Federal Court  Cour fédérale

Date: 20180504

Docket: IMM-3493-17

Citation: 2018 FC 480

Ottawa, Ontario, May 4, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MD MOSTOFA KAMAL

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Summary

[1] The Applicant is a thirty-one-year old citizen of Bangladesh. In 2015 he left Bangladesh and made a refugee claim in Canada. The refugee claim was suspended. He was subsequently found inadmissible because there were reasonable grounds to believe he was a member of an organization that engages in terrorism and instigated the subversion by force of the Bangladesh

government. He was ordered deported. He seeks judicial review which is dismissed for the following reasons.

II. Background facts

[2] The Minister of Public Safety and Emergency Preparedness [Minister] alleges there are reasonable grounds to believe that the Applicant is a member of the Bangladesh Nationalist Party [BNP]. The Minister also alleges that the BNP is an organization that engages in terrorism and engaged in, or instigated the subversion by force of the Bangladesh government as set out in paragraphs 34(1)(c) and (b) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA].

[3] Findings to this effect were first made in a report prepared by a Canadian Border Security Agency [CBSA] enforcement Officer, acting pursuant to subsection 44(1) of IRPA.

[4] Thereafter, a delegate of the Minister of Public Safety and Emergency Preparedness, acting pursuant to subsection 44(2) of IRPA, referred the CBSA report to the Immigration Division of the Immigration and Refugee Board of Canada [ID] for an admissibility hearing.

[5] The matter was reviewed by the ID under subsection 44(2) of IRPA.

[6] The Minister of Public Safety and Emergency Preparedness took part in the ID hearing through counsel. The Minister argued that there are reasonable grounds to believe the Applicant is a member of the Bangladesh Nationalist Party. The Minister also asked the ID to find reasonable grounds to believe that BNP is an organization that engages in terrorism and engaged

in, or instigated the subversion by force of the Bangladesh government per paragraphs 34(1)(c) and (b) of IRPA.

[7] The ID upheld the position of the Minister, finding reasonable grounds to believe both that the Applicant was a member of the BNP, and that the BNP engaged in terrorism and engaged in, or instigated the subversion by force of the Bangladesh government. As a consequence, the ID determined the Applicant was inadmissible on security grounds pursuant to paragraph 34(1)(f) of IRPA. Therefore the ID issued the Applicant a deportation order.

[8] The Applicant applies for judicial review of the ID's decision pursuant to subsection 72(1) of IRPA.

[9] This application raises two issues. First, the Applicant challenges the decision on the ground that it is flawed by procedural unfairness. In my view, this argument is unfounded. The second asks whether the ID's decision is reasonable, that is, whether it falls within the range of possible, acceptable outcomes defensible on the facts and law in this case. In my view, the decision of the ID is reasonable. Therefore, and for the following reasons, judicial review is dismissed.

III. Issues

[10] The following issues are raised by the Applicant:

a) Whether the ID breached the Applicant's right to natural justice by refusing to allow as expert witness to testify?

b) Whether the ID member displayed a reasonable apprehension of bias by failing to recuse?

c) Whether the ID erred by finding that the BNP engaged in terrorism or subversion of force for the purposes of paragraph 34(1)(c) of IRPA?

[11] In my view, the central issues are:

(1) Did the ID breach procedural fairness with respect to the expert evidence or the alleged bias?

(2) Was the ID's finding of reasonable grounds to believe that the Applicant is a member of the BNP, reasonable?

(3) Was the ID's finding of reasonable grounds to believe that the BNP engaged, is engaging or will engage in terrorism, reasonable?

IV. Standard of Review

[12] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question". This Court has determined that findings of inadmissibility under subsection 34(1) of IRPA are reviewable on the reasonableness standard: *A.K. v Canada (Citizenship and Immigration)*, 2018 FC 236 [*A.K.*] per Mosley J; *S.A. v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 494 [*S.A.*] per Fothergill J, and my decision in *Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94 [*Gazi*] at para 17.

[13] Findings of the terrorist nature of an organization or an individual's membership in a particular organization are reviewable on the reasonableness standard: *Kanagendren v Canada*

(Citizenship and Immigration), 2015 FCA 86 at para 11 per Dawson JA; *Suresh v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 28 at para 44 per Mosley J; *Mirmahaleh v Canada (Citizenship and Immigration*), 2015 FC 1085 at para 15 per Gascon J; and see my decision in *Ali v Canada (Minister of Citizenship and Immigration)*, 2017 FC 182 [*Ali*] at para 22.

[14] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[15] An important factor in this analysis is the standard of proof applicable in this inadmissibility hearing. A standard of proof upon which the ID may make decisions under paragraph 34(1)(f) of IRPA is "reasonable grounds to believe". The availability of this standard was enacted by Parliament in 2001. It is found in section 33 of IRPA:

Inadmissibility **Rules of interpretation** 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.	**Interdictions de territoire** **Interprétation** 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.

[16] Further relevant law is established by this Court, the Federal Court of Appeal, and the Supreme Court of Canada, as noted in *Gazi*, at paras 19-22:

> [19] In addition, I also wish to note at the outset that Senior Immigration Officers have a recognized and accepted degree of expertise in these matters: *Gutierrez v Canada (Minister of Citizenship and Immigration),* 2013 FC 623 at para 21 [*Gutierrez*]:
>
> > [21] The Federal Court of Appeal has held that the question of whether a person is a "member" of an organization described in paragraph 34(1)(*f*) of the *IRPA* is a question of mixed fact and law reviewable on a standard of reasonableness: *Poshteh*, above. The same applies to determining whether there are reasonable grounds to believe that the organizations in question have engaged, are engaging or will engage in acts of terrorism. In fact, these two aspects are closely related, and both raise questions of mixed fact and law in which immigration officers have a degree of expertise, as our Court has also recognized on a number of occasions: see, *inter alia*, *Jalil v Canada (Minister of Citizenship and Immigration)*, 2006 FC 246 at paras 19-20, [2006] 4 FCR 471 [*Jalil*]; *Daud v Canada (Minister of Citizenship and Immigration)*, 2008 FC 701 at para 6, (available on CanLII) [*Daud*]; *Omer v Canada (Minister of Citizenship and Immigration)*, 2007FC 478 at paras 8-9, 157 ACWS (3d) 601.
> >
> > [emphasis added]
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> [20] Moreover, the Federal Court of Appeal said of paragraph 34(1)(b) of *IRPA* that there is a presumption of deference to be afforded to the IAD's interpretation of its home statute: *Najafi (FCA),* above at para 56. I see no reasons why a Senior Immigration Officer acting under paragraph 34(1)(c) of *IRPA* should not be afforded the benefit of the same presumption of deference, and so find.
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> [21] This Court in *Gutierrez* considered the standard of review in terms of the standard of proof under paragraph 34(1)(f):
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> > [22] On the other hand, it should be noted that the standard of proof that an immigration officer must apply in the context of sections 34 to 37 of the

> *IRPA* is that of "reasonable grounds to believe" that the facts stated in those sections have occurred, are occurring or may occur (*IRPA*, s 33). It is settled law that this standard requires more than mere suspicion but is not equivalent to the balance of probabilities required in civil matters: *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114, [2005] 2 SCR 100; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 39, [2007] 1 SCR 350. Accordingly, the role of this Court when reviewing an immigration officer's inadmissibility decision is not to determine whether, in fact, there were reasonable grounds to believe that the individual engaged in or was a member of an organization that engaged in the alleged acts but to consider whether the officer's finding that there were reasonable grounds to believe can itself be regarded as reasonable.

[22] The Supreme Court of Canada held in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114, that "reasonable grounds to believe" requires something more than mere suspicion but less than the balance of probabilities:

> The Federal Court of Appeal has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted] in essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible evidence.

[17] The Supreme Court of Canada instructs that judicial review is not a line-by-line treasure hunt for errors; instead, the reasonableness of a decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v*

Driver Iron Inc, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[18] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required of a court reviewing on the correctness standard of review:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

V. Analysis

A. *Did the ID breach procedural fairness with respect to the alleged expert evidence and or the alleged bias of the decision-maker?*

(1) Issues surrounding the alleged expert's witness evidence

[19] At the Applicant's request, the hearing before the ID was scheduled for Tuesday and Wednesday, June 6 and 7, 2017. On the Friday before the hearing, the Applicant requested leave to call an alleged expert witness to testify on five issues.

[20] An alleged separation between the BNP and Jubo Dal was not one of the five issues.

[21] The Minister objected to the late-filed request. At the hearing, and in reply, the Applicant sought leave to tender the alleged expert to testify in relation to an additional sixth issue, namely the alleged separateness between the BNP and Jubo Dal. The ID ruled against hearing oral testimony from the alleged expert on any of six issues. However, the ID did admit a lengthy draft report authored by the alleged expert.

[22] In dismissing the request, the ID considered both the lateness and the substance of the proposed testimony. The ID ruled the Applicant had given insufficient notice requirements of his request and refused to abridge the time to accommodate its lateness. With respect to the substance of the proposed testimony, the ID held that the alleged expert's evidence was either irrelevant or unhelpful.

[23] In terms of notice, I am prepared to accept that the request was made on the Friday before the hearing, and not on the day before the hearing as stated by the Officer. The Applicant raised this matter a day or so before the judicial review hearing. That said, the request was still filed short of the five days' notice required by paragraph 32(2)(b) of the *Immigration Division Rules* (SOR/2002-229).

[24] In terms of the alleged separateness between Jubo Dal and BNP, the sixth ground on which the Applicant wanted his alleged expert to testify, the Applicant sought to rely on a Response to Information Request [RIR] document, also not tendered earlier. The Applicant's counsel said he came across the RIR the night before the hearing. The Applicant argued the RIR establishes that the BNP and Jubo Dal are completely separate from each one another. In this connection, the ID said:

> [19] The topic of the RIR is the roles and responsibilities of the executive members of the local branches of the BNP and Jubo Dal. The author notes that information about this "was scarce amongst the sources consulted by the Research Directorate within the time constraints of this response." […] The author quotes an unspecified "US-based professor of political science, who is a specialist in Bangladeshi politics." […] In speaking about the executive committee structure of the Jubo Dal, the professor stated that it is:
>
> > a completely separate organization from the BNP, and it has completely separate executive committees from the BNP structure and leadership. The [Jatiyatabadi Juba Dal] structures its executive committees in a similar way to the BNP, however there is no overlap between the two organizations, as there is a practice of "graduation" of activists from [Jatiyatabadi Juba Dal] who then move into the BNP. The executive committees have the same positions and responsibilities as those of the BNP.[…]

[25] The ID disagreed with the Applicant's interpretation of the RIR. The ID concluded the Applicant took certain phrases out of context. The ID found the RIR proved the Jubal Dal and BNP were related:

> [20] Mr. Berger fixated on the phrase "completely separate organization" and took it out of context. This professor is addressing the separateness of the executive committee structures, not the overall nature of the relationship between the BNP and the Jubo Dal. Ironically, this statement actually tends to prove the relatedness of the organizations in saying that there is a practice of Jubo Dal members graduating into the BNP. I do not find that this RIR opened up a new basis for hearing testimony from Dr. Bahar.

[26] In my view, this is a fair analysis of the RIR. While there was evidence of separation between the BNP and Jubo Dal, there was also evidence that Jubo Dal is a front for the BNP, that Jubo Dal is under the command and control of BNP, and that there is a seamless transition from one to the other.

[27] Further and in this connection, neither the Applicant nor his supporters alleged any difference between the BNP and Jubo Dal when they filed their written material, including the Applicant's BOC. They did not claim any difference or separation until the day of the hearing. It was at the hearing when the Applicant attempted to distance himself from his previous position that he *was* a member of BNP.

[28] The ID found the Applicant's evidence, including statements in his BOC and letters provided by the Applicant, to be in direct contrast with the evidence of the alleged expert witness. Again this was fair on the record. It was open to the ID to prefer the Applicant's firsthand evidence over the proposed expert witness's evidence.

[29] In my respectful view, the decision not to hear from the alleged expert is not flawed by procedural unfairness; it was the exercises of a reasoned discretion.

(2) Alleged bias of ID

[30] After the ID's ruled against hearing testimony from the Applicant's alleged expert witness, counsel for the Applicant requested the ID member recuse herself on grounds of bias because she had allegedly "pre-judged the case" in disagreeing with the Applicant's interpretation of the RIR.

[31] The ID member found the allegation of bias was baseless and dismissed the recusal request.

[32] Justice Kane sets out the test for bias in *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 at para 50:

> [50] The test for bias was established by Justice de Grandpré, writing in dissent, in *Committee for Justice and Liberty* at 394:
>
> > […] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information […] [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.
> >
> > [48] In *R v S (RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS*], at para 113, Justices L'Heureux-Dubé and McLachlin referred to the test and noted that the threshold for a finding of real or perceived bias is high, explaining that "an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice." The Court cautioned that allegations of bias are serious and should not be made lightly. The same principles apply to allegations against other decision makers.
>
> [51] A reasonable apprehension of bias requires more than an allegation based on a passing comment in the decision. The allegation must be accompanied by cogent evidence (RDS at paras 114, 117). In this case, there is no evidence at all to suggest that an informed person would have a reasonable apprehension of bias.

[33] Before me, the Applicant specifically alleged not only apprehension of bias but actual bias:

> This finding by the ID is tainted by bias as it disallows the Applicant from rebutting the Minister's case against him; indeed it is a grave breach of natural justice as by refusing [name of the alleged expert] to testify on this basis, the ID is effectively breaching the Applicant's right to put forward his case.

[34] In my respectful view, the allegations of apprehended bias and actual bias are unsupported. The ID made an evidentiary ruling in the course of an inadmissibility hearing. The Applicant requested relief from his failure to follow the rules established by the ID for the admission of oral evidence. It was open on the record for the ID to decline to abridge time; the ID not only considered the lateness of the filing but also considered the substance of the proposed testimony. The ID considered the Applicant's newly-discovered RIR, which the Applicant used to support the request for oral testimony. The ID noted that the Applicant's discovery of the RIR was extremely late in the day (the night before the hearing). Further, the ID found its lateness was inadequately explained.

[35] In my view, and with respect, the ID did nothing more than reject a request to admit oral evidence. The ID accepted a draft report from the proposed witness. In my view this exercise of the ID's very considerable decision is unassailable. Having an interlocutory evidentiary ruling dismissed does not constitute grounds for apprehended bias. Nor do the circumstances in this case come close to grounding an allegation of actual bias. One party inevitably loses such motions. If it were otherwise, few if any decision-makers would escape motions to recuse.

[36] Finally, the Applicant says his apprehension of bias is heightened by the ID's finding at para 25 of her decision that, "a baseless allegation of bias is unbecoming conduct for a lawyer." Counsel submits that this is a "personal attack on counsel for advocating fearlessly and without frivolity for his client is indeed further evidence of the ID's bias." With respect, I disagree. Unjustified attacks on a decision-maker such as the ID on the basis of actual bias cannot be encouraged. I am not persuaded it is an error to state that a baseless allegation of bias is unbecoming conduct.

[37] In summary, I am not persuaded on the standard of correctness that there was a breach of procedural fairness.

B. *Was the ID's finding that there were reasonable grounds to believe that the Applicant is a member of the BNP, reasonable?*

[38] This is a new issue raised at the hearing. It arose because the Applicant at the hearing attempted to distance himself from his previous assertions and accompanying evidence, that he *was* a member of the BNP. Before the ID, and essentially at the last minute, the Applicant alleged that he was *not* a member of BNP, but instead was a member of Jubo Dal, the BNP's youth wing.

[39] The ID rejected this argument:

> [36] In his Basis of Claim Form he wrote, "… I was a General Member and Publicity Secretary of Bangladesh Nationalist Party (BNP)[…]. In another section he wrote, "I fear that members of the Awami League will harm or kill me because of my BNP politics".[…]
>
> [37] In the narrative attached to his Basis of Claim Form, he wrote, "In February 2005, I joined the Jubodal, the youth wing of the Bangladesh Nationalist party, as a general member. In October 2006, I became Publicity Secretary of the Comilla City Jubodal committee. I organized meetings and processions and encouraged people to support the BNP." […]
>
> [38] He also described having been attacked as he "was going home from the BNP office". He recounted how "[a]long with my fellow committee members, I participated in the BNP picketing program that was taking place." After being threatened and attacked, he contacted the agricultural secretary of the BNP Central Committee and another BNP leader for assistance.[…]
>
> [39] He referred to "my BNP colleagues who have also been falsely charged…".[…]

> [40] He signed a declaration in his Basis of Claim Form that the "entire content of this form and all attached documents have been interpreted to me" and that "the information I have provided in this form is complete, true and correct". This was accompanied by a signed declaration from a Bengali interpreter confirming that, "The claimant has assured me that he/she understood the entire content of this form and all attached documents and the answers provided, as interpreted by me".[…]
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> [41] Mr. Kamal also completed a Schedule A Background Form in which he indicated that he became a general member of the BNP in February 2005, then Publicity Secretary for the BNP in October 2006 and held that position until August 2015 when he came to Canada. He also signed a declaration for this form that the information he gave was true, complete and correct. He then signed another declaration in the presence of an immigration officer on November 2, 2015 that the information was true, complete and correct. A Bengali interpreter signed a declaration that he/she faithfully and accurately interpreted the content of the application and any related forms to the person concerned.
>
> [Emphasis added.]

[40] As a result, the ID found that the Applicant's attempt to distance himself from the BNP not credible; indeed the ID found it disingenuous. In my view, these findings are defensible on the record.

[41] The Applicant pressed his allegation respecting non-membership in the BNP by referring to the RIR he located the night before the hearing discussed above. The ID sets out the circumstances and contents of the RIR as follows:

> [43] As noted earlier, [Applicant's counsel] stated that he informed the Minister prior to the hearing that Mr. Kamal intended to concede being a member of the BNP. It was only after [Applicant's counsel] found the RIR the night before the hearing that Mr. Kamal changed his position. This would imply that Mr. Kamal only realized that he was not a member of the BNP because [Applicant's counsel] discovered the RIR. Otherwise, he erroneously believed for the past 12 years that he was a member and Publicity Secretary

> for the BNP. This lacks credibility and I find Mr. Kamal's last-minute change to be disingenuous.
>
> [44] During his testimony, Mr. Kamal said that he was Publicity Secretary for the Jubo Dal for only two years between October 2006 and October 2008, after which he became a general member. This conflicts with his Schedule A Background form in which he declared he became a general member of the BNP in February 2005 and Publicity Secretary for the BNP in October 2006. Mr. Kamal testified that he simply made a mistake in the form naming the BNP instead of the Jubo Dal because he does not speak English. This makes no sense. The name "Jatiyatabadi Jubo Dal" is not English whereas "Bangladesh Nationalist Party" is. Alternatively, if he did not understand the question in the form, this does not explain why then he gave the same information in his narrative attached to the Basis of Claim Form. Even more to the point, he confirmed that he completed the forms with the assistance of a lawyer and interpreter. He was evasive when confronted with the fact that he had made corrections to other information in the form and initialed those corrections, yet had made no correction to identifying himself as a BNP member. He said that someone from his lawyer's office made the corrections and that he just initialed them. He could not explain, however, how that person knew to make those corrections. I do not find this credible.
>
> [45] I find that the information in his refugee claim documents is more reliable since this is the information he provided in the first instance, prepared in writing with the assistance of a lawyer and interpreter, prior to this admissibility hearing where it is now in his interest to deny his membership and level of involvement in the BNP.
>
> [46] I find on reasonable grounds that Mr. Kamal was a member of the Jubo Dal and that, throughout his membership and beyond, he understood that being a member of the Jubo Dal meant that he was also a member of the BNP.
>
> [Emphasis added.]

[42] In addition, the ID referred to letters of support filed by the Applicant, one of which states:

> In February 2005, Md Mostofa Kamal joined to the Jubodal, the youth faction of Bangladesh Nationalist Party as a general member under my leadership. Within a very short period of time, he

> achieved huge popularity as a member of the Bangladesh Nationalist Party of his own area South Chartha. As a result, in October 2006, he was nominated as a Publicity Secretary of the Executive Committee of Jubodal of Comilla District.
>
> [Emphasis added.]

[43] Another letter supporting the Applicant states:

> Md. Mostofa Kamal became a very popular worker in the Dakkhin Chartha area of the Bangladesh Nationalist Youth Party and he was Publicity Secretary of the Executive Committee of the Bangladesh Nationalist Youth Part of Comila [*sic*] District.
>
> Since Md. Mostofa Kamal was a committed worked of the Bangladesh Nationalist Party, he became a victim of torture and persecution …
>
> As all of his family members are the workers and supporters of the Bangladesh Nationalist Party, everybody is facing threats". […]
>
> [Emphasis added.]

[44] Yet another supporter writes:

> Md. Mostofa Kamal and I together with all other political workers of the Comilla Youth Party, Bangladesh Nationalist Party used to participate in all the program and processions of the party. Md. Mostofa Kamal gained familiarity as a very popular political worker in Bangladesh Nationalist Party of South Chortha area. And until he left Bangladesh for going to Canada, he was the advocacy secretary of the executive committee of Camilla Youth Party. We always used to take part in the protest, defensive program and blockade of BNP together.[…]
>
> [Emphasis added.]

[45] Another supporter says:

> My brother Mostofa and myself have been active members of Bangladesh Nationalist Party in Camilla District since quite a long period. Everyone from my father's and mother's family is member and follower of Bangladesh Nationalist Party.

> Mostofa kamal *[sic]* had been working as the Publicity Secretary of the Executive Committee of Camilla Bangladesh Nationalist Youth Party very successfully. . . .
>
> ... One of Mostofa's maternal uncles Samsul Huda [the uncle Mr. Kamal named as a Jubo Dal member as noted above] was a General Secretary of executive Committee of Bangladesh Nationalist Party of Kotowali thana of Comilla ...
>
> At present we have been getting so much threats as we all the followers and workers of the Bangladesh Nationalist Party *[sic]*[...]
>
> [Emphasis added.]

[46] Also in evidence before the ID was an RIR filed by the Minister. This RIR concludes in effect that Jubo Dal is a front organization for the BNP, and that the Jubo Dal falls under the discipline of the BNP, notwithstanding they have separate constitutions. As such a front, the RIR concludes that the purpose of Jubo Dal is to support the "implementation of the party programs". Those were the BNP party programs.

[47] The ID considered all this and concluded that while the Jubo Dal enjoyed some autonomy, its existence and legitimacy is based on the constitution of the BNP. The ID further concluded that the "[t]he raison d'être of the Jubo Dal is to further the BNP. It falls under the discipline of the BNP and even shares in BNP governance in that the Jubo Dal secretary sits on the BNP's national executive committee."

[48] On this point, and in summary, the ID concluded on the record before it:

> I find on reasonable grounds that the Jubo Dal is a facet of the BNP, and not a completely separate organization. By being a member of the Jubo Dal, Mr. Kamal was a member of the BNP.

[49] In my respectful view, this finding is defensible on the record.

C. *Was the ID's finding that she had reasonable grounds to believe that the BNP engaged, is engaging or will engage in terrorism, reasonable?*

[50] The next step is to consider the meaning of "engaging in terrorism" in paragraph 34(1)(c) of IRPA. This was legislated by Parliament in amendments to IRPA forming part of Canada's response to the September 11, 2001 World Trade Center and Pentagon attacks:

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;

[51] Terrorism was defined by the Supreme Court of Canada shortly thereafter in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*] at para 98:

> [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.

[52] In 2001, as another part of Canada's response to 9 / 11, Parliament created new crimes in connection with which it legislated a definition of "terrorist activity" as paragraph 83.01(1)(b) of the *Criminal Code*, RSC, 1985, c C-46:

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	**A)** cause des blessures graves à une personne ou la

the use of violence,	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).
and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance	Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte — action ou omission — commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit

with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. (*activité terroriste*)	international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international. (*terrorist activity*)

[53] In my view, the ID acted reasonably in considering both the definition of "terrorism" in the Suresh decision of the Supreme Court of Canada, and the definition of "terrorist activity" in the Criminal Code in determining there were reasonable grounds to believe that the BNP was engaging in terrorism: S.A., at para 17; Ali at paras 39-45; *Soe v Canada (Minister of Citizenship and Immigration)*, 2007 FC 671 at paras 22-24; *Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957 at para 102; and *Gazi* at para 27. I do not read A.K. as concluding otherwise.

[54] It is worth noting that Parliament enacted section 83 of the Criminal Code in the same post 9 / 11 period it enacted what is now paragraph 34(1)(c) [engages in terrorism] of IRPA; both came into force in December 2011. I am not persuaded Parliament enacted these two provisions virtually simultaneously in the expectation they would thereafter to be considered in isolation.

[55] A hallmark of terrorism, as Justice Mosley stated in A.K. at para 41, is the intention to and/or use of violence to achieve the political ends:

> I have considerable difficulty with the notion that a general strike called by a political party in an effort to force the party in power to take steps such as proroguing Parliament or convening by-

> elections, falls within the "essence of what the world understands by 'terrorism'". It is not an overstatement to suggest, as the Applicant has in these proceedings, that the Respondent's interpretation of the statute could capture political activities which, if carried out in Canada, would be protected under s 2 of the *Canadian Charter of Rights and Freedoms*, absent an intention to use violence to achieve the political ends.
>
> [Emphasis added.]

[56] In finding reasonable grounds to believe the BNP engaged in terrorism, the ID focused on just that: the use of violence to achieve the political ends. Indeed, the ID referred to the BNP's conduct as an "orgy of violence."

[57] In coming to its conclusion, the ID had evidence before it. I will not go through it all; it is in the record. The ID made its findings after considering the history of the BNP taken from numerous sources including The Guardian (a newspaper), Human Rights Watch, Amnesty International. It also had before it announcements made by the BNP itself.

[58] In the result, the ID found reasonable grounds to believe that BNP engaged in "terrorism" as understood for the purposes of s. 34(1)(c) by using hartals which the ID, as a matter of fact, found had become synonymous with violence causing death or serious bodily injury. The ID concluded:

> I find on reasonable grounds that the BNP engaged in "terrorism" as understood for the purposes of s. 34(1)(c) by using hartals which had become synonymous with violence causing death or serious bodily injury, not to mention great economic harm, for the purpose of compelling the government to meet its demands.

[59] In this connection, the ID considered events in April 2012:

> [64] In April 2012, the BNP called for a hartal to protest the disappearance of BNP senior party leader Ilias Ali. The strike effectively shut down the country for three days during which time "the opposition unleashed an orgy of violence in Dhaka and the northern district of Sylhet (where Ali was a former MP), smashing up vehicles and setting fire to 10 buses. One bus driver, who was asleep in his vehicle, was burned alive." There were "running battles in the street with police" and "daily clashes between the protesters enforcing the general strike and police." […]
>
> [65] Despite her awareness of what transpired when the BNP called for a hartal in April 2012, BNP leader Khaleda Zia called for a series of hartals on October 25, 2013 to protest the upcoming general elections in January 2014, demanding that they take place under the caretaker system.
>
> > 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 fresh produce as they could not transport it to the cities. The estimated cost to the economy runs in to 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 ...in some cases members of opposition groups recruited street children to carry out the attacks.[…]

[60] There was evidence from Human Rights Watch that a leader of Jubo Dal paid children to fire bomb buses:

> [66] […] Human Rights Watch interviewed a 15-year-old boy who reported that on one occasion, a leader of the Jubo Dal paid him and his three friends 2000 taka to set fire to two buses using petrol bombs.[…]

[61] The ID could have continued quoting from the report from Human Rights Watch, which is in the record:

> A Human Rights Watch researcher interviewed 25 patients or their relatives in December in the burn unit at Dhaka Medical College Hospital where many the injured were brought. When Human Rights Watch visited the hospital it was so overcrowded that some of the injured were forced to sleep in the corridors. Most patients said they had not had any warning they were going to be attacked and had not seen who had thrown the bombs. Others identified their attackers as opposition supporters.
>
> For example, one man told us that opposition supporters attacked his family as the truck they were riding in passed through Gazipur, north of Dhaka, on the evening of December 10, 2013. The opposition supporters, who had put timbers and bricks on the road, threw bricks at the vehicle. Adam Ali, a factory security guard, said he pleaded with them not to throw any petrol bombs. He told Human Rights Watch:
>
> > I said, 'Please show us some mercy, my family is inside, please don't throw the bombs.' There were about 15 of them, aged 20 to 25. They saw my children were inside the cab. They shouted swear words at us then threw petrol bombs inside. I jumped out of one door with two of my children and told my wife, Sumi, to get out of the other. But she was trapped inside along with my 2-year-old, Sanjida. The door was locked and they could not get out. They died in the van. After that I was lying semi-conscious on the ground when some of those men came up to me. 'Whatever happened, happened, you have to get over it,' they told me.
>
> One of the worst single incidents took place in Dhaka on November 28, 2013. In response to the November 25, 2013 announcement of the date of the 2014 election, the 18-party opposition alliance announced a 48-hour rail-roadway-waterway blockade. The blockade was later extended. A wave of violence ensued across Bangladesh. At around 6:30 p.m. that day, attackers threw a petrol bomb at a bus, killing four passengers and injuring 15. The driver, Hassan Mahbub, who suffered burns on 30 percent of his body, said the bus was struck as it was travelling at over 70 kilometers per hour. He told Human Rights Watch:

> All of a sudden two men threw a bottle. They were aged 20-30. They threw it through the windscreen. The whole bus caught fire. I was hit first. The bottle hit me. I jumped from the bus which then hit a traffic island. The flames burnt my face and arms. I thought I was dying. It was a blockade but the government ordered the bus owners to keep running their buses.

In another case, Rubel Mia, a motorized rickshaw driver from Comilla, told Human Rights Watch he was burned from the waist down after driving into a road block:

> I was driving down the road when all of a sudden I came across a picket. There were lots of men. I had no idea they were there. I tried to escape but they chased me and they hit the vehicle with sticks and I crashed. They then poured petrol into the cab and lit it. I think they wanted to kill me. No one came to help me.

[62] Of events in November 2013, as another example, the ID stated:

> [67] On November 28, 2013 in response to the announcement of the date for the 2014 election, an 18-party opposition alliance, including the BNP, announced a 48-hour rail-roadway-waterway blockade, which the BNP then extended. A bus attempting to transport passengers suffered a petrol bomb attack, killing four passengers, injuring 15 and badly burning the driver. A motorized rickshaw driver was burned from the waist down when he drove into a roadblock and, even as he attempted to escape, men threw petrol into the cab and lit it.[…] In spite of this hartal- related violence, the BNP and its allies extended the hartal on its fifth day, claiming it would not stop until its caretaker demand was met.

[63] The ID addressed the situation in January 2015:

> [68] On the anniversary of the January 2014 elections, the BNP called for yet another hartal, this time an indefinite one, as it continued to demand the reinstallation of the caretaker system. On January 29, 2015, Amnesty International reported that since the BNP had imposed a transport blockade, more than two dozen people had been killed and hundreds injured due to supporters throwing petrol bombs at buses and vehicles. Amnesty urged that

> the BNP "should exhort their members and supporters to stop these politically-motivated criminal acts ...". […] By March 10, 2015, the death toll had risen to at least 115 people, 60 of whom had been burned to death.[…] By the beginning of April 2015, the economic loss due to this hartal was estimated at 49 billion taka ($630 million) or 0.6 percent of the country's gross domestic product.[…] It is unclear from the evidence when the hartal ended, but it lasted at least three months.

[64] The ID considered the Applicant's argument that it was only "fringe" or "rogue" members of the BNP who engaged in acts of violence and that they did so without any authority from the BNP. However, the ID found that there was no evidence that it was only "fringe" or "rogue" members who committed violence, finding on the evidence:

> [69] Mr. Kamal argued that it was "fringe" or "rogue" members of the BNP who committed acts of violence and that they did so without the "blessing" or authority of the BNP. As such, the BNP cannot be understood as an organization that engaged in these activities.
>
> [70] There is no evidence that it was only "fringe" or "rogue" members who committed violence. What the evidence does show is that the BNP did grant its "blessing" on the commission of violence because they kept calling for hartals despite the fact doing so had become synonymous with declaring 'open season' on violence whether committed by BNP members, supporters or others. The BNP continued to use hartals as a way of exerting pressure and, even in the midst of hartal-related violence, actually called for hartals to be extended.
>
> [71] Mr. Berger attempted to elicit evidence from Mr. Kamal that the BNP is not responsible for the violence committed by its members by asking him to estimate how many people in Bangladesh are Jubo Dal and BNP members. Mr. Kamal estimated 900,000. Mr. Berger asked Mr. Kamal whether he thought that when the BNP calls for a hartal, it can control the actions of its 900,000 members. Mr. Kamal answered, "It is not possible." If it was not possible for the BNP to control its 900,000 members and yet calling for hartals had become synonymous with calling for violence, this only leads me to believe that the BNP is even more responsible for unleashing uncontrollable mass violence.

> [72] There is evidence that Khaleda Zia denounced violence around the hartals, but to be clear, she did so only insofar that she "continued to pin the blame entirely on members of the Awami League in spite of credible allegations that members of her own party are involved in these attacks." […]

[65] As can be seen from the above, the ID also considered the Applicant's argument that the leader of the BNP did denounce violence; however on the record before it the ID gave this argument little if any weight.

[66] The Applicant argues section 83's definition of terrorist activities should not be relied upon in considering if there are reasonable grounds to believe that the BNP is an organization that engages, has engaged or will engage in acts of terrorism per paragraph 34(1)(f) of IRPA. In this he points to *A.K.*, where Justice Mosley said:

> [38] I agree with the Applicant that in relying on the Criminal Code definition of "terrorist activity", an administrative tribunal decision maker has to be alert to the context in which that definition is meant to be employed. It requires proof beyond a reasonable doubt of one or more of the acts and omissions described in the enactment and the necessary mental element.

[67] I do not read A.K. as supporting the Applicant's argument. It is one thing to speak of the context in which Canadian criminal law is enacted. It is another to import criminal law concepts and the criminal law burden of proof into IRPA proceedings such as those under paragraph 34(1)(f). The latter is not allowed.

[68] The burden of proof under section 34 of IRPA was addressed by Justice Fothergill in S.A. who confirmed long-standing jurisprudence to the effect that principles of criminal law do not apply directly to decisions made under IRPA:

> [21] 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?
> >
> > …
>
> [22] 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).
>
> [23] 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.

[69] *Ahani v R.*, [1996] FCJ No. 937, cited by Justice Fothergill, is a decision of the Federal Court of Appeal upholding a decision of Justice McGillis under subsection 40.1 of the Immigration Act, SC, 1976-77, c 52. Justice McGillis found that criminal law principles did not apply to the removal of a person previously found to be a refugee. That being the case, I see no reason to apply criminal law principles to the removal of an applicant for refugee status.

[70] In Re *Harkat*, 2005 FC 393, also relied upon by Justice Fothergill, Justice Dawson (as she then was) held that criminal law principles and policies do not apply in the security certificate regime under IRPA:

> [85] A group or organization with hostile intentions has an ongoing existence with a continuity of operations. Accordingly, a security intelligence investigation does not end with the detention or apprehension of one member of the group. Rather, investigations are long-range and on-going. This is one of the principal factors that distinguishes intelligence investigations from criminal investigations. Furthermore, there is no completed "offence" to provide a framework for the investigation. For this and other reasons, the Court has in the past held that criminal law principles and policies do not apply to security certificate proceedings (see, for example, Madam Justice McGillis in *Ahani*, *supra* at paragraphs 40 and 42) and the Court has held that transcripts of any electronic surveillance need not be disclosed where disclosure would be injurious to national security or the safety of persons. See: *Canada (Minister of Citizenship and Immigration) v. Singh* (1998), 153 F.T.R.

[71] In addition, and as noted at the outset of these reasons, the burden of proof for findings under subsection 34(1) of IRPA, is codified in section 33 of IRPA – see below. Importantly the standard of proof is not the criminal standard. Section 33 enacts that the standard of proof includes “reasonable grounds to believe”. Section 33 was also enacted in the post-September 11, 2001 timeframe, as were both sections 34 of IRPA and 83 of the Criminal Code. Reasonable grounds to believe is a test used by the ID; in my respectful view, it was the proper and reasonable test:

Inadmissibility	**Interdictions de territoire**
Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés

otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
[Emphasis added]	[mise en evidence ajoutée]

[72] In my respectful view, the ID's assessment and conclusions relating to "engages in terrorism" per 34(1)(c) of IRPA including its choice of standard of proof, are defensible on the record and law.

D. *Was the ID's finding of reasonable grounds to believe that the BNP engaged in or instigated "the subversion of force" of the Bangladesh government for the purposes of paragraph 34(1)(b) reasonable?*

[73] I address this issue because the parties argued it. It asks whether BNP was "engaging in or instigating the subversion by force of any government" per paragraph 34(1)(b) of IRPA. However, I need not determine this issue. The inadmissibility finding made under 34(1)(f) does not need a finding under paragraph 34(1)(b) to support it, given the ID's finding under paragraph 34(1)(c) of IRPA. The ID found there was "barely enough" evidence to discharge the Minister's burden of proof in this connection. The ID said its decision "rested primarily" on its finding that the BNP engaged in terrorism under para 34(1)(c) of IRPA. There being no requirement to consider this issue, I respectfully decline to do so.

VI. Certified question

[74] Both parties proposed questions to certify.

[75] The Applicant proposed:

> Does a political party engage in terrorism or subversion by force by calling for strikes or civil disobedience without calling for violence when violence subsequently ensures?

[76] The Respondent proposed:

> Can a group or individual who calls for or condones a general strike or hartal as a means of coercing a government which foreseeably and frequently results in violence, be considered to have engaged in terrorism under paragraph 34(1)(c) of IRPA?

[77] In my view, no question of general importance arises. To begin with, it is trite to observe that every case such as this is determined based on the record before the tribunal. Both questions are fact specific to the record before the ID in this case. Moreover, the Applicant's proposed question does not capture the facts dispositive of the case, as referred to in these reasons. The Respondent's question speaks to facts not found by the ID, and appears to ask this Court to convert judicial review into a private reference.

[78] It seems to me that the proposed questions essentially ask the Federal Court of Appeal to make some form of binding determination as to whether paragraphs 34(1)(b) and or (c) apply to the BNP based on the facts of this case.

[79] Therefore, I respectfully decline to certify a question.

VII. Conclusion

[80] There being no procedural unfairness, that aspect of judicial review must be dismissed. On the question of the reasonableness of the ID's decision, standing back and reviewing the

decision as an organic whole, I am not persuaded that the Applicant has established the conclusions of the ID are unreasonable. The reasons are justifiable, intelligible and transparent. In addition, per *Dunsmuir*, the decision falls within the range of acceptable, possible outcomes that are defensible on the facts and law discussed above. Therefore, the challenge based on alleged unreasonableness fails.

> I should add that at the outset of the hearing, the Applicant indicated one of his tasks was to "change my mind", a comment made with reference to *Gazi*. As I said at the time, that is not the issue. Instead, the issue is whether the ID's decision is reasonable and if the procedures followed were fair in the circumstances of this case. I said that I did not make "global" findings on the determinative issues in *Gazi*. Likewise, I make none here. This decision is based on the record before this Court.

[81] Therefore judicial review is dismissed.

JUDGMENT in IMM-3493-17

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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