Date: 20031212

Docket: IMM-4057-02

Citation: 2003 FC 1462

CALGARY, Alberta, Friday, the 12th day of December, 2003.

Present: The Honourable Madam Justice Heneghan

BETWEEN:

RODOLFO GUERRERO PACIFICADOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Rodolfo Guerrero Pacificador (the "Applicant") seeks judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA" or "the Act"), of a decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board"), dated July 19, 2002. In its decision, the Board found that the Applicant was not a Convention refugee. The Applicant seeks an order setting aside the Board's decision and referring the claim back to the Board for redetermination with such directions as this Court considers appropriate.

FACTS

[2] The Applicant is a citizen of the Philippines. He left that country on March 15, 1986. On September 29, 1987, he claimed Convention refugee status in Canada on the grounds of political affiliation and membership in a particular social group, that is a family with known political affiliations. He is a member of a prominent political family in the Antique province of the Philippines. The Applicant was also politically active himself in Antique. The Applicant's father, Arturo Pacificador, once held various high profile government positions under the Marcos regime. The Applicant's family was politically allied with Marcos.

[3] National presidential elections took place in February 1986 in the Philippines. The Applicant and his family supported President Ferdinand Marcos and the Javier family, political rivals in Antique politics, supported Corazon Aquino. Later that year, Corazon Aquino was declared President.

[4] On February 11, 1986 Evelio Javier, the brother of Ezekiel Javier, the governor of Antique province, was murdered. The Applicant has been charged with this murder. His father and several others are also accused of being involved in the murder. The Applicant has also been accused of four charges of attempted murder and one charge of "frustrated" murder, in connection with the same incident.

[5] The Applicant is now wanted in the Philippines in connection with that murder. He attests that he is innocent of the charges. He claims that the prosecution is really a politically motivated, directed by his political rivals. He fears that he will be tortured and mistreated, detained arbitrarily and/or killed before he is tried. If a trial is held, he claims it will be politically motivated, without due process.

[6] In November 1991, the Applicant was arrested in Canada pursuant to the *Extradition Act*, R.S.C. 1985, c. E-23, then in force. In October 1992, he was ordered committed for extradition by the Ontario Court (General Division). In October 1996, the Minister of Justice ordered the Applicant surrendered by signing the warrant of surrender. On November 1, 1996, the Applicant applied to the Ontario Superior Court of Justice for *habeas corpus, certiorari*, prohibition and relief under section 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), c. 11 (the "Charter") or alternatively, to stay or prohibit his surrender pending the determination of his refugee claim.

[7] In the meantime, the Applicant underwent a hearing to see if there was a "credible basis" for his Convention refugee claim. In 1991, in a split decision, a credible basis tribunal constituted under the legislation then in force found that there was a credible basis for his claim and the claim was referred to the Board for a full hearing.

[8] Then, in 1997, the Department of Citizenship and Immigration ("CIC") issued a report alleging that the Applicant was a person described in section 19(1)(c.1) of the former *Immigration Act*, R.S.C. 1985, c. I-2 (the "former Act"), due to acts of foreign criminality. An immigration inquiry was held before the Immigration and Refugee Board, Adjudication Division. That inquiry resulted in a finding that the Applicant was inadmissible and a conditional departure order was issued. That conditional departure order was set aside in May 2001, following an application for judicial review to the Federal Court of Canada and a re-hearing was ordered. The matter was scheduled to be heard before the Immigration and Refugee Board, Immigration Division, on November 14, 2002.

[9] In February 2000, the Board began hearing the Applicant's claim. This involved multiple sittings and concluded on December 3, 2001. Counsel representing the Minister of Citizenship and Immigration (the "Minister") appeared, as did a refugee claims officer (the "RCO"). The Board's reasons for decision are dated July 19, 2002.

[10] By letter dated August 6, 2002, the Applicant forwarded the Ontario Court of Appeal decision of his warrant of surrender to the Board: *Canada (Minister of Justice)* v. *Pacificador* (2002), 60 O.R. (3d) 685 (Ont. C.A.), leave to appeal to S.C.C. refused February 20, 2003, [2002] S.C.C.A. No. 390 (QL). In this judgment, the provincial appellate court set aside the lower court decision of Justice Dambrot of the Ontario Superior Court of Justice (see reasons: (1999), 60 C.R.R. (2d) 126 and final decision, [1999] O.J. No. 3866 (QL)), and the Minister of Justice's warrant of surrender for extradition of the Applicant was quashed. Applicant's counsel also included brief submissions in the cover letter accompanying this decision. The Applicant, through a letter dated April 16, 2002, had earlier notified the Board that the oral argument had concluded in his extradition appeal before the Ontario Court of Appeal, on March 19 and 20, 2002 and the Court had reserved judgment. The Applicant requested that the Board postpone from making a decision until the Ontario Court of Appeal had rendered its judgment.

[11] By letter dated August 12, 2002, a Case Officer of the Board informed the Applicant that the Board had rendered and signed its reasons for decision on July 19, 2002. A Notice of Decision was signed August 8, 2002 and sent to the Applicant, along with the reasons for decision, dated July 19, 2002. This letter referred to the Ontario Court of Appeal decision as "unsolicited additional documentation" that was not brought to the Board's attention prior to its decision, and therefore, the Board refused to accept it and returned the August 6, 2002 letter and Ontario Court of Appeal decision to the Applicant.

The Board's Decision

[12] The Board found that Article 1F(b) of the *Convention Relating to the Status of Refugees* did not apply to exclude the Applicant from refugee protection. The Board found that there was no serious reason to consider that the Applicant had committed a serious, non-political crime. Referring to *Canada (Minister of Employment and Immigration)* v. *Satiacum* (1989), 99 N.R. 171 (F.C.A.), the Board held that the assumption that a foreign judicial system was fair and independent did not currently apply to the Philippines.

[13] The Board concluded, at page 6 of its reasons, that the prosecution's case in the Philippines is "badly tainted by corruption and interference, and that it is an inconsistent, implausible shambles". The Board found that the Minister had not discharged his onus of showing that there were reasonable grounds to believe that the Applicant had committed a serious non-political crime and should be excluded from seeking Convention refugee protection in Canada pursuant to Article 1F(b). The Board went on to state, at page 10 of its reasons, that all the "...extraordinary shenanigans that have gone on with the prosecution of the Javier case... go beyond discrete indiscretions or illegalities by individual participants spoken of in Satiacum, and by the standard reliable country sources... ".

[14] The Board then found that the Applicant did not have a well-founded, objective basis to fear persecution in the Philippines. It based this conclusion on the fact that, despite documentary evidence that the judicial system in the Philippines is corrupt and unfair and there exists torture and police brutality, the evidence also suggested that rich and influential people benefit from such corruption and are not the victims of such abuses. Since the Applicant fit the profile of a wealthy and influential man, the Board found that he would not be "punished" as per the documentary evidence. The Board concluded as follows at page 14 of its reasons:

The claimant has testified that he is also rich and influential and is the son of Arturo Pacificador, who has apparently been able to use wealth and influence to avoid beating, torture, harsh prison conditions, unfair conviction and death. We are therefore not persuaded that there is a serious possibility that such human rights abuses would happen to the claimant if he were to return to the Philippines either.

[15] The Board also based its final conclusion on the fact that a similarly situated person to the Applicant, the Applicant's father, had not been tortured, mistreated, detained arbitrarily and/or incommunicado, and/or killed, while awaiting trial for the same crime.

[16] As for whether there was a serious possibility that the Applicant would be arbitrarily detained or detained "incommunicado", the Board concluded that although there was a "great deal of room to doubt whether the claimant would actually get a speedy trial if he were to return to the Philippines", his detention would not be arbitrary or incommunicado, considering that the Javier case "is moving again" and considering the fact that the Applicant's father "has had bail hearings...".

APPLICANT'S SUBMISSIONS

[17] The Applicant presents four arguments. First, he argues that the Board breached a principle of natural justice by not responding to his request to suspend its deliberations until the Ontario Court of Appeal ("OCA") decision concerning his extradition was delivered. He says that the Board's characterization of the OCA decision as "unsolicited" and without notice is perverse. By failing to respond to his request to defer rendering a decision until the OCA decision had been released, and in the absence of any specific objection from the Minister, the Applicant argues that the Board breached a principle of natural justice.

[18] The Applicant says that all parties to the hearing, including the Minister's representative, the RCO and the Board members, agreed at a pre-hearing conference that his extradition case, then pending in the Ontario Superior Court of Justice, was relevant. At this pre-hearing conference, the RCO recorded that the Minister's representative and the Applicant's counsel would advise the Board about the outcome of that proceeding. Further, the Applicant argues that the Minister's representative submitted Dambrot J.'s decision into evidence at the hearing before the Board and relied on this lower court judgment.

[19] While the Board had reserved its decision, the Applicant, through a letter dated April 16, 2002, notified the Board that the oral argument had concluded on March 19 and 20, 2002 in his extradition appeal before the OCA and that judgment had been reserved. The Applicant requested that the Board postpone from making a decision until the OCA had rendered its judgment.

[20] The Applicant deposes that neither Minister's representative nor the Board responded to this request. The Board made its decision without acknowledging or dealing with his April 16, 2002 request. The Applicant says that his April 16

request must be viewed in context. The Board had previously suspended its deliberations and reopened the hearing, on its own motion, to deal with new evidence. This was concerning the Applicant's father's acquittal in the "Pangpang" case. In such a context, the Applicant says that his request was not inappropriate or unreasonable.

[21] The Applicant argues that while the Board is not obligated to grant a request for a postponement, it is a breach of natural justice to fail to deal with such request. In support of this proposition, he relies on *Pinkrah* v. *Canada (Minister of Employment and Immigration)* (1994), 79 F.T.R. 4; *Niedzialkowski* v. *Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 459 (C.A.)(QL); *Iqbal* v. *Canada (Minister of Citizenship and Immigration)* (1996), 114 F.T.R. 10; and *Acquah* v. *Canada (Minister of Employment and Immigration)* (1994), 83 F.T.R. 68.

[22] Second, the Applicant argues that the Board failed to consider post-hearing affidavit evidence. The last sitting of the Board hearing was on December 3, 2001. Such sitting was convened at the request of the Board to respond to new information that was possibly relevant to the Applicant's fear of persecution in the Philippines. This information related to the acquittal of the Applicant's father of an unrelated murder charge. The Board wanted to hear evidence on whether the acquittal meant that justice might be available to the Applicant if he was returned to the Philippines.

[23] Subsequently, the Applicant wrote the Board on March 28, 2002 stating that he wished to submit further material and requested that the Board suspend its deliberations for three weeks to allow him to submit the additional evidence.

[24] On April 16, 2002, the Applicant submitted an affidavit where he gave further evidence about the Pangpang case, in which his father was acquitted. This affidavit was accompanied by the letter requesting that the Board not render its decision prior to the OCA decision.

[25] In this affidavit, the Applicant gave evidence as to how the hearing before the Supreme Court of the Philippines had been unfair, particularly in relation to the partiality of the judge hearing the case. The judge dismissed the appeal against the Applicant's father's co-accused. The Tribunal Record indicates that the Board received this material and marked the affidavit as Exhibit "C-9" to the hearing.

[26] The Applicant says that a refugee claimant has a right to submit post-hearing evidence up until a decision is rendered by the Board and, subject to the relevance of such evidence, is entitled to have it considered by the Board: *Yushchuck* v. *Canada (Minister of Employment and Immigration)* (1994), 83 F.T.R. 146. Further, he says that there is no indication that the Board considered the post-hearing evidence, despite the statement in the Board's reasons that it had considered all of the evidence. The Applicant argues that an inference can be drawn that such evidence was not considered from the failure of the Board to mention that post-hearing evidence was received. Here, he relies on *Nadarajah* v. *Canada (Minister of Employment and Immigration)* (1993), 151 N.R. 383 (F.C.A.); *Barakat* v. *Canada (Secretary of State)*, [1994] F.C.J. No. 601 (T.D.)(QL) and *Mladenov* v. *Canada (Minister of Employment and Immigration)* (1994), 74 F.T.R. 161.

[27] The Applicant submits that the issue of the fairness of the Philippines justice system was central to the Board's ultimate finding against him, that is, that "rich and influential" people are not harmed by an unfair Philippines justice system. The Board did not discuss or acknowledge the post-hearing evidence. The Applicant relies on *Cepeda-Gutierrez* v. *Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 and *Sinko* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1181(T.D.)(QL), where this court held that if the Board refers in some detail to evidence that supports its finding against an applicant, but is silent as to evidence which contradicts this finding, then an inference can be drawn that the evidence was ignored.

[28] In this case, the Applicant says that the Board failed to acknowledge his post-hearing evidence which contradicted its finding that justice was available to the Applicant in the Philippines. Applying *Cepeda-Gutierrez, supra,* it should be inferred that the post-hearing evidence was ignored.

[29] Third, the Applicant argues that the Board made a number of internally inconsistent and perverse findings of fact. He refers to the Board's conclusions that the prosecution's case in the Philippines appears rife with corruption, including bribery and interference by political rivals. The Board found that the Minister's representative did not attempt to "refute or discredit" the evidence of such corruption "in any significant way".

[30] The Applicant submits that there are more problems with the Board's findings of fact. The Applicant refers to the fact that the Board did not mention that his co-accused had been held in pre-trail custody for a decade and a half due to an *ex parte* "restraining order", issued by the Supreme Court of the Philippines, halting the Javier trial of the Applicant's co-accused for a decade was only lifted due to pressure exerted by the Ontario Court of Justice in the Applicant's extradition case. Further, there was evidence before the Board that despite assurances to the contrary at the time of surrender, the Applicant's father was only provided with a bail hearing in 2000, some five years after his surrender in 1995.

[31] The Applicant argues that the Board's reasoning was internally contradictory and perverse, in the sense that the Board found that there was no serious reason to consider he had committed the offences for which he is charged, however, the Board also found that having to undergo a corrupt, politically motivated prosecution and lengthy detention for the offences was not persecution. He submits, relying on *Kicheva* v. *Canada (Minister of Employment and Immigration)* (1993), 71 F.T.R. 159 and Hathaway, *The Law of Refugee Status* (Markham: Butterworths, 1991) at 169-79, that being subjected to corrupt prosecution and a significant period of unjustified deprivation of liberty is inherently persecutory.

[32] The Applicant also says that any influence that his father may have been able to exert on the judicial system has not prevented him from remaining in custody. Consequently, it was perverse for the Board to search for more hallmarks of persecution, above and beyond the prospect of the Applicant's unjustified detention.

[33] The Applicant relies on *R.* v. *Storrey*, [1990] 1 S.C.R. 241 for the principle under Canadian law that a detention will be regarded as "arbitrary" and in violation of section 9 of the Charter in the absence of reasonable grounds to believe that an offence was committed.

[34] Further, the Applicant says that the Board's conclusion that the "Javier case is moving again" contradicts evidence before it in this regard. The trial proceeded for only three days in the year 2001 and other hearing dates were postponed for various reasons.

[35] The Applicant also says that the Board did not acknowledge that a possible reason why his father had not been abused in custody was the fact that the Philippines authorities knew such evidence would jeopardize the chances that the Applicant would be returned to the Philippines. The Applicant argues that this is a perverse finding of fact, particularly in light of the Board's acknowledgment that there are serious concerns about torture in the Philippines and that several co-accused in the Javier prosecution, other than the Applicant's father, had been tortured.

[36] The Applicant submits that the Board misinterpreted evidence that suggested that influential people can obtain justice in the Philippines. He says that the evidence did not imply that is *always* the case, but only that this sometimes occurs. Further, the Applicant says that the Board failed to acknowledge his testimony that while his family is relatively rich and influential, his political rivals, specifically the Javier family, are "richer" and "more influential" and more capable of exerting influence over the courts.

[37] The Applicant submits that the standard of proof to establish an objective bases for a well-founded fear of persecution is not high, simply that there is a reasonable chance or serious possibility of persecution: *Adjei* v. *Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (C.A.). He says that it cannot reasonably be found that he does not have at least a "serious possibility" of being tortured, arbitrarily detained or subjected to an unfair trial.

[38] The Applicant argues that the Board did not properly consider that there was at least a serious possibility that he could be extrajudicially killed upon returning to the Philippines, either prior to detention or during detention. He refers to his testimony that Ezekiel Javier threatened one of his co-accused with a cocked pistol and that he has made a public statement that he will personally meet the Applicant at the airport in the Philippines to serve his warrant for arrest.

[39] The Applicant also says that the courts have recognized that people who are persecuted because of their opposition to corruption are Convention refugees based on their political opinion: *Klinko* v. *Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327 (C.A.).

[40] The Applicant's fourth and final argument is that the concept of refugee status and extradition are related and should be interpreted consistently. In this regard, he relies on Hathaway, *supra,* at. 221. The OCA decided that returning the Applicant to the Philippines would result in violation of the Applicant's fundamental Charter rights. The Applicant says that the term "persecution" in refugee law is properly defined as a breach of a fundamental human right.

[41] The OCA decision and the Board decision cannot be distinguished on the basis of different tests in two forums. The Applicant here relies on *Ward* v. *Canada (Attorney General)*, [1993] 2 S.C.R. 689.

[42] The Applicant submits that the OCA's reasoning on the Charter issues involved in sending the Applicant back to the Philippines is "worthy of deference" by this Court. He says it would be "inappropriate" in these circumstances to allow the conflicting Board decision to stand, as the OCA's order that the Applicant cannot be extradited to the Philippines will be frustrated.

