Federal Court  Cour fédérale

Date: 20220307

Docket: IMM-7876-19

Citation: 2022 FC 311

Ottawa, Ontario, March 7, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

RAFAEL CHOWDHURY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Bangladesh Nationalist Party (BNP) is a political party. This application for judicial review, like others that have come before this Court, relates to the characterization of the BNP as an organization that has engaged in terrorism, and the inadmissibility of a former member of the BNP on the basis of membership in such an organization under paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. In particular, this application

raises questions regarding the timing of events characterized as terrorism, whether that timing matters to inadmissibility under paragraph 34(1)(*f*), and the reasonableness of an immigration officer's conclusions on these issues.

[2] Rafael Chowdhury was a member of the BNP prior to December 2012, when he fled to Canada after being persecuted by the Awami League (AL), the ruling political party in Bangladesh. His claim for refugee protection was granted by the Refugee Protection Division in January 2018. Following a security review, Mr. Chowdhury's application was referred to a Senior Immigration Officer. After receiving submissions on the issue from Mr. Chowdhury, the officer concluded there were reasonable grounds to believe the BNP had engaged in terrorism, and that Mr. Chowdhury was inadmissible as a member of the BNP.

[3] I conclude the officer's decision was unreasonable. The officer's analysis of whether the BNP had engaged in terrorism was based on events occurring both during and after Mr. Chowdhury's membership in the BNP, and was not consistent with the jurisprudence of this Court regarding the temporal aspects of membership in an organization engaged in terrorism. The officer also concluded that the BNP intended to cause death or serious bodily injury based on a conclusion that these outcomes were foreseeable, thereby applying a lower standard to the mental element of engaging in terrorism than the specific intent standard required by law. The decision did not comply with the legal constraints upon it and was therefore unreasonable.

[4] The application for judicial review is therefore granted. In accordance with the parties' request, they will be permitted to make written submissions as to whether the Court should certify a serious question of general importance within two weeks.

II. Issues and Standard of Review

[5] Mr. Chowdhury raises the following issues on this application:

(1) Did the officer err in finding there were reasonable grounds to believe the BNP had engaged in terrorism?

(2) Did the officer err in their findings regarding the temporal and foreseeability aspects of Mr. Chowdhury's association with the BNP?

[6] I conclude that the second of these issues is determinative on this application. While my findings in this regard engage questions related to the first issue, I conclude that I need not and should not address the first issue as a whole.

[7] The parties agree, as do I, that the officer's decision is to be reviewed on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. Reasonableness review does not call on the Court to decide the issue anew, nor to conduct its own assessment of the evidence, or assess how they would have decided the case: *Vavilov* at paras 75, 125, 288–291. Rather, the Court reviews the decision of the administrative decision maker and the reasons given, seeking to understand the reasoning and assessing whether the decision as a whole bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 15, 83–86, 94–100.

III. Analysis

A. *Legal Framework*

(1) Membership in an organization that has engaged in terrorism

[8] Subsection 34(1) of the *IRPA* provides that a permanent resident or foreign national is inadmissible on security grounds for reasons that include being a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in terrorism:

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).

[9] The "reasonable grounds to believe" standard set out in paragraph 34(1)(*f*) is also reflected in the general interpretive rule in section 33 of the *IRPA*:

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.

[10] A number of relevant principles regarding subsection 34(1) have been developed in the jurisprudence. The first is the meaning of "terrorism" in paragraph 34(1)(*c*). In *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, the Supreme Court of Canada found the term as used in the predecessor provision was not unconstitutionally vague. At paragraph 98 of *Suresh*, the Court said the following:

> 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.
>
> [Emphasis added.]

[11] The officer in the present case cited this passage from *Suresh*, and the parties take no issue with either the *Suresh* definition of terrorism or the officer's statement of it.

[12] The parties also agree that the requirement in *Suresh* for an "act intended to cause death or serious bodily injury" is a requirement that there be a specific intention to cause these outcomes, and not simply an awareness of the likelihood that they will occur, or a recklessness or wilful blindness to their resulting from conduct, even violent conduct: *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 at para 66; *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at paras 41–43; *Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404 at paras 14–16.

[13] The jurisprudence is also clear that "being a member" under paragraph 34(1)(*f*) does not require either formal membership in the organization, or involvement or complicity in the terrorist activity itself: *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 27, 29; *B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at paras 28–29; *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paras 22–27; *Foisal* at para 11. Nor does it require the permanent resident or foreign national to be a member of the organization at the time of the inadmissibility determination: *Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326 at paras 16–29, 55; *IRPA*, s 33.

[14] The jurisprudence is somewhat less clear about the relationship between the time of an individual's membership in the organization and the organization's engagement in terrorism. This temporal aspect of the membership was an important aspect of Mr. Chowdhury's arguments to the officer and the officer's decision.

(2) The temporal element of membership

[15] After citing subsection 34(1) of the *IRPA* and paragraph 98 of *Suresh*, the officer referred to this Court's decision in *Yamani v Canada (Public Safety and Emergency Preparedness)*, 2006 FC 1457. In that case, the applicant had been a member of the Popular Front for the Liberation of Palestine (PFLP) at various times from 1972 to 1992: *Yamani* at paras 17–20. The PFLP was found to be an organization that engaged in terrorism, notably with respect to various acts from 1972 to 1999 and thereafter: *Yamani* at paras 31–34. Justice Snider rejected Mr. Al Yamani's arguments that the Immigration Division of the Immigration and Refugee Board of Canada (IRB) erred in referring to terrorist activities that occurred at times when he was not a member. In doing so, she made the following statements at paragraphs 11 and 12 of her decision:

> Quite simply, and contrary to the arguments made by Mr. Al Yamani, there is no temporal component to the analysis in s. 34(1)(f). If there are reasonable grounds to believe that an organization engages today in acts of terrorism, engaged in acts of terrorism in the past or will engage in acts of terrorism in the future, the organization meets the test set out in s. 34(1)(f). There is no need for the Board to examine whether the organization has stopped its terrorist acts or whether there was a period of time when it did not carry out any terrorist acts.
>
> Membership by the individual in the organization is similarly without temporal restrictions. The question is whether the person is or has been a member of that organization. There need not be a matching of the person's active membership to when the organization carried out its terrorist acts.
>
> [Emphasis added.]

[16] Justice Snider affirmed her decision in *Yamani* in a subsequent case in which the applicant was a member of an organization that had previously engaged in subversion and terrorism but that had subsequently ceased doing so: *Gebreab v Canada (Public Safety and*

Emergency Preparedness), 2009 FC 1213 at paras 13, 22–30. She certified a question on the issue, asking whether inadmissibility under paragraph 34(1)(*f*) applied when the organization had ceased its engagement in subversion and terrorism. The Federal Court of Appeal endorsed Justice Snider's decision and answered the certified question by stating that "[i]t is not a requirement for inadmissibility under s. 34(1)(f) of the IRPA that the dates of an individual's membership in the organization correspond with the dates on which that organization committed acts of terrorism or subversion by force": *Gebreab v Canada (Public Safety and Emergency Preparedness)*, 2010 FCA 274 at para 3.

[17] Justice Mandamin considered the meaning of *Yamani* and *Gebreab* in his decision in *El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612. The facts in *El Werfalli* were different, as the applicant had not been a member of the organization at various times over the period it had engaged in terrorists acts (as in *Yamani*) or after the organization had ceased to engage in terrorist acts (as in *Gebreab*). Rather, the applicant had been a member, and had ceased being a member, before the organization had engaged in terrorism: *El Werfalli* at paras 3–4.

[18] Justice Mandamin concluded that to interpret paragraph 34(1)(*f*) so as to retroactively associate individuals with future terrorism occurring after their departure from the organization would mean that "any permanent resident or foreign national who is a member of any organization […] has a Sword of Damocles suspended indefinitely over his or her head should the organization they once had been a member [of] become engaged in terrorist activities in the future": *El Werfalli* at para 62. He concluded that given their facts, the *Yamani* and *Gebreab*

decisions were precedential for cases involving membership in organizations engaged in terrorism in the past or present, but that they did not address the case of someone who ceased being a member before the organization engaged in terrorism: *El Werfalli* at paras 79–88. In such a case, Justice Mandamin concluded that at the time of membership, there had to have been "reasonable grounds to believe" the organization may engage in terrorism. Otherwise, there was no nexus between the individual's organization and the terrorism, and paragraph 34(1)(*f*) would not be triggered: *El Werfalli* at paras 73–76.

[19] This Court has endorsed the reasoning in *El Werfalli* in a number of subsequent cases: *Mahjoub (Re)*, 2013 FC 1092 at para 49; *Chowdhury v Canada (Citizenship and Immigration)*, 2017 FC 189 [*Chowdhury (2017)*] at paras 13–20; *Abdullah v Canada (Citizenship and Immigration)*, 2021 FC 949 at para 29. As Justice Southcott noted in *Chowdhury (2017)*—a case involving a different individual than the current case—*El Werfalli* has been recognized as consistent with *Yamani*, given the differences in the factual underpinnings of the cases: *Chowdhury (2017)* at para 21. The Immigration Appeal Division of the IRB has also adopted this analysis: *X (Re)*, 2019 CanLII 147466 (CA IRB) at paras 3, 19, quashed on other grounds *Canada (Public Safety and Emergency Preparedness) v Hamid*, 2021 FC 288 at paras 43–47.

[20] The Minister does not argue in this case that *El Werfalli* is wrongly decided, or that it is inconsistent with *Yamani* or *Gebreab*. Rather, the Minister argues that *El Werfalli* is largely irrelevant, as the officer conducted the required analysis and concluded that the BNP engaged in terrorism, including having the requisite intent to kill or seriously injure a civilian, during the time when Mr. Chowdhury was a member of the BNP.

B. *The Officer's Decision was Unreasonable*

[21] For the following reasons, I conclude that the officer's decision does not demonstrate the justification, transparency, and intelligibility required of a reasonable decision. In particular, I agree with Mr. Chowdhury that the officer's analysis of whether the BNP had engaged in terrorism relied materially on events after his departure, that the officer did not consider whether there were reasonable grounds at the time of his membership to conclude that the BNP would subsequently engage in terrorism, and that in the period when he was a member the officer inferred intent to kill or seriously injure from knowledge and foreseeability.

[22] As noted above, the officer referred to and reproduced paragraphs 11 and 12 of *Yamani* at the outset of his decision. They then summarized the evidence regarding the country conditions in Bangladesh and the role of the BNP in organizing and conducting violent and often deadly general strikes known as *hartals*. This evidence included extensive citations from an August 2014 Centre for Policy Dialogue report; an April 2016 International Crisis Group report; an April 2014 Human Rights Watch report; a December 2016 Asylum Research Consultancy report; and a March 2005 United Nations Development Programme report.

[23] The officer then reproduced the written submissions of Mr. Chowdhury's counsel. While not referring specifically to *El Werfalli*, *Mahjoub*, or *Chowdhury (2017)*, those submissions argued that this Court has interpreted paragraph 34(1)(*f*) to require a temporal nexus between the membership and the reasonable grounds to believe the organization has engaged in terrorism, in

the sense that individuals who are members of an organization before there were reasonable grounds to believe the organization would engage in terrorism are not captured by the paragraph.

[24] With reference to *Yamani*, the officer concluded it was not necessary for Mr. Chowdhury to have been a member of the BNP when specific acts of terrorism were carried out by BNP members. It appears the situation is therefore similar to that in *Chowdhury (2017)*, in that the decision maker "made no mention of *El Werfalli* or *Mahjoub* or the principles derived from those decisions": *Chowdhury (2017)* at para 22. I pause to note that there is no unreasonableness in the officer not expressly citing *El Werfalli* or cases following it. As the Supreme Court has noted, an administrative decision will not always look like a court decision and may not refer to all of the "jurisprudence or other details the reviewing judge would have preferred": *Vavilov* at paras 91–92. Nonetheless, judicial precedent on the issue before the decision maker acts as a legal constraint on what the decision maker can reasonably decide, such that it is unreasonable to apply the provision without regard to that precedent: *Vavilov* at para 112.

[25] As in *Chowdhury (2017)*, I consider the relevant issue to be not whether the officer cited *El Werfalli*, but whether his analysis of the facts and his conclusions regarding Mr. Chowdhury's inadmissibility considered the issues and used an interpretation consistent with the relevant jurisprudence: *Chowdhury (2017)* at paras 23–26. I conclude that it did not.

[26] The officer did not distinguish in his analysis between information and evidence regarding the BNP and its tactics in *hartals* in 2012 and before and in 2013 and after. This was significant, as much of the evidence pertained to violence by opposition party members from the

end of October 2013 onwards as part of "the most violent [Parliamentary elections] in the country's history" in January 2014. Rather, the officer conducted an overall assessment of whether the BNP engaged in terrorism, placing specific reliance on post-October 2013 tactics. Indeed, the officer's conclusion that tactics directed by BNP leadership meet the definition of terrorism activities from *Suresh* referred in particular to "arming its cadres with petrol bombs." The only evidence cited by the officer related to the use of "petrol bombs" came from the late-2013 lead up to the January 2014 election.

[27] There is no doubt the officer also considered the period during which Mr. Chowdhury was a member of the BNP. They concluded that "the violent behaviour of BNP personnel is not a recent development" and that "criminal behaviour to enforce hartals has been used for many years, going back to at least 2002," citing data regarding violent incidents between 2002 and 2013. Unlike some other cases that have come before this Court, the officer also clearly made a finding that the BNP caused and directed acts intended to cause death or serious bodily injury for purposes falling within the definition of terrorism: *MN v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 at para 11; *Rana* at para 66.

[28] However, I conclude the officer's analysis was unreasonable in two respects.

[29] First, by considering the period both before and after December 2012, the officer made no clear finding regarding whether the evidence demonstrated that the BNP had engaged in terrorism when or before Mr. Chowdhury was a member, or that there were reasonable grounds to believe that they would engage in terrorism thereafter. Following the reasoning of

Justice Southcott in *Chowdhury (2017)*, I conclude this rendered the decision unreasonable: *Chowdhury (2017)* at para 13.

[30] Second, the officer's analysis, particularly as it related to the pre-2012 period when Mr. Chowdhury was a member of the BNP and to the extent that it concluded the BNP engaged in terrorism in that period, invoked a lower mental element than the specific intent to kill or seriously injure required by the definition of terrorism adopted in *Suresh*. The officer found that "the end result" of the tactics used in *hartals* "was and is entirely foreseeable to the leadership of the BNP as previous hartals and other clashes between BNP members and AL members and between BNP members and the police caused substantial damage to public and private properties as well as many injuries and deaths" [emphasis added]. Leaving aside the reference to property damage, which does not fall within the definition of terrorism set out in *Suresh*, the officer's primary conclusion was that the BNP engaged in tactics for which injuries and deaths were "entirely foreseeable." To infer an intent to kill based on a knowledge of the foreseeable or probable fatal consequences of the *hartals* is to effectively apply a lower standard than that required by *Suresh*. Following the reasoning of Justice Grammond in *Foisal*, I conclude this also rendered the decision unreasonable: *Foisal* at para 15; see also *Islam v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 108 [*Islam (2021)*] at paras 20–22; *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 [*Islam (2019)*] at paras 12, 26, 31.

[31] In this regard, I recognize there are decisions of this Court that may be read as accepting that it is reasonable to infer a specific intent to cause death or serious bodily injury from the knowledge of foreseeable consequences, or implicitly condoning such acts: *Gazi v Canada*

(Citizenship and Immigration), 2017 FC 94 at paras 30–31; *SA v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 494 at para 20; *Saleheen* at paras 46–47, 50; *Khan v Canada (Citizenship and Immigration)*, 2019 FC 899 at paras 30, 35–36; *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38 at paras 42–43. Mr. Chowdhury distinguishes these cases on the basis that the applicants in those cases, other than *Gazi*, were involved in the BNP until at least 2014. While I am not sure the reasoning in these cases can necessarily be distinguished on this basis, I conclude that the approach in *Foisal*, *Islam (2021)*, and *Islam (2019)* is applicable and, to the extent it represents a conflicting approach to that in *Gazi*, *SA*, *Saleheen*, *Khan*, and *Miah*, is to be preferred.

[32] These findings were central to the officer's conclusion that Mr. Chowdhury was a member of an organization that engages, had engaged, or will engage in acts of terrorism. I consider the flaws in the officer's analysis sufficiently central to render their decision unreasonable and require that it be set aside: *Vavilov* at para 100.

[33] Mr. Chowdhury also submitted that it was not reasonably possible on the record before the officer and the Court to conclude that the BNP had ever engaged in terrorist activities within the meaning of paragraph 34(1)(*f*). This question, an aspect of the first issue raised by Mr. Chowdhury, raises even more squarely the apparent differences in outcome in cases before this Court involving membership in the BNP. I echo Justice Grammond's concern about the state of the case law of this Court with respect to the BNP and whether differences in outcomes in that case law can always be explained by differences in either the record or the decision maker's reasoning: *Foisal* at para 25. Given these concerns, and my conclusion that the errors I have

described above are sufficient to dispose of this application, I consider it better not to address Mr. Chowdhury's first issue in any greater degree for risk of adding further uncertainty to the jurisprudence when it is not necessary.

IV. Conclusion

[34] The application will therefore be granted and Mr. Chowdhury's application for permanent residence, including the question of his inadmissibility under paragraph 34(1)(*f*) of the *IRPA*, will be remitted for redetermination by a different officer.

[35] Neither party proposed a question for certification before or at the hearing of the matter. However, recognizing that their views on whether a question should be certified in this case would depend significantly on the reasoning of this Court, the parties requested an opportunity to consider and make submissions on the matter upon receipt of the Court's judgment.

[36] 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 v Canada (Citizenship and Immigration)*, 2018 FC 922 at paras 38–46 and the cases cited therein. In the circumstances, I will permit the parties to address the Court regarding a certified question. The parties may submit written representations on the issue, of a maximum of two pages in letter format, within two weeks of the date of this judgment. The parties are encouraged to communicate to determine whether a joint submission on the issue is possible and may speak to the Court if brief additional time is required.

JUDGMENT IN IMM-7876-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The December 13, 2019 decision of a Senior Immigration Officer finding Mr. Chowdhury inadmissible under paragraph 34(1)(*f*) of the *IRPA* is set aside and his application for permanent residence is remitted for determination by another officer.
2. The parties may, jointly or separately, submit written representations of a maximum of two pages in letter format on whether the Court should certify a serious question of general importance, within two weeks of the date of this judgment.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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