Date: 20080408

Docket: IMM-506-07

Citation: 2008 FC 436

BETWEEN:

JAIME CARRASCO VARELA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] The Immigration and Refugee Board found there were reasonable grounds to believe that Mr. CARRASCO Varela, a Nicaraguan citizen and a member of the Sandinista Front of National Liberation, was an active and willing participant in combat against the Contras, armed guerrillas opposed to the government. His activities included the committing of atrocities against individuals under his guard, the killing of peasants in the mountains and the execution of four prisoners responsible for the kidnapping of a Soviet military attaché, all part of a widespread and systematic attack against any civilian population operating contrary to Sandinista rule. Mr. Carrasco was

determined to be a person described in section 35(1) (a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (IRPA), and as such inadmissible to Canada. He was ordered deported.

[2] This is a judicial review of that decision, which held he violated human or international rights for having committed an act outside Canada that constituted an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24. In the context of the decision, the Board was of the view there were reasonable grounds to believe Mr. Carrasco had committed a crime against humanity which is defined in section 6 of that Act as meaning:

> murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
>
> Meurtre, extermination, réduction en esclavage, déportation, emprisonnement, torture, violence sexuelle, persécution ou autre fait — acte ou omission — inhumain, d'une part, commis contre une population civile ou un groupe identifiable de personnes et, d'autre part, qui constitue, au moment et au lieu de la perpétration, un crime contre l'humanité selon le droit international coutumier ou le droit international conventionnel ou en raison de son caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations, qu'il constitue ou non une transgression du droit en vigueur à ce moment et dans ce lieu.

ISSUES

[3] As in all judicial reviews of the decisions of administrative tribunals, the Court must determine the degree of deference it owes the decision maker. In this case:

a. are there reasonable grounds to believe Mr. Carrasco participated in: i) the committing of atrocities against prisoners under his guard; ii) the killing of peasants in the Nicaraguan mountains; and iii) the extra-judicial execution of four kidnappers?
b. if so, do any of these events constitute a crime against humanity? and
c. were defences or mitigating factors which may be available to Mr. Carrasco properly considered, more particularly duress, superior orders and a general amnesty?

[4] Mr. Carrasco has had a long and complicated history in Canada, since his arrival here in 1991. As events finally unfolded, this history is irrelevant, at least to this judicial review. He was a member of the Sandinistas, the party which overthrew the Somoza Regime in 1979 and which held sway in Nicaragua until voted out in 1990. It was a time of internal conflict with armed guerrillas, the Contras, opposing the government; with Cold War overtones on both sides. From 1983 to 1989, Mr. Carrasco served in the military, primarily as a guard at El Chipote prison in the capital of Managua, but also for a short time in the village of San Jose de los Ramates, situated in the mountains.

[5] When Mr. Carrasco arrived here, crimes against humanity were defined in the *Criminal Code* and although the definition thereof is somewhat expanded in the current Act, and although the admissibility hearing began under the *Immigration Act* and was thereafter continued under the

current IRPA, these changes do not affect Mr. Carrasco's case, with the possible exception that the *Crimes Against Humanity and War Crimes Act* appends portions of the *Rome Statute of the International Criminal Court* adopted by the United Nations in 1998, and which came into force in 2002.

CRIMES AGAINST HUMANITY

[6] It must be borne in mind that crimes against humanity are considered in two different Canadian contexts. Persons are not normally charged in Canada with respect to alleged crimes committed in other jurisdictions. However, war crimes and crimes against humanity are considered so heinous that those alleged to have committed them may be charged in Canada with an indictable offence and, if found guilty, are liable to life imprisonment. Mr. Carrasco has not been charged with a crime against humanity, or any crime, here or elsewhere.

