

**Date: 20080625**

**Docket: IMM-3276-07**

**Citation: 2008 FC 804**

**Ottawa, Ontario, June 25, 2008**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**LEMIE JANE GADDI PACIA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

*Background*

[1] The applicant seeks judicial review of a decision of an Immigration Officer, dated June 19, 2007, that there were insufficient humanitarian and compassionate considerations to allow the applicant to apply for permanent residence from within Canada.

[2] Ms. Pacia is a citizen of the Philippines who entered Canada on a temporary resident visa in September 2002, ostensibly to visit a friend. That permit was extended to March 6, 2003. In

September 2003, Ms. Pacia was caught trying to enter the United States illegally and barred from entering that country for 20 years. She returned to Canada without a passport, but was released from detention on a cash bond and ordered to purchase her own tickets to leave Canada by September 23, 2003. She failed to present herself to immigration officers to confirm her departure, but instead applied for an extension of her visa. The application was denied.

[3] A claim for refugee status was submitted in February 2004 and deemed abandoned on June 11, 2004. After Ms. Pacia failed to report for a pre-removal interview, a warrant for her arrest was issued in February 2006.

[4] Ms. Pacia applied for a waiver on humanitarian and compassionate (H&C) grounds and a Pre-removal Risk Assessment (PRRA). Leave was denied in the PRRA on November 14, 2007. An application for review of a refusal to defer removal was dismissed on May 21, 2008: *Pacia v. Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FC 629, [2008] F.C.J. No. 788. This application is for judicial review of the remaining decision, that of refusing the H&C waiver.

#### *Impugned decision*

[5] The Officer assessed Ms. Pacia's application on the grounds of risk if returned and hardship based on her establishment in Canada, and found that neither warranted granting the exemption. The Officer found that state protection was reasonably available in the Philippines.

*Issues*

[6] The applicant submitted prior to the hearing that the Officer's finding of state protection was unreasonable as the reforms noted in support are shown in the evidence not to be effective. At the hearing, however, she opted not to pursue that argument in light of the recent determination by the Federal Court of Appeal that adequacy, rather than effectiveness, is the test: *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399.

[7] The applicant asserts that the Officer erred by applying the test for risk as set out in sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), which apply to refugees or persons in need of protection and pre-removal risk assessments, as opposed to that appropriate for assessment under the humanitarian and compassionate consideration provision of section 25.

*Standard of review*

[8] The selection of the appropriate legal test against which to assess the facts of a specific application is a question of pure law and interpretation of statute and jurisprudence, separate from specific facts or areas of expertise of the tribunal. It is, thus, reviewable on the higher correctness standard.

*Analysis*

[9] The applicant submits that the Officer erred in finding that her return to the Philippines would not constitute undue, disproportionate or undeserved hardship as she would not be at risk in that country. In coming to this conclusion, she contends, the Officer applied the higher test appropriate for the application of sections 96 and 97 rather than the lower threshold of section 25.

[10] This application will be allowed and returned to the Officer for reconsideration on the question of risk alone. The instant case is distinguishable from that of *El Doukhi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1464, 304 F.T.R. 266, cited by the respondent, where it was clear from the decision that the Officer was aware of and applied the lower threshold to determine whether the risk claimed amounted to undue, disproportionate or undeserved hardship.

[11] The Officer considering Ms. Pacia's H&C application missed what Justice Johanne Gauthier referred to as the 'subtle difference' between the two assessments of risk factors: *Melchor v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327, [2004] F.C.J. No. 1600. The conclusion of her analysis is illustrative of this lapse:

Having considered the evidence in its entirety, I find that I am not satisfied that if the applicant returns to the Philippines she will personally be subjected to a risk to her life or to a risk to the security of the person. Consequently, I find, taking into account the applicant's personal circumstances, evidence, current country conditions and the availability of state protection that the hardships associated with returning to the Philippines do not constitute unusual and undeserved or disproportionate hardship.

[12] A risk to life or security of the person is the test applicable in the context of sections 96 and 97. Undue, undeserved or disproportionate hardship, even where caused by risk, is the focus of the correct test for section 25 analyses. The Officer's error lies in having undertaken an analysis under the former test and found against the applicant, as a direct consequence, under the latter.

[13] There will be cases in which this subtle distinction is immaterial, for example where the Officer finds after conducting an analysis under sections 96 and 97 that there was no evidence of risk or that the allegations of risk lacked credibility. In those circumstances, it would not be necessary to consider whether the alleged risk would cause hardship. But that was not the situation in this instance. The Officer accepted the applicant's account of a long-standing dispute in her community and threats of harm. The finding that protection was available to the applicant does not address the question whether she would encounter undue hardship should she be required to avail herself of the state's shelter.

[14] The respondent was provided with an opportunity following the hearing to submit a question for certification. She chose not to do so and no questions will be certified.

**JUDGMENT**

**IT IS THE JUDGMENT OF THIS COURT that** this application is returned to the Immigration Officer for reconsideration of the question of hardship based on the risk that the applicant may face upon return to the Philippines. No questions are certified.

“Richard G. Mosley”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3276-07

**STYLE OF CAUSE:** LEMIE JANE GADDI PACIA

AND

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** June 18, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** MOSLEY J.

**DATED:** June 25, 2008

**APPEARANCES:**

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