Federal Court  Cour fédérale

Date: 20130307

Docket: IMM-1545-12

Citation: 2013 FC 247

Ottawa, Ontario, March 7, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

MARVIN ADOLFO GALVEZ PADILLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant seeks judicial review of a decision by J. Stock, the Minister's delegate (the "Delegate"), dated February 2, 2012, determining that he should not be allowed to remain in Canada on the ground that he is a danger to the public in Canada, pursuant to paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] Having carefully considered the records and the authorities submitted by the parties, as well as their written and oral submissions, I have come to the conclusion that this application for judicial review must be allowed.

1. Background

[3] The Applicant, Marvin Adolfo Galvez Padilla (Mr. Galvez), is a citizen of Honduras. He came to Canada in 1991 at the age of 24 to escape political problems related to forced military conscription and torture. He was recognized as a Convention Refugee in 1992 and obtained permanent residence in 1995. The Applicant had sexual encounters with men in Honduras but was not openly gay until he moved to Canada. He is now openly gay and transgendered, and was diagnosed with HIV in 2000.

[4] The Applicant had no criminal record prior to February 3, 1997, and attests to being an active, contributing member of Toronto's gay Latino community between 1991 and 1997. In 1997, the Applicant tried and became addicted to crack cocaine, as a result of which he lost his job and his home, began working as a transgendered prostitute, and started stealing to support his drug habit. While the Applicant had occasional jobs, he suffered a serious hand injury in 2004. He began collecting disability benefits from the Ontario Disability Support Program (ODSP) but sent this money back to his family in Honduras.

[5] The Applicant's long criminal history from 1997 to 2010 is not in dispute and is set out in the evidence in various forms and summarized in the Delegate's Decision and in the Respondent's Memorandum of Argument. These convictions under the *Criminal Code*, RSC 1985, c C-46,

include thirteen charges for theft under $5,000 (s. 334), seven charges for failure to attend court (subs. 145(2)), and three charges for communication for the purposes of engaging in prostitution (para. 213(1)(c)). On June 14, 2011, the Applicant was convicted of two further charges of theft under $5,000 and failure to comply with probation (s. 733.1). None of the sentences ordered in relation to these crimes were sufficient to ground a finding of "serious criminality" under para. 36(1)(a) of *IRPA*, nor were these crimes punishable by a maximum term of imprisonment of at least 10 years.

[6] It is uncontested that the Applicant became the subject of an inadmissibility report under section 44 of *IRPA* after being convicted in December 2005 of aggravated assault pursuant to section 268 of the *Criminal Code*. The Applicant was sentenced to 233 days jail concurrent but consecutive to any other sentence being served. At or about the same time, the Applicant was convicted of two counts of trafficking cocaine under paragraph 5(3)(a) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, for which he received 160 days jail on the first count and 160 days jail concurrent but consecutive to any other sentence on the second count, and of one count of theft under $5,000, for which he received 233 days jail in view of 132 days of pre-trial custody. The Applicant pled guilty to all charges.

[7] The conviction for aggravated assault is the result of an incident that occurred on September 29, 2005, in which the Applicant was stopped by a security guard while attempting to shoplift a number of items from a Shoppers Drug Mart store. While there is some inconsistency in the evidence as to what actually occurred, including the extent of any injury suffered by the security

guard, whether threats were uttered, and whether or not the Applicant was high on drugs at the time of the incident, the Applicant pled guilty to biting the security guard.

[8] In 2007, the Applicant was involved in a second shoplifting-related incident in which he used an umbrella to cause minor injuries to a storekeeper who attempted to prevent him from leaving a store with unpaid merchandise. The incident resulted in a conviction for theft under $5,000, a conviction for uttering threats pursuant to paragraph 264.1(1)(a) of the *Criminal Code*, and a conviction for assault with intent to resist arrest pursuant to paragraph 270(1)(b) of the *Criminal Code*. In all, the Applicant was sentenced to 25 days pre-sentence custody, 15 days concurrent on each charge, and 24 months probation. Again, none of the sentences ordered in relation to this incident would be sufficient to ground a finding of "serious criminality" under paragraph 36(1)(a) of *IRPA*, nor are the crimes in question punishable by a maximum term of imprisonment of at least 10 years.

[9] The Applicant argues that all his convictions prior to 2010 arose as a result of his drug addiction and that he has been clean and sober since May 2010, and has now disavowed all sex work and criminal activity. He claims to have honoured this commitment with the exception of a "momentary relapse" on or about May 31, 2011, when he attempted to shoplift from a No Frills store. He claims that he needed the money to pay a cell phone bill, having previously sent approximately $200 to his sister, who had fled to Guatemala to escape violence in Honduras and requested his help.

[10] Since becoming sober, the Applicant attests to successfully completing a number of addiction programs, to seeking psychiatric counselling until the end of 2011, and to becoming involved in various community groups and his church.

[11] The Applicant receives antiretroviral treatment and is dependent on this medication. He notes that his physician has advised that his HIV infection would be fatal within 10 years without this medication.

2. Decision under review

[12] The Delegate concluded, on the basis of the information before her, that the Applicant constitutes a danger to the public in Canada pursuant to paragraph 115(2)(a) of *IRPA*. This decision permits the Applicant to be refouled to Honduras, his country of citizenship, if to do so is in accordance with section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The Delegate found that it was.

[13] The Delegate first set out to determine if the Applicant was a danger to society, which has been interpreted as "a present or future danger to the public". She reviewed the circumstances of the offences and the submissions made by counsel for the Applicant, and then asked herself "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".

[14] She noted that the Applicant, by his own account, has lived much of his life as a vagrant, being homeless, and admitted to continued drug use despite having completed treatment for

chemical dependency. She also found that Mr. Galvez did commit the offences of uttering a serious threat and assaulting the employee at Shoppers Drug Mart, both of which are serious and violent offences that pose an element of danger to Canadian society. As for the numerous convictions for theft under $5,000, the Delegate recognized that these offences may not *per se* endanger someone's life but nevertheless exhibit a pattern of recidivism. This is compounded by the fact that a drug addict can add an element of danger to any circumstance since he can exhibit volatility and sudden adverse behaviour when facing the possibility of being caught.

[15] The Delegate also noted that Mr. Galvez was advised at the time of the hearing of the appeal of his deportation order before the IAD that his compliance with probation orders and ability to remain crime free would impact on whether or not his deportation would be effected. At the time, in June 2008, he pled guilty, asked to be sent to an addiction program, and undertook to comply with conditions such as maintaining his addiction treatment and demonstrating employment efforts. Yet, he went on to commit other crimes that resulted in an additional seven convictions, leading the Delegate to believe that Mr. Galvez has no respect for court-imposed orders or any understanding of compliance with the laws of Canada.

[16] The Delegate was alarmed by the fact that Mr. Galvez would not disclose his HIV status to his clients because he was of the view that this was a personal thing that he did not need mention and always used protection. In her view, the Applicant's assertion that he is under no duty to disclose his HIV status was "very disturbing", and she was not satisfied that he would not continue with this behaviour in the future, thereby exposing individuals to "a lethal degree of risk".

[17] Based on all the foregoing evidence, the Delegate concluded that the Applicant is a danger to the public. In that respect, she wrote:

> Most, if not all of Mr. Galvez's criminal history is related to drug addiction but as of 2008 the programs he had attended have been unsuccessful and he had failed to live up to the requirement to stay drug free. If, as he now claims, he is now rehabilitated, that will clearly serve him well in the future. However, I am not satisfied that after years of committing crimes, some of which are generated by his lifestyle choices, that he will remain crime free and not be a danger to the public.
>
> In January 2012 at the time of my reviewing all this record, further information came to light that on 14 June 2011, Mr. Galvez had been convicted of Theft under (contrary to section 334 of the Criminal Code) and Failure to Comply with Probation (contrary to section 733 of the Criminal Code). While the circumstances of these convictions is unknown, they show that Mr. Galvez has returned to a life of crime and in my opinion, despite some positive steps he has taken, he has not severed ties from former criminal lifestyle.
>
> Based on the criminal record of Mr. Galvez in my opinion, he is a danger to the public in Canada.
>
> Decision-Danger
>
> Based on the evidence before me that Mr. Galvez's criminal activities were both serious and dangerous to the public. I find, on a balance of probabilities, that Mr. Galvez represents a present and future danger to the Canadian public, whose presence in Canada poses an unacceptable risk.
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> Applicant's Record, p. 27.

[18] The Delegate then turned to the risk Mr. Galvez would be facing if returned to Honduras, and reviewed the country documentation extensively. With respect to the Applicant's alleged risk as a gay, transgendered individual, the Delegate concluded that most of the persons targeted while lesbian, gay, bisexual or transgendered were also political activists. Given the volatility in general in Honduras, these individuals would be targeted, regardless of their sexual orientation. The

Delegate acknowledged that the Applicant would not enjoy the same benefits that exist in Canada and likely not the same standard of living, but concluded there is nothing to prevent him from seeking employment and making a fresh start. Violence is commonplace and protection of human rights in Honduras is almost non-existent, the Delegate found, and not just in the case of lesbian, gay, bisexual or transgendered persons.

[19] The Delegate concluded that there was no difference in access of men and women to diagnosis and treatment of sexually transmitted infections, including HIV. She was also satisfied that Mr. Galvez would have access to antiretroviral therapy in Honduras and that he would be able to be connected to a health care system in Honduras. There was also no reported widespread societal violence or discrimination against persons based on their HIV/AIDS status. However, the Delegate concluded that the "poverty, human rights abuses and general police corruption in Honduras leads to a generalized risk faced by all individuals" (Applicant's Record, p. 41). Accordingly, she found that Mr. Galvez is unlikely to face a personalized risk to his life, risk of torture or risk of cruel and unusual punishment if returned to Honduras, and that he would face no more than a mere possibility of persecution on grounds of race, religion, nationality, political opinion or membership in a particular social group.

[20] Finally, the Delegate considered the various humanitarian and compassionate considerations put forward by the Applicant, but was not satisfied that Mr. Galvez had demonstrated a degree of establishment in Canada, either social or economic, that would cause him disproportionate hardship should he be removed.

[21] In the final part of her decision, dealing with the balancing of the danger assessment and the risk assessment, the Delegate wrote:

> As I have not found Mr. Galvez at risk as described in either section 96 or 97 of IRPA if he were returned to Honduras, and I have found that he does constitutes a danger to the public in Canada, the balance weighs in favour of Mr. Galvez's removal from Canada. In addition, I am satisfied, on a balance of probabilities, that the humanitarian and compassionate factors in this case do not outweigh the danger that Mr. Galvez presents to the public of Canada.
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> Applicant's Record, p. 43

[22] As a result, Mr. Galvez may be deported despite subsection 115(1) of *IRPA*, since his removal to Honduras would not violate his rights under section 7 of the Charter.

3. Issues

[23] The parties have identified a number of questions, which can be summarized as follows:

a) Did the Delegate apply the correct test in determining that the Applicant is a danger to the public in Canada?

b) Is the Delegate's decision with respect to danger to the public reasonable?

c) Did the Delegate breach the duty of procedural fairness by failing to give notice of her intention to consider the Applicant's most recent criminal convictions, and by failing to give an opportunity to respond?

d) Did the Delegate properly conduct the s. 7 risk analysis required in connection with para. 115(2)(a) of *IRPA*?

e) Is the Delegate's decision with respect to the risk analysis reasonable?

4. Analysis

- **The statutory scheme**

[24] A permanent resident or a foreign national is inadmissible on grounds of serious criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years for which a term of imprisonment of more than six months has been imposed: *IRPA*, para. 36(1)(a).

[25] However, subsection 115(1) of *IRPA* prohibits the return of Convention refugees and protected persons to any 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. This provision incorporates into Canadian law the fundamental international legal principle of non-refoulement, found at Article 33(1) of the 1951 *Convention Relating to the Status of Refugees* (the "*Convention*"). These two provisions read as follows:

Immigration and Refugee Protection Act

Protection	**Protection**
115. (1) A protected person or a person 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.	115. (1) Ne peut être renvoyée dans un 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.

1951 *Convention Relating to the Status of Refugees*

Article 33 PROHIBITION OF EXPULSION OR RETURN ("REFOULEMENT")	Article 33 DÉFENSE D'EXPULSION ET DE REFOULEMENT
1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.	1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

[26] This principle of non-refoulement has been described by Sir E. Lauterpacht and D. Bethlehem, in their authoritative opinion for the United Nations High Commissioner for Refugees ("The scope and content of the principle of non-refoulement", 20 June 2001, at paras. 51-53) as a "cardinal principle" of refugee protection, and they note that its fundamental importance has been repeatedly affirmed in Resolutions of the General Assembly. As a result, the exceptions to this principle found in Article 33(2) of the *Convention* and subsection 115(2) of *IRPA* must be applied restrictively, in keeping with the fundamental character of the prohibition of refoulement. These two provisions state:

1951 *Convention Relating to the Status of Refugees*

33(2). The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the	33(2). Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer

security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.	comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

Immigration and Refugee Protection Act

Exceptions	**Exclusion**
115 (2) Subsection (1) does not apply in the case of a person	115 (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.

