danger the Applicant represents to the public in Canada;

- Third, an assessment of the risk to the Applicant if returned to Nicaragua;

- Fourth, balancing danger to the public in Canada and risk to the Applicant of return to Nicaragua; and,

- Fifth, an assessment of humanitarian and compassionate considerations.

[7] The Applicant, through his counsel, filed written submissions to the Delegate. These submissions focussed on his (1) rehabilitation; (2) the best interests of the children; (3) risk of return to Nicaragua given Daniel Ortega had recently been elected as President of that country; and, (4) other H&C factors. The delegate also referred to the submissions made by the Applicant's previous counsel which were filed in support of his first PRRA application.

[8] In oral argument before me his counsel concentrated on two areas.

[9] First, he argued, while the Delegate correctly framed the danger test as meaning present or future danger, she did not properly assess his future risk because she concentrated her analysis on his past crimes and discounted his rehabilitation. He referred to four facts to substantiate his submission:

1. The Applicant's last conviction was in early 2005 and arose from a November 2004 incident; he received a 75 day sentence but only served 15 days having been detained 60 days in pre-trial custody.

2. The March 10, 2006 letter from his supervisor at the Toronto Bail Program into which he was admitted on August 26, 2005. That letter said the Applicant had been compliant with his bail conditions and had found gainful employment.

3. The statement made by the presiding member at his February 17, 2005 detention review. The presiding member expressed the view the Crown had not established he was a danger to the public in Canada but he was a flight risk.

4. The Applicant's testimony at that same detention review hearing where he admitted his mistakes and wanted to stay out of trouble which is why he had moved away from Montreal where his family live to Toronto with his common law spouse (see Applicant's record, page 102).

[10] Second, he argued the Delegate's assessment of the humanitarian and compassionate factors was deficient particularly as to the impact the Applicant's removal would have on his common law spouse whose mental health is fragile as she is suffering from post partum depression with psychotic features which led to the intervention of the Catholic Children's Aid Society of Toronto (CAS) who was concerned she could not be left alone with the children. Another factor was the fact the Applicant was the sole provider for the family and played an important role in the children's lives.

[11] Counsel for the Applicant was particularly critical of the Delegate's finding where she wrote:

> There are humanitarian factors in this case, however in my view, they cannot or do not outweigh or negate the danger opinion. I recognize and have read the decision in *Legault v. Canada (M.C.I.)* [2001] 3 F.C. 277 which supports the position that except in very few cases, the children's best interests must prevail. I am of the view that this would be one of the very few cases based on or given Mr. Barrera Morales, history of violent and volatile behaviour and serious criminal convictions which render him a present and future danger to Canadian society. [Emphasis mine.]

The Delegate's opinion

[12] The Delegate began her opinion by pointing out paragraph 115(2)(a) of the *Act* was implemented by Canada to conform with Article 35(2) of the Geneva Convention on Refugees which in her words "permits the host country to remove a refugee who has been convicted of a particularly serious crime and who constitutes a danger to the country".

[13] She then outlined the Applicant's immigration history in Canada and summarized his convictions:

(1) On January 17, 2002, in Montreal: (1) robbery and conspiracy to commit robbery (sentenced to nine months imprisonment, concurrent with two years probation); (2) assault causing bodily harm (sentenced to six months imprisonment); (3) theft under $5000 x 3 counts (sentenced to six months imprisonment, concurrent); (4) driving while impaired (sentenced to 15 days imprisonment, concurrent); (5) mischief over $5000 x 2 counts (sentenced to three months imprisonment, concurrent); and, (6) possession of property obtained by crime (sentenced to six months imprisonment, concurrent);

(2) On February 12, 2002, in Montreal: (1) assault of a police officer; (2) obstruction of a peace officer; and (3) uttering threats (sentenced to five days imprisonment for each conviction); and,

(3) On January 28, 2005, in Toronto: break, enter and commit theft (sentenced to 15 days imprisonment taking into account 60 days pre-trial detention).

[14] Under the heading “Danger information”, the Delegate first wrote:

> Mr. Barrera Morales has accumulated 14 convictions since 2002, many which are for serious criminality such as robbery, assault bodily harm, break and enter, assault police officer. Although there are no sentencing reports on record, during interviews with CBSA officials in March 2005, Mr. Barrera Morales stated that he had problems with the law years ago in Montreal. He had no recollection of many events such as the circumstances leading to the convictions named above and although he pled guilty, he states he did not commit several of the crimes. [Emphasis mine.]

[15] The Delegate then went on to analyse the circumstances out of which the Applicant committed the crimes: (1) the robbery and conspiracy arose on November 2001 when the Applicant

and two other youths decided to rob a teenage male of his money. The remaining convictions resulted from various incidents in September and October of 2001. The Delegate wrote: “Mr. Barrera stated that he also had no recollection of these events”; (2) the convictions in January 2002 resulted from one incident on December 24, 2001 in attempting to steal a car when the owner appeared. The Applicant, who was drunk at the time, got away after he injured the owner who according to the police was “seriously hurt”; and, (3) the January 2005 conviction which did not involve any violence.

[16] Under the heading “Danger Assessment”, the Delegate adopted the present or future danger test to determine whether he was a danger to the public in Canada with future danger focussed on his “being a potential re-offender whose presence in Canada poses an unacceptable risk to the public”.

[17] She then wrote:

> Mr. Barrera Morales’s criminal convictions are severe and do not demonstrate any regard for values of Canadian society. The robbery of a car, assaulting an innocent person, driving while impaired, are all acts which could reasonably lead to harm if not death to unassuming members of the Canadian public going about their daily affairs. The use of alcohol cannot be used as an excuse to lessen the severity of such actions and this was not a crime which happened in isolation. Mr. Barrera Morales went on to commit additional crimes. The fact that he may or may not be cognizant of the damage he could do does not excuse or justify his actions.
>
> Although it is only [previous] Counsel’s opinion that Mr. Barrera Morales does not have the intellectual ability to comprehend the severity of his actions, he has on each conviction been found to be competent and responsible for his actions. If anything, the suggestion that Mr. Morales does not comprehend the severity of his actions argues for increased caution, as he might revert to criminal acts without appreciating the severity of harm that could be rendered to innocent persons.

> Further, I have considered the claims that Mr. Morales has put his criminal life behind him and I am not convinced. He has engaged in numerous criminal acts over time of a violent nature. Even in a recent place of employment he forced open a door to steal from his employer, violating a position of trust. [Emphasis mine.]

[18] The Delegate then analyzed the September 16, 2006 psychological assessment of the Applicant, by Dr. Oren Gozlan (Applicant's Motion Record, pages 124 to 128).

[19] The Delegate then expressed her conclusion on danger:

> Pursuant to paragraph 115(2)(a) of IRPA, it is incumbent upon me to assess whether Mr. Barrera Morales constitutes "a danger to the public" which has been interpreted to mean "a present or future danger to the public". Thus, I am required to turn my mind to the particular circumstances of Mr. Barrera Morales' case in order to determine whether there is sufficient evidence on which to formulate the opinion that he is a potential re-offender, whose presence in Canada poses an unacceptable risk to the public.
>
> I have a duty to look forward in my determination of the likelihood Mr. Barrera Morales re-offending or being an acceptable risk and I am basing my opinion on all the evidence before me. He has committed some frightening acts upon innocent people. The use of a firearm to rob someone, driving while severely impaired, robbery are all very serious and dangerous acts of violence that could have resulted in much more severe consequences than what actually occurred. I am not satisfied with Mr. Barrera Morale's explanation that he cannot remember any of the exact circumstances, rather I find this a convenient out for him to not recognize or be responsible for his actions. I am also not satisfied given his pas criminal convictions and behaviour that this is unlikely to reoccur in the future. It is my opinion that Mr. Barrera Morales presents a danger now and in the future to the public in Canada. [Emphasis mine.]

[20] The Delegate next embarked upon her analysis of his risk of return to Nicaragua. She acknowledged his counsel's 2006 submissions on the November 2006 election of Daniel Ortega as once again President of Nicaragua. The Delegate was aware why the family fled Nicaragua in 1994 was fear of the Sandinista army because of the disclosure by his parents of confidential information on the human rights violations by that organization coupled with his parents' defection as members

of the Sandinista party arising out to their growing dissatisfaction with the policies and activities of that party then in power.

[21] The Delegate on risk of return stated first:

> There is nothing in the record before me that would suggest that their names would be remembered or that they would be remembered in any way that could place Mr. Barrera Morales at risk in any fashion. Mr. Barrera Morales would be returning to Nicaragua as a young adult and I am satisfied there is nothing that could or would draw attention to him any more than any other adult residing in Nicaragua, especially based on any participation that his parents may have been involved in so long ago.

