Federal Court  Cour fédérale

Date: 20221019

Docket: IMM-1802-21

Citation: 2022 FC 1426

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 19, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

PARI SELAHI REIHANI
AND
SIAVASH BALADI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) that confirmed a decision of the Refugee Protection Division (RPD) rejecting the applicants' claim for refugee protection under sections 96 and 97 of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 [IRPA or the Act]. Leave to apply for judicial review was granted under section 72 of the Act.

[2] The applicants are Iranian citizens who allege persecution by their government and a fear of further persecution in their country of nationality.

[3] Both the RPD and the RAD rejected the claims on the grounds that the applicants were not credible. An additional problem arose regarding a potentially significant piece of evidence, a subpoena that the applicant Mr. Baladi claims to have received, that could at least partially corroborate his allegations of persecution.

I. Facts

[4] The applicants arrived in Canada on temporary resident visas obtained on different dates from the Embassy of Canada to Türkiye. Ms. Reihani was born in 1960, and Mr. Baladi, in 1954. They arrived together on November 15, 2017, but did not claim refugee protection until June 12, 2018. Both were allegedly persecuted for political activities related in some way to their respective jobs.

[5] The applicants chose not to speak directly before this Court about the evidence they had submitted in support of their claims, which had been found not to be credible. This evidence is worth describing more fully, to put the case into context.

[6] The Iranian authorities allegedly criticized Mr. Baladi for expressing his political opinion at work. His opinion of the current government was highly critical. His Basis of Claim Form [BOC Form] contains few details. It states that he had been working for a certain "Azmayesh Technical Company" since September 2003. He claims that the Heresat office interrogated him a few times over the years and that he belongs to a family that has been against the regime in place since the 1979 revolution. He also states that a brother of his disappeared after being arrested in November 2015.

[7] Mr. Baladi testified before the RPD that he had participated in a protest against the regime. Surprisingly, he stated that he was not sure in what year and then at what point during 2015 he was detained and beaten so severely that he needed back surgery a number of months later, in 2016. I have read the transcript of the RPD hearing, and it does not appear to identify the causes of Mr. Baladi's back problems. I note that the BOC Form states specifically that Mr. Baladi was detained on October 27, 2015, had surgery on March 11, 2016, and recovered from surgery over the three months that followed.

[8] The BOC Form goes on to describe Mr. Baladi's arrest on September 10, 2017, and his detention. Mr. Baladi claims that he was arrested at work for remarks he had made to colleagues about the regime and that he was beaten while in detention. He was interrogated about his political activities and about his brother. He was not taken to a hospital until September 16, 2017. It was not until a ransom had been paid that he was released from hospital (where he was being held in custody) on condition that he appear at what the BOC Form refers to as an "Islamic trial". Mr. Baladi claims that he was issued a subpoena. The translated version states that it was

issued on October 23, 2017, for an appearance on November 8, 2017. The alleged offence is "participation in disturbing public order and disturbing public opinion".

[9] Following the attack in the first week of September, Mr. Baladi allegedly went to Ankara to obtain a temporary residence visa from the Embassy of Canada. He arrived in Türkiye on October 4, 2017, and returned to Iran on October 8. The visa was issued on October 18. The couple did not leave Iran for Canada until November 15, 2017, even though Mr. Baladi was scheduled to appear before the Islamic court on November 8, 2017. Mr. Baladi did not comply with the subpoena.

[10] Ms. Reihani's situation is not much clearer. In her BOC Form, which is dated the same as Mr. Baladi's, she states that she was hired as a teacher in 2000 and was harassed at work.

[11] It appears that the harassment started in 2015. A mosque had been built at the school where Ms. Reihani was teaching. A few months after the mosque was completed, she was summoned because she was not attending the midday prayer each day. A mullah ordered her to attend.

[12] She was then told by the school office that she should not encourage girls to resist marrying at a young age and starting a family. Ms. Reihani states that she was insulted by the "Hezbollah principal" and forced to sign an undertaking to comply. Some time later, on December 1, 2016, Ms. Reihani asked her students to write an essay on one of two topics: human rights or society's openness to criticism. When the students were asked to discuss their essays on

December 4, a dispute arose between two of them. The Hezbollah principal had to intervene. He accused Ms. Reihani of provoking the students. She was detained for three days, during which she claims to have been insulted, interrogated and beaten; in addition, her house was searched. Ms. Reihani was dismissed.

[13] Three months later, on March 21, 2017, she arrived in Canada, where a son of hers lives. In preparation for this trip, Ms. Reihani had gone to Türkiye on December 22, 2016, to obtain a temporary residence visa for Canada, which she received on December 29, 2016.

[14] She returned to Iran on September 21, 2017. Before the RPD, Ms. Reihani stated that she returned because her husband was being detained. She was arrested at the airport upon her return, detained for one week and released on bail and on a written undertaking. No other details have been provided. Ms. Reihani and Mr. Baladi left Iran together on November 15, 2017, without incident. They have been in Canada ever since.

II. Decision under judicial review

[15] A review of the RPD hearing transcript clearly shows that the RPD was seeking corroboration of the applicants' story. For example, the RPD wondered about Mr. Baladi's back injury that required surgery several months after the incidents that allegedly caused the injury (the protest and Mr. Baladi's subsequent arrest). Questions also arose about Mr. Baladi's employment in 2016 and 2017. The relative scarcity of details resulted in the subpoena for Mr. Baladi's appearance on November 8, 2017, being given more weight than it would probably have otherwise received.

[16] The determinative issue for both the RPD and the RAD was whether the applicants' stories were credible. Of course, this is an application for judicial review of the RAD's decision only.

[17] From the outset, the RAD noted that the RPD considered the copy of the subpoena to be unreliable, especially since Mr. Baladi had made no effort to produce the original. The subpoena appears to corroborate an incident involving Mr. Baladi. Without it, there is little direct evidence to support the allegations, apart from the applicants' testimony. There was some confusion about the subpoena at the RPD hearing. It was eventually established that the document filed (P-13) was in fact a document that had been emailed to Mr. Baladi by his daughter in Iran. This is hardly the best evidence. The RPD also drew a negative inference from the lack of documentation on the back surgery allegedly required as a result of abuse by the authorities in 2015.

[18] In addition, Ms. Reihani claims she was detained and abused in December 2016, yet she had no difficulty leaving Iran three months later to visit her son in Canada. The RAD points out that the RPD considered the credibility of the applicants' account of past and potential future abuse to be undermined by their ability to leave Iran unhindered by the authorities.

[19] The RAD therefore dismissed the appeal because the applicants' credibility was undermined. In fact, the RAD raised its own credibility issues and questioned the applicants. The questions were about the number of times Ms. Reihani claimed she had been detained, which seemed unclear to the RAD. Although Ms. Reihani testified that she returned to Iran because her

husband had been arrested there, the RAD noted that a letter from her son suggested she had been planning to return to Iran since August 2017. Therefore, it would not have been her husband's detention that prompted her to return to Iran. Lastly, the National Documentation Package had been amended since the RPD decision, and it contained new information on entering and leaving Iran that might undermine the applicants' credibility. The RAD noted that there were strict controls on people such as the applicants, which cast doubt on the applicants' claims. Assuming that the claims were true, the applicants should have encountered problems entering and leaving Iran.

[20] Having completed its independent review, the RAD found that the applicants were not credible. It rejected the allegation that the RPD had failed to act impartially. This allegation was based on the RPD's interpretation of the applicants' evidence. However, the very role of the RPD is to weigh evidence and draw conclusions. To do so is not to be biased.

[21] The RAD questioned whether the applicants could have left Iran as they said they did, if their claims were true. Ms. Reihani stated that she was detained upon her return from Canada in September 2017. Mr. Baladi was arrested on September 17, 2017, and detained for one week. He was allegedly issued a subpoena to appear before the Islamic court on November 8; however, he did not do so and instead left the country on November 15. In light of these allegations and the new information in the National Documentation Package that there are strict entry and exit controls in Iran for those involved in so-called "political" cases, the RAD did not find the applicants' allegations to be credible, especially since their activities were considered by the authorities to be punishable by detention and release on an undertaking. If the applicants' claims

were true, it would be doubtful that they could have entered and left Iran so easily. Moreover, Mr. Baladi allegedly failed to comply with a subpoena. The subpoena obviously lent weight to his claim that he was oppressed in his country but made it less likely that he could have left the country a week later.

[22] Even more than the political activities the applicants described, the reprisals they claimed to have experienced were problematic, since they showed how serious the situation was. It was not credible that the applicants were able to leave Iran if their allegations of harsh treatment were true, that is, they suffered reprisals in being arrested, detained and released less than two months before they left, and if Mr. Baladi had failed to comply with a subpoena in relation to political charges. In other words, their harsh treatment would have made them persons of interest to the Iranian authorities. The RAD made its finding of implausibility cautiously, on the basis of evidence that it considered to be clear and well-founded.

[23] The RAD also considered the subpoena to be unreliable. The RPD had doubts about the appearance of the document and complained that the original had not been produced. No explanation was given to the RPD for the failure to provide an original. Not even a certified copy was produced. The RAD also had doubts.

[24] The RAD raised an issue that was discussed at length during the hearing before this Court. Given its significance, I reproduce paragraphs 36 to 38 of the RAD's decision:

> [36] The RAD made a request to the Appellants to produce the copy of the subpoena that was produced to the RPD (the "RPD Copy"), and counsel confirmed that the RPD Copy was provided in the Appellants' Record. A review of the Appellants' Record

> contained in the RAD file confirmed that it did not contain the RPD Copy of the subpoena. RAD Rule 3 requires that an appellant provide two copies of their Appellant's Record to the RAD, and the RAD Registry is required to forward one copy of the record to the Minister. Thus, it was presumed that the copy of the Appellants' Record containing the RPD Copy of the subpoena was inadvertently sent to the Minister. The RAD Registry subsequently made efforts to obtain the RPD Copy from the Minister, which were unfortunately unsuccessful.
>
> [37] However, having reviewed the copy of the subpoena in the RAD file (the "RAD Copy"), I am able to observe that the RPD correctly found that parts of the document are very precise while other parts appear fuzzy. While I do not have the same copy before me as was before the RPD, given that I can identify the same issues that were noted by the RPD, I do not find that the RPD had any meaningful advantage in reviewing the RPD Copy. I find that I am able to conduct my analysis of the subpoena's appearance based on the RAD Copy of the document, and on the basis of that analysis, I agree with the RPD's finding that the inconsistent appearance raises concerns as to the authenticity of the original document.
>
> [38] Given my concerns with the appearance of the document, as well as the Principal Appellant's failure to produce the Certified Copy, which was not reasonably explained, I am not satisfied that the document provided is a true copy of an authentic subpoena, on a balance of probabilities. As such, I find that the allegation that the Principal Appellant was subject to an outstanding subpoena at the time of his departure is not credible.

I will come back to this because I believe that it warrants referring the matter back to the RAD.

[25] The RAD also found support for its negative credibility finding in the fact that Mr. Baladi had stated that his employer when he obtained his temporary residence visa to Canada in October 2017 was Tasalsol Nasb Co rather than Azmayesh, where he had been employed since 2003. The applicants stated that there was no documentation in relation to Azmayesh because Mr. Baladi had been dismissed and a [TRANSLATION] "facilitator" had taken it upon himself to

produce fictitious documentation in relation to another employer. This explanation was not accepted. Three reasons were given. First, there was no evidence that a facilitator had obtained that evidence. Second, Mr. Baladi testified that he had worked for both companies, which could be seen as contradictory if it was indeed fictitious documentation that had been produced. Finally, if Mr. Baladi did work at Tasalsol Nasb Co, the fact remains that he failed to mention it in his claim for refugee protection in Canada.

[26] Regarding Ms. Reihani, the RAD noted an inconsistency in the evidence as to the number of times she had been detained. The RAD included the summons in 2015 to appear before a mullah after Ms. Reihani failed to attend the midday prayer each day.

[27] As well, the RAD had corroborative evidence in the form of letters of support. Essentially, the RAD found that the letters had little probative value because they tended to corroborate reprimands and harassment but not what was at the heart of the applicants' claim, namely, that they were arrested and abused by the Iranian authorities on political grounds. One of the letters even included a completely new allegation that Ms. Reihani had travelled from city to city before leaving for Canada to save her life. It is unclear where this information came from. This evidence has little probative value.

[28] As for the disappearance of Mr. Baladi's brother, it is simply not relevant because his disappearance was never linked to Mr. Baladi's activities. Lastly, although an allusion was made in the BOC Form to the applicants' ethnicity, no specific allegation was ever made of a fear based on ethnicity; the applicants merely alleged a fear of the government they oppose.

III. Arguments and analysis

[29] In its reasons, the RAD concluded that there were major concerns regarding the applicants' credibility and the quality of their allegations, and now, on judicial review, the applicants are trying every angle possible. In my opinion, all the concerns raised with respect to the RAD's decision can be easily dismissed. However, because of the question that arose throughout the hearing of this case as to how to deal with the subpoena allegedly issued to Mr. Baladi, for which supplementary notes were requested, it is both necessary and prudent to refer the matter back to the RAD for reconsideration. In fact, new evidence was filed by the applicants on January 26, 2022, and by the respondent on February 10 and March 22, 2022.

[30] Reasonableness is the standard that applies to all issues regarding the applicants' credibility. Reasonableness has been the presumptive standard since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], and there is no reason to depart from it. There is consensus on this. The applicants stated before the RAD and before this Court that the original subpoena issued to Mr. Baladi was filed with the RAD and then lost by the RAD. This problem stems from the opportunity to be heard by the administrative tribunal. It calls for the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 at para 74), where the reviewing court must be satisfied that procedural fairness has been met in the given case (*Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14, citing *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, [2019] 1 FCR 121). Either way, the reviewing court owes no particular deference to the administrative tribunal.

[31] I will start with the various grounds of appeal before me. The applicants have presented three arguments to this Court:

(a) The analysis is inconsistent with the evidence, an error of law was made in the implausibility test, and there are contradictions regarding the departure from Iran.

(b) An overall finding of non-credibility was made before all the evidence had been assessed, and no determination was made on the elements at the heart of the refugee protection claim.

(c) The loss of the original subpoena resulted in a breach of natural justice.

A. *Issues reviewable on reasonableness*

[32] The applicants submit that the RAD erred by failing to accept corroborative evidence consisting of letters of support. They state that this means an [TRANSLATION] "overall finding of non-credibility was made before the evidence had been assessed". The applicants rely on two decisions of this Court confirming that it is "unreasonable to reach a finding of non-credibility without considering corroborative evidence, and then dismiss the corroborative evidence based on the applicant being found not credible" (*Cheema v Canada (Citizenship and Immigration)*, 2020 FC 1055 at para 49; see also *Jiang v Canada (Citizenship and Immigration)*, 2021 FC 44 at para 13).

[33] This is a rule that follows directly from the nature of corroborative evidence. Corroborative evidence is independent evidence that confirms other evidence (DM Paciocco & L Stuesser, *The Law of Evidence*, 7th ed (Irwin Law) at 566–75). It is common knowledge that the master of the facts relies on common sense and human experience in assessing the usefulness of

a given piece of evidence. It goes against common sense to assess credibility before considering corroborating evidence and then reject the evidence on the basis that it is not credible because the applicant is not credible. This is a circular proposition and a truism.

[34] But is that what the RAD did? I do not think so. The letters in support of the applicants were given little weight because of their low intrinsic probative value, based on their content, as the RAD states at paragraphs 52 and 53 of the decision under review. The RAD found that they had some corroborative value, but for evidence that was not central to the allegations that the applicants had been arrested and abused. It was open to the master of the facts to make these assessments, and it is hard to see how they would be unreasonable. The evidence was not rejected on the basis of the applicants' credibility; rather, it was the intrinsic quality of the letters that made their probative value low.

[35] The applicants have also tried to attack the decision on the grounds that it was not sufficiently justified. In my opinion, this ground of attack is without merit. The decision is justified on the basis of the issues raised. The RAD dealt with the grounds of appeal raised by the applicants. I have read the memorandum filed with the RAD on behalf of the applicants. It focuses on undermined credibility. For example, on the first page, it states that "[i]t is our contention that what happened to the claimants is true but they failed to properly express it". The RPD had found that the applicants were not credible, and the appeal dealt with that issue. The RAD can hardly be faulted for dealing with the grounds of appeal brought before it.

[36] The applicants submit that the RAD erred in law in applying the implausibility test. This issue arises because the RAD, having notified the applicants that the National Documentation Package had been amended since the RPD decision, was requesting submissions regarding entering and leaving Iran. The new documentary evidence suggested that there were entry and exit controls in Iran and that travel bans were being placed on people who were wanted in "political cases". The RAD was surprised that the applicants could leave the country so easily if the government was truly interested in them. It was therefore not plausible that they left only one week after Mr. Baladi allegedly failed to appear at the Islamic court (the validity of the subpoena was disputed).

[37] The applicants not only disagree with the RAD's conclusion but also claim that the RAD failed to apply the appropriate legal test on what might be implausible. I do not agree that the RAD failed to apply the appropriate legal test. On the contrary, the decision refers directly to the same test as the one referred to by the applicants. Behind the allegation that the RAD erred in law regarding the applicable test is, in fact, an allegation that the RAD relied on insufficient evidence in drawing a conclusion of implausibility. Of course, the burden is on the applicants to show that an error of law occurred (*Vavilov* at para 100) and that the review is not a treasure hunt for error (*Vavilov* at para 102). Neither the applicants' memorandum nor their counsel's submissions at the hearing are persuasive. The RAD did not err in law as alleged. It exercised due caution.

[38] Somewhat in the same vein, the applicants argue that the RAD made a contradictory argument in the decision it rendered. I disagree.

[39] If I understand correctly, the applicants are submitting that the contradiction arises from the RAD's statement in its decision that the travel ban was [TRANSLATION] "due to their arrest, release and failure to comply with the subpoena issued to them" (Applicants' Memorandum of Facts and Law at para 23). The applicants state that this contradicts the RAD's assertion that [TRANSLATION] "the applicants' political involvement resulted in a travel ban" (Applicants' Memorandum of Facts and Law at para 24), which implies that the travel ban was not the result of problems with the law.

[40] With all due respect, I fail to see any contradiction whatsoever. The applicants claim that it was either political involvement or problems with the law that resulted in the travel ban. This argument is more artificial than real. It is hard to see where the contradiction lies when the applicants claim they were abused because of comments critical of the government, in the case of Mr. Baladi, and because of teachings and statements considered inappropriate by the Iranian authorities, in the case of Ms. Reihani. The applicants state that these actions resulted in their detention and release on a commitment and, in the case of Mr. Baladi, a subpoena with which he allegedly did not comply. The one led to the other. Simply put, the problems with the law, which stemmed from political activities, and the travel ban are consistent. Both form part of the same story. The reasons for decision could be clearer, but perfection is not the goal.

[41] Ultimately, the RAD stated that, if the applicants' account were true, they would not have been able to leave Iran so easily. Their account on its own, without further evidence, was not considered to be credible because documentary evidence indicated that people such as the applicants could not leave so easily. Therefore, the account is not credible.

B. *Subpoena*

[42] In a decision where the applicants' story is disputed because, if true, they would not have been able to leave the country, the existence of a subpoena for an appearance on November 8, 2017, is significant. The story would be stronger if an order to appear before an Islamic court was in fact issued.

[43] The subpoena could be evidence that Mr. Baladi was targeted by the regime. However, it is also possible that being able to leave the country without difficulty despite the subpoena does not undermine the applicants' credibility. The RAD devoted more than one page of a fourteen-page decision to its conclusion that the subpoena produced at the RPD hearing was not reliable. The RAD drew a negative inference from the fact that an original subpoena was not produced (RAD decision at para 35). That is significant. The RAD further noted that, despite the submissions of counsel for the applicants before the RAD (who is not their counsel on judicial review), the original subpoena was not found. Nevertheless, the RAD stated that it was able to conclude that the appearance of a copy raised doubts as to the authenticity of the original (RAD decision at para 37). The RAD concluded as follows:

> [38] Given my concerns with the appearance of the document, as well as the Principal Appellant's failure to produce the Certified Copy, which was not reasonably explained, I am not satisfied that the document provided is a true copy of an authentic subpoena, on a balance of probabilities. As such, I find that the allegation that the Principal Appellant was subject to an outstanding subpoena at the time of his departure is not credible.

[44] The importance of the subpoena seems obvious. It is documentary evidence that gives more weight to the applicants' assertions than does their testimony alone. A great deal of time

was spent on this at the hearing before this Court, with the applicants claiming that the original subpoena had been filed with the RAD and then lost. If this is true, the RAD's conclusions are invalid and the entire case must be reconsidered, since the subpoena is important not only for the conclusion that the applicants would not have left Iran (which they obviously did) but also for the very allegations that affect the credibility of the applicants, as set out in paragraphs 35 to 38 of the decision under review.

[45] Thus, at the end of the hearing, the Court requested notes to clarify the situation. In essence, the RPD hearing transcript confirmed that the copy of the subpoena before the RPD was a document emailed by the applicants' daughter. The applicants filed affidavits after the hearing before this Court. These affidavits explain what had so far remained unexplained.

[46] It is now established that counsel for the applicants before the RAD filed an "original" subpoena with the RAD. Indeed, a Department of Citizenship and Immigration official wrote the applicants on March 16, 2022, apologizing for the inconvenience caused by an item mailed to the Refugee Appeal Division that was apparently never delivered. The letter, although not particularly clear, nevertheless confirms that a document was lost; the affidavits made on behalf of the applicants describe the problem more clearly.

[47] Three affidavits were submitted on behalf of the applicants. First, their niece, a Canadian citizen, states that she assisted the applicants in their refugee protection claim; she was an observer at the RPD hearing and noticed the focus on the subpoena. The possibility of obtaining the original subpoena was considered, but it was agreed that mailing it from Iran was inadvisable

because it could be intercepted and seized. Another solution had to be found. The document had to be carried out of the country. This was done by an uncle, a permanent resident of Denmark visiting Iran, who managed to get the so-called [TRANSLATION] "original document" out. Once back in Denmark, the uncle sent the [TRANSLATION] "original document" to counsel for the applicants at the time, so it could be filed on appeal.

[48] Second, counsel also filed an affidavit. He states that he realized after the RPD hearing that it was important to provide the [TRANSLATION] "original subpoena from Iran" rather than the emailed copy. He received the original subpoena in January 2020 from the applicants' niece, who allegedly received it from Denmark.

[49] The [TRANSLATION] "original document" was filed in support of the memorandum in the appeal record after the record was returned to him by the RAD for what appears to be clerical reasons.

[50] The record has been lost since then. Counsel describes discussions between the RAD and the department to locate the record. At paragraph 16 of his affidavit, he states that he filed [TRANSLATION] "the original" that the applicants' niece had given him. He further states that [TRANSLATION] "[s]ince Mr. Baladi stated that this was the document he received in Iran, I argue that the original subpoena issued by Iran to Mr. Baladi was filed in the appeal record before the RAD".

[51] Third, Mr. Baladi filed a short affidavit. He states that he identified the document received by his niece [TRANSLATION] “as being the original subpoena issued in Iran” (para 4).

[52] The respondent called an affiant who, being new to the Department of Citizenship and Immigration and working remotely during the pandemic, stated merely that she had handled the record. The affiant had nothing to add regarding the loss of record.

[53] The respondent’s submissions do not dispute that the record was lost. They do dispute that there was a breach of natural justice. The submissions point out that the new evidence was not the subject of a request under subsection 110(4) of the IRPA. Surprisingly, the submissions state that [TRANSLATION] “the RAD’s determination that the applicants failed to submit the ‘original’ subpoena obtained from Iran and failed to explain why is well-founded.” It is suggested that there continues to be confusion about what the “original” subpoena is. It is believed that an attempt is being made to justify the RAD’s decision on the basis that this was the information before it when the decision was rendered. With all due respect, this ignores the fact that the respondent forwarded and lost the information about the original. The submissions suggest that the RAD was able to do its analysis using the “RPD Copy”. But that is not the issue. The applicants tried to provide the “original” subpoena, but were unable to because of an administrative oversight for which they cannot be held responsible. Paragraph 38 of the RAD decision finds fault with the applicants for failing to produce a certified copy of the subpoena and failing to explain why they could not (I have reproduced paragraph 38 at paragraph 43 of these reasons). However, there is no longer any doubt that an “original” does exist and that it was produced. Counsel for the applicants may not have followed the procedure directly to submit his

new evidence, but the evidence presented by affidavit in this Court, which is not in dispute, is that the "original" subpoena was sent to the RAD. In my opinion, this is sufficient to dispose of the respondent's submissions. But there is more.

[54] The respondent reviewed the applicants' affidavits and is challenging the assertions made. However, the respondent has not cross-examined the affiants. The respondent questions the testimony of the three affiants that the document provided to the RAD was the original received by Mr. Baladi in Iran. It seeks to create or maintain doubt without attempting to resolve it through cross-examination. The respondent argues that the Court does not have to accept everything in an affidavit. Still, the Court should have reasons before it does so. If the respondent has issues with some of the affiants' statements, it should have sought an explanation from the affiants. That would have had the advantage of informing the Court if necessary. That was not done. Many of the respondent's criticisms relate in one way or another to the question of how the lost document was an original subpoena. The respondent has chosen not to challenge by cross-examination what was stated under oath.

[55] I was particularly surprised by two arguments that the respondent made at the last minute. First, the respondent argues at paragraph 35 of its additional submissions that, despite the misplaced record, [TRANSLATION] "the applicants were not prevented from submitting their evidence". This seems to contradict the very contents of the RAD decision. The original subpoena has become a potentially pivotal piece of evidence. The importance placed on the subpoena is obvious. The RAD rejected the allegation that Mr. Baladi was subject to an authentic subpoena at the time of his departure. Regarding the weight to be given to the evidence that the

subpoena existed, it is not a reviewing court's place to supplant the administrative tribunal's role in reviewing a case on its merits.

[56] Second, the respondent flatly states at paragraph 36 of its submissions that the applicants failed to indicate which element of the subpoena would have been analyzed differently had it been the original subpoena from Iran. The statement suggests a possible misunderstanding of the RAD's reasons for decision, in which the RAD expressed doubts about the applicants' accounts because, if true, the applicants would not have been able to leave Iran as easily as they claimed. In light of the RAD's decision, it is the very existence a subpoena that is important. The RAD states that, given the entry and exit controls, if a subpoena had indeed been issued for the type of offence alleged, the applicants would not have been able to leave the country. The fact that they were able to leave shows that they were not persons of interest. If a subpoena exists, it can no longer be argued that it is not credible that they are being targeted by the government. The existence of a subpoena perhaps suggests the seriousness of the matter. The negative inference drawn by the RAD from the fact that the original subpoena was not produced no longer holds. In short, the fact that they were able to leave their country and that a genuine subpoena did not prevent their departure changes the credibility of the applicants and their story. By how much? That is not for the reviewing court to determine. What seems clear to me is that the applicants were not afforded the measure of procedural fairness commensurate with the evidence in question and the consequences that a negative decision would have on them (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21–28; *Congregation of Jehovah's Witnesses of St Jerome-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650 at para 5).

IV. Remedy

[57] In my opinion, the matter should be referred back to the RAD for redetermination. This would put the parties and the RAD in the position they would have been in had the record containing the subpoena not been lost. Since it has now been established that the authentic subpoena has been lost, and the uncontradicted affidavits attest to its authenticity, its authenticity must now be accepted as fact before the RAD. That is the end of the matter. Therefore, the appeal must be reconsidered, on the basis that the authentic subpoena is in the applicants' appeal record. The authenticity of the subpoena is not to be disputed.

[58] The applicants may argue before the RAD that the authentic subpoena is available (virtually) and that it should be admitted as new evidence on appeal to the RAD under the IRPA. The RAD may choose to hold an oral hearing if permitted under the Act. The process will follow its course and the evidence will be reassessed.

V. Conclusion

[59] The application for judicial review is allowed. The importance of the subpoena issued to Mr. Baladi warrants a new proceeding before the RAD, with the authenticity of the subpoena concerning Mr. Baladi being accepted as fact.

[60] The parties will return to the initial stage of the appeal, and a new panel will be called upon to hear the appeal and make a new determination.

[61] Given the highly exceptional circumstances of this case and the fact that the issues arise from the particular evidence in question, there is no serious question of general importance which ought to be certified.

JUDGMENT in IMM-1802-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The matter is referred back for redetermination by a differently constituted panel of the RAD.
3. There is no serious question of general importance to certify under section 74 of the IRPA.

"Yvan Roy"
Judge

Certified true translation
Vincent Mar

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1802-21
STYLE OF CAUSE:	PARI SELAHI REIHANI AND SIAVASH BALADI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
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APPEARANCES:

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