Federal Court  Cour fédérale

Date: 20210201

Docket: IMM-701-19

Citation: 2021 FC 108

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 1, 2021

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MOHAMMED SYEDUL ISLAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Immigration Division (ID) of the Immigration and Refugee Board dated January 9, 2019, in which the member determined that the applicant is inadmissible to Canada pursuant to paragraphs 34(1)(f) and 34(1)(c) of the

Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA], because he belongs to the Bangladesh Nationalist Party (BNP), an organization engaged in terrorist activities.

[2] For the reasons that follow, the application for judicial review is allowed.

II. **Background**

[3] The applicant is a citizen of Bangladesh. He is married and has three children. He left Bangladesh on June 15, 2010. After leaving Bangladesh, the applicant lived for a few years in Latin America, obtaining permanent residence in Brazil. In 2014, the applicant attempted to immigrate to the United States. From October 2014 to May 2016, he was detained by the U.S. Immigration and Customs Enforcement (ICE).

[4] While in the custody of ICE, the applicant allegedly sought the translation services of a fellow detainee to prepare an account in support of his application to immigrate to the United States. However, the applicant never completed his United States immigration application because of political pressures at the time. Upon being ordered deported, the applicant decided to immigrate to Canada.

[5] On May 22, 2017, the applicant entered Canada illegally, on Roxham Road near the border crossing at Lacolle, Quebec. When the applicant entered Canada, he had a few documents in his possession, including the account that he had prepared with the help of his fellow detainee

for his United States immigration application. The account contained two references to his membership in the BNP as well as some written amendments.

[6] In the Basis of Claim Form (BOC Form) that he submitted in support of his claim for refugee protection in Canada, the applicant essentially repeats the account that he had prepared while in the United States. However, all references to the BNP have been removed.

III. **Impugned decision**

[7] The decision of the ID member is based on three reasons. First, the member concluded that the wording of paragraph 45(d) creates a reverse onus when the Minister introduces *prima facie* evidence. The member concluded that in this case, the onus was therefore on the applicant to establish that he was not inadmissible.

[8] Second, the member concluded that the evidence in the record showed the applicant was a member of the BNP and that the applicant had failed to show the evidence was unreliable. The member in fact rejected the applicant's explanations, describing the applicant as not credible because he had repeatedly changed his account, resulting in contradictory versions. The member found that the applicant's lack of proficiency in English was contradicted by the evidence in the record. The member also noted that the applicant's claim for asylum in the United States was based on his political opinion as a BNP member, which enabled the member to conclude, on a balance of probabilities, that the applicant was a member of the BNP.

[9] Third, on the basis of the evidence in the record and the definition of terrorism set out in the Supreme Court's decision in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, the member concluded that politically motivated violence by BNP members during hartals had endangered lives and, in some cases, caused death or serious bodily harm. The member therefore found that the BNP had engaged in acts that meet the definition of terrorism, within the meaning of paragraph 34(1)(c) of the IRPA.

IV. **Issue**

[10] The determinative issue in this case is the following:

> Was the member's decision reasonable in this case?

V. **Standard of review**

[11] The Supreme Court confirmed in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, that reasonableness is the presumptive standard for most categories of questions on judicial review. This presumption prevents undue interference with the decision maker's administrative functions. Although there are some exceptions to the presumption of reasonableness review, none apply in this case.

[12] In carrying out a reasonableness review, a court must focus on the decision actually made by the administrative decision maker, including the decision maker's reasoning process. In applying the reasonableness standard, the court does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the range of possible

conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker— including both the rationale for the decision and the outcome to which it led—was reasonable (*Vavilov* at para 83).

VI. **Statutory provisions**

[13] The following provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are relevant to this application for judicial review:

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).
Preparation of report	**Rapport d'interdiction de territoire**

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

. . .

. . .

Decision

45 The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

Décision

45 Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

. . .

. . .

(d) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.	**d)** prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

[14] The following provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, are relevant to this application for judicial review:

Obligation on entry	**Obligation**
27 (1) Unless these Regulations provide otherwise, for the purpose of the examination required by subsection 18(1) of the Act, a person must appear without delay before an officer at a port of entry.	**27 (1)** Sauf disposition contraire du présent règlement, la personne qui cherche à entrer au Canada doit sans délai, pour se soumettre au contrôle prévu au paragraphe 18(1) de la Loi, se présenter à un agent à un point d'entrée.
Seeking entry at a place other than a port of entry	**Point d'entrée le plus proche**
(2) Unless these Regulations provide otherwise, a person who seeks to enter Canada at a place other than a port of entry must appear without	**(2)** Sauf disposition contraire du présent règlement, si la personne cherche à entrer au Canada à un point autre qu'un point d'entrée, elle

delay for examination at the port of entry that is nearest to that place.

doit se présenter au point d'entrée le plus proche.

Refused entry elsewhere

Admission refusée par un pays tiers

(3) For the purposes of section 18 of the Act, every person who has been returned to Canada as a result of the refusal of another country to allow that person entry is a person seeking to enter Canada.

(3) Pour l'application de l'article 18 de la Loi, toute personne retournée au Canada du fait qu'un autre pays lui a refusé l'entrée est une personne cherchant à entrer au Canada.

End of examination

Fin du contrôle

37 (1) Subject to subsection (2), the examination of a person who seeks to enter Canada, or who makes an application to transit through Canada, ends only when

37 (1) Sous réserve du paragraphe (2), le contrôle de la personne qui cherche à entrer au Canada ou qui fait une demande de transit ne prend fin que lorsqu'un des événements ci-après survient :

(a) a determination is made that the person has a right to enter Canada, or is authorized to enter Canada as a temporary resident or permanent resident, the person is authorized to leave the port of entry at which the examination takes place and the person leaves the port of entry;

a) une décision est rendue selon laquelle la personne a le droit d'entrer au Canada ou est autorisée à entrer au Canada à titre de résident temporaire ou de résident permanent, la personne est autorisée à quitter le point d'entrée où le contrôle est effectué et quitte le point d'entrée;

(b) if the person is an in-transit passenger,

b) le passager en transit quitte le Canada;

the person departs from Canada;

(c) the person is authorized to withdraw their application to enter Canada and an officer verifies their departure from Canada; or

(d) a decision in respect of the person is made under subsection 44(2) of the Act and the person leaves the port of entry.

c) la personne est autorisée à retirer sa demande d'entrée au Canada et l'agent constate son départ du Canada;

d) une décision est rendue en vertu du paragraphe 44(2) de la Loi à l'égard de cette personne et celle-ci quitte le point d'entrée.

End of examination — claim for refugee protection

(2) The examination of a person who makes a claim for refugee protection at a port of entry or inside Canada other than at a port of entry ends when the later of the following occurs:

Fin du contrôle — demande d'asile

(2) Le contrôle de la personne qui fait une demande d'asile au point d'entrée ou ailleurs au Canada prend fin lors du dernier en date des événements suivants :

(a) an officer determines that their claim is ineligible under section 101 of the Act or the Refugee Protection Division accepts or rejects their claim under section 107 of the Act;

a) l'agent conclut que la demande est irrecevable en application de l'article 101 de la Loi ou la Section de la protection des réfugiés accepte ou rejette la demande au titre de l'article 107 de la Loi;

(b) a decision in respect of the person is made under subsection 44(2) of the Act and, in the case of a claim made at a port of entry, the

b) une décision est rendue en vertu du paragraphe 44(2) de la Loi à l'égard de cette personne et celle-ci, dans le cas d'une

person leaves the port of entry.	demande faite au point d'entrée, quitte le point d'entrée.

VII. **Analysis**

[15] The issue of the applicant's membership in the BNP is essentially based on the member's finding as to the applicant's credibility. The panel specializes in assessing the credibility and plausibility of facts described by refugee protection claimants. On judicial review of a credibility determination, this Court therefore owes the panel considerable deference (*Conde v Canada (Citizenship and Immigration)*, 2013 FC 1059 at para 25; *Cheema v Canada (Citizenship and Immigration)*, 2020 FC 1055 at para 6).

[16] In this case, it was open to the panel to find that the applicant's multiple versions of the facts as to how the references to the BNP appeared on the document in his possession, as well as the documentary evidence regarding his knowledge of English, suggested that the applicant was not credible. Although the member erred in concluding that the claimant had prepared a claim for asylum based on his political opinion in the United States, the error was not determinative. The panel simply did not believe the applicant's version that the translator had mixed up his story with that of another fellow detainee. In passing, I note that the applicant's explanation was rejected by the border services officer in a hostile and biased manner. The officer ended the interview as follows:

> . . . Everybody, when they come to our office, they are no more of any member any political organization never [*sic*]. I never met a customer that's coming and saying, "Yeah, I was a member of a political organization or affiliation in Bangladesh" [Certified Tribunal Record at p 579]

[17] The applicant argues that the member based his conclusion that the BNP is a terrorist organization on its use of hartals. However, on the basis of *AK v Canada (Citizenship and Immigration)*, 2018 FC 236 [*AK*], and *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 [*Rana*], the applicant argues that the BNP is not a terrorist organization and is not listed as one in Canada or elsewhere. The question of the nature of the BNP's activities is essentially based on the BNP's intent to cause death or serious bodily harm in its use of hartals.

[18] In *Rana*, this Court stated the following:

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

> the *IRPA*, cannot stand. As a result, this aspect of the finding that the applicant's membership in the BNP rendered him inadmissible under section 34(1)(f) of the *IRPA* cannot be sustained.

[19] In *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912, this Court stated the following:

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

[20] In this case, it is clear that political parties in Bangladesh, including the BNP, use hartals and that these often lead to violence. However, contrary to the member's conclusion at paragraph 82 of his decision, the mere fact that innocent children or bystanders are victims of indiscriminate violence is not sufficient to conclude that a group is engaged in terrorist activity. The group must have the intention to cause death or serious bodily harm.

[21] At paragraphs 85 and 86 of his decision, the member makes the same error as the ID made in *Islam*, above. The member conflates intent with wilful blindness and knowledge. He finds it implausible that the BNP did not intend to cause death or serious bodily harm because it should have known that the hartals would result in violence. However, the test is not one of wilful blindness or knowledge, but rather one of intention.

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

VIII. **Conclusion**

[23] For these reasons, the application for judicial review is allowed.

[24] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-701-19

THIS COURT ORDERS that this application for judicial review be allowed and that the matter be remitted to a different panel for redetermination in accordance with the reasons above.

No question is certified for appeal.

"Richard G. Mosley"
Judge

Certified true translation
Johanna Kratz, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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