Immigration, Refugee, and Citizenship Law Moot 2020 Team No. 240

**IN THE CROWN COURT OF CANADA**

(ON APPEAL FROM THE FEDERAL COURT OF CANADA)

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

*Appellant*

and

MD. JANNA N. CHOWDHURY

*Respondent*

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| FACTUM OF THE RESPONDENT |

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# **OVERVIEW**

1. The Respondent received a favourable decision in the Federal Court where Jagger J agreed that the Bangladesh National Party (“BNP”) does not fall under s 34(1)(b) of the *Immigration and Refugee Protection Act* (“*IRPA*”) and that duress is an applicable defence for individuals found inadmissible to Canada under s 34(1)(f) of the *IRPA*.
2. Political parties performing legitimate democratic functions should be presumed not to be engaging in subversion by force under s 34(1)(b) of the *IRPA*. The implementation of this presumption is supported by case law, the *IRPA*’s objectives, and Canada’s international obligations. Jurisprudence supports this different treatment between political parties performing legitimate democratic functions and despotic and authoritarian regimes. The Respondent’s submissions are aligned with the purposes of the *IRPA* under s 3(1), including the security objectives. Further, adopting the Respondent’s submission would align with the values and principles of the international treaties ratified by Canada.
3. The BNP cannot be found to be engaging in subversion by force under s 34(1)(b) of the *IRPA* by merely calling for *hartals*. Immigration Officer A. Ali (the “Officer”) failed to consider that *hartals* are a part of Bangladesh’s political and cultural context. Calling for *hartals* does not meet the definition of subversion set out in the jurisprudence, which demands requisite intent and a link to the violence. The BNP did not intend to overthrow the government nor to use force.
4. The Respondent also submits that duress is an applicable defence at inadmissibility proceedings, which can negate a finding of membership under s 34(1)(f) of the *IRPA*. A purposive and harmonious reading of the *IRPA* should align with common law principles, the *Criminal Code*, and the *Canadian Charter of Rights and Freedom* (“*Charter*”). Inadequate means for a substantive *Charter* consideration at the post-inadmissibility stages means the applicant should have the opportunity to present all applicable defences at the inadmissibility proceeding.
5. The analysis for membership under s 34(1)(f) of the *IRPA* should not be overly broad and unrestricted. Mere affiliation is not sufficient for a finding of membership. In the case at bar, Mr. Chowdhury’s intention was to promote voting rights, and nothing more. He was not sufficiently involved and committed to the BNP’s goals to warrant a finding of membership under s 34(1)(f) of the *IRPA*.
6. This appeal before the Crown Court of Canada is an opportunity to align the inadmissibility framework under the *IRPA* with Canada’s domestic and international commitments to democratic values. It is also an opportunity to ensure that innocent applicants are not mistakenly caught by the overbroad membership analysis pursuant to s 34(1)(f) of the *IRPA*.

# **PART I – FACTS**

## **FACTUAL BACKGROUND**

**The Respondent**

1. The Respondent, M.D. Janna N. Chowdhury (“Mr. Chowdhury”), is a citizen of Bangladesh residing in Canada. He is neither a Canadian citizen nor a permanent resident of Canada. Mr. Chowdhury is married and has a four-year-old son with his wife, who are residing citizens in Bangladesh.

Reasons of Immigration Officer A. Ali, Refugee Law Moot Problem at paras 2-3 [Reasons of Immigration Officer].

1. Mr. Chowdhury has always identified, privately, as a gay man because homosexuality is not socially acceptable in Bangladesh. Mr. Chowdhury believed his occasional same-sex relationships were in secret.

Reasons of Immigration Officer, *ibid* at para 4.

1. Mr. Chowdhury worked as the Executive Director in a non-governmental organization (the “NGO”) in Bangladesh. The NGO promotes gender equality, women’s leadership, women’s human rights, and opposes violence against women and children. Mr. Chowdhury received threats from Muslim fundamentalists as a result of his employment.

Reasons of Immigration Officer, *supra* para 7 at para 5.

1. Mr. Chowdhury is a strong supporter of democratic principles and choice in Bangladesh. He disagrees with the Awami League’s (AL) repression of free and democratic elections. Mr. Chowdhury became affiliated with the BNP between 2011 and November 2013 as he believed that the BNP intended to restore democracy in Bangladesh. Mr. Chowdhury’s sole involvement with the BNP during this period was encouraging people to exercise their democratic right to vote. He handed out pamphlets on the right to vote and helped people sign up to vote.

Reasons of Immigration Officer, *supra* para 7 at paras 6, 16.

1. Mr. Chowdhury did not want to join the BNP when he received the request to become a formal member in December 2013. Yet, when he declined the membership request, a high-ranking BNP member threatened to expose his sexual orientation to his family. Fearful of losing his son, Mr. Chowdhury was forced to become a formal member of the BNP in December 2013.

Reasons of Immigration Officer, *supra* para 7 at para 17.

1. In early February 2014, Mr. Chowdhury fled Bangladesh due to threats from the high-ranking BNP member and from Muslim fundamentalists.

Reasons of Immigration Officer, *supra* para 7 at para 7.

**The Bangladesh National Party**

1. The BNP is a legitimate and internationally recognized political party in Bangladesh. It adheres to the democratic election process and has formed the ruling party on two occasions over the last 30 years. Currently, the BNP is the main opposition party and enjoys popular support in Bangladesh.

Reasons of Immigration Officer, *supra* para 7 at para 14.

*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987 at para 29.

1. *Hartals* are strikes or mass protests on a national level, which are used to protest unpopular government activities in Bangladesh. Calling for *hartals* is not unique to the BNP. Other parties in Bangladesh, including the AL, have done so in the past. While the BNP has called for *hartals* on several occasions, they never called for violence.

Reasons of Immigration Officer, *supra* para 7 at para 29.

*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987 at para 26.

*Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 at paras 12, 14 [*Rana*].

## **PROCEDURAL HISTORY**

1. Mr. Chowdhury made a refugee claim under s 96 of the *IRPA* at the Port of Entry on January 23, 2016. His refugee claim was based on the threats he received as the Executive Director of the NGO. The Board found that Mr. Chowdhury would face a serious possibility of persecution if he returned to Bangladesh. Mr. Chowdhury was found to be credible and his claim was accepted on December 14, 2017.

Reasons of Immigration Officer, *supra* para 7 at paras 7-8.

1. Mr. Chowdhury applied for permanent residence as a protected person on February 14, 2018. He provided the same information as in his refugee claim. Mr. Chowdhury received a procedural fairness letter on June 15, 2019. The letter stated that he was likely inadmissible for “engaging in or instigating the subversion by force of any government” and also for 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) of the IRPA – namely the BNP”.

Reasons of Immigration Officer, *supra* para 7 at paras 8-10.

1. Mr. Chowdhury responded with two arguments. First, he argued that the BNP does not fall within the scope of s 34(1)(b) because it operates as a legitimate and democratic political party. Second, Mr. Chowdhury argued that his membership was the result of duress. If he refused to become a member, the BNP would have disclosed his sexual orientation.

Reasons of Immigration Officer, *supra* para 7 at paras 7-8.

1. On November 25, 2019, the Officer denied Mr. Chowdhury’s application for permanent residence, finding him inadmissible to Canada under s 34(1)(f) of the *IRPA*. The Officer concluded that the BNP falls under s 34(1)(b) of the *IRPA* and that Mr. Chowdhury was a member of the BNP. The defence of duress was not addressed because the Officer believed that intent is not required for a finding of membership.

Reasons of Immigration Officer, *supra* para 7 at paras 26-28, 34.

1. Mr. Chowdhury sought judicial review on the Officer’s decision at the Federal Court. Justice Jagger held that the Officer erred in finding that duress did not apply because determining whether an applicant was a “genuine” member requires an analysis of all circumstances and factors relating to their membership. Justice Jagger also held that the BNP does not fall under s 34(1)(b) of the *IRPA* because, as a political party within a functioning democracy, it should be presumed that the BNP is acting in its legitimate political functions. The evidence did not support a finding that the BNP had the intention to use violence or force. The judicial review was granted, and the Officer’s decision was set aside.

*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987 at paras 22-23, 33.

# **Part II – POINTS IN ISSUE**

1. The present appeal raises the following issues:
2. Is the BNP an organization under s 34(1)(b) of the *IRPA*?
3. Is Mr. Chowdhury a member of the BNP under s 34(1)(f) of the *IRPA*?

