Federal Court  Cour fédérale

Date: 20220805

Docket: IMM-6019-21

Citation: 2022 FC 1172

Ottawa, Ontario, August 5, 2022

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

MOHAMMED MAHFUGUR RASHID MUSA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, a citizen of Bangladesh, seeks judicial review of the decision of the Immigration Division of the Immigration and Refugee Board of Canada [ID], dated August 12, 2021 [the Decision] finding the Applicant inadmissible to Canada under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [*IRPA*] in reference to paragraph 34(1)(c).

II. Background

[2] On April 18, 2018, the Applicant entered Canada on a student visa. He applied for asylum on October 2, 2018.

[3] On November 15, 2019, the Minister issued a report under subsection 44(1) of the *IRPA* against the Applicant, declaring that there were reasonable grounds to believe that the Applicant was a member of an organization that engaged in terrorism and was therefore inadmissible under paragraphs 34(1)(c) and 34(1)(f) of the *IRPA*.

[4] Section 34 of the *IRPA* sets out various security grounds under which foreign nationals or permanent residents can be held inadmissible to Canada, thereby preventing them from remaining in Canada. Paragraphs 34(1)(c) and (f) are reproduced below:

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 :
…	[…]
(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).

[5] The Minister's report sets out the reasons for concluding that the BNP and the Jatiyatabadi Chatra Dal (JCD) were organizations that had engaged in terrorist activities.

> Documentary evidence shows that the Bangladesh Nationalist Party and the Chatra Dal activists have engaged in terrorist activities. The Bangladesh Nationalist Party and the Chatra Dal are organisations that has (sic) engaged in, or has (sic) instigated in, acts of subversion by force against the government of Bangladesh. The Bangladesh Nationalist Party and the Chatra Dal leadership did not clearly condemn or took actions to dissociate the organization from these violent activities. To the contrary, the evidence shows that the Bangladesh Nationalist Party and Chatra Dal implicitly organized street violence and terrorism to achieve his goal.

[6] The Minister referred the matter to the ID for an admissibility hearing under paragraph 44(2) of the *IRPA*. The hearing took place on April 13, 2021.

A. *Evidence before the ID*

[7] At the hearing before the ID, counsel for the Minister presented dozens of documents to establish that there are reasonable grounds to believe that the Applicant was a member of the JCD, the student wing of the BNP, and that there are reasonable grounds to believe that the BNP has engaged in terrorism.

[8] It should be noted at the outset that the Applicant did not deny his involvement and membership in the BNP, as he self-admitted this fact. However, he denied that the BNP is a violent organisation that engages, will engage or has engaged in acts of terrorism.

[9] Counsel for the Minister described the history of the political landscape in Bangladesh. In summary, the main political parties in Bangladesh have been the BNP and the Awami League

[AL]. The BNP won the elections in 1991 and 2001, whereas the AL won the 1996, 2008 and 2014 general elections, the first three being under a caretaker government.

[10] In 2011, the AL government abolished the caretaker government system. The BNP responded by calling for blockades and general strikes (known in Bangladesh as *hartals*) to force the AL government to reinstate the caretaker government. The *hartals* resulted in the closing down of shops and businesses, which has caused overall economic losses of millions of dollars a day across all sectors. Major disturbances and violence erupted in the streets of Bangladesh.

[11] The documentary evidence presented on behalf of the Minister illustrates that the BNP planned and implemented *hartals* during their term of opposition which often resulted in violence, including death and serious bodily harm. The acts of violence took various forms, such as throwing petrol bombs at innocent victims to enforce blockades and causing damage to railway lines with potential of causing serious injuries to its ridership.

[12] An article entitled “Party Politics and Political Violence in Bangladesh: Issues, Manifestation and Consequences”, authored by M. Moniruzzaman in March 2009, provides an analytical look at the nature of inter-party political interactions, and the manifestation and consequences of political violence in Bangladesh. The article states that “(a) dominant aspect of the party-system in Bangladesh is its culture of violence. It has become commonplace for political parties to often engage in street violence.”

[13] Counsel for the Minister argued before the ID that the JCD is a creation of the BNP and that its members are the main actors in the political violence in Bangladesh. This is consistent with a report by Human Rights Watch that the members of the student wings of both the BNP and AL "are often implicated in violent attacks and clashes". She maintained that the BNP must be accountable as an organization for the violence that resulted from their calling for *hartals* and blockades. The BNP knew that death and serious bodily harm would occur, and yet they have denied their actions. The BNP has shown a lack of action to eliminate from their ranks those individuals involved in subversive and terrorist activities. By so doing, they have demonstrated that they sanctioned the violence. Counsel submitted that there are reasonable grounds to believe that the Applicant was a member of the JCD, and that the JCD has engaged in terrorism and requested that a deportation order be issued against him.

[14] The Applicant admitted under oath that he was a member of the JCD. He testified that he joined the JCD because he needed a place to stay and protection as he completed his studies. He was under the banner of the BNP for the metropolitan student union, and won the seat of organizing secretary of the student union of the metropolitan university, as he believed it would look good on his resume. In his role, he occasionally posted anti-government information, but never attended meetings, rallies or *hartals* in connection with the JCD.

[15] The Applicant stated that he never voted for JCD candidates, was never asked to participate in any violent activities, and never witnessed JCD leaders instructing the lower members to engage in any violence. He denied that the BNP is a violent organisation that engages, will engage or has engaged in acts of terrorism.

B. *Decision of the ID*

[16] The ID concluded that there were reasonable grounds to believe that the BNP and the JCD engaged in terrorism. In its analysis, the ID adopted the definition of "terrorism" as set out by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] at para 98:

> 98. In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the 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"…

[17] The ID noted that the fact that the BNP is not listed as a terrorist entity in Canada is not an element which is determinative in establishing whether or not it is a terrorist organization for the purposes of 35(1)(c) of the *IRPA*.

[18] The ID canvassed the documentary evidence produced by the Minister, particularly between the years of 2012 and 2015. In determining whether the BNP has engaged in terrorism, the ID focussed on four factors enumerated by Mr. Justice Sebastien Grammond in *M.N. v Canada (Public Safety and Emergency Preparedness),* 2019 FC 796 [*M.N.*] at para 12, notably: 1) the internal structure of the organization; 2) the degree of control exercised by the organization's leadership over its members; 3) the organization's leadership's knowledge of the violent acts, and; 4) public denunciation or approval of those acts.

[19] The ID agreed with the Applicant that the definition of the word “terrorism” as found in immigration law requires proof on the part of the organization of an intention to the cause serious injury, death, endangerment of life and a serious risk to life and safety. It found that the four factors laid down in *M.N.* had been met based on the following reasoning.

> [71] **Factor 1**: The BNP is a legally constituted political party. Regarding the internal structure of the organization, the decision to call a hartal is made at meetings of the BNP’s steering Committee. Hartals and blockades did not occur spontaneously. They were planned and initiated by the leadership of the BNP. This implementation would have necessitated time and money to prepare in order to have a successful hartal and blockade. It requires members and supporters to be easily mobilized who are willing to engage in the planned activities. It most certainly entails detailed coordination to ensure all the moving pieces are set in place.
>
> [72] **Factor 2**: The membership of the BNP and their student wing, the JCD, are under the discipline and control of the BNP’s national leadership. The BNP’s national leadership had the control, authority and power to instruct their members and supporters to do their bidding. Beginning in October 2013, the BNP staged blockades and demonstrations and called for an election boycott that resulted in people who did not respect the blockades in being killed or seriously injured. The Hindu minority was particularly targeted by the violence. Schools and buildings that were used as polling stations were attacked (Exhibit C-28, page 212). The BNP’s objective was to force the Awami League to, amongst other things, reinstate a caretaker government to oversee the general election.
>
> [73] **Factor 3**: The documentation shows that the BNP leadership had knowledge of the consequences of calling on their members and supporters to engage in hartals, demonstrations and blockades as many members of the leadership were accused of violent crimes themselves, including President Zia. Further proof that the BNP leadership had knowledge of the death and bodily harm committed by their party was the extensive media coverage of the political situation in Bangladesh, particularly from 2012 onward. Reports on the current events in Bangladesh at the pertinent time period is included in the multiple newspaper articles provided in the Minister’s disclosure. In spite of having knowledge of the devastating consequences on the Bangladeshi population, the leadership of the BNP continued to call on their people to engage

> in hartals and street agitation, which instructions their membership heard and executed.
>
> [74] **Factor 4**: Human Rights Watch (Exhibit C-36, pp. 357 – 360)) and Amnesty International (Exhibit C-34, p. 351) urged the three main political parties, including the BNP, to make clear and strong public statements at the highest level, denouncing politically motivated violence and to dismiss party members who were found to be involved, in order to stem the violence (Exhibit C-28, p. 271). In spite of these important recommendations from human rights organizations, the BNP only vaguely denounced the actions of their members, and instead, blamed other parties for the violence that occurred during the hartals and blockades. No series (sic) steps were taken by the BNP leadership to ensure the safety of the Bangladeshi population or curtail the violence. The tribunal finds […] that there exist sufficient elements establishing that the BNP condoned and sanctioned the illegal, violent activities of their membership.

[20] Based on the record before it, the ID concluded that the requisite specific intent to cause death and serious bodily harm by the BNP had been established by the Minister. Having found that the BNP, with the help of its student youth wings and allies, had engaged in extreme acts of violence for a variety of political reasons, the ID determined that the Applicant was inadmissible under section 34(1)(f) of the *IRPA* and issued a removal order against him.

C. *Standard of Review*

[21] It is settled law that a determination under subsection 34(1)(f) of the *IRPA* as to whether there are reasonable grounds to believe that an organization engaged in acts of terrorism is reviewed against a standard of reasonableness: *Intisar v Canada (Citizenship and Immigration)*, 2018 FC 1128 at para 15; *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38 [*Miah*] at para 18.

[22] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court of Canada describes a reasonable decision as one that is based on reasoning that is both rational and logical (at para 102), and that is justified in relation to the constellation of law and facts that are relevant to the decision (at para 105). The Court must therefore be able "to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived" (at para 102).

D. *Analysis*

[23] The only issue to be determined is whether the ID reasonably concluded that there exist reasonable grounds to believe that the BNP, ergo the JCD, is an organization that engages in acts that fall within the definition of terrorism pursuant to paragraph 34(1)(c) of the *IRPA*.

[24] The parties agree that the presence of an intention to cause death or serious bodily harm by the use of violence is an essential element in determining if an act or acts constitute terrorism within the meaning of paragraph 34(1)(c).

[25] While the Applicant does not dispute that the evidence before the ID establishes that violence occurred when *hartals* were called by the BNP during the periods he was a member of the organization, he argues that none of the evidence can lead to a conclusion that the BNP leadership intended for civilians to be injured or die during the demonstrations, strikes or *hartals*.

[26] The matter comes down to whether the ID properly applied the *Suresh* definition of terrorism to the evidence before it and made the required finding that the BNP intended to cause death or serious injury by calling for *hartals* to further its political agenda.

[27] The reasonableness of such a determination has been the subject of much debate before this Court. As recently noted by Mr. Justice William Pentney in *Babu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 510 at para 26, the division in the Court regarding how to address the issue of intent reveals a true schism in the Court's approach:

> [26] I pause to note that, in several previous cases, the ID had relied on similar conclusions to support a finding that a BNP member was inadmissible because of the association between hartals and violence, and that it was foreseeable that violence would erupt when one was called. In several of these cases this Court has found the decisions were unreasonable because the ID failed to apply the specific intention requirement, and instead relied on concepts such as "foreseeability" or "wilful blindness" or "recklessness" (see *Rana* at paras 23-26; *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 at para 23; *M.N. v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 [M.N.] at paras 10-12; *Islam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 108 at para 22; *Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404 at paras 14-15). In other cases, this Court has found the evidence and reasoning sufficient to support the reasonableness of the decision (see, for example: *S.A.* at para 19; *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at paras 46-47; *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38 [*Miah*] at paras 43-44).

[28] There is consensus, however, that in terms of proof of a specific intention to cause death or serious injury for a finding of terrorism, more is required than simply an awareness of the likelihood that violence will occur by calling for a *hartal*, or wilful blindness to the fact that doing so would result in deaths and serious injuries (see *Saleheen v Canada (Public Safety and*

Emergency Preparedness), 2019 FC 145 at para 41; *Miah* at paras 34; *Islam v Canada (Public Safety and Emergency Preparedness),* 2021 FC 108 at para 20).

[29] In the present case, the ID found that: (a) the BNP planned and implemented strikes or *hartals* during their term in opposition; (b) the BNP's objective was, in part, to force the AL to reinstate a caretaker government to oversee the general election; (c) the membership of the BNP and its student wing, the JCD, were under the discipline and control of the BNP's national leadership; (d) *hartals* were organized by the BNP leadership with the knowledge that calling on its members to engage in the *hartals* could lead to violence causing serious bodily harm or death; (e) some leaders and activists of the BNP and its student wings were implicated in the violence; and (f) the BNP managed little more than a tepid denunciation of the violence. I see no error in these findings of fact, which are based on credible and trustworthy sources.

[30] After setting out its findings at paragraphs 71 to 74 of the Decision, the ID reached the following conclusion:

> [75] For all of the above, the tribunal finds that the requisite specific intent to cause death and serious bodily harm by the BNP has been established by the Minister, and the 4 factors laid down in the case of *M.N.* have been met.

[31] In my view, this critical finding is conclusory without any analysis as to how it was reached.

[32] The ID does not mention that the BNP is a legitimate and recognized political party in Bangladesh and that it has as its platform and goal to form a democratic government by a

legitimate general election wherein the people of Bangladesh can freely cast their votes. It also glosses over the fact that *hartals* are the most widely used means of registering opposition in the history of Bangladesh politics. Expressive activity, such as advocacy, protest, dissent and disruption of essential services, facilities or systems, provided it is not aimed at the violent, dangerous ends contemplated in *Suresh*, cannot constitute terrorist activity. As stated in the Moniruzzaman article.

> Though *hartal* has been used for many years, its objectives exclusively remained in greater public and national interest until the 1980s. However, during the parliamentary era starting from 1991, *hartal* has been used as a tool by the opposition to manifest its political antagonism towards the government. [...]
>
> Parliamentary boycotts often result in street politics of *hartal* which perpetuates mass agitations, street processions, massive public violence and disorder and sometimes loss of lives. It is conveniently used by the opposition to create its support base, to increase and consolidate it and to create disturbances for the ruling party. Confrontation and violence generated from *hartals* lead to further *hartals* and further violence.

[33] Some reports before the ID contain disturbing descriptions of violent attacks that took place during *hartals* called by the BNP and that resulted in the serious injuries and loss of life. However, those reports do not purport to show that the BNP has engaged in terrorism, nor do they draw any conclusion in this regard.

[34] The BNP may be criticized for not clearly condemning or taking action to dissociate the organization from the violent activities, including those of its leaders and members. However, there is no evidence that the BNP leadership gave instructions to its members, either through political speeches or coded language, to commit violent acts during demonstrations. The

existence of a link between isolated acts of violence and the intention of an organization must be proven. In this case, such evidence is lacking.

[35] By ignoring that the law requires that the "act" of calling for *hartals* "intended to cause death or serious bodily injury", and substituting a lower standard, requiring only that there be knowledge, or wilful blindness, that the calling for *hartals* would result in deaths and/or injuries, the ID rendered an unreasonable decision.

[36] The reasoning of Mr. Justice John Norris in *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 at para 66 is apposite to the circumstances in this case.

> [66] Here, however, the member found that *hartals* and blockades fell within the definition of "terrorist activity" simply because there was a causal connection between them and acts of violence. She also appears to have been prepared to find that they constitute terrorist activity simply because they involved causing economic harm to pressure the government. Even assuming that *hartals* and blockades could satisfy the ulterior purpose and motive elements of the definition of "terrorist activity" (as the member found), the member should have considered that they are forms of advocacy, protest, dissent or stoppage of work and, as such, could constitute terrorist activity only if they were called with the intention of causing death or serious bodily harm by the use of violence, with the intention of endangering lives, or with the intention of causing a serious risk to the health or safety of the public. Even if *hartals* and blockades called for by the BNP have led to these results, this is not sufficient. Intending to do these types of harm is an essential element of the *Criminal Code* definition. Indeed, it reflects part of what the Supreme Court of Canada expressed in *Suresh* as the "essence" of what the world understands by "terrorism." It was a serious error for the member to fail to consider it. Having decided to rely on the *Criminal Code* definition of "terrorist activity," it was incumbent on the member to apply it properly. Absent an express finding that when it called for *hartals* and blockades the BNP <u>intended</u> to cause death or serious bodily harm by the use of violence, to endanger a person's life, or to cause a serious risk to the health or safety of the public,

> the finding that this constitutes terrorist activity and, as such, engagement in terrorism within the meaning of section 34(1)(c) of the *IRPA*, cannot stand…

[37] Applying the same reasoning as Justice Norris, I conclude that the finding that the Applicant's membership in the BNP rendered him inadmissible under section 34(1)(f) of the *IRPA* cannot be sustained.

[38] The application for judicial review is granted and the matter shall be remitted back to the ID for reconsideration by a differently constituted panel.

E. *Whether the Court should certify a question for appeal*

[39] The Minister submits the following question for certification:

> Can an organization that repeatedly calls for general strike action causing serious interference or disruption of essential services, as a means of intimidating a population or pressuring the government to do something, with the common knowledge that when they have done so in the past their members engaged in acts causing death or serious bodily harm to civilians, be found to have engaged in terrorism under s.34(1)(c) *IRPA*?

[40] There have been several attempts by the Respondent to seek the guidance of the Federal Court of Appeal on the thorny issue of intention in the context of inadmissibility proceedings. The uncertainty created by the divergent views of this Court is unfortunate. It remains that the question formulated by the Respondent does not fit the criterion of a question of general importance as it fails to recognize that the notion of intent is primarily a question of fact.

JUDGMENT IN IMM-6019-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is remitted back to the Immigration Division for redetermination by a differently constituted panel.
3. No question will be certified.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6019-21
STYLE OF CAUSE:	MOHAMMED MAHFUGUR RASHID MUSA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 23, 2022
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	AUGUST 5, 2022

APPEARANCES:

Viken Artinian	FOR THE APPLICANT
Sonia Bédard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Allen & Associates Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT