

Federal Court



Cour fédérale

Date: 20190122

Docket: IMM-2217-18

Citation: 2019 FC 88

Ottawa, Ontario, January 22, 2019

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ALVINA ANDRINA FEDEE

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD or the Board], dated March 1, 2018 [Decision], which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under ss 96 and 97 of the Act.

II. BACKGROUND

[2] The Applicant, Alvina Andrina Fedee, is a citizen of Saint Lucia.

[3] The Applicant's family moved into her aunt and uncle's house when she was a child. The Applicant claims that her uncle was physically abusive towards her. She says she went to the hospital and to the police after her uncle broke a bottle over her head. The police took the complaint, but did not come to the house or arrest her uncle. Subsequent acts of violence against the Applicant were met with similar police inaction.

[4] The Applicant alleges that her uncle has engaged in repeated harassment of her mother and sister in order to find out her whereabouts.

[5] The Applicant fled to Canada in 2003, but did not make a refugee claim until 2012. The Applicant asserts that the officers at the Kipling immigration office would not provide her with the forms to submit her application. Instead, they asked her to fill the forms out in the office. She did not do so because she had been told by an immigration consultant to avoid speaking with immigration officers. The Applicant says she avoided submitting a claim for refugee protection until 2012 due to her fear of being deported.

[6] The Applicant has a number of medical conditions which include iron deficiency and swollen kidneys. The Applicant has also been diagnosed with psychological issues, including severe post-traumatic stress disorder and major depressive disorder.

III. DECISION UNDER REVIEW

[7] The RPD hearing took place over three sittings. The Applicant fell ill during the first sitting and the hearing was adjourned. At the second sitting, the RPD denied the Applicant's request to be deemed a vulnerable person due to health problems. The RPD provided reasons orally for this rejection. Following the rejection, the Applicant requested that the RPD member recuse himself on the basis of reasonable apprehension of bias. This request was refused and reasons were provided orally. Despite its rejection of the vulnerable person designation, the RPD made a number of accommodations during the second sitting.

[8] The RPD reversed its decision on the requested vulnerable person designation before the third hearing. The RPD considered the Applicant's health difficulties which she experienced during the proceedings as well as the medical documentation submitted. Based on this information, the RPD designated the Applicant as a vulnerable person. The RPD accepted the requested accommodations except the request for an in-person hearing. The RPD held that the Applicant had failed to demonstrate that a videoconference would cause unfair prejudice.

[9] The RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection. The RPD identified three determinative issues. Firstly, parts of the Applicant's testimony were found not to be credible. Secondly, the RPD found that the Applicant does not face a forward-looking fear of persecution. Finally, the RPD determined that there are not sufficient compelling reasons arising out of past persecution.

[10] The RPD found the Applicant's testimony about the abuse at the hands of her uncle to be credible. Additionally, this testimony was found to be supported by the objective evidence about domestic abuse in Saint Lucia. As a result, the RPD determined, on a balance of probabilities, that the Applicant had been physically abused by her uncle in the past. The RPD held that this mistreatment constitutes persecution by reason of the Applicant's membership in a particular gender-based social group.

[11] The RPD noted that past persecution is relevant, but emphasized that the assessment of a Convention refugee claim is forward-looking. The RPD went on to conclude that the Applicant's testimony that she would face a serious possibility of persecution or risk of harm in the future was not credible.

[12] The RPD considered the Applicant's claim that her uncle continues to ask her mother and sister about when she will return to Saint Lucia. Additionally, the RPD considered the Applicant's testimony that her uncle visited her mother's house to ask about her whereabouts, at which point her mother called the police. The RPD found that this testimony lacked sufficient detail to be convincing. Specifically, the RPD found that the Applicant could not explain whether her uncle had harassed her family members from 2003 until 2017. The Applicant also could not explain in detail the harassment which is said to have taken place in 2017.

[13] The RPD noted the contradiction between the Applicant's testimony that the police did not come when called in relation to the uncle's harassment of the mother and sister, and the

mother's letter which states that the police were called several times and arrived on two occasions. The RPD also noted that no explanation was provided for this discrepancy.

[14] The RPD questioned the Applicant in order to ascertain further details about the uncle's harassment of her mother and sister. The Applicant stated that her mother did not give her all the information in order to protect her. The RPD did not accept this explanation. Firstly, the RPD noted that the Applicant is close with her mother and sister and remains in contact with them. Moreover, the RPD found it reasonable to expect that the Applicant would want to know the details about the threats facing her in Saint Lucia. The RPD found that the Applicant had not provided an adequate explanation for why her mother refrained from telling her about the harassment from the uncle until May 2017. The RPD concluded that the Applicant had not substantiated her claim that her uncle has engaged in ongoing threats. As a result, the RPD held that it did not believe the allegation that the uncle is continuing to engage in ongoing threatening behaviour.

[15] The RPD considered the affidavits submitted by the Applicant's mother, sister, and aunt. The RPD found that these affidavits lacked relevant details and dates. The RPD reasoned that the Applicant's family members would have been interested in providing as much detail as possible in their affidavits.

[16] The RPD considered the Applicant's testimony that she has two living paternal aunts in Saint Lucia named Pamela and Mary. The RPD held that the Applicant had failed to explain why she refers to her aunt Pamela by the name "Mary." Additionally, the RPD noted that the

Applicant claims to have lived with her aunt Mary, but provided an affidavit from an individual named Pamela Seraphin. The RPD stated that this was not implausible but went on to note that the Applicant had undermined her credibility by providing inconsistent details about her aunt's family and the time that she lived with them. Particularly, the Applicant provided inconsistent testimony about the number of children in her aunt's family, the date that she moved into her aunt's house, and the duration of her residence with her aunt's family.

[17] The RPD considered the Applicant's explanation for her inconsistent testimony that, at the hearing, she felt ill and could not concentrate, that the video feed was poor, and that the panel member spoke too fast and had a strong accent. The RPD accepted the explanation that the Applicant had difficulty concentrating due to her mental health. Additionally, the RPD recognized that the Applicant had become ill during the hearing. Finally, the RPD accepted that the quality of the video feed was deficient. The RPD noted, however, that it had adjusted the speed of the video feed and given clarifications when asked. Further, the RPD noted that steps were taken to improve the video feed.

[18] After considering the explanations, the RPD held that the discrepancies were not adequately explained by the Applicant. As a result, the RPD made a negative credibility inference in relation to the later allegations of abuse. The RPD accepted that the Applicant had been abused in the past, but held that its negative credibility finding is relevant to the assessment of forward-looking risk. Accordingly, the RPD drew a negative credibility inference in relation to the Applicant's testimony that her uncle poses an ongoing threat.

[19] The RPD determined that, on a balance of probabilities, the Applicant's uncle is not searching for her. Additionally, the RPD determined that there is no more than a remote possibility that the uncle would persecute her in the future. The RPD found the Applicant's medical conditions and physical ability to flee irrelevant to the analysis because she had not demonstrated that her uncle is searching for her with the intention of causing her harm.

[20] The RPD noted the Applicant's mental health issues as well as her unresolved problems with her kidneys and held that the Applicant had not demonstrated that she would be arbitrarily denied medical care in Saint Lucia. As a result, the RPD found that the Applicant did not face a well-founded fear of persecution or a risk of cruel and unusual treatment or punishment based on medical conditions.

[21] The RPD determined that the letter from the Applicant's psychiatrist had probative value with respect to the Applicant's medical conditions and mental health. The psychiatrist's findings of fact about the Applicant's claim as well as the impact of the video feed, however, were found to be matters within the RPD's jurisdiction.

[22] The RPD went on to consider whether there are any "compelling reasons" to accept the Applicant's claim based on her previous persecution. The RPD determined that the Applicant did not meet the high threshold required to establish compelling reasons. The RPD recognized that the Applicant had suffered repeated, gender-based violence at the hands of her uncle in the past. The RPD found, however, that these acts did not rise to the level of "atrocious" or "appalling" conduct but did not, in any event, hold her to this standard and went on to consider the full

context. In this regard, the RPD noted the Applicant's age, resourcefulness, and level of independence. Despite her mental and physical conditions, the Applicant has been able to support herself independently. The RPD noted that the Applicant's circumstances had changed significantly since she was young and dependent on her aunt and uncle.

[23] The RPD determined that the Applicant is neither a Convention refugee nor a person in need of protection. Additionally, the RPD held that there are not "compelling reasons" to allow the refugee claim.

IV. ISSUES

[24] The issues to be determined in the present matter are the following:

1. What is the standard of review?
2. Did the RPD breach the duty of procedural fairness?
3. Did the RPD show a reasonable apprehension of bias?
4. Was the RPD's Decision reasonable?

V. STANDARD OF REVIEW

[25] 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.

[26] A standard of reasonableness applies to the RPD's credibility findings as well as other determinations based on mixed fact and law (*Koffi v Canada (Citizenship and Immigration)*, 2016 FC 4 at para 27).

[27] 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 *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]. 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."

[28] Courts have recently held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa*, above, at paras 59 and 61).

[29] While an assessment of procedural fairness accords with recent jurisprudence, it is not a doctrinally sound approach. A better conclusion is that no standard of review at all is applicable

to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated (at para 74) that the issue of procedural fairness,

requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation.

[30] Whether a hearing was tainted by a reasonable apprehension of bias is a matter of procedural fairness. It is possible, therefore, to rely on recent jurisprudence from the Federal Court which posits that a standard of correctness applied to the question of reasonable apprehension of bias (*Zhu v Canada (Citizenship and Immigration)*, 2013 FC 1139 at para 38). As described above, this is not doctrinally sound. As stated by Justice Teitelbaum, “Procedural fairness requires that decisions be made free from a reasonable apprehension of bias by an impartial decision-maker” (*Gagliano v Canada (Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 981 at para 59). If a decision is found to have been affected by a reasonable apprehension of bias, the parties affected will have been denied procedural fairness. This will result in the decision being overturned.

VI. STATUTORY PROVISIONS

[31] The following statutory provisions of the Act are relevant to this application for judicial review:

Convention refugee

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 opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves 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.

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

Définition de réfugié

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 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.

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; or	torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires 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 elles,
(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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Rejection

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

(a) the person has voluntarily reavailed themselves of the protection of their country of nationality;

(b) the person has voluntarily reacquired their nationality;

(c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;

(d) the person has voluntarily become re-established in the country that the person left or remained outside

(e) the reasons for which the person sought refugee protection have ceased to exist.

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country

Rejet

108 (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

a) il se réclame de nouveau et volontairement de la protection du pays dont il a la nationalité;

b) il recouvre volontairement sa nationalité;

c) il acquiert une nouvelle nationalité et jouit de la protection du pays de sa nouvelle nationalité;

d) il retourne volontairement s'établir dans le pays qu'il a quitté ou hors duquel il est demeuré et en raison duquel il a demandé l'asile au Canada;

e) les raisons qui lui ont fait demander l'asile n'existent plus.

Exception

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du

which they left, or outside of pays qu'il a quitté ou hors
 which they remained, due to duquel il est demeuré.
 such previous persecution,
 torture, treatment or
 punishment.

VII. ARGUMENT

A. *Applicant*

[32] The Applicant says that the RPD erred by failing to accommodate her as a vulnerable person. The Applicant suffers from medical issues which include swollen kidneys which results in swollen feet as well as back and abdomen pain. Additionally, the Applicant experiences migraines. She also has psychological issues including severe post-traumatic stress disorder and major depressive disorder.

[33] The video screen used during the first sitting was affected by technical difficulties. According to the Applicant, “the view was of the entire room in Vancouver rather than a closer shot of the panel. In addition, the screen was dim and whenever the Member would move, his image would transform into pixels of black and grey so that it looked like there was a dark blob at the end of the room. Overall the technical difficulties resulted in a sinister appearance” (Applicant’s Record at 62). The Applicant says these issues made her nervous and uncomfortable.

[34] The Applicant’s psychiatrist recommended that the hearings take place in person due to the Applicant’s psychological issues. The RPD, however, assigned little weight to the psychiatrist’s recommendation and denied the Applicant’s request for accommodation. The

technical issues persisted throughout the remainder of the hearings. The Applicant says that the RPD erred by giving little weight to the psychiatrist's letter. Moreover, the RPD erred by failing to accommodate the Applicant.

[35] The Applicant says that the RPD also failed to apply the Gender Guidelines. The RPD should have considered the repetitive nature of domestic abuse. Further, the RPD should have considered the Applicant's testimony within the context of her medical and psychological issues. Instead, the RPD expected her to recite specific incidents of abuse. The RPD displayed a lack of sensitivity when assessing the Applicant's testimony. This led the RPD to make erroneous negative credibility findings in relation to minor inconsistencies.

[36] The Applicant says that the RPD erred in its credibility assessment. It was an unreasonable and contradictory finding for the RPD to believe that the Applicant suffered abuse in the past, but that she did not face a risk in the future. Minor inconsistencies led the RPD to make a negative credibility inference. Furthermore, the RPD made these inferences based on the hearing in which the video quality was poor and the Applicant was sick.

[37] The Applicant also says that it was unreasonable for the RPD to assign little probative value to the affidavits written by her mother and sister because they did not include enough detail about the uncle's inquiries about her whereabouts.

[38] The Applicant says that the RPD erred further in its "compelling reasons" analysis. This analysis is contextual and does not require that the acts be "atrocious" or "appalling." The

psychological effects of past abuse are relevant. The RPD erred by failing to consider the physical and psychological conditions of the Applicant. Further, the RPD should have considered the Applicant's age and cultural background.

[39] The Applicant says that the RPD showed a reasonable apprehension of bias. Firstly, the RPD disbelieved her contention that the quality of the video feed was poor until the IT staff confirmed the quality. The RPD then requested a different room. The RPD disbelieved her that the video quality was poor in the second room as well until the IT staff gave their confirmation. Similarly, the RPD requested a medical note after she became ill during the hearing. This demonstrates that the RPD did not believe that the Applicant was sick.

[40] Finally, the Applicant says that the RPD was not competent. The failure to understand the cycle of abusive violence or the psychological impact of abuse demonstrates a lack of competence. There was a denial of procedural fairness because of this lack of competence.

B. *Respondent*

[41] The Respondent says that the RPD did not err by requiring the Applicant to be overly precise about the abuse that she suffered. Instead, the RPD noted inconsistencies about basic aspects of the refugee claim.

[42] The Respondent also says that the RPD did not violate the Gender Guidelines. The Applicant contends that the RPD ignored the cycle of violence she experienced, but she has not

demonstrated how this allegation is relevant to this case. The RPD made numerous findings which are consistent with the Gender Guidelines. For example, the RPD readily accepted: the claim that domestic abuse had occurred; the Applicant's desire to remain unaware of her uncle's recent activities; and the Applicant's nine-year delay in claiming refugee protection. The Applicant has not succeeded in demonstrating that any aspect of the Decision violates the Gender Guidelines.

[43] The Respondent also points out that the RPD acknowledged and took into account the Applicant's physical and psychological conditions. Accordingly, there is no weight to the argument that the RPD ignored medical and psychological evidence.

[44] The Respondent says that the RPD reasonably arrived at its negative inferences of credibility. The Applicant's contention that the RPD focused on minor inconsistencies is not accurate. Instead, the RPD identified an absence of basic information and discrepancies concerning central aspects of the claim.

[45] The Respondent also says that the Applicant has misconstrued the RPD's statement that the abuse never happened outside the aunt and uncle's home. The RPD mentioned this in order to address the Applicant's argument that she will be unable to flee from her uncle. There would be no need to flee if she lived apart from her uncle. Additionally, the Applicant misconstrues the RPD's remark that the abuse took place a long time ago. This was mentioned in order to demonstrate the lack of sufficient evidence that her uncle was still searching for her.

[46] It was not unintelligible or unreasonable for the RPD to find an absence of a forward-looking risk of persecution despite its finding that the Applicant had been abused in the past. Past mistreatment does not constitute future risk.

[47] Nor did the RPD rely upon minor inconsistencies. Instead, the RPD noted inconsistencies in relation to numerous details of the Applicant's testimony and considered the explanations offered for these inconsistencies. It was reasonable for the RPD to draw negative credibility inferences based on the inconsistencies. These inconsistencies were assessed sensitively in light of the acknowledged abuse suffered by the Applicant.

