

2022-2023 – IMMIGRATION, REFUGEE, AND CITIZENSHIP LAW MOOT PROBLEM

The following are the Decision and Reasons of Board Member Aleksander Karłowicz of the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board (“IRB”) in respect of the claimants, Isabella Barbosa Reis, a.k.a. Isabella Santos Reis, and her children, Pedro Reis Barbosa and Alandra Reis Barbosa, Therein, the RPD Board Member admitted and relied upon unsolicited evidence filed by Isabella’s husband (the alleged agent of persecution), as well as transcript evidence from his refugee hearing, to find that the claimants were not credible in their allegations of domestic violence. This led to a negative refugee determination for the claimants. The decision of the RPD Board Member was subsequently overturned by the Honourable Justice Jemima Okoro of the Federal Court of Canada; the judgment for which is also set out below.

In this moot, both the RPD Board Member and Federal Court have jurisdiction over the issues raised in their respective decisions. The standard of review adopted by the Federal Court is also correct and not the subject of appeal to the Crown Court of Canada. Furthermore, arguments related to the constitutionality of the Safe Third Country Agreement are not to be raised. Please do not make arguments relating to these issues.

The Crown Court is a fictional court established to hear immigration and refugee appeals from the Federal Court. No decision of any Canadian court, including the Supreme Court of Canada, is binding on the Crown Court of Canada; however, Canadian jurisprudence can and should be used in the appeal facta to argue respective positions. In accordance with Rule 9 of the *Official Rules*, decisions of appellate courts and the Supreme Court of Canada are persuasive in the Crown Court of Canada in accordance with the established hierarchy of those courts.

All the issues raised in the reasons given by the RPD Board Member and Federal Court should be addressed by Counsel for the Appellant or Respondent in their submissions. Arguments not referenced in the reasons may be advanced by counsel in their submissions, but only if they relate to the issues identified in the previous decisions.

In order to appeal to the Crown Court of Canada, Justice Okoro certified the following question:

Can unsolicited evidence, including affidavit evidence, filed by the agent of persecution be admitted and considered by the Refugee Protection Division?

Whether this question is properly certified **is not** a subject of appeal to the Crown Court. As the moot is to proceed on the basis that the above question has been properly certified, this also opens the grounds of argument on appeal to both issues raised and decided before the Federal Court.

Pursuant to Rule 10 of the *Official Rules*, mooters may request clarification on points that are unclear in the Official Problem and that reasonably need to be clarified in order to submit a proper

argument. Such requests must be made by email to info@ilm-cpdi.ca by midnight EST on November 25, 2022 and include a max. 250 word explanation as to why a clarification is necessary.

Immigration and
Refugee Board of Canada
Refugee Protection Division



Commission de l'immigration et
du statut de réfugié du Canada
Section de la protection des réfugiés

**RPD File No. / N° de dossier de la SPR : RPD20-12345
RPD20-12346
RPD20-12347**

Private Proceeding / Huis clos

Reasons and Decision

Applicant(s)	Isabella Barbosa Reis, a.k.a. Isabella Santos Reis Pedro Reis Barbosa Alandra Reis Barbosa	Demandeur(s)
Respondent(s)	Minister of Citizenship and Immigration	Intimé(e)(s)
Date(s) of Hearing	September 15 2021	Date(s) de l'audience
Place of Hearing	Toronto, Ontario	Lieu de l'audience
Date of Reasons and Decision	October 25 2021	Date des motifs et de la décision
Panel	Aleksander Karlowicz	Tribunal
Counsel for the Applicants	Staff Lawyer, Refugee Law Office	Conseil(s) de la (des) personne(s) protégée(s)
Designated Representative(s)	Angelique Charles	Représentant(e)(s) désigné(e)(s)

REASONS AND DECISION**INTRODUCTION**

1. Ms. Isabella Barbosa Reis (the principal claimant), and her two children, Pedro Reis Barbosa and Alandra Reis Barbosa (minor claimants), are citizens of Brazil. They claim refugee protection pursuant to s. 96 and subsection 97(1) of the *Immigration and Refugee Protection Act (IRPA)*.
2. Their claim was initially joined with that of their husband and father, respectively, Manuel Alves Barbosa (RPD20-12344), but was subsequently separated after an application was made by the claimants pursuant to Rule 56(2) of the *Refugee Protection Division Rules* on the basis of intimate partner violence and abuse. Accordingly, the claim of Mr. Alves Barbosa is not the subject of this decision.

DETERMINATION

3. The panel determines that the claimants are neither refugees, nor persons in need of protection, pursuant to ss. 96 and 97(1) of the IRPA.

ALLEGATIONS:

4. The Principal claimant, Isabella Barbosa Reis, née Santos Reis, married her spouse, Manuel Alves Barbosa in 2015 in São Paulo, Brazil.
5. The couple had two children together, Pedro Reis Barbosa, a male child born on October 28, 2017 and Alandra Reis Barbosa, a female child born on August 3, 2019.
6. In mid-2019, Mr. Alves Barbosa claimed that a gang, Comando Vermelho (“C.V.”), began to target him with extortion demands, based on their belief that he was a member of a rival gang. In December of that same year, when the family could not pay the extortion fee, members of the C.V. physically attacked Mr. Alves Barbosa and threatened to kill him if he did not make payment. As a result, in February 2020, the family fled to Canada, entering via the United States. They were exempted from the Safe-Third-Country Agreement, as Ms. Barbosa Reis has a Canadian citizen sister in Toronto, Ontario.
7. The family made their refugee claims together at the port-of-entry. In both the eligibility interview with Canada Border Services Agency (“CBSA”) and the Basis of Claim (“BOC”)

forms subsequently filed by the family, the sole risk raised is the alleged persecution by the C.V. These events are laid out in detail in the BOC narrative of Mr. Alves Barbosa. No independent narrative was filed for Ms. Barbosa Reis, with the notation in her BOC form that she relied on the narrative of Mr. Alves Barbosa.

8. A hearing date was scheduled for the family's claims for July 9, 2021.
9. On June 1, 2021 the RPD received an application on behalf of Ms. Barbosa Reis and the two minor claimants to sever the claims, along with a change of counsel notification. In that application, she alleged that she had been the victim of ongoing domestic violence at the hands of Mr. Alves Barbosa. At the time of the application, Ms. Barbosa Reis was living in a shelter with the couple's two young children. The application to sever was granted on June 11, 2021 and the original hearing date was vacated for Ms. Barbosa Reis (now principal claimant) and the minor claimants. Out of an abundance of caution and given the potential for a conflict of interest, a Designated Representative, Angelique Charles, was appointed for the minor claimants.
10. The principal claimant filed a new BOC narrative for herself on July 5, 2021. Her narrative details her marriage to Mr. Alves Barbosa as a violent union with many incidents of violence at his hands. Her new BOC narrative provides a detailed description of her allegations in regard to the domestic violence experienced in Brazil and in Canada. For this reason the Panel will provide here only an overview of the allegations outlined in the amended BOC narrative of the principal claimant.
11. The principal claimant alleges that Mr. Alves Barbosa became physically and verbally abusive towards her shortly after their marriage in 2015. He became controlling towards her. For example, he demanded that she end all friendships or interactions with men and would not let her leave the house for activities on her own unless she had his permission. She alleges that when she found out that she was pregnant on February 4, 2016, he accused her of an extramarital affair and assaulted her violently, leading to a miscarriage. Subsequently, there was a period of four months in which Mr. Alves Barbosa was not abusive as she recovered from the miscarriage. However, this ended on June 17, 2016 when the principal claimant discovered that Mr. Alves Barbosa had been seeing another woman. When she confronted him, Mr. Alves Barbosa beat her and threatened to hurt members of her family should she leave him. The abuse resumed.
12. After the birth of their son (minor claimant) in 2017, the principal claimant alleged that Mr. Alves Barbosa began to threaten her with taking her son away from her should she report the abuse to anyone. He continued to make these threats when their daughter was born; she alleged this was a means to control her and prevent her from leaving him. She

did not make any attempts to obtain protection from the police as, according to the principal claimant, intimate partner violence is seen as a “domestic issue” in Brazil in which the police do not intervene.

13. The alleged abuse continued after their arrival to Canada in February 2020. Mr. Alves Barbosa kept the principal claimant isolated. He would not allow her to leave their apartment if he did not accompany her. As the principal claimant did not speak English and Mr. Alves Barbosa did, he would act as her interpreter in every interaction. In addition, Mr. Alves Barbosa became physically aggressive towards their children. He would hit and yell at them when they were too loud or when they would not stop crying. The principal claimant alleges that it was his change in behaviour towards the minor claimants that led her to leave him as she believed that it was necessary to protect them.
14. She indicated in her BOC narrative that she was no longer relying on the risk alleged by her ex-partner, Mr. Alves Barbosa.
15. No independent Basis of Claim narrative was filed for the minor claimants by the Designated Representative due to their young age (2 and almost 4 years of age at the time of hearing). No specific incidents of abuse are detailed in the amended BOC narrative of the principal claimant in respect of the minor claimants.

PRELIMINARY MATTERS

Decision on admissibility of Transcript evidence¹

16. The claim of Mr. Alves Barbosa was heard at the original hearing date of July 9, 2021 with a differently constituted RPD panel. The Minister intervened in person in his claim on the basis of program integrity and credibility. A negative decision was issued in his refugee claim on August 2, 2021.
17. On August 13, 2021, the Minister also intervened in this claim on the basis of program integrity and credibility. Included in the Minister’s intervention materials was an application to include excerpts of a hearing transcript (“Transcript”) from Mr. Alves Barbosa’s oral refugee hearing and his refugee decision, dated August 2, 2021. The Minister argued that Mr. Alves Barbosa provided testimony at the July 9, 2021 hearing that was directly relevant to the credibility and basis of claim for Ms. Barbosa Reis and the two

¹ Preliminary decision issued on August 26 2021 in writing to the parties, indicating that the transcript evidence was admitted as it meets the requirements of RPD Rule 21, is relevant, credible and probative of the central issues in this refugee claim. The decision and final reasons have been developed further in this decision.

minor claimants. The Minister notes that the excerpts speak specifically as to Mr. Alves Barbosa's opinion about why the claims have been disjoined and the credibility of the claims of domestic violence, as well as describing his relationship with the minor claimants. The Minister further argued that the decision in Mr. Alves Barbosa's refugee claim was also relevant as it pertained to any residual risk from the C.V. gang, as well as supporting the credibility of Mr. Alves Barbosa as no credibility findings were made and his claim was denied solely on state protection. The Minister's position is that the content of the Transcript and RPD decision is highly relevant as it controverts the principal claimant's key allegations and admitting this evidence is indispensable to a full and proper determination of this claim, while also serving the interests of justice. Lastly, the Minister included a consent from Mr. Alves Barbosa for his Transcript and RPD decision to be used in the claimants' hearing, as required by Rule 21(2) and no request for personal and other information was made by Mr. Alves Barbosa under Rule 21(3).

18. In their reply, the claimants argued that it would be inconsistent with Rule 21(5) of the *RPD Rules* and s.170(h) of the *IRPA* to admit the transcript evidence of the agent of persecution. They argued that the Transcript originates directly from the agent of persecution who has strong bias, interest and motivation to be untruthful. The Transcript does not have sufficient probative value as evidence because it is self-serving in favour of the perpetrator. The claimants also contend that it is impossible to test the transcript evidence properly by way of cross examination without calling the agent of persecution as a witness in his victim's refugee proceedings. Apart from the psychological turmoil suffered by encountering her abuser directly during the hearing, the principal claimant would be vulnerable to her husband's retaliation, harassment, and other abuse, actual or attempted. They argue that this is incompatible with the mandate of the RPD as a non-adversarial administrative board which hears the claims of vulnerable claimants. With regards to the refugee decision, they argued that it had no relevance as the claimants were not advancing a claim based on risk by the C.V. gang and further that a lack of credibility findings does not support a finding of positive credibility. The claimants argue that disclosing this evidence from the agent of persecution's refugee claim would cause an injustice contrary to RPD Rule 21(5) and is highly prejudicial.
19. I allowed the application of the Minister on August 26, 2021. RPD Rule 21 allows me to do so, as the factual content of the Transcript is clearly relevant to the Claimant's key allegations in this claim. With regards to the safeguards contained in sub-paragraph (5) of Rule 21, no evidence has been put forward that using the content of the Transcript in the principal claimant's refugee proceedings will endanger anyone's life, liberty or security or cause an injustice. Further, the principal claimant had proper notice of the Transcript's disclosure into her claim, and she took advantage of her opportunity to respond by presenting her objections.

20. Furthermore, Mr. Alves Barbosa as the source of the Transcript is identifiable and known. The information in the Transcript reflects his testimony given under oath of telling the truth. It is well-settled in Canadian law that sworn testimony is presumed to be credible.² There are no bases to overcome this presumption of truthfulness. Although the claimants or their counsel were not present to cross examine Mr. Alves Barbosa, the Minister and the Board Member were present to cross examine instead. I am satisfied that the testimony of Mr. Alves Barbosa was tested for its credibility and trustworthiness in the context of the July 9 2021 hearing. No breach of natural justice or injustice will occur as a result of admitting the evidence.
21. Finally, I do not consider it an operative or relevant factor that the Transcript originates from the alleged agent of the persecution to the extent of declining to admit it into evidence. The claimants are entitled to make a formal request, in accordance with Rule 45, to compel Mr. Alves Barbosa to appear as a witness in their claim. This would allow a full opportunity to cross-examine him about the content of the Transcript. Any potential concerns about juxtaposing the alleged perpetrator and the alleged victim as witnesses against each other in the same proceedings are outweighed by the high degree of relevance of the information. I am not persuaded by the principal claimant's argument that she should not have to face and confront her alleged abuser in cross-examination.
22. Similarly, the RPD decision is admitted as evidence based on its relevance and probative value in regards to the residual gang claim and the credibility of Mr. Alves Barbosa.

Decision on Admissibility of Unsolicited Information³

23. Subsequent to the July 9, 2021 hearing, Mr. Alves Barbosa initiated family law proceedings for custody and access to the minor claimants.
24. On August 16 2021, the Board received a voluminous package of unsolicited documents filed by counsel for Mr. Alves Barbosa in the family law proceedings. The package consisted of documentation filed in the family law proceedings by Mr. Alves Barbosa, including his sworn affidavit and letters from family members and friends in Brazil. The evidence describes Mr. Alves Barbosa as a committed family man and a caring, responsible

² *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) at para 5.

³ Preliminary decision issued on August 30, 2021 in writing to the parties, indicating that the Unsolicited Information was admitted as it meets the requirements of the IRB's *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division*, is relevant to the central issues in this refugee claim and that there was no prejudice to the claimants if admitted. The decision and final reasons have been developed further in this decision.

parent (“Unsolicited Information”). Copies of the Unsolicited Information were provided to the claimants and Minister for reply.

25. The claimants object to the admission of the Unsolicited Information for reasons similar to their opposition of my admission of the transcript evidence: because it originates directly from the agent of persecution who has strong bias, interest and motivation to be untruthful, and further because the agent of persecution should not be called as a witness in the refugee hearing. Therefore, the claimants argue that the Unsolicited Information is inherently untrustworthy and cannot be properly tested for credibility and probative value, which is contrary to the IRB’s formal *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division* (the “Policy”).⁴ The claimants further argue that the appropriate forum to test the Unsolicited Information is not this refugee claim but rather the family law proceedings.
26. The Minister, in turn, contends that the Unsolicited Information is admissible because it is highly relevant to establishing the bases of the claimants’ risk of persecution. In Minister’s view, not admitting this documentation would amount to impermissible withholding of material information, prevent a full and proper determination of the claim, and bear negatively on the integrity of the Canadian refugee protection system.
27. Having taken into account the claimants’ and Minister’s arguments, the Policy and relevant legislative provisions, and considered the issue thoroughly, I admitted the Unsolicited Information, treat it as potential evidence, and rely on it in the determination of this claim. My reasons follow immediately below.
28. I am satisfied that treating the Unsolicited Information as potential evidence is consistent with the three Policy criteria at subsection 5. Namely, the Unsolicited Information concerns a pending identifiable claim; it has originated from a known informant (Mr. Alves Barbosa); and he clearly intended it to be disclosed to all the parties. As to the last criterion in the Policy regarding the Spouse’s appearance as a witness, it is formulated as a non-mandatory one: “if subsequently requested by the RPD”. This wording indicates that I have the discretion to summon the Spouse to testify or not; I deemed it unnecessary in light of the July 9, 2021 RPD decision and the affidavit evidence itself.
29. I also note that there is no prejudice to the claimants as they are already fully aware and have seen these documents from the family law proceedings. The claimants were notified about the RPD’s receipt and consideration of the Unsolicited Information, while also being provided with a copy, in accordance with Rule 33. The claimants had an opportunity to object to the potential admission of the Unsolicited Information. I was attentive to their

⁴ <https://irb.gc.ca/en/legal-policy/policies/Pages/PolNonUnsol.aspx#>

objections and did not disregard them while making my decision to admit on the Unsolicited Information.

30. The Policy reiterates a well-established legal principle: “all relevant evidence should be made available to decision-makers of the RPD”. The Unsolicited Information is clearly relevant as it contains statements regarding character and conduct of Mr. Alves Barbosa, and contradicts the core of the principal claimant’s claim. The three criteria from the Policy which I applied in determining whether to treat the Unsolicited Information as potential evidence are also appropriate and sufficient to test the Unsolicited Information in accordance with the legal rules of evidence. Therefore, the requirement under the Policy that unsolicited information be adequately tested has been satisfied.
31. Lastly, I am relying on the *IRPA* to justify my decision to admit the Unsolicited Information and use it in my decision-making and adjudication of this claim. In particular, section 170(g) of *IRPA* permits me to act outside of any rigid or technical rules of evidence, and to receive and rely on any adduced evidence which I determine to be credible and trustworthy. For the reasons articulated above, I have concluded that the Unsolicited Information is credible and trustworthy, and have admitted it into the record for this claim.

ANALYSIS AND CREDIBILITY

The Chairperson’s Gender Guidelines

32. The *Chairperson’s Gender Guidelines*⁵ were taken into account when considering the process of the hearing and the facts in this case. All relevant factors, such as the social and cultural context in which the principal claimant found herself, along with the issues of state protection and credibility were examined and guided with consideration of the *Chairperson’s Gender Guidelines*. The Panel is cognizant of the difficulties faced by the principal claimant in establishing her claim, including the challenges of remembering difficult and emotionally charged events, and as a result addressed the claimant with heightened sensitivity.

The Chairperson’s Guidelines on Child Refugee Claimants

33. The *Chairperson’s Guidelines on Child Refugee Claimants*⁶ were also taken into account when considering the procedures and facts in this case. The minor claimants were appointed an external legal Designated Representative (“DR”) in order to ensure that their rights were protected throughout the hearing process. Although a DR was appointed for

⁵ *Chairperson’s Guideline 4: Women Refugee Claimants fearing Gender-Related Persecution*; <https://web.archive.org/web/20210811232828/https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx>

⁶ *Chairperson’s Guideline 3 - Child Refugee Claimants: Procedural and Evidentiary Issues*; <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir03.aspx>

the minor claimants, she presented no testimony or independent evidence on behalf of the children. The Panel accepts that child refugee claimants pose a special challenge since they represent a particularly vulnerable group, but note that the guidelines do not lower the standard or burden of proof by which a child can be found to be a Convention Refugee or a person in need of protection.

Evidentiary record before the Panel

34. Prior to this hearing, the Minister provided a certified transcript of an excerpt from the July 9 2021 hearing of Mr. Alves Barbosa. In summary, Mr. Alves Barbosa testified that his wife (the principal claimant) had made up allegations of domestic violence because she was advised by someone in the community that refugee claims based on violence by gangs such C.V. have a low rate of success, but that claims based on allegations of domestic violence have a high rate of success at the RPD. He says that she wants a reason to stay in Canada with her sister and that he has never been violent towards either her or their children. He testified that sometimes they would argue and she had a bad temper, but strenuously denied that he was physically abusive towards her. He further testified that he was a good father to his children and was an active participant in their care, giving as an example that he took his son to the doctor. His testimony was subject to cross-examination by both the Minister and the Panel hearing his claim. He was represented by counsel who was allowed the opportunity for re-direct questions, but did not take it. The Transcript covered 7 minutes and 33 seconds of his testimony and cross-examination.

35. As mentioned above, I admitted Unsolicited Information from Mr. Alves Barbosa filed by him in the family's family law proceedings, including his sworn affidavit and letters from family members and friends in Brazil. In response to the admission of the Unsolicited Information, the claimants provided a copy of the principal claimant's responding affidavit from the family law proceedings. The family law proceedings at this time are still ongoing; no decision has been made by the family court. Letters from various individuals who were identified as neighbours to the claimants while they resided with Mr. Alves Barbosa were also included in a personal documents package from the claimants; these letters were accompanied by copies of identity cards. The authors of the letters indicated that they had heard loud yelling and noises from their apartment and had seen the principal claimant with large bruises on her arms and face. One letter from a Mr. Henry Robinson stated that he had observed the family together when leaving the apartment, and that Mr. Alves Barbosa had slapped the eldest minor claimant on his face when the child was crying. The claimants also provided a report from a psychiatrist, who diagnosed the principal claimant with Major Depressive Disorder ("MDD") and Post-Traumatic Stress Disorder ("PTSD").

Credibility Analysis

36. The determinative issue in this refugee claim is that of credibility.

37. In coming to this determination, I am mindful of the Federal Court of Appeal decision in *Maldonado*⁷ wherein the Court stated, in part, that “where a claimant swears to the truth of certain allegations, this creates the presumption that those allegations are true, unless there be reason to doubt their truthfulness.” I have also considered the decision in *Orelien*,⁸ in which the Federal Court of Appeal held that it is necessary that the claimant establish that the evidence is probably credible or trustworthy, not just possibly so.
38. In making my decision, the Panel has also taken into consideration the various factors that could affect the testimony of the claimant, including the nature of the allegations of gender-related violence, the milieu of the hearing room, cultural differences, level of education and the use of an interpreter.
39. For the following reasons, I find the presumption of truthfulness has been rebutted and that the principal claimant has failed to establish her credibility on a balance of probabilities.
40. Subsequent to the severing of her claim from that of Mr. Alves Barbosa, the principal claimant filed an amended BOC narrative, in which she provided detailed allegations of domestic violence by her husband, but vague and non-specific statements regarding his treatment of the minor claimants. In contrast, her affidavit from the family law proceedings, included as part of her disclosure, provided detailed information as to specific incidents in which she alleged her husband hit the children. For example, in her BOC narrative, there were only general statements that her husband would hit and yell at the children when they were too loud or failed to stop crying, yet in the family law affidavit, she recounted a specific incident on April 15, 2021 in which he had picked up the elder minor claimant, striking him on his shoulder and threatening to throw him out of the window if he didn’t stop crying. At the hearing, the principal claimant also provided more detailed testimony regarding the interactions with the minor claimants. When asked why this information was not included in her BOC narrative, she testified that she believed that the DR would file a narrative with the allegations for her children and that she would be able to provide additional detail as to the abuse of her children at the hearing. I find that this explanation is not reasonable due to the age of her children and that this constitutes a material inconsistency between her Basis of Claim narrative and the evidence. This undermines her credibility and rebuts the presumption of truth.
41. In addition to the claimant’s BOC and testimony, I also have before me a sworn affidavit provided by Mr. Alves Barbosa, the decision in his refugee claim, and copies of documents relating to the family law proceedings. Together, these documents present a more

⁷ *Supra* note 1.

⁸ *Orelien v. Canada (Minister of Employment and Immigration)* (1992) [1991 CanLII 13531 \(FCA\)](#), 1 F.C. 592 (C.A.); (1991), 15 Imm. L.R. (2d) 1 (F.C.A.).

believable version of events. In his affidavit, Mr. Alves Barbosa explains that the domestic violence allegations were fabricated in order to create a viable refugee claim. This is consistent with the testimony that he provided in his July 9, 2021 refugee hearing and found in the admitted Transcript. He has challenged the domestic violence allegations made the principal claimant within the family law proceedings and provided evidence from these proceedings. This evidence includes letters from family and friends in Brazil, who corroborate that he is a good father and that they have never seen him act violently towards the claimants. I place significant weight on these documents, as Mr. Alves Barbosa was found to be credible in his refugee claim.

42. The Unsolicited Information and Transcript evidence from Mr. Alves Barbosa shows that he is a good father to his two young children. The principal claimant, on the other hand, was not able to produce sufficient evidence to rebut this.
43. I have reviewed the letters from the neighbours provided by the claimant and note that all but one provide their speculation as to abuse, despite not being witness to any actual abuse. The remaining letter, from a Mr. Henry Robinson, is insufficient to overcome the preponderance of credible evidence from Mr. Alves Barbosa. I also note that the psychiatric report is based on a one time psychiatric assessment and reliant upon information provided by the principal claimant. As per *Kanthasamy*,⁹ the report does not prove that the incidents of abuse happened and a psychiatrist cannot usurp the role of the RPD in making findings of fact. While the children are too young to testify or otherwise provide evidence, the principal claimant was given ample opportunities to provide disclosure to rebut evidence provided by Mr. Alves Barbosa. She did not do so and based on the reasons above, I find that her *viva voce* evidence was not sufficient to overcome the evidence from Mr. Alves Barbosa.
44. I find, on a balance of probabilities, that the principal claimant is not a credible and trustworthy witness in regard to her history of domestic violence.

CONCLUSION

45. For these reasons, the Refugee Protection Division determines that the claimants are not Convention refugees nor persons in need of protection and therefore, rejects their claims for refugee protection.

“Aleksander Karlowicz”

DATED at Toronto this 25th of October 2021

Date: 20221017

⁹ *Kanthasamy v. Canada (Citizenship and Immigration)*, [2015 SCC 61](#).

Docket: IMM-28908-21

Citation: 2022 FC 90210

Ottawa, Ontario, October 17 2022

PRESENT: The Honourable Justice Jemima Okoro

BETWEEN:

**ISABELLA BARBOSA REIS, a.k.a. Isabella Santos Reis
PEDRO REIS BARBOSA, by his litigation guardian, Angelique Charles
ALANDRA REIS BARBOSA, by her litigation guardian, Angelique Charles**

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

1. This is an application for judicial review of a decision made on October 25 2021 by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB], in which it found that the Applicants are not Convention Refugees or persons in need of protection, pursuant to s. 96 and 97(1) of the *Immigration and Refugee Protection Act* (“IRPA”).

2. For the reasons that follow, I have come to the conclusion that this judicial review must succeed. The RPD erred in its approach to both the admission of the transcript evidence and Unsolicited Information, and its assessment of this evidence, particularly in relation to credibility.

II. Background Facts and Decision under Review

3. The Applicants, a mother and two minor children, are citizens of Brazil. They came to Canada together with their husband and father, Manuel Alves Barbosa, in February 2020, via the United States, and entered as an exception to the Safe Third Country Agreement. Together as a family, they made refugee claims at the Port of Entry. The claims were based on the risk faced by Mr. Alves Barbosa at the hands of a gang, Comando Vermelho (“C.V.”).
4. In June 2021, the RPD received and granted an application to sever the claims of the Applicants from that of Mr. Alves Barbosa; this was based on allegations of domestic violence. A Designated Representative (“DR”) was appointed for the two minor Applicants and the hearing date was rescheduled for the Applicants.
5. The principal Applicant filed an amended Basis of Claim narrative for herself, providing details of the domestic abuse by Mr. Alves Barbosa (alleged agent of persecution). No independent narrative was filed for the minor Applicants (respective dates of birth, October 28, 2017 and August 3, 2019) by the DR.
6. The Minister intervened in the Applicants’ refugee proceedings. As part of the intervention, the Minister sought to introduce a Transcript excerpt from the July 9, 2021 refugee hearing of Mr. Alves Barbosa and a copy of his negative RPD decision, dated August 2, 2021. The transcript excerpt covered the testimony of Mr. Alves Barbosa regarding his opinion as to reason for the disjoining of the claims, the credibility of the claims of domestic violence, and a description of his relationship with the minor claimants. The RPD decision was denied based on state protection; no credibility findings, either positive or negative, were made in the decision. The Applicants opposed the inclusion of this evidence. The application was allowed by the Board on August 26, 2021, with full reasons delivered in the October 25, 2021 RPD decision.
7. Mr. Alves Barbosa also filed a package of documentary evidence with the RPD (“Unsolicited Information”) for inclusion in the Applicants’ refugee proceedings. The documentary package comprised of material that had been filed by Mr. Alves Barbosa in the custody and access proceedings initiated before the Ontario Superior Court of Justice.

At that time, the family law proceedings were ongoing with no decision yet made by the family court. The documents included affidavit evidence from Mr. Alves Barbosa, as well as letters from family and friends back in Brazil; the evidence described Mr. Alves Barbosa as a committed family man and a caring, responsible parent.

8. After considering the IRB's formal *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division* and responding submissions of both the Minister and the Applicants, the Board admitted the Unsolicited Information for inclusion in the RPD record. The Board concluded that the evidence met the criteria for admission as found in the IRB Policy criteria, that it was not necessary to call Mr. Alves Barbosa as a witness, that the Applicants were not prejudiced because they were already aware of the evidence from the family law proceedings and that all relevant evidence should be made available to decision-makers at the RPD.
9. On October 25 2021, the RPD found that the Applicants were neither Convention Refugees nor were persons in need of protection.
10. The RPD found that the determinative issue was credibility. It identified a material inconsistency between the amended BOC narrative of the principal Applicant and her responding affidavit filed in the family law proceedings, and which was not explained in a satisfactory way. The RPD also preferred the Unsolicited Information and testimony of Mr. Alves Barbosa during his refugee hearing, on the basis that the documents present a more believable version of events and that he had been found to be credible in his refugee claim.

III. Issues and Standard of Review

11. The Applicants argue that the RPD erred in the Decision for three reasons. First, the RPD erred in admitting the Unsolicited Information from the alleged agent of persecution, including untested affidavit evidence. Second, the RPD erred in allowing the application of the Minister to admit transcript evidence from the refugee hearing of Mr. Alves Barbosa, the alleged agent of persecution. Third, the RPD erred in its credibility findings by preferring the untested evidence from the agent of persecution over *viva voce* testimony of the Principal Applicant.
12. The Applicants argue that the appropriate standard of review for all issues is that of correctness as these errors have led to breaches of procedural fairness and ultimately negatively impacted the fairness of the proceedings for the Applicants. In contrast, the Respondent argues that the appropriate standard of review is that of reasonableness for all issues. The Respondent argues that it is well established that with regards to the issue of

credibility, the appropriate standard of review is that of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 47, and further that the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that judicial review of an administrative decision is presumed to be on the standard of reasonableness, subject to certain exceptions. The Respondent disputes that the admission of untested transcript evidence and unsolicited evidence was a breach of procedural fairness as the RPD is not bound by technical rules of evidence and correspondingly these issues should be assessed for their reasonableness.

13. I find that the RPD erred by admitting the Unsolicited Information and transcript evidence, and that these errors are compounded by the Panel’s reliance on this evidence over the *viva voce* evidence of the principal Applicant. On these issues, I find the appropriate standard of review to be reasonableness. The admission of evidence and the weighing of credibility are decisions delegated to the RPD and fall within the tribunal’s expertise. That being said, I agree with the Applicant that the issue of fairness looms large in the analysis; as detailed below, the overarching requirement that refugee proceedings be fair to claimants is a very important consideration in deciding whether the RPD acted reasonably in its admission and use of the Unsolicited Information and transcript evidence.

IV. Analysis

(A) The Board erred in admitting the Unsolicited Information

14. The Applicants argue that the RPD erred in admitting the Unsolicited Information filed by Mr. Alves Barbosa, the alleged agent of persecution, from the family court proceedings. The Unsolicited Information included affidavit evidence from Mr. Alves Barbosa himself, as well as letters from his family and friends in Brazil. The Applicants argue that this decision led to a breach of procedural fairness as the affidavit evidence of the agent of persecution could not be tested by way of cross-examination and was contrary to the RPD’s own policy regarding unsolicited evidence and s.170(h) of the *IRPA*.
15. The Respondent maintains that the RPD’s decision to admit the evidence was reasonable as the evidence was directly relevant and otherwise would not be before the Board. To not allow in the evidence would lead to a miscarriage of justice and a mischaracterization of the evidence in the case.
16. I agree with the Applicant, albeit I would classify the error as one of unreasonableness rather than unfairness. Section 170(h) of the *IRPA* states that the RPD “may receive and base a decision on evidence that is adduced in the proceedings and considered credible or

trustworthy in the circumstances.” The ability to test is crucial to determine whether particular evidence is credible or trustworthy.

17. This is reflected in the RPD’s *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division*. This policy repeatedly avers to the need to be able to adequately test the evidence as critical to the assessment of admission of Unsolicited Evidence. The Policy states that evidence should not be admitted “from informants who are unwilling or unable to appear as witnesses at the hearing of the claim” and further that:

However, all relevant evidence should be made available to decision-makers of the RPD. Unsolicited information may be taken into consideration in a refugee protection hearing, provided that it can adequately be tested. This policy ensures that unsolicited information received by the IRB enters the decision-making process of the RPD only if it can adequately be tested. The RPD’s use of unsolicited information, subject to this policy, is in keeping with the concept of refugee protection determination as a process of inquiry.”

18. Although the RPD nominally applied the Policy’s criteria for admission of Unsolicited Information, the analysis conducted by the RPD was completely devoid of consideration of the context and preamble from the Policy. In particular, there was no acknowledgement that such Unsolicited Information only enters the decision-making process of the RPD “if it can be adequately tested.”
19. One avenue to test the evidence is referenced in the last of three criteria for admission set out in the Policy, that “the informant agrees to the disclosure of the information to all parties and to appear as a witness if subsequently requested by the RPD.” The jurisprudence, though limited, has confirmed that Unsolicited Information must be tested in order to be used as evidence by the RPD and that “testimony by the author of such evidence is a means of verification”: *Reyes Pino v. Canada (Citizenship and Immigration)*, 2012 FC 200, at para. 38; *Nechiporenko v. Canada (Citizenship and Immigration)*, 1997 CanLII 16659 (FC), 135 FTR 75, IMM-4667-96.
20. The RPD acknowledged the Applicants’ argument that it was not possible to call the source of the Unsolicited Information to testify as they were the agent of persecution, preventing his evidence from being properly tested for credibility and probative value. Nonetheless, the RPD held instead that the third criteria was a non-mandatory and discretionary requirement as it was only employed “if subsequently requested by the RPD”.
21. That conclusion runs afoul of the requirement in *Vavilov* to provide responsive reasons that meaningfully account for the central issues and concerns raised by the parties in order to

demonstrate that it actually listened to them (*Vavilov*, at paragraph 127). The central issue raised was the ability to test the Unsolicited Information. The Applicants argued that in the present context, testing the evidence would require calling the alleged agent of persecution to testify. It was not dispositive of the matter to conclude that calling Mr. Alves Barbosa as a witness was non-mandatory as the RPD's reasoning still failed to account for the issue of how the evidence was then to be tested.

22. Similarly, the RPD's finding that Unsolicited Information was relevant and its admission would not be prejudicial as the Applicants were already aware of the documents from the family law proceedings was also not responsive to the Applicants' concerns or the RPD policy itself. There is a lack of analysis provided by the RPD as to how the evidence would be adequately tested. This is a particularly relevant consideration since the evidence was filed by the agent of persecution, an adverse and biased party who had a clear interest that his version of events be accepted, namely that the domestic violence did not occur.
23. It is beneficial to step back here and review the nature of a refugee hearing. As per section 166(c) of the *Immigration and Refugee Protection Act*, RPD and RAD proceedings must be held in the absence of the public. This is because of "the important interests at stake in those sorts of proceedings and the particular sensitivity of the information" (*Jemmo v. Canada (Citizenship and Immigration)*, 2021 FC 965 (CanLII), at para. 17). It has been acknowledged that the "intent of Section 166 is to ensure that refugee proceedings do not themselves add to the risk faced by the claimants or others, that they are fair, and that public security is not compromised." (*X (Re)*, 2015 CanLII 39898 (CA IRB), at para. 149).
24. Calling the alleged agent of persecution as a witness to test unsolicited evidence would directly compromise the intent of Section 166(c). It could result in refugee determination proceedings adding to the risk faced by claimants, violating confidentiality and the RPD's mandate of refugee protection. For example, in the present context, the participation of the agent of persecution in the process could carry negative psychological impacts for the claimant and compromise her ability to present her case, both in testimony and in documentary evidence. It inherently impacts upon the fairness of the proceedings for such claimants, particularly noting the need to apply the *Chairperson's Gender Guidelines* meaningfully,¹⁰ and calls into question whether a claimant would be able to participate meaningfully and without interference if the agent of persecution was given standing as a party or witness in otherwise private and confidential proceedings.

¹⁰ A new version of the Chairperson's Guideline 4 was issued in July 2022. The version of the guideline before the RPD member in this case was Guideline 4: Women refugee claimants fearing gender-related persecution, effective date November 13 1996.

25. It is also a concerning potential precedent for the agent of persecution to be given an uncontested voice and standing in the refugee determination process, either through admission of untested evidence or as a witness. To provide one alternate scenario, would it be equally permissible for the RPD to admit Unsolicited Information and call representatives of a foreign government as witnesses in order to allow them to put forward the evidence of lack of persecution? This example makes stark the troubling implications of admitting evidence from an alleged agent of persecution in terms of claimant security and the integrity of the refugee determination process.
26. I find it was an error for the RPD to admit the Unsolicited Information without first determining whether it could be appropriately tested.

(B) The Board erred in admitting the transcript evidence

27. The RPD allowed the Application of the Minister to admit the Transcript Evidence from the July 9 2021 hearing of Mr. Alves Barbosa. The Applicants argue that the Board erred in admitting the transcript evidence from the RPD hearing of Mr. Alves Barbosa. Similar to the arguments raised in regards to the Unsolicited Information, the Applicants argue that the evidence could not be tested properly by way of cross examination without calling the agent of persecution as a witness to the proceedings. The Applicants further re-iterate that its admission caused an injustice contrary to RPD Rule 21(5) as it was highly prejudicial but lacked probative value as self-serving opinion evidence.
28. The Respondent maintains that the RPD's decision to admit was reasonable because the test outlined in RPD Rule 21(5) for disclosure of evidence from another claim was met, and the fact that it originated from the alleged agent of persecution was irrelevant.
29. I again agree with the Applicant, for the many of the same reasons outlined above, but again I would classify the error as one of unreasonableness rather than unfairness.
30. The fact that the evidence originated from the alleged agent of persecution was, in fact, critical, as it pointed to the need to test the credibility of the admitted transcript evidence due to its potential for bias and untrustworthiness. Although it originated in a refugee hearing presided over by a different Board Member, the testimony of Mr. Alves Barbosa was not impartial or objective. From the record, it is apparent that he had a direct interest in having his version of events accepted such that his family would not obtain refugee protection in Canada, in addition to his adversarial interest in the family law proceeding. The transcript evidence was primarily composed of his untested opinion evidence as to why the principal claimant had severed the claim from his. As the refugee determination

hearing at the RPD is of an inquisitorial and non-adversarial nature (*Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 (CanLII), [2007] 1 FCR 107 at para. 62), the Board does not require that allegations of persecution are put to the alleged agent of persecution for their response or opinion. It is of limited probative value but conversely highly prejudicial to the ultimate determination in the refugee claim as a result. The Board acted unreasonably in failing to take this into consideration in assessment of RPD Rule 21(5).

31. The RPD also acted unreasonably by concluding that his testimony had in fact been tested for its credibility and trustworthiness in the context of the July 9, 2021 hearing.
32. First, it was not fully tested in the context of his hearing as the veracity of his ex-partner's domestic violence allegations was not at issue, but rather the only issue in his refugee hearing was that of whether he was at risk from the C.V. gang. This is demonstrated by the short seven and a half minutes of testimony on the issue of the abuse allegations and nature of his relationship with his children in the overall context of a full half day hearing.
33. Second, neither the Applicants nor their counsel were present at that hearing to cross-examine Mr. Alves Barbosa. As the Supreme Court of Canada has explained (*R v. Lyttle*, 2004 SCC 5 (CanLII), [2004] 1 SCR 193, at para. 1), cross-examination is “an indispensable ally” in the search for truth:

“Cross-examination may often be futile and sometimes prove fatal, but it remains nonetheless a faithful friend in the pursuit of justice and an indispensable ally in the search for truth. At times, there will be no other way to expose falsehood, to rectify error, to correct distortion or to elicit vital information that would otherwise remain forever concealed.”
34. While *Lyttle* was of course a criminal case, the Court's remarks on the fundamental importance of the right to cross-examine have been applied in other contexts. As explained by the Honourable Justice Noël, “what should be retained from *Lyttle* is that cross-examination plays an important role, that this important role is not limited to the criminal context, and that it is an essential element to a fair judicial process, being a fundamental principle of justice under section 7 of the Charter” (*Brar v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729, at para. 236).
35. Although cross-examination may have taken place in the July 9, 2021 hearing by parties to that claim, it was not in the presence of the presiding Board member hearing the Applicants' claim or indeed the Applicants themselves such that they could hear and fully observe the testimony of Mr. Alves Barbosa, as well as asking their own questions in the context of the full evidentiary record of the Applicants.

36. Given the above, it was unreasonable for the Board to conclude that the transcript evidence had been sufficiently tested and should be admitted as credible and trustworthy.

[C] The RPD erred in its reliance on untested evidence to find the Applicants lacking in credibility

37. I turn now to the RPD's analysis of the various credibility issues. As a general proposition, it is uncontroversial that the RPD's assessment of credibility is entitled to deference on judicial review. The RPD enjoys a meaningful advantage over a reviewing court when making credibility assessments, as the RPD has the benefit of directly hearing the oral testimony of the claimants. However, in the circumstances of this case, the approach taken by the Board Member strayed outside the bounds of reasonableness.
38. Credibility was held to be the determinative issue in this case, which included allegations of domestic violence and two directly contradictory versions of events from the Principal Applicant and her former husband, Mr. Alves Barbosa. The error in admitting the untested and unverifiable evidence of Mr. Alves Barbosa was compounded by the Board's reliance on this evidence over the *viva voce* testimony of the Principal Applicant. For example, the RPD relied heavily on the Unsolicited Information, including the affidavit from Mr. Alves Barbosa, and his testimony found in the admitted Transcript Evidence. The RPD preferred this evidence and gave it substantial weight in impeaching the principal Applicant's credibility.
39. However, Mr. Alves Barbosa was never called as a witness before this RPD panel, and his evidence, either testimony or affidavit, was not tested by cross-examination or subject to challenge. In contrast, the principal Applicant's *viva voce* evidence was tested and subject to cross-examination. This has led to unequal scrutiny of the testimony and the application of different standards to the evidence of opposing parties, itself a reviewable error (*R v. Chanmany*, 2016 ONCA 576, at para. 26).
40. In the immigration context specifically, if the Board is to rely on untested affidavit evidence over tested and cross-examined testimony, the Board has to provide clear and unmistakable reasons for this preference (*Veres v. Canada (Minister of Citizenship and Immigration)*, 2001 2 FC 124, citing *Mahendran v. Canada (MEI)*, (1991), 14 IMM. L.R. (2d) 30 [FCA, A-1052-90]; *Nechiporenko v. Canada (Citizenship and Immigration)*, 1997 CanLII 16659 (FC), 1997 40 Imm. L.R. (2d) 180).
41. The RPD Decision does not reveal the necessary clear and unmistakable reasons for their preference. The RPD found the principal Applicant's version of events not credible, based in large part on accepting the evidence of Mr. Alves Barbosa as unshakable truth. However, the RPD failed to rationalize why there was this preference, instead uncritically relying on

the opinion evidence of the ex-husband as fact. This position creates an unreasonable presumption that the evidence of the alleged agent of persecution is credible – and that it is up to the Applicants to rebut this. This was made clear by the RPD’s repeated statement that the Applicants had not rebutted the evidence of Mr. Alves Barbosa through their own evidence. This is an erroneous presumption that disregards the well-established principle of *Maldonado* attached to the testimony of the Principal Applicant in her hearing.

42. Although some of the evidence (Unsolicited Information and Transcript) was sworn evidence, it best resembles a “poison pen” letter alleging improper motives or unfavourable circumstances surrounding an applicant to Canada. Given the clear animus between the principal Applicant and Mr. Alves Barbosa, the RPD ought to have directed itself to consider the evidence carefully before assigning it particular weight, noting that “poison pen” letters are inherently unreliable (*D’Souza v. Canada (Citizenship and Immigration)*, 2008 FC 57, at para. 15). Furthermore, without allowing for the meaningful testing of this evidence in an oral hearing by way of cross-examination, I find the approach of the RPD lacked justification, and was therefore in error.
43. Finally, the RPD found support for its positive assessment of the credibility of Mr. Alves Barbosa on what it considered to be a positive credibility finding by another panel in his claim. Based on the record before me, I note that the refugee claim of Mr. Alves Barbosa was refused on the basis that adequate state protection was available to him in Brazil. The RPD decision does not reveal any specific finding on his credibility, positive or otherwise. The absence of credibility findings does not mean that he was found to be credible, but rather that the assessment of the determinative factor of state protection could be completed without engaging in consideration of the credibility of his allegations. As a result, I do not find this conclusion to be rationally supported.

V. Test for Certification and Certification of Questions

44. The Respondent proposes the following question for certification:

Can unsolicited evidence, including affidavit evidence, filed by the agent of persecution be admitted and considered by the Refugee Protection Division?

45. Subsection 74(d) of the *IRPA* provides that "an appeal to the Crown Court of Canada may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question". The Federal Court of Appeal has provided guidance as to when a legal issue is an appropriate basis for a certified question. It must involve a serious issue of general importance that is dispositive of the appeal and must be

dealt with by the Applications Judge: *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 [*Varela*] at paragraph 28 and 32.

46. I am prepared to certify this question as it is a legal issue that arises from the facts of the case (*Sran v. Canada (Citizenship and Immigration)*, 2018 FCA 16 at para. 16), and transcends the case at hand such that it lends itself to an answer of general application (*Kunkel v Canada (Citizenship and Immigration)*, 2009 FCA 347 at paragraph 9). As noted by the Respondent, there are currently no appellate decisions on this issue. The Applicants oppose the certification of this or any question, arguing that this is not one of general importance as this is the first case in which the issue has arisen and is factually specific based on the nature of their refugee claim and profile of the agent of persecution.
47. I am prepared to certify this question. Although this may be the first time that this issue has arisen before, this is usually the case with a certified question. I also disagree that this question is limited to the particular factual matrix before me as it could arise in any refugee determination where the agent of persecution seeks to intervene by directly filing evidence to the RPD.

THIS COURT'S JUDGMENT is:

1. The application for judicial review is granted.
2. The decision of the Refugee Protection Division is set aside and the matter being remitted for redetermination by a differently constituted panel.
3. The following question are certified under subsection 74(d) of the *IRPA*:

Can unsolicited evidence, including affidavit evidence, filed by the agent of persecution be admitted and considered by the Refugee Protection Division?

4. There is no order as to costs.

“J. Okoro”