Federal Court  Cour fédérale

Date: 20190710

Docket: IMM-5497-18

Citation: 2019 FC 912

Ottawa, Ontario, July 10, 2019

PRESENT: Mr. Justice Roy

BETWEEN:

MOHAMMAD RAFIQUL ISLAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The judicial review application, made pursuant to Section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [the *Act*], concerns a decision made by the Immigration Division (October 19, 2018) to find the applicant inadmissible to Canada, pursuant to paragraphs 34(1)(f) and 34(1)(c) of the Act. They read:

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).

[2] The sole issue in the case is whether the applicant's membership in a political opposition party in Bangladesh is sufficient to engage the application of paragraphs 34(1)(c) and (f).

[3] It is not disputed that the applicant is a member of the Bangladesh Jatiyotabadi Dal, referred to in English as the Bangladesh Nationalist Party (BNP). The dispute centers rather around whether the BNP qualifies under paragraph 34(1)(f) as an organization there are reasonable grounds to believe engages, has engaged or will engage in terrorism.

[4] For the reasons that follow, I have come to the conclusion that the judicial review application must succeed.

I. Facts

[5] The facts in this case are not disputed. The applicant states on the record that he is a member of the BNP, a recognized political party in Bangladesh, which is one of the most prominent parties in the country. There is no evidence whatsoever that the party is somewhat of an underground organization.

[6] The best that can be said of the nature of the applicant's membership is that it was "bare bones". The applicant did not have any position in the party and he did not have any authority (he was a member from November 2008 until January 2016). When questioned about his involvement, the applicant states that he was a card carrying member (CTR, p. 689), but there does not appear to have been any official role, let alone that of an officer of the party. The applicant also testified that he participated in some protests (once in 2011) and took part in three hartals when he would shut down his store. In essence, it is not disputed that the applicant's role was limited to distributing leaflets when there were gatherings and to stand on the streets with banners, but he did not have an official role in the party.

[7] Nevertheless, the contention is that membership would be enough for inadmissibility if the membership is an organization believed to be engaged in terrorism. The engagement in terrorism is said to happen through the political party to which the applicant belonged, calling for hartals to take place nation-wide (Bangladesh is a country of 168 million inhabitants). During these hartals, there have been acts of violence that have occurred, especially but not exclusively in the enforcement of the strike order.

[8] The evidence before the Immigration Division was that “hartals” are a political phenomenon in Bangladesh. They are essentially economic blockades which translate into “closing down shops” or “locking doors”. They are general and national strikes which include stoppage of traffic and closure of markets, shops and offices for a period of time: they are an act of protest with respect to grievances, called by political parties or groups, against governmental actions. Every section of the country is expected to observe a total shut down. There are enforcement actions that are taken, which result in violence of significant magnitude in some cases: mass demonstrations, agitation and disorder degenerate into violence. A report, filed into evidence at the hearing, from Human Rights Watch, seems to capture what is the nature of hartals. The following summary is taken from the Immigration Division (ID) decision, at pages 7-8:

> Exhibit C-28 *Human Rights Watch*. Democracy in the Crossfire. Opposition violence and Government Abuses in the 2014 Pre-and-Post — Election Period in Bangladesh, 2014, at pages 224-232: On October 25, BNP leader Khaleda Zia announced a series of general strikes. (known in Bangladesh as *hartals*), protests, and traffic blockades (known as *abarudh*), halting transport links to the capital, Dhaka. The strikes and traffic blockades had a significant impact on the economy. The opposition was successful in preventing almost all travel outside the major cities during this period, harming many people's incomes and the national economy. Schools remained closed. Farmers were forced to dump milk and other flesh produce as they could not transport it to the cities. The estimated cost to the economy runs into the billions.
>
> In many incidents, opposition party workers attacked those not heeding the calls with petrol bombs and homemade grenades, and set off improvised grenades in busy streets without warning. As detailed below, in some cases members of opposition groups recruited street children to carry out the attacks.

[9] What was not clear from the evidence is whether the violence, which could be extreme, was ordered by the BNP or was rather a by-product of hartals. The ID referred specifically to exhibit C-10 presented by the Minister:

> Exhibit C-I0 *M Moniruzzaman* "Party Politics and Political Violence in Bangladesh: Issues, Manifestation and Consequences", in South Asian Survey, March 2009, at pages 141—144: A third consequence of violence politics is institutionalisation of violence as a legitimate means to express political demands. A violent *hartal* has become a cheap means to attract the attention of the government. Student and trade union fronts of mainstream political parties use extensive violence on educational campuses, industrial compounds and public spaces to have their demands satisfied by the relevant authorities. Violence has become a normal political behavioural pattern rather than an extreme expression in extreme contexts.
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> [My emphasis.]

II. The arguments

[10] The government's argument is that there is a nexus close enough between the acts of violence and the calling of hartals by the BNP to support an inference that it is engaged in terrorism. One of the BNP's objectives has been to force the party in power to reinstate the caretaker government's system that was in place prior to 2014 in order to hold elections, yet the hartals have resulted in violence. According to the Minister, the BNP's president has not denounced forcefully enough the violence, claiming that her party was not involved in the violence: her "vague" denunciations are not enough.

[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.

[12] The occurrence of violence during hartals does not establish the intent of the BNP to cause death or serious bodily harm when strikes and blockades are carried out, which might be described as terrorism or terrorist activity. As counsel for the applicant repeated before this Court, all acts of terrorism are criminal, but not all violent or criminal acts can be described as terrorism. The ID captures adequately the argument made before this Court as well as before the ID where it writes at paragraph 41 of its decision:

> [41] In summary, she submits that the Minister has not demonstrated the required element of intention to use violence to achieve political ends. She adds that the BNP's attempts to force the AL [the party in power, the Awami League] to make changes by calling for mass protests in order to obtain legitimate political goals such as a free and legal election is not equivalent to instructing the population to engage in acts of terrorism even if violence occurs during those demonstrations.

III. The decision under review

[13] In view of the fact that the applicant conceded his membership in the BNP, the only issue to be considered is whether there are reasonable grounds to believe that the party is an organization that engages, has engaged or will engage in terrorism.

[14] The Immigration Division concludes that such reasonable grounds exist. 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).

[15] One of the definitions is the one adopted by Parliament following the terrorist attacks in New York on September 11, 2001. The portions relevant to this case read as follows:

Definitions	**Définitions**
83.01 (1) The following definitions apply in this Part.	**83.01 (1)** Les définitions qui suivent s'appliquent à la présente partie.
…	[…]
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	**(ii)** d'autre part, qui intentionnellement, selon le cas:
(A) causes death or serious bodily harm to a person by the use of violence,	**(A)** cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,
(B) endangers a person's life,	**(B)** met en danger la vie d'une personne,
(C) causes a serious risk to the health or safety of the public or any segment of the public,	**(C)** compromet gravement la santé ou la sécurité de tout ou partie de la population,

(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	**(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) 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),	**(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).
…	[…]

The other comes from the case law of *Suresh*:

> 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.
>
> [My emphasis.]

[16] The more difficult task is to apply the facts as presented in evidence to the law as found. Thus, the ID finds that the BNP is a legitimate and recognized party in Bangladesh. Nevertheless, legitimate goals do not factor in the equation if the organization engages or has engaged in terrorism (*Kanagendran v Canada (Citizenship and Immigration)*, 2014 FC 384). Similarly the fact that the BNP is not a listed terrorist entity is of no moment: it is not required that the organization be listed.

[17] The ID recognizes that the contentious issue is whether the BNP has been the perpetrator of violent acts "and that there was an intention on the part of the BNP to cause violence, death or serious injury when calling for hartals" (ID decision, para 71). It then goes on to find that the mere calling of hartals satisfies the requirement that the BNP (and the AL for that matter) engages in terrorism.

[18] Quoting from various documents over the years, the ID put it at its highest "that hartals that were called by the BNP between 2012 and 2014 resulted in deaths and serious bodily harm such as severe burns as described in the following excerpts which the tribunal finds pertinent" (ID decision, para 77). Read as a whole the decision does not find more than hartals result in violence where deaths and serious bodily harm ensue. While the leader of the BNP urged participants not to attack innocent and ordinary people, as well condemned attacks on the Hindu population, that did not satisfy the ID because she "did not make clear and strong public statements to denounce politically motivated violence" (ID decision, para 78). No further explanation is provided. In fact, it appears that the BNP is guilty of calling and organizing hartals: they create chaos:

> [80] It is clear from the documentary evidence that hartals are organized and prepared. Individuals are hired to enforce the shutdown. There is a forced imposition on civilians to observe the shutdown and those not respecting that shutdown often are victims of attacks such as petrol bombs or home grenades being thrown at them. In recent years, the documentary evidence reveals that hartals are synonymous to violence. It is well documented that hartals have created chaos and mayhem which resulted in street violence. The evidence reveals that violence led to more hartals, which in turn led to more violence. Deaths and serious injuries that occurred during hartals that were called by the BNP were not isolated incidents and by calling for further hartals, the BNP leadership could reasonably expect that more deaths or serious injuries would occur.
>
> [81] Considering that hartals called by the BNP 'in the context of the 2014 general election and after were intricately tied with a level of violence that led to deaths and serious injuries, such as severe burns, considering that deaths and serious injuries were not isolated nor did they occur during only one hartal, considering that hartals are enforced and that individuals not respecting the shutdown face consequences, the tribunal concludes that by calling for hartals, the BNP leadership knew or, at best, was wilfully blind to the fact that it would result in deaths and serious injuries.

It suffices, in the view expressed in this case, that hartals are called for a political party to engage in terrorism, as the notion is known in Canadian law.

IV. Standard of review

[19] It is not a matter of dispute that the standard of review is reasonableness (*Najafi v Canada (Public Safety and Emergency Preparedness*), 2014 FCA 262, [2015] 4 FCR 162; *A.K. v Canada (Citizenship and Immigration)*, 2018 FC 236 [*A.K.*]; *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922; *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080) [*Rana*]. A decision will be reasonable if its outcome falls within a range of possible acceptable outcomes; but the reviewing court is also concerned with "the existence of

justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47). Thus, not only the outcome counts, but also the process of articulating that outcome.

V. Analysis

[20] It is not needed in this case to decide if it is the *Suresh* decision that should control on what constitutes "terrorism", as was suggested in *A.K.*, because this is not where the difficulty resides. I note that other judgments of this Court have found that is open to immigration officers to rely on the definition of "terrorist activity" in the *Criminal Code* [the *Code*] as well as the definition arrived at in *Suresh* (see *Ali* and its progeny) while some have reservations (*A.K.*) and others simply conclude that the *Criminal Code* definition serves other purposes and does not "operate in tandem" as parts of a single regulatory scheme (*Rana*, para 47).

[21] However, both definitions are congruent to the extent that they both require that terrorism or terrorist activity be intentional; the intention is itself specific as the *Code* speaks of "an act or omission, in or outside Canada … that intentionally causes death or serious bodily harm to a person by the use of violence, endangers a person's life, causes a serious risk to the health of safety of the public …", while the *Suresh* description speaks in terms of any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking part in the hostilities in a situation of armed conflict …" (para 98). The description does not constitute an exhaustive definition of the term. But as the Court puts it in *Suresh*, "(t)his definition catches the essence of what the world understands by "terrorism" " (para 98).

[22] The common element between the *Code* and the *Suresh* decision is obviously the intention to cause death or serious bodily harm through the act or omission of the perpetrator. That constitutes its essential element. It follows that the ID had to have reasonable grounds to believe that there was an intention to cause harm. Coincidence does not count, nor does correlation. The perpetrator must intend to cause that harm. In *Rana*, my colleague Norris J. had this to say, with which I agree:

> [66] Here, however, the member found that *hartals* and blockades fell within the definition of "terrorist activity" simply because there was a causal connection between them and acts of violence. She also appears to have been prepared to find that they constitute terrorist activity simply because they involved causing economic harm to pressure the government. Even assuming that *hartals* and blockades could satisfy the ulterior purpose and motive elements of the definition of "terrorist activity" (as the member found), the member should have considered that they are forms of advocacy, protest, dissent or stoppage of work and, as such, could constitute terrorist activity only if they were called with the intention of causing death or serious bodily harm by the use of violence, with the intention of endangering lives, or with the intention of causing a serious risk to the health or safety of the public. Even if *hartals* and blockades called for by the BNP have led to these results, this is not sufficient. Intending to do these types of harm is an essential element of the *Criminal Code* definition. Indeed, it reflects part of what the Supreme Court of Canada expressed in *Suresh* as the "essence" of what the world understands by "terrorism." It was a serious error for the member to fail to consider it. Having decided to rely on the *Criminal Code* definition of "terrorist activity," it was incumbent on the member to apply it properly. Absent an express finding that when it called for hartals and blockades the BNP intended to cause death or serious bodily harm by the use of violence, to endanger a person's life, or to cause a serious risk to the health or safety of the public, the finding that this constitutes terrorist activity and, as such, engagement in terrorism within the meaning of section 34(1)(c) of the *IRPA*, cannot stand. As a result, this aspect of the finding the applicant's membership in the BNP rendered him inadmissible under section 34(1)(f) of *IRPA* cannot be sustained.
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> [My emphasis.]

[23] In the case at bar, it is clear that the ID had some difficulty in bridging the calling of hartals with the requirement that there be an intention to cause harm. Rather it seems to be satisfied that "by calling for hartals, the BNP leadership knew or, at best, was wilfully blind to the fact that it would result in deaths and serious injuries" (ID decision, para 81). With all due respect, that does not correspond with the intention to cause death or serious bodily harm. Intention to cause and knowledge are not one and the same. Professor Stuart, in his *Canadian Criminal Law* (The Carswell Company Ltd., 1987, second edition, at p. 128) put it succinctly: " "Intent" seems to have been construed in a loose colloquial sense of actual desire, end, purpose, aim, objective and design and knowledge to mean actual knowledge, for example, of the contents of the package possessed". "Knowledge" is required for various offences, often through the use of the word "knowingly". Nothing prevents that for offences there be the requirement of intent and knowledge, but intent and knowledge are two different concepts, as are intention, recklessness and wilful blindness.

[24] As Professor Granville Williams put it in his seminal *Criminal Law* (Stevens & Son Limited, London, 1961), "the mental element may be either intention to do the immediate act or bring about the consequences or (in some crimes) recklessness as to such act or consequence. In deferent and more precise language, *mens rea* means intention or recklessness as to the elements constituting the *actus reus*" (#14). Later, Professor Williams added in his *Textbook of Criminal Law* (Stevens & Son Limited, London, 1978) that "(a)s a philosophical matter, however, intention is readily definable. In ordinary language a consequence is said to be intended when the actor desires that it shall follow from his conduct" (p. 51). While intention and recklessness are

easier to distinguish, there is often confusion between recklessness and wilful blindness, which is nothing other than a substitute for actual knowledge.

[25] In *R v Briscoe*, 2010 SCC 13, [2010] 1 SCR 411, the Supreme Court states again that recklessness and wilful blindness are not to be confused:

> [21] Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries. See *Sansregret v. The Queen*, 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570, and *R. v. Jorgensen*, 1995 CanLII 85 (SCC), [1995] 4 S.C.R. 55. As Sopinka J. succinctly put it in *Jorgensen* (at para. 103), "[a] finding of wilful blindness involves an affirmative answer to the question: Did the accused shut his eyes because he knew or strongly suspected that looking would fix him with knowledge?"
>
> [22] Courts and commentators have consistently emphasized that wilful blindness is distinct from recklessness. The emphasis bears repeating. As the Court explained in *Sansregret* (at p. 584):
>
> > . . . while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry <u>because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry</u>.
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> [Emphasis added in original and my emphasis.]

[26] By concluding the way it did, the ID conflates intent with knowledge and wilful blindness. Indeed, one is bound to ask ‘knowledge or wilful blindness as to what?’ It may even have injected an element of recklessness or even negligence. It states that the BNP knew or was wilfully blind that hartals would result in deaths or serious injuries. That does not constitute the intent to cause death or serious bodily harm. The ID had, based on the evidence before it, to find the intent to cause harm and not only that, calling for hartals, there was the knowledge that deaths and serious injuries would result. What is needed is that the harm is intentionally caused by the perpetrator.

[27] In *M.N. v Canada (Public Safety and Emergency Preparedness),* 2019 FC 796 [*M.N*], the ID made a finding similar to that in this case. The BNP was said to be engaged in terrorism because it had called on a number of occasions for hartals where frequent outbursts of violence sometimes resulted in loss of life and in serious injuries. Our Court in that case was not satisfied that calling for hartals, in and of themselves, met the requirements of the law. In fact, it looks like the reasoning of the ID in *M.N.* is fundamentally the same as that of the ID in this case. The essential finding is presented at paragraph 11 in *M.N.:*

> [11] Nevertheless, the ID never clearly made a finding that the BNP, as an organization, had such an intention. Instead of focusing on the intention to cause death or bodily harm, the ID’s findings are described in broader language that conflates “violence” in general with “death or serious injury,” for example at paragraph 57 of its reasons, when it refers to an “intention … to cause violence, death or serious injury.” Rather than a finding of intention in the criminal law sense, that is, an intention to bring about the prohibited consequence, the ID appears to be relying on a form of negligence that is ascribed to the BNP leadership for calling for further *hartals* when previous ones led to casualties and for not denouncing violence sufficiently strongly. Thus, the ID concludes, at paragraphs 65-66:

> Deaths and serious injuries that occurred during hartals that were called by the BNP were not isolated incidents and by calling for further hartals, the BNP leadership could reasonably expect that more deaths or serious injuries would occur.
>
> […] by calling for hartals, the BNP leadership knew or, at best, was wilfully blind to the fact that it would result in deaths and serious injuries.
>
> [My emphasis.]

[28] Although I am not convinced that knowledge and wilful blindness can be said to equate to negligence, the broader and more important point is that the ID was incapable of finding the required intention, probably because the evidence is not present to support such conclusion.

[29] I have already spoken of coincidence, correlation and causation. It seems to me that if an organization is using a "code" in calling for some events such that it can be reasonably inferred from the evidence that it intentionally causes death and serious injury, a proper finding of engaging in terrorism might be considered. But such finding would require evidence.

[30] I share the view expressed at paragraph 12 of *MN* about the reasonableness of a decision:

> [12] I cannot find that the ID's reasons comply with the requirements of "justification, transparency and intelligibility" set by *Dusnmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190; see also *Rana*, at paragraph 66. Such requirements are particularly apposite in this case, where a political party that has participated in several elections and that formed the government for certain periods of time in Bangladesh's recent history is characterized as an organization that engages in terrorism. Of course, I do not wish to suggest that a terrorist organization ceases to be so simply by fielding candidates in a democratic election. However, the fact that lethal violence takes

> place during protests called by a political party may or may not lead to a finding that the political party has engaged in terrorism. Such a finding would need to be based on an analysis of a number of factors, including the circumstances in which violent acts resulting in death or serious bodily harm were committed, the internal structure of the organization, the degree of control exercised by the organization's leadership over its members, and the organization's leadership's knowledge of the violent acts and public denunciation or approval of those acts. In this case, it appears that the ID focused exclusively on the last factor.
>
> [My emphasis.]

[31] By ignoring that the law requires that the perpetrator intentionally caused death and serious bodily harm, and substituting a different element (the requirement that there was knowledge, or even wilful blindness, that the calling for hartals would result in deaths and injuries), the ID rendered a decision which is unreasonable as, "in order for a decision to be reasonable, it must relate to a matter within the Minister's statutory authority and he must apply the correct legal tests to the issues before him" (*Németh v Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281, at para 10). In effect, a lower standard was applied, one that is arguably close to recklessness or negligence as to what might ensue, and quite removed from the actual intent to cause death and serious injury.

[32] The application of paragraphs 34(1)(c) and (f) in this case proposed by the ID is particularly sweeping. The scope given is so broad that the paragraphs in effect cover anyone who is a member of a legitimate organization that is said engages, has engaged or will engage in "terrorism", without the specific intent being shown as being present. In the case of Bangladesh, hartals are a way to express political views: the two principal parties, the BNP and Awami League [AL] have been calling for these in the past. If the mere calling of hartals were to suffice,

that would encompass many millions of members of parties in a country of 170 million inhabitants. I share the concern expressed in *A.K*, and endorsed in *Rana* (at para 58). In *A.K.*, the Court was preoccupied by "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' " " (at para 41, citing para 98 of Suresh). Surely, the Court says in *Rana*, "(i)f the actions of the BNP warrant the label of "terrorism" under Canadian law at all, this requires a better explanation than the member provided to meet the requirements of justification, transparency and intelligibility" (para 58). I agree. Indeed, the required intent must be present.

[33] As a result, the judicial review application must be granted with the matter sent back to the Immigration Division for redetermination. The parties were canvassed and they do not propose that a question be certified pursuant to section 74 of the *Act*.

JUDGMENT IMM-5497-18

THIS COURT'S JUDGMENT is:

1. The application for judicial review is granted.

2. The decision of the Immigration Division is set aside, the matter being remitted for redetermination by a differently constituted panel.

3. There is no serious question of general importance that is stated.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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