[48] The Respondent says that it was reasonable for the RPD to assign little probative value to the letters written by the Applicant's mother and sister. The letters were dismissed due to their vagueness rather than their failure to include very specific details.

[49] The Respondent says that the RPD also properly considered the Applicant's mental health conditions as part of the "compelling reasons" analysis. The RPD was not required to consider the Applicant's ability to flee her uncle, because she would no longer be required to live in his house. The RPD did not simply require the Applicant to show that the past persecution was "atrocious" or "appalling." Instead, the RPD considered the Applicant's personal characteristics and background.

[50] The Respondent emphasizes that the threshold for establishing a reasonable apprehension of bias is high. The Applicant has failed to establish any such bias. The RPD assisted the

Applicant to overcome several issues that arose during the hearings. The requirement that the Applicant obtain a medical note does not demonstrate bias.

[51] The Respondent says that the RPD granted sufficient accommodations to the Applicant and that it was not unfair to hold the hearings through videoconference. The RPD has broad discretion over the procedures chosen for hearings. Additionally, the RPD used the criteria for vulnerable people in order to accommodate the Applicant. A number of accommodations were made which included the termination of a hearing, adjustment of the video quality, slowing down speech, offering breaks, and encouraging the Applicant to seek clarifications.

VIII. ANALYSIS

[52] The Applicant alleges a broad range of misconduct and error on the part of the RPD. I have carefully reviewed each of her assertions against the Decision and the record and my conclusions are as follows.

A. *Failure to Apply the Gender Guidelines*

[53] The Applicant alleges that the RPD failed to apply the Gender Guidelines. First of all, she says that the RPD denied her request for accommodation despite the continued poor quality of the video feed and gave little weight to Dr. Kitamura's advice and request for an in-person hearing in his Psychological Follow-up:

10. In the previously disclosed psychiatric assessment, Dr. Kitamura diagnosed the Applicant with chronic post-traumatic stress disorder (PTSD), severe. He also diagnosed her with chronic major depressive disorder, severe. It is important to take into

consideration that the Applicant was already suffering from the affects [*sic*] of severe chronic PTSD and severe depression. Given her psychological state and her experience with the videoconference, Dr. Kitamura has recommended that the presiding member be in person. He stated:

Reviewing her reported experience at this hearing, and your observations, it is quite apparent that Ms. Fedee struggled to relate to the use of videoconference technology. The result was increased distress and likely greater mistrust during a hearing that is already highly emotionally laden. This caused further distress and impaired her performance. **I would ask that when re-scheduled, she please be granted a hearing that is in person with the presiding member,** in order to reduce undue hardships on Ms. Fedee and support her providing her evidence most effectively. As per my previous note, in future hearing, permitting her the breaks she feels necessary to compose herself in times of acute stress, and the option of having a support person present with her, would be most helpful.

[Emphasis in original.]

[54] In written submissions, the Applicant summarizes her complaint as follows:

12. In reaching its conclusion, the panel states that it gave little weight to the psychiatrist's follow-up letter regarding the impact on the Applicant of testifying by video. The panel stated that those matters are within the purview of the Board. It is submitted that the panel erred by doing so. The psychiatrist is a skilled and experienced professional and is an expert on assessing psychological impacts on his patients. He reported on the severe distress of the Applicant with the video equipment and recommended that she have an in-person member. This is certainly within his expertise and purview.

[55] The Decision itself reveals that the RPD was fully alive to the Applicant's medical and psychological problems and her concerns about the video feed:

[43] The claimant's explanation for these inconsistencies was that she was not feeling well and could not concentrate. In her submissions, Counsel also notes various issues during the first sitting of the hearing including the appearance of the video feed from Vancouver, the effects of the claimant's severe PTSD and depression and other health issues, as well as the panel's "accent issues and speaking too fast" and states that the panel should not draw any negative inferences from discrepancies in the claimant's answers on that date.

[44] The panel accepts the claimant's medical diagnoses, including that persons suffering from these psychological illnesses or conditions "often have difficulties with concentration and memory, especially under times of stress". It also notes that the hearing was stopped because the claimant became ill, and was unable to continue with the proceeding.

[45] With respect to the other issues, the panel accepts that the video feed was imperfect, and that on occasion the claimant asked the panel to slow down or to repeat or clarify a question. However, overall, the flow of questions and answers during the hearing was continuous, with no significant interruption or delay. The issues identified by Counsel were not raised until well into the first sitting, and when the claimant asked the panel to adjust its speed or clarify something, it responded without delay. As already indicated, the panel took other steps to improve the video feed during the proceedings. Counsel did not explain how the quality of the video feed at any point during the hearing is to blame for any of the material discrepancies noted here.

[46] Counsel gives the example in her submissions of how there was some confusion between the words "Mary" and "married". Specifically, the panel had asked if both of the claimant's paternal aunts were married, which the claimant understood to mean whether both aunts are named Mary. When asked further about this, the claimant explained that she had misunderstood the panel's question, an explanation that the panel accepted on the record. The panel considers this to be illustrative of how some of the issues raised by Counsel were in fact satisfactorily resolved during the hearing.

