Federal Court Cour fédérale

Date: 20240621

Docket: IMM-6876-22

Citation: 2024 FC 967

Ottawa, Ontario, June 21, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

REAJ HAMID and NADIR HAMID

Applicants

and

THE MINISTER OF CITIZENHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Context

[1] The Applicants seek judicial review application of a decision by the Immigration Appeal Division [IAD] dated June 27, 2022 [Decision]. The Decision is the IAD's second decision regarding the Minister of Public Safety and Emergency Preparedness's [Minister] appeal of a decision by the Immigration Division's [ID] dated October 2, 2018. The ID found that there had been reasonable grounds to believe that, from 2012 onward, the Bangladesh National Party [BNP] and its student wing Bangladesh Jatiyatabadi Chatra Dal [JCD] [collectively the BNP] are

organizations defined under paragraph 34(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The ID also found that the Applicants were members of the JCD only from December 2008 to March 2010. Based on those findings, the ID concluded the Applicants were not inadmissible pursuant to paragraph 34(1)(f) of the IRPA.

[2] The Minister appealed the ID's decision to the IAD. On December 16, 2019, the IAD subsequently issued a decision [IAD's First Decision]. The IAD's First Decision agreed with the ID's findings that the Applicants were not inadmissible under paragraphs 34(1)(c) and 34(1)(f) of the IRPA.

[3] The IAD's First Decision was judicially reviewed in *Canada (Public Safety and Emergency Preparedness) v Hamid*, 2021 FC 288. Justice St-Louis found the IAD's First Decision to be unreasonable based on its assessment of the Applicants' credibility and their membership to the BNP. The matter was remitted to the IAD for redetermination.

[4] The IAD issued a new Decision, which is the subject of this judicial review. In this second decision, the IAD found the Applicants were inadmissible pursuant to paragraphs 34(1)(c) and 34(1)(f) of the IRPA. The Applicants argue that the Decision is unreasonable because the IAD applied a lower mental element than the specific intent element as outlined in the case law, and by making findings of facts unsupported by the record.

II. Legal Issues and Standard of Review

[5] The two questions before this Court are:

1. Did the IAD unreasonably interpret paragraphs 34(1)(c) and 34(1)(f) of the IRPA, or unreasonably applied Suresh, in concluding that the BNP leaders had the specific intention to cause death or bodily injury in calling for hartals?

2. Did the IAD unreasonably interpret paragraph 34(1)(f) of the IRPA, in concluding that the Applicants are members of the BNP during the relevant period?

[6] The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]).

[7] To avoid intervention on judicial review, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

[8] A reviewing court must take a "reasons first" approach by examining the reasons provided with "respectful attention," in which the Court seeks to understand the reasoning process followed by the decision maker for drawing its conclusion (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras 58, 60; *Vavilov* at para 84). Flaws must be more than superficial for the reviewing court to overturn an administrative decision. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

III. Analysis

[9] Section 34(1)(c) and (f) of the IRPA provides statutory requirements for determining findings of inadmissibility for security reasons.

> 34 (1) A permanent resident or a foreign national is inadmissible on security grounds for
>
> (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
>
> (b) engaging in or instigating the subversion by force of any government;
>
> (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
>
> (c) engaging in terrorism;
>
> (d) being a danger to the security of Canada;
>
> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (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).
>
> [Emphasis added].

[10] The first requirement focuses on the nature of the "organization" [terrorist organization]. This requires applying the element of "reasonable grounds to believe" to determine whether the organization engages, has engaged, or will engage in "terrorism." The "reasonable grounds to believe" element may be determined on "compelling and credible information" (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*] at para 114).

[11] The definition of "terrorism" is set out in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] at paragraph 98. Jurisprudence has continued to follow the Supreme Court's analysis in *Suresh* deals with any "act intended to cause death or serious bodily injury" to an individual, "when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government to do or to abstain from doing any act" (*Suresh* at para 98).

[12] The second requirement focuses on whether the permanent resident or a foreign national was a member of an organization engaging in terrorism [membership] (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 [*Poshteh*] at paras 26-29).

[13] There is also established jurisprudence that paragraph 34(1)(f) of the IRPA does not require a "temporal connection" between the individual's membership and the terrorist activity in paragraphs 34(1)(c) and 34(1)(f) of the IRPA (*Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 262 at para 101; *Gebreab v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FCA 274 [*Gebreab*] at para 2).

[14] In the IAD's Decision, it found that there were "reasonable grounds to believe" that the Applicants were members of the BNP and that the BNP engages, has engaged or will engage in the acts of terrorism referenced in paragraphs 34(1)(c) and (f) of the IRPA.

[15] There is no dispute that the IAD identified the correct law. The IAD correctly referred to the applicable statutory provisions found in paragraphs 34(1)(c) and 34(1)(f) of the IRPA. The

IAD correctly identified that the standard of proof requires “more than mere suspicion” based on compelling and credible information, following *Mugesera*.

A. *Did the IAD unreasonably interpret paragraph 34(1)(f) of the IRPA, in concluding that the Applicants are members of the BNP during the relevant period?*

[16] At the hearing, the Applicants focused on issues of membership, and an individual’s right to dissent and to oppose their current government. The Applicants’ written submissions insist on the fact that the BNP is a legitimate government party and that an affiliation to the BNP should not subject them to the definitions provided under paragraphs 34(1)(c) and 34(1)(f) of the IRPA.

[17] The case law is clear that, an organization recognized as an opposition party does not automatically shield an organization and its members from being considered under section 34 of the IRPA. Legitimate goals do not factor in the equation if the organization engages or has engaged in terrorism (*Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 at para 16). Moreover, the IAD in the Applicants’ case considered the Applicants’ position and found that “political party may have a legitimate objective, but it may use what are considered terrorist methods in its attempt to reach it.”

[18] Those reasons clarified the IAD’s grounds for proceeding with the legal test under *Suresh*, despite it having also recognized that the BNP may be a legitimate political party. The philosophical question, that the Applicants put forward, are perhaps more a question of policy rather than a legal interpretation (*Alam v Canada (Citizenship and Immigration)*, 2018 FC 922 [*Alam*] at para 47).

[19] The Applicants contend that the IAD applied too broad a definition when it found them to be members of the BNP. The Respondent submits that "membership" pursuant to paragraph 34(1)(f) of the IRPA should be interpreted broadly (*Poshteh* at paras 29, 36).

[20] In the Applicants' case, the IAD concluded that "the evidence establishes that there are reasonable grounds to believe that both Applicants were members of the BNP organization within the meaning of paragraph 34(1)(f) of the IRPA from the time of their initial involvement [with JCD] in 2008 until their departure from Bangladesh in December 2016."

[21] The IAD relied on the Applicants' Basis of Claim in which they admitted to being a "primary member" of the JCD from December 2008 until March 2010, and a supporter of BNP from April 2010 until December 2016. The IAD also found that the Applicants attended a "mass rally" organized by the local BNP in the last week of December 2013. The IAD considered the testimony before the ID in which the Applicants confirmed having formal membership in the JCD while they were university students. The Applicants also relied on their membership in the JCD and BNP as reasons of a fear of persecution warranting Canada's protection. Furthermore, the IAD recognized that both of the Applicants attempted to downplay their involvement with the BNP when they were before the IAD the first time, and the IAD rejected those attempts for credibility reasons. Finally, the IAD listed a summary of its factual findings relating to the issue of "membership" in the Decision.

[22] In *Gebreab* at paragraph 3, the Federal Court of Appeal held that the dates of an individual's membership in an organization does not need to correspond with the dates when the

organization had committed acts of terrorism. Since the IAD found the Applicants were likely still members in 2018 and that was reasonable grounds to believe that they were members of the BNP during the lead up to and aftermath of the January 2014 elections, the IAD's finding is not unreasonable on this issue (*Opu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 650 [*Opu*] at para 95).

[23] Having reviewed the Decision as a whole, the relevant case law and the record before the IAD, I cannot find that the IAD was unreasonable in finding that the Applicants meet the broad definition of "membership," pursuant to paragraph 34(1)(c) of the IRPA (*Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404 [*Foisal*] at para 11; *Kanagendren v Canada*, 2016 FCA 428).

B. *Did the IAD unreasonably interpret paragraphs 34(1)(c) and 34(1)(f) of the IRPA, or unreasonably applied Suresh, in concluding that the BNP leaders had the specific intention to cause death or bodily injury in calling for hartals?*

[24] While the Applicants stressed the issue of membership, for completeness, I address the elements of the *Suresh* test and specific intent.

[25] The parties present diametrically opposed views on the IAD's Decision. The Applicants argue that, the IAD applied an "intellectual shortcut" by referring to a lower mental element (*Foisal* at para 17). The Respondent argues that the IAD applied the correct specific intent threshold (*Opu* at para 39).

[26] This Court will not review the Decision based on a "line-by-line treasure hunt for error" (*Vavilov* at para 102). In reading the Decision as a whole, I find that the IAD did not err in applying the definition of "terrorism" as outlined in paragraphs 34(1)(f) and 34(1)(c) of the IRPA and in *Suresh*.

[27] The IAD concluded that the sources of information were authoritative and credible which meets the Supreme Court of Canada's definition of "reasonable grounds to believe" as set out in *Mugesera*. The IAD also concluded, based on those authoritative and credible sources, that the intention of inciting hartals was to cause death or serious bodily injury, and that the purpose of inciting hartals was to intimidate a population and to compel the government to re-instate a caretaker government or to hold fresh elections. *Suresh* defines an act of terrorism as an act intended to cause death or serious bodily injury to a civilian, and has the purpose to intimidate a population or compel a government.

[28] The Applicants submit that *Foisal* provides guidance to determine whether there is a reasonable link between the BNP activities (i.e. inciting hartals) and the definition of "terrorism." In *Foisal,* the Court clarified the specific intent test. A decision maker is required to refer to factors that demonstrate the path they took to conclude specific intent. Such factors relate to:

1. the circumstances of the violent acts resulting in the death or serious bodily injury;
2. the internal structure of the organization;
3. the degree of control exercised by an organization's leadership over its member;
4. the knowledge of the organization's leaders; and,
5. the existence of a public denunciation or approval of the impugned acts

> (*Foisal* at para 20, *citing M.N. v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 at para 12).

[29] The Applicants argue that the IAD referred to a lower mental element than that of specific intent by referring to two references in support of their argument. First, the Applicants contend the IAD erred by using mere violence to impute specific intent when mentioning the "BNP's intent to use violence" as the "foundation upon which [the] findings of fact rest." Second, the Applicants contend that the IAD erred by using the BNP leaders' mere knowledge to impute specific intent when mentioning that, "those who direct the activities of the BNP know that inciting hartals leads to violent confrontation and to the death or serous injury for civilians."

[30] The Respondent argues that the IAD had not misapplied *Suresh* or that a lower mental element was applied to assess specific intent. The Respondent agrees that mere violence is not enough to find specific intent (*Rahman v Canada (Citizenship and Immigration)*, 2023 FC 1695 at para 17; *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at paras 42, 44). The Respondent refers to *Opu* for the proposition that specific intent may be determined by the degree of certainty that an act causes death and serious bodily harm.

[31] As the case law reiterates, the outcome of an application for judicial review on questions related to inadmissibility and the BNP will depend on the unique facts and evidence as submitted to the decision maker, as well as the character of analysis undertaken (or not) by the decision maker.

[32] A proper application of the definition of *Suresh* requires reasons which demonstrate an understanding that there is a distinction between the intent to use violence and the intent to cause death or serious bodily harm (*Foisal* at para 17). In *Foisal*, the Court found that the tribunal did not explain how it had imputed "specific intent to the BNP" because it was silent in its analysis, including the degree of control the BNP had over its members and on the internal structure of the organization.

[33] In the Applicants' case, the IAD was not silent on those factors. The IAD's reasons clarified that the findings of the ID's decision were those upon which the IAD relied upon in making its own conclusions. However, unlike *Foisal*, the IAD considered the appropriate factors when assessing the Applicants' case, and explained the path it took for imputing specific intent to the BNP.

[34] Although the IAD's analysis resembles that of the ID's decision, the Decision demonstrates that the IAD had engaged in analysis as required by paragraphs 34(1)(c) and 34(1)(f) of the IRPA and the test set out in *Suresh*. The IAD addressed *inter alia* the history of violence, the changing nature of hartals, the extent of the BNP leadership's knowledge of hartals leading to death and serious injuries. Those findings were based on the evidence before the tribunal.

[35] The Applicants also contend that the IAD relied on erroneous findings of fact. However, I disagree. The IAD relied on findings of fact in the ID's decision by reference, which had specifically identified evidence it relied upon. The IAD engaged with the substance of the evidence to draw its conclusions that the BNP's objective was to force the current government into agreeing

to put in place a caretaker government to oversee the general election, and the intentional acts and omissions of the BNP reached the threshold for terrorist activities within the meaning of the definition in *Suresh*.

[36] A reviewing court must refrain from reweighing and reassessing the evidence considered by the decision maker (*Vavilov* at para 125). As such, the IAD was not unreasonable in its analysis.

IV. Applicants' Proposed Certified Questions

[37] The Applicants proposed the following questions for certification, provided to the Court and to the Respondent in accordance with the Court's *Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection Proceedings (last amended October 31, 2023)*:

> A. Does "membership" relate to a question of "possible use of violence" or the "possible objection of public disorder"? In other words, does "membership" require an analysis of the personal characteristics of the applicant, in this case someone who has been a sympathizer or a member of the main opposition party and has never taken up arms?
>
> B. Is there a legal presumption that the sympathizer or members of a legal political party in a constitutional democracy cannot be judged inadmissible to Canada solely on the basis of their membership?
>
> C. Does Section 34(1)(f) as related to the other paragraphs of Section 34 violate the constitution guarantees of Section 2 of the *Canadian Charter of Rights and Freedoms* with regard to freedom of association and freedom of expression?

[38] The threshold for certifying a question is whether there is a serious question of general importance which could be dispositive of the appeal (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 12). It is well established in the jurisprudence that a question cannot be certified unless it is serious, dispositive of the appeal, and transcends the interests of the parties. It must also have been raised and dealt with by the court below, and it must

arise from the case rather than from the judge's reasons. Finally, and as a corollary of the requirement that it be of general importance pursuant to section 74 of the IRPA, it cannot have been previously settled by the case law (*Obazughanmwen v Canada (Public Safety and Emergency Preparedness*), 2023 FCA 151 at para 28).

[39] The Respondent states that the fist two questions are similar questions and have already been answered by the Federal Court of Appeal in *Poshteh*. On the third question, the Respondent states that the Applicants never provided a Notice of Constitutional Question at any juncture and should not be able to raise it now. Furthermore, the Supreme Court of Canada in *Suresh* already provided answers to the question, as the Charter is not engaged because they are not currently facing deportation. I agree with the Respondent's submissions.

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

JUDGMENT in docket IMM-6876-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6876-22
STYLE OF CAUSE:	REAJ HAMID, ET AL. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL (QUÉBEC)
DATE OF HEARING:	FEBRUARY 7, 2024
JUDGMENT AND RESONS:	NGO J.
DATED:	JUNE 21, 2024

APPEARANCES:

Stewart Isvanffy	FOR THE APPLICANTS
Guillaume Bigaouette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Étude Légale Stewart Isvanffy Barristers and Solicitors Montréal (Québec)	FOR THE APPLICANTS
Attorney General of Canada Montréal (Québec)	FOR THE RESPONDENT