**THE CROWN COURT OF CANADA**

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

 B E T W E E N:

**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**

**RESPONDENTS**

**FACTUM OF THE RESPONDENT**

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Counsel of the Respondent

**OVERVIEW**

1. Refugee claimants face the difficult task of establishing essential elements of their claim for protection. In particular, claimants that are women may have suffered intimate partner violence and other circumstances of extreme hardship, prior to their arrival in Canada. As a result of their troubled immigration and personal experiences, many refugee claimants struggle to manage the overwhelming and ongoing effects of abuse-related trauma. When survivors make the difficult decision to bring forward their legitimate claims of abuse, they must overcome another hurdle: reporting their history of abuse to a stranger in the context of a Refugee Protection Division (“RPD”) hearing.
2. To ensure that the refugee claims are determined fairly and expeditiously, the *Immigration and Refugee Protection Act* (“*IRPA*”) provides that the RPD may preside over hearings without the formalities of a typical court proceeding.[[1]](#footnote-1) Such allowances permit the RPD to make determinations free from the technical rules of evidence. The RPD has statutory authority to receive and consider evidence that is credible or trustworthy. RPD members operate in an inquisitorial rather than adversarial process to test evidence fairly. This provides the claimant ample opportunity to give a complete and accurate account of their claim.
3. In the present case, the Respondents, Ms. Isabella Barbosa Reis and her children, are refugee claimants suffering the ongoing effects of abuse-related trauma. Having endured years of torment at the hands of her husband, Ms. Barbosa Reis separated her claim and her children’s claim from that of her abuser. Her hope was to be free from mistreatment, abuse, and the source of trauma. The expectation was for a fair hearing. The Respondents however, received neither a trauma-informed nor a fair hearing. Instead, the RPD proceeded in a manner that increased the risk that the Respondents would be re-traumatized. The RPD erroneously admitted and unreasonably preferred the untested evidence of the agent of persecution. The Respondents, Ms. Barbosa Reis especially, faced the profoundly difficult task of divulging a deeply personal and traumatic period of her life, only to be found unworthy of belief despite her substantial submissions.
4. The RPD in its decision, accepted and relied on unsolicited information and a transcript from her husband. In doing so, the RPD breached Ms. Barbosa Reis’ right to procedural fairness. The Unsolicited Information and Transcript were not and could not be adequately tested. By relying on this untested evidence, the RPD placed Ms. Barbosa Reis in an impossible situation: to face her husband, the agent of persecution as a witness, or receive an unfair hearing resulting from the admission of untested evidence. The Federal Court recognized the RPD’s error and found that the unsolicited information and transcript should not have been admitted for consideration.
5. In the alternative, if the RPD was permitted to admit the Unsolicited Information and Transcript of the agent of persecution, it nevertheless arrived at an unreasonable decision. The RPD member failed to provide adequate reasons for preferring the evidence from the agent of persecution and misapplied the *Chairperson’s* *Gender Guidelines.*[[2]](#footnote-2) Allowing the RPD’s decision to stand in this case would be an endorsement of a prejudicial evaluation of evidence.

**PART I: FACTS**

**Immigration History**

1. Ms. Isabella Barbosa Reis and Mr. Manuel Alves Barbosa were married in 2015 and lived in Brazil with their two children, Pedro and Alandra Reis Barbosa.
2. In mid-2019, her husband claimed the Commando Vermelho gang in Brazil began targeting him. The family could not pay the extortion fee, and as a result, the gang physically attacked her husband, threatening to kill him. This prompted the family to claim refugee protection at a port of entry in Canada in February 2020, pursuant to sections 96 and 97(1) of the *IRPA*.[[3]](#footnote-3) Her husband’s Basis of Claim narrative (“BOC”) was filed on the family’s behalf.
3. Despite ongoing physical abuse by her husband, Ms. Barbosa Reis did not file an independent BOC. She relied on her husband’s narrative to enter Canada, as she spoke no English and he controlled every aspect of her life, including all her social interactions and movements to and from the home.