[43] The Applicant relies on the OCA decision to support his submission that he would face arbitrary detention and would not attain "justice" due to his privileged background. He says that the reasoning of the OCA is to pe preferred to that of the Board.

[44] The Applicant submits that on judicial review an applicant need only show that the Board's errors *might* have affected their ultimate finding. Here he relies on *Pathmanathan* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 641 (T.D.) (QL) and *Fahiye* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 242 (C.A.) (QL).

RESPONDENT'S SUBMISSIONS

[45] The Respondent submits that the Board did not breach the rules of natural justice in failing to respond to the Applicant's April 16, 2002 letter. First, the Respondent says that Applicant's counsel took the position at the hearing that the findings of fact of Dambrot J., at the Ontario Court of Justice, should be given little or no weight by the Board because the extradition process is substantively different from the refugee determination process. The Respondent says that the Board was obviously of the same view, as it did not rely on or mention the Ontario Court of Justice decision in its reasons.

[46] The Respondent says that it is well-established that a tribunal has the power to control its own procedure, subject only to limitations found at common law or in legislation: *Prassad* v. *Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 and *Fishing Vessel Owner's Association of B.C. et al.* v. *Canada* (1985), 57 N.R. 376 (F.C.A.). Further, the Board is mandated to deal expeditiously with all claims brought before it: section 68(2) of the former Act.

[47] The Respondent argues that the Applicant should have made his request for the Board do suspend its deliberations, pending the decision of the OCA, by way of motion pursuant to Rule 28 of the *Convention Refugee Determination Division Rules*, SOR/93-45 (the "CRDD Rules"). The Respondent also relies on *Salinas* v. *Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 247 (C.A.) and *Lawal* v. *Canada (Minister of Employment and Immigration)*, [1991] 2 F.C. 404 (C.A.), in support of the position that the only way for the Board to consider additional submissions or evidence (beyond those for which it could take judicial notice) provided post-hearing would be to reconvene the hearing on a motion brought in the appropriate manner.

[48] The Applicant did not bring a motion pursuant to Rule 28 of the CRDD Rules. Further, the Respondent says that the Applicant's argument that Rules 13 and 27 of the CRDD Rules, regarding postponements and adjournments, require only a written request, and not an actual motion needed, misinterprets those Rules. Neither Rule applied to the Applicant's situation in making the April 16, 2002 request.

[49] The Respondent also argues that the onus was on the Applicant to make an application pursuant to Rule 40 of the CRDD Rules to remedy non-compliance with the Rules. The Respondent relies on *Aguilar-Osorno* v. *Canada (Minister of Citizenship and Immigration)* (1997), 139 F.T.R. 22, to support its position that there was no breach of natural justice by the Board in rendering its decision without first communicating with counsel. There was no "onus" on the Board to "respond" to counsel's request.

[50] The Respondent argues that the Board's failure to refer specially to the post-hearing evidence in its reasons is in not a reveiwable error. The Board is presumed to have weighed and considered all the evidence submitted unless there are valid reasons to rebut this presumption. In this regard, the Respondent relies on *Hassan* v. *Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.) and *Florea* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (C.A.)(QL). In the present case, the Board stated in its reasons that it had considered all the evidence before it and there is no reason to question this statement.

[51] Further, the Respondent says that the post-hearing evidence was not material, in that it did not contain any information which would have altered the Board's decision. This evidence only repeated what the Applicant had already

presented at the hearing. The Respondent says that this evidence was not the kind of evidence referred to in *Cepeda-Gutierrez, supra*, in that it did not contradict the Board's ultimate conclusion.

[52] The Respondent takes the alternative position that even if the Applicant's post-hearing evidence did not reach the Board, the cases of *Vairavanathan* v. *Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 397 (F.C.T.D.) and *Ahmad* v. *Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1740 (T.D.)(QL), state that an applicant has the duty to obtain confirmation from the relevant Board members that their submissions have actually been received. In this case, there is no evidence that the Applicant attempted to do this.

[53] The Respondent also relies on *Avci* v. *Canada (Minister of Citizenship and Immigration)* (2002), 226 F.T.R. 238, reversed on other grounds, 2003 FCA 359, to support the argument that a Board will not err in failing to consider new material where an applicant does not comply with the CRDD Rules in filing it and the new material does not add anything of significance to what the Board already had before it.

[54] The Respondent argues that the Board's findings are reasonable and there is no inconsistency between the conclusions that the Applicant does not fall within the exclusion of Article 1F(b) and that he is not a Convention refugee. The Respondent submits that a nexus must exist between the personal situation of the refugee claimant and the general situation with respect to country conditions. The Respondent says that Convention refugee status does not exist "at large" so that anyone from a country with a corrupt judicial system is automatically found to be a Convention refugee. A claimant must adduce some evidence to indicate that the violations of human rights established by the documentary evidence threaten him personally if he returns. In support of this proposition, the Respondent relies on *Sheikh* v. *Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 238 (C.A.).

[55] The Respondent submits that the Board did not err in its assessment of how the Applicant would be treated upon return by examining the circumstances of the person most similarly situated to him, that is, his father, who is charged in the same murder and who is currently being detained.

[56] The Respondent says that despite the fact that the Board accepted that the Applicant would be detained to face possible charges that were politically motivated, the Board was correct to go beyond this finding and determine whether the Applicant's detention, viewed objectively, demonstrated the basis for a well-founded fear of persecution.

[57] Concerning the Applicant's fear that he would be tortured or mistreated in detention, the Board noted that the Applicant's father had never been tortured or beaten while in detention and that there was no persuasive evidence that the Applicant's father had been intentionally worn down by harsh prison conditions.

[58] The Respondent says that the Board properly considered evidence of his father's treatment in detention to determine that the Applicant could obtain due process in the Philippines due to his status as a member of a powerful and rich family. Such conclusion is not, according to the Respondent, unreasonable and does not warrant the intervention of this court.

[59] The Respondent says that the Board, as a specialized tribunal with expertise in assessing country conditions, should be granted deference in making factual findings. Its conclusions, as a whole, are "eminently reasonable" : *Sivasamboo* v. *Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 (T.D.). Further, the Respondent says that this court should not scrutinize the Board's reasons in a "microscopic" fashion. If the finding is reasonable, then it must stand, even if this Court may have arrived at a different conclusion.

[60] The Respondent says that the Board was *functus officio* as of July 19, 2002 because this was the date that it signed its written reasons for decision. On this date, its decision was "rendered": *Tambwe-Lubemba* v. *Canada (Minister of Citizenship and Immigration)* (2000), 11 Imm. L.R. (3d) 175 (F.C.A.).

[61] The Respondent argues that the Applicant has improperly introduced the OCA decision and has argued that this court should set aside the Board's decision on the basis of the reasoning of the OCA judgment. The OCA decision was rendered after the Board's decision, in the context of a different issue and statutory scheme and on the basis of a different evidentiary and factual record. The Respondent submits that the Applicant's argument on this issue is without legal basis and also contrary to the position he took at the Board's hearing.

[62] The Respondent submits, relying on section 67(1) of the former Act, that the Board has sole and exclusive jurisdiction to hear and determine all questions of law and fact concerning Convention refugee decisions.

[63] Contrary to the Applicant's argument, the Respondent says that a finding that he is not a Convention refugee does not frustrate the OCA's ruling in the extradition case. The purpose and nature of refugee proceedings are different from extradition proceedings. Extradition is based on principles of reciprocity between states and comity: *U.S.A.* v. *Cobb*, [2001] 1 S.C.R. 587. Further, the Respondent argues that denial of Convention refugee status does not result in extradition, nor does it, by itself, imply or result in deportation: *Arica* v. *Canada (Minister of Employment and Immigration)* (1995), 182 N.R. 392 (F.C.A.) and *Barrera* v. *Canada (Minister of Employment and Immigration)*, [1993], 2 F.C. 3 (C.A.).

ANALYSIS

[64] The Applicant argues that the Board breached the duty of procedural fairness owed to him by failing to defer its decision until he had the opportunity to provide it with the decision of the OCA, concerning his extradition case.

[65] Two issues arise in relation to the Applicant's arguments about alleged breaches of the duty of fairness. First, it is well established that the Board has control over its own procedures, including requests for postponements. The Applicant's request that the Board await the pending decision of the Ontario Court of Appeal was in the nature of a request for a postponement. The Board was not obliged to grant that request, although it may have been prudent to do so. While the Board is recognized as the trier of fact and vested with authority to apply the relevant law, it could be assisted by determinations of law, particularly findings relative to alleged Charter violations, made by a superior court, that is the Ontario Court of Appeal.

[66] The second issue arising from the Applicant's submissions in this regard is the fact that the Board had made its decision, prior to receipt of the Ontario Court of Appeal decision. The reasons were signed by the Board on July 19, 2002 and the Applicant delivered the decision of the Ontario Court of Appeal, dated August 1, 2002, to the Board on August 6, 2002. According to the decision of the Federal Court of Appeal in *Tambwe-Lubemba, supra,* a decision is "rendered" by the Board on the date that it signs its reasons. In that case, the Federal Court of Appeal found that the Board was *functus officio* after its reasons were signed. I conclude that the Board had no authority to address the decision of the Ontario Court of Appeal upon receipt of those reasons on August 6, 2002.

[67] The Respondent adopts a highly technical approach to the failure of the Applicant to file a written motion before the Board for its consideration of the leading decision of the Ontario Court of Appeal. That approach was not useful. In my opinion, in certain circumstances, the Board has jurisdiction to act upon an informal motion for delay, exercising control over its process. However, that issue is not determinative of the present application and requires no further discussion.

[68] The Applicant also argues that the Board erred in failing to consider the post hearing evidence, that is the affidavit he submitted on April 16, 2002 with further evidence about the trial of his father in relation to the Pangpang murder trial.

[69] In my opinion, the Applicant has failed to show that this evidence was not considered by the Board. Pursuant to *Hassan, supra* and *Florea, supra*, the fact that the Board did not refer to every piece of evidence before it does not mean that it did not take it into consideration. A Board is presumed to have weighed and considered all the evidence presented, unless the contrary is shown. An inference that the post-hearing affidavit evidence was not considered due to the Board's failure to refer to it in its reasons, as described in *Cepeda-Guiterrez, supra,* does not arise in this case because the affidavit evidence simply elaborated on what the Applicant had already presented.

[70] The third argument raised by the Applicant concerns the substance of the Board's decision, that he had not established an objective basis for his claim. The Board explicitly based this conclusion on its finding that, notwithstanding the fact that the judicial system in the Philippines is corrupt, unfair and marked by torture and police brutality, there was other evidence to suggest that persons of wealth and influence could manipulate that corrupt judicial system to their benefit. The Board found that the Applicant fell within that group of persons who could avoid abusive treatment by exercising his power, influence and wealth.

[71] The Applicant submits that this is a perverse finding of fact that undermines the Board's ultimate conclusion that he had failed to establish an objective basis for his claim. He says that, pursuant to *Adjei, supra,* the burden of establishing an objective basis for a Convention refugee status is not high and he is required to show only that there is a reasonable chance or serious likelihood of persecution.

[72] In *Ward, supra,* the Supreme Court of Canada ruled that a person making a claim for Convention refugee status bears the burden of establishing both an objective and subjective basis for the claim. The Board's decision is to be grounded in the evidence. The Board's factual findings are open to review if they do not meet the standard set out in section 18.1(4)(d) of the *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, as follows:

(4) The Trial Division may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises par la Section de première instance si elle est convaincue que l'office fédéral, selon le cas_:
...(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	...
...	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
	...

[73] In the present case, I find that the Board's conclusion that the Applicant would not face an objectively well-founded fear of persecution, because he appeared to be a person who could use a corrupt judicial system to his benefit, is perverse. The Board found that the judicial system of the Philippines is corrupt, as a whole. It also went further to find that several aspects of that state's prosecution against this Applicant were tainted with corruption and interference, including bribery and coercion of witnesses, and politically motivated pressures.

[74] The Respondent argues that the Applicant must show that he personally will face persecution, in view of the documentary evidence concerning corruption of the judicial system in the Philippines. In this regard, the Respondent relies on *Sheikh, supra*.

[75] In my opinion, this argument must give way in favour of the reasoning of the Federal Court of Appeal in *Salibian v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 250 (C.A.) where Justice Décary wrote, as follows, at paragraphs 16-19:

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.

It can be said in light of earlier decisions by this Court on claims to Convention refugee status that

(1) the applicant does not have to show that he had himself been persecuted in the past or would himself be persecuted in the future;

(2) the applicant can show that the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged;

...

...and I adopt this description of the applicable law to be found at the end of the aforementioned article:

In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is ***usually*** the **treatment afforded similarly situated persons** in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

In the case at bar the Refugee Division misunderstood the nature of the burden the applicant had to meet and dismissed his application on the basis of a lack of evidence of personal persecution in the past. This conclusion is a twofold error: in order to claim Convention refugee status, there is no need to show either that the persecution was personal or that there had been persecution in the past.

[Emphasis added]

[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.

[77] Rather, the Board should have considered the objective basis of the Applicant's fear of persecution relative to his membership in a group consisting of persons in the Philippines who are prosecuted for political motives and whose prosecution appears to be tainted by corruption.

[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.

[79] Finally, I turn to the fourth argument raised by the Applicant, that is the relationship between the extradition process and an affected person's opposition to that process, and the determination of a Convention refugee claim, particularly when issues of Charter rights are raised. The Applicant speaks of the possible frustration of a successful challenge to an extradition warrant if that challenge is not considered by a Board in determining a claim for Convention refugee status.

[80] In broad terms, the Respondent takes the position that there are two different proceedings, governed by different statutory regimes and addressing different purposes.

[81] Extradition is recognized as a particular form of co-operation between states regarding the enforcement of criminal law. In its decision, the Ontario Court of Appeal said the following at page 705:

...Extradition is based upon principles of comity and mutual cooperation and respect between states. Extradition plays a vital role in the international community's effort to fight crime and to ensure those accused of serious wrongdoing are brought to trial. On the other hand, these important values are subject to the rights guaranteed by the Charter. Where an individual establishes that he or she would face a situation that would be "simply unacceptable" or that would "shock the conscience", a s. 7 claim has been established and a Ministerial surrender order must be set aside.

[82] In the present case, the Board was aware of the on-going extradition proceedings. That was part of the factual material submitted to it. However, the OCA decision was not before the Board when it made its decision, and it was evidently, therefore, not a basis for its decision concerning the Applicant's claim for Convention refugee status. Moreover, it is not the basis upon which I have found that the Board erred in its decision. The existence of extradition proceedings,

including a claim for protection of Charter rights before courts of competent jurisdiction, may prove to be relevant evidence in other cases for determination of Convention refugee status. Any decisions made relative to such evidence will be amenable to judicial review on the grounds provided in the applicable law.

[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.

[84] The Applicant submitted the following questions for certification:

1. Is a decision by a Canadian court not to permit extradition due to violation of human rights relevant to consideration of refugee status?

2. Absence evidence of guilt, does lengthy pretrial detention in a corrupt criminal prosecution, interfered with by political rivals, afford a basis for a well-founded fear of persecution?

[85] The Respondent did not submit a question for certification and objects to the proposed questions for certification. The Respondent says that the first question is not one of general importance and that this question would not be determinative of the issue raised in this case, as the extradition decision was not relied on by the Board as a basis for its decision and the appellate level of that proceeding was not before the Board when it rendered its decision. Regarding the second question, the Respondent submits that this question is quite specific to the facts of this case and improperly assumes the "absence of guilt" of an individual charged with a crime in a foreign jurisdiction. The Respondent submits that this question does not raise a serious question of general importance and further, does not deal with an issue arising from the Board's findings in this case.

[86] In my opinion, these objections have merit. In *Canada (Minister of Citizenship and Immigration)* v. *Liyanagamage* (1994), 176 N.R. 4 (F.C.A.), the Federal Court of Appeal held that a question should be certified when it transcends the interests of the parties to a particular case and raises issues of broad significance or general application, as well as being determinative of the appeal. This approach has been followed by this Court: see *Samoylenko* v. *Canada* (*Minister of Citizenship and Immigration*), (1996), 116 F.T.R. 144 and *Chu* v. *Canada (Minister of Citizenship and Immigration)* (1996), 116 F.T.R. 68.

[87] In my opinion, the two questions proposed by the Applicant do not meet this test; the first would not be determinative of the appeal and the second is confined by the facts of this case. I decline to certify either of these questions and no question is certified.

ORDER

The application for judicial review is allowed and the matter remitted to a differently constituted Board for redetermination in accordance with these reasons. There is no question for certification arising.

"E. Heneghan"

J.F.C.

FEDERAL COURT

Names of Counsel and Solicitors of Record

DOCKET: IMM-4057-02

STYLE OF CAUSE: RODOLFO GUERRERO PACIFICADOR

Applicant

- and -

THE MINISTER OF CITIZENSHIP AND

IMMIGRATION

Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: June 24, 2003

REASONS FOR ORDER

AND ORDER BY: HENEGHAN J.

DATED: December 12, 2003

APPEARANCES BY: Mr. Douglas Lehrer

For the Applicant

Mr. Stephen H. Gold

Ms. Andrea Hammell

For the Respondent

SOLICITORS OF RECORD: Mr. Douglas Lehrer

Vander Vennen Lehrer

45 St. Nicholas St

Toronto, Ontario

M4Y 1W6

For the Applicant

Morris Rosenberg

Deputy Attorney General of Canada

For the Respondent

FEDERAL COURT

Date: 20031212

Docket: IMM-4057-02

BETWEEN:

RODOLFO GUERRERO PACIFICADOR

Applicant

- and -

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER