Federal Court  Cour fédérale

Date: 20180917

Docket: IMM-5226-17

Citation: 2018 FC 922

Ottawa, Ontario, September 17, 2018

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

SHAMSUL ALAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Shamsul Alam is a citizen of Bangladesh. He seeks judicial review of an immigration officer's decision to refuse his application for permanent residence. The officer found Mr. Alam inadmissible to Canada pursuant to s 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Mr. Alam was formerly a member of the Bangladesh National Party [BNP]. The immigration officer found there were reasonable grounds to believe the BNP is an organization that engages, has engaged, or will engage in acts of terrorism or subversion contrary to s 34(1)(f) of the IRPA.

[3] 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. They had a political purpose and were intended to intimidate opponents and innocent civilians alike. The activities were directed and organized by the BNP itself, not by rogue elements.

[4] Having regard to the function of judicial review and the deference owed by this Court to the immigration officer's expertise, I am satisfied the officer's conclusion that Mr. Alam is inadmissible pursuant to s 34(1)(f) was reasonable. The application for judicial review is dismissed.

II. Background

[5] The BNP and the Awami League [AL] are the two main political parties in Bangladesh. Mr. Alam admitted to being the "organizing secretary" for the student wing of the BNP from 1994 to 2013. He came to Canada on March 20, 2013, and claimed refugee status based on a risk of persecution arising from his prior involvement in the BNP.

[6] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] refused Mr. Alam's claim on July 4, 2013. However, on December 2, 2013, the Refugee Appeal Division of the IRB remitted the matter to the RPD for redetermination. The RPD subsequently found Mr. Alam to be a Convention refugee and a person in need of protection.

[7] On September 17, 2014, Mr. Alam applied for permanent residence as a protected person.

III. Decision under Review

[8] Mr. Alam's application for permanent residence was refused on November 29, 2017. The immigration officer found there were reasonable grounds to believe the BNP engages, has engaged or will engage in terrorism and/or subversion. According to public documents in the record, the BNP used general strikes (known as "hartals") and blockades as a means of coercion against the government. These often resulted in violence, property damage and disruption. The officer noted there is no temporal component to an analysis under s 34(1)(f) of the IRPA, and also considered the BNP's activities after Mr. Alam arrived in Canada.

IV. Issues

[9] The sole issue raised by this application for judicial review is whether the immigration officer's decision was reasonable. This question may be divided into the following sub-issues:

A. What is the standard of review?

B. Was the immigration officer's determination that the BNP is an organization described in s 34(1)(f) of the IRPA reasonably supported by the evidence?

C. Was the immigration officer's reliance on the definition of "terrorist activity" in the *Criminal Code*, RSC 1985, c C-46 reasonable?

D. Was the immigration officer's finding that there is no temporal component to the analysis under s 34(1)(f) of the IRPA reasonable?

E. Did the immigration officer unreasonably fail to consider Mr. Alam's particular role and involvement in the BNP?

[10] Mr. Alam also asks that a question be certified for appeal.

V. Analysis

A. *What is the standard of review?*

[11] A decision regarding inadmissibility pursuant to s 34(1) of the IRPA involves questions of mixed fact and law, and is subject to review by this Court against the standard of reasonableness (*SA v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 494 at paras 9-10 [*SA*]; *Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94 at para 17 [*Gazi*]). The Court will intervene only if the decision falls outside the "range of possible, acceptable

outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[12] The facts giving rise to inadmissibility must be established on the standard of "reasonable grounds to believe" (IRPA, s 33; *Gazi* at paras 21-22; *Mugesera v Canada (Citizenship and Immigration)*, 2005 SCC 40 at para 116 [*Mugesera*]). Reasonable grounds to believe require "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" (*Mugesera* at para 114).

[13] The question before the Court is not whether there were reasonable grounds to believe Mr. Alam was inadmissible pursuant to s 34(1)(f) of the IRPA. Rather, the question is whether the immigration officer's conclusion that there were reasonable grounds was itself reasonable (*Gutierrez v Canada (Citizenship and Immigration)*, 2013 FC 623 at para 22).

[14] An immigration officer is presumed to have expertise and sensitivity to the imperatives and nuances of the legislative scheme of the IRPA. The decision should therefore be afforded deference. A reviewing court should not re-weigh the evidence (*Khosa v Canada (Citizenship and Immigration)*, 2009 SCC 12 at paras 25, 59).

B. *Was the immigration's officer determination that the BNP is an organization described in s 34(1)(f) of the IRPA supported by the evidence?*

[15] Subsection 34(1) of the IRPA provides as follows:

Security	Sécurité
34(1) A permanent resident or	34 (1) Emportent interdiction

a foreign national is inadmissible on security grounds for	de territoire pour raison de sécurité les faits suivants :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;	b.1) se livrer à la subversion contre toute institution démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(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).

[16] Terrorism is not defined in the IRPA. In *Suresh v Canada (Citizenship and Immigration),* 2002 SCC 1 at paragraph 98 [*Suresh*], a case concerning judicial review of a danger opinion under the *Immigration Act*, R.S.C. 1985, c. I-2, the Supreme Court of Canada defined terrorism as follows:

> 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. […]"

[17] The definition of "terrorist activity" in s 83.01(1) of the *Criminal Code* is broader, and includes the following:

terrorist activity means	***activité terroriste***
[…]	[…]
(b) an act or omission, in or outside Canada,	b) soit un acte — action ou omission, commise au Canada ou à l'étranger :
(i) that is committed	(i) d'une part, commis à la fois :
(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and	(A) au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,
(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and	(B) en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,
(ii) that intentionally	
(A) causes death or serious bodily harm to a person by the use of violence,	

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state

(ii) d'autre part, qui intentionnellement, selon le cas :

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu

in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. (*activité terroriste*)	que sont exclus de la présente définition l'acte — action ou omission — commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international. (terrorist activity)

[18] According to Mr. Alam, the evidence before the immigration officer did not support a finding that hartals and blockades are acts of terrorism or subversion. Instead, they are "an inexorable part of the culture" and are commonly used in Bangladesh to articulate political interests. They are not intended to cause death or bodily injury to civilians, and they are not illegal. While violence may result from hartals, this does not mean the BNP sanctions violence, or that the violent actions of supporters may be ascribed to the group. Mr. Alam notes that in a confidential decision dated April 4, 2017, a member of the Immigration Division held that the BNP is not an organization described in s 34(1)(f) of the IRPA.

[19] Mr. Alam places considerable reliance on the recent decision of Justice Richard Mosley in *AK v Canada (Citizenship and Immigration)*, 2018 FC 236 [*AK*]. In *AK*, the applicant was involved with various BNP organizations between 1980 and May 2013. Justice Mosley found the immigration officer's determination that the applicant was inadmissible under s 34(1)(f) of the

IRPA to be unreasonable because the factual findings were hedged with qualifications, and there was no finding that calls for hartals were synonymous with calls to commit terrorist acts. Justice Mosley said the following at paragraph 41:

> I have considerable difficulty with the notion that a general strike called by a political party in an effort to force the party in power to take steps such as proroguing Parliament or convening by-elections, falls within the "essence of what the world understands by 'terrorism'". It is not an overstatement to suggest, as the Applicant has in these proceedings, that the Respondent's interpretation of the statute could capture political activities which, if carried out in Canada, would be protected under s 2 of the *Canadian Charter of Rights and Freedoms*, absent an intention to use violence to achieve the political ends.

[20] The absence of any finding by the immigration officer that the BNP's calls for hartals were synonymous with calls to commit terrorist acts was central to Justice Mosley's decision in *AK*. His broader point about *Charter*-protected speech in Canada is subject to the important qualification that this must be "absent an intention to use violence to achieve political ends".

[21] The immigration officer's decision was supported, *inter alia*, by the following evidence in the certified tribunal record:

(a) in 1994, the student wing of the BNP to which Mr. Alam belonged attacked an AL student group procession, causing injuries to 45 people including three police officers;

(b) in 2004, members of the BNP launched more than 24 grenades at a political rally, killing 20 and injuring 150;

(c) in 2006, Mr. Alam was injured in an intra-party BNP "clash";

(d) in April 2012, the BNP organized and enforced a hartal that paralyzed the country for three days;

(e) in December 2012, the BNP organized and enforced a hartal where homemade bombs were used in an effort to restore the caretaker government;

(f) Mr. Alam stated in his Basis of Claim form that he was asked by the BNP to work on the December 2012 protest and return of the caretaker government; and

(g) the National Security Screening Division found as follows:

> […] the BNP has engaged in activities that constitute acts of terrorism such as violent protests, rallies, bombings and beatings", and despite being politically motivated they have been carried out by both the BNP and the student wing against both political opponents and innocent civilians for intimidation, and such acts were "being directed and organized by the BNP itself and were not separate incidents committed by rogue members acting independently from the organization."

[22] Whether an immigration officer has reasonable grounds to believe the BNP is an organization that engages, has engaged or will engage in acts of terrorism depends on the factual record before the officer. Justice Mosley found in *AK* that the officer had made no explicit finding that the BNP's calls for hartals were synonymous with calls to commit terrorist acts. In *SA*, I upheld an officer's decision to find a former member of the BNP inadmissible based on the

factual conclusions reached in that case. Justice Henry Brown did the same in *Gazi* and, most recently, in *Kamal v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 480 at paragraphs 56 to 65 [*Kamal*].

[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.

[24] For the most part, Mr. Alam does not contest the reliability of the sources relied upon by the immigration officer. As previously noted, it is not the role of this Court to re-weigh the evidence. Having regard to the function of judicial review and the deference owed to the immigration officer's expertise, I am satisfied the officer's determination that the BNP is an organization described in s 34(1)(f) of the IRPA was reasonably supported by the evidence.

C. *Was the immigration officer's reliance on the definition of "terrorist activity" in the Criminal Code reasonable?*

[25] Mr. Alam says the immigration officer unreasonably relied on the expansive definition of terrorist activity in the *Criminal Code*, rather than the definition specifically developed in the immigration context by the Supreme Court of Canada in *Suresh*. He notes that economic disruption and interference with essential services are encompassed only by the *Criminal Code*

definition. In *AK*, Justice Mosley remarked at paragraph 39 that he thought it "more useful to begin with the decision of the Supreme Court of Canada in *Suresh*".

[26] In *Ali v Canada (Citizenship and Immigration)*, 2017 FC 182 at para 39 [*Ali*], Justice Brown rejected the argument that s 34(1)(f) of the IRPA should be interpreted only with reference to *Suresh*. The Supreme Court acknowledged in *Suresh* at paragraph 93 that it did not seek to define terrorism exhaustively, "a notoriously difficult endeavour", but would content itself with finding that the term provided a sufficient basis for adjudication and was not unconstitutionally vague. The definition provided was not exhaustive ("includes"), and the Supreme Court noted that Parliament was free to adopt a more detailed or different definition of terrorism. Justice Brown found at paragraph 42 of *Ali* that this is precisely what Parliament did when it enacted s 83.01 of the *Criminal Code*. He invoked the doctrine of *in pari materia* to support his conclusion that the definition of terrorist activity in s 83.01 of the *Criminal Code* informs the meaning of terrorism in s 34 of the IRPA (at para 44).

[27] In *Kamal*, Justice Brown observed at paragraph 54 that Parliament enacted s 83 of the *Criminal Code* and s 34(1)(c) of the IRPA immediately following the terrorist attacks against the United States of America on September 11, 2001. He was not persuaded that Parliament had enacted the two provisions virtually simultaneously in the expectation that they would be considered in isolation.

[28] I agree with Justice Brown. As I found in *SA*, it was open to the immigration officer to rely on the statutory definition of terrorist activity enacted by Parliament in the *Criminal Code*, as well as the one formulated by the Supreme Court of Canada in *Suresh*.

D. *Was the immigration officer's finding that there is no temporal component to the analysis required by s 34(1)(f) of the IRPA reasonable?*

[29] It is unclear how this argument assists Mr. Alam. There is no dispute that he was a member of the BNP during most of the time periods when the organization was found by the immigration officer to have engaged in terrorist activity. In any event, this Court has previously rejected the argument that there is a temporal component to the analysis required by s 34(1)(f). The following paragraphs are largely derived from my decision in *SA* (at paras 13 to 15).

[30] In *Anteer v Canada (Citizenship and Immigration)*, 2016 FC 232 at paragraphs 50 to 57, Justice Cecily Strickland confirmed that there is no temporal component to an analysis under s 34(1)(f) of the IRPA. The question was effectively resolved by the Federal Court of Appeal in *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274 at paragraph 3 [*Gebreab*]:

> It is not a requirement for inadmissibility under s. 34(1)(f) of the IRPA that the dates of an individual's membership correspond with the dates on which the organization committed acts of terrorism or subversion by force.

[31] In reasons substantially endorsed by the Federal Court of Appeal (*Gebreab* at para 2), Justice Judith Snider said the following in *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1213, aff'd 2010 FCA 274:

> [21] In *Al Yamani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1457, 304 F.T.R. 222, this Court was asked to review the decision of the Board which found Mr. Al Yamani inadmissible to Canada on security grounds under s. 34(1)(f). Mr. Al Yamani conceded that he was a member of the Popular Front for the Liberation of Palestine (PFLP). However, he argued that the Board erred in finding him inadmissible under s. 34(1)(f) of *IRPA* because [he] was not an active member when the PFLP committed acts of terrorism.
>
> [22] This Court concluded that, under s. 34(1)(f), the Board must carry out two separate assessments:
>
> 1. whether reasonable grounds existed to believe that the organization in question engages, has engaged or will engage in acts of espionage, terrorism, or subversion by force; and
>
> 2. whether the individual is a member of the organization (at para. 10).
>
> [23] Under this analysis, "there is no temporal component" in the determination of organization, or in the determination of the individual's membership (*Al Yamani*, above, at paras. 11-12). The Board does not have to examine whether the organization has stopped terrorist acts, and does not have to see if there is a "matching of the person's active membership to when the organization carried out its terrorist acts" (*Al Yamani*, above, at para. 12). Furthermore, for the purposes of s. 34(1)(f), the determination of whether the organization in question engages, has engaged, or will engage in acts of terrorism is independent of the claimant's membership.

[32] Mr. Alam relies on the decision of Justice Richard Southcott in *Chowdhury v Canada (Citizenship and Immigration)*, 2017 FC 189 [*Chowdhury*]. In *Chowdhury*, Justice Southcott held that findings of inadmissibility pursuant to s 34(1)(f) of the IRPA must take into account "whether, at the time of membership, there were reasonable grounds to believe that the organization would in the future engage in terrorist activities" (at para 20). The present case is

distinguishable from *Chowdhury*. In *Chowdhury*, the alleged terrorist activities of the BNP relied on by the immigration officer post-dated the applicant's membership (at para 23). That is not the case here. Furthermore, to the extent that *Chowdhury* may be seen as a departure from the Federal Court of Appeal's decision in *Gebreab*, I am bound by the latter.

E. *Did the immigration officer unreasonably fail to consider Mr. Alam's particular role and involvement in the BNP?*

[33] Mr. Alam maintains that the immigration officer failed to properly assess the link between his activities as a member of the BNP and the organization's alleged terrorism or subversion. He relies on Justice Michel Shore's decision in *Zahw v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1112 [*Zahw*]. In *Zahw*, the applicant was an officer in the Egyptian military and was found inadmissible on security grounds. Justice Shore held that mere membership in the military was insufficient to establish membership for the purpose of s 34(1)(f) of the IRPA. Citing Justice Leonard Mandamin's decision in *El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612, he held at that s 34(1)(f) "is a single provision requiring regard for all its elements in an integrated manner" (at para 30).

[34] Direct complicity is not required by s 34(1)(f) of the IRPA (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 22). The immigration officer found there were reasonable grounds to believe the BNP instigated terrorism or subversion. No similar finding was made regarding the Egyptian military in *Zahw*.

[35] Given the immigration officer's conclusion that the BNP was implicated in terrorist activity, an enquiry into Mr. Alam's particular role or function within the organization was not required. Consistent with the wording of s 34(1)(f) of the IRPA, the officer focused on whether Mr. Alam was a member of the organization. The officer referred to jurisprudence establishing that "member" should be given a broad interpretation having regard to the evidence as a whole (*Poshteh v Canada (Citizenship and Immigration)*, 2005 FCA 85 at para 27; *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319 at para 45; *Krishnamoorthy v Canada (Citizenship and Immigration)*, 2011 FC 1342 at paras 21-26). The officer listed 20 non-exhaustive factors that may be *indicia* of membership.

[36] The immigration officer supported the decision with the following factual findings:

(a) Mr. Alam admitted his membership in the BNP and its student wing;

(b) Mr. Alam stated in his Basis of Claim form and interview that he was an active member of the BNP and participated in meetings, demonstrations, and recruiting new members;

(c) Mr. Alam was not just an ordinary member, but held a position as an organizing secretary; and

(d) the nature and extent of his involvement in the BNP formed the basis for a successful claim for refugee status before the RPD.

[37] It is therefore clear that the immigration officer considered Mr. Alam's particular role and involvement within the BNP. The officer addressed all of the elements of s 34(1) of the IRPA "in an integrated manner."

F. *Should a question be certified for appeal?*

[38] This Court may certify a question only where it is dispositive of the appeal and transcends the interests of the immediate parties to the litigation due to its broad significance (*Torre v Canada (Citizenship and Immigration)*, 2016 FCA 48 at para 3).

[39] Mr. Alam asks that the following question be certified for appeal:

> Can a strike, or other similar organized activity, which is a legal act in a particular country and legal in Canada, that results in economic disruption or which is intended to influence a government action in such country, be considered an act of terrorism or subversion under section 34 of the *Immigration and Refugee Protection Act*?

[40] Mr. Alam says that appellate guidance is needed, given the conflict in the jurisprudence regarding whether the BNP may be reasonably characterized as an organization that engages, has engaged or will engage in terrorism. He points to Justice Mosley's strongly-expressed doubt in *AK* that a general strike called by a political party in an effort to force the party in power to take certain democratic steps falls within the "essence of what the world understands by 'terrorism'".

[41] In *AK*, the Minister proposed that the following question be certified for appeal (at para 45):

> Are the violent acts that frequently and predictably result during a general strike or hartal in a particular country, which are intended to compel a government to do something, considered terrorism under s. 34(1) of the *Immigration and Refugee Protection Act* despite the fact that they occur in the context of a general strike?

[42] Justice Mosley declined to certify the question, because he considered it to be ambiguous, and was not satisfied it would be dispositive of an appeal given the facts of that case (at para 47).

[43] In *Kamal*, Justice Brown was presented with possible questions for certification by both parties:

> [75] The Applicant proposed:
>
> > Does a political party engage in terrorism or subversion by force by calling for strikes or civil disobedience without calling for violence when violence subsequently ensures?
>
> [76] The Respondent proposed:
>
> > Can a group or individual who calls for or condones a general strike or hartal as a means of coercing a government which foreseeably and frequently results in violence, be considered to have engaged in terrorism under paragraph 34(1)(c) of IRPA?

[44] Justice Brown declined to certify either question for appeal:

> [77] In my view, no question of general importance arises. To begin with, it is trite to observe that every case such as this is determined based on the record before the tribunal. Both questions are fact specific to the record before the ID in this case. Moreover, the Applicant's proposed question does not capture the facts dispositive of the case, as referred to in these reasons. The

> Respondent's question speaks to facts not found by the ID, and appears to ask this Court to convert judicial review into a private reference.
>
> [78] It seems to me that the proposed questions essentially ask the Federal Court of Appeal to make some form of binding determination as to whether paragraphs 34(1)(b) and or (c) apply to the BNP based on the facts of this case.

[45] While I acknowledge the tension in the jurisprudence regarding whether the BNP may be reasonably characterized as a terrorist organization, I am not persuaded this gives rise to a conflict in the legal sense. As Justice Brown observed in *Kamal* at paragraph 77, every case is determined based on the record before the tribunal. This accounts for the different outcomes in *Gazi*, *SA* and *Kamal* on one hand, and *AK* on the other.

[46] Furthermore, the question proposed by Mr. Alam omits any reference to violence, and therefore does not capture the facts dispositive of the case. Even if the question were to accurately reflect the basis for the officer's decision, it would amount to a request that the Federal Court of Appeal make a binding determination whether ss 34(1)(b), (c) or (f) of the IRPA apply to the BNP based on the facts of this case. As Justice Brown held in *Kamal*, this would not be an appropriate question for certification.

[47] Whether the actions of the BNP may be said to fall within the "essence of what the world understands by 'terrorism'" is perhaps more a question of policy than legal interpretation, and therefore a matter for Parliament rather than the Courts. Alternatively, the Minister retains a discretion not to argue for an individual's inadmissibility based on past membership in the BNP.

VI. Conclusion

[48] The application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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