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 Isbaella Santos Reis
PEDRO REIS BARBOSA, by his litigation guardian, Angelique Charles
ALANDRA REIS BARBOSA, by her litigation guardian, Angelique Charles

Respondents

APPELLANT's MEMORANDUM OF ARGUMENT

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Counsel for the Appellant

CONTENTS

OVERVIEW

1. This case concerns the Refugee Protection Division's ("RPD") ability to scrutinize refugee claims using evidence from an alleged agent of persecution. At issue is whether the RPD Member ("the Board Member") acted reasonably in admitting and relying upon transcript evidence and unsolicited information originating from the Respondents' alleged agent of persecution, Mr. Manuel Alves Barbosa ("Mr. Alves Barbosa"). The transcript evidence recorded Mr. Alves Barbosa's sworn testimony at his RPD hearing, while the unsolicited information contained a sworn affidavit by Mr. Alves Barbosa and letters from his family and friends in Brazil. Relying in part on this evidence, the Board Member denied the Respondents' refugee claims on the grounds that the Respondent Ms. Isabella Barbosa Reis ("the Principal Respondent"), was not credible.

2. It was reasonable for the Board Member to admit the transcript evidence in part because it could be adequately tested pursuant to s 170(h) of the *Immigration and Refugee Protection Act*[1] ("*IRPA*") without calling Mr. Alves Barbosa as a witness. Furthermore, the transcript evidence was highly relevant and more probative than prejudicial. Admitting the transcript evidence was also consistent with r 21 of the *Refugee Protection Division Rules* ("the *Rules*").[2]

3. It was reasonable for the Board Member to admit the unsolicited information. The unsolicited information could be adequately tested pursuant to s 170(h) of the *IRPA* and the *Policy on the Use of Unsolicited Information in the Refugee Protection Division* ("the *Policy*").[3] Testing the unsolicited information did not require the Board Member to call Mr. Alves Barbosa

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[1] *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
[2] *Refugee Protection Division Rules*, SOR/2012-256 [*Rules*].
[3] Immigration and Refugee Board of Canada, *Policy on the Use of Unsolicited Information in the Refugee Protection Division*, Policy No 2015-02 (Ottawa: Immigration and Refugee Board, 2016), online: <https://irb.gc.ca/en/legal-policy/policies/Pages/PolNonUnsol.aspx#> [*Policy*].

as a witness, although this would not have been contrary to either s 166(c) of the *IRPA* or the *Chairperson's Gender Guidelines* ("the *Guidelines*").[4] Furthermore, it was reasonable for the Board Member to admit the unsolicited information because it was highly relevant and more probative than prejudicial.

4. The Board Member's conclusion that Ms. Barbosa Reis had failed to establish her credibility was reasonable. Per *Maldonado v Minister of Employment and Immigration*,[5] sworn testimony is presumed to be true unless there is reason to doubt its truthfulness. Here, a material inconsistency between Ms. Barbosa Reis's Basis of Claim ("BOC") narrative and her subsequent testimony raised sufficient doubt to rebut the *Maldonado* presumption of truthfulness.

5. It was reasonable for the Board Member to conclude that the transcript evidence and unsolicited information presented a more believable version of events than Ms. Barbosa Reis's allegations.[6] Unlike Ms. Barbosa Reis's testimony, the presumption of the truth of Mr. Alves Barbosa's RPD testimony and of his sworn affidavit had not been rebutted. It was reasonable for the Board Member to conclude that this evidence weighed against the Principal Respondent's credibility. Weighing evidence to assess credibility is within the RPD's expertise, and its findings are entitled to significant deference. The Board Member was also sufficiently attentive to the *Guidelines* in his assessment of Ms. Barbosa Reis's credibility.

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[4] Immigration and Refugee Board of Canada, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 1996), online: <https://web.archive.org/web/20210704221719/https://irb.gc.ca/en/legal-policy/policies/Pages/chairperson-guideline.aspx>, [*Guidelines*].

[5] *Maldonado v Minister of Employment and Immigration*, 1979 CanLII 4098 (FCA) at para 5 [*Maldonado*].

[6] Reasons of RPD Board Member Aleksander Karlowicz at paras 4-7 (RPD20-12345, RPD20-12346, RPD20-12347) [RPD Reasons] at para 41.

6. In the alternative, if this Honourable Court finds that the admission of the transcript evidence and unsolicited information was unreasonable, this finding does not disturb the fact that the Board Member's overall credibility finding was reasonable given the material inconsistencies in Ms. Barbosa Reis's retelling of her allegations.

PART I: FACTS

1) Background

7. The Principal Respondent and her children Pedro Reis Barbosa and Alandra Reis Barbosa ("the Minor Respondents") are citizens of Brazil who claimed refugee protection in Canada alongside Mr. Alves Barbosa, the Principal Respondent's husband and the Minor Respondents' father. The Respondents' refugee claims were initially based on persecution Mr. Alves Barbosa claimed to have suffered at the hands of Comando Vermelho, a Brazilian gang. The Respondents now claim refugee protection based on abuse the Principal Respondent alleges she and the Minor Respondents suffered at the hands of Mr. Alves Barbosa, who has denied these allegations. As a result of the Principal Respondent's abuse allegations, Mr. Alves Barbosa's refugee claim was severed from the Respondents' and a Designated Representative was appointed to represent the Minor Respondents. Mr. Alves Barbosa and the Principal Respondent are now separated, and are involved in ongoing child custody and access proceedings.[7]

8. Mr. Alves Barbosa's refugee claim was heard by the RPD in July 2021, when he was cross-examined by both the RPD Member presiding over his hearing and counsel for the Appellant, who intervened in the claim. Mr. Alves Barbosa's refugee claim was denied by the RPD on state protection grounds. The RPD did not raise any concerns as to his credibility.[8]

[7] *Ibid* at paras 4-13, 23.
[8] *Ibid* at paras 16-17, 34.

2) Procedural History

9. The Minister intervened in the Respondents' refugee claims and sought to admit transcript evidence from Mr. Alves Barbosa's RPD hearing.[9] This transcript evidence contained Mr. Alves Barbosa's testimony regarding the Principal Respondent's abuse allegations, which he denied.[10] Per r 21(2) of the *Rules*, Mr. Alves Barbosa was informed that the Appellant wished to disclose information from his refugee claim to the Respondents, but he did not make a r 21(3) request for disclosure of the Respondents' personal information.[11] Although the Respondents objected to the inclusion of the transcript evidence, the Board Member admitted the transcript evidence without calling Mr. Alves Barbosa as a witness.[12]

10. The Respondents also objected to the admission of unsolicited information that Mr. Alves Barbosa had submitted to the RPD.[13] This unsolicited information contained materials originating from Mr. Alves Barbosa's family law proceedings, including a sworn affidavit by Mr. Alves Barbosa and letters from his family and friends in Brazil.[14] The Board Member admitted this unsolicited information without calling Mr. Alves Barbosa as a witness.[15]

11. The Board Member considered the transcript evidence and unsolicited information in evaluating the Respondents' refugee claims, as well as documentary evidence submitted by the Respondents, the Principal Respondent's BOC narrative, and her oral testimony before the RPD.[16] The Board Member denied the Respondents' refugee claims on credibility grounds.[17]

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[9] *Ibid* at para 17.
[10] *Ibid* at para 34.
[11] *Ibid* at para 17.
[12] *Ibid* at paras 18-22.
[13] *Ibid* at para 25.
[14] *Ibid* at para 24.
[15] *Ibid* at paras 27-31.
[16] *Ibid* at paras 34-35, 38, 40.
[17] *Ibid* at paras 32-33 and 36-44.

