Federal Court  Cour fédérale

Date: 20240923

Docket: IMM-8498-23

Citation: 2024 FC 1489

Ottawa, Ontario, September 23, 2024

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MD MILON TALUKDER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision of the Immigration Division [ID] under s 45 of the *Immigration and Refugee Protection Act*, SC 2001 [*IRPA*], c 27, dated June 8, 2023 [Decision]. The ID found the applicant inadmissible to Canada on security grounds pursuant to s 34(1)(f) as it relates to s 34(1)(c) of *IRPA*, finding he was a member of the Bangladesh Nationalist Party [BNP]. The ID found reasonable grounds to believe the BNP was

an organization that is engaging, has engaged or will engage in acts of terrorism per s 34(1)(c) of *IRPA*.

[2] In my respectful view the Decision under review is reasonable. Therefore this application will be dismissed. However, the Court considers this to be a proper case to certify a question of general importance for consideration by the Federal Court of Appeal.

II. Facts

[3] The ID summarized the Applicant's admissions of fact, which are not disputed:

- [The Applicant] was born on July 6, 1987, and is a citizen of Bangladesh.
- He is neither a permanent resident of Canada, nor a Canadian citizen.
- He had been marginally associated with the BNP Student Wing (Bangladesh Jatiobadi Chatra Dal [JCD]) in 2004 when he himself was a student at the Jajira Mohor Ali institution and was living with his aunt in a nearby village, but it was on a casual, sporadic, basis.
- He had helped in the 2005 election campaign, by encouraging people to vote.
- He was attacked and withdrew from school and went to live with his parents in Dhaka.
- On July 6, 2009, he became a member of the BNP… [Jatiotabadi Jubo Dal [JD]] (BNP Youth Wing) in a subdivision and was appointed the position of treasurer, meaning that he was the financial secretary - a post he maintained until February 15, 2012.
- In this capacity he collected money but did not attend BNP Youth Wing meetings.

- He resigned from his post because he had made enemies and there had been a plot to kill him and a false case made against him.
- After his resignation, he was not involved in any type of activities.
- He had never been told, during his membership or association with the BNP to commit or encourage others to commit acts of violence.
- According to him, hartals are called for so that people's civil rights are heard, and anyone can participate.
- According to him, the BNP does not have a military wing.
- According to him, the BNP never supplies its supporters with weapons.

[4] However, as outlined further below, the ID found he was not credible and rejected his claim he ceased to be a member of the BNP in 2012:

> [7] While the tribunal found Mr. Talukder's testimony to be generally credible, one <u>important exception</u> must be noted: when his membership in the BNP ceased…
>
> [Emphasis added]

[5] The Respondent did not allege the Applicant was complicit in acts of violence carried out in the course of hartals called for by the BNP.

[6] The Applicant alleges he was physically attacked by AL supporters on several occasions: 1) in 2005, he was attacked while on the way home and stabbed; 2) in 2013, he was attacked in his own home and strangled with a scarf, and soon afterward fled to India; 3) in 2015, after returning to Bangladesh, he was again attacked in his own home and beaten; 4) in July 2016, he

was attacked on the street, stabbed several times, and left on the side of the road. Each incident required treatment at the hospital, the latter of which took 7 days.

[7] The Applicant claims he was also targeted by members of the AL through a fraudulent lawsuit in 2011 and harassment of his siblings, fraudulent charges made against him, his father, and several others after reporting the 2013 attack to police, dropped in 2015, and fraudulent charges made against him in 2016 after attempting to report the 2016 attack to police.

[8] After the incidents in 2005 and 2011, the Applicant says he ceased his involvement with the JCD and JD, respectively, out of fear for his own and his family's safety. The Applicant claims his resignation as secretary in 2012 terminated his membership with the JD, and following his resignation he was not involved in any political activity.

[9] As noted above, the ID, having heard the Applicant testify and based on documentary evidence, did not believe the Applicant's assertion that he ceased to be a member of the BNP when he resigned as secretary in 2012.

[10] The Applicant claims he did not participate in or attend any demonstrations, protests, or hartals during his association and membership with the BNP, nor was he told at any time to commit or encourage others to commit acts of violence. He says he did not and does not condone violence of any kind, in any form.

[11] The Applicant says he fled to India in December 2018. He arrived in Montreal on January 25, 2020, on a fraudulent passport acquired in India. He then made a claim for refugee protection and disclosed to border officials that he had travelled to Canada on a fraudulent passport. He was detained and held in immigration detention until March 11, 2020.

[12] On March 6, 2020, a Canada Border Services Agency officer issued a report under s 44(1) of *IRPA* against the Applicant, finding there were reasonable grounds to believe the Applicant was inadmissible to Canada under ss 34(1)(f), (b), and (c) of *IRPA* for being a member of the BNP. In brief, the CBSA officer had reasonable grounds to believe the BNP met the tests for engaging in acts of terrorism. The matter was referred to the ID for an admissibility hearing, which the ID held on June 13, 2022.

[13] The Applicant's refugee claim was suspended pending a decision on his admissibility. Given the ID's conclusion the Applicant was a member of the BNP and there were reasonable grounds to believe the BNP is engaging, has engaged, or will engage in acts of terrorism, and the dismissal of this judicial review, the Applicant may not proceed further with his refugee claim. However several other remedies may be available to him including an application to the Minister for relief under section 42.1 of *IRPA* as discussed below.

III. Decision under review

[14] The ID found the Applicant is inadmissible to Canada as described under s 34(1)(f) in reference to 34(1)(c) of *IRPA.* It found the Applicant was a member of the BNP and that the

BNP "had the requisite specific intent to engage in terrorism" when calling for hartals, including two deadly petrol bombings that took place in 2013 and 2015.

A. *Credibility findings*

[15] The ID found the Applicant's testimony to be "generally credible," but as noted the ID did not believe the Applicant's claim his membership in the BNP ceased in February 2012. This negative credibility finding — not disputed by the Applicant — was based on discrepancies between his testimony and the evidence: 1) the dates provided on his Schedule A eligibility form, which indicated "member inactive" from December 2012 until December 2018, and 2) his resignation letter dated February 15, 2012, which only stated he resigned from his post as Finance Secretary from the JD, not as a member.

[16] The ID concluded:

> [9] The tribunal rejects Mr. Talukder's explanations. While the tribunal accepts, as the letter states, and as he testified, that he had had personal and family difficulties that led to his decision to leave his post, the tribunal relies on the dates provided in his eligibility forms consistent with the jurisprudence that the first presentation of facts provided is more reliable than subsequent versions: *Ishaku v. Canada*.[1] The tribunal finds that the inconsistency was an unconvincing attempt to diminish his BNP profile that lacked credibility.
>
> [10] The tribunal notes that Mr. Talukder's counsel did not provide explicit arguments to refute the inconsistency. She simply repeated the dates that he had provided in his Schedule A form. While Mr. Talukder also swore in an affidavit signed ten days prior to the hearing that he had resigned from the BNP in 2012 at C-1 on p. 2 (without providing a specific date or month), counsel made no reference to this document. She restricted herself to the question of whether the BNP as an organization engaged in terrorism. Furthermore, counsel made no arguments as to whether temporal

> considerations might apply within the assessment of Mr. Talukder's period of membership.
>
> [Emphasis added]

[17] In this connection the ID found as a fact (at paragraph 50 of its Reasons) that the Applicant's "tenure, albeit as an inactive member clearly included the 2012 – 2015 period, to which the bulk of the analysis in this decision is devoted." That is, when hartals were characterized by particular violence.

B. *Documentary evidence*

[18] The ID found the considerable objective country condition documentary evidence submitted by the Respondent Minister to be credible and trustworthy, noting "[t]hey are from respected sources such as Amnesty International, Human Rights Watch, International Crisis Group and the United Nations and are well researched." The ID cites several pages of specifically relevant excerpts, and summarizes this evidence:

- Bangladesh is a formal democracy but has suffered from the legacies of authoritarianism.
- Two political parties the Awami League and the BNP have dominated politics for decades often engulfed in bitter rivalry.
- Both are legitimate, constituted political parties.
- The BNP was the ruling party in Bangladesh from 1991 to 1996 and in 2001 to 2006.
- The BNP structure is guided by the Standing Committee at the top, and there are executive committees elected by district committees, and the main leadership posts are the Party Head, Senior Vice Chairman, and the Secretary General.

- The perpetuation of hartals [general strikes] has been a major characteristic of the nation's political culture.

- The Caretaker system imposed in January 2007 was a response to major political parties instigating, supporting, or directly engaging in violence, through affiliated student groups that the leaders failed to disarm, condemn the violence, and rather showed tacit support as well as colluded with criminal gangs to attack opponents.

- Embittered by what was perceived as an illegitimate victory by the AL in the 2008 elections, exacerbated by the abolition of the Caretaker system in 2011, the BNP engaged in campaigns demanding its restoration ahead of the 2014 elections.

- The lead-up to the elections triggered the BNP leader Khaleda Zia to call nationwide hartals, blockades and boycotts which led to violent clashes between the BNP and opposition protestors, including the Jamaat -e-Islami (Jel) and the pro-government and security forces.

- The boycott of the January 2014 elections which gave the AL a sweeping victory led to further hartals being declared by the BNP leader with the goal of having fresh elections.

- The level of violence beginning in 2012 spanning to 2015 was on an unprecedented scale.

- A central feature of the hartals was a strategy of planning and preparation from the BNP Party Executive Steering Committee, and the execution involved the use of petrol bombs, grenades and small arms that led to injuries and deaths to the general population, in the context of enforcement measures taken against the public not to defy the strikes and blockade actions.

- The AL government and its security forces acted aggressively in an attempt to stop the hartals.

- The BNP leader blamed the AL and its state agents for failing to curb violence.

- The BNP leader denounced violence against the Hindu minority and ordinary citizens yet did not acknowledge the role played by her party or other members of the coalition.

- The violence that the hartals produced in the period of the election of January 2014 led to further hartals calls by the BNP leader a year later, and the same aggressive response by the AL government and its security forces which led to further violence and human rights violations.

C. *Membership in the BNP*

[19] In regard to the Applicant's membership in the BNP, the ID stated:

> [49] The Minister is not alleging that Mr. Talukder was himself personally engaged in any acts that would be considered acts of terrorism. Rather, the Minister is alleging that he would be a member of an organization, namely the BNP, that engages, has engaged, or will engage in acts of terrorism. Counsel for Mr. Talukder admitted that her client was a member of the BNP.
>
> [50] In support of Mr. Talukder's membership in the BNP, the tribunal found his testimony generally credible, with the exception of his unconvincing attempt to tie his resignation as treasurer of his BNP Youth Wing subdistrict post with his resignation from the party. As Mr. Talukder's counsel conceded membership and made no arguments whatsoever regarding the temporal considerations in the context of her client's membership, the tribunal finds it unnecessary to pursue this aspect, except to state that Mr. Talukder's tenure, albeit as an inactive member clearly included the 2012 – 2015 period, to which the bulk of the analysis in this decision is devoted.
>
> [51] While Mr. Talukder's work involved mainly the Youth Wing, the evidence is clear that it is an associate organization and an affiliate of the BNP and falls under its structural umbrella. (C-47, p. 435 – 436).
>
> [52] The tribunal therefore finds that there are sufficient credible and trustworthy elements present to establish Mr. Talukder's membership in the BNP.
>
> [Emphasis added]

D. *BNP's intention to engage in terrorism*

[20] Following and consistent with one of several competing and conflicting lines of jurisprudence in the Federal Court, the ID found the BNP as an organization had the "specific intent" to engage in terrorism. It did so based on the objective country condition documentary evidence described above, having applied the standard of "reasonable grounds to believe" per s 33 of *IRPA.*

[21] Much of the ID's analysis grappled with the definition of terrorism. The ID adopted 1) the definition of terrorism set out by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 98 [*Suresh*]), 2) the heightened *mens rea* (specific intent, imported from *R v Tatton,* 2015 SCC 33 [*Tatton*] as applied by Justice Little in *Opu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 650 [*Opu*]), and 3) the ID followed the analysis propounded by Justice Grammond in *MN v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 [*MN*]).

[22] The ID also noted competing and divergent approaches existing within this Court. Perhaps not surprisingly, counsel advised that similar competing approaches are also present within the ID.

[23] Following the specific intent approach imported from *Tatton* and applied in *Opu*, and using the "directing mind" framework outlined by Justice Grammond in *MN* paragraph 12, the ID applied a four-part test to determine whether the BNP had the specific intent to engage in

terrorism having regard to: 1) the circumstances in which violent acts resulting in death or serious bodily harm were committed; 2) the internal structure of the organization; 3) the degree of control exercised by the organization's leadership over its members; and 4) the organization's leadership's knowledge of the violent acts and public denunciation or approval of those acts. The ID found all four factors weighed in favour of a conclusion that the BNP had the requisite specific intent to engage in terrorism.

[24] Specifically, the ID found there were 1) "reasonable grounds to believe that the repeated calling of hartals by [BNP] Chairwoman Khaleda Zia in two distinct periods, produced repeated violence pursuant to the planning and implementation conceived from the leadership and executed by members and supporters," that 2) the BNP had a highly organized, hierarchical internal structure which 3) allowed leadership to channel and exercise "control over its members who carried out the party agenda and objectives," and 4) that "BNP leadership had knowledge that the strategy would lead to violence."

IV. Issues

[25] The Applicant asks:

1. Did the ID err in its interpretation of "specific intent" in finding that the BNP is an organization that engages, has engaged, or will engage in terrorism within the meaning of subsections 34(1)(f) and 34(1)(c) of *IRPA*?
2. Did the ID err in its interpretation of specific intent 34(1)(f) and 34(1)(c) of *IRPA* in light of Canada's international human rights obligations?
3. Did the ID err in failing to consider the serious consequences of its decision on the Applicant?

[26] The Respondent states the issues as:

1. Standard of Review
2. Statutory context
3. *Mason* and *Weldemariam*
4. The ID's approach to the BNP jurisprudence
5. Analysis of intent was reasonable

V. Standard of review and determining specific intent

A. *Standard of review*

[27] The parties agree the standard of review is reasonableness. With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will

> always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[28] The Supreme Court of Canada in *Vavilov* at paragraph 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

> [Emphasis added]

[29] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[30] In regard to reasonableness where there is a lack of unanimity within a tribunal (as here), the Respondent notes *Vavilov* at paragraphs 72 and 112:

> [72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the amici curiae — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which

accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see Domtar, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

…

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 Alta. L.R. 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[Emphasis added]

B. *Defining specific intent in criminal law*

[31] In my respectful view, it is well established that a party specific intent may be determined based on an inference drawn from the evidence that people intend the natural and probable consequences of their actions. This is a rule of evidence and a matter of common sense. This approach for specific intent is confirmed in *R v Seymour*, [1996] 2 SCR 252 [*Seymour*] of the Supreme Court of Canada per Cory J for a unanimous Court. Notably, *Seymour* was a case of specific intent — second degree murder. The Supreme Court put it this way at paragraph 19:

> [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result, it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.
>
> [Emphasis added]

[32] The mental element of specific intent was discussed again by the Supreme Court of Canada in its 2015 *Tatton* judgment. There, the Court concluded arson is a general intent offence. In the course of its reasons, per Moldaver J at paragraphs 27 and 39, the Court reiterated that from the common sense inference that a person intends the natural consequences of his or her actions, fact finders may typically infer intent from the performance of the act:

> [27] [In *R v Daviault*, 1994 CanLII 61 (SCC), [1994] 3 SCR 63] Justice Sopinka specified that general intent crimes involve "the minimal intent to do the act which constitutes the *actus reus*":

> *Daviault*, at p. 123. Because such crimes involve minimal thought and reasoning processes, even a high degree of intoxication short of automatism is unlikely to deprive the accused of the slight degree of mental acuity required to commit them (*ibid.*). In his view, this feature alone provided a sound policy basis for precluding reliance on the defence of intoxication (*ibid.*). Bearing in mind the common sense inference that a person intends the natural consequences of his or her actions, one can typically infer intent from the performance of the act...
>
> …
>
> [39] To summarize, specific intent offences contain a heightened mental element. That element may take the form of an ulterior purpose or it may entail actual knowledge of certain circumstances or consequences, where the knowledge is the product of more complex thought and reasoning processes. Alternatively, it may involve intent to bring about certain consequences, if the formation of that intent involves more complex thought and reasoning processes. General intent offences, on the other hand, require very little mental acuity.
>
> [Emphasis added]

VI. Relevant provisions

[33] Under s 45 of *IRPA*, admissibility hearings by the ID "shall" result in one of four outcomes, one being that a foreign national is not admissible leading to a deportation order (s 45(d)), as in this case.

[34] The ID relied on several sections of *IRPA*, most notably ss 33, 34(1)(c), 34(1)(f), and 173. Section 33 outlines the rules of interpretation for inadmissibility, while s 34(1)(c) and (f) outline the relevant grounds in this case:

Inadmissibility	**Interdictions de territoire**
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 :
…	…
(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).

[35] Meanwhile, s 173 outlines the rules of evidence in proceedings before the ID:

Proceedings	**Fonctionnement**
173 The Immigration Division, in any proceeding before it,	**173** Dans toute affaire dont elle est saisie, la Section de l'immigration :
…	…

(c) is not bound by any legal or technical rules of evidence; and	**c)** n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(d) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	**d)** peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

VII. Submissions of the parties

[36] The Applicant submits the Decision is unreasonable because it ignores what the Applicant describes as the prevailing interpretation of the "specific intent" requirement under ss 34(1)(f) and 34(1)(c) of *IRPA* in light of some Federal Court jurisprudence and international human rights obligations. I should note the alleged "prevailing" interpretation in the Federal Court is but one of several competing lines of authority within it. The Applicant also submits the Decision was unreasonable because it failed to consider the serious consequences on the Applicant.

[37] The Respondent submits the Decision is fact-driven, consistent with one line of contemporaneous (albeit competing) Federal Court jurisprudence, and is reasonable based on the record and constraining law. As will be seen below, I agree with the Respondent.

A. *Applicant's involvement in the BNP*

[38] The Applicant admits he is a former member of the BNP, but submits his membership in the JD ended in February 2012. The ID did not believe him and found his membership in BNP

continued after 2012, and specifically from 2012 to 2015. That is, the ID found the Applicant was a member of the BNP when hartals were markedly violent. The Applicant does not ask the Court to reverse this finding, and with respect, there is no basis to interfere with the ID's weighing and assessing of the evidence in this respect.

[39] The Respondent submits membership is not defined in *IRPA* but is to be given a broad interpretation, citing *Potesh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 26-32). I respectfully accept this oft-applied determination by the Federal Court of Appeal.

B. *Standard of proof*

[40] Per s 33 of *IRPA*, the standard of proof for inadmissibility is "reasonable grounds to believe." As found by the ID, this standard is refined by the Supreme Court of Canada's decision in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40:

> 114 … The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 3012 (FCA), [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16793 (FCA), [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship & Immigration)* (2000), 2000 CanLII 16300 (FC), 9 Imm. L.R. (3d) 61 (F.C.T.D.).

[41] As noted in s 173 of the *IRPA*, above, Parliament, in creating the ID, determined the ID is not bound by rules of evidence.

C. *Applicability of criminal law concepts in administrative law*

[42] As the Court recently concluded in *Makarov v Canada (Foreign Affairs)*, 2024 FC 1234 at paragraphs 64-5, judicial review is doctrinally different from and must not be transformed into civil or criminal proceedings before ordinary courts:

> [64] It is also the law that judicial review is doctrinally different from and must not be transformed into civil or criminal proceedings before ordinary courts. For example, in *Chshukina v Canada (Attorney General)*, 2016 FC 662, my colleague Justice Roy at paragraph 43 concludes: "[43] As has been said many times before, administrative proceedings must not be transformed into civil or criminal proceedings before ordinary courts." This encompasses the conclusion reached by the Federal Court of Appeal in *Turcotte v Commission de l'Assurance-Emploi du Canada*, (26 February 1999), Montréal A-186-98 (FCA) at paragraph 5, to the effect that this Court is not to import criminal law principles into administrative law:
>
> > [5] As Marceau J.A. said in The Attorney General of Canada and Cou Lai, [1] we are not in a criminal law context but in an administrative law one. It does not seem desirable to import the principles applicable to one into the other.
>
> [65] To the same effect is *Canada (Attorney General) v Lai*, (25 June 1998), Vancouver A-525-97, where the Federal Court of Appeal held:
>
> > [4] … <u>In any event, we are not in a criminal law context, but in an administrative law one.</u> The sanctions provided by the Act must be viewed not so much as punishment, but as a deterrent necessary to protect the whole scheme whose proper administration rests on the truthfulness of its beneficiaries. And the Commission's practices, like the one involved here, are established not as

> limitations of discretion, but as a means of determining guidelines that will assure some consistency. The position adopted by the umpire, if upheld, would limit the discretion to impose penalties conferred on the Commission by section 33 of the Act. That would defeat the will of Parliament.
>
> [Emphasis added]

[43] The distinction between criminal law and immigration law is also confirmed in the following jurisprudence, cited by the Applicant.

[44] In *AK v Canada (Citizenship and Immigration)*, 2018 FC 236 [*AK*], Mosely J states:

> [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.

[45] In *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 [*Rana*], Norris J states:

> [43] Parliament's decision to leave the term "terrorism" undefined in immigration legislation—first made in 1992, repeated in 2001, and not revisited since then—places a significant burden on immigration decision makers. Defining terrorism is "a notoriously difficult endeavour" yet Parliament offers decision makers no direct assistance. At the same time, Parliament has given those decision makers the important responsibility of determining whether someone is inadmissible because he or she has engaged in terrorism or is a member of an organization that engages in terrorism. It is understandable that a decision maker faced with this difficult task would look for help wherever it might be found. Since 2001, the *Criminal Code* is one such place. However, it should be apparent that while the *Criminal Code*

> definition of "terrorist activity" captures what the Supreme Court of Canada later judged in *Suresh* [at paragraph 98] to be the "essence of what the world understands by 'terrorism'", it also extends the reach of this concept well beyond the essential elements identified there. This brings me to the reasons why care is required when considering the criminal law concept of "terrorist activity" in an immigration context.

[46] In *MN*, Grammond J states:

> [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."

[47] In *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 [*Islam* 2019], Roy J states:

> [11] The applicant contends that in order to satisfy the *Act*, it must be shown that there are reasonable grounds to believe that the BNP engages, has engaged or will engage in terrorism. There is a need to establish that the BNP, perhaps through its leadership, intended for persons to be injured or killed when calling for civil disobedience, whether they be demonstrations, strikes or full hartals. The element of intent is required, whether one relies on the definition of "terrorist activity" at section 83.01 of the *Criminal Code*, R.S.C., 1985, c. C-46, or the definition of "terrorism" found in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*]: without it, it cannot be said that an organization is engaged in terrorism. The mere coincidence of acts of violence with hartals is not enough. Furthermore, the BNP does not quality as a "terrorist group" as the notion is defined in Section 83.01 because the definition of "terrorist group" requires that "one of its purposes and activities [is] facilitating or carrying out any terrorist activity" The BNP is a legitimate and recognized political party.

> …
>
> [14] … The first matter to be determined is the definition of "terrorism" for the purpose of the Act, given that it is not defined in the legislation. Accepting the guidance of this Court in cases such as *Ali v Canada (Citizenship and Immigration)*, 2017 FC 182; *Kamal v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 480; *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922, the ID finds that two definitions found in our law, at section 83.01 of the *Criminal Code* and in *Suresh*, should be considered. In fact, the ID quoted from the Court's decision in *Ali* that "the contours of each are so over-lapping that any distinction between the two, in my respectful opinion, has no meaningful significance. I take them to be interchangeable" (para 42).

[48] In *Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404, Grammond J states:

> [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*.

[49] In *Babu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 510, Pentney J states:

> [13] There is no dispute about the following aspects of the legal framework that governs the interpretation of this provision:
>
> A. The standard of "reasonable grounds to believe" requires more than mere suspicion, but less than proof on a balance of probabilities. "[R]easonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information…" (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 114, citing *Sabour v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16300 (FC), [2000] FCJ No 1615, 100 ACWS (3d) 642 (TD));
>
> B. The concept of membership in an organization must be given a broad interpretation, and does not require formal indications of membership or participation in acts of terrorism (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 27, 29; *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paras 22-27);
>
> C. The meaning of the term "terrorism" for the purposes of determining admissibility under paragraph 34(1)(f) of *IRPA* is set out in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*], at paragraph 98:
>
> > In our view, it may safely be concluded… that "terrorism" in s. 19 of [*IRPA*] 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… to do or to abstain from doing any act." This definition catches the essence of what the world understands by "terrorism."
>
> D. It is not, in itself, a reviewable error for the ID to also refer to the definition of "terrorist activity" set out in s 83.01 of the *Criminal Code*, R.S.C. 1985, c c-46 [*Criminal Code*], as long as the decision maker is alive to the significant distinctions between the criminal and immigration contexts, as well as the differences between the definition applicable to criminal conduct as opposed to that governing immigration inadmissibility (*Rana v Canada*

> *(Citizenship and Immigration)*, 2018 FC 1080 [*Rana*] at paras 43-50);
>
> E. There must be proof of a specific intention to cause death or serious injury for a finding of terrorism, whether the decision-maker applies the *Suresh* or the *Criminal Code* definition. This must be more than simply "an awareness of the likelihood that [such acts] will occur, or a recklessness or wilful blindness to their resulting from conduct, even violent conduct" *(Chowdhury v Canada (Citizenship and Immigration)*, 2022 FC 311 [*Chowdhury* 2022], at para 12; see also *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38 [*Miah*], at paras 34-35 and *Rana* at para 66).

D. *Definition of terrorism*

[50] As noted in the foregoing jurisprudence, "terrorism" is not defined in the *IRPA*. Both in the Federal Court and the ID, there are, as the ID put it, "competing" and "vying interpretations." These divergent and competing interpretations, said the ID, "show that there is no unanimous jurisprudential approach as to how to interpret the word 'terrorism' under *IRPA*."

[51] The ID went on to say, reasonably in my view, that "It is incumbent upon the tribunal to arrive at its own conclusion based on the particular set of facts and on the evidence presented before it, while keeping in mind the objectives of the Act which are to protect public health and safety and to maintain the security of Canadian society."

[52] The Supreme Court of Canada's definition of terrorism in *Suresh* has been applied by this Court numerous times: most recently in *Anam v Canada (Public Safety and Emergency* Preparedness*)*, 2024 FC 968 at paragraph 9 [per Ngo J]; *Hamid v Canada (Citizenship and Immigration)*, 2024 FC 967 at paragraph 11 [per Ngo J]; *Hossain v Canada (Citizenship and*

Immigration), 2024 FC 477 at paragraph 8 [per Aylen J]; and in *Rahman v Canada (Citizenship and Immigration)*, 2023 FC 1695 [*Rahman*, per Rochester J as she then was].

[53] In *Rahman*, Justice Rochester (as she then was) discusses the definition of terrorism in *Suresh*, and concludes:

> [16] It is common ground between the parties that the IAD referenced the proper definition of terrorism as set out in *Suresh* when assessing whether the BNP engaged in terrorism. 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.
>
> …
>
> [19] … 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 willful blindness to the fact that doing so would result in deaths and serious injuries – specific intent must be imputed to the BNP (*Saleheen* at para 41; *Miah* at paras 34-35). Specific intent may be found where a consequence is substantially certain to result from an act or omission, such as engaging "in acts or omissions

> while being substantially certain that violence would occur" (*Saleheen* at paras 42, 44).
>
> [Emphasis added]

E. *Standard of specific intent*

[54] The parties seem to agree (at least in this case) that a finding under ss 34(1)(f) and 34(1)(c) requires the establishment of a specific intent by the BNP to engage in terrorism. They do not agree on the meaning of or how the ID may or should approach the determination of specific intent.

[55] In my respectful view, the best starting point for approaching the application of specific intent, a well-known criminal law but also a general law of evidence concept, is found in the Supreme Court of Canada's decision in *Seymour* at paragraph 19 dealing specifically with specific intent:

> [19] When charging with respect to an offence which requires proof of a specific intent it will always be necessary to explain that, in determining the accused's state of mind at the time the offence was committed, jurors may draw the inference that sane and sober persons intend the natural and probable consequences of their actions. Common sense dictates that people are usually able to foresee the consequences of their actions. Therefore, if a person acts in a manner which is likely to produce a certain result it generally will be reasonable to infer that the person foresaw the probable consequences of the act. In other words, if a person acted so as to produce certain predictable consequences, it may be inferred that the person intended those consequences.
>
> [Emphasis added]

[56] The Supreme Court of Canada confirmed this approach to determining specific intent in 2015 in *Tatton*. Specific intent per *Tatton* and *Seymour* was applied by Justice Little in *Opu*. This is important because the ID adopted Justice Little's reasoning and applied it in paragraphs 70-74 of its Decision:

> [70] To better understand the issue of intent, Justice Little referred to the Supreme Court decision of *R. v. Tatton*[17]. At paragraph 42 of the decision, he stated:
>
> > (42) In criminal proceedings in Canada, criminal offences require proof of a mental element. The Supreme Court in *Tatton* confirmed that most are general intent offences: they require the proof of a mental element that is "straightforward" and involves "little mental acuity". Some other offences require proof of a heightened mental element that involves more complex thought and reasoning processes – acting with an ulterior purpose in mind or with an intention to being about certain consequences, or with actual knowledge of certain circumstances or consequences: *R v Tatton*, 2015 SCC 33, [2015] 2 SCR 574, at paras 35-38, 41 and 48. In *Tatton*, the Supreme Court stated:
> >
> > > [39] To summarize, specific intent offences contain a heightened mental element. That element may take the form of an ulterior purpose, or it may entail actual knowledge of certain circumstances or consequences, where the knowledge is the product of more complex thought and reasoning processes. Alternatively, it may involve intent to bring about certain consequences if the formation of that intent involves more complex thought and reasoning processes. General intent offences, on the other hand, require very little mental acuity.
>
> [71] The Court noted the distinction in *Tatton* between offences of general and specific intent, namely that in the latter case a heightened mental element involving a more nuanced and complex reasoning process such as an ulterior purpose or knowledge of certain circumstances or consequences was necessary, as opposed

to the former, more limited in scope, did not require this higher threshold. Importing this distinction to the analysis made by the IAD, he reasoned,

> [56] Second, the IAD's findings were consistent with the substantive requirements in *Tatton*. The IAD found that violence by BNP supporters was an intended part of the planning, execution and enforcement of the *hartal* and blockade action, including with bombs and grenades, which led to serious bodily injury or death to members of the general public. Its factual findings, in particular concerning *hartal* planning, implementation and enforcement, and the continued calls for *hartal* after deaths and serious injuries had already occurred, demonstrate that the IAD turned its mind to and concluded that the BNP intentionally engaged in acts involving a heightened mental element: as *Tatton* described, intent or knowledge based on a more complex thought and reasoning processes.
>
> [57] Third, the IAD expressly made important findings related to calls for *hartals* and blockages that this Court has concluded were reasonable to support specific intent in prior cases. The IAD held, as of the lead-up to the 2014 elections:
>
> > a) the call for *hartal* in contemporary Bangladeshi politics had become synonymous with a call to violence, where violence was intended to intimidate the public into respecting the *hartals* and to obtain the political goals of the BNP;
> >
> > b) *hartal* violence routinely occurred and caused death and serious injury to those involved; and
> >
> > c) the call for *hartal* was also synonymous with the likely death or serious injury of civilians and was part of the chaos the BNP was trying to create.

[72] The tribunal finds that the facts of *Opu*, namely, two central reports upon which critical findings of fact were based, and the analysis of Justice Little importing the framework from *Tatton* are

> all elements that are equally relevant and applicable in the analysis of the present case.
>
> [73] The heightened specific intent is borne out in C-6 cited herein setting out the calculated planning, preparation and the execution of the hartals and strikes and transportation stoppages in the context of the unprecedented level of violence from the 2013 to 2015 period. The tribunal also finds that within the planning and implementation of the hartals, the same documentary evidence demonstrates that the most egregious violence involved the enforcement of the hartals, both in the lead-up acts of intimidation by the student groups and during the implementation and execution by compelling conformity through built-in tactics, such as the fire bombing of buses filled with ordinary citizens 'defying' the operations by using transit for their daily activities. It is the ulterior purpose of the BNP, coming from the leadership and trickling down to the street-level clashes and the enforcers targeting the population through acts of bloodshed and death, to keep the hartals and blockades entrenched to further the BNP led coalition's political agenda of forcing concessions from the Awami League government.
>
> [74] The tribunal therefore finds that the refinement imported by Justice Little from *Tatton*, applied in *Opu*, satisfies the heightened *mens rea* to meet specific intent, in the case at bar.
>
> [Emphasis added]

[57] The Applicant submits the ID's findings and application of Justice Little's guidance on "specific intent," just set out, is unreasonable because it ignores what the Applicant describes as "the prevailing interpretation" by this Court of the "specific intent" requirement of ss 34(1)(f) and 34(1)(c) of *IRPA*. The Applicant is referring to one of several competing approaches.

[58] Contrary to what Justice Little concluded in *Opu,* the Applicant submits specific intent requires more than an awareness or knowledge on the part of BNP leadership of the likelihood that death or serious injury will occur by calling for a hartal. In doing so the Applicant submits he relies on *Musa v Canada (Public Safety and Emergency Preparedness),* 2022 FC 1172 [*Musa,*

per Lafrenière J] and *Badsha v Canada (Citizenship and Immigration)*, 2022 FC 1634 [*Badsha*, per Ahmed J].

[59] The Applicant submits that by equating the required specific intent with "knowledge of the probable consequences of the use of hartals," the ID's decision is out of step with "building consensus" among this Court that "the test is not one of willful blindness or knowledge, but rather one of intention" (*Islam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 108 at para 21).

[60] The Respondent submits the Applicant's argument fails to engage with both the record in the case at hand and the ID's actual chain of reasoning. The Respondent submits the ID acted reasonably because it was guided by a relevant and binding line of jurisprudence as set out by Justice Little in *Opu*.

[61] With respect, I disagree with the Applicant's submissions. In my respectful view the ID's reasons, just quoted, amply and in a detailed and careful manner, demonstrate it acted reasonably and within its remit to rely upon and apply Justice Little's reasoning and approach in *Opu* to the facts of the case at bar. I am unable to see how or why a federal decision-maker may be faulted for acting unreasonably when it follows legal authority determined by the Federal Court, as here.

[62] And while I appreciate there are competing approaches in this connection — both in the Federal Court and at the ID — in my respectful opinion, Justice Little's reasoning aligns with both jurisprudence from the Supreme Court of Canada and other decisions of the Federal Court

concerning specific intent, particularly that of Justice Rochester in *Rahman*. In my respectful view, it strikes a balance in the jurisprudence, especially when applied together with the four-part test for determining specific intent adopted by Justice Grammond in *MN*. With respect again, I venture to suggest this should be the preferred approach.

[63] I am also unable to accept the Applicant's core argument which, as I understand it, is that the ID acted unreasonably because it did not point to 'specific evidence' establishing the leadership of BNP 'directed' hartals to be carried out with murder and violence (that is, in the manner in which BNP leadership was certain hartals would be carried out as they had been carried out by BNP in the past).

[64] In this respect, Applicant's counsel orally submitted: "one way to establish specific intent… in line with *Mason* and *Weldemariam* is for a decision-maker… to point to… specific evidence the BNP has directed its members… to not just conduct violence… but direct violence with the intention of causing death and serious bodily harm… Yes [that would be hard to find]… but the Court has said we still need to point to something. We still need evidence," citing *Hossein v Canada (Citizenship and Immigration)*, 2021 FC 91.

[65] In my view, the ID after detailed and careful analysis, reasonably identified the linkage between BNP leadership and specific direction of killings and violence through construing specific intent per *Opu* per Little J, and carrying out the analysis suggested by Justice Grammond in *MN*.

[66] The ID's entire analysis warrants careful attention and is found at paragraphs 75 to 98 of the ID's reasons.

[67] On specific intent I refer most particularly to the ID's paragraphs 90 and following for a most reasonable analysis per *Vavilov*:

> [90] Considering the planning, the implementation, and the execution as described in [United Nations Development Programme (UNDP), *Beyond Hartals: Towards Democratic Dialogue in Bangladesh*, March 2005 [*Beyond Hartals*]], including built-in enforcement mechanisms of the hartal actions with an ulterior purpose constituting intent imported from *Tatton* by Justice Little in *Opu*, the tribunal finds that the BNP leadership had knowledge that the strategy would lead to violence. Moreover, the fact that renewed calls for hartals were made by [BNP] Chairwoman Zia a second time on the first anniversary of the boycotted 2014 election, further reinforces that the leadership had knowledge based on what had happened before.
>
> [91] As to the extent to which the BNP leadership denounced or approved of the violence, to some degree the same reasoning applies. [BBC Worldwide. "Bangladesh political violence death toll rises to 31", 23 January 2015] at p. 342 indicates that Chairwoman Zia denounced the violence, but blamed it on the AL government and its agents, despite, in the words of Human Rights Watch, that there were credible allegations that members of her own party were involved in the attacks ([Human Rights Watch. *Democracy in the Crossfire. Opposition Violence and Government Abuses in the 2014 Pre-and Post-Election Period in Bangladesh*, 2014] p. 208 [*Democracy in the Crossfire*]; [Human Rights Watch, *Bangladesh: End Cycle of Crime. Petrol Bomb Attacks and Security Force Abuses Filling Hospitals*, 6 February 2015], p. 351 [*End Cycle of Crime*]).
>
> [92] It is precisely within the analysis of the specific intent with an ulterior purpose, having witnessed and acknowledged the violence that had erupted in the period up to the boycotted elections, including the deadly petrol bomb attack that took place on November 25, 2013, graphically described in [*Democracy in the Crossfire*], that Chairwoman Zia again called a hartal on the anniversary of the election defeat with a similar violent outcome,

> including another deadly petrol bombing that took place on February 6, 2015 described in [*End Cycle of Crime*].
>
> [93] The tribunal acknowledges Justice Grammond in *Foisal* referred to Justice Roy's suggestion in *Islam*, of examining speeches, plans or codes to canvas whether explicit declarations as to an intent to cause serious injury or death are mentioned.
>
> [94] While the tribunal recognizes that no overt examples are found in the evidence, in *Opu*, this element was not determinative in Justice Little's analysis upholding the Immigration Appeal Division's decision finding the person concerned to be described under paragraph 34(1)(f) in relation to paragraph 34(1)(c).
>
> [95] Furthermore, the tribunal again notes at [Amnesty lnternational, *Bangladesh: Elections Present Risks and Opportunities for Human Rights*, 23 December 2008] at p. 125, that Amnesty International indicates, referring to the period in late 2006 leading to the declaration of the state of emergency, 'None of the political parties has condemned the violence carried out by its members. On the contrary, the leaders have shown tacit support for violent means, and at times have colluded with criminal gangs to attack their opponents.'
>
> [96] The tribunal finds that the built-in enforcement measures described in [*Beyond Hartals*], relied upon by the Immigration Appeal Division in *Opu*, intertwined with the ulterior purpose imported from *Tatton* provide a bridge that is evocative of the indicia suggested by Justice Roy, and equally finds application in the case at bar.
>
> [97] The tribunal finds that this factor weighs in favour of a conclusion that the BNP had the required intent.
>
> [98] The tribunal therefore finds that the BNP as an organization, had the requisite specific intent to engage in terrorism.
>
> [Exhibit numbers replaced by document citations]

[68] In my respectful view the ID acted reasonably in citing and following the methodology advanced by Justices Little in *Opu*, and Grammond in *MN*.

[69] With respect, there is certainly no basis upon which to insist that specific intent may only be established by proof of specific written or oral directions — such as speeches or orders — made by an organization's leadership. That, in my respectful view, is to set an unrealistically high bar that in my respectful view would almost certainly allow organizations' leaders to specifically intend and direct extreme and murderous violence and incite others to commit acts of terrorism – but with impunity. Moreover, this is no place for a one rule fits all approach. It must be left to the ID to reasonably assess the constraining evidence, which, and with respect, it did in this case.

F. *Non-refoulement*

[70] The Applicant also submits the Decision is unreasonable because it breaches the obligation of non-refoulement under the *United Nations Convention Relating to the Status of Refugees* [*Refugee Convention*]. The Applicant relies on *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*] and *Canada (Public Safety and Emergency Preparedness) v Weldemariam*, 2024 FCA 69 [*Weldemariam*], which mandate a narrow and constrained interpretation of "specific intent" under subsections s 34(1)(a) and 34(1)(e), and s 34(1)(c) of *IRPA* As discussed later, neither deal with s 34(1)(f) which is the applicable provision in the case at bar.

[71] I do not accept this argument. In my respectful view, *Mason* does not mean the *Refugee Convention* restricts Parliament's ability to establish domestic admissibility criteria for non-citizens seeking to enter or remain in Canada. That, with respect, would be a radical departure from the fundamental principles of immigration law.

[72] While the *Refugee Convention* may limit who may be removed from Canada, it does not determine who may be found inadmissible. In any event it is well established that the risk of *refoulement* is to be assessed *at the time of removal*, and not at the time of determining inadmissibility which may be years apart: *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paragraph 75; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 at paragraph 67.

[73] I also agree that Canada has numerous and significant international obligations to combat terrorism, including: *International Convention for the Suppression of the Financing of Terrorism*, 12 December 1999, UNTS 2178 at 197; *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, UNTS 2149 at 256; *International Convention against the Taking of Hostages*, 17 December 1979 UNTS 1316 at 205; *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]* (UNSC, 56th Sess, UN Doc S/RES/1373(2001) SC Res 1373); *Security Council Resolution 2322 (2016) [on threats to international peace and security caused by terrorist acts]*, UNSC, 2016, S/RES/2322; *Security Council Resolution 2178 (2014) [on addressing the growing issue of foreign terrorist fighters]*, (UNSC, 69th Sess, UN Doc S/RES/2178 (2014) SC Res 2178)), which form a crucial part of the interpretive context for the *IRPA* (*IRPA*, ss 3(1)(i) and 3(2)(h).

[74] Moreover I agree Canada has a critical and "genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security" as stated by the Supreme Court of Canada in *Suresh* at paragraph 58; see also *Pushpanathan v*

Canada (Minister of Citizenship and Immigration), 1998 CanLII 778 (SCC); *Zrig v Canada (Minister of Citizenship and Immigration* (CA), 2003 FCA 178 (CanLII) at paragraph 174, [2003] 3 FC 761.

[75] Quite properly, the Respondent further relies on the mandatory nature of the preamble of the United Nations *Declaration on Measures to Eliminate International Terrorism* (UNGA, 49th Sess, UN Doc A/RES/49/60 (1994) GA Res 49/60), which requires Canada to take appropriate measures, *before granting asylum*, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities:

> 5. States must also fulfil their obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism, in particular:
>
> > (a) To refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other states or their citizens;
> >
> > …
> >
> > (f) to take appropriate measures, <u>before granting asylum</u>, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in subparagraph (a) above;
>
> [Emphasis added]

G. *Impact on the Applicant*

[76] Finally, the Applicant submits the Decision is unreasonable because it fails to consider the serious consequences of this inadmissibility on the Applicant. The Applicant again relies on *Mason* and *Weldemariam* to argue that an inadmissibility finding results in the Applicant being placed on a path to removal to a country where he faces persecution, and that he is not adequately protected against *refoulement* by "safety valves" or processes available after such a finding.

[77] With respect, I am not persuaded. These submissions are both without merit and speculative. Contrary to the arguments of the Applicant, the Applicant has access to judicial review by this Court of the ID's inadmissibility decision. He is exercising that access here. He will also have the ability to appeal this Judgment to the Federal Court of Appeal (because a question of general importance will be certified), and he may further appeal from the Federal Court of Appeal to the Supreme Court of Canada (with leave).

[78] Moreover, the Applicant also has a statutory right to apply for Ministerial relief under s 42.1(1) of *IRPA*. Notably thereafter should he be unsuccessful, judicial review may be available along with the ability to seek a stay from this Court relating to any attempt to remove him pending final resolution of his legal challenges. The Applicant says it takes too long for section 42.1 decisions to be made, but with respect that is not relevant. I am told the Minister's powers are not delegated in this regard; it seems to me that is a matter for the Minister or Parliament to address.

[79] Moreover and in addition, the Applicant will almost certainly have access to a Pre-Removal Risk Assessment [PRRA] before being required to leave Canada. If a PRRA is unsuccessful he may seek leave to apply for judicial review from this Court, and pending that, if needed, he may apply to defer his removal and or to this Court for a stay. There may be other avenues open to him as advised by his experienced immigration counsel.

[80] And if the Applicant obtains permanent resident status, or Canadian citizenship, *refoulement* will likely be completely off the table, barring fraud or misrepresentation related to his application.

[81] The Applicant submits the *Vavilov* framework requires the ID's reasons to "reflect the stakes" and demonstrate it had considered the consequences of its Decision and that those consequences were justified in light of the facts and law (*Vavilov* at para 133). No one disagrees. The Applicant submits the ID's decision bears no trace of any consideration of the consequences of its decision on the Applicant, and only advises the Applicant of his right to judicial review.

[82] In this respect I note both *Mason* and *Weldemariam* were released after the Decision was rendered in June 2023.

[83] However and again with respect, in addition to the foregoing, I am not persuaded of this argument because, as the Respondent submits, s 34(1)(c) of the *IRPA* relates to terrorism, which is specific and conceptually distinguishable from the subparagraphs of s 34(1) at issue in *Mason* and *Weldemariam*, namely s 34(1)(e) and s 34(1)(a), respectively. These deal with engaging in

acts of violence that would or might endanger the lives or safety of persons in Canada (34(1)(e)), and engaging in an act of espionage that is against Canada or that is contrary to Canada's interests (s 34(1)(a)). I am not persuaded that lumping all three together is justified.

VIII. Conclusions

[84] For the foregoing reasons, this application will be dismissed.

[85] However a serious question of general importance will be certified pursuant to s 74(d) of *IRPA*.

IX. Certified question

[86] The Applicant proposes the following certified question pursuant to section 74(d) of the *IRPA*:

> What is the mental element required for a finding of "specific intent" under subsections 34(1)(f) and 34(1)(c) of the *IRPA*?

[87] The Respondent opposes certification of a question of general importance, relying on the reasons of my colleague Justice Phuong Ngo in *Hamid v Canada (Citizenship and Immigration)*, 2024 FC 967:

> [40] Certified questions have been considered but declined by this Court in other cases pertaining to membership in the BNP, on a number of grounds (*Foisal* at para 25; *Alam* at paras 38-46; *Chowdhury v Canada (Citizenship and Immigration)*, 2022 FC 311 at para 36). Furthermore, the questions that the Applicants seek to certify are overly broad, and the disposition of these types of questions are highly fact-specific. They do not meet the threshold for certification. Consequently, I decline to certify these questions.

[88] However and with respect, this case is different. The central issue in this proceeding has been the Applicant's request that the Court adopt and apply a competing legal test and approach than the one applied by the ID.

[89] Both parties agree, as do I, and as did the ID, that several competing and divergent legal tests and approaches to specific intent are being applied by this Court and the ID in relation to the critical linkage between calls by BNP leadership for hartals and the murderous violence unleashed thereafter on Bangladeshi authorities and its civilian population. This divergence is not justified and contrary to first principles of law, that similar cases be treated similarly. In my respectful opinion this conflict is worthy of consideration by a higher court, in this case the Federal Court of Appeal.

[90] Moreover, the competing divisions in the Federal Court are replicated in the ID, according to counsel for both parties.

[91] With respect, there is no longer any justification for not certifying a question of general importance on the basis that 'each case is factually unique and entails the ID's assessment on a case by case basis'. I (and other judges) have relied on this argument in declining to certify a question of general importance in cases like this; none has been certified to date.

[92] However, the Applicant filed Federal Court documentary evidence that established the records in many of these BNP cases are identical or nearly identical to that filed in the case at bar. In particular the records are virtually identical in this case and the following:

- *Rahman v Canada (Minister of Public Safety and Emergency Preparedness)*, 2024 FC 491 [*Rahman*] (IMM-7074-22)
- *Badsha v Canada (Citizenship and Immigration)*, 2022 FC 1634 [*Badsha*] (IMM-7804-21)
- *Musa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2022 FC 1172 [*Musa*] (IMM-6019-21)
- *Babu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 510 [*Babu*] (IMM-3426-20)
- *Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404 [*Foisal*] (IMM-3349-20)
- *Islam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 108 [*Islam* 2021] (IMM-701-19)
- *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 [*Islam* 2019] (IMM-5497-18)
- *MN v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 [*MN*] (IMM-4992-18)

[93] The Court thanks counsel for this information. It seems to me the ID decisions in these cases rely on virtually identical objective country condition evidence. As such, the records in these cases differ only in respect of the written and oral evidence of the claimants who will 1) deny membership in the organization (which is a successful defence but not relevant here), or 2) deny or minimizes their complicity and or temporality (which are also of little or no legal relevance in these cases, although addressing the ‘equities’ in one case or another).

[94] The fact that admissibility to Canada of individuals from Bangladesh may markedly differ from Officer to Officer or Judge to Judge is unsatisfactory. The Court accepts counsel’s indication that a large number of similarly situated past or present BNP members seek to come to Canada. The Court notes the BNP party has a long history and continues today and has held

officer; doubtless its membership is large. This unsatisfactory situation also applies to those from Bangladesh seeking refugee protection, or coming to Canada as temporary or permanent residents. In my view this situation undermines confidence and respect for the immigration system.

[95] In my respectful view, the existence of unresolved competing legal tests and approaches both in the Federal Court and the ID gives rise to a proper instance in which the Court may and should properly certify a question of general importance for consideration by the Federal Court of Appeal.

[96] After the hearing, the Respondent asked for leave to pose questions for certification after reviewing the Court's reasons. I decline this request because it is contrary to longstanding Federal Court of Appeal jurisprudence: see *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 (per Pelletier JA):

> [29] Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons. The judge, who has heard the case and has had the benefit of the best arguments of counsel on behalf of both parties, should be in a position to identify whether such a question arises on the facts of the case, without circulating draft reasons to counsel. Such a practice lends itself, as it did in this case, to a "laundry list" of questions, which may or may not meet the statutory test. In this case, none of them did.
>
> [Emphasis added]

[97] In all the circumstances the Court will certify the following question of general importance:

> To the extent an organization's "specific intent" is required to support findings under s 34(1)(c) and s 34(1)(f) of *IRPA* that the organization is engaging, has engaged, or will engage in acts of terrorism, is the legal and analytical approach applied by the Immigration Division in this case reasonable and if not must the Applicant's alternative proposal be followed?

JUDGMENT in IMM-8498-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no order as to costs.

3. The following question is certified:

To the extent an organization's "specific intent" is required to support findings under s 34(1)(c) and s 34(1)(f) of *IRPA* that the organization is engaging, has engaged, or will engage in acts of terrorism, is the legal and analytical approach applied by the Immigration Division in this case reasonable and if not must the Applicant's alternative proposal be followed?

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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