[47] Notwithstanding these issues, the panel finds that the claimant did not provide an adequate explanation for the discrepancies noted above. These are basic facts about the claimant's life which she should be able to consistently recount if what she alleges is true. The claimant alleged that she moved in with her aunt and uncle for a specific purpose, to attend secondary

school, a pivotal time that is usually associated with a specific age or year. Moreover, the panel asked numerous follow-up questions about her aunt's children and the years that the claimant lived with her aunt. She did not correct herself, despite these opportunities to do so. While Counsel submits that any inconsistencies during the first hearing should be disregarded, the panel notes that she provided further contradictory testimony during resumptions. The claimant later testified that she moved in with her aunt when she was 13 years old and attended school while living there for two years, which contradicts the revised testimony that she gave at the start of the second hearing date.

[56] The RPD also considered Dr. Kitamura's report and explains why it did not grant the request for an in-person hearing:

The various letters item the claimant's psychiatrist, nurse practitioner, and her social worker have probative value with respect to the claimant's psychological and medical problems, however I do not give any weight to the psychiatrist's several findings of fact about the claimant's narrative or his evaluation of the impact of the videoconference technology during the hearing on the evidence, matters that are within the purview of the Board. As already indicated, the panel found that the issues with the videoconference technology did not have a significant impact on the claimant's testimony, and that remedies were promptly put in place when the matter was raised by the claimant and her counsel.

[57] The RPD points out that "Counsel did not explain how the quality of the video feed at any point during the hearing is to blame for any of the material discrepancies noted here." This finding remains unchallenged before me. At the hearing before me in Toronto, the Applicant alleged generally that the failure to allow her an in-person hearing meant that there was no environment of trust in which she could speak and make her case. This is belied by the fact that the RPD accepted the Applicant's case for past persecution by her uncle, and there is no evidence that any continuing problems with the video feed or an improper or hostile environment

prevented her from speaking about future risk, the evidence for which mostly came from third-party family members in affidavit form.

[58] In other words, the Applicant is attempting to rely generally upon her various health problems and problems with the video feed to question the RPD's findings without providing the specifics for each of the material discrepancies relied upon by the RPD. In taking this approach, she has not demonstrated a reviewable error on this point.

[59] Also, under this heading, the Applicant says that the RPD failed to follow the Gender Guidelines in the following ways:

14. It is submitted that the Board did not consider the Gender Guidelines. The Board's approach failed to consider the repeated cycle of violence prevalent in domestic violence situations. The Board took a rigid approach in expecting the Applicant to regurgitate exact information from over 15 years ago. The Board did not approach the Applicant's testimony from the medical and psychological contexts, which would have informed the gender guidelines.

[60] It isn't entirely clear what the Applicant means by a "repeated cycle of violence" in the present context. The violence suffered by the Applicant at the hands of her uncle occurred before she came to Canada in 2003 and she has remained in Canada since that time without exposure to domestic violence.

[61] However, the RPD fully accepted that the Applicant had been abused by her uncle prior to her coming to Canada. The Applicant's problem before the RPD was that she was unable to establish that she would face violence from her uncle if she returned to Saint Lucia:

[27] I find on a balance of probabilities that the claimant was physically abused by her uncle prior to her departure from Saint Lucia in 2003, and that this mistreatment constitutes persecution by reason of her membership in a gender-defined particular social group. I note that according to her psychiatric report, she reported being slapped, punched and verbally abused, and that she recalled being severely anxious and fearful in Saint Lucia as a result. With a few exceptions, identified below, I find that her testimony and the other supporting evidence was consistent and adequately detailed on this point, and in line with the objective evidence about Saint Lucia, which suggests that domestic violence remains “very common”.

[28] However, I have found the claimant’s testimony that she would face a serious possibility of persecution or a personal risk of harm from her uncle in Saint Lucia in the future not to be credible for the following reasons.

[62] If the RPD “took a rigid approach in expecting the Applicant to regurgitate exact information from over 15 years ago,” this is not apparent in the RPD’s reasons and it obviously accepted, for the most part, the Applicant’s evidence on what happened to her over 15 years ago.

[63] The Applicant’s allegation that the RPD “did not approach the Applicant’s testimony from the medical and psychological contexts” is unconvincing given the RPD’s full acknowledgment of the medical and psychological evidence in the context of assessing the evidence on future risk:

[44] The panel accepts the claimant’s medical diagnoses, including that persons suffering from these psychological illnesses or conditions “often have difficulties with concentration and memory, especially under times of stress”. It also notes that the hearing was stopped because the claimant became ill, and was unable to continue with the proceeding.

[64] The Applicant's logic appears to be that the RPD's failure to render a decision in her favour means that the RPD did not examine the medical and psychological evidence. Given the Decision as a whole, and what the RPD says about her medical and psychological condition throughout, this assertion by the Applicant does not establish a reviewable error.

[65] Much the same can be said for the Applicant's bald assertion that the RPD "erred by making negative credibility findings because of minor inconsistencies."

[66] The RPD provides a lengthy and detailed explanation as to why the Applicant's evidence does not establish future risk, and the inconsistencies mentioned are not "minor." Part of the analysis reads as follows:

[35] The claimant has not explained why she is unable to provide specific and consistent details of her sister's encounters with her uncle during the past 15 or so years or about the most recent incident involving her mother, which her mother did divulge to her in May 2017. If what the claimant alleges is true, that her uncle is obsessed with her whereabouts: and has been harassing her mother and sister, including at their homes in order to determine her location, according to their affidavits she should be able to provide considerably more detail about this. The claimant has not alleged that her sister or aunt concealed any information from her about her uncle. I am mindful of the fact that sometimes victims of violence particularly domestic violence, wish to avoid learning about their persecutor and do not want to be reminded of their horrific experience. However, the claimant has not been avoiding it, especially since she made a refugee claim. Since then, she has actively tried to seek out the necessary information from her family. She has been talking about it regularly with her family, and has asked them to provide information in writing. Once she received the information, she had the opportunity to ask them about more details. The claimant was not knowledgeable about basic relevant details, including whether the threats have been going on in a continued fashion for the past 15 years or whether they restarted more seriously only about a year ago and shortly before the hearing. This lack of curiosity and her inability to

provide a reasonable explanation for it seriously bring into question the credibility of her evidence.