12. The Respondents sought judicial review of this decision at the Federal Court ("FC"). The reviewing judge held that it had been unreasonable for the Board Member to admit the transcript evidence because it was of limited probative value, was highly prejudicial, and had not been adequately tested.[18] For similar reasons, the reviewing judge held that it had been unreasonable for the Board Member to admit the unsolicited information.[19] The reviewing judge also concluded that the Board Member's credibility findings were unreasonable.[20]

13. The FC certified one question on appeal to this Honourable Court: "Can unsolicited information, including affidavit evidence, filed by the agent of persecution be admitted and considered by the [RPD]?"

PART II: POINTS IN ISSUE

14. The parties agree that reasonableness is the appropriate standard of review for all issues raised in this appeal. These issues are as follows:

1) Did the FC err in holding that it was unreasonable for the Board Member to admit the transcript evidence?
2) Did the FC err in holding that it was unreasonable for the Board Member to admit the unsolicited information?
3) Did the FC err in holding that it was unreasonable for the Board Member to deny the Respondents' refugee claims on credibility grounds?

[18] *Barbosa Reis v Canada (Minister of Citizenship and Immigration)*, 2022 FC 90210 [*Barbosa Reis*] at paras 27-36.
[19] *Ibid* at paras 14-26.
[20] *Ibid* at paras 37-43.

PART III: ARGUMENT

1) It was reasonable for the Board Member to admit the transcript evidence.

15. It was reasonable for the Board Member to admit the transcript evidence because it was relevant and more probative than prejudicial. Furthermore, admitting the transcript evidence was consistent with r 21 of the *Rules*.

A) The transcript evidence was relevant and probative.

16. All relevant evidence should generally be admitted before the RPD if it is more probative than prejudicial.[21] The transcript evidence was highly relevant because it had direct bearing on a core element of the Respondents' refugee claims: namely, whether Mr. Alves Barbosa had ever been abusive.[22] This transcript evidence contained a denial of abuse by Mr. Alves Barbosa which was highly probative because, if accepted by the Board Member, it would strongly support the conclusion that he had never abused the Respondents.[23]

17. The reviewing judge erred in concluding that the transcript evidence was of limited probative value because Mr. Alves Barbosa "had a direct interest in having his version of events accepted."[24] The reviewing judge effectively indicated that the Board Member should not have

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[21] All evidence that is relevant and probative should generally be admitted by decision making bodies: *R v Corbett*, 1988 CanLII 80 (SCC) [*Corbett*] at 697, cited in *Canada (Minister of Citizenship and Immigration) v Skomatchuk*, 2006 FC 730 at para 11. See also *X (Re)*, 2017 CanLII 56261 (CA IRB) [*X (Re)* 2017] at para 55: the RPD "must generally admit all evidence unless it is irrelevant, repetitive or prejudicial." Prejudicial evidence will be excluded from administrative decision-making processes if it is more prejudicial than probative; see *Chen v Canada (Citizenship and Immigration)*, 2010 CanLII 69789 (CA IRB) [*Chen*] at para 14.

[22] As the Supreme Court observed in *R v Cloutier*, 1979 CanLII 25 (SCC) [*Cloutier*] at 731, cited by the Federal Court in *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [*Magonza*] at para 22: "For one fact to be relevant to another, there must be a connection or nexus between the two which makes it possible to infer the existence of one from the existence of the other."

[23] As the Federal Court stated in *Magonza*, *ibid* at para 21: "Probative value is the measure of the strength of [the] inferences [that can be drawn from known facts]."

[24] *Barbosa Reis*, *supra* note 18 18at para 30.

admitted the transcript evidence because Mr. Alves Barbosa's testimony was not likely to be truthful. However, it is not the role of the reviewing court to assess credibility.[25] Respectfully, the reviewing judge should have confined herself to the question of whether the transcript evidence was relevant and more probative than prejudicial, not whether it was credible. For the reasons discussed below, the RPD was not required to conclude that the transcript evidence was credible in order to determine that it was sufficiently probative to be admitted.

18. The reviewing judge's conclusion that the transcript evidence was not probative was in error because it was inconsistent with *Magonza v Canada (Citizenship and Immigration)*.[26] In *Magonza*, the FC indicated that probative value and credibility should be distinguished in the refugee law context because "the criteria used to assess credibility and probative value are fundamentally different" and the two concepts "are answers to different questions."[27] These concepts should also be distinguished because the RPD should only make its final credibility assessments at the end of the hearing process, when it has considered all available evidence.[28]

19. The reviewing judge's conclusion that the transcript evidence was not probative was also inconsistent with *Tabatadze v Canada (Citizenship and Immigration)*.[29] There, the FC indicated that it is "unprincipled" to exclude evidence from the refugee determination process on the grounds that it originates from a refugee claimant's family or friends, and is therefore likely to be

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[25] See *Singh v Canada (Citizenship and Immigration)*, 2019 FC 1375 at para 20, citing *Ortez Villalta v Canada (Citizenship and Immigration)*, 2010 FC 1126. See also *Singh v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 347 at para 18.
[26] *Magonza*, *supra* note 22. It was not open to the reviewing court to depart from *Magonza*: *R v Sullivan*, 2022 SCC 19 [*Sullivan*] at para 75.
[27] *Magonza, ibid* at para 24. See also para 15.
[28] Immigration and Refugee Board of Canada, "Weighing Evidence – Chapter 3: Evidence and the Decision-Making Process," s 3.3.1 (31 December 2020), online: <https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/EvidPreu03.aspx>.
[29] *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 [*Tabatadze*]. It was not open to the reviewing judge to depart from *Tabatadze*: see *Sullivan*, *supra* note 26 at para 75.

self-serving.[30] It would be equally unprincipled to exclude evidence from an alleged agent of persecution on the grounds that their evidence is likely to be biased or self-serving. Excluding evidence on such grounds would defeat "a primary task of [administrative] decision-makers, which is to assess and weigh the evidence before them."[31] Furthermore, the RPD should not be required to reject relevant, probative evidence before it has had the opportunity to evaluate that evidence within the context of the broader record. Precluding the RPD from considering such evidence undermines its ability to scrutinize refugee claims and to maintain the integrity of Canada's refugee protection system, as required by s 3(2)(e) of the *IRPA*.

B) The transcript evidence was more probative than prejudicial.

20. All relevant evidence should generally be admitted before the RPD if it is more probative than prejudicial.[32] Evidence will be prejudicial where its admission would threaten "to undermine an accurate result; to complicate, frustrate or degrade the [decision-making] process; or to assault the dignity of witnesses or parties."[33] But in this case, the transcript evidence was more probative than prejudicial. As discussed below, the reviewing judge erred in finding that the prejudicial effects of admitting the transcript evidence outweighed its probative value.

i) The transcript evidence could be adequately tested.

21. Contrary to what the reviewing judge indicated,[34] it was possible for the RPD to test the transcript evidence without calling Mr. Alves Barbosa as a witness. As a result, the admission of

[30] *Tabatadze, ibid* at para 6. See also *Varon v Canada (Citizenship and Immigration)*, 2015 FC 356 at para 56.
[31] *Tabatadze*, *ibid* at para 6.
[32] See *Corbett*, X *(Re)* 2017, and *Chen*, *supra* note 21.
[33] David M Paciocco, Lee Steusser & Palma Paciocco, *The Law of Evidence*, 8th edn (Toronto: Irwin Law, 2020) [*Law of Evidence*] at 53.
[34] *Barbosa Reis*, *supra* note 18 at paras 30-35.

the transcript evidence was not prejudicial because it did not undermine the RPD's ability to make accurate findings of fact, nor did it degrade the decision-making process.[35]

22. Rule 21 of the *Rules* does not state that the RPD should only disclose information from another refugee claim if the source of that information testifies. Rule 21's silence on this point indicates that the RPD possesses significant discretion in determining whether *viva voce* testimony is required to test evidence from another refugee claim. This interpretation of r 21 is "consistent with the text, context, and purpose" of the *Rules*,[36] which is to "ensure an efficient and fair process."[37] An efficient and fair process is one that allows the RPD to scrutinize refugee claims.[38] Preventing the RPD from admitting evidence from another refugee claim unless the source of that evidence testifies would undermine its ability to scrutinize refugee claims.

23. The discretion afforded to the RPD by r 21 is consistent with the principle that "refugee law does not require evidence to be presented *viva voce*."[39] It is also consistent with the purposes of ss 170(g) and (h) of the *IRPA*, which provide the RPD with significant flexibility in its approach to the admissibility of evidence.[40] Refugee law does not require evidence to be presented *viva voce* because there are other means of testing evidence besides cross-examination.

24. For instance, the RPD may test narrative evidence by examining it for the key markers of credibility identified in *Magonza*.[41] These markers of credibility concern a witness's ability to

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[35] See *Law of Evidence*, *supra* note 33 at 53.
[36] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 120.
[37] *Alvarez Rivera v Canada (Citizenship and Immigration)*, 2021 FC 99 at para 1.
[38] This is one of the RPD's core purposes: *IPP v Canada (Citizenship and Immigration)*, 2018 FC 123 [*IPP*] at para 129.
[39] *Jalil v Canada (Citizenship and Immigration)*, 2022 FC 897 [*Jalil*] at para 24.
[40] *Ossé v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1552 at para 15 and *X (Re)*, 2019 CanLII 143615 (CA IRB) at para 11.
[41] *Magonza*, *supra* note 22 at para 19.

observe and remember facts, the internal coherence and plausibility of a witness's narrative, that narrative's consistency with previous declarations, the availability of corroborative evidence, possible sources of bias on the part of the witness, and the witness's demeanour.[42] A witness need not testify before the RPD for the Board to assess how these factors bear on credibility. Similarly, a witness does not necessarily need to testify before the RPD for it to assess whether their narrative evidence is trustworthy. As indicated in *Kallab v Canada (Citizenship and Immigration)*, the RPD may assess the trustworthiness of evidence by considering whether it can be corroborated.[43] Testing evidence in this way does not require *viva voce* testimony.

25. In this case, it was reasonable for the Board Member to admit the transcript evidence without calling Mr. Alves Barbosa as a witness because this evidence could be adequately tested without his *viva voce* testimony. The Board Member was able to test the transcript evidence by determining whether it bore any of the key markers of credibility identified in *Magonza*, as well as by determining whether the narrative it disclosed could be corroborated by other evidence.

26. The Board Member's reasons show that this was how he tested the transcript evidence. For instance, in his credibility analysis, the Board Member noted that the narrative disclosed in the transcript evidence was corroborated by letters from Mr. Alves Barbosa's family and friends in Brazil.[44] The Board Member also indicated that the circumstances in which the transcript

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[42] *Ibid*. It should be noted that demeanour may be assessed by examining whether the witness's answers to questions were "adequate and direct," *Gjergo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 303 at para 22 or, rather, whether their testimony was "vague, evasive and unresponsive to direct questions," *Abbas v Canada (Citizenship and Immigration)*, 2016 FC 911 at para 31. However, the FC has indicated that demeanour should generally not be afforded an especially prominent role in assessing credibility: see *Matharoo v Canada (Citizenship and Immigration)*, 2020 FC 664 at para 43, citing *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 [*Rahal*] at para 45.

[43] *Kallab v Canada (Citizenship and Immigration)*, 2019 FC 706 [*Kallab*] at para 155.

[44] RPD Reasons, *supra* note 6 at para 41.

evidence originated bolstered its credibility.[45] The reviewing judge failed to recognize how the Board Member tested the transcript evidence because she did not read the Board Member's reasons for admitting the transcript evidence in the context of his reasons as a whole.[46] She also failed to recognize that s 170(h) of the *IRPA* entitled the Board Member to consider the fact that Mr. Alves Barbosa's testimony had been tested via cross-examination at his own RPD hearing. This was one of the key circumstances informing the credibility of the transcript evidence.

27. As the Board Member noted, sworn testimony carries a presumption of truthfulness.[47] Because the Board Member who presided over Mr. Alves Barbosa's hearing did not make any negative credibility findings, they must be assumed to have accepted his testimony.[48] It was therefore reasonable for the Board Member who determined the Respondents' refugee claims to conclude that Mr. Alves Barbosa's cross-examination had not uncovered any reason to disturb the *Maldonado* presumption of truthfulness. While Mr. Alves Barbosa's relationship with the Respondents was not the principal focus of his testimony before the RPD, there is no established rule that a refugee claimant's testimony should only be presumed to have been accepted insofar as it relates to a core element of their claim.[49] As a result, Mr. Alves Barbosa's testimony as a

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[45] *Ibid* at paras 20 and 41.
[46] This was contrary to *Vavilov*, *supra* note 36 at para 103: written reasons should be read "holistically" and "in light of the record and with due sensitivity to the administrative regime in which they were given."
[47] RPD Reasons, *supra* note 6 at para 20. *Maldonado*, *supra* note 5 at para 5. The *Maldonado* presumption of truthfulness has been recognized outside of the refugee law context: see, for example, *Larkman v Canada (Attorney General)*, 2013 FC 787 at para 81. The FC's application of *Maldonado* outside of the refugee law context indicates that the *Maldonado* presumption of truthfulness may apply to testimony that is not being tendered in evidence for the purposes of supporting a refugee claim.
[48] See *X (Re)*, 2020 CanLII 122834 (CA IRB) at para 14: "In the absence of negative credibility findings, the RPD is presumed to have accepted that all the evidence is trustworthy" (emphasis added).
[49] *Ibid*.

whole carried a presumption of truthfulness, which the Board Member was entitled to consider in assessing the transcript evidence pursuant to s 170(h). As a result, the reviewing judge erred in concluding that the Board Member placed unreasonable emphasis on the fact that Mr. Alves Barbosa's testimony had previously been tested via cross-examination.[50]

28. It should be emphasized that the Board Member's reasons for admitting the transcript evidence "must not be assessed against a standard of perfection."[51] Nor did the Board Member's reasons need to include "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred."[52] Because the Board Member's reasons for concluding that the transcript evidence could be tested without Mr. Alves Barbosa's *viva voce* testimony may be inferred from his reasons, these reasons were sufficiently intelligible.[53]

ii) Admitting the transcript evidence did not violate the principles of fundamental justice.

29. Contrary to what the reviewing judge suggested, the admission of the transcript evidence did not cause prejudice by violating the principles of fundamental justice.[54] The reviewing judge's holding on this point relied on a flawed reading of *R v Lyttle* and *Brar v Canada (Public Safety and Emergency Preparedness)*, which she interpreted as requiring that evidence be tested

[50] *Barbosa Reis*, *supra* note 18 at para 31.
[51] *Vavilov*, *supra* note 36 at para 91.
[52] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, cited in *Vavilov*, *supra* note 36 at para 91.
[53] See *Vavilov*, *supra* note 36 at para 103: "a decision will be unreasonable if the reasons for it, read holistically [and within the context of the broader record], fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis."
[54] *Barbosa Reis*, *supra* note 18 at paras 33-35.

via cross-examination.[55] However, *Lyttle* and *Brar* established only that cross-examination is a valuable tool in the search for truth, not that witnesses must always be cross-examined.[56]

30. The principles of fundamental justice were not violated in this case because, as the Board Member noted, the Respondents could have cross-examined Mr. Alves Barbosa.[57] Calling Mr. Alves Barbosa as a witness may have been distressing for the Respondents, but this did not preclude them from doing so. The FC has accepted that the RPD hearing process will inevitably cause refugee claimants some measure of distress and discomfort.[58] Moreover, the FC has indicated that the RPD is not required to provide refugee claimants with "a perfect or the most favourable process."[59] The RPD may be obliged to offer accommodations so as to reduce the distress experienced by refugee claimants,[60] but such accommodations should not be provided if they would shield a refugee claim from scrutiny or preclude the RPD from assessing the merits of a refugee claim.[61] In short, the refugee determination process is not required to prioritize the psychological wellbeing of refugee claimants over the RPD's ability to scrutinize refugee claims. As a result, the transcript evidence could not have been excluded from the RPD hearing process on the grounds that challenging this evidence would have been distressing for the Respondents.

