CROWN COURT OF CANADA (ON APPEAL FROM THE FEDERAL COURT OF CANADA)

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

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

Respondent

RESPONDENTS' MEMORANDUM OF ARGUMENT

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Counsel for the Respondent

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OVERVIEW

1. This case concerns the integrity of the refugee determination process and the dangerous precedent that will be set by involving an agent of persecution in a claimant's refugee hearing. Specifically at issue is whether the *Refugee Protection Division* ("the Board") acted unreasonably in admitting Unsolicited Information and Transcript Evidence originating from the agent of persecution, Manuel Alves Barbosa ("Mr. Barbosa"). Relying mainly on Mr. Barbosa's evidence, the RPD decision-maker ("Board Member") denied the Respondents' refugee claim on credibility grounds.

2. It was unreasonable for the Board to admit Mr. Barbosa's Unsolicited Information because it was not adequately tested for its credibility and trustworthiness as required by the *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division* ("IRB's *Policy*")[1] and s.170(h) of the *Immigration and Refugee Protection Act* ("*IRPA*").[2] Further, the certified question should be answered in the negative. Unsolicited Information filed by the agent of persecution should generally not be admitted by the Board as it is (1) contrary to the intent of 166(c) of the *IRPA*[3] and (2) contrary to the *Chairperson's Gender Guideline 4* (*"Guideline 4"*).[4]

3. It was also unreasonable for the Board to admit the Transcript Evidence for three reasons. Firstly, it was not justified in relation to the object and purpose of s.170(h) of the *IRPA*.

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[1] Immigration and Refugee Board of Canada, Legal Policies, *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division*, Policy No 2015-02 (20 April 2016), online: <https://irb.gc.ca/en/legal-policy/policies/Pages/PolNonUnsol.aspx#> [*Policy*].
[2] Immigration and Refugee Protection Act, SC 2001, c 27, s170(h) [*IRPA*].
[3] *IRPA*, *supra* note 2 s.166(c).
[4] Immigration and Refugee Board of Canada, Legal Policies, *Chairperson's Guideline 4: Women Refugee Claimants fearing Gender-Related Persecution* (November 1996), online: <https://web.archive.org/web/20210811232828/https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> [*Guideline 4*].

Secondly, the Transcript Evidence was not sufficiently tested in the context of Mr. Barbosa's July 9th refugee hearing. Finally, the admission of the Transcript Evidence caused an injustice contrary to RPD Rule 21(5), as it was highly prejudicial to Ms. Reis.

4. Finally, the Board acted unreasonably in its weighing of the evidence. The Board Member was unreasonable in: (1) finding that Mr. Barbosa's untested evidence presented a "more believable version of events" in the absence of clear and unmistakable reasons; (2) finding that Mr. Barbosa's Transcript Evidence was credible in his refugee hearing; (3) finding Ms. Reis' testimony to be materially inconsistent with her amended BOC; and (4) failing to provide sufficient reasons, in accordance with *Guideline 4*, for its preference of Mr. Barbosa's evidence in a case involving severe gender-based violence.

PART I: FACTS

Background

5. The Principal Respondent, Ms. Isabella Barbosa Reis ("Ms. Reis"), and her two children, Pedro Reis Barbosa and Alandra Reis Barbosa ("the Minor Respondents") are citizens of Brazil.[5]

6. In February 2020, Ms. Reis came to Canada with her husband, Mr. Barbosa, and the Minor Respondents. They claimed refugee protection at the Port of Entry pursuant to s. 96 and ss. 97(1) of the *IRPA*.[6]

7. The Respondents' claim was initially joined with that of Mr. Barbosa and was based on the risk he faced at the hands of the Comando Vermelho ("C.V.") gang. No independent narrative was filed for Ms. Reis—she relied on the narrative of Mr. Barbosa.[7]

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[5] Reasons of Board Member Karlowicz, Moot Problem at para 1 [Board Member's Reasons].
[6] *Ibid* at para 6-7; *IRPA, supra* note 2 s.96 and 97(1).
[7] Reasons of Justice J. Okoro, Moot Problem at para 3 [Okoro J's Reasons]; Board Member's Reasons, *supra* note 5 at paras 7.

8. In June 2021, the Board granted Ms. Reis' application, pursuant to Rule 56(2) of the Board *Rules,* to sever the Respondents' claim from that of Mr. Barbosa. This application was based on allegations of intimate partner violence and abuse against Mr. Barbosa ("domestic violence"). A Designated Representative ("DR") was appointed for the two minor Respondents. The principal Respondent filed an amended Basis of Claim narrative for herself on July 5, 2021, providing details of domestic abuse by Mr. Barbosa. No independent narrative was filed for the minor Respondents by the DR.[8]
9. On July 9, 2021, the Board heard Mr. Barbosa's claim. The Board denied his refugee claim on state protection grounds but did not make any findings on credibility.
10. The Minister intervened in the Respondents' refugee proceedings on the basis of program integrity and credibility. As part of the intervention, the Minister sought to introduce a transcript excerpt from the July 9, 2021, refugee hearing of Mr. Barbosa. The transcript excerpt covered Mr. Barbosa's testimony regarding his opinion as to the 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 Respondents promptly opposed the inclusion of this evidence.[9]
11. On August 16, 2021, the Board also received a voluminous package of documents filed by Mr. Barbosa ("Unsolicited Information") for inclusion in the Respondents' refugee proceedings. The Unsolicited Information consisted of material from Mr. Barbosa's child custody and access proceedings initiated before the Ontario Superior Court of Justice. The documents included affidavit evidence from Mr. Barbosa and letters from family and

[8] Board Member's Reasons, *supra* note 5 at para 15.
[9] *Ibid* at paras 17-18.

friends back in Brazil describing Mr. Barbosa as a committed family man and a caring parent. The Respondents also opposed the inclusion of the Unsolicited Information.[10] The Respondents, in response, provided various letters of support detailing violent events and a report from a psychiatrist, who diagnosed Ms. Reis with Major Depressive Disorder ("MDD") and Post-Traumatic Stress Disorder ("PTSD").

