Federal Court  Cour fédérale

Date: 20180403

Docket: IMM-5135-15

Citation: 2018 FC 123

Ottawa, Ontario, April 3, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

I.P.P. AND OTHERS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued February 5, 2018)

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act or *IRPA*], for judicial review of the decision of the Refugee Protection Division [RPD or Board] of the Immigration and Refugee Board of Canada [IRB], dated October 14, 2015 [Decision], which refused the Applicants' applications to be deemed Convention refugees or persons in need of protection under ss 96 and 97 of the Act. In addition

to ordinary administrative law remedies, the Applicants also request extraordinary remedies under s 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*], for alleged violations of their *Charter* rights.

II. BACKGROUND

[2] The Applicants are an extended family of twenty-four Mexican citizens. Over the course of 2007 and 2008, they arrived in Canada in separate groups and made claims for Convention refugee status.

[3] The Applicants' claims were all connected to an incident in 1992 when the principal Applicant, I.P.P., witnessed the murder of a neighbour and assisted police by identifying one of the murderers. I.P.P. later discovered that a particular gang [Gang] was responsible for the murder. After the Gang's leader was jailed for the crime, the Gang engaged in a fifteen-year vendetta against I.P.P. and his family. The Applicants allege that the Gang are "*madrinas*" for the Mexican judicial police. They say that *madrinas* are criminal gangs who serve as clandestine wings of police forces in Mexico.

[4] The first group of Applicants arrived in Toronto on April 17, 2007 and a Port of Entry [POE] interview was conducted by Canadian immigration officials. The original group retained counsel and submitted their original Personal Information Forms [PIF] on May 11, 2007. The first group became dissatisfied with their original counsel and retained new counsel in March of 2008. Over the course of 2008 and 2009, I.P.P., his mother, L.M.P.A., and his cousin, C.A.A.P.,

swore several new affidavits with their new counsel to amend the PIFs submitted by their first counsel.

[5] Due to delays caused by the need to amend the Applicants' PIFs, adjournments requested by the Applicants' counsel, and the need to join different groups of claims, the Applicants' first pre-hearing conference at the RPD did not begin until July 8, 2009. Five pre-hearings were required before the Applicants began giving oral testimony on February 8, 2011. After four oral hearings in February, the RPD could not schedule another hearing until October of 2011. Seven more hearings of oral testimony concluded with the Applicants' final hearing on December 6, 2011.

[6] During the 2011 intermission in hearings, the Applicants became aware of the RPD Member's reported "zero percent acceptance rate" in refugee claims. Consequently, when hearings resumed on October 13, 2011, the Applicants made submissions to the Member requesting that he recuse himself on the basis of a reasonable apprehension of bias, delay, and because of the adverse impact that reports of his zero acceptance rate were having on the Applicants. After taking the matter under reserve, the Member declined the Applicants' request and refused to recuse himself at the next hearing on October 18, 2011.

[7] The Applicants allege that, after the Member's refusal to recuse himself, their stress levels resulting from the claim process dramatically increased. They say this stress manifested itself in several physical incidents during hearings in the fall of 2011. Consequently, the

Applicants made a renewed request for the Member to recuse himself at the October 27, 2011 hearing.

[8] As part of their post-hearing submissions in January of 2012, the Applicants again requested that the Member recuse himself. As part of this request, they submitted a report prepared by Professor Sean Rehaag which described concerns with the Member's methodology. Attached to the affidavit containing Professor Rehaag's report were copies of every refugee decision rendered by the Member between 2008 and 2010. This amounted to over six hundred pages of exhibits. The Applicants went on to make three more requests for the Member to recuse himself before the Decision was rendered on October 14, 2015.

[9] In November 2014, nearly three years after the conclusion of oral testimony, with the Decision still not rendered, the Applicants launched an Access to Information/Privacy [ATIP] request for all RPD documents related to the file.

[10] The Applicants received notification of the Decision on October 27, 2015. The Member's reasons, included with the notification, are dated October 14, 2015, which was the final day of the Member's term of appointment with the RPD.

III. DECISION UNDER REVIEW

[11] The Decision begins by acknowledging that the Applicants' claim is for refugee protection under ss 96 and 97(1) of the Act. Ultimately, the Member concludes that the

Applicants are not Convention refugees or persons in need of protection because he does not find their story credible.

A. *Allegations*

[12] The first section of the Decision summarizes the basis of the Applicants' claim "as per the Original Personal Information Form" and provides a brief procedural history of the claim's progress. It recounts the Applicants' allegation that their persecution all stems from I.P.P.'s having witnessed a murder committed by persons he later learned were members of the Gang, and his involvement in identifying the killer. Persistent attacks that the Applicants attribute to the Gang led to the Applicants seeking refugee protection in Canada beginning in 2007.

[13] The Decision notes that the first group of Applicants to arrive in Canada submitted a joint narrative under the supervision of a lawyer. The Applicants eventually changed counsel and complained that the original narrative was an inaccurate reflection of their story. The Member notes that "[v]arious 'affidavits' were filed to add extensive information to the narrative and change some of the things mentioned." The Member takes issue with the format of these amendments to the Applicants' PIF narrative but acknowledges that these problems were rectified. The Member concludes this section by stating that, over the course of 2007 and 2008, the total number of Applicants grew to twenty-six, but that three claimants later withdrew their claims.

B. *Recusal*

[14] The next section of the Decision addresses the Applicants' requests for the Member's recusal, which are characterized as being made at "various times" on "various bases." The Member states that all requests were overruled. With regard to complaints about his demeanour, the Member is confident "that with two counsels and [a Refugee Protection Officer (RPO)] constantly in the hearing room with me, none of them ever witnessed, in their opinion, any instances of inappropriate demeanour."

[15] The Member proceeds to state his reasons for overruling the Applicants' objection that a document he relied on was solicitor-client privileged and for overruling objections based on delay in the proceedings. The document in question was introduced by the Applicants to establish that their original counsel had failed to include all the details of their story in their initial PIF. The Member points out that, like the PIF, the document lacks details, and determines that the Applicants waived solicitor-client privilege by proffering the document to the RPD. The Member concludes that delays in the proceeding were a function of the large number of Applicants. This made it difficult to schedule hearings in the only Toronto hearing room large enough to accommodate the whole group. The Member discounts any evidentiary problems arising from the delay, since RPD proceedings are digitally recorded and can be consulted "if memory and written notes are not clear."

[16] The Member returns to the question of recusal with the statement that "[s]tatistics were also noted." He acknowledges media reports of his "zero percent acceptance rate" but explains

that, when one considers the countries of origin involved in the decisions, his average acceptance rate did not place him on the list of RPD members who were highly off the average. The Member points out that he is bound by the RPD Code of Conduct to decide cases on the facts and law before him and that "each case turns on its own merits." He points out that statistics alone cannot determine whether a positive or negative result was warranted. Evidently the Applicants made other objections, but the Member says he "will not repeat them."

[17] The Member then offers a lengthy rebuttal of Professor Rehaag's report. He discounts the report's value because Professor Rehaag's language "appears to be advocating for a certain viewpoint, rather than being dispassionate." Specific criticisms of the report include:

- Lack of mathematical explanation for how Professor Rehaag arrived at his statistical conclusions, including what variables were controlled for;
- Failure to analyze the decisions of other RPD members;
- Disagreement with characterising the Member's credibility findings as being based on differences between oral testimony, the PIF, Port of Entry [POE] notes, and other documentary evidence, rather than a claimant's explanation for those differences;
- Mischaracterization of the Member's approach to psychological evidence;
- Ignoring the reasonable explanation for boilerplate passages and reasoning templates in the Member's decisions; and
- Pointing out that mentioning the RPD Gender Guidelines in decisions is not a requirement, that it is more important that the Gender Guidelines be followed, and asserting that the Member's questioning of L.M.P.A. did conform to the Gender Guidelines.

[18] The Member proceeds to defend the record of his decisions in applications for judicial review in this Court. He points out that only a small portion of his decisions have been granted leave, and that it is therefore incorrect to assume that those decisions are a representative sample.

While some claimants may have lacked the resources to proceed with an application for leave, the Member is confident that Legal Aid Ontario can assist with cases that appear to be well founded. In addition, the Member points out that a small number of overturned decisions does not give rise to a reasonable apprehension of bias, particularly after *Turoczi v Canada (Citizenship and Immigration)*, 2012 FC 1423 at para 18 [*Turoczi*], where Justice Zinn accepted that the Member's "findings were straightforward applications of binding legal authorities and the relevant burden of proof…. [And that] there was very little likelihood that any member would have decided the claim differently."

[19] The Member returns to the issue of delay to note that, in addition to the scale of the proceedings mentioned earlier, the time taken to reach a decision was impeded by the Applicants' ATIP request. The Member accepts that such a request was completely proper, but states that "the file was returned from [the] ATIP with nothing in order." The Member also reiterates the availability of a digital recording of the proceedings, "so if there is something in doubt, the recording can be examined."

[20] The Member also addresses the Applicants' request for his recusal based on adverse psychological impact during the hearings. He explains that he gives little weight to the evidence of the Applicants' family therapist, [omitted], because she is not licenced to diagnose psychological conditions. The Member points out that "every precaution" was taken to accommodate the Applicants, including frequent breaks, reverse questioning, support persons being allowed to be seated next to the Applicants, not questioning over specific details of L.M.P.A.'s sexual assault, and offering to use closed circuit television to monitor the

proceedings. The Member acknowledges that I.P.P. became sick during the proceedings, but states that this was while his counsel was asking him questions. Therefore, the Member fails to see what could have been done differently.

[21] The section of the Decision dealing with recusal concludes by quoting the test for reasonable apprehension of bias espoused by Justice de Grandpré in *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369 at 394 [*Committee for Justice*]. The Member "cannot see how this test has been satisfied."

C. *Determination*

[22] The Member states that the Applicants have failed to satisfy the burden of establishing a serious possibility of persecution or the probability that they would be subjected to a danger of torture, a risk to life, or a risk of cruel and unusual treatment or punishment if they were returned to Mexico. He mentions that all of the evidence was considered in the context of the Gender Guidelines and he accepts that "the circumstances which give rise to women's fear of persecution are often unique to women."

D. *Credibility*

[23] The Member accepts the Applicants' identities as citizens of Mexico.

[24] The Member's credibility analysis starts by reiterating that he cannot find the Applicants credible. Of particular concern to the Member are discrepancies between the Applicants' oral

testimony, their PIFs, and other documentary evidence. The Member notes that amendments to the PIFs state that the Gang is a *madrina* affiliated with a Mexican police force. The Member accepts that confusion over the particular level of police to which the Gang is connected is understandable, but highlights that I.P.P.'s initial statement to immigration officials made no mention of the Gang's connection to any police force. I.P.P.'s explanation that he had not known what to say, that the immigration officers had been rude, and that he only recalled this after therapy are rejected by the Member. The Member states that he understands that a claimant can be tired from travelling, and that perfect recollection is unlikely in a spontaneous interview, but emphasizes I.P.P.'s initial statement's length. In these circumstances, the Member finds that the Gang's connection to the police "would have come to mind," and declines to accept I.P.P.'s explanation for the omission.

[25] Mention of the Gang being *madrinas* for a police force was also absent from the Applicants' original PIF narrative. The Member finds I.P.P.'s explanation that it was their original counsel who omitted these details to be unsatisfactory because counsel was a licenced lawyer. The Member notes that, when faced with the Applicants' complaint alleging improper service, their first lawyer disputed the allegations and asserted that he prepared the PIF properly. The Member finds it telling that the Applicants "did not push the matter further." Since several of the claimants relied on I.P.P.'s narrative, the Member "cannot see how all would not remember this fairly basic fact" during its preparation, and finds that "these omissions" undermine the credibility of the Applicants.

[26] The Member then deals with a "subplot… not mentioned in the original narrative" that was added in later PIF amendments. The incident in question involved a revenge murder of a member of the Gang, committed by the family of the person whose murder I.P.P. had witnessed. The Member rejects I.P.P.'s explanation that this was not clear to him at the time the original narrative was submitted. The Member reasons that the twenty-eight day deadline for submission of the PIF and narrative "is almost the entire time allowed for certain current refugee claims from start to finish." Considering the narrative's length, and its inclusion of "minute details… and other mundane things," the Member holds that "[i]t makes no sense that the original PIF narrative does not mention the second murder." I.P.P.'s own testimony was that he did not testify against the Gang leader. The Member therefore concludes that "[the Gang leader] was jailed by other means and it seem[s] strange that [the Gang] would spend all of these years seeking revenge against [I.P.P.]." Thus, the Member found that it was more likely that the story of the second murder was "concocted" and its omission from the original PIF further undermined the Applicants' credibility.

[27] Other omissions from the original PIF that the Member finds undermine the Applicants' credibility include:

- I.P.P. being drugged, abducted, beaten, and told at gunpoint that the Gang leader was still deciding what to do with him in 2000;
- An incident where someone with a gun chased I.P.P. after he stopped for gas;
- I.P.P.'s son's face being smashed into the windshield of a car during a 2003 incident involving a vehicle; and
- The Gang leader's call to I.P.P.'s father after the family's vehicle was stolen in 2007 – the incident which ostensibly prompted their flight to Canada.

[28] The Member considers I.P.P.'s explanations for the omission of each of these incidents from the original PIF narrative in turn. I.P.P.'s explanations centre on further attacks being recalled during therapy, I.P.P. assuming that the incidents were described in his mother's subsequent narrative, and his original lawyer's omission of details from the first PIF narrative. In each case, the Member "do[es] not find these explanations satisfactory."

[29] The Member also comments on "discrepancies" between I.P.P's testimony and the amended PIF that undermine the Applicants' credibility. Again, in each case, the Member considers I.P.P.'s explanation for these discrepancies, but "do[es] not find these explanations satisfactory." The discrepancies include:

- Precise details of the killers' movements during the murder I.P.P. witnessed in 1992;
- Whether assailants hit I.P.P. while attacking him in 1999, or if he was merely slashed;
- The number of assailants who attacked I.P.P. after his marriage, whether a gun was used, and whether I.P.P. lost consciousness; and
- The scope of the 2006 attack and whether it was followed by police misconduct when I.P.P. attempted to report the crime.

[30] The Member then proceeds to evaluate the testimony of I.P.P.'s family members. In each case, the Member finds discrepancies and omissions that "further undermine the [Applicants'] credibility." Again, none of the explanations the Applicants offer are found to be satisfactory. The Member's specific concerns include:

- A.A.P. not describing two 2002 attacks on him in either the handwritten statement he gave to immigration officials as part of his claim or in the original PIF;
- A.A.P's failure to give the Gang leader's name to an immigration official at the time he made his claim;

- L.M.P.A.'s failure in an interview with an immigration official to describe threats made against the family after 1992;
- The precise nature of alleged police involvement in L.M.P.A.'s rape;
- F.P.R.'s answer to an immigration official that there was no reason why he could not return to Mexico and his failure to disclose incidents that occurred after 1992;
- F.P.R.'s failure to mention being attacked on the highway in his handwritten statement to immigration officials;
- D.P.P.'s claim that she did not know about L.M.P.A.'s rape until after her arrival in Canada;
- R.P.P.'s not mentioning the kidnapping of her cousin in her original narrative filed in 2010;
- C.A.A.P.'s proffering a police report about his kidnapping that was dated 2006, rather than 2008, and admitting that in his first interview with an immigration officer he told the officer that he had only been kidnapped for one day because he did not want to contradict the report, even though it was incorrect;
- A.D.P.A.'s statement to immigration officials, both orally and in a handwritten note, that C.A.A.P. had been kidnapped and released on the same day, rather than after three days, and her admission that she also did not want to contradict the police report; and
- Why J.E.T.P. stated in his PIF that he feared the judicial police rather than the Gang.

[31] The Member also makes specific credibility findings in relation to C.A.A.P.'s testimony about his fear of persecution based on sexual orientation. The viability of La Zona Rosa, a gay district in Mexico City, is addressed. The Member takes issue with C.A.A.P.'s assertion that "there are daily dead bodies and wounded people in La Zona Rosa." While accepting that "there may be isolated incidents of gay bashing in Mexico," the Member finds it implausible that the carnage described by C.A.A.P. could go unreported. Therefore, "it was obvious [C.A.A.P.] was lying and to a somewhat fantastic degree." C.A.A.P.'s testimony that his uncle was gay, had died of AIDS, and had been attacked on account of his sexuality is also noted as being absent from his PIF. The Member reasons that if C.A.A.P. fears persecution on account of his sexual orientation,

then the possibility that C.A.A.P.'s uncle faced attacks is something he would have expected to be mentioned in C.A.A.P.'s amended PIF.

[32] While considering the Applicants' testimony, the Member specifically finds that the behaviour of D.P.P.'s husband exhibited a lack of subjective fear that undermined the Applicants' credibility. D.P.P.'s husband arrived in Canada with her, but returned to Mexico and later travelled to the United States. Considering that D.P.P.'s husband was allegedly aware that the Gang was hunting the family, the Member cannot accept that D.P.P.'s husband would return to Mexico or not "simply cross a bridge from Buffalo" to join his family's refugee claim.

[33] The Member also considers documents the Applicants submitted, but in each case either questions the documents' veracity or concludes that the documents reinforce the Member's negative credibility finding. A handwritten note the Applicants gave to their original counsel is noted to be similar to the PIF the lawyer produced. Both omit connecting the Gang to the police. Since the Applicants' argument was that their original PIF was deficient because the lawyer had ignored the document, the Member finds that this "actually reinforces the negative credibility findings made with respect to the original PIF." A news report mentioning the Gang is criticized for the timing of its admission and for the detail that the Gang was using the Applicants' abandoned house, an assertion the Applicants had never previously made. The Member notes that a police report about an alleged highway attack on F.P.R. incorrectly refers to him as a journalist, states that he lives in the wrong city, and fails to mention the Gang. And a "denunciation about recent events in Mexico" bears an official stamp on one otherwise blank

page and lacks a file number. The Member concludes that the denunciation's discrepancies call into question the authenticity of all documents submitted by the Applicants.

[34] The Member summarizes his credibility conclusions as follows:

> [47] Given the serious discrepancies, omissions and outright lies with respect to major issues, I find that the claimants were generally lacking in credibility. I simply do not believe, on a balance of probabilities, that any of the significant events that the claimants alleged happened to them actually happened. Given this finding and the irregularities with respect to several documents, I find on a balance of probabilities, that the documents presented by the claimants are forgeries.

E. *Internal Flight Alternative*

[35] The Member then determines that C.A.A.P., who also raised sexual orientation as a separate ground, has a viable Internal Flight Alternative [IFA] in the Federal District of Mexico City. The Member cites the test for finding a viable IFA set out in *Rasaratnam v Canada (Minister of Employment & Immigration)* (1991), [1992] 1 FCR 706 (CA) [*Rasaratnam*]. Under the first prong of the test, the Member reasons that, since he does "not believe any of the [Applicants'] evidence, to find in [C.A.A.P.'s] favour, [he] would have to find that all gay men in the Federal District face persecution." While acknowledging that isolated violence is possible, the Member is satisfied that the existence of a gay district in the Federal District, openly gay bars, and openly gay politicians precludes a serious possibility that C.A.A.P. will be persecuted there. The second prong analysis relies on *Canada (Minister of Citizenship and Immigration) v Ranganathan* (2000), [2001] 2 FCR 164 (CA), to establish that the threshold for showing that relocation to the proposed IFA is unreasonable is high. The Member finds that as C.A.A.P.

would “essentially be moving closer to the centre of a city he already lived in,” it is not unreasonable to expect him to avail himself of the IFA.

F. *Conclusion*

[36] The Decision concludes by stating the Member’s determination that the Applicants’ claims under s 96 of the Act fail because the Member does not believe them and finds that there is an IFA available for C.A.A.P. The Member holds that the Applicants are not persons in need of protection because there is “no other evidence that they would be subject to the harms delineated in section 97 of the [Act].”

IV. ISSUES

[37] The Applicants submit that the following are at issue in this application:

1. Did delay or a reasonable apprehension of bias in the RPD proceedings violate the Applicants’ s 7 *Charter* rights?
2. Did delay or a reasonable apprehension of bias in the RPD proceedings violate administrative law principles of natural justice?
3. Is the RPD’s credibility assessment unreasonable?
4. Is the RPD’s determination that a viable IFA exists for C.A.A.P. unreasonable?
5. What is the appropriate remedy?

V. STANDARD OF REVIEW

[38] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where

the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[39] The issues the Applicants raise with respect to delay and reasonable apprehension of bias are questions of procedural fairness. Questions of procedural fairness are reviewed under the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*].

[40] The RPD's credibility findings are findings of fact reviewable on a reasonableness standard: *Fatih v Canada (Citizenship and Immigration)*, 2012 FC 857 at para 62 [*Fatih*].

[41] The RPD's application of the IFA test and finding that a viable IFA exists for C.A.A.P. is reviewable on a reasonableness standard: *Ahmed v Canada (Citizenship and Immigration)*, 2016 FC 828 at para 8; *Estrada Lugo v Canada (Citizenship and Immigration)*, 2010 FC 170 at paras 30-31.

[42] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the

decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa*, above, at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[43] The following *Charter* provisions are relevant in this proceeding:

Rights and freedoms in Canada	**Droits et libertés au Canada**
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
…	…
Life, liberty and security of person	**Vie, liberté et sécurité**
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
…	…

Equality before and under law and equal protection and benefit of law	**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
…	…
Enforcement of guaranteed rights and freedoms	**Recours en cas d'atteinte aux droits et libertés**
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

[44] The following provisions from the Act are relevant in this proceeding:

Convention refugee	**Définition de *réfugié***
96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political	96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions

opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires

generally by other individuals in or from that country,	de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
…	…
Abandonment of proceeding	**Désistement**
168 (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.	168 (1) Chacune des sections peut prononcer le désistement dans l'affaire dont elle est saisie si elle estime que l'intéressé omet de poursuivre l'affaire, notamment par défaut de comparution, de fournir les renseignements qu'elle peut requérir ou de donner suite à ses demandes de communication.
…	…
Proceedings	**Fonctionnement**
170 The Refugee Protection Division, in any proceeding before it,	170 Dans toute affaire dont elle est saisie, la Section de la protection des réfugiés :
…	…
(b) must hold a hearing;	b) dispose de celle-ci par la tenue d'une audience;
…	…
(f) may, despite paragraph (b),	f) peut accueillir la demande

allow a claim for refugee protection without a hearing, if the Minister has not notified the Division, within the period set out in the rules of the Board, of the Minister's intention to intervene;	d'asile sans qu'une audience soit tenue si le ministre ne lui a pas, dans le délai prévu par les règles, donné avis de son intention d'intervenir;
…	…
(i) may take notice of any facts that may be judicially noticed, any other generally recognized facts and any information or opinion that is within its specialized knowledge.	i) peut admettre d'office les faits admissibles en justice et les faits généralement reconnus et les renseignements ou opinions qui sont du ressort de sa spécialisation.

[45] The following provisions of the *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules], are relevant in this application:

Specialized Knowledge	**Connaissances spécialisées**
Notice to parties	**Avis aux parties**
22 Before using any information or opinion that is within its specialized knowledge, the Division must notify the claimant or protected person and, if the Minister is present at the hearing, the Minister, and give them an opportunity to	22 Avant d'utiliser des renseignements ou des opinions qui sont du ressort de sa spécialisation, la Section en avise le demandeur d'asile ou la personne protégée et le ministre — si celui-ci est présent à l'audience — et leur donne la possibilité de faire ce qui suit :
(a) make representations on the reliability and use of the information or opinion; and	a) présenter des observations sur la fiabilité et l'utilisation du renseignement ou de l'opinion;
(b) provide evidence in support of their representations.	b) transmettre des éléments de preuve à l'appui de leurs observations.

…	…
Opportunity to explain	**Possibilité de s'expliquer**
65 (1) In determining whether a claim has been abandoned under subsection 168(1) of the Act, the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned,	65 (1) Lorsqu'elle détermine si elle prononce ou non le désistement d'une demande d'asile aux termes du paragraphe 168(1) de la Loi, la Section donne au demandeur d'asile la possibilité d'expliquer pourquoi le désistement ne devrait pas être prononcé :
(a) immediately, if the claimant is present at the proceeding and the Division considers that it is fair to do so; or	a) sur-le-champ, dans le cas où le demandeur d'asile est présent à la procédure et où la Section juge qu'il est équitable de le faire;
(b) in any other case, by way of a special hearing.	b) au cours d'une audience spéciale, dans tout autre cas.

[46] The following provisions of the *Federal Courts Act*, RSC 1985, c F-7 [*Federal Courts Act*], are relevant in this application:

Powers of Federal Court	**Pouvoirs de la Cour fédérale**
18.1 (3) On an application for judicial review, the Federal Court may	18.1 (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :
(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or	a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;
(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance	b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions

with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

VII. ARGUMENT

A. *Applicants*

(1) Section 7 *Charter* Arguments

[47] The Applicants submit that their s 7 *Charter* rights are engaged by the Decision in two ways.

[48] First, because the Decision's denial of refugee protection imposes on them a risk of persecution, a risk to their lives, and a risk of cruel and unusual treatment or torture if returned to Mexico. See *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 207 and 210 [*Singh*]. As legacy claimants whose claims were referred to the Immigration and Refugee Board before December 15, 2012, the Applicants do not enjoy a right of appeal to the Refugee Appeal Division [RAD]: *Balanced Refugee Reform Act*, SC 2010, c 8, s 36(1), as amended by the *Protecting Canada's Immigration System Act*, SC 2012, c 17, s 68; *Order Fixing August 15, 2012 as the Day on which Certain Sections of the Act Come into Force*, SI/2012-65, (2012) C Gaz II, 1917; *Economic Action Plan 2013 Act, No. 1*, SC 2013, c 33, s 167. As Mexico is a designated country of origin under s 109.1 of the Act, the Applicants are not entitled to a pre-removal risk assessment until three years after the Decision: Act, s 112(2)(c). The RPD's

Decision, therefore, determines whether the Applicants are subject to *refoulement* and engages interests protected by s 7 of the *Charter*.

[49] Second, the Applicants argue that the circumstances of the refugee proceedings also engage their s 7 interests. State-induced delays caused the Applicants anxiety and psychological harm independent of the proceeding's eventual outcome. This amounts to serious, state-imposed psychological stress: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 56 [*Blencoe*]. The scale of the delay led to impacts beyond the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer" in refugee proceedings, and are consistent with the threshold for engaging the Applicants' security of the person as set out in *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 59. Unlike *Blencoe*, the Applicants argue that the evidence in this case demonstrates that the psychological and physical harms they suffered were caused by the Member's conduct of the hearings and inordinate delay in determination.

[50] Having engaged s 7 *Charter* interests, the RPD's proceedings must accord with the principles of fundamental justice. See *R v Beare*, [1988] 2 SCR 387 at 401. The Supreme Court of Canada has observed that "at a minimum the concept of 'fundamental justice' as it appears in s. 7 of the *Charter* includes the notion of procedural fairness": *Singh*, above, at 212. In the context of an administrative proceeding, the content of the duty of fairness includes the right to have the matter determined by an unbiased decision-maker. See *Pearlman v Manitoba Law Society Judicial Committee*, [1991] 2 SCR 869 at 883. The Applicants argue that fairness also

demands that the proceeding be determined in a reasonable time. See *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 at paras 25-28 [*Parekh*], citing *Blencoe*, above.

(a) *Delay*

[51] To establish that state-induced delay amounts to an abuse of process which violates the duty of fairness, three factors must be considered: the time taken compared to the inherent time requirements; the causes of the delay beyond the inherent time requirements of the matter; and the impact of the delay. See *Parekh*, above, at para 28, quoting *Blencoe*, above, at para 160. The Applicants say that, in the present case, the delay of three years and ten months from the final oral hearing on December 6, 2011 until the Decision was rendered on October 14, 2015 exceeded the inherent time requirements of the case, even accounting for its complexity and the volume of evidence. In *Yadav v Canada (Citizenship and Immigration)*, 2010 FC 140 at paras 63-65, an immigration officer's delay of ten and a half months between an interview and rendering the decision breached the duty of fairness. In the refugee context, a seven month delay was considered "inexplicable" in *Sasan v Canada (Minister of Citizenship and Immigration)* (1998), 141 FTR 158 at para 14 (TD).

[52] Causes of delay in the present case include periods of unexplained inactivity that cannot be attributed to the Applicants, particularly when the Applicants' attempts to obtain explanations for the delay went unanswered. The Applicants dispute the Member's assertion in the Decision that their ATIP request created disorder in the file. They point out that the request came nearly three years after the final oral hearing. The Member mentions scheduling difficulties caused by

accommodating the group's size, but the Applicants say that there is no evidence that the RPD unsuccessfully attempted to schedule hearings between February 24, 2011 and October 13, 2011.

[53] Regarding the impact of the delay, the Applicants argue that they have suffered prejudice to their case because the delay calls into question the Member's ability to recall details of the Applicants' testimony. Considering that the Member's determination was primarily based on credibility concerns, the Applicants say that the length of delay effectively denied them the benefits of an oral hearing. Courts are "well aware of the inherent weakness of written transcripts where questions of credibility are at stake": *Singh*, above, at 214. These problems were exacerbated by the Member's reliance on a mistranslated document that corroborated part of the Applicants' story. The Applicants document numerous mental and physical health impacts, financial impacts, and impacts on interpersonal relationships that they attribute to the delay. They assert that these harms surpass the ordinary stress and anxiety expected in the refugee claim process and are consistent with the impacts documented in Dr. Lisa Andermann's research: higher anxiety and depression resulting from long-term uncertainty; and exacerbated post-traumatic stress disorder symptoms resulting from chronic instability.

[54] In response to the Respondent's argument that the Federal Court of Appeal, in *Hernandez v Canada (Minister of Employment & Immigration)* (1993), 154 NR 231 at para 4 (FCA) [*Hernandez*], warned that unreasonable delay will rarely, if ever, be successfully accepted as a ground of review, the Applicants point out that the Court's comments in *Hernandez* were based on the decision in *Akthar v Canada (Minister of Employment & Immigration)*, [1991] 3 FCR 32 (CA) [*Akthar*]. In *Akthar*, the Court held that a claim that delay has resulted in a *Charter* breach

must “be supported either by evidence or at the very least by some inference from the surrounding circumstances that the claimant has in fact suffered prejudice or unfairness because of the delay.” The need to produce proof, and not simply rely on assertions, was followed in *Rana v Canada (Minister of Citizenship and Immigration)*, 2005 FC 974 at para 20 [*Rana*]. The Applicants say that their case is supported by evidence and that the case law cited by the Respondent does not apply in the present circumstances.

(b) *Reasonable Apprehension of Bias*

[55] In addition to delay, the Applicants say that the principles of fundamental justice are violated where there is a reasonable apprehension of bias on the decision-maker’s part. The test for reasonable apprehension of bias is “what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly”: *Committee for Justice*, above, at 394. This is a fact-specific inquiry, with the facts “addressed carefully in light of the entire context”: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 77 [*Wewaykum*]. The Applicants say that a reasonable apprehension of bias in this case arises out of multiple factors considered together and that a reasonable person, thinking the matter through, would consider the Member predisposed to find the Applicants not credible and to refuse their claim.

[56] The Applicants offer four factors that would lead the reasonable person to this conclusion:

1. The Member took an adversarial approach to the Applicants' evidence in seeking to impugn their credibility;
2. The Member's adversarial approach is corroborated by the academic review of Professor Rehaag and the jurisprudence of this Court;
3. The procedure followed by the Member was irregular and punitive; and
4. The Applicants experienced profound psychological and physical reactions to the Member's conduct.

[57] This Court has criticized RPD hearings where "the member questioned the applicant relentlessly on countless details, evidently with the goal of making him 'crack'": *Guermache v Canada (Minister of Citizenship and Immigration)*, 2004 FC 870 at para 10. Similarly, the questioning of claimants should not mimic "cross-examination… worthy of a criminal trial": *De Leon v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 852 (QL) at para 17 (TD). The Applicants argue that the Member's approach contravened the presumption of truthfulness in oral testimony established in *Maldonado v Canada (Minister of Employment & Immigration)* (1979), [1980] 2 FCR 302 (CA), and was inconsistent with the IRB's Gender Guidelines. The Member's active attempts to discredit the Applicants extended to: threatening to summon their former counsel; relying on the note the Applicants provided to their original counsel to impugn the Applicants' credibility; improperly relying on asserted specialized knowledge contrary to RPD Rule 22 to draw conclusions about the Applicants' inability to locate media reports; and suggesting that the Applicants' therapist may have committed an offence by offering observations concerning the Applicants' mental health.

[58] The Applicants submit that Professor Rehaag's study establishes that the Member: did not grant any refugee claims from his appointment in 2008 through to the end of 2010; granted

fewer claims than other RPD members; and made no-credible-basis findings at a higher rate than other members. See also Sean Rehaag, "'I Simply do not Believe…': A Case Study of Credibility Determinations in Canadian Refugee Adjudication" (2017) 38 Windsor Rev Legal Soc Issues 38. Professor Rehaag concludes that the most likely explanation is that the Member decides claims differently from other members. Professor Rehaag's qualitative analysis of the Member's decisions identifies patterns that the Applicants say are present in the Decision under review here, and suggests that the Member takes an adversarial approach. These patterns include: beginning and ending with a standard sentence concerning credibility; relying heavily on discrepancies between oral testimony, the PIF, and POE notes to impugn credibility; pointing to perceived omissions in the PIF and POE notes; dismissing explanations for perceived omissions on the basis that the PIF instructions are clear and that the PIF was otherwise quite detailed; finding that documents are forgeries; and disregarding psychological evidence because it is based on a story the Member did not find credible.

[59] The Applicants submit that the Member's adversarial approach can also be inferred from his reliance on grounds for finding the Applicants not credible that have been found unreasonable in other decisions of this Court.