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[55] *Ibid* at paras 33-34, citing *R v Lyttle*, 2004 SCC 5 [*Lyttle*] at para 1 and *Brar v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 729 at para 236.
[56] *Lyttle* and *Brar*, *ibid*. In *R v Potvin*, 1989 CanLII 130 (SCC) [*Potvin*], the Supreme Court indicated that the principles of fundamental justice require only that parties to a judicial proceeding be afforded an opportunity to cross-examine.
[57] RPD Reasons, *supra* note 6 at para 21, *Rules*, *supra* note 2, r 45, *Potvin*, *ibid*.
[58] *IPP*, *supra* note 38 at para 129.
[59] *Ibid* at para 99.
[60] See, e.g., *Guidelines*, *supra* note 4. See *IPP*, *supra* note 38 at para 99 for examples of procedural accommodations that may be granted under the *Guidelines*. The Respondents do not appear to have requested any such accommodations.
[61] See *Osikoya v Canada (Citizenship and Immigration)*, 2018 FC 720 [*Osikoya*] at para 14.

iii) Admitting the transcript evidence did not render the RPD hearing process adversarial.

31. The reviewing judge erred in suggesting that admitting the transcript evidence was prejudicial because it was inconsistent with the non-adversarial nature of the RPD hearing process.[62] The reviewing judge failed to acknowledge that the RPD is required to scrutinize all elements of a refugee claim so as to maintain the integrity of Canada's refugee protection system.[63] Properly scrutinizing refugee claims requires the RPD to consider evidence that denies the basis of a refugee claim, even where it originates from an alleged agent of persecution. Allowing the RPD to consider such evidence does not render the RPD hearing process adversarial. If it did, then the RPD's non-adversarial process would be fundamentally incompatible with its obligation to scrutinize refugee claims.

C) Admitting the transcript evidence was consistent with r 21 of the *Rules*.

32. Admitting the transcript evidence was consistent with the requirements of r 21.[64] Mr. Alves Barbosa was notified of the Board Member's intention to disclose his transcript evidence to the Respondents, pursuant to r 21(2). Furthermore, there was not a serious possibility that admitting the transcript evidence would endanger anyone's life, liberty, or security, which would have been contrary to r 21(5)(a). Because Mr. Alves Barbosa did not request disclosure of the Respondents' personal information pursuant to r 21(3), there was no reason for the Board Member to conclude that admitting the transcript evidence would place the Respondents at risk of harm or harassment by Mr. Alves Barbosa. Nor was there any reason for the Board Member to

[62] *Barbosa Reis*, *supra* note 18 at para 30.
[63] *IPP*, *supra* note 38 at para 129.
[64] *Rules*, *supra* note 2.

conclude that admitting the transcript evidence was likely to cause an injustice contrary to r 21(5)(b) because, for the reasons discussed above, admitting this evidence was not prejudicial.

2) It was reasonable for the Board Member to admit the unsolicited information.

33. The unsolicited information was relevant and more probative than prejudicial. Furthermore, admitting the unsolicited information was consistent with the *Policy.*

A) The RPD may admit and consider unsolicited information from an alleged agent of persecution.

34. The Certified Question should be answered in the affirmative: the RPD should be permitted to admit and consider unsolicited information from an alleged agent of persecution where it is relevant, more probative than prejudicial, can be adequately tested, and meets the other requirements of the *Policy*.[65] Further, the RPD should not necessarily be required to call an alleged agent of persecution as a witness in order to admit their unsolicited information.

35. The *Policy* indicates that unsolicited information should only be admitted before the RPD if it can be tested. The *Policy* also indicates that unsolicited information should only be admitted if (1) the information concerns an "identifiable claim that has not yet been finalised," (2) the information originates "from an identifiable informant," and (3) the informant agrees "to the disclosure of the information to all parties and to appear as a witness <u>if</u> subsequently requested by the RPD" (emphasis added).[66] The use of the word "if" indicates that the *Policy* is intended to afford the RPD with significant discretion in determining whether an informant must testify.[67]

36. Interpreting the *Policy* as requiring that informants always testify would be inconsistent with the holistic approach to statutory interpretation. This approach requires that statutory

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[65] *Policy*, *supra* note 3. See also *IRPA*, *supra* note 1, s 170(h) and *Corbett, X (Re)* 2017, and *Chen*, *supra* note 21.
[66] *Policy*, *supra* note 3.
[67] It should also be noted that refugee claimants may choose to call an informant to testify under r 45 of the *Rules*, *supra* note 2.

provisions be assumed to have been "intended to work together as parts of a functioning whole to form a rational, internally consistent framework."[68] As stated above, the wording of the *Policy* indicates that it affords the RPD with significant discretion in determining whether informants must testify. This aspect of the *Policy* must be interpreted harmoniously with the *Policy*'s requirement that evidence must be testable to be admitted. If cross-examining informants were the only means of testing unsolicited information, then there would be no reason for the *Policy* to afford the RPD discretion in determining whether informants should be called as witnesses.

37. The reviewing judge accordingly erred in suggesting that Mr. Alves Barbosa's unsolicited information needed to be tested via cross-examination.[69] This conclusion relied on a flawed reading of *Reyes Pino v Canada (Citizenship and Immigration)*, where the FC indicated that "testimony by the author of [unsolicited information] evidence is a means of verification."[70] Contrary to what the reviewing judge indicated, *Reyes Pino* did not indicate that cross-examination is the sole means of testing unsolicited information. As discussed above, it may be possible for the RPD to test evidence without calling the source of that evidence to testify.

38. Furthermore, the reviewing judge erred in failing to interpret the *Policy* in light of ss 170(g) and (h) of the *IRPA*. As discussed above, ss 170(g) and (h) indicate that it may be possible for the RPD to test evidence using other means besides cross-examination.[71]

39. However, in some instances, the RPD may decide to call an alleged agent of persecution as a witness so that their unsolicited information can be tested via cross-examination. The

[68] *R v Kirkpatrick*, 2022 SCC 33 at para 46.
[69] *Barbosa Reis*, *supra* note 18 at paras 18-19.
[70] *Reyes Pino v Canada (Citizenship and Immigration)*, 2012 FC 200 [*Reyes Pino*] at para 38, cited in *Barbosa Reis*, *supra* note 18 at para 19.
[71] See also *Jalil*, *supra* note 39 at para 24.

reviewing judge erred in indicating that this would be contrary to s 166(c) of the *IRPA*.[72] In *Reyes Pino*, the FC held that a witness who knew the refugee claimant and who had denied facts alleged in their refugee claim was an interested party who should not be barred from testifying before the RPD under s 166(c).[73] It follows from *Reyes Pino* that where an alleged agent of persecution with personal knowledge of the facts alleged by a refugee claimant denies some of those facts, they may be permitted to testify before the RPD.