[36] Moreover, this explanation is undermined by the fact that the claimant was unable to reasonably account for why her mother suddenly told her about the harassment from her uncle in May 2017. She said that her mother finally told her because of the ongoing harassment and the inadequate police response. However, according to the claimant these were not new developments, and the claimant has not provided a reasonable explanation for why her mother would suddenly tell her about her uncle's threatening approaches in May 2017 despite allegedly concealing all of the other incidents in order to protect her mental health.

[37] Apart from the two incidents in May 2017, the affidavits from the claimant's mother, sister and aunt lack detail about their other alleged encounters with the claimant's uncle during which he asked about the claimant. No dates and few details about these incidents are provided. While the claimant's mother may at some point have been reluctant to tell her everything it is likely that the claimant's family members would be motivated to provide as much relevant information as possible in their letters to the Board.

[38] The claimant has alleged a pattern of harassment from her uncle towards her mother and sister because of her departure from Saint Lucia. She has also alleged that mere weeks before the first RPD hearing date in May 2017, she finally learned about the details of this harassment, and that there were two sudden and specific encounters with her uncle despite no specific evidence of any particular incident during the claimant's preceding 14 years in Canada. The claimant does not provide a reasonable explanation as to why it was only in 2017 that she learned about the harassment. For the reasons given above, I find that the claimant has not provided sufficient credible evidence to establish ongoing threats by the uncle, which I therefore do not believe.

[67] The Applicant has not established that the RPD failed to consider the Gender Guidelines in any material way. This is particularly the case because the RPD fully accepted the Applicant's evidence of past persecution by her uncle. The Applicant can hardly complain when the RPD accepted what she had experienced prior to 2003 when she came to Canada. And the RPD specifically says that "I am mindful of the fact that sometimes victims of violence, particularly

domestic violence, wish to avoid learning about their persecutor and do not want to be reminded of their horrific experience.” The problem for the Applicant was that she really had no personal experience to rely upon as regards recent threats by her uncle. As the RPD says:

[30] The claimant testified that her uncle still approaches her mother and her sister and asks in a threatening manner about when she will return to Saint Lucia. She also testified that her mother called the police when the claimant’s uncle came from Maynard Hill to her house in Aynes-La-Raye to ask about the claimant.

[31] However, I found that the claimant’s testimony about this lacked detail and contained contradictions. She did not know whether her uncle had harassed any of her family members about her whereabouts during the roughly 14 years after her departure from Saint Lucia in 2003 until the two alleged encounters in or around May 2017. Nor was she able to provide specific details about the 2017 incidents, referring the panel to the related affidavits from her family members, which, additionally, contradict some of her testimony about those encounters.

B. *Credibility Assessment*

[68] The Applicant also alleges that, quite apart from the Gender Guideline issues, the RPD erred in its credibility assessment.

[69] Under this heading, the Applicant says that the RPD rendered an “unintelligible decision” because it believed the Applicant has suffered domestic abuse in the past but disbelieved that she was at risk in the future.

21. It is submitted that this is a contradictory findings [*sic*]. The Board found the Applicant credible but then discounts her future risk based on testimony that it accepted with respect to the abuse. It is submitted that this flawed reasoning has led to a [*sic*] unintelligible decision.

[70] There is nothing unintelligible or contradictory about the Decision on this issue. Solid reasons are given as to why the Applicant's account of pre-2003 abuse at the hands of her uncle is credible but her evidence for future risk is not.

[71] Once again, the Applicant alleges that the RPD relied upon "minor inconsistencies." A simple reading of the Decision reveals that this is not the case.

[72] The Applicant adds that the RPD "relied on testimony that was provided at the first hearing, which had to be adjourned because the Applicant was sick and had left the hearing to be sick... yet the [RPD] used her testimony from that day, the same day that the video quality was at its worst, to make negative credibility findings." The Applicant and her counsel were given a full opportunity at the second hearing to correct any adverse testimony she had given at the first hearing before her dizzy spell.

[73] The Applicant further alleges that, contrary to the principles stated in *Arachchilage v Canada (Citizenship and Immigration)*, 2017 FC 433, the RPD assessed the affidavits of the Applicant's mother and sister and gave them little weight because of what they did not say, rather than for what they do say.

[74] As I have discussed above, the RPD's assessment of the affidavits takes place within a broader discussion in which the RPD questions why the Applicant has not provided "more details about her uncle's harassment of her mother and sister over her whereabouts..." (para 33).

The affidavits do not provide evidence that fills the evidentiary gaps or explains why the Applicant had no knowledge of “basic relevant details” (para 35).

[75] It is clear that the affidavits are not simply rejected for what they do not say. The problem is that the Applicant provided insufficient evidence to establish a “pattern of harassment from her uncle towards her mother and sister because of her departure from Saint Lucia,” and she “does not provide a reasonable explanation as to why it was only in 2017 that she learned about the harassment.” I see no reviewable error here.

C. *Compelling Reasons Analysis*

[76] Under this heading, the Applicant makes a number of assertions that are not born out by a simple reading of the Decision. She says:

- (a) The acts complained of do not have to be “atrocious or appalling” and a “variety of factors need to be considered” such as continuing “psychological trauma,” “country conditions,” and “population attitude”;
- (b) The “psychological consequences” of her return “were not considered”;
- (c) Her medical condition was not considered “with regard to her ability to evade a persecutor”;
- (d) The RPD did not consider “the age, cultural background and history of the Applicant”;

- (e) The RPD accepted that “the Applicant had been a victim of domestic abuse of several years duration.” This means that the RPD “erred by rejecting the compelling reasons exception for the Applicant”;
- (f) The reasons for which the Applicant sought refuge “have not ceased to exist.”

[77] Once again, a simple reading of the RPD’s analysis makes it clear that each of these issues is either fully addressed by the Board or did not need to be addressed given other findings:

[55] There are essentially two lines of authority with respect to compelling reasons. According to one line of cases, to establish compelling reasons, the claimant must have suffered “atrocious” or “appalling” acts of persecution. Another line of cases hold that *Obstoj* did not establish such a test for past persecution. According to *Suleiman*, referenced by Counsel in her submissions, the issue is whether considering the totality of the situation, it would be wrong to reject the claim in the wake of a change of circumstances. The claimant’s age, cultural background and previous social experiences are relevant considerations. Being resilient to adverse conditions will depend on a number of factors which differ from one individual to another. “[P]ast acts of torture and extreme acts of mental abuse, alone, in view of their gravity and seriousness, can be considered “compelling reasons” ... despite the fact these acts have occurred many years before.”

[56] The panel finds the claimant has not established that there are compelling reasons under either line of authority.

[57] The claimant experienced serious physical and verbal abuse from her uncle, which was often fueled by her uncle’s heavy alcohol consumption. He hit and cursed her, and threatened her with a knife. She describes two specific incidents when her uncle struck her with a pot or a bottle and cut her badly, in 2002 and 2003 respectively. After one of these incidents, she required stitches. She still has scars from these attacks. On another occasion, her uncle choked her, and she picked up a knife to defend herself. Although the claimant and her aunt reported him to the police, he was never arrested or charged.

[58] It has already been established that the claimant’s uncle’s repeated physical assaults against the claimant constitute gender-

based persecution. However, without diminishing the serious and criminal acts that the claimant has suffered, the panel finds that the claimant's persecution does not meet the high threshold of "atrocious" or "appalling". Nor after considering the totality of the situation and the claimant's individual circumstances does the panel find that there are compelling reasons to grant her refugee protection. Even with the more holistic approach to compelling reasons suggested in *Suleiman*, I find that as soon as the claimant was no longer a young and vulnerable child or young woman, she was able to take matters into her own hands and make bold decisions, including facilitating her trip to Canada where she has been sufficiently resourceful to stay and live independently for a long period of time. This is not consistent with the behaviour of someone who was affected by the abuse in a serious and lasting manner, which is contemplated by the logic of compelling reasons, an exceptional remedy with a high threshold.

[59] The claimant testified that she was never physically abused or assaulted outside of her uncle's home. For example, she was able to escape his mistreatment temporarily by going to the neighbour's house. For the reasons already given, the panel also finds that the claimant likely embellished the duration and circumstances of the abuse, to the extent that there were credibility problems in her testimony about when and how long she lived with her aunt and uncle.

[60] Although the claimant suffers from psychological conditions and medical problems which made her a vulnerable person for the purposes of the RPD proceedings, she has been independently supporting herself in Canada as well as her mother in Saint Lucia. She has been employed for most of her roughly 15 years in Canada, and while she has reduced her working hours more recently, she attributed this to her back pain and not her mental health issues.

[61] The claimant's psychiatrist recommended a course of treatment for the claimant in May 2017 that he believes would have a significant positive impact on the claimant's PTSD and depression. This treatment was through a community health clinic and a therapist, with whom the claimant was already connected. The claimant reported being "motivated and hopeful" about the therapy in the psychiatrist's report. Therefore, the claimant has had the opportunity to pursue accessible treatment over the course of a year that would likely have a significant impact on her psychological symptoms.

[62] As counsel notes, the claimant was significantly younger and more vulnerable, and financially dependent on her aunt and uncle at the time of her mistreatment. While I accept that this is an aggravating factor in the abuse she suffered at the time, her changed circumstances are also a relevant consideration. The claimant is now a middle-aged woman who financially supports her family in Saint Lucia. She is still close to her mother and sister in Saint Lucia, who have demonstrated a strong interest in her well-being and who would likely assist her upon her return to Saint Lucia. The claimant has not demonstrated that there is any requirement for her to live with her aunt and uncle.

[63] At the time the claimant left her uncle's, she was fearful of him. Though it is difficult to understand why the claimant did not seek refugee protection until nearly 9 years after her arrival in Canada, the panel does not draw a significant negative inference from this after considering the claimant's explanations.

[64] As impacted as the claimant is by her mental and physical health issues, the evidence favours a finding that she has been relatively resourceful and resilient during the past 15 years, and the panel finds that the past persecution that she suffered does not meet the high threshold required for compelling reasons.

[78] The RPD did not need to address the Applicant's inability "to evade a persecutor" because she did not establish that her uncle was still interested in seeking her out to continue the abuse. In addition, the RPD did not hold the Applicant to the "atrocious and appalling" standard. I can find no reviewable error in this analysis.