[7] The second context arises in refugee and immigration matters. It may be determined that the *United Nations Convention Relating to the Status of Refugees* is not applicable because section 1F thereof specifically excludes its application to persons who have committed crimes against peace, war crimes or crimes against humanity, or that a putative refugee or immigrant is not admissible for having committed an act outside Canada that constitutes either a war crime or a crime against humanity. The burden of proof is neither on the criminal standard of beyond a reasonable doubt nor on the civil standard of the balance of probabilities. Section 33 of IRPA only requires that there be "…reasonable grounds to believe…"

[8] Crimes against humanity, in the immigration context, were recently considered by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Mugesera*, 2005 SCC 40, [2005] 2 S.C.R. 100. The Court held at paragraphs 37 and 38 that the standard of review on questions of law was correctness and on questions of fact patent unreasonableness. However, in light of the Court's subsequent decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, which eliminated the patent unreasonableness standard, I take it that questions of fact are analysed on a reasonableness *simpliciter* basis.

[9] In interpreting "reasonable grounds to believe" set out in s. 33 of IRPA, I rely upon paragraph 114 of *Mugesera* where the Court said:

> "…[T]he reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).

[10] As to the elements of a crime against humanity (and it makes no difference that the reference was to the *Criminal Code* rather than to the current Act), the Court stated at paragraph 119:

> As we shall see, based on the provisions of the *Criminal Code* and the principles of international law, a criminal act rises to the level of a crime against humanity when four elements are made out:
>
> 1. An enumerated proscribed act was committed (this involves showing that the accused committed the criminal act and had the requisite guilty state of mind for the underlying act);

2. The act was committed as part of a widespread or systematic attack;

3. The attack was directed against any civilian population or any identifiable group of persons; and
4. The person committing the proscribed act knew of the attack and knew or took the risk that his or her act comprised a part of that attack.

[11] I now turn to the three factual findings in their basic chronological order: i) the commitment of atrocities while acting as a prison guard at El Chipote Prison; ii) the murder of peasants while posted in the village of San Jose de los Ramates; and iii) the murder of the four kidnappers. I will then consider whether the facts justify a conclusion in law that crimes against humanity were committed.

i) EL CHIPOTE PRISON

[12] Mr. Carrasco served as a prison guard from mid-1984, except for a brief sojourn at San Jose de los Ramates, until he left Nicaragua in 1989. El Chipote was a prison in the capital of Managua where political prisoners were held, although thereafter they might be transferred elsewhere.

[13] According to Mr. Carrasco's own testimony, prisoners were held in what can only be considered brutal and inhumane conditions. Many were held in tiny bare cells with no means of removing their excrement. They were regularly deprived of food and water and interrogated by Russian and Cuban advisors. Interrogation techniques included subjecting prisoners to extremes of hot and cold, so much so that some died of heart failure. Reprisals were threatened against their families. Many left, and Mr. Carrasco did not hear of them again. He did not have sufficient authority to make inquiries. I doubt there is clear and compelling evidence to give reason to believe

that they were “disappeared” as that term is now used. According to Mr. Carrasco, all he did was escort prisoners to and from their cells and their interrogation rooms.

[14] A case very much on point, and a case frequently cited, is the decision of the Federal Court of Appeal in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306. In speaking for the Court, Mr. Justice MacGuigan held that simple membership in an organization which, from time to time, commits international offences is not normally sufficient to tar a mere guard with same, unless the organization is principally directed to a limited brutal purpose such as secret police activity. The Sandinistas formed the government and so cannot be considered as being limited to brutal purposes (*Moreno v. Canada (Minister of Employment and Immigration*), [1994] 1 F.C. 298 (C.A) and *Murillo v. Canada (Minister of Citizenship and Immigration*), [2003] 3 F.C. 287 per Lemieux, J. at para.42).

[15] Mere presence at the scene of an offence is not enough to qualify as personal and knowing participation, and as Mr. Justice MacGuigan added, one must be careful not to automatically condemn everyone engaged in conflict under conditions of war as the law does not demand immediate benevolent intervention at a person’s own risk. “Usually, law does not function at the level of heroism.” However, he went on to say: “With respect to the appellant’s serving as a guard, I find it impossible to say that no properly instructed tribunal could fail to draw a conclusion as to personal participation”.

[16] He added that Mr. Ramirez:

> [37] […] was an active part of the military forces committing such atrocities, he was fully aware of what was happening, and he could

> not succeed in disengaging himself merely by ensuring that he was never the one to inflict the pain or pull the trigger.

[17] Mr. Ramirez only had 20 months of service. Mr. Carrasco had six years; six years which afforded him ample opportunity to withdraw his services and to leave Nicaragua. He did not. The finding that he participated in these atrocities should not be disturbed.

[18] *Ramirez* has served as a template in these matters. See *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), *Bazargan v. Canada (Minister of Citizenship and Immigration)* (1996), 205 N.R. 282, [1996] F.C.J. No. 1209 (C.A.) and *Harb v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 502 (Madam Justice Tremblay-Lamer).

ii) THE KILLING OF PEASANTS

[19] According to Mr. Carrasco, because he regularly raised the plight of prisoners at El Chipote Prison at party meetings, he was banished to the countryside. He served as a guard in the village of San Jose de los Ramates for a time in 1986. He was concerned that the hunting down of Contras in the countryside was indiscriminate. He did not wish to be a member of search parties. With the help of an understanding superior officer, he was protected from active service as he was issued a medical certificate which stated he had a heart condition. The Board member did not consider this evidence credible, and his finding stands up to examination. He pointed out that it would be highly unlikely that a commander would jeopardize his own situation as once Mr. Carrasco returned to El Chipote Prison, which he did, it would likely be discovered that he had no heart condition. Mr. Carrasco claims that after six months at that village, he deserted and was captured but only spent

two weeks in jail before he returned to his duties at El Chipote Prison and later formed part of a death squad.

[20] However, it does not follow that the situating of Mr. Carrasco in the mountains, hunting down Contras, gives rise to a crime against humanity. I see no clear and compelling information which would give reasonable grounds to believe he deliberately killed innocent peasants.

[21] As stated in *Mugesera*, above, the facts are one thing, but the determination that a crime against humanity has been committed is quite another, a matter of law.

[22] In *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [1994] 3 F.C. 646, (1994), 115 D.L.R. (4th) 403, the Court of Appeal dealt with a refugee applicant who had been a member of a Nicaraguan battalion which encountered Contras hiding in a peasant's house. In the ensuing gun battle, three women and six children were killed along with about ten Contras. Apparently, Mr. Gonzalez had objected to firing on the women and children. The Court of Appeal held that this was an incident of war, not a war crime. In the circumstances, Mr. Gonzalez had committed neither a war crime nor a crime against humanity and so the Immigration and Refugee Board erred in applying exclusion clause 1F of the Convention. In concurring reasons, Mr. Justice Létourneau added:

> However, I do not wish to be understood as saying that the killing of civilians by a private soldier while engaged in an action against an armed enemy can never amount to a crime against humanity or a war crime so as to never give rise to the application of the exclusion found in Article lF(a) of the Convention. Each individual case will depend on its own particular facts and circumstances. It may be that in a given situation, while the death of innocent civilians occurred at the time of, or during, an action against an armed enemy, such deaths

> were not the unfortunate and inevitable casualties of war as contended, but rather resulted from intentional, deliberate and unjustifiable acts of killing and slaughtering.

iii) THE MURDER OF THE KIDNAPPERS

[23] Notwithstanding the many run-ins Mr. Carrasco said he had with the authorities, and notwithstanding his prior desertion, he was assigned to be part of a death squad to deal with four just captured kidnappers of a Soviet military attaché. They were led out into a field handcuffed and blindfolded. There, they were murdered in cold blood. Mr. Carrasco said that he did not fire and protested. His superior officer said, however, to use Mr. Carrasco's own words:

> So at that time, at that moment, I knew that I could not kill people like that because I've never done it before. So being very nervous I told the commander, I told the commander, Lenin Cerna, that I was going to go there but I wasn't going to take part in the execution. At that time Oscar Losa, the department chief, was also present so the commander shouted at me and said, how is it possible that a member of the party would be so weak in front of the enemy? […]

[24] Mr. Carrasco did not fire, and again was punished. He remained on the job and only left Nicaragua, however, more than a year later.

[25] The remarks of Mr. Justice MacGuigan in *Ramirez* are even more telling when it comes to cold blooded murder.

CRIMES AGAINST HUMANITY AND MR. CARRASCO

[26] I have no doubt that the Board was correct in holding that Mr. Carrasco had committed crimes against humanity not only with respect to the murder of the kidnappers, but also with respect to his participation in the abuse of other prisoners at El Chipote Prison. As mentioned above, and

relying on *Gonzalez,* there is insufficient evidence to give reasonable grounds to believe he participated in the murder of peasants in the mountains.

[27] The Board based itself on the summary of the jurisprudence set out by Mr. Justice Nadon in *Mohammad v. Canada (Minister of Employment and Immigration),* [1995] 115 F.T.R. 161. One of the issues is whether he protested against the crimes and either tried to stop their commission or attempted to withdraw from the organization. It was open to the Board not to be convinced that Mr. Carrasco ever experienced discipline problems. Even if he did, they were minor. He had ample opportunity to withdraw from the Sandinistas and leave Nicaragua. He chose not to do so.

[28] Mr. Carrasco argues that the kidnappers were garden variety criminals out for personal gain. Although they were civilians, there is no evidence that the murder was committed as part of a widespread or systematic attack, or against a civilian population, as opposed to four specific individuals. While these events might give rise to serious criminality, another ground for inadmissibility under section 36 of IRPA, that was not the basis of the report against Mr. Carrasco which led to the admissibility hearing.

[29] The evidence is clear and compelling that the kidnappers were treated as enemies of the state. Mr. Carrasco claims the President of Nicaragua personally attended El Chipote Prison. As Mr. Justice MacGuigan said in *Ramirez*, it does not really matter whether the crime is a war crime or a crime against humanity. It was a crime committed during the course of what was either a civil war or civil insurrection. He simply employed the term “international crime”. In *Sivakumar*, above, Mr. Justice Linden referred to article 6 of the Charter of the International Military Tribunal.

Historically, a crime against humanity was committed against one's own nationals, which helped distinguish it from a war crime. In *Gonzalez*, above, Mr. Justice Mahoney made mention of the *United Nations Handbook on Procedure and Criteria for Determining Refugee Status*, 1979, which in turn referred to the *London Agreement* of 1945. A war crime included murder, and ill-treatment of prisoners of war. Crimes against humanity included murder, or other inhumane acts committed against any civilian population. Article 8 provided that superior orders would not free a person from responsibility, but could be considered in mitigation of punishment.

[30] Regardless how the matter is considered, Mr. Carrasco was rightly ordered deported. The order states: "The Immigration Division determines that you are a person described in 35(1) (a) of the Act." Both crimes against humanity and war crimes are covered.

[31] By the same token, the prisoners in El Chipote Prison were either Contras or ordinary political dissidents. It matters not whether Mr. Carrasco's involvement could be characterized as ill-treatment of prisoners of war or inhumane acts committed against a civilian population. As Madam Justice Tremblay-Lamer noted in *Harb*, above, even if the prisoners had been soldiers, they were not involved in hostilities at the time of their ill-treatment in prison. She concluded that they could be considered as civilians, basing herself on the decision in *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia* since 1991 in *Prosecutor v. Blaskic*, IT-95-14-T, ICTY, March 3, 2000, Trial Chamber.

[32] The Act requires the Court to take account of international law, and the Supreme Court referred to a great number of international cases in *Mugesera*, above. More recently, the importance of international law was re-emphasized in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292.

[33] The tests set out in *Mugesera* have been met.

DEFENCES AND MITIGATION

[34] The defences of superior orders and duress do not apply. Section 14 of the *Crimes Against Humanity and War Crimes Act* repeats the long standing rule in international law that the defence of superior orders has no application if the order was manifestly unlawful. Cold blooded murder is always manifestly unlawful. Over time Mr. Carrasco also had to come to learn that the treatment of inmates at El Chipote Prison was manifestly unlawful.

[35] Duress would only apply if Mr. Carrasco had reason to apprehend that he was in imminent physical peril, at least equivalent to the harm he was ordered to inflict (*Ramirez*, above). He testified that he had heard it said that a soldier who had disobeyed orders had been killed. More to the point is the fact that his own treatment in the past for disobeying orders was mild. He was not in physical danger, and he knew it.

AMNESTY

[36] The Board noted Mr. Carrasco's argument that the Managua Accord led to a general amnesty in favour of Sandinistas and Contras alike. This amnesty is claimed to serve as a complete discharge or exoneration, and as a defence to all inadmissibility allegations. The Board obviously

considered the submissions were without merit, but never analyzed them. The more important the issue, the more important it is to give reasons. If one is to be branded as one who has committed a crime against humanity, and one submits what may be a defence then that defence should be considered, and reasons given why it was rejected.

[37] As Mr. Justice Pelletier, speaking for the Court of Appeal, said in *North v. West Region Child and Family Services Inc*., 2007 FCA 96, [2007] F.C.J. No. 400:

> [3] The obligation to give reasons is a requirement of procedural fairness. The basis of the obligation was set out by the Supreme Court in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, a decision which, though made in the criminal context, is equally applicable to the administrative law context. In this case, the obligation to give reasons is found in the statute.
>
> [4] If the decision-maker does not provide reasons which set out his findings and the basis upon which they are made, there is no substrate for the application of the standard of review.

[38] However, if despite the lack of this procedural fairness there could only be one result then the matter need not be sent back for re-determination per Mr. Justice Linden at page 449 *(Sivakumar, above)*;

> In some cases, the inadequacy of the Refugee Division's findings would require the case to be sent back to the Refugee Division for a new determination. However, as MacGuigan J.A. held in Ramirez, supra, this Court may uphold the decision of the Refugee Division, despite the errors committed by the panel, if " on the basis of the correct approach, no properly instructed tribunal could have come to a different conclusion" (pages 323-324). In my opinion, under the standard articulated in Ramirez, supra, it is not necessary to send this matter back to the Refugee Division for a new determination for no properly instructed tribunal could come to any other conclusion than that there were serious reasons for considering that the appellant had committed crimes against humanity.

See also *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

[39] The legal issue is whether an amnesty could have benefited Mr. Carrasco at the admissibility hearing. The Minister argues that the record does not contain sufficient detail of the amnesty. That may, or may not, be so, but the Board did not make a ruling on that point.

[40] Two interesting articles were cited to me; Rikhof "The Treatment of the Exclusion Clauses in Canadian Refugee Law" (1994), 24 Imm. L.R. (2d) 31 and Naqvi "Amnesty for War Crime: Defining the Limits of International Recognition", [2003] 85 I.R.R.C 583. They make the assertion that amnesties do not presently have international effect. However, within the Canadian context, they really address the issue whether a person could or should be charged with a crime against humanity, notwithstanding a general pardon or amnesty. More on point are the United Nations Refugee Agency (UNHCR) Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees. Paragraph 23 thereof provides;

> "Where **expiation** of the crime is considered to have taken place, application of the exclusion clauses may no longer be justified. This may be the case where the individual has served a penal sentence for the crime in question, or perhaps where a significant period of time has elapsed since commission of the offence. Relevant factors would include the seriousness of the offence, the passage of time, and any expression of regret shown but the individual concerned. In considering the effect of any pardon or amnesty, consideration should be given to whether it reflects the democratic will of the relevant country and whether the individual has been held accountable in any other way. Some crimes are, however, so grave and heinous that the application of Article 1F is still considered justified despite the existence of a pardon amnesty."

[41] Section 36 of the IRPA specifically provides that inadmissibility on the grounds of serious criminality may not be based on a conviction in respect of which a pardon has been granted, or if there has been a final acquittal. Furthermore, rehabilitation is taken into account. Although section 35 which deals with war crimes and crimes against humanity is silent on these matters, given the international context of the case, the United Nations Guidelines cannot simply be ignored.

[42] The *Crimes Against Humanity and War Crimes Act*, but again I emphasize in the criminal charge context rather than in the immigration and refugee context, sets out at section 12 that if the person has been tried and dealt with outside Canada in such a manner that if he or she had been tried and dealt with in Canada a plea of *autrefois acquit, autrefois convict* or pardon would be available, the person is deemed to have been so tried and dealt with in Canada.

[43] Mr. Carrasco has not been dealt with on the criminal level in Nicaragua, Canada or elsewhere.

[44] In any event, I hold, taking into account the UNHCR Handbook, that Mr. Carrasco's participation in a death squad and in the treatment of prisoners above described was so grave and heinous that as a matter of law the full application of section 35 of IRPA cannot be mitigated.

[45] It follows, as per *Sivakumar*, above, that it is not necessary to send this matter back for a new determination, as there was only one legal conclusion open to the Board.

[46] Mr. Carrasco submits that the Board fell into error in referring to the *Rome Statute*. In my opinion, it is not necessary to consider that submission as the Statute says nothing new as far as Mr. Carrasco's activities are concerned, as per *Gonzalez*, above.

ABUSE OF PROCESS

[47] In this case, unlike many of the others cited, it was never found that Mr. Carrasco would be at risk if returned to Nicaragua. He was excluded by the Board in 1992 on the basis of Article 1F. However, his accompanying wife and minor son were found not to be at risk. Reasons were never given, so we are left to speculate whether the Board had in mind that the Sandinistas had been voted out of power, or the general amnesty, or both. Then as a humanitarian gesture the Minister allowed the family to return to Canada on a series of temporary residence permits, subject to establishing admissibility.

[48] When questioned as to why the report to the Minister did not include serious criminality as a ground of inadmissibility, the reply was that if Mr. Carrasco ultimately succeeds on the crimes against humanity issue it would then be open to the Minister to attempt to render him inadmissible on the grounds of serious criminality. The decision of *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 482, (2003) 314 N.R. 347, was cited as authority. Mr. Justice Rothstein, speaking for the Court, said:

> "In the circumstances of this case, even though the Minister has unsuccessfully engaged a permanent resident in inadmissibility

> proceedings for more than eight years, it is not an abuse of process for the Minister to commence a new proceeding against the permanent resident on a different ground, even though that ground has been available to the Minister since February 1, 1993."

[49] It is certainly desirable that all matters of inclusion and exclusion be dealt with at once. In granting judicial review in *Rai v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 764, [2001] F.C.J. No. 1163, Mr. Justice Nadon stated at paragraph 21:

> It would be preferable for the new panel, as it would have preferable for the panel that rendered the impugned decision, to consider both exclusion and inclusion so as to avoid unnecessary delays."

In *Gonzalez*, supra, Mr. Justice Mahoney said there was a practical reason for all elements of the claim to be dealt with. "Taxpayers might appreciate the economies of that approach."

[50] Although not necessary for the purposes of this decision, I am compelled to say that the idea of the Minister saving another argument for another day is disturbing. The decision of the Court of Appeal in *Abbott Laboratories v. Canada (Minister of Health)*, 2007 FCA 140, 282 D.L.R. (4^{th}) 145, 59 C.P.R. (4^{th}) 139 may stand for the broad proposition that one has to put one's best foot forward, and not save arguments for a possible second go-around. (See also *Morel v. Canada*, 2008 FCA 53, [2008] F.C.J. No. 204.)

[51] For instance had the facts been somewhat different, there might still have been reasonable grounds to believe that Mr. Carrasco participated in the murder of the four kidnappers but that the murder was not part of a widespread or systematic attack, or was not directed against a civilian population or an identifiable group. It would be a waste of resources both at the Board level and at this Court to start the whole matter over on what is an

included offence, as murder is certainly a serious crime, even if other requirements of a crime against humanity, or a war crime, were not met.

[52] It might also be abusive if in an admissibility hearing it had been found that Mr. Carrasco had not participated in the mistreatment of prisoners or the murder of the four kidnappers. Is it right that the Minister could gather up better evidence at a fresh hearing based on serious criminality?

CERTIFIED QUESTIONS

[53] Section 74(d) of IRPA provides that a judgment in judicial review is final with no appeal to the Federal Court of Appeal unless "the judge certifies that a serious question of general importance is involved and states the question." It was agreed during the hearing that a draft of the reasons would be provided to counsel before the issuance of a judgment so as to give them an opportunity to suggest appropriate questions. Consequently, a draft of the above paragraphs was duly circulated.

[54] The question must be one which has not been already decided by an appellate court and one, depending on the answer, which could be determinative of the appeal. However, once the matter is in appeal, the Court of Appeal is not confined to answering the stated question or questions. All issues arising from the appeal may be considered (*Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, (2004), 36 Imm. L.R. (3d) 167, 318 N.R. 365).

[55] Counsel for Mr. Carrasco proposed four questions, which I have reworded somewhat:

a. Are all prisoners necessarily "civilians" for the purpose of defining a crime against humanity as per *Canada (Minister of Citizenship and Immigration) v. Mugesera*, 2005 SCC 40, [2005] 2 S.C.R. 100?

b. May the execution of criminals constitute a crime against humanity as being part of a widespread and systemic attack on civilians?

c. Were the acts committed by the Sandinistas against the Contras in military or civil war activities part of a "widespread and systemic attack on civilians"?

d. Is it an error in law to rely on the *Rome Statute* in consideration of whether the mistreatment of prisoners constitutes a crime against humanity (in relation to the applicant's service as a prison guard at El Chipote Prison)?

[56] Counsel for the Minister submits that none of the proposed questions transcends the interests of the immediate parties, or contemplates issues of broad significance, or has not already been answered. More particularly, it was suggested that in *Sumaida v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 10, the Federal Court of Appeal dealt with the first three questions. I do not share that reading of the *Sumaida* case. In speaking for the Court, Mr. Justice Létourneau noted that some of those targeted were civilians, and could not be considered terrorists. The question as certified need not have been and was not answered. Furthermore, in *Gonzalez*, above, the Court of Appeal characterized encounters between the Sandinistas and Contras as incidents of war. Although there has been reference in the case law to the distinction between war crimes and crimes against humanity based on the characteristics of the targeted group, it may well be time to revisit that distinction, in the light of recent international developments.

[57] As to the fourth question, the Minister submits, at least in so far as it relates to Mr. Carrasco's situation, that the *Rome Statute* is simply a restatement of existing law. That is indeed my opinion. However, this is an important issue, and that opinion might not be shared.

[58] These questions are interrelated, and at the risk of being somewhat overcautious, I am prepared to certify all of them.

[59] Although the general amnesty in Nicaragua was the subject of considerable discussion in both written and oral submissions, no question was proposed by Mr. Carrasco in that regard. However, as other questions will be certified, given the distinction between sections 35 and 36 of IRPA, and the UNHCR *Handbook*, I propose certifying the following question myself:

> Should a pardon or general amnesty be taken into account in considering whether a person is inadmissible on grounds of violating human or international rights within the meaning of section 35 of the *Immigration and Refugee Protection Act?*

"Sean Harrington"
Judge

Ottawa, Ontario
April 8, 2008

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-506-07
STYLE OF CAUSE:	JAIME CARRASCO VARELA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 20, 2008
REASONS FOR ORDER AND ORDER:	HARRINGTON J.
DATED:	April 8, 2008

APPEARANCES:

Mr. Michael Crane	FOR THE APPLICANT
Mr. Jamie Todd	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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