[60] The Applicants say that the Member's procedural decisions in the present case also indicate an adversarial, or even punitive, approach to the Applicants' claim. The Member refused to recuse himself when presented with evidence that appearing before him prejudiced the Applicants by affecting their mental and physical health. This forced the Applicants to choose between abandoning their claim and jeopardizing their health. When L.M.P.A. became ill during

one of the hearings and could not proceed, the Member scheduled a show-cause hearing to deal with her claim's abandonment. Also, the Member scheduled a hearing for January 2015, well after the conclusion of oral hearings, but would not explain its purpose despite requests from counsel. The hearing was cancelled the day before it was scheduled to take place and was never rescheduled. The Decision was issued on the final day of the Member's term of appointment, the last day he could issue the Decision.

[61] The Applicants argue that the Member failed to grant procedural accommodation allowed by the Gender Guidelines and the Vulnerable Persons Guidelines. Failure to meaningfully implement the Gender Guidelines is itself a reviewable error. See *Jones v Canada (Minister of Citizenship and Immigration)*, 2006 FC 405 at para 28; *Yoon v Canada (Citizenship and Immigration)*, 2010 FC 1017 at para 5. The Member did not recuse himself after being presented with expert evidence that his presence had put the Applicants' health at risk. Further, the Member demonstrated gross insensitivity and persistent closemindedness when questioning L.M.P.A. The Decision reflects this when the Member finds that this was not a case of a woman "reluctant to disclose… intimate details of the assault itself."

[62] The Applicants argue that their psychological and physical reactions to the Member's conduct are relevant to evaluating whether there is a reasonable apprehension of bias. The Federal Court of Appeal has noted that "when a reviewing court constructs the fictional reasonable person and determines how much information and understanding should be imputed to her for the purpose of the bias test, it should not altogether lose sight of the perspective of the

unsuccessful refugee claimant": *Ahumada v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 97 at para 24.

[63] The Applicants submit that the Respondent's reliance on *Chippewas of Mnjikaning First Nation v Chiefs of Ontario*, 2010 ONCA 47 [*Chippewas*], and *Martin v Sansome*, 2014 ONCA 14 [*Martin*], does not further the argument, as both cases concern the approach of trial judges in a different context from the administrative determination of a refugee claim. The Applicants accept that the refugee process is inquisitorial and allows RPD members to take an active role in the proceedings. See *Kumar v Canada (Citizenship and Immigration)*, 2009 FC 643 at para 28, citing *Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 35. The Applicants assert, however, that the Member's behaviour in this case exceeded the RPD's role in an inappropriate manner that contravened the *Charter*.

[64] The Applicants also submit that *Arthur v Canada (Attorney General)*, 2001 FCA 223 [*Arthur*], is distinguishable. In *Arthur*, the Court's comment, at para 8, that an allegation of bias cannot rest "on mere suspicion, pure conjecture, insinuations and mere impressions of an applicant or his counsel" must be read in the context of the issue first being raised in oral argument on judicial review. Thus, the Court's censure was directed at the cavalier manner in which the bias allegations were raised in that case. In contrast, the Applicants have raised the issue of reasonable apprehension of bias throughout the RPD proceedings and as grounds for judicial review in this application.

(2) Natural Justice

[65] The Applicants submit, in the alternative to finding that the delay or reasonable apprehension of bias violate the Applicants' s 7 *Charter* rights, that the delay and reasonable apprehension of bias also violate administrative law principles of natural justice and render the decision procedurally unfair.

(3) Credibility

[66] The Applicants accept that judicial review of credibility findings is carried out under the reasonableness standard. See *Fatih*, above, at para 65. However, determination of the reasonableness of the RPD's credibility findings is based on the record that was before the decision-maker at the time. See *Khatun v Canada (Citizenship and Immigration)*, 2011 FC 3 at para 10; *Kalra v Canada (Minister of Citizenship and Immigration)*, 2003 FC 941 at para 15; *Adil v Canada (Citizenship and Immigration)*, 2010 FC 987 at para 34. The Member "was obligated to disclose the full and true bases for his decision," which must be found in the Decision, "viewed alongside the proper record of the case" contained in the Certified Tribunal Record [CTR]: *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at paras 40-42. The Applicants say the record reveals that the Member arrived at his credibility findings in an improper and unreasonable manner because the Decision is "over-vigilant in its microscopic examination of the evidence of persons who… testif[ied] through an interpreter and [told] tales of horror in whose objective reality there is reason to believe": *Attakora v Canada (Minister of Employment & Immigration)*, [1989] FCJ No 444 (QL) at para 9 (CA) [*Attakora*].

[67] The Applicants submit that the Member also inadequately considered the circumstances in which the POE notes were taken. They point out that POE notes are not meant to provide the entire basis of a claim. See *Argueta v Canada (Citizenship and Immigration)*, 2011 FC 1146 at para 34 [*Argueta*]. Therefore, "[a]dverse inferences should not necessarily be drawn when claimants simply add details consistent with the original statement": *Argueta*, above, at para 34. This Court has held that it is an error for the RPD to impugn the credibility of a claimant "on the sole ground that the information provided… at the POE interview lacks details": *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 51. The Applicants say that, in the present case, omissions from the POE notes show no true inconsistency as the central incident on which the claim is based is present in additional accounts the Applicants provided. In these circumstances, the Member should not have cited the POE notes to impugn the Applicants' credibility. See *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 19-25 [*Lubana*]. Considering the harsh and stressful circumstances under which the POE interviews were conducted, the Applicants say that the Member's failure to account for these circumstances when evaluating minor omissions in a narrative that spans more than a decade constitutes a reviewable error.

[68] The Applicants further submit that the Member failed to adequately consider their explanations for amendments to the PIFs. They accept that amendments to a PIF that add details of central importance can be scrutinized by the RPD. See *Zhang v Canada (Citizenship and Immigration)*, 2007 FC 665 at para 6. Further, the act of amending a PIF "should not be fatal to [the] claim": *Li v Canada (Minister of Citizenship and Immigration)*, 2006 FC 868 at para 29. Valid reasons exist for amending a PIF and the duty of fairness requires consideration of the

Applicants' explanation for their PIF amendments: *Erduran v Canada (Citizenship and Immigration)*, 2011 FC 1299 at para 4; *Touraji v Canada (Citizenship and Immigration)*, 2011 FC 780 at paras 23-24. The Applicants' explanation that their first counsel was responsible for deficiencies in the original PIFs was disregarded by the Member and he repeatedly used the Applicants' amendments to impugn their credibility. The Member engaged in speculation to find that the Applicants' complaint against their former counsel was "not found to be proven" and gave undue weight to the former counsel's denial of misconduct.

[69] The Applicants also submit that the Member's credibility findings in relation to L.M.P.A.'s evidence about sexual assault are unreasonable. They say that L.M.P.A. demonstrated characteristics consistent with the effects of sexual trauma described in *Akter v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1205 at para 17 [*Akter*]. In such circumstances, it is an error to draw "a hasty conclusion" about credibility based on such behaviour: *Akter*, above, at para 18. L.M.P.A.'s interactions with police immediately after she was assaulted are properly regarded as part of the same incident and questions about those interactions should be subject to the sensitivity prescribed in the Gender Guidelines. The Member's repeated questions about those interactions, his rejection of L.M.P.A.'s explanation for why she did not mention them, and his inferring a lack of credibility all result from the Member's failure to consider how past trauma may affect demeanour. The Applicants submit that by making a negative credibility inference, the Member was merely paying "lip service to the Gender Guidelines": *Lumaj v Canada (Citizenship and Immigration)*, 2012 FC 763 at para 65.

[70] The Applicants also say the Member compounds this error when he relies on his own judgment about when, to whom, and in what detail L.M.P.A. would be comfortable disclosing her assault. When asserting that it was obvious that D.P.P. would have known about her mother's rape, the Member ignores L.M.P.A.'s context as a Mexican woman accompanied by her husband and children. The Applicants submit that it is not obvious that L.M.P.A. would have discussed her rape with her daughter. The Member's finding that L.M.P.A. is not credible is unreasonable because it results from an implausibility determination that is not "based on clear evidence, as well as a clear rationalization process supporting the Board's inferences": *Santos v Canada (Minister of Citizenship and Immigration)*, 2004 FC 937 at para 15.

[71] The Applicants also submit that the Member fails to consider valid reasons for gaps in the documentary evidence they provided. They acknowledge that credibility "may be rebutted by the failure of the documentary evidence to mention what one would normally expect it to mention": *Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 (QL) at para 1 (CA) [*Adu*]. *Adu*, however, dealt with the existence of a law. In *Bao v Canada (Citizenship and Immigration)*, 2015 FC 606 at para 20, Justice Mosley distinguished *Adu* on the basis that while "[o]ne may expect that statutes and official decrees issued by a state will be published by that state's organs… there is no reason to expect that an activist organization has the ability to report every single incident which falls within its area of interest." Similar logic should be applied to the Member's confidence that the Gang was unlikely to have avoided media attention. The Applicants argue that Mexico's level of gang activity makes it unreasonable to expect that every gang will be reported on, and that the Gang's police connection makes its absence from coverage more plausible.

[72] The Applicants say that the Member makes a similar error when dismissing police reports containing certain incorrect details, or that fail to mention the Gang. Fear of reprisal makes it unsurprising that police officers would neglect to record the name of a police-affiliated gang. In the context of state corruption and sloppy reporting, the omission of the Gang should not rebut the presumption of truthfulness that claimants are afforded.

[73] Likewise, when the Member finds a lack of documentary evidence about the persecution of gay people in La Zona Rosa, and uses this to impugn the credibility of C.A.A.P., the Member does not consider whether much of the violence against gay men in Mexico is reported.

[74] The Applicants say that the Member also fails to consider evidence concerning J.E.T.P.'s difficulties in testifying, and why M.T.M. and her family do not recall that the people who attacked them identified themselves as Gang members.

[75] The Applicants submit that the Member further errs by failing to consider the psychological evidence when making credibility findings. They cite *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 393 at paras 36-40, to establish that it "it is an error to dismiss psychological evidence in reaching a credibility determination on the basis that [the Member] has already found the Applicants' evidence not to be credible": Applicants' Further Memorandum of Argument at para 52. The Applicants say that the Member makes precisely this error at para 47 of the Decision when he dismisses the psychological reports because he did not find the Applicants credible. The Applicants suggest that the Member could have reached a

different credibility determination had he considered the psychological reports relevant to his credibility finding.

(4) Internal Flight Alternative

[76] The Applicants submit that the Decision makes a palpable and overriding error when applying the test for a viable IFA. They say that the correct test is to determine whether there is a serious possibility that the actual claimant, not persons like the claimant, faces a serious possibility of persecution in the part of the country where an IFA exists. In the Decision, the Member relies on his negative credibility finding with respect to C.A.A.P. to reject all of C.A.A.P.'s evidence about fear of persecution in the proposed IFA. C.A.A.P.'s unique circumstances due to his family history are ignored and the Member reasons that "[he] would have to find that all gay men in the Federal District face persecution."

[77] The Applicants also say that the Member's IFA determination is unreasonable. They point to a paper on legal references from the IRB that lists the circumstances of persons similarly situated to the claimant as only one factor in evaluating the possibility of persecution in the potential IFA. See Immigration and Refugee Board of Canada, "Chapter 8 – Internal Flight Alternative", (Ottawa: IRB, 24 November 2015) at 8.5.1, online: <http://www.irb-cisr.gc.ca>. The Decision grounds its determination of an IFA on the circumstances of persons similarly situated to C.A.A.P..

[78] In determining the availability of an IFA, the RPD "must always examine the circumstances particular to the applicant": *Pathmakanthan v Canada (Minister of Employment &*

Immigration) (1993), 23 Imm LR (2d) 76 at para 5 (FCTD). The Applicants say the Decision ignores C.A.A.P.'s reasons for fearing to move to the proposed IFA based on the Federal District being less than one hour away from his previous residence, and the police discrimination he is likely to face if he asks for protection from the Gang. The existence of legal gay marriage and gay culture in the Federal District does not eliminate the danger from the Gang or suggest an inadequate police response.

(5) Remedy

[79] The Applicants submit that this Court should grant an extraordinary remedy under s 24(1) of the *Charter* to redress the violation of their s 7 rights. Subsection 24(1) of the *Charter* offers broad remedial powers and a purposive interpretation confers on courts wide scope to craft remedies for *Charter* violations. See *R v 974649 Ontario Inc*, 2001 SCC 81 at para 18. See also *Mills v The Queen*, [1986] 1 SCR 863 at 882. At least two things are required by a purposive approach to remedies: "First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies": *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 25 [*Doucet*] [emphasis in original]. The Applicants say that such remedies may be appropriate even where they touch the functions of other decision-makers where an order of *mandamus* or *certiorari* fails to vindicate the claimant's *Charter* rights. See e.g. *Doucet*, above, at paras 60-67 and *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 146-153 [*Insite*].

[80] The Applicants say that a responsive and effective remedy in this case would be for this Court to order a directed verdict requiring a differently constituted panel of the RPD to grant the Applicants status as Convention refugees or protected persons without the need to hold a hearing. In the context of the Applicants' decade-long attempt to gain refugee status, a declaration or order returning the matter for redetermination would not effectively remedy the impacts that delay in the process has already had on their mental and physical health. In fact, redetermination would add to the delay, exacerbating the circumstances that have brought the Applicants to this Court.

[81] The Applicants point out that in *Attakora*, above, at para 14, the Federal Court of Appeal overturned the RPD's credibility findings and returned the matter with a directed verdict that the applicant is a Convention refugee. See also *Chaudri v Canada (Minister of Employment & Immigration)* (1986), 69 NR 114 (FCA). Therefore, the remedy of a directed verdict has already been applied where erroneous credibility findings are based on a member's over-vigilant and microscopic examination of the evidence.

[82] The Applicants submit that the law favours a directed verdict. They say this Court has power to make such an order under s 18.1(3) of the *Federal Courts Act*, and other statutes may be helpful to the Court in determining an appropriate remedy under s 24(1) of the *Charter*. See *Doucet*, above, at para 51. The Court's power under s 18.1(3) of the *Federal Courts Act* grants jurisdiction to direct a differently constituted panel of the RPD to declare a claimant to be a Convention refugee. See *Ali v Canada (Minister of Employment & Immigration)*, [1994] 3 FCR

73 at paras 4 and 16 (TD). Paragraph 170(f) of *IRPA* contemplates the RPD granting a claim without a hearing in circumstances where the Minister has not intervened.

[83] In *Doucet* and *Insite*, the Supreme Court of Canada held that declaratory relief was insufficient. In those circumstances, the importance of a timely remedy and the barriers associated with beginning new proceedings justified the Court's incursion into the executive sphere. See also *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at paras 10-15; *Wihksne v Canada (Attorney General)*, 2002 FCA 356 at para 10; *Canada (Minister of Human Resources Development) v Tait*, 2006 FCA 380 at para 33. In *Pointon v British Columbia (Superintendent of Motor Vehicles)*, 2002 BCCA 516 at para 27, the British Columbia Court of Appeal held that "[t]he interests of the good administration of justice and of the reputation of the good administration of justice would not be served by ordering a further review hearing" as the appellant had already "been through two review hearings, two *Judicial Review Procedure Act* petitions, and three full-scale arguments in court."

[84] The Applicants say that substantial delay, and additional delay caused by remitting the matter for redetermination, hinders the good administration of justice. A six-year delay in a pension determination, with the prospect of a further two-year delay if the matter was simply remitted for redetermination, met the "threshold of exceptionality" that justified a directed verdict in *D'Errico v Canada (Attorney General)*, 2014 FCA 95 at para 18. The Applicants have participated in multiple hearings, marked by procedural unfairness and unexplained delay, over an extended period of time. Remitting the matter back to the RPD would "undermine the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized

administrative tribunals in the first place": *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 55.

[85] The Applicants say that remitting the matter for redetermination would also subject them to further trauma and depart from Canada's obligation to provide a timely and fair assessment of refugee claims. Given the effect of time on memory, being forced to recall events even further removed from the present would impose on the Applicants an undue burden when establishing their credibility.

[86] The Applicants initially sought *Charter* damages for the violation of their s 7 rights. An order of Justice Boswell, dated May 2, 2017, denied the Applicants' motion for a separate determination of *Charter* damages. Justice Boswell held, however, that the Applicants were at liberty to initiate a motion to convert this application into an action and "[i]n the event the application for judicial review is not converted into an action… the Applicants may commence an action claiming damages in respect of any infringement of their *Charter* rights as found and determined by the judge who [hears] the application for judicial review." The Applicants did not convert the application into an action and instead seek a declaration, pursuant to s 24(1) of the *Charter*, that their s 7 rights have been violated.

B. *Respondent*

(1) Section 7 *Charter* Arguments

(a) *Delay*

[87] The Respondent submits that, given the complexities of the refugee application and the Applicants' contributions to the delay, the time taken was not inordinate or "unacceptable to the point of being so oppressive as to taint the proceedings": *Blencoe*, above, at para 121. In *Hernandez*, above, at para 4, the Federal Court of Appeal warned that unreasonable delay "cannot be perceived as a fertile basis for setting aside decisions of tribunals." The rarity of the argument's success has been commented on in the refugee context. See *Cihal v Canada (Minister of Citizenship and Immigration)* (2000), 257 NR 62 at para 8 (FCA).

[88] Whether a delay is inordinate depends on "the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, [and] whether the respondent contributed to the delay or waived the delay": *Blencoe*, above, at para 122. The Respondent says that the contextual factors in this case justify the time taken. These factors include the large number of Applicants, numerous adjournments, incomplete PIFs, new allegations, amended affidavits, the appointment of new counsel, translation issues at the hearings, and the schedules of all participants. Despite this, the first pre-hearing was held less than one year after all the Applicants claimed refugee protection and the RPD held multiple pre-hearings and eleven hearings between July 8, 2009 and December 6, 2011. The nearly four years it took to issue the Decision is not unreasonable because the Decision was rendered eleven months after the

Applicants submitted their final disclosure package and request for recusal. During the entire period after the final hearing, ongoing communications between the Applicants' counsel and the RPD demonstrate that the RPD continued to actively assess the file.

[89] The Respondent notes that the Applicants never brought an application for *mandamus* to order the RPD to render a decision during the period of alleged delay. The *mandamus* remedy has been used by other refugee claimants. See e.g. *Nyamoya v Canada (Citizenship and Immigration)*, 2016 FC 642.

[90] The Respondent says that the Court would have to ignore the evidence to find that the delay is unexplained or solely attributable to the RPD. Delays were caused by scheduling issues involving the availability of the Applicants, their counsel, the Member, the RPO, and the only room that could accommodate the group's size. The Applicants contributed to the delay through multiple requests for adjournment and by filing amended PIFs, supporting documents, and pre-hearing applications. These factors establish that the hearings were completed in a reasonable time.

[91] In addition, the large amount of evidence the Applicants submitted after hearings concluded, post-hearing submissions, the ATIP request, a further motion for recusal, written submissions in response to figures provided as part of the recusal motion, and demands regarding the Member's statistics all contributed to the post-hearing delay. In *Blencoe*, above, at para 125, the Supreme Court of Canada held that the British Columbia Council of Human Rights should not be held responsible for delay caused by the time taken to respond to questions about the

timeliness of the complaint and allegations of bad faith. The RPD cannot be faulted for the time taken to consider post-hearing submissions and requests.

[92] Regarding the impact of the delay, the Respondent submits that there is an insufficient causal connection between the RPD process and the alleged impacts on the Applicants' mental and physical health. Other stressors were present in the Applicants' lives and they have provided insufficient evidence to support their causal assertions.

[93] The Respondent also says that the delay between the last hearing and the date of the Decision did not impact the Member's ability to recall the Applicants' testimony or prejudice their case. Evidence the Applicants have introduced in the affidavits of Audrey Macklin and Peter Showler to show prejudice to their case should be given low weight because the affiants have drawn legal conclusions, do not provide the factual foundation for their opinions, have failed to consider the facts of this case, and have relied on information on the past practices of the IRB not relevant to this case. See *R v Abbey*, [1982] 2 SCR 24 ("[b]efore any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist" at 46); *AB Hassle v Canada (Minister of National Health and Welfare)*, 2002 FCA 421 at para 45. Regarding the inherent weakness of written transcripts, the Respondent says that *Singh*, above, is distinguishable as, unlike in *Singh*, the Applicants were provided with an oral hearing and a recording of the oral hearing is available. While new National Documentation Packages [NDP] for Mexico were issued between the final hearing and the Decision, the Respondent points out that the Applicants have not shown how changes in the NDP could have impacted the Decision.

(b) *Reasonable Apprehension of Bias*

[94] The Respondent agrees that the test for reasonable apprehension of bias is stated in *Committee for Justice* but says that this is meant to be a high threshold in light of the presumption of judicial impartiality. See *R v S (RD)*, [1997] 3 SCR 484 at para 113; *Chippewas*, above, at para 243. The grounds for a reasonable apprehension of bias must be substantial and the test should not be applied from the point of view of a "very sensitive or scrupulous conscience": *Committee for Justice*, above, at 395. See also *Wewaykum*, above, at para 76; *Geza v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1039 at paras 16-18 [*Geza*], rev'd 2006 FCA 124 at paras 51 and 60. An allegation of bias is serious and must be supported by evidence, not "mere suspicion, pure conjecture or mere impressions of an applicant or counsel": *Arrachch v Canada (Minister of Citizenship and Immigration)*, 2006 FC 999 at para 20 [*Arrachch*], citing *Arthur*, above.

[95] The Respondent submits that the Decision demonstrates the Member's thorough grasp of the evidence and jurisprudence, a situation comparable to that in *Luzbet v Canada (Citizenship and Immigration)*, 2011 FC 923 at paras 9-13 [*Luzbet*]. The Decision makes it clear that the Member had taken an oath of office to decide cases based on the facts and law, and he refers to the IRB's Code of Conduct for members.

[96] The Respondent says that the Member's questioning and demeanour are not evidence of bias. Some RPD hearings require a more proactive approach than is customary. In this case, with a large number of claimants all relying on the same alleged incident in support of their claim, it

made sense for the Member to ask each of them about similar issues. The Member was obligated to test the Applicants' case and doing so does not demonstrate a reasonable apprehension of bias. See *Luzbet*, above, at para 13.

[97] The Applicants have not identified any portions of the transcript where the Member's questioning inhibited their ability to testify. Instead, the transcripts show the Applicants' counsel handling the questioning of sensitive topics. For example, C.A.A.P. was questioned about his sexual orientation by his own counsel, rather than the Member. Similarly, a full review of the questioning of L.M.P.A. does not demonstrate bias or closemindedness on the Member's part. The Member asked L.M.P.A. if she was okay or needed to take a break and only questioned her about police interactions after the assault without going into details about the assault.

[98] Contrary to the Applicants' assertions, the Respondent says that the Member's demeanour and expressions do not give rise to a reasonable apprehension of bias. See *Chippewas*, above, at para 243; *Martin*, above, at paras 35-37. The transcripts indicate that the Member is correct when he states that the RPO could not recall witnessing instances of inappropriate demeanour.

[99] Procedural fairness requires a fair hearing, but does not require a perfect or the most favourable process. See *Restrepo Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para 67, aff'd 2007 FCA 199, citing *R v Lyons*, [1987] 2 SCR 309 at 362 and *Ruby v Canada (Solicitor General)*, 2002 SCC 75 at para 46; *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 43. Efforts were made to ensure that the Applicants

received “a fair process having regard to the nature of the proceedings and the interests at stake”: *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 20. As the Decision notes, the Member accommodated the Applicants by granting frequent breaks, allowing reverse questioning and the presence of a support person while testifying, not questioning about details of L.M.P.A.’s sexual assault, offering closed circuit television to monitor proceedings, and canvassing the Applicants’ counsel about other possible accommodations. The Member permitted the Applicants’ counsel to ask questions in areas of concern the Member identified, and consistently granted the Applicants’ requests for adjournments and extensions.

[100] The Respondent disputes the Applicants’ submission that the Member actively sought to discredit the Applicants during the hearings. Rather than “threaten[ing] to subpoena” the Applicants’ former counsel, the Member asked whether the former counsel would be brought as a witness. Omissions between the handwritten narrative and the initial PIF that the Member identified are apparent in the documents and were put to L.M.P.A. during the hearings. The Member did not improperly rely on specialized knowledge, as the RPD is permitted to rely on its expertise regarding reporting on gang violence in Mexico and the provision of medical documents. See *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282 at paras 24-25; *Maslej v Canada (Minister of Manpower & Immigration)* (1976), [1977] 1 FCR 194 at para 11 (CA); *Saim v Canada (Minister of Citizenship & Immigration)* (1998), 148 FTR 219 at para 5 (TD); *IRPA*, s 170(i). The Member’s questioning of the Applicants’ family therapist’s qualifications for providing a medical diagnosis does not indicate bias. See *Chehade v Canada (Citizenship and Immigration)*, 2017 FC 293 at para 15. The RPD’s role is to test the Applicants’ claim. It was confirmed that [the family therapist] is not a member of any of the

Ontario Colleges that would allow her to make medical diagnoses, and [the family therapist] stated that the diagnoses contained in her letters to the RPD were instead "clinical observations." It was the RPO, not the Member, who used the term "ringleader," and the Member stated that, if he had used the term, it was a "poor choice of wording" as there was no basis for any allegation of criminality on the part of the Applicants. The Member did not accuse the Applicants of coaching or conclude that the Applicants were using coughs to prompt one another. Rather, at the first hearing, the Member advised the Applicants not to blurt out answers while a witness was testifying. And, instead of being adversarial, the Member repeatedly assured the Applicants that the process was informal and directed towards making sure all the relevant questions were asked.

[101] The Respondent says that the Member's acceptance rate in other cases does not raise a reasonable apprehension of bias and that this argument was rejected by this Court in another case involving a report prepared by Professor Rehaag regarding the Member's acceptance rate. Rather than relying on statistics alone, an informed reasonable person would require a statistical analysis that accounts for "all of the various factors and circumstances that are unique to and impact on determinations of refugee claims": *Turoczi*, above, at para 15. See also *Zupko v Canada (Citizenship and Immigration)*, 2010 FC 1319 at para 22; *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634 at paras 54 and 56-58. Professor Rehaag is not a statistician and the statistical analysis in his report does not meet the methodological standard set out in *Turoczi*. This limits the report's probative value and fails to support an allegation of bias.

[102] The Respondent also submits that the Member's decision not to recuse himself is not evidence of bias. Contrary to the Applicant's submission that the Member did not respond to

recusal requests or take them seriously, the record shows that the Member considered the issue during two hearings and addressed the requests in seven pages of the Decision. The Decision covers allegations regarding the Member's demeanour, acceptance rate, assessment of psychological evidence, delay, and Professor Rehaag's report. The time taken to render the Decision does not indicate that the Member did not take the Applicants' claims seriously, as the record shows that the RPD was actively engaged in attempting to release a decision. The Applicants' additional submissions, including a further recusal motion, further affidavits, and medical evidence, all added to the record and required the Member's consideration. Speculation over the reasons for delay cannot give rise to a reasonable apprehension of bias. See *Arthur*, above, at para 8.

[103] Further, the procedure used by the RPD after the recusal motion does not give rise to a reasonable apprehension of bias. The Member acknowledged the Applicants' alleged stress and offered accommodations to mitigate its impact. The show-cause hearing to determine whether L.M.P.A.'s claim ought to be abandoned is permitted by RPD Rule 65. Contrary to the Applicants' submission, the Respondent says that the IRB did advise the Applicants' counsel of the purpose of the January 2015 hearing and the Applicants have failed to provide support for their assertion that the Member cancelled the meeting because the file was messy. The Decision explains the reasons for delay.

(c) *No deprivation and insufficient causal connection*

[104] The Respondent submits that the Applicants have failed to establish a breach of s 7 of the *Charter*. Establishing a breach of s 7 requires the Applicants to demonstrate deprivation of their

life, liberty or security of the person in order to engage s 7. Once s 7 is engaged, the Applicants must also show that the deprivation is not in accordance with the principles of fundamental justice. See *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55. The Respondent says that the Applicants have not established a deprivation of life, liberty or security of the person, or proven sufficient causal connection between state-caused delay or bias and any serious or profound effects. See *Blencoe*, above, at paras 57, 59-60, 81 and 83. Stress and anxiety are an expected part of the refugee process and s 7 does not protect the Applicants from ordinary stresses and anxieties.

[105] The Respondent submits that the principles of fundamental justice were not violated by the RPD process which has been repeatedly found to be compliant with s 7 of the *Charter*. See e.g. *Peter v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 1073, aff'd 2016 FCA 51; *YZ v Canada (Citizenship and Immigration)*, 2015 FC 892. In response to the Applicants' argument that their lives have been negatively impacted by delay in the RPD process, the Respondent submits that this type of argument was "expressly rejected" by the Supreme Court of Canada in *Blencoe*, above, at para 86.

[106] Numerous other factors present during the Applicants' refugee claim make the Applicants' attempts at finding a causal connection between the RPD process and impacts on their health completely speculative. The evidence presented does not make it clear which stressor caused the Applicants' health issues, and cross-examination of several Applicants has revealed a variety of other possible stressors. The Respondent argues that little reliance should be placed on Dr. Lisa Aldermann's affidavit as none of the studies she relies on relate to the issues she was

asked to answer. See *Kwicksutaineuk Ah-Kwa-Mish First Nation v Canada (Attorney General)*, 2012 FC 517 at paras 65-66 and 70-71; *R v Mohan*, [1994] 2 SCR 9 at 21; *Es-Sayyid v Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59 at para 41. Dr. Aldermann's findings are speculative because they fail to consider positive factors present in the Applicants' circumstances.

[107] The Respondent submits that the Court should also consider the benefits the Applicants have enjoyed from being in Canada. The ability to live in safety, attend school, gain employment, start a business, maintain significant relationships, have children born in Canada, and benefit from social assistance and publicly-funded healthcare all mitigate the impact of delay. The Respondent notes that several Applicants have made applications for permanent residence on humanitarian and compassionate grounds that describe their ability to establish themselves in Canada. In contrast to the evidence showing these benefits, the Applicants have made "bald and speculative assertions" that state-induced delay or bias of the Member caused family turmoil, real estate loss, health and employment issues, and out-of-pocket medical expenses. Many of these alleged impacts either pre-date the hearings or post-date the Decision.

[108] The Respondent says that the Applicants have not satisfied the onus of supporting their claim with evidence and that more is required to establish a breach of s 7 than asserting illness without proof of diagnosis, lost opportunities without proof that opportunities had been offered, or medical expenses without providing medical records, bills, and proof of payment. The Respondent notes that many requested undertakings to produce documentary evidence in support of the Applicants' allegations remain outstanding and argues that, in these circumstances, the

Court should give no weight to the relevant affidavits. See *Sinkili v Canada (Citizenship and Immigration)*, 2015 FC 1413 at paras 10-11; *Ortiz Juarez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 288 at para 7.

[109] The Respondent submits that any delay in rendering the Decision did not prejudice the Applicants by affecting the Member's ability to recall their testimony. The Applicants can only speculate as to why the detailed and complete record that was before the Member, which included recordings of the hearings, is insufficient. The Decision shows that the Member's credibility determinations were based on inconsistencies in the written evidence. These inconsistencies were tested at the hearings, and the Applicants have not shown how subtle nuances in their testimony would have affected the Member's findings.

(2) Natural Justice

[110] The Respondent says that the requirements of natural justice were met in the Applicants' case. The duty of fairness requires that affected individuals "have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision": *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 28. Over the course of sixteen hearings, the Applicants were able to fully and fairly present their case, and the RPD granted the accommodations, adjournments, and extensions they requested.

[111] The Respondent submits that the Applicants have not provided proof of significant prejudice that would demonstrate an abuse of process. See *Blencoe*, above, at paras 101 and 104. The Applicants' admissions during cross-examinations show that they have not experienced the severe impacts alleged in their affidavits. Further, there is no proof that significant evidentiary prejudice resulted from changes to the NDPs for Mexico during the alleged delay.

[112] That the Member came to a different conclusion from the one the Applicants would have preferred is not evidence that the Member disbelieved the Applicants throughout the process or failed to appreciate their claim. The Respondent says that a reasonable person would not find an apprehension of bias because the Decision shows a thorough analysis and comparison of the evidence before the Member comes to a conclusion.

(3) Credibility

[113] The Respondent submits that the Decision's credibility findings are reasonable. Credibility determinations are at the core of the RPD's jurisdiction and expertise and are worthy of deference: *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 41-46 [*Rahal*]; *Lubana*, above, at paras 7-8. The Respondent disputes the Applicants' characterization of the Member's credibility findings as "microscopic," and says that the Decision highlights significant discrepancies between POE notes, the PIF narratives, and the Applicants' oral testimony. Major omissions from the POE notes include mention of the Gang or an indication that the Gang is connected to a Mexican police force. Rather than minor details, these sources of persecution are central to the Applicants' claim. And the Member did not impugn the Applicants' credibility solely on the basis of these omissions from the POE notes. The Decision

also notes continued concerns with both the original and amended versions of the Applicants' PIFs.

[114] The examination of inconsistencies through a comparison of the POE notes, PIFs, and oral testimony is an established method of testing credibility in the refugee process and it is open to the RPD to make adverse credibility findings based on inconsistencies in the evidence. See *Eustace v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1553 at paras 6, 10; *Rrukaj v Canada (Minister of Citizenship and Immigration)*, 2004 FC 605 at para 10 [*Rrukaj*]; *Fang v Canada (Citizenship and Immigration)*, 2013 FC 241 at paras 17-18; *Abid v Canada (Citizenship and Immigration)*, 2012 FC 483. The Respondent says that the noted inconsistencies in this case include omission of several incidents in both the POE notes and the original PIF, discrepancies over what caused the Applicants to leave Mexico, A.P.P.'s failure to identify the Gang as the agent of persecution at the POE stage, initial failure to connect the Gang to the police, no mention of the murdered neighbour's family taking revenge on the Gang, and discrepancies in the length of time C.A.A.P. was kidnapped.

[115] The Respondent submits that the evidence shows that the Applicants' attempt to blame their first counsel for problems with their original PIF is misplaced. The matter was investigated by the Law Society of Upper Canada and the Complaints Resolution Commissioner and both found that "no further action" against the lawyer was necessary. The Respondent says that it was reasonable for the Member to rely on the conclusions by these regulatory bodies and to reject the Applicants' explanations from omissions from the original PIF.

[116] The Respondent submits that the Decision does consider the circumstances in which the POE notes were taken and acknowledges that "one can be tired from travelling, especially with family… [and that] one may not have 100% recollection in a spontaneous interview."

[117] The Respondent says that the Member did not improperly dismiss the psychological evidence as an explanation for the credibility concerns identified in the evidence. A negative credibility finding allows the RPD to place low probative value on documents which reflect a claimant's statements. See e.g. *Giron v Canada (Citizenship and Immigration)*, 2008 FC 1377 at para 11; *Ye v Canada (Citizenship and Immigration)*, 2014 FC 1184 at para 20, quoting *Gosal v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 346 (QL) at para 14 (TD). The Member's dismissal of the psychological evidence is buttressed by the reasonableness of his findings regarding the probative value of reports from the Applicants' family therapist.

[118] The Respondent says that the Member's finding that it was implausible that D.P.P. was unaware that L.M.P.A. had been sexually assaulted until she arrived in Canada is reasonable. This did not require the Member to find that L.M.P.A. had explicitly discussed the matter with her family. The Member found that D.P.P. would have been aware of the assault because of threats that she had allegedly received. Therefore, the Member never "substituted his judgement for L.M.P.A.'s own experience."

[119] It was open to the Member to make a negative credibility finding with respect to C.A.A.P. based on inconsistencies in the evidence about how long C.A.A.P. was allegedly kidnapped. It was also reasonable for the Member to reject C.A.A.P's explanation for this

discrepancy. See *Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at paras 10-11. Further, since there is no objective evidence that establishes that C.A.A.P.'s description of significant violence in La Zona Rosa is accurate, it was reasonable for the Member to conclude that C.A.A.P. was lying. The Respondent says that it was open to the Member to expect that reports of violence on the scale C.A.A.P. described would have been available. See *Wang v Canada (Citizenship and Immigration)*, 2011 FC 636 at paras 22 and 28.

[120] The Respondent also notes that, despite assertions that the Gang had operated in their neighbourhood for over a decade, the Applicants were unable to provide evidence of the Gang's existence. It was reasonable for the Member to reject the only newspaper article provided by the Applicants. Despite the article describing a murdered woman found in the Applicants' own house, which the Gang had been using for two years, the Applicants claimed to be unaware of this until they received a copy of the article.

[121] Further, the Respondent submits that the Member did not make an error in questioning the authenticity of the police reports provided by the Applicants. I.P.P.'s explanation that the police had refused to properly fill out the report had never been mentioned in earlier statements. And F.P.R.'s report contained major factual errors about his occupation and where he lived. As the report also did not mention the Gang, it was wrong about the essential facts of perpetrator and victim.

(4) Internal Flight Alternative

[122] The Respondent submits that the Member's application of the test for an IFA and his findings were reasonable. The Decision correctly states the test from *Rasaratnam* and considers C.A.A.P.'s circumstances. Once the Member identified a viable IFA, the onus remained on C.A.A.P. to establish that there was a serious possibility of persecution in the IFA. See *Thirunavukkarasu v Canada (Minister of Employment & Immigration)* (1993), [1994] 1 FCR 589 at paras 5-6 (CA). The Respondent says that C.A.A.P.'s evidence failed to satisfy that onus and amounted to conceding that "apart from [the Gang] and being gay, he would have no difficulty living" in the Federal District.

[123] The Member only accepted C.A.A.P.'s evidence regarding his sexual orientation, and did not find C.A.A.P.'s allegation of persecution by the Gang credible. Therefore, the only factor to consider in the IFA analysis was C.A.A.P.'s sexuality. The Member's IFA finding is grounded in the documentary evidence in the record about the Federal District, including the legality of same-sex marriage in Mexico and the existence of openly gay bars and gay politicians. Regarding C.A.A.P.'s particular circumstances, the Respondent says that the Member did consider them when he observes that C.A.A.P. would be travelling directly to the Federal District and moving closer to the centre of a city he has lived in previously. Therefore, the Decision did not rely on documentary evidence only.

(5) Remedy

[124] The Respondent submits that the appropriate remedy is for this Court to dismiss the application for judicial review.

[125] Alternatively, should this Court hold that the matter ought to be sent back to the RPD for redetermination, the Respondent submits that a directed verdict granting the Applicants refugee protection without a hearing is not appropriate and just in the circumstances. See *Doucet*, above, at paras 55-58. The Federal Court of Appeal has held that a directed verdict "is an exceptional power that should be exercised only in the clearest of circumstances": *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at para 14. Such circumstances are not present in this case as the evidence does not show that there is only one possible conclusion and the issue to be decided is not a question of law. The volume of evidence requires careful review and the RPD's expertise in considering such information. See *Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065 at paras 78-81; *Xie v Canada (Minister of Employment & Immigration)* (1994), 75 FTR 125 at para 18 (TD); *Malicia v Canada (Minister of Citizenship and Immigration)*, 2006 FC 755 at paras 20-25; *Xin v Canada (Citizenship and Immigration)*, 2007 FC 1339 at paras 5-6, quoting *Marsh v Zaccardelli*, 2006 FC 1466 at paras 45-46. Therefore, the Court should decline to issue a direction or make specific factual findings.

[126] The Respondent maintains that damages are not available in this application. See *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at para 52; *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 151; *Collin v Lussier* (1984), [1985] 1 FCR 124 at para 2 (CA).

VIII. ANALYSIS

A. *Introduction*

[127] This was inevitably a very difficult refugee application for the Applicants to mount and for the RPD to process and decide. Among the many reasons for this were the extensive lapses in time between key events in the Applicants' narratives and their arrival in Canada, as well as the sheer number of individual Applicants whose claims were dependent upon those key events but who also had individual narratives to bring before the RPD. This meant that those Applicants who alleged they had been targeted by the Gang had to substantiate (or rely upon the substantiation of others) a sequence of incidents that went back to 1992 after they began arriving in Canada between April 2007 and October 2008. It also meant that the RPD had to deal with the inherent difficulties of assessing claims that, when hearings finally got underway, required the Member to hear and assess evidence about key events that had begun 19 years previously.

[128] On the one hand, the Applicants had to overcome the usual difficulties of maintaining a consistent and convincing narrative that spanned many years, compounded by the number of people contributing to that narrative and the inevitable inconsistencies that multiple claimants would induce. On the other hand, the Member had to do his duty by assessing the credibility of twenty-four claims in a way that recognized and accommodated those same difficulties.

[129] The Applicants are now before the Court asserting that the Member failed in this task and relying upon rights that Canadian law grants to them. Canadian law, however, also imposes a duty upon RPD members to assess the credibility of refugee claimants and prescribes limits upon

what the Court can do when it comes to judicial review. By coming to Canada, the Applicants must be taken to have accepted all aspects of our system of making and deciding refugee claims. One of our rules is that evidence should not be assessed through a Canadian lens that does not allow for the cultural realities in a claimant's country of origin. But this does not mean that a claimant's mere assertion of a fact or an event must be accepted without some probing to test its credibility. There is no automatic granting of refugee status. Claims must be tested. Claimants inevitably find this challenging and uncomfortable, but by seeking asylum in Canada they must be taken to have agreed that some stress and discomfort are likely to result and that an RPD member must assess credibility in every refugee claim. There are those who come to Canada and assert false refugee claims as a step towards gaining permanent residence and citizenship. So scrutiny and wariness are inevitable and necessary components of the system. Failed claimants inevitably think that decisions are unfair and unreasonable, but this does not mean they are. Our methods for testing the credibility of claimants may be culturally strange and alienating to some, but we have jurisprudentially approved ways of doing this and, in some cases, though not all, inconsistencies in evidence can lead to negative credibility findings.

[130] Claimants must also be taken to accept that complex claims will take longer than less complex claims, that the RPD and its members have a large inventory of claims to deal with, and that resources are not infinite.

[131] Conceptually at least, I don't see the Applicants disagreeing with any of this. In the end, their complaint is that, notwithstanding the inherent complexities and unwieldiness of their claims, the Decision in this case is unreasonable, as well as being marred by a reasonable

apprehension of bias and inordinate delay that, in addition to denying them status as refugees, has also caused at least some of them damages in the form of emotional hardship, financial loss, lost opportunities, and physical and psychological health problems during the period of time they have spent in Canada. I will deal with each of these grounds of complaint in turn.

B. *Reasonableness*

[132] Leaving aside the issue of bias for a moment, can it be said that the Decision is simply unreasonable? Credibility is at the heart of the Decision.

[133] The Member's general observation is that "[i]t was apparent throughout the hearing that there were a number of serious discrepancies in the claimants' evidence when the oral testimony was compared to the Personal Information Forms and the other documents available" (Decision at para 19, emphasis added).

[134] The Member's general approach to testing credibility in this case was to bring these discrepancies to the attention of the Applicants who gave evidence at the hearing and to ask for an explanation. There is Court jurisprudence that care must be taken when using this approach and, in particular, not too much reliance should be placed upon POE notes because of the condition under which they are taken. See *Wu v Canada (Citizenship and Immigration)*, 2010 FC 1102 at para 16 ("I accept that the Board should be careful not to place undue reliance on the POE statements. The circumstances surrounding the taking of those statements is far from ideal and questions about their reliability will often arise.") and *Lubana*, above, at para 13 ("In evaluating the applicant's first encounters with Canadian immigration authorities or referring to

the applicant's Port of Entry Statements, the Board should also be mindful of the fact that ‘most refugees have lived experiences in their country of origin which give them good reason to distrust persons in authority’: see Prof. James C. Hathaway, The Law of Refugee Status, (Toronto: Butterworth, 1991) at 84-85.”).

[135] The Member actually explains his position and his approach in the Decision:

> [7] The author then goes on to analyse the content of some of my decisions (but none of any other Member). He notes that I sometimes base credibility concerns on differences between oral testimony, the PIF, Port of Entry notes, documentary evidence, etc. This is not actually correct. The fact that there are differences may mean a variety of things. The important thing is the explanation for the difference and it is the explanation for the difference that can lead to a credibility finding, negative or positive. For example, a woman who omits mentioning being raped to a male Immigration officer at the Port of Entry may still be found to be quite credible as she may have felt shame/stigma at the time and uncomfortable in answering questions from a male who was a total stranger. However, if the explanation is lacking then it can lead to a negative credibility finding. These methods of testing credibility have been upheld in numerous cases in Federal Court stretching back years.

[136] The Applicants do not take issue with this general approach to testing credibility and, as the Respondent points out, one of the RPD’s “common tools” for testing credibility is “comparing a claimant’s evidence at three different times during the refugee claim process: the POE notes, the PIF (or Basis of Claim Form), and the oral evidence at the hearing.” See *Rrukaj*, above, at para 10.

[137] While the Applicants do not take issue with the general approach used to test credibility in this case, they do take issue with the way this “common tool” was, according to them, inappropriately misused by the Member.

(1) Microscopic Examination

[138] As a general proposition, the Applicants say that the Member was "over-vigilant in [his] microscopic examination of the evidence of the applicants…."

[139] We know that this can lead to a finding of unreasonableness (see *Attakora*, above, at para 9) but, significantly, the Applicants don't say which of the findings are microscopic and over-vigilant, so I take it that they feel they all are. This is certainly not the case.

[140] The complaint against being too "microscopic" was brought up at the hearing because the Member acknowledges and deals with it in relation to the seminal incident in 1992:

> [21] In the final amended narrative, [the Gang leader] and the other gang member cruise by several times before they opened the vehicle's door and shot the claimant's neighbour. However, as noted at the hearing, in oral testimony, [the Gang leader] and the other gang member leave their vehicle and approach the neighbour closely. They then shoot him and run 20 meters back to the car. [I.P.P.] stated that this might be a terminology issue, that his mother spent more time preparing the PIF and that the incident left a mark on him. Counsel submitted that this was too microscopic of an area. I do not find these explanations satisfactory. [I.P.P.] also seemed confused about what he was doing when he was shot at; in the original PIF he was face to face with [the Gang leader], in the amended narrative he was running away and in oral testimony it happened as he rounded a corner. However, given this alleged traumatic incident would have happened in a split second a long time ago, I can understand there would be some mental confusion about this portion of the issue. However, the killers leaving their vehicle and getting close to the neighbour, murdering him at close range and then running back to their vehicle 20 metres away is quite different from them cruising around and then firing as they opened their door. Even with the passage of time I would not expect to hear such differences in testimony. I find that this discrepancy further undermines the claimants' credibility.
>
> [Footnote omitted.]

[141] A reading of the whole Decision makes it clear that the Member, for the most part, focused upon major discrepancies and acknowledged when an inconsistency was of lesser import:

> [34] [F.P.R.] also made a handwritten statement in Spanish. As noted at the hearing, while in his final PIF it mentioned him being attacked on the highway, this was not mentioned in the statement. [F.P.R.] stated that he had not remembered the incident at the time that he made the statement and that he remembered more details only later. I do not find this explanation satisfactory. I can understand that with the passage of time memories tend to fade. However, this was allegedly a very significant event in [F.P.R.]'s life and one of only a small number that happened to him directly. While not a major point, I find that this omission further undermines the credibility of the claimants.
>
> [Emphasis added.]

[142] I am not convinced by the Applicants' assertions that the Member was microscopic and overly-vigilant in testing discrepancies in the Applicants' evidence.

(2) Failure to Adequately Consider the Circumstances in Which the POE Notes Were Taken

[143] The Applicants make a series of points under this heading:

> 69. POE notes are not meant to be the entirety of a basis of claim and it is an error for the RPD to impugn the credibility of a claimant on the sole ground that the POE interview lacks details. Omission of events from POE notes is acceptable as long as there is no true inconsistency and the pivotal incident on which the claim is based is present.
>
> 70. The circumstances of the POE interviews were harsh and incredibly stressful. It is entirely reasonable that under these circumstances the applicants, though consistently presenting the core incidents of their persecution, omitted minor details. The pivotal incident of the applicants' claim is consistently described in every version of the claimants' narratives. For the Member to cite a

> lack of detail or omission of specific instances of persecution in a narrative that spans more than a decade to impugn the credibility of the claimants is thus a reviewable error.
>
> [Footnotes omitted.]

[144] My review of the Decision suggests to me that the Member does not treat the POE notes as "the entirety of [the] basis of claim" and he does not "impugn the credibility of a claimant on the sole ground that the POE interview lacks details." The Applicants point to nothing in the Decision to support this criticism. Also, there is no issue that "[o]mission of events from the POE notes is acceptable as long as there is no true inconsistency and the pivotal incident on which the claim is based is present." In the present case, there were significant, true inconsistencies on major points and pivotal incidents were either described in different ways or, with some witnesses, contradicted or entirely omitted.

[145] The Member repeatedly refers to conditions under which the POE interviews took place but explains why they do not satisfactorily explain the discrepancy. See, for example, para 19 of the Decision, quoted above: "I can understand that one can be tired from travelling, especially with family. I can also understand that one may not have 100% recollection in a spontaneous interview."

[146] The Applicants did not consistently present the core incidents of their alleged persecutions (see the Decision throughout) and omitted more than minor details. Nor, in my view, is the "pivotal incident of the applicants' claim… consistently described in every version of the claimants' narrative." The Member sets out the inconsistencies in the Decision. See, for example, para 21 of the Decision, quoted above.

[147] In my view, the Applicants' complaints under this heading are little more than assertions that mischaracterize the Decision.

(3) Deficient Former Counsel

[148] While arguing on the one hand that the Applicants consistently presented the core incidents of their persecution, and that the "claim is consistently described in every version of the claimants' narrative," the Applicants also argue that their previous counsel was responsible for the deficient preparation of their PIFs:

> 72. As the claimants testified to repeatedly, they found their first counsel deficient in the preparations of their original PIF narratives. Because of this, much of the detail of their narrative was added as amendments to their PIFs. The Member disregards this and other explanations and repeatedly uses the mere fact that a detail was added as an amendment to the PIFs to impugn credibility.
>
> 73. In response to the complaint to the Law Society made by the plaintiffs against their former counsel the Member stated only that [former counsel] denied impropriety and that the complaint "went nowhere" and was therefore "not found to be proven." The latter is mere speculation on the part of the Member as he had no information before him as to the resolution of the LSUC complaint. As for the former counsel's denial, the brother of the principal claimant explains succinctly at oral testimony that it is in the former counsel's professional interest to deny any misconduct. Considering the conflicting motives, the presumption of credibility given to the former counsel's denials should have been extended equally to the claimants' accusations against him absent other evidence.
>
> [Footnotes omitted.]

[149] I do not see in the Decision any instance where the Member "uses the mere fact that a detail was added as an amendment to the PIFs to impugn credibility." The Applicants are, once

again, mischaracterizing the Decision. The Member "repeatedly" notes significant discrepancies, asks for explanations, and then comes to conclusions that take into account the passage of time and the conditions under which the evidence was created.

[150] The Member addresses the Applicants' allegations against former counsel as follows:

> [19] … More importantly, the PIF was prepared in consultation with a licenced lawyer. While the claimants filed a complaint against him alleging improper service, he responded in a strongly worded statement and disputed all allegations against him and confirmed that the PIF was prepared properly. Somewhat tellingly, the claimants did not push the matter further…

[151] This issue is also mentioned by the Member when dealing with I.P.P's testimony:

> [25] In oral testimony, [I.P.P.] described an incident in 2006 wherein he was stuffed into his own car, driven around for hours and was hit and beaten at various times along the way before being left to walk home. However, as noted at the hearing, in the amended PIF, the incident is brief, almost like a quick car-jacking in that the claimant was beaten and that the assailants then left with his car. [I.P.P.] stated it was not a car-jacking and that memories came up in therapy. Also, in oral testimony, [I.P.P.] stated that the police had refused to fill out a proper report as they would only mention the simple theft and that they asked for a bribe. However, as further noted at the hearing, there is nothing in the amended narrative that mentions the police behaving improperly with respect to this incident. Counsel submitted that this was mentioned in the amended narrative of [I.P.P.]'s mother. Finally, as further noted at the hearing, this incident was not mentioned in the original PIF. [I.P.P.] stated that previous counsel and his staff had not acted properly. I do not find these explanations satisfactory. Perhaps the police behaving improperly is a small point, given the extreme number of allegations in [I.P.P.]'s amended narrative, however given the level of detail in the amended narrative one would think that this would have been mentioned. Yet again, it seems odd that this and numerous other incidents would be omitted from a detailed original PIF. Not only did previous counsel deny impropriety but also it appeared that the claimants' complaint with the Law Society went nowhere, so it appears that their complaints were not found to be proven. Most important is the description of

> the incident itself. [I.P.P.] affirmed the amended narrative as true after being in Canada for years. It makes no sense that by that time he would be so wrong in his recollection of the evenst [*sic*] in the amended PIF. I find that these discrepancies, particularly with respect to the description of the event to further undermine the credibility of the claimants.

[152] The issue is also addressed in the context of the handwritten story that L.M.P.A. says was presented to previous counsel's office:

> [30] The claimant's [*sic*] presented a copy of the handwritten story that they brought to their original counsel's office. However, as noted at the hearing, it did not mention that [the Gang] were associated with the police. [L.M.P.A.] stated that former counsel and his assistant did not read this statement, that it was written and rewritten just after arriving in Canada, and that some things only surfaced during therapy. Counsel objected stating that this document was not a formal narrative and that it was solicitor-client privileged. I denied the objection in that the claimants themselves had waived privilege when they introduced the document through their counsel. The whole thrust of their evidence with respect to former counsel was that he and his staff did not listen to their story and that they had refused to read this document. While I can understand that it is not a formal narrative as created through counsel, if the claimants wanted to rely on counsel not reading this document as the reason the original PIF was deficient, then questions about what the document contained were more than fair. [L.M.P.A.] then stated that she did not think the connection between [the Gang] and the police was important at the time the document was created. As further noted at the hearing, the fact that there were threatening calls throughout the 15 years before the claimants came to Canada were not mentioned either. [L.M.P.A.] stated that she was trying to remember the major incidents. I do not find these explanations satisfactory. As I stated, this document would not be comprehensive like a narrative prepared with counsel. However, it was very similar to what was produced and omitted many of the same things. The claimants collectively kept stating that the original PIF was deficient because their original counsel failed to read this document. I do not see how this document helps the claimants; it actually reinforces the negative credibility findings made with respect to the original PIF.
>
> [Footnote omitted.]

[153] Applicants who are dissatisfied with a negative decision often blame those who represented them. Such accusations are easily made. The Court has made it clear that there is a significant burden upon those who wish to assert this ground: before pleading incompetence by former counsel, current counsel must make personal inquiries and satisfy himself or herself that there is some factual foundation for the allegation; former counsel must be notified and provided time to respond and, where applicable, a signed authorization releasing former counsel from any privilege attached to the former representation; any perfected application which raises allegations against former counsel must be served on former counsel; and, if leave is granted, current counsel will provide a copy of the order granting leave or the order setting the matter down for hearing to former counsel. See Procedural Protocol, Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court (7 March 2014). The law on point was summarized by Justice Strickland in *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850:

> [17] The test for addressing allegations of ineffective or incompetent assistance of counsel has been well defined by the jurisprudence (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39-43). First, the applicant must establish that the impugned counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*R v GDB*, 2000 SCC 22 at para 26 ("*GDB*")). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a breach of procedural fairness (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 (FCA) ("*Shirwa*"); *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*")). There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16, 18). Incompetence will only result in procedural unfairness in

> "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24)….

[154] The Member's point is that any mistake or wrongdoing by previous counsel has never been established. No presumption of credibility is given to previous counsel. The onus is upon the Applicants to prove any impropriety by previous counsel. The Applicants did not discharge this onus.

(4) Applying a Canadian Cultural Lens to Implausibility Findings

[155] The Applicants' arguments on this issue are as follows:

> 74. As detailed above, the Member questioned L.M.P.A. about the details surrounding her sexual assault with a degree of insensitivity that violated the *Gender Guidelines*. In his decision the member uses the responses gleaned from this improper questioning to impugn the credibility of the claimants. In so doing he violated the established principle from *Akter v Canada* that the RPD must consider the past trauma of a claimant if they are going to use their demeanor during testimony to make negative credibility findings.
>
> 75. Further, the Member substitutes his judgement for L.M.P.A.'s own experience regarding when, to whom, and in what detail she would be comfortable talking about her assault. In so doing he applied Canadian cultural norms to the behavior of a female rape victim, in clear contravention of the ruling of this Court in *Lubana v Canda* [*sic*] *(MCI)*.
>
> 76. The Member makes a similar error when he asserts that "[w]hether or not they had discussed the matter explicitly it was obvious that [D.P.P.] would have known her mother had been raped in the early 1990's by the same men that came after her[.]" This is stated with no supporting argument for why this would be obvious, even though "implausibility determinations must be based on clear evidence, as well as a clear rationalization process supporting the Board's inferences." Further [the Member] does not

> take into account D.P.P.'s cultural background or show any regard to compelling evidence to the contrary.
>
> [Footnotes omitted.]

[156] To begin with – as I will discuss below – the Member does not violate the Gender Guidelines.

[157] Secondly, L.M.P.A. makes it clear in several ways that she was comfortable with the Member's questions regarding police involvement. At pp 5680-5681 of the CTR, she says:

> **CLAIMANT 11**: I think it's such a lengthy story. When these things arrived, when these things happen one can't avoid remembering. This is a very delicate, delicate issue for me, not because of me but because of my husband. He suffered greatly because of his inability to protect us. He thinks he didn't step, step up to the plate but, really, he wasn't able to. He had no option. I knew that we would talk about this, but I've, I've, I've just … limited myself to answering what I'm being asked without adding too much more. I ask for my apologies.

[158] In the CTR, at p 5683, lines 14-26, L.M.P.A. says to the Member: "I appreciate the way you are treating me and dealing with me."

[159] Thirdly, the Member did not question L.M.P.A. on the details of the sexual assault. The record confirms the Member's own characterization of what occurred:

> [32] In the final version of [L.M.P.A.]'s narrative at line 173 it states that in the incident wherein she was raped in front of her husband and son […], the police were actually working with the perpetrators. However, as noted at the hearing, in the original PIF it simply states that the claimants spoke with the police, not that they were involved. [L.M.P.A.] stated that much came out in therapy and that she tried to keep the children out of things. Counsel objected that details of a sexual assault were being asked

> about. I over-ruled this objection as the details of the assault itself were not being questioned, that [L.M.P.A.] had disclosed the sexual assault immediately upon arrival in Canada and stated it again in the original PIF and made a specific reference to speaking to the police. [L.M.P.A.] stated that it was because of this incident that she had difficulty thereafter in speaking with the police. I do not find these explanations satisfactory. I can understand that a woman may be reluctant to disclose that she had been sexually assaulted or speak about intimate details of the assault itself. However, this is not one of those cases. [L.M.P.A.] disclosed the matter to the Immigration officer upon arrival and it was disclosed again in the original PIF. As I stated, the police are specifically mentioned in the original PIF with respect to this incident, albeit in a non-sinister fashion, so obviously [L.M.P.A.]'s mind was turned to them. The directions for filling out the PIF narrative are clear in that if there was some reason not to seek protection from the authorities it should be stated. [L.M.P.A.] stated it was the police involvement in this incident which made her distrust the authorities thereafter. I find that in these circumstances, if the police had really been involved in the incident in a sinister way this would have been mentioned in the original narrative. I find the fact that it was not to further undermine the claimants' credibility.

[160] As regards D.P.P., the Applicants quote selectively from para 35 of the Decision. In full, the paragraph reads as follows:

> [35] [I.P.P.]'s sister [D.P.P.] also testified. In oral testimony, she stated that she never found out that her mother was raped until after she came to Canada. However, as noted at the hearing, she had long known that [I.P.P.] witnessed a member of [the Gang] commit a murder and during incidents in 1995 and 2003 her assailants threatened to rape her like they had her mother. [D.P.P.] stated that she had never been told explicitly that her mother had been raped. I do not find this explanation satisfactory. Whether or not they had discussed the matter explicitly, it was obvious that [D.P.P.] would have known that her mother had been raped in the early 1990s by the same men that came after her. This simply did not match her testimony about when she found out about what happened. It actually appeared that [D.P.P.] said this in an attempt to explain why she had not made a refugee claim upon arrival in Canada. I find that this discrepancy further undermines the credibility of the claimants.

[161] As this paragraph makes clear, there was obvious evidence to support that D.P.P. knew about her mother's alleged rape. To begin with, D.P.P. states in her affidavit that "[a]fter my mother was raped in 1993, I received violent phone threats from [the Gang] containing threats of sexual violence and making reference to the rape against my mother": CTR, p 3927 (emphasis omitted). D.P.P.'s therapist confirmed that she "received many threats like her mom and sister that she was going to be raped": CTR, p 456. On top of this, at p 712 of the CTR, Applicants' counsel in written submissions confirmed as follows:

> [DPP and her sister] were both subjected to aggressions by [the Gang], and both received telephone threats over the years, containing threats of sexual violence against them and making reference to the rape of their mother [L.M.P.A.].

[162] The Applicants do not indicate what they mean by "compelling evidence to the contrary." It seems to me, however, that it is the Applicants who are making assertions in the face of compelling evidence to the contrary.

(5) Failure to Consider Valid Reasons for Gaps in Documentary Evidence

[163] The details of this complaint are as follows:

> 78. [The Member] found there was a lack of documentary evidence about routine deadly persecution and harmful violence against gay people in the gay district of Mexico City, *La Zona Rosa*, and during pride parades. He used this to impugn the credibility of C.A.A.P. going so far as to accuse him of "lying [...] to a somewhat fantastic degree." However, the Member did not consider an alternative explanation that much of the violence in Mexico against gay men might not be reported as such and that many human rights organizations continue to report on homophobic violence, even within the *Zona Rosa* of the Federal District.

> 79. Further, the Member said it was unlikely for [the Gang] to have avoided media attention, as "the Mexican media devotes a great deal of time to gangs and their activity." When the claimants later produced a local paper's report mentioning the gang the Member disputed its authenticity. The applicants submit that the same logic from *Bao* applies *mutatis mutandis* to the work of journalists. In a country with as much organized crime as Mexico, it is not reasonable to expect that every single criminal organization would be covered extensively in the media. [The Gang] being *madrinas* for the judicial police makes it even more plausible that there [*sic*] name would be absent from coverage.
>
> 80. A similar error is committed when the Member dismisses the police reports that have details wrong or fail to mention [the Gang]. For it to be robust the rule in *Adu* must take into account the particular failures or vulnerabilities of certain state reporters. Particularly, it is unsurprising that a police officer would be loath to record the name of a police affiliated gang for fear of reprisal. Thus, the omission of the gang name, corruption or sloppy reporting on the part of police should not overcome the presumption of truthfulness afforded to the plaintiffs [*sic*].
>
> [Footnotes omitted.]

[164] The Applicants' complaints under this heading do not really engage with the reasoning in the Decision. As regards the evidence of C.A.A.P., the Member reasons as follows:

> [38] [C.A.A.P.], a cousin of [I.P.P.]'s, also testified. After making his claim but during the hearing process he came out for the first time to his family and told them that he is gay. He based his claim not only on a fear of [the Gang], but also generally on sexual orientation. He testified among other things, about being kidnapped for three days. This was consistent with his PIF. However, as noted at the hearing, he presented a police report that stated that he was kidnapped for three and a half hours. It was further noted that at one point, the report is dated in 2006, rather than 2008 when the incident allegedly took place. [C.A.A.P.] stated that the officers that he spoke with were disinterested and did not take care in their work. As further noted at the hearing, when he spoke with an Immigration officer at the time that he made his claim, he stated that he had been kidnapped and released the same day. [C.A.A.P.] stated that he had a copy of the report and did not want to contradict it as he did not know the Canadian system and feared being deported. I do not find these explanations

> satisfactory. Essentially, [C.A.A.P.] admitted that the first thing he did when he arrived in Canada was to lie to an Immigration official to make his story fit what was expected. I do not see why a fear of deportation would lead him to do this. If questioned on it, he could have simply given the same explanation that he gave me. I find that these contradictions and an outright willingness to lie to Immigration officials to further undermine the claimants' credibility. Furthermore, the discrepancy in the year on the document calls into question its authenticity.
>
> [39] [C.A.A.P.] explicitly confirmed that his fear was also based on sexual orientation alone as a separate ground apart from his fear of [the Gang]. However, as noted at the hearing, in Mexico City there are openly gay bars, an openly gay area (La Zona Rosa), the annual Pride parade draws hundreds of thousands of people and when Argentina attempted to claim that they were the first Spanish country in the Americas to allow gay marriage, Mexican officials noted that Mexico was actually the first to do so and offered a free honeymoon in Mexico to the first same sex couple to be married in Argentina. [C.A.A.P.] stated that while large, La Zona Rosa has daily dead bodies and seriously injured people and that there are a number of physical attacks at the Pride parade. However, as further noted at the hearing, while there can of course be incidents of gay bashing in Mexico, there is absolutely nothing in the documentary evidence to indicate that there are daily dead bodies and wounded people in La Zona Rosa or attacks at the annual Pride parade. [C.A.A.P.] stated that not everything was allowed to be in the news, only selected information. I do not find these explanations satisfactory. Of course there may be isolated incidents of gay bashing in Mexico. The same is true of Canada. However, for there to be unreported carnage at the level that [C.A.A.P.] described there would have to be a conspiracy between the government, every media organization and every human rights monitoring organization to keep this quiet. Either that, or [C.A.A.P.] was lying. Of course, it was obvious he was lying and to a somewhat fantastic degree. I find that this further undermines the credibility of the claimants.

[165] This indicates that there were several reasons why C.A.A.P. could not be believed:

(a) The discrepancies in the evidence as to when and for how long C.A.A.P. was kidnapped;

(b) C.A.A.P.'s outright willingness to lie to an immigration official at the time he made his claim; and

(c) C.A.A.P.'s allegations of daily dead bodies and seriously injured people in La Zona Rosa and a number of physical attacks at the Pride parade.

[166] Far from failing to consider that violence against gay men might not be treated as such and that human rights organizations continue to report on homophobic violence, the Member, in fact, takes up and considers C.A.A.P.'s suggestions to this effect and gives reasons why they are unacceptable. There are, of course, incidents of gay bashing in Mexico, but the "unreported carnage" suggested by C.A.A.P. is not believable because it would require "a conspiracy between the government, every media organization and every human rights monitoring organization to keep this quiet." So, C.A.A.P.'s evidence is not believed because he admits he lied to an immigration official on entering Canada and he failed to substantiate the "carnage" he claims takes place within La Zona Rosa. C.A.A.P.'s alternative explanation is fully addressed.

[167] With regard to the news article, the Member reasoned as follows:

> [41] After days of hearings and much time passing the claimants presented what purported to be a news article featuring [the Gang]. However, as noted at the hearing, this appeared to be the only mention of [the Gang] that could ever be found in the media. [L.M.P.A.] noted that she did not know why this was and that more famous gangs get the coverage. Apart from some awkward phrasing in the article, it was noted that it was alleged that [the Gang] had been using an abandoned house belonging to the claimants for the last two years and this had never before been mentioned. [L.M.P.A.] stated that no one had told them about this and that she learned about it from reading the article and having someone take pictures of the house. I do not find these explanations satisfactory. As noted much earlier at the hearing, Mexican media gives a great deal of coverage to gangs and their activities. At times, the claimants stated that [the Gang] were notorious. However, this one article was the only media report presented and this was long after it was noted that it was strange that there was no reference to the gang in the media. Furthermore, the claimants were in contact with various people back in Mexico throughout their time in Canada. It makes no sense that if [the

> Gang] used and vandalized their house for two years that someone would not have told the claimants and they would have noted this at the hearing long before the article appeared. I find that these discrepancies not only call into question the authenticity of the documents presented, but also further undermine the credibility of the claimants.

[168] As can be seen, the Member does not reason that "every single criminal organization would be covered extensively in the media." The Applicants had stated that they were targeted by a "notorious" gang, but they had produced no media reports about this gang. After days of hearings, they then produced a report that the gang had vandalized their house for two years. These discrepancies are not decisive but, as the Member notes, they "call into question the authenticity of the documents presented, [and] also further undermine the credibility of the claimants." The negative credibility finding in this Decision involves a cumulative process with the Member making it clear that some discrepancies carry more weight than others.

[169] Also, by this point in the Decision, the Applicants cannot simply rely upon the presumption of truthfulness. The discrepancies are so significant that the Member is entitled to require corroboration and to carefully examine documentary evidence that describes incidents that the Applicants "would have noted… at the hearing long before the article appeared."

[170] The Member deals with the police reports as follows:

> [42] Also presented late in the hearing was a police report allegedly about the incident wherein [I.P.P.]'s father, [F.P.R.] crashed his car. However, as noted at the hearing, in the report, he is referred to as a journalist, which he had never been. [F.P.R.] stated that he would have been in no shape to tell anyone that and it must be an error. It was further noted that the report states that he lived in Tlalnepantla, where he has never lived. [F.P.R.] stated that this must be another error. As further noted at the hearing, there is

> no mention of [the Gang] in the report. [F.P.R.] insisted that he had mentioned them several times to the police and that they write what they want. I do not find these explanations satisfactory. It makes no sense that the police would randomly omit or change things about what happened, particularly such mundane things such as [F.P.R.]'s occupation or place of residence. It appeared that the report simply did not match his story. I find that this not only further calls into question the authenticity of the documents presented, but also further undermines the credibility of the claimants.

[171] Once again, the discrepancies between this documentation are not treated as decisive. The documentation was presented "late in the hearing" when, as the Decision makes clear, the Applicants could no longer simply rely upon the presumption of truthfulness and the Member had good reason to require corroborative documentation. The documentation is considered suspect because "[i]t makes no sense that the police would randomly omit or change things about what happened, particularly such mundane things such as [F.P.R.]'s occupation or place of residence. It appeared that the report simply did not match his story" (emphasis added). The discrepancy is not treated as decisive; it simply "further calls into question the authenticity of the documents, [and] also further undermines the credibility of the claimants."

[172] The state reporters here are the police, and there is no evidence to support that getting someone's occupation or place of residence wrong is a particular failure or vulnerability of the police.

(6) Unreasonable IFA Finding

[173] The Applicants' complaints on this issue are as follows:

81. [The Member] makes a palpable and overriding error in applying the test for the existence of an Internal Flight Alternative (IFA) in Mexico City for C.A.A.P as a gay man. As stated in *Rasaratnam v Canada*, the correct test for determining whether an IFA exists is to consider whether there is a serious possibility of the actual claimant — and not all people like the claimant — face persecution in a place, on the balance of probabilities. In the RPD decision, the Member first made a negative credibility finding against C.A.A.P. and then used that finding to reject the totality of C.A.A.P.'s evidence despite C.A.A.P.'s apprehension of fear of persecution in the IFA and unique circumstances due to his family's history. The Member's mis-characterisation of the test is evident in this passage of his reasons: "Since I do not believe any of the claimants' evidence, to find in [C.A.A.P.]'s favour, I would have to find that all gay men in the Federal District face persecution".

82. Additionally, the Member's determination on the issue of IFA is unreasonable. The circumstances of other people who are similarly situated to the claimant is only one factor that is important in considering whether there is a serious possibility of persecution of the claimant. In his reasons, [the Member] grounds the IFA determination on the circumstances of other people who are similarly situated to C.A.A.P.

83. Further, in determining whether there is an objective basis for fearing persecution in the IFA, the Refugee Division must consider the personal circumstances of the claimant, and not just general evidence concerning other persons who live there. [The Member] gives no mention to C.A.A.P.'s reasons for fearing moving to the IFA, which is less than one hour away from his old place of residence, which arise from both the close distance it is to where [the Gang] operates, and the police discrimination he is likely to experience if he were to ask for protection against [the Gang], because of his sexual orientation.

84. [The Member's] assessment of the evidence in favour of a viable IFA is unreasonable. The existence of formal legal marriage equality and gay culture in the Federal District does not mitigate the possibility of C.A.A.P. being harmed by [the Gang] and receiving little protection from authorities.

[Footnotes omitted; emphasis in original.]

[174] These complaints are levelled against the following finding and conclusions of the Member:

> [48] While [C.A.A.P.] lived in suburban Mexico City, our documentation deals with the Federal District itself, the heart of the city, so I will deal with his situation as one of IFA. I find that there is a viable IFA in the Federal District. In *Rasaratnam*, the Federal Court of Appeal set out a two-prong test to be used in determining if an IFA is viable:
>
> (i) The Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists.
>
> (ii) Conditions in that part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there.
>
> [49] With respect to the first prong of the test, the claimant would be returning to Mexico through the airport in the Federal District so he would not have to go elsewhere in Mexico. While counsel did submit that [C.A.A.P.] is not only gay, but is married to a same sex partner and this would place him at greater risk of harm, I do not see this being the case given that same sex marriage is legal in the Federal District. Since I do not believe any of the claimants' evidence, to find in [C.A.A.P.]'s favour, I would have to find that all gay men in the Federal District face persecution. As noted earlier in dealing with the report by Professor Rehaag, the situation with respect to sexual orientation does not change that often and while there can be discrimination and isolated acts of violence, the situation for gay men is generally positive. As noted at the hearing, there is a gay district in the Federal District, there are openly gay bars and there are openly gay politicians. I find there is no serious possibility of [C.A.A.P.] being persecuted in the Federal District.
>
> [50] With respect to the reasonability of the claimant moving to the Federal District, I note that the threshold for the claimant to show that relocation to the proposed IFA would be unreasonable is quite high. As noted previously, the claimant would be able to travel directly to the Federal District. He would essentially be moving closer to the centre of a city he already lived in. He conceded at the hearing that, apart from [the Gang] and being gay, he would have no difficulty living there.

[Footnotes omitted.]

[175] As these reasons make clear, the Member applied the correct test and considered the particular circumstances of C.A.A.P.. The onus was upon C.A.A.P. to establish that the identified IFA was not safe or reasonable and he failed to do this for reasons provided by the Member. I can see nothing incorrect or unreasonable in the Member's treatment of this issue.

(7) Conclusions on Reasonableness

[176] The Applicants must bear in mind that, under Canadian law, the Member does not have to be "correct" in his credibility findings and the Court cannot simply substitute its own view for that of the Member. Even if I might have come to different conclusions myself, this would not necessarily render the credibility findings unreasonable.

[177] In order to be reasonable, the credibility and IFA findings must provide "justification, transparency and intelligibility" and must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law." See *Dunsmuir*, above, at para 47.

[178] In my view, the Member's reasons and findings on credibility and IFA are justifiable, transparent and intelligible. The credibility findings are based upon major and cumulative discrepancies in the Applicants' evidence for which the Applicants were unable to provide reasonable explanations. In arriving at his conclusions on credibility, the Member took into account the long lapses of time between the events alleged and the Applicants' testimony, the circumstances under which the POE notes were made and the PIFs completed, the medical

evidence adduced concerning the stresses and other difficulties under which the evidence was provided, and the difficulties of testifying.

[179] It is revealing that the Applicants do not allege in their submissions that the Member made any mistakes of fact or that the discrepancies in evidence that he identified do not exist. Their argument is that the discrepancies are not material or that they can be explained by the passage of time or the conditions under which the evidence was given. This is equivalent to asking the Court to interfere with the Member's expertise in assessing credibility, and the Court has often expressed a reluctance to do this. In *Rahal*, above, after reviewing the relevant jurisprudence, Justice Gleason summarized the Court's stance in the following way:

> [60] None of these points warrants intervention by the Court. In matters of credibility, as with identity findings, it is my view that intervention by the Court is not warranted if there is some evidence to support the Board's conclusion, if the RPD offers non-generalized reasons for its findings (that are not clearly specious) and if there is no glaring inconsistency between the Board's decision and the weight of the evidence in the record. It does not matter if the RPD's reasons are not perfect or even if the Court agrees with the conclusion, let alone each step in the RPD's credibility analysis. As the case law establishes, matters of credibility are at the very heart of the task Parliament has chosen to leave to the RPD.

[180] The Applicants may well disagree with the Member's conclusions, and this is inevitably the case with many negative credibility findings, but they have not shown that those conclusions fall outside of a range of acceptable outcomes which are defensible in respect of the facts and the law.

C. *Reasonable Apprehension of Bias*

[181] There is no dispute between the parties that, in order to establish a reasonable apprehension of bias, the Applicants must establish that an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision-maker would not decide the matter fairly. The governing jurisprudence also makes it clear that the grounds must be substantial and the test should not be applied from the point of view of a "very sensitive or scrupulous conscience." See *Committee for Justice*, above, at 395 and *Wewaykum*, above, at para 76.

[182] Also, it is clear that an allegation of bias must be supported by evidence and cannot rest upon "mere suspicion, pure conjecture or mere impressions of an applicant or counsel." See *Arrachch*, above, at para 20 and *Luzbet*, above, at para 9.

[183] In *Geza*, above, Justice Campbell of this Court had the following to say on this issue:

> [16] In *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at page 394, de Grandpré J. enunciated the test for reasonable apprehension of bias as follows:
>
> > [...] the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would a [*sic*] informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?["]

> The test recognizes the importance of impartiality which, at common law "refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" ...connotes absence of bias, actual or perceived" (Le Dain J. in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685, cited in *Bell Canada v. Canadian Telephone Employees Assn.*, [2003] 1 S.C.R. 884 at para. 18). Impartiality and the appearance of impartiality are fundamental not only to the capacity to do justice in a particular case, but also to individual and public confidence in the administration of justice (*Valente* at p. 689).
>
> [17] The Applicants do not challenge the test for a reasonable apprehension of bias; however, they contest the level of proof required to reach a finding that the test has been met. The Applicants argue that to succeed on their bias argument, they need only demonstrate reasonable grounds for an apprehension of bias. I do not accept this argument.
>
> [18] The case law is clear that the grounds for the apprehension must be substantial (see *Committee for Justice and Liberty* at pp. 394-395; *R. v. R.D.S.*, [1997] 3 S.C.R. 484 at paras. 31 and 112). As Cory J. noted in *R.D.S.* at para. 112, the jurisprudence supports the contention that a real likelihood or probability of bias must be demonstrated, and that a mere suspicion is not sufficient (see also *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884 at paras. 17, 18, and 50).

[184] While Justice Campbell's application of these principles to the facts in *Geza* was ultimately overturned by the Federal Court of Appeal, his statements on the test for a reasonable apprehension of bias were not criticized. See *Kozak v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124.

[185] In the present case, the issue of reasonable apprehension of bias cannot be totally divorced from my findings on reasonableness. In effect, the Applicants have to demonstrate that

it is more likely than not that a decision that is reasonable on its face is, nevertheless, a biased decision. The Applicants seek to do this in several ways.

(1) Predisposition to Disbelieve the Applicants

[186] The Applicants say that the Member's credibility findings demonstrate a predisposition to disbelieve them:

> 46. [The Member]'s approach to questioning the applicants focused "relentlessly on countless details, evidently with the goal of making [them] "crack"." It appears that the Member proceeded from the position that the claimants were lying, disrupting the perception of impartiality and directly contravening the presumption of truthfulness in oral testimony.
>
> [Footnotes omitted.]

[187] It is telling that the Applicants cite no specific examples to substantiate these bald assertions. My reading of the record suggests to me that the Member discharged his duty to test the truthfulness of the Applicants' evidence that was called into question by significant discrepancies in their account of important aspects of the narrative that formed the basis of their claim. And I have already found that the Member's conclusions were reasonable.

(2) Improperly Relying on Specialized Knowledge

[188] The Applicants also make the following complaint:

> 47. Also, [the Member] improperly relied on specialized knowledge in contradiction of the facts in evidence to arrive at unfair and unjust conclusions about credibility. Contrary to RPD Rule 22, [the Member] did not give the applicants an opportunity to provide evidence or make representations on the reliability and use of his opinion.

> [Footnotes omitted.]

[189] The "specialized knowledge" referred to here is that the "Mexican media gives a great deal of coverage to gangs and their activities" and that claimants are often able to present medical reports for treatment obtained in Mexico. I deal with this issue at paras 217-219 of these reasons. In my view, the Member does not improperly rely upon specialized knowledge.

(3) Unfounded Accusation of Coaching

[190] The Applicants also assert that:

> 49. [The Member]'s unfounded accusations that the claimants were coaching each other to lie also indicated his predisposition to disbelieve the claimants. At the slightest disruption, a cough, and despite counsel's clarifications, the Member wrongly concluded that the claimants were prompting each other, illustrating his distrust of the claimants and his closed-mindedness as to the veracity of the claim.
>
> [Footnote omitted.]

[191] In support of this allegation, the Applicants refer the Court to the affidavit of F.A.M.L., Exhibit "A" at pp 108-110, which reads, in relevant part, as follows:

> **Member**: I would note that someone spoke at the back of the room in between the time that you said the other two individuals and the other individual.
>
> **Interpreter**: Noté, dice, que alguien habló atrás en la sala cuando usted dijo, eh, yo entendí, los otros sujetos y alguien habló. [I noted, he says, that someone in the back of the room talked when you said, um, I understood, the other individuals and someone spoke]
>
> **Member**: I've said this several times.

Interpreter: Lo he dicho esto ya varias veces. [I've already said this several times]

Member: When someone speaks at the back of the room,

Interpreter: Cuando alguien, dice, habla atrás de la sala. [When someone, he says, speaks at the back of the room.]

Member: that can look like you're trying to coach the claimant who's testifying.

Interpreter: Esto daría la apariencia de que la intención es el de tratar de darle, dice, ayuda a la persona que está dando testimonio. [That would give the impression that the intention is to give, he says, help to the person that is giving testimony.]

Member: In this case, the testimony did change

Interpreter: En este caso, dice, el testimonio cambió [In this case, he says, the testimony changed]

Member: on a fairly basic point.

Interpreter: En un punto, dice, muy básico. [He says, on a basic point]

Member: Between the time that the claimant initially spoke

Interpreter: Entre el momento de que el peticionario había, dice, hablado [Between the time that the claimant, he says, had spoken]

Member: there was an interruption

Interpreter: Hubo una interrupción [There was an interruption]

Member: and then the testimony was different.

Interpreter: Y luego el testimonio cambió. [and then the testimony changed.]

Member: That is not helpful.

Interpreter: Esto, dice, - [This, he says,-]

Counsel (interrupting): I -

Interpreter: - no contribuya a nada. [- does not help anything.]

> **Counsel**: I don't believe that happened. I believe that if ... if I'm not mistaken, I believe that [I.P.P.] was correcting something in the translation. And I believe that the sound at the back of the room was ... was [D.P.P.] coughing because of her asthma.
>
> **Interpreter**: Creo que se hizo una corrección de la interpretación pero creo que atrás hubo un … fue la persona que tiene asma quien tosió. [I believe that a correction was made of the interpretation but I think that there was... it was the person who has asthma that coughed.]
>
> **[Member]**: Well that's not the impression I necessarily had. But I just caution everyone -
>
> **Interpreter (interruption)**: Eso no fue la impresión que yo recibí [That's not the impression that I had]
>
> **Member**: I caution everyone. Coughing, I'm not trying to limit.
>
> **Interpreter**: Bien. Quiero advertir a todos aquí, no tenemos problemas con toser. [Ok. I want to warn everyone here, we don't have problems with coughing]
>
> **Member**: But I'd like to hear from the claimant who's testifying what he as to say.
>
> **Interpreter**: Pero quiero que el testigo diga algo si tiene que decir algo al respecto. [But I want that the witness says something if he has something to say about this.]
>
> **[Member]**: So, sir, perhaps we can continue?

[192] The record shows that I.P.P. was indeed merely correcting an error by the translator, but this is still a reasonable caution, the purpose of which was to preserve the value of the Applicants' evidence. The Member is duty-bound to ensure that the evidence is the witness' own version of events and is unprompted. This is particularly important in a context where there are multiple applicants, all of whom are relying upon the evidence given by other applicants, and who may not understand that, in order to be persuasive, oral evidence must be spontaneous and unprompted. Cultural factors also make it important that the Applicants understand this. The

Member says that interruptions can look like coaching. The Applicants may well believe that the Member was expressing a distrust of their evidence, but a reasonable apprehension of bias cannot rest upon personal impressions. In my view, a reasonable and right-minded person looking at this objectively would understand that the Member was simply concerned to protect the integrity of the Applicant's evidence.

(4) Dismissing Motions for Recusal without Satisfactorily Addressing Them

[193] The Applicants' complaint on this issue is as follows:

> 50. A reasonable person would consider the Member's failure to address the recusal requests put forward by the claimants' counsel as disregard for and bias against the claimants. The Member refused to recuse himself after counsel for the claimants made their first two requests, in October 2011. The Member never directly responded to subsequent requests for his recusa1. The Member's dismissive attitude and evident failure to take the requests seriously and reply in a timely manner contribute to a larger impression that he did not have an open-mind to the claims put forward by the applicants.
>
> [Footnote omitted.]

[194] The Member's refusal to recuse himself is not, *per se*, evidence of bias. And the Member does respond to the recusal requests because they are dealt with extensively in the Decision where he obviously takes them very seriously. I fail to see how this is evidence that the Member did not have an open mind. The argument appears to be that because the Member did not recuse himself as and when requested by the Applicants (there were six requests) this showed he did not have an open mind. What it really shows is that the Member was not satisfied that the Applicants had established sufficient grounds for recusal, and this is explained fully in the Decision.

(5) Excessive Delay

[195] The Applicants also invite the Court to see excessive delay as evidence of a reasonable apprehension of bias.

> 52. The Member's failure to hold the hearings and release a decision within a reasonable period of time is a further factor in a reasonable person's impression that the Member failed to take the claims seriously.
>
> 53. Counsel for the claimants requested explanations for the inordinate delay on several occasions and reiterated the physical and psychological toll the proceedings were taking on the claimants, as outlined above. The Member failed to directly respond or explain.
>
> 54. The applicants interpreted the excessive delay to be a reflection of the Member's disrespect of them and disbelief of their situation. According to the Vulnerable Person Guidelines, it is the IRB's duty to determine proceedings "as informally and quickly" as possible. The Guidelines advise that, where necessary, scheduling priority should be given to claimants as necessary, noting that "uncertainty and anxiety caused by delay can be particularly detrimental to some vulnerable persons."
>
> [Footnotes omitted.]

[196] If the Applicants "interpreted the excessive delay to be a reflection of the Member's disrespect of them and disbelief of their situation," this does not mean that an objective, informed person, viewing the matter realistically would do so. There is a real issue of whether the delay in this case was excessive or inordinate which I will address below, but delay on these facts does not suggest the "Member's disrespect of [the Applicants] and disbelief of their situation." There were many factors that contributed to the delay both before and during the hearings, but no reasonable person would conclude that bias was one of them.

(6) The Gender Guidelines and the Vulnerable Persons Guidelines

[197] There are several issues raised by the Applicants under this heading:

> 55. The Gender Guidelines and the Vulnerable Person Guidelines give the IRB broad authority to grant procedural accommodation. The failure to meaningfully implement the Gender Guidelines is a reviewable error. In this case it is further indication that the Member did not take applicants' trauma seriously.
>
> 56. [The Member] did not accommodate the applicants' October 13, 2011 request that he recuse himself pursuant to the Vulnerable Person Guidelines, despite the applicants having presented expert evidence that the composition of the panel was putting the claimants' mental and physical health at risk and that the claimants were in fear of the Member and felt terror testifying in front of him. He stated that he did "not see how changing members will help anything." He said that all members and public servants receive ongoing training for dealing with claimants who have "mental health issues and other sensitive issues." He said that all Members at the IRB are "authority figures" and many had publicly known low acceptance rates, so a change of member would not solve any of the problems described.
>
> 57. [The Member] demonstrated a gross lack of sensitivity and persistent closed-mindedness toward the applicants' narrative when questioning L.M.P.A. about her sexual assault. The Member questioned L.M.P.A. incessantly about her interaction with police moments after her sexual assault. She repeatedly told the Member that the subject matter made it "extremely difficult for me to think;" that the issue was "very delicate" for both her and her husband and for that reason she had been limiting her answers to respond to the questions asked. Despite L.M.P.A. saying she was uncomfortable speaking about this delicate issue, found it hard to think about, and explaining omitted details, [the Member] continued with the line of questioning, badgering her about why she had not expanded earlier about the police response to her sexual assault. In his decision, [the Member] wrote that because she disclosed details of her sexual assault to the immigration officer and on her PIF, this was not a case of a woman who may be reluctant to "speak about intimate details of the assault itself".
>
> [Footnotes omitted.]

[198] In my view, the Applicants' assertions here look very much like a case constructed after the fact and that leaves out of account the contemporaneous evidence.

[199] First of all, the Member's questioning of L.M.P.A. with regards to the sexual assault reveals no insensitivity. As the Member makes clear in the Decision, he did not question L.M.P.A. on the details of the assault and merely sought an explanation for the discrepancy with regards to police involvement:

> [32] In the final version of [L.M.P.A.]'s narrative at line 173 it states that in the incident wherein she was raped in front of her husband and son [A.P.P.], the police were actually working with the perpetrators. However, as noted at the hearing, in the original PIF it simply states that the claimants spoke with the police, not that they were involved. [L.M.P.A.] stated that much came out in therapy and that she tried to keep the children out of things. Counsel objected that details of a sexual assault were being asked about. I over-ruled this objection as the details of the assault itself were not being questioned, that [L.M.P.A.] had disclosed the sexual assault immediately upon arrival in Canada and stated it again in the original PIF and made a specific reference to speaking to the police. [L.M.P.A.] stated that it was because of this incident that she had difficulty thereafter in speaking with the police. I do not find these explanations satisfactory. I can understand that a woman may be reluctant to disclose that she had been sexually assaulted or speak about intimate details of the assault itself. However, this is not one of those cases. [L.M.P.A.] disclosed the matter to the Immigration officer upon arrival and it was disclosed again in the original PIF. As I stated, the police are specifically mentioned in the original PIF with respect to this incident, albeit in a non-sinister fashion, so obviously [L.M.P.A.]'s mind was turned to them. The directions for filling out the PIF narrative are clear in that if there was some reason not to seek protection from the authorities it should be stated. [L.M.P.A.] stated it was the police involvement in this incident which made her distrust the authorities thereafter. I find that in these circumstances, if the police had really been involved in the incident in a sinister way this would have been mentioned in the original narrative. I find the fact that it was not to further undermine the claimants' credibility.

[200] In other words, the Member was focused upon why L.M.P.A. did not seek the protection of the authorities, and not upon the assault itself. Applicants' counsel had already raised with L.M.P.A. her interactions with the police. See CTR, pp 5632-5634. And the Member made it clear that he had no intention of going into details of the assault because he regarded it as a "sensitive matter," see CTR, pp 5678-5683. L.M.P.A. indicates herself that she could respond to this line of questioning and, given the concerns of her own counsel, she reassures the Member that "I appreciate the way that you're treating me and dealing with me. I knew that I was going to be asked many questions and it's not easy to do so. It's not easy to describe everything." To which the Member replies, "Thank you, Ma'am," before moving on to another topic. See CTR, p 5683, lines 14-26.

[201] This does not look like a "gross lack of sensitivity" to me. Nor do I see any evidence of "badgering." L.M.P.A. obviously found the questioning difficult but it is clear that she did not regard the Member as the cause of these difficulties.

[202] As regards the Vulnerable Persons Guidelines, the Applicants leave entirely out of account the many efforts at accommodation implemented by the Member to assuage their concerns. A review of the record reveals that the Member, in order to alleviate the tensions that the Applicants were under, allowed frequent breaks, counsel's questioning first, a support person to sit next to the claimants, the avoidance of any questions about details of the sexual assault in relation to L.M.P.A., an offer to set up closed circuit television so that proceedings could be monitored from outside the hearing room, and repeatedly inquired of counsel if other

accommodations could be made to assist the Applicants. Also, adjournments and extensions were repeatedly allowed at counsel's request.

[203] In my view, the Applicants' real complaint is that the Member should have recused himself, not because of the way he conducted the hearings, but because they regarded him as someone, who, because of his previous record, would not be likely to grant their claims. In this application for judicial review, they speak of feeling trapped in light of the statistics produced regarding the Member's record. I shall come to those statistics below in some detail, but at this juncture, I don't think there is evidence to support a reasonable apprehension of bias on the part of the Member in the way that he handled the lead up to the hearings or the hearings themselves.

(7) Conduct During the Hearings

[204] In this regard, the Applicants now make the following assertions:

> 58. The Member's role demands "exemplary probity and integrity" and "impartiality and openness of mind." Members must "preclude any suggestion that Canada is not willing to accept refugees." A reasonable person considering the Member's overall conduct during the hearings would question his impartiality and openness of mind.
>
> 59. When questioning refugee claimants, a Member must display a neutral and respectful attitude. A Member cannot interfere with testimony in a manner that does not exhibit respect. [The Member] did not display the requisite neutral or respectful attitude toward the applicants and crossed the line from the role of impartial adjudicator. For example, [the Member] made the irrelevant and unnecessarily aggressive comment that the claimants' family therapist, [the family therapist], may have committed a provincial offence for offering her opinion on the client's mental state.
>
> 60. The applicants' testimonies were inhibited due to [the Member]'s perceived tone and his criticism and blame toward the

> applicants and their counsels on several occasions. I.P.P., found [the Member] to be "insensitive, inhumane (not a hint of humanity in what he did), non-objective and cruel." Dr. Freire, in her psychiatric assessment of I.P.P., relayed his experience with [the Member] as "dehumanizing", "humiliating" and having "no consideration of the family's life-threatening experiences back in Mexico."
>
> [Footnotes omitted.]

[205] The Member's comments regarding [the family therapist] were as follows:

> **MEMBER**: Oh, please, yes. Thank you very much. All right. That was one of the things. Now, going back to you, Ms. Stothers. I'm just going along with some of the ... the issues that I had highlighted. One of the things that we had talked about the last time was that we had a number of reports from Asami Asan (ph) [*sic*] who had diagnosed several of the claimants with various psychiatric conditions. And on the qualifications that she had listed in her letters, it didn't indicate that she was actually licenced to do so in the Province of Ontario.
>
> **COUNSEL 1**: Okay, well, first I ... having read those reports, she makes clinical observations regarding certain symptoms that she ... she observes in the clients during her sessions with them so I don't believe that she did make any diagnosis.
>
> **MEMBER**: I disagree. She says that several claimants were suffering from post-traumatic stress disorder and several other ailments. That's ... that's a diagnosis and that's something that we're intended to rely upon. That is a provincial offence.
>
> **COUNSEL 1**: Yeah, I did take note of the comments that you made last time. I would have to pull out her reports and look at it more carefully 'cause, I mean...
>
> **MEMBER**: Does she have a licence?
>
> **COUNSEL 1**: No, she doesn't. She's not a psychologist or a psychiatrist. She's a therapist. There is no regulating body for therapists in Canada at the moment. She is a member of the American Association of Marriage and Family Therapists.
>
> **MEMBER**: Yes, but my question is, is she a member of any of the Ontario Colleges that allow you to...

COUNSEL 1: No.

MEMBER: ...make psychiatric...

COUNSEL 1: No.

MEMBER: ...diagnosis?

COUNSEL 1: No, she's not. She's not.

MEMBER: Well, like I said, it appears on the face of it, a Provincial offence. It may have created in doing so. But the more practical matter, the weight given to those reports is going to be adjusted accordingly. Because if someone who is lacking a licence to make a diagnosis is purporting to do so, that tends to change the weight that one might otherwise give it then someone who ... who is licenced to do so.

COUNSEL 1: Okay, if ... may I make a few comments?

MEMBER: Sure.

COUNSEL 1: So, I ... when ... when you're assessing how much weight you're going to give to her reports, I would ask that you consider the length of time that she's been working as a counsellor with this family and the fact that she does have a counselling relationship with the family. There's a genuine professional relationship with the family. I would also ask that you consider the experience that she has working as a therapist with refugees, with people with experiencing trauma. That experience, I won't repeat it. It's outlined in ... in her report.

MEMBER: Well, I'm sure whatever experience she has will be taken into account, but as I said, this isn't quite the same as having somebody who's licenced to give a diagnosis ... give a diagnosis.

[CTR, pp 5505-5506, emphasis added.]

[206] This is an exchange between the Member and Applicants' counsel regarding the evidence of [the family therapist]. The concern is obviously not whether a provincial offence has been committed but whether [the family therapist] is qualified to offer a diagnosis as evidence. The Member's exchange with counsel does not show him being disrespectful towards the Applicants

or as lacking in impartiality. The comment about the provincial offence is obviously intended to underscore the Member's concern to Applicants' counsel that [the family therapist] cannot be a qualified expert. Counsel seems to have no problem understanding that this is the issue. Counsel does not complain about intimidation or impartiality but addresses the real issue that is of concern to the Member.

[207] The Applicants now say that their testimonies were "inhibited" due to the Member's perceived tone and his criticism and blame towards them and their counsel. No contemporaneous evidence is cited for this and no explanation is given of what the Applicants were "inhibited" from saying. The Applicants' quotations from Dr. Freire's assessment are after-the-fact and do not explain how or why, for instance, the two counsels and the RPD, who were at the hearing, never witnessed "in their opinion, any instances of inappropriate demeanour" (Decision at para 4). The record suggests that Dr. Friere's report is based upon her interview of I.P.P. describing his recollection of testifying before the RPD. Dr. Friere's assessment is primarily based on an interview with I.P.P. that took place on July 4, 2016. Dr. Friere was provided the original and amended PIFs, and other psychiatric assessments, but did not review the transcripts of the hearing. The most relevant contemporaneous document she was provided with was a letter from [the family therapist] to the Member, dated October 11, 2011 (CTR, pp 645-647, Tab 2, additional materials). I note that [the family therapist]'s letter was prepared after the Applicants had learned of the Member's reported "zero percent acceptance rate" in anticipation of hearings resuming and the Applicants' first recusal request on October 13, 2011. The latter quotes from Dr. Friere's report are in the context of her summarizing I.P.P.'s recollections: "In summary, [I.P.P.]'s experiences at the hearing with the RPD were described as dehumanizing, humiliating,

no consideration of the family's life-threatening experiences back in Mexico and finally discarded and denied ("made up lies")."

[208] The Applicants say that the Member also sought to discredit their evidence by threatening to subpoena their former counsel to testify at the hearing.

[209] The Member asked Applicants' counsel whether former counsel was "going to be a witness?" Following this question, the following exchange occurred:

> **COUNSEL 1**: I'm not planning on bringing him as a witness. We have his response in writing.
>
> **MEMBER**: Yes, but we don't have his response to the claimants' response. That's never been put to him.
>
> **COUNSEL 1**: Right. She just sent it today. I'm, I'm not sure how the Law Society process works in terms of whether they'll give him a chance to provide another response, when they'll ... if they'll make a decision.
>
> **COUNSEL 2**: I don't think he could be a witness, too, because of confidentiality.
>
> **REFUGEE PROTECTION OFFICER**: I'm sorry, I couldn't hear you.
>
> **COUNSEL 2**: I don't believe he could be a witness because of solicitor-client confidentiality. Like he can defend himself to the Law Society, but I don't know if he could be compelled to testify...
>
> **MEMBER**: Actually, yes, he can.
>
> **COUNSEL 2**: ...in relation to a former client.
>
> **MEMBER**: And I've done that before. We have the power to issue a summons here, and actually have had several hearings where counsels in disagreement over how things developed. Once, once the claimant says, I disagree with what happened, they've waived solicitor-client privilege, and it's the claimant's privilege to waive, not the solicitor's. Once that privilege has been waived, as has been done by the claimant here, a summons can be issued, and

> [former counsel] can be called here, or he can just appear out of his own free will, not (inaudible) end of a summons. But to say no, this is my version of events, and if you want to disagree, well, let's hear it, and he can give testimony.
>
> I've actually done several cases like that. Now I haven't read what the claimants' response is, obviously, to see whether or not they disagree substantially with what he says or maybe it's just a difference in spin, I don't know. I haven't read it. It'll take me a while to read that. Thoughts. Mr. Gould.
>
> **REFUGEE PROTECTION OFFICER**: Well, I haven't read it either. It's obviously critical that we have a translation of this document which ... pardon me, I'm referring here to the Spanish document that's attached to this letter. Like you, I assume that we're looking at the original, handwritten, Spanish narrative, which is a root document that's critical here. Actually, I don't have anything practical to add.
>
> **MEMBER**: That's fair enough. But no, you're ... I, I agree with you, saying that, you know, a lot of this controversy was well, if we had only used the original written narrative as it was written in Spanish, well, it wouldn't have been a problem. Well, this is the narrative, well, what does it say?
>
> **COUNSEL 1**: I'll provide a translation as soon as possible.
>
> **MEMBER**: All right. Now I'm going to have to see what her response is, because like I said, I'm not going to read it right now. It's going to take a little bit for me to digest it and dive back into the rest of the, the Law Society documents to see what was there, but, just let me throw it out there, that if the claimants and [former counsel] are not in agreement on what happened, on significant and substantial points, one of the options that I will have is to issue a summons to him and have him come in here and we can all question him. As I said, I've done that in several cases where counsels have had differences of opinion.
>
> [CTR, pp 5439-5440.]

[210] It is obvious from this exchange that the Member's interest is in resolving the conflict between the Applicants' allegations that former counsel did not represent them appropriately and former counsel's denial of this accusation. Applicants' counsel says that former counsel cannot

be called as a witness and does not answer the Member's question. The implication surely is that the Applicants will not be calling former counsel as a witness so that the conflict in evidence can be resolved. The Member, however, points out that, indeed, former counsel could be called and clearly contemplates that former counsel might have to be called if the matter cannot be otherwise resolved by going back into the Law Society documentation.

[211] To characterize this exchange as involving some kind of threat, or improper attempt to discredit the evidence of the Applicants, is not accurate. The RPO had similar concerns and asked Applicants' counsel if she intended to call former counsel as a witness. Applicants' counsel replied "[n]o, I have no intention of calling him," and obviously has no concerns about the Member resolving the matter on the basis of the documentation before the Law Society:

> **COUNSEL 1**: No, I have no intention of calling him. Although if, if there's any other documentation from the … as a result of the Law Society complaint, I can provide for that. I'm …I'm going to have to look into what the next steps are … would be in this Law Society complaint process. I'm not … it's a process I'm not particularly familiar with. I've … I've never had clients who … who've done this sort of thing before. But, no, I'm … I'm not at all intending on bring [*sic*] [former counsel] in.
>
> [CTR, p 5515.]

[212] It is telling that, when the Member makes it clear to the Applicants that former counsel can be called so that their allegations against him can be tested, their response is that they have no intention of calling him and they don't ask the Member to call him.

[213] Also in relation to previous counsel, the Applicants' complain that the Member improperly sought to discredit their evidence because, when they submitted a document they had

provided to their former counsel, the Member identified perceived omissions in the document and relied upon those omissions to impugn the credibility of the Applicants.

[214] It is unclear what the Applicants mean here by "perceived omissions" as opposed to "omissions." However, the omissions in the document are more than apparent and were acknowledged by Applicants' counsel and put to L.M.P.A. at the hearing by the RPO:

> **COUNSEL 2**: I'd just like to state something as well. I, I just wanted to raise a concern. I realize that this document is being repeatedly referred to as a narrative, but … well I believe it's apparent it's not formally a narrative. It was not submitted by the claimants together with their PIF in response specifically to the questions in the PIF asking for the summary of why they fear persecution in Mexico; rather it's a document that they prepared for the purpose of their lawyer to assist him in representing them. It might have been for the purposes of assisting the lawyer in preparing the narrative, but it is not a narrative in and of itself; rather it's a communication between clients and their legal representative. And being that it's for the purposes of litigation before the board I think this document would even correctly be characterized as a privileged document between counsel and their clients. And I realize it's being put before the board in the context of providing documentation relating to the complaint to the Law Society, but I would raise an objection with regards to discrepancies or omissions in that document being treated for credibility concerns the same way that omission or discrepancy in a properly composed narrative would be.
>
> **REFUGEE PROTECTION OFFICER**: I can understand counsel's concern inasmuch as she doesn't want the document to be given the sort of weight that would be given to a formally prepared narrative, but the use of the word privilege is rather ... privilege rather surprises me. Given that the document was actually presented on the claimants' behalf I don't see how you can claim that it's protected by privilege now. Has privilege not been waived?
>
> **COUNSEL 2**: I admit I'm not well versed in the jurisprudence relating to privilege, but maybe if I could just bring a ... my concern is mostly the ... that communications between a counsel and client are being used as a means of impugning the client's credibility.

REFUGEE PROTECTION OFFICER: Well we have...

MEMBER: Before...

REFUGEE PROTECTION OFFICER: Sorry.

MEMBER: ...we hear from you, Mr. Gould, Ms. Stothers, anything on this point?

COUNSEL 1: Not at the moment, except that I, I, I believe ... I'm not sure if I'm remembering this correctly, but I, I believe that you, you, the Board Member, had asked for this document or had asked about this document during one of our pre-hearing conferences. Again, like I'd have to listen to the recording of those pre-hearing conferences. There were quite a few of them, but I believe it was provided in response to your request for the document.

MEMBER: Thank you. Mr. Gould, I don't need to hear from you further on the point. The objection's overruled. Solicitor/client privilege is the client's to waive, whether they waived it explicitly or it's just simply implicit from the fact that they prevented [*sic*] this document, the privilege has long since been waived. I'm not an expert in the English language. To me the word narrative means written story or story. Yes, I'm mindful as well that this is not a narrative as we define it in the technical sense as part of a Personal Information Form. It's simply a story that this claimant wrote down. All claimants to testify so far have relied heavily on this document. I [*sic*] felt it was quite inappropriate for their former counsel to not use it, which to me the, the argument is, is that if only he had the original Personal Information Forms would have been much more complete. Mr. Gould is simply exploring why certain events are not mentioned in this document, whether an omission in this document would carry the same weight as an omission in the Personal Information Form is a, is, not only a question of weight, but a matter for submissions. So if I find the ... these ... this area of questioning quite appropriate. Mr. Gould, please continue.

REFUGEE PROTECTION OFFICER: Well to the claimant have you completed your answer to the question that I'd asked? To refresh your memory...

CLAIMANT 11: Please.

REFUGEE PROTECTION OFFICER: ...I was asking why this document, however it is called, does not mention that [the Gang] were associated with the police.

> **CLAIMANT 11**: I believe that the reasons I have already expressed them, I wrote them, trying to put ... to include there what I thought that it was important for my story. However, taking into account that having no experience as to what would be seen as important and I'm, and I'm sure that that document has a lot of things that are not included. You would understand trying to express, you know, many years of my life on one page of paper, however, you would see that there, there are points ... things that in my mind they were really clear and important and perhaps there is a moment there that I might have described it but without saying a name, their name and there it contains very important events that if ever that document had been used wouldn't have ... would have been included in the original PIF, the one that was prepared by our lawyer, our first, our first lawyer….
>
> [CTR, pp 5661-5663, emphasis added.]

[215] The Applicants now complain about the use of this document which they introduced into evidence. It looks as though their position is that this is evidence that can be used to impugn the competence of former counsel but it cannot be used as evidence against the Applicants to test their credibility. But they don't explain why. The actual use of the document is made clear in para 30 of the Decision, which I will quote here again for convenience:

> [30] The claimant's [*sic*] presented a copy of the handwritten story that they brought to their original counsel's office. However, as noted at the hearing, it did not mention that [the Gang] were associated with the police. [L.M.P.A.] stated that former counsel and his assistant did not read this statement, that it was written and rewritten just after arriving in Canada, and that some things only surfaced during therapy. Counsel objected stating that this document was not a formal narrative and that it was solicitor-client privileged. I denied the objection in that the claimants themselves had waived privilege when they introduced the document through their counsel. The whole thrust of their evidence with respect to former counsel was that he and his staff did not listen to their story and that they had refused to read this document. While I can understand that it is not a formal narrative as created through counsel, if the claimants wanted to rely on counsel not reading this document as the reason the original PIF was deficient, then questions about what the document contained were more than fair. [L.M.P.A.] then stated that she did not think the connection

> between [the Gang] and the police was important at the time the document was created. As further noted at the hearing, the fact that there were threatening calls throughout the 15 years before the claimants came to Canada were not mentioned either. [L.M.P.A.] stated that she was trying to remember the major incidents. I do not find these explanations satisfactory. As I stated, this document would not be comprehensive like a narrative prepared with counsel. However, it was very similar to what was produced and omitted many of the same things. The claimants collectively kept stating that the original PIF was deficient because their original counsel failed to read this document. I do not see how this document helps the claimants; it actually reinforces the negative credibility findings made with respect to the original PIF.
>
> [Footnote omitted.]

[216] I simply do not understand the Applicants' assertion that the Member improperly uses this document to discredit the Applicants. The Member is obviously correct that solicitor-client privilege had been waived by the Applicants by proffering the document. The Applicants testified that this document was evidence of their former counsel's incompetence, yet its contents directly contradicted their suggestions.

(8) Specialized Knowledge

[217] As further support for their reasonable apprehension of bias allegations, the Applicants say that the Member "relied on his alleged specialized knowledge to impugn the Applicants' evidence that they could not locate media reports concerning [the Gang] or obtain certain medical reports from Mexico contrary to RPD Rule 22" (footnotes omitted).

[218] The Member's reliance upon his knowledge of gang violence and the availability of medical documentation is not improper. See *Razburgaj v Canada (Citizenship and Immigration)*, 2014 FC 151, where Justice Roy held:

> [19] The applicants have not argued, with authorities in support, and I have not found any, that the duty on the Board had to be any heavier than that which is outlined in rule 22. A hearing held by the Board should not be turned into a trial. The consequences that attach to these hearings are serious and the measure of procedural fairness must be commensurate. However, it does not reach the level of disclosure found in criminal law, for instance. What rule 22 contemplates is that a protected person be afforded an opportunity to make representations and to provide evidence in line with the representations.
>
> [20] In this case, there is no doubt that the principal applicant, and his counsel, knew precisely about the information and the opinion that were conveyed to him. Two opportunities were in fact given to the principal applicant to correct the "specialized knowledge" displayed by the Board. He knew the case he had to meet and the information in the possession of the Board was specific and clear. Contrary to the contention of counsel on this judicial review, I cannot find that the specialized knowledge was so "unquantifiable and unverifiable" that it was impossible to respond. On the contrary, the information was specific and precise.
>
> [Emphasis added.]

[219] Similarly, the portions of the transcript the Applicants point to show the Member identifying what he refers to as specialized knowledge and indicating that he intends to rely on at the hearings. See CTR, pp 5955-5958 and pp 5975-5978. In doing so, the Member provided the Applicants with notice of that knowledge and an opportunity to correct the knowledge he was relying on. Rule 22 was not breached.

(9) Terminology

[220] The Applicants allege that the Member's use of the term "ringleader" to identify who the principal claimant was reveals that he was adversarial towards the Applicants from the outset.

[221] The record is clear that it was not the Member who used the term "ringleader," it was the RPO. See CTR, p 5334. In fact, when the matter was brought up with the Member much later in the proceedings, he made it clear that he regarded this term as highly inappropriate:

> **MEMBER**: …
>
> Finally, counsels raised the issue of demeanour as a result of the contents of recently received reports and other evidence. I must admit have I smiled at various points during these proceedings, of course I have. Personally I would find it somewhat bizarre for me not to smile in four full days of proceedings plus various pre and mid-hearing conferences. In fact everyone in this room has smiled at one time or another.
>
> For instance, at our last sitting we were having an awful time trying to get everyone assembled in this room and once everyone was here Miss Stothers rather jokingly remarked something to the affect [*sic*] of now nobody leave. I definitely smiled when she said that.
>
> A long, long time ago we were in one of our pre-hearing conferences when we were trying to differentiate between the exhibits between the two counsels Ms. Bondy suggested how about using B for Bondy and I smiled at that too. Smiling is actually a normal thing to do and usually in refugee hearings one would actually hope that the participants were smiling as much as possible as usually it puts the participants at ease.
>
> However, what is important if there was anything objectively wrong about my demeanour at some point in the hearing or at any other point I would have expected with three people who are quite experienced in what to expect in the hearing process, that is two separate counsels for the claimants and an RPO who has spent more time at the I.R.B. than my 13 years, with these three people being present throughout I would have expected some form of

> objection or other comments to have been raised at the point when it was happening.
>
> The fact that there has never been an objection to me is quite telling with respect to the objective situation in the hearing room. I realize that Ms. Stothers mentioned that the mother of the principal claimant reminded her that I apparently referred to her as a ringleader at the initial pre-hearing conference and she felt that this was some sort of criminal connotation.
>
> Now, I do note there are multiple definitions of the word, but to tell you the truth I cannot recall ever using it or if I did the context in which it was used. Assuming I did say it, it was likely a poor choice of wording that was referencing something else in the context at the time. I would of course not be accusing the claimants of criminality as there is absolutely no basis to that allegation. I honestly apologize to the claimants if they felt there was something more than that.
>
> [CTR, p 5730.]

(10) Unfounded Accusations

[222] The Applicants also allege that:

> The Member made unfounded accusation that the Applicants were coaching each other to lie. At the slightest disruption, a cough, and despite counsel's clarifications, he wrongly concluded that the Applicants were prompting each other.

[223] For this accusation, the Applicants rely upon the affidavit of F.A.M.L., Exhibit "A" at pp 108-109, which I have dealt with above at paras 191-192. It is not evidence that would support a reasonable apprehension of bias.

[224] A reading of the CTR makes it clear that these accusations are, once again, inaccurate. At the first hearing, the Member advised the Applicants as follows:

> As I have said, all of you, the testimony of other people may affect your own outcome. So, just because someone else is testifying, that's not a time for you to ... to relax and just turn off your mind. It may be, in listening to the other person's testimony, you realize, wait a minute, that's not quite right. Now, one word of caution, when you hear somebody who's related to you, perhaps someone very close to you, and you see them struggling with an answer, it's a very human thing to just blurt out some help. I advise you not to do that. Even though it's a very human thing to do. One of the things that we're trying to test here is whether or not a person can remember all the events that have … have happened to them, without help. And if you provide that help, even though you meant well, it can look very bad in certain circumstances. All right?
>
> [CTR, p 5524.]

[225] This is both appropriate and prudent advice. Its purpose is to assist the Applicants to understand that they should not do anything to jeopardize the evidence of another witness. Providing helpful advice and assistance to applicants is not an indication of any form of bias.

[226] As regards coughing, the Member's advice was as follows:

> **MEMBER**: … as we were discussing while you were in the washroom, if ever you need to cough or something like that, that's fine. Please cough if that's what you need to do. I know we spent a lot of time last time cautioning people not to talk, but we all cough from time to time. And if medically speaking that's what you need to do, please don't … don't hesitate.
>
> And as I said earlier, whether you or any other claimant feels in physical discomfort and distress, don't be shy in raising your hand. We can always take a break to hopefully look after whatever the situation is. So are you … are you okay to proceed?
>
> [CTR, p 5944.]

[227] As I have set out above, the Member also deals with interruptions as follows:

> **MEMBER**: I would note that someone spoke at the back of the room in between the time that you said the other two individuals and the other individual. I've said this several times. When someone speaks at the back of the room, that can look like you're trying to coach the claimant who's testifying. In this case, the testimony did change on a fairly basic point. Between the time that the claimant initially spoke there was an interruption and then the testimony was different. That is not helpful.
>
> **COUNSEL**: I ... I don't believe that happened. I believe that ... if ... if I'm not mistaken, I believe that [I.P.P.] was correcting something in the translation. And I believe that the sound at the back of the room was ... was Daniela coughing because of her asthma.
>
> **MEMBER**: Well, that's not the impression I necessarily had, but I just caution everyone. I caution everyone. Coughing, I'm not trying to limit. But I'd like to hear from the claimant who's testifying what he has to say. So, sir, perhaps we can continue?
>
> [CTR, p 5948.]

[228] The Member is, here again, attempting to assist the Applicants by pointing out that interruptions "can look like you're trying to coach the claimant who's testifying." This advice is important in this case. There were many claimants and their claims were all dependent upon the evidence of other claimants. The Member attempts to make this clear to the Applicants so they can understand the importance of clear, unprompted evidence. No one is accused of coaching. A caution is not an accusation.

[229] For the Applicants to now say that the "Member made unfounded accusations that the Applicants were coaching each other to lie" is, again, not supported by the record.

(11) Refusal to Recuse

[230] The Applicants say that the Member followed a procedure that was irregular and punitive. One of the examples they cite is the Member's refusal to recuse himself:

> 29. The procedure followed by the Member following the Applicants' recusal motion indicates that his approach to the claim was adversarial and even punitive:
>
> a) By refusing to recuse himself despite the Applicants' evidence that appearing before [the Member] was prejudicing their mental and physical health, he placed the Applicants in the situation of choosing between abandoning their claim and putting themselves at risk of being returned to persecution in Mexico, or jeopardizing their health by proceeding with the claim. The Applicants continued with their claim, and several of them became unwell and even experienced medical emergencies as a result. They renewed their recusal request, but [the Member] continued to refuse to do so.
>
> [Footnotes omitted.]

[231] It is important to keep in mind that the recusal requests involved two distinct issues. One was that the Member recuse himself because, for various reasons, he had manifested a reasonable apprehension of bias and a predisposition to treat and decide the Applicants' claim in a negative way. The other issue was procedural fairness. Counsel for the Applicants made the point that, even if the Member decided not to recuse himself for a reasonable apprehension of bias, he should nevertheless do so because the Applicants had formed a negative view of his disposition, believed him to be biased against them, interpreted his demeanour as hostile, and had developed medical symptoms because of their concerns, all of which meant they could not fairly present their case.

[232] All of these issues were raised in the oral recusal motion that was made at the hearing. In order to address the Applicants' present complaints, it is necessary to quote in full the Member's reasons at the hearing for refusing to recuse himself:

> **MEMBER**: It was Justice Degromprey (ph). The name of the case is Committee for Justice and Liberty and National Energy Board, a decision of the Supreme Court and counsels and Mr. RPO if you need case citations I can provide them later if you are not familiar with them, but I will be citing a number of cases and rather than have Madam Interpreter read out a whole list of numbers I can provide them later.
>
> Now, his dissent was actually followed by the Federal Court of Appeal in a case called Satiakum (ph) and Canada Ministry of Employment and Immigration. The test being what would an informed person viewing the matter realistically and practically and having thought the matter through conclude. Would he think that it is more likely than not that the decision-maker whether consciously or unconsciously would not decide fairly.
>
> Now, I note that members of the Refugee Protection Division in Toronto are assigned to geographic teams. These teams are responsible for very different types of cases which can lead to very different types of results. For example, one might expect more claims to be accepted from North Korea than from France.
>
> Furthermore, refugee claims are often unique and are always decided on their individual merits. So, even claims involving the same country may be decided differently based on the facts involved. There can be any number of reasons totally unrelated to any bias that can result in any number of acceptance rates.
>
> Like all members I am bound by a code of conduct that requires me to adjudicate the merits of each case, based on thorough preparation, the assessment of evidence properly before me and the application of the relevant law. That is what I have done to the best of my ability in every case that I have heard.
>
> As counsel has noted the Federal Court has dealt with the acceptance rates of Refugee Protection Division members in a number of cases. These include but are not limited to Fenanir, Mohammed Hosni, Zrig, Syed Nasam Hudin, Bulut, first name is Byrom, Hernandez Victoria, personal name as being Jose Salvador, Dunova, first name being Zenatta, Sahil, first name being Naheed, Gabor, Zupko and Cervenakova.

Now, in looking at all these cases together the Federal Court has ruled that acceptance rates in and of themselves cannot found a bias argument.

While both counsels cited several instances beyond simple statistics that they felt gave rise to an apprehension of bias I disagree that they do even taken collectively. I would agree that yes many questions regarding credibility issues were put to the claimants; however, as Mr. Gould correctly observed this hardly makes for a mind that is already made up. Giving the claimants a chance to explain what may be a credibility issue is the heart of what we do and one of the main reasons we have oral hearings and yes I agree that sensitivity is required in many areas, that is why we receive extensive sensitivity training before we take this job and that training is ongoing while we are in the job.

Now counsel has references [*sic*] some questions with respect to an incident that involved a sexual assault.

INTERPRETER 2: Sorry, they made some reference to …

MEMBER: Some questions asked about an incident which involved a sexual assault. However, to the best of my recollection the questions were actually asked about the events surrounding the incident, not the specific details of the assault itself.

Furthermore, while counsels have argued that some questions and answers are related to microscopic issues in their opinion these are actually submissions as to what the evidence means, that even if there is a credibility concern perhaps it is about something that in the end is not so important.

Like I said it is usually a submission that is made at the end of the case when trying to sum up what the evidence means.

Furthermore, counsels reiterated their concern about me disclosing specialized knowledge, that other claimants have been able to obtain medical documents after their arrival in Canada.

INTERPRETER 2: Sorry, the counsels have … I missed the word after that about the evidence.

MEMBER: They reiterated their concerns … let me just continue. Me disclosing specialized knowledge that other claimants have been able to obtain medical documents after arrival in Canada from their home country, in this case Mexico. I actually agree with Mr. Gould's summary at the time and that it amounted to saying seen it done.

INTERPRETER 2: Seen it done … I am not sure what you mean by that.

MEMBER: I have seen it done. I am just quoting directly. Once again if the claimants were not able to obtain documents where others have putting this to them gives them a chance to explain what has happened and then it is up for all of us to provide some assessment of that explanation. I do not see how bias could be apprehended in any of these areas.

Also raised was the issue of former counsel, [former counsel], both with respect to the handwritten document that the claimants brought to his office, that they hoped to be used in the writing of the original personal information form and with respect to his potential testimony. Now, it is obvious the handwritten document is not a formal narrative and once again it may be a good submission at the end of the day that it would not be as complete as a formal narrative.

However, as I have ruled previously the claimants have stated repeatedly that if [former counsel] had only used this document the PIF would have been more complete as presumably the handwritten document contained a more fulsome story.

INTERPRETER 2: More what?

MEMBER: Given that the handwritten document contained a more complete story.

INTERPRETER 2: Yeah a more fulsome story.

MEMBER: Fulsome.

INTERPRETER 2: More fulsome.

MEMBER: Given that the claimants put this matter at issue the document and its contents are quite properly in evidence and once again we have to … I have to assess at the end of the day their answers as to what was in and what was not in this document. Furthermore, [former counsel] provided evidence that I must assess. Whether it is written or oral he is providing evidence and once again that evidence must be assessed.

In many cases where former counsel either fails to provide evidence or the evidence is not satisfactory former counsel can be issued a summons so that further evidence might be elicited. This happens with many witnesses not just former counsels. That is normal part of hearing cases.

Counsels have also referenced reports written by the observer, (inaudible) Sad. These documents appear to make psychological diagnoses. I am going to have to assess the weight to begin with these documents. Given the provincial legislature felt strongly enough to enact legislation giving rise to provincial offences in this area it is a serious matter.

Counsels are quite correct that I have no jurisdiction to adjudicate provincial offences and to the best of my knowledge I have never expressed any thoughts of doing so. However, out of an abundance of fairness I disclosed these concerns to the parties so that informed submissions could be made with respect to the weight to be given to these documents. I do not see how bias could be apprehended in these areas.

Now, Ms. Bondy also raised the issue that I have declared that a number of claims had no credible basis. I think I need to correct something. Section 107(2) of the *Immigration and Refugee Protection Act* actually states that there is no credible basis when there is no credible or trustworthy evidence upon which a claim could be based. The evidence could be quite credible and trustworthy yet be no base for a claim.

For example, back when I was the manager of the old West Central Europe team …

INTERPRETER 2: Sorry, what was the name?

MEMBER: West Central Europe.

INTERPRETER 2: No, the name of the person.

MEMBER: Oh, back when I was the manager of the old West Central Europe team the peak inventory of acknowledged economic migrants, claimants who stated up front that they were in Canada for economic reasons only and had no fear of returning to their home country beyond fear of poverty was over 600 principal claimants, so thus processing them six per day per member. Now that high volume was before these statistics were created.

However, we still do get claims like that. I have done a number of them and they are in my statistics.

Furthermore, even if a claimant is quite fearful of the situation in country A if it is determined that they have status in country B and they have no fear in country B that will also most like [*sic*] be a no credible basis decision. This often actually skews the reported statistics.

Since Mr. Rehag [*sic*] is reporting only the first country entered into our computer system, not necessarily the country that the decision was based upon, once again I have done a number of these cases.

Now, apart from the fact that the Federal Court is saying that well statistics are just statistics essentially, I note that no evidence has been presented that an exceptional number of my decisions have been overturned upon judicial review; yes, there have been a few, but that happens to all decision-makers and as I said nothing has been presented to indicate any exceptional amount. So, once again I do not see how these areas can lead to an apprehension of bias.

Finally, counsels raised the issue of demeanour as a result of the contents of recently received reports and other evidence. I must admit have I smiled at various points during these proceedings, of course I have. Personally I would find it somewhat bizarre for me not to smile in four full days of proceedings plus various pre and mid-hearing conferences. In fact everyone in this room has smiled at one time or another.

For instance, at our last sitting we were having an awful time trying to get everyone assembled in this room and once everyone was here Miss Stothers rather jokingly remarked something to the affect [*sic*] of now nobody leave. I definitely smiled when she said that.

A long, long time ago we were in one of our pre-hearing conferences when we were trying to differentiate between the exhibits between the two counsels Ms. Bondy suggested how about using B for Bondy and I smiled at that too. Smiling is actually a normal thing to do and usually in refugee hearings one would actually hope that the participants were smiling as much as possible as usually it puts the participants at ease.

However, what is important if there was anything objectively wrong about my demeanour at some point in the hearing or at any other point I would have expected with three people who are quite experienced in what to expect in the hearing process, that is two separate counsels for the claimants and an RPO who has spent more time at the I.R.B. than my 13 years, with these three people being present throughout I would have expected some form of objection or other comments to have been raised at the point when it was happening.

The fact that there has never been an objection to me is quite telling with respect to the objective situation in the hearing room. I

realize that Ms. Stothers mentioned that the mother of the principal claimant reminded her that I apparently referred to her as a ringleader at the initial pre-hearing conference and she felt that this was some sort of criminal connotation.

Now, I do note there are multiple definitions of the word, but to tell you the truth I cannot recall ever using it or if I did the context in which it was used. Assuming I did say it, it was likely a poor choice of wording that was referencing something else in the context at the time. I would of course not be accusing the claimants of criminality as there is absolutely no basis to that allegation. I honestly apologize to the claimants if they felt there was something more than that.

Now, one thing that struck me in some of the reports that we have got here is that some of the claimants seem outright confused as to what is happening or why things are happening and this is affecting their perceptions of the hearing. I note that all claimants are represented by counsel. If they are unclear as to why something is happening or what the process is, what the statistics mean or any other matter, I would expect them to discuss the matter with their counsel.

In the end I do not see how my demeanour could be objectively seen as inappropriate, so I do not see how bias could be apprehended in this area. Whether these points are taken individually or collectively, based on the previously cited test, I am denying counsels [*sic*] application with respect to reasonable apprehension of bias.

With respect to procedural accommodation, I have already discussed a number of the points, but I note that I have already allowed a variation in the standard order of questioning to aid in the claimants' testimony. I have also allowed for there to be an observer here as a support person, once again to aid the claimants. However, I do not see how changing members will help anything.

If the concern is that I am simply an authority figure all members are authority figures so a new one will not change anything. Furthermore, as I had noted previously media coverage about low acceptance rates was not limited to me. The media article provided by Ms. Bondy names a large proportion of the rest of my team, as they all have low acceptance rates and we are all responsible for the same countries.

As I have further noted in the statistics themselves there is a list of members whose acceptance rates are extremely different from the

average for the country that that member does. My acceptance rate and the others from my team who are named are not on that list.

INTERPRETER 2: My acceptance rate, is that what you said?

MEMBER: Yeah, myself and the others from my team who are named are not on the list of exceptionally different acceptance rates. Therefore, other members who might be assigned to the case would also have low acceptance rates, so changing members would once again not likely change anything.

Now, like I said earlier like all members and public servants receive training dealing with claimants who have mental health issues and other sensitive issues and this training has been ongoing over the years. While I am quite open to hearing by what methods we could potentially accommodate either all the claimants generally or individual claimants in particular and I am sure we are going to discuss that somewhere, I do not see how recusing myself when one has a look at the objective situation how that would be an appropriate remedy.

Lastly, there is the issue of delay. Yes, there was a gap in hearing evidence between February and October; however, I have got no evidence in front of me about the cause of the delay and I do not believe there have been any complaints in the intervening period about the scheduling unit, at least not that I am aware of.

I am quite aware that memories can fade over time, especially in a case where some events took place close to 20 years ago. However, the claimants who testify are not being asked to recall each other's testimony as some form of text, they are going to be asked about what they remember about their own experiences and I know Ms. Bondy presented a couple of Federal Court cases; however, neither of them squarely deals with the issue of delay as there were actual errors made in each decision and in this case we are not even at the decision-making stage.

I do not see how starting over with another member will be helpful with respect to delay. The best thing that we can do is proceed which I hope to do in the near future. Therefore, I am denying all counsels [*sic*] applications.

[CTR, pp 5726-5732.]

[233] The Member also addresses these issues extensively in the Decision itself. On the perception issue, he has the following to say:

> [14] Finally, there is the psychological evidence on file and the issue of me being one of the sources of problems for the claimants. I note that much of the evidence is from [the family therapist], who does not appear to be licenced to diagnose any form of psychological condition. While counsel noted that any person can offer an "opinion" she seems to do far more than that, so I give little weight to her evidence. More importantly, every precaution that could be thought of was employed during the hearing. Frequent breaks, counsels questioning first, a support person sitting next to the claimants, not questioning about the specific details of a sexual assault, the offer of setting up closed circuit television to monitor the proceedings, repeatedly canvassing the counsels to see if there were any other accommodations that could be made, etc. While counsel has referenced [I.P.P.] becoming ill at one point to the point of vomiting repeatedly and being taken to hospital as a precaution, I note that this was while Counsel Stothers was asking questions. I do not see how any other Member would have handled this differently.

[234] As the Member points out, the test for a reasonable apprehension of bias is an objective test. The issue is not what the Applicants might subjectively feel about the Member and his disposition. The issue is what an informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude.

[235] In my view, a reading of the transcript makes it clear that the Applicants really became concerned about the Member after learning about his acceptance rate in news articles and otherwise. This source of information is all negative. It would naturally cause the Applicants great concern, and no doubt could give rise to psychological and physical symptoms. But this is not something the Member has done or induced in the Applicants. It comes from outside the RPD. In my view, there is nothing in the hearing process itself, and the Member's conduct

throughout that process, that would cause an informed person, viewing the matter realistically and practically, to detect a reasonable apprehension of bias. What is more, I think that most of the allegations and evidence cited by the Applicants in this review to support their case for a reasonable apprehension of bias, even when they are accurate, have little substance to them and would not cause a fully-informed objective observer to detect bias on a balance of probabilities.

[236] The real issue here is procedural fairness. Given the personal and psychological evidence that the Applicants, whether rightly or wrongly, had formed a negative view of the Member that was causing them considerable distress or fear of the Member, which could in turn negatively impact their ability to testify to such an extent that they were unable to present their case in full, should the Member have recused himself?

[237] As the sequence from the hearing cited above makes clear, the Member gave this issue serious consideration and provided full reasons why he should not recuse himself on a procedural fairness basis.

[238] This is a somewhat novel procedural fairness issue and, in the end, I think we can only ask whether, by continuing to hear the claims, the Member, in fact, denied the Applicants the opportunity to fairly state their case.

[239] The issue is not whether the Applicants were under considerable stress and some of them became physically ill; the issue is whether any of this prevented them in some material way from

making their claim in full, or from answering the questions that were put to them by counsel, the Member or the RPO.

[240] The Applicants have not demonstrated before me how the Member – through conduct or demeanour or by refusing to recuse himself – prevented them from giving their own account of what had happened to them in Mexico. To ensure they were able to do this, the Member was careful that "every precaution that could be thought of was employed during the hearing," including counsel questioning first. The Member's questions dealt with the discrepancies in the evidence that he was duty-bound to put to the Applicants. There is no evidence that the Applicants were inhibited or prevented in any way from providing a full response to these questions.

[241] In the end, it seems that the Applicants' concerns about the Member's predisposition are prompted by outside sources. For instance, in I.P.P.'s affidavit, he says,

> 21. From the time I learned about [the Member]'s zero percent acceptance rate, I became afraid that he would not care about my family's troubles and think we were liars. I started to question the worth of telling him intimate details about my family's life, but I could do nothing but keep going through with the process....

Based on my review of the timelines, I.P.P. did not testify after learning about the Member's reported acceptance rate. Circumstances are more complicated in two cases, however. In M.T.M.'s affidavit, sworn April 5, 2017, she says,

> 8. After the February 2011 hearings, we became aware that [the Member] had never granted refugee status to a claimant. This news made my stress worsen considerably, and with it, my health problems. My sleep became even more irregular, and I began to put on even more weight. My mental state was such that in

> September 2011, Dr. Friere wrote a letter saying that if I were made to testify in this case, I would likely experience an anxiety attack.

The report from Dr. Friere appears in the CTR at pp 3521-3523, Tab 3, additional materials. In the report, Dr. Friere says that "[M.T.M.] suffered a reactivation of her symptomology prior to the hearing of February 2011" and concludes that "[i]f she were to testify before this Member, her performance would be even poorer and there is a high risk that she may create a medical emergency like a panic attack, fainting spell or any other manifestation of anxiety due to acute stress." This conclusion must be qualified, however, by Dr. Friere's observation that "[M.T.M.], even with a different Member and because of her current mental status would be a poor witness in a hearing with the IRB" (emphasis added). M.T.M. is J.E.T.P. and E.M.V.'s daughter. After the hearings, both M.T.M. and E.M.V. swore affidavits that were submitted with the Applicants' post-hearing submissions. See CTR, pp 1507-1516, Tab 4, additional materials. In the affidavits, both M.T.M. and E.M.V. claim that they were unable to testify before the Member and that this prevented them from being able to explain the omission of mention of the Gang in J.E.T.P.'s original PIF. The Member found that this omission, and contradictions in J.E.T.P.'s explanation for it, impugned J.E.T.P.'s credibility. See the Decision, para 45. It seems to me, however, that widespread difficulties in testifying are not borne out by the evidence, and that the Member took into account and assessed what evidence was placed before him on this issue.

(12) The Show-Cause Issue

[242] The Applicants complain that when L.M.P.A. became too ill during a hearing to proceed, the Member scheduled a hearing for her to show cause why her claim should not be abandoned.

[243] The suggestion of a show-cause hearing has to be examined in the full context of the Member's concerns about efficiencies. The full exchange is as follows:

> **MEMBER**: …
>
> Now, during the application it was noted that some claimants may not be medically able to proceed today. Is that the case?
>
> **COUNSEL 1**: I'd have to speak with them again.
>
> **MEMBER**: Well, I had understood that discussions had already taken place, because obviously if someone's medically unable to proceed, well, that would ... would stop us.
>
> **COUNSEL 1**: Several ... several of the claimants indicated that they were feeling ill. We've already outlined what ... what they told us. I ... it wasn't something that we specifically discussed, adjourning purely for medical reasons. So I would have to check with them again.
>
> **MEMBER**: Well, speaking once again as a layperson, there's a difference between feeling unwell and being medically unable to proceed with the hearing. Many claimants might feel unwell but still feel well enough to proceed with the hearing, which is the same for all hearing participants. I'm going to come back at eleven o'clock. I would expect that we would either proceed at that time or we would be … know who is medically unable to proceed.
>
> We're off the record.
>
> **--- OFF THE RECORD ---**
>
> **--- ON THE RECORD ---**
>
> **MEMBER**: Good morning. We're back on the record. Same people are present. Counsels, are any of the claimants medically unable to proceed at this point?
>
> **COUNSEL 1**: Yes. I spoke with the whole family. [L.M.P.A.] indicates that she's having blood sugar problems this morning. As you know, she has diabetes. She also has a very severe pain in her neck. So she's indicated that she needs to go to the doctor now.
>
> **MEMBER**: Any further people unable to proceed?
>
> **COUNSEL 1**: Just her in the ... I mean, medically unable to proceed.

MEMBER: Ms. Bondy, any of your clients ... sorry. Do you need a moment?

COUNSEL 2: No, I'm fine.

MEMBER: I note I caught you in the midst of coughing.