D. *Reasonable Apprehension of Bias*

[79] The Applicant's case for a reasonable apprehension of bias is based upon the following:

- (a) The RPD accepted that the quality of the video equipment was poor only after the Applicant's complaints were confirmed by staff;

- (b) The RPD requested that the Applicant provide a medical note after the first sitting was adjourned, thus implying that it did not believe the Applicant;
- (c) The Decision itself “demonstrates a lack of understanding of the depth and breadth of domestic violence” by finding no future risk to the Applicant;
- (d) The RPD demonstrated a “lack of competence” because it “assumes that being beaten in public is a hallmark or a test and only then would that require its intervention.” A competent panel is a *prima facie* requirement for a fair hearing.

[80] Grounds (c) and (d) suggest that the Applicant feels that a reasonable apprehension of bias is demonstrated when the RPD disagrees with the Applicant. This is not the case. Even if the RPD commits a reviewable error – which is not the case here – this cannot be reasonable grounds for bias. And when grounds (a) and (b) are examined in the context of the Decision as a whole, no “informed person, viewing the matter realistically and practically—and having thought the matter through” would think that “it is more likely than not that [the RPD], whether consciously or unconsciously, would not decide fairly,” to quote the test cited by the Applicant from *Committee for Justice and Liberty v Canada (National Energy Board)* [1978] 1 SCR 369:

[T]he 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 Mr. Crowe [the Chairman of the Board], whether consciously or unconsciously, would not decide fairly.

[81] A reading of the Decision as a whole does not suggest any ground for an allegation of reasonable apprehension of bias.

E. *Accommodation*

[82] Related to the reasonable apprehension of bias ground, the Applicant argues that the RPD “failed to provide the accommodations requested by the Applicant, who was found to be a Vulnerable Person” so that the RPD’s conduct “created an untenable environment for the Applicant.” The Applicant insists that,

Her severe physical and psychological issues made her particularly vulnerable to questioning by video, particularly as that equipment was malfunctioning. Her request for an in-person hearing was reasonable and should have been accommodated.

[83] The RPD has a broad discretion to adopt its procedures to accommodate vulnerable persons such as the Applicant. See Guideline 8. In *Gandarilla Martinez v Canada (Citizenship and Immigration)*, 2011 FC 1464, Justice Shore explained the objective of the accommodation guideline as follows:

The main objective of this guideline is to “provide procedural accommodation(s) for individuals who are identified as vulnerable persons by the Immigration and Refugee Board of Canada (IRB)” with a view to taking full consideration of the frailty and vulnerability resulting from personal and specific circumstances. This guideline allows for accommodations to be made at the hearing in view of the individual’s vulnerability to ensure that he or she is not disadvantaged in his or her testimony.”

[84] The fact that the Applicant was found to be a vulnerable person does not mean that she had a right to receive a particular kind of hearing process. As the record before me shows, the

Applicant would clearly have preferred an in-person hearing. Dr. Kitamura supported her in this regard and requested on her behalf an in-person hearing:

[I]n order to reduce undue hardships on Ms. Fedee and support her providing her evidence most effectively. As per my previous note, in future hearing, permitting her the breaks she feels necessary to compose herself in times of acute stress, and the option of having a support person present with her, would be most helpful.

[85] As the record and the Decision show, the RPD acknowledged and considered the Applicant's request. The RPD did not grant her request for an in-person hearing but it fully acknowledged and accepted her medical diagnosis and granted her various forms of accommodation to assist her to deal with the hearing. This included:

- (a) Terminating the hearing when the Applicant suffered a dizzy spell;
- (b) Allowing counsel to re-examine the Applicant on what she had said prior to the dizzy spell;
- (c) Adjusting the video image when she said it was hurting her eyes;
- (d) Offering to slow down verbal exchanges and encouraging the Applicant to ask for clarification at any time she required it;
- (e) Offering the Applicant breaks at her discretion; and
- (f) Allowing Applicant's counsel to ask any clarifying questions she thought would be advantageous.

[86] In addition to this, the RPD also shows that it was fully aware of the Applicant's request for an in-person hearing and alleged negative consequences of proceeding with the video in its Decision: see paras 43-46 that I have quoted above at para 55.

[87] Furthermore, the RPD directly addressed the letters from Dr. Kitamura in the Decision:

[51] I have considered the claimant's documentary evidence, however I find that it is insufficient to establish that she faces a forward-looking risk of persecution in Saint Lucia. I have already addressed the affidavits from family members, to which I assign little weight for this purpose, given their lack of detail and the claimant's problematic testimony about the events in question after 2003. The various letters item the claimant's psychiatrist, nurse practitioner, and her social worker have probative value with respect to the claimant's psychological and medical problems, however I do not give any weight to the psychiatrist's several findings of fact about the claimant's narrative or his evaluation of the impact of the videoconference technology during the hearing on the evidence, matters that are within the purview of the Board. As already indicated, the panel found that the issues with the videoconference technology did not have a significant impact on the claimant's testimony, and that remedies were promptly put in place when the matter was raised by the claimant and her counsel.

[88] Before me, the Applicant has made it clear that she would have been more comfortable with an in-person hearing, but she has not shown that the process and accommodation used by the RPD prevented her from making her case in a fair and full way.

IX. CERTIFICATION

[89] The parties agree there is no question for certification and I concur.

JUDGMENT IN IMM-2217-18

THIS COURT'S JUDGMENT is that

1. The application is dismissed.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2217-18

STYLE OF CAUSE: ALVINA ANDRINA FEDEE v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 8, 2019

JUDGMENT AND REASONS: RUSSELL J.

DATED: JANUARY 22, 2019

APPEARANCES:

Lina Anani FOR THE APPLICANT

Stephen Jarvis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lina Anani FOR THE APPLICANT
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario