Federal Court  Cour fédérale

Date: 20170215

Docket: IMM-2367-16

Citation: 2017 FC 189

Toronto, Ontario, February 15, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

NASEEM AL JANNA CHOWDHURY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a member of the Immigration Division [ID] of the Immigration and Refugee Board, dated January 22, 2016, to issue a removal order against the Applicant upon concluding that he is inadmissible pursuant to s. 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] As explained in greater detail below, this application is allowed, because I have found that the ID's reasons do not demonstrate a sufficient understanding of the analysis required under s. 34(1)(f) of the Act and cannot be confident that the ID made the findings and conducted the analysis necessary to support its inadmissibility conclusion.

II. Background

[3] The Applicant, Naseem Al Janna Chowdhury, is a citizen of Bangladesh. From January 2010 until July 2010, he was a member of the Bangladeshi Islami Chhatra Shirir [ICS], a student wing of the Jamaat-e-Islami political party. From May 2011 to May 2012, he was a member of the Bangladesh Nationalist Party [BNP], with which the Jamaat-e-Islami party is in alliance. In May 2012, he traveled to the US with a student visa. He then traveled to Canada in May 2014 and claimed refugee status, alleging that he was in danger in Bangladesh. This claim was suspended pending an admissibility hearing.

[4] Mr. Chowdhury is the subject of a s. 44(1) report dated January 23, 2015, alleging that he is inadmissible pursuant to s. 34(1)(f) of the Act. The particular concerns raised were based on his admitted membership in the BNP and ICS, organizations of which there are reasonable grounds to believe engage, have engaged, or will engage in terrorism and subversion of a government. The inadmissibility hearing took place on several dates in 2015, following which the ID found Mr. Chowdhury to be inadmissible and issued a removal order against him. That decision, dated January 22, 2016, is the subject of this application for judicial review.

III. Immigration Division Decision

[5] The question before the ID, in determining whether Mr. Chowdhury was inadmissible under s. 34(1)(f) of the Act, was whether he was a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in terrorism or the subversion by force of any government. Based on Mr. Chowdhury's testimony, the ID concluded that he was a member of the BNP and ICS during the time periods to which he had testified. It also considered Mr. Chowdhury's testimony that he joined the ICS as a minor, that he attended BNP meetings but did not believe that they engaged in political violence, and that he did not fully accept that the ICS and BNP have participated in activities that would constitute subversion against a government or that they have engaged in terrorism.

[6] However, the ID noted that, to be found inadmissible under s. 34(1)(f), a person need only be found to be a member of the organization. It does not require active participation or knowing support of terrorism or subversion by force of a government (*Nassereddine v Canada (Citizenship and Immigration)*, 2014 FC 85). The ID also relied on the decision of the Federal Court in *Yamani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1457), [*Yamani*], in concluding that s. 34(1)(f) does not require that the act of terrorism or subversion by the organization coincide with an individual's period of membership.

[7] The ID then considered the documentary evidence and concluded that the BNP was an organization within the meaning of s. 34(1)(f) and that there were reasonable grounds to believe it engages, has engaged, or will engage in both terrorism and subversion by force against the Bangladesh Government. The evidence and analysis leading to these conclusions by the ID are addressed in more detail later in these Reasons.

IV. Issue and Standard of Review

[8] Based on the arguments advanced by the parties, the only issue for the Court's consideration is whether the ID's decision is reasonable. The parties agree, and the Court concurs, that the standard of review for a decision under s. 34(1)(f) of the Act is reasonableness (see *El Werfalli v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 612, at para 39 [*El Werfalli*]; *Yamani*, at para 7).

V. Analysis

[9] Mr. Chowdhury submits that the ID's decision erroneously relied on acts that the BNP is alleged to have committed after he ceased his membership in 2012, with a focus in particular on events in 2014. He argues that the ID relied on the decision in *Yamani* in a manner which is contrary to this Court's recent jurisprudence which has clarified that acts of an organization that post-date a person's membership are not necessarily attributed to that former member (see *El Werfalli*, at paras 60-78; *Mahjoub (Re)*, 2013 FC 1092 [*Mahjoub*], at para 49).

[10] Mr. Chowdhury's position is that the analysis in *Yamani*, which does not require that the acts of terrorism by an organization coincide with a person's period of membership, is limited to its facts, where the impugned acts included activities preceding the person's membership. He does not argue that the more recent jurisprudence has contradicted *Yamani*, only that it has clarified that a person is not automatically held to account for post-membership acts of his/her former organization. Mr. Chowdhury submits that the ID did not appreciate this aspect of the

jurisprudence and erred in relying on post-membership acts of the BNP to find him inadmissible, without any analysis linking such acts to his period of membership.

[11] The Respondent submits that, as Mr. Chowdhury has admitted his membership in BNP and ICS, and does not contest that they are organizations, the only issue is whether there were reasonable grounds to believe that these organizations engage, have engaged, or will engage in terrorism or subversion. The Respondent does not disagree with Mr. Chowdhury's description of the current state of the law, which the Respondent describes as requiring that activities that post-date Mr. Chowdhury's membership can only render him inadmissible if there were reasonable grounds to believe at the time of his membership that the organization would engage in subversion or terrorism in the future.

[12] However, the Respondent's position is that this does not assist Mr. Chowdhury, as the documentary evidence establishes that the BNP had been engaging in terrorism and subversion since at least 1971, when Bangladesh became independent, and there is evidence of the BNP engaging in terrorism and subversion during Mr. Chowdhury's membership. The activities that post-date his membership were therefore part of a pattern of terrorist and subversive actions by this organization, such that the ID had grounds to find him inadmissible. The Respondent's position is that, in such circumstances, the ID is not required to engage in the sort of particularized temporal analysis prescribed by *El Werfalli.*

[13] I agree with the manner in which Mr. Chowdhury characterizes the ID's decision and that it is therefore unreasonable. As explained below, I reach this conclusion because of a

combination of the ID's failure to recognize the jurisprudential development in *El Werfalli*, the ID's heavy reliance on post-membership activities in conducting its analysis of the BNP's engagement in terrorism and subversion, and the resulting lack of a transparent analysis forming the basis for its conclusion that Mr. Chowdhury is inadmissible under s. 34(1)(f) of the Act.

[14] The relevant provisions of the Act are as follows:

DIVISION 4 Inadmissibility	SECTION 4 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 otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	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.
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 :
(a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;	a) être l'auteur de tout acte d'espionnage dirigé contre le Canada ou contraire aux intérêts du Canada;
(b) engaging in or instigating the subversion by force of any government;	b) être l'instigateur ou l'auteur d'actes visant au renversement d'un gouvernement par la force;
(b.1) engaging in an act of subversion against a	b.1) se livrer à la subversion contre toute institution

democratic government, institution or process as they are understood in Canada;	démocratique, au sens où cette expression s'entend au Canada;
(c) engaging in terrorism;	c) se livrer au terrorisme;
(d) being a danger to the security of Canada;	d) constituer un danger pour la sécurité du Canada;
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or	e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;
(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).

[15] In *Yamani*, at paragraphs 11 to 12, Justice Snider interprets s. 34(1)(f) as follows:

> [11] Quite simply, and contrary to the arguments made by Mr. Al Yamani, there is no temporal component to the analysis in s. 34(1)(f). If there are reasonable grounds to believe that an organization engages today in acts of terrorism, engaged in acts of terrorism in the past or will engage in acts of terrorism in the future, the organization meets the test set out in s. 34(1)(f). There is no need for the Board to examine whether the organization has stopped its terrorist acts or whether there was a period of time when it did not carry out any terrorist acts.
>
> [12] Membership by the individual in the organization is similarly without temporal restrictions. The question is whether the person is or has been a member of that organization. There need not be a matching of the person's active membership to when the organization carried out its terrorist acts.

[16] However, as argued by Mr. Chowdhury, it is important to understand the factual context in which *Yamani* was decided. That case surrounded Mr. Al Yamami's membership in the Popular Front for the Liberation of Palestine. He acknowledged that he was a member from 1972

to 1974, 1974 to later that year or early 1975, 1979 to 1982, and 1987 to 1991 or early 1992. Mr. Al Yamami's position was that the ID erred by considering acts of terrorism that occurred before or after the time of his membership or during times of his inactivity. In other words, that case involved a person with a substantial overall period of membership, although arguing that there were times during that period when he was not a member. Justice Snider's analysis rejected Mr. Al Yamami's argument that a finding of inadmissibility under s. 34(1)(f) required matching with precision the times of his membership in the organization with the times the organization conducted terrorist activity.

[17] The jurisprudential development represented by *El Werfalli* resulted from the application of s. 34(1)(f) to a different set of facts, where the person's membership in the organization completely pre-dated the organization's participation in terrorist acts. In that context, Justice Mandamin found that the ID had erred in making two entirely separate determinations, whether the person had been a member of the organization, and whether the organization engaged in terrorist activities, without asking itself whether there is a nexus between the membership and the organization's involvement with terrorist acts. The Court stated as follows at paragraph 60:

> [60] I consider the Board to have erred in treating s. 34(1)(f) as creating two separate independent determinations. Paragraph 34(1)(f) requires one determination, that of being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in terrorism. The paragraph is a single provision requiring regard for all its elements in an integrated manner.

[18] In the course of his subsequent reasons in support of this conclusion, Justice Mandamin provided at paragraph 78 the following guidance as to the analysis that must be conducted in circumstances where the terrorist activity post-dates a person's membership in the organization:

> [78] In the case of organizations where there is reasonable grounds to believe the organization will engage in terrorism in the future, I am satisfied the point of reference must be during the time of membership. Are there reasonable grounds to believe an organization, during the time the individual is a member, will engage in future acts of terrorism? This approach provides for a nexus between membership and future organizational activity associated with terrorism. It provides for the requisite national security and public safety objectives. Importantly, it does not include within s. 34(1)(f) individuals who are themselves innocent of the conduct of the organization in the future.

[19] The impact of *El Werfalli* is summarized well at paragraph 49 of Justice Blanchard's subsequent decision in *Mahjoub*:

> [49] With respect to membership pursuant to paragraph 34(1)(f), the Federal Court of Appeal does not comment on Mr. Harkat's argument that "the absence of a temporal nexus between membership and the terrorist nature of the organization leads to an interpretation which offends sections 2 and 7 of the *Charter*." Subsequently, the Federal Court has interpreted paragraph 34(1)(f) to require a temporal nexus between membership and the reasonable grounds to believe that the organization engages, has engaged or will engage in acts referred to in paragraph (a), (b) or (c) (see Justice Leonard Mandamin's comments in *El Werfalli v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 612, at paragraphs 61-78). This interpretation restricts the provision, for it will not capture individuals who are members of an organization before there were reasonable grounds to believe that the organization will engage in the enumerated acts, avoiding a situation where a member of a lawful group has a "Sword of Damocles suspended indefinitely over his or her head" in case that organization ever engages in acts described in (a), (b) or (c) (*Werfalli* at paragraph 62). This interpretation is in my view reasonable. If at the time of membership it is established, on reasonable grounds to believe, that the organization is not engaged, has not engaged or will not engage in the enumerated acts, the member will not be captured by the provision.

[20] To be clear, this does not mean that a member of an organization cannot be subject to inadmissibility under s. 34(1)(f) as a result of terrorist acts committed by an organization after

the cessation of his or her membership. However, such inadmissibility would require an analysis as to whether, at the time of membership, there were reasonable grounds to believe that the organization would in the future engage in terrorist activities.

[21] As acknowledged by Mr. Chowdhury, *El Werfalli* and *Mahjoub* should not be regarded as contradicting *Yamani*. Indeed, *Yamani* was subsequently cited by Justice LeBlanc in *Gacho v Canada (Citizenship and Immigration)*, 2016 FC 794, at paragraph 26, for the principle that an immigration officer conducting an inadmissibility analysis under s. 34(1)(f) need not match a person's active membership to when an organization carried out subversive acts. The Court in that case did not refer to *El Werfalli*, but there appears to have been no dispute that Mr. Gacho was a member of the Armed Forces of the Philippines at the time of the coup that represented the subversive act.

[22] Returning to the present case, the ID quoted from *Yamani* and correctly summarized that decision as rejecting the argument that the prescribed act must coincide with the period of membership for purposes of s. 34(1)(f) of the Act. However, the ID made no mention of *El Werfalli* or *Mahjoubi* or the principles derived from those decisions. The Respondent argues that this is immaterial, as the evidence before the ID and the ID's reasons reflect the BNP's engagement in terrorist and subversive acts not only after, but also before and during, Mr. Chowdhury's membership. Therefore, the circumstances are analogous to *Yamani* and no particularized temporal comparison, between the membership and the terrorist or subversive activity, is required.

[23] The difficulty with this argument is the fact that the ID's decision focuses on activities by the BNP which post-date Mr. Chowdhury's membership. Indeed, it could be said that the analysis itself is based entirely on such activities. While there are passing references in the decision to documentary evidence of violence which pre-dates or possibly coincides with the membership period, that evidence is not subjected to any meaningful analysis and does not appear to form the basis of the BNP's inadmissibility finding.

[24] Turning first to the ID's consideration of subversion, the evidence upon which it relies for its finding that the BNP is engaged in subversion by force against the Bangladesh Government appears to relate entirely to activities that post-date Mr. Chowdhury's membership. The decision explains the political context of recent unrest, being that, under the Bangladeshi system, when an administration comes to the end of its term, it must hand over rule to an unelected caretaker government which then has 90 days to organize elections. However, when the rival political party, the Awani League, refused to hand over power to a caretaker government in 2014, this prompted the BNP to boycott general elections. In its analysis of subversion, the ID refers to the BNP's call for general strikes or hartals, road blockades, setting fire to public transport, rioting and committing various brutalities. This analysis all relates to the violence resulting from the events surrounding the 2014 elections, after the end of Mr. Chowdhury's membership.

[25] The Respondent submits that one item of documentary evidence referenced in the ID's analysis of subversion is a United Nation's Development Program study of the cost of hartals in 2005. However, as noted in Mr. Chowdhury's submissions, the relevant document written by the

Council on Foreign Relations actually relates to the unrest surrounding the 2014 elections and, while it refers to a study of the cost of hartals in 2005, there is no indication that the BNP was responsible for those hartals. In fact, Mr. Chowdhury notes that 2005 was a period when the BNP formed the government.

[26] It is therefore my conclusion that the ID's analysis of subversion by the BNP is based entirely on post-membership activities by the BNP. Therefore, the ID could not find Mr. Chowdhury inadmissible based on those activities without conducting the analysis prescribed by *El Werfalli*. This alone is not a sufficient basis to set aside the decision, as a reasonable analysis of the BNP's participation in terrorism would still support the inadmissibility finding. However, the ID's subversion analysis does lend significant support to Mr. Chowdhury's argument that the ID failed to refer to the principles derived from *El Werfalli*, not because those principles were inapplicable to the facts it was considering, but because it was unaware of those principles.

[27] Reviewing the ID's subsequent terrorism analysis through that lens, again the ID focuses on violence surrounding the 2014 elections. However, as noted by the Respondent, the decision does contain some broader statements and references to earlier events. For instance, the ID states that the documentary evidence is replete with acts undertaken by the BNP which fall precisely with the definition of terrorism or terrorist activities. It also states that news reports such as The Guardian and The Daily Star accuse not only the BNP but also the other political parties of human rights abuses, killings and overall miscarriages of justice. The Respondent draws the Court's attention in particular to an article from The Guardian dated April 26, 2012 (which

coincides with Mr. Chowdhury's membership in the BNP) that refers to recent violence in Bangladesh as well as violence when the BNP was last in power in 2001 to 2006.

[28] The ID also notes that the International Crisis Group describes the BNP's performance in office between 2001 and 2006 as marred by rampant corruption, heavy-handed use of force, poor governance and alliance with Islamist parties that allowed extremist groups to expand their space. The ID observes that the Rapid Action Battalion, deployed by the current government and responsible for extrajudicial executions, forced disappearances, arbitrary arrests and the unlawful destruction of private property, was created by the BNP when they were in power.

[29] The challenge for the Respondent in relying on these references in the ID's decision, as support for its position that an *El Werfalli* analysis was unnecessary, is that the Court cannot be satisfied from review of the decision that these references formed part of the analysis upon which the ID based its inadmissibility conclusion. These references read largely as background to the current political climate and in part were considered by the ID in response to Mr. Chowdhury's argument that the Minister's documentary evidence did not paint a credible and balanced picture of the current and historical political situation in Bangladesh. This includes the article from The Guardian, which the ID describes as accusing the BNP of abuses, killing and miscarriages of justice. The ID does not make a finding on the merit of these accusations.

[30] As previously noted, the ID's subsequent analysis focused upon violence surrounding the 2014 elections. As with the subversion finding, the terrorism analysis referred to hartals, strikes, demonstrations, blockades, bombings and other violence, including violence against minority

religious groups. The ID noted that the destruction of properties belonging to religious minorities falls within the definition of terrorist activities in Canada's Criminal Code. The ID then again referenced the hartals in particular, concluding that they fall within the definition of terrorism prescribed in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3, and stating that, as such, it is of the view that there are reasonable grounds to believe that the BNP is an organization that engages, has engaged or will engage in terrorism.

[31] In relation to the violence against religious minorities, the Respondent notes the ID's comment that violence by the BNP and its allies against religious minorities is not new, as at least 20 attacks were reported against minority communities in Bangladesh between 2012 and 2013, including attacks on temples, homes and shops belonging to Buddhists and Hindu communities in September 2012. However, as the only date identified with any precision is September 2012, and as Mr. Chowdhury's membership ended in May 2012, this portion of the analysis does not assist the Respondent.

[32] I emphasize that I am not expressing a conclusion on whether the evidence that relates to periods before and during Mr. Chowdhury's membership in the BNP would support a finding that it engaged in terrorist activities during such periods. It is the role of the ID to conduct this analysis. Rather, taking into account the ID's apparent lack of familiarity with the jurisprudential development in *El Werfalli*, and its focus upon events following the cessation of Mr. Chowdhury's membership, I cannot be satisfied that this analysis has taken place. I therefore find the decision unreasonable and must allow this application for judicial review.

[33] Neither party proposed a question for certification for appeal, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted back to a differently constituted panel of the Immigration Division of the Immigration and Refugee Board for reconsideration in a manner consistent with the above Reasons. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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