Federal Court  Cour fédérale

Date: 20180301

Docket: IMM-3490-17

Citation: 2018 FC 236

Vancouver, British Columbia, March 1, 2018

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

A.K.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision of a Senior Immigration Officer (officer) wherein the Applicant was found to be inadmissible to Canada under section 34(1)(f) of the IRPA for being a member of the Bangladesh National Party (BNP). The officer found that there are reasonable grounds to believe that the BNP is an organization that engages, has

engaged or will engage in acts of terrorism pursuant to s 34(1)(c) of the IRPA. For the reasons that follow, the application is granted.

[2] The style of cause in this matter is amended in the order below. As originally filed, the Notice of Application referred to three Applicants. This stemmed from an administrative error on the part of the Respondent Minister's officials. They had mistakenly interpreted the decision of the officer as applying to the Applicant's wife and daughter as well as to him.

[3] The error was acknowledged by the Respondent in correspondence to the Court prior to the hearing after it was highlighted in the Applicant's Further Memorandum of Argument. The applications for permanent residence of the wife and daughter had been closed by the Respondent. This should not have occurred in light of s 42(1)(b) of the IRPA. As protected persons, the wife and daughter's applications for permanent residence are not affected by the denial of the Applicant's application for permanent residence. The wife and daughter's applications have now been reopened by the Respondent, who proposes that their names be struck from the style of cause. The Court is content to do so on the understanding that the applications for permanent residence of the two female applicants will continue to be processed.

[4] At the hearing, the Applicant requested that his identity be protected at least to the extent of the substitution of initials for his name in the Court's Judgment and Reasons. The Respondent took no position on this request. The Court considers it appropriate in the circumstances and will so order.

II. Background

[5] The Applicant is a citizen of Bangladesh. He arrived in Canada on a temporary resident visa in May 2013 and claimed refugee status two months later on July 24, 2013. His wife and daughter arrived later and their claims were joined with his. On October 21, 2014, the Refugee Protection Division (RPD) found that the Applicant and his family are Convention refugees. They then submitted a Protected Persons Application for Permanent Residence. Stage one approval was granted on February 16, 2016. The file was then transferred to the Backlog Reduction Office in Vancouver and given to the officer to conclude the security review.

[6] In his application for permanent residence, the Applicant had stated that he was a member of the BNP from January 1980 to May 2013 in various roles. Between 1980 and 1987, the Applicant was a member of the executive committee of the BNP's student organization. In 1987, he joined the Bangladesh Nationalist Lawyer Forum, an association linked to the BNP. Between 1989 and 1996, the Applicant served as assistant secretary of this association.

[7] The Applicant was sent a procedural fairness letter (PFL) on May 25, 2017, to inform him that he may be inadmissible to Canada due to his self-admitted membership in the BNP. The officer noted that the BNP has been deemed to be an organization that has committed terrorism or subversion by force and that some members of this organization may be found inadmissible. The Applicant was invited to present submissions.

[8] The Applicant submitted that his involvement was limited and only in relation to the student organization and lawyers' forum. The Applicant noted that he left the organization in 2013; a year before political violence erupted as a result of the 2014 election and before the 2015 blockades were established by the BNP in an effort to have the governing party hold new elections. During the time that the Applicant was involved with the BNP, the BNP could not be viewed as a terrorist organization he submitted.

[9] On July 26, 2017, the Applicant was found to be inadmissible to Canada under s 34(1)(f) of the IRPA. In the decision, the officer examined reports and open sources regarding the BNP. The officer noted that in Bangladesh the use of general strikes called "hartal", is a form of political protest and coercion against the government. The officer noted that violence has been common in Bangladesh politics for decades. The officer found that the BNP had been the author of violence and had not discouraged the use of violence against other political parties. The officer concluded that the Applicant is a member of the BNP based on his self-admission. The officer concluded that the BNP is an organization that engaged, engages or will engage in terrorism.

[10] There is no evidence to suggest that the Applicant personally engaged in any acts of violence or acts which could be characterized as terrorist in nature while belonging to the BNP's student and lawyer wings.

III. Issues

[11] The sole issue for consideration is whether the decision is reasonable.

IV. Standard of review

[12] The parties agree and I concur that it is well established that the standard of review for a finding under s 34 of the IRPA is reasonableness; *Gazi v Canada (MCI)*, 2017 FC 94 at paras 17-23; *Najafi v Canada (MPSEP)*, 2014 FCA 262; *Poshteh v Canada (MCI)*, 2005 FCA 85. The officer's findings of fact are owed a high degree of deference: *Canada (MCI) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339.

V. Relevant legislation

[13] The relevant provisions of the IRPA read as follows:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
Security	**Sécurité**
34 (1) A permanent resident or a foreign national is inadmissible on security grounds for	**34 (1)** Emportent interdiction de territoire pour raison de sécurité les faits suivants
[…]	[…]
(b) engaging in or instigating the subversion by force of any government;	**b)** être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(b.1) engaging in an act of subversion against a democratic government, institution or process	**b.1)** se livrer à la subversion contre toute institution démocratique, au sens où cette

as they are understood in Canada;	expression s'entend au Canada;
(c) engaging in terrorism;	**c)** se livrer au terrorisme;
[…]	[…]
(f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).	**f)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b), b.1) ou c).

[14] The definition of terrorist activity in s 83.01(1)(b) of the *Criminal Code*, RSC 1985, c C-46 is also relevant to this application:

Definitions	**Définitions**
83.01 (1) The following definitions apply in this Part.	**83.01 (1)** Les définitions qui suivent s'appliquent à la présente partie.
[…]	
terrorist activity means	***activité terroriste***
[…]	[…]
(b) an act or omission, in or outside Canada,	**b)** soit un acte — action ou omission, commise au Canada ou à l'étranger :
(i) that is committed	**(i)** d'une part, commis à la fois :
(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and	**(A)** au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,
(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act,	**(B)** en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir,

whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

[…]

For greater certainty

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition terrorist activity in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas :

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

[…]

Interprétation

(1.1) Il est entendu que l'expression d'une pensée, d'une croyance ou d'une opinion de nature politique, religieuse ou idéologique n'est visée à l'alinéa b) de la définition de activité terroriste au paragraphe (1) que si elle constitue un acte — action ou omission — répondant aux critères de cet alinéa.

VI. Analysis

[15] While the Applicant argued in his written representations that the officer erred in finding that he was a member of the BNP, his counsel readily conceded at the hearing that this was not his strongest argument. I agree. The evidence in the record is that the student body and the lawyers' association were closely affiliated with the BNP. Moreover, the Applicant had relied upon his involvement with the BNP in his refugee claim.

[16] It is well-established in the jurisprudence that the phrase "member of an organization" in s 34(1)(f) of the IRPA is to be given a broad definition: *Poshteh,* above, at para 38.This is not a case in which I would find, as I did in *Toronto Coalition to Stop the War v Canada (MPSEP),* 2010 FC 957, that evidence pointing away from a finding of membership had not been taken into consideration. The officer's membership finding is, in my view, unassailable.

[17] That leaves the question of whether the officer reasonably arrived at the finding that the BNP is an organization that engages, has engaged or will engage in acts of terrorism, as stated in the decision letter of July 26, 2017, pursuant to s 34(1)(c) and s 34(1)(f) of the IRPA.

[18] The officer began the analysis of this question by setting out the text of the definition of terrorist activity as defined in s 83.01(1)(b) of the *Criminal Code* that is reproduced above. The officer then noted that the IRPA does not define engaging in or instigating subversion by force, as set out in s 34 (1)(b), and referenced the Enforcement Manual ENF1 which provides some guidance on the meaning of the term "subversion" as well as related terms such as "democratic".

[19] It appears from the reasons provided that the officer may have been uncertain at the outset whether to rely upon s 34(1)(b) or s 34(1)(f), or both, as the basis for an inadmissibility finding before finally settling upon s 34(1)(f).

[20] The officer reproduced paragraphs 40-49 of *Maqsudi v Canada (MPSEP)*, 2015 FC 1184 [*Maqsudi*], and then stated that, in the officer's opinion, the BNP "is considered to be an organization that has committed terrorism/subversion".

[21] In *Maqsudi*, at paras 40-49, Justice Diner relied on *Najafi*, above, for the discussion therein by the Federal Court of Appeal relating to the use of force to overthrow a repressive regime – in that case, the government of Iran. The Court of Appeal in *Najafi* had concluded that the clear and unambiguous language of "any government" in s 34(1)(b) was not limited to only democratic governments but also applied to colonial governments, foreign occupations, and oppressive regimes. While that finding is binding on this Court, it is not clear to me how *Maqsudi* and *Najafi*, as discussed by the officer, relate to this case. As noted above, the officer's conclusion was that the Applicant was inadmissible under s 34(1)(f) not s 34(1)(b).

[22] The officer's analysis then addressed the question of membership. As I have stated, I do not find that there are any grounds to interfere with the officer's finding that the Applicant was a member of the BNP, albeit through its student and lawyer subsidiaries.

[23] The officer reached the crux of the matter in his analysis of whether the BNP was an organization that engaged, engages or will engage in acts of terrorism. The officer conducted

some basic research on the Internet using the search term “Bangladesh nationalist party terrorist acts”. While this search term would appear to be not neutral and presume the result, as argued by the Applicant in his written submissions, he did not pursue this argument at the hearing. The search produced a considerable amount of material from news agencies, government and non-governmental organizations and other sources. Much of this relates to the violent nature of Bangladeshi politics as practiced by the two leading political parties, the Awami League and the BNP, and their respective activists.

[24] The officer focused in particular on the use of general strikes, referenced in South Asian languages by the term “hartal”. This is a form of mass protest and civil disobedience first used during the Indian Independence Movement by leaders such as Mahatma Ghandi. In Bangladesh, the officer found, both the Awami League and the BNP have engaged in similar tactics when not in office. The officer found that the underlying purpose of the hartal was to cause “economic disruption as a means of coercion against the government to achieve a particular goal”. The other issue with the hartals, the officer noted, is that they also frequently resulted in violence as a means of coercion against the government in power.

[25] Reports cited by the officer describe the bitter struggle between the BNP and the Awami League. When out of power, as a U.S. Congressional Research Service report states, both parties “have devoted their energies to parliamentary boycotts, demonstrations and strikes in an effort to unseat the ruling party. The strikes often succeed in immobilizing the government and disrupting economic activity.”

[26] The officer concluded that the "hartals employed by the BNP have significant economic impact on Bangladesh's economy and have resulted in both substantial damage to property and both death and serious bodily harm caused by BNP activists and members as well as disruptions in services." The officer notes that the BNP leadership denied responsibility for some actions and condemned the violence but concluded that this occurred after the events.

[27] The BNP's consistent use of hartals and the resulting violence led the officer to the belief that the BNP implicitly condoned the use of violence and did not discourage its use by the membership. Based on that finding and the Applicant's membership in the BNP, the officer concluded that the Applicant was inadmissible to Canada under s 34(1)(f) for being a member of an organization of which there are reasonable grounds to believe engages, has engaged or will engage in acts of terrorism under s 34(1)(c).

[28] The Applicant argues that the officer erred in relying upon the definition of terrorist activity in s 83.01(1)(b) of the *Criminal Code* as that definition requires proof of an intentional act or omission. He argues that the *Criminal Code* definition applies to individuals, not organizations, who are capable of intentionally causing death, serious bodily harm, property harm or serious interference with or serious disruption of an essential service, facility or system as set out in the section.

[29] Moreover, the Applicant argues, the officer failed to address the "for greater certainty" limitation in clause 83.01 (1)(b)(ii)(E) that excludes advocacy, protest, dissent or stoppage of work not intended to result in the more serious forms of conduct or harm referred to in clauses

83.01(1)(b)(ii)(A) to (C). Nor did the officer consider, the Applicant argues, the limitation found in subsection 83.01(1.1) relating to the expression of a political, religious or ideological thought, belief or opinion.

[30] The officer's view of the BNP's organization of hartals as terrorist in nature, the Applicant suggests, could apply equally to the Winnipeg Trades and Labour Council that organized the general strike of 1919 or, for that matter, to the Citizen's Committee of 1,000 that violently suppressed it with the aid of strike breakers and the Royal North-West Mounted Police.

[31] The Respondent argues that this Court has already recognized the reasonableness of the officer's finding that the BNP, through its reliance on hartals as a tool to coerce the government by creating significant economic disruption as well as the incidence of violence that result therefrom, was engaged in terrorism: *Gazi*, above, at paras 11, 38-39.

[32] At paragraph 30 of *Gazi*, Justice Brown reproduced the text of the officer's reasons from the decision in that case. I note that they are word for word identical to six and a half pages of the officer's reasons in the present matter where the BNP's use of hartals is discussed, suggesting a cut and paste copying of the text from one decision to the other. Justice Brown went on to discuss a number of other issues raised by the Applicant. He concluded that on the evidence in that case, it was open to the officer to find that the BNP itself was engaged in terrorism.

[33] At para 38, Justice Brown held that terrorism was defined so broadly in the *Criminal Code* that hartals may reasonably be said to come within the definition:

> [38] In addition, to emphasize, Canada defines terrorism very broadly and in in [sic] my view, in such a way that hartals may reasonably be said to come within that definition. To repeat, Canada's definition of terrorism in this case include acts *and* omissions outside Canada (e.g., that occurred in Bangladesh) that have elements of intimidation of the public or parts of the public (e.g., perhaps, hartals) that affect security, including economic security (e.g., perhaps, hartals), that compel a government to do or refrain from doing any act (e.g., perhaps, hartals), where that act or omission intentionally causes death or serious bodily harm to a person by violence, endangers a person's life, causes a serious risk to the health or safety of the public or a segment thereof (e.g., perhaps, hartals), or causes substantial property damage (e.g., perhaps, hartals) or where such acts or omissions intentionally cause serious interference with or serious disruption of an essential service, facility or system (e.g., perhaps, hartals).

[34] The Respondent also relies upon the decision of Mr. Justice Fothergill in *S.A. v Canada (MPSEP)*, 2017 FC 494 [*S.A.*], a judicial review of a decision of the Immigration Division (ID) which bears considerable similarity to *Gazi* and the present matter.

[35] In *S.A.*, the ID based its definition of terrorism on the Supreme Court of Canada's decision in *Suresh v Canada (MCI)*, 2002 SCC 1 at para 98 [*Suresh*], as well as the *Criminal Code* definition. It was argued, among other things, that where the ID chooses to invoke the definition of terrorism found in the *Criminal Code*, it must apply it correctly. In particular, the Applicant argued, the ID must be satisfied that the BNP had the necessary purpose and intent when it called for hartals. The Applicant argued further that *Gazi* was distinguishable because Justice Brown's repeated reference to "e.g., perhaps, hartals", meant that the case stood only for the proposition that hartals *may* satisfy the Canadian definition of terrorism. The evidence had to be assessed in each case.

[36] Justice Fothergill, at paras 17-19 of *S.A.*, pointed to the findings of the ID that the evidence in that case disclosed that the leader of the BNP was well aware of what it meant in the ears of the party's supporters when she called for strikes, protests and blockages. This was, the ID found, synonymous with a call for violent actions that fall within an understanding of terrorism for the purposes of s 34 of the IRPA. Justice Fothergill found no fault with the ID's analysis given the evidence before it of the BNP's awareness of the effects of its actions.

[37] In this matter, the Respondent argued at the hearing, in reply to the Applicant's submissions, that the *Criminal Code* definition of terrorist activity was not determinative and that the officer applied a broader definition of terrorism. If so, that is not apparent from the officer's reasons for decision. As I read the reasons, the officer relied entirely upon the *Criminal Code* definition. And, as argued by the Applicant, the reasons reflect, at best, an incomplete understanding of that definition.

[38] I agree with the Applicant that in relying on the *Criminal Code* definition of "terrorist activity", an administrative tribunal decision maker has to be alert to the context in which that definition is meant to be employed. It requires proof beyond a reasonable doubt of one or more of the acts and omissions described in the enactment and the necessary mental element.

[39] In the immigration law context, I think it more useful to begin with the decision of the Supreme Court of Canada in *Suresh*, above, a case which concerned judicial review of a danger opinion under the *Immigration Act,* R.S.C. 1985, c. I-2. As with IRPA, the relevant provision of the *Immigration Act,* s 19, contained no definition of the term "terrorism". The adjudicator had

found, as here, that there were no reasonable grounds to conclude that Suresh had personally committed any acts of violence or directly engaged in terrorism but held, nonetheless, that he should be deported on grounds of membership in a terrorist organization.

[40] The Supreme Court concluded at para 98 that following the *International Convention for the Suppression of the Financing of Terrorism*, "terrorism" in s 19 of the *Immigration Act:*

> […] includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.

[41] I have considerable difficulty with the notion that a general strike called by a political party in an effort to force the party in power to take steps such as proroguing Parliament or convening by-elections, falls within the "essence of what the world understands by 'terrorism'". It is not an overstatement to suggest, as the Applicant has in these proceedings, that the Respondent's interpretation of the statute could capture political activities which, if carried out in Canada, would be protected under s 2 of the *Canadian Charter of Rights and Freedoms*, absent an intention to use violence to achieve the political ends.

[42] In this matter, I had difficulty understanding what the officer's findings were as the comments about the BNP leadership's intentions in calling hartals were hedged about with

qualifications. The officer acknowledged that the leadership had condemned the use of violence but considered that it was too late and only after the fact. Unlike *S.A.*, there is no express finding that the calls for hartals were synonymous with calls to commit acts that would fall within the meaning of terrorism.

[43] In the result, I am not satisfied that the decision is justified, transparent, and intelligible and falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. Accordingly, I will grant the application.

VII. Certified questions

[44] In *Torre v Canada (MCI)*, 2016 FCA 48 at para 3, the Federal Court of Appeal restated and confirmed that, "to be certified, a question must be dispositive of the appeal and transcend the interests of the immediate parties to the litigation due to its broad significance" for appeals pursuant to s 74(d) of the IRPA. In other words, it must have an impact on the result of the litigation.

[45] The Respondent requests that the following question be certified pursuant to r 18(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22:

> Are the violent acts that frequently and predictably result during a general strike or hartal in a particular country, which are intended to compel a government to do something, considered terrorism under s. 34 (1) of the *Immigration and Refugee Protection Act* despite the fact that they occur in the context of a general strike?

[46] The Applicant submits that the question is not appropriate as a certified question, at this time. He argues that on the particular facts of the record in this case, the officer had not turned his or her mind to the purpose and intention of the BNP in calling for general strikes as found in *S.A.*, above. The question, he submits, is also ambiguous as it is not clear whether it refers to any general strike that results in harm or just strikes that are intended to result in violent acts.

[47] I agree with the Applicant that the question proposed is not an appropriate question to certify as it is ambiguous and would not be dispositive of an appeal on the facts of this case.

JUDGMENT in IMM-3490-17

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is remitted for reconsideration by a different officer;
2. The Style of Cause is amended to strike the names of the two female Applicants that appear in the Notice of Application and other documents in the Court file and to substitute the initials A.K. for the name of the male Applicant in this Judgment and Reasons; and
3. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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