Federal Court  Cour fédérale

Date: 20240328

Docket: IMM-7074-22

Citation: 2024 FC 491

Ottawa, Ontario, March 28, 2024

PRESENT: The Honourable Madam Justice Tsimberis

BETWEEN:

MD WAHIDUR RAHMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, MD Wahidur Rahman, is a citizen of Bangladesh. The parties agree on the following facts. While living in Bangladesh, in 1994, the Applicant became a member of the Islami Chatra Shibir [ICS], which is the student wing of the Jamaat-E-Islami [JEI]. From 1994 to 1998, when he was 15 to 19 years old, the Applicant was a member of the student wing of JEI. From 2009 to 2014, the Applicant was a member of JEI and in 2010 elected assistant secretary of

the Sharifgonj union branch of JEI. On December 7, 2017, the Applicant entered Canada where he claimed refugee status.

[2] In this application for judicial review, the Applicant seeks to set aside a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board rendered on June 29, 2022 [Decision] determining that the Applicant was inadmissible to Canada on security grounds as a member of the JEI, an organization aligned with the Bangladesh Nationalist Party [BNP], under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA]. The IAD concluded that there were reasonable grounds to believe that both the BNP and the JEI were organizations that engage in terrorism as referred to in paragraph 34(1)(c) of the IRPA. The IAD further concluded that the Applicant is a person described in paragraph 34(1)(f) of the IRPA as he was a member of the JEI, which through its membership by association and alliance with the BNP, is an organisation that engages in terrorism per paragraph 34(1)(c) of the IRPA. The IAD did not find it necessary to make a determination on the question of whether the JEI is an organization engaged in the subversion by force of any government as per paragraph 34(1)(b) of the IRPA; as such, only terrorism per paragraph 34(1)(c) of the IRPA is before this Court.

[3] The Applicant submits that the IAD erred in concluding that the Applicant was inadmissible to Canada for the following reasons: (i) nowhere in the Decision does the IAD conclude that the BNP and JEI had the requisite intent to cause death or serious bodily harm as required by the definition of terrorism defined by the Supreme Court decision of *Suresh v Canada*, [2002] 1 SCC 1[*Suresh*]; (ii) the presence of acts of violence and knowledge of such violence on the part of the BNP and JEI is insufficient to render the Applicant inadmissible; and (iii) the Decision does not refer to any specific evidence to conclude the JEI is an organisation

engaged in terrorism and/or what evidence existed were all from local media resources in Bangladesh (not recognized in international sources) that make them less reliable.

[4] The Respondent submits that the IAD: (i) correctly identified, understood, and applied the test in *Suresh* when determining there were reasonable grounds to believe the activities described in the evidence of causing terror and intimidating the general population, and consequently, could reach the threshold of the definition of "terrorism" per paragraphs 34(1)(c) and (f) of the IRPA, and as defined in *Suresh*; (ii) correctly found there was an alliance between the BNP and JEI organizations for carrying out acts with the intent to kill or to seriously injure in order to ensure the success of the hartals, with the JEI being an active participant in the actions of the BNP alliance; and (iii) correctly refers to specific evidence to conclude the JEI was part of an alliance with BNP for carrying out hartal activities, thereby engaged in terrorism, and this evidence included articles from international media sources that are reliable.

[5] Having considered the record and the parties' submissions, as well as the applicable law, I am persuaded that the IAD's Decision is unreasonable. For the reasons that follow, and despite the able submissions of counsel for the Respondent, this application for judicial review is granted.

II. Issues and Standard of Review

[6] The issue in the present case is whether the IAD reasonably determined that the Applicant is inadmissible to Canada by virtue of paragraph 34(1)(f) of the IRPA. The Respondent breaks the issue down into two sub-issues, namely:

i. Did the JEI associate or form an alliance with the BNP?

ii. Did the BNP-JEI alliance, in the context of hartals, engage in terrorism pursuant to paragraph 34(1)(c) of the IRPA, as defined in *Suresh* as any "act intended to cause death or serious bodily injury to a civilian"?

[7] I agree that these two sub-issues appropriately capture the issues in the present matter.

[8] The parties agree that the applicable standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov*, at para 85). The starting point is the reasons provided by the decision maker (*Vavilov*, at para 84). The reviewing court must read the reasons holistically and contextually, and in conjunction with the record that was before the decision maker (*Vavilov*, at paras 91, 97, and 103). The Court's review considers both the reasoning process and the outcome (*Vavilov*, at paras 83, 86). Reasonableness is a deferential, but robust, standard of review (*Vavilov*, at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov*, at para 125).

III. Analysis

[9] It is agreed between the parties that the IAD referenced the proper definition of terrorism as set out in *Suresh*. In *Suresh*, the Supreme Court defined terrorism as follows:

> [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". 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.
>
> (*Suresh*, at para 98)

[10] Where the parties differ in their views is on the IAD's application of this definition, particularly concerning the intent to cause death or serious bodily injury. The Applicant submits that the IAD did not properly apply the test, in particular in relation to the issue of intention. The Applicant pleads that the jurisprudence has evolved and that focusing on violence and knowledge of the violence is insufficient to demonstrate intent. It must be clear that the intention was to cause serious injury or death. The Applicant relies on a number of recent judgments of the Federal Court, including *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 [*Rana*], that held:

> [65] … However, hartals and blockades are a form of advocacy, protest, dissent or stoppage of work. Advocacy, protest, dissent or stoppage of work that intentionally causes serious interference with or serious disruption to essential services, facilities or systems **is**

> **specifically excluded from what is meant by "terrorist activity", even if those actions are undertaken to intimidate the public with regard to its security (including economic security) or to compel a government to act or refrain from acting in a certain way. This exclusion is subject to a single exception:** advocacy, protest, dissent or stoppage of work which intentionally causes serious interference with or serious disruption to essential services, facilities or systems can constitute terrorist activity if it is also intended 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 or any segment of the public. **Absent at least one of these specific intentions**, advocacy, protest, dissent or stoppage of work **cannot constitute terrorist activity**, even if it intentionally causes serious interference with or serious disruption of essential services, facilities or systems, and **even if it is undertaken to intimidate the public or to cause a government to act or refrain from acting in a certain way**…
>
> (*Rana* at para 65, our emphasis)

[11] The Applicant also relies on cases like *Islam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 108 [*Islam*], which similarly addresses these concerns:

> [20] In this case, it is clear that political parties in Bangladesh, including the BNP, use hartals and that these often lead to violence. However, contrary to the member's conclusion at paragraph 82 of his decision, the mere fact that innocent children or bystanders are victims of indiscriminate violence is not sufficient to conclude that a group is engaged in terrorist activity. **The group must have the intention to cause death or serious bodily harm.**
>
> [21] At paragraphs 85 and 86 of his decision, the member makes the same error as the ID made in [*Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912*]*. **The member conflates intent with wilful blindness and knowledge. He finds it implausible that the BNP did not intend to cause death or serious bodily harm because it should have known that the hartals would result in violence.** However, **the test is not one of wilful blindness or knowledge, but rather one of intention.**
>
> (*Islam* at paras 20-21, our emphasis)

[12] The Respondent submits that the IAD understood and applied the proper test in both its conclusions that BNP and JEI, in the context of their hartals activities, are organizations that engage in terrorism. In this case, the IAD concluded at paragraph 20 of the Decision that the Immigration Division [ID] was correct at paragraphs 57 and 58 of its own reasons when finding that the activities described in the evidence reached the threshold of causing terror and intimidating the general population; and consequently, these activities could reach the threshold of the definition of terrorism in *Suresh*. The Respondent submits that throwing bombs at passenger-filled vehicles and derailing trains shows intent to cause death and serious bodily harm.

[13] The Court reproduces below the key paragraphs 15, 16 and 20 of the IAD Decision and its relevant headings, as well as the referenced paragraphs 23 of *Alam v Canada (Citizenship and Immigration*, 2018 FC 922 [*Alam*] and paragraphs 57 and 58 of the ID decision, to which the IAD refers in making its Decision:

> **Is the Bangladesh Nationalist Party (BNP) an organization that engages in terrorism per paragraph 34(1)(c) of the IRPA?**
>
> (…)
>
> [15] The [Applicant] submitted that these findings are flawed. The BNP has often used hartals, a form of general strike, to advance its positions. The fact that the hartals have often been violent is not disputed. However, the [Applicant] argues that the hartals are acts of advocacy and that there was never an intent by the BNP to engage in violence. The [Applicant] submits that findings that hartals are terrorist activities due to their causal connection with acts of violence are incorrect.
>
> [16] I am not persuaded by the [Applicant]'s arguments. **I am bound by the decisions of the Federal Court which has repeatedly found that there is a causal connection between the BNP's call for hartals and the related acts of violence. This is best summed up in the case of *Alam* where the court found:**

> 23. **In the present case, the immigration officer made an explicit finding that the BNP had engaged in activities that constitute terrorism.** These included violent protests, rallies, bombings and beatings. **The activities had a political purpose and were intended to intimidate political opponents and innocent civilians alike.** They were directed and organized by the BNP itself, not by rogue elements.

Are the ICS and JEI organizations that engage in terrorism per paragraph 34(1)(c) of the IRPA?

(…)

[20] The Appellant provided numerous articles at the ID which show that the JEI was engaged in various instances of extreme violence over the past few decades in Bangladesh. **The ID concluded that some of these activities reached the threshold of causing terror and intimidating the general population, and consequently they reached the threshold of the definition of terrorism. [11] While I am not bound by the ID' s decision, I concur with this particular finding.**

11 Decision of ID no. 0018-C0-00418, at paras. 57-58:

> [57] The tribunal has carefully considered the documentary evidence of both parties, and finds the following excerpts submitted by the Minister to be particularly pertinent:
>
> (reproduces excerpts from Exhibits C-17, C-18, C-21, C-26, C-30, C-38, and C-47)
>
> [58] As appears from the documentary evidence, the Jamaat has engaged in extreme acts of violence over the past few decades in Bangladesh, for a variety of religious, political and non-political reasons, depending on the time period. **Some of these activities could reach the threshold of causing terror and intimidating the general population and consequently could reach the threshold of the definition of "terrorism".** (…)

(Our emphasis)

(1) "I am bound by the decisions of the Federal Court"

[14] As to the IAD's conclusion that he is bound by the Federal Court's decisions, this Court has rendered several decisions that indicate the Supreme Court's element of intent to cause death or bodily harm is required. Decisions like *Alam*, which the IAD suggested they are bound by on findings of fact, are conducting the fact-specific analysis required by the *Suresh* test, and are not to be considered binding findings of fact but merely the case-specific application of the *Suresh* test. As the Respondent points out, each case considering the BNP and associated organizations is entirely fact-based and has a relatively unique outcome, making them appear at surface level to be at odds with one another. This explains why there are no certified questions in such cases and why the ID and IAD decisions themselves are, according to the Respondent, "all over the place."

[15] Justice Rochester (then of this Court) recently indicated in *Rahman v Canada (Citizenship and Immigration)*, 2023 FC 1695 [*Rahman*], in agreeing with the Respondent that there are not two separate streams of Federal Court cases on this issue, the different outcomes are the result of the case-specific analyses concerning organizations engaging in terrorism and subversion by force. Justice Rochester indicated each particular case is "decided on the basis of [each case's] particular record, the findings of fact made in the impugned decision, and the reasons given by the administrative decision maker" (*Rahman*, at para 12, citing *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145, at para 26; *Rahaman v Canada (Citizenship and Immigration)*, 2019 FC 947, at para 10; *Haque v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 847, at para 67; *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38, at para 30). Justice Rochester went on to explain this phenomenon:

> [12] … In the context of a reasonableness review, differing outcomes ought to be expected given that this Court's decisions are based on the aforementioned factors. The decisions of this Court are

> not, nor should they be, characterized as broad proclamations on the status of the BNP that bind future decisions.
>
> (*Rahman*, at para 12, citation omitted).

[16] As Justice Rochester illustrated, the fact-specific nature of this analysis based on the record in each case means individual Federal Court decisions on the status of the BNP as it relates to each individual claimant cannot be characterized as broad and inconsistent proclamations on the BNP's status going forward. Even the Respondent in its argumentation at the hearing specified to the Court that the BNP is not a terrorist organisation generally but only when it is engaged with its hartal activities. The role of the ID and IAD as triers of fact in matters such as these necessitate that they cannot simply defer findings of fact to other bodies, even the Federal Court, when it is their own role to make the findings of fact based on the evidence before them.

[17] Even if it was reasonable for the IAD to generally rely upon a single Federal Court decision, it is inappropriate in this fact-and-law case given the fact-specific nature of the analysis required. As such, it was unreasonable for the IAD to merely cite *Alam* and defer its role as a trier of fact to a finding of the Court with different facts and a different record without drawing the necessary parallels and justification for its decision given the facts and evidence between this case and *Alam* were not completely identical. This is particularly problematic given the IAD only cited paragraph 23 of *Alam*, referencing the Court's statement that the BNP in that case "intended to intimidate political opponents and innocent civilians alike." In isolation, this does not meet the Supreme Court's required element of intent to cause death or serious bodily harm. The Supreme Court was clear that the purpose to intimidate is one of the criterion, separate and

apart from the intent to cause death or serious bodily harm criterion (*Suresh*, at para 98). This second criterion established by the Supreme Court is missing from the paragraph 23 quote of *Alam* reproduced by the IAD in its Decision. The ID, IAD, and this Court are all ultimately bound by the Supreme Court to follow the *Suresh* test and establish these criteria from the record, and the IAD in this case has failed to establish the criterion of intent in their deferral to *Alam*.

(2) "causal connection between BNP's call for hartals and the related acts of violence"

[18] The Respondent argues that the hartals, or violent strikes, are incited and supported by the BNP-JEI alliance. The Respondent argues that, while the BNP is a legitimate political party, when it engages in hartals as described in the chapter on *The Anatomy of Hartals: How to Stage a Hartal* in the United Nations Development Programme Report entitled *Beyond Hartals: Towards Democratic Dialogue in Bangladesh* (UN Report), the BNP engages in terrorism because the violence leading to death and serious injury went "part and parcel" with their activities.

[19] The Respondent refers to the various stages of a hartal: the preparation (members of the BNP Steering Committee declaring a hartal, followed by armed cadres being present at rallies and processions to instill an element of fear and apprehension among the general student boy and citizens by letting off cocktail explosives), implementation (violent activities include setting off bomb explosions, setting buses on fire), and enforcement of violent hartals (including hands for hire that will throw bombs, hand grenade and hand bombs and firearms and ammunition being

the tools of hartals). The Respondent also argues that JEI is part of the BNP led alliance, with JEI actually suggesting some violent activity and being particularly violent in the hartals.

[20] In deferring to the Federal Court on findings of fact, the IAD stated "I am bound by the decisions of the Federal Court which has repeatedly found that there is a casual connection between the BNP's call for hartals and the related acts of violence." Separate from the improper deferral on findings of fact in cases differing from the one before them, simply citing causal connection, as the IAD did in this case, is not enough. This language is very similar, if not identical, to the language of the decision maker in *Rana*, where the decision maker found that the BNP's hartals and blockades fall within the definition of "terrorist activity" simply because there was a causal connection between them and acts of violence (*Rana*, at para 66). As Justice Norris stated in *Rana*:

> [66] (…) Intending to do these types of harm is an essential element of the *Criminal Code* definition [of terrorist activity]. 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 [intent].
>
> (*Rana*, at para 66).

[21] I agree with the assessment of Justice Norris. Strictly within the confines of considering whether an individual or organization has engaged in terrorism under IRPA, the very essence of terrorism requires intent. A causal connection may lead a trier of fact to discover the intent, but the connection is not, in and of itself, intent to engage in terrorist activities. As the triers of fact, it is the role of the ID and IAD to go beyond establishing connections to identify the intent behind the alleged activities. The IAD's failure to do so was an unreasonable and serious error.

[22] The Applicant submits that the evidence referred to by the IAD does not prove that the JEI leaders' intent in calling hartals in the name of the party was to cause death or serious bodily harm to the population, even if they knew such violence would ensue by calling said hartals. Conversely, the Respondent submits that the violent incidents captured within the record are sufficient in and of themselves to establish intent, and continue on to make the same mistake as the IAD made. The Respondent cites that the IAD itself cited with approval the ID's determination that the activities described in the Respondent's materials "reached the threshold of causing terror and intimidating the general population and, consequently, could reach the threshold of the definition of « terrorism » in Suresh." With respect, this circle of citation misses the point: the IAD fails to include at least *some* substantive discussion or references to evidence in the record on the key element of intent. I must agree with the Applicant that one cannot infer the intent to cause death or serious bodily harm to the population, nor can the Court go picking through the record (which I have spent much time going over) to justify the Decision when the IAD did not justify it themselves.

[23] In Justice McHaffie's case of *Chowdhury v Canada (Citizenship and Immigration)*, 2022 FC 311, he at least had findings of intent from the IAD to work with, which are lacking in the IAD's Decision before me. Since there were findings of intent in that case, Justice McHaffie was able to review the IAD's analysis and conclude that, in his particular case, those findings were unreasonable. I am unable to even get that far and conduct an analysis of intent on judicial review, because the IAD made no real findings or reasons on the element of intent for me to analyze.

[24] The Respondent submits that I should follow Justice Rochester's finding in *Rahman* that, despite the fact that the IAD did not specifically lay out the intent, their decision was not unreasonable because the acts themselves are sufficient to illustrate intent. *Rahman* can be distinguished from this case. In *Rahman*, the acts were reasonably found to be sufficient to illustrate intent because they were established by the IAD's findings of fact based on the record before them:

> [20] Having carefully considered **the language of the Decision, the incidents to which the IAD refers, and the record before the IAD**, I am not persuaded that it was unreasonable for the IAD to find that the BNP engages, has engaged in, or will engage in acts of terrorism. **The IAD traced the history and inevitability of violence during hartals**; the implication of the senior leadership of the BNP, youth members and armed cadres; the numerous examples of violence; the manner in which it was organized and perpetrated; and the resulting deaths and injuries. **The IAD repeatedly noted that it was satisfied that the BNP had the specific intent to cause death or serious bodily harm**, describing activities such as setting fire to buses with people inside; rape; the use of firearms, grenades and petrol bombs; firebombing buses of civilians; kidnappings and murder. **The IAD found that the senior leaders of the BNP organized and used armed cadres to violently enforce the hartals knowing that it will lead to death and serious bodily harm to innocent people**.
>
> [21] I agree with the Applicant that simply referring to violence is not enough. **In the present case, however, the IAD's reasoning and its factual findings demonstrate that it turned its mind to the mental element required for a finding that the BNP specifically intended to cause bodily harm and death**. I find the IAD properly applied the definition of terrorism in *Suresh* and **the resulting findings are internally coherent and justified on the record**.
>
> (*Rahman* at paras 20-21, our emphasis)

[25] In this case, the IAD did not make any such findings on the intent of either BNP or JEI to cause death or serious bodily harm, and there is nothing in the Decision that suggests the IAD

turned its mind to consider this required mental element based on the record before them. While the Respondent submits, albeit with able submissions, that the IAD's analysis of intent should be understood as implied or implicit by the Court, the only suggestion of their awareness of the requirement of intent was in the IAD's total and improper deferral to the Federal Court, and this improper deferral permeates throughout the rest of their findings.

IV. Conclusion

[26] For the foregoing reasons, I conclude that the Decision does not meet the standard of reasonableness. On judicial review, the role of this court "is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves", not to re-litigate the tribunal's hearing or decide it for ourselves (*Vavilov*, at para 83, emphasis in original). This application for judicial review is therefore granted. No serious question of general importance for certification was proposed by the parties and I agree that no such question arises.

JUDGMENT in IMM-7074-22

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is granted;
2. The matter is remitted back to the Immigration Appeal Division for reconsideration by a differently constituted panel; and
3. There is no question for certification.

"Ekaterina Tsimberis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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