[27] In the aforementioned opinion authored by Sir E. Lauterpacht and D. Bethlehem, we find the following paragraph:

> 186. The text of Article 33(2) makes it clear that it is only convictions for crimes of a particularly serious nature that will come within the purview of the exception. This double qualification – *particularly* and *serious* – is consistent with the restrictive scope of the exception and emphasizes that *refoulement* may be contemplated pursuant to this provision only in the most exceptional of

> circumstances. Commentators have suggested that the kinds of crimes that will come within the purview of the exception will include crimes such as murder, rape, armed robbery, arson, etc.

[28] In *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 153, [2009] 2 FCR 52, Justice Trudel addressed the threshold to be met with respect to the nature and severity of the acts sufficient to warrant the application of subsection 115(2) of *IRPA*. She insisted on the fact that this provision applies only where the person has been found inadmissible for "serious criminality", as defined by subsection 36(1) of *IRPA*, as opposed to inadmissibility for "criminality" pursuant to subsection 36(2). She then reproduced the excerpt from Lauterpacht and Bethlehem quoted in the preceding paragraph of these reasons, and agreed with these two eminent jurists that the "fundamental character of the prohibition of *refoulement*, and the humanitarian character of the *1951 Convention* more generally, must be taken as establishing a high threshold for the operation of exceptions to the Convention" (Lauterpacht and Bethlehem, at para. 169; *Nagalingam*, at para. 69.

[29] The principles governing the proper approach to be taken by the Minister's delegate in conducting a danger opinion under paragraph 115(2)(a) of *IRPA* are well established in the jurisprudence and have been summarized by the Court of Appeal in the following manner:

> (1) A protected person or a Convention refugee benefits from the principle of *non-refoulement* recognized by s.115(1) of IRPA, unless the exception provided by paragraph 115(2)(a) applies;
>
> (2) For paragraph 115(2)(a) to apply, the individual must be inadmissible on grounds of serious criminality (s. 36 of IRPA);
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> (3) If the individual is inadmissible on such grounds, the delegate must determine whether the person should not be allowed to remain in Canada on the basis that he or she is a danger to the public in Canada;

> (4) Once such a determination is made, the delegate must proceed to a s. 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*) analysis. To this end, the delegate must assess whether the individual, if removed to his country of origin, will personally face a risk to life, security or liberty, on a balance of probabilities. This assessment must be made contemporaneously; the Convention refugee or protected person cannot rely on his or her status to trigger the application of s. 7 of the *Charter* (*Suresh*, above, at paragraph 127);
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> (5) Continuing his analysis, the delegate must balance the danger to the public in Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations (*Suresh*, above, at paragraphs 76-79; *Ragupathy*, above, at paragraph 19).
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> *Hasan v Canada (Citizenship and Immigration)*, 2008 FC 1069, 75 Imm LR (3d) 64, at para. 10. See also: *Nagalingam*, above, at para. 44.

[30] The first two steps of this analysis are obviously met in the case at bar. Mr. Galvez has been recognized as a Convention refugee in 1992. On January 5, 2006, Mr. Galvez became the subject of an inadmissibility report under section 44 of *IRPA*, and on May 25, 2006, a deportation order was issued against him. On July 14, 2008, the appeal of his deportation order was dismissed by the Immigration Division.

[31] Counsel for the Applicant contends that the Delegate erred in her assessment of the danger to the public of the Applicant, both because she applied the wrong danger test and because she ignored material evidence of the Applicant's rehabilitation. I will now turn to these two arguments. The question of the correct test to be applied must be evaluated on a correctness standard, whereas questions relating to the Delegate's assessment of danger are subject to a reasonableness standard: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190; *Hasan*, above, at paras. 7-9; *Nagalingam*, above, at paras. 32-34.

a) Did the Delegate apply the correct test in determining that the Applicant is a danger to the public in Canada?

[32] Counsel for the Applicant argued that the Delegate's assessment is flawed because she failed to undertake a prospective assessment of danger, relying instead on the past convictions of the Applicant. As evidence of that mistake, counsel refers to page 20 of the decision, where the Delegate wrote: "Based on the criminal record of Mr. Galvez in my opinion, he is a danger to the public in Canada". Counsel added that even if the Delegate had found that subsection 115(2) could be satisfied by finding the Applicant had a serious criminal conviction, she also erred in holding that the Applicant's crimes were sufficiently serious to forfeit Canada's protection against refoulement. Finally, it is submitted that the Delegate applied the wrong burden of proof as she was not tasked with ascertaining whether the Applicant "could" reoffend, but rather whether there are reasonable grounds to believe that the Applicant is presently or will be a danger to the Canadian public.

[33] Having carefully reviewed the reasons given by the Delegate, I have to agree with the Respondent that the Applicant has mischaracterized the Delegate's assessment by focusing on two statements taken out of context. The Delegate was clearly aware of the prospective nature of the text, as is made evident from the excerpt of her decision that is reproduced at paragraph 17 of these reasons. Moreover, she started her analysis by quoting from the decision of Justice Lemieux in *La v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 476, 36 Imm LR (3d) 64, who in turn quotes Justice Strayer in *Williams v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 646, [1997] FCJ no 393 (CA), according to which "public danger" means "the possibility that a person who has committed a serious crime in the past may seriously be thought to be a potential re-offender" (Applicant's Record, p. 23). She goes on to say:

> Pursuant to paragraph 115(2)(a) of IRPA, it is incumbent upon me to assess whether Mr. Galvez 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. Galvez's 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.
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> Applicant's Record, p. 24.

[34] The Delegate was obviously not impressed by the track record of the Applicant. Of course, she looks back at his past conviction, but one cannot make a prediction about the future without looking at the past behaviour of the Applicant, his previous attempts to rehabilitate, and the pattern of his criminal activities. In this respect, she considered that Mr. Galvez committed several crimes after having been told that whether or not his deportation would be effected would depend on his compliance with probation orders and remaining crime free. She also noted that all the drug addiction programs he had attended as of 2008 had been unsuccessful and that he had failed to live up to the requirement to stay drug free. It is in that context that she came to the conclusion that Mr. Galvez represents a present and future danger to the Canadian public. When read as a whole, it is clear that her analysis is not only focussed on the past but is aimed at determining whether he is a potential re-offender.

[35] I am similarly unable to agree with the Applicant that the Delegate erred in her formulation of the test and set the bar too high. The Applicant's whole argument rests on the following sentence of the decision: "I am not satisfied that after years of committing crimes, some of which are generated by his lifestyle choices, that he will remain crime free and not be a danger to the public".

[36] I agree with counsel for the Applicant that the Delegate was not tasked with ascertaining whether the Applicant "could" reoffend, but whether there are reasonable grounds to believe that the Applicant is presently or will be a danger to the Canadian public. However, when considered as a whole (and especially in light of the opening paragraph of her analysis quoted above, at para. 32 of these reasons), the decision of the Delegate appears to be premised on the proper interpretation of the danger test. Whether the Delegate properly assessed the evidence of rehabilitation when evaluating whether there are reasonable grounds to believe that the Applicant is or will be a danger to the Canadian public is a different matter, to which I shall turn shortly. But there is insufficient evidence to establish that the Delegate erred in the formulation of the danger test.

[37] More problematic is the Delegate's finding that the Applicant's crimes were sufficiently serious to forfeit Canada's protection against refoulement. This is a mixed question of fact and law, and as such it is reviewable on the reasonableness standard. The ostensibly serious crimes that triggered the danger opinion were the aggravated assault resulting from the incident that occurred at the Shoppers Drug Mart on September 29, 2005, the two counts of drug trafficking, and the aggravated assault in which the Applicant used an umbrella to cause minor injuries to a storekeeper who attempted to prevent him from leaving a store with unpaid merchandise in January 2007. There is no doubt that the first two infractions were punishable by a maximum term of imprisonment of at least 10 years under the first prong of paragraph 36(1)(a), and that the third one qualified as "serious criminality" under the second prong of paragraph 36(1)(a). While these crimes are no doubt serious and unacceptable, the real issue is whether they rise to the magnitude of a "particularly serious crime", to take up the wording of Article 33(2) of the *Convention*.

[38] As regards the shoplifting incident at the Shoppers Drug Mart, I have previously noted some inconsistency in the evidence. According to the Police Occurrence Report dated September 29, 2005, the Applicant "bit one of the security guards hard enough to break the skin" (Applicant's Record, p. 173). These reports, it must be stressed, do not necessarily reflect what was established in court. At his trial, it appears that no evidence was adduced in this respect because he pleaded guilty to that offence. Before the Immigration Board, he stated: "I know that I ended up biting the person in the hand" (Applicant's Record, p. 69). Yet, at Mr. Galvez's appeal of his deportation order before the IAD, he testified that he made the threat but never actually bit the security guard, and pleaded guilty because he thought he could use some help with his drug addiction. In its decision, the IAD appears to have accepted the Applicant's version, as it wrote that the aggravating circumstance for the Applicant's conviction "was the HIV positive appellant's threat to bite the store employee who was trying to arrest him for shoplifting" (Applicant's Record, p. 123). The victim never testified, although there is some mention in the record of a letter he apparently wrote to the effect that he was so nervous he couldn't be with his girlfriend as a result of having been bitten by the Applicant. In light of this somewhat conflicting evidence, I find the Delegate's reasoning problematic and lacking. She seems to take for granted that the employee was in fact severely bitten, commented that it must have been very frightening to live with the prospect to have been infected with HIV, and then wrote:

> Although the injuries caused by Mr. Galvez to the store owners at the time of committing these thefts thankfully did not result in major injuries. But the fact that they could have placed anyone in the vicinity into a life threatening situation is not unrealistic. To my mind, a drug addict can add an element of danger to any circumstance since he can exhibit volatility, sudden adverse behaviour and is not clear-minded in his thinking…
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> Applicant's Record, p. 25

[39] This is clearly insufficient to establish the seriousness of the offence for which Mr. Galvez was convicted, for the purposes of a danger opinion. As for the drug trafficking offences, the Delegate similarly did not turn her mind to the actual circumstances of these offences. It appears from the Police Occurrence Report that the accused was only peripherally involved in the drug trade, as he was merely a go-between for two $20 transactions. While this offence was clearly not insignificant, there is hardly any discussion as to whether it can be assimilated to a particularly serious crime.

[40] The Delegate also did not discuss the second shoplifting-related incident of 2007, where the Applicant used an umbrella in trying to escape from the shop owners. She only commented indirectly on that offence in the following paragraph:

> Counsel does not diminish the problems associated with shoplifting however states that Mr. Galvez's criminal behaviour has not escalated in severity. In my opinion, with over 10 convictions for theft under, this points to a drain on the economy and to the store owners who are the subjects of the thefts. While theft per se, may not endanger someone's life, I cannot downplay the seriousness or pattern of recidivism that is evident by the number of thefts. For Mr. Galvez to resell or give the goods away to in turn, support his drug habit, in my mind, this is a dangerous mind set and pattern, especially when on the possibility of being caught, it ends in a skirmish with an innocent member of the public.
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> Applicant's Record, p. 25.

[41] Once again, these observations fall far short of an analysis as to the seriousness and gravity of this offence within the purview of a danger opinion.

[42] Upon review, what seems to have weighed most heavily on the Delegate's mind is the sexual behaviour of Mr. Galvez and the fact that he admitted not disclosing his HIV status to his clients. The Delegate quoted from the transcript of the hearing before the IAD where the Applicant stated that he did not need to tell his clients that he is HIV positive because he always used protection, and then wrote:

> In my opinion, the use of a condom does not guarantee protection against coming into contact with HIV. I also find Mr. Galvez's attitude is dangerous to assume that all you have to do is protect yourself. I find this non-disclosure of his HIV status and his assertion that he was under no duty to so very disturbing and I am not satisfied that he would not continue with this behaviour in the future.
>
> He worked as a prostitute and in my opinion, he has exposed individuals to a lethal degree of risk. Furthermore, based on the record, no one knows or can say, if any of these individuals whom he engaged sexually, have been infected. This to me, is a huge breach of trust to the Canadian public or more specifically, to the individuals who engaged in his services.
>
> Applicant's Record, p. 27

[43] There are two problems with this statement. First of all, the Applicant has never been convicted for aggravated sexual assault as a result of his failure to disclose his positive HIV status. Mr. Galvez was found inadmissible for serious criminality based on his convictions on December 1, 2005, for aggravated assault and for trafficking in cocaine. Since a danger opinion is premised on inadmissibility for serious criminality, I find it troubling that the Delegate relied on behaviour for which the Applicant was never convicted, let alone found inadmissible, to ground her danger opinion.

[44] Moreover, it is not at all clear that the Applicant's behaviour would attract criminal liability. The law with respect to aggravated sexual assault and the transmission of HIV, as developed by the Supreme Court of Canada in *R v Cuerrier*, [1998] 2 SCR 371, [1998] SCJ no 64, attaches criminal liability to the failure to disclose one's positive HIV status only when there is a "significant risk of serious bodily harm". In other words, the HIV status must be disclosed only if there is a realistic possibility of transmission of HIV. Yet, the Delegate assumes that the use of a condom does not guarantee protection against coming into contact with HIV, contrary to scientific and medical evidence.

[45] Indeed, the Supreme Court recently found in *R v Mabior*, 2012 SCC 47, [2012] SCJ no 47, that a realistic possibility of transmission of HIV is negated if the accused's viral load at the time of sexual relations was low and condom protection was used. Of course, the Delegate did not have the benefit of that decision at the time of writing her opinion, but it could reasonably have been inferred from the previous decision of the Court in *Cuerrier*, above. Indeed, the Manitoba Court of Appeal in *Mabior* (2010 MBCA 93) and the Quebec Court of Appeal in *R v D.C.* (2010 QCCA 2289) had come to that same conclusion. In those circumstances, the Delegate's finding is questionable, and would at the very least have warranted a more thorough discussion.

[46] In light of the foregoing, I am of the view that the Delegate's decision is defective and unreasonable, and ought to be quashed. Without downplaying the significance of the Applicant's long list of convictions, I believe the Delegate erred in assuming that they are of such gravity as to amount to particularly serious crimes. As mentioned earlier, the exceptions to the principle of non-refoulement must be interpreted restrictively. A careful reading of the Delegate's decision does not

demonstrate that she fully grasped this requirement, and her reasons are less than satisfactory. If left standing, that decision could have the perverse effect of facilitating the removal of petty criminals, drug addicts involved only peripherally in the drug trade, and individuals who are HIV positive. Such a result would clearly not be in keeping with Canada's international obligations and must be censored.

[47] While this finding would be sufficient to grant the application for judicial review, I feel compelled to address the other arguments raised by the Applicant, first because they have been thoroughly argued and also to assist the Delegate who will eventually have to reassess the Applicant's case. I shall now turn, therefore, to the other issues raised by this application.

b) Is the Delegate's decision with respect to danger to the public reasonable?

[48] Counsel for the Applicant submitted that the Delegate failed to consider material evidence of the Applicant's rehabilitation and that she was wrong to rely upon evidence of old convictions in light of more recent evidence related to treatment, counselling and successful drug tests. It is also argued that the Delegate made no reference to the fact that Mr. Galvez had been clean for 20 months when she issued her decision, and she also ignored the supportive evidence from professionals familiar with the Applicant's progress.

[49] It is true that the Delegate's analysis on the issue of rehabilitation consisted entirely of the following paragraph:

> Most, if not all of Mr. Galvez's criminal history is related to drug addiction but as of 2008 the programs he had attended have been unsuccessful and he had failed to live up to the requirement to stay drug free. If, as he now claims, he is now rehabilitated, that will

> clearly serve him well in the future. However, I am not satisfied that after years of committing crimes, some of which are generated by his lifestyle choices, that he will remain crime free and not be a danger to the public.
>
> Applicant's Record, p. 27

[50] I agree with the Applicant that it would have been more prudent to comment more specifically on the evidence tending to show that he was well on his way to rehabilitation. That being said, the Delegate cannot be faulted for not having discussed all the evidence before her. She is presumed to have taken into account the Applicant's affidavit and supporting evidence, as well as the submissions made by his counsel wherein he describes in great detail his rehabilitation. In fact, this presumption is borne out by her comments as quoted in the preceding paragraph.

[51] At the end of the day, the Applicant's submissions in this respect are no more than a disagreement in the weighing of the evidence. Considering that the Delegate's findings are entitled to significant deference, I am therefore of the view that the Applicant has failed to establish that her decision was unreasonable.

c) Did the Delegate breach the duty of procedural fairness by failing to give notice of her intention to consider the Applicant's most recent criminal convictions, and by failing to give an opportunity to respond?

[52] Counsel for the Applicant submitted that the Delegate violated procedural fairness by referring to a piece of evidence without notice to the Applicant and without providing an opportunity to respond. The Applicant's submission in this respect refers to the following paragraph of the Delegate's decision:

> In January 2012 at the time of my reviewing all this record, further information came to light that on 14 June 2011, Mr. Galvez had been

> convicted of Theft under (contrary to section 334 of the Criminal Code) and Failure to Comply with Probation (contrary to section 733 of the Criminal Code). While the circumstances of these convictions is unknown, they show that Mr. Galvez has returned to a life of crime and in my opinion, despite some positive steps he has taken, he has not severed ties from former criminal lifestyle.
>
> Applicant's Record, p. 27.

[53] The Applicant argues that the Delegate relied on this conviction without advising the Applicant that she would be considering it, without permitting the Applicant to respond, and with no knowledge of the details of the offense or the circumstances. In an affidavit dated April 23, 2012, submitted as part of this application for judicial review and subsequent to the Delegate's February 2, 2012 decision, the Applicant describes the details of the event, including what he claims are mitigating circumstances demonstrating that the conviction was a one-time setback. He explained that he needed $45 to keep his cell phone account going and that he had no money left as he had recently sent approximately $200 to his younger sister, who needed it for food and lodging for herself and her children after fleeing from Honduras to Guatemala to escape a violent organization. The Applicant added that he is "determined never to commit another crime", that he is "embarrassed and ashamed" about the shoplifting attempt, and noted "I felt I was doing really well in my recovery and my decision to shoplift once again was distressing and disappointing to me" (Applicant's Record, p. 46).

[54] The Respondent, on the other hand, attempted to distinguish the cases relied upon by the Applicant. Counsel argued that the Delegate in this case relied on a recent conviction that the Applicant should have been aware of since he was the subject of that conviction, and that the information relied upon was within the Applicant's knowledge, whereas in the cases relied upon by

the Applicant, the information/documentation relied upon would not have been available to the Applicant in the absence of disclosure. The Respondent further argues that the evidence in question was not the only piece or even the most important piece of evidence relied on by the Delegate.

[55] I agree with the Respondent that in both *Nagalingam v Canada (Minister of Citizenship and Immigration)*, 2012 FC 176, 7 Imm LR (4th) 62, and *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49, [2001] 3 FC 3, the information /documentation relied on by the Delegate was not available and would not have been available to the applicant in the absence of disclosure, whereas in the present case the Delegate relied on a recent conviction that the Applicant should have been aware of since he was the subject of that conviction. In the first case, the respondent had breached procedural fairness in denying the applicant an opportunity to cross-examine a detective who had prepared a report that was key to the CBSA's case against the applicant. In the second, the Court of Appeal held that the Minister was obliged to disclose the reports prepared by Ministry officials that advocated that the applicant in that case be found to be a danger to society.

