Federal Court  Cour fédérale

Date: 20190610

Docket: IMM-4992-18

Citation: 2019 FC 796

Ottawa, Ontario, June 10, 2019

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

M.N.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant was found to be inadmissible to Canada because of his membership in a political party in Bangladesh that was said to have engaged in terrorism. I am granting his application for judicial review of that decision, because the reasons offered by the decision-maker failed to satisfy the standard of "justification, transparency and intelligibility," in particular by failing to differentiate an intention to have recourse to violence and an intention to cause death or serious bodily harm.

I. Background

[2] The applicant is a citizen of Bangladesh. He came to Canada in May 2013 on a student visa and claimed asylum a year later. He says that, as a result of his involvement with the Bangladesh National Party [BNP], which is currently in opposition, he was victim of threats, physical attacks and abduction on the part of supporters of the party currently in power, the Awami League.

[3] The Immigration Division [ID] of the Immigration and Refugee Board determined that the applicant was inadmissible to Canada under section 34 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because the BNP is an organization that has engaged in terrorism.

[4] The ID reached that conclusion because the BNP has, on a number of occasions, called for general strikes or "*hartals*." During those *hartals*, there are frequent outbursts of violence that sometimes result in loss of life. According to the ID, this is enough to bring the *hartals* under the definition of terrorism, even if the BNP leadership has condemned the violence.

[5] The applicant is now seeking judicial review of the ID's decision.

II. Analysis

[6] Sections 33-43 of IRPA describe a variety of grounds for which foreign nationals or permanent residents may become inadmissible to Canada. Inadmissibility severely restricts a

person's ability to remain in Canada. Among other consequences, it results in the termination of the person's claim for refugee protection and narrows the grounds on which the person may ask for a pre-removal risk assessment. Section 34(1)(c) of IRPA states that a person is "inadmissible on security grounds" for "engaging in terrorism." Moreover, section 34(1)(f) extends that inadmissibility to anyone who is "a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage" in terrorism.

[7] The applicant's membership in the BNP is not in dispute. Nor does the Minister allege that the applicant himself engaged in any form of terrorism. But this, according to the Federal Court of Appeal, is irrelevant. A person's mere membership in an organization is enough to trigger inadmissibility under section 34(1)(f), irrespective of the person's actual participation in terrorism: *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86, [2016] 1 FCR 428.

[8] Thus, the only live issue is whether the BNP is an organization that has engaged in terrorism.

[9] Several decisions of this Court have concluded that decisions of the ID that found that the BNP has engaged in terrorism are reasonable: *Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94; *S.A. v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 494; *Kamal v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 480; *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922; *Intisar v Canada (Citizenship and Immigration)*, 2018 FC 1128; *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145. Other

decisions of this Court, however, have reached the opposite conclusion: *A.K. v Canada (Citizenship and Immigration)*, 2018 FC 236; *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 [*Rana*]. These different outcomes may perhaps be explained by the different reasoning adopted by the ID in each case or by differences in the record before the ID.

[10] Both parties before me agree that the Minister had to prove an intention to cause death or serious bodily harm. This, indeed, is consistent with *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*] and with the interpretation given to section 83.01 of the *Criminal Code* in *R v Khawaja*, 2012 SCC 69 at paragraph 25, [2012] 3 SCR 555: "the act or omission must be done with the intention of causing one of the enumerated consequences."

[11] Nevertheless, the ID never clearly made a finding that the BNP, as an organization, had such an intention. Instead of focusing on the intention to cause death or bodily harm, the ID's findings are described in broader language that conflates "violence" in general with "death or serious injury," for example at paragraph 57 of its reasons, when it refers to an "intention … to cause violence, death or serious injury." Rather than a finding of intention in the criminal law sense, that is, an intention to bring about the prohibited consequence, the ID appears to be relying on a form of negligence that is ascribed to the BNP leadership for calling for further *hartals* when previous ones led to casualties and for not denouncing violence sufficiently strongly. Thus, the ID concludes, at paragraphs 65-66:

> Deaths and serious injuries that occurred during hartals that were called by the BNP were not isolated incidents and by calling for

> further hartals, the BNP leadership could reasonably expect that more deaths or serious injuries would occur.
>
> […] by calling for hartals, the BNP leadership knew or, at best, was wilfully blind to the fact that it would result in deaths and serious injuries.

[12] I cannot find that the ID's reasons comply with the requirements of "justification, transparency and intelligibility" set by *Dusnmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190; see also *Rana*, at paragraph 66. Such requirements are particularly apposite in this case, where a political party that has participated in several elections and that formed the government for certain periods of time in Bangladesh's recent history is characterized as an organization that engages in terrorism. Of course, I do not wish to suggest that a terrorist organization ceases to be so simply by fielding candidates in a democratic election. However, the fact that lethal violence takes place during protests called by a political party may or may not lead to a finding that the political party has engaged in terrorism. Such a finding would need to be based on an analysis of a number of factors, including the circumstances in which violent acts resulting in death or serious bodily harm were committed, the internal structure of the organization, the degree of control exercised by the organization's leadership over its members, and the organization's leadership's knowledge of the violent acts and public denunciation or approval of those acts. In this case, it appears that the ID focused exclusively on the last factor.

[13] At the hearing of this application, counsel for the Minister invited me to look at the record in order to cure the deficiencies in the ID's reasoning. As the Supreme Court of Canada noted in *Delta Air Lines Inc v Lukács*, 2018 SCC 2, [2018] 1 SCR 6, such an exercise must be

approached with caution and cannot result in the reviewing court making findings that the decision-maker chose not to make.

[14] Apart from a number of newspaper articles, the evidence consisted mainly of two reports. One was written in 2005 by Bangladeshi academics under the auspices of the United Nations Development Program [UNDP] and analyses the causes and consequences of the frequent use of *hartals* in the political life of Bangladesh. The other was written in 2015 by Human Rights Watch and is mainly concerned with human rights violations committed by the country's security forces, although it also contains a smaller section devoted to "opposition violence." Those reports, in particular the Human Rights Watch report, contain disturbing descriptions of violent attacks that took place during *hartals* called by the BNP and that resulted in the loss of life. Those reports, however, were not written for the purpose of showing that the BNP has engaged in terrorism and do not draw any conclusion in this regard. While the facts described in those reports may be relevant to the analysis that the ID had to perform, they do not address the full range of circumstances that I identified above. As such, they do not allow me to supplement the ID's deficient reasons.

III. Disposition

[15] As a result, the application for judicial review will be allowed and the matter will be sent back to the Immigration Division for redetermination.

[16] By order of Justice Lafrenière, the identity of the applicant was kept confidential to ensure that he not be exposed to negative consequences should he be removed to Bangladesh.

The reasons justifying this order remain valid today. Hence, I will order that the style of cause be anonymized and that the applicant be referred to by his initials.

JUDGMENT in IMM-4992-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is sent back to the Immigration Division for redetermination;
3. The style of cause is to remain anonymous and the applicant is to be referred to by his initials.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Kathleen Hadekel	FOR THE APPLICANT
Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Hadekel Shams LLP Barristers and Solicitors Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT