Federal Court  Cour fédérale

Date: 20210408

Docket: IMM-92-20

Citation: 2021 FC 288

Ottawa, Ontario, April 8, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

REAJ HAMID AND NADIR HAMID

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] The Minister of Public Safety and Emergency Preparedness [the Minister] seeks judicial review of the December 16, 2019 decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada [the IAD], that denied his appeal and upheld the decision of the Immigration Division [the ID] of the same tribunal.

[2] The IAD agreed with the conclusion of the ID finding that the Respondents are not individuals who are inadmissible to Canada and are not individuals described under paragraph 34(1)(f) of the *Immigration and Refugee Protection Act* (SC 2001, c 27 [the Immigration Act]).

[3] For the reasons discussed below, the Application for judicial review [the Application] will be granted.

II. Context

[4] The Respondents, brothers, are citizens of Bangladesh. On December 23, 2016, they entered Canada as visitors, and on February 3, 2017, they claimed refugee status.

[5] In their Basis of Claim forms, the Respondents expressed fear of the Awami League affiliated "thugs" [the Awami League or AL] who seek political vengeance against them. In their narrative attached to their forms, they indicate having been members in the Jatiyatabadi Chhatra Dal [JDC] (a student division or section of the Bangladesh Nationalist Party [BNP]) from December 2008 to March 2010. They also indicate having been, respectively, a supporter and a strong supporter of the BNP from April 2010 until they left for Canada in December 2016. They outline having participated in rallies organised by the BNP and its allies in 2011, 2013, and 2016. They also confirm that they were supporters of the BNP from 2010 to 2016 in their Schedule A forms.

[6] On April 3, 2017, an immigration officer signed reports under subsection 44(1) of the Immigration Act expressing his opinion that the Respondents are inadmissible to Canada

pursuant to paragraphs 34(1)(f), 34(1)(b), 34(1)(b.1) (subversion), and 34(1)(c) (terrorism) of the Immigration Act. On April 13, 2017, the Minister referred the report to the ID for an inadmissibility hearing, under subsection 44(2) of the Immigration Act.

[7] Before the ID, the Minister sought a determination that the Respondents are inadmissible to Canada because there are reasonable grounds to believe that they were members of the JCD and the BNP, organisations that there are reasonable grounds to believe engages, has engaged or will engage in terrorism, as per paragraph 34(1)(f) with reference to paragraph 34(1)(c) of the Immigration Act. The Minister also sought a deportation order be issued according to paragraph 229(1)(a) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227).

[8] The Respondents submitted that the Minister had not established on reasonable grounds that the BNP is "an organisation that has engaged in terrorism" and that, consequently, the issuance of a removal order was not warranted.

[9] On June 19, 2018, the ID held a hearing, and on October 2, 2018, the ID issued two separate but similar decisions, one for each brother.

[10] In regards to subversion, i.e. paragraph 34(1)(f) in reference to paragraphs 34(1)(b) and (b.1) of the Immigration Act, the ID noted that the Minister's counsel made no arguments and referred to no evidence, and the ID thus concluded there was no link between the Respondents' membership in the JDC and these grounds of inadmissibility.

[11] In regards to terrorism, i.e. paragraph 34(1)(f) in reference to paragraph 34(1)(c) of the Immigration Act, the ID concluded there were reasonable grounds to believe that the BNP and its student wing, the JDC, have engaged in acts of terrorism, more particularly since 2012 and during the time following the January 2014 elections.

[12] The ID noted that, in their forms and testimony, the brothers had admitted that they were members of the JDC, and thus concluded there were reasonable grounds to believe that they were members of either the JDC or the BNP from December 2008 to March 2010. However, the ID noted that, although the brothers had stated in their refugee forms that they were supporters of the BNP, there was no evidence of membership in the BNP during the relevant period, i.e. from 2012 to 2016. The ID stated that it evaluated their participation in support of the BNP as minimal. The ID thus concluded that there were no reasonable grounds to believe that the brothers were members during the pertinent time period, i.e. after 2012, and that there was no link between their membership and the terrorist activities required under *El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612.

[13] The ID determined that the Respondents were not persons who are inadmissible to Canada, as they are not described under paragraph 34(1)(f) in reference to paragraphs 34(1)(b), (b.1), or (c) of the Immigration Act.

[14] The Minister appealed from the ID decision to the IAD.

III. The IAD Decision

[15] Before the IAD, the Minister relied on the written arguments included in the appeal record submitted to the ID on July 27, 2018, and added further observations dated May 30, 2019.

[16] The Minister recognised having to meet the "reasonable grounds to believe" standard of proof, per section 33 of the Immigration Act, and as confirmed in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114 [*Mugesera*].

[17] The Minister referred to the definition of terrorism outlined by the Supreme Court of Canada in *Suresh c Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 98. He submitted documentary evidence to support the argument that the BNP was a terrorist organisation, per the definition, and that the acts listed in the documentary evidence meet the definition of "engaging in terrorism." The Minister submitted that the violence carried out by the BNP was directly aimed at causing death or serious bodily harm to civilians, and that the JDC is as violent as the BNP.

[18] The Minister added that the Respondents were members of the JDC and the BNP per the concept of membership, which includes both formal and informal membership (citing *B074 v Canada (Citizenship and Immigration*), 2013 FC 1146 at para 29 [*B074*]). He stressed the incompatibility of the Respondents' testimony in the admissibility proceedings with the information they provided to support their refugee claims. The Minister argued that the Respondents diminished their involvement in the BNP, following the declared period of

membership in the JDC, and that it is impossible to determine that before 2012, no acts of violence committed by the BNP fall under the description of terrorism.

[19] Before the IAD, the Respondents also relied on their representations before the ID. They added that they did not diminish their involvement in the BNP, and testified that they were fully engaged in their business after they finished school, and that the credibility issues raised by the Minister are unsupported.

[20] On December 16, 2019, the IAD rendered its decision and found that the Respondents were not inadmissible to Canada pursuant to paragraphs 34(1)(f) and 34(1)(c) of the Immigration Act. The IAD issued a single decision regarding both Respondents.

[21] The IAD outlined the essence of the ID decision, the parties' pretentions, and the factual context regarding the Respondents.

[22] At paragraph 6 of its decision, and before continuing with its analysis, the IAD commented, on general terms, on the differences between the information submitted in the Basis of Claim forms, for purpose of applying for refugee status, and the information submitted in exclusion procedures such as those before the IAD. The IAD indicated that, notwithstanding outright misrepresentation, misleading or lying, one could imagine that individuals will on one hand somewhat embellish their political roles and importance of perception by political opponents in order to increase the chances of being recognized as refugees, while on the other hand, try to diminish the importance of their political roles in inadmissibility proceedings,.

[23] In the same vein, the IAD stated later on that: “[T]he tribunal is ready to a certain extent to give the benefit of the doubt to the Respondents, given, on one hand, the type of catch 22 individuals face when they have to show on a refugee claim that they are very important members of a political party and, on the other hand, in a procedure such as this one where they have to minimise it. One would guess the truth could usually lie between both versions.”

[24] The IAD accepted a new, amended version of the facts, different from the one the Respondents presented in their refugee claims. In this amended version, the Respondents diminished their political involvement and varied the reasons they had initially invoked for having fled their country and claimed refugee status in Canada. The IAD accepted that the facts outlined could differ depending on the type of application the Respondents were faced with. The IAD even asked the Respondents, at the hearing, if they wished to amend their Basis of Claim forms.

[25] At paragraph 7 of its decision, the IAD noted that the Respondents were supporters of one of the two main political parties in Bangladesh, the BNP, during the relevant period (2012 to 2016). The IAD added that being supportive of one of the two main political parties in Bangladesh is not sufficient to invoke a serious possibility that section 34(1)(f) should apply, as otherwise, thousands of Bangladeshis would be inadmissible on the basis of being members or supporters of one of the two main political parties. The IAD concluded that, on a balance of probabilities, the Respondents were relatively successful businessmen.

[26] The IAD added that it considered the Respondents' testimony to be credible and proceeded to outline the components of their testimony in regards to their activities between 2010 and 2016, namely that their political involvement was minimal between 2010 and 2016, and that they were attacked for other reasons (which could include political reasons combined with other reasons).

[27] Ultimately, the IAD concluded that it was plausible that the Respondents were attacked for reasons that the Respondents had not raised in their refugee claims, but had raised as part of the inadmissibility proceedings, reasons that were, at least in part, not related to their political involvement.

IV. Standard of Review

[28] I agree with the parties that the presumptive standard of review is reasonableness under *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and nothing refutes the presumption in this case.

[29] When the reasonableness standard of review is applied, the burden is "on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). The Court's focus must be "on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83) to determine whether the decision is "based on an internally coherent and rational chain of analysis and […] is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). It is not for the Court to substitute its preferred outcome (*Vavilov* at para 99).

[30] I am cognizant that the role of the Court is not to reweigh the evidence, and that particular deference must be shown to the IAD's assessment of the Respondents' credibility.

V. Applicable Legal Framework

[31] Paragraphs 34(1)(c) and (f) of the Immigration Act 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 <u>member</u>** 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 **<u>membre</u>** 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).

(my emphasis)

[32] The standard of proof applicable in determining whether a foreign national is or was a member of an organization that there are reasonable grounds to believe engages in, has engaged in, or will engage in terrorism, as contemplated by paragraphs 34(1)(c) and (f) of the Immigration Act, is low. In general, the evidence must establish "more than mere suspicion, but less than [what is required by] the standard applicable in civil matters of proof on the balance of probabilities" (*Mugesera*). This test will be met where there is an objective basis, based on compelling and credible information, for the belief that (i) the person is or was in fact a member

of the organization, and (ii) that the organization does, did or will engage in terrorism (*Mugesera*; *Kanapathy v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 459 at paras 32-34 [*Kanapathy*]).

[33] The Courts have recognised that informal participation or support for a group supporting a party, as opposed to being a formal member thereof, can suffice to meet the definition of member under paragraph 34(1)(c) of the Immigration Act (*Kanapathy*; *Khan v Canada (Citizenship and Immigration*), 2017 FC 397 at paras 28-30 [*Khan*]).

[34] Although there is no definition of the term "member" in paragraph 34(1)(f) of the Immigration Act, it is well established that this term should be given a broad interpretation, and actual or formal membership in an organisation is not always required. Instead, participation in or support for a group may suffice, depending on the nature of that participation or support (*Poshteh v Canada (Minister of Citizenship and Immigration*), 2005 FCA 85 at para 27 [Poshteh]; *Helal v Canada (Citizenship and Immigration)*, 2019 FC 37 at para 27; *Abounakar v Canada (Citizenship and Immigration)*, 2020 FC 181).

[35] As per the jurisprudence, in determining whether a foreign national is a member of an organization described in paragraph 34(1)(f), some assessment of that person's participation in the organization must be undertaken. In this regard, the following three criteria should be considered: (1) the nature of the person's involvement in the organization; (2), the length of time involved; and (3) and the degree of the person's commitment to the organization's goals and objectives (*TK v Canada (Minister of Public Safety and Emergency Preparedness*, 2013 FC 327 at para 105). Where

there are some factors which suggest that the foreign national was in fact a member and others which suggest the contrary, those factors must be reasonably considered and weighed (*B074*).

VI. Parties' Submissions

[36] The Minister submits that there is no analysis in the IAD decision as to whether the Respondents' self-admitted status as supporters of the BNP from 2012 to 2016 could be equated to membership in the organisation under paragraph 34(1)(f) of the Immigration Act and thus bring into play terrorist activity of the BNP between 2012 and 2016.

[37] The Minister submits that it is trite law that informal participation or support for a group supporting a party, as opposed to being a formal member thereof, can suffice to meet the definition of "member" under paragraph 34(1)(f) of the Immigration Act (citing *inter alia* *Kanapathy* at para 34; *Khan* at paras 28-30).

[38] The Minister points to the contradiction between the Respondents' testimony, where they indicated that their support meant voting for the BNP, and the information the Respondents provided both in their Basis of Claim and in their testimony, that shows the Respondents participated in several rallies and demonstrations and were the victims of multiple extortion attempts by the AL *as a result*.

[39] The Minister submits that the IAD's conclusions that the Respondents were targeted by AL for political and financial reasons, and that the Respondents were not members of the BNP because they were too busy with their business, are unreasonable.

[40] The Minister adds that the IAD appears to conclude that the Respondents were indeed supporters of the BNP during the period for which the ID found terrorist acts were committed (after 2012), but that being a supporter was insufficient to impute membership and find an individual inadmissible. Otherwise, thousands of Bangladeshis would be inadmissible on the basis of supporting one of the two main political parties in their country. The Minister submits that this conclusion contains two errors. First, the number of members or supporters in an organisation is an irrelevant consideration, which the IAD incorporated in determining inadmissibility due to membership in an organisation that has engaged in terrorism (*Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94 at para 26). Second, the IAD failed to consider whether the Respondents' self-declared status as supporters of the BNP from 2010 to 2016 could be construed as membership under the broad definition of member laid out by the Federal Court of Appeal in *Poshteh*.

[41] The Respondents respond that a clear reading of the IAD reasons (at paragraphs 7-14) shows that the IAD did not fail to consider whether their status as supporters of the BNP could be equated to that of members under the Immigration Act. They submit that the IAD, at paragraphs 7 and 20 of its reasons, agreed with the ID's assessment that being a supporter did not equate to being a member, which Respondents submit is a correct application of the guidance from the Federal Court of Appeal in *Poshteh*.

[42] The Respondents further submit that the IAD repeated the ID's assessment of their participation in rallies and gatherings, found their testimony credible, and explained that the Respondents focussed mostly on their business, had minimal involvement, and that the attacks

they were victims to may have results from a combination of their imputed political opinions, past involvement with the JDC and successful business. The Respondents submit that this analysis of the IAD was contextual and sufficient under *Poshteh.*

VII. Analysis and Decision

[43] The Minister raised a number of issues. However, I need not examine all of them, as one suffices to set aside the decision. I am satisfied that the IAD failed to properly analyse whether the Respondents' respective, self-admitted status as supporter and strong supporter of the BNP, during the period deemed relevant by the IAD, i.e. from 2012 to 2016, could be equated to *membership* in the organisation under paragraph 34(1)(f) of the Immigration Act.

[44] It is clear from the narrative and statements the Respondents presented in support of their refugee claim that the Respondents were, respectively, supporter and strong supporter of the BNP, and that they feared violence and extortion at the hands of the AL thugs *as a result* of their political involvement in the BNP. It is only once their file was deferred to the ID for inadmissibility, precisely to examine their involvement in the BNP, that the Respondents minimised their political involvement and raised other reasons to explain the violence and extortion directed at them by the AL thugs.

[45] The IAD does briefly discusses the Respondents' activities between 2010 and 2016. However, it does not conduct a proper analysis, as directed by the jurisprudence of the Court, in order to determine if the activities amount to *membership* under subsection 34(1)(f) of the Immigration Act.

[46] The IAD, faced with different versions from the brothers regarding their political involvement, assessed their particular credibility only after having acknowledged and approved the possibility for individuals, in general, to vary their testimony depending on their objective in a particular proceeding. I agree with the Minister that this approach is not reasonable or founded in law. I am satisfied it fatally tainted the IAD's assessment of the Respondents' credibility and the analysis of their activities and political involvement from 2012 to 2016.

[47] Furthermore, the IAD notably acknowledged that the Respondents were indeed supportive of the BNP throughout the relevant period, i.e. from 2012 to 2016. However, it found that being supportive of the BNP, one of the two main political parties in Bangladesh, was not sufficient to invoke a serious possibility that paragraph 34(1)(f) would apply, as "Otherwise, thousands of Bangladeshis would be inadmissible on the basis of being a member or supporter of the two main political parties" [my emphasis], thus concluding that even formal members of the party could evade section 34 by sole virtue of their sheer numbers. This runs contrary to decisions of this Court (see e.g. *Intisar v Canada (Citizenship and Immigration*) 2018 FC 1128; *Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94).

VIII. Conclusion

[48] The Minister has satisfied his burden to demonstrate the decision is unreasonable. For the reasons stated above, the Application for judicial review will be granted, and the file sent to another decision-maker for a new examination.

JUDGMENT in IMM-92-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted;

2. The file is sent back to the Immigration Appeal Division for a new examination;

3. No question is certified.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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