[56] Procedural fairness, however, goes beyond the obligation to ensure that the applicant is aware of the information that will be used in making a decision affecting him. The fact that the applicant knows about the charge and conviction does not relieve the delegate of the duty of procedural fairness to ensure that all evidence to be relied upon is provided to the applicant for rebuttal prior to a decision being rendered. In *Bhagwandass*, above, the Federal Court of Appeal relies on *Haghighi v Canada (Minister of Citizenship and Immigration)*, [2004] 4 FC 407, [2000]

FCJ no 854, to clarify the obligations owed to subjects of danger opinions and went much beyond the restrictive approach suggested by the Respondent:

> *Haghighi* also establishes that, in considering whether the duty of fairness requires advance disclosure of an internal Ministry report on which a decision maker will rely in making a discretionary decision, the question is not whether the report is or contains extrinsic evidence of facts unknown to the person affected by the decision, but whether the disclosure of the report is required to provide that person with a reasonable opportunity to participate in a meaningful manner in the decision-making process. The factors that may be taken into account in that regard may include the following: (i) the nature and effect of the decision within the statutory scheme, (ii) whether, because of the expertise of the writer of the report or other circumstances, the report is likely to have such a degree of influence on the decision maker that advance disclosure is required to "level the playing field", (iii) the harm likely to arise from a decision based on an incorrect or ill-considered understanding of the relevant circumstances, (iv) the extent to which advance disclosure of the report is likely to avoid the risk of an erroneously based decision, and (v) any costs likely to arise from advance disclosure, including delays in the decision-making process.
>
> *Bhagwandass*, above, at para. 22.

[57] Section 7.6 of the CIC Enforcement Operations Manual, *Chapter ENF28: Ministerial Opinions on Danger to the Public and Security of Canada* explains the purpose of the disclosure in similar terms:

> 7.6 Procedural Fairness
>
> The decision-making process for a Minister's opinion must adhere to the principles of procedural fairness. The person concerned must be fully informed of the case and be given a reasonable opportunity to respond to any information the decision-maker will use to arrive at a decision.
>
> Note: A copy of all documentation that will be put before the decision-maker must be provided to the person concerned.

[58] I appreciate that a report, the content of which is not available to the relevant party, is not the same as an uncontested fact like a conviction. That said, each of the factors enumerated in *Bhagwandass* favours the Applicant's position that disclosure was required as a matter of procedural fairness: (1) the decision is crucial in light of its last-chance nature and its ties with Article 33(2) of the *Convention*; (ii) as the decision of a judge of a court of law, a criminal conviction carries significant weight; (iii) the harm that will arise if the Applicant's justification for the 2011 conviction would have altered the Delegate's conclusion is significant; (iv) advance disclosure would have permitted the Applicant to present the arguments contained in his April 23, 2012 Affidavit; and (v) the Respondent has not presented any evidence of costs or delays likely to arise from advance disclosure by the Delegate.

[59] In his Further Memorandum of Argument, the Respondent argued that in any event, the last conviction was not the most important piece of evidence that the Delegate considered in making her decision. During her cross-examination on her affidavit, the Delegate repeatedly stated that she had already concluded that the Applicant was a danger to society before she considered the information regarding his most recent convictions, and that these convictions or the lack of the same was not going to change her mind. Yet, a careful reading of her decision suggests otherwise. Although the 2011 conviction is only one of nine such convictions for theft under $5,000 that have occurred since the more serious 2005 and 2007 incidents described above, the Delegate does appear to rely on it in support of her conclusion that the Applicant's alleged rehabilitation is unlikely to prevent future danger to society. The Respondent's thesis in this respect is belied by its own Memorandum of Argument, where it states: "The Delegate concluded that given his most recent conviction, among others, that the Applicant continues to be a present and future danger to the public".

[60] The fact that the 2011 conviction was apparently unrelated to drug use, that it could in fact serve as yet another example that the Applicant has learned not to resort to violence when apprehended, that it was indirectly motivated by the need to help his sister and her children, and that his probation officer did not see fit to press charges for breach of probation, could foreseeably have altered the Delegate's opinion. To pretend otherwise could only give rise to the prospect of a closed mind, which would be equally problematic.

[61] I am therefore of the view that the Delegate's decision must also be quashed on the ground that it breaches the Applicant's right to procedural fairness. It is not one of those exceptional cases, as in *Mobil Oil Canada Ltd. v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, [1994] SCJ no 14, where it can safely be assumed that the result would have been the same were it not for the breach. The circumstances surrounding the latest convictions could well have supported a conclusion by the Delegate that the Applicant has in fact been rehabilitated and no longer presents a danger to the public of Canada.

d) Did the Delegate properly conduct the s. 7 risk analysis required in connection with paragraph 115(2)(a) of *IRPA*?

[62] The parties are in agreement that, once the Delegate determined that the Applicant is a danger to the public, she was required to proceed to an analysis of section 7 of the Charter. While there is no requirement to analyse risk pursuant to subsection 115(2) of *IRPA*, it was grafted onto the danger opinion by the Supreme Court in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, in order to enable a determination as to whether a protected person's removal would so shock the conscience as to constitute a breach of the person's

rights under section 7 of the Charter: see *Suresh,* at paras. 76-79; *Ragupathy v Canada (Minister of Citizenship and Immigration),* 2006 FCA 151, [2007] 1 FCR 490, at paras. 18-19.

[63] I agree with counsel for the Applicant that the range of risks to "life, liberty or security of the person" that the Delegate is required to consider is broader than the risks described in sections 96 and 97 of *IRPA*. While it is difficult to conceive of a situation where the treatment described by sections 96 and 97 of *IRPA* would not also constitute a breach of "life, liberty and security of the person", the converse is not true: the rights to "life, liberty and security of the person" in section 7 of the Charter are not, and cannot be, limited or circumscribed by sections 96 and 97 of *IRPA*.

[64] Counsel for the Applicant submitted that the Delegate improperly limited herself to a risk assessment pursuant to sections 96 and 97, instead of assessing whether Mr. Galvez would face a risk to life, liberty and security. Counsel relied for that proposition on the following sentence of the Delegate's decision: "While the issue of whether or not Mr. Galvez is removable from Canada is principally guided by the degree of risk he would face, as defined in section 97 of *IRPA,* I also take into account the risk of persecution under section 96 of IRPA" (Applicant's Record, p. 32). According to counsel, it is on the basis of this misguided assumption that the Delegate found that "Mr. Galvez is unlikely to face a <u>personalized</u> risk to his life, risk of torture or risk of cruel and unusual punishment" and that there was "no serious possibility that he will be persecuted" if returned to Honduras, since many other individuals are also exposed to a high degree of violence (Applicant's Record, p. 41; underlining is part of the decision). Counsel is of the view that it is an error to insist on a personalized risk, and that generalized risk must be taken into account so long as

there are probable grounds to believe that the life, liberty or security of the person concerned will be affected by that generalized risk.

[65] Needless to say, this issue raises an important question of law and, as such, the Delegate's decision must be reviewed against a standard of correctness. Indeed, I note that my colleague Justice Harrington certified a question raising essentially the same issue in *Mohamed v Canada (Citizenship and Immigration)*, 2011 FC 1473, [2011] FCJ no 1869. Unfortunately, the Court of Appeal refused to answer the question, on the basis that the issue was moot at the time of the hearing since the applicant had been removed in the meantime: *Mohamed v Canada (Citizenship and Immigration)*, 2012 FCA 303, [2012] FCJ no 1483.

[66] Reading the decision as a whole, it is clear that the Delegate understood and applied the proper test with respect to risk under paragraph 115(2)(b) of *IRPA*. The opening paragraph of her reasons shows that she understood the significance of section 7 of the Charter, as interpreted by the Supreme Court in *Suresh*, above. She states:

> A determination that Mr. Galvez constitutes a danger to the public permits him to be refouled to Honduras if to do so is in accordance with section 7 of the Canadian Charter of Rights and Freedoms (Charter). As outlined in the Supreme Court decision in Suresh, to comply with section 7 of the Charter requires a balancing of the risk Mr. Galvez faces should he be refouled to Honduras and the danger to the public should he remain in Canada.Where the evidence demonstrates a substantial risk of torture or the death penalty, the individual cannot be removed save in exceptional circumstances. Humanitarian and compassionate considerations also factor into the balancing exercise.
>
> Applicant's Record, p. 8

[67] The fact that the Delegate focused her decision on an assessment of the risks described in sections 96 and 97 of *IRPA* is easily explainable in the context of the Applicant's file. The Applicant did not present evidence of any risks other than those envisioned by these two provisions. In his written submissions, counsel for the Applicant refers to examples of section 7 rights not included in sections 96 and 97 of *IRPA*, such as the right to live one's life with personal autonomy including right to privacy, right to parental interest in caring for one's children, choosing where to establish one's home, and a person's ability to control his own physical or psychological integrity, such as prohibiting assisting suicide or regulating abortion. While these examples clearly demonstrate that the right to life and to security of the person must be interpreted broadly, the fact remains that counsel concentrated on risks under sections 96 and 97 of *IRPA* in his written submissions to the Delegate, and did not refer to any facts that would render the above examples relevant.

[68] It is true that the Delegate seemed to insist in her reasons on the need for the Applicant to establish that he would face a personalized risk, as opposed to a general risk faced by the population in general. To the extent that she read in an exclusion of generalized risk as set out in subparagraph 97(1)(b)(ii) of *IRPA*, her decision is deficient. For the purposes of the analysis pursuant to section 7 of the Charter, there can be no requirement to demonstrate that one will be at greater risk than the general population.

[69] That being said, an applicant must still show that he or she would personally be at risk for his or her life, liberty or security if removed to his or her country of origin. The Supreme Court of Canada held in *Suresh*, above, that the assessment of whether a person faces a substantial risk of

torture is a fact-driven and individualized inquiry. General country conditions are relevant to the inquiry but, ultimately, the person must show that he or she faces a substantial personal risk to life, liberty or security on a balance of probabilities. This has been made abundantly clear by this Court in the fourth subparagraph of the above-quoted extract of *Hasan*, reproduced at paragraph 29 of these reasons, and counsel for the Applicant admits as much. It is that substantial personal risk that needs to be balanced against the danger to the public in order to determine whether removal would offend the principles of fundamental justice and whether deporting a refugee to that risk would shock the conscience of Canadians.

e) Is the Delegate's decision with respect to the risk analysis reasonable?

[70] Counsel for the Applicant submitted that, even accepting the Delegate's flawed legal test to determine risk, her conclusion that he would not be at risk of being killed, of torture or of cruel and unusual treatment or punishment, is unreasonable and not supported by the evidence.

[71] The Delegate reviewed the documentary evidence in great detail. It appears from that evidence that over 200 members of the LGBT community were killed between 1991 and 2001, that attacks on transgendered people are commonplace in Honduras, that homosexuals are frequently harassed by the Honduran police, and that social discrimination against persons from sexual minority communities was widespread. Yet, the Honduran government issued a report in 2009 whereby it committed to working to change its culture of violence, and suggested changes to its legislation and law enforcement attitudes in order to protect LGBT people. The Delegate also noted that some of the LGBT individuals who were targeted were also activists, and added that the Applicant will not be forced to belong to or join an organization that has any public profile or that

would draw attention to himself as being a transgendered person. On that basis, she was satisfied, on a balance of probabilities, that Mr. Galvez would not be at risk for his life or his security.

[72] It is very clear that the Delegate came to her conclusion on the basis of her finding that the Applicant would not be targeted or at any greater risk than the general population. Not only did she insist on a "personalized risk", as is evident from the extract of her decision quoted at paragraph 64 of these reasons, but she also stated:

> I recognize that LGBT organizations have no legal status per se, in Honduras but Mr. Galvez will not be forced to belong to or join an organization that has any public profile or that would draw attention to himself as being a transgendered person. All reports on record show that Honduras has high rates of domestic violence, rape, sexual harassment and workplace discrimination. The country has such a high rate of violence that it is not just the lesbian, gay, bisexual or transgendered persons that are targeted or discriminated against. Violence is commonplace and protection of and respect for human rights is almost non-existent. Honduras has extremely high rates of violence, including many recorded cases of violence committed by the police … between 2006 and 2008, police ill-treated 70 percent of the people they detained.
>
> Applicant's Record, pp. 36-37

[73] There is no doubt in my mind that if one applies the "personalized risk test" of section 97, the analysis of the Delegate is reasonable and does not warrant the intervention of this Court. The real issue, however, is not so much whether the Delegate properly applied the test, but rather whether the test she applied is the correct one. I have already indicated in the previous section of these reasons that she erred in that respect, and that the relevant inquiry for the purposes of a risk analysis is not whether the Applicant is likely to face a personalized risk but whether he would personally face a risk to life, liberty or security. Since the Delegate did not perform that analysis, it is impossible to determine whether the removal of Mr. Galvez to Honduras would contravene

section 7 of the Charter, as it is impossible to balance the appropriate risk with the danger to the public. Accordingly, this is a further reason to quash the Delegate's decision and to send it back for a fresh assessment.

5. Conclusion

[74] For all of these reasons, I am of the view that this application for judicial review ought to be granted.

[75] Counsel for the Applicant also sought his costs in this litigation, on the basis that the Respondent has been less than diligent in the disclosure of documentation that should have constituted part of the certified tribunal record (CTR), and that this lack of diligence has required the Applicant to repeatedly raise objections, demand further disclosure, and even cross-examine the decision-maker.

[76] Having carefully considered the post-hearing submissions filed by the parties at the invitation of the Court, as well as the cross-examination of the Delegate on her affidavit, I am of the view that this request for costs ought to be dismissed. Even if the information that was mistakenly omitted from the CTR, consisting of a request to update the Applicant's criminal record and the response to that request, was material to the decision, the cross-examination of the Delegate was not necessary. The Respondent had already admitted that the information that the Delegate requested, that is, the Applicant's most recent convictions, was contained in an email and that it had been inadvertently left out of the CTR. As for the email wherein the Delegate's supervisor had asked her whether the most recent information should be disclosed, it was not relevant to these proceedings.

[77] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* (SOR/93-22) states that costs shall not be awarded in an application for leave or for judicial review except for "special reasons". I can find no special reasons for awarding costs in the present case. The Respondent provided the missing information to the Applicant as soon as it was reasonably practicable after being advised that it was missing from the CTR, and the Applicant has not established that any conduct of the Respondent was unfair, oppressive, improper, or actuated in bad faith. The request for costs is therefore dismissed.

[78] After reviewing a draft version of these reasons, the Respondent proposed the following three questions for certification:

(i) Once a person has been found to be inadmissible on grounds of serious criminality, in order for the Minister to decide whether that person is a danger to the public in Canada pursuant to paragraph 115(2)(a) of *IRPA*, must the Minister consider once again whether the person's crimes were sufficiently serious to forfeit Canada's protection against non-refoulement?

(ii) Once a person has been found to be inadmissible on grounds of serious criminality, when deciding whether that person constitutes a danger to the public in Canada pursuant to paragraph 115(2)(a) of *IRPA*, is it acceptable for the Minister to consider a person's behaviour, for which the person was never convicted and which behaviour may not constitute a criminal offence?

(iii) When conducting the risk assessment required in the context of a danger opinion pursuant to paragraph 115(2)(a) of *IRPA*, is the Minister required to assess risk beyond s. 96 & 97 of *IRPA* in order to be in compliance with s. 7 of the *Charter*?

[79] The first and second proposed questions arise in relation to the test applied by the Delegate in determining that the Applicant is a danger to the public in Canada. The third proposed question arises in connection with the Delegate's section 7 risk assessment. The Applicant argues that none of the questions can be considered dispositive of the appeal and that, even if all three questions were to be certified, they would not in combination be dispositive because there are other grounds upon which the decision is being overturned, including a breach of procedural fairness as discussed at paragraph 61 of these reasons.

[80] Having reviewed the law applicable to the certification of questions and having considered the parties' respective arguments, I have concluded that the Applicant's position should be accepted and find that none of the three questions proposed satisfy the criteria for certification as set out in the jurisprudence.

[81] The case law is clear that questions that are not determinative of an appeal should not be certified (*Re Harkat*, 2011 FC 75, 382 FTR 274 at para 13).

[82] While the Respondent relies on *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 FCR 129 at para 29, in support of its position that what is dispositive should be determined in relation to the issues of the case and not from the judge's reasons, I do not

agree that the cited passage establishes that the questions proposed should be considered determinative despite my finding above that the Delegate breached the Applicant's right to procedural fairness. The Court of Appeal's comments in that paragraph were focused on the process by which a judge solicits proposals for certification and not with the determination of whether an issue is dispositive.

[83] In *Zazai v Canada (Minister of Citizenship and Immigration*, 2004 FCA 89, 36 Imm LR (3d) 167, the Federal Court of Appeal established at paragraph 12 that the corollary of whether a question is determinative of an appeal is that it must have been raised and dealt with in the decision of this Court. This suggests that the focus in determining what is dispositive must be on the reasons for the decision rendered and not on what could have been or was argued by the parties. This approach is supported by a statement made by Justice O'Reilly when deciding not to certify a proposed question in *Nguyen v Canada (Minister of Citizenship & Immigration)*, 2012 FC 331, 214 ACWS (3d) 574 at para 16: "I find that the proposed question should not be certified as it does not correspond with the basis on which I have decided this application."

[84] In *Liyanagamage v Canada (Secretary of State)* (1994), 176 NR 4, 51 ACWS (3d) 910 (FCA) [*Liyanagamage*], the Federal Court of Appeal considered whether a certified question was determinative of an appeal where the Trial Division decided in favour of an individual and referred a matter back for redetermination on two separate issues. The party opposing certification argued that even if the Court of Appeal decided differently on the certified issue, the second uncertified issue would stand and therefore the certified issue could not be considered determinative. The Court

of Appeal refused that party's argument and accepted that the issue was determinative, holding as follows:

> [7] Counsel is wrong, however, when he contends that the question as here certified is not determinate of the appeal. The Board, once it had concluded that the claimant had no good grounds to fear persecution for a Convention reason, could have stopped there. It did not need to go on and find that even if the claimant's fear of persecution was well-founded, he had an IFA. If the motions judge is found to have been wrong in his conclusion that the Board violated a principle of natural justice, then the appeal would be allowed and the Board's decision would be restored. If, on the other hand, the motions judge is found to have been right, then the appeal would be dismissed and the decision of the Board would be set aside. Whether we answer the certified question in the affirmative or in the negative, our decision will therefore be determinative of the appeal.

[85] Applying the above approach to the issues at hand, I must determine if either the test applied by the Delegate in assessing danger to the public or the way in which she has carried out her section 7 risk analysis are determinative of the totality of the issues at play or would change the findings made (*Re Harkat*, above, at para 15), in spite of my conclusion that there was a breach of procedural fairness leading to the formation of the Delegate's danger opinion.

[86] At paragraph 47 of these reasons, I state that my finding that the Delegate applied the incorrect test in determining that the Applicant is a danger to the public in Canada would be sufficient to grant the application and that I only felt compelled to address the other arguments raised by the Applicant because they had been thoroughly argued and would assist the delegate to whom the case is ultimately assigned for redetermination. I am not, however, convinced that this is sufficient to render the first and second proposed questions determinative of the appeal.

[87] Although the Federal Court of Appeal's analysis is not confined by a certified question and may consider all issues raised in the appeal (*Re Harkat*, above, at para 12; *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 160 DLR (4th) 193; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193), this Court should not simply validate questions proposed by a party without further analysis if the "gatekeeper function", as described at paragraph 43 of *Varela*, above, is to be taken seriously (*Re Harkat*, above, at para 13). In fact, given my finding that the Delegate breached procedural fairness in assessing the evidence leading to her danger finding, I think that the first and second proposed questions could not be considered determinative of the appeal, since the matter would nevertheless need to be sent back for redetermination on the basis of the breach of procedural fairness. Although, were a question to be certified, the Federal Court Appeal could ultimately disagree with my finding regarding the breach of procedural fairness, such a finding would be independent of their consideration of any of the proposed questions and the situation in the case at hand is thus different from the one described in *Liyanagamage*.

[88] It appears even clearer that the third issue cannot be considered determinative, as ordering a different approach to the section 7 risk analysis would not eliminate the need to properly consider evidence related to the danger opinion.

[89] For all of the foregoing reasons, I accept the Applicant's submission that none of the proposed questions should be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1545-12
STYLE OF CAUSE:	MARVIN ADOLFO GALVEZ PADILLA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	September 25, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	de MONTIGNY J.
DATED:	March 7, 2013

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