Federal Court  Cour fédérale

Date: 20101124

Docket: IMM-4423-09

Citation: 2010 FC 1175

Ottawa, Ontario, November 24, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BRANDON CARL HUNTLEY

Respondent

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REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD), dated August 27, 2009 (Decision), which granted the Respondent status as a Convention refugee pursuant to section 96 of the Act.

BACKGROUND

[2] The Respondent, Brandon Carl Huntley, is a white, male citizen of the Republic of South Africa (South Africa). He claimed refugee status on the basis of fear of discrimination, harassment and possible death because of his race. The Respondent reports having been attacked and assaulted by black South Africans on numerous occasions. His attackers used racial slurs.

[3] The Respondent first came to Canada on a work permit in 2004 to work as an amusement park attendant. He then returned to South Africa in November 2004 upon the expiration of his first work permit. The Respondent returned to Canada on another work permit in June 2005. That permit expired in December 2006.

[4] The Respondent remained in Canada illegally upon the expiration of his second work permit. He married Melani Crête, a Canadian citizen, in August 2007. He then applied for refugee status in April 2008. The Respondent's application was allowed. However, the Minister of Citizenship and Immigration (Applicant or Minister) now seeks to quash the Decision.

[5] The Respondent brought a motion on March 31, 2010 requesting that this matter be converted from an application to an action, or that the Minister be ordered to forward to the Respondent his reasons for commencing judicial review. Justice Yvon Pinard heard the Respondent's motion and issued an order on April 16, 2010 dismissing it.

DECISION UNDER REVIEW

[6] The RPD determined that the Respondent was a credible witness and accepted his evidence with regard to the attacks he had suffered. Moreover, the RPD determined that the Respondent's allegations of persecution of white South Africans were enhanced by the oral testimony of Ms. Lara Anne Kaplan, who is also a citizen of South Africa.

[7] Ms. Kaplan stated that "things started to shift to the disadvantage of the white South Africans" after Nelson Mandela's release from prison and his election as president. She said that part of the shift included an attempt to "get the formally (*sic*) underprivileged African-South Africans to move into the business world and start earning better money." This was known as Black Economic Empowerment (BEE). Moreover, Ms. Kaplan suggested that affirmative action in South Africa involves the use of different standards in order to allow black South Africans to attain positions of influence and power. According to the RPD Member, "[a]t the time, [the witness] was at the top of the corporate ladder. But some 12-13 years into her career, she noticed she was not receiving any further promotions and that 'a lot of black people were coming in to take our place.'"

[8] Ms. Kaplan also noted two incidents in which she was accosted by black South Africans and threatened with a gun.

[9] The RPD noted Ms. Kaplan's belief that "[black South Africans] believe that all whites are equally responsible for apartheid and that 'we should be eradicated and stomped on like an ant.'" She described the current situation in South Africa as being a "reverse apartheid", and claimed that all whites feel the hatred of black South Africans towards them.

[10] Ms. Kaplan alleged that the police in South Africa, who are themselves mainly Black South African, do not act upon crimes that black South Africans commit against white South Africans. It was the witness's view that this occurs because the police are "corrupt" and "in cahoots with the criminals." According to Ms. Kaplan, the police do not want to help white South Africans who are attacked. Because you are white, "you deserve it. [I]t's long overdue."

[11] Ms. Kaplan then described what happened to Robert Kaplan, one of her brothers. While Robert's son was asleep in the house, four black South African men broke into his house, apparently intending to harm his child. Robert pleaded with them not to harm his son and told them they could do what they wanted to him instead. Robert was then tied up, tortured, stabbed nine times, shot three times in the chest, burned with a hot iron and "left for dead." Robert survived this ordeal, although he required open-heart surgery and long-term intensive care.

[12] This incident was well-documented on the television and radio and in the newspapers. Ms. Kaplan stated her belief that the attack on Robert occurred because her brother was both white and wealthy. The RPD described the telling of this incident by Ms. Kaplan as follows:

> During the course of [the witness'] testimony, she broke down and cried openly. That was to be expected. What I did not expect was to see counsel, Russell Kaplan, also break down and cry while she was describing the torture of her brother. It turns out that counsel, Mr. Kaplan, is also a brother of the witness and Robert's brother. He was also born in South Africa and came to Canada some years ago as an immigrant. I gather from what I took out of the evidence that he left South Africa for the same reasons as his sister; namely, the reverse apartheid attitude which prevails in that country.

[13] The RPD then considered the documentary evidence presented, including *Daily Sun* article by Africa Ka Mahamba entitled "'Taking from whites is not a crime in SA,'" which reported that a leader of a Pretoria-based youth organization had condoned stealing from white people in the suburbs because "[t]he whites have stolen from us since 6 April 1652" and [t]aking from whites is not a crime because you repossess what belongs to you."

[14] Ms. Kaplan also provided the RPD with accounts of incidents about other people who had experienced psychological and physical damage as a result of attacks by black South Africans.

[15] One incident involved a woman's friend who, according to that woman, was shot to death for no reason "by scum-of-the-earth robbers" while waiting for his son to finish soccer training at a park. According to her, some black South African men were trying to rob a second woman of her cellular phone and, as they ran past, they shot the first woman's male friend in the neck. The RPD noted that Ms. Kaplan "has no doubt that he was shot simply because the victim was white and the

black killers knew they would get away with it, scot free." In the words of the RPD, Ms. Kaplan opined that, "in any other country, a mass genocide … on such a scale as is occurring against whites in South Africa would be considered genocide and crimes against humanity."

[16] The RPD then considered Ms. Kaplan's upbringing in a well-educated family. It noted: "[L]ittle did [the Kaplan family] expect that when Nelson Mandela came into power, that the government policies would shift to the extent that African South Africans were to become the masters and the white South Africans the servants, with all of its intended consequences."

[17] The RPD stated in its Decision that the "witness's evidence was the lifeline for the claimant's claim", and that she brought to the hearing a "vivid and detailed account" of what is occurring in South Africa with regard to white South Africans, as well as the indifference of the mainly black South African police force and its failure to protect them.

[18] The RPD then considered the Respondent's personal circumstances and noted that he had not sought refugee protection at the first opportunity. The RPD accepted that, on his first trip to Canada, the Respondent did not seek refugee status because he was not aware of the refugee system. Furthermore, on his second trip to Canada, the Respondent did not claim refugee status because he erroneously believed he was precluded from doing so because he does not speak French.

[19] The RPD noted that the Respondent had tried to join the Canadian Armed Forces to avoid returning to South Africa. The RPD also noted that "[h]e met his wife to be and fell in love with her.

He married her believing that he could use her to help him get permanent status in Canada. He was to find out later that 'she was not a nice woman.'" Consequently, he separated from her in or around December 2008.

[20] Although the RPD observed that a delay in making a refugee claim may affect the credibility of the claim, it found that, upon the expiration of the Respondent's work visa, he made attempts to solidify his stay in Canada by attempting to join the Armed Forces and by marrying a Canadian citizen. Accordingly, the RPD determined that the Respondent's "subjective fear of persecution remained constant and consistent up to and including the time he made his refugee claim."

[21] The RPD then considered country conditions in South Africa. It noted reports of serious human rights problems, including use of excessive force by the police, vigilante and mob violence and violence resulting from social, racial and ethnic tensions. The RPD noted the killings and violent crimes against white farmers and their families, which continue in rural areas.

[22] The RPD then considered some of the "reports" contained in the Respondent's Index of Documents, including such articles as M. Riordan-Bull Kleinmond's "Attacks have shown most of ANC to be racists" *Cape Argus* (31 May 2008) and David Bullard's "Loss of freedom creeps up on us like a face of wrinkles" *Sunday Times* (21 October 2007).

[23] The RPD went on to consider in more detail the murder of almost 2000 white farmers in South Africa, many of whom had also been brutally tortured. The RPD noted that "[s]ome victims have been burned with smoothing irons or had boiling water poured down their throats" and that "[t]his type of torture is consistent with the torture received by the witness' brother Robert." Pictorial evidence of some of these murders was included in the evidence before the RPD.

[24] The RPD found the following facts were proven on the evidence before it:

a. That the Respondent was attacked by black South Africans on "at least six or seven occasions because of his white skin";

b. That the Respondent "has scars on various parts of his body";

c. That Ms. Kaplan was attacked and threatened with guns by black South Africans "on two separate occasions because of the colour of her skin and perceived wealth";

d. That Ms. Kaplan's brother Robert, "who was tortured and shot by African South Africans and miraculously lived, now has major physical and psychological problems";

e. That Ms. Kaplan's brother Robert and her father "survived only because of their wealth, being able to install electronic and guard protection for themselves both inside and outside their homes."

[25] The RPD also found that the evidence before it demonstrated the "indifference and inability or unwillingness of the government and the security forces to protect White South Africans from persecution by African South Africans." The RPD determined that the Respondent had presented

"'clear and convincing proof' of the state's inability or unwillingness to protect him." Furthermore, the RPD held that "the claimant was a victim because of his race (white South African) rather than a victim of criminality and that he has established a link between his fear of persecution and one of the five grounds in the Convention definition."

[26] Moreover, the RPD determined that no viable Internal Flight Alternative (IFA) existed for the Respondent in any part of South Africa. It relied on the Europa World Yearbook 2008 in finding that black South Africans make up about 80% of the population, while white Europeans make up 9% of the population. Accordingly, the RPD found that the claimant would "stand out like a 'sore thumb' due to his colour in any part of the country."

[27] The RPD determined that the Respondent's fear of persecution by black South Africans was justified based on the objective evidence before it. Having considered the evidence and submissions of counsel, the RPD determined that the Respondent had satisfied his burden of establishing a serious possibility of persecution on the Convention ground of race.

ISSUES

[28] The issues on this application can be summarized as follows:

1. Whether the RPD erred in finding that the Respondent had sufficiently rebutted the presumption of state protection;

2. Whether the RPD erred in its assessment of the evidence;

3. Whether the violence and criminality experienced by the Respondent constitutes persecution;

4. Whether the RPD erred in its assessment of the Respondent's lack of subjective fear of persecution;

5. Whether the Minister's application for judicial review constitutes an abuse of process and breaches the Respondent's rights under the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (Charter).

STATUTORY PROVISIONS

[29] The following provisions of the Act are applicable in these proceedings:

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	**72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
Application	**Application**
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
[…]	[…]

(*d*) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; ….	*d*) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne; ….
Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[30] The following provision of the *Federal Courts Act*, R.S.C. 1985, c. F-7 is applicable in these proceedings:

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction	**18.** (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en

première instance, pour :

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

b) connaître de toute demande de réparation de la nature visée par l'alinéa *a*), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

(*a*) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

(*b*) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

(*c*) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

(*e*) acted, or failed to act, by

e) a agi ou omis d'agir en raison

reason of fraud or perjured evidence; or	d’une fraude ou de faux témoignages;
(*f*) acted in any other way that was contrary to law.	*f*) a agi de toute autre façon contraire à la loi.
Defect in form or technical irregularity	**Vice de forme**
(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may	(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu’en l’occurrence le vice n’entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l’ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu’elle estime indiquées.
(*a*) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and	
(*b*) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.	

[31] The following provision of the *Federal Courts Rules*, SOR/98-106 is also applicable in these proceedings:

Content of affidavits	**Contenu**
81. (1) Affidavits shall be confined to facts within the deponent’s personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent’s belief, with the grounds for it,	**81.** (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s’ils sont présentés à l’appui d’une requête – autre qu’une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des

may be included.	déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.

[32] The following provision of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 is also applicable in these proceedings:

12. (1) Affidavits filed in connection with an application for leave shall be confined to such evidence as the deponent could give if testifying as a witness before the Court.	**12.** (1) Tout affidavit déposé à l'occasion de la demande d'autorisation est limité au témoignage que son auteur pourrait donner s'il comparaissait comme témoin devant la Cour.
(2) Unless a judge for special reasons so orders, no cross-examination of a deponent on an affidavit filed in connection with an application is permitted before leave to commence an application for judicial review is granted.	(2) Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, le contre-interrogatoire de l'auteur de l'affidavit déposé à l'occasion de la demande n'est pas permis avant que la demande de contrôle judiciaire soit accueillie.

[33] The following provision of the Charter is also applicable in these proceedings:

Life, liberty and security of person	**Vie, liberté et sécurité**
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

STANDARD OF REVIEW

[34] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis. In the case at hand, the appropriate standard of review for each issue has been addressed by judicial precedent.

[35] A standard of reasonableness is appropriate when determining whether the RPD erred in finding that the Respondent had sufficiently rebutted the presumption of state protection. See *Song v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 467, [2008] F.C.J. No. 591 at paragraph 6.

[36] The RPD's assessment of the evidence and its factual findings are owed considerable deference and are reviewable on a standard of reasonableness. See *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, 212 D.L.R. (4th) 139 at paragraph 11; and *Dunsmuir*, above, at paragraph 51.

[37] Reasonableness is also the appropriate standard of review when determining whether the RPD erred in its assessment of the Respondent's subjective fear. See *Cornejo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 261, [2010] F.C.J. No. 295 at paragraph 17.

[38] The RPD's determination of whether the violence and criminality experienced by the Respondent constitutes persecution is an issue of mixed fact and law. Accordingly, it will be reviewed on a standard of reasonableness. See *Liang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 450, [2008] F.C.J. No. 572 at paragraph 15.

[39] When reviewing a decision on the standard of reasonableness, the analysis is concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[40] As regards the Respondent's allegation that this application for judicial review constitutes an abuse of process and a breach of the Respondent's Charter rights, the appropriate standard of review is one of correctness. See, for example, *Blake v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 572, [2009] 1 F.C.R. 179; and *Smith v. Canada (Chief of Defence Staff)*, 2010 FC 321, [2010] F.C.J. No. 371.

ARGUMENTS

The Applicant

Preliminary issues

Affidavits

[41] The Applicant submits that the two affidavits sworn in support of the Respondent's position should be struck since they address matters that are not within the knowledge of the affiants and/or are irrelevant.

[42] The Applicant contends that the affidavit of Ms. Stefanie Gude is irrelevant. This affidavit refers to various reactions to the RPD's Decision that occurred after the Decision was made and that do not affect the errors made by the RPD. Moreover, the affiant expresses opinions and makes assertions that are not within her knowledge. This is contrary to Rule 81 of the *Federal Courts Rules* and Rule 12(1) of the *Federal Courts Immigration and Refugee Protection Rules*.

[43] Similarly, the affidavit of Ms. Amina Sherazee is irrelevant and argumentative; it is simply based on her opinions and fails to show that she has any personal knowledge of the matters to which she deposes. The Applicant submits that Ms. Sherazee speculates about the Minister's motives for applying for leave and judicial review of the RPD's Decision. However, there is no evidence that she has been privy to any discussions that may have led the Minister to seek leave and review. As such, she has no personal knowledge of this matter. Further, Ms. Sherazee's affidavit attempts to draw legal conclusions and casts aspersions on the Court.

[44] The Court determined in *Ly v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1184, [2003] F.C.J. No. 1496 (*Ly*) at paragraph 10 that

> [e]xcept on motions, affidavits shall be confined to facts within the personal knowledge of the deponent: Rule 81(1), Federal Court Rules, 1998. The affidavit must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions… If an affidavit does not meet these requirements, the application can only succeed if an error is apparent on the face of the record (citations omitted).

[45] The Applicant says that the affidavits put forward by the Respondent do not meet the requirements for affidavits as set out by the Court in *Ly*, above. As such, the Applicant submits that they should be either struck from the record or completely ignored.

No abuse of process

[46] There is no merit to the Respondent's contention that the Minister's application for judicial review constitutes an abuse of process. The Respondent is attempting to argue that the Minister should be precluded from seeking judicial review of a decision that the Minister considers unreasonable and flawed. Furthermore, the Respondent alleges that the Court should be deprived of jurisdiction to hear the application. This ignores the independence of the Court, as well as its ability to make its own decisions.

[47] The Respondent's allegation that the Minister's application for judicial review is the result of political pressure is unfounded. It is open to the South African government to protest a finding that it is presiding over the genocide of white South Africans or that all black South African citizens

want white citizens eradicated. The Minister's decision to seek leave and judicial review, however, is based on the legal and factual errors in the RPD's Decision.

[48] Because the Minister's application discloses serious issues, the rule of law dictates that the Minister – like all litigants before the Court – be given a chance to be heard. Apart from his baseless speculation, the Respondent has not shown that there has been any abuse of process or that the Minister's application lacks merit and should not be entertained by this Court.

Errors in the Decision

[49] The Applicant submits that the RPD erred by:

a. Finding that the Respondent had rebutted the presumption of state protection;

b. Ignoring evidence that was crucial to the determination at hand;

c. Equating random acts of violence and criminality with persecution due to the Respondent's race;

d. Failing to assess properly the Respondent's subjective fear in light of his delay in making a claim for refugee status.

State Protection

[50] The onus was on the Respondent in this instance to provide clear and convincing evidence that the government of South Africa is unable or unwilling to protect him. However, in the RPD's reasons, there is no reference to, or consideration of, the Respondent's burden in this regard.

[51] The Respondent admits that he never reported any of the alleged attacks to the authorities. While the RPD acknowledged that the Respondent did not seek state protection, it failed to consider properly the impact of the Respondent's failure to seek protection on his onus to rebut the presumption of state protection.

[52] Moreover, the Respondent's claim that he did not report any of the alleged attacks because in other instances such reports "got lost in the system" is unsupported by evidence. The Applicant submits that the RPD erred in simply accepting that the majority of police in South Africa are black and are not interested in protecting whites. Indeed, this finding is flawed for a number of reasons.

[53] First, the two initial attacks faced by the Respondent occurred in 1991 and 1992 when apartheid was still occurring in South Africa. As such, the police and other security services were controlled by the apartheid state whose main goal was to protect the privileged position of the white minority and suppress the black majority of the population. There was no evidence before the RPD on which it could reasonably conclude that the police powers in South Africa at this time would not have been interested in protecting a white person who had allegedly been assaulted by black people.

Consequently, the Respondent's failure to report the first attacks on him in 1991 and 1992 should have been considered by the RPD in its analysis of state protection.

[54] Moreover, the Respondent's contention that the South African police are not interested in protecting whites does not withstand scrutiny, since the Respondent stated that his family had reported a robbery in 2005. According to the Respondent's testimony, the police both responded to and investigated this complaint. The failure to lay charges is not evidence of a lack of state protection. As noted in *Zhuravlvev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 3, [2000] F.C.J. No. 507 (T.D.), "[a]ll policing activity is bound to encounter failures, particularly in a democratic state. Even in Canada, random acts of vandalism or violence seldom yield convictions" (paragraph 19).

[55] The complaint of the Respondent's own family to the police and the ensuing investigation undermine the Respondent's claim – and the RPD's finding – that the South African police are not concerned with the protection of white South Africans. Despite the fact that the police were responsive when his family sought police protection, the Respondent failed to report any of the attacks he faced. The Applicant submits that this failure is inconsistent with the Respondent's onus as set out in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1.

[56] Furthermore, the RPD's Decision seems to suggest that if a claimant is not the same ethnicity as the members of the law enforcement service then the duty to seek state protection is relaxed or lessened, even where no credible evidence of the state's inability or unwillingness to

protect has been shown. According to the Applicant, this view is unsupported by international law or Canadian jurisprudence; it rests largely on the Board's flawed assessment of the country conditions.

Assessment of evidence was unreasonable

[57] The RPD noted in its Decision that the Respondent's claim was enhanced and supported by the oral testimony of a witness whose evidence was "the lifeline for the claimant's claim." It can be inferred that the RPD found Ms. Kaplan to be credible and accepted her evidence as true. Within her testimony, Ms. Kaplan made many assertions which the RPD must be taken to have accepted. These assertions include the following:

a. That the South African police, who are mainly black, are "corrupt" and "in cahoots with the criminals" who attack whites;
b. That Black South Africans have a hatred and a vendetta against the white South Africans" due to the injustices of the apartheid regime and that all whites feel this hatred;
c. That all blacks in South Africa hold all whites equally responsible for apartheid and want whites eradicated and stomped on like ants;
d. That a mass genocide of white South Africans by the black majority is occurring in South Africa.

The Applicant submits that the RPD's acceptance of these assertions, which have no objective evidentiary foundation, epitomizes the unreasonableness of the Decision.

No evidence supporting witness's opinions

[58] No evidence exists to support Ms. Kaplan's statements with regard to the general attitude of black South Africans towards white South Africans. The RPD failed to critically analyze the witness's statements. As such, the RPD seems to have taken the witness's statements as reflective of the feelings and beliefs of all black South Africans.

[59] The country condition evidence before the RPD fails to support Ms. Kaplan's statements. According to the Minister,

> [i]n neither the country condition documents from credible and trustworthy sources such as Amnesty International, Human Rights Watch, US State Department nor the newspaper articles submitted on the Respondent's behalf is there any mention of a general animus among ***all*** blacks towards whites and a desire to have whites "eradicated and stomped on like ants" [original emphasis].

[60] By characterizing Ms. Kaplan's evidence as the "lifeline" for the Respondent's claim, the RPD gives the impression that it accepted the witness's unsubstantiated assertions and based its Decision on those assertions. The Applicant submits that this is both unreasonable and perverse.

No evidence of genocide

[61] The RPD erred further in failing to address Ms. Kaplan's assertion that the black majority in South Africa is perpetrating genocide against white South Africans. Because the witness's testimony was the "lifeline" for the Respondent's claim, the RPD's failure to comment on this

assertion must be taken as acceptance of the witness's evidence of an ongoing genocide against whites in South Africa.

[62] Had the RPD adequately consulted the documentary evidence, it would have realized that Ms. Kaplan's evidence was unsupported. Although the evidence shows the emigration of many white professionals from South Africa in recent years, it also shows considerable movement of foreign nationals (such as British citizens) to South Africa. Although some of these citizens may not be white, this trend nonetheless suggests that some white people have no difficulty moving to, or residing in, South Africa. The Applicant submits that this evidence contradicts the witness's assertion of genocide and demonstrates that the RPD's assessment of the conditions in South Africa was both incomplete and misleading.

Affirmative action policies

[63] The RPD also erred with regard to its appraisal of South Africa's affirmative action policy. While the RPD appears to believe that the affirmative action in favour of blacks and other racial groups constitutes state-sponsored persecution, this is clearly incorrect. Rather, the affirmative action policy seeks to ensure that black South Africans and minorities are adequately represented within the workforce.

[64] The RPD's failure to cite any evidence that suggests that South Africa's affirmative action policy reflects animosity towards white South Africans demonstrates the perversity of its findings.

Moreover, the Applicant submits that the RPD's focus on South Africa's affirmative action policy and its impact on whites is all the more unreasonable because there is no credible evidence that this Respondent was ever prevented from advancing in his career due to his race.

Focus on white farmers is unreasonable

[65] In its Decision, the RPD implies that the conditions of white farmers support Ms. Kaplan's allegations of a racially-motivated genocide. This is not a reasonable implication; it is unreasonable to conclude that the plight of farmers demonstrates what will happen to the Respondent upon returning to South Africa. The Applicant characterizes the situation of farmers in South Africa as being "a consequence of [a] long history and specific circumstances," but these are distinguishable from the circumstances of the Respondent.

IFA finding is perverse

[66] The RPD's finding that the Respondent cannot return to South Africa because he would "stand out like a 'sore thumb' due to his colour in any part of the country" is unreasonable and perverse. The evidence before the RPD demonstrated that white South Africans constitute approximately 10% of the country's total population and a far higher percentage in major cities and urban centres. The RPD's finding that the Respondent will be unable to find refuge because of his skin colour cannot be reconciled with the population figures that were before it.

Selective use of objective documentary evidence

[67] The "objective" documentary evidence relied on by the RPD consisted of: a) letters to newspapers; b) the personal opinions of newspaper columnists and other individuals; and c) reports on the conditions of white farmers. Notably absent from this evidence is objective documentary evidence from such sources as Amnesty International, Human Rights Watch, the US Department of State and the British Home Office, which are commonly used in asylum cases.

[68] The evidence assessed by the RPD gives the impression that the African National Congress is indifferent towards the plight of the minority white population. The Applicant contends that this is an incomplete assessment of country conditions since the black majority in South Africa is at least equally victimized by criminals. See, for example, "South Africa's crime crisis" *BBC News* (27 May 1999). It is clear that the RPD failed to examine the evidence before it with a balanced view.

Random acts of violence are not persecution

[69] The RPD further erred in equating the random acts of violence and criminality experienced by South Africans of every background to persecution experienced by white South Africans. The Applicant submits that crime is prevalent in South Africa and victimizes all South Africans, regardless of race. Rather, it is more likely that white South Africans are targeted because they are perceived to be wealthy.

[70] There is no evidence in this instance, other than some equivocal racial slurs, to prove that the attacks experienced by the Respondent were racially motivated. Moreover, even if the Court were convinced that the attacks were racially motivated, these attacks lack the systemic element required to constitute persecution. The RPD's Decision is unreasonable and inconsistent with the principle that random acts of violence or criminality do not constitute persecution. See *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, [2009] F.C.J. No. 143.

Absence of subjective fear

[71] The RPD also erred in failing to consider properly whether the Respondent's return to South Africa after his first trip to Canada undermined his allegation of subjective fear of persecution. The Applicant contends that the jurisprudence holds that a claimant's return to the country of alleged persecution is incompatible with a subjective fear of persecution or negates a well-founded fear of persecution. See, for example, *Caballero v. Canada (Minister of Employment and Immigration)* 1993, 154 N.R. 345, [1993] F.C.J. No. 483 (F.C.A.).

[72] It was unreasonable for the RPD to accept the Respondent's explanation that he did not believe he could make a refugee claim because he did not speak French. However, the RPD accepted this explanation without any evidence that the Respondent made any effort to ascertain the truth of this belief by contacting legal counsel, Citizenship and Immigration Canada, the Refugee Board or a community legal clinic.

Delay

[73] The RPD erred in accepting the Respondent's explanation for delay simply because it had not made any other findings of adverse credibility. According to the Applicant, it is not a prerequisite that there should be an adverse credibility finding against a claimant in order for the RPD to draw an adverse inference from his/her delay to apply for protection. Rather, a delay is a relevant factor that must be considered even in cases where the claimant is found to be credible.

[74] Getting married or seeking employment with a government agency is not an adequate explanation for a delay. Furthermore, the Respondent sought refugee protection only after he separated from his spouse. According to the Applicant, this demonstrates the fallacy of the RPD's finding that the Respondent attempted to regularize his status in Canada via marriage to a Canadian citizen.

[75] What is more, the Respondent claims to have been the victim of numerous attacks over the course of a ten-year period. Nevertheless, he left South Africa only in 2004, after he was hired to work in Canada. This conduct is inconsistent with a subjective fear of persecution.

The Respondent

Abuse of process

[76] In light of the political pressure brought to bear by the South African government in response to the Decision and the political nature of the Decision, the Respondent alleges that the Minister's application for judicial review constitutes an abuse of process. Accordingly, this application should be dismissed for reasons set out in *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587 (*Cobb*). The Respondent submits that the Court cannot adopt the "executive abuse" of a party such as the Minister without depriving itself of jurisdiction.

[77] The Respondent also says that the Minister's decision to judicially review this Decision is most likely based on the pressures placed on the Canadian government by the South African government. The timing and circumstances of this application, as well as the "tenor, texture, and non-existent weight or merit" of the grounds relied upon, have made it politically abusive. This has resulted in an abuse of process as well as a breach of the Respondent's section 7 Charter rights.

[78] Moreover, the Respondent submits that the "Honorable Court's (*sic*) track record as between applications on behalf of refugee claimants/immigrants versus those by the Minister" demonstrates a reasonable apprehension of bias on the part of the Court. Consequently, whether a true loss of independence has occurred, or whether it is simply apprehended that the Court has acquiesced to pressure applied by a foreign government, the result is that the Court has been stripped of its jurisdiction.

Re-weighing evidence

[79] The Respondent contends that the Applicant is asking the Court to re-weigh the evidence that was before the RPD simply because the Applicant is not satisfied with the RPD's Decision. However, such an approach is contrary to *Dunsmuir*, above, which states that "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences."

[80] The Respondent submits that it is unfair and inaccurate to confuse the recitation of *viva voce* evidence within the Decision (i.e., the evidence of Ms. Kaplan) with a presumption that the RPD accepted these statements as findings of fact. Rather, the Decision must be read properly and contextually, without the assumption that the RPD adopted all of the statements made by Ms. Kaplan during her testimony. Indeed, the witness's allegations of persecution were accepted by the RPD; however, this does not mean that the RPD accepted the sweeping generalizations made, and conclusions reached, by Ms. Kaplan. The RPD simply recited her evidence without making findings of fact.

[81] Moreover, the Applicant has mischaracterized the RPD's use of Ms. Kaplan's testimony. The RPD makes it clear that it considers the witness's position and experiences as similarly situated to those of the Respondent.

State protection

[82] The RPD's findings with regard to state protection were reasonable in this instance. The Respondent provided credible evidence concerning the attacks he had experienced and the evidence of a similarly situated witness to rebut the presumption of state protection. The Respondent rebutted the presumption of state protection by providing clear and convincing evidence that demonstrated the inability and/or unwillingness of the South African state to provide protection. The Respondent was not required to risk his life by seeking ineffective state protection simply to demonstrate its inadequacy. See *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211, [2007] F.C.J. No. 1563 at paragraph 19.

Factual findings

[83] The Applicant has misrepresented the factual findings of the RPD as including every statement made by Ms. Kaplan. Even credible witnesses may draw conclusions that are unwarranted; however, this does not affect the credibility of their evidence, nor does it mean that the RPD has accepted as fact each and every conclusion reached by the witness.

[84] The Applicant is mischaracterizing the findings of the RPD in an attempt to have the evidence re-weighed. According to the Respondent, "the tenor, texture, and weight of the Applicant's arguments are to have this Court rehear and re-determine the claim, based on

misguided, politically correct notions and alarm of potential opening of (white) flood-gates from South Africa."

Persecution

[85] The Applicant also characterizes the persecution faced by the Respondent as "acts of random violence." This finding, however, does not follow from the evidence before the RPD, which indicated that the Respondent was subjected to racial slurs, such as "white dog", "settler" and "white fuck," when he was attacked on numerous occasions. These attacks were clearly not random. This was confirmed by Ms. Kaplan and was corroborated by the documentary evidence.

Subjective fear

[86] It was open to the RPD to make the finding of subjective fear based on the evidence and facts before it. Especially in light of the seven serious physical attacks suffered by the Respondent, as well as the corroborating evidence of Ms. Kaplan and the documentary evidence.

[87] The consideration and assessment of delay was also within the purview of the RPD. It appropriately assessed this issue as simply one consideration in determining the existence of a well-founded fear of persecution.

[88] Moreover, the Respondent was found to be credible, and the Applicant has not attempted to take issue with his credibility.

Costs

[89] The Respondent submits that he is entitled to solicitor-client costs due to the circumstances of the case.

ANALYSIS

General

[90] If the evidence before the RPD in this case is anything to go by, then the people of South Africa are living through an extremely dangerous and difficult time in the history of their country. The evidence reveals that crime is widespread and endemic against South Africans of all races and that racial and ethnic tensions continue to plague the country in the post-apartheid era. Many people have found the situation intolerable and have left. Many of those who have stayed, and who can afford it, have adopted a siege mentality, living in protected enclaves and/or in heavily secured and monitored houses.

[91] There is evidence before me that when the RPD rendered a positive decision in this case and concluded that the Respondent qualified for refugee protection against racially-motivated crime in South Africa, the South African authorities labelled the RPD's Decision itself as "racist" and "ridiculous" and threatened that, if allowed to stand, it could "seriously damage relations between

the two countries." Attempts to exert diplomatic pressure on the Government of Canada to ensure that the Decision was reversed give rise to complex constitutional, Charter and jurisdictional issues that the Court will now need to address as part of this application. If such threats are representative of the attitude of the South African authorities then they suggest an unfortunate misunderstanding of the way the rule of law works in Canada and an equally unfortunate lack of sympathy for South African citizens who find the current situation in their own country to be intolerable.

[92] Given the evidence of endemic, and often horrendous, crime in South Africa that has been presented in this case, it surely cannot be a surprise to anyone that a South African such as the Respondent might conclude that he is the victim of violence directed against white South Africans and that the South African authorities are either unwilling or unable to protect him. Whatever conclusions the Court may come to regarding the RPD's Decision in this case, the Respondent's attempts to secure refugee status are, at least, understandable. The evidence is clear that he has been repeatedly attacked and stabbed by black assailants in South Africa. It is not, therefore, obviously delusional that he might have formed the impression that his attackers were motivated by the colour of his skin. For the South African authorities to attack the RPD's Decision as "racist" and as a threat to the relationship between Canada and South Africa suggests an intolerance to criticism from one of its own citizens and an attitude that no white person should be allowed to claim he or she has been racially targeted even when repeatedly attacked by black criminals.

[93] In the end, however, and notwithstanding the legal ramifications that the actions of the South African authorities in response to the RPD Decision have brought into play, this application is

not about what the South African government or the Canadian government, or even this Court, believes is happening in South Africa. The application is about whether, given the evidence presented at the RPD hearing, it was unreasonable for the RPD to conclude that this Respondent is a victim of race-based crime against which the South African authorities cannot, or will not, protect him. This does not mean that in rendering a positive Decision on this issue the RPD was correct; the issue is whether the Decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. Just because some people dislike the Decision and do not find it tenable for political reasons does not make it unreasonable.

[94] The Minister says the Decision is unreasonable because, given the facts and the law, it does not fall within the range of possible, acceptable outcomes. The Respondent says it is reasonable because, although everyone may not agree that all crime committed by black people against white people in South Africa is race-based, the evidence is clear that at least some of it is, that it was in his case and that the authorities are either unable or unwilling to protect poor white citizens, such as the Respondent, who find themselves repeatedly victimized by their black compatriots.

[95] Generally speaking, the question of whether the Decision was reasonable or not turns upon the quality and treatment of the evidence that was placed before the RPD by the Respondent.

The Respondent's Oral Evidence

[96] My review of the record suggests to me that there is a significant degree of ambivalence in the Respondent's personal evidence about why he came to Canada and why he did not seek police protection in South Africa when attacked and robbed by his black assailants.

[97] The RPD found the Respondent's narrative entirely credible and, in terms of the attacks he suffered and the injuries he sustained, there is nothing to suggest that this finding was unreasonable. The ambivalence arises from what the Respondent says about the motivation for the attacks, his reasons for coming to Canada and his reasons for not seeking police protection in South Africa.

[98] When questioned by the RPD about the seven attacks he suffered between 1991 and approximately 2003, the Respondent's answers do not suggest anything overtly racial about them apart from racial insults that were uttered during the attacks. According to his own evidence, it looks as though the criminals were after his personal property and money.

[99] In 1991, when he was stabbed on the train, his evidence was that the attackers said he was sitting in their chair and they wanted money and they stabbed him because he did not have any.

[100] In the 1992 attack at the bus stop, his evidence was that the attackers "wanted my shoes and my money or whatever." When the RPD asked him what they were after, the Respondent explained as follows:

> You see they want everything we have because we, how do you say, they don't have much money because of what we did to them in the past ….

[101] The incident itself, as the Respondent explains, suggests that the crime was carried out by black people who do not have much money because of past injustices. The Respondent may well have been noticed because of his white skin, but this does not mean he was attacked because he is white. In the Respondent's account of the incident there is nothing to suggest that the attackers wished to rob or injure him because he is white. His whiteness was simply an indicium of relative wealth, and they attacked him to try and obtain whatever he had in terms of property that was valuable to them.

[102] This raises, of course, a difficult conceptual issue. The Respondent may well have been conspicuous on the train and at the bus stop because he is white. And this is because, in the context of South Africa's culture and history, whiteness connotes either substantial or relative wealth. In my view, however, this does not render the attacks racist. The Respondent's unprompted evidence suggests that the attacks were made to acquire property and not to punish the Respondent for being white. There is no evidence that attacks are not made against black people in South Africa in situations where they also display the trappings of substantial or relative wealth. In fact, there was evidence before the RPD that South Africans of every race and ethnic background are robbed and stabbed by black criminals. As the Respondent explained to the RPD, many robbers are black because of what happened in the past, and many black people remain poor and are prepared to resort to criminal means to acquire money and other property.

[103] The Respondent was also stabbed by black attackers at a nightclub in 1996. Again, the Respondent's evidence was that the assailant wanted "shoes and money."

[104] In 1998, the Respondent was stabbed in the hand. Again, the Respondent's account of the incident was that he was at a bus stop and "they wanted my things again and I managed to step back and I got stabbed in my hand."

[105] The fifth attack occurred in 2000 while the Respondent was playing in a rugby match. The Respondent's unprompted account runs as follows:

> Yeah, I was playing a rugby match and I think it's 2000 and I wasn't the only who (*sic*) got stabbed. It was a shady town kind of thing, industrial town and we were playing a rugby match. And me and two other guys we never got stabbed, we were more scraped because we were in the middle of a rugby match and we tried to tell the ref. but all that he would was (*sic*) just stop the game.

[106] This time the assailant "sort of scraped [the Respondent's] knee with a sharpened screwdriver sort of thing, home-made knife and two other guys they got one, and it was in the arm I think and another one in the hand."

[107] We are not told at this point whether the "two other guys" who "got one" were black or white. This is significant because the Respondent says that although the opposition was an all-black team, there were, besides himself, two other white players on his team.

[108] What is interesting and significant, in my view, is that the Respondent obviously had no fear of playing rugby against an all-black team in a small industrial town as part of a mixed team that had three white players and 12 black players.

[109] When asked by the RPD why he was attacked during the rugby game, the Respondent was definitive in his answer: “Because they were losing.”

[110] The Respondent was also asked whether he was afraid to play a team of underprivileged black Africans in “an African area.” His answer was “It depends where.”

[111] Once again, there is no indication here that the Respondent was attacked for racial motives. He says that he, and two others (who he later says were also white), were attacked because the team they were playing against was losing.

[112] The sixth incident was recounted by the Respondent as follows:

> Yeah. I got, well my friend and I were at the, like the market you guys have here, we were at our version of one in Capetown and we were on the way to go home in the car and we seen an African trying to what looked like steal the car or open the door and when we tried to stop him about five of them came out from hiding around the cars. And I got, my hand got, the palm of my hand got sliced and my friend got stabbed in the buttocks.

[113] There is no evidence here that the Respondent was targeted because he was white. He appears to have come upon someone attempting to break into his friend’s car. We are not told

whether his friend was black or white. The RPD asked him about the friend, but all the Respondent would say was "Well we sort of grew up together back home."

[114] In my view, there is no evidence whatsoever that this attack was racially motivated. There is no evidence, for instance, that the black perpetrator knew he was trying to break into the car of a white person or indeed that it was a car belonging to a white person. The Respondent and his friend came upon a crime in progress, decided to intervene and were set upon by the gang. That is it.

[115] The seventh attack occurred some time after 2000 when the Respondent and a friend were walking home late at night from "the beach area, all the pubs and night life." The pair were confronted by black people who "were trying to intimidate" them. The Respondent says that he was not intimidated because "I was pretty close to my house." Here is what he says happened as a result of the confrontation:

> And they gave me what they call a smiley, they hold their lighter upside down so that the flame burns the middle part and in the (inaudible) it leaves like a smiley thing there.

[116] As for the Respondent's friend "he got the lights beaten out of him because he was smaller than me and they see (*sic*) he was scared …."

[117] Once again, the RPD asked why the Respondent and his friend were attacked. The answer was a simple: "There is a – that's life for us."

[118] The RPD also asked if the assailants wanted money. The Respondent replied: “Well anything. You see they like to intimidate us because there is nothing we can do to them so they do that.”

[119] As well as the attacks against the Respondent himself, he also referred to an attack upon a friend called Jamie McAlister whose brother accompanied the Respondent to Canada in 2004. Jamie was abducted outside a nightclub by “four Africans and one African woman.” The Respondent is unclear regarding the reasons for this attack upon his friend Jamie:

> I don’t know if they were doing initiation thing (*sic*) but she wanted to sexually harass him or rape him or whatever and after they seen, they had enough, whatever, they dropped him off in his underpants in the middle of nowhere.

[120] It is not clear how the Respondent knows what happened to Jamie and how much of it he witnessed himself. Here again, however, there is no mention of a racial dimension to the attack. It does not follow that, because Jamie’s abductors happened to be black, they abducted and beat him up <u>because he was white</u>.

[121] In general, then, the Respondent’s unprompted evidence cannot reasonably support a finding of systemic, racially-motivated attacks.

Examination by Mr. Kaplan

[122] It is apparent from the record that the racial aspects of the attacks I have referred to were introduced into evidence when the Respondent was examined by his own counsel, Mr. Kaplan. Reading over the transcript, there is a strong impression of Mr. Kaplan attempting to remind the Respondent that he is involved in a refugee claim and that the racial element is all important. To do this Mr. Kaplan goes over the attacks again and asks the Respondent extremely leading questions about racial motivation. Mr. Kaplan's questions suggest in an obvious way the answers he requires. In fact, in my view, Mr. Kaplan prompts and encourages the Respondent to give a particular answer.

[123] I will use the rugby game incident to illustrate this. Here is Mr. Kaplan going over the sequence of events with the Respondent:

Q. Okay. Now in the rugby match incident the member asked you, member, the Chairman there, and he asked you, the judge, he asked you why were you stabbed and you said because they were losing.

A. Yeah. It's also because – you got to remember we got nice rugby jerseys because we are a club, they, underprivileged town, and so they pick on us. That's what they do. When I came home in 2004 there were people on the airplane, when we walked out there was the security, they recognized our accent and they pick on us. They want do to (*sic*) check our bags and that's outside the airport, that's not even in Customs. That's what they do ---

Q. Okay. Sorry, Brandon, just one second. In that rugby match you were on the team, you said there was three white people.

A. Yeah.

Q. And 12 African people on that team, now is it correct that all 15 people on your team would have had nicer rugby jerseys, you would be wearing the same jerseys that your ---

A. Yeah, but we belong to a club.

Q. Yes. But the other African players, right?

A. Yeah.

Q. Now was there any racial motivation in your view regarding that particular incident?

A. I mean from our team ---

Q. You were stabbed, right?

A. Yeah.

Q. With a screwdriver, and it was by an African person on the other team.

A. Yeah.

Q. And then another two people were also injured, right? Were those other two people African or white?

A. They were white.

Q. So all three people on that team, on your team who were white were stabbed. Was there apart – you said that the reason was they did that because you were losing. Was there any racial motivation for stabbing you and the other two guys as far as you know?

A. Well they were, they smirk and they give us comments and we can't go to the ref. because he was an African too and all that he did was just stop the game, nothing else was done about it. Because if there is I mean what are you going to do when there is about a thousand people watching the game and they get angry, so.

So, even though he is our colour he is a referee, he has to be neutral. But you can't hold it against him for doing that but what happens to him when he walks off the field then they get a hold of him because he is taking the side of us and that's a no, no.

Q. Do you think that there was racial motivation in being attacked?

A. There had to have been.

[124] Not only does the Respondent have to be reminded of the racial dimension and prompted to give an answer that will bring him within the definition of a Convention refugee, but the answer he gives reveals that, in fact, he does not really know whether the attack was racially motivated or not. The answer "There had to have been" is speculation. He has told the RPD previously that the attack was made "Because they were losing," but at this point, and only after his counsel has prompted him with the words "racial motivation," does he answer "There had to have been."

[125] The Respondent is similarly led by his counsel when he is asked to go over other incidents. As revealed elsewhere in the transcript, the Respondent appears to equate racial persecution with affirmative action and the difficulties he has experienced in finding a job in South Africa. Hence, what the Respondent means by racial motivation and persecution is never made entirely clear. He believes that the general situation in South Africa is now racially prejudicial to white South Africans like himself. This is why, in his view, the physical attacks against him "had to have been" racially motivated.

Objective Evidence of Racial Motivation

[126] In fact, the only objective evidence offered by the Respondent to suggest that the attacks were racially motivated is that his assailants were always black and they uttered racial insults. It seems to me that if you live in a country where black people make up 80% of the total population, and where the white European population is only 9%, and if, like the Respondent, you do not live in a predominantly white enclave and choose to go to nightclubs, pubs and beaches frequented by black people and to play in rugby games against teams that are totally composed of black players, then the chances of the perpetrators being black if you are robbed or assaulted must be pretty close to 100%. Hence, the fact that the assailants in each instance were black cannot, per se, be equated with racial motivation. Black people who live in and/or frequent the same areas as the Respondent, or engage in the same pastimes, are pretty well assured that, if they are robbed, the perpetrators will be black, and for the same demographic reasons.

[127] As for racial insults and epithets, it would be passing strange if they were not a common occurrence in a country where racial tensions and racial disparities have been so much a part of that country's political and social history, and where those tensions have yet to be resolved fully even though the apartheid era has passed. The fact that the Respondent's black assailants called him a "white dog," a "boer," a "settler" or a "witnai" when they attacked him does not mean that they attacked him <u>because</u> he was white or because they considered him a "white dog" or a "witnai." Verbal and racial abuse is a form of aggression and a means of denigrating or frightening the victim. Such terms are not, in themselves, an objective indicator that the Respondent was attacked because

he was white. In my view, this is not like being deprived of property, attacked or rounded up and killed because you happen to be Jewish or Tutsi; nor is it like being lynched because you happen to be black. The use of racial slurs is not, in my view, in itself supportive of systemic racially-motivated attacks against the Respondent.

[128] Mr. Galati, Respondent's counsel at the hearing before me, astutely drew my attention to the fact that the motives behind a crime might well be mixed and that, even if there was only an element of racial motivation behind what white South Africans might suffer at the hands of black South Africans, our jurisprudence does not exclude refugee protection just because the motives are mixed. He referred me to the cases of *Shahiraj v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 453, [2001] F.C.J. No. 734 and *Flores v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 893, [2002] F.C.J. No. 1167, which make it clear that a nexus sufficient to sustain a claim to Convention refugee status may be established where the motivation for persecution is mixed, provided it can be partially related to a Convention ground. In both of these cases, the decision under review was set aside because the Refugee Board failed to consider evidence that linked the targeting of the victim to a Convention ground. In *Shahiraj* there was reason to believe that the applicant had been targeted for extortion by the police in India at least partially due to his association with his brother, who was a militant Sikh. In *Flores*, the Board erred because it failed to examine documentary evidence that state officials in Mexico often asserted false charges of weapons and drug trafficking to prosecute alleged Zapatistas.

[129] In the present case, we are not dealing with the mixed motivations of state officials and the police who may be using criminal pretexts to target political militants. The Respondent's refugee claim was that he had been physically attacked by fellow citizens because he was white. Hence, in terms of mixed motivation, there would have to be evidence that the Respondent was attacked and robbed not just because the assailants wanted money and property but because they also wanted to harm and punish him for being white. I agree with Respondent's counsel that such mixed motivation is conceivably possible. What is lacking in the present case, in my view, is objective evidence that the attacks, at least in part, were made to persecute the Respondent for being white. One of the attacks relied upon by the RPD occurred in a car park when it was the Respondent who took the initiative to intervene when black men were attempting to break into his friend's car. The Respondent was not even targeted in this incident.

[130] Mr. Galati's argument is, intuitively, that surely in a country where so much crime is perpetuated by black assailants upon white victims some of it must be racially motivated, and surely this means that at least part of the motivation for the attacks upon the Respondent had to be racial.

[131] My answer to these perceptive arguments is that surely in a country where the black population amounts to 80% of the whole, and where the white European population only 9%, then most of the crime perpetuated against white people must, of necessity, be perpetrated by black people, just as most of the crime against black people must also, of necessity, be perpetrated by black people. This must be even more inevitable when economic and class factors are taken into account.

[132] But more importantly in the Respondent's case, which is the only case before me, it was almost inevitable that his assailants would be black because of where he lives and because of some of the activities he was engaged in when the attacks occurred. If you play rugby against a team composed of 15 black players then your assailant must inevitably be black. The Respondent's unprompted evidence about why his black assailants attacked him was that they wanted to rob him or because, in the case of the rugby game, because they were losing. The Respondent may have been targeted for robbery because he was white (and, therefore, presumably better-off than most blacks), but he was not robbed or stabbed for being white, at least as far as his unprompted evidence goes.

[133] It may be, of course, that a black South African could decide to rob or stab a white South African because he is white and because of the injustices practised by white South Africans against black South Africans in the past. That would make the attack racist in my view because its purpose would be to punish and harm the victim for being white, rather than to acquire the victim's property or to injure the victim in a personal confrontation. The Respondent's unprompted evidence was that he was robbed and stabbed not to punish and harm him for being white but to purloin his shoes, money and "things." I agree with Respondent's counsel that, conceptually at least, it is possible to rob and stab someone to obtain their property and to punish and harm them for being white. This would obviously be the case in a situation where black perpetrators attacked and robbed white victims only. In this case, however, the Respondent's unprompted evidence did not suggest that mixed motives were present, and even his responses to his counsel's leading questions do not make clear how we could know that a racial element was present, other than by way of speculation. In

addition, there is no evidence to suggest that those who attacked and robbed the Applicant attacked and robbed white South Africans only.

[134] Mr. Galati has also drawn my attention to the Respondent's Personal Information Form (PIF) where the Respondent asserts racial motivation for the attacks. He argues that the PIF is evidence before the RPD, so that the RPD was quite reasonable to overlook the discrepancies in testimony between the Respondent's unprompted evidence when questioned by the RPD and his evidence when questioned by Mr. Kaplan.

[135] The Respondent's Personal Narrative does say that he fears being killed and/or persecuted for being white:

> I am afraid of being killed by African South Africans who will kill me because I have a white skin. At a very minimum, I believe I will be discriminated against because I am white. This type of discrimination has affected me on all levels of life and will continue – if not worse – if I return to South Africa. I believe I have been persecuted as well and that my life is at risk if I were to return to South Africa because I am a Caucasian South African. In addition to the discrimination, I have been attacked for having a white skin no fewer than 6 times and I have been threatened as well because of my white skin.

[136] The Respondent is clear that "at a very minimum" he has been discriminated against, but persecution remains a matter of belief. He does, however, state that he has "been attacked for having a white skin no fewer than 6 (*sic*) times and I have been threatened as well because of my white skin."

[137] As regards the sixth incident at the market (which he says in the transcript occurred in 2000), he says in his PIF that this occurred in 2002. He makes it clear that it was his friend's car that was being broken into:

> We approached and tried to prevent this person (who was African) at which moment about 5 other Africans appeared from nowhere (I think they were hiding behind other vehicles) and tried to stab us. I raised my hands to protect myself and was stabbed in the hands. My friend was also stabbed (in the buttocks).

[138] Once again, we are not told if the friend was black or white, but what is clear is that the Respondent was not even personally targeted in this incident. The assailants were trying to break into someone else's car and the Respondent attempted to intervene.

[139] As regards the other incidents recounted in the Personal Narrative, there is nothing inherent in the attacks themselves to suggest that they were racially motivated except that the assailants were always black and racial insults and epithets were used. I have discussed these issues above. All we are left with in the Personal Narrative are the Respondent's beliefs and views which are not grounded on objective evidence of racial motivation:

> My view of these incidents: they like to pick on "big white boys" because it is their time. They believe that it was "big white boys" who picked on them before and therefore it is "payback from wayback."

[140] This is put forward as a concept or a theory. It is not objective evidence. The RPD's job was to assess whether the Respondent's theory was founded upon objective evidence.

[141] In other words, I do not think that what the Respondent says in his Personal Narrative brings any objective evidence to support his view that the attacks were racially motivated. In fact, it is difficult to see how the attack at the market even involved the targeting of a white person. How could the assailants have known that they were breaking into the car of a white person? That attack was obviously motivated by the intervention undertaken by the Respondent and his friend.

[142] In addition, there is nothing in the Personal Narrative to dispel the general impression created by the transcript of the RPD hearing that the Respondent had to be prompted by his legal counsel, Mr. Kaplan, to claim that all of the attacks involved "racial discrimination" and that this remains an opinion unsupported in an objective way by the Respondent's personal evidence. This is why it seems to me that the evidence of Ms. Kaplan became the "lifeline" for the Respondent's claim. The RPD, as I will discuss later, obviously felt that the Respondent's refugee claim could not live, and would drown, if left to the Respondent's own evidence.

[143] The reasons in the Decision appear to suggest that the Respondent's evidence of his personal experiences was not sufficient to support his opinion that the attacks were racially motivated. I have gone over the Respondent's own, unprompted account of those attacks in some detail to make it clear why this should be so. In so far as the RPD concludes that the Respondent's personal account was not sufficient to establish racial motivation in order to bring the Respondent within the definition of a Convention refugee, then, in my view, the RPD reached a reasonable conclusion. In so far as the RPD may have felt, as the Respondent's present counsel Mr. Galati feels, that the Respondent himself provided sufficient evidence to support racial motivation (a view

which I do not think is found in the Decision) then I would have to say that such a finding is unreasonable for the reasons given above.

[144] If we go back to the PIF of May 27, 2008 – the Respondent's sworn statement of what he fears in South Africa and why he claims refugee status on the basis of race – the explanation is much more about economic discrimination than black violence:

> With the new government in power, us white people are struggling. The jobs go to the people of colour because of "Affirmative Action." It is easier for us people to get work in other countries. They have the law on their side. The are (*sic*) singing songs to the white people. Crime is at the highest. The farm killings are climbing. Its (*sic*) called land reformation. So far nothing has been done.

[145] Significantly, this statement says nothing about the personal attacks that the Respondent has faced and upon which he based his refugee claim. The narrative appears to have evolved in this regard, as I will discuss later, as the Respondent fell under the influence of the Kaplan family and their view of what is happening in South Africa.

Subjective Fear

[146] In reading the record in detail I am also struck by a recurrent note of pride on the part of the Respondent that he was not intimidated by what happened to him. There are references to his size and strength. This is a "big white boy" – to use his own phrase – who had no fear of going into a black industrial district to take on the all-black local side in a team of which he was one of only three white men. When he sees someone attempting to break into his friend's car at the market he

has no fear of immediately intervening. When the Respondent and his friend were attacked while walking home from the beach area at night, he says he was not intimidated. His friend got beaten because “they see (*sic*) he was scared.” In other words, the Respondent clearly was not scared. When the RPD asked him why he and his friend were attacked, the Respondent’s answer was “that’s life for us.”

[147] The overall impression is that the Respondent has not been scared by the physical attacks because he is strong and cannot be intimidated and because confrontations of this kind are just a way of life for him. Even when he does not have to, he jumps into the fray to take on a black man who is breaking into his friend’s car at the market. This is something he can handle.

[148] This note also becomes clear when the Respondent is asked why he did not go to the police about any of the attacks. His oral evidence suggests that the Respondent fears his father more than he fears his assailants. He appears to be someone who has grown up in a white environment where real men handle black aggressors themselves. He is a “big white boy” and “that’s life for us.”

[149] This becomes important when considered against the RPD’s treatment of the Respondent’s returning to South Africa and his delay in making a refugee claim.

Reasons for Coming to Canada

[150] Further undermining the subjective fear element are the reasons that the Respondent has given for coming to Canada.

[151] When asked by the RPD why he came to Canada, the Respondent's answer is unequivocal and it has nothing to do with a fear of race-based violence:

> I came here to look for work because I can't find work in my country and it's easier finding work overseas so I jumped at the opportunity to – I didn't pick Canada, it was just they advertised in the newspaper for the carnival work so I put my name down and I was off because they paid for our way to come here. Otherwise I could never leave.

[152] Nothing could be clearer from this answer than that the Respondent's reasons for coming to Canada were economic and had nothing to do with being a refugee.

[153] Once again, the Respondent has to be reminded in examination by his lawyer, Mr. Kaplan, that coming to Canada to seek work is not enough:

Q. When you were asked this morning by the (RPD) member when you came to Canada and you were looking for a job, were you really wanting to look for a better life or to save your life. So the member asked you ---

A. Well it's both.

Q. --- when you came, just let me finish my question, Brandon, first.

A. Sorry.

Q. So he asked you when you came were you looking for a better life or were you looking to save your life. This morning you said it was to save your life and okay, now you said it was both. I would like you just to clarify what, your answer please. So when you came to Canada what was your motivation to come to Canada?

A. Well I couldn't find a job and I am tired of living in fear, I am tired of the people's attitude. I mean I am born there and it's like they don't want me there. So I jumped to leave my country and I didn't pick Canada. I applied for many other jobs but this company they paid for our trip to come over to (*sic*) I jumped to it. And I wanted to stay. And the lady that did our paperwork said we had to go home in order to come back.

Q. Okay, well I am going to ask you about that because that was an important part of today's case. But you said two things, you were tired of living in fear.

A. Yeah.

Q. Okay. Just tell me exactly the fear you were feeling?

A. I mean you can be anywhere, anywhere, it's a problem walking home because – at night or even if you go to the store, I mean we don't even let our children walk alone anywhere. The same as we take the car, the car high-jackings, you can write the letter to the police, if you got flashed with a camera after 12 o'clock you just write a letter and say well it was a couple of Africans standing there and what they are doing there that time of night standing on the road and by the traffic light. Because we got people that sell newspapers, they run around the cars and they are selling newspapers but if it's late at night what are they doing there. And women, they don't even find the women of, well you could just write a letter and they will scrap that because we know we have got a problem like that and what do you do.

Q. You commented just a few seconds ago “I am born there but they don’t want me there”. Just explain that part, I am born there but they don’t want me, who is they and why do you feel they don’t want you there.

A. Yeah, the Africans and the government has taken all our – they made our hands tied. It’s like the farm killings, they done away with the commandos, the people that the reservist, the reserve guys that patrol the farms, they done away with it because they know that just like they done away with the death penalty and all that. So now they just see us as a link to the past and why they are like that. But like that, they don’t have anything because we got (inaudible) shanty towns or informal settlements and the problem is now the cities and suburbs are getting bigger and they are starting to get closer. So it’s like you – I mean how do you go away, you go away on a Friday and the guy can jump over the wall and sit there for 48 hours and you can’t chase him away, that’s his piece of land, he can do what he wants. Now who protects us from that, nobody. Who protects the people dying on the farms or for land reformation and it’s not a question about get off the land. They kill the granny’s (*sic*), the mothers, the children, the dogs, the animals, the cows, they go like that. Because the farm doesn’t have anyone else to go to in the family it goes to the government, but that farmer is giving a hundred job opportunities so the land goes back and it goes to waste.

[154] Besides the prompting in this sequence and the obvious attempt by Mr. Kaplan to have the Respondent say that he came to Canada to escape the racial violence directed against him, it is

obvious that although the Respondent does not like the situation in South Africa he does not abandon his original answer that his primary motivation in coming to Canada was to find a job.

[155] Even when Mr. Kaplan waves the verbal cue card marked “FEAR” in front of him, the Respondent expresses no objective bases to support personal fear. He talks about the white people – the farmers, the women, the grannies and the mothers. Even when prompted, it is obvious that the Respondent wants to talk about his (and the Kaplan) view of what is generally happening in South Africa. At some points in the transcript (p. 43, for example) he talks about being afraid to go to some parts of South Africa, but he claims not to have been afraid when he was attacked because “that’s life for us” (p. 46) The fact that the Respondent may fear to live in South Africa does not make the attacks against him race-based. The evidence is that many people in South Africa, white and black, are the victims of crime and that crime is endemic. I think we can safely assume that black South Africans also live in fear of this widespread crime.

[156] Once again, in my view, there is no objective foundation for a finding in the Respondent’s personal evidence that he left South Africa because he fears race-based crime. He finds the lack of economic opportunities intolerable and he is looking for a better way of life. He is also, perhaps, fearful of the prevalent crime that exists in South Africa, but this is not, in my view, a sufficient objective basis to support a claim for persecution.

Failure to Report to the Police

[157] The Respondent failed to report to the police any of the attacks he now relies upon to support his claim for refugee status. This becomes an important factor for the RPD's analysis of state protection, but it also confirms the Respondent's lack of subjective fear.

[158] The transcript reveals the following:

Q. So, okay. So why didn't you go to the police?

A. Because nothing will be done. You get lost in the system.

Q. Nothing will be done. How do you know that?

A. Well if you could wait up to three, four years just to go to court because they are full of crime and violence, the courts are too full. We still got our fingerprinting on paper (inaudible), we are still behind the time and ---

Q. So it takes three to four years to get to court?

A. Till you finally get a decision or any – you see they make an example of us because we are educated as we have had our chance so you will get nowhere unless you have lots and lots of money.

Q. So the courts are too full of crimes.

A. Yeah.

BY THE COUNSEL (to the person concerned)

Q. Just pause for a second, sir. Sorry, could you repeat what you said, Brandon, when you said they want to make an example of us, can you repeat what you said please?

A. For example if you don't pay for a parking ticket you – they come and get you. But somebody else that commits a murder he just needs to say they killed my father in the old days and no one can teach me right from wrong and nothing happens to him. Our prisons are too full.

Q. Can you just, this part you are speaking with pronouns.

A. Oh, sorry.

Q. Pronouns, do you know what pronouns are like him, them, can you be more specific. So you said if you don't pay a parking ticket they will come and get you, who is they and who is you?

A. Me is the white people and the African police, South African police because it's a government job and we (inaudible) apply for that.

Q. And when you said about the murder, can you just tell me the colours, who is talking, somebody committed a murder.

A. Yeah. If an African commits a murder they feel sorry for you because he doesn't know right from wrong because the white people were bad in the old day so they just, it's like pay back from way back. They make an example out of us in everything.

BY THE PRESIDING MEMBER (to the person concerned)

Q. So if a white – a black person kills a black person what do they do?

A. It depends where it is because if it's in the rural areas somebody might even get to the police, the police are very on demand. It's a dangerous job so there is not (inaudible) like when there is a riot they just close off the roads and wait for it to stop.

Q. You say you don't go to the police because your lack of confidence.

A. Yeah.

Q. Where the claims get lost in the system et cetera and there is nothing that can be done.

A. And you don't want to go to jail as a white person, you get – it's just – we are the minority so there is nothing we can do, absolutely nothing.

Q. So do you mean to say that every crime in South African (*sic*) involving white people nobody ever ---

A. No, no, they are white people, yes.

Q. Nobody reports to the police?

A. Well it depends if it's (inaudible) in the police because that's in the open but we don't, you can't – it's even scary going to the police station because they ransack post offices, police stations, hospitals, they are undermanned, the police. And they would rather help their kind than ---

Q. The police are undermanned you say, right?

A. Yeah. And it's 90 percent, 80 percent of the police are all Africans because it's a government job.

Q. Yeah.

A. For example I can't join the army, I don't fit the colour criteria, that's just an example.

Q. So is the other 20 percent of the police force white?

A. Maybe the guys with authority, maybe even less.

Q. But if 80 percent of the police are Africans is the other 20 percent white?

A. Yeah.

BY THE COUNSEL (to the person concerned)

Q. Did you say 80 or 90?

A. I said 80 or 90. It's very little white policemen because they, I don't know what the name is called but what they do is like take my dad for example. He worked with the municipality for the government for 15 years so what they do is they give – if you are an African you can just pick what you want to do and they will give you the job and he has to train someone what he has been doing for 15 years. He has to teach this guy in a couple of months and the guy might be, he could sort of read or write and then after that they tell my dad bye, bye, you have to go now. Because it's called affirmative action, the government jobs go to the other people to make it right. Affirmative action means to make it right. And the jobs too, they implement laws in the legislation that has to be – they can't say you open up a company and you want five people, you can't just hire your sister or your mother and your cousin, you can't do that.

You have to give them a position and that's the way it works.

[159] There is a great deal in this sequence that is simply irrelevant to the issue of why the Respondent did not report the attacks to the police. Once again, he falls back upon general opinions about what is happening in South Africa. What little he does say on point suggests that the Respondent did not go to the police because he thinks the police are undermanned and prosecutions can take some time. It also reveals that he believes affirmative action to be a problem. In one sense, this is also irrelevant because the Respondent's refugee claim was based upon seven personal attacks involving physical violence. He appears to be suggesting, however, that he did not go to the

police because affirmative action has resulted in more black police officers, who will look after their own kind but are not likely to do anything for him.

[160] Applicant's counsel attempted to clarify the situation with the Respondent. The result was as follows:

Q. They did, yes. Just a little bit about the police. This morning you said, I think it was 80 to 90 percent of the police are black and the other 10 to 20 percent are white. Can you repeat once more why you did not go to the police?

A. Because it's scary because all the government jobs, every government job police or anything, they get it because it's their chance. So now if I go to the police station and I make a statement like I just got stabbed, they took my shoes, they are going to sort of like okay, well, you know, now you know what we have been through and et cetera. So, and if you go it's going to – you'll get lost in the system. It's so full of – and it's not that I say it's only them, there is a lot of bad white people there still but we are totally outnumbered. And they see (*sic*) the white people also, we have got two kinds, the English and Afrikaans and they also, like in the hostel because I had a English last name, they Afrikaans and the English people they also don't like to, how do I put an example, like the French and English they don't see eye to eye, the same with us back home. Because the Afrikaans people want to do things their way and the English people want to do things their way.

Q. Do you think from your experience the police wanted to help?

A. Well they have to help us (inaudible) police station and opened up the case and all that but – like I'll give an example. One of my friends got caught smoking drugs in a public place and

they had to wait three years before it got thrown out of court, three years for something that – and it was their first time. I know that smoking is bad but I'm using that as a real example. Or the famous Mark Yeoman (ph) he got in trouble for having, I think it was he had a pirate, not pirated DVD's but he had all the copies at his house, then he made like his own personal mix when he drives in the car and the policeman asked him right there but this is whatever, and he had to go to court and he stands next to a guy that's committed murder and he is African and he gets bail and he has to pay or he spends a couple of days in jail. Because all they need to see oh the victim of the system, so that's the way it works. I mean there is a lot of South Africans that do vigilante because they have to see their children's rapist walked past him and our hands our (*sic*) tied. It's like a normal thing. There was a big thing two years ago of a little girl of three years old getting raped by four Africans and their excuse was the witch doctor told them that if they do that then the curse of the AIDS gets taken away because we got two laws. We got tribal law and the government can't do nothing because it's their community. It's just – and it got thrown out of court because the policeman that wrote in the file he was semi illiterate so it got thrown out of court because the file is corrupt now. And then this poor guy has to live with that and they had a big thing because they could, it's going to sound bad, but they could look into her body because she was damaged so bad and absolutely nothing happened to them because I'm a victim of the system. And that works for them.

But if we do something wrong we get the law-law (*sic*). It's like our government can't even stop the tribes from circumcizing (*sic*) the girls and boys and a thousand die from infection

> but we can't do nothing because it's the tribal law. But if they come into the city and they can do the same it still doesn't matter.

[161] This attempt at clarification by Mr. Kaplan, it seems to me, yields more about the Respondent's perceptions about general problems in South Africa, and the difficulties faced by black people, than about the Respondent's failure to go to the police when he was attacked. There was no evidence before the RPD that the Respondent either asked for help from the police or was denied help in any shape or form. Delay in prosecuting cases can occur anywhere. This will become particularly important when the RPD's state protection analysis is examined, but it also adds to the impression that the Respondent had little in the way of subjective fear and that he knew how to take care of himself in a world where racial tension and confrontation is a way of life. Very telling in this regard is the fact that the Respondent did not go to the police following the 1991 and 1992 attacks which occurred at a time when the white apartheid regime was in full control and intent upon subduing black South Africans. Whatever the Respondent may say about present police practices, there is no evidence that he would have suffered any kind of delay or other problems had he gone to the police in 1991 and 1992. The fact that he chose not to do so suggests to me that he did not feel he needed police protection, and this adds to the general impression that he felt quite up to handling personally the physical threats and attacks that he says he suffered at the hands of black assailants. The RPD does not reasonably address in its Decision the Respondent's failure to seek police protection.

Delay in Making a Refugee Claim

[162] The Respondent first came to Canada on June 9, 2004, but he did not make a claim for refugee status until April 3, 2008.

[163] In the interim, the Respondent returned to South Africa in November 2004 and lived with his father until June 2005, at which time he returned to Canada with another work permit which was renewed until December 31, 2006.

[164] After December 2006, the Respondent remained in Canada illegally and made his refugee claim on April 3, 2008.

[165] In the usual case, such an extensive delay in making a refugee claim, although not fatal, would have counted against an allegation of subjective fear. In this case, the RPD excused the delay because it accepted the Respondent's explanation that, at least when he returned to South Africa, he did not know he could make a refugee claim and, subsequently, for the following reasons:

> In this particular claim, the claimant's work permit gave him validity until its expiry. He subsequently made attempts to solidify or justify his stay in Canada by attempting to join the Armed Forces and by marrying a Canadian citizen.

[166] The Respondent's work permit ran out on December 31, 2006. His attempts to join the Armed Forces and his marriage to a Canadian citizen in August 2007 did not prevent the Respondent from making a refugee claim. The RPD found as a fact that the Respondent "tried to

join the Canadian Armed Forces to avoid having to go back to South Africa ….” The RPD also found that he “married [his wife] believing that he could use her to help him get permanent status in Canada.” The marriage did not work and the Respondent eventually moved out before Christmas 2008.

[167] Hence, it is clear that, after December 2006, the Respondent was actively looking for ways to remain in Canada but did not make a refugee claim until April 2008. No reasonable explanation exists as to why someone who wanted to stay in Canada and who was actively seeking ways to remain in the country would try joining the Armed Forces and marriage but would not consider a refugee claim. There is nothing to suggest that the Respondent lacked the intelligence or the wherewithal to explore refugee protection if he felt that he truly qualified.

[168] In my view, it is plain from both the Decision and the record that the RPD excused the Respondent’s extensive delay in making a refugee claim because the RPD bought into what I will, for the sake of convenience, refer to, and later explain, as the “Kaplan view” of what is happening in South Africa. If the delay factor were the only questionable aspect of the Decision, I would have no hesitation in saying that the RPD weighed the evidence and exercised its discretion in a way that the Court should not question. However, when taken in conjunction with other aspects of the Decision, the RPD’s handling of the delay adds to the impression of imbalance and an unreasonable lack of objectivity.

Conclusions about the Respondent's Personal Evidence

[169] In my view, the Respondent's personal evidence provides no reasonably acceptable grounds to support his speculative assertions (often prompted by his legal counsel, Mr. Kaplan) that the attacks he suffered were racially motivated (even if mixed with other motives), or that he has a subjective fear of persecution in South Africa. I think the RPD was fully aware of this, which is why so much is made of the other evidence to bolster what was obviously, when the Respondent's own evidence is considered, a weak claim for refugee protection. Even accepting as credible the Respondent's account of what happened to him (and I do not question the RPD's credibility finding in this regard) there was insufficient objective evidence of racial motivation behind the attacks, or of subjective fear by the Respondent, to support the Respondent's claim.

[170] This conclusion is supported by the RPD's treatment of the evidence provided by Ms. Lara Kaplan, which obviously played a crucial role in the RPD's Decision to grant the Respondent refugee status.

The Evidence of Ms. Lara Kaplan

[171] A reading of the Decision as a whole reveals that the RPD was captivated by the Kaplan view of what is happening in South Africa generally. This caused the RPD to lose sight of the specifics of the Respondent's case and to suspend its objectivity when dealing with general conditions and state protection.

[172] There are a number of revealing comments in the Decision that should be mentioned. Before I do that, however, I think a few general comments are in order.

[173] As the RPD makes clear, it regarded the evidence provided by Ms. Lara Kaplan as "the lifeline for the claimant's claim."

[174] Lara Kaplan is the sister of Mr. Russell Kaplan, who was the Respondent's counsel before the RPD. It was Mr. Kaplan who decided to call his own sister to bolster the Respondent's claim.

[175] This is very significant because the RPD found as fact that the Kaplan family is "a close-knit one with a deep concern for each other's welfare."

[176] This close-knit and mutually-concerned family, which includes Mr. Russell Kaplan, the Respondent's counsel, and Ms. Lara Kaplan, the "lifeline for the [Respondent's] claim," has suffered a horrendous tragedy in South Africa for which its members deserve both my and everyone else's deepest sympathy. I have no doubt that the family feels devastated by what has happened to a second brother, Robert Kaplan, and by what it sees as happening to the country generally. The RPD acknowledges that both Lara and Russell Kaplan have come to Canada because of what they perceive to be "the reverse apartheid attitude which prevails in that country."

[177] The depth of the family's emotion concerning what has happened since apartheid ended in South Africa is more than evident in the excesses of Lara's testimony.

[178] Lara believes that the horrendous and deplorable attack upon her brother Robert, by black assailants in South Africa occurred because Robert was perceived to be "both white and wealthy." Quite naturally, Lara is highly emotional about the whole situation. So is her brother Russell, who is the Respondent's counsel. This caused the RPD to comment as follows in its Decision:

> During the course of her testimony, she (Laura (*sic*)) broke down and cried openly. That was to be expected. What I did not expect was to see counsel, Russell Kaplan, also break down and cry while she was describing the torture of her brother.

[179] I have to say that I am less surprised than the RPD that Russell Kaplan broke down and cried when reminded of what had happened to his brother. The Kaplan family is, as found by the RPD, "a close-knit one with a deep concern for each other's welfare."

[180] As indicated in the evidence of Lara Kaplan, the Kaplan family believes that a situation of "reverse apartheid" now exists in South Africa and that the family has suffered horrendously because of it. In other words, and to put it bluntly, Russell Kaplan was not the most objective counsel that the Respondent could have chosen, and Ms. Lara Kaplan was not the most objective witness to call to bolster the Respondent's claim for refugee protection. The hearing was obviously – and understandably – highly emotional for them. Naturally they wanted to ensure that the RPD received the Kaplan family version of the situation in South Africa and to demonstrate that what has happened to the Respondent supports their interpretation of the general situation there.

[181] This is why, in the end, the Respondent's account of what motivated the attacks and why he failed to inform the police is an ambivalent one. It is part Brandon Huntley's story and in part the

Kaplan family view. This also explains why Mr. Kaplan was a little heavy-handed with his questions and his verbal cues about "racial motivation." The Kaplan family obviously has a heavy emotional investment in the outcome of this case. They want to assert their view of "reverse apartheid" before the world. I am not saying that Russell and Lara Kaplan were wrong to do this or that their view of the situation in South Africa is unreasonable, but it certainly behoved the RPD to take care in handling the evidence brought forward in this case so that objective fact was clearly distinguished from the highly emotional, even if understandable, views of the Kaplan family.

[182] Mr. Galati argues that objectivity was achieved because the RPD's Decision clearly distinguishes between a recounting of the evidence that Lara Kaplan gave and the findings of fact that were distilled from that evidence.

[183] Ms. Kaplan witnessed none of the attacks upon the Respondent. Her role as a witness was to provide evidence of what had happened to similarly situated persons, including herself, and whether the South African authorities are either able or willing to provide protection to someone in the Respondent's position.

[184] I agree with Mr. Galati that the RPD does recite Ms. Kaplan's evidence before it makes its findings of fact based on that evidence. However, a crucial passage occurs at paragraph 73 of the Decision:

> This witness' [Ms. Kaplan's] evidence was the lifeline for the claimant's claim. She brought to the hearing, from her own personal experience, a vivid and detailed account of what is taking place in South Africa today vis-à-vis the African South Africans and the

> white South Africans and the indifference of the mainly African South African police force to protect them. White South Africans, she alleges, are no longer welcome in South Africa.

[185] This passage is not without its ambiguities. The final sentence is referred to as an allegation rather than a finding of fact, but the import of the rest of the paragraph cannot be ignored. A "lifeline" is a rope or line for saving or safeguarding life; it is something indispensable for the maintenance and protection of life. All common dictionary definitions define it in similar terms. So what is it in Ms. Kaplan's evidence that was indispensable to save, protect or maintain the Respondent's claim? Inevitably, I think the RPD has to mean her "vivid and detailed account of what is taking place in South Africa today vis-à-vis the African South Africans and the white South Africans and the indifference of the mainly African South African police force to protect them."

[186] In other words, the RPD is indicating in this passage that the Respondent's refugee claim would be dead in the water without the lifeline provided by Ms. Kaplan's evidence. Certainly it could not be maintained on the basis of the Respondent's evidence alone or any other evidence before the RPD. Moreover, the lifeline does not consist of what Ms. Kaplan says about the particular attacks suffered by the Respondent or his failure to seek state protection; it consists of what she says about what happened to her and her view of the general situation in South Africa. It is clear to me that, at this point in the Decision, the RPD has accepted the Kaplan family view of what is happening in South Africa and has decided that this view allows the Respondent to claim refugee status in Canada.

[187] The Kaplan family view of "what is taking place in South Africa today vis-à-vis the Black South Africans and the white South Africans and the indifference of the mainly Black South African police force to protect them" is a grim view. It is driven by the unquestionably horrendous experiences of Robert Kaplan in particular. Although it is articulated by Lara Kaplan, I do not doubt that it is sincerely held by the whole of the Kaplan family and by many other South Africans. For all I know, it may be entirely accurate. What I have to decide, however, is whether, on the evidence before it, it was reasonable for the RPD to accept the Kaplan family view as supporting the Respondent's claim which, in my view and, I believe, in the view of the RPD, could not stand on its own and so required a "lifeline."

[188] In her evidence Ms. Kaplan described incidents that she herself had experienced, incidents suffered by third parties and a general view of the situation in South Africa.

Ms. Kaplan's Personal Experiences

[189] In her evidence, Ms. Kaplan related two specific incidents in which she was personally accosted by black South African men. Neither incident is inherently racist in nature. Ms. Kaplan was driving a BMW and was inevitably identified as a prosperous person who might yield money or valuable property.

[190] As regards the August 2008 incident, Ms. Kaplan says she did go to the police:

a. Oh, you did report that to the police?

A. Yes, and I have the paperwork if you need that.

Q. Okay. I am just curious did the police do anything?

A. No, they never do anything. What police, there is no law and order there, there is no proper police force. It's free reign in South Africa, kill who you want and get away with murder.

Q. Okay. So just before we go on to your other family members I just want to spend a few minutes on this because this is an important part of the case.

A. Right.

Q. You said no they never do anything. Can you just elaborate on that statement?

A. The crime in South Africa is so completely out of control it is anoki (ph), it's in free fall. There are 50 murders a day, that is a busload of people are murdered in South Africa every single day. The police force cannot cope with the amount of crime. Most of the time the police force are corrupt. They are in cahoots with the criminals. They are so poorly paid they get backhands, it's full of fraudulent (sic) and corruption and there is no proper police force like there was prior to 1994.

They could not handle it even if they wanted to and to be honest I don't think they want to. They don't care, if you are white South African and you report a case it's like, you know, sorry, I'm busy, I'm on my tea break. That's the perception.

Q. Why do you say that you don't even think they would even want to?

A. Because they – everybody including the police force seems to believe that if you are a white South African and you are attacked it's because you deserve it. It's coming to you, it's due to you, it's long overdue

[191] Ms. Kaplan's evidence shows that she relies upon what she perceives to be the general situation in South Africa. We are not told what happened to her particular report of the attack against her and what consequences followed. We are not told if she followed up and attempted to find out what was happening. We are not told if the police did nothing in her case or simply could not trace the perpetrators. The RPD in its Decision simply relies upon her general statements and makes no reference to the specifics of her experiences with the police.

[192] As regards the 1997 incident where Ms. Kaplan says that the assailant wanted her vehicle, there is no evidence that she went to the police.

[193] This is not a sufficient objective basis for a finding that the South African police did nothing in Ms. Kaplan's case or that they would not have assisted the Respondent had he reported the attacks against him. It is noteworthy that, instead of providing specifics about what happened in her case, Ms. Kaplan takes refuge in general, unsubstantiated assertions about what she sees as the overall situation in South Africa. We are never told what happened, or failed to happen, as a result of her report, or why.

[194] This Court has noted the difficulties faced by the police in investigating and prosecuting random and isolated criminal acts by anonymous individuals. See *Ramirez Tenorio v. Canada (Minister of Citizenship and Immigration)* 2007 FC 63, [2007] F.C.J. No. 98 at paragraph 25; *Mejia v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1180, [2003] F.C.J. No. 1493 at paragraph 12; *Syed v. Canada (Minister of Citizenship and Immigration)*, [2000] 195 F.T.R. 39,

[2000] F.C.J. No. 1556 at paragraphs 17-18; *Danquah v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 832, [2003] F.C.J. No. 1063 at paragraph 22.

[195] In *Smirnov v. Canada (Secretary of State)*, [1995] 1 F.C. 780, [1994] F.C.J. No. 1922 (T.D.), at paragraph 11, the Court pointed out that it is a "reality of modern-day life that protection offered is sometimes ineffective" and that anonymous harassment and random assaults are difficult to investigate and protect against:

> In all such circumstances, even the most effective, well-resourced and highly motivated police forces will have difficulty providing effective protection. This Court should not impose on other states a standard of "effective" protection that police forces in our own country, regrettably, sometimes only aspire to.

[196] It is also noteworthy that the RPD does not make a finding that Ms. Kaplan went to the police as a basis for its Decision. The Respondent says that I must make a careful distinction between the RPD's recitation of Ms. Kaplan's evidence and the findings which are the basis of the Decision. Following this advice, I have to say that there is no finding that Ms. Kaplan went to the police although there is a recitation of her evidence to that effect.

Ms. Kaplan's Account of Third Party Attacks

[197] Ms. Kaplan also provided evidence as to what had happened to her brother Robert. Robert suffered appalling torture at the hands of black assailants in his own home. He was tied up, tortured, stabbed nine times, shot in the chest three times, burned with a hot iron and left for dead. He survived the open-heart surgery to remove the bullets from his chest. He continues to live in South

Africa with his father, who has fortified their living quarters to provide some protection. Another brother, David, has installed an electric fence around his home in South Africa, but there is no evidence that he had been attacked. Ms. Kaplan believes that both she and Robert were targeted because they were perceived as wealthy and white.

[198] Mr. Galati points out that, surely, when white people are tortured in such a horrendous way by black assailants the motives for the attack have to be more than robbery. The viciousness of the treatment meted out to the victim suggests racial revenge and hatred. It seems to me that to assess this argument properly it would be necessary to review evidence concerning what happens to black victims of crime in South Africa when they are assaulted and robbed either by black or white assailants. On the evidence of what happened to Robert, it is not possible to say whether the viciousness of the attack had a racial basis or whether certain human beings are just sadistic enough to enjoy mutilating and killing. Viciousness and sadism during the commission of a crime are not necessarily concomitant with racial hatred.

[199] It might be different if Robert had been targeted simply because he was white and there was no other purpose for breaking into his house than to torture and kill him because he was white.

[200] In any event, the Respondent was not tortured and sadistically abused in a way that has had a detrimental effect upon his health. He has been stabbed and cut various times but there is no objective evidence in my view to support a racial component to what he had suffered. A BBC News

Report entitled “South Africa’s Crime Crisis” reveals that black South Africans are also the victims of violent crime. It is not only white South Africans who are murdered.

[201] Ms. Kaplan also recounted stories about what had happened to her friend, Liza Chinn, who was attacked by a black South African while she was out jogging. The man attempted to rape her but did not succeed. There is no objective evidence, however, to suggest that the attempted rape was racially motivated.

[202] Ms. Kaplan also had received a fax from her cousin, Liz Marcus, describing how one of her friends was shot to death by black robbers while waiting for his son to finish soccer training at a park. Ms. Marcus reported that the black men were trying to rob a woman of her cellular phone and, for no reason, shot Ms. Marcus’s friend in the neck as they ran past him, simply because he was white. There is no objective evidence to support this conclusion or to explain how Ms. Marcus knew that her friend was shot simply because he was white. Random killings occur in Canada, and there is no reason to think that they must inevitably be racially motivated.

[203] Once again, horrendous as the stories related by Ms. Kaplan are, there is nothing, in my view, to suggest an obvious racial motivation. Ms. Kaplan’s opinions on what prompted the crimes recounted are simply her opinions and these opinions are driven by what has happened to her and to her family and the conclusions that she and her family have come to about what is taking place generally in South Africa. As I read the Decision, these are views that the RPD accepted and which became the “lifeline” for the Respondent’s refugee claim.

Ms. Kaplan's General Views

[204] Ms. Kaplan's general views are recounted by the RPD in its Decision. Ms. Kaplan, according to the RPD, holds the following views about what is taking place in South Africa:

1. She believes that black South Africans hate white South Africans for historical reasons and that "all" whites are regarded as being equally responsible for apartheid and that "we should be eradicated and stomped on like an ant."
2. She describes the present situation as being "reverse apartheid, which is in 200 percent of all the minds of white South Africans";
3. She believes that all whites in South Africa feel the hatred of black South Africans towards them;
4. She believes that black South Africans have "no regard" for the lives of white South Africans and that South African society is "brutal";
5. She believes that most crimes in South Africa are committed by black South Africans against white South Africans;
6. She believes that the police will do nothing about the crimes committed against white South Africans;
7. She believes that the mainly black South African police are "corrupt" and are "in cahoots" with black criminals;
8. She believes that the police will not help white South Africans because the whites deserve what is happening to them for historical reasons and that, in the words of the RPD, it is "payback time for the blacks";

9. She believes that what is happening to whites in South Africa at the hands of black South Africans is some kind of genocide;
10. She believes that since the end of apartheid the South African government has adopted and promoted policies aimed replacing white South Africans with black South Africans in positions of influence and power.

[205] Contrary to what the RPD says in paragraph 73 of its Decision, Ms. Kaplan's evidence does not provide "a vivid and detailed account of what is taking place in South Africa today" based upon "her own personal experience."

[206] Ms. Kaplan's personal experience is extremely limited, and it can hardly be said to equate to the Respondent's experiences. Ms. Kaplan has personally experienced two incidents that do not provide objective evidence of racial motivation, and she recounts stories of a few other people, none of which can reasonably be said to contain a racial dimension in terms of the motivation for the crimes that were committed against white victims.

[207] So Ms. Kaplan's "vivid and detailed account of what is taking place in South Africa today vis-à-vis the African South Africans and the white South Africans and the indifference of the mainly African South African police force to protect them" can only tenuously be connected to her own personal experiences. Her account is little more than a personal view propagated from within a prosperous and successful white South African family that, since the end of apartheid, finds the

"good life" they lived before 1994 not as good as it was and that regards affirmative action as a form of "reverse apartheid."

[208] In other words, Ms. Kaplan's view is highly partial and based upon her membership in a particular racial and socio-economic class. Notwithstanding Robert's brutal experiences, the evidence shows that the Kaplan family remain prosperous and successful. They have the power and the wealth to decide whether to remain in South Africa (Robert and his father have) or to make successful careers for themselves abroad. Most black South Africans remain poor and have no choice but to remain in South Africa and to face on a daily basis the rampant crime to which the objective documentation says they are subjected. This does not mean that Lara Kaplan's views cannot be accurate. Reasonably speaking, however, they cannot be relied upon by the RPD to provide a "lifeline" to the Respondent's refugee claim because her personal experiences provide no objective basis for her general opinions, and her general opinions need to be tested against impartial and objective evidence.

[209] In this respect, then, the RPD's conclusions regarding the value of Ms. Kaplan's evidence are unreasonable and the "lifeline" use that it makes of her evidence to support the Respondent's refugee claim is equally unreasonable. A similar lack of objectivity can be found in the RPD's treatment of the documentary evidence.

The Documentary Evidence

[210] In reviewing the documentary evidence, the RPD refers to South Africa's affirmative action policy or Black Economic Empowerment (BEE). It is not clear whether the RPD regards this as a form of racial persecution against white people. The RPD comments as follows:

> The new phenomena of white poverty is often blamed on the government's Affirmative Action legislation, which reserves 80 percent of new jobs for blacks and favours black-owned companies (i.e. BEE).

[211] I do not see what this has to do with the physical threats that form the basis of the Respondent's refugee claim, except that it appears to confirm that the Respondent's real purpose in coming to Canada was to find a job. Nor do I see any evidence that this kind of affirmative action policy could be regarded as a form of, or even evidence of, persecution in a country faced with the gargantuan task of rectifying the racial, social and economic inequities of the apartheid era.

[212] The RPD also refers to documentation about the killing of "mostly white farm owners by black assailants" that has created a concern "among white farmers that they … [are] being targeted for racial and political reasons." Given the situation in Zimbabwe, this concern by white South African farmers is entirely understandable, but that issue was not before the RPD and it is not before me. The Respondent is not a farmer. He claims to be a poor white South African. Evidence that some white South African farmers have been targeted is not evidence that all white South Africans are being targeted or that the Respondent has been, or may be, targeted for racial reasons.

[213] The balance of the documents referred to by the RPD were drawn from Mr. Kaplan's "Index of Documents." The RPD refers to these documents as "reports," but they are personal and somewhat idiosyncratic pieces that, as might be expected, are submitted to support the Kaplan family view of the general situation for whites in South Africa. There is nothing unreasonable about the Board considering these so-called "reports," but the RPD does not reveal an awareness of the highly personal and partisan nature of these documents; nor does it balance them with a review of more objective and authoritative reports of the current state of affairs in South Africa in so far as they relate to the Respondent's refugee claim.

[214] Mr. Galati has helpfully referred me to various passages in the documentation which he believes provide a reasonable, objective basis for the RPD's findings regarding the race-based risks faced by the Respondent and the inability and/or unwillingness of the South African authorities to provide adequate protection to poor white South Africans such as the Respondent.

[215] There is no doubt that these documents can be used to portray a grim picture of racial persecution against white South Africans which the state can do nothing about or, in some cases, that the state actively encourages. However, I think it is important to bear in mind the nature of the documentation to which the RPD itself refers in order to support its positive Decision. Consideration of the documentation occurs in paragraphs 96 to 118 of the Decision.

[216] When these paragraphs are viewed together we can see which aspects of the documentation were used by the RPD for its final findings of fact:

a. Paragraph 106: The RPD quotes from an article asserting that the ANC's "policies of affirmative action have destroyed many businesses and jobs, leading to an exodus of skills and expertise." In my view, this has nothing to do with the Respondent's claim for refugee status. There is no evidence that affirmative action and BEE are a form of persecution. The persecution relied upon by the Respondent is physical violence against which the state cannot or will not protect him. The Respondent portrays himself as a "poor" white South African. He worked as a bartender (1998-2001), a cleaner, a parking lot attendant and a technician in South Africa and came to Canada as a carnival worker. It is difficult to see what his refugee claim has to do with the destruction of "businesses and jobs" and "an exodus of skills and expertise";

b. Paragraphs 107-108: The RPD relies upon this article for its references to "police corruption and the chance if you report such corruption to another police officer, of ever seeing daylight again." Whether the Respondent and Ms. Kaplan have ever been the victims of police corruption is unclear. The Respondent has never reported any of the attacks made against him to the police and, although Ms. Kaplan says she reported one attack made against her, it is not made clear why there may have been no police response. The Respondent's principal concern about reporting was that prosecutions in South Africa take a long time. We are not told by the RPD how corruption relates to the treatment of race-based crime;

c. Paragraphs 109-110: The RPD relies upon this document to show that the hijacking of vehicles is prevalent in South Africa, and the document "gives instructions how to

avoid them and how to recognize what is a suspicious vehicle or person." There is no indication as to why the RPD considered the hijacking of vehicles as relevant to racial violence suffered by the Respondent or to state protection issues;

d. Paragraphs 111-112: The RPD refers to this document because it comments on "the wave of attacks targeting foreigners near Johannesburg and of people set alight by angry mobs who roamed townships looking for foreigners and looting their shops and homes." This article, in fact, is about violence against black migrant workers who came from other African states. The Respondent and Ms. Kaplan do not claim to have suffered violence as black migrant foreign workers. They are both white South Africans who say they have been attacked because they are white;

e. Paragraphs 113-114: The RPD makes use of this document for its guidance as to who is regarded as a "white South African." This is not an issue in the present case. There is no doubt that the Respondent and Ms. Kaplan are white South Africans.

[217] So when the RPD's reliance, as expressed in the Decision, is examined, I think it has to be said that, apart from the police corruption issue, it is difficult to see what relevance that reliance has for the Respondent's refugee claim of having suffered racially-motivated violence at the hands of black attackers against which the state could not, or would not, protect him. Even with respect to police corruption, it is difficult to see how this can apply to the facts of the Respondent's case.

[218] The RPD then goes on to make some general statements based upon, presumably, its reading of the documentation:

a. Paragraph 115: "The new phenomena (*sic*) of white poverty is often blamed on the government's Affirmative Action legislation, which reserves 80 percent of new jobs for blacks and favours black-owned companies (i.e. BEE)." Affirmative action and its consequences for white South Africa is what appears to lie behind the complaints of the Respondent and Ms. Kaplan. They do not think affirmative action is fair to white people. The Respondent came to Canada to work and find a better life. Ms. Kaplan came to Canada to continue "the good life" her family had enjoyed in South Africa before the end of apartheid. None of this has anything to do with the refugee claim in this case, but it does reveal, in my view, that the RPD has become sidetracked by irrelevancies;

b. Paragraph 116: This paragraph deals with the plight of white farmers in South Africa: "close to 2,000 farmers have been murdered in tens of thousand (*sic*) farm attacks in South Africa, many brutally tortured and slashed or raped. Some victims have been burned with smoothing irons or had boiling water poured down their throats. This type of torture is consistent with the torture received by the witness' brother Robert." These are indeed horrendous and disturbing statistics but their relevance for the Respondent's refugee claim is tenuous at best. The farmers are white and the Respondent is white, but he is not a farmer and he will not be going back to South Africa as a farmer. Robert Kaplan has the means to continue living in South Africa, even if he has chosen to protect himself inside a domestic fortress. The Respondent is a poor white South African who was born in Cape Town but who has most recently lived in Pringle Bay;

c. Paragraph 118: “However, white South Africans in predominantly wealthy white suburbs have been affected by the 2008 13.5 percent rise in house robberies and associated crime.” So crime is on the rise in South Africa and even wealthy white South Africans are feeling the effect. The evidence reveals that black South Africans are feeling it too. The fact that crime is on the rise and is an endemic and serious problem is not disputed in this claim. In my view, however, that fact tells us nothing about whether the Respondent and/or Ms. Kaplan were attacked for being white, or whether the state can or will protect the Respondent.

[219] Respondent’s counsel correctly pointed out to me at the review hearing that it is not my job to re-weigh evidence or to re-decide the Decision. My job is to judicially review the RPD’s Decision and decide whether it falls within a “range of possible, acceptable outcomes which are defensible in respect of the facts and law” as directed by the Supreme Court of Canada in *Dunsmuir*, above, and related cases. However, the necessary correlative to this position must also be observed. It is not my job to review the decision that Respondent’s counsel would, or could, have written had he been fixed with that task. I have to look at the use made by the RPD of the documentation it cites and bear in mind the reliance which the RPD says it placed upon that documentation.

[220] So my first and most general observation on this issue is that the RPD’s Decision cites and relies upon documentation for facts and information that have very little to do with the basis of the Respondent’s refugee claim and very little to do with the kind of white South African that the Respondent claims to be.

[221] In reviewing the documentation cited by the RPD, I also note the following specifics:

a. **United States Department of State (DOS) Report,** 25 February 2009

Although the US DOS report can be a very valuable source of information, in this case the RPD used this evidence selectively. Indeed, the report states that the "continued killings of mostly white farm owners by black assailants created concern among white farmers that they were being targeted for racial and political reasons." However, elsewhere the report notes that "[d]espite concern among the farmers that they were targeted for racial and political reasons, studies indicated that the perpetrators generally were common criminals motivated by financial gain [emphasis added]." When considered in its full context, then, it is clear that the US DOS report does not support the RPD's conclusions;

b. "Time for the Truth," 2009

The RPD clearly erred in relying on this opinion article as objective evidence. This article is based on opinion and was written by someone using the pseudonym "The Pied Piper." The RPD's reference to this article as a "report" and its contention that this is objective documentary evidence as to the current state of affairs in South Africa are misleading. Indeed, it is misleading to suggest that this article is anything but an opinion;

c. "Race-Fuelled Myopia Driving Skills out of South Africa," 2009

This newspaper article asserts the existence of a skills-drain of white South-Africans and says why this could be occurring. The article also describes what the government and other

political parties think about this phenomenon. In my view, this has nothing to do with the Respondent's refugee claim, which is based upon racially-motivated physical attacks;

d. **"South Africa – the Next Zimbabwe"** 3 February 2009, the Trumpet.com, by Robert Morley

This opinion article cannot be considered objective evidence. The author opines that in South Africa "the rule of law" is "the rule of organised crime," and he refers to a biblical prophecy that the curses South Africa "increasingly finds itself under" are going to get worse. The purpose of this article appears to be to encourage readers to read a booklet entitled "The Wonderful World Tomorrow – What It Will Be Like";

e. **"Attacks have shown most of ANC to be racists"** by M. Riordan-Bull Kleinmond, Cape Points, *Cape Argus*, 31 May 2008

The RPD again errs in referring to this article as a report. This article is a comment on the government. It demands that people of integrity be placed in power and forecasts that Jacob Zuma will fail as president;

f. **"Loss of freedom creeps up on us like a face of wrinkles"** by David Bullard *Sunday Times*, 21 October 2007

Again, the RPD refers to what is clearly an opinion article as a "report." The author gives his opinion on how South Africa has changed, and on the quality of judges, the police and the justice system in general. It describes the entire judiciary as "sycophantic drunks and rogues who are so desperate for a job that they will do anything the government tells them to";

g. **"Hijacking Awareness Guide"** prepared by Inspector Riaan Steenkamp, Silica Fund Administration Systems, 2 August 2006

In considering this report, the RPD seems to be inferring that hijacking is prevalent. While this report has been generated by an agency, there is no information provided on the agency;

h. **"South Africa: Burning the welcome mat"** by IRIN, 30 April 2009

This report considers xenophobia and attacks targeting foreign nationals. This article makes no mention of white foreigners but focuses on illegal migrants from other parts of Africa;

i. **"Quite (*sic*) South African"** 30 April 2009

The RPD erroneously relied on this as a "report." In reality, it is a Wikipedia entry defining "White South African" and the RPD has quoted directly from it

[222] It is clear that most of the "objective evidence" relied on by the RPD in this instance was anything but objective. Indeed, the RPD relied on a number of articles and editorials that are strong on opinions but not on facts.

National Documentation Package

[223] The RPD fails to balance the evidence referred to above against the more objective evidence found in the Immigration and Refugee Board's National Documentation Package.

[224] It is noteworthy that the National Documentation Package's List of Documents provides no sources or overt mention of racism, discrimination or violence targeted against white South Africans. Indeed, the only source found under the Nationality, Ethnicity and Race section of the package is an article entitled "Societal treatment of foreigners from other African countries, in particular from the Democratic Republic of Congo."

[225] However, an examination of some of the sources under the Human Rights portion of the package reveal some concern with regard to racial tensions in South Africa.

a. **US DOS Report**

Under the section of the DOS Report entitled National/Racial/Ethnic Minorities, the only mention of white South Africans concerns the continued killings of "mostly white farm owners by black assailants." However, the Report notes, as I do above, that studies show these killings to be financially motivated. The Report notes both concern that some white employers have been accused of killing black farm labourers and complaints that white employers receive preferential treatment from the authorities. Other racial concerns include the under-representation of blacks in the workforce, particularly at professional and managerial levels. The section on internally Displaced Persons notes:

> "[i]n mid-May xenophobic attacks against foreign African migrants and ethnic minorities by South African civilians in the townships in Johannesburg escalated into a national wave of violence in which 62 people were killed …. Of these, 21 were South African citizens, 11 were Mozambican, five were Zimbabwean, and three were Somali…. The perpetrators blamed the immigrants for job and housing losses and increasing levels of crime…. The estimated

> 80,000 migrants who were displaced by the violence fled to 72 temporary shelters …."

b. **Amnesty International Report 2008 – South Africa**

Highlighted issues in this report include widespread poverty and unemployment, use of excessive violence by police, the failure of authorities to respect the principle of non-refoulement, violence against women and a high prevalence of HIV. There is no mention whatsoever of discriminatory treatment against white South Africans;

c. **Human Rights Watch –World Report 2008 – South Africa**

Human Rights Watch notes that widespread poverty, unemployment, gender inequality and persistently high levels of violent crime remain significant barriers to human rights in South Africa. Large numbers of Mozambican and Zimbabwean migrants seek employment in South Africa's commercial agricultural sector. Although foreign migrant workers have legal rights, many farmers disregard laws governing minimum wage and paid overtime. We are told that "Undocumented migrants are also frequently harassed by police and immigration officials and are subject to assault and extortion during farm raids." Other issues noted in this report include excessive use of force by the police, issues with refugees and migrants, and women's and children's rights;

d. **BBC Report, "South Africa's Crime Crisis,"** 27 May 1999

This article, discussed in the Applicant's materials, is concerned with criminality in South Africa. Indeed, according to the article, "[a] serious crime is committed every 17 seconds in South Africa …." This article notes, however, that

> [f]or a people so traumatised, the fact that there has been so little revenge since the first all-race elections five years ago, is nothing short of miraculous. But nothing can excuse the unnecessary loss of life every day in this country through violent crime. It adds new traumas onto the old – for black people as well as whites are the victims [emphasis added].

The article then recounts the following story:

> The other day, one of my colleagues returned from the bank. He had been queuing up inside when outside on the pavement a security guard delivering cash was murdered by a gang of armed robbers.
>
> The guard had already handed over what he was carrying; he was lying face down in supplication. But one of the robbers shot him at point blank range.
>
> The guard was black – forced no doubt by unemployment levels into this dangerous job – and his family may have lost their only breadwinner.

This article seems to demonstrate that the loss of life and criminality that is occurring in South Africa transcends racial boundaries and is affecting all South Africans.

[226] In my view, the objective documentary evidence not only fails to support, but rather contradicts, the Respondent's allegations of systemic criminality based on racial discrimination against white South Africans. Indeed, the documentary evidence that discusses racial issues mainly focuses on the xenophobia against immigrants from other African states.

[227] There is little discussion of violence against white people in these reports and articles, and the discussion that exists is limited to the killing of white farmers, which has been attributed more to financial rather than racial motivation. The Respondent is not a white farmer.

[228] Furthermore, the documentary evidence in the National Documentation Package paints a picture of a South Africa in which black South Africans are under-represented in the workforce and have a hard time "climbing the ladder" into professional and managerial levels. In essence, this is the opposite story from the experiences claimed by the Respondent and his witness.

[229] My general conclusion on the RPD's handling of the documentation, as revealed by the Decision itself, is that reliance was, for the most part, based upon factors that have little relevance to the refugee claim made by the Respondent. The package of documents prepared by Mr. Kaplan, whose emotional involvement in these issues was acknowledged by the RPD, is highly reflective of the Kaplan family view of what is happening in South Africa. Indeed, it was prepared to support that point of view using sources who hold the same opinions about present-day life in South Africa. This partial approach to evidence should have been identified by the RPD. The RPD should have taken the precaution of checking it against more objective and authoritative sources. The Kaplan family point of view, and the picture painted by those documents submitted by the Respondent to show both the fate of white South Africans in South Africa and the failure of the state to protect them, cannot be discounted, but it was unreasonable of the RPD – given its own identification of Mr. Kaplan's emotional involvement; the fate of his brother; and the close-knit, mutually-supportive nature of the Kaplan family – not to have rounded out its assessment with a review of more

authoritative, objective and less emotionally partial sources than the ones upon which it chose to rely.

The RPD's Findings

[230] Having assessed the Respondent's personal evidence, the evidence of Ms. Kaplan and the documentary evidence, the RPD then came to its conclusions and findings. These findings occur at paragraphs 119 to 130 of the Decision. They are worth commenting upon in some detail because of what they reveal about the unreasonable errors that underlie the Decision:

a. "The claimant was attacked personally by African South Africans on at least six or seven occasions because of his white skin".

The factual evidence is clear that the Respondent was attacked by black South Africans. There is little objective evidence, however, to support a conclusion that the Respondent was attacked "because of his white skin." The Respondent's own evidence is that his attackers often had a purpose in attacking him other than his white skin: either they wanted to rob him or, in the case of the rugby match, because "they were losing the game." In the market car-park attack it was the Respondent who confronted the black man attempting to break into his friend's car. The attack while he was walking home with his friend from the beach at night does appear to have a systemic racial element. It looks like an attempt by black males to intimidate a "big white boy." The Respondent says, however, that he was not intimidated and that "that's life for us." It is also noticeable that the kind of racial intimidation evident in this attack took place in a setting – they were walking from "the beach area, all the pubs and

night life" – where tensions can result in racial violence in any country. Racial tension is not persecution. This incident hardly supports a general conclusion that the Respondent has been repeatedly attacked because of his skin colour. There is a possibility of mixed motives in some of the attacks, but the RPD does not grapple with this and there is no additional evidence of racial motivation other than the racial insults and epithets used during the attacks. The RPD does not adequately address the issue of whether the Respondent's whiteness was an indicium of relative wealth or whether the Respondent was attacked for being white. There is also little to suggest that the Respondent had, or has, any subjective fear of attacks by black males. His stated purpose in coming to Canada was economic. The "racial discrimination" aspect of the claim appears to have been suggested and played up so that he could claim a Convention ground rather than being an explicit or inherent aspect of the attacks;

b. "He has scars on various parts of his body, stomach, right eye, right side of his body and hands".

These facts are not in dispute, but they do not, in themselves, support racially-motivated attacks and a lack of state protection so as to make the Respondent a refugee;

c. "Multiple attacks. The witness, Laura (*sic*) Kaplan, was attacked and threatened with guns by African South Africans on two separate occasions because of the colour of her skin and perceived wealth".

Being attacked because you are perceived to be wealthy is not a ground for refugee protection. The RPD is undermining the reasonableness of its own Decision by relying upon "wealth" as a basis for protection. More importantly, however, there is no objective

evidence to support a conclusion that Ms. Kaplan was attacked "because of the colour of her skin" other than skin colour being an indicium of wealth. The evidence is that she was driving a BMW on both occasions. A BMW is also an indicium of relative wealth. Black South Africans are also attacked and threatened with guns by black South Africans. Ms. Kaplan's opinion of why she was attacked is based upon the Kaplan family's general view of what is happening in South Africa. This view includes a belief that all crimes are committed by black South Africans and that a situation of "reverse apartheid" and genocide exists in South Africa. There was no objective evidence before the RPD to support these extreme views. What is more, there is no clear evidence as to whether Ms. Kaplan's experiences were fully reported to the police or that the police failed to respond for the general reasons she gave as opposed to particular difficulties with her case;

d. "Laura's (*sic*) brother Robert who was tortured and shot by African South Africans and miraculously lived, now has major physical and psychological problems".

What happened to Robert, horrendous as it was, cannot support a general conclusion that the Respondent suffered and will suffer racial persecution in South Africa. As well as being tortured and left for dead, Robert was robbed by his black assailants. And even assuming that, at least in part, Robert was shot and tortured for being white, this in itself does not demonstrate that the Respondent is at risk of racial persecution against which the state cannot, or will not, protect him. Having suffered significantly more than the Respondent, Robert is still living in South Africa;

e. "Laura's (*sic*) brother Robert and her father survived only because of their wealth, being able to install electronic and guard protection for themselves both inside and outside their homes".

There is no evidence that Ms. Kaplan's father personally suffered and survived any attacks. The building of domestic fortresses is not, *per se*, an indicator of race-based attacks against the occupants. It merely shows that the wealthy have ways of protecting themselves against endemic crime in South Africa. Many black South Africans, who make up the majority of the poor, do not have this option. They are constantly attacked, robbed, murdered and raped by black South Africans who are, for obvious demographic and socio-economic reasons, the majority of the perpetrators;

f. "The evidence of the claimant and the witness [Ms. Kaplan] and the documentary evidence which I accept as credible show a picture of indifference and inability or unwillingness of the government and the security forces to protect White South Africans from persecution by African South Africans".

The Respondent has provided no reasonable explanation as to why he did not seek state protection. The RPD overlooks entirely that the 1991 and 1992 attacks relied upon by the Respondent took place before the 1994 end to apartheid and the coming to power of the ANC. The Respondent's failure to seek state protection at a time when it was reasonable to expect that a white South African would have no problem in securing it should have alerted the RPD to the evidence in the Respondent's testimony that he has no subjective fear. Furthermore, it should have prompted the RPD to examine more objective and authoritative sources of information concerning the availability of state protection in South Africa for white South Africans such as the Respondent. The Court cannot say that adequate state protection does exist, but the RPD must undertake a more objective assessment of this issue.

The documentation quoted by the Respondent is relevant and cannot be overlooked, but it is personal, partial and political and it needs to be examined against a broader background of more independent sources;

g. "I find that the claimant has presented "clear and convincing" proof of the state's inability or unwillingness to protect him".

The Respondent has never asked the state for protection and he has provided no reasonable explanation for his failure to seek help from the state, even when the state was a white-ruled apartheid state. Ms. Kaplan's evidence is equally lacking in this regard. The documentary assessment is incomplete in the ways I have already described, and the use made of the documents (e.g. to cite the position of white farmers) is often not relevant to the Respondent's position or to the nature of his refugee claim;

h. "I find that the claimant was a victim because of his race (white South African) rather than a victim of criminality and that he has established a link between his fear of persecution and one of the five grounds in the Convention definition".

As explained above, I do not think it was reasonable for the RPD to conclude that the Respondent, on the evidence he gave, established even subjective fear of persecution based upon racially-motivated attacks. Also for reasons given above, I think that the RPD's assessment of the objective situation was equally unreasonable;

i. "I find that there is no viable IFA (Internal Flight Alternative) for the claimant in any part of South Africa. According to the most recent statistics, African South Africans make up about 80 percent of the population; white Europeans approximately 9 percent and the remainder are other coloured and Asians …. I find that the claimant would stand out like a "sore thumb" due to his colour in any part of the country".

It is not clear what the RPD is using as the basis for this conclusion. The 9% of white South Africans are not all dispersed throughout the 80% black population. White enclaves exist where white South Africans continue to live and work. White people are moving to South Africa to live, so it must be possible for a white South African to live safely in some areas at least and not to stand out like a sore thumb. So it is not accurate to say that the Respondent would stand out "due to his colour in any part of the country" (emphasis added).

Counsel for the Respondent has argued that the Respondent cannot go to a white enclave or a city where a substantial number of white South Africans continue to live and work because the Respondent is "poor."

It is true that the Respondent did allege a lack of money in connection with an IFA. The RPD refers to this in paragraph 77 of the Decision:

> The claimant alleges there is no internal flight alternative (IFA) for him in South Africa because the African South Africans are everywhere and most of them have the same hatred against white South Africans. The only way he could live safely, if he had the money, would be to hire security guards and construct security features around his home like the witness' father and brother have done.

The problem with accepting counsel's argument is that I am hamstrung by another argument by the same counsel which I have accepted.

Mr. Galati has asserted (and I agree) that I must make a very careful distinction when reviewing the Decision between those earlier parts of the Decision where the RPD is

summarizing the evidence of the Respondent and Ms. Kaplan (indicated by the use of such words as “the claimant alleges”) and those parts of the Decision where the RPD makes findings based upon that evidence.

If I follow Mr. Galati’s advice, as I think I must in order to be consistent, then I must treat paragraph 77 as a recital of the Respondent’s evidence and not as a finding upon which the Decision is based.

Paragraph 129, on the other hand, is clearly the RPD’s finding with regard to an IFA and it makes no mention of the Respondent’s alleged lack of money. The finding is that he would stand out like a “sore thumb” “in any part of the country” “due to his colour” (emphasis added). Clearly this is untenable because he would not stand out “due to his colour” in those parts of the country where white South African’s congregate.

In any event, the Respondent’s allegation, as summarized in paragraph 77 of the Decision was not that there are white enclaves where he cannot go. His allegation was that “African South Africans are everywhere and most of them have the same hatred against white South Africans” (emphasis added). He alleged that “the only way he could live safely, if he had the money, would be to hire security guards and construct security features around his home like the witness’ father and brother have done.”

So the issue of an IFA, and whether a poor white South African such as the Respondent can go and live safely somewhere else where white South African's congregate is never fully canvassed in the Decision. The Decision itself deals with an IFA in paragraphs 128 and 129. It is clear that, when these paragraphs are read together, the RPD is saying that the Respondent would stick out "due to his colour in any part of the country" (emphasis added) because black South Africans make up 80% of the population and whites only 9%. The availability of a white enclave where white South African's congregate and make up a more significant portion of the local population is never addressed. Hence, this finding on an IFA is also unreasonable;

j. "I find that the claimant's fear of persecution by African South Africans is justified considering the objective evidence referred to".

As already discussed, the "objective evidence" is identified and dealt with in paragraphs 91 to 118 of the Decision. This objective evidence is partial and incomplete. In addition, of course, the objective evidence could not overcome other conclusions about the Respondent's lack of subjective fear and the unreasonable treatment of an IFA.

Conclusions on Merits

[231] There are numerous errors in this Decision that, either individually or cumulatively, render it unreasonable within the meaning of *Dunsmuir*, above, and require that it be returned for reconsideration by a differently constituted RPD.

[232] As I hope I make clear in the reasons, my principal concerns with the Decision are the RPD's heavy reliance upon the evidence and views of Ms. Kaplan regarding the general situation for white South Africans and the RPD's failure to consider the Respondent's documentation package against broader and more independent sources of general information.

[233] I am not saying that the South African state is either willing or able to protect persecuted white South Africans. What I am saying is that this is an issue that remains to be determined on a much more objective evidentiary basis than the RPD referred to and relied upon in this case.

[234] In addition, and as I have indicated, I have serious reservations about why this particular white South African came to Canada and, after a considerable delay, opted to claim refugee status. Once again, however, just because the Respondent's circumstances may not qualify as persecution under section 96 of the Act does not mean that I am saying that other white South Africans could not so qualify.

[235] I wish to emphasize again that all I am dealing with is a particular decision about one white South African within the narrow confines of Canadian jurisprudence on reviewable error. This decision cannot, and should not, be taken as either a personal or a political opinion or assessment about the plight of white South Africans in the post apartheid era.

[236] Having said that, however, I am now compelled to deal with certain constitutional, Charter, rule of law and jurisdictional issues that arise in this case because of alleged attempts by the South

African authorities to assert political and diplomatic pressure to subvert the rule of law in Canada in so far as the facts of this case are concerned.

External Considerations

[237] Counsel for the Respondent has, quite rightly in my view, brought to the Court's attention what he regards as chilling and coercive attempts by the South African authorities to subvert the rule of law in this case. The legal implications of these attempts at political and diplomatic interference are extremely serious. It could mean, for instance, that, notwithstanding the merits of this judicial review application, the Court should decline to entertain it because the Government of Canada has acted unconstitutionally and the Court should not encourage or condone such behaviour. It could mean that the Court itself has lost the jurisdiction to hear the application. Or it could mean, notwithstanding the unreasonable errors I have identified on the merits, that I should decline to send the Decision back for reconsideration because the matter is now so tainted that a legally independent decision is no longer possible.

[238] Let me say, at the outset, that I do not regard these concerns as entirely groundless or vexatious and I believe that counsel had both a responsibility to his client and to the Court to raise them.

The Evidence of Interference

[239] The Respondent has filed two affidavits to support his allegations of interference and loss of jurisdiction by the Court.

The Affidavit of Ms. Stefanie Gude

[240] Ms. Gude is Mr. Galati's assistant. Mr. Galati is the Respondent's counsel who argued the case for the Respondent at the hearing before me.

[241] Ms. Gude did a Google search and discovered that, following the RPD's positive Decision in this case, approximately 113,000 articles and stories appeared on the Internet and that considerable debate ensued around the implications of the Decision.

[242] Based on this Internet search, Ms. Gude points out that, immediately following the Decision, the reaction of the South African government was "swift and hostile" and that the South African government "threatened that diplomatic relations would be threatened, if the decision were not reversed."

[243] Ms. Gude has provided the Court with some sample articles. They report, for instance, that the African Nation Congress (ANC) labelled the RPD's Decision as "racist," "sensationalist" and

"alarming" and that "Canada's reasoning for granting Huntley [the Respondent] a refugee status can only serve to perpetuate racism."

[244] It was reported in the *Agence France-Presse* on September 2, 2009 that "South Africa's top diplomat in Canada" was "shocked" by the Decision and said that if the ruling was left to stand it could "seriously damage relations between the two countries."

[245] It was also reported that Mr. Abraham Sokhaya Nkomo, South Africa's high commissioner in Canada, dismissed the Decision as "outrageous" and that Mr. Nkomo "vowed to pursue every avenue to the Harper government to appeal the ruling – made last week by a one-man refugee board – to the Federal Court."

[246] The same article also reported Mr. Nkomo as saying that he had "already met with officials from the Department of Foreign Affairs and International Trade" and was "seeking a meeting with Immigration Minister Jason Kenney in a bid to get the ruling appealed." Mr. Nkomo was reported as saying: "We will pursue all avenues."

[247] On September 3, 2009 the *National Post* reported that the Decision had "ignited diplomatic tensions between Canada and South Africa" and that "the South African government [had] asked Canada to appeal the ruling on the grounds that there is no factual basis for it."

[248] On September 11, 2009 *Macleans* reported Mr. Nkomo as vowing "to leave no stone unturned in the effort to get the Harper government to appeal the ruling … to the Federal Court."

[249] The above is a sampling, but I think the implications are clear that the South African government was highly displeased with the Decision and brought diplomatic pressure to bear on the Canadian government to appeal the Decision to this Court.

[250] The government of Canada has no control over how or when the government of South Africa might decide to take umbrage and bring diplomatic pressure to bear. The reports suggest that, at least at a diplomatic level, it was understood that the RPD was not the government of Canada and that the only way to challenge the Decision would be to appeal it to the Federal Court.

[251] Based upon the articles that have been placed before me, I think it can only be said that, perhaps, the pressure from the South African government had something to do with the decision of the Minister to bring judicial review proceedings before this Court.

[252] However, there is no evidence whatsoever that the government of Canada paid any heed to diplomatic pressure in deciding whether or not to commence these judicial review proceedings. In her affidavit, Ms. Gude attempts to make up for this deficiency by referring the Court to articles that appeared after the decision to apply for leave and judicial review had been taken. However, these articles simply point out that the decision to appeal was made after South Africa raised its concerns

and that the South African high commission was pleased with the decision to have the RPD Decision reviewed.

[253] Ms. Gude also refers to articles that cite the wording used in the judicial review application itself, but such wording is standard and says nothing whatsoever about what may have prompted the judicial review proceeding.

[254] Based upon the articles presented in Ms. Gude's affidavit, I have no evidence before me to support a proposition that the government of Canada was influenced in any way by the South African government to bring these judicial review proceedings. Even if diplomatic pressure caused the government of Canada to inquire into the Decision, there is no evidence that the Minister brought this application for any reason other than that, having examined the Decision, he decided to seek judicial review because of reviewable errors in the Decision itself.

[255] In written argument, the Respondent asks me to find that "it is more probable than not that the Minister made his decision to commence the application as a result of pressure(s) from the South African government (against whom the Respondent made his claim), namely on improper political interference …."

[256] To support such a ruling based upon political abuse, the Respondent cites: (a) "the timing and circumstances of this application"; and (b) "the tenor, texture, and non-existent weight or merit of this application."

[257] Using the Respondent's own criteria, I think I have to say that the tenor, texture, and weight and merit of the application, as I have pointed out in my reasons on the merits, suggest nothing more than a decision by the Minister to have a seriously flawed RPD decision reviewed. The timing of the decision proves nothing. The South African government was bound to react as soon as the Decision was made, and the Minister had to decide whether or not to commence judicial review proceedings within the relatively short time allowed. The timing could not have been otherwise, and it says nothing about why the Minister decided to proceed with judicial review.

[258] So there is no evidence to support a finding that political or diplomatic pressure or interference prompted or caused the Minister to seek judicial review. Not content with this, the Respondent argues that it is the perception of abuse and interference that matters, and that the Court must examine the issue from this perspective.

[259] Based upon Ms. Gude's affidavit, there is no evidence to support any kind of perception other than the following:

a. The government of South Africa did not like the RPD Decision and asked the government of Canada to have it appealed to the Federal Court;

b. The government of Canada reviewed the Decision and commenced judicial review proceedings in the Federal Court because the Decision was seriously flawed and contained reviewable errors as defined by Canadian law.

[260] Ms. Gude's affidavit provides no evidence upon which the Court could conclude that the Applicant has brought these judicial review proceedings for any other reason than that the Decision contains reviewable errors and should be considered by the Court.

The Affidavit of Ms. Amina Sherazee

[261] In order to enhance his argument based upon perception, the Respondent has introduced a second affidavit. This one is sworn by Ms. Amina Sherazee, a barrister and solicitor who practises exclusively in the area of Immigration and Refugee Law and who says that much of her practice is in the Federal Court.

[262] Ms. Sherazee provides the Court with the following evidence and guidance:

> I can state, without hesitation, from personal experience, professional experience, and expert opinion, as well as the discussion of my immigration barrister colleagues at the bar, based on conversations and the monitoring of such list-serves (*sic*) as the RLA (Refugee Lawyers' Association) list, the CCR (Canadian Council of Refugees) list, and the like, and based on the grounds of review, and the "issue(s)" set out by the Minister, that had it not been for the explosive, hostile, and "racist"-allegation-ridden pressure of the South African government, and the public diplomatic threats made, and allegations of "racism", that the Minister would not seek judicial review of such a decision, which rests on anemic ***factual*** complaints on evidence and factual issue(s) of effective state protection, tied to the extreme, conceded facts of Mr. Huntley's ordeal, in what he suffered by way of physical attack(s).
>
> It is clear to everyone, that this is a "political" decision to bring judicial review, and not one based on any visible legal principle, which in my respectful view brings the administration of justice into disrepute, in that it compromises the underlying constitutional

> principles of the Rule of Law, Constitutionalism, and the Independence of the Judiciary.
>
> This is compounded and aggravated given the leave ratio granted by this Honourable Court. It is generally gauged that in 'bad years', the Court grants leave to 2 to 3%, and in 'good years' 5 to 6%, of all applications for judicial review brought by immigration/refugee applicants to the Court. It is virtually unheard of that the Minister's applications are ever refused. The difference, for the immigration bar, is slanted and inexplicable.
>
> With the greatest of respect, this further raises more than a palatable apprehension of bias, and an abuse of process by the Minister, with respect to this Court's adjudication of the within "application for leave and judicial review" [original emphasis].

[263] Given her professed experience in the Federal Court on Immigration and Refugee Law, it comes as a surprise to the Court that Ms. Sherazee would swear an affidavit that does not comply with the Court's rules for the swearing of affidavits.

[264] The relevant *Federal Courts Rules* on the swearing of affidavits provide as follows:

81. (1) Affidavits shall be confined to facts within the deponent's personal knowledge except on motions, other than motions for summary judgment or summary trial, in which statements as to the deponent's belief, with the grounds for it, may be included.	**81.** (1) Les affidavits se limitent aux faits dont le déclarant a une connaissance personnelle, sauf s'ils sont présentés à l'appui d'une requête – autre qu'une requête en jugement sommaire ou en procès sommaire – auquel cas ils peuvent contenir des déclarations fondées sur ce que le déclarant croit être les faits, avec motifs à l'appui.
(2) Where an affidavit is made on belief, an adverse inference may be drawn from the failure of a party to provide	(2) Lorsqu'un affidavit contient des déclarations fondées sur ce que croit le déclarant, le fait de ne pas

evidence of persons having personal knowledge of material facts.	offrir le témoignage de personnes ayant une connaissance personnelle des faits substantiels peut donner lieu à des conclusions défavorables.

[265] Ms. Sherazee's affidavit is problematic for the following reasons :

a. In the first quoted paragraph above, she does not really reveal how she comes by her "knowledge" that "had it not been for the explosive, hostile, and 'racist' - allegation-ridden pressure of the South African government, and the public diplomatic threats made, and allegations of 'racism', … the Minister would not seek judicial review of such a decision … ." She says that she bases her "knowledge" of this fact upon "personal experience, professional experience, and expert opinion, as well as the discussion of my immigration barrister colleagues at the bar, based on conversations and the monitoring of such list-serves (*sic*) as the RLA (Refugee Lawyers' Association) list, the CCR (Canadian Council of Refugees) list, and the like … ." However, Ms. Sherazee neither recites nor attaches as exhibits the substance, or even the gist, of the personal or other experience upon which she is relying. It looks as though she is simply asking the Court to accept her assertion that she knows what prompted the Minister's decision, even though she is not prepared to reveal how she knows this;

b. Ms. Sherazee also says that she bases her knowledge on the "grounds of review, and the 'issue(s)' set out by the Minister" and the fact that the application rests on "anemic <u>factual</u> complaints on evidence and factual issue(s) of effective state

protection, tied to the extreme, conceded facts of Mr. Huntley's ordeal, in what he suffered by way of physical attack(s)." This is nothing but argument and legal opinion, which it is Mr. Galati's role to provide. It has no place in an affidavit;

c. The second paragraph is, likewise, nothing but argument and opinion and, if it is clear to "everyone," I am left wondering why Ms. Sherazee cannot make it clear to me by providing the facts upon which she relies and allowing me to make up my own mind. As an officer of this Court I trust that Ms. Sherazee, in representing to the Court that it is "clear to everyone," has indeed taken appropriate steps and consulted with "everyone" or, if "everyone" means all of the Immigration bar, that she has indeed consulted with "everyone" who practises at that bar. Without an explanation, I cannot possibly understand how she appears to know in such detail what "everyone" thinks. This matter goes beyond professional courtesy. Members of the Immigration bar, in particular, may take exception to Ms. Sherazee presuming to represent their views before the Court in this way;

d. As I read the third paragraph of the quoted portion of Ms. Sherazee's affidavit together with the fourth paragraph, she is attempting to suggest that the Court's decisions on leave applications create an apprehension of bias if the Court decides this application in favour of the Minister. The source of Ms. Sherazee's assertions is not revealed to the Court and it is not clear who she means by the "Immigration bar." I think she must mean the side of the Immigration bar that represents claimants because my reading of Mr. Assan's materials (Minister's counsel in this application) is that he understands the process very well and does not find it "slanted and

> inexplicable." Once again, there is nothing here that rightly belongs in an affidavit. Ms. Sherazee is providing argument and opinion rather than facts within her knowledge that the Court can assess and use to reach its own conclusions.

[266] As Justice Konrad von Finckenstein stated in *Ly*, above, at paragraph 10,

> [e]xcept on motions, affidavits shall be confined to facts within the personal knowledge of the deponent: Rule 81(1), *Federal Court Rules, 1998*. The affidavit must be free from argumentative materials and the deponent must not interpret evidence previously considered by a tribunal or draw legal conclusions (*Deigan v. Canada (A.G.)* (1996), 206 N.R. 195 (Fed. C.A.); *West Region Tribal Council v. Booth* (1992), 55 F.T.R. 28; *First Green Park Pty. Ltd. v. Canada (A.G.)*, [1997] 2 F.C. 845). If an affidavit does not meet these requirements, the application can only succeed if an error is apparent on the face of the record (*Turcinovica v. Canada (M.C.I.)*, 2002 FCT 164).

[267] Moreover, according to *Deigan v. Canada (Minister of Industry)* (1996), 206 N.R. 195, 66 A.C.W.S. (3d) 837 (*Deigan*) at paragraph 2, the Court ought to reject portions of affidavits that are "tendentious, opinionated, argumentative or improper."

[268] To determine if an affidavit is proper, I have to consider whether the facts deposed to are within the knowledge of the affiant. To make this determination, the Court may consider the affiant's office or qualifications and whether it is probable that a person holding such office or qualifications would be aware of such facts. See *Smith Kline & French Laboratories Ltd. v. Novopharm Ltd*. (1984), 2 C.I.P.R. 205, [1984] F.C.J. No. 223 (C.A.). However, no matter how experienced an affiant may be, he or she is not entitled to speculate, makes legal arguments or draw

conclusions of law. See *First Green Park Pty. Ltd. v. Canada (Attorney General)*, [1997] 2 F.C. 845, [1997] F.C.J. No. 257 (T.D.).

[269] Indeed, the general requirement under Rule 81(1) is that affidavits ought to be confined to the personal knowledge of the deponent. This embodies the common law rule against hearsay. See *Bressette v. Keettle and Stony Point First Nations Band Council* (1997), 137 F.T.R. 189, [1997] F.C.J. No. 1130 (T.D.). This does not necessarily exclude hearsay evidence. Rather, a principled approach must be considered when determining the admissibility of hearsay evidence. See, for example, *Éthier v. Canada (RCMP Commissioner)*, [1993] 2 F.C. 659, [1993] F.C.J. No. 183 (C.A.).

[270] Sub-Rule 81(2) of the *Federal Courts Rules* allows the Court to draw an adverse inference from a party's failure to provide evidence from persons having personal knowledge. As such, an affidavit based on information and belief should provide an explanation as to why the best evidence is not available. See *Split Lake Cree First Nation v. Sinclair*, 2007 FC 1107, 320 F.T.R. 1. This rule is consistent with the principle that the failure to provide the best evidence will affect the weight given to the affidavit. See *Lumonics Research Ltd. v. Gould*, [1983] 2 F.C. 360 (C.A.).

[271] Ms. Sherazee's affidavit is unacceptable because it contains:

1. Facts outside of her personal knowledge;
2. Unsubstantiated opinion evidence;
3. Argumentative material; and

4. Conclusions of law.

[272] Any portions of the Sherazee affidavit containing factual statements cannot be dissociated from the numerous statements of opinion offered by Ms. Sherazee. As such, the affidavit is struck and is assigned no weight. See, for example, *Deigan*, above, and *Kassab v. Bell Canada*, 2008 FC 1181, [2008] F.C.J. No. 1503.

[273] Moreover, pursuant to sub-Rule 81(2), the Court may draw an adverse inference from the affiant's failure to provide the sources for the information upon which she relies and an explanation of why the best evidence was not available in this instance.

[274] In general, then, there is nothing in Ms. Sherazee's affidavit that is either relevant or admissible with regard to the issues that are presently before the Court. Nor does the Court have any evidence before it to support the Respondent's constitutional and abuse arguments.

The Jurisprudence

[275] The Respondent has offered the following factual basis for his allegation of a constitutional breach and abuse of process:

1. The Respondent is a white South African;
2. The Respondent was granted refugee status from the Board; and
3. The Minister commenced judicial review due to "political considerations and complaints from the South African government."

While (1) and (2) are not disputed, the third statement of fact, upon which the allegation hinges, has not been proven. While the Respondent claims that the Minister began his application for judicial review because of pressure from the South African government, the only alleged evidence to this effect is contained in the Gude and Sherazee affidavits. However, these affidavits do not meet the standards set out in *Ly*, above, and are full of irrelevant considerations, facts outside of the personal knowledge of the deponents, argumentative statements and legal conclusions. As such, I give these affidavits no weight and they cannot be used to uphold the allegations they are intended to support.

[276] The only other evidence which the Respondent believes supports his political influence allegation is the proximity in timing of the alleged meeting between Canadian and South African officials and the start of the Minister's application for judicial review.

[277] However, we have no knowledge of what was said in the alleged meeting between South African and Canadian officials. Moreover, we have no reliable evidence or knowledge that this meeting (or any discussion that occurred during this meeting) was the impetus for the Minister's decision to bring an application for judicial review.

[278] The Respondent brought a motion to have the Minister justify the application for judicial review. This motion was dismissed by the Court. As a result, the Minister has not had to justify the purpose for bringing this application for judicial review. Although the Respondent has attempted to use this as proof that the Minister's application for judicial review was based on undue pressure by

the South African government, I do not believe that this has been proven. It is the Respondent's duty to prove this fact, and not the Applicant's onus to disprove it.

[279] The Respondent's allegations of political interference and abuse have an extremely weak factual basis and hinge primarily on flawed affidavits as well as an inference the Respondent would have me draw with regard to the timing of the application for judicial review. I do not believe that this weak factual basis adequately supports the Respondent's claim.

[280] Not only is the premise of the Respondent's allegations flawed, but the Respondent would have me take a step further and find that the Court cannot consider the application for judicial review because to do so would result in a reasonable apprehension of bias and a lack of judicial independence, which in turn would result in the Court losing its jurisdiction over this matter.

[281] In support of this allegation, the Respondent compares the case at hand to that of *Cobb*, above. However, an examination of the facts of *Cobb* makes it clear that there is little to no similarity on the facts.

[282] At issue in *Cobb* were threats made by both a trial judge and a prosecutor against Canadians who were challenging extradition to the United States. The trial judge commented to a co-accused: "I want you to believe me that as to those people who don't come in and cooperate and if we get them extradited and they're found guilty, as far as I'm concerned they're going to get the absolute maximum jail sentence that the law permits me to give" (paragraph 7).

[283] Meanwhile, the prosecutor in *Cobb* threatened the appellants with homosexual rape in jail by stating on national television: “You’re going to be the boyfriend of a very bad man if you wait out your extradition” (paragraph 8).

[284] On this basis alone it is clear that the situation is *Cobb* is highly distinguishable from the case at hand. *Cobb* dealt with the potential extradition to the US of appellants who had been threatened by parties in the legal process itself in an effort to influence the appellants to relinquish their right to challenge extradition. According to the Supreme Court of Canada, these statements “were an attempt to influence the unfolding of the Canadian judicial proceedings by putting undue pressure on the appellants to desist from their objections to the extradition request” (paragraph 43). This is clearly distinguishable from the case at hand.

[285] Another factual consideration that distinguishes *Cobb* from the case at hand is that in *Cobb* the statements made by the American judge and prosecutor could be directly linked to the requesting state, who was a party before the court (albeit represented by Canada). As noted by the Court, the statements made by the American judge and the US attorney may properly be visited upon the requesting state itself, who was a party before the Court. In the case before me, the alleged requesting state would be South Africa; however, South Africa is clearly not a party before the Court and, as previously noted, there is no reliable evidence to demonstrate that the Minister is acting in the interest of South Africa.

[286] In *Cobb*, clear threats were made against the appellants by people taking part in the judicial process. This is clearly not the case at hand. Rather, South Africa has expressed its displeasure with regard to the finding of a Canadian tribunal. There is no proof that the government of Canada began its application for judicial review as a result of any threats. Similarly, if the South African government was found to be pressuring the Canadian government in any way, such pressure was not to relinquish a right but rather to exercise a right granted to the Minister by statute.

[287] The Respondent has also raised the case of *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405 in this instance. I do not believe that the facts of that case are relevant or comparable to the case at hand. The portion of *Mackin* cited by the Respondent simply discusses the law of judicial independence.

[288] While the Respondent alleges that the Court's judicial independence has been compromised because of the Minister's motivation in bringing this application for judicial review, I do not believe there is any merit to this argument and there is certainly no evidence before me to support such an allegation. I have already examined the motive imputed to the Minister by the Respondent, and I have determined that it is based not on evidence but rather on speculation.

[289] As quoted in *Mackin*, above, at paragraph 35:

> Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

[290] In this instance, neither the Minister nor the government of Canada has placed any pressure on the Court. As such, there is no reason why I cannot consider the matter before me impartially and in accordance with my assessment of the facts and the law as noted in *Mackin*.

[291] *Mackin* enumerates three essential characteristics of judicial independence: financial security, security of tenure and administrative independence. Both the existence in fact of these essential characteristics as well as the maintenance of the perception that they exist are important.

[292] The test for determining the judicial independence of the Court is similar to that for a reasonable apprehension of bias, that is, "whether a reasonable person who is fully informed of all the circumstances would consider that a particular court enjoyed the necessary independent status." See *Mackin* at paragraph 38 and *Committee for Justice and Liberty v. (Canada) National Energy Board*, [1978] 1 S.C.R. 369 (*Committee for Justice and Liberty*). However, the Court must emphasize the appearance of impartiality as well. According to the Court in *Mackin*, "[e]mphasis is placed on the existence of an independent status, because not only does a court have to be truly independent but it must also be reasonably seen to be independent" (paragraph 38).

[293] I do not believe that judicial independence is an issue in this application before me. While Ms. Sherazee alleges that there is a perception of bias with regard to the Court's decisions to grant leave applications, this allegation is based upon unsubstantiated statistics, speculation and personal opinion. I do not think it can be said that any reasonable, well-informed person would believe that there is a concern with regard to judicial independence in this instance. Moreover, as stated by the

Federal Court in *Geza v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 124, [2006] F.C.J. No. 477, "the reasonable person in the rule against bias is not to be equated with either the losing parties or the unduly suspicious."

The Remedy

[294] At the hearing of this matter, Respondent's counsel suggested that, even if I found a reviewable error in the Decision, I should not quash it and return it for reconsideration because the RPD cannot now fairly, and impartially, re-determine the Respondent's refugee claim. However, there is no evidence whatsoever before me to suggest that the RPD cannot fairly and impartially consider the claim in accordance with my reasons. As the Applicant points out, the RPD has heard, and will continue to hear, highly publicized and controversial refugee claims.

[295] There is simply no evidence before me to support the bald assertion – made by a party who is not disinterested – that the comments by the South African government, the controversy surrounding this case, or the fact of these proceedings and the way they have progressed could have any impact upon the independence of the RPD or any individual member who re-hears this refugee claim.

[296] The test for a reasonable apprehension of bias in this context is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude." See *Committee for Justice and Liberty*, above, at 394.

[297] As the Applicant points out, no reasonable bystander would conclude that the RPD has lost its independence as a result of anything that has happened in this case. There is no evidence that the RPD either is predisposed towards the Minister or has in any way been influenced, or could be influenced, by what has been written or said about this case in the media.

[298] In addition, all of the Respondent's arguments on this issue are premature. If bias or a reasonable apprehension of bias arises upon reconsideration of this case then the Respondent will have ample opportunity to raise it and seek judicial review before this Court.

[299] In my view, the Respondent is simply attempting to immunize his case against judicial review and re-hearing. He cannot become a Convention refugee by default and by mere assertions of partiality or institutional bias on the part of the RPD.

Certification

[300] The Respondent has suggested two questions for certification. The first one is:

> Does the SCC decision in *USA v. Cobb*, [2001] 1 S.C.R. 587, and its principles, apply in cases of political interference with the (quasi) judicial process under the IRPA?

[301] Questions for certification must be serious questions of general importance that would be determinative of the appeal. See *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4, [1994] F.C.J. No. 1637, (C.A.); and *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368 at paragraph 11. In addition,

the question must not be hypothetical and "must … invite the Federal Court of Appeal to deal only with the specific decision under appeal and not with broad issues for which no factual basis or, at best, no adequate factual basis is provided by the matter under appeal." See *Pillai v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1417, [2001] F.C.J. No. 1944 at paragraph 32.

[302] The most obvious problem with the first question is that it is purely hypothetical. I have found as a fact that there is no evidence of "political interference," either actual or perceived, before the Court in this application. Hence, the question cannot be certified.

[303] The second question raised by the Respondent reads as follows:

> Does the Federal Court, in granting the Minister a remedy on an application for judicial review, where the genesis of that review can be reasonably seen to be external political interference with the process under review, lose jurisdiction:
>
> i. constitutionally, by losing its judicial independence by being "reasonably perceived" as (institutionally) biased, as set out by the SCC in, *inter alia*, *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 S.C.R. 405; and
>
> ii. statutorily, under ss. 18-18.1 of the *Federal Courts Act*?

[304] Once again, the obvious problem with this question is that, on the facts of this case, it remains purely hypothetical. I have made a factual finding that there is no evidence before me to suggest that the genesis of this review could reasonably be seen to be external political interference with the process under review.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed. The Decision is set aside and the matter is returned for reconsideration by a differently constituted RPD in accordance with my reasons;
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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