**Personal History**

1. Ms. Barbosa Reis suffered significant abuse at the hands of her husband. Her husband began physically and verbally abusing her shortly after their marriage. Her husband controlled all her social interactions and prohibited her from leaving the home unless she obtained his permission. His abuse led Ms. Barbosa Reis to suffer a miscarriage. After the birth of each of their children on October 28, 2017, and August 3, 2019, Mr. Alves Barbosa leveraged the children to prevent Ms. Barbosa Reis from reporting the abuse to anyone. He threatened to take her children away if she did not comply.[[4]](#footnote-4)
2. On June 1, 2021, Ms. Barbosa Reis applied to sever her and her children’s claims from her husband pursuant to Rule 56(2) of the *RPD Rules*.[[5]](#footnote-5) She applied to sever the claims because she and the children had been victims of ongoing, intolerable physical abuse by her husband. Her application was approved, and the hearing date was set for September 15, 2022 (the “September Hearing”).
3. In Canada, her husband continued his abusive behaviour. He held Ms. Barbosa Reis in isolation and began to abuse his children. Her husband hit and yelled at his children when they did not behave to his liking. Determined to protect her children from his abusive parenting, Ms. Barbosa Reis and her children left her husband for a shelter.

**Procedural History**

***RPD Decision***

1. On October 25, 2021, the RPD found that credibility was the determinative issue.
2. Evidence before the Board at the September Hearing included a transcript of her husband’s testimony from his July hearing (the “Transcript”) and a package of unsolicited information. This package included his sworn affidavits and letters from family members in Brazil (the “Unsolicited Information”) which were tendered to bolster her husband’s image.
3. Ms. Barbosa Reis argued that admitting the Transcript and Unsolicited Information as evidence would be inconsistent with Rule 21(5) of the *RPD Rules* and section 170(h) of *IRPA*. [[6]](#footnote-6) The evidence originated from the agent of persecution, someone with a motive to be untruthful. It was not possible to adequately test this evidence without having the agent of persecution present at the September Hearing to be cross-examined, which is contradictory to the non-adversarial nature of the RPD.
4. Despite Ms. Barbosa Reis’ concerns, the Board Member admitted the Unsolicited Information and Transcript evidence. The Board Member claimed that testing the evidence was optional and said the evidence was properly tested because the Minister and a Board Member were present at the July hearing and could have cross-examined her husband there.
5. Ms. Barbosa Reis’ evidence included letters from neighbors who observed her husband’s pattern of emotional and physical abuse, and a psychiatric diagnosis of Major Depressive Disorder (“MDD”) and Post-Traumatic Stress Disorder (“PTSD”). Despite this, the RPD Board Member found that Ms. Barbosa Reis was not credible because her descriptions of her husband’s abuse towards the children in her independent BOC lacked specificity in comparison to her family law affidavit, which contained more detail about the abuse. The RPD noted that she believed the designated representative assigned to her children for the hearing, would submit a separate BOC for the children. She also believed she would have an opportunity at the hearing itself to answer any additional questions.

***Federal Court of Canada Decision***

1. The Federal Court found the RPD erred by admitting and relying on the Unsolicited Information and Transcript evidence filed by the agent of persecution. The Unsolicited Information and Transcript evidence were untested, and the RPD erred by relying on this body of evidence to determine that Ms. Barbosa Reis lacked credibility.
2. The Federal Court determined that the Transcript and Unsolicited Information could not be tested properly by way of cross-examination without calling the agent of persecution, her husband, as a witness to the proceedings. The Federal Court pointed to the inquisitorial and non-adversarial nature of the RPD and found that it failed to consider the absurdity of putting the allegations to the alleged agent of persecution for his response.*[[7]](#footnote-7)* The Federal Court also held that the RPD failed to provide adequate reasons for preferring her husband’s evidence and why Ms. Barbosa Reis’ evidence was considered unreliable.
3. The Federal Court judge 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?*

**PART II: POINTS IN ISSUE**

1. The RPD cannot admit unsolicited information, including affidavit evidence, filed by the agent of persecution for the following reasons:
	1. The evidence could not be adequately tested; and
	2. Procedural fairness has not been met.
2. In the alternative, if this Court finds that the RPD did not err in admitting the Unsolicited Information and Transcript evidence, the RPD nevertheless erred in its decision for the following reasons:
	1. The RPD’s preference for the agent of persecution’s evidence was inadequately explained;
	2. The RPD misapplied the *Chairperson’s Gender Guidelines* by:

i) Failing to assess the Respondent’s psychiatric report; and

ii) Arriving at a negative credibility finding against the Respondent when her omission did not constitute a material inconsistency.

**PART III: ARGUMENT**

**STANDARD OF REVIEW**

1. The Supreme Court of Canada in *Vavilov* establishes that “[w]here a court reviews the merits of an administrative decision…the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness”.*[[8]](#footnote-8)*
2. *Vavilov* establishes the requirements for a reasonable decision. The Supreme Court of Canada found that“the burden is on the party challenging the decision to show that it is unreasonable”.[[9]](#footnote-9) There are two types of issues that may show a decision is unreasonable. The first are decisions that fail to be internally coherent or are logically flawed.[[10]](#footnote-10) The second type of decisions are those that are untenable in light of the relevant factual and legal constraints.[[11]](#footnote-11) Further, any shortcomings or flaws must be ones which are “sufficiently central or significant to render the decision unreasonable”.[[12]](#footnote-12) The role of the reviewing court then, is to examine the RPD decision for the existence of a requisite degree of “justification, intelligibility and transparency” and “[a]ny alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision”.[[13]](#footnote-13)
3. The Federal Court in the present case correctly found that the standard of review is reasonableness. This standard applies to the RPD’s contemplation and interpretation of evidence, credibility determinations, and chain of analysis. However, the Federal Court also found that the issue of fairness “looms large in the analysis”.[[14]](#footnote-14)

**1) The RPD cannot admit Unsolicited Information, including affidavit evidence, filed by the agent of persecution.**

**A) The Unsolicited Information and Transcript Evidence could not be adequately tested.**

1. The RPD has broad discretion to prefer certain evidence over other evidence. Subsection 170(g) of the *IRPA* establishes that the RPD is not bound by any legal or technical rules of evidence.[[15]](#footnote-15) Subsection 170(h) of *IRPA* makes clear that the RPD may base a decision on evidence that is adduced in the proceedings. However, this evidence must be considered credible or trustworthy in the circumstances.
2. The *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division* (the “Unsolicited Information Policy”) governs the treatment and use of unsolicited information the IRB receives in respect of RPD proceedings.*[[16]](#footnote-16)* The *Unsolicited Information Policy* defines unsolicited information as information that is provided by persons not party to the RPD proceedings and was not requested by IRB officials, including representatives of the Minister, a claimant, or a claimant’s representative. Section 3 provides that the unsolicited information enters the decision-making process only if it can be adequately tested.[[17]](#footnote-17) The purpose of Section 3 is to ensure that the RPD’s use of the unsolicited information is in keeping with the refugee protection determination process, which is inquisitorial in nature.
3. Section 166(c) of the *IRPA* provides that proceedings before the RPD must be held in the absence of the public.[[18]](#footnote-18) As per this section, claimants in RPD hearings have an enhanced expectation of privacy because the important interests and sensitive information in the proceedings deserve protection.[[19]](#footnote-19)
4. The Federal Court in *Olah v Canada* acknowledged the inquisitorial role of the RPD. Here, the court affirms that as decision-makers “[p]residing over proceedings that are more inquisitorial than adversarial, RPD members have an important and difficult role to play. Determining whether a claim is well-founded or not often involves at least some degree of testing of the evidence”.[[20]](#footnote-20) At the same time, the Federal Court in *Olah* emphasized that “...members must not test a claim in ways that reasonably suggest that they have prejudged a case, in ways that prevent claimants from giving as complete and accurate an account as they are able to provide, or in ways which themselves could (re)traumatize the claimant”.[[21]](#footnote-21)
5. In accordance with the *Unsolicited Information Policy,* the evidence from the Respondent’s husband can be admitted provided it can be adequately tested. *[[22]](#footnote-22)* This is because the RPD does not act as a referee in a competitive process between the parties, but rather serves as an examiner to ascertain the truth of a claim. The RPD board member noted that the Respondents were “entitled to make a formal request…to compel Mr. Alves Barbosa to appear as a witness” [[23]](#footnote-23) in order to test the evidence in question. The RPD board member noted that “any potential concerns about juxtaposing the alleged perpetrator and the alleged victim as witness against each other in the same proceedings are outweighed by the high degree of relevance of information”.[[24]](#footnote-24) While it is important to ensure that all relevant evidence is available to RPD decision-makers, the protection of vulnerable claimants in this case, should take precedence. The RPD board member assumes that Ms. Barbosa Reis would be able to face Mr. Alves Barbosa in the same proceedings as any refugee claimant. He fails to appreciate the gravity of her situation and the repercussions of a confrontation between Ms. Barbosa Reis and her husband if the evidence were tested in the way he described.
6. Ms. Barbosa Reis is not a typical claimant. She and her children are victims of ongoing domestic violence. She provided ample evidence of severe domestic violence against her and her children and given that this is not a criminal proceeding, she is not required to prove her allegations beyond a reasonable doubt. On a balance of probabilities, Ms. Barbosa Reis has shown that she and her children endured many years of physical and psychological abuse in Brazil and in Canada. Ms. Barbosa Reis lives with the imprints of trauma inflicted by her husband, as indicated by the medical documentation she provided. By taking issue with Ms. Barbosa Reis’s failure to compel the agent of persecution as a witness, the RPD board member appears to expect a victim of domestic abuse to face her abuser as if he were a regular witness. This is unreasonable and contrary to the intention of section 166(c) of the *IRPA*, which indicates that the RPD values and takes seriously its role in protecting vulnerable refugee claimants and conducting respectful, trauma-informed hearings.
7. Expecting Ms. Barbosa Reis to confront her abuser in cross-examination not only suggests that the RPD is agreeable to re-traumatizing her by exposing her to additional psychological harm. It also implies that the RPD is satisfied with placing Ms. Barbosa Reis in a position that seriously compromises her ability to present her case fully and accurately. The court in *Olah* strongly discouraged the RPD from putting claimants in such a position. Ms. Barbosa Reis is diagnosed with MDD and PTSD. Facing her abuser can be psychologically triggering. Such an environment is detrimental to her meaningful participation in the proceedings as there is a serious potential for it to affect her ability to answer questions, recall events, and communicate effectively. If Ms. Barbosa Reis is unable to present her case, the RPD cannot reach a well-reasoned, efficient, or fair determination that is in accordance with the law.
8. The RPD board member incorrectly states that the last element of the *Unsolicited Information Policy* is optional without taking into consideration that if the RPD did call the Respondent’s husband as a witness,[[25]](#footnote-25) she would be at the risk of continued fear within the RPD hearing itself. An RPD hearing ought to be private, confidential, and be a space where a claimant can meaningfully participate without fear of interference from their agent of persecution.[[26]](#footnote-26) The RPD board member did not provide any alternative for how this last element of the *Unsolicited Information Policy* could potentially be applied to prevent further adverse health outcomes for Ms. Barbosa Reis.
9. As provided for in subsections 170(g) and (h) of the *IRPA,* the RPD is authorized to admit evidence that it determines is appropriate for the proceedings before it. However, the *IRPA* does not permit the RPD to admit all evidence regardless of whether it can be adequately tested or not. The Unsolicited Information and Transcript cannot be adequately tested by calling the agent of persecution as a witness without inflicting further harm on Ms. Barbosa Reis. Without alternate methods of testing the evidence, the RPD cannot admit the Unsolicited Information and Transcript from the agent of persecution. The certified question must therefore be answered in the negative.

**B) Procedural fairness has not been met.**

1. Although decision-makers can limit a party’s right to adduce evidence on considerations of irrelevance, confidentiality, prejudicial effects, or repetitiveness, the jurisprudence indicates that the RPD must respect the principles of procedural fairness.Adecision to admit and rely on evidence which may not be reliable, credible, or trustworthy can breach procedural fairness. *Fong v Canada* is an example of this principle.*[[27]](#footnote-27)*
2. In *Fong,* the Immigration Appeal Division (“IAD”) erred by admitting police reports in the applicant’s hearing to stay his removal on humanitarian and compassionate grounds. The police reports related to luring and assault charges for which the applicant was acquitted. The Federal Court held that the IAD failed to determine that the police reports were credible or trustworthy, as set out in section 175(1)(c) of *IRPA.*[[28]](#footnote-28) By admitting the reports, the IAD breached the applicant’s right to a fair hearing because the IAD member “...was not fully successful in removing from her mind the statements contained in the police reports relating to the charges on which the applicant was acquitted.”[[29]](#footnote-29) The IAD Member’s decision contained wording that indicates she focused her decision on the applicant’s alleged “sexual offence”.[[30]](#footnote-30) Consequently, the applicant did not receive a fair and impartial hearing.[[31]](#footnote-31)
3. The admission of the Unsolicited Information and Transcript in the present case led to a similar breach of procedural fairness as was in *Fong*.
4. In his reasons, the RPD member wrote that the Unsolicited Information “...includes letters from family and friends in Brazil, who corroborate that he [the Respondent’s husband] is a good father and that they have never seen him act violently towards the claimants”.[[32]](#footnote-32) The RPD member then confirms that he places “significant weight on these documents”.[[33]](#footnote-33) The phrase “these documents” refers to the compilation of the Transcript from the husband’s refugee hearing, RPD decision in his refuge claim, and the Unsolicited Information. From this body of evidence, the RPD member makes the character inference that the husband, being such a “good father”, would not abuse his wife or children. It is apparent that the RPD member used the husband’s untested evidence to establish a factual foundation on which he subsequently assessed Ms. Barbosa Reis’ evidence.
5. The RPD member in the present case and the IAD member in *Fong* committed similar errors. Both decision-makers admitted and relied on evidence that was not found to be credible or trustworthy. Close examination of the RPD member’s decision reveals that he was unable to fully remove from his mind the untested statements from the husband’s evidence. This tainted decision-making process deprived Ms. Barbosa Reis of her right to a fair hearing.

