Federal Court  Cour fédérale

Date: 20190705

Docket: IMM-3484-18

Citation: 2019 FC 896

Ottawa, Ontario, July 5, 2019

PRESENT: Mr. Justice Annis

BETWEEN:

SANDY SHENNA MOFFAT

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA] of a Refugee Protection Division [RPD] decision dated July 3, 2018 [the Decision]. The RPD determined that the Applicant would not be subject to risk of persecution, danger of torture, risk to her life or risk of cruel and unusual

treatment or punishment if removed to St. Lucia under sections 96 and 97 of the IRPA.

II. Background

[2] The Applicant's narrative will be briefly summarized below, though I make no determination as to the truth of its contents.

[3] The Applicant was born in St. Lucia in 1989. After being outed as bisexual, the Applicant fled the country when she was 17, fearing that her life was threatened by her boyfriend Brian and the community.

[4] The Applicant's mother abandoned her at an early age and she lived with her grandmother. At the age of 14, she had a yearlong relationship with a female friend, while also dating boys. The Applicant then met Brian who was a few years older and well-off, albeit short-tempered and prone to jealousy. In June 2006, she met a new friend named Erica, with whom she shared a secret romance in January 2007.

[5] The Applicant's difficulties began when Brian learned of her relationship with Erica. He did so by surprise when first seeing the couple through a "window door" from outside her grandmother's home where she lived. Brian then created a loud scene and threatened her. Later, Brian told Erica's boyfriend about the lesbian relationship. He in turn assaulted Erica, and spread rumours that the Applicant and Erica were lesbians.

[6] Brian also became angry and assaulted the Applicant on a number of occasions, once so

badly that she was hospitalized for a few days. Twice the Applicant reported the beatings to police, but they took no action. As a result of the beatings and fears that her life was at risk, she left St. Lucia.

[7] The RPD identified a number of issues related to the Applicant's credibility, and found that she had not met the onus of presenting credible evidence to support the allegations that form the basis of her claim on a balance of probabilities.

[8] The RPD identified several inconsistencies and improbabilities in the Applicant's testimony which are summarized as follows:

1. The Applicant did not explain the contradictory evidence that she obtained a passport in February 2005 but testified that she obtained the passport due to the threats made against her in 2006;
2. There was contradictory evidence regarding Brian's discovery of the Applicant having sex with Erica:
    i. Whether Brian snuck in through the "window door" or the Applicant opened the door for him;
    ii. Whether Erica took her things and ran out while Brian grabbed and slapped the Applicant, or whether Erica left by the front door before the Applicant let Brian into the house;
    iii. In oral evidence, the Applicant omitted that Brian had threatened to kill her, as stated in her Personal Information Form [PIF];
    iv. In oral evidence, the Applicant omitted that she called Erica to say that

Brian would not tell anyone, but that they could not be together, as stated in the PIF;

v. The Applicant testified that neighbours heard the shouting, came out of their houses, learned what was happening, and they spread the word. However, the PIF stated that it was Erica's boyfriend who spread the word and did not mention the neighbours;

vi. The Applicant did not cover the "window door" of her house as there were no houses in the back, only a road. However, she also stated that Brian would walk to the house from the back road. The Applicant did not explain why people walking along the road could not see into the home.

3. The Applicant's testimony and PIF were not consistent regarding her reports of the beatings to the police. The Applicant testified that she went to the police three times: the first time they turned her away, the second time they would not listen because they do not like bisexual people, and the third time the police said that it was not important and did not give her a chance to tell her story. However, in the PIF the Applicant indicated that she reported to the police two times, but that each time, the officer said it was a "love thing" and not police business;

4. There was contradictory evidence regarding the Applicant's contact with Erica after they were caught having sex;

5. There was contradictory evidence in the PIF and oral testimony regarding the manner and timing of Brian's approaches to the Applicant's grandmother after the Applicant arrived in Canada and threats that he would kill the Applicant;

6. The Applicant's evidence regarding how she came to Canada and who she stayed

with was not forthright; and

7. The PIF addendum referred to new threats by Brian made in October 2017 reported to the Applicant via her sister. However, this was not supported by a letter or affidavit.

[9] The RPD also considered that the Applicant arrived in Canada on June 17, 2007 when she was 17 years old, but did not claim refugee protection until October 26, 2012, more than five years later. The RPD acknowledged that the Applicant was a minor when she arrived in Canada, but also noted that she reached the age of majority five months after she arrived. The Applicant's mother had successfully claimed refugee protection in Canada. The Applicant may not have had contact with her mother, but she had a family friend in Canada and other friends who could have directed her. The Applicant has ten years of education and was resourceful enough to get her own passport when she was 15 years old. The Applicant could have used the internet to inform herself about the refugee claim process, and she could have consulted a lawyer at any time. The RPD concluded that this delay supported its finding that the Applicant lacks subjective fear and was not persecuted in St. Lucia for her alleged sexual orientation.

[10] Finally, the RPD reviewed a psychological report drafted by Dr. Gerald M. Devins, dated June 13, 2013, diagnosing the Applicant with a schizoaffective disorder [the Report]. The RPD gave the Report little evidentiary weight, as it was based on a one-hour interview, was five years old, and was not followed up by any psychiatric treatment, although the Report recommended that the Applicant undertake treatment.

[11] The RPD concluded that the Applicant is neither a Convention refugee nor a person in need of protection, and consequently dismissed the Applicant's claim. The Applicant now seeks judicial review of this Decision.

III. Issues

[12] The Applicant raises three issues relating to the RPD's factual findings:

a) Did the RPD err in finding that the Applicant was not credible?

b) Did the RPD err by failing to consider the Gender Guidelines?

c) Did the RPD err in assigning little weight to the psychological report mitigating credibility inconsistencies of the Applicant?

IV. Standard of review

[13] The first and third issues relate to weight assessment findings of fact, including the assignment of weight to the reliability of medical reports on relevant factors, while the second issue is an alleged fact-finding process error resulting from the failure to consider a relevant factor. The standard of review for the three issues concerning findings of fact is as follows:

1. With respect to the RPD's findings of fact, inferential facts, and the factual component of questions of mixed fact and law where the legal issue is not extricable from the facts, fact-finding process errors are reviewed on a correctness standard, while fact-finding weight assessment errors are reviewed on a reasonableness standard, but accorded the highest deference. The fact can only be set aside if the error is plain to see, without recourse to a reasonability analysis.

The same standard applies to the review of the inference drawing step of an inferred fact: *Jean Pierre v Canada (Immigration and Refugee Board)*, 2018 FCA 97 at paras 51-53; *Housen v Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33 at paras 21-23; *Kallab v Minister of Citizenship and Immigration*, 2019 FC 706.

2. The outcome of the review of the factual issues is thereafter integrated and considered with the remaining issues to determine whether the decision falls within a range of possible, acceptable outcomes in respect of the facts and law and justified with transparent and intelligible reasons: *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

V. Analysis

A. *Did the RPD err in finding that the Applicant was not credible?*

[14] The Applicant advances a number of submissions that fundamentally ask this Court to reweigh the evidence, arguing that:

- the RPD identified minor inconsistencies of limited value to assessing the risk of persecution upon her removal to St. Lucia;
- the RPD misapprehended the facts, by focusing on selective portions of her evidence, and that for this reason its decision is unreasonable;
- the RPD undertook a microscopic examination of her testimony, and it expected an encyclopaedic recitation of the evidence from her PIF narrative;
- the RPD put the Applicant to a memory test and thereby wrongfully assessed her

credibility; and

- the evidence or testimony with respect to whether a claimant travels on false documents, destroys travel documents or lies about them upon arrival is peripheral and of very limited value to a determination of credibility.

[15] I find that no fact-finding process errors arise, while the negative credibility findings are supported by evidence, with no error plain to see. In effect, the Applicant is asking the Court to reweigh the evidence which it cannot do. Accordingly, there is no basis to conclude that the RPD's factual findings are unreasonable, or that there exists any other ground that would permit this Court to interfere with the RPD's conclusion that the Applicant was not credible.

B. *Did the RPD err by failing to consider the Gender Guidelines?*

[16] The Applicant argues that there was no indication that the RPD considered the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines]. She argues that the RPD was insensitive with respect to the peculiar circumstances of the Applicant as directed by the Guidelines, and that it failed to apply specialized knowledge in assessing the Applicant's claim, as someone who had suffered domestic violence and abuse. As such, the Applicant maintains that the RPD erred in its assessment of her claim.

[17] The difficulty with the Applicant's submissions is that she does not refer to specific instances in which the RPD exhibited a lack of sensitivity. Thus, there is no indication that the RPD was not sensitive to the Applicant's personal situation during the hearing or in assessing the

evidence. Moreover, there were other problems with the Applicant's testimony, particularly the delay of five years in bringing forward her refugee claim while residing in the country without proper immigration status, which was not accounted for and cannot be explained by simply pointing to the Guidelines.

[18] The Guidelines are not a cure for every evidentiary deficiency and do not need to be specifically mentioned when they are considered (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at paras 36-38, *Karanja v Canada (Minister of Citizenship and Immigration)*, 2006 FC 574 at paras 5-7). I agree with the Respondent that no reviewable error arises with respect to this issue.

C. *Did the RPD commit a reviewable error by assigning little weight to the expert psychological assessment and thereby fail to consider the impact of the Applicant's mental state on her testimony?*

(1) Introduction: the nature and scope of the Report

[19] The Report was drafted by Dr. Gerald M. Devins, who holds a Ph.D. in Clinical Psychology and is registered as a Clinical Psychologist. Dr. Devins essentially drafted a psychological assessment of the Applicant a few days after interviewing her on May 27, 2013. This five-page Report contains a statement of Dr. Devins' qualifications and experience, his approach to the assessment, and sets forth a recitation of the Applicant's narrative, including his clinical impressions following their meeting and several recommendations to the RPD member.

[20] Of note, the Report contains Dr. Devins' opinion about three matters of relevance to the

underlying refugee proceedings, namely: 1) the Applicant's psychological disorders and their impact on her competency to testify; 2) the potential misconception of her credibility when testifying as a result of these disorders; and 3) the expected consequences of her removal to St. Lucia.

[21] While the Applicant did not raise the opinions expressed in the Report about risks upon removal to St. Lucia, or the issue of appointing a Designated Representative before the RPD, I will nevertheless address these remarks, in addition to the other opinions and recommendations contained in the Report in the analysis that follows.

[22] The Report's three opinions, along with specific symptomology references of particular relevance, with my emphasis, are as follows:

> (a) *Designated representative - competency to testify*
>
> "Ms. Moffat reported symptoms indicative of major mental illness [later described as schizoaffective disorder, depressive type (29.570) in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed., DSM-IV)]
>
> […] She anticipates that these symptoms will interfere significantly with her ability to testify at the Refugee Hearing. I discussed the notions of a Designated Representative with her and Ms. Moffat indicated receptivity. This should be given consideration."
>
> (b) *Prediction of unclear and inconsistent evidence – misleading credibility assessment*
>
> "Ms. Moffat will be nervous and inhibited at the Refugee Hearing. She will be intimidated by people in authority. It will be important to exercise sensitivity during the questioning to avoid re-traumatizing her […] Symptoms may arise during the Hearing in the form of difficulty understanding questions, requests for questions to be repeated or rephrased, inability to retrieve specific details of the past, or an apparent inability to formulate a coherent

response. Stress-related cognitive problems can lead to difficulties in providing clear and consistent testimony. Should such problems become evident, it will be important to understand that they likely reflect the disorganizing effects of major mental illness and/or traumatic stress rather than an effort to evade or obfuscate."

(c) *Treatment interruption and relapse - risk on removal to the country of origin*

"She attempted to take her life by ingesting flammable fluid. On another occasion, she attempted to take her life by jumping from a tree." [In St. Lucia, evidence not found in the record]

[…] The uncertainty of her immigration status is intensely threatening.

Ms. Moffat acknowledged suicidal thoughts while in St. Lucia, but denied current suicidal ideation.

[…] She is convinced she will be targeted in St. Lucia. The prospect of removal is too threatening to contemplate. When asked about her plans if she cannot stay in Canada, Ms. Moffat averted her gaze slowly and replied helplessly, 'If they say, 'No,' I will cry. I don't know what I will do.'"

CLINICAL IMPRESSION

Ms. Moffat satisfies diagnostic criteria for schizoaffective disorder, depressive type (295.70) in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th edition, DSM-IV). She presents significant stress-response symptoms and stress-related adjustment problems. She requires psychiatric evaluation and treatment. With her permission, I request that Ms. Moffat's Counsel assist her in finding a physician who can refer her for psychiatric evaluation and treatment. Such treatment must not be interrupted. Ms. Moffat's condition can improve with appropriate care and guaranteed freedom from the threat of removal. If refused permission to remain in Canada, her condition will deteriorate (e.g., possible decompensation). As noted, it will be impossible for Ms. Moffat to feel safe anywhere in St. Lucia.

Appointment of a Designated Representative should be considered.

I hope that this report will assist you and the courts in determining the best possible outcome for Ms. Moffat.

[23] At the outset of the Report, Dr. Devins stated that since 1966, he has conducted psychological assessments of more than 4,300 refugee claimants and others seeking permission to stay in Canada. Recall that the Report is dated June 1, 2013. From other more recent decisions in which his reports have been considered, I understand that Dr. Devins continues to regularly provide psychological assessments on behalf of refugee claimants, i.e. 5,200 as of 2017 (*Brown v Canada (Citizenship and Immigration),* 2017 FC 710 at para 80).

[24] At paragraph 13 of the Decision, the RPD explained why it gave the Report little evidentiary weight:

> [13] I have reviewed psychological report from Dr. Devins dated June 13, 2013. The diagnosis was schizo-affective disorder. I give this report little evidentiary weight, as it was based on a one hour interview, is five years old and was not followed up by any psychiatric treatment as recommended. In addition, I have considered the remarks made by Justice Annis in [*Czesak*] *v Canada*, [2013 FC 1149] … when he stated "... decision-makers should *be wary of reliance* upon forensic expert evidence *obtained for the purpose of litigation, unless it is subject to some form of validation*." The claimant did not appear to have any problems in testifying.
>
> [Italicized passage in RPD Decision.]

[25] I agree with the RPD's conclusion that the Report should be given little weight, for the reasons described above, among further reasons set forth in greater detail below. I will further supplement my reference to reliability issues facing unchallenged expert reports, while describing the particular difficulties expert reports pose for RPD members, by providing further analysis of the Report at issue here. In so doing, I will refer to some of the factors that the RPD may apply to assess the probative value and reliability of an expert medical or psychological report. These remarks extend to considerations of whether the RPD may declare expert reports

inadmissible as opposed to uniquely considering their weight, in addition to considering if the RPD may exercise a similar cost/benefit "gatekeeping function" as trial judges.

(2) The potential dangers of expert evidence

[26] In the recent decision of *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*], the Supreme Court of Canada repeated concerns about potential dangers arising from the misuse of expert evidence, which it previously raised in *R v Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9 [*Mohan*] and several other decisions. These comments referred to juries as the triers of fact, but they also apply to other triers of fact, namely judges sitting without a jury and arguably to administrative tribunal decision-makers (see for example *Cinar Corporation v Robinson*, [2013] 3 SCR 1168 at para 49 concerning a civil action without a jury; see also *Melhi v Canada (Citizenship and Immigration)*, 2018 CanLII 107568 (CA IRB), in which the Immigration Division applied the *Mohan* test (at paras 20-33 to expert testimony while acknowledging as follows at para 25: "[w]hile it may not be completely settled as to whether the *Mohan* test should be applied in the administrative law context, even without applying the *Mohan* criteria strictly, the discretion to admit evidence and/or hear the testimony of a witness rests with the Immigration Division."; see also *Sandhu v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 133401 (CA IRB) at paras 28-29).

[27] The Supreme Court's concerns are found at paras 17 and 18 of *White Burgess* as follows, with my emphasis:

> [17] We can take as the starting point for these developments the Court's decision in *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9. That case described the potential dangers of

> expert evidence and established a four-part threshold test for admissibility. The dangers are well known. One is that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it. As Sopinka J. observed in *Mohan*:
>
> > There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and as having more weight than it deserves. [p. 21]
>
> (See also *D.D.*, at para. 53; R. v. J.-L.J., 2000 SCC 51 (CanLII), [2000] 2 S.C.R. 600, at paras. 25-26; *R. v. Sekhon*, 2014 SCC 15(CanLII), [2014] 1 S.C.R. 272, at para. 46.)
>
> [18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury "will be unable to make an effective and critical assessment of the evidence": *R. v. Abbey*, 2009 ONCA 624 (CanLII), 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its "informed judgment", not simply decide on the basis of an "act of faith" in the expert's opinion: *J.-L.J.*, at para. 56. The risk of "attornment to the opinion of the expert" is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert's reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting "junk science" (*J.-L.J.*, at para. 25); and the risk that a "contest of experts" distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27 (CanLII), [2011] 2 S.C.R. 387, at para. 76.

[28] The potential dangers of expert reports are exacerbated in most refugee proceedings because of their one-sided quasi-adversarial nature. In such cases, only the claimant is in full adversarial mode, with the Minister rarely appearing at the hearing. This provides a distinct

advantage in these proceedings, and particularly it would appear in relation to a claimant's use of expert reports. The respondent Minister rarely participates in these proceedings (despite having the power to do so under section 29 *Refugee Protection Division Rules*, SOR/2012-256 [RPD Rules]) due to many factors. Most of these barriers relate to the cost and scarcity of valuable legal and related expert resources to respond to the ever-increasing caseload and legal challenges faced in refugee and immigration matters. The Minister must respond to cases arising in a smorgasbord of different decision-making forums, each highly judicialized by the wide number of decisions subject to judicial review and the variability of their context, not to mention that these decisions are often both highly complex and/or controversial. This is unlikely to change.

[29] If the Minister wanted to challenge these reports, it would presumably need to engage experts in the field at issue, with perhaps an opportunity to interview and assess the claimants in a manner somewhat similar to that carried out by the claimants' own experts. This would be followed by drafting a contradictory report. It would also entail procedures to obtain corroborating information, or even relevant information, which is not furnished to the RPD as in this matter. While expert witnesses are permitted to testify before the RPD (see section 44 of the RPD Rules), I am not aware of circumstances in which physicians or other experts have been called to testify before the RPD and were further subject to cross-examination by lawyers, as is the norm in trial courts and some administrative tribunals. If the parties' expert reports are significantly at odds, it is generally recognized that only cross-examination before the decision-maker can allow them to be appropriately weighed.

[30] However, since this is not the ordinary procedure followed before the RPD, it is therefore

left to the member to assess and provide reasons explaining the degree of weight attached to an expert report. The member must do so however, without ever being able to respond to the substantive nature of the opinions contained in the expert report. Without the Minister's participation, backed up by an opposing expert report containing opinions challenging those of a claimant's expert, the RPD is not in a position to question the substance of the opinions provided. Indeed, this Court has ruled that the RPD does *not* have the psychological expertise to reject the substantive opinions in an expert's report, such as a diagnosis, see *Trembliuk v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1264 at paras 11-12 with my emphasis:

> [11] The RPD, in its reasons, wrote:
>
> ... I do not accept this diagnosis because I find the witness not to be a credible or a trustworthy witness.
>
> [12] While it was open to the RPD to determine the weight, if any, to be given to the assessment provided by the psychologist, it was not open to the RPD to reject the psychologist's diagnosis. While the RPD is undoubtedly a specialized tribunal as noted by Justice Décary in the quotations from Aquebor appearing earlier in these reasons, it is certainly not an expert tribunal in the area of psychological assessment.

[31] The final sentence of this excerpt confirms that the RPD also does not have the expertise to reduce the weight of the substantive opinion. Rather, it can only reduce the weight of a substantive medical or psychological expert opinion by relying on collateral considerations, such as those relied upon by the RPD member in the case at hand to give little weight to Dr. Devins' Report. If the member fails to consider a relevant expert opinion, or to provide appropriate or sufficient reasons for assigning little weight to the expert report, the decision will be set aside and sent back to be heard by another member, who will face the same difficulties.

[32] The decision in *Atay v Canada (Citizenship and Immigration)*, 2008 FC 201 [*Atay*] which the Applicant relies on is a typical example of this outcome. *Atay* referred to similar expert reports drafted by Dr. Devins and another doctor. Dr. Devins' report contained a similar credibility-related opinion that if problems occurred in the Applicant's testimony "it will be important to understand that they likely reflect the disorganizing effects of traumatic stress rather than an effort to evade or obfuscate"(at para 15). In *Atay*, the Court found that "[a]s the contents of the psychological report were relevant to the Board's credibility findings, the Board should have taken the time to consider how the applicant's medical condition affected his behaviour before making its credibility finding" (at para 32).

[33] In *Atay*, the applicant provided an overview of the relevant supporting jurisprudence at the time cited and relied upon by the Court. The description of this jurisprudence, which is still generally relied upon in this Court, can be found at para 16 of *Atay* as follows, with my emphasis:

> [16] The applicant submitted that as the Board accepted that the applicant suffered from chronic posttraumatic stress disorder, it was obliged to consider the impact of this condition on the quality of the applicant's evidence. The applicant relied on a number of authorities including *Min v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1676 (CanLII), for the proposition that where there is medical evidence before the Board that might explain shortcomings in an applicant's testimony, it is incumbent on the Board to consider and give appropriate weight to such evidence. It is an error for the Board to base a decision on a discrepancy between information given at the port of entry and information given later in the process without taking into account the evidence of the applicant's psychological state (*Singh v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 963). Simply referring in its reasons to a psychological report addressing posttraumatic stress disorder is not sufficient; <u>the Board must consider whether the psychological circumstance might help explain an omission, lack of detail, or confusion regarding the</u>

> events if these are the exact cognitive errors referred to in the psychologist's report (*Rudaragi v. Canada (Minister of Citizenship and Immigration.),* 2006 FC 911 (CanLII)). The Board cannot merely state that it considered the report, it must provide some meaningful discussion of how the medical condition affects its decision before making a negative credibility finding (*Fidan v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1190 (CanLII), [2003] F.C.J. No. 1606). The applicant submitted that psychological impairment must be taken into account, even where the main issue is plausibility of testimony (*Chen v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1070).

[34] In *Atay*, this Court accepted those arguments, at paras 29-32. In this matter, the Applicant has cited several other decisions of this Court essentially standing for the same proposition (*Khawaja v Canada (Minister of Citizenship and Immigration)* [1999] FCJ No 1213 at para 8; *B.C. v Canada (Minister of Citizenship and Immigration)*, 2003 FC 826 at paras 15-20; *Mendez Santos v Canada (Citizenship and Immigration)*, 2015 FC 1326 at paras 16-19; *Olalere v Canada (Citizenship and Immigration)*, 2017 FC 385 at paras 50-60).

[35] Just recently, this Court has made a similar finding with respect to a psychiatric report in *Mowloughi v Canada (Citizenship and Immigration)*, 2019 FC 270 at paras 67-70 [*Mowloughi*], with my emphasis:

> [67] The [PRRA] Officer gives little weight to the psychiatric evidence related to the Applicant's spouse and his own mental condition on the grounds that such evidence is based upon the Applicant's statements and the doctors have no first-hand knowledge of the events the Applicant says occurred in Iran.
>
> [68] Once again, the Officer misses the point of this evidence. It is corroborative of the Applicant's story because the symptoms are consistent with people who have suffered what the Applicant says he and his wife have suffered. For example, Dr. Lisa Andermann finds that the Applicant suffers from Post-Traumatic Stress Disorder symptoms that are "consistent with… someone who has

> been beaten and tortured." And the Iranian doctor indicates that the Applicant's spouse suffers from anxiety and depression, which is consistent with her evidence of harassment by the authorities.
>
> [69] The Officer gives this evidence little weight because the doctors have no first-hand knowledge of what the Iranian authorities have done to the Applicant and his wife. But the evidence was not produced to prove first-hand knowledge. The medical opinions of these doctors are valid circumstantial evidence which corroborates the Applicant's account. The Officer seems to be indicating that he will only accept and assess direct evidence which, as the Supreme Court of Canada pointed out in *Kanthasamy* v Canada (Citizenship and Immigration), 2015 SCC 61 at para 44 [Kanthasamy], is unreasonable:

[36] This Court cannot comment with certainty on the influence that such expert reports have had on outcomes in refugee proceedings. That said, refugee claimants regularly rely on them. This may be particularly so after the Supreme Court rejected an immigration officer's assignment of little weight to a medical report in a humanitarian and compassionate [H&C] application in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], as followed in the decision in *Mowloughi* above. In *Kanthasamy*, the Court commented on the error of the officer in an H&C matter as follows at para 47:

> [47] … Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

[37] From this passage, it is not clear whether the Supreme Court recognized that the officer had no option but to accept the report for admissibility purposes. The officer could not have substantively taken issue with the opinions set forth in the report, lacking both evidence of an opposing expert report, normally found in trials, or the expertise to challenge those opinions. It is

also not clear whether the officer's point was that the expert cannot provide evidence which if not entered into the record by the claimant, vitiates the opinion it is based on. It goes without saying that the decision-maker's lack of expertise is the tautological reason why parties have recourse to experts in adversarial proceedings in the first place.

[38] It is just this glaring disadvantage faced by most decision-makers in refugee and immigration procedures that they have no option but to accept the substantive opinions of medical experts, which requires them to focus on collateral issues affecting the weight or scope of the opinions.

[39] This is precisely the point I am addressing here. Before the RPD substantively accepts the Report, it could benefit from applying the assessment factors regularly adopted by judges in trials to determine whether the expert has adequately demonstrated that the opinions in his or her report have been sufficiently proven to be reliable.

[40] These factors have been developed by the Supreme Court and Ontario Court of Appeal in their efforts to ensure that the potential dangers of expert evidence are constrained by requiring such reports to pass a "gate-keeping" process before admitting them as evidence. The factors used in this process can equally be applied to assess the weight of a report's reliability. Reliability requirements are not considered technical evidentiary rules. They are the substance of what decision-makers do in assigning weight to evidence. As shall be seen, of particular relevance and utility is a list of reliability-demonstrating questions developed by the Ontario Court of Appeal in the matter of *R v Abbey*, 2009 ONCA 624, (leave to appeal dismissed [2010]

SCCA No 125) [*Abbey*]. These questions are especially useful when assessing the reliability of the opinions based primarily on the experience of the expert (as opposed to scientifically develop statistical testing) as is often the case in reports considered by the RPD. An obvious advantage of assessing a report's reliability is that such findings are highly factual and therefore generally not reviewable by the courts so long as there is some evidence to support the finding. The analysis that follows describes these reliability assessment tools and applies them to Dr. Devins' report.

(3) The test for the admissibility of expert reports

[41] The Supreme Court decision of *Mohan,* as interpreted and reformulated by the Ontario Court of Appeal in *Abbey* describes the principles relied upon to address the admissibility of expert reports.

[42] Unlike lay witnesses of fact, expert opinion evidence is presumptively inadmissible. Expert evidence is given this distinct treatment because it presents the trier of fact with a ready-made opinion as to a factual inference that should be drawn from the information the expert has accumulated from his or her work and experience and has combined with other evidence. For this reason, "[e]xpert evidence has the real potential to swallow whole the fact-finding function of the court" (*Abbey* at para 71).

[43] As such, in trial courts, expert opinion evidence can be admitted *only* if the party calling it satisfies the four preconditions to admissibility, on a balance of probabilities, and further passes the discretionary gatekeeping step that balances the potential costs and benefits of admitting the evidence in order to decide whether those potential benefits justify the costs. In this

regard, “benefits” refers to the probative value of the evidence, while “costs” refers to the “distracting and time-consuming thing expert testimony can become” (*R v D.D.*, 2000 SCC 43 at para 57 [*D.D.*]).

[44] The Supreme Court has recently summarized the law regarding the admissibility of expert opinion evidence in *White Burgess* at paras 22-24, which read as follows:

> [22] *Abbey* (ONCA) introduced helpful analytical clarity by dividing the inquiry into two steps. With minor adjustments, I would adopt that approach.
>
> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or will science used for a novel purpose, the reliability of the underlying science for that purpose: *J.-L.J.*, at paras. 33, 35-36 and 47; *Trochym*, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey* (ONCA), at para. 82; *J.-L.J.*, at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: *D.D.*, at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283 (CanLII), 85 C.R. (6th) 290, at para. 13; *R. v. C. (M.)*, 2014 ONCA 611 (CanLII), 13 C.R. (7th) 396, at para. 72.
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the “reliability versus effect factor” (p. 21), while in *J.-L.J.*, Binnie J. spoke about “relevance, reliability and necessity” being “measured against the counterweights of consumption of time, prejudice and confusion”: para. 47. Doherty J.A. summed it up well in *Abbey*, stating that the “trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert

evidence": para. 76.

(See also: *R v Bingley*, [2017] 1 SCR 170 at paras 15-17.)

[45] With these principles in mind, the current Common Law test for the admissibility of expert evidence can be distilled as follows:

1) The expert evidence must meet the four threshold requirements for admissibility (the *Mohan* factors), that is:

   a) The evidence must be logically relevant, i.e. the evidence must have the tendency, as a matter of human experience and logic, to make the existence of a fact in issue more or less likely than it would be without that evidence (not to be confused with legal relevance) (*Abbey* at paras 82-85);

   b) The evidence must be necessary to assist the trier of fact, ie. the trier of fact cannot form its own conclusions without help (*R. v Sekhon*, [2014] 1 SCR 272 at paras 43-48);

   c) Absence of an exclusionary rule;

   d) The expert must be properly qualified i.e. the expert has special knowledge and experience beyond that of the trier of fact. Following *White Burgess*, this step also concerns issues regarding the expert's independence and impartiality and whether or not the expert is willing and able to comply with his or her duty to the Court (at para 53).

2) Gatekeeping function: Cost/benefit assessment step (including assessment of

reliability);

3) Assuming the evidence is admitted, the trier of fact can weigh it among the other evidence.

[46] Having set forth the Common Law test for the admissibility of expert evidence, I would now turn to the application of these principles in the administrative law context.

(4) Do the principles of *Mohan* apply in proceedings before administrative tribunals?

[47] There remains an issue as to whether the above test may be applied by administrative tribunals dealing with expert evidence. In particular, there is a discussion as to whether administrative tribunals must confine their comments to the weight given to such expert opinions, as opposed to permitting the tribunal to declare a given report, or parts of it, inadmissible.

[48] In *Alberta (Securities Commission) v Workum*, [2010] AJ No 1468 [*Workum*], the Alberta Court of Appeal concluded that the *Mohan* criteria for admissibility do not apply in hearings before the Alberta Securities Commission (at para 82: citing paragraph 29(f) of the *Securities Act*, RSA 2000, c S-4, which provides that: [f]or the purpose of a hearing before the Commission…the following applies: […] (f) the laws of evidence applicable to judicial proceedings do not apply). However, the Court further held that consideration of the *Mohan* criteria may lead a tribunal to accord more or less weight to the evidence (at paras 82-84, citing the text of David Jones and Anne de Villars, *Principles of Administrative Law*, 5th ed. (Toronto:

Carswell, 2009) at 306). However, given that the standard of review under Alberta law did not permit that court to intervene in questions of weight, the Court dismissed that ground of appeal (at para 84). Instead, the matter was decided on the basis of fairness principles, namely whether or not there was a reasonable apprehension that the decision-maker was biased.

[49] The authors of the text Paciocco & Stuesser, *The Law of Evidence*, 7th ed. Toronto: Irwin Law, 2015 [Paciocco Text] do not cite *Workum*. However, they appear to agree as they state, with my emphasis, that "[t]he Mohan standards apply in civil litigation, administrative cases where rules of evidence are applied, and in criminal cases". In support of this proposition the authors refer to the decision of *Deemar v College of Veterinarians of Ontario*, 2008 ONCA 600, 92 OR (3d) 97 at para 20 [*Deemar*], which itself refers to the matter of *Drummond v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 477 (TD) at para 9 [*Drummond*].

[50] Neither of these cases explicitly refers to *Mohan*, although both decisions upheld rulings by an administrative tribunal finding expert reports to be inadmissible.

[51] In *Deemar*, the Ontario Court of Appeal upheld a decision of the College of Veterinarians of Ontario Disciplinary Committee. Essentially, the Court held that the respondent veterinarian's right to file expert evidence is qualified by the Committee's jurisdiction to rule on the admissibility of evidence (at para 18). Ultimately, the Court upheld the Commission's decision refusing to admit an expert report because the author lacked independence, it was largely advocacy, and the author had a recent relationship with the College of Veterinarians (at paras 19-23). The Court further upheld the Commission's decision refusing to admit a second expert

report because it lacked logical relevance (at para 29).

[52] Of particular interest, in *Deemar*, the Court referred to the decision of *Drummond* at paras 27-28. In *Drummond*, Justice Rothstein, addressed an application for judicial review of a decision rendered by the Immigration Appeal Division [IAD] dismissing an application to reopen an appeal of the applicant's deportation order. While granting the judicial review on the merits of the reopening issue, Justice Rothstein upheld the IAD's decision to exclude an affidavit tendered as expert evidence, regarding the incompetence of her counsel during a hearing before the IAD, because the deponent had acted as a member of the IAD three months before the reopening hearing and therefore the expert did not appear to be independent. In this regard, Justice Rothstein held that "[w]hile as a general rule a tribunal must not reject evidence, in this case, I think it had reason to do so" (at para 9).

[53] Accordingly, I conclude that the jurisprudence of this Court would permit the RPD to rule an expert report to be inadmissible in the limited circumstances in which there is reason for it to do so.

[54] However, there is no apparent jurisprudence permitting administrative tribunals to apply the gatekeeping cost/benefit rules to refuse admission of an expert report, absent permissive statutory language. Nonetheless, in respect of the RPD, it remains a live issue if, as the Paciocco Text suggests, a tribunal's jurisdiction to rule on admissibility depends on whether or not it has the jurisdiction to apply the rules of evidence. This question would be determined by interpreting the RPD's governing statute. In this respect, paragraph 170(*g*) of the IRPA states that the RPD

"is not bound by any legal or technical rules of evidence".

[55] In my view, this provision must be interpreted to mean that the RPD is not required to follow technical rules of evidence, such as the *Mohan*/*Abbey* test to determine the admissibility of expert evidence. In other words, administrative tribunals such as the RPD, which are not "bound by technical or legal rules of evidence" are permitted to admit evidence that would normally be inadmissible before a civil court (see the discussion in *Canadian Recording Industry Association v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322 at paras 13-22 [*CRIA*], citing *Suchon v Canada*, 2002 FCA 282 at paras 31-32 [*Suchon*]). In this regard, the discussion of the Federal Court of Appeal in *Suchon*, referred to in *CRIA* (at para 18) is of interest and reads as follows with my emphasis:

> [31] Finally, contrary to the view expressed by the Tax Court Judge, subsection 18.15(4) of the *Tax Court of Canada Act* may require the Tax Court Judge in an informal proceeding to ignore the technical and legal rules of evidence, including the provisions of the *Canada Evidence Act*…if to do so would facilitate an expeditious and fair hearing of the merits of the appeal. Evidence tendered in an informal proceeding cannot be excluded simply because it would be inadmissible in an ordinary court proceeding.
>
> [32] That is not to say that a Tax Court Judge in an informal proceeding is obliged to accept all evidence that is tendered. There is no such requirement. However, it is an error for a Tax Court Judge in an informal proceeding to reject evidence on technical legal grounds without considering whether, despite the ordinary rules of evidence or the provisions of the *Canada Evidence Act*, the evidence is sufficiently reliable and probative to justify its admission. In considering that question, the Tax Court Judge should consider a number of factors, including the amount of money at stake in the case and the probable cost to the parties of obtaining more formal proof of the facts in issue.

[56] Again, I take from this that the RPD may refuse to admit expert evidence "when it has

reason to do so" (*Drummond* at para 9). While not binding on the RPD, the criteria set forth in *Mohan/Abbey* may be useful in allowing it to determine if such reason to refuse admission of expert evidence arises. In other words, an administrative tribunal, like the RPD, is not bound to admit every document tendered by an applicant (*Suchon* at paras 31-32; *CRIA* at para 18; *Beltran v Canada (Citizenship and Immigration)*, 2016 FC 1143 at paras 10-20). From these cases, "reason to do so" seems to relate to expert evidence that lacks logical relevance (step 1 (a) above), or suggests that the expert is not qualified in the sense that he or she lacks in independence or partiality (step 1 (d) above). That said, following the principle of *Suchon* and *CRIA*, "necessity" and the gatekeeping step, normally considered at the admissibility stage by trial finders of fact, appear to be better reserved at the weight assessment stage for administrative tribunals.

[57] As I conclude that the RPD may apply the factors described in *Mohan* and *Abbey* on the benefit side of the cost issue equation to assist in the weight assessment analysis of an expert report, I will complete this analysis and briefly consider whether the RPD has jurisdiction to apply cost/benefit gatekeeping principles and how the reliability of its decisions could be enhanced by it assuming this jurisdiction.

(5) Reliability factors

[58] The decision of *Abbey*, which followed the *Mohan* approach's substance while reformulating it, describes the reliability factors that a trier of fact, such as the RPD, might employ to assess the weight of an expert report as follows: (1) necessity; (2) the subject matter of the evidence in terms of the significance of the issue to which it is directed; (3) the methodology

used by the proposed expert in arriving at his or her opinion; (4) the expert's expertise; and (5) the extent to which the expert is shown to be impartial and objective (*Abbey* at para 87).

[59] In *D.D.*, the Supreme Court of Canada adopted the necessity factor principles described in D. Paciocco, *Expert Evidence: Where Are We Now? Where Are We Going?* (1998), at 16-17, under the heading "Summary of General Approach to Necessity", I cite the excerpt distilling the conclusion, with my emphasis, as follows (at para 57):

> … When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As *Mohan* tells us, it is not enough that the expert evidence be helpful before we will be prepared to run these risks. That sets too low a standard. It must be necessary.

[60] The second of three expert opinions contained in the Report relating to 1) the Applicant's competency and need of a Designated Representative; 2) the credibility of her testimony before the RPD; and 3) risk of harm upon her removal to St. Lucia due to her mental disorders, can be considered *prima facie* necessary, in the sense that without consideration of these factors, the RPD might come to the wrong conclusion. For the same reason, the first factor described above concerning the significance of the subject matter to the outcome would also be met if the Applicant had sought a Designated Representative. The third opinion might be relevant to an officer's assessment of hardship under subsection 25(1) of the IRPA, though it likely would not be relevant to the issue of determining if the Applicant meets the criteria of sections 96 and 97 of the IRPA.

[61] However, there remains one area of analysis that the Paciocco Text considers a

standalone issue as a basis for inadmissibility, but in a weight assessment determination, I conclude bears on the issue of necessity. I refer to Dr. Devins' prognosis that apparent credibility problems in the Applicant's testimony will "likely" be caused by the "disorganizing effects of major mental illness and/or traumatic stress". I consider this opinion to be a form of impermissible "oath-helping". Even if the RPD is not authorized to make rulings on the admissibility of evidence on this basis alone, such conclusions in a report should nevertheless influence an assessment of the opinion's weight. This issue will be considered below, in addition to the remaining relevant issues described above (consideration of Dr. Devins' methodology, his expertise and the extent to which he is shown to be impartial and objective in the circumstances).

[62] In offering the opinions that follow, I am critical of the Report. However, there should be no misunderstanding that I attribute primary responsibility to the lawyers who Dr. Devins has relied upon to advise on what may appropriately be included in an expert's report. To the extent that practices have developed of which I am critical and are reflected in the Report, they are matters that retaining counsel should have prevented, though I instead suspect they have encouraged these practices over the years.

[63] Moreover, so many reports appear to have evaded challenges that some may mistakenly assume that in refugee law, the normal principles upholding the *reliability* of evidence in the assessment of weight, and the cases setting forth those principles, somehow do not apply. If nothing else, this decision serves to hopefully disabuse future assumptions that expert reports are not required to meet the basic rules of law that apply to all judicial and quasi-judicial procedures in Canada, even those in which the decision-maker is not bound to follow the "technical or legal"

rules of evidence.

(6) The rule against oath-helping

[64] In the Paciocco Text, under the title “the ultimate issue rule”, the authors consider the “rule against oath-helping”. In that section, the authors state that the ultimate issue of witnesses providing accurate testimony is an area in which decision-makers do not need assistance. An excerpt to that effect reads as follows (at 202, item 3.3):

> Triers of fact can discharge their central function of deciding the ultimate issue of whether witnesses are providing accurate testimony without the need for the opinions of others about whether those witnesses are being truthful. It is not just that such opinions are superfluous or unnecessary. Even though laypeople are capable of assessing credibility, determinations of credibility are notoriously difficult. There is a fear that if experts, or even laypersons familiar with witnesses, are permitted to express their opinions as to whether witnesses are telling the truth or furnishing accurate information, triers of fact might simply defer to those opinions rather than assessing credibility and reliability themselves.

[65] The rule against oath-helping prohibits the admission of evidence adduced for the purpose of proving that a witness is truthful. As described in the above passage, the right question is whether “triers of fact can discharge their central function of deciding the ultimate issue of whether witnesses are providing accurate testimony without the need for opinions of others about whether those witnesses are being truthful.”

[66] Permissible oath-helping is evidence proven to be necessary to assist the trier of fact in properly evaluating the credibility of witnesses. As indicated in the Paciocco Text, “the law

therefore draws a distinction between opinion evidence ‘about credibility’ (which is inadmissible because of the rule against oath-helping) and opinion evidence ‘relevant to credibility’” (at 204). For clarity purposes “about credibility” in the above-quoted passage refers to the credibility of the witness testifying, i.e. does the opinion address the witness’s credibility? If so, it is impermissible.

[67] In *R v Reid* (2003), 177 CCC (3d) 260, the Ontario Court of Appeal stated that the evidence’s purpose was to educate the trier of fact about an issue (in that matter being the nature of battered women’s syndrome), and its possible effects on disclosure patterns (evidence generally relevant to credibility), instead of expressing an opinion with a conservative degree of possibility that inconsistencies in a given witness’ evidence could possibly be (“possible effects”) discounted on that basis.

> [46] In my view, Dr. Jaffe's evidence was admissible but only for a limited purpose. It should have been restricted to a brief description of the nature and root causes of the conditions known as Battered Women's Syndrome and Post-traumatic Stress Disorder and their possible effects on disclosure patterns. Had the evidence been so limited, it could have been given in brief compass.
>
> [Emphasis added.]

[68] The expert’s evidence will be rejected if it is cast in a fashion that has more impact in revealing the expert’s belief of the complainant, or a specific witness, than in educating the trier of fact about the behaviours and characteristics of the type of conduct (*R. v Llorenz*, 2000 CanLII 5745 (ON CA) [2000] OJ No 1885; *D.D.* at paras 19-20).

[69] Additionally, in terms of reliability, the Paciocco Text notes that the permissible

instances of oath-helping tend to be recognized examples of witness testimony problems that regularly occur, such as that of the battered women syndrome or recantations of allegations of sexual abuse by children (at 204). In other words, the Applicant's psychological circumstances can be validated in the profession by other self-situated subjects. There does not appear to be a case in which the stress of testifying, even objectively demonstrated by testing (not the situation here) and/or interview, has been sufficient to affect a decision-maker's credibility finding. Certainly, there is nothing supporting the notion that such a prognosis could be greater than a conservative possibility at best.

[70] Applying these precepts to the Report, I find that Dr. Devins' prognosis that inconsistencies, etc. that may arise in the Applicant's testimony during the refugee hearing will likely be attributable to her mental disorders, rather than attempts to evade or obfuscate, is clearly evidence relevant to the Applicant's credibility, rather than evidence generally relevant to the subject matter of credibility at large.

[71] Ultimately, the Report's categorical statements that the Applicant is credible and that any inconsistency should not be attributed to an intent to mislead is impermissible oath-helping. Furthermore, as discussed below, this conclusion suggests partiality by pegging the degree of reliability of Dr. Devins' opinion at the probative level of a likelihood and is not supported by any reliable scientific evidence, references, or documents. These opinions are very far removed from permissible oath-helping, where an expert would provide information *relevant to credibility*, through adequately explained scientific methodology. In this case, however, the Report provides the RPD member with a ready-made inference about a specific individual,

which is an impermissible opinion about *the Applicant's credibility*.

(7) Reliability assessment of expertise and methodology to provide opinions

[72] The "benefit" factors described in *Abbey*, as a component of the cost/benefit analysis carried out in the gatekeeping admissibility exercise, may serve to assess the reliability and probative weight of expert reports filed in RPD proceedings.

[73] In *Abbey*, the Court stressed the significance of testing the expert's methodologies against those accepted in the field, with my emphasis (at para 120):

> [120] The significance of testing the expert's methodologies against those accepted in the field was highlighted in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999), at p. 152 U.S.

[74] The objective of the gatekeeper function is to ensure the reliability and legal relevance of expert testimony. It is also to ensure that in the courtroom, whether basing testimony upon professional studies or personal experience, an expert employs the same level of intellectual rigour characterizing the practice of experts in their field.

[75] Ensuring that expert testimony is reliable and legally relevant can therefore be achieved by referring to scientific professional studies in the field at issue, or alternatively, by the expert's personal experience. However, one should not hold an expert to a lower standard of requisite intellectual rigour in RPD proceedings if the opinions are to have meaningful probative value.

[76] On my reading of the Report, Dr. Devins does not appear to significantly rely on scientific professional tests, as one would expect a psychological expert to do. Rather, under the title "Approach to Psychological Assessment" he states that "interview data are supplemented by standard psychological tests." According to the Report, he administered the Minnesota Multiphasic Personality Inventory F-PTSD Scale [MMPI] on the Applicant. However, Dr. Devins provided neither an indication of what the MMPI was designed to establish, nor the results of the MMPI after administering it on the Applicant. Thus, the Report's contents appear to be entirely based on the information obtained from interviewing the Applicant, typically said to last one hour, but without any specific duration mentioned in the Report and without specific reference to the outcomes or findings of the MMPI that had apparently been administered.

[77] In determining whether opinions gained from personal experience are relevant and reliable, *Abbey* is again highly instructive on the approach that a court, or in this case the RPD, should follow. The methodology assessed in *Abbey* was that employed by an expert sociologist. His opinions were described as being "based on knowledge he acquired about a particular culture through years of academic study, interaction various ways with members of that culture and review of the relevant literature" (at para 116). The Ontario Court of Appeal remarked that the expert's evidence could not be regarded as "scientific theory"; rather, it was the expert's understanding, from his knowledge and research, of the meaning of certain symbols within gang culture.

[78] The Court described a series of questions that may be relevant when addressing the reliability of an opinion that was based upon research and experiences of the expert alleging a

specialized knowledge, which are as follows (at para 119):

> -- To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
>
> -- To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
>
> -- What are the particular expert's qualifications within that discipline, profession or area of specialized training?
>
> -- To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
>
> -- To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?
>
> -- To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
>
> -- To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
>
> -- To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
>
> -- To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?

[79] The Court then briefly described the evidence presented by the sociologist, that it considered satisfied the reliability requirements as follows, with my emphasis:

> [122] Dr. Totten <u>testified at length about the techniques and methods he used in his research to assemble and verify the information</u> he ultimately drew on to advance his opinion. <u>While acknowledging that he could not ensure</u> that all the information he

> received from gang members was accurate, he explained the various methods used in an attempt to maximize the veracity of the information received. Dr. Totten testified that the methodology he followed was well established within his field of study and was entirely consistent with the methods used by others conducting the same kind of research. For example, Dr. Totten explained several ways in which the concept of peer review was used in his field. His studies were all peer reviewed using those techniques.

[80] This foregoing list of pertinent reliability-proving questions, in addition to the example of how they were applied by the expert in *Abbey*, demonstrate just how little cogent supporting evidence Dr. Devins provided to prove his specific qualifications or to validate the methodologies underlying his opinions.

[81] At first blush, his credentials appear highly pertinent to the issues in question. He has spent a lifetime practicing clinical psychology in Ontario since 1966. He has conducted innumerable psychological assessments of refugee claimants and others seeking permission to stay in Canada. In addition to his qualifications as a psychologist, he is also a professor of psychiatry at the University of Toronto and head of the Psychosocial Oncology and Palliative Care Research Institute at the University Health Network. He also holds senior positions with a number of different scientific and health organizations. He has also received a number of awards honouring his significant contributions to psychological and medical research and his other work.

[82] Of more particular relevance to his expertise in this matter are his credentials as associate editor of *assessment*, a scholarly journal devoted to psychological measurement and assessment, and his appointments to other editorial boards. He states that his scholarly work focuses on

stress, coping and cultural factors as they shape the psychological impact of disease.

[83] However, the problems start with the fact that these assertions of relevant scholarly work are not supported beyond the general statements just described. This is a severe handicap to Dr. Devins' attempt to demonstrate his expertise in psychological assessment and the reliability of his methodology relied on to prepare the Report.

[84] Dr. Devins' initial statement said to support the reliability of his psychological assessments is found under the title of "Approach to Psychological Assessment". He states as follows:

> "Reliability and validity of interview data are evaluated by a number of means, including but not limited to: internal consistency; nonverbal behaviors and its congruence with self-report; the number of extremely-low-frequency symptoms reported; and congruence between reported symptoms and known patterns of distress."

[85] This brief statement is clearly inadequate to meaningfully inform the RPD, or to shore up the reliability of his opinions, which appear to be based solely upon information that the Applicant provided him. The relatively esoteric and unfamiliar language he uses is somewhat reminiscent of Justice Sopinka's warning in *Mohan* regarding opinions "[d]ressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents" (at 21). Even so, it is not much of an interpretive exercise to infer that these terms express the same factors that the RPD would consider if the Applicant were to provide testimony confirming the evidence relied upon by Dr. Devins, which she is required to do in some form, without which his opinion loses most of its probative value.

[86] Under the same title, Dr. Devins further states as follows concerning the reliability of his methodology, with my emphasis:

> This approach to assessment is well-established and anchored in the philosophy that a standard format provides a valid, reliable, and comprehensive delineation of psychological strengths and weaknesses.

[87] The statement is similar to some extent to that quoted in *Abbey* at para 122 above that the methodology the sociologist followed was "well-established within his field of study and was entirely consistent with the methods used by others conducting the same kind of research." The difference is that the Court in *Abbey* noted that the expert "explained several ways in which the concept of peer review was used in his field [and t]he studies were all peer-reviewed using those techniques." There is no supporting information to demonstrate that Dr. Devins' approach is well-established, that it is based on some form of philosophy whatever that may be, or that he is following a standard format that has been validated by his research and has been peer-reviewed. It is not sufficient for an expert to simply make statements of this nature. They must be supported by evidence.

[88] In my view, the overriding problem with the Report's reliability is that it is founded entirely on Dr. Devins' assessment of the Applicant's answers to his questions, with some tangible reference to demeanour when responding. While I find that this observation applies throughout the Report, it is probably best evidenced in the section held out to demonstrate the reliability of his opinions as described under the title, "Test Behaviour and Reliability of the Interview Data". The short passage reads as follows, with my emphasis:

> Test Behaviour and Validity of the Interview Data
>
> Ms. Moffat cooperated fully. She established eye contact and responded directly to the questions. Bags appeared beneath her eyes. The interview was stressful for Ms. Moffat. Almost immediately, she cast her gaze downward, indicative of shame. She wrung her hands. She experienced flashbacks and distress (e.g., "I feel pain. I feel I want to cry right now"). She experienced depersonalization (i.e., an unconscious psychological defence in which emotions are "split off" from associated threat-related thoughts, memories, or other experiences, resulting in a feeling of unreality, as if one were in the dream or a movie). Concentration problems rendered it difficult to focus. Responses were credible and internally consistent. Nonverbal behaviors and emotional display were congruent with the themes presented in response to the questions. Psychological testing indicated a social-desirability bias, but I do not believe this threatens the validity of the self-report. I believe Ms. Moffat did her best to present valid and reliable information. The events to which she was exposed in St. Lucia were traumatic. Deleterious psychological after-effects persist. Her distress has begun to subside because Ms. Moffat feels safe in Canada.

[89] This paragraph is somewhat confusing. The last three sentences are irrelevant to the issue of the interview data's reliability. Like the rest of the Report, which mainly chronicles information obtained from the Applicant, it mixes information she provides with his observations (stressful interview, depersonalization, concentration problems). Dr. Devins then provides two opinions intended to buttress the reliability of her statements: "responses were credible and internally consistent. Nonverbal behaviors and emotional display were congruent with the themes presented in response to the questions." The language is unnecessarily esoteric to assist the RPD either as to what these statements refer to, or the observations said to support the interview data's reliability. With respect, it is not apparent how the premises or logic of this methodology based on finding her credible in response to his questions, supports the reliability of his opinions. The reliability of his opinions is based on the reliability of her answers, yet she is

not mentally well and her answers at the hearing may not appear credible. In any case, the exercise of commenting on the Applicant's credibility is impermissible oath-helping.

[90] Dr. Devins also references "[p]sychological testing" that indicated a "social-desirability bias." This testing can only refer to the MMPI assessment. Again, the Report neither indicates what the test was designed to establish nor the results of the Applicant's MMPI assessment, or what "social-desirability bias" is or why it might be relevant. Presumably, the test is relevant to issue of PTSD. It is difficult to discern if the testing even confirmed his later conclusion that the Applicant suffers from "stress-related cognitive problems". At the outset of the Report, he stated that if the test would support his conclusions, he would use the results to supplement his findings from the interview. As near as I can figure, this was not done.

[91] In short, Dr. Devins' claims of the reliability underlying his opinions about the Applicant's credibility are premised, to some considerable extent, on references to her demeanour from observations during the interview. It is difficult to make a case that his expertise, in determining the Applicant's credibility in what he describes as a stressful situation, based on her demeanour is superior to that of the RPD.

[92] Dr. Devins has also not provided any meaningful information supporting the reliability of his conclusion that the Applicant suffers from major mental illness. While not specifically relied upon by the Applicant, this opinion strongly supports the credibility mitigating opinion. If an adult claimant is so mentally disabled as to require a Designated Representative, anything she says cannot be relied upon.

[93] Dr. Devins' Report is based upon her statements to him that she has symptoms of what would be a serious mental illness (hallucinations, voices advising self-harm, sensations of insects crawling on her skin, racing thoughts, and delusions that someone has control of her mind). However, there are no examples in the interview itself of conduct representing major mental illness. Furthermore, nothing points to the reliability of statements other than Dr. Devins' opinion that she is credible, despite her major mental illness. There is no previous corroborating historical evidence of mental illness. Self-reported symptoms of such severe mental illness favourable to legal procedures coincidentally arising at the last moment require substantiation to possess any degree of probative value.

[94] In the last paragraph of the Report, in which Dr. Devins expresses his clinical impressions, he states that "Ms. Moffat satisfies diagnostic criteria for schizoaffective disorder, depressive type (295.70) in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th edition, DSM-IV)". This is insufficient to provide scientific or other well-established psychological teachings, demonstrating a reliable interview methodology providing a nexus between her statements and his opinion of a major mental illness. Again, this is just a statement, without any explanation as to how her evidence is sufficiently reliable to establish what her schizoaffective disorder is, in relation to a statistical manual, when neither the disorder is explained, nor is there evidence of "statistics" playing any role in his opinions or the factors used to make this determination.

[95] The opinion that the Applicant suffers from a major mental illness is used to support an opinion that the RPD should consider appointing a Designated Representative to act on her

behalf during the hearing. In effect, he is suggesting that she is not competent to testify due to her mental condition.

[96] However, in *R v Parrott*, 2001 SCC 3, the Supreme Court of Canada held that competency is not a matter outside the experience and knowledge of a judge, rather: "It is the very meat and potatoes of the trial court's existence" (at para 57). The same would apply to the RPD member whose daily functions entail assessment of the capability and proficiency of witnesses to testify in refugee proceedings. Moreover, the RPD expressly disagreed with Dr. Devins' opinion in finding that "[t]he claimant did not appear to have any problems in testifying". Admittedly, the RPD made this finding five years after the Report was drafted; however, this settles the issue as a finding of fact that can only be overturned if the error is plain to see, or was not supported by some evidence, which was clearly not the case here.

[97] Proof of incompetency is also a high threshold (*R. v D.A.I.*, [2012] 1 SCR 149). An example of this can be found in the decision of *Regina v Hawke*, (1975), 7 O.R. (2d) 145, in which the evidence disclosed a lengthy history of serious mental illness, including treatment at psychiatric facilities, which illness resulted in the misconception of reality, diminution of judgment and ability to recount, and active hallucination under stress. In any case, notice under section 20 of the RPD Rules was not provided to the RPD and so the issue as to whether a Designated Representative ought to be appointed was not before the RPD.

[98] As a final exercise in considering the reliability of Dr. Devins' opinion, it is useful to compare his evidence to support his expertise and methodology with the nine relevant

considerations to establish the reliability of an expert opinion suggested at para 119 of *Abbey*.

[99] In my view, only the first question would receive a positive conclusion: whether the opinion is offered in a recognized discipline, profession or area of specialized training.

[100] The second question, "to what extent is the work within that field subject to quality assurance measures…" appears positive. However, it becomes a negative factor when one remarks that Dr. Devins did not refer to quality assurance measures applied to his research or methodology that would support opinions, which appear to be solely based on the subject's answers to his questions.

[101] The answer to the remaining questions asking to what extent the evidence of reliability is provided is little or none at all, i.e.:

> 3. the particular expert's qualifications within the field of specialized training claimed;
>
> 4. the extent to which the opinion rests on data accumulated through various means is the data accurately recorded, stored and available;
>
> 5. the extent to which the reasoning processes underlying the opinion and methods to gather relevant information are clearly explained and susceptible to critical examination by the RPD;
>
> 6. the extent the methodologies used to support the opinion have been accepted by those working in the particular field;
>
> 7. the extent to which the accepted methodologies promote and enhance the reliability of information gathered and relied upon;
>
> 8. the extent to which the opinion honors the boundaries and limits of the discipline; and finally;

> 9. the extent to which the opinion is based on data and information gathered independently of the specific case, or more broadly of the litigation process.

[102] Information supporting the reliability of Dr. Devins' opinions from answers to these questions is not apparent, such that these questions remain unanswered and the Report is therefore unreliable.

[103] I would draw particular attention to these last two questions. With respect to honouring the boundaries and limits of his discipline, there is no mention anywhere in the Report of dissenting factors or concerns of a possibility that the Applicant could be exaggerating or even misstating her symptoms. Dr Devins' opinions are wholly unqualified.

[104] With respect to the final question, the Report is entirely dependent on the specific case and is focused on the refugee determination process and its outcome of possible removal to her country of origin. These questions are aimed at issues of self-interest and bias. On both counts, I conclude that Dr. Devins' opinions fail, as discussed in the next section regarding the expert's independence and impartiality.

(8) The requirement that experts be independent and impartial

[105] As noted in the Paciocco Text, "[e]xperts are a unique class of witnesses. Because they are brought in to instruct the trier of fact, their primary duty is to the court and not to the party that called them" (at 223). As discussed above, evidence therefore can be excluded on the inadmissibility precondition of the expert not being properly qualified for lack of independence

and/or impartiality. However, in most cases, these issues go to the weight of the evidence (*Carmen Alfano Family Trust (Trustee of) v Piersanti*, 2012 ONCA 297; *White Burgess*).

[106] "Independence" relates to the connexion between the expert and the case, usually in relation to the party, the case or its outcome, as opposed to institutional links (*Beazley v Suzuki Motors Corp*, 2010 BCSC 480 at para. 21). "Impartiality" relates to the expert's state of mind, whether the expert is biased and favours the party calling the expert (Paciocco Text at 224).

[107] The terms bias and partiality are sometimes used interchangeably. However, there is a difference in their meaning. Bias, usually used in relation to appearances and independence, refers to apparent attitudes from associations; whereas partiality speaks to conduct, usually in relation to acting on an apparent bias. The distinction was noted by Doherty J.A., in *R v Parks*, (1993), 15 OR (3d) 324, 84 CCC (3d) 353, and cited with approval by Cory J. in *R v R.D.S.*, [1997] 3 SCR 484 , as follows (at para 107):

> [107] …
>
> > Partiality has both an attitudinal and behavioural component. It refers to one who has certain preconceived biases, and who will allow those biases to affect his or her verdict despite the trial safeguards designed to prevent reliance on those biases.
>
> In demonstrating partiality, it is therefore not enough to show that a particular juror has certain beliefs, opinions or even biases. It must be demonstrated that those beliefs, opinions or biases prevent the juror (or, I would add, any other decision-maker) from setting aside any preconceptions and coming to a decision on the basis of the evidence: Parks, supra, at pp. 336-37.

[108] Descriptions of different forms of biases are found in *McWilliams' Canadian Criminal*

Evidence (4d ed. Looseleaf (Aurora, Canada Long Book, 2010, at 12: 30.20.50 footnotes 398b-398g). A comprehensive description of these different biases is also presented in Paciocco, "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts", (2008-09) 34 Queen's L.J. 565.). These biases, with my emphasis are as follows:

> Bias or partiality, an approach or attitude at odds with objectivity, neutrality and uninfluenced search for the truth, that can range from the unconscious circumstances to the rare instance of patent partisanship or corruption.
>
> An adversarial bias includes "all pressures that are inherent in the adversarial model" including selection and association bias.
>
> Selection bias is the term used to describe the process of parties selecting expert witnesses predicted to favourably advance their positions.
>
> Association bias, linked as well to considerations of independence, relates it to an alignment posture motivated by a desire on the part of the expert to please the retaining employer or under pressure to do so, the existence of a personal relationship, shared ideological objectives, or the influence of communications and information upon the expert's analysis and conclusions.
>
> The latter circumstance, frequently described as "confirmation bias", involves a tendency to collect interpret, analyze and form opinions in a fashion supporting the belief or expectation of the retaining party while diminishing the significance of or altogether ignoring, or contra-interpreting, contradictory facts pointing in a different direction.

[109] In reviewing the Report, I find much to be concerned about. The Report apparently demonstrates adversarial bias, which includes all three subcategories of bias, i.e. selection, association and confirmation biases. To some extent, I also find the Report demonstrates partiality through its apparent advocacy in support of the Applicant's refugee claim, and against any outcome that would see her removed from Canada.

[110] While I have already noted that issues with an expert's independence or impartiality may appropriately form a basis for declaring their evidence to be inadmissible before an administrative tribunal (such as the RPD) in exceptional cases (*Drummond*; *Deemar*; *White Burgess*), the following comments relate to considerations which may affect the weight that the RPD affords such expert evidence.

[111] Concerns about Dr. Devins' adversarial bias in all three forms are predicated on the mere fact that he has provided an unheard of number of expert reports in support of refugee claimants. The highly favourable report in terms of its evidentiary impact is fed by an apprehension of bias from his long association with members of the immigration bar who retain him with such frequency, which are indicia of the strongest possible selection bias. This is compounded by what I would describe as a remuneration bias in terms of the significant revenue these reports would have generated over the years such that they appear to comprise a significant source of continuing income for Dr. Devins (see also question 9 of the reliability factors set forth in *Abbey* at para 119). This supports a strong association bias in view of pleasing the retaining lawyers with highly favourable reports that assist in providing clients with favourable outcomes as an incentive to continue retaining him.

[112] The content of the Report that I find most disquieting turns on the unwavering support it provides the Applicant in obtaining a positive outcome from the refugee determination process. This is best demonstrated by repeating some of his opinions. They are, above all else, directions to the RPD, mostly imperative in tone, based upon categorical conclusions, as demonstrated in the following examples, with my emphasis:

> Ms. Moffat *will be* nervous and inhibited at the Refugee Hearing. She *will be* intimidated by people in authority. It *will be* important to exercise sensitivity during the questioning to avoid re-traumatizing her."
>
> I discussed the notions of a Designated Representative with her and Ms. Moffat[t] indicated receptivity. This *should be* given consideration
>
> Symptoms may arise during the Hearing … Should such problems become evident, it *will be* important to understand that they likely reflect that disorganizing effects of major mental illness and/or traumatic stress rather than an effort to evade or obfuscate.
>
> Such treatment must not be interrupted. Ms. Moffat's condition can improve with appropriate care and guaranteed freedom from the threat of removal. If refused permission to remain in Canada, her condition *will deteriorate* (e.g., possible decompensation [a suicidal ideation]). As noted, it *will be impossible* for Ms. Moffat to feel safe anywhere in St. Lucia.
>
> Appointment of a Designated Representative *should be* considered
>
> I hope that this report will assist you and the courts in determining the best possible outcome for Ms. Moffat

[113] All of the above excerpts represent impermissible overreach by Dr. Devins and are examples of advocacy on behalf of the Applicant. These are not opinions intended to assist the RPD to better understand the influence of mental disorders in some form that are relevant to issues before the RPD. Rather, they are directives, and in many cases categorical, with the view to persuading the RPD to implement an obvious strategy in support of her lawyer's presentation of its case before the RPD.

[114] Regarding the opinion that the appointment of a Designated Representative *should be considered*, that would likely dispense the Applicant from testifying before the RPD; moreover, the opinion is directive as to how the RPD should conduct itself in this regard on two occasions,

the second being a repetition as the departing opinion of a "Clinical Impression". They are directives in that Dr. Devins is advising the RPD that it should consider appointing a representative. Not to be forgotten is the fact that this opinion is based solely on the statements and information supplied by the Applicant and is otherwise unsubstantiated by any documents or statements describing objective psychological methodologies used.

[115] I have already described the patent nature of Dr. Devins' oath-helping directions. The advocacy aspect categorically directs the RPD to exercise sensitivity, etc. ("it will be important to understand"). This is a secondary limitation on the RPD's capacity to assess credibility. First, the Applicant should not be forced to testify, instead allow her case to be heard through a Designated Representative. But if she must testify, credibility issues should be anticipated and it is important to understand that they will likely be caused by her mental illness or stress-related disorders. In addition, the advice to the RPD is legalistically framed to provide a successful outcome by use of the term "likely": the legal threshold for a finding of fact, in this case the Applicant being a credible witness, as he found her to be during the interview.

[116] If framing a prognosis at this degree of probability, strongly corroborating scientific or peer-reviewed substantiation is required with reference to all the variables that would affect such a prediction, Dr. Devins has assumed the authority to determine the outcome of the decision on behalf of the RPD.

[117] Third, the Report's partiality and advocacy on behalf of the Applicant is apparent when Dr. Devins categorically states that she should not be removed to St. Lucia, and that it will be

"impossible" for her to feel safe there, which is the ultimate outcome that she seeks from any refugee or related process. Without any need to refer to the traumatic events alleged to have been suffered by the Applicant, Dr. Devins has expressed her fear for her safety on removal to her home country based on ostensibly scientific grounds. Immediately after opining on the need to continue to receive treatment for her safety, he adopts her fear of returning anywhere in St. Lucia. Without any foundation related to his expertise, this opinion describes the legal test of a "well-founded fear" required to establish persecution under section 96 of the IRPA.

[118] In summary, Dr. Devins could not have provided a more advantageous report in support of his lawyer's implied instructions for "a psychological assessment to accompany her request to remain in Canada".

[119] It is not my desire to single out a psychologist who appears to have contributed meaningfully to his profession over many years. Indeed, he may have developed some form of validated personal ability to predict with some degree of reliability to make his prognoses, but doubtfully however, as a likelihood, and not explained in his report. It is best in such matters to be guided by the extensive jurisprudence warning of the dangers caused by overreaching experts unsupportedly contending to possess reliable diagnostic and prognostic capabilities. Nor do I think it plausible that evidence is forthcoming to demonstrate that the science of psychology or psychiatry has advanced to the point of displacing experienced decision-makers in assessing the credibility and trustworthiness of persons testifying in front of them when issues of mental competency supposedly arise unless corroborated by an independently reliable historical medical file.

[120] In any event, credibility problems described by the RPD in this case tend to belie Dr. Devins' conclusions. It appears that the Applicant got along just fine in the five years after receipt of an opinion that she was suffering a major mental illness and significant stress disorder, without any form of psychiatric or psychological treatment. Such is the confidence that lawyers attach to the unassailable character of expert medical reports, that even in such challenging circumstances they argue that giving the Report little weight was unreasonable.

(9) A more rigorous approach to consideration of expert medical reports

[121] It is fair to conclude that medical experts retained by counsel have had their way with little constraint in the content and nature of the medical and psychological reports filed in refugee matters. It is perhaps time to consider whether rules or practices of counsel and their experts might not be adopted.

[122] As a starter, one could consider the Code of Conduct for Expert Witnesses which is a Schedule to the *Federal Courts Rules*, SOR/98-106. It provides a statement on the "General duty to the Courts" and a standard format to be followed for the presentation of expert reports. A copy of the relevant Code provisions is attached as Appendix 1 to this decision. Affirming the expert's duty to the decision-maker and adopting the structure of the report outlined in the Code serves the purpose of enhancing the probative value of the report.

[123] In addition, aspects of the content of an expert's report at paragraph 3 of the Code, are relevant to describe its preferred structure that best conveys the information necessary to buttress the reliability of the report.

[124] Otherwise, such rules or practice directives might call upon representatives to provide available corroborative materials with an expert report or an explanation for the absence of those materials. This could include relevant supporting historical medical records, including those from the country of origin, information on the client's medical history available from provincial insurance programs, i.e. in Ontario, the Ontario Hospital Insurance Program, lists of medications purchased by the claimant from pharmacies, the expert's notes, including interview notes or a video of the interview of the claimant, test documents, and the results of tests. Alternatively, the RPD could consider the absence of normal supporting documentation and information corroborating the expert report as a matter affecting its weight.

[125] Similarly, rules and practice directives could include stipulations of appropriate counsel conduct. This could include cautioning parties not to use the request for expert reports as a "fishing expedition" in the hopes of searching out and providing psychological evidence to support the client's case, as appears to be the circumstance in this case. Counsel should understand not to communicate with an expert witness in any manner likely to interfere with the expert's duties of independence and objectivity, as stated in the *Principles Governing Communications with Testifying Experts*, (Toronto: The Advocates' Society, 2014). "Woodshedding" the client in preparation for an interview with the expert would fall in this category of impermissible counsel interference with the expert's functions.

[126] But even without these rules or practices, the factors discussed above should assist refugee and immigration decision-makers and counsel in more comprehensively addressing the reliability of expert reports for the assignment of evidentiary weight they deserve. They can also

be considered a form of guidelines that medical experts should seek to adhere to if their reports are to receive any meaningful evidentiary weight by refugee and immigration decision-makers.

VI. Conclusion

[127] The application is dismissed. No questions are certified for appeal.

JUDGMENT in IMM-3484-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no questions are certified for appeal.

"Peter Annis"
Judge

APPENDIX 1

Federal Courts Rules, SOR/98-106, Rule 52.2

Code of Conduct for Expert Witnesses	**Code de déontologie régissant les témoins experts**
General Duty of the Court	**Devoir général envers la Cour**
1 An expert witness named to provide a report for use as evidence, or to testify in a proceeding, has an overriding duty to assist the Court impartially on matters relevant to his or her area of expertise.	1 Le témoin expert désigné pour produire un rapport qui sera présenté en preuve ou pour témoigner dans une instance a l'obligation primordiale d'aider la Cour avec impartialité quant aux questions qui relèvent de son domaine de compétence.
2 This duty overrides any duty to a party to the proceeding, including the person retaining the expert witness. An expert is to be independent and objective. An expert is not an advocate for a party.	2 Cette obligation l'emporte sur toute autre qu'il a envers une partie à l'instance notamment envers la personne qui retient ses services. Le témoin expert se doit d'être indépendant et objectif. Il ne doit pas plaider le point vue d'une partie.
Experts' Reports	**Les rapports d'expert**
3 An expert's report submitted as an affidavit or statement referred to in rule 52.2 of the *Federal Courts Rules* shall include	3 Le rapport d'expert, déposé sous forme d'un affidavit ou d'une déclaration visé à la règle 52.2 des *Règles des Cours fédérales*, comprend :
(a) a statement of the issues addressed in the report;	a) un énoncé des questions traitées;
(b) a description of the qualifications of the expert on the issues addressed in the report;	b) une description des compétences de l'expert quant aux questions traitées;

(c) the expert's current *curriculum vitae* attached to the report as a schedule;

c) un *curriculum vitae* récent du témoin expert en annexe;

(d) the facts and assumptions on which the opinions in the report are based; in that regard, a letter of instructions, if any, may be attached to the report as a schedule;

d) les faits et les hypothèses sur lesquels les opinions sont fondées, et à cet égard, une lettre d'instruction peut être annexée;

(e) a summary of the opinions expressed;

e) un résumé des opinions exprimées;

(f) in the case of a report that is provided in response to another expert's report, an indication of the points of agreement and of disagreement with the other expert's opinions;

f) dans le cas du rapport qui est produit en réponse au rapport d'un autre expert, une mention des points sur lesquels les deux experts sont en accord et en désaccord;

(g) the reasons for each opinion expressed;

g) les motifs de chacune des opinions exprimées;

(h) any literature or other materials specifically relied on in support of the opinions;

h) les ouvrages ou les documents expressément invoqués à l'appui des opinions;

(i) a summary of the methodology used, including any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out, and whether a representative of any other party was present;

i) un résumé de la méthode utilisée, notamment des examens, des vérifications ou autres enquêtes sur lesquels l'expert se fonde, des détails sur les qualifications de la personne qui les a effectués et une mention quant à savoir si un représentant des autres parties était présent;

(j) any caveats or qualifications necessary to render the report complete and accurate, including those relating to any insufficiency

j) les mises en garde ou réserves nécessaires pour rendre le rapport complet et précis, notamment celles qui ont trait à une insuffisance de

of data or research and an indication of any matters that fall outside the expert's field of expertise; and

(k) particulars of any aspect of the expert's relationship with a party to the proceeding or the subject matter of his or her proposed evidence that might affect his or her duty to the Court.

données ou de recherches et la mention des questions qui ne relèvent pas du domaine de compétence de l'expert;

k) tout élément portant sur la relation de l'expert avec les parties à l'instance ou le domaine de son expertise qui pourrait influencer sur son devoir envers la Cour.

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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