Federal Court  Cour fédérale

Date: 20200113

Docket: IMM-1201-19

Citation: 2020 FC 38

Ottawa, Ontario, January 13, 2020

PRESENT: Madam Justice Walker

BETWEEN:

SHAHIN MIAH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Shahin Miah is a citizen of Bangladesh who came to Canada in 2017 and made a claim for refugee protection. In a decision (Decision) dated January 29, 2019, the Immigration Division (ID) of the Immigration and Refugee Board found that Mr. Miah was inadmissible to Canada on security grounds pursuant to paragraphs 34(1)(c) and 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The basis of the Decision was two-fold. The ID

concluded that (1) Mr. Miah was a member of the Bangladesh Nationalist Party (BNP) from 2005 to 2017; and (2) there were reasonable grounds to believe that the BNP engages, has engaged or will engage in acts of terrorism through its use of *hartals* to further its political goals. Mr. Miah contests both of the ID's conclusions and seeks judicial review of the Decision pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be dismissed.

II. Background

[3] Mr. Miah joined the BNP on April 28, 2005 as a general member, attending meetings and political rallies. He was promoted within the BNP to the position of General Secretary of his local ward in 2007. His responsibilities in that role were humanitarian in nature. These facts are not in dispute.

[4] Mr. Miah alleges that he was targeted for persecution and harassment by members of the BNP's political rival, the Awami League (AL), from 2009 to 2014. He states that he was kidnapped and severely beaten in 2009 by AL members and went into hiding following the attack, moving between his parents' and sisters' houses to avoid further violence as AL members continued to look for him.

[5] Mr. Miah left Bangladesh on August 9, 2014. He travelled through a number of countries and arrived in the United States on December 11, 2014. He claimed asylum in the U.S. but his claim was denied on July 2, 2015.

[6] Mr. Miah remained in the U.S. following the adverse asylum determination until he entered Canada on July 2, 2017 and made a refugee claim. He was interviewed by an officer of the Canada Border Services Agency (CBSA) on August 11, 2017.

[7] On September 19, 2017, the CBSA officer prepared a report regarding Mr. Miah under subsection 44(1) of the IRPA. The officer concluded that Mr. Miah is inadmissible to Canada pursuant to paragraph 34(1)(f) of the IRPA due to his membership in the BNP, an organization that there were reasonable grounds to believe engaged in acts of subversion of the Government of Bangladesh (paragraphs 34(1)(b) and (b.1) of the IRPA) and in acts of terrorism (paragraph 34(1)(c) of the IRPA).

[8] On October 4, 2017, the Minister's delegate referred Mr. Miah's case to the ID for an admissibility hearing pursuant to subsection 44(2) of the IRPA. Mr. Miah's claim for refugee protection was suspended pending the ID's determination of his inadmissibility.

[9] The ID held an admissibility hearing on October 23, 2018 and issued the Decision on January 29, 2019. Mr. Miah filed this application for judicial review of the Decision on February 20, 2019.

III. Decision Under Review

[10] The ID concluded that Mr. Miah is inadmissible to Canada as a person described in paragraph 34(1)(f) of the IRPA due to his membership in the BNP and its involvement in acts of terrorism. The Minister did not pursue the issue of whether the BNP had engaged in acts of

subversion in his arguments before the ID. As a result, the ID did not address the application of paragraphs 34(1)(b) and (b.1) to the BNP's activities. The Minister's arguments, and the ID's Decision, focussed on the duration of Mr. Miah's membership in the BNP and the question of whether the BNP was an organization engaged or engaging in terrorism within the meaning of paragraph 34(1)(c) of the IRPA.

[11] The ID found that Mr. Miah was a member of the BNP from April 2005 until at least August 2017, the date of his CBSA interview. The panel did not accept Mr. Miah's submission that he had ceased to be a BNP member at the end of 2011 and, therefore, that he was not a member during the 2012-2014 campaigns of violence incited by the BNP. The ID found that Mr. Miah had made statements to Canadian and U.S. immigration authorities in 2014 and 2017 regarding his continued BNP membership and rejected his explanations of those prior contradictory statements.

[12] Having established Mr. Miah's membership, the ID turned to the BNP's alleged involvement in acts of terrorism. The panel reviewed the recent jurisprudence of this Court regarding the BNP and the discussions in those cases of the appropriate definition of "terrorism" for purposes of subsection 34(1)(c) of the IRPA. The ID concluded that it would rely on the definition set forth by the Supreme Court of Canada (SCC) in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (*Suresh*).

[13] The ID first reviewed the use of *hartals* generally by political parties in Bangladesh and their evolution from general strikes to protests that are synonymous with violence. The ID also

reviewed the BNP's historical connection with the use of violence, its well-documented and repeated calling of *hartals* to protest the 2014 general election, and the scope of the violence by BNP members during the *hartals*. The panel stated that the violence included the "killing of people who refused to honour the blockades, attacking democratic institutions, such as polling stations and election officials and throwing petrol bombs at buses and vehicles". The panel concluded that the actions taken by the perpetrators of those attacks amounted to terrorism.

[14] The ID referred to this Court's decision in *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 (*Rana*), and the presence of an intention to cause death or serious bodily harm by the use of violence as crucial in determining if an act or acts constitute terrorism within the meaning of paragraph 34(1)(c). The panel found that the predictable consequence of calling a *hartal* was the use of violence and that it was difficult to conclude that BNP leaders did not know that civilian deaths and serious bodily harm would result from the *hartals*. The ID concluded that it was not plausible that the BNP, in calling *hartals* during the 2012-2014 election period, did not intend to achieve its political ends through violence.

[15] The ID found that the essential elements of the definition of terrorism set out in *Suresh* had been met and that the BNP had engaged in acts that correspond to terrorism within the meaning of paragraph 34(1)(c) of the IRPA. The panel confirmed the subsection 44(1) report and determined that Mr. Miah is inadmissible to Canada.

IV. Issues

[16] Mr. Miah raises the following issues in this application:

1. Did the ID reasonably conclude that Mr. Miah was a member of the BNP from April 2005 until at least August 2017?

2. Was the ID's finding that the BNP engaged in acts that fall within the definition of terrorism pursuant to paragraph 34(1)(c) of the IRPA reasonable?

V. Standard of Review

[17] On December 19, 2019, the SCC rendered its decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*), establishing the presumptive standard of review of an administrative decision as reasonableness (*Vavilov* at para 10). None of the situations identified by the SCC for departing from the presumption apply here and, accordingly, I have reviewed the Decision for reasonableness. The majority in *Vavilov* also set out guidance for reviewing courts on the application of the reasonableness standard drawing on prior jurisprudence, notably *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*). I have applied that guidance in my review, exercising restraint but conducting a robust review of the Decision for justification and internal coherence (*Vavilov* at paras 12-15, 85-86; see also *Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at paras 28-29 (*Canada Post*))).

[18] The standard of review of a decision regarding inadmissibility under subsection 34(1) of the IRPA was reasonableness under the pre-December 19, 2019 jurisprudence (*Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at para 24 (*Saleheen*); *SA v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 494 at para 9). On the facts of this case, I am satisfied that there is no need to request additional submissions from the parties on

either the appropriate standard of review or the application of that standard (*Vavilov* at para 144). My conclusions in this judgment would have been the same under the *Dunsmuir* framework (*Canada Post* at para 24).

[19] I note that the facts giving rise to inadmissibility must be established on the standard of "reasonable grounds to believe" (section 33 of the IRPA). On judicial review, my role is not to determine whether there were reasonable grounds to believe Mr. Miah is inadmissible pursuant to paragraph 34(1)(f) of the IRPA; rather, my role is to determine whether the ID's finding that there were 'reasonable grounds to believe' was itself reasonable (*Rana* at para 21; *Rahaman v Canada (Citizenship and Immigration)*, 2019 FC 947 at para 9).

VI. Applicable Legislative Provisions

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

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).

VII. Analysis

1. Did the ID reasonably conclude that Mr. Miah was a member of the BNP from April 2005 until at least August 2017?

[21] Mr. Miah submits that he ceased to be a member of the BNP in 2012 when he did not renew his membership and went into hiding until his departure from Bangladesh in 2014. He argues that the ID unreasonably concluded that he continued to be a BNP member until August 2017 and erred in finding that his explanations of his prior contradictory statements were not credible.

[22] The ID made four findings in determining that Mr. Miah's BNP membership extended to August 2017:

(1) The ID relied on the admissions made by Mr. Miah at the admissibility hearing on October 23, 2018. The panel found that Mr. Miah had confirmed the admissions made on his behalf by counsel, specifically that, during his interview with the CBSA officer on August 11, 2017, he declared that "he is a member of the BNP since April 28, 2005…".

(2) During the August 2017 CBSA interview, Mr. Miah was asked about his membership in the BNP. The transcript of the interview reads as follows

> Q- In your Basis of Claim form, you declared to be a member of the Bangladesh National Party, known as the BNP. Is this correct?
>
> A- Yes
>
> Q- Are you still a member of the Bangladesh National Party, today?
>
> A- Yes.

The ID stated in the Decision that Mr. Miah's position was that he had not understood the question from the CBSA officer. Mr. Miah argues, and the Respondent concedes, that this was not Mr. Miah's response. Rather, his explanation to the ID was that his affirmative response to the officer was due to the fact that his name would still be listed in the BNP books as a member.

(3) Also during the August 2017 CBSA interview, Mr. Miah made reference to a BNP procession in 2012 and stated:

> When Tarek Zia [the BNP leader's son] was arrested, at the time we also… and also when Tarek Zia was arrested at the time we also performed the procession. And we also performed the procession with the peaceful people of my area.

When the ID questioned Mr. Miah about this statement, he stated that he was not present at the procession. The panel found that the contradiction in his testimony greatly affected his credibility.

(4) Finally, the ID referred to Mr. Miah's confirmation of his BNP membership during a December 2014 interview for his U.S. asylum claim. When asked how long he had been a member of the BNP, Mr. Miah responded, "I became a member in 2005, since then". The ID stated that there was no ambiguity in Mr. Miah's response and that he had portrayed himself as a BNP member in the context of his U.S. asylum claim, giving no indication that his involvement stopped after 2011.

[23] I have considered each of Mr. Miah's submissions and reviewed the evidence in the record against the ID's conclusion that Mr. Miah's attempts to disassociate himself from the BNP from 2011 onwards were not credible. I find that the ID made no reviewable error in its analysis of Mr. Miah's continued membership in the BNP. The panel addressed Mr. Miah's evidence and arguments in detail and its conclusion was justified. There was ample evidence before the ID in support of its conclusion that there were reasonable grounds to believe that Mr. Miah's membership in the BNP continued past the end of 2011.

[24] I agree with Mr. Miah that the ID erred in characterizing his explanation of his August 2017 confirmation of membership as a "misunderstanding". However, the panel did not err in relying on the statement as contradictory to Mr. Miah's later submissions that he ceased to be a member at the end of 2011.

[25] Mr. Miah argues that his use of the word “we” in response to questions surrounding the 2012 procession should not be interpreted as indicating he personally participated in the procession and that the word was intended to signify the BNP’s participation more generally. In my view, the fact that an alternate meaning for his answer may exist does not render the ID’s plain reading of the answer unreasonable.

2. Was the ID’s finding that the BNP engaged in acts that fall within the definition of terrorism pursuant to paragraph 34(1)(c) of the IRPA reasonable?

[26] Mr. Miah submits that the ID erred in concluding that there were reasonable grounds to believe that the BNP engaged in acts of terrorism within the meaning of paragraph 34(1)(c) of the IRPA during the 2012-2014 election period. He argues that the Board did not make a finding that the BNP intended to cause death or serious bodily injury by calling *hartals* in pursuit of its political goals, as required by the definition of terrorism set out in *Suresh* and as emphasized in the jurisprudence of this Court.

[27] In his submissions, the Respondent canvasses the Court’s jurisprudence and agrees with Mr. Miah that the question in each case is whether the specific intent to cause death or serious injury can be imputed to the BNP. The Respondent relies on the ID’s conclusion that it was not plausible that there was not an underlying intention on the part of the BNP to achieve its goals through violence. The Respondent argues that the documentary evidence in this case was clear and fully supported the panel’s conclusion.

[28] As noted above, the ID analysed the evidence in the record regarding the BNP’s involvement in *hartals* using the *Suresh* definition. The panel did not rely on the definition of

"terrorist activity" in paragraph 83.01(1) of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*), as was the case in *Rana*, or on both the *Suresh* definition and the *Criminal Code* (see, e.g., *Saleheen*; *Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 (*Islam*)).

[29] The SCC's widely-cited *Suresh* definition is as follows (*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". …

[30] The SCC did not attempt to establish an exhaustive definition of terrorism, a "notoriously difficult endeavour" (*Suresh* at para 93), instead providing a definition that focuses on the intent of the actor or actors in carrying out the specified acts. In this Court, regardless of the definition relied on by the ID or the eventual result in the particular case, each of my colleagues has closely reviewed the decision before them and centred their conclusion on the critical issue of whether the ID reasonably and expressly found that the BNP intended to cause death or serious bodily harm by calling *hartals* to achieve its political goals. As in each prior case, the outcome of this application turns on the particular facts and documentary evidence in the record and the reasons given by the ID in the Decision (*Saleheen* at para 26; *Rana* at para 7; *Rahman v Canada (Public Safety and Emergency Preparedness*), 2019 FC 807 at para 33).

[31] In *Rana*, the ID member applied the *Criminal Code* definition of "terrorist activity" to the evidence before her regarding the BNP's activities. Justice Norris emphasized that the intention to cause death or serious bodily harm by the use of violence is an essential element of that *Criminal Code* definition and the essence of the *Suresh* definition of terrorism (*Rana* at para 66):

> [66] … Indeed, [the intention to cause death or serious bodily harm] 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 intended 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. ...
>
> (Emphasis in original.)

[32] The Court again considered the BNP's use of *hartals* and paragraphs 34(1)(c) and (f) of the IRPA in *Islam*. There, the ID considered both the *Criminal Code* and *Suresh* definitions. Justice Roy stated that it was not necessary to decide whether the *Suresh* decision should govern the ID's analysis because the difficulty with the decision under review was the ID's failure to find the required specific intent on the part of the BNP to cause death or serious bodily harm. The ID reviewed the violence inherent in the BNP's use of *hartals* in the 2014 election period and concluded only that "by calling for *hartals*, the BNP leadership knew or, at best, was wilfully blind to the fact that it would result in deaths and serious injuries" (as cited in *Islam* at para 18).

[33] Justice Roy found that the ID wrongly equated intent, knowledge, wilful blindness and recklessness. The fact that the BNP knew or was wilfully blind that *hartals* would result in deaths or serious injuries was not sufficient. The ID was required, and failed, to find that the BNP intended to cause harm (*Islam* at para 26).

[34] In *Saleheen*, Associate Chief Justice Gagné reviewed in detail the Court's recent judgments regarding the BNP's involvement in the calling of *hartals* for political purposes and the issue of whether, in so doing, the BNP engaged or engages in acts of terrorism within the meaning of paragraph 34(1)(c) of the IRPA (*Saleheen* at paras 25-37). The Associate Chief Justice confirmed that the specific intention to cause death or serious injury must exist for a finding of terrorism, whether the decision-maker applies the *Criminal Code* or the *Suresh* definition (*Saleheen* at para 41):

> [41] I agree that a specific intention to cause death or serious injury is required for a finding of terrorism, whether the *Criminal Code* or the *Suresh* definition is used. The question of whether the BNP engaged in terrorism turns on whether the requisite specific intention can be imputed to the BNP in the context of this factual record.

[35] The factual findings of the ID in *Saleheen* were not entirely clear. In some passages, the ID focused on the intent to carry out violence. In others, it appeared to equate knowledge of the likelihood of violence with intent or recklessness (which it mistakenly referred to as wilful blindness) (*Saleheen* at para 45). Nevertheless, Associate Chief Justice Gagné concluded that the ID made the required finding of specific intent to cause violence, citing a number of excerpts from the decision under review and emphasizing the fact that the BNP leadership knowingly

ordered its supporters to participate in *hartals* where the foreseeable consequence was violence. The ID stated (as cited, with emphasis, in *Saleheen* at para 46):

> While the opposition consisted of some 18 parties and the Jamaat party are noted as playing an active role in the protests and violence the panel finds that the continuation of the violence likely was intended by the BNP leadership. Continuing to call for the use of a tactic which leads to widespread fire bombings of civilians, injuries and deaths is clear evidence of the intent to use violence as a means to a political end. The fact that this tactic was employed again in January 2015 and the violence was repeated contributes to the finding that it was a deliberate attempt to use violence to undermine the AL government.

[36] The issue before me is whether the ID properly applied the *Suresh* definition of terrorism to the evidence before it and made the required finding that the BNP intended to cause death or serious injury by calling for *hartals* before and after the 2014 election order to further its political agenda.

[37] I begin with a summary of the ID's factual findings regarding the nature of the BNP's involvement and the violence occasioned by its use of *hartals* in 2012-2014.

[38] The ID reviewed the history of the use of *hartals* in Bangladesh and the specific involvement of the BNP. The panel cited from a United Nations Development Program report that detailed the organizational steps that precede a *hartal*. The decision to call the *hartal* is made at a meeting of the AL Presidium Committee or the BNP's Steering Committee, following which the party initiates three to four days of pre-*hartal* activities, usually by their student wing. Processions and rallies are staged around university campuses. Members of the armed cadre of the party attend to instil an element of fear and apprehension. When the *hartal* begins, the

students rally at pre-planned areas and proceed to police barricades to incite and antagonize police. Bombs are hurled toward the barricades and mayhem ensues. Party workers carry out similar assignments elsewhere in the city, setting off bombs, burning tires and ransacking rickshaws and cars.

[39] The ID summarized the BNP's use of *hartals* and the rising levels of violence they engendered in the 2012-2014 period:

> [72] The violence illustrated by the above referred documents, takes the form of killing people who refuse to honour the blockades, attacking democratic institutions, such as polling stations and election officials and throwing petrol bombs at buses and vehicles. When children and innocent bystanders are the victims of indiscriminate violence, we can conclude that actions taken by the perpetrators amount to terrorism. The violent acts perpetrated by BNP members and supporters were for political purposes and aimed at disrupting civilian life. Hartals were frequently called by the BNP to put pressure on the AL government to hold elections under a caretaker government. The hartals have had a profound impact on the economy of Bangladesh (Document C-14) and resulted in numerous violations of human rights.

[40] The ID emphasized the involvement of the BNP leadership and found that "there is a clear and documented pattern" that *hartals* lead to violence and economic chaos, deaths, random bombings, economic shutdowns and serious injuries. In the ID's view, the perpetrators of those acts, BNP members and supporters, were engaged in terrorism.

[41] The ID's reliance on the BNP's involvement in the calling and organizing of a *hartal* is important as it addresses certain of the indicia noted by this Court in *MN v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 at paragraph 12, including the circumstances

in which the violent acts resulting in death or serious bodily harm were committed, the internal structure of the organization, and the BNP leadership's knowledge of the violent acts.

[42] The ID's conclusion is set out in two paragraphs:

> [75] In the present case, the tribunal concludes that violence was used to achieve political objectives, the link between the calls for hartals and the perpetration of terrorist acts is established. Given the predictable consequences of calling a hartal, it is difficult to find that political leaders did not know that deaths amongst the civilian population or serious bodily harm would result. … Because of the history of decades of violence associated with such political demonstrations only willful blindness would explain that political leaders were not aware of the human rights violations associated with such actions.
>
> [76] As illustrated by the documentary evidence, the 2012-2014 period in Bangladesh was one of the most violent in the history of Bangladesh. During that period, the BNP was the organization calling the hartals and promoting social disturbance to achieve political objectives. It is not plausible that there was not an underlying intention to achieve these goals through violence. The consequences of calling a hartal as well as the use of such a method to achieve political goals leaves little doubt of the intentions of political leaders calling for such actions.
>
> (My emphasis.)

[43] As in *Saleheen*, the ID's conclusions in this case imported into the Decision the concepts of knowledge and wilful blindness. However, the ID also found that it was not plausible that the BNP did not intend to further its political goals through the use of violence that would cause civilian deaths and serious injury. The panel traced the history and inevitability of *hartal* violence; the BNP's repeated calls for *hartals*; the role of its leadership, student wings, armed cadre and supporters; the mechanics and perpetrators of the violence; and the resulting deaths and injuries. Although expressed in the negative, the ID imputed to the BNP and its political leaders the requisite specific intention to cause death and bodily harm. In so doing, the panel

properly applied the *Suresh* test. The ID's finding is internally coherent and justified on the record.

[44] The ID then concluded that there were reasonable grounds to believe that the BNP engaged in terrorism during the 2012-2014 period within the meaning of paragraph 34(1)(c) of the IRPA. Reasonable grounds to believe require "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114). I find that the ID's conclusion is justifiable as its falls within the possible and acceptable outcomes for Mr. Miah's case. There is no basis for the Court to intervene and set aside the Decision.

VIII. Conclusion

[45] The application is dismissed.

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

JUDGMENT IN IMM-1201-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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