Procedural History

12. On October 25, 2021, the Board Member determined that the Respondents are neither refugees nor persons in need of protection, pursuant to s. 96 and 97(1) of the *IRPA*.[11] First, the Board Member admitted the Unsolicited Information filed by Mr. Barbosa, including his affidavit and letters from family members and friends in Brazil. Second, the Board Member allowed the Minister's application to admit the Transcript Evidence from Mr. Barbosa's July 9, 2021, hearing. Finally, the Board Member held that the determinative issue was credibility. In finding the Respondents not credible, he relied on the Unsolicited Information and the Transcript Evidence. The Board Member preferred this evidence and gave it substantial weight on the basis that the documents present a more believable version of events and that Mr. Barbosa was found to be credible in his refugee claim.[12] The Board Member also raised what he found to be a material inconsistency between Ms. Reis' amended BOC narrative and her responding affidavit filed in the family law proceedings.[13]
13. On October 17, 2022, Justice Okoro**,** writing for the Federal Court ("FC"), determined that the Board was unreasonable in its approach to the admission of the Unsolicited Information

[10] *Ibid* at paras 24-25.
[11] *IRPA*, *supra* note 2 s. 96 and 97(1).
[12] Board Member's Reasons, *supra* note 5 at paras 19-21.
[13] *Ibid* at para 40.

and Transcript Evidence and its assessment of this evidence. First, the FC held that it was unreasonable for the Board to admit the Unsolicited Information because it was of limited probative value, was highly prejudicial, and had not been adequately tested. The FC found that the Board's reasons for admitting this information were not adequately responsive to their mandate and *Guideline* concerns raised by the Respondents. Second, the FC held that it was unreasonable to admit the Transcript evidence for similar reasons. Third, the FC concluded that the Board unreasonably relied on the information described above in reaching its negative credibility findings.[14]

14. Justice Okoro certified one question for appeal, which is reproduced in Part II below.[15]

PART II: POINTS IN ISSUE

15. The parties agree that the appropriate standard of review is reasonableness.[16]

16. This appeal raises three issues:

    1) Did the FC err in holding that it was unreasonable for the Board to admit Mr. Barbosa's Unsolicited Information?

        a. Certified Question: Can unsolicited evidence, including affidavit evidence, filed by the agent of persecution be admitted and considered [by the Board]?

    2) Did the FC err in holding that it was unreasonable for the Board to admit the Transcript Evidence from Mr. Barbosa's refugee proceeding?

    3) Did the FC err in holding that it was unreasonable for the Board to rely on this evidence in order to deny the Respondents' refugee claims on credibility grounds?

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[14] Okoro J's Reasons, *supra* note 7 at para 16, 21- 22, 24, 29-31, 41.
[15] *Ibid* at para 44.
[16] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 [Vavilov].

PART III: ARGUMENT

1) It was unreasonable for the Board to admit the Unsolicited Information

17. The FC judge correctly held that the Board's decision to admit the Unsolicited Information was unreasonable.

18. First, Mr. Barbosa's Unsolicited Information was not adequately tested for its credibility and trustworthiness, as required by the IRB's Policy and s.170(h) of the *IRPA*. Just as the refusal to admit relevant evidence may be unreasonable, so too can a decision to admit and rely on evidence which may not be reliable, credible, or trustworthy.[17]

19. Second, this Court should answer the certified question in the negative—unsolicited information, including affidavit evidence, when filed by the agent of persecution, should not be admitted by the Board. Unsolicited information filed by the agent of persecution should generally not be admitted by the Board as it is: (1) contrary to the intent of 166(c) of the *IRPA* and (2) not justified in relation to *Guideline 4*.

A. Mr. Barbosa's Unsolicited Information was not adequately tested for its credibility and trustworthiness, as required by the IRB's policy and s.170(h) of the *IRPA*.

i. <u>The Board's decision to admit the Unsolicited Information was unreasonable considering the IRB's *Policy*.</u>

20. The governing *Policy* is an internal administrative structure that ensures that unsolicited information received by the IRB enters the decision-making process of the Board only if it (1) can be adequately tested and (2) satisfies the following three preconditions: (i) the information concerns an identifiable claim that has not been finalized; (ii) the information originates from an identifiable informant; and (iii) the informant agrees to the disclosure

[17]Aiken, S., Grey, C., Dauvergne, C., Heckman, G., Liew, J. C. Y., MacIntosh, C., & Galloway, J. D. C. (2020). *Immigration and refugee law: cases, materials, and commentary* (S. Aiken & C. Grey, Eds.; Third edition.). Emond; *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134.

of the information to all parties and to appear as a witness if subsequently requested by the Board.[18]

21. The Board Member erred in conflating the two stages of the *Policy*. It was unreasonable to conclude that satisfying the three preconditions was sufficient to test the Unsolicited Information.[19] The *Policy* explicitly states that unsolicited information which satisfies the preconditions may be treated as "potential evidence," which must still be tested.[20]
22. The Unsolicited Information in question failed to satisfy the *Policy's* first stage (the general bar to entry stage). In the alternative, the Unsolicited Information failed to satisfy the second stage, as its admittance was an unreasonable exercise of the Board's discretion.
23. By admitting Mr. Barbosa's Unsolicited Information, the Board Member departed from this established internal authority and failed to satisfy the "justificatory burden of explaining that departure in its reasons."[21] The Board's decision is thus unreasonable.

1. The Unsolicited Information was not adequately tested per IRB's *Policy.*

24. Mr. Barbosa's Unsolicited Information was not adequately tested per the *Policy* as he did not appear as a witness, and the Board Member's reasons failed to present another means of testing. The Board cannot test the Unsolicited Information by merely reading it for inconsistencies. As the agent of persecution, Mr. Barbosa has a "bias, interest and motivation to be untruthful."[22] The Unsolicited Information, therefore, fails to satisfy the

[18] *Policy, supra* note 1.
[19] Board Member's Reasons, *supra* note 5 at para 30.
[20] *Policy, supra* note 1.
[21] *Vavilov, supra* note 16 at para 131.
[22] *Magonza v Canada (Citizenship and Immigration),* 2019 FC 14 at para 19 [*Magonza*].

key markers of credibility identified in *Magonza* and cannot rely on that method of testing.[23]

25. The requirement for testing is established by the context and preamble to the *Policy*, which states that unsolicited information received by the IRB enters the Board's decision-making process only if it can adequately be tested."[24]

26. The *Policy* presents the testimony of the informant as an avenue of testing:

> It is important that the IRB, as an independent tribunal adjudicating the merits of a claim for refugee protection, not take on an active investigative role with respect to unsolicited information received from anonymous sources or from informants who are unwilling or unable to appear as witnesses at the hearing of the claim (emphasis added).[25]

27. The relevant jurisprudence, though limited, confirms that unsolicited information must be tested to be used as evidence by the Board and that "testimony by the author of such evidence is a means of verification." [26]

28. It was unreasonable for the Board to dismiss the dominant method of testing recognized by both the *Policy* and relevant jurisprudence without implementing an alternative method. Doing so precluded any opportunity to test the Unsolicited Information.

29. *Reyes Pino* and *Singh* are the only two cases at the Federal Court dealing explicitly with the admissibility of unsolicited information and the IRB's *Policy*. In *Reyes Pino*, the Court held that the *Policy* required the informants' presence at the hearing.[27] In both

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[23] *Ibid.*
[24] *Policy*, *supra* note 1.
[25] *Ibid.*
[26] *Reyes Pino v. Canada (Citizenship and Immigration)*, 2012 FC 200 at paras 37-38 [*Reyes Pino*]; *Singh v. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2012 FC 1038 at para 16 [*Singh*].
[27] *Reyes Pino*, *supra* note 26 at para 37.

cases, the claimants were also allowed to cross-examine the informant and make submissions.

30. In *Reyes Pino,* the Federal Court found that the unsolicited information was properly admitted because "counsel for the applicant had every opportunity to cross-examine the witness" and "ample opportunity to make his arguments".[28] Similarly, in *Singh*, the Federal Court found the unsolicited information to be admissible and noted that the applicant's representative remained silent on the issue, despite having had the opportunity to cross-examine the witness and make submissions at the hearing.[29] In both cases, the Federal Court draws a link between the proper admittance of unsolicited information and the claimants' opportunity to cross-examine the witness and make responsive arguments. The Respondents in the case at bar had no such opportunity to hear and/or cross-examine Mr. Barbosa's testimony.

31. We concede that "refugee law does not require evidence to be presented *viva voce*"[30] and that it may be possible for the Board to test evidence using other means besides testimony and cross-examination. However, having determined that Mr. Barbosa's presence at the Respondents' hearing was non-mandatory and, in fact, harmful to the Respondents, the Board should have suggested an alternative method for testing the Unsolicited Information. The Board had available the reasonable options to (1) refuse to admit the Unsolicited Information, (2) determine an alternative method for testing the Unsolicited

[28] *Ibid* at para 29.
[29] *Singh, supra* note 26 at para 17.
[30] *Jalil v. Canada (Citizenship and Immigration),* 2022 FC 897 at para 24.

Information, or (3) provide a separate venue for Mr. Barbosa's testimony.[31] The Board neglected to exercise any of these reasonable options. Instead, Mr. Barbosa did not appear as a witness, and no other means of testing occurred, which resulted in the Board admitting untested information.

2. *In the alternative, if it was reasonable to conclude that satisfying the three preconditions was sufficient to test Mr. Barbosa's Unsolicited Information, admitting it without requiring his appearance was an unreasonable exercise of discretion.*

32. As the Board Member noted, the *Policy* requires that informants agree to appear as witnesses "if subsequently requested by the Board" [emphasis added].[32] The Respondents concede that the wording of IRB's *Policy* affords the Board Member discretion in determining whether informants must testify. However, such discretion must be exercised reasonably.[33]

33. The Board Member's decision to admit Mr. Barbosa's Unsolicited Information was an unreasonable exercise of discretion because he failed to consider the *Policy's* entire context, scope and object. The different sections of IRB's *Policy* should have been interpreted "together as parts of a functioning whole to form a rational, internally consistent framework."[34] The failure of an administrative decision-maker to consider such a highly relevant consideration amounts to a reviewable error.[35]

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[31] Immigration and Refugee Board of Canada, Legal Policies, *Chairperson's Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*, (December 2012) online: <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>. The IRB has broad discretion to tailor procedures to meet the particular needs of a vulnerable person.
[32] Board Member's Reasons, *supra* note 5 at para 28; *Policy*, *supra* note 1.
[33] *Vavilov*, *supra* note 16 at para 313; H.W.R. Wade, Administrative Law, 4th ed. (Oxford: Clarendon Press, 1977) at 336-37.
[34] *R. v. Kirkpatrick*, 2022 SCC 33 at para 46.
[35] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27.

34. The IRB's *Policy* places great emphasis on testing information prior to its admittance. The *Policy* also notes that the IRB, as an independent tribunal adjudicating the merits of a claim for refugee protection, ought not to take on an active investigative role concerning said testing. Therefore, an informant's testimony and cross-examination emerge as a dominant method of testing.

35. Having rejected a dominant method of testing, it was unreasonable to conclude the matter without suggesting an alternative method for testing the Unsolicited Information. The Board Member's reasons failed to explain its departure from the *Policy*.

36. A purposive approach to the *Policy* required the Board Member to either (1) exercise his discretion to call Mr. Barbosa as a witness or (2) provide reasons and an alternative method for testing the Unsolicited Information. The Board's failure to proceed with either option resulted in an unreasonable exercise of discretion.

ii. The Board's decision to admit Mr. Barbosa's Unsolicited Information is not justified in relation to the object and purpose of s.170(h) of the IRPA[36].

37. While proceedings before the Board are informal and not bound by any "legal or technical rules of evidence," [37] the Board's exercise of discretion must comply with the underlying rationale and purview of the *IRPA* and with any specific constraints that the scheme imposes.[38]

38. One such constraint is in s.170(h), which provides that the Board must only admit evidence that is considered credible and trustworthy in the circumstances–i.e., worthy of

[36] *IRPA, supra* note 2 s.170(h): The Refugee Protection Division, in any proceeding before it, may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances.
[37] *Ibid,* s.170(g): The Refugee Protection Division, in any proceeding before it, is not bound by any legal or technical rules of evidence.
[38] *Vavilov, supra* note 16 at para 108.

belief.[39] The admittance of evidence that is not credible or trustworthy, thus, fails to comply with s.170(h). The legislature's inclusion of the phrase "in the circumstances" is designed to allow the Board to "take into consideration different circumstances and respond appropriately to them"[40] and to "accommodate a level of flexibility to provide justice and to get closer to the truth."[41]

39. The Board Member's decision to admit Mr. Barbosa's Unsolicited Information was unreasonable because he failed to consider and respond appropriately to two key concerns: (1) the Unsolicited Information was contradictory evidence from an agent of persecution, with a strong bias, interest and motivation to be untruthful and (2) the letters from family members and friends in Brazil were unsigned, unsworn and unaccompanied by copies of identity cards. These concerns warrant greater scrutiny and a more restrictive approach to admitting evidence under s. 170(h).

1. Contradictory evidence from an agent of persecution.

40. As an agent of persecution, Mr. Barbosa is a biased party with a strong interest and motivation to deny the domestic violence allegations. Per *Magonza*, this factor affects his credibility and trustworthiness.[42]

41. The Board failed to consider that Mr. Barbosa launched his family law proceeding after his refugee claim was denied, possibly to remain in Canada. Indeed, s.50(a) of the IRPA allows for the stay of a removal order where a decision made in a judicial proceeding (like a civil court order granting custody/access and non-removal) would be directly contravened by

[39] *IRPA*, *supra* note 2 s.170(h); *Magonza*, *supra* note 22 at para 16.
[40] *X (Re)*, 2019 CanLII 143615 (CA IRB) at para 11.
[41] *Ibid.*
[42] *Magonza, supra* note 22 at para 19.

the enforcement of the removal order.[43] In *Canabate*, Stanley B. Sherr J. granted custody to the applicant at risk of deportation and issued a non-removal order for the child in question.[44] If Mr. Barbosa were to receive a similar access order, any removal order against him could be deemed subservient or secondary.[45] Indeed, where children are subject to a non-removal order, CBSA's efforts to deport the custodial parent are greatly affected.

42. As such, Mr. Alves is incentivized to deny all allegations of domestic violence and present himself as " a committed family man and a caring, responsible parent."[46] The Respondents submit that the Board acted unreasonably in failing to consider that Mr. Barbosa may be using the family courts to thwart the removal process "under the guise of determining [the] best interests of a child."[47] Family law proceedings must not frustrate the deportation of persons in this manner.

43. Further, if Mr. Barbosa fails to stay in Canada, a negative refugee determination for the Respondents would still benefit him. Mr. Barbosa could apply under s.40 of the *Children's Law Reform Act* ("*CLRA*") for an order to have his children returned to him in Brazil. As the Court of Appeal made clear in *DEME*, he could not apply if the children's asylum claims were undecided or successful.[48] Indeed, the provisions of the *CLRA* must be

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[43] *IRPA*, *supra* note 2 s.50(a): A removal order is stayed if a decision that was made in a judicial proceeding, at which the Minister shall be given the opportunity to make submissions, would be directly contravened by the enforcement of the removal order.
[44] *N.E.C. v. A.A.A.*, 2010 ONCJ 54 (CanLII) at para 58-60 [*Canabate*].
[45] Citizenship and Immigration Canada. *Operational Manual: Enforcement (ENF)*. Chapter ENF 10: "Removals", online: <http://www.cic.gc.ca/english/resources/manuals/enf/enf10-eng.pdf>.
[46] Board Member's Reasons, *supra* note 5 at para 24.
[47] *Augustin v. Canada (M.P.S.E.P) and Leonty* (27 February 2008), Toronto 07/FA/014805 (Ont. S.C.), at para. 9 cited in *Canabate supra* note 44 at para 51.
[48] *M.A.A v. DEME,* 2020 ONCA 486 at paras 68 and 78 [DEME].

informed by principles of non-refoulment set out in the *1951 Refugee Convention* and the Convention on the Rights of the Child.[49]

2. Mr. Barbosa's corroborating letters were unsigned, unsworn and not accompanied by copies of identity cards.

44. Unlike the Respondents' corroborating evidence, Mr. Barbosa's letters from family members and friends in Brazil were not signed, sworn and accompanied by copies of identity cards. Without documentation to verify the authors' identities, such letters should be given significantly less weight.[50] In the absence of trustworthy documentary evidence, admitting the Unsolicited Information without further scrutiny would undermine the integrity of the truth-finding functions of immigration administrative tribunals.

45. *Khelili* and *Zararsiz* support the above conclusion. In both cases, the Federal Court upheld RPD decisions where neither weight nor probative value was given to testimonial letters which were not signed and accompanied by legible identity cards.[51]

46. Considering these two circumstances, the appropriate forum to test the Unsolicited Information (i.e., whether Mr. Barbosa was, in fact, a "committed family man and a caring, responsible parent") was not the Respondents' refugee claim but the family law proceedings.

47. In the alternative, the Board's decision to simply admit the Unsolicited Information without proper scrutiny was inconsistent with the purpose and object of s. 170(h) of the *IRPA*. The

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[49] 1951 *Convention relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 150 [*1951 Refugee Convention*], cited in *DEME supra* note 48 at para 28.
[50] *X (Re)*, 2020 CanLII 125399 (CA IRB) at para 72; *X (Re), 2015* CanLII 110317 (CA IRB) at para 55; *Zararsiz v. Canada (Citizenship and Immigration)*, 2020 FC 692 at paras 77-81 [*Zarasiz*].
[51] *Khelili c. Canada (Sécurité publique et Protection civile)*, 2022 FC 18 at para 13; *Zararsiz supra* note 50 at paras 77-81.

Board Member's failure to consider such critical concerns is unreasonable because he may well have arrived at a different result had he done so.[52]

B. This court should answer the certified question in the negative. Unsolicited information filed by an agent of persecution should not be admitted as it is (i) contrary to the intent of 166(c) of the *IRPA* and (ii) not justified in relation to the *Chairperson's Gender Guidelines 4.*

48. For the reasons above, the FC did not err in holding that it was unreasonable for the Board to admit Mr. Barbosa's Unsolicited Information. More broadly, this Court must address a serious question of general importance. Beyond the Respondents' case, the Board should not admit unsolicited information, including affidavit evidence, where it is filed by an agent of persecution.

i. Where an agent of persecution files unsolicited information, its admittance contradicts the intent of s.166(c) of the *IRPA*.[53]

49. Any involvement of an agent of persecution in a refugee hearing (physical or otherwise) is unreasonable considering the intent of s.166(c) of the *IRPA.* As noted in *X (Re)*, 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."[54]

50. The Plaut report, which predates the creation of the IRB, articulated the rationale for closed hearings as follows:

> There is no doubt that the public has a valid interest in legal proceedings […]. In the refugee context, however, this interest is outweighed by the very real danger to the claimant (should the claim be refused) or to the claimant's family, if the fact of the claim and the testimony given at the hearing becomes

[52] *Vavilov, supra* note 16 at para 122.
[53] *IRPA, supra* note 2 s.166(c): subject to paragraph (d), proceedings before the Refugee Protection Division and the Refugee Appeal Division must be held in the absence of the public.
[54] *X (Re)*, 2015 CanLII 39898 (CA IRB), at para 149.

> public knowledge and comes to the attention of [agents of persecution] [emphasis added].[55]

51. In *Reyes Pino*, the FC indicated that calling "interested persons" to testify as witnesses is not, in and of itself, contrary to the requirement that claims be heard in the absence of the public.[56] Similarly, we concede that an agent of persecution, who has a direct connection to the claimant, may be similarly situated. However, their involvement is unreasonable, not because they would form the "public" but because of s.166's intent and rationale.[57] Indeed, involving an agent of persecution would exacerbate a claimant's risk of danger and call into question whether they could participate safely, meaningfully and without interference. Apart from the psychological turmoil suffered by encountering their persecutor directly, claimants would be vulnerable to retaliation, harassment and other abuse.

52. Therefore, when applied to agents of persecution, "the interplay of text, context, and purpose leaves room for a single reasonable interpretation of [s.166(c)]".[58] In the case at bar, the only reasonable option for the Board was to refuse to admit Mr. Barbosa's Unsolicited Information. Its decision to do otherwise was blind to "the important interests at stake [in refugee proceedings]"[59] and to the "delicate or intimate matters that may have been a traumatic part of an applicant's life."[60]

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[55] W. Gunther Plaut, *Refugee determination in Canada: A report to the Honourable Flora MacDonald, Minister of Employment and Immigration*, April 1985, Government of Canada publication, at page 128.
[56] *Reyes Pino, supra* note 26 at para 39, citing *Nechiporenko v. Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No. 1080.
[57] *Vavilov, supra* note 16 at para 108.
[58] *Vavilov, supra* note 16 at para 124.
[59] *Jemmo v. Canada (Citizenship and Immigration),* 2021 FC 965, at para 14.
[60] *Adeleye v. Canada (Citizenship and Immigration),* 2020 FC 681, at para 10.

53. This Court should answer the certified question in the negative and find, as the reviewing judge did, that the presence of any agent of persecution unreasonably contradicts the intent of s.166(c).

ii. Admitting unsolicited information filed by an agent of persecution contradicts the principles in *Guideline 4*.[61]

54. As an internal administrative structure, *Guideline 4* fosters consistency and fairness in cases involving gender-related persecution. One objective of *Guideline 4* is to address "special problems women face when called upon to state their claim at refugee determination hearings."[62] In meeting this objective, relevant evidence must be adduced and evaluated with due sensitivity.[63] Such a trauma-informed approach is also echoed by Canada's international obligations, per the UNHCR.[64]

55. Far from evaluating a claim in a manner sensitive to the specific circumstances of domestic violence, admitting unsolicited information from an agent of persecution would undoubtedly stymie the presentation of the refugee claim.[65]

56. Admitting unsolicited information from an agent of persecution runs afoul of the following provisions in *Guideline 4*:

> D(3): [W]omen who have been subjected to domestic violence may exhibit a pattern of symptoms referred to as Battered Woman Syndrome [and may require extremely sensitive handling].
> In some cases, it will be appropriate to consider whether claimants should be allowed to have the option of providing their testimony outside the hearing room by affidavit or by

[61] *Guideline, supra* note 4.
[62] *Ibid*.
[63] *Moya v. Canada (Citizenship and Immigration)*, 2016 FC 315 (CanLII) at para 36.
[64] UNHCR, *Policy on the Prevention of, Risk Mitigation, and Responses to Gender-Based Violence* (October 2020), online: <https://www.unhcr.org/5fa018914/unhcr-policy-prevention-risk-mitigationresponse- gender-based-violence> at p.7.
[65] *Olah v. Canada (Citizenship and Immigration),* 2019 FC 401 at para 39.

videotape, or in front of members and refugee claims officers specifically trained in dealing with violence against women [emphasis added].

57. Instead of accommodating the Claimant, involving an agent of persecution in their proceeding would exacerbate harm by encouraging communication, fueling conflict and placing a victim in close proximity to their persecutor. In fact, there is overwhelming evidence that demonstrates that the commencement of court proceedings can escalate the risk of domestic violence even further.[66]

58. Although *Guideline* 4 is not binding, the Board must nonetheless apply its principles enshrined in a meaningful way.[67] Substance must prevail over form when determining whether the *Guideline* has been complied with.[68] It is not sufficient to simply state that *Guideline* 4 has been applied if the reasons or the conduct of the hearing suggests that they have not been appropriately followed.[69]

59. A failure to abide by *Guideline 4* can constitute a reviewable error.[70] There are numerous cases in which Courts have set aside Board decisions that fail to exhibit adequate sensitivity to *Guideline 4*.[71] The Board made the same error in this case.

2)It was unreasonable for the Board to admit Mr. Barbosa's Transcript Evidence.

60. The FC did not err in finding that the Board acted unreasonably by admitting the Transcript Evidence from Mr. Barbosa's July 9, 2021, refugee hearing.

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[66] Desmond Ellis, *Divorce and the family court: What can be done about domestic violence?* (2008) 46:3 Family Court Review 531-532.
[67] *Kaké v. Canada (Citizenship and Immigration)*, 2015 FC 852 at para 37 [*Kaké*].
[68] *Keleta v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 56 at para 15 [*Keleta*].
[69] *Yoon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1017 at para 5 [*Yoon*]; *Odia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 663 at para 18 [*Odia*].
[70] *Keleta*, *supra* note 68 at paras 16-21; *Odia*, *supra* note 69 at para 9.
[71] See e.g. *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291 at para 16; *Sukhu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 427 at paras 18-21; *De Araujo Garcia v Canada (Citizenship and Immigration)*, 2007 FC 79 at para 24.

61. While Rule 21 of the RPD Rules permits a Board Member to disclose and rely on information from Mr. Barbosa's claim, doing so in this case was unreasonable.

62. First, admitting the Transcript Evidence was unreasonable considering the object and purpose of s.170(h) of the *IRPA*. Second, admitting the Transcript Evidence was unreasonable as it was not sufficiently tested in the context of the July 9th hearing. Third, disclosing the Transcript Evidence caused an injustice contrary to Board Rule 21(5) as it was highly prejudicial to Ms. Reis.

A. It was unreasonable considering the object and purpose of s.170(h) of the *IRPA*.

63. The arguments set out in paragraphs 40-46 also apply to Mr. Barbosa's Transcript Evidence.

64. Like the Unsolicited Information, the Transcript Evidence is not credible or trustworthy because of Mr. Barbosa's bias, interest and motivation to deny the domestic violence allegations.[72] The Transcript Evidence is self-serving.[73] Despite being given under oath, an agent of persecution should not be able to participate in victim's claim and equally enjoy the presumption of truthfulness.[74] In immigration matters, where there is a reasonable apprehension of some potential benefit to the party bringing forth evidence, it may be found unreliable.[75] As previously discussed, there is reasonable apprehension that Mr. Barbosa is motivated by his desire to stay in Canada and to have his children returned to him.

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[72] *Magonza, supra* note 22 at para 19.
[73] While "self-serving" has typically been used in the context of corroborating evidence submitted by a claimant's family members, it can readily extend to the circumstances at bar.
[74] *Maldonado v. Canada (Minister of Employment and Immigration*), 1979 CanLII 4098 at page 305 [*Maldonado*].
[75] *Fadiga v. Canada (Citizenship and Immigration),* 2016 FC 1157 at para 15 [*Fadiga*].

65. *Fadiga* supports the above conclusion as the FC found "oath[s] will not prevent dishonest persons from misrepresenting the truth … [t]he truth-seeking function of hearings is to test for dishonesty and to determine the reliability of the evidence."[76]

66. The Board's decision to admit the Transcript Evidence without proper scrutiny cannot be justified in relation to the purpose and object of s. 170(h) of the *IRPA*. Indeed, had proper scrutiny occurred, the Board Member may very well have arrived at a different result.[77]

B. It was unreasonable because Mr. Barbosa's Transcript Evidence was not sufficiently tested in the context of his July 9th hearing.

67. The Board was unreasonable in finding that Mr. Barbosa's Transcript Evidence was sufficiently tested for its credibility and trustworthiness in the context of his July 9th, 2021, refugee hearing. The Transcript excerpt only covered 7 minutes and 33 seconds of Mr. Barbosa's testimony and cross-examination.[78]

68. While Mr. Barbosa was subject to cross-examination by both the Minister and the Panel, the veracity of Ms. Reis' domestic violence allegations was not at issue in his hearing. At issue was his alleged risk from the C.V. gang.

69. Further, neither Ms. Reis nor her counsel was present at his refugee hearing to cross-examine and contest Mr. Barbosa on these points. It is, therefore, unreasonable to find that the claims he made in the Transcript excerpt were sufficiently tested.

C. It caused an injustice contrary to Board Rule 21(5) as it lacked probative value and was highly prejudicial to Ms. Reis.

70. The Board was unreasonable in failing to respect its own Rules regarding the disclosure of personal information from another refugee protection claim. Board Rule 21(5) states:

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[76] *Fadiga, supra* note 75 at para 20.
[77] *Vavilov, supra* note 16 at para 122.
[78] Board Member's Reasons, *supra* note 5 at para 34.

> The Division must not disclose personal or other information unless it is satisfied that (a) there is not a serious possibility that disclosing the information will endanger the life, liberty or security of any person; or (b) disclosing the information is not likely to cause an injustice.

71. Admitting Mr. Barbosa's Transcript caused an injustice because it lacks probative value and is highly prejudicial to the Respondents. Probative value must not be determined in isolation, as the Appellants seek to do. The Board states in its Legal Services paper on Weighing Evidence that "where the prejudicial effect of the evidence outweighs its probative value," it is best for the RPD to "refuse to admit the evidence at all," as opposed to admitting the evidence and giving it little or no weight.[79]
72. The Transcript Evidence is of little probative value. Indeed, evidence tendered by a witness with a personal interest typically requires corroboration if it is to have probative value.[80] Mr. Barbosa's Transcript was not accompanied by any such corroboration.
73. Further, admitting the Transcript was overwhelmingly prejudicial to the Respondents. Evidence will be prejudicial if admitting it would negatively impact the fairness and integrity of the RPD hearing process. This will be the case where, for instance, the evidence cannot be tested,[81] or where admitting the evidence would be inconsistent with the purpose and procedures of the RPD. In the case at bar, not only was the Transcript untested, but its admittance rendered the hearing process adversarial. The participation of Mr. Barbosa's carried negative psychological impacts for the principal Respondent, compromising her ability to present her case. Giving an agent of persecution a voice in refugee proceedings

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[79] Legal Services, Refugee Protection Division, Immigration and Refugee Board (IRB), *Weighing Evidence*, at paragraphs 2.3.
[80] *Arsu v. Canada (Citizenship and Immigration)*, 2020 FC 617 at para 41.
[81] *Lin v Canada (Citizenship and Immigration)*, 2008 CanLII 77229 (CA IRB) at para 16; *R v Frimpong*, 2013 ONCA 243 at para 18.

calls into question whether a claimant would be able to participate meaningfully and without interference. The Board's reasons failed to sufficiently respond to this potential for prejudice.

74. Given these circumstances, disclosing the Transcript caused a serious injustice and was unreasonable considering the Board's own rules.

3) **The Board erred in according the Unsolicited Information and Transcript Evidence greater weight than Ms. Reis' evidence without reasonable justification.**

75. Even if this court finds that admitting Mr. Barbosa's Unsolicited Information and Transcript Evidence were reasonable, the Board's decision still merits this court's review. The Board acted unreasonably in according Mr. Barbosa's untested evidence substantial weight over Ms. Reis' *viva voce* testimony, which was tested and cross-examined, in the absence of clear and unmistakable reasons for doing so.

76. It is well-established that the Board's assessment of credibility is entitled to deference on judicial review.[82] However, as *Vavilov* makes clear, to be reasonable the Board's reasoning must follow a "rational chain of analysis."[83] Even if the outcome of a decision - such as a negative refugee determination - is reasonable, reviewing courts must not "disregard the flawed basis for a decision and substitute its own justification for the outcome." To do so would "allow an administrative decision-maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion."[84]

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[82] *Tamayo c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2015 FC 1217 at para 17 [*Tamayo*].
[83] *Vavilov, supra* note 16 at para 103.
[84] *Ibid* at para 96.

77. The Board acted unreasonably in failing to provide sufficient reasons for its preference of Mr. Barbosa's untested evidence over Ms. Reis' *viva voce* testimony. The main explanation provided–that Mr. Barbosa was found credible in his refugee hearing–is an unreasonable basis for determining his credibility regarding the domestic violence allegations against him. Further, the Board was unreasonable in finding that the discrepancy between Ms. Reis' amended BOC and her testimony in the family law and refugee proceedings reflected a "material inconsistency." Finally, the Board's reasons for assigning little weight to Ms. Reis' evidence reflected a failure to meaningfully engage with *Guideline 4*.

A) The Board failed to provide clear and unmistakable reasons for its preference of Mr. Barbosa's untested evidence over Ms. Reis' *viva voce* testimony.

78. In the refugee context, the starting point for assessing credibility comes from *Maldonado*, where the Federal Court of Appeal states that when a claimant swears that certain facts are true, this creates a presumption that they are true unless there is a valid reason to doubt their truthfulness.[85]

79. The presumption of truthfulness increases the Board's burden of explanation. For a Board Member's decision to reasonably displace the presumption, the Board Member must set out his thinking in "clear and unmistakable terms,"[86] give "specific and clear reference to the evidence,"[87] provide "illustrations or examples"[88] of the kinds of factors that led him to doubt the claimant and explain their relevance.

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[85] Immigration and Refugee Board of Canada, Legal Policies, *Assessment of credibility in claims for refugee protection*, (31 December 2020), online: <https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/Credib.aspx#toc1> [*Assessment of credibility in claims for refugee protection*]; see also *Maldonado* supra note 74 at para 5.
[86] *Hilo v Canada (Minister of Employment and Immigration*), 1991 130 NR 236 at para 6.
[87] *Leung v Canada (Minister of Employment and Immigration*) (1994), 81 FTR 303 at para 14.
[88] *Gonzalez v Canada (Minister of Employment and Immigration*), 1993 45 ACWS (3d) 710 at para 5.

80. In *Veres,* for example, the FC found that the Convention Refugee Determination Division (CRDD) did not provide clear and unmistakable reasons for preferring a telephone report given to the hearing officer by a party official over the claimant's tested and corroborated testimony.[89] This is because there were reasons to doubt the party official's claims, including that his rank and source of knowledge were unknown.

81. Similar to *Veres,* there are compelling reasons to doubt the veracity of Mr. Barbosa's evidence, including the fact that it originates from the agent of persecution and remains untested. The Board's failure to sufficiently explain why it finds the Unsolicited Information and Transcript Evidence to be a "more believable version of events" than Ms. Reis' sworn testimony is, thus, a reviewable error.

B) The Board's explanation for finding Mr. Barbosa's evidence more credible is unreasonable.

82. The only reason the Board offers for why Mr. Barbosa's evidence is a "more believable version of events" is that he was found to be "credible" in his refugee hearing. It is unreasonable to rely on this premise.

83. Pascal is instructive in assessing the weight to be given to determinations from previous proceedings.[90] In that case, the FC argued it was reasonable for the Immigration Division (ID) to attribute significant weight to the factual findings regarding relevant issues from a previous proceeding. The case at bar is distinguishable because no factual findings on the relevant issue–Mr. Barbosa's credibility concerning the domestic violence allegations against him–were made in Mr. Barbosa's refugee law proceeding. In *Pascal*, the FC writes:

> [68] A prior decision involving the same party was also at issue in *Malik*, in which the Supreme Court of Canada considered use of earlier decisions more broadly: *British*

[89] *Veres v Canada (Minister of Citizenship and Immigration),* [2001] 2 FC 124 (TD) at para 11.
[90] *Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 [*Pascal*].

Columbia (Attorney General) v Malik, 2011 SCC 18. After considering principles of litigation efficiency and fairness, Justice Binnie for the Court concluded that whether a prior decision is admissible is not a matter of "rigid rules," but will depend on the purpose for which it is put forward, and the use sought to be made of its findings and conclusions: *Malik* at paras 37, 44-46. The weight to be given to such findings will then "depend on the circumstances of each case," considering matters such as the identity of the participants, the similarity of the issues, the nature of the earlier proceedings, and the opportunity given to the prejudiced party to contest it: *Malik* at paras 47-48.

[69] [...] The identity of the participants, the similarity of the issues, and the nature of the earlier proceedings are all relevant to the question of whether the information is credible and trustworthy. And in the administrative law context, the relevance of an opportunity to address the prior findings is an issue of procedural fairness, a concern raised in both *Smith* (paras 57-60) and *Pathmanathan* (paras 37-41)." (emphasis added)[91]

84. The case at bar can be meaningfully distinguished from *Pascal* because the issues in Mr. Barbosa's refugee hearing and Ms. Reis' refugee hearing are not similar. While Mr. Barbosa did not receive a negative credibility assessment in his refugee claim, it was unreasonable for the Board to find that he received a positive credibility assessment. His refugee claim was refused on the basis of adequate state protection available to him in Brazil and did not go to the issue of credibility.

85. Even if he had been found credible in his refugee claim, the Board's credibility assessment concerned the risk of persecution he faced at the hands of the C.V. gang, not the domestic violence allegations against him. In *Gomez Arango*, for example, the FC found that the RPD should have accepted the claimant's allegations of persecution as true because it had made no negative credibility findings.[92] In the case before us, the RPD acted unreasonably in extending this principle to aspects of Mr. Barbosa's case which did not concern his persecution. The RPD failed to consider important reasons for why it should not have

[91] *Ibid* at paras 68-69.
[92] *Gomez Arango v Canada (Citizenship and Immigration)*, 2021 FC 1114 at para 25.

accepted the extension of this principle to Mr. Barbosa's claims that he is a good father, or that he has never been physically abusive to Ms. Reis or to the Minor Respondents.

86. Even if this Court were to find that Mr. Barbosa's refugee hearing reflects a factual determination regarding his specific claims against Ms. Reis, there was no opportunity for her, as the "prejudiced party," to contest these findings during his refugee hearing. As such, assigning his evidence substantial weight purely on the basis of an earlier credibility determination is unreasonable.

C) It was unreasonable for the Board to find that Ms. Reis' testimony was "materially inconsistent" with her BOC.

87. It is unreasonable for the Board to consider the discrepancy between Ms. Reis' amended BOC and her subsequent affidavit and refugee testimony a "material inconsistency." The Board argues that Ms. Reis' amended BOC while containing detailed instances of domestic violence by her husband, was vague regarding his treatment of her minor children. When the Board asked why she had failed to provide details regarding the abuse of her minor children in her amended BOC, Ms. Reis claimed she believed her DR would file an independent narrative with allegations for her children, which the Board found unreasonable due to the childrens' ages.

88. While contradictions in evidence, particularly in an applicant's testimony, provide a reasonable basis for a negative credibility finding, the court in *Tamayo* emphasizes that "such contradictions must be real and more than trivial or illusory."[93] The subsequent details Ms. Reis provides about her children's mistreatment in her refugee hearing do not contradict her amended BOC, nor do they reflect claims that were entirely omitted from

[93] *Tamayo, supra* note 82 at para 17.

her amended BOC, both of which are situations *Navaratnam* suggests justify a negative finding of credibility.[94] Instead, these details elaborate on claims she had made in her amended BOC instead of introducing "new and important facts" at the hearing stage.[95]

89. While it is reasonable for the Board to consider the credibility of Ms. Reis' claims that her husband abused their children as material to the credibility of her own domestic violence claims, the Board would have had the opportunity to question Ms. Reis regarding both these claims at her hearing. If the Board still chose not to believe her, it is required to "make clear findings as to what evidence is believed or disbelieved and set out the principal evidence upon which those findings were based."[96]

90. In *Bains,* for instance, the Court notes that while the Refugee Division determined the applicant had not given "sufficient" evidence, it did not specify what was not credible, nor whether they found the applicant to be untruthful or evasive.[97] In the case at bar, the Board not only failed to specify what evidence it disbelieved, it appears to assign little probative value to it all–including Ms. Reis' consistent and detailed testimony regarding her own domestic violence allegations–given its foregone conclusion that Mr. Barbosa is a "good father to his two young children."

91. Further, even if Ms. Reis' amended BOC was vague, the Board's reasons failed to grasp the significance of her psychiatric report, detailing a MDD and PTSD diagnosis. In *Warsame*, the Court finds that the Board must "appreciate the Applicant's mental health

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[94] *Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856, at paras 16-17 [*Navaratnam*].
[95] *Ibid* at para 18.
[96] *Assessment of credibility in claims for refugee protection*, *supra* note 85.
[97] *Bains v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 497(FCTD)(QL).

contextually" in order for its decision to be reasonable.[98] While the Board can treat the psychiatric report with caution in terms of proving Ms. Reis' abuse, the Court in *Warsame* found this insufficient to reject a similar psychiatric report entirely.[99]

D) The Board's reasons for assigning little weight to Ms. Reis' evidence are unreasonable as they reflect a failure to meaningfully engage the *Guideline 4*.

92. The Board assigns little probative value to Ms. Reis' evidence, including her consistent and detailed testimony, letters from her neighbours, and her psychiatric report. This is because such evidence was held up to the evidence of Mr. Barbosa, which the Board prematurely determined to be more credible.

93. The Board acted unreasonably in holding the evidence of a victim of domestic violence up to the evidence of her agent of persecution without expressly being sensitive to the difficulties women face in demonstrating their credibility in cases of domestic violence, as explicitly articulated in *Guideline 4*.

94. At the time of the Board decision, the 1996 Guideline was in effect, which makes it clear that women refugee claimants "face special problems in demonstrating that their claims are credible and trustworthy."[100] The *Guideline* challenges common myths that underpin decision-makers' reasoning, including why women might not come forward or why loved ones might not be aware of their abuse. The *Guideline* states, for example, that "women from societies where the preservation of one's virginity or marital dignity is the cultural

[98] *Warsame v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 118 at para 32 [*Warsame*].
[99] *Ibid* at paras 30-32.
[100] *Guideline, supra* note 4.

norm may be reluctant to disclose their experiences of sexual violence in order to keep their "shame to themselves and not dishonour their family or community."[101]

95. While the amended 2022 Guideline had yet to be released at the time of the Board's decision, it elaborates on the 1996 Guideline. The 2022 Guideline outlines what might be required for a well-reasoned decision and draws attention to ways Board Members can meet their burden of explanation in s. 7.4 in particular. It states that "[i]n cases of gender-based violence, individuals may face difficulty obtaining corroborative evidence in the form of personal disclosure for several reasons, including shame, stigma, secrecy and the cycle of power and control that can often contribute to such violence."[102] The amended Guideline thus provides us with further interpretive tools to understand the purpose of this Guideline in the refugee context and whether the Board met this purpose.

96. In its decision, the Board states that it considered *Guideline 4* in assessing the claimant's credibility. Still, its reasoning points to a failure to take the *Guideline* into account. In particular, we see the Board's failure to be sensitive to the "shame, stigma, secrecy, and the cycle of power and control" in cases of gender-based violence. This can be seen in the Board's negative view of the claimant's difficulty in finding letters of support from people who witnessed her abuse and not merely speculated on it, compared to its treatment of Mr. Barbosa's support letters. In so doing, the Board failed to apply the principles enshrined in the Guideline in a meaningful way.[103] It is not sufficient for the Board to merely say that

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[101] *Ibid.*
[102] Immigration and Refugee Board of Canada, Legal Policies, *Chairperson's Guideline 4: Gender Considerations in Proceedings Before the Immigration and Refugee Board* (July 2022), online: <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx#s8>.
[103] *Kaké, supra* note 67 at para 37.

Guideline 4 was applied, especially if the reasons or conduct of the hearing suggest it had not been adequately followed.[104]

97. The Board's unreasonable finding that Mr. Barbosa's documents provided a "more believable version of events" - and their discounting of any of Ms. Reis' evidence - led to unequal scrutiny of their evidence. Although decision-makers are given "considerable latitude in making credibility findings, which should not be lightly interfered with," credibility findings are not "immune from review," and must be clearly articulated and justified on the evidence,"[105] which the Board failed to do in this case.

98. The Board's inability to sufficiently substantiate their decision constitutes a reviewable error even if Ms. Reis' refugee claim was likely to fail. As *Vavilov* affirms, even if the outcome of an administrative decision is reasonable–in other words, even if arriving at a negative credibility finding or a negative refugee determination for Ms. Reis was reasonable–reviewing courts must remain attentive to critical gaps or illogicalities in the decision-maker's chain of reasoning.

99. Given all these concerns, the flaws or shortcomings of the Board's decision are "more than merely superficial or peripheral to the merits" of their negative refugee determination for Ms. Reis and are, in fact, "sufficiently central or significant" to render the Board's decision unreasonable per *Vavilov*.

PART IV: ORDER SOUGHT

100. The Respondent respectfully requests that the Honourable Court dismiss the appeal and answer the Certified Question in the negative.

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[104] *Yoon, supra* note 69 at para 5; *Odia, supra* note 69 at para 18.
[105] *Mariyaseelan v. Canada (Citizenship and Immigration)*, 2022 FC 155.

APPENDIX: LIST OF AUTHORITIES

Legislation

Immigration and Refugee Protection Act, SC 2001, c 27, ss 166 (c), 170(h)
166 Proceedings before a Division are to be conducted as follows, [...] **(c)** subject to paragraph (d), proceedings before the Refugee Protection Division and the Refugee Appeal Division must be held in the absence of the public.
170 The Refugee Protection Division, in any proceeding before it, […] **(g)** is not bound by any legal or technical rules of evidence; **(h)** may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances; and […]
Refugee Protection Division Rules, SOR/2012-256, rr 21
21 **(5)** The Division must not disclose personal or other information unless it is satisfied that **(a)** there is not a serious possibility that disclosing the information will endanger the life, liberty or security of any person; or **(b)** disclosing the information is not likely to cause an injustice.

Case Law

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Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65
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Fong v Canada (Public Safety and Emergency Preparedness), 2010 FC 1134
Gomez Arango v Canada (Citizenship and Immigration), 2021 FC 1114
Gonzalez v Canada (Minister of Employment and Immigration), 1993 45 ACWS (3d) 710
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Mariyaseelan v. Canada (Citizenship and Immigration), 2022 FC 155
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R v Frimpong, 2013 ONCA 243
R. v. Kirkpatrick, 2022 SCC 33
Sukhu v Canada (Minister of Citizenship and Immigration), 2008 FC 427
Tamayo c. Canada (Ministre de la Citoyenneté et de l'Immigration), 2015 FC 1217
Veres v Canada (Minister of Citizenship and Immigration), [2001] 2 FC 124 (TD)
Warsame v. Canada (Immigration, Refugees and Citizenship), 2019 FC 118
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X (Re), 2019 CanLII 143615 (CA IRB)
X (Re), 2020 CanLII 125399 (CA IRB)
Yoon v Canada (Minister of Citizenship and Immigration), 2010 FC 1017
Zararsiz v. Canada (Citizenship and Immigration), 2020 FC 692

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