COUNSEL 2: Yes, I'm recovering from the cold I had last week so it causes me to cough. No, my clients are not ... none of my clients are medically unable to proceed.

MEMBER: So this is what we're going to do. For the one claimant who is not able to medically proceed at the moment, Tuesday will convert into a show cause proceeding. And you've said that she's on her way to the doctor, I would assume that they would be able to provide a note as to her not being able to proceed today.

And at that ... on Tuesday, assuming there's a note, and ... well, I'll listen to whatever the submissions are at the time. Assuming all is in order, we'd just then continue with the proceedings. If not, well then, of course, I'd be hearing submissions as to why the claim should not be declared abandoned. What I can also do is look into the possibility of setting up a satellite room for next time. While the claimants have previously indicated that that would be not a benefit, that thinking may change at some point so I'll definitely look into that possibility.

Is there anything further that we can accomplish at this point?

COUNSEL 2: But ... maybe this is not of significant consequence since hopefully there'll be a medical note Tuesday and we'll proceed, but it appears that show cause hearing seems unwarranted in the particular circumstances. To my knowledge, and I realize these are long proceedings and my ... I only joined them not at the outset, to my knowledge ... and again, I apologize if I stand to be correct ... there have not been any postponement requests in the past on the part of the claimants.

And with...

MEMBER: Well, counsel, I'll just...

COUNSEL 2: Okay.

MEMBER: ...stop you there.

COUNSEL 1: I have. (Inaudible)

COUNSEL 2: Oh.

MEMBER: That's actually one of the factors to be considered in a show cause proceeding, and it may be a very good submission to make at the time. But is there anything further beyond us setting up the show cause? I don't want to delay the claimant any further from seeking medical attention.

INTERPRETER: I'm sorry, Mr. Chair. Could you repeat that again?

MEMBER: To the effect of I don't want to delay the claimant any further in seeking medical attention. So were there any other matters that we could deal with quickly now?

COUNSEL 1: Nothing from me.

[CTR, pp 5791-5792.]

[244] Counsel says that a show-cause hearing is "unwarranted in the particular circumstances" but this is premature. Given the length of proceedings (something of concern to the Applicants as well as the Member), the Member needed to know that illnesses were genuine and the Member expects the Applicant concerned will have a medical note and there will be no need for a show-cause hearing. All he needs is a note from her doctor. Given the Applicants' complaint that the hearing process is making them ill and preventing them from participating as they would wish, it is not unreasonable or overly aggressive for the Member to request a routine doctor's note that confirms any illness. A show-cause hearing sounds formal, but the reality is that the Member is simply requesting a doctor's note to confirm that "all is in order" so that they can "continue with the proceedings." If all is not in order, then the Member is obliged to consider the consequence, which will require further submissions.

[245] This is not an issue that, either considered in isolation or with other factors, a fully-informed person, aware of the whole context and the problems associated with organizing a complex hearing involving many applicants, would consider as evidence of a reasonable apprehension of bias.

(13) Sarcastic and Accusatory Language

[246] This complaint involves the following:

> 31. The Member's use of sarcastic and accusatory language in the reasons for refusal further indicates an adversarial approach to this claim, and even suggests a personal animosity towards the Applicants. The Member finds I.P.P. "concocted" a "subplot" to his claim, that a psychological report is not a "magic document" that the issue shouldn't be whether he used "a word processor processor [*sic*] rather than a thesaurus" and that Professor Rehaag's conclusions that he is troubled by aspects of [the Member]'s decision making are themselves "troubling."

[247] The word "subplot" appears in paras 20 and 31 of the Decision where it appears to be a deployment of the "narrative" metaphor to refer to the Applicants' account of their experiences in Mexico. In my experience, this is not an uncommon term in RPD decisions. Everything depends, of course, on the whole context. Used in conjunction with "concocted," I think the Member is clearly indicating that he finds this evidence not to be credible. He could have said that the account of the events at issue was not credible, but I think he is trying to suggest here that he finds the revenge murder evidence to be particularly far-fetched and unconvincing. I don't think that this sentiment, although it may be offensive to some, is evidence of a general animosity or bias towards the Applicants. The Member is simply indicating that he finds this evidence entirely unbelievable and he gives reasons for his strong views on this. The Applicants

are correct that a member's use of the words "concoction" and "concocted" were among the words used that gave rise to a reasonable apprehension of bias in *Xie v Canada (Solicitor General)* (1993), 67 FTR 316 (TD) [*Xie*]. However, in *Xie*, the Court also found that the decision under review was "replete with errors of both fact and law" including mischaracterizing certain evidence as second hand and hearsay, making factual presumptions not supported by the record, and not giving the claimant an opportunity to respond to adverse findings. It was in this context that the Court was "prepared to accept the applicant's argument that the words used by the Board in their reasons give rise to a reasonable apprehension of bias": *Xie*, above, at para 10. Such is not the case here.

[248] The full context for "magic document" is at para 8 of the Decision, which reads as follows:

> [8] The author also notes that I sometimes cite the lack of psychological evidence in a case or discount the evidence produced. This is true; I cannot take into account psychological evidence as an explanation if it does not exist. Furthermore, apart from the quality of psychological evidence before the RPD often being quite low (unlicensed authors or people with a licence who briefly meet someone once, etc.) one has to believe the story upon which that evidence is based. Eventually, if there are enough credibility concerns a psychological report is not a magic document that makes everything OK and allays all concerns.

[249] As I read this, the Member is simply saying in a colourful way that, as a general proposition, psychological evidence cannot cure extensive credibility concerns. I see nothing sarcastic or accusatory here. Read in context, the words "magic document" carry no animosity and do not suggest bias of any kind.

[250] The "word processor" language occurs in para 9 of the Decision:

> [9] The author also notes that in a number of decisions that same [*sic*] passages are used repeatedly, such as the case of gay men having an Internal Flight Alternative in the Federal District of Mexico. This is quite true and it would be surprising if it were otherwise. RPD Members are generally assigned to teams that specialize in certain countries. A Member may see the same general claim type in several different hearings in the same week. The case law does not generally change frequently. The standard documentary packages dealing with country conditions are usually updated once, perhaps twice in a year. Therefore, in decisions involving the same general evidence and claim profile, the same general case law and the same general country conditions, I cannot see why one would not expect the same general findings and written passages on these points. The situation for gay men in the Federal District did not change between those decisions and it has not to this day. While not perfect, as cited in the quoted passages there is a viable IFA in the Federal District (as I find below). The Federal Court has repeatedly upheld the use of "boilerplate" passages. The important thing is not whether the member used a word processor rather than a thesaurus, but whether the passages validly apply to the claim. Also, there is a reference made to the effect [that] if I cannot find a way to deny a claim based on credibility, I find another way using a standard template. This is a somewhat reverse analysis. Templates, as noted are fine if they are applicable to the case. However, in all the cases analysed, the decision was negative because the claim failed on one of the essential grounds. If it did not fail on one of the essential grounds, it would have been a positive decision.

[251] I simply do not understand the Applicants' objection to this terminology. Clearly, the Member is merely saying that "boilerplate" passages are acceptable where "the same general evidence and claim profile, the same general case law and the same general country conditions" are at play, and the important issue in each case is whether any such passages deployed by a member "validly apply to the claim." Boilerplate passages are acceptable when they address the actual claim being considered and are not, therefore, always evidence of some kind of bias. This is a perfectly valid point to make.

[252] The Member's comment, in para 11 of the Decision, that he finds Professor Rehaag's conclusions "troubling" is entirely apt for the point that the Member wishes to make.

> [11] In his conclusion, the author states that there are "serious reasons to be concerned about the tests and standards [that I used]," that he is "troubled by the surprising frequency (i.e. in two thirds of the cases he heard) that he flat-out disbelieves stories...," that he is "troubled by the grounds that he offers..." (I will deal with the reference to the Federal Court below), and that he is "troubled that he frequently copies lengthy passages...." The use of this language is in and of itself, "troubling." This report starts off as a simple neutral academic article, but conducts no scientific analysis when one would expect there to be some. It seems to suggest that many things are inappropriate, when as noted above, they are quite appropriate. It also states that the decisions analysed must be different from the decisions of other Members, but no decisions from other Members are analysed. By concluding with this language, the author appears to be advocating for a certain viewpoint, rather than being dispassionate. I see little value in this document.

[253] I fail to see why Professor Rehaag can use "troubled" without giving offence and showing animus, but the Member cannot use "troubling" without doing so. The Applicants offer no explanation.

[254] Quite apart from the particular passages where these words appear, they have to be weighed against the general language of the Member as it appears throughout the hearings and the Decision. In my view, the Member's language does not suggest animosity towards the Applicants and is not adversarial. The words cited by the Applicants do not, in my view, suggest any kind of bias.

(14) Applicants' Reaction to the Member's Conduct

[255] The Applicants allege that they "had profound psychological and physical reactions to [the Member's] conduct" and that this is evidence of a reasonable apprehension of bias on the part of the Member:

> 32. While the test for reasonable apprehension of bias is not what an unsuccessful refugee claimant would think of the Member, the Federal Court of Appeal has held that a claimant's reaction is nonetheless relevant. Several of the Applicants here had profound physician [*sic*] and psychological reactions to attending the hearings before [the Member] due to their perception that he had adopted an adversarial approach and was predisposed to finding them not credible and refusing their claim. These reactions were only exacerbated upon learning that he had never granted a claim, to the extent that several Applicants experienced medical emergencies when the hearings resumed, and continued following the conclusion of oral evidence in large part as a result of the inordinate delay before they received a decision, including the January 2015 cancelled hearing. Their reactions were so severe, that they impaired their ability to present evidence in support of their claim and affected their overall health.
>
> [Footnotes omitted.]

[256] Reduced to its essence, the Applicants' position on reasonable apprehension of bias is that the problems they were facing could only have been cured by the Member recusing himself as and when requested to do so. The Member explained why he should not do this and offered them every other accommodation they might require to assist them to get through the hearings. I have already discussed why I do not think that the Member's refusal to recuse himself was either evidence of a reasonable apprehension of bias or resulted in a breach of procedural fairness.

[257] The Applicants' "perception that he had adopted an adversarial approach and was predisposed to finding them not credible and refusing their claim," even before they learned about his past record is not supported by anything that appears in the transcript of the hearings. The first recusal motion was based, in part, upon the Member's past record and the impact that learning of that record had upon the Applicants. Had bias and procedural fairness concerns arisen before that time, then counsel would no doubt have raised them and taken appropriate action. I see no evidence of this occurring or anything in the transcript that would give rise to earlier concerns. Medical reports were all created in anticipation of the first recusal request or subsequent to the hearings resuming. Where they state that the Applicants would have a difficult time testifying, the reports are based on the Applicants' description of their perception of the hearing and learning of the Member's acceptance rate. In other instances, the reports make references to the stress of the hearings process exacerbating the Applicants' ailments. I think it is fair to conclude that the Applicants established that they were suffering from the stress of the hearings, but they have not demonstrated that the stress was caused by the Member's demeanour or his actions.

[258] The record in general suggests to me that the physical and psychological reactions of some of the Applicants were a result of a combination of factors. Some of them arrived in Canada with medical conditions and predispositions. They then faced the various stages of preparing an extremely complex claim that took a considerable amount of time even before the hearings began. They then faced the hearings themselves and the inevitable stresses of giving oral evidence and being asked questions on discrepancies in that evidence. During the course of these hearings, they were told by sources outside of the RPD that the Member had a poor

acceptance record. Their descriptions of feeling trapped at this juncture and fearing a negative outcome ring true to me. This was a long and complex process and the Applicants were obviously impacted by learning that the Member had granted no claims at that point.

[259] That being said, the principal factors I have listed above for their stress and illness were all an inevitable part of a long and complex claims process up to and including the hearings. The Member was not responsible for previous illnesses and predispositions and, as I will discuss in detail below, he was not responsible for the length and stress of the hearings, and the inevitable pain of giving evidence and having to answer questions on this evidence. In my view, the Member recognized and accepted the Applicants' concerns and symptoms and offered every accommodation to alleviate those concerns and symptoms short of recusing himself.

[260] The Member was also not responsible for convincing the Applicants that they would not receive a fair hearing and that a negative result was inevitable. Some of the Applicants now say that he conducted the hearings in an adversarial and humiliating way, but this is an after-the-fact assertion that I don't think is supported by the record. The contemporaneous evidence does not suggest that the hearings were conducted in an adversarial and humiliating way and, as the Member points out in his Decision, "[t]wo counsels and a RPO were present throughout. None of them could point to a single instance where I acted [in]appropriately." Legal counsel who had no fear of bringing major recusal motions and making multiple recusal requests, would not be shy of objecting to concerns about the Member's conduct as and when they arose.

[261] Nor have the Applicants shown me in the record where the conduct or words of the Member "impaired their ability to present evidence in support of their claim" or to answer questions based upon discrepancies in that evidence. Dr. Friere's report suggests M.T.M. would be unable to testify because she would likely experience a panic attack. The Applicants cite a statutory declaration M.T.M. swore after the hearings concluded (CTR, pp 1507-1512) and Dr. Friere's report on M.T.M. In explaining the reasons why she did not testify, she does mention her "fear of the Member" (at para 14) and makes a generalized reference to his demeanor (at para 22). However, as noted, this cannot be blamed exclusively on the Member, as Dr. Friere's report indicates that "[M.T.M.] suffered a reactivation of her symptomology prior to the hearing of February 2011" (CTR, p 3523). The portion of the affidavit of Dr. Lisa Aldermann cited by the Applicants, essentially states that based on the existing literature, the Applicants' loss of hope and demoralization upon learning that the Member had a zero acceptance rate could affect their mental health. Once again, it seems to me that it is the zero acceptance rate that was the principal concern.

[262] In order for the Applicants' reactions and perceptions to be taken into account as material considerations by the informed person, viewing the matter realistically and practically, there must be some objective basis to support the accuracy of those perceptions. And it seems to me that the Applicants have not demonstrated that their perceptions of bias were based upon anything that the Member did or said in conducting the lead up to the hearings and the hearings themselves. The source of those perceptions, apart from the stresses and worries that arise with just about every refugee claim, comes from outside the RPD and, in particular, rests upon the newspaper reports concerning the Member's past record and Professor Rehaag's report and

analysis of the Member's past decisions. The gist of this evidence is that the Member has demonstrated a predisposition to refuse claims in the past, which predisposition, more likely than not, caused him to refuse the Applicants' claims. I deal with this issue below.

(15) Professor Rehaag's Report

[263] Professor Rehaag has a continuing interest in the decisions of this Member. His reports have come before this Court before. In *Turoczi*, above, the applicants made allegations of a reasonable apprehension of bias similar to the allegation before me, and they relied upon a previous report of Professor Rehaag to make their case. Justice Zinn's decision in *Turoczi* is worth quoting at some length because similar arguments and issues arise in the present case:

> Reasonable Apprehension of Bias
>
> [9] The parties agree that the test for determining whether there is a reasonable apprehension of bias was articulated in *Committee for Justice and Liberty v Canada (National Energy Board)* (1976), [1978] 1 SCR 369 at p 394 [*Committee for Justice and Liberty*]:
>
> > [...] the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." [emphasis added]
>
> [10] Needless to say, the parties disagree about what the "informed person, viewing the matter realistically and practically – and having thought the matter through – [would] conclude."
>
> [11] The applicants made it clear in their submissions that they were not suggesting any actual bias by the Member; this is a much higher test than that required when the allegation is an

apprehension of bias. Nonetheless, whether one alleges actual bias or a reasonable apprehension of bias, the allegation is a serious one. A person occupying a judicial or quasi-judicial position against whom it is alleged that there is a reasonable apprehension of bias is entitled to have that allegation properly tested against credible evidence and sound reasoning.

[12] In my view, even if the data in the Rehaag Report is credible evidence, it is credible evidence only of the result of various refugee determinations made by various members of the RPD over a specific period of time. It is not evidence of any of the variables that may impact the inference that the applicants seek to make.

[13] Quite simply, the statistics provided by the applicants are not, without more, sufficiently informative. Furthermore, one must question what the "informed person" would take from them.

[14] The applicants submit, and this is the true focus of their submission, that the acceptance and rejection rate data, standing alone, is such that "one must be wilfully blind not to see that there exists a reasonable apprehension of bias" on the Member's part. This ignores or overlooks that the acceptance and rejection rate alone says nothing to the "informed person" even if the uninformed person might reach the conclusion that the applicants suggest.

[15] Although the statistical data presented by the applicants may raise an eyebrow for some, the informed reasonable person, thinking the matter through, would demand to know much more, including:

- Were all of the figures, including, importantly, the weighted country origin averages, properly compiled?
- Did the RPD randomly assign cases within each country of origin? If not, how did the RPD assign cases?
- Can factors affecting the randomness of case assignment be reliably adjusted for statistically?
- If so, what are the adjusted statistics, and what is their significance?
- If the RPD did randomly assign cases, what is the statistical significance of the Member's rejection rate?

- Beyond the Member's relative performance within the RPD, is there anything objective impugning the Member's decisions (i.e. that suggests they are wrongly decided)?

- Accounting for appropriate factors (if that is possible), are the Member's decisions more frequently quashed on judicial review than would be expected?

- Has the Member made recurring errors of a certain type, e.g. on credibility, state protection, etc., that bear a semblance to the impugned decision?

In short, the informed reasonable person, thinking the matter through, would demand a statistical analysis of this data by an expert based upon and having taken into consideration all of the various factors and circumstances that are unique to and impact on determinations of refugee claims before he or she would think it more likely than not that the decision-maker would not render a fair decision.

[16] The applicants submit that the data raises a reasonable apprehension of bias in the mind of an informed person, even without the additional evidence and analysis I think necessary. They rely on the following statement attributed to Peter Showler, a former Chair of the Immigration and Refugee Board, in an article published in the Toronto Star on March 4, 2011:

> For Showler, a zero per cent pass rate from a single adjudicator is "tremendously suspicious."
>
> "It certainly hints at bias, that this member has an attitude about either particular claimants from particular countries or claimants in general." [emphasis added]

[17] That something is said to "hint" at a result can hardly be said to raise to the level that one "think[s] that it is more likely than not" as required by *Committee for Justice and Liberty*.

[18] The applicants make no attempt to impugn the Member's decision on their application. It did not involve the exercise of discretion on his part. The applicants claimed refugee protection fearing Ms. Karpati's violent former boyfriend, who could not accept that their relationship was over and that a new one with Mr. Turoczi had begun. The Member determined that the applicants had a suitable internal flight alternative (IFA) in Budapest, which is 200 kilometres away from the applicants' home town, and that they had not rebutted the presumption of state protection. These

> findings were straightforward applications of binding legal authorities and the relevant burden of proof. In my view, the fact that the Member was practically obliged, in light of the relevant law and the burden of proof, to decide as he did, is another factor that a reasonable and informed person, examining the issue thoughtfully, would consider. Indeed, in the instant case, there is every likelihood that an informed person, viewing the matter realistically and practically – and having thought the matter through – would conclude that there was very little likelihood that any member would have decided the claim differently.
>
> [19] Accordingly, this application must be dismissed. No question for certification was proposed.

[264] The Applicants now acknowledge that statistics alone cannot establish a reasonable apprehension of bias, but put forward the following arguments as to why the problems identified by Justice Zinn in *Turoczi* have been rectified in the evidence that is now before me:

> 51. Further, the Member did not give adequate consideration to the applicants' submissions on his 0% acceptance rate during his first three years as a member at the board and his high levels of finding no credibility in past decisions, particularly Professor Rehaag's very detailed analysis of all of [the Member]'s previous decisions. A reasonable person looking at this, along with the other evidence on the record, would believe there was a real danger that [the Member] was biased.
>
> …
>
> 26. According to studies conducted by Professor Sean Rehaag, [the Member] did not grant any refugee claims from when he became an adjudicator in 2008 through to the end of 2010, granted fewer claims than other members of the Refugee Protection Division and has a higher rate of making no credible basis findings." The author concludes that the most likely explanation is that [the Member] decides claims differently than other members.
>
> 27. Professor Rehaag also conducts a substantive review of all of [the Member]'s reasons for decision issued from 2008 to 2010, and concludes that he "had the distinct impression that [the Member] takes an adversarial approach to adjudicating refugee claims" and that his hearings "appear to amount to cross-examinations aiming to impugn the claimant's credibility." He

> identifies a series of patterns in [the Member]'s decision-making, many of which are present here, including beginning and concluding with a standard sentence concerning the claimant's credibility; relying heavily on discrepancies between the claimant's oral testimony, PIF and Port-of-Entry notes to impugn their credibility as well as perceived omissions within these documents; dismissing the claimant's explanations for any omissions on the basis that the instructions in the PIF are clear and what was filed was otherwise quite detailed; finding that documents are forgeries; and dismissing psychological evidence on the basis that he does not believe the evidence on which it is based.
>
> [Footnotes omitted.]

[265] We can see from these arguments and terminology why the Applicants have framed their arguments about the Member's conduct at the hearing in the way they have, and why the evidentiary support for those arguments is not convincing on the facts of this case. The Applicants are looking for ways to substantiate Professor Rehaag's conclusions about previous cases and prove him right rather than realistically assessing the Member's conduct based upon the evidence in this case.

[266] It is unclear what the Applicants mean by inadequate consideration. As the Decision reveals, the Member took Professor Rehaag's report very seriously and devoted a considerable amount of analysis to it:

> [4] … Statistics were also noted. There was great (at least for the RPD) media attention that I had a "zero percent acceptance rate" for the first three years as a Member of the RPD. Of course at the time, there was very little other information available to the public, other that [*sic*] the fact that the countries of origin involved in those decisions (including Sweden, France, Italy, Portugal, The Philippines, etc.), generally had extremely low acceptance rates and when my average was compared to other Members issuing decisions on the same countries I was not on the list of Members who were highly off the "average." Of course more importantly, I am bound by a Code of Conduct to decide cases based on the facts

and the law before me and each case turns on its own merits. One cannot simply check year to date statistics and determine that a positive or a negative decision is due rather than actually hear the case and make the right decision based on the evidence available. There were other objections as well, but I will not repeat them.

[5] After the hearing concluded, a renewed application for recusal was launched which included with [it] a huge document from Professor Sean Rehaag. While it apparently includes a copy of every decision I had made to that point, I do not see how it adds much value to any argument for recusal. The author states that there is only a 1 in 50,000 chance that the results in my decisions were appropriate as this is simply what I was assigned randomly. However, there is absolutely no mathematical explanation as to how this number was arrived at or any other mathematical analysis that one would normally find in probability analysis (e.g. what variables were controlled for and which were not and how this was done, what is the standard deviation in the analysis, etc.). He then goes on to state that I must decide cases differently from other RPD Members. However, there is nothing in the analysis that deals with any other RPD Members and how they would decide cases differently from me, other than raw numbers. All Members are bound with the same case law and generally use the same standard documentary evidence packages for each country. Each of us are bound by the same Code of Conduct that we swore an oath to or affirmed, that we would decide cases properly on the facts and the law before us.

[6] Concern is also expressed about the number of no credible basis decisions that I have issued. As I noted at the hearing, one can be credible but simply have no basis for a claim. As noted previously, given that I was assigned to the team that handled claims from Western Europe, such as Portugal, Italy, Iceland, etc. it is not surprising that there were a number of no credible basis decisions. More importantly, I am mandated by the IRPA to declare [that] a claim has no credible basis in the appropriate circumstances. I do not see in these circumstances how RPD Members can be making decisions in a “different” manner and that I somehow apply different tests and legal standards.

[7] The author then goes on to analyse the content of some of my decisions (but none of any other Member). He notes that I sometimes base credibility concerns on differences between oral testimony, the PIF, Port of Entry notes, documentary evidence, etc. This is not actually correct. The fact that there are differences may mean a variety of things. The important thing is the explanation for the difference and it is the explanation for the difference that can

lead to a credibility finding, negative or positive. For example, a woman who omits mentioning being raped to a male Immigration officer at the Port of Entry may still be found to be quite credible as she may have felt shame/stigma at the time and uncomfortable in answering questions from a male who was a total stranger. However, if the explanation is lacking then it can lead to a negative credibility finding. These methods of testing credibility have been upheld in numerous cases in Federal Court stretching back years. The author further comments that sometimes vagueness in testimony, the use of forged documents and delays showing a lack of subjective fear can factor into a credibility finding. This is quite true and all have been repeatedly upheld as appropriate factors to consider in Federal Court. While the author states that I usually do not cite the fact that testimony before the RPD is presumed to be true (which there is no legal requirement to cite), he actually omits the second part of that statement; unless there is reason to not presume it to be true. The credibility based decisions show those reasons.

[8] The author also notes that I sometimes cite the lack of psychological evidence in a case or discount the evidence produced. This is true; I cannot take into account psychological evidence as an explanation if it does not exist. Furthermore, apart from the quality of psychological evidence before the RPD often being quite low (unlicensed authors or people with a licence who briefly meet someone once, etc.) one has to believe the story upon which that evidence is based. Eventually, if there are enough credibility concerns a psychological report is not a magic document that makes everything OK and allays all concerns.

[9] The author also notes that in a number of decisions that same passages are used repeatedly, such as the case of gay men having an Internal Flight Alternative in the Federal District of Mexico. This is quite true and it would be surprising if it were otherwise. RPD Members are generally assigned to teams that specialize in certain countries. A Member may see the same general claim type in several different hearings in the same week. The case law does not generally change frequently. The standard documentary packages dealing with country conditions are usually updated once, perhaps twice in a year. Therefore, in decisions involving the same general evidence and claim profile, the same general case law and the same general country conditions, I cannot see why one would not expect the same general findings and written passages on these points. The situation for gay men in the Federal District did not change between those decisions and it has not to this day. While not perfect, as cited in the quoted passages there is a viable IFA in the Federal District (as I find below). The

Federal Court has repeatedly upheld the use of "boilerplate" passages. The important thing is not whether the member used a word processor rather than a thesaurus, but whether the passages validly apply to the claim. Also, there is a reference made to the effect [that] if I cannot find a way to deny a claim based on credibility, I find another way using a standard template. This is a somewhat reverse analysis. Templates, as noted are fine if they are applicable to the case. However, in all the cases analysed, the decision was negative because the claim failed on one of the essential grounds. If it did not fail on one of the essential grounds, it would have been a positive decision.

[10] The author also notes that I normally don't state how the *Gender Guidelines* came into play in the hearing or the decision. However, there is no requirement to do this. What is important is that what the Guidelines say be followed. For example, apart from the example above with respect to Port of Entry disclosure, there are many accommodations that one can provide during the hearing, such as having support people with the claimant (as in this case), varying the order of questioning (as in this case), not asking questions about the specifics of an alleged rape (as in this case), etc. I realize that counsel has made several objections with respect to the questioning of [I.P.P.]'s mother about her alleged rape. However, no details were ever asked of the actual rape itself. The only questions stemmed from the fact that she stated in testimony that the police were "in on it," whereas originally the police were referenced in the aftermath of the incident, but in a non-sinister way. The *Gender Guidelines* in no way state that no questions can ever be asked in response to an allegation of gender based persecution. They merely guide us in the way that questions should be properly asked.

[11] In his conclusion, the author states that there are "serious reasons to be concerned about the tests and standards [that I used]," that he is "troubled by the surprising frequency (i.e. in two thirds of the cases he heard) that he flat-out disbelieves stories...," that he is "troubled by the grounds that he offers..." (I will deal with the reference to the Federal Court below), and that he is "troubled that he frequently copies lengthy passages...." The use of this language is in and of itself, "troubling." This report starts off as a simple neutral academic article, but conducts no scientific analysis when one would expect there to be some. It seems to suggest that many things are inappropriate, when as noted above, they are quite appropriate. It also states that the decisions analysed must be different from the decisions of other Members, but no decisions from other Members are analysed. By concluding with this language, the author appears to be advocating for a certain

viewpoint, rather than being dispassionate. I see little value in this document.

[12] With regard to the current application for me to recuse myself, reference is made to statistics at Federal Court. Unfortunately, the IRB is notorious for being a paper-based tribunal, rather than a computer based tribunal. In attempting to gather data as to what happens to my decisions in Federal Court, one can rarely get a consistent response from our database as far as specific numbers and cases assigned. Counsel appears to focus on the percentage of cases wherein judicial review was granted after an application for leave was granted. This is inappropriate. One cannot look only at cases where the application for leave was granted. One has to look at all the cases in totality. The number of cases where judicial review was granted is actually a tiny minority of the cases of the cases [*sic*] where I issued a decision on the merits. I do note that some claimants may have lacked the resources to proceed on an application for leave. However, there is always Legal Aid Ontario for what appears to be a founded case and if a claimant is concerned that they will be removed after receiving a no credible basis decision, an application for a stay of removal can always be made and will be granted where there is merit in doing so. Anecdotally, within the same week wherein my "acceptance rate of zero" over the course of several years received media attention, also receiving media attention was the first decision of mine overturned on judicial review where I made a decision on the merits of the claim for a principal claimant (there had been one previous case when I was upheld on the principal claimant but the decision on a secondary claimant had been over-turned and there had been a handful of cases where I issued decisions as one of the few Members assigned to our front end processing "courts" to deal with late PIFs and other matters not going to the merits of the claims). While no decision maker wants to have a decision overturned, it does happen and it happens to all decision makers. Given the small number of cases where decisions were over-turned on the merits as compared to the total number of decisions, I do not see how this can lead to any perception of bias. In fact, in *Obiter* in the case of *Turoczi v. MCI*, 2012 FC 1423, a case that dealt with my general acceptance rate, it was noted that the decision was a simple one that dealt with well accepted legal principles that any Member would have dealt with in the same way. I do not see how a very small percentage of decisions over-turned on judicial review can lead to a perception of bias.

[267] This looks like "adequate consideration" to me. It seems to me that the Member addresses each of the points raised by the Applicants in argument.

[268] Professor Rehaag's affidavit report comes to the following general conclusions:

> Based on my quantitative and qualitative examination of [the Member's] RPD decisions from 2008 to 2010, I have serious concerns about the frequency with which he denies refugee claims, and the grounds he deploys to justify rejecting these claims.

[269] In his qualitative analysis of the data, Professor Rehaag notes the following and I have added my responses to his observations:

(a) Credibility is found to be lacking in 116 cases (66.7%). Anyone who has to deal with refugee claims knows that negative credibility findings are common in a large number of cases;

(b) Strong patterns are evident in the Member's reasons. But Professor Rehaag fails to consider that repetitions and formulas or approaches to writing decisions are an inevitable consequence of volume and the similarity of many cases. For example, anyone who has had to deal extensively with refugee claims from China based upon persecution for religious or Falun Gong practices will be aware of constantly recurring fact patterns that often vary very little beyond the names of the individuals involved. Those same claims inevitably require the RPD to deal with recurring credibility and other issues. It would be both unreasonable and unnecessary to find new ways of saying things that need to be said in most cases. This is not evidence of a predisposition to decide cases in a particular way. For example, Professor Rehaag finds that the Member often refers to "contradictions" or "discrepancies" in evidence. One wonders what to make of this? These terms are often

used by other members in their decisions. Professor Rehaag has not tabulated how many times other members use these terms. So there are no comparators or conclusions that can be drawn from the data on these terms. Nor does Professor Rehaag explain why the regular use of these terms should give rise to "serious concern";

(c) The Member often finds the testimony of claimants to be "vague or elusive and draws negative credibility inferences on this basis." My experience with hearing judicial review applications, and reading many decisions over a long period of time, is that this is a legitimate and common practice followed by other members. I don't see why it should support a "serious concern" finding;

(d) The same goes for Professor Rehaag's observation that the Member finds that documents are "forgeries," or that "delay" in making a claim can undermine subjective fear, or that psychological evidence that is totally reliant upon an applicant's narrative lacks credibility;

(e) The same also goes for the "at least 8 cases where [the Member] found that Mexico City is a viable internal flight alternative for homosexuals" and which use similar wording to make this point. As the Member points out, the issue is not whether similar wording is used, but whether that wording is apt and accurate for the facts at play in each case;

(f) One has to wonder, for instance, what is the point and relevance of the following observation of Professor Rehaag for the present case:

> [The Member] also often uses the following passage, which is included in at least 12 cases (with only slight modification): "The claimant alleged that he is a victim of crime based on a criminal vendetta. As such, his claims under section 96 of the *IRPA* fails for lack of nexus to any of the Convention grounds."

I have seen this phrase, or some phrase like it, used in hundreds of decisions by different members. In my view, this observation as an indicia of any propensity or predisposition in the Member is irrelevant to the adverse credibility findings that are the basis of the particular decision; and

(g) Another significant comment occurs with respect to the Gender Guidelines;

> In my professional opinion, merely stating – by using a standard phrase found in most of one's decisions on the subject – that one has taken into account the Gender Guidelines without explaining (in all but one decision) how the specific principles articulated in the Gender Guidelines are relevant to one's analysis reflects a lack of meaningful engagement with the Gender Guidelines.

No one would take issue with this observation. It is made repeatedly in judicial review applications. It's rather like members who say they have considered all the evidence. Such phrases are never taken at face value. One always examines the decision under review to see if there is evidence that something has been overlooked or whether guidelines have really been taken into account. In the present case, the Member's approach to questioning L.M.P.A. in particular shows that they were. She thanked the Member for the way he had treated her.

[270] The general point is that the existence of patterns and formulaic language in the Member's decisions is not evidence, *per se*, of a closed mind or a mind with a particular disposition. Such comparisons are meaningless unless they are compared with the approaches of other members, or unless the patterns and formulae do not adequately address the points at issue in any particular claim.

[271] Professor Rehaag also refers to two Federal Court cases in which the Member's decisions have been overturned on review and in which the Member was heavily criticised by the Court for his credibility findings. But two cases are no kind of meaningful comparator and the test is not whether the Member has been overturned and criticized in past decisions (both case were decided in 2011) but whether or not the Member has learned from his mistakes, and whether he has repeated them in the Decision before me.

[272] In his expanded conclusions to which the Member responded – and this is where the word "troubled" appears – Professor Rehaag provides the following summary:

> 76. Having reviewed over 1300 pages of RPD decisions written by [the Member], as well as the two Federal Court cases overturning his decisions, in my professional opinion, there are serious reasons to be concerned about the tests and standards that he often used in denying every application for refugee protection that he heard from 2008 to 2010.
>
> 77. In particular, I am troubled by the surprising frequency (i.e. in two thirds of the cases he heard) with which he flat out disbelieves stories recounted by claimants. Similarly, it is worrisome that in only one of the 174 cases he decided did he indicate that he generally believed the claimant (and in that case he was sitting on a panel of three RPD members).
>
> 78. I am also troubled by the grounds that he typically offers for holding that claimants generally lack credibility. In particular, in my view — a view echoed by the Federal Court in the two cases overturning his decisions — he relies excessively on notes taken by Immigration Officers at the time that refugee claims are first made. Similarly, he regularly draws negative credibility inferences from relatively minor "inconsistencies" — and he is very quick to discount supporting documents, including expert psychological evidence.
>
> 79. In cases that are rejected on grounds other than credibility, I am troubled that he frequently copies lengthy passages from his other decisions – making it appear that he has templates used to deny claims.

> 80. After reading all of his decisions, I had the distinct impression that [the Member] takes an adversarial approach to adjudicating refugee claims. His hearings — at least as he describes them in his written decisions, appear to amount to cross-examinations aiming to impugn the claimant's credibility. In the comparatively few cases where the claimant's credibility survives this cross-examination, he denies on other grounds, often using a standard template that he employs in other cases.

[273] I have already examined the Member's use of the POE notes in the present case and concluded there are no grounds for concern on these facts. In my view, the present Decision is not based upon "minor 'inconsistencies," and does not unreasonably discount supporting documents, including expert psychological evidence. Professor Rehaag is rendering an opinion on many cases that are not before me, and there can be a distinct difference of opinion as to what is a minor inconsistency and what is not. In the present case, the Applicants allege that all of the discrepancies that the Member seeks to have clarified are minor inconsistencies or "microscopic" inconsistencies. They don't all look minor or microscopic to me, though some are more telling than others, as the Member points out. The Decision is based, not upon one discrepancy, but upon an accumulation of them.

[274] Any cases rejected on grounds other than credibility are not helpful comparisons for the present case. Nor do I see the Member taking an adversarial approach in the present case in cross-examining witnesses. Applicants' counsel led the questioning and the Member's questions were limited to discrepancies in evidence where he was duty-bound to ask for an explanation and give the witness an opportunity to clarify the inconsistency.

[275] In general, I do not find Professor Rehaag's qualitative analysis helpful for the purposes of this case. But I do agree with him on one major point, and that is that the quantitative data and the number of refusals is troubling when looked at in isolation, and I can well understand why the Applicants found it troubling and why some of them developed psychological and physical stress symptoms as a result. But the jurisprudence is clear that the quantitative data is not, *per se*, sufficient evidence of a reasonable apprehension of bias. Many of the questions that Justice Zinn poses in para 15 of *Turoczi*, that needed to be answered before the informed reasonable person could think the matter through, are not answered by Professor Rehaag or anyone else in this case. For instance, Justice Zinn held that the informed reasonable person would want to know if the IRB randomly assigns cases within each country of origin to members, and whether the statistics have been adjusted for a lack of randomness. Professor Rehaag anticipates this concern, but can only argue that since the IRB has "never acknowledged that it uses such a screening process" this explanation should be rejected. And the informed reasonable person's need to know whether the Member's decisions are quashed more often on judicial review is not addressed in the report.

[276] Irrespective of the Member's statistical history, the Court must still determine whether a predisposition is evident on the facts of this case. One of the principal factors for a reasonably informed person to consider is whether, on its face and within its own terms, this Decision is reasonable. In *Turoczi*, Justice Zinn found that the applicant had not rebutted the presumption of adequate state protection and the member's findings were "straightforward applications of binding legal authorities and the relevant burden of proof." Justice Zinn said that "the fact that the [m]ember was practically obliged, in light of the relevant law and the burden of proof, to decide as he did, is another factor that a reasonable and informed person, examining the issue

thoughtfully, would consider." In the present case, I would not say that the Member was "practically obliged" to decide this matter as he did. But the reasonable person would have to take into account that credibility assessments are at the heart of what the RPD does and the governing jurisprudence does not require perfection of any member. Decisions need only fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (emphasis added). I have already concluded that this Decision does fall within that range. The Applicants are entitled to disagree with the Member's findings and conclusions, and I may well disagree with some of them myself, but this does not mean that the Decision falls outside of the *Dunsmuir* range or that the Member demonstrated a reasonable apprehension of bias on the facts of this case.

(16) Conclusion on Reasonable Apprehension of Bias

[277] In my view, there is insufficient evidence, either from the proceedings themselves, or from witnesses commenting upon the Member's general performance at the RPD, to support a reasonable apprehension of bias finding. From the Applicants' perspectives, the Member was predisposed to decide against them. From the Member's perspective, he was doing his duty:

> I am bound by a Code of Conduct to decide cases based on the facts and the law before me and each case turns on its own merit…. All members are bound with the same case law and generally use the same standard documentary evidence packages for each country. Each of us are bound by the same Code of Conduct that we swore an oath to or affirmed, that we would decide cases properly on the facts and the law before us.

D. *Delay*

[278] This is the most intractable ground for review that the Applicants raise in this application. The reasons for this are obvious: the large number of Applicants; scheduling problems; evidentiary complexities; volume of documents, etc.

[279] Delay was raised as a ground of recusal with the Member during the hearings and his answer was as follows:

> **MEMBER**: … Lastly, there is the issue of delay. Yes, there was a gap in hearing evidence between February and October; however, I have got no evidence in front of me about the cause of the delay and I do not believe there have been any complaints in the intervening period about the scheduling unit, at least not that I am aware of.
>
> I am quite aware that memories can fade over time, especially in a case where some events took place close to 20 years ago. However, the claimants who testify are not being asked to recall each other's testimony as some form of text, they are going to be asked about what they remember about their own experiences and I know Ms. Bondy presented a couple of Federal Court cases; however, neither of them squarely deals with the issue of delay as there were actual errors made in each decision and in this case we are not even at the decision-making stage.
>
> I do not see how starting over with another member will be helpful with respect to delay. The best thing that we can do is proceed which I hope to do in the near future. Therefore, I am denying all counsels applications.
>
> [CTR, pp 5731-5732]

[280] More importantly, the Member deals with delay in the Decision itself, although here again he is doing so in the context of the recusal issue and is not, of course, dealing with the

Applicants' present complaints about unacceptable gaps between hearings and between the conclusion of hearings and the issuance of the Decision:

> [4] … Delay was also brought up as an issue. However, no evidence was brought that attempts were made to schedule and refused by the IRB. Given that there were 26 claimants for most of the hearing process, there is only one hearing room in Toronto capable of fitting everyone and the availability of numerous people had to be taken into consideration. While counsels did present some examples of cases wherein the Federal Court over-turned decisions of the RPD, delay was mentioned only in *Obiter* as a possible reason for the actual error made in the decision. In those cases, there was no record of what transpired at the hearing or interview. As I noted, all of the proceedings before the RPD are digitally recorded and if memory and written notes are not clear, the digital recording can readily be used to refresh one's memory.
>
> …
>
> [13] There is also the issue of delay. Unfortunately, hearings and decisions can be delayed for a host of factors. A massive case such as this with a veritable mountain of documents, at one point 26 claimants, two counsels and an RPO, simply keeping track of everything can be daunting. At one point, an Access to Information/Privacy request was made for copies of everything in the file. While the ATIP request was quite proper, the file was returned from ATIP with nothing in order. Just that one act has necessitated the use of several employees in reconstructing the file. Other factors can come into play such as health, availability, etc. Most importantly, apart from the physical file, there is a digital recording of the entire proceeding, so if there is something in doubt, the recording can be examined.

[281] As these quotations make clear, the Member is concerned with the impact of delay upon the fairness of the hearings, which is only one of the aspects of delay before me, the other being the impact of delay upon the lives of the Applicants.

[282] Essentially, the Applicants' position on both aspects of delay is as follows:

> 30. Section 7 is also engaged where state-induced psychological stress impinges the security of the person. The state-induced psychological and physical stress of the RPD proceedings impinged on the applicants' security of the person, grossly affecting their well-being and physical integrity. Over a period of six years, from the initial hearing on July 8 2009 to the release of the Member's final decision on October 27 2015, the applicants suffered tremendous mental and physical hardship that went far beyond the "ordinary stresses and anxieties" that could be expected from the refugee process.
>
> …
>
> 32. Unacceptable delay in an administrative proceeding compromises the fairness of the hearing. The delay in this case was unacceptable, impeded the applicants' ability to have a fair hearing contrary to the principles of fundamental justice, and constituted a breach of the applicants' section 7 *Charter* rights.
>
> [Footnotes omitted.]

[283] One of the problems with dealing with these issues is that the Applicants were not all equally impacted. We are dealing with twenty-four Applicants, all of whom would have been impacted in different ways, but who appear to assume they can rely upon the evidence of other Applicants for either unreasonable or inordinate delay. This may be appropriate when we are addressing the actual length of time, but it is highly inappropriate when actual impacts are the issue. Hence, anything I conclude about delay may have to be confined to those Applicants for whom there is sufficient evidence to allow some kind of reasonable conclusion.

[284] Also, as the jurisprudence makes clear, delay is difficult to deal with because it is inevitably enmeshed with institutional administration and its impacts are so varied and raise difficult causation problems. Hence, the case law suggests that caution is required.

[285] The Supreme Court of Canada, in *Blencoe*, provided the following guidance:

> 160 As indicated above, the central factors toward which the modern administrative law cases as a whole propel us are length, cause, and effects. Approaching these now with a more refined understanding of different kinds and contexts of delay, we see three main factors to be balanced in assessing the reasonableness of an administrative delay:
>
> (1) the time taken compared to the inherent time requirements of the matter before the particular administrative body, which would encompass legal complexities (including the presence of any especially complex systemic issues) and factual complexities (including the need to gather large amounts of information or technical data), as well as reasonable periods of time for procedural safeguards that protect parties or the public;
>
> (2) the causes of delay beyond the inherent time requirements of the matter, which would include consideration of such elements as whether the affected individual contributed to or waived parts of the delay and whether the administrative body used as efficiently as possible those resources it had available; and
>
> (3) the impact of the delay, considered as encompassing both prejudice in an evidentiary sense and other harms to the lives of real people impacted by the ongoing delay. This may also include a consideration of the efforts by various parties to minimize negative impacts by providing information or interim solutions.
>
> (See generally: *Ratzlaff*, *supra*, at p. 346; *Saskatchewan (Human Rights Commission) v. Kodellas* (1989), 60 D.L.R. (4th) 143 (Sask. C.A.); *R. v. Morin*, [1992] 1 S.C.R. 771; McMurtrie, *supra*; and Skiffington, *supra*.) Obviously, considering all of these factors imposes a contextual analysis. Thus, our Court should avoid setting specific time limits in such matters. A judge should consider the specific content of the case he or she is hearing and make an assessment that takes into account the three main factors that have been identified above.
>
> [Emphasis in original.]

[286] As regards s 7 *Charter* issues, the Supreme Court of Canada, in *Blencoe*, had the following to say:

> 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler*, *supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G. (J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.
>
> …
>
> 59 Stress, anxiety and stigma may arise from any criminal trial, human rights allegation, or even a civil action, regardless of whether the trial or process occurs within a reasonable time. We are therefore not concerned in this case with all such prejudice but only that impairment which can be said to flow from the delay in the human rights process. It would be inappropriate to hold government accountable for harms that are brought about by third parties who are not in any sense acting as agents of the state.
>
> 60 While it is incontrovertible that the respondent has suffered serious prejudice in connection with the allegations of sexual harassment against him, there must be a sufficient causal connection between the state-caused delay and the prejudice suffered by the respondent for s. 7 to be triggered. In *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, Dickson J. (as he then was) concluded that the causal link between the actions of government and the alleged *Charter* violation was too "uncertain, speculative and hypothetical to sustain a cause of action". In separate concurring reasons, Wilson J. also conveyed the need to have some type of direct causation between the actions of the state and the resulting deprivation. She stated, at p. 490:
>
> > It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would

> limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face. [Emphasis added.]

[Emphasis in original.]

[287] As regards the duty of fairness, the Supreme Court, in *Blencoe*, provided the following guidance:

> 121 To constitute a breach of the duty of fairness, the delay must have been unreasonable or inordinate (Brown and Evans, *supra*, at p. 9-68). There is no abuse of process by delay *per se*. The respondent must demonstrate that the delay was unacceptable to the point of being so oppressive as to taint the proceedings. While I am prepared to accept that the stress and stigma resulting from an inordinate delay may contribute to an abuse of process, I am not convinced that the delay in this case was "inordinate".
>
> 122 The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.
>
> …
>
> 125 During those 24 months, the Commission also had to deal with a challenge by the respondent as to the lateness of the

> Complaints and his accusation that the Complaints were in bad faith. The respondent refused to respond to the allegations until this determination was made. As a result, the process was delayed for some eight months. The respondent was perfectly entitled to bring forward allegations of bad faith and to question the timeliness of the Complaints. However, the Commission should not be held responsible for contributing to this part of the delay. In this regard, Lowry J. stated (at para. 42):
>
> > It is not suggested that Mr. Blencoe was not entitled to challenge the complaints, as he did at the outset, but having done so, and having been unsuccessful, it is not in my view open to him now to claim that the events of the eight months elapsed contributed to an unacceptable delay.

[288] The Federal Court and the Federal Court of Appeal have also addressed delay in the context of immigration claims and non-penal proceedings. In *Rana*, above, Justice von Finckenstein drew attention to the following:

> [18] The Applicant relies on the decisions of the Federal Court of Appeal in *Akthar v. Canada (Minister of Employment and Immigration)*, [1991] 3 F.C. 32; *Canadian Airlines International Ltd v. Canada (Human Rights Commission)* [1996] 1 F C 638 and *Hernandez v. Canada (Minister of Employment and Immigration) (F.C.A.)* [1993] F.C.J. No. 345 for the proposition that unreasonable delay can deprive the applicant of a right to a fair hearing and thus amount to a violation of s. 7 of the *Charter of Rights and Freedoms*.
>
> [19] The impact of delay on fair hearings and the preceding three cases where succinctly summarized by Pinard J. in *Canada (Minister of Citizenship and Immigration) v. Cortez* [2000] F.C.J. No. 115 where he stated at paragraphs 11 to 13:
>
> > In Akthar v. Canada (Minister of Employment and Immigration) (1991), 14 Imm.L.R. (2d) 39, the Federal Court of Appeal found that a refugee claimant is not in the same legal position as an accused person because refugee claimants are ascertaining claims against the State and bear the burden of showing that their claim has a credible basis. The Court of Appeal further stated "[i]f no

disposition is ever made in his case an accused is and remains innocent; a refugee claimant in the same circumstances never attains refugee status." The Federal Court of Appeal concluded, in that case, that any claim in a non-criminal case to Charter breach based on delay must be supported either by evidence or, at the very least, by some inference from the surrounding circumstances that the claimant has in fact suffered prejudice or unfairness because of the delay.

In Hernandez v. M.C.I. (1993), 154 N.R. 231, the Federal Court of Appeal again dealt with the issue of delay in processing a refugee claim. Robertson J.A. warned counsel that, in light of the framework set out in Akthar, supra, the "'unreasonable delay' argument cannot be perceived as a fertile basis for setting aside decisions of tribunals. It is probably closer to legal reality for one to presuppose that rarely, if ever, will the argument be successfully invoked."

In Canadian Airlines International Ltd. v. Canada (Canadian Human Rights Commission), [1996] 1 F.C. 638 (leave to appeal to S.C.C. denied, [1996] S.C.C.A. No. 44, 205 N.R. 399), the Federal Court of Appeal dealt with the issue of whether a four and a half year delay between the filing of a complaint and a decision by the Human Rights Commission to appoint a Human Rights Tribunal was unreasonable. Décary J.A. adopted the words of the Manitoba Court of Appeal in Nisbett v. Manitoba (Human Rights Commission) (1993), 101 D.L.R. (4th) 744, at pages 756 and 757:

> ["]It cannot now be doubted that the principles of natural justice and the duty of fairness which are part of any administrative civil proceeding include the right to a fair hearing, and that delay in the performance of a legal duty may amount to an abuse that the law will remedy" (at page 756); that "If there has been prejudice of such a kind and degree as to significantly impair the ability of a party to receive a fair hearing, then the administrative tribunal may well lose jurisdiction" (at page 756); that "In certain circumstances, unreasonable delay can

> constitute an abuse of process" (at page 756); and that "The question is simply whether or not on the record there has been demonstrated evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing (at page 757).

Décary J.A. went on to say that:

> In our view, a delay in the proceedings of an administrative tribunal which has not been caused by the applicant will only give rise to prohibition where it is such that it prevents the tribunal from adequately fulfilling its legislative mandate in accordance with the requirements of natural justice. Thus, a tribunal may, by reason of its failure to proceed expeditiously, be unable to fulfill its mandate in accordance with these requirements, if there is evidence that the prejudice caused by the delay is such as to deprive a party of his right to a full and complete defence. The accent is to be put on the nature of the prejudice suffered by a party rather than on the cause for the delay or on the length of the delay. Since the test used with respect to non-penal proceedings is distinct from the test used with respect to penal proceedings, it may be less confusing to speak in terms of "unreasonable" delay when Charter rights are involved and of "unacceptable" delay when the rules of natural justice are involved.

[20] In this case, the delay caused by processing the Applicant under the backlog scheme resulted in a delay of 14 years. The case was not referred to the IRB before 2002. While this is an exceedingly long period and as much as one may sympathise with the Applicant's long wait in having his refugee claim addressed, there is simply no "evidence of prejudice of sufficient magnitude to impact on the fairness of the hearing" within the meaning of *Nisbett*, *supra*. The Applicant relied on assertions but failed to produce any proof. He never even asserted that it was the passage of time that made him forget who he is afraid of or why. In light of this total lack of evidence regarding prejudice caused by delay, there is no reason for finding the Board's decision to be incorrect.

[21] Accordingly, this application cannot succeed.

[289] In the present case, the Applicants are not complaining about the length of time it took to commence the hearings following their claims. Indeed, for this period of time, the RPD appears to have been remarkably efficient. By the time all of the Applicants had requested refugee protection it was late 2008, and the first pre-hearing took place in July 2009. The periods at issue here stretch from the first pre-hearing in 2009 and the last hearing in December 2011, and between the last hearing in December 2011 and the issuance of the Decision in October 2015.

(1) The July 8, 2009 to December 6, 2011 Period

[290] This is the period during which all of the Applicants' claims were heard over five pre-hearing conferences and eleven hearings. The RPD began hearing individual testimonies on February 8, 2011.

[291] The first group of Applicants had arrived in Canada on April 17, 2007 and their refugee claim was referred to the RPD a few days later. Other Applicants arrived in separate groups and made claims, with the final group arriving in October 2008 and the final claims being made in November 2008.

[292] The Applicants do not complain about the time it took between April 2007 and February 2011 and leave it out of account when looking at the July 8, 2009 to December 6, 2011 period. This distorts the full context of the delay in several ways. First of all, the delays and complexities of the hearing period, as well as the stresses suffered by the Applicants and their psychological and physical symptoms, cannot be separated from the complexities of the pre-hearing period, during which time the Applicants arrived in four separate groups that had to be

absorbed into the same claim. The hearings began in February 2011, but would have begun earlier had the Applicants not arrived in groups. The Applicants have provided no evidence of the extent to which their physical and psychological problems can be attributed to the hearing period as opposed to the pre-hearing period. In addition, the evidence of the pre-hearing period shows the Member and the RPD working efficiently to organize all of the Applicants' claims and to accommodate the Applicants' many requests for adjournments and conferences and extensions of time. There are no complaints about the Member's conduct during the pre-hearing period when he was working efficiently and providing his experience to assist the Applicants to organize their claims in a way that would allow them to be dealt with efficiently at the hearing.

[293] Another significant problem related to the impact of any delay upon the Applicants is that, in mid-2011, the Applicants learned of media coverage about the Member's acceptance rate, which the Applicants say had a significant effect upon their stress levels and well-being. This revelation – that led to time being taken up with a recusal motion – cannot be attributed to delay or the RPD process dealing with their claims. The Applicants describe the impact of the revelations in this way:

> 13. In mid-2011, the family learned of media coverage about [the Member] having a 0% acceptance rate on refugee claims. On October 13, 2011, the applicants made submissions asking the Member to recuse himself due to the impact this revelation had on the claimants, as well as for a reasonable apprehension of bias and delay. The Member denied this request at the next hearing.
>
> 14. Subsequently, the applicants' stress levels increased considerably. This stress manifested itself in severe physical ailments. On October 21, 2011, I.P.P. began to vomit compulsively after F.P.R. testified. The vomiting was so severe that he had to be taken in an ambulance to the emergency room at St. Michael's Hospital. The hearing was suspended. The doctor who examined I.P.P. established that the stress of the proceeding likely caused his illness.

> 15. At the next hearing, on October 27, 2011, the applicants made another request for the Member to recuse himself on the same grounds as before, and provided medical documentation of I.P.P.'s illness. Again, the Member denied the request. L.M.P.A. then felt a sharp pain in her neck and torso, and went to the emergency room for treatment. She was diagnosed with a panic attack and once again, stress was cited as a likely cause of the incident. The hearing was suspended again.
>
> 16. Throughout October 2011, Y.T.M. suffered stress-induced physical distress including irregular menstrual bleeding and vomiting due to her experience of the hearings.
>
> 17. In the final hearing, on December 6, 2011, E.M.V. became too ill to keep participating in the proceedings. After the hearing, counsel Bondy advised the Member of her experience.
>
> [Footnotes omitted.]

[294] The Applicants cannot prove that these symptoms were caused solely, if at all, by the RPD's delay or the Member's refusal to recuse himself, although of course the Member had to accommodate them, which he made every effort to do so short of recusing himself. One of the problems here is that, quite apart from caution issues, it would have been impossible for the Member to foresee or predict which of the Applicants would be affected in the ways described by the Applicants. It was not unreasonable for the Member to assume that the stresses faced by the Applicants could be dealt with by the many accommodations he made available to them. And the Applicants' proposed solution, that the Member recuse himself, could only have further contributed to any stress caused by delay.

[295] The Applicants continued to suffer anxiety and stress symptoms during the post-hearing period but, once again, these symptoms cannot be disconnected from what they were told by sources and parties outside of the RPD about the Member's record and his alleged

predisposition. The Applicants make no submissions on this issue and appear to expect the Court to attribute all impacts to the Member and the RPD.

[296] Another problem with dealing with impacts during this period, as well as the post-hearing period, is that the Applicants make no attempts to take into account the medical predispositions and personal situations they brought with them to Canada. The Applicants allege they have been living under considerable stress since 1992 and some of them arrived in Canada with diagnosed medical problems. This raises significant causation issues that the Applicants have made no attempt to resolve.

[297] The Court cannot resolve these problems without the requisite evidentiary base. There are also significant problems with the evidence that has been provided, although this is particularly problematic for the post-hearing period when it comes to impacts.

(2) Section 7 *Charter* rights

[298] I agree with the Applicants that, in accordance with *Singh*, above, at 210, "[g]iven the potential consequences for the appellants of a denial of that status if they are in fact persons with a 'well-founded fear of persecution', it seems… unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status." This, however, is not at issue in this application. What is at issue is the delay in the proceedings, and whether the delay engages and breaches the Applicants' s 7 *Charter* rights or was procedurally unfair.

[299] The Applicants' arguments for breach of their s 7 *Charter* rights are essentially as follows:

> 6. Second, the proceeding itself implicates their psychological security. State delays in this proceeding have caused anxiety and psychological harm, and deprived the Applicants of the ability to make fundamental life choices. This state-induced psychological and physical stress impinges the security of the person, independent of the eventual outcome of the determination. As a result of the extremely delayed decision the Applicants suffered tremendous mental and physical hardship that went far beyond the "ordinary stresses and anxieties" that could be expected from the refugee process.
>
> 7. These stresses are attributable to the state [and] are a direct result of the nature and length of the RPD proceedings. Unlike in *Blencoe*, the Applicants have demonstrated that the harms to their physical and psychological wellbeing are caused by the manner in which the RPD hearing was conducted and the unreasonably long delay in its determination.
>
> [Footnotes omitted.]

[300] I do not think that the Applicants have established that, with regard to the period extending from November 2008 (when all of the claims had been made) through to the last hearing date in December 2011, there was any unreasonably long delay. I have come to this conclusion for several reasons:

(a) The Applicants themselves do not take issue with the period from the first claims made in April 2007 up to the commencement of the pre-hearings in July 2009. The record itself shows that this period was marked by the arrival of additional Applicants, incomplete PIFs, numerous requests for adjournments and extensions of time, and changes of counsel. By the time of the first pre-hearing conference in July 2009, the claims had become extremely complex and cumbersome to manage and the time taken before the

hearings began was well within inherent time requirements. What is more, there is no convincing evidence that, during this period, anything that occurred at the RPD was causing negative impacts over and above the stresses of making a claim by persons with the Applicants' backgrounds, illnesses, family relationships, and personal proclivities. And the Applicants themselves took no steps during this early period to reduce the time the process was taking;

(b) Between the first pre-hearing date in July 2009, and the last hearing date in December 2011 (a period the Applicants do take issue with), there were obvious delays due to scheduling, the availability of a hearing room large enough to accommodate everyone involved, and finding dates to fit the availability of Applicants' counsel, the Member, the RPO and others involved in the administration of the hearings. There were also recusal motions to deal with, conferences to be scheduled and re-scheduled at the request of counsel, psychiatric assessments to be considered, illness by the Member, delays in providing a final narrative for the Applicants, other demands on the Member's work schedule, amendments to PIFs, and a special application related to C.A.A.P.;

(c) Before the gap occurs between the February 2011 hearing and the resumption in October 2011, we can see the Member dealing with, and trying to rearrange, his work schedule to make sure the hearings were completed within a reasonable time. See CTR, pp 5687-5688. The Member says that "my coordinating member has said that I can move anything else out of the way to accommodate this hearing" and "we're gonna be moving some files around to other staff… we will send out a notice to all of you with the next date on it" (CTR, p 5687). However, nothing appears to have happened until the RPD scheduled the October hearing dates on September 2, 2011 (Khoushabeh affidavit at para 77). Later,

once there had been the delay in the hearings and the recusal request, the Member does say at the November 1, 2011 hearing: "I have no idea why it took so long the last time to get rescheduled, and it's not going to take that long this time. I'm going to make sure that the next time we meet it will be in the very near future. Because I know that you've been waiting, in some cases, several years for a resolution here and I want to avoid any further delay." November 1, 2011 was the final hearing scheduled to that point, and the RPD did manage to schedule the next hearing for November 29, 2011;

(d) In a letter dated November 12, 2009, Ms. Stothers complained after a pre-hearing conference to consider joining the claims scheduled for November 13, 2009 was cancelled. She states that hearings are being "postponed again and again" (CTR, p 523-524). The conference was rescheduled and held on November 24, 2009. On March 24, 2010, as part of submitting the amended PIFs requested by the Member at the November 24, 2009 conference, Ms. Stothers concludes her letter by noting that she hopes "we might be able to finally secure dates for the hearing of this family's claim, which has been adjourned numerous times" (CTR, pp 3811-3812). On July 22, 2010, in a letter requesting a pre-hearing conference before the Applicants' hearings then scheduled to start on August 24, 2010, Ms. Stothers notes that the "family started their refugee claim over three years ago, and their hearing has been postponed numerous times" and that they "were supposed to start last summer" but the RPO who appeared had not been given sufficient notice and could not locate all of the material that had been submitted (CTR, p 558). In a letter dated August 5, 2010, Ms. Stothers notes that "[t]he hearing into this claim has been repeatedly postponed, to the detriment of all involved, especially my

clients who have been waiting for their hearing for over three years" (CTR, pp 3720-3722);

(e) The Member says in the Decision that any delays were the result of this being a massive case "with a veritable mountain of documents, at one point 26 claimants, two counsels and an RPO" so that "simply keeping track of everything can be daunting." He also refers to the problems caused by the health and the availability of participants. There is no reason to doubt this explanation in the reasons;

(f) During this period, the Member was alerted to psychological and physical symptoms of some Applicants. However, the Applicants' concerns (as I have previously found) arose principally from events outside of the RPD process, and the Member offered every accommodation to deal with them short of recusing himself. Despite their symptoms, I can find no evidence that the Applicants were prevented from giving their own evidence through counsel or in answering the Member's questions except for M.T.M. and E.M.V., who claim that their symptoms prevented them from being able to testify, but who did submit evidence in the form of post-hearing affidavits (CTR, p 1507-1516);

(g) The Applicants argue that there were "extended periods of no activity" during this period when the Member appeared not to be dealing with their claim. However, as the record shows, the Member had other work commitments to deal with and hearing dates were set based upon his own availability, the availability of the RPD and Applicants' counsel. There was a gap between the second pre-hearing on November 24, 2009 and the third on August 20, 2010. That is explained, however, by the final group's claim being joined at this hearing and the administrative burden that caused (CTR, p 534). Communication

> between the parties continued during this period and became intense in the lead-up to the resumption of the pre-hearing conference in August 2010. In my view, the only period that can be looked at as an extended period of no activity is the gap in oral hearings between February 24, 2011 and October 13, 2011. The Khoushabeh affidavit does not suggest that there was communication between the parties until the fall dates for hearings were scheduled in September. But I think the delay is reasonable based on the difficulty of scheduling the only room that could accommodate the size of the group. And it is clear that after that delay, efforts were successfully made to make sure another delay in hearings of that length did not occur.

[301] I cannot find that any delays during this period of time were inordinate or unreasonable. I don't think the delays went beyond the inherent time requirements to be expected in this complex and unwieldy process, or that the RPD did not efficiently use those resources available to it. The impact of the delays did not, in my view, prejudice the Applicants in any material way in a procedural or evidentiary sense, and I am not convinced they were contributing factors to the harms they claim to have suffered during this period.

(3) December 6, 2011 to October 14, 2015

[302] This is the period that extends from the final hearing to the issuance of the Decision. For this period of time, the Applicants make following points:

> 11. **Time taken compared to inherent time requirements**:
> The delay of over three years and ten months from the conclusion of oral hearing on December 6, 2011 to rendering a decision on October 14, 2015 far exceeded the inherent time requirements as required by the facts of the case even considering its complexity

> and volume of evidence. This is particularly so since there were extended periods of time with no activity. Without any evidence the Member was doing any work on the case during these periods of inactivity, the inordinate delay cannot be attributed to the complexity of the case.
>
> 12. **Causes of Delay Beyond the Inherent Time Requirements**: The extended periods of non-communication and inactivity are inordinate and unexplained and cannot be attributed to the Applicants.
>
> 13. The Applicants efforts to obtain an explanation for the delay while they waited for the Member's decision went unanswered and the Member "essentially failed even to keep those affected by its decisions up to date with what was going on." He failed in his responsibility to manage this complex case to ensure a fair and expeditious decision.
>
> 14. The reasons for decision fail to provide any explanation for the delay. With regards to the delay between the hearing in February 24, 2011 and resuming in October 13, 2011, the Member cites logistical difficulties of accommodating a large group of applicants, including finding a courtroom to accommodate them and the availability of numerous people, but there is no evidence that the Board attempted unsuccessfully to schedule a hearing during this period. With regards to the delay in rendering his decision following the conclusion of hearing on December 6, 2011, the Member cites reasons why hearings and decisions "*can*" be delayed without stating the reason for the delay here. In any event, these hypothetical reasons do not justify the delay here. The Member's suggestion that delay was aggravated by the Applicants' *Privacy Act* request is without basis, since the request was made on September 6, 2014 — nearly three years after hearings concluded, the Applicants played no role in creating the alleged disorder in the file, and in any event, were simply asserting their rights.
>
> 15. The Board and the Respondent have repeatedly opposed any efforts by the Applicants to seek information as to the causes of the delay. As a result, the delay remains unexplained.
>
> [Footnotes omitted.]

[303] The Applicants' comments on the ATIP request do not seem valid to me. The fact that the Applicants were exercising their rights does not mean the exercise of those rights did not

interfere with the progress of the Decision. As the Member points out in his Decision "the file was returned from ATIP with nothing in order. Just that one act has necessitated the use of several employees in reconstructing file." The Member does not, however, tell us how long the reconstruction took or, indeed, whether reconstruction took up any of the time. The Applicants played no role in creating the alleged disorder, but nor did the RPD.

[304] The Applicants also say that any delay during this period cannot be attributed to them. This is not accurate. The record shows that, after the last day of hearings on December 6, 2011, the Applicants, *inter alia*:

(a) Filed post-hearing submissions;

(b) Brought a further recusal motion for the Member's removal;

(c) Exchanged correspondence and continued to provide evidence and submissions;

(d) Requested and obtained extensions to make submissions;

(e) Made a further request for recusal; and

(f) Continued to submit evidence. Mr. Scott provided 44 pages of additional disclosure on January 8, 2015 and on January 12, 2015, he provided a letter dated January 9, 2015 from [the family therapist].

[305] During this whole period, I can find only one request for an explanation for the delay. This occurs in Ms. Bondy's letter of September 2, 2014 in which she asks, *inter alia*, for the reason for the delay in deciding the Applicants' renewed recusal motion and finalizing the claim. Ms. Bondy's letter of September 2, 2014 requests that the Member inform the Applicants, in writing, of "[t]he reason for the severe delay in deciding the claimants' renewed recusal motion and finalizing the claim" (CTR, p 2164, emphasis added). Earlier, in Ms. Bondy's submissions of November 12, 2013, in response to the Member's request for submissions on new Federal

Court jurisprudence, she notes that "[t]he claimants have also not been provided any explanation for this delay, although as the delay here is so extreme it is submitted that it amounts to a breach of procedural fairness regardless of whether any reasonable explanation for the delay exists" (CTR, p 1970). Consequently, the November 12, 2013 submissions do not request an explanation for the delay. Ms. Bondy's letter of January 7, 2015 requests clarification of the issues to be addressed at the resumption hearing scheduled for January 29, 2015 but does not request an explanation for the delay. Similarly, Mr. Scott's letter of January 28, 2015, in response to notification that the resumption hearing scheduled for that day had been postponed, renews the request for an explanation of the purpose of the hearing but does not request an explanation for the delay. So only the letter of September 2, 2014 requests an explanation for the delay on either the recusal motion or finalizing the claim.

[306] It is also relevant that during this whole period when the Applicants say that the delay was having a profound impact upon them, they do not seem to have turned their minds to lodging a complaint with the RPD. At the relevant time, the Board did have a Protocol Addressing Member Conduct Issues that created a complaint mechanism and the Applicants do not say that this protocol could not have been used in the circumstances. It seems also that the Applicants did not consider approaching the Court with a *mandamus* application.

[307] The Applicants also make the following complaint:

> 39. An additional hearing was scheduled nearly 3 years after the final hearing, and one year after the last communication to the applicants' counsel on behalf of the Member. Neither the Member nor the IRB provided a written response to the applicants' requests for an explanation of the purpose of the hearing. After this hearing was cancelled, no reason was provided as to why a decision was

> rendered without a new hearing, though a new hearing had been requested.
>
> [Footnote omitted.]

[308] As I have pointed out above, the record shows, however, that on August 8, 2014, the RPD's Scheduling Department left a telephone message for Ms. Bondy indicating the RPD wished to schedule another hearing date to address additional documents that had been filed and the latest recusal motion. See CTR, p 2154. This was the first communication from the RPD since the Applicants' request for an extension of time to respond to the Member's request for submissions on recent Federal Court jurisprudence was granted on November 8, 2013. Ms. Bondy's September 2, 2014 letter states that the voicemail was received on August 11, 2014. The actual record of the action is dated August 8, 2014.

[309] Ms. Bondy responded to this telephone message on September 2, 2014 by letter asking the RPD to provide in writing the reasons for the delay in deciding the recusal motion and finalizing the claim, and the purpose of the resumption hearing and what evidence and submissions were needed at the hearing. See CTR, pp 2162-2165.

[310] In response to Ms. Bondy's letter, the RPD Registry immediately (September 3, 2014) requested directions from the Member for Ms. Bondy's request and advised the Member that "counsel won't schedule until she receives this in writing." See CTR, pp 2166-2167.

[311] There appears to be no response by the Member to this internal memo. However, in a letter dated January 7, 2015, Ms. Bondy wrote to the Member, indicating that she had received a

voicemail response on the Member's behalf which informed her that the purpose of the resumption meeting scheduled for January 29, 2015 was to address "updated narratives and motions that have been filed in support of this claim." In response to this, Ms. Bondy requested a specific list of any claimants who should attend and an outline of what evidence, or what factual and legal issues, the Member intended to question the claimants on, and any specific issue that would require submissions from counsel.

[312] Clearly, then, Ms. Bondy was told what the hearing was intended to deal with, but she was not told the specifics of how she or the Applicants would need to prepare themselves for the resumption hearing.

[313] On January 9, 2015, the RPD sent Applicants' counsel a Notice to Appear for a hearing on January 29, 2015. See CTR, p 2272.

[314] It would appear that the resumption hearing was postponed because, in a letter dated January 28, 2015, Mr. Scott wrote to the RPD and informed them that "Ms. Bondy and I received notice yesterday morning that the resumption hearing set for this claim tomorrow has been postponed" and he requested that the Member "either immediately recuse yourself from this matter or, within two weeks of the date of this letter, this matter be set down for scheduling within the next two months and that you provide myself and Ms. Bondy in writing the purpose of this new hearing date." See CTR, p 2281.

[315] There was no response to this letter before the Decision on October 14, 2015.

[316] This is, indeed, an odd sequence of correspondence. There is no explanation as to why the Member did not provide Applicants' counsel with the specifics they requested and needed in order to prepare for the resumption hearing. On the other hand, it doesn't suggest that the Applicants were concerned about overall delay. At this stage in the process, the Applicants still wanted the Member to recuse himself which, given what had occurred to this date, would have meant significant further delay. And again, the Applicants do not turn their minds to a *mandamus* application which would have been the obvious remedy if they were concerned about overall delay in the rendering of the Decision. Instead, their preferred remedy was recusal, which would have significantly extended the whole process.

[317] In the end, however, the Member does not provide an adequate explanation for why it took him so long to complete this Decision. He leaves us with generalities about other responsibilities and how "hearings and decisions can be delayed for a host of factors." But he provides no specifics for this case other than "[a] massive case such as this with a veritable mountain of documents," the ATIP request, and other factors such as "health, availability, etc." These vagaries do not explain the three years and ten months it took to complete the Decision.

[318] The Decision itself is hardly complex or extensive. On the merits, the Member simply denies C.A.A.P.'s sexual orientation claims on the basis of an IFA in three paragraphs that are mostly boilerplate with a few specifics about the reasonableness of C.A.A.P. moving to the Federal District.

[319] The rest of the Decision on the merits is simply a cumulative negative credibility finding that, as Professor Rehaag points out, involves the Member following his usual practice of noting inconsistencies in the evidence and asking for an explanation, and then coming to a conclusion. The Member himself points out that boilerplate passages are not a problem provided "the passages validly apply to the claim."

[320] In short, notwithstanding the number of Applicants and the inevitable volumes of evidence, this is not an overly complex Decision that gives rise to difficult questions of fact and law. Any delay in producing the Decision can only be justified by the additional matters that followed the hearings and which I have outlined above. On the whole, I think I must draw a negative inference from the Member's failure to adequately explain the delay in producing the Decision and his resort to vagaries. The Applicants have convinced me that, following the hearings, the Member took much longer to produce this Decision than the inherent time requirements required.

[321] As regards the causes of the delay beyond the inherent time requirements, I have very little evidence with which to examine whether the RPD used available resources as efficiently as possible. I would have expected here some explanation and evidence to support other claims upon the Member's time. But the Member is not helpful on this and the Respondent has not disclosed what else the Member was doing that required three years and ten months to produce a fairly simple and straightforward Decision. On the other hand, the Applicants did produce further evidence and continued with their recusal efforts during this period (though not enough to justify the time taken) and, if they did not waive the delay, they did not seek the obvious solutions of

complaining to the RPD or coming to the Court for *mandamus* if they thought the Member was taking too long to produce a decision and this delay was causing them to suffer the impacts they claim. However, I think the real telling factor in this case is the impact of the delay.

(4) Impact of the Delay

[322] In general, the Applicants claim that the delay had two major impacts:

> 16. **Impact of the Delay**: The unreasonable delay in the adjudication of their claim prejudiced the Applicants' case and had a severe negative impact on their lives. The delay therefore undermined the integrity of the refugee process, which includes having the claim decided in a fair and efficient manner, and protecting displaced and persecuted persons.
>
> [Footnotes omitted.]

[323] In the general scheme of things, one would expect that genuine refugee claimants would recognize and acknowledge some benefits for any delay between the end of the hearings and the rendering of a decision. There are some fairly obvious reasons for this:

(a) The delay keeps them in Canada and safe from the dangers they are fleeing;

(b) While in Canada, they can avail themselves of all of the support and opportunities that Canadian law and society makes available to claimants;

(c) Long delays, in particular, will provide opportunities to achieve permanent resident status as they will bolster the important "establishment" factor; and

(d) Delays will also provide opportunities for the submission of additional supportive evidence.

[324] It is strange, then, that in the present case, the Applicants mention nothing positive that came their way as a result of the delays and claim compensation for what they allege are lost opportunities and costs incurred. The Applicants put it this way:

> 21. Specific impacts of the delay are described above in paragraph four. The Applicants have been subject to a constellation of harms, the sum of which constitutes a violation of their liberty and security of the person rights at the hands of the state. The delay had a severe, long-term impact on the mental and physical health of the Applicants. The delay also posed significant barriers to interpersonal relationships, establishment in Canada, access to social services, and prospects for employment and education. They have had challenges accessing even their valid IFH coverage. In some instances it resulted in direct financial loss or loss of employment. These harms far surpassed the "ordinary stress and anxiety" expected from the process. The Applicants' experience is consistent with the impact of determination delays on refugee claimants described in Dr. Lisa Andermann's affidavit: this includes high rates of anxiety and depression from long-term uncertainty of immigration status, and the exacerbation of PTSD symptoms from chronic instability.
>
> [Footnotes omitted.]

This is a case in which the Applicants accentuate the negatives and ignore the positives.

[325] It is telling, for instance, that as of the date of the judicial review application before me, information provided by Respondent's counsel (with no disagreement from Applicants' counsel) was that four of the Applicants now have permanent resident status in Canada and a further eight have achieved first-stage approval. There is no indication from the other Applicants about their present status or future plans. This would tend to negate to some extent the assertion that "[a]fter the hearings concluded in December 2011, the claimants were in status limbo for four years, and have been unable to properly establish themselves in Canada." I don't know how some Applicants have achieved establishment sufficient to attain permanent resident status if this is the

case, and no explanation is offered. And those Applicants who have not achieved permanent resident status, or are not well on with their applications, have not explained whether they have even considered seeking this status, and, if not, why not? This is important because, for those Applicants who have achieved permanent resident status, this application is effectively moot. See *Velasquez Guzman v Canada (Citizenship and Immigration)*, 2007 FCA 358 at para 4. C.A.A.P. initially tried spousal sponsorship but his relationship with his ex-husband ended before the sponsorship process was completed and he blames his marital breakdown on the "stress of the hearings, combined with the delay and being without status for so long." His first stage application on humanitarian and compassionate grounds was approved in March 2017. There was some reference to his reasons for not applying with his family in A.D.P.A.'s affidavit, but there is a letter from the Applicants saying that they are no longer relying on that affidavit.

[326] It has to be borne in mind that, with regard to personal impacts, I am only concerned with impacts that the Applicants have established were caused by the delay between the conclusion of hearings and the rendering of the Decision. It also has to be borne in mind that, in considering personal impacts, the Court cannot assume that all of the Applicants have suffered serious adverse impacts or have suffered them to the same degree. Conceptually, at least, there may be cases where the delay: (a) had an impact sufficient to warrant relief; (b) had some impact but not sufficient to warrant relief; (c) had no impact at all; or, (d) resulted in a positive benefit. In all cases, any negative impact will have to be balanced against positive impacts in order to arrive at some overall conclusion for each individual Applicant.

[327] Those impacts which the Applicants appear to think were severe enough to breach their s 7 *Charter* rights are set out in their written submissions as follows:

> **a) Health Impacts**
>
> i. L.M.P.A. suffers from Acute Stress Disorder and the delay has exacerbated this condition as well [as] her ability to optimally treat her diabetes. In 2015, L.M.P.A. was hospitalized for chest pains, made more likely by the high stress levels resulting from her family's position. L.M.P.A.'s anxiety, depression, and PTSD have been exacerbated directly by the delay.
>
> ii. In March 2015, M.T.M. went to the hospital with pain on the left side of her body. This pain was due to extreme anxiety and resulted in an abnormal pupil dilation she still lives with.
>
> iii. I.P.P. suffers from Chronic Stress Disorder and PTSD related to his experience in Mexico. His feelings of anxiety and helplessness were exacerbated by the extended delay and by watching its effects on the family.
>
> iv. F.P.R. lives with pre-diabetes, hypertension, and dyslipidemia. These conditions have arisen in the last few years and have been exacerbated by the lengthy refugee claim process. He also suffers from PTSD, anxiety, and depression, each of which has been exacerbated by the delay.
>
> v. C.A.A.P. suffered from at least three stress-related panic attacks in 2011, 2015, and 2016, including instances of lost consciousness and hospitalization. For him, these attacks are a direct result of enduring this refugee process and delay.
>
> **b) Financial Impacts**
>
> i. Unable to renew Interim Federal Health Plan (IFHP) coverage, Y.T.M. was charged around $5000 out of pocket for her son's hospital treatments in 2014.
>
> ii. M.T.M. and her husband were charged $6000 out of pocket for expenses related to her 2015 anxiety episode and the birth of their daughter. She was unsuccessful in renewing her IFHP coverage in 2013.
>
> iii. C.A.A.P. visited the hospital in 2015 for a stress-related panic attack. His new health card was delayed despite a timely renewal, and his IFHP coverage was invalid at that time. He was required to pay $450 out of pocket.

iv. After her refugee claimant identification document expired in late 2013 or early 2014, R.P.P. began to pay $250 every six months to renew her work permit. She paid this repeating fee at least until February 2017.

v. Due to gaps in IFHP coverage, L.A.A.H. and A.P.P. accrued debt to hospitals between 2010 and 2015, including for L.A.P.A.'s broken wrist in 2010. IFHP has not retroactively covered their expenses and they have paid at least $2,061 out of pocket.

c) Strain on Family Relationships

i. Y.T.M. and I.P.P. separated in 2013. They attribute the dissolution of their marriage at least in part to the stress caused by the proceedings and delay in obtaining a decision. This separation has affected their children and the rest of the family.

ii. M.T.M.'s relationship with her husband has suffered, and to avoid confrontation about their position they communicated less and less over the course of the delay.

iii. C.A.A.P. drifted away from his parents as the delay wore on to avoid the pain of considering their deportation, and to avoid continual discussion of their legal issue.

iv. For L.A.A.H. and her husband, A.P.P., the delay and uncertainty put significant strain on their relationships and directly contributed to conflict and isolation within the family.

v. The extended delay has directly reduced the amount of time L.A.A.H.'s Mexican parents have seen their grandchildren.

d) Strain on New Relationships

i. C.A.A.P. got married in September 2011, but this partnership slowly fell apart and then ended in 2013, primarily due to the stress and uncertainty caused by the delay.

ii. For M.I.P.T. and C.A.A.P., the prolonged uncertainty of their status in Canada acted as a barrier to developing new romantic relationships.

e) Loss of Opportunities to Receive Education

i. L.M.P.A., C.A.A.P, and D.N.A.P each completed their high school education while in Canada, but were unable to pursue post-secondary education while subject to international fees.

ii. The delay began just as F.P.P. started high school in Canada. Upon graduation, just after the negative decision, F.P.P. could not pursue higher education due to international fees.

iii. M.I.P.T. has had difficulty engaging in school after seeing his relatives unable to move past high schoo1.

iv. Y.T.M. and M.T.M each sought to take ESL classes with the YMCA, but did not have the appropriate identification as their refugee claimant ID documents had expired.

v. Prior to first-stage approval on her H&C application, international fees made university impossible for R.A.O.P., even after being out of high school for over a year.

f) Loss of Opportunities to Work

i. L.M.P.A. was unable to work at Sunlife Financial in 2015 due to her unstable immigration position. She also had an offer to work with a talent agency company revoked once the employer learned about her lack of status.

ii. Y.T.M. had a good job opportunity with a realty company in 2015. After learning of her insecure status, the manager would not hire her.

iii. I.P.P. experienced gaps in valid work permits, despite timely renewals. This caused short periods where he was unable to work.

iv. A.D.P.A. worked with a hearing aid company in 2014 and 2015. People with less experience were promoted past her while she remained part-time for over a year. She left this position in frustration.

v. Despite his family's early renewals, C.A.A.P. has had his work disrupted significantly by gaps in valid work permits. In one instance the delay was so severe that the employer (Apple) would not recognize implied status and C.A.A.P. was forced to leave work for two months. His opportunities to advance in his position at Apple from 2014-2017 have been limited, because essential training takes place in the U.S. and he was unable to travel.

vi. In 2010 or 2011, R.P.P. was on track to work with Wheel Trans, but then they did not offer her a position, due to her uncertain status. In 2012, R.P.P. was unable to act on a lead through her daughter's work: applying with the Toronto

District School Board. Their application required documents she could not provide without status.

vii. In late 2015, L.A.A.H. was offered a new job, but then, after leaving her previous work, had the offer revoked because she was unable to provide adequate ID after her refugee claimant form had expired.

viii. A.P.P. worked with State Farm Insurance starting in 2010, but was limited to being a sub-contractor, unable to obtain the necessary college certificate due to international fees.

g) Loss of Other Opportunities

i. M.I.P.T., a talented soccer player, has been unable to travel with his team and to be scouted internationally during a critical period for an aspiring professional player. M.I.P.T. was also forced to withdraw from air cadets once his refugee claimant ID documents expired in 2012.

ii. F.P.P. and L.M.P.A. each feel that L.M.P.A.'s non-profit organization "Light Your Life" has been hamstrung by the family's extended lack of status, either through hesitant donors or administrative barriers to increasing the organizations [*sic*] reach.

iii. F.P.P. was unable to take advantage of an international leadership opportunity arranged for him by a teacher during the 10th Grade.

iv. As an Air Cadet, D.N.A.P. was unable to travel with the group to events outside the country.

v. A.S.O.P. was unable to participate in an early high school program offering international experience.

vi. R.A.O.P. was unable to travel outside of the country with her air cadet group on two occasions. In the 12th Grade, R.A.O.P. planned a foreign trip as part of a leadership class, but was then unable to leave the country with her group.

vii. L.A.P.A. was a star cheerleader on competitive team, but was demoted in 2016 after being unable to travel. She then left a second team in 2017 for the same reason, and has since quit the sport in frustration. I.H.P.A. was unable to travel to the U.S. with his soccer team.

viii. A.P.P. dreams of buying a home for his family, but during the delay has been subject to high down payments for non-citizens.

[Footnotes omitted.]

[328] Nowhere do the Applicants provide the Court with a list of corresponding benefits, or explain how benefits can be left out of account when deciding whether their s 7 *Charter* rights have been sufficiently breached in each case.

[329] Further problems arise from the challenges that have been made to the Applicants' evidence and assertions. In addressing this issue, the Respondent has asked the Court to note the following in the evidence:

(a) There is no evidence to corroborate [that] any of the Applicants have been denied health care in Canada;

(b) LMPA had diabetes when she arrived in Canada. She has been able to manage her diabetes because it has become a habit;

(c) There is no evidence to corroborate delay "directly" exacerbated the health of LMPA or FPR or of IPP's pre-existing conditions;

(d) FPR does not know what dyslipidemia is despite his alleged diagnosis;

(e) There is no evidence to corroborate MTM went to the hospital in March 2015 or that she has abnormal pupil dilation;

(f) CAAP did not receive a diagnosis for his alleged panic attacks and could not provide proof of payment for any hospitalization;

(g) Health insurance coverage was available through work insurance plans, Community Health Centres or the Ontario Health Insurance Plan;

(h) There is no evidence to corroborate YTM paid $5000 out of pocket for hospital expenses or that MTM was charged $6000 in 2015;

(i) RPP only began paying to renew her work permit after her refugee claim was refused;

(j) There is no evidence to corroborate there was a hospital charge for LAPA's broken wrist in 2010 or that they sought reimbursement for any payments made while covered under the Interim Federal Health Plan;

(k) There were other factors related to the separation of YTM and IPP;

(1) MTM did not receive a diagnosis for any intimacy problems with her husband. They have since had one child in Canada;

(m) CAAP's application for permanent residence includes photographs of time spent with his parents and shows he continued to live with them;

(n) LAAH and APP separated before the RPD hearings started;

(o) LAAH and APP spend time with their family in Canada;

(p) LAAH's parents and sister have visited Canada on multiple occasions and her brother presently resides in Canada;

(q) CAAP married in Canada and is currently in a long-term relationship;

(r) None of the Applicants inquired about exemptions, or in some cases even the fee, for international students to attend university;

(s) English as a second language programs were available;

(t) There is no evidence to corroborate MIPT's alleged "difficulty engaging in school" is based on "seeing his relatives unable to move past high school";

(u) There is no evidence to corroborate job opportunities lost for LMPA, YTM, ADPA, RPP or LAAH;

(v) CAAP's work disruption with Apple occurred after his refugee claim was refused and there is no evidence to corroborate he

was limited in his opportunities to advance based on his status as a claimant;

(w) The Applicants would have been able to work during periods of implied status and there is no evidence to corroborate IPP was unable to work at times [while] he was waiting for his work permit to be renewed;

(x) LMPA and APP have both started successful organizations, with APP's business income at $100,000 in its first year;

(y) There is no evidence to corroborate MIPT, FPP, DNAP, ASOP, RAOP or IHPA were offered opportunities that required their travel out of the country;

(z) There is no evidence to corroborate FPP and LMPA were refused sponsorships for Light Your Life because they were refugee claimants;

(aa) LAPA was demoted from the cheerleading team after the refugee claim was decided and there is no evidence to corroborate [that] she was asked to travel abroad prior to that time;

(bb) APP is currently able to rent a home with his wife and four children and is able to accommodate his wife's family when they visit;

(cc) Many of the Applicants have filed or intend to file applications for permanent residence on humanitarian and compassionate ("H&C") grounds; CAAP has received permanent residence status.

[Footnotes omitted.]

[330] When I review the evidence cited on both sides, I am not convinced that a breach of the Applicants' s 7 *Charter* rights resulted from the Member's delay in rendering a Decision in this case. I have reached this conclusion for several reasons:

(a) The Federal Court of Appeal has made it clear in *Hernandez*, above, at paras 3-5, that the "unreasonable delay" argument, in the context of an RPD decision will rarely, if ever, be successful:

> The second ground is rooted in the *Canadian Charter of Rights and Freedoms*. The applicant submits that the tribunal erred in concluding that the delay in processing the applicant's claim did not constitute an unreasonable delay which violated the applicant's right to "life, liberty and security of the person" under section 7 of the *Charter*. Though this ground was dismissed without hearing from the respondent, a few remarks are warranted. It is apparent that the argument is gaining in popularity despite the decision of this Court in *Akthar v. Canada (Minister of Employment & Immigration)* (1991), 14 Imm. L.R. (2d) 39 (F.C.A.). Admittedly, as counsel for the applicant was so quick to point out, Mr. Justice Hugessen did state:
>
> > In these circumstances, and while, as indicated, I do not exclude the possibility of delay in the conduct of a refugee hearing giving rise to a *Charter* remedy, this is not such a case.
>
> It is understandable that an appellate court would not wish to foreclose absolutely on a *Charter* argument. A rule without exceptions has more often than not proven to be a source of controversy rather than consensus. At the same time, I am of the view that the above statement must be placed in the context of the incisive analysis which preceded it. Within that framework, <u>it is abundantly clear that the "unreasonable delay" argument cannot be perceived as a fertile basis for setting aside decisions of tribunals. It is probably closer to legal reality for one to presuppose that rarely, if ever, will the argument be successfully invoked. Counsel should be guided accordingly.</u>
>
> This application should be dismissed.
>
> [Emphasis added.]

(b) As regards psychological integrity, the Supreme Court of Canada had the following to say in *Blencoe*, above:

> 81 In order for security of the person to be triggered in this case, the impugned state action must have had a serious and

profound effect on the respondent's psychological integrity (*G. (J.), supra*, at para. 60). There must be state interference with an individual interest of fundamental importance (at para. 61). Lamer C.J. stated in *G. (J.)*, at para. 59:

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.

…

83 It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.

…

86 Few interests are as compelling as, and basic to individual autonomy than, a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed. Such interests are indeed basic to individual dignity. But the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being. The prejudice to the respondent in this case, as recognized by Lowry J., at para. 10, is essentially confined to his personal hardship. He is not "employable" as a politician, he and his family have moved residences twice, his financial resources are depleted, and he has suffered physically and psychologically. However, the state has not interfered with the respondent and his family's ability to make essential life choices.

> To accept that the prejudice suffered by the respondent in this case amounts to state interference with his security of the person would be to stretch the meaning of this right.
>
> [Emphasis added.]

(c) Some of the Applicants have offered no evidence of a breach of their s 7 *Charter* rights;

(d) For those Applicants who have offered evidence, there is not a sufficiently clear causal connection between the delay in rendering the Decision and any harm that would meet the *Blencoe* test;

(e) Causation is not sufficiently attributable to the delay because there are numerous contributing factors at play in each case;

(f) The Applicants' assertions are often not supported by sufficient objective evidence and they often cite causes that are not connected to the delay or that came from third parties. Many of their assertions are simply bald and speculative;

(g) The Applicants simply ignore the many substantial benefits they have enjoyed during the period of the delay; and

(h) There is insufficient basis for their claim that the delay, or even the claims process in general, breached their s 7 *Charter* rights in accordance with the requirements set out in *Blencoe*, above.

[331] The complexities of the evidence in this case do not allow me to find that the Applicants have established a sufficient causal connection between the various impacts they claim and the

Member's delay in producing the Decision that would render the state responsible for the degree and type of harm required by *Blencoe*.

(5) Fairness

[332] The Applicants also say that the delay between the last hearing date and the Decision casts doubt on the Member's ability to properly assess their evidence and to make credibility findings, and also violates the Applicants' right to an oral hearing:

> 17. This delay calls into question the Member's ability to recall the details of the Applicants' testimonies and the subjective elements of their testimonies, such as their spontaneity, hesitation or reticence, and their general attitude and behaviour. Professor Audrey Macklin explains in her affidavit that UNHCR cautions against lengthy delays and has established strict timelines for the issuance of a decision. This is of particular concern because the decision relied so heavily on their credibility, and the Applicants gave lengthy and detailed testimony of events occurring over many years. In his decision, the Member responded to this concern by highlighting that "most importantly... there is a digital recording of the entire proceeding, so if there is something in doubt, the recording can be examined." While rendering his decision, the Member does not state whether he in fact listened to the recording. Further, the gaps in the record would preclude engaging in a comprehensive analysis of the whole case. Accordingly, [the Member] either relied on an incomplete CTR or relied on his recollection of the 16 hearings that took place over four years earlier to make his final determination.
>
> 18. The Court has held that "where a serious issue of credibility is involved fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate Courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake". In her affidavit, Audrey Macklin similarly notes that "while transcripts for the oral evidence are available, they are a poor substitute for the wealth of non-verbal information present before a Member during hearings. The ways in which an applicant's emotional state and manner of testifying coincide with the available written submissions are of critical importance...especially so in determining the credibility of an applicant."

> 19. The extremely long delay between the hearing and the Member's actual decision detracts from many of the benefits of the hearing and frustrates its purpose. As Peter Showler notes in his affidavit, its advantages diminish with time as the Member's memory of the oral proceedings fades. The Applicants respectfully submit that, years after hearing the testimony in person, the Member's ability to make credibility assessments would differ little, if at all, from an adjudicator relying only on transcripts and recordings. The effect of this is that the Applicants lose the benefits that the right to an oral hearing is designed to protect.
>
> 20. Fairness in the determination was also compromised due to a translation error in an important corroborating document, which [the Member] relied on in his decision. Furthermore, the Applicants' ability to participate in the hearing process was compromised because of the delay.
>
> [Footnotes omitted.]

[333] In my view, there is no convincing evidence to support the assertion that the gap between the close of the hearings and the rendering of the Decision prevented the Member from making the assessments he relied upon for his credibility findings.

[334] To begin with, those findings were based upon discrepancies between POE notes and various PIF narratives and amendments that were tested at the hearings. A full written record is available that covered all of this evidence and the delay could certainly not impact the POE notes or the PIFs in the way suggested by the Applicants. So the only concern here would be the hearing testimony for which there was a digital recording.

[335] The fallacy in the Applicants' arguments is that decisions on credibility are not made on the day that a decision is issued. A decision is simply the conclusion and reasons for a deliberative process that begins as soon as the hearings ended. And, given this Member's

methodologies, as outlined by Professor Rehaag, and the questions he asked during the hearings, I think we can be confident that credibility would be foremost in his mind as soon as the hearings ended. The Member would obviously not wait until October 2015 to make his assessments of the evidence he had heard. And the Applicants have not shown where, in their testimony, such factors as opportunity, hesitation or reticence, and their general attitude and behavior could have had an impact on the Member's findings, especially given the fact that they gave evidence through a translator.

[336] The Applicants ask the Court to draw a negative inference from the Member's words in the Decision where he says: "Most importantly, apart from the physical file, there is a digital recording of the entire proceeding, so if there is something in doubt, the recording can be examined." No negative inference is possible here. The Member is not saying that he needed to consult the recording. The impact of his words is that he was fully aware that it might be necessary to listen to a recording if the factors raised by the Applicants such as spontaneity and hesitation are an issue or need to be reviewed. He doesn't say that this was problematic or necessary in the present case. But most importantly, I don't perceive anything in the Decision that indicates the Member relied on factors that are not present in the written record.

[337] The Applicants have also not demonstrated how fairness in the credibility findings was compromised by a translation error in any material way.

(6) Conclusions on Delay

[338] I agree with the Applicants that the delay between the closing of the hearings and the issuance of the Decision was longer than the inherent time requirement, but the Applicants have not demonstrated that this delay caused serious and profound impacts in a way that breached their s 7 *Charter* rights. Nor have the Applicants demonstrated that the delay prevented the Member from properly assessing the Applicants' evidence and making reasonable credibility findings, or that it violated the Applicants' rights to an oral hearing.

E. *Evidentiary Issues*

(1) Affidavits of Caroline Khoushabeh, Baljinder Rehal and Rocchina Cretto

[339] The Applicants take objection to these three affidavits filed by the Respondent and have asked the Court to strike and disregard them on the following grounds:

(a) The affidavit of Caroline Khoushabeh improperly provides gloss to the CTR, attempts to buttress the reasons for the decision under review, and has a significant prejudicial effect;

(b) The affidavit of Baljinder Rehal constitutes a breach of the *Privacy Act*, RSC 1985, c P-21, the *Personal Information Protection and Electronic Documents Ac*t, SC 2000, c 5, and the Applicants' ss 7 and 8 *Charter* rights; and

(c) The affidavit of Rocchina Cretto is not relevant, and has a prejudicial effect which outweighs any probative value.

[340] The purpose of the Khoushabeh affidavit is to assist the Court in identifying the chronology of events leading up to the Decision. She sets out her purposes as follows:

> 2. I have reviewed the Certified Tribunal Record ("CTR") provided by the Refugee Protection Division ("RPD") in June 2016 prior to leave being granted by the Federal Court. The

> purpose of my Affidavit is to provide a summary of the evidence contained in the CTR, including the refugee claim process timelines for the Applicants, and to identify inconsistencies in the evidentiary record. The facts contained in my Affidavit are entirely based on the evidence contained in the CTR, unless otherwise stated.

[341] In so far as this affidavit merely identifies a chronology of events, it is useful to the Court and non-prejudicial to the Applicants. Simply identifying events in the record saves time at the hearing; without it, counsel would have to lead the Court step-by-step through the record. It is not prejudicial to the Applicants because they can correct any inadequacies or inaccuracies.

[342] In so far as the affidavit offers gloss, argument or an interpretation of the chronology, such is unacceptable. But I see very little that could be characterized this way. I have used this affidavit merely as one of several guides to the facts, but only after checking against the record.

[343] In so far as the affidavit draws the Court's attention to inconsistencies in the evidentiary record that are intended to bolster the basis for the Member's credibility findings, I have disregarded these inconsistencies because the inconsistencies upon which the Member relies for his findings are found in the Decision itself, and it is those inconsistencies alone against which the reasonableness of the Decision must be determined.

[344] The purpose of the Baljinder Rehal affidavit is to provide the Court with Interim Federal Health Plan [IFHP] usage summaries for each of the Applicants. This evidence is highly relevant because the Applicants have put in issue in this application their insurance coverage and access

to services under the IFHP and the Court needs these summaries in order to determine the accuracies of the Applicants' evidence on this point.

[345] The Applicants do not dispute the accuracy of any of these summaries. They simply object that this is private information that should not have been disclosed to the Court. Obviously, if the Court cannot review this information, then it cannot check the Applicants' assertions regarding the coverage and services they have accessed, or have not been able to access, under IFHP. I don't think the Applicants can have it both ways. To exclude this evidence would result in serious prejudice to the Respondent.

[346] If the Applicants do not provide their consent to the disclosure of this information for the purpose of checking the accuracy of their own evidence on IFHP usage, then I would draw a negative inference because the Applicants are attempting to hinder the Court from getting at the truth of their assertions. However, it is my view that by putting their IFHP coverage at issue in this application, the Applicants have waived any confidentiality attached to this information in so far as its disclosure to the Court is necessary to make the necessary checks. The Court record is sealed and this information will remain sealed. The order of Prothonotary Aalto of December 31, 2015, sealed the Court File and ordered that access is prohibited.

[347] The Applicants say that the affidavit of Rocchina Cretto should be struck for irrelevance and because its prejudicial effect outweighs its probative value.

[348] The purpose of this affidavit is to provide the Court with information and documentation that goes to assertions the Applicants have made in their affidavits and/or pleadings with regard to difficulties they have experienced as a result of their refugee claims and the process they have been through at the RPD. In so far as this material can be linked to the actual Applicants, then it is relevant and I have admitted it. In so far as it cannot be linked to the Applicants, then I have excluded it.

[349] Generally speaking, the exhibits are intended to provide facts that are relevant to specific assertions made by the Applicants. For this reason, they cannot be excluded as irrelevant or as prejudicial. In submissions, the Respondent has disputed specific assertions made by the Applicants. If any of these documents cannot be linked to those assertions, then the Applicants had every opportunity to point this out at the oral hearing. Once again, the Court needs any relevant document that will enable it to get at the truth of this matter.

(2) Affidavit of M.I.P.T.

[350] The Respondent has taken objection to the affidavit of M.I.P.T. and has asked the Court to strike it.

[351] For medical reasons, M.I.P.T. failed to attend a scheduled cross-examination on his affidavit and the Respondent agreed to request undertakings for production of documents referred to in M.I.P.T.'s affidavit as an alternative to conducting an oral cross-examination.

[352] By the time of the hearing of this application, the Applicants had not been able to provide all of the requested undertakings. However, the missing documentation was provided post-hearing and was dealt with by the parties in post-hearing written submissions.

[353] It seems clear from the record that the Applicants had been making reasonable efforts to obtain and provide the requested documentation and were finally able to do so. The late delivery has not prejudiced the Respondent who was able to make full oral and/or written submissions on M.I.P.T.'s evidence.

[354] Consequently, I have admitted M.I.P.T.'s evidence in full and have considered it in reaching my conclusions.

IX. Certification

[355] The Applicants have not raised any question for certification and the Court sees no question that needs to be raised given the basis for this judgment.

JUDGMENT IN IMM-5135-15

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. No question is certified.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5135-15
STYLE OF CAUSE:	I.P.P. AND OTHERS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 4 AND 5, 2017
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