**2) In the alternative, if this Court finds that the RPD can consider the Unsolicited Information and Transcript, the RPD nevertheless erred in its decision.**

**A) The RPD’s preference for the agent of persecution’s evidence was inadequately explained.**

1. As confirmed by *Vavilov*, the Board is required to justify its decisions with adequate reasons that are “transparent, intelligible, internally coherent, grounded in the evidence and based on a logical chain of analysis”. [[34]](#footnote-34) These reasons must explain how and why the Board made a particular determination. The determinative issue in the RPD hearing was credibility. Since a negative credibility determination is detrimental to the success of a claim, the Board’s reasons for its negative or positive credibility determination must be made in clear and in unmistakable terms.[[35]](#footnote-35)
2. Where there is conflicting documentary evidence, as submitted by Mr. Alves Barbosa and Ms. Barbosa Reis, the RPD must analyze the conflicting evidence and explain why it prefers one documentary evidence over another.[[36]](#footnote-36) “That usually includes an obligation to provide explanations and examples”.[[37]](#footnote-37)
3. The RPD’s reasoning for why it preferred Mr. Alves Barbosa’s evidence over Ms. Barbosa Reis’ evidence was based on an incorrect finding. The RPD board member in his reasons stated that he gave significant weight to the documents submitted by Mr. Alves Barbosa. This is because a positive credibility determination was made at his RPD hearing and his affidavits from his family law proceedings were tested. In fact, at Mr. Alves Barbosa’s hearing, there was no credibility finding, positive or negative.[[38]](#footnote-38) Mr. Alves Barbosa’s refugee claim was denied solely on state protection. It was factually incorrect for the RPD board member to assume positive credibility in the absence of any such decision.
4. The RPD board member erred in concluding that testing evidence, the last element written in the *Unsolicited Information Policy,* was optional rather than mandatory.*[[39]](#footnote-39)* Ms. Barbosa Reis raised an objection and questioned how the Unsolicited Information from the agent of persecution would be tested. However, the RPD board member did not consider or explain in his reasons how it would be tested to meet the credibility threshold. As affirmed by Justice Okoro of the Federal Court, the RPD failed “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”.[[40]](#footnote-40) Similarly, the RPD board member did not explain how the husband’s family law affidavits would be tested.
5. The RPD board member also failed to explain why the content in the untested letters from Mr. Alves Barbosa’s family and friends were a more “believable version of events”. Mr. Alves Barbosa’s Unsolicited Information lacks the specificity of Ms. Barbosa Reis’ evidence, which includes letters and accompanying identity cards from her neighbors. A letter from Mr. Henry Robinson is especially persuasive because he directly witnessed an incident of abuse. In his letter, Mr. Robinson stated that he observed Mr. Barbosa “[slap] the eldest minor claimant on his face when the child was crying”.[[41]](#footnote-41) This is an example of a specific instance of violence, yet the RPD found it was not enough to overcome the content submitted by Mr. Alves Barbosa. The RPD board member should have provided reasons why the letters from Ms. Barbosa Reis were inadequate. Mr. Robinson’s letter is a corroborating piece of evidence which is impartial and confirms that Mr. Alves Barbosa abused his children.
6. Without drawing direct comparisons between Mr. Alves Barbosa’s Unsolicited Information and Transcript evidence and Ms. Barbosa Reis’ cross-examined testimony and tested submissions, the RPD failed to provide adequate justification for Ms. Barbosa Reis’ negative credibility finding. This error resulted in the failure of the Respondent’s refugee protection claim.

**B) The RPD Misapplied the *Chairperson’s Gender Guidelines***

1. In *Olah,* the Federal Court found that “...individuals’ experiences of the events that underlie their claims for protection can be shaped by cultural norms or backgrounds that are not shared by the decision-maker…these circumstances can jeopardize the integrity of the refugee determination process and call into question the soundness of its results. To address this, the Chairperson of the RPD has established, among resources, the *Gender Guidelines*”.[[42]](#footnote-42) A failure to abide by the Gender Guidelinescan constitute a reviewable error.[[43]](#footnote-43)
2. A failure to abide by the Gender Guidelinescan constitute a reviewable error as *Olah* confirms.[[44]](#footnote-44)

**i) Failure to Consider the Psychiatric Report**

1. In *Okpanchi v Canada,* the court affirmed that “[t]he purpose of the Gender Guidelines is to ensure that any assessment of omissions and contradictions takes into account the factors set out in the Gender Guidelines.” [[45]](#footnote-45)
2. Omissions and contradictions in a claimant’s evidence affect their credibility assessment in an RPD hearing. Section7.4 of the Chairperson’s Guideline 4 provides that where a credibility concern arises from a person’s evidence or testimony, members should:
* “consider the person’s response and whether trauma or its aftereffects may reasonably explain the perceived discrepancy;
* evaluate the totality of the circumstances and the internal consistency of the evidence”[[46]](#footnote-46)
1. In *Lozano Pulido v Canada,* the Federal Court noted that “...while members of the Refugee Protection Division have expertise in the adjudication of refugee claims, they are not qualified psychiatrists, and bring no specialized expertise to the question of the mental condition of refugee claimants”. *[[47]](#footnote-47)* In this case, the Federal Court found that the RPD’s negative credibility finding against the Applicant, Mr. Lozano, was patently unreasonable in light of the medical evidence before the Board.[[48]](#footnote-48) What the Federal Court found “even more troubling” was that in its reasons, the RPD accepted the clinical diagnosis from the psychological reports, but did not accept that the Applicant’s condition resulted from his fear of persecution.[[49]](#footnote-49)
2. In *RKL v Canada* *(Minister of Citizenship and Immigration*) the court quashed the Board’s adverse credibility finding against the applicant.*[[50]](#footnote-50)* The court found the applicant’s vague answers to questions can be explained by a limited education as well as a psychological condition, PTSD. The court determined that "a lack of coherency or consistency in the claimant's testimony would be viewed in light of the claimant's psychological condition, especially where it has been medically documented."[[51]](#footnote-51)
3. The assessment of psychological reports as it pertains to credibility is further qualified in *Krishnasamy v Canada*, where the court found that once a tribunal considers the report and diagnosis, it does not err if it refuses the Applicant’s medical condition as a basis for the inconsistent evidence.[[52]](#footnote-52) This is permissible so long as the tribunal provides cogent reasons for its conclusion.
4. In the present case, Ms. Barbosa Reis offered a psychiatric assessment as part of her personal documents package. This package was provided in response to the RPD’s admission of her husband’s Unsolicited Information and Transcript evidence. Ms. Barbosa Reis’ psychiatric report was from a psychiatrist, who diagnosed her with MDD and PTSD. The psychiatric report was tendered to corroborate Ms. Barbosa Reis’s allegations of domestic violence and provide details of her psychological health. The report, therefore, is highly relevant to Ms. Barbosa Reis’s credibility assessment.
5. The RPD member expressed cognizance “...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.”[[53]](#footnote-53) The RPD board member indicates that past domestic violence impacts a victim’s ability to testify as well as the credibility assessment. However, his decision demonstrates a failure to properly evaluate Ms. Barbosa Reis’ psychiatric report or adequately consider how the trauma from years of brutal abuse could have impacted her ability to bring her claim forward.
6. The RPD board member cites *Krishnasamy* to support his position that the psychiatric report does not prove the incidents of abuse occurred. While it is true that a psychiatrist “cannot usurp the role of the RPD in making findings of fact”, *Krishnasamy* establishes thatthe decision-maker can refuse to accept a party’s medical condition only if cogent reasons are provided for this conclusion.[[54]](#footnote-54) The RPD board member’s decision did not consider the impact of Ms. Barbosa Reis’ trauma on her ability to explain her narrative. He does not assess Ms. Barbosa Reis’ psychiatric report but instead dismisses a critical piece of evidence in a single sentence. This is an improper application of important sections of the Gender Guidelines and their purpose.

**ii) The Respondent’s omissions are not a material inconsistency that warrants a negative credibility finding.**

1. Section 7.4 of the *Chairperson’s Guideline 4* provides that where a credibility concern arises from a person’s evidence or testimony, members should:
* explain the concern to the person;
* provide an opportunity for the person to respond to the concern;
* consider the person’s response and whether trauma or its aftereffects may reasonably explain the perceived discrepancy;
* evaluate the totality of the circumstances and the internal consistency of the evidence; and
* explain in their reasons for decision whether the response reasonably accounts for the discrepancy.[[55]](#footnote-55)
1. The RPD erred in finding that Ms. Barbosa Reis’ presumption of truthfulness was rebutted because of a “material inconsistency” between her BOC narrative and family law affidavit, which led to a negative credibility finding. There was no material inconsistency between her BOC narrative and family law affidavit. In the alternative, if there was a material inconsistency, the RPD should have thoroughly explained any potential credibility concern to her, given her an opportunity to respond, and considered her response with regard to all of her circumstances, and written in its reasons whether her explanation was adequate as per section 7.4 of *the Chairperson’s Gender Guidelines.*
2. For there to be a material inconsistency strong enough to rebut the presumption of truthfulness or the credibility of the claimant, the inconsistency “must be significant and be central to the claim”. [[56]](#footnote-56) If there is an inconsistency that comes up in the course of the proceedings, for example, between two pieces of evidence, the RPD should allow the claimant to explain why an inconsistency may be present and consider the explanation so long as it is not obviously implausible.
3. In its reasons, the RPD explained that Ms. Barbosa Reis’ presumption of truthfulness was rebutted because of a “material inconsistency” between her BOC narrative and family law affidavit, which in part led to a negative credibility finding.
4. When Ms. Barbosa Reis filed her amended BOC narrative after severing her claim from her abusive husband, the BOC narrative went into detail about the domestic abuse she suffered at the hands of Mr. Alves Barbosa. The description of the abuse the children suffered was less detailed. Instead of recounting a specific incident, Ms. Barbosa Reis’ amended BOC stated that Mr. Alves Barbosa hit and yelled at the children when they were too loud or cried. In her family law affidavit however, Ms. Barbosa Reis included specific incidents where Mr. Alves Barbosa physically abused their children. For example, on April 15, 2021, Mr. Alves Barbosa struck their eldest child on the shoulder and threatened to throw him out the window if he did not stop crying.
5. Although Ms. Barbosa Reis’ BOC narrative and her family law affidavit contain different levels of specificity when describing the same incident, this difference does not amount to a “material inconsistency”. Both the BOC narrative and family law affidavit speak to the fact that Mr. Alves Barbosa hit his children when they cried. The BOC narrative and family law affidavit do not present conflicting accounts of the same incident.
6. When asked about the differing levels of specificity, Ms. Barbosa Reis provided a reasonable explanation. She explained that she did not provide additional details in her BOC narrative because she believed that she would be able to testify at the hearing. She further explained that she understood that the Designated Representative assigned to her children would file any additional information as required. The RPD was quick to reject her explanation due to the age of the children. The RPD board member failed to consider the reasonableness of Ms. Barbosa Reis’ explanation in light of her personal circumstances. Ms. Barbosa Reis is no ordinary claimant. She has endured extreme hardship in her marriage, suffered years of ongoing domestic violence and the effects of trauma. Despite this, she was willing to testify to provide additional information when asked to do so.

**PART IV: ORDERS SOUGHT**

1. The Respondent respectfully requests that this Honourable Court order the following:
2. Uphold the decision of the Federal Court to overturn the Immigration and Refugee Board decision and submit the matter for redetermination by a differently constituted Panel; and
3. Answer the certified question in the negative.

**APPENDIX: LIST OF AUTHORITIES**

**Legislation**

Immigration and Refugee Protection Act, SC 2001, c 27, ss 96, 97(1), 170.

Refugee Protection Division Rules, SOR/2012-256.

**Cases**

*Benitez v Canada (Minister of Citizenship and Immigration),* 2006 FC 461, [2007] 1 FCR 107.

*Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, [2019] 4 SCR 653.

*Fong v Canada (Public Safety and Emergency Preparedness),* 2010 FC 1134*.*

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