Federal Court  Cour fédérale

Date: 20210506

Docket: IMM-3349-20

Citation: 2021 FC 404

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, May 6, 2021

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

ROHOMAN HUSSAN FOISAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Because of his membership in the Bangladesh National Party [BNP], the Immigration Division [ID] declared Mr. Foisal inadmissible to Canada. The ID found that the BNP, which is currently the main opposition party, is an organization that engages in terrorism, within the meaning of paragraphs 34(1)(c) and (f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For reasons similar to those I gave in *M.N. v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 [*M.N.*], I allow Mr. Foisal's application for judicial review of the ID's decision. The ID's findings on the requisite degree of fault are unreasonable and its analysis of the BNP's intent to cause death or serious injury is flawed and not remedied by the evidence on the record.

I. Background

[3] Mr. Foisal is a citizen of Bangladesh. In June 2014, he left Bangladesh for the United States. In February 2018, he arrived in Canada and applied for refugee protection.

[4] From 2012 until his departure for the United States, Mr. Foisal was involved in charity work organized by the BNP a few times a month. Along with his father, then president of the party's Dhaka Rampura chapter, he would donate blood and take care of lepers and needy people in several parts of Dhaka city. In January 2014, he officially became a member of this section of the party and continued his volunteer activities. He has no membership card or specific role in the organization. He did not participate in BNP meetings, parades, rallies, *hartals*, or other political activities.

[5] Given that he has been a formal member of the BNP since January 2014, the ID concluded that Mr. Foisal was inadmissible to Canada under section 34 of the Act because the BNP is an organization allegedly engaged in terrorism.

[6] The acts of terrorism attributed to the BNP stem from its use of *hartals*, a practice embedded in Bangladesh's political culture of calling widespread strikes affecting all sectors of society in order to pressure the government. *Hartals* often result in escalating violence. This violence reportedly reached an unprecedented peak during the January 2014 elections, resulting in the deaths of hundreds of people.

[7] The ID noted the existence of a climate of political violence starting in 2011. During this period, the conflict between the BNP and the ruling Awami League escalated due to the abolition of the transitional governance system that had previously governed the elections and ensured the neutrality of the process. This is one of the major areas of contention between the two parties, as my colleague Justice John Norris points out in his summary of the Bangladeshi political situation: *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080, at paragraphs 8–15, [2019] 3 FCR 3 [*Rana*].

[8] On this basis, the ID made the following findings. First, due to the intensity and frequency of political violence, the ID concluded that the BNP knew the likely consequences of its calls for *hartals*, which would be sufficient to impute the required mental element to the BNP. Second, the ID determined that the BNP's calls for *hartals* since 2011 were intended to intimidate the public or coerce the government. This would qualify the BNP as an organization that engages in terrorism under paragraph 34(1)(c) of the Act.

[9] Mr. Foisal is now seeking judicial review of the ID's decision.

II. Analysis

[10] Mr. Foisal argues that the ID erred as to the degree of fault required to find that an organization has engaged in terrorism under paragraph 34(1)(c) of the Act. Alternatively, if the ID reasonably concluded that the BNP is an organization that engages in terrorism, he challenges the ID's determination of his membership status on the basis that his formal membership in January 2014 did not change the nature of his activities.

[11] The parties accept that Mr. Foisal has only been involved in charitable work with the BNP, both before and after he became a member. This, however, has no bearing on his membership in the BNP: *Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86, [2016] 1 FCA 428; *Khan v Canada (Citizenship and Immigration)*, 2017 FC 397, at paragraphs 29–31. By his own admission, Mr. Foisal was formally a member of the BNP as of January 2014. This is sufficient to consider him a member of the organization within the meaning of paragraph 34(1)(f) of the Act. Regardless of the nature, frequency, duration or degree of involvement of Mr. Foisal's activities with the BNP, if that organization engages in terrorism, Mr. Foisal will be inadmissible.

[12] The only real issue in dispute, therefore, is the characterisation of the BNP as an organization that has engaged in terrorism. The reasonableness of this determination has been repeatedly challenged in this Court. Several decisions have held that it was reasonable for the ID to conclude that the BNP had engaged in terrorism: *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 [*Saleheen*]; *Rahaman v Canada (Citizenship and Immigration)*, 2019 FC 947; *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38 [*Miah*].

[13] Conversely, similar findings were found to be unreasonable in the following cases: *A.K. v Canada (Citizenship and Immigration)*, 2018 FC 236; *Rana*; *M.N.*; *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 [*Islam 2019*]; *Islam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 108 [*Islam 2021*].

[14] Nonetheless, there is unanimity as to the starting point of the analysis. Regardless of whether the focus is on *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*], or section 83.01 of the *Criminal Code*, RSC 1985, c C-46, a person or organization only engages in terrorism, within the meaning of section 34 of the Act, if they have the specific intent to cause death or serious injury: *Saleheen*, at paragraph 41; *Rana*, at paragraphs 65–66; *M.N.*, at paragraph 10; *Islam 2019*; *Islam 2021*, at paragraphs 17–21; *Miah*, at paragraph 34. *Mens rea* is a basic concept in criminal law. Specific intent is its highest level and is clearly distinguishable from other forms of *mens rea*: *R v Tatton*, 2015 SCC 33, at paragraphs 30–39, [2015] 2 SCR 574; *Islam 2019*, at paragraph 24; *Rana*, at paragraph 65. Yet, "where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard": *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at

paragraph 111 [*Vavilov*]. In this regard, no one argues that negligence, recklessness or even wilful blindness can constitute a sufficient degree of fault to support a charge of terrorism: *R v Khawaja*, 2012 SCC 69 at paragraphs 45–47 and 57, [2012] 3 SCR 555; *Vavilov* at paragraph 112 *in fine*.

[15] In this respect, the decision of the ID is unreasonable, since it equates the required intent with "knowledge of probable consequences" of the use of *hartals* or with a form of recklessness regarding the effects of *hartals* on the general population. In so doing, it effectively substitutes a lower degree of fault for the specific intent requirement that characterizes the concept of terrorism:

> Given the intensity and number of events that led to political violence, particularly, but not only during hartals, the BNP leaders knew the probable consequences of the calling of such political activities that would lead to deaths and serious harm to the civilian population of Bangladesh. Given the predictable consequences of holding such activities, at least during the above-mentioned period, it leaves little doubt as to the intent of the BNP leaders to accept violence as a way to achieve their political objectives.

[16] Nevertheless, the Minister argues that the ID applied the correct test, that of specific intent, and that it could reasonably conclude that such intent was established on the basis of the evidence on the record. With respect, I disagree. Nowhere in its decision does the ID mention that the offence of terrorism requires proof of an intent to cause death or serious injury. Rather, it appears that the ID consciously avoided explicitly stating the degree of fault required, even though the case law of this Court makes it clear that the specific intent to cause death or serious injury is required. It would appear that the ID relied on the climate of violence during the 2014 election period and the impact of the *hartals* on Bangladeshi society to conclude that only an

intent to cause death or serious injury could have motivated the BNP when it decided to use the *hartals*. With respect, I cannot accept this line of reasoning where the consequences of a widespread strike, however disastrous, can alone suggest that its organisers *intended to* kill or seriously injure. This amounts to an attempt to "'reverse-engineer' a desired outcome", which is proscribed by *Vavilov*, at paragraph 121.

[17] Even if the ID had made it clear that it was using the test for specific intent to cause death or serious injury, this would not have cured the flaws in its decision. It is not enough for the ID to state the required degree of fault correctly if, in fact, it applies a different test. To the extent that the ID based its reasoning on the presumption that there is an equivalence between the use of violence and the intent to cause death or serious injury, I am of the view that its analysis is unreasonable. Violence cannot be indiscriminately confused with causing death or serious injury: *M.N.* at paragraph 11; *Islam 2019* at paragraph 23; *Islam 2021* at paragraph 20. This intellectual shortcut amounts, in effect, to a lowering of the fault requirement.

[18] It would appear that the ID was unable to identify the required mental element from the quoted extracts. It therefore substituted a lower degree of fault, which would fall between wilful blindness and negligence. Neither of these is equivalent to the required degree of fault: *Rana,* at paragraph 66; *M.N.*, at paragraph 11; *Islam 2019*, at paragraph 28; *Islam 2021*, at paragraph 21.

[19] Furthermore, the reasonableness of the ID's reasons is undermined by a second error, namely the lack of adequate justification for imputing intent to the BNP's leadership. In this regard, the ID struggles to support its conclusions. It first notes that the evidence shows that the

BNP is one of the two major political parties in Bangladesh, that its constitution does not condone violence, and that nothing suggests that it is listed as a terrorist organization in Canada or elsewhere. It concludes, however, that:

> [50] But the tribunal finds that trustworthy and credible documentary evidence submitted by the Minister's representative confirms that BNP members did commit acts of terrorism as defined in *Suresh.* These events, hartals, transport blockades, economic shutdowns, etc, seriously injured Bangladesh's economy, but more so, injured or killed many of its civil population.
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> [51] As the use of hartals by the BNP at least after 2011 were held to intimidate the Public or a segment of the Public, and/or compel a person or compel the government to do or refrain from doing an Act, the tribunal finds that the evidence shows that the BNP did commit acts of terrorism in accordance with section 34(1)(c) of the Act.

[20] The ID does not explain how the actions of some of its members are directly attributable to the BNP. It seems to consider that the presence of violence alone is sufficient to infer a specific intent and attribute it to an organization. As I have already pointed out in *M.N.*:

> [12] . . . 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 injury 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. . . .

[21] When attempting to deduce the terrorist intent of an organization from the actions of its members, it may also be appropriate to draw on the principles of criminal law that deal with the attribution of wrongdoing to legal persons. Without discussing this complex issue in detail, it is

useful to recall that the criminal law only recognises the liability of a corporation for acts committed by its directing mind, in the exercise of his or her functions, which are not contrary to the interests of the corporation: *Canadian Dredge & Dock Co v The Queen,* [1985] 1 SCR 662; *Austeville Properties Ltd v Josan,* 2019 BCCA 416, at paragraphs 33–35. Since an organization can only act through its members, the corporate identification doctrine distinguishes between wrongful acts that are truly the responsibility of the organization and those that are only the personal fault of its members.

[22] However, the ID's reasons are silent on this issue. There is no reference to the degree of control the BNP has over its members or to the internal structure of the organization. Yet assessing the accountability of a major political party with a nationwide following for the actions of its members is a delicate exercise that must take into account the intentions communicated by the party's "directing mind" and the degree of control it exercises over its members. In order to infer this intention, the ID had to at least refer to political speeches, plans or, as my colleague Justice Yvan Roy suggests, codes that demonstrate the organization's intention to kill or seriously injure citizens: *Islam 2019*, at paragraph 29. These could have formed the basis of evidence of intent from the highest levels of the party. However, as in *M.N.*, it would appear that the ID does not have the necessary evidence to draw this conclusion.

[23] I have no doubt that some of the acts described in the documentary evidence are "the essence of what the world understands by 'terrorism'": *Suresh,* at para 98. I share the ID's indignation at the terrible picture painted by the reports of the situation in Bangladesh, including the deaths of innocent children and witnesses. However, the case before us is not that of the

perpetrator, but of a major political party with hundreds of thousands of members. Given the size and nature of the organization, it is difficult to assume that the actions of some of its members during widespread strikes are attributable to the party leadership when there is insufficient evidence on this point. The existence of a link between isolated acts and the intention of an organization must be proven, and in this case, such evidence is lacking.

III. Conclusion

[24] Accordingly, I allow the application and refer the matter back to the Immigration Division for redetermination in accordance with these reasons.

[25] I questioned whether it was appropriate to certify a question under section 74 of the Act in order to allow the Federal Court of Appeal to address the underlying issues in this case. At the hearing, the Minister stated that he was not seeking certification of an issue, since in his view there is no contradiction between the principles that emerge from the various decisions of this Court and the divergent results are explained by the circumstances of each case, as I alluded to in *M.N.* at paragraph 9. I do not consider it appropriate to certify an issue if the losing party does not request it. However, I remain concerned about the state of the case law and now doubt whether it can be explained by the circumstances of each case, when in all likelihood the evidence presented to the ID is substantially the same.

JUDGMENT in IMM-3349-20

THE COURT ORDERS as follows:

1. The application for judicial review is allowed;
2. The case is remitted to a different panel of the Immigration Division for reconsideration;
3. No question of general importance is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3349-20
STYLE OF CAUSE :	ROHOMAN HUSSAN FOISAL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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