Federal Court  Cour fédérale

Date: 20170512

Docket: IMM-3768-16

Citation: 2017 FC 494

Ottawa, Ontario, May 12, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

S.A.

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Request for Anonymity

[1] The Applicant has requested that his name not be disclosed in this Judgment and Reasons, on the ground that his safety may be jeopardised if the facts that underlie his claim for refugee status are made public. The Respondent acknowledges that Canadian and other foreign court decisions concerning the Bangladesh National Party [BNP] may attract media attention in

Bangladesh. Nevertheless, the Respondent opposes the request for anonymity on the ground that the Applicant has not demonstrated that he will be personally harmed if he returns to Bangladesh and is identified by name in this Judgment and Reasons.

[1] The Applicant's request for anonymity is not a motion to seal the court file under Rule 151 of the *Federal Courts Rules*, SOR/98-106. It is limited to the publication of this Judgment and Reasons. I am satisfied that the Applicant's concern for his safety is well-founded, and that the public interest in open and accessible court proceedings will not be unduly affected by identifying the Applicant in the style of cause by his initials, and in these Reasons as "the Applicant". The request is therefore granted.

II. Overview

[2] The Applicant seeks judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board. The ID found the Applicant to be inadmissible to Canada pursuant to s 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] because he is a member of the BNP.

[3] The Applicant acknowledges that at all material times he was a member of the BNP. The Federal Court of Appeal has ruled that there is no temporal component to an analysis under s 34(1)(f) of the IRPA. For the reasons that follow, I find that the ID's definition of terrorism, its consideration of the evidence, and its conclusion that the BNP is an organization that engages, has engaged or will engage in terrorism, were all reasonable. The application for judicial review is therefore dismissed.

III. Background

[4] The Applicant is a citizen of Bangladesh. In April 2004, he became a member of the BNP and joined its youth wing, the Jatiyatabadi Jubo Dal. In 2012, he became joint secretary of the BNP's executive committee. The Applicant arrived in Canada in April 2014 and applied for refugee status.

IV. Decision under Review

[5] The ID conducted an inquiry into the Applicant's admissibility on August 24, 2016 and issued its decision the same day. The Applicant acknowledged that he was a member of the BNP. The ID determined that there were reasonable grounds to believe the BNP is an organization that engages, has engaged or will engage in terrorism. The ID therefore found the Applicant to be inadmissible to Canada pursuant to s 34(1)(f) of the IRPA.

V. Issues

[6] This application for judicial review raises the following issues:

A. Was the ID's finding that the Applicant is inadmissible to Canada pursuant to s 34(1)(f) of the IRPA reasonable?

B. Should questions be certified for appeal?

VI. Analysis

A. *Was the ID's finding that the Applicant is inadmissible to Canada pursuant to s 34(1)(f) of the IRPA reasonable?*

[7] Paragraphs 34(1)(c) and 34(1)(f) of the IRPA provide as follows:

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).

[8] 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 (*Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94 at para 17 [*Gazi*]; *Chowdhury v Canada (Citizenship and Immigration)*, 2017 FC 189 at para 8 [*Chowdhury*]). 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).

[9] 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).

[10] In *Gazi*, which bears a strong resemblance to this case, Justice Henry Brown upheld a finding by the ID that the BNP is an organization that engages, has engaged or will engage in terrorism. As in *Gazi*, the ID in this case focused on the BNP's use of general strikes (or hartals) as a form of political protest. The ID found that in the months preceding Bangladesh's 2014 election, the BNP leadership called for hartals and blockades in order to pressure the Awami League into installing a caretaker government for the purpose of overseeing the general election. On the first anniversary of the general election, which was won by the Awami League, the BNP called for another round of hartals and blockades to pressure the government into holding a multiparty election.

[11] In *Gazi*, Justice Brown applied the definition of terrorism found in the *Criminal Code*, RSC 1985, c C-46 to the BNP's use of hartals in the following manner:

> [38] […] Canada defines terrorism very broadly and in in [*sic*] my view, in such a way that hartals may reasonably be said to come within that definition. To repeat, Canada's definition of terrorism in this case include acts *and* omissions outside Canada (e.g., that occurred in Bangladesh) that have elements of intimidation of the public or parts of the public (e.g., perhaps, hartals) that affect security, including economic security (e.g., perhaps, hartals), that compel a government to do or refrain from doing any act (e.g., perhaps, hartals), where that act or omission intentionally causes death or serious bodily harm to a person by violence, endangers a person's life, causes a serious risk to the health or safety of the public or a segment thereof (e.g., perhaps, hartals), or causes substantial property damage (e.g., perhaps, hartals) or where such acts or omissions intentionally cause serious interference with or

> serious disruption of an essential service, facility or system (e.g., perhaps, hartals). [Emphasis original]

[12] The Applicant seeks to distinguish *Gazi* on two grounds. First, he says that when he left Bangladesh in 2014, there were not yet reasonable grounds to believe that the BNP was engaging, had engaged or would engage in terrorism. Second, he says that *Gazi* stands only for the proposition that hartals *may* satisfy the Canadian definition of terrorism – hence Justice Brown's repeated use of the word "perhaps". He argues that the ID is obliged to assess the evidence in each case, and to reach a reasonable conclusion that hartals constitute a form of terrorism. He maintains that the ID failed to conduct a proper analysis in this case.

[13] With respect to the Applicant's first point, 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.

[14] In reasons substantially endorsed by the Federal Court of Appeal (*Gebreab* at para 2), Justice Judith Snider conducted the following analysis 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.

[15] The Applicant relies on the decision of Justice Richard Southcott in *Chowdhury*. In *Chowdury*, 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). *Chowdury* may be distinguished from the present case. Mr. Chowdury ceased his

membership in the BNP in 2012. Here, the Applicant acknowledges that he remained a member of the BNP at all material times. To the extent that *Chowdury* may be seen as a departure from the Federal Court of Appeal's decision in *Gebreab*, I am bound by the latter.

[16] Turning to the Applicant's second point, the ID based its definition of terrorism on s 83.01(1) of the *Criminal Code* and the Supreme Court of Canada's decision in *Suresh v Canada (Citizenship and Immigration)*, 2002 SCC 1 at paragraph 98. The Applicant does not take issue with this approach, but says that if the ID chooses to invoke the definition of terrorism found in the *Criminal Code*, then it must apply it correctly. In particular, the Applicant says that the ID must be satisfied that the BNP had the necessary purpose and intent when it called for hartals.

[17] The ID observed that "the effect of calling for hartals, protests or blockades was certainly made clear to the BNP during the time leading up to the 2014 election." Later in its decision, the ID remarked that by January 2015, the BNP leader was "well aware of what it meant in the ears of the BNP supporters when she called for strikes, protests and blockades. At that point in time, a call for such action was synonymous with a call for actions that fall within an understanding of terrorism for the purposes of paragraph 34(1)."

[18] The ID supported its conclusion with a lengthy recitation of documentary evidence from sources such as Amnesty International, Human Rights Watch and *The Guardian* newspaper. The credibility of this evidence was not in dispute. The ID concluded that "the BNP had ample awareness of what ensued or what the effect was of its calls for action." These effects included

extreme violence, the indiscriminate killing of people, and massive economic disruption. The ID also found that the BNP failed to denounce, and thereby condoned, the violence.

[19] I can find no fault in the ID's analysis. Given the broad definition of terrorism in Canadian law, the purpose and intent of the BNP's calls for hartals, the violence and disruption that ensued, and the BNP's awareness of the consequences of its calls to action, the ID reasonably concluded that the BNP is an organization that engages, has engaged, or will engage in terrorism. The Applicant acknowledged his membership in the BNP and accordingly the ID's finding that he was inadmissible to Canada pursuant to s 34(1)(f) of the IRPA was also reasonable.

B. *Should questions be certified for appeal?*

[20] In written submissions made after the hearing of this application for judicial review, the Applicant requested that three questions be certified for appeal:

> In determining that the Applicant was inadmissible according to s.34(1)(f) of IRPA, was the Immigration Division required to determine whether the organization engaged in acts that were terrorist according to the definition set out in 83.01 (1) *Criminal Code*, R .S.C, 1985, c. C-46 including the *mens rea* elements of the definition, given that the Immigration Division selected that definition?
>
> Was the Immigration Division required to determine whether the organization engaged in terrorist acts according to the principles of complicity set out in *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40; that is whether the organization made significant and knowing contributions to the persons that committed terrorist acts?

> Was the Immigration Division required to determine if there were reasonable grounds to believe that the organization would engage in future terrorist activities after the Applicant sought admission to Canada?

[21] This Court may certify a question only where it: (a) is dispositive of the appeal; (b) transcends the interests of the immediate parties to the litigation; (c) contemplates issues of broad significance or general importance; and (d) arises from the case itself (*Zazai v Canada (Citizenship and Immigration)*, 2004 FCA 89 at paras 10-12; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, rev'd on other grounds 2015 SCC 61; *Liyanagamage v Canada (Secretary of State)*, [1994] FCJ No 1637, 176 NR 4).

[22] With respect to the first proposed question, it is well-established that principles of criminal law do not apply directly to administrative decisions made under the IRPA (see, for example, *Harkat, Re*, 2005 FC 393 at para 85; *Ahani v Canada*, [1996] FCJ No 937 at para 4). Nor would the answer to this question be dispositive of the appeal. Having opted to apply the definition of terrorism found in the *Criminal Code*, the ID then considered whether the BNP had the necessary purpose and intent when it called for hartals.

[23] The second proposed question has been answered by the Federal Court of Appeal in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paragraph 22: "[…] nothing in paragraph 34(1)(f) requires or contemplates a complicity analysis in the context of membership. Nor does the text of this provision require a "member" to be a "true" member who contributed significantly to the wrongful actions of the group. These concepts cannot be read into the language used by Parliament."

[24] As previously discussed, the third proposed question has been answered in *Gebreab* at paragraph 3.

[25] I therefore decline to certify any of the questions proposed by the Applicant for appeal.

VII. Conclusion

[26] 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.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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