Date: 20071015

Docket: IMM-4383-06

Citation: 2007 FC 1050

Ottawa, Ontario, October 15, 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

RODOLFO GUERRERO PACIFICADOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Rodolfo Pacificador is a fugitive from the Philippines, who is wanted to stand trial for his role in the 1986 murder of a major political figure and rival. For two decades, he has been subject to extensive immigration and extradition proceedings in Canada.

[2] In July 2006, the Immigration and Refugee Board's Refugee Protection Division (the Board) decided Mr. Pacificador was neither a Convention refugee nor a person in need of protection. It was the second time the Board held a hearing into Mr. Pacificador's refugee status, because this Court had quashed the Board's first refugee decision on judicial review. Indeed, this

Court also quashed a conditional deportation order from the Board in an earlier application for judicial review. This is therefore Mr. Pacificador's third application for judicial review in this Court.

[3] Mr. Pacificador argues that the Board erred by narrowly construing the comparator group to assess his risk of prosecution. He also submits the Board applied the wrong standard of proof, and did not properly address the possible risk of arbitrary detention and torture at the hands of Philippine authorities.

[4] The Minister submits Mr. Pacificador's attacks are disguised challenges to the Board's weighing of the evidence. The panel properly focused on the recent trial decision from the Philippines, it is argued, acquitting some of Mr. Pacificador's co-accused and convicting others. As a result, the Board's assessment was logical and reasoned, and should not be disturbed.

[5] For the reasons that follow, I would allow this application.

FACTS

[6] The applicant comes from a family that has been prominent in Antique provincial politics and Philippine national politics for many years. He and his father, Arturo Pacificator, were political allies of Ferdinand E. Marcos. Commencing in 1971, his father held various elected offices culminating in 1984 with his appointment as Minister of State for Public Works and Highways, and majority floor leader of President Marcos' party in the national parliament. As for the applicant, he worked in his father's constituency office and developed his own political support in Antique. Both

father and son supported President Marcos in the presidential election that took place on February 7, 1986.

[7] A few days after the election, Mr. Evelio Javier was shot dead while monitoring vote-counting in the plaza of San Jose, in Antique. Mr. Javier was a national politician and a member of one of the families supporting Corazon C. Aquino, thus a rival of the Pacificador family. Five others were wounded by a group of men who were heavily armed and disguised in balaclavas. This incident took place during a tense period, as President Marcos was being accused of having manipulated the election. Later that year, Corazon C. Aquino was declared President.

[8] Shortly thereafter, both the applicant and his father fled the Philippines, as they were suspected of the killing. The applicant transited through Thailand, Hong Kong, Singapore and the US before arriving in Canada on September 29, 1987. He claimed refugee status at the port of entry in Niagara Falls.

[9] Witnesses identified two known associates of the applicant's family as being among the assassins, but no witness saw the applicant at the scene of the killing. In the following months and years, however, some witnesses alleged that the Pacificadors were involved in ordering the murder, supplying masks for the killers, and giving the killers aid and clothing after the killing. As a result, the applicant, his father and five others were charged with offences arising out of the February 11, 1986 assassination (murder, frustrated murder of one bystander and attempted murder of four

others). The prosecution filed amended informations over several years naming other suspects, eventually bringing the total number of people charged to 21.

[10] The Minister, through the former Refugee Status Advisory Committee, found Mr. Pacificador was not a Convention refugee on October 1, 1988. The applicant appealed to the Immigration Appeal Board. When the new immigration legislation was enacted in January 1989, Mr. Pacificador's case became part of the refugee backlog program. In 1991, a "credible basis tribunal" constituted pursuant to the legislation in force at that time found in a split decision that there was a credible basis for his claim. As a result, his claim was referred to the Convention Refugee Determination Division (the CRDD) for a full hearing; contrary to the legislation, however, the claim did not proceed to hearing until 1999.

[11] In the meantime, the Philippine Supreme Court issued a Temporary Restraining Order (TRO) on September 22, 1989, ordering the presiding judge to "cease and desist from further acting" in this case. The Court was apparently responding to the prosecution's claim that the presiding judge was biased in favour of one of the accused. The Court upheld the TRO three years later, in September. The prosecution took the position that the TRO effectively prevented any further proceedings against the accused. Despite numerous petitions to have the TRO set aside, the Supreme Court of the Philippines did not respond and so the case for all intent and purposes ground to a halt for ten years. As will be explained below, it is only as a result of pressure from the Ontario Courts to rectify what they considered unconscionable pre-trial delay and detention that the Supreme Court of the Philippines finally lifted the TRO in the summer of 1999.

[12] On November 12, 1990, Canada and the Philippines signed an extradition treaty. It appears that the negotiations leading to that treaty were largely motivated by the Philippines' desire to secure the applicant's return so that he could face murder charges.

[13] On November 12, 1991, Mr. Pacificador was arrested on a Warrant of Apprehension under the old *Extradition Act*, R.S.C. 1985, c. E-23. He was committed for extradition in October, 1992. His application for *habeas corpus* was dismissed on February 5, 1993, and the Ontario Court of Appeal dismissed his appeal on July 29, 1993. Leave to appeal was dismissed by the Supreme Court of Canada on April 28, 1994.

[14] The Minister of Justice then ordered that Mr. Pacificador be surrendered for extradition to the Philippines in October 1996. The Minister acknowledged "weaknesses and inconsistencies" in the evidence against the applicant, but rejected his submission that the prosecution against him was politically motivated and that the Philippines' extradition request was made for the purpose of punishing him for his political beliefs. The Minister nevertheless sought and obtained two assurances from the Philippines to ostensibly preserve Mr. Pacificador's section 7 rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*). First, he obtained an assurance that the death penalty would not be imposed or carried out on the applicant, and second, that the Philippines would exert its best efforts to ensure that the applicant's trial would be completed within one year from the date of his surrender.

[15] On November 1, 1996, the applicant applied for *habeas corpus, certiorari,* prohibition and relief under section 24 of the *Charter* to quash the warrant of surrender or, in the alternative, to stay or prohibit his surrender pending the determination of his refugee claim. In support of his application, the applicant sought to introduce several affidavits providing evidence on the treatment of co-accused and witnesses and on the TRO issued by the Supreme Court of the Philippines. This evidence was not contradicted by the respondent, who did not cross-examine the affiants or lead evidence to challenge their evidence.

[16] The application judge refused to admit all but two of the affidavits, but granted an adjournment to give the applicant an opportunity to request that the Minister of Justice, then Anne McLellan, reconsider former Minister Rock's decision in light of the new evidence. On March 19, 1998, Minister McLellan declined to reconsider the surrender decision.

[17] On May 19, 1998, Mr. Pacificador's application to quash or stay the warrant of surrender came before the applications judge again, who eventually released three sets of reasons. Justice Dambrot found, in reasons dated January 18, 1999 ([1999] O.J. No. 35 (QL)), that it would violate section 7 of the *Charter* to surrender a fugitive to a state were he would not receive a trial or bail hearing within a reasonable amount of time. He held, at para. 53:

> I do not pretend to have a full appreciation of the rationale for, or the significance of the procedural goings-on in this case in the courts of the Philippines. I have no view of the legal correctness of the current state of affairs, but what is uncontradicted in the record before me is this: all proceedings arising out of the Javier killing are subject to a restraining order. As a result, the trial of two of the accused, which was in the defence stage, has been halted for several years. Two other accused have been unable to have bail hearings for several

> years for the same reason. All of these accused remain in custody in the interim. On the face of it, the applicant will find himself in the same position if he is returned to the Philippines. It requires little analysis to come to the conclusion that to surrender a fugitive to a requesting state where he will be unable to have a bail hearing or a trial in the foreseeable future would deprive the fugitive of his right to liberty and security of the person in a manner that does not conform to the principles of fundamental justice, contrary to s. 7 of the Charter.

[18] Justice Dambrot did not doubt the good faith of the Philippine government in giving its assurance, but was of the view that it could not give an assurance that the court would lift its restraint order and permit the bail hearing and trial of Mr. Pacificador, should he be surrendered, to proceed expeditiously, since the government does not control the judiciary. The applications judge also noted that a similar undertaking in respect of the applicant's father, who had surrendered in 1995, had been ineffective. However, Justice Dambrot withheld his final determination to allow the Minister an opportunity to supplement the record. The Minister took that opportunity and requested further information form the Philippines. In a diplomatic note dated March 2, 1999, the embassy of the Philippines stated that the TRO did not apply to the applicant and that the Philippines' Constitution guaranteed accused persons the right to a speedy trial. The Solicitor General of the Philippines also filed a motion in the Supreme Court of that country to lift the TRO. In his second set of reasons dated May 31, 1999, Justice Dambrot found that the foregoing material filed by the Minister did not alter his conclusion that the applicant's surrender would violate his section 7 rights. Once again, he reserved his decision and gave the Minister another opportunity to file additional material.

[19] Finally, in the summer of 1999, the Supreme Court of the Philippines lifted the TRO without explanation. The trials and bail hearings of the accused resumed on September 27, 1999. The prosecutor was also instructed to conclude the proceedings as quickly as possible. As a result of this new evidence, Justice Dambrot felt his concerns had been addressed and dismissed Mr. Pacificador's application to quash the warrant on October 19, 1999.

[20] On August 1, 2002, the Ontario Court of Appeal set aside Mr. Justice Dambrot's decision: (2002), 60 O.R. (3d) 685 (permission to appeal denied: [2002] S.C.C.A. No. 390). The Court found the criminal procedures applied in the Javier murder trial were sufficiently shocking that extraditing Mr. Pacificador would violate section 7 of the *Charter*. The Court was particularly disturbed by the fact that the Supreme Court of the Philippines repeatedly failed to respond to requests to lift the TRO by the applicant's co-accused, who were in detention. The Court noted that the very institution to which the applicant would have to look for protection from delay and political manipulation was the cause of the unconscionable delay and failed to explain the reason for the order and its continuation for more than a decade. The Court also found unpersuasive the assurance that the delay and pre-trial detention of the applicant's co-accused would not be inflicted on the applicant as well. Mr. Justice Sharpe, for a unanimous Court, wrote:

> [52] …The Supreme Court lifted the order only after the Solicitor General's motion suggesting that Ontario courts would compare the appellant's situation with that of his co-accused and only after the applications judge held that he would set aside the appellant's surrender if the Temporary Restraining Order were not lifted. I find it significant that the only arguments to catch the court's attention for over ten years were the submission that nothing else would procure the appellant's surrender and the indication from a Canadian judge that the appellant's surrender order would soon be set aside.

[21] In parallel with these extradition proceedings, the refugee proceedings were also running their course. In 1997, the Minister issued a Direction for Inquiry and a report alleging Mr. Pacificador had committed foreign acts of criminality and was therefore a person described under section 19(1)(c.1)(ii) of the old *Immigration Act*. An immigration inquiry was eventually convened before the Immigration and Refugee Board, Adjudication Division, on this allegation. The inquiry resulted in a finding that the description of Mr. Pacificador in the report was accurate and a conditional deportation order was issued in December 1999. Pursuant to that decision, the deportation order would come into effect only if the applicant's refugee claim was finally determined against him.

[22] Mr. Pacificador successfully applied for judicial review of the Board's order. Justice O'Keefe found the order gave rise to a reasonable apprehension of bias, and set it aside: *Pacificador v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 426. However, instead of proceeding with the rehearing, the Minister withdrew the section 19(1)(c.1) proceedings against Mr. Pacificador.

[23] In February 2000, Mr. Pacificador's refugee hearing opened before the then CRDD. In a decision dated July 19, 2002, the Board found Mr. Pacificador was not excluded from claiming refugee status under article 1F(B) of the *Convention relating to the Status of Refugees*. It decided the Minister had not discharged his onus of showing that there were reasonable grounds to believe Mr. Pacificador had committed a serious non-political crime in the Philippines, mainly because the

prosecution's case in the Philippines was "badly tainted by corruption and interference, and that it is an inconsistent implausible shambles".

[24] Having said that, the Board nevertheless found Mr. Pacificador was not a Convention refugee because he did not have a well-founded fear of persecution. It based this conclusion on the fact that Mr. Pacificador, being a man of wealth and prestige, would be able to avoid beating, torture, harsh prison conditions, unfair conviction and death that are prevalent in the Philippine judicial system. The Board also based its conclusion on the fact that Mr. Pacificador's father had not been tortured, mistreated, detained arbitrarily and/or held incommunicado while awaiting trial for the same crime. It is worth stressing that the Board made its decision without the benefit of the Ontario Court of Appeal's decision, which was released two weeks later.

[25] On December 12, 2003, Justice Heneghan quashed the Board's decision rejecting Mr. Pacificador's refugee claim (*Pacificador v. Canada (Minister of Citizenship and Immigration),* 2003 FC 1462). She found that it was "perverse" to conclude that the applicant would not have an objectively well-founded fear of persecution because he appeared to be a person who could use a corrupt judicial system to his benefit. She also found that the Board erred by limiting the comparison of the applicant to only one other similarly situated person, that is, his father; in her view, the Board should have looked at the group of persons who were prosecuted for political motives and whose prosecution appeared to be tainted by corruption to determine if the applicant had an objective basis for his fear. Justice Heneghan wrote:

> [78] The Board found that the prosecution of the Applicant was highly tainted by corruption and that such corruption was due to his

> political and family affiliation, a ground for claiming Convention refugee status. The fact that the Applicant's father was not abused or tortured is not determinative, in my opinion, of the Applicant's claim for Convention refugee status. I conclude that the Board erred in its conclusion concerning the objective basis of the Applicant's claim. That error is sufficient to allow this application for judicial review.

[26] Subsequent to the decision of Madam Justice Heneghan, but before the new hearing of Mr. Pacificador's refugee claim, the Regional Trial Court of the Sixth Judicial Region, Branch 12 in San Jose, Antique, acquitted Arturo Pacificador and three of his co-accused of all charges relating to Mr. Javier's murder. The Court also found seven of the accused guilty of all charges. One was found guilty of being an accomplice to the murder and acquitted on the other charges. The cases against Rodolfo Pacificador, another suspect and various accused not yet properly identified or arrested were archived to be re-instated upon their arrest.

THE IMPUGNED DECISION

[27] The panel held a pre-hearing conference and decided to contact the Minister to see if he intended to make submissions with respect to the exclusion issue, in light of the verdict reached by the Philippines Court. The Board also decided that it did not need to revisit the issue of nexus, which had been established at Mr. Pacificador's first hearing. However, since the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *IRPA*) had come into effect after that hearing, the panel would hear section 97 issues for the first time.

[28] The Board declined to revisit the issue of exclusion, which had been addressed by the first panel who heard Mr. Pacificador's case. The Board endorsed the earlier panel's finding that the

prosecution's case was "badly tainted by corruption and interference, and that it [was] an inconsistent, implausible shambles". The Board noted that the Minister did not appeal that decision. As he indicated that he did not intend to participate in the re-hearing of Mr. Pacificador's claim, the Board took it as an indication the Minister had no new evidence which might affect the earlier panel's decision.

[29] As for inclusion, the panel made it clear from the outset it considered the verdicts in the Javier murder trial "the most significant new evidence" since Mr. Pacificador's first hearing, although it also considered Justice Heneghan's decision and that of the Ontario Court of Appeal.

[30] In light of the well-known rivalry between the Javier and Pacificador families, the Board found it logical that Arturo and Rodolfo Pacificador were both immediately considered suspects in the Javier murder. There was nothing inherently persecutorial about it. The Board also acknowledged documentary evidence showing that the judiciary in the Philippines is not free and independent. However, the fact that Arturo Pacificador and others were ultimately acquitted of all charges made it very difficult to argue that the applicant's trial would be politically motivated and unfair. As the Board wrote (A.R., pp. 23-124):

> Had his father been found guilty despite his protestations of innocence, the claimant could point to the result as confirmation of his fears. Given the outcome of the trial, the panel does not accept that the Court was corrupted or politically influenced. In fact, once the trial got underway, either there was no attempt to apply political pressure to the court or the court rose above any attempted political manipulation. The court found that the prosecution simply had not discharged their burden with evidence sufficient to support a conviction of Arturo Pacificador and others beyond a reasonable doubt. In the cases of those accused found guilty, the prosecution

> was able to prove guilt beyond a reasonable doubt. The panel has to assume, reading the decision of Judge Castrojas and without persuasive evidence to the contrary, that once the trials were underway, they were fair and not politically influenced. There is no other rational way to explain the acquittals.

[31] The Board also rejected the applicant's theory that his father had been acquitted to mislead the Canadian government into returning him to the Philippines as "speculation", and found that Mr. Pacificador's claims that the prosecution against him was politically motivated was hardly credible in light of the adverse reactions to the verdicts from the very people who are allegedly behind the persecution..

[32] With respect to fair trial, the Board also found that the Philippine trial was conducted in accordance with the rules of natural justice. The accused had access to counsel, the presumption of innocence applied, and the accused had the right to know the case against them and to refute it. More than 50 witnesses testified. The prosecution had the burden of proof. The Court also relied on the rule against hearsay and looked to case law for legal principles.

[33] The Board rejected Mr. Pacificador's argument that the Philippine court acquitted his father so that Canada would deport him. It found it "strained credulity" to accept that a corrupt judiciary would release Arturo Pacificador, whose reputation was far more notorious than his son's, on the hope that Canada would perceive this as a sign of a fair trial and return his son. It rejected Mr. Pacificador's claim that Philippine rivals see him as a larger threat than his father, because he is the "heir apparent" to his family's legacy.

[34] Once the TRO was finally lifted in 1999, it took approximately five years for the trial to conclude and Judge Castrojas to release his decision. Given the complexity of the case and the number of accused, this was not unreasonable. The Board felt obliged to note that Mr. Pacificador himself had spent more than six years in a Canadian prison, awaiting the outcome of his extradition case.

[35] Finally, the panel considered Arturo Pacificador's acquittal as a sign that his son would receive a fair trial on his return. The Board wrote (A.R., p. 30):

> While hastening to repeat that it is not within this panel's jurisdiction to make a finding concerning the claimant's criminal guilt, the panel does agree with the various tribunals and courts that have exhaustively examined the claimant's situation and arrived at a consensus that the evidence against him is a "shambles" and a "contradictory mess". The panel goes one step further and finds that in light of the decision of Judge Castrojas, the Court in the Philippines made a similar finding in relation to the claimant's father and others in acquitting them because the prosecution evidence did not prove their guilt beyond a reasonable doubt. This provides support for the position that if the case against the claimant is indeed a "shambles" and a "contradictory mess", he too will get a fair trial, and if the prosecution cannot prove his guilt beyond a reasonable doubt, he will be acquitted.

[36] The Board then considered the lengthy pre-trial detention as the key issue in its decision. It focused on the fact that the accused had been held in jail for an inordinately long time, without their trials proceeding and for some without opportunity for bail hearings. There was also evidence that some accused had been mistreated and/or tortured.

[37] The Board looked at whether the trial verdicts, as new evidence, established Mr. Pacificador would be at risk under section 97 of the *IRPA*. It accepted that the accused had been detained for too long in the Philippines, such that their pre-trial detention breached their right to trial within a reasonable time and their right not to be held indefinitely in custody without bail. The Board found the TRO was the cause of the unacceptable delay, and clearly created a situation of persecution in terms of detention during the delay of the trials and bail hearings. But once the trial finally began, in 1999, the timeline was not inordinate.

[38] That was relevant because there was not a serious possibility or reasonable chance that a TRO would be imposed again if Mr. Pacificador was returned home. Further, he would not be tried with as many co-accused, which would also speed up his trial. Finally, Philippine officials knew that delay in this case was a critical factor in the Ontario Court of Appeal's decision. They would want to avoid further delays to minimize similar outcomes in future extradition cases. As the Board wrote (A.R., pp. 35-36):

> The claimant maintains that once he is returned there will be no reason for the Philippine government to be concerned about what Canada thinks. The panel disagrees. The two countries have signed an extradition treaty. There may be other cases in the future where the Philippines will seek extradition of their citizens from Canada and other countries with whom they have extradition treaties. Any repetition of the sort of unexplained delay and prolonged pre-trial detention suffered by the co-accused in the Javier murder case might well damage, beyond repair, any future hopes of extradition in other cases.

[39] As for the conditions of detention, the Board referred to documentary evidence of torture and mistreatment in Philippine prisons, but also noted that some of the accused, and in particular the

applicant's father, were rather well treated for a significant portion of their detention. On that basis, the panel was not prepared to extrapolate from the general country condition that there is a serious possibility Mr. Pacificador would be tortured and mistreated.

[40] Finally, the Board rejected Mr. Pacificador's claim that he could be extra-judicially executed, finding no persuasive evidence that anyone involved as a suspect in the Javier murder had been extra-judicially executed. Mr. Pacificador gave evidence that his father was still living in the Philippines since his acquittal, and no attempt had been made on his life. Further, Judge Castrojas made it clear that no one convicted in relation to the Javier murder should face the death penalty, as the Philippines had abolished it in 1987 with retroactive effect.

ISSUES

[41] This application for judicial review raises three issues, which can be stated as follows:

a. Did the Board err in defining the comparator group?
b. Did the Board err in the way it assessed the risk of arbitrary and lengthy detention, and the risk of torture?
c. Did the Board apply the wrong standard of proof?

ANALYSIS

[42] Before embarking upon an analysis of the aforementioned issues, it is necessary to determine the applicable standard of review. Since the standard can be different for each of the issues raised by the applicant, it is appropriate to deal with them separately.

[43] In analyzing whether the applicant has a well-founded fear of persecution or faces risk in the Philippines, the Board limited the comparison of the applicant to the applicant's father and the other accused in the Javier murder trial. According to Mr. Pacificador, this definition of the proper comparator group is a legal issue, to be determined on a correctness standard.

[44] Counsel for the applicant relied for that proposition on the decision of the Federal Court of Appeal in *Salibian v. Canada (Minister of Employment and Immigration) (C.A.)*, [1990] 3 F.C. 250 [*Salibian*]. Having read that decision, I do not think this is an accurate interpretation of what the Court said. Writing for a unanimous Court, Justice Décary said (at pp. 257-258):

> In short, the Division concluded that for the plaintiff to be eligible for refugee status he had to be personally a target of reprehensible acts directed against him in particular. The Division further concluded, despite evidence that the plaintiff was a victim of these acts in his capacity not as a Lebanese citizen but as an Armenian and Christian Lebanese citizen, that the plaintiff was "a victim in the same way as all other Lebanese citizens are". This in my opinion is an error of law, in the first case, and an erroneous conclusion of fact in the second, drawn without taking into account the factual evidence available to the Division. This error of fact is especially significant in the context of the error of law.

[45] In the present case, the applicant is not arguing that the Board erred in setting out the proper test to determine if he had an objective basis for his fear of persecution, but rather that it improperly limited the comparison of the applicant to the applicant's father and the other accused of the murder. This is not a legal issue. Nor is it a pure question of fact, it seems to me. The Board was not asked to decide, as in *Salibian*, the basis upon which Mr. Pacificador had been treated, as a matter of fact, but rather what comparable group is the best predictor of his likely treatment if ever he is returned to the Philippines.

[46] When Justice Heneghan addressed the issue of a proper comparator group, in the judicial review of the first Board's decision, she did not discuss the standard of review. She did, however, characterize the nature of the question in the following way, after having quoted from *Salibian* at length:

> [76] In my opinion, this decision supports a finding that the Board erred in the manner in which it concluded that the Applicant did not face a serious possibility of persecution in the Philippines. The Board erred by limiting the comparison of the Applicant to only one other similarly situated person, that is, his father. The fault was not in looking for a comparator, as in *Salibian, supra*, but in defining the comparator group too narrowly.

[47] Mr. Pacificador is making the same argument here that he made before. He does not argue that the Board erred in comparing his situation to that of others in assessing his objective fear, but that the Board was wrong in defining the comparator group as his father and co-accused. This, in my view, is clearly a question of mixed fact and law, reviewable on a standard of reasonableness. Accordingly, this Court will intervene only if the Board's decision is not supported by reasons that can stand up to a somewhat probing examination. See: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 56. A decision may satisfy the standard of review if supported by a tenable explanation, even if the explanation is not one that the reviewing court finds compelling. See: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247 at paragraph 55.

[48] As to the Board's findings that the applicant will not face persecution as a result of torture or arbitrary and lengthy detention, these are clearly issues of fact with which this Court should only

interfere if they are patently unreasonable. Finally, the applicant's claim that the Board applied the wrong standard of proof raises an issue of law, to be assessed on a standard of correctness.

a) Did the Board err in defining the comparator group?

[49] Mr. Pacificador claims the Board made the same error it made in its first decision from 2002, by limiting its comparison of the applicant to his father and the other accused in the Javier murder trial in assessing whether he had a reasonable fear of persecution. According to Mr. Pacificador, this error runs through the Board's analysis as to whether he could expect a fair trial, whether he will face persecution through arbitrary trial delays, and whether he will be subject to torture. Mr. Pacificador argued there is no analysis in the Board's lengthy reasons of whether others similarly situated to him, namely, persons in the Philippines who are prosecuted for political motives and whose prosecution appears to be tainted by corruption, can expect a fair trial. He submitted the Board wrongly considered his father's verdict determinative of his own claim, instead of approaching the outcome of the trial of his father as being merely an example of what might happen to him.

[50] As already indicated (*supra*, para. 25), Madam Justice Heneghan agreed with that submission and allowed Mr. Pacificador's previous application for judicial review.

[51] Mr. Pacificador now claims the Board erred again, by narrowing its comparison solely to his father and the other accused in the Javier murder. Indeed, the Board makes no mystery of the fact that the decision of the Regional Trial Court in the Philippines, acquitting Arturo Pacificador

and several others, is “the most significant new evidence since the original hearing of this claim and the decisions of the Court of Appeal and Federal Court in Canada” (A.R., p. 22). Central to the Board’s reasoning was its conclusion that the Philippine verdicts were a conclusive sign that those accused in the Javier murder received fair trials. That being the case, there was no need to look at the situations of people subject to politically corrupt prosecutions in general, since the prosecution of the applicant’s co-accused (and particularly the prosecution of his father) was far more relevant to the applicant’s likely fate were he to be returned to the Philippines.

[52] It may well be that once the trial got started, the time required to bring it to a conclusion was not inherently persecutory. Similarly, there is no evidence that the trial, once it got underway, was politically manipulated or that the accused did not benefit from due process. The Court’s final verdict was lengthy, detailed, and quite clearly went through the evidence to explain the rationale behind its decision. Having read the 113-page decision, I agree with the Board that it seems the accused were treated fairly and in conformity with their fundamental rights.

[53] But is that sufficient to conclude: that there is not a reasonable chance or serious possibility that the applicant’s trial will be unduly delayed; that there is no reasonable chance or serious possibility that he will be mistreated or arbitrarily detained in facilities so inhumane as to be inherently persecutory; and, that there is no reasonable chance or serious possibility his trial will not be manipulated and will be conducted without due regard to the rules of procedural fairness? I do not think so.

[54] The Board concedes, on numerous occasions, that the Philippines does not have a free and independent judicial system (A.R., p. 23) and that the judicial system is corrupt (p. 19). Also, the Board does not disagree with the first panel's findings, according to which the Philippines "does not, in reality, offer defendants a free and independent judicial system because the system suffers from corruption" (A.R., p. 406), that there have been problems not only with the fairness of prosecution of the Javier case, but also "disturbing problems with the actual *trial* of the Javier case" (A.R., p. 406), and that country documentation reports "a number of serious concerns about torture, police brutality, and deplorable prison conditions in the Philippines" (A.R., p. 408). Are all of these disturbing findings cured by the acquittal of the applicant's father and some of his co-accused?

[55] While I am not necessarily prepared to speculate as to the reasons why Arturo Pacificador and a few other accused were found not guilty (and I would be loathe to impute Machiavellian motives to the Court in reaching its decision), I fail to understand how, in and of itself, it is sufficient to conclude that there is not a reasonable chance or serious possibility that the applicant will not be persecuted were he to be returned. Just as the lifting of the TRO did not convince the Ontario Court of Appeal that the applicant would get a speedy trial, I find that the acquittal of the applicant's father and the fact he was not tortured is no guarantee that the applicant himself will benefit from the same treatment. As the Ontario Court of Appeal indicated, it is only as a result of clear indication from a Canadian judge that the applicant's surrender order would be set aside that the TRO was eventually lifted. And since no reason has ever been given for that order, its continuation or its lifting, what is to preclude the possibility that a similar order could be made again? And what are the assurances, against the appalling background of corruption, ineffectiveness

and unfairness that seems to prevail in the Philippines judicial system, that another judge may not raise above an attempted political manipulation?

[56] The Board suggested that there is no serious possibility or reasonable chance that the circumstances that led to the imposition of the TRO in 1989 will recur should the claimant return to face trial. The Board based this assumption on the fact that sixteen years have passed since the TRO was imposed, six years since it was lifted, and that "[e]motions in the Philippines around the issue of the murder are not running as high now as they were then" (A.R., p. 35). The Board also noted that the Pacificadors have not been in a position of power for twenty years and that Rudolfo Pacificador does not represent such a threat to the established political order in Antique province that he would be a special target of opponents of the Pacificador family any more (A.R., p. 29).

[57] While this may well be true, there are countervailing factors that were not taken into consideration by the Board. First of all, it appears that the applicant has been painted as the mastermind of the Javier murder, and Judge Castrojas stated in his decision that Rudolfo Pacificador "ran the affairs, so to speak" (A.R., p. 318). He is also much younger than his father, and as such more of a threat to the rival families now in power.

[58] Indeed, the Philippine President herself gave a speech in February, 2002, on the 16th death anniversary of the late Governor Evelio B. Javier at which she described Mr. Javier as "one of our country's most courageous and inspiring political leaders" and Mr. Pacificador as the "mastermind" of the crime, and one of the perpetrators who "continue to elude the final consequences of their

terrible act". The speech was disseminated on a Philippine government web site. During the course of the speech, the President apparently stated that she raised the extradition of Mr. Pacificador in a recent official visit to Canada and asked the Prime Minister why the "mastermind" had not yet been extradited to the Philippines. Given the continued animosity to the Pacificadors at the highest political levels, the adverse reactions to the acquittal of Arturo Pacificador, and the increased pressure to mete out punishment of some form to the Pacificador family after the acquittal of the applicant's father, it is far from clear that the applicant is similarly situated to his father. Yet, none of this was discussed by the Board.

[59] Even if I were prepared to accept that the decision of the Regional Trial court in the Philippines and the treatment received by the accused in that trial were the most crucial factor in assessing the applicant's well-founded fear of persecution, I would still come to the conclusion that the Board's decision was unreasonable. Despite the Board's claims that it looked at all of the accused to determine how Mr. Pacificador would be treated on his return, a close reading of the decision reveals that too much emphasis was placed on his father's situation, as opposed to that of the group of accused as a whole. In other words, aside from whether the group of accused in the Javier trial could be the relevant comparator group in assessing Mr. Pacificador's fear, the Board did not even get to that stage since it relied much too heavily on Arturo Pacificador. Had it properly taken into consideration the treatment received by all the accused, instead of honing in quite narrowly on the applicant's father, its decision might well have been different.

[60] The following paragraph of the Board's decision provides a good illustration of the pre-eminence given to the applicant's father in its reasoning:

> The panel has taken note of the fact that his father, whose situation among the accused would be the most similar to that of the claimant, namely possible "mastermind", returned voluntarily to the Philippines in March 1995 to face the charges against him, was not tortured, was not subjected to cruel and unusual treatment or punishment, lived in a cottage on the prison grounds, was allowed out of prison for medical attention and to attend church in his hometown and was permitted to run for political office (unsuccessfully) three times (1995, 2001, and 2004) while detained. Since his acquittal, he has chosen to remain in the Philippines despite the fact that, according to the claimant's testimony, he is free to leave the Philippines at any time. There was no persuasive evidence before the panel that anything untoward has happened to his father since his release from jail in the Philippines in October 2004.
>
> (A.R., pp. 29-30)

[61] Had the Board written this passage as part of a broader section looking at how all the accused were treated, I would not find it suspect. However, with respect to certain issues, I believe the Board unfairly gave Arturo Pacificador's situation more weight than those of the other accused. This error dos not run throughout the Board's decision; for example, the Board did look at how all the accused were treated in pre-trial detention. But I am particularly concerned with the Board's comparative analysis in its section on torture.

[62] The Board practically skated over evidence that some of the accused in the Javier murder had been tortured, writing (A.R., p. 37):

> [T]here is evidence of at least three accused being mistreated or tortured and that those incidents occurred almost twenty years ago, except for one incident which was almost ten years ago. While the panel deplores any mistreatment or torture of prisoners, it is not

> willing to extrapolate from this evidence that the claimant faces torture and mistreatment if he should return to the Philippines.

[63] Thereafter, however, the Board engaged in a lengthy review of Arturo Pacificador's favourable treatment as a prisoner, citing an article describing his living conditions. The Board did not disregard evidence that other accused had been tortured simply because of the passage of time, but because there was evidence that Arturo Pacificador had not been tortured or mistreated. It felt that evidence about his father would more effectively predict whether Mr. Pacificador himself had a well-founded fear of persecution in the Philippines. At least with respect to its analysis of the risk of torture, the Board considered the situation of Arturo Pacificador determinative. This part of the Board's decision most explicitly undermines the argument that it truly considered all those accused of the Javier murder as a single group or entity.

[64] Even if I were prepared to accept that the Board was not obliged to follow Justice Heneghan's reasons to the letter, and compare Mr. Pacificador's situation to "persons in the Philippines who are prosecuted for political motives and whose prosecution appears to be tainted by corruption" (*Pacificador v. Canada (Minister of Citizenship and Immigration), supra*, at para. 77), that would not excuse the Board from at least looking at what happened to all the accused in the Javier murder.

[65] The Board should therefore have provided a more detailed explanation why documentary evidence and specific evidence of torture in the Javier murder prosecution was less persuasive than evidence about how Arturo Pacificador was singled out for preferential treatment in prison. Indeed,

the analysis of the Board contrasts starkly with the conclusions of the Ontario Court of Appeal on the same issue:

> [15] With respect to the affidavit evidence on the treatment of co-accused and witnesses, two affiants described being subjected to electric shock while in custody. Vegafria swore that Congressman Javier pointed a cocked pistol at him while visiting him in jail and that a jail guard pleaded with him not to shoot. Four witnesses stated that they were bribed or threatened to swear false statements against the Pacificadors. Two affiants provided evidence that Congressman Javier had paid or offered to pay witnesses. A chief of police swore that he had been in the appellant's company elsewhere at the time of the killing, and that the prosecutor was uninterested in verifying the appellant's whereabouts at that time. He also swore that Congressman Javier had tried to bribe him to give inculpatory evidence against the appellant.
>
> […]
>
> [53] …The appellant makes serious allegations of political manipulation and fabrication of evidence, as well as allegations of appalling treatment to his co-accused during the lengthy period of pre-trial detention. No evidence has been led to dispute those allegations. At the very least, they establish a significant risk that the appellant will not be fairly treated upon his surrender…

[66] In light of all this, I find that the Board made a reviewable error in defining the proper comparator group for the purpose of assessing the objective basis of Mr. Pacificador's fear of persecution. While purporting to pay attention to the decisions of the Ontario Court of Appeal and of this Court, the Board effectively decided to zero in on the fate of Rudolfo Pacificador's father as the best predictor of what would happen to him upon his return to the Philippines. In doing so, the Board ignored the admonitions of Justice Heneghan, who stated in no uncertain terms:

> [78] The Board found that the prosecution of the Applicant was highly tainted by corruption and that such corruption was due to his political and family affiliation, a ground for claiming Convention refugee status. The fact that the Applicant's father was not abused or

> tortured is not determinative, in my opinion, of the Applicant's claim for Convention refugee status. I conclude that the Board erred in its conclusion concerning the objective basis of the Applicant's claim. That error is sufficient to allow this application for judicial review.
>
> […]
>
> [83] Further, the Ontario Court of Appeal's decision is now part of a body of jurisprudence. I expect that on the redetermination of this matter, the newly constituted Board will consider it carefully. The lower court decision was tendered as evidence before the Board, therefore the Ontario Court of Appeal's decision, overturning this decision, must form part of the record before the newly constituted Board who will rehear this matter. The Board does not decide in a vacuum. While the Ontario Court of Appeal decision will not be binding on the Board, it is relevant and important evidence that places the Applicant's situation in context.

[67] I do not dispute that the decision of the Regional Trial court in the Philippines is an important factor to take into consideration in evaluating the objective basis of Mr. Pacificador's fear of persecution. But just as the facts that the TRO has been lifted and that the applicant's father has not been tortured cannot be determinative of the applicant's claim for refugee status, neither does the acquittal of Arturo Pacificador. For the reasons already set out, the Board had to reach beyond the fate of Arturo Pacificador and look at the very least into the treatment received by his co-accused to assess whether there is a reasonable chance or serious possibility that the applicant will be persecuted upon his return to the Philippines. It was unreasonable for the Board to close its eyes to the numerous shortcomings of the Philippine judicial system and to the serious violations of the fundamental rights of the other accused that have marred their trial for the Javier murder, only to assume that the applicant will benefit from the same favourable treatment as his father. The fact that a single judge "got it right" in a specific instance is no guarantee, in and of itself, that the system will produce the same result in the future.

b) Did the Board err in the way it assessed the risk of arbitrary and lengthy detention, and the risk of torture?

[68] Even limiting consideration to that of the fate of the applicant's father, it is significant that the Board found that the applicant's father experienced past persecution in the Philippines. The Board found that lengthy trial delays that affected the various accused in the Javier murder prosecution amounted to persecution. Once the TRO was lifted, however, the trial procedures have unfolded in a reasonable and procedurally fair manner, and the Board found it was "logical to assume" that Philippine officials do not wish to risk other foreign courts reacting like the Ontario Court of Appeal because of unreasonable delay in pre-trial detention.

[69] It may well be that the TRO was not necessarily relevant to assessing Mr. Pacificador's fear of lengthy detention, not only because it was lifted, but also because it was a particular measure taken in this case many years ago. The fact remains, however, that Philippine judicial and prosecutorial authorities never explained why the restraining order came into being or why it was eventually lifted. This lack of transparency casts some doubt as to the possible repetition of that scenario in the future.

[70] But more importantly, the Board never came to grip with the uncontradicted country documentation according to which "[d]ue to the slow judicial process, lengthy pre-trial detention remained a problem", and the "judicial system was unable to ensure expeditious trials for detained persons" (U.S. Department of State, Country Reports on Human Rights Practices - 2003, February

25, 2004; A.R., pp. 422 and 424). After all, there are other ways to delay a trial than by imposing a TRO. This is not to say that every person who is subject to the criminal justice system in the Philippines should be granted refugee status because of the undue delays in processing cases; but considering the particular context into which the trial of the applicant would take place, the Board should at least have broadened its inquiry instead of speculating that the Philippine Supreme Court would not impose another TRO.

[71] As for the risk of torture, I have already touched upon this in the previous section. The Board acknowledged in its reasons that, "on occasion, mistreatment and torture do occur in Philippine police stations and jails, and that police and guards act with a certain degree of impunity in some cases" (A.R., p. 36). The Board also noted the evidence according to which "several of the accused in the Javier murder trial were mistreated and that jail conditions for a number of the accused were harsh and substandard" (A.R., p. 37). This, coupled with the length of the accuseds' pre-trial detention, led the Ontario Court of Appeal to the conclusion that their treatment had been "appalling", and that the criminal procedures of the Philippines have been interpreted and applied in that prosecution in a manner that shocks the conscience.

[72] Had the Board not been blinded by the acquittal of Mr. Arturo Pacificador and the fact he was not mistreated, it might well have reached the same result. After all, if the surrender of the applicant would violate his section 7 right not to be denied life, liberty and security of the person except in accordance with the principles of fundamental justice, how was it possible to find that the same applicant did not have a well-founded fear of persecution or that there was no reasonable

chance or serious possibility of a lengthy pre-trial detention or torture? Unless the Board could point to a change in the country conditions or to other similar trials that were conducted in conformity with the rules of natural justice, the conclusion seems inescapable that Arturo Pacificador's acquittal and fair treatment were more the exception than the rule.

d) Did the Board apply the wrong standard of proof?

[73] The applicant submitted that in assessing whether his fear of persecution had an objective basis, the Board erred in formulating the standard of proof. In support of that claim, counsel quoted a few passages where the Board asked itself whether the claimant "would" or "will" be persecuted.

[74] It is well established that the standard of proof a refugee claimant must satisfy to show an objective basis for a fear of persecution is a serious possibility or reasonable chance of persecution in the future. The facts grounding the claim, however, must be established on a balance of probabilities. In other words, one must distinguish between what happened in the past, to be established on the civil standard of the balance of probabilities, and what will happen in the future, to be determined on the basis of the reasonable chance yardstick.

[75] The Board set out the correct test in a number of places. For example, it stated:

> The panel has to decide, based on all the evidence, whether the claimant has established that he has a well-founded fear of persecution for a Convention reason. The test is whether there is a "reasonable chance" or "serious" possibility, as opposed to a "mere" possibility, that he would be persecuted if he returned to the Philippines.
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> (A.R., p. 32)

[76] The question raised by counsel for the applicant, then, is whether or not this "boilerplate" statement was outweighed by the way in which the Board actually evaluated Mr. Pacificador's claims. Thus, the Court has been asked to decide whether the Board actually applied the correct standard of proof in practice, looking at the decision as a whole. Mr. Pacificador submits the Board strayed from the appropriate test, and in so doing improperly raised the standard of proof. The Minister, in turn, claims the Board's use of words like "would" were made in the context of deciding whether or not Mr. Pacificador met the standard of proof. They were not statements of the standard itself, but rather assessments of fact well within the Board's jurisdiction. After reading the Board's decision as a whole, I agree with the Minister.

[77] Among the examples of the incorrect formulation or application of the standard of proof quoted by the applicant are the following passages:

> However, in the very prosecution concerning the claimant's co-accused, the fact that Arturo Pacificador and others were ultimately acquitted of all charges makes it very difficult for the claimant to continue to maintain that if he faces trial in the Philippines it <u>will</u> be politically motivated and without due process. (A.R., p. 23)
>
> The question, in this case, then becomes whether the claimant <u>would</u> suffer a similar fate if he were to be detained pending trial in the Philippines. <u>Would</u> the claimant suffer persecution, as have other accused, by being subjected to an unacceptable delay, while in detention, in having his trial started and concluded? (A.R., p. 34)
>
> There is no persuasive evidence that the accused in the Javier murder have been subjected to torture or to any sort of systematic or ongoing mistreatment such that the panel should believe <u>that there is a serious possibility or reasonable chance that this is the inevitable fate of the claimant</u>. (A.R., p. 38)
>
> (Emphasis added)

[78] While I am concerned about the Board's use of the words "will", "would" and "inevitable", I think the Court must look at these excerpts in the context of the Board's total analysis. Throughout its reasons, it repeatedly addressed whether or not Mr. Pacificador's claim met the standard of a "reasonable chance" or "serious possibility". As Justice Phelan noted in *Mutangadura v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 298:

> [9]…One cannot become fixated on these words or engage in matters of semantics without considering the whole of the decision and the context within which those words appear. (See *Sivagurunathan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 432)
>
> [10] As I read these words, they refer to whether the Applicant has met the legal criterion under s. 96, not a definition of the legal test to be applied under that provision. This view is reinforced by the fact that the Board refers to the legal test under s. 96 later in the judgment.

[79] In this case, the Board did not simply state the proper test once, as a formality. It repeatedly addressed whether or not there was a "reasonable chance" or "serious" possibility that Mr. Pacificador would be subject to the risks he alleged in his application. I agree with the Minister that the alleged examples of the tribunal's misstatements of the standard of proof as suggested by the applicant do not purport to be, nor are they, statements of the legal test or definition to be met under section 96 of the *IRPA*, but merely relate to findings of fact as to whether the applicant met the legal criterion under section 96. In other cases, the wording used by the Board is not meant to be a statement of the legal test, but is rather best understood as a response to allegations made by the applicant. As a result, I would dismiss this ground of review.

[80] For all of these reasons, I am therefore of the view that this application for judicial review should be granted. The Board erred in assessing whether the applicant has a well-founded fear of persecution by limiting the comparison of the applicant to that of his father and, to some extent, that of the other accused in the Javier murder trial. The Board also made a reviewable error in finding that the applicant does not face risk due to a lengthy and arbitrary detention, and that there is not a serious possibility or reasonable chance he will be tortured or mistreated.

[81] The applicant sought a specific direction from this Court, asking that the matter be sent back to the Board for redetermination on the basis that the applicant has a well-founded fear of persecution in his country of nationality for reasons of his political opinion, or that he is a person in need of protection. While I sympathize with the applicant and recognize that his refugee claim has been pending and unresolved for some 20 years through no fault of his own, I have not been convinced that it would be appropriate in the circumstances of this case to direct the Board to come to a specific conclusion. I would simply reiterate that a newly constituted Board shall pay close attention to these reasons and to the decisions of the Ontario Court of Appeal and of Madam Justice Heneghan from this Court. I refrain from speculating as to what the result might be once the inquiry into the objective basis of the applicant's fear has been broadened to take into account a proper comparator group.

[82] Neither party suggested the certification of a serious question in this proceeding and none will be certified.

ORDER

THIS COURT ORDERS that the application for judicial review is allowed, the Board decision is set aside and the matter is referred back to a different panel of the Board for redetermination.

"Yves de Montigny"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4383-06
STYLE OF CAUSE:	RODOLFO GUERRERO PACIFICADOR v. MCI
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 24, 2007
REASONS FOR ORDER AND ORDER:	DE MONTIGNY, J.
DATED:	October 15th 2007

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