Federal Court  Cour fédérale

**Date: 20240621**

**Docket: IMM-4952-23**

**Citation: 2024 FC 968**

**Ottawa, Ontario, June 21, 2024**

**PRESENT: The Honourable Madam Justice Ngo**

**BETWEEN:**

**S M FAKHRUL ANAM**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. Context

[1] The Applicant, S M Fakhrul Anam [Applicant], filed a judicial review application of a decision by the Immigration Appeal Division [IAD] dated March 29, 2023 [Decision]. The Minister of Public Safety and Emergency Preparedness [Minister] appealed a decision by the Immigration Division [ID] dated November 30, 2021 determining that the Applicant was not

subject to inadmissibility under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The IAD found that the evidence had established reasonable grounds to believe that the Applicant was a member of an organization that engages, has engaged, or will engage in terrorism as contemplated by paragraph 34(1)(f), in relation to paragraph 34(1)(c) of the IRPA. As a result, the Applicant was found to be inadmissible to Canada pursuant to section 34 of the IRPA.

[3] The Applicant filed an application for judicial review of the Decision and alleges that the IAD erred in its application of the definition of "terrorism" as set out by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration*), 2002 SCC 1 [*Suresh*], and its interpretation of section 34 of the IRPA. The Applicant submits that the IAD applied a lower threshold than the specific intent element as outlined in the case law, and by making findings of facts unsupported by the record.

[4] After a thorough review of the record, the Decision, and the parties' submissions, the Decision was not unreasonable. For the following reasons, this application for judicial review is dismissed.

## II. Legal Issues and Standard of Review

[5] The only issue before this Court is whether the IAD's Decision was unreasonable. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25). To avoid

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

[6] A reviewing court must take a "reasons first" approach by examining the reasons provided with "respectful attention," in which the Court seeks to understand the reasoning process followed by the decision maker for drawing its conclusion (*Mason v Canada (Citizenship and Immigration),* 2023 SCC 21 at paras 58, 60; *Vavilov* at para 84).

## III. Analysis

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

> 34 (1) A permanent resident or a foreign national is inadmissible on security grounds for:
>
> (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
>
> (b) engaging in or instigating the subversion by force of any government;
>
> (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
>
> (c) engaging in terrorism;
>
> (d) being a danger to the security of Canada;

> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (f) being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b.1) or (c).
>
> [Emphasis added]

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

[9] The definition of "terrorism" is set out in *Suresh* at paragraph 98. The test used in the jurisprudence that has followed the Supreme Court of Canada's analysis in *Suresh* deals with any "act intended to cause death or serious bodily injury" to an individual, "when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government to do or to abstain from doing any act" (*Suresh* at para 98).

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

[11] There is also established jurisprudence that paragraph 34(1)(f) of the IRPA does not require a "temporal connection" between the individual's membership and the terrorist activity in

paragraphs 34(1)(c) and 34(1)(f) of the IRPA (*Najafi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FCA 262 at para 101; *Gebreab v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FCA 274 at para 2).

[12] In this case, the Applicant concedes that he readily admitted to being a member of the BNP. Thus, the only element that the IAD needed to demonstrate was that there were reasonable grounds to believe that the BNP was an organization subject to the definition of terrorism as defined in paragraph 34(1)(c) of the IRPA and *Suresh*.

[13] There is no dispute that the IAD identified the correct law. The IAD correctly referred to the applicable statutory provisions found in paragraphs 34(1)(c) and 34(1)(f) of the IRPA, and the standard of proof. The IAD correctly found that the standard of proof requires "more than mere suspicion" based on "compelling and credible information" (*Mugesera* at para 114). The IAD also referred to subsection 83.01(1) of the *Criminal Code*, RSC 1985, c C-46, to refer to the definition of terrorism.

[14] The crux of the disagreement hinges on whether the IAD had correctly applied the definition of terrorism as set out in *Suresh*. The parties submit diametrically opposed views on whether the IAD had correctly applied the legal requirements as set out by the IRPA and the case law.

[15] The Applicant submits that the IAD had unreasonably concluded that the BNP was an organization that engaged in terrorism. The Applicant suggests the IAD erroneously relied on

evidence of the BNP engaging in violence, as opposed to evidence of the BNP engaging in acts that intentionally caused death and serious bodily injury. The Applicant submits that the "unfortunate death or injury as being caused by an act of terrorism" is insufficient to meet the threshold for terrorism per *Suresh*.

[16] The Respondent agrees that a proper application of the definition of *Suresh* requires that the evidence the IAD relies on needs to demonstrate more than violence. In reviewing the IAD's reasons, I find the IAD understood this nuance.

[17] The Applicant argues that the IAD relied on a lower mental element for demonstrating the requisite intent by referring to the Federal Court's cases where decisions discussing the BNP's activities were found to be unreasonable. However, the outcome of those cases were dependent on their unique facts and evidence as submitted to the decision maker, as well as the character of analysis undertaken (or not) by the decision maker.

[18] In the Applicant's case, the IAD cogently set out the factual and legal constraints binding upon them. The IAD referred to *Opu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 650 [*Opu*], in which Justice Little had referred to the framework set out in *R v Tatton*, 2015 SCC 33 [*Tatton*] at paragraphs 35-38, 41, 48.

[19] As described in *Tatton* (which was identified by the IAD in its Decision), specific intent offences contain a heightened mental element:

> "That element may take the form of an ulterior purpose or it may entail actual knowledge of certain circumstances or consequences,

> where the knowledge is the product of more complex thought and reasoning processes. Alternatively, it may involve intent to bring about certain consequences if the formation of that intent involves more complex thought and reasoning processes. General intent offences, on the other hand, require very little mental acuity."
>
> (*Tatton* at para 39).

[20] The IAD also relied on the factors set out in *M.N. v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 [*M.N.*], in which Justice Grammond confirmed factors for determining "specific intent." Those factors were reproduced in the IAD's reasons (*Foisal v Canada (Citizenship and Immigration)*, 2021 FC 404 [*Foisal*] at para 20, *citing M.N.* at para 12), which include:

- the circumstances in which violent acts resulting in death or serious bodily harm were committed;
- the internal structure of the organization;
- the degree of control exercised by the organization's leadership over its members
- the organization's leadership's knowledge of the violent acts and public denunciation or approval of those acts.

[21] The IAD explained that it had to determine whether the evidence establishes that the organization had the intention to cause serious injuries or death in achieving its political objectives. The Decision clearly sets out that the IAD grappled with each of the *M.N.* factors to arrive at a conclusion that the BNP had the specific intent to cause death and bodily harm when it ordered hartals.

[22] Contrary to the Applicant's arguments, the IAD does not refer to the evidence to suggest that evidence pertaining to violence is enough to impute "specific intent." Indeed, a review of the Decision identifies that the IAD considered the evidence vis-à-vis each *M.N.* factor.

[23] The Applicants argue that the IAD referred to a lower mental element than that of "specific intent" by referring to the cases of *Foisal, Badsha v Canada (Citizenship and Immigration),* 2022 FC 1634 [*Badsha*], *Musa v Canada (Public Safety and Emergency Preparedness),* 2022 FC 1172, *Rana v Canada (Public Safety and Emergency Preparedness),* 2018 FC 1080, *Islam v Canada (Public Safety and Emergency Preparedness),* 2019 FC 912, *Islam v Canada (Public Safety and Emergency Preparedness),* 2021 FC 108.

[24] The IAD correctly determined that the cases cited by the Applicant "have specifically considered these issues in the context of the BNP Bangladesh." The IAD further noted that the findings of fact did not bind it because each decision depended on the particular evidence before the decision maker. I find that the IAD appropriately came to its own conclusions based on the particular set of facts and evidence before it. Therefore, it is unnecessary to distinguish the cases to which the Applicant submits. That being said, I provide two examples to demonstrate that the cases, which the Applicant refers to do not apply to these circumstances.

[25] The Applicant refers to *Foisal*, in which the Court found that the tribunal's reasons were unjustified in that there had been no coherent logic explaining how it had imputed specific intent. Justice Grammond found that the decision failed to refer to specific factors which would have

justified imputing specific intent, such as referring to the *M.N.* factors (*Foisal* at para 20). In this case, the IAD specifically referred to the *M.N.* factors and dealt with them extensively.

[26] The Applicant also refers to *Badsha,* in which the Court took issue with the fact that the IAD did not reference which evidence shows that the BNP or members of the BNP have sufficient knowledge to fulfill the intent element (*Badsha* at para 37). The Court found that the tribunal's conclusions do not reference any specific evidence and did not explain how these instances of violence equate to a finding that the BNP intends to cause death or bodily injury. Rather, the Court found the reasons made an analytical leap that is unsupported by the evidence. This was not the case in the Decision. Here, the IAD referred to specific evidence, especially during the evaluation of the first *M.N.* factor.

[27] I agree with the Respondent that the IAD had not misapplied *Suresh* or that a lower mental element was applied than that of specific intent. The Respondent pointed to *Opu* (which had referred to *Tatton*) and *Rahman v Canada (Citizenship and Immigration)*, 2023 FC 1695. The IAD applied the concepts from *Opu* and *Tatton* in framing the issue of whether the specific evidence, including the supplementary evidence submitted on appeal by the Minister, and found based on the evidence that the BNP had specific intent to cause death and bodily harm.

[28] This Court must not ask itself how it would have resolved an issue. The Court must refrain from reweighing and reassessing the evidence considered by the decision maker (*Vavilov* at para 125). Instead, I must focus on whether the Applicant has demonstrated that the decision is unreasonable.

[29] Despite the very able arguments by Applicant's counsel, I am unable to find that the Decision was unreasonable, particularly in view of the legal and factual constraints that bear on it. As a result, the application for judicial review is dismissed.

[30] The parties both confirm that there was no question to certify and I agree that none arises.

**JUDGMENT in IMM-4952-23**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed.

2. There are no questions for certification.

"Phuong T.V. Ngo"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4952-23 |
| **STYLE OF CAUSE:** | S M FAKHRUL ANAM v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | MONTRÉAL (QUÉBEC) |
| **DATE OF HEARING:** | APRIL 30, 2024 |
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| **DATED:** | JUNE 21, 2024 |

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