40. Allowing an alleged agent of persecution to testify before the RPD is not inconsistent with the *Guidelines*, contrary to what the reviewing judge suggested.[74] The *Guidelines* in effect at the time of the Respondents' RPD hearing required the Board to account for the "special problems" that women refugee claimants may face during the RPD hearing process.[75] They also required the RPD to offer procedural accommodations to women refugee claimants, where appropriate.[76] But the *Guidelines* did not require the RPD to ensure that women refugee claimants suffer no distress during the hearing process because the RPD is not required to provide refugee claimants with "a perfect or the most favourable process."[77] Furthermore, the *Guidelines* cannot be interpreted or applied in ways that would compromise the RPD's ability to scrutinize refugee claims.[78] As a result, where the RPD determines that unsolicited information from an alleged agent of persecution is relevant, more probative than prejudicial, and meets the *Policy*'s requirements, and where it determines that calling the alleged agent of persecution as a

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[72] *Barbosa Reis*, *supra* note 18 at paras 23-24.
[73] *Reyes Pino*, *supra* note 73 at para 39, citing *Nechiporenko v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1080.
[74] *Barbosa Reis*, *supra* note 18 at para 24.
[75] *Guidelines*, *supra* note 4, s D.
[76] *Ibid.* See *IPP*, *supra* note 38 at para 99 for some examples of procedural accommodations that may be granted under the *Guidelines*.
[77] *IPP*, *supra* note 38 at para 99.
[78] See *Osikoya*, *supra* note 61 at para 14.

witness is required to test their unsolicited information, the *Guidelines* cannot preclude the alleged agent of persecution from testifying.

B) Mr. Alves Barbosa's unsolicited information met the requirements of admission.

41. It was reasonable for the Board Member to admit the unsolicited information in part because it was relevant, more probative than prejudicial, and could be tested for its credibility and trustworthiness. Further, the unsolicited information met the *Policy*'s three basic requirements, outlined above: (1) the unsolicited information concerned the Respondents' refugee claims, which had not yet been finalized, (2) the unsolicited information originated from Mr. Alves Barbosa, whose identity was known to the Board Member, and (3) Mr. Alves Barbosa agreed to the disclosure of this information. Because the unsolicited information could be tested without Mr. Alves Barbosa's *viva voce* testimony, the Board Member did not need to address whether Mr. Alves Barbosa was willing to appear as a witness.

i) The unsolicited information could be adequately tested.

42. Testing the unsolicited information did not require calling Mr. Alves Barbosa as a witness. For the same reasons discussed above, it was possible for the Board Member to test the credibility and trustworthiness of the unsolicited information by examining it for key markers of credibility and by determining whether the narrative it disclosed could be corroborated.

43. The reviewing judge erred in holding that the unsolicited information had not been adequately tested by the Board Member.[79] The Board Member tested the unsolicited information in part by assessing whether the narrative it disclosed was consistent with previous declarations by Mr. Alves Barbosa.[80] This bolstered the credibility of the unsolicited information, as did the fact that the sworn affidavit contained it contained benefited from the *Maldonado* presumption of

[79] *Barbosa Reis*, *supra* note 18 at paras 18-21.
[80] RPD Reasons, *supra* note 6 at para 41. See *Magonza*, *supra* note 22 at para 19.

truthfulness.[81] The narrative disclosed in this affidavit also bore a key marker of credibility and trustworthiness because, as the Board Member noted, it was supported by letters from Mr. Alves Barbosa's family and friends in Brazil.[82] The reviewing judge failed to recognize that the Board Member had tested the unsolicited information in these ways because she did not read his reasons for admitting the transcript evidence holistically.[83]

44. Further, the reviewing judge erred in holding that the Board Member failed to adequately address the Respondents' concerns about whether the unsolicited information could be tested.[84] The Respondents argued that the unsolicited information could not be tested without Mr. Alves Barbosa's *viva voce* testimony and that Mr. Alves Barbosa could not be called to testify.[85] However, the Board Member concluded that the unsolicited information could be tested without calling Mr. Alves Barbosa as a witness because the *Policy*'s requirements had been met.[86] This conclusion addressed the core concern raised in the Respondents' argument.

45. Again, it should be emphasized that the Board Member's reasons "must not be assessed against a standard of perfection."[87] As the Board Member's reasons for admitting the unsolicited information can be discerned from his reasons as a whole, it was not open to the reviewing judge to find that the Board Member had not justified his decision to admit this information.[88]

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[81] *Maldonado*, *supra* note 5 at para 5.
[82] RPD Reasons, *supra* note 6 at para 41. See *Magonza*, *supra* note 22 at para 19 and *Kallab*, *supra* note 43 at para 155.
[83] This was contrary to *Vavilov, supra* note 36 at para 103.
[84] *Barbosa Reis*, *supra* note 18 at paras 20-21.
[85] RPD reasons, *supra* note 6 at para 25.
[86] *Ibid* at para 30.
[87] *Vavilov*, *supra* note 36at para 91.
[88] *Ibid* at para 103.

ii) The unsolicited information was relevant and more probative than prejudicial.

46. The unsolicited information was highly relevant because it had direct bearing on a core element of the Respondents' refugee claims: namely, whether Mr. Alves Barbosa had ever been abusive.[89] The unsolicited information was also highly probative because, if believed, it would assist the Board Member in determining whether Mr. Alves Barbosa had ever abused the Respondents.[90] For the reasons discussed above, the unsolicited information was not rendered non-probative merely because Mr. Alves Barbosa may have had an interest in ensuring he was not represented as an abusive husband and father.

47. The unsolicited information was far more probative than prejudicial. As discussed above, the unsolicited information was not prejudicial in the sense that it could not be tested by the Board Member. Further, the unsolicited information was not prejudicial in the sense that its admission rendered the RPD hearing process adversarial. For the same reasons discussed above, allowing the RPD to consider evidence that contradicts the basis of a refugee claim does not render the RPD hearing process adversarial. Because the unsolicited information was not prejudicial in any of these ways, it was reasonable for the Board Member to admit it.

48. Although admitting the unsolicited information may have been distressing for the Respondents, admitting this information was key to the Board Member's ability to scrutinize the Respondents' refugee claims. As discussed above, the RPD hearing process is not required to prioritize refugee claimants' psychological security at the expense of the RPD's ability to scrutinize refugee claims. Any distress caused to the Respondents by the admission of the unsolicited information was outweighed by the information's significant probative value.

[89] See *Cloutier*, *supra* note 22 at 731, cited in *Magonza*, *supra* note 22 at para 22.
[90] See *Magonza*, *supra* note 22 at para 22.

Further, it was open to the Respondents to request procedural accommodations if they felt such accommodations were needed to facilitate their participation in the hearing process.[91]

3) It was reasonable for the Board Member to conclude that the Respondents were not credible.

49. The Respondents' refugee claims were denied because the Board Member did not find the Principal Respondent credible. Assessing refugee claimants' credibility is one of the RPD's central functions, and its findings are entitled to significant deference.[92] The Board Member identified a material inconsistency between the Principal Respondent's BOC form and her later testimony, as well as insufficient corroborating evidence. This alone would have been sufficient to dispense with the Respondents' claims regardless of whether the transcript evidence and unsolicited information had been admitted. However, it was reasonable for the Board Member to find that the totality of the evidence—including the transcript evidence and the unsolicited information—weighed against the Respondents' credibility.

A) Weighing evidence to assess credibility is within the RPD's expertise, and its findings are entitled to significant deference.

50. The Respondents have not demonstrated that the Board Member's credibility determination did not meet the standard of reasonableness. *Canada (Minister of Citizenship and Immigration) v Vavilov* makes clear that a reviewing court's role is not to reweigh evidence that

[91] The Respondents do not appear to have requested any procedural accommodations. Nevertheless, the Board Member indicated that they took the *Guidelines* into account in "considering the process of the hearing and the facts of the case" and that he "addressed the [Principal Respondent] with heightened sensitivity," RPD Decision, *supra* note 6 at para 32. If the Respondents required particular procedural accommodations, they should have indicated as much to the Board member. As the Refugee Appeal Division ("RAD") indicated in *X (Re)*, 2019 CanLII 126390 (CA IRB) at para 35, refugee claimants and their counsel will generally be best placed to bring any particular vulnerabilities or needs for accommodation to the attention of the RPD.

[92] See *Rahal*, *supra* note 42 at para 42, *Durojaye v Canada (Citizenship and Immigration)*, 2020 FC 700 [*Durojaye*] at para 15, and *Suleman v Canada (Citizenship and Immigration)*, 2020 FC 654 [*Suleman*] at para 24.

was put to an administrative tribunal.[93] Furthermore, case law has repeatedly affirmed that the RPD's credibility findings are entitled to significant deference.[94] The Board Member gave clear reasons for his finding that the Principal Respondent lacked credibility and for his preference for Mr. Alves Barbosa's version of events over the Respondents. The Board Member's reasons on these points met the required standard of justification, transparency and intelligibility. While the Respondents may disagree with the Board Member's consideration of the evidence, this was not a basis for the FC to interfere with the Board Member's credibility assessment.[95]

B) The *Maldonado* presumption of the truthfulness of the Principal Respondent's testimony was rebutted.

51. In *Maldonado*, the FC affirmed that sworn testimony is presumed to be credible unless there is reason to doubt its truthfulness.[96] However, this presumption is rebuttable, and it does not immunize a refugee claimant's evidence from scrutiny.[97] Based on the available evidence, it was reasonable for the Board Member to find that the presumption of the truthfulness of the Principal Respondent's testimony had been rebutted.

52. The Principal Respondent's failure to mention specific instances of Mr. Alves Barbosa's violence toward the two Minor Respondents in her BOC narrative constitutes a material inconsistency with the Principal Respondent's oral testimony at her RPD hearing and her

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[93] *Vavilov*, *supra* note 36 at para 125.
[94] *Singh c Canada (Citoyenneté et Immigration)* 2022 FC 79 at para 41: "It is well established that the Court must show deference to the RPD and RAD's interpretation of a refugee protection claimant's credibility [citations omitted]. Indeed, these issues of credibility are at the very heart of their jurisdiction and expertise [citations omitted]." See also *Rahal*, *supra* note 42 at para 42, *Durojaye*, and *Suleman supra* note 92.
[95] *Tsigehana v Canada (Citizenship and Immigration)*, 2020 FC 426 at para 34.
[96] *Maldonado*, *supra* note 5 at para 5: "When a claimant swears that certain facts are true, this creates a presumption that they are true, unless there is valid reason to doubt their truthfulness."
[97] *Lunda v Canada (Citizenship and Immigration)*, 2020 FC 704 [*Lunda*] at para 29: "*Maldonado* does not raise an irrebuttable presumption of truthfulness or immunity from suspicion for the applicants' testimony."

affidavit from the family law proceedings. The RPD is entitled to base negative inferences about a refugee claimant's credibility on inconsistencies between their BOC form and later testimony.[98] Per *Basseghi v Canada (Minister of Citizenship and Immigration)*, it is insufficient for a claimant to suggest that their subsequent testimony elaborated on the BOC form if the latter document omitted the relevant facts: "All relevant and important facts should be included in one's [BOC]."[99]

53. In her BOC narrative, the Principal Respondent provided a detailed description of Mr. Alves Barbosa's alleged violence towards her but made only vague allegations about his treatment of their two children. In contrast, her affidavit in the family law proceedings describes a specific incident that occurred on April 15, 2021, which she also referred to during her RPD hearing. However, this incident was not mentioned in her BOC form. Mr. Alves Barbosa's alleged violence toward the Minor Respondents is highly relevant and important to the Respondents' claims, as by the Principal Respondent's own account, it was the catalyst for her decision to leave Mr. Alves Barbosa and, as a result, to claim refugee status based on abuse.[100]

54. It was reasonable for the Board Member to conclude that the other evidence submitted by the Respondents did not support their credibility. The Respondents submitted letters from neighbours who claimed to have heard yelling from the Respondents' apartment and to have seen

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[98] *Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 17: "it was entirely open to the Board to conclude that the Applicant's failure to mention important facts in his Personal Information Form [PIF] was the basis for a negative conclusion as to the Applicant's credibility, most especially after he had the opportunity to amend his PIF at the hearing and declared it to be complete and accurate [citations omitted]," followed in *Bouarif v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 49.

[99] *Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1867 (Fed TD) at para 33, followed in *Kaleja v Canada (Minister of Citizenship and Immigration)* 2011 FC 668 at para 18, and *X (Re)*, 2016 CanLII 102945 (CA IRB).

[100] RPD Reasons, *supra* note 6 at para 14.

the Principal Respondent with bruises on her arms and face. As the Board Member noted, these accounts are speculative, and it was reasonable for the Board Member to give them little weight.[101] One neighbour wrote that he had once seen Mr. Alves Barbosa slap the eldest Minor Respondent on the face when the child was crying. As this was the only eyewitness account with no further corroboration, the Board Member was similarly entitled to assign it little weight.[102]

55. Finally, the Board Member's treatment of the psychiatric report provided by the Respondents was reasonable. The Respondents submitted a psychiatric assessment diagnosing the Principal Respondent with major depressive disorder and post-traumatic stress disorder. The Board Member reasonably gave this evidence little weight, as a diagnosis alone "cannot prove the facts that led to the diagnosis or the facts underlying the refugee protection claim."[103] In *Dzey v Canada (Minister of Citizenship and Immigration)*, an Applicant sought judicial review of the denial of her refugee claim based, in part, on the RPD's purported failure to give sufficient weight to a psychological report indicating the Applicant "initially suffered from symptoms of post-traumatic stress disorder due to her prolonged experience of spousal abuse."[104] However, the FC upheld the RPD's treatment of the report: "Given that the Board's finding that the

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[101] See *X (Re)*, 2021 CanLII 153025 (CA IRB): the RAD examined a letter from a refugee claimant's sister alleging that the claimants had been threatened and forced to leave their city. The RAD assigned the letter "little weight" because, as a speculative account, it "[did] not establish, on a balance of probabilities, that the Principal Appellant's sister heard or was present when the threats were allegedly levied."

[102] See *Gebetas v Canada (Citizenship and Immigration)*, 2013 FC 1241 at para 29: "as stated by this Court numerous times, general findings of lack of credibility can affect all relevant evidence submitted by an applicant, including documentary evidence, and ultimately cause the rejection of a claim," followed in *Dag v Canada (Citizenship and Immigration)*, 2017 FC 375. See also *Lunda*, *supra* note 97 at para 31: "if there is any reason to doubt the veracity of the allegations made in a claimant's affidavit or sworn testimony, adverse inferences about credibility may be drawn if the claimant is unable to provide an explanation for the lack of reasonably expected corroborative evidence."

[103] *Nteta-Tshamala v Canada (Citizenship and Immigration)*, 2019 FC 1191 at para 33.

[104] *Dzey v Canada (Minister of Citizenship and Immigration)*, 2004 FC 167 at para 42.

underlying facts upon which the report was based were not credible, it was open to the Board to give limited weight to this document."[105] Similarly, the Board Member in the present case was entitled to give limited weight to the psychiatrist's report, given his doubts about the Principal Respondent's underlying factual claims.

i) The Board Member was sufficiently attentive to the *Guidelines.*

56. The *Guidelines* note the challenges that survivors of domestic violence may have in recounting evidence thereof.[106] However, courts have recognized that the *Guidelines* "cannot be treated as corroborating any evidence of gender-based persecution so that the giving of the evidence becomes proof of its truth."[107] The *Guidelines* do not lower the standard of assessing a refugee claimant's credibility, and the Board Member's finding that the Principal Respondent was not credible does not indicate that the Board Member did not follow the *Guidelines*. On the contrary, the Board Member's reasons note that he was "cognizant of the difficulties faced by the [Principal Respondent] in establishing her claim, including the challenges of remembering difficult and emotionally charged events, and as a result addressed the [Principal Respondent] with heightened sensitivity."[108] This approach was reasonable.

ii) In the alternative, if the admission of transcript evidence and unsolicited information was unreasonable, the overall finding of credibility was reasonable.

57. The determinative issue in the Respondents' refugee claims was the Principal Respondent's credibility. The Respondents' allegations of domestic violence, which formed the basis of their refugee claims, were undermined by the version of events put forward in the

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[105] *Ibid*. See also *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 34.
[106] *Guidelines*, *supra* note 4.
[107] *Pazmandi v Canada (Citizenship and Immigration)*, 2020 FC 1094 at para 29, citing *Newton v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15385 at para 18, followed in *Szepesi v Canada (Citizenship and Immigration)* 2022 FC 716 at para 38.
[108] RPD Reasons, *supra* note 6 at para 32.

transcript evidence and unsolicited information. Even if that evidence had not been admitted, the Respondents' evidence alone would not have withstood scrutiny. The material inconsistencies between the Principal Respondent's amended BOC narrative and her subsequent testimony rebutted the *Maldonado* presumption of reasonableness. The letters from neighbours and the psychiatric report were also insufficient to establish the Respondents' allegations on a balance of probabilities. It would have been reasonable for the Board Member to deny the Respondents' claims for refugee protection on this evidence alone.

C) Ultimately, the cumulative effects of the transcript evidence and unsolicited information presented a more believable version of events.

58. If the Principal Respondent's inconsistent accounts did not on their own justify the Board Member's negative credibility finding, they added to the larger body of evidence that was relied upon by the Board Member in making a reasonable finding.

i) The transcript evidence from Mr. Alves Barbosa's refugee hearing and his affidavit from the family law proceedings were credible.

59. As sworn statements, Mr. Alves Barbosa's transcript evidence and his affidavit from the family law proceedings are presumed to be credible.[109] It is also evident from the Board Member's reasons that the transcript evidence and the unsolicited information were tested for their credibility, as discussed above.[110] The transcript evidence contained testimony from Mr. Alves Barbosa's RPD hearing, where he was cross-examined by both the RPD Member hearing his claim and the Minister. Mr. Alves Barbosa's explanation that the Principal Respondent's abuse allegations were fabricated to support the Respondents' refugee claims was given

[109] *Maldonado*, *supra* note 5 at para 5.
[110] See sections 1(B)(i) and 2(B)(i), above.

consistently in both the hearing transcript and the family law affidavit. Mr. Alves Barbosa's testimony was also corroborated by letters from his family and friends in Brazil.[111]

60. The reviewing judge erred in equating the unsolicited information with a "poison pen letter" and dismissing it as "inherently unreliable."[112] For this proposition, Justice Okoro quoted a passage from *D'souza v Canada (Minister of Citizenship and Immigration)*,[113] which itself cited *Canada (Minister of Citizenship and Immigration) v Navarrete*[114] and *Ray v Canada (Minister of Citizenship and Immigration)*.[115] Further inspection of these earlier cases reveals that this type of unsolicited information is not necessarily unreliable in all circumstances. For instance, in the full *Navarrete* passage cited in *D'souza*, the FC stated that

> even though the [Immigration and Refugee] Board is not bound by statutory evidence rules, it is reasonable for the Board to refuse to give weight to information provided in anonymous letters. The source and the motives as well as the information provided by this type of letter cannot always be verified. Therefore, the information is not necessarily trustworthy.[116] (emphasis added)

In *Navarrete*, the information was received from an anonymous source. The present case is distinguishable because the informant was known and the information was verifiable, as discussed above.

61. *Ray* is also distinguishable from the current case. In *Ray*, a Pre-Removal Risk Assessment Officer received a letter from a known source, the Applicant's former father-in-law, alleging that the Applicant had committed an act of violence. In that case, the father-in-law's letter was given little weight because the information could not be corroborated. However, in the

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[111] Consistency and corroboration are markers of credibility: *Magonza*, *supra* note 22 at para 19.
[112] *Barbosa Reis*, *supra* note 18 at para 42.
[113] *D'Souza v Canada (Minister of Citizenship and Immigration)*, 2008 FC 57 [*D'Souza*] at para 15: "Poison pen letters are inherently unreliable."
[114] *Canada (Minister of Citizenship and Immigration) v Navarrete*, 2006 FC 691 [*Navarette*] at paras 24-27.
[115] *Ray v Canada (Minister of Citizenship and Immigration)*, 2006 FC 731 [*Ray*] at paras 36-38.
[116] *Navarrete*, *supra* note 114 at para 27.

current case, the unsolicited information itself contained supporting evidence in the form of letters from Mr. Alves Barbosa's friends and family members, and was also corroborated by the transcript evidence, which was scrutinized via cross-examination.[117] It was therefore an error for the reviewing judge to equate the unsolicited information with an anonymous, unverifiable poison pen letter.

ii) It was reasonable for the Board Member to conclude that the evidence weighed against the Respondents' credibility.

62. In assessing the Respondents' credibility, the Board Member was presented with two versions of events: the version proposed by the Principal Respondent, and the version proposed by Mr. Alves Barbosa. The Board Member weighed the evidence before him, found Mr. Alves Barbosa's account to be more persuasive than the Principal Respondent's testimony, and provided sufficiently intelligible reasons for this finding.

63. As discussed, the Board Member identified material inconsistencies between the Principal Respondent's amended BOC narrative and her later testimony that rebutted the *Maldonado* presumption of truthfulness and undermined her credibility. Conversely, the presumption of truthfulness attached to the transcript evidence and Mr. Alves Barbosa's affidavit had not been rebutted. Both the Respondents and Mr. Alves Barbosa submitted letters that purported to corroborate their respective stories: the Board Member placed little weight on the letters provided by the Respondent, as they were largely speculative, but found that those provided by Mr. Alves Barbosa corroborated his testimony. A psychiatric report provided by the

[117] It is further worth noting that the *Ray* passage cited in *D'Souza*, paras 36-38, does not actually refer to the father-in-law's poison pen letter in that case. Rather, paras 36-38 discuss the probative value that ought to be given to letters written by the Applicant's own parents and submitted into evidence by the Applicant himself. The passage merely confirms that, as unsworn evidence, the parents' letters do not benefit from the presumption of truth attached to sworn testimony.

Respondents was assigned little weight, as an expert's diagnosis cannot prove that the underlying events that gave rise to the condition actually occurred. The Board Member thus offered sufficiently intelligible reasons to justify the relative weight given to the evidence supporting Mr. Alves Barbosa's version of events over that of the Respondents.

64. At the FC, Justice Okoro took issue with what she viewed as the Board Member's "unreasonable presumption that the evidence of the alleged agent of persecution is credible – and that it is up to the Respondents to rebut this."[118] Respectfully, this mischaracterizes the Board Member's reasons. Read in context, the Board Member's use of the word "rebut" does not suggest an onus was on the Respondents to disprove any and all unfavourable evidence. Rather, the Board Member's reasons on this point refer to how he weighed the available evidence.

65. At their hearing, the Respondents had to prove their refugee claims to the RPD on a balance of probabilities.[119] In making this assessment, the Board Member was entitled to consider all the available evidence. Having found the transcript evidence and unsolicited information to be credible, the Board Member went on to state that "[t]he unsolicited information and transcript evidence from Mr. Alves Barbosa shows that he is a good father to his two young children. The [Principal Respondent], on the other hand, was not able to produce sufficient evidence to rebut this."[120] Here, the Board Member was describing the relative weight assigned to the admitted evidence; the Board Member explained that he preferred Mr. Alves Barbosa's version of events over the Respondents' because the evidence supporting Mr. Alves Barbosa's version of events outweighed the Respondents' evidence, about which the Board Member had already stated his significant credibility concerns.

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[118] *Barbosa Reis*, *supra* note 18 at para 41.
[119] *Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 at para 24.
[120] RPD Reasons, *supra* note 6 at para 42.

66. This meaning is apparent from the paragraph immediately following: "the principal claimant was given ample opportunities to provide disclosure to rebut evidence provided by Mr. Alves Barbosa. She did not do so and based on the reasons above, I find that her *viva voce* evidence was not sufficient to overcome the evidence from Mr. Alves Barbosa" (emphasis added).[121] The overall context makes clear that in these passages, the Board Member was merely explaining that, on a balance of probabilities, the evidence provided by Respondents was outweighed by the other persuasive and credible evidence available to the RPD.[122] Reading the reasons as a whole, it is clear that the Board Member first assessed the Respondents' evidence on its own terms before weighing it in context with the other admitted evidence. This was a reasonable exercise of the Board Member's discretion in weighing evidence to assess credibility, and was consistent with the RPD's mandate to scrutinize refugee claims.

PART IV: ORDER SOUGHT

67. The Appellant respectfully requests that this Honourable Court allow the appeal, answer the Certified Question in the affirmative, and restore the Board Member's decision.

[121] *Ibid* at para 43.
[122] An imprecise choice of words does not, without more, render a decision unreasonable. See *Vavilov*, *supra* note 36 at para 91: "A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection."

APPENDIX: LIST OF AUTHORITIES

Legislation

Immigration and Refugee Protection Act, SC 2001, c 27, ss 3(2)(e), 170(g), 170(h)
3(2) The objectives of this Act with respect to refugees are […] **(e)** to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;
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, 45
21(1) Subject to subrule (5), the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of their claim. **(2)** If the personal or other information of another claimant has not been made public, the Division must make reasonable efforts to notify the other claimant in writing that **(a)** it intends to disclose the information to a claimant; and **(b)** the other claimant may object to that disclosure. **(3)** In order to decide whether to object to the disclosure, the other claimant may make a written request to the Division for personal and other information relating to the claimant. Subject to subrule (5), the Division may disclose only information that is necessary to permit the other claimant to make an informed decision.

(4) If the personal or other information of the claimant has not been made public, the Division must make reasonable efforts to notify the claimant in writing that

(a) it intends to disclose the information to the other claimant; and

(b) the claimant may object to that disclosure.

(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.

(6) Personal or other information from a joined claim is not subject to this rule. If claims were once joined but were later separated, only personal or other information that was provided before the separation is not subject to this rule.

45 (1) A party who wants the Division to order a person to testify at a hearing must make a request to the Division for a summons, either orally at a proceeding or in writing.

(2) In deciding whether to issue a summons, the Division must consider any relevant factors, including

(a) the necessity of the testimony to a full and proper hearing;

(b) the person's ability to give that testimony; and

(c) whether the person has agreed to be summoned as a witness.

(3) If a party wants to use a summons, the party must

(a) provide the summons to the person by hand;

(b) provide a copy of the summons to the Division, together with a written statement indicating the name of the person who provided the summons and the date, time and place that it was provided by hand; and

(c) pay or offer to pay the person the applicable witness fees and travel expenses set out in Tariff A of the *Federal Courts Rules*.

Case Law

Abbas v Canada (Citizenship and Immigration), 2016 FC 911

Alvarez Rivera v Canada (Citizenship and Immigration), 2021 FC 99

Basseghi v Canada (Minister of Citizenship and Immigration), [1994] FCJ No 1867 (Fed TD)

Bouarif v Canada (Immigration, Refugees and Citizenship), 2020 FC 49

Brar v Canada (Public Safety and Emergency Preparedness), 2020 FC 729

Canada (Minister of Citizenship and Immigration) v Navarrete, 2006 FC 691

Canada (Minister of Citizenship and Immigration) v Skomatchuk, 2006 FC 730

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65

Chen v Canada (Citizenship and Immigration), 2010 CanLII 69789 (CA IRB)

Dag v Canada (Citizenship and Immigration), 2017 FC 375

Durojaye v Canada (Citizenship and Immigration), 2020 FC 700

D'souza v Canada (Minister of Citizenship and Immigration), 2008 FC 57

Dzey v Canada (Minister of Citizenship and Immigration), 2004 FC 167

Gebetas v Canada (Citizenship and Immigration), 2013 FC 1241

Gjergo v Canada (Minister of Citizenship and Immigration), 2004 FC 303

IPP v Canada (Citizenship and Immigration), 2018 FC 123

Jalil v Canada (Citizenship and Immigration), 2022 FC 897

Kaleja v Canada (Minister of Citizenship and Immigration), 2011 FC 668

Kallab v Canada (Citizenship and Immigration), 2019 FC 706

Larkman v Canada (Attorney General), 2013 FC 787

Lawani v Canada (Citizenship and Immigration), 2018 FC 924

Lunda v Canada (Citizenship and Immigration), 2020 FC 704

Magonza v Canada (Citizenship and Immigration), 2019 FC 14

Maldonado v Minister of Employment and Immigration, 1979 CanLII 4098 (FCA)

Matharoo v Canada (Citizenship and Immigration), 2020 FC 664

Nageem v Canada (Citizenship and Immigration), 2012 FC 867

Navaratnam v Canada (Citizenship and Immigration), 2011 FC 856

Nechiporenko v Canada (Minister of Citizenship and Immigration), [1997] FCJ No 1080

Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62

Newton v Canada (Minister of Citizenship and Immigration), 2000 CanLII 15385

Nteta-Tshamala v Canada (Citizenship and Immigration), 2019 FC 1191

Ortez Villalta v Canada (Citizenship and Immigration), 2010 FC 1126

Osikoya v Canada (Citizenship and Immigration), 2018 FC 720

Ossé v Canada (Minister of Citizenship and Immigration), 2004 FC 1552

Pazmandi v Canada (Citizenship and Immigration), 2020 FC 1094

Pepaj v Canada (Citizenship and Immigration), 2014 FC 938

R v Cloutier, 1979 CanLII 25 (SCC)

R v Lyttle, 2004 SCC 5

R v Kirkpatrick, 2022 SCC 33

R v Potvin, 1989 CanLII 130 (SCC)

R v Sullivan, 2022 SCC 19

Rahal v Canada (Citizenship and Immigration), 2012 FC 319

Ray v Canada (Minister of Citizenship and Immigration), 2006 FC 731

Reyes Pino v Canada (Citizenship and Immigration), 2012 FC 200

Singh v Canada (Minister of Citizenship and Immigration), 2002 FCT 347

Singh v Canada (Citizenship and Immigration), 2019 FC 1375

Singh c Canada (Citoyenneté et Immigration) 2022 FC 79

Suleman v Canada (Citizenship and Immigration), 2020 FC 654

Szepesi v Canada (Citizenship and Immigration) 2022 FC 716

Tabatadze v Canada (Citizenship and Immigration), 2016 FC 24

Tsigehana v Canada (Citizenship and Immigration), 2020 FC 426

Varon v Canada (Citizenship and Immigration), 2015 FC 356

X (Re), 2016 CanLII 102945 (CA IRB)

X (Re), 2017 CanLII 56261 (CA IRB)

X (Re), 2019 CanLII 126390 (CA IRB)

X (Re), 2019 CanLII 143615 (CA IRB)

X (Re), 2020 CanLII 122834 (CA IRB)

X (Re), 2021 CanLII 153025 (CA IRB)

Secondary Source Materials

David M Paciocco, Lee Steusser & Palma Paciocco, *The Law of Evidence*, 8th edn (Toronto: Irwin Law, 2020)

Immigration and Refugee Board of Canada, *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (November 1996), online: <https://web.archive.org/web/20210704221719/https://irb.gc.ca/en/legal-policy/policies/Pages/chairperson-guideline.aspx>.

Immigration and Refugee Board of Canada, *Policy on the Use of Unsolicited Information in the Refugee Protection Division*, Policy No 2015-02 (Ottawa: Immigration and Refugee Board, 2016), online: <https://irb.gc.ca/en/legal-policy/policies/Pages/PolNonUnsol.aspx#>.

Immigration and Refugee Board of Canada, "Weighing Evidence – Chapter 3: Evidence and the Decision-Making Process," s 3.3.1 (31 December 2020), online: < https://irb.gc.ca/en/legal-policy/legal-concepts/Pages/EvidPreu03.aspx>.