[22] She then quoted extensively from what she labelled as "the most current" US DOS released on March 8, 2007 for the 2006 year in support of her conclusion the Applicant would not be at risk if returned to Nicaragua.

[23] Based on the two above findings of danger and no risk of return, the Delegate wrote on balancing as follows:

> Mr. Barrera Morales has committed very serious criminal offences. I am not satisfied that he faces any of the risks listed under s. 97 of IRPA should he be returned to Nicaragua, while I find there is a pressing need to protect Canadian society from Mr. Barrera Morales who is a person I have found likely to re-offend. Thus, I find on balance, that Mr. Barrera Morales can be refouled to Nicaragua. [Emphasis mine.]

[24] For the final stage of her analysis, the Delegate examined the humanitarian and compassionate considerations applicable to this case. She analysed counsel for the Applicant's 2006 submissions which focused on the special needs of the Applicant's common law spouse and the

documentary evidence which supported that issue as well as the Applicant's evidence that he has turned the page. Her conclusions were:

> Undoubtedly the removal of Mr. Barrera Morales from Canada would negatively impact on his common law wife and his children. Letters on record indicate that he is a good and attentive father and that it would be better if he was not separated from his children. I am sensitive and alert to these humanitarian considerations however given his criminal convictions, I am not certain of his being an exemplary "role model" for his son. I think it is clear he would be missed by his entire family, as evidenced as well by a letter of close support from his brother.
>
> I also acknowledge the hardship that Mr. Barrera Morales would face in relocating to Nicaragua given his lack of formal education and vocation training. I recognize that having left the country at such a young age he will not be familiar or likely remember the general living environment and will find the transition difficult especially without familial support. I acknowledge the difficulty that he is likely to experience due to his forced separation from his close family members. However Mr. Barrera Morales was separated from his family when incarcerated and has now had different types of employment in Canada and I am satisfied he will be able to find employment in Nicaragua and earn a living. [Emphasis mine.]

[25] She expressed her final conclusions:

> The pertinent objectives outlined in IRPA are as follows:
>
> > 3. (1) The objectives of this Act with respect to immigration are
> >
> > …
> >
> > (h) to protect the health and safety of Canadians and to maintain the security of Canadian society;
> >
> > (i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and
> >
> > …
> >
> > 3. (3) This Act is to be construed and applied in a manner that furthers the domestic and international interests of Canada;

> After fully considering all facts of this case, including the humanitarian aspects, an assessment of the risk and the need to protect Canadian society, I find that the latter outweighs the former. In other words, upon consideration of all the factors noted above, I am of the opinion that the interests of Canadian society outweigh Mr. Barrera Morales' presence in Canada. I find that he may be deported despite subsection 115 (1), since removal to Nicaragua would not violate his rights under section 7 of the Charter.

Analysis

(a) The standard of review of the underlying decision

[26] As a result of the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Delegate's decision is to be gauged in terms of reasonableness since the Delegate's decision relates to questions of fact, discretion and policy (see *Dunsmuir*, at paragraph 51). Justices Bastarache and LeBel, writing for five of the all concurring nine judges, explained what the reasonableness standard meant at paragraph 47:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [Emphasis mine.]

(b) Preliminary issue

[27] The Applicant was one day late in the filing of his application record. Counsel for the Applicant did not strenuously oppose the extension which I ordered at the hearing.

(c) The test for the grant of a stay

[28] The test for the grant of a stay is set out in the Supreme Court of Canada's decision in *RJR-MacDonald Inc. v. the Attorney General of Canada et al,* [1994] 1 S.C.R. 311 (*RJR-MacDonald Inc.*). The Applicant has the burden of meeting all of the elements of the three part test: (1) serious question to be tried; (2) irreparable harm flowing from the failure to obtain the stay; and, (3) the balance of convenience favors the Applicant.

(1) Serious issue

[29] Save for two exceptions which are not applicable here, Justices Sopinka and Cory, writing for the Supreme Court of Canada in *RJR-MacDonald,* framed the existence of a serious issue at pages 337 and 338 of their reasons:

> "Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable." [Emphasis mine.]

[30] In making my determination on the serious question test, both parties agreed I must decide on the basis of the record which was before the Delegate. Two new facts emerged in the written submissions of the parties and discussed at the hearing:

- First, unknown to the Delegate is the fact the Applicant on May 14, 2008 was arrested in Toronto for impaired driving and later charged. His trial is scheduled for August 19, 2009. The Ontario Crown Attorney is prepared to stay the charges when he is removed from Canada;

- The fact the CAS had written a letter to the Minister of Immigration on November 17, 2008 reporting on the family's health, CAS's role in assisting the family unit and in support of the Applicant remaining in Canada.

[31] Being in agreement with the views of both counsel on this point, I will not take into account these two new facts in assessing a serious question but, as submitted by both counsel, will take into account the Family Worker's November 17, 2008 letter for the irreparable harm test and the new criminal charge against in relation to the balance of convenience criteria.

[32] In my view, the Applicant has made out the following serious issues arising from the Delegate's opinion:

1. First, the Delegate's analysis and consideration of the evidence on the issue of danger to the Canadian public may have been perfunctory in that she did not adequately assess the entire evidence before her some of which was conflicting:

   (a) contrast the evidence in the Applicant's submissions on the issues of his acknowledgement of his mistakes in his testimony on detention, his recollection of the offences and remorse v. the Delegate's contrary finding based on two dated interviews the Applicant had with the authorities. Her lack of analysis on this point would have gone to the heart of her finding on rehabilitation;

(b) the lack of comment on a contradictory finding by the Immigration Division on detention review in 2006, he was not a danger to the Canadian public if released;

(c) the persistent focus of the Delegate on his past convictions without regard to the progress made in rehabilitation being crime free, and compliant with his bail conditions plus the Applicant's apparent turn around in terms of responsibility arising out of his son's birth; and,

(d) the Delegate's reliance on a dated and limited psychological report.

2. A second serious issue arises on the Delegate's treatment of the evidence relating to his risk of return to Nicaragua where Daniel Ortega is now in power (since late 2006) and her reliance on a dated US DOS report for Nicaragua in 2006 published in March 2007 when for most of the time a person other than Daniel Ortega was President of that country. In other words, did the Delegate fail to properly take into account, as she must, the most current country conditions relating to the Applicant's fear. In my view, if the Delegate erred in the area, it would fundamentally alter the balancing exercise she undertook when balancing danger and risk of return.

3. A third serious issue arises out of her treatment of the evidence on the impact of his deportation to Nicaragua i.e. the humanitarian and compassionate considerations underlying this case.

[33] The focus of counsel for the Applicant's arguments relates to the best interest of the children; the fragility of his common law spouse's mental health and the place the Applicant plays in the functioning of the family unit. In particular, the Applicant's focus was on the lack of analysis, based on the Federal Court of Appeal's decision in *Legault*, that the Applicant's past criminal behaviour trumps or fits in those very few cases, where the best interest of the children which she seems to recognize should be overridden. The same lack of analysis argument extends to the treatment of the evidence before her of the fragility of the mother's mental health and her possible support without the Applicant's presence. Counsel for the Applicant argued the Delegate's assessment was not based on the evidence but in speculation.

(2) Irreparable harm

[34] I find the Applicant has established irreparable harm based on: (1) the risk to his physical integrity on his return to Nicaragua given why the family unit fled Nicaragua; (2) the impact on the family unit is substantial and it is speculative that outside help available to the family unit would overcome the Applicant's absence; and, (3) the Applicant's common law partner is mentally fragile and the CAS's intervention is present. To separate a family by placing their children in foster homes is a drastic consequence which not considered by the Delegate.

(3) Balance of convenience

[35] Normally, the combination of serious and irreparable harm would favour the Applicant. Counsel for the Minister argues the recent 2008 charges of drunken driving (a pending charge) shifts to balance in favour of the Minister because such pending charge destroys the Applicant's case on rehabilitation and likelihood of not re-offending. At this point in time, I am not prepared to

accept the balance of convenience shifts to the Minister in these circumstances because: (1) he has yet to be convicted of the charge; (2) if convicted, what kind of sentence will he receive?; and, (3) whether there were mitigating circumstances surrounding the incident which led to the charge.

[36] For these reasons a stay is granted.

"François Lemieux"

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Judge

Ottawa, Ontario
January 22, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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