# **Part III – ARGUMENT**

## **ISSUE 1: IS THE BNP AN ORGANIZATION UNDER SECTION 34(1)(b) OF THE *IRPA*?**

### **A Political Party that Performs Legitimate Democratic Functions, such as the BNP, Cannot Fall within the Scope of s 34(1)(b) of the *IRPA*.**

1. A political party performing legitimate democratic functions, such as the BNP, should be differentiated from organizations engaging in non-democratic activities. Under the s 34(1)(b) analysis, there should be a presumption that when political parties are exercising legitimate democratic functions, they are not engaging in subversion by force under s 34(1)(b) of the *IRPA*. As discussed below, this presumption is supported by the objectives of the *IRPA*, Canada’s international obligations, and Canadian jurisprudence.

#### **Purposes of the IRPA**

1. The Respondent submits that the Parliament has intended the objectives of the *IRPA* to be considered within the “context of the values of a democratic state”. The relevant objectives of the *IRPA* in respect to inadmissibility under s 34(1)(b) are set out in ss 3(1)(h), 3(1)(i), and 3(3)(d). Section 3(1)(h) aims “to protect the health and safety of Canadians and to maintain the security of Canadian society”. Section 3(1)(i) is aimed at “promoting international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks”. Section 3(3)(d) guides decision-makers in ensuring that the *IRPA* is construed and applied consistently with the *Charter*.

*Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 78 [*Agraira*].

Mario Bellissimo, *Canadian Citizenship and Immigration Inadmissibility Law*, 2nd ed (Toronto: Carswell, 2014) at 1.2(b).

*Immigration and Refugee Protection Act*, SC 2001, c 27, ss 3(1)(h), 3(1)(i), 3(3)(d) [*IRPA*].

1. Section 34 of the *IRPA* is not exclusively aimed at protecting national security and public safety. In *Agraira*, the Supreme Court of Canada explained that “[s]ection 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy.” Section (3)(1) of the *IRPA* sets out 11 objectives to be considered with respect to immigration. Besides the two objectives on public safety and national security, there are also nine other objectives related to Canada’s national interest. The explicit inclusion of these other objectives demonstrates that the purpose of *IRPA* is not limited to public safety and national security.

*Agraira*, *supra* para 22atpara 78.

1. The SCC in *Mugesera v Canada (Minister of Citizenship and Immigration)* describes the policy reason behind s 34(1)(b) as aiming to prevent conflicts that originated in foreign countries from spilling into Canada. It was further articulated that Parliament intended the acts described under the inadmissibility provisions to be subject to extraordinary condemnation, such as war crimes and crimes against humanity. This would not include legitimate democratic functions by political parties.

*Mugesera v Canada (Minister of Citizenship and Immigration*, 2005 SCC 40 at paras 114-116.

1. Through s 34 of the *IRPA*, the Parliament is seeking to not only protect the safety and security of Canadians, but also to maintain Canada’s democratic values. This goal should be reflected in the s 34 analysis: as the objectives of safety and security are not undermined when political parties are performing legitimate democratic functions, it follows that the analysis should consider democratic values through the operation of a presumption in these circumstances.

#### **Canada’s International Legal Obligations**

1. The Canadian government is committed to promoting democratic values through various international legal treaties, which should be reflected in this Crown Court’s approach to s 34 of the *IRPA*. The courts in *Munar v Canada (Minister of Citizenship and Immigration)* and *De Guzman v Canada (Minister of Citizenship and Immigration)* both found that s 3(3)(f) “directs that [the] IRPA must be construed and applied in a manner that complies with [international human rights instruments]”. Further, *Baker v Canada (Minister of Citizenship and Immigration)* allowed for the values and principles of unimplemented human rights instruments to inform statutory interpretation and discretionary administrative decision-making.

*Munar v Canada (Minister of Citizenship and Immigration),* 2005 FC 1180 at para 23.

*De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 at para 73.

*Baker v Canada (Minister of Citizenship and Immigration)*,1999 SCC 39 at paras 69-71.

Sharryn Aiken et al, *Immigration and Refugee Law: Cases, Materials, and Commentary*, 2nd ed (Toronto: Emond Montgomery Publications Limited, 2020) at 306-310.

1. Canada began advocating for the advancement of democratic values through its efforts in drafting the Universal Declaration of Human Rights in 1947-48. Today, through international law and the *Charter of the United Nations* (“UN Charter”), Canada works to provide “direct support for the development of democratic institutions and practices”.

“Canada’s Approach to Advancing Human Rights” (last modified 9 January 2021), online: *Government of Canada* <[www.international.gc.ca/world-monde/issues\_development-enjeux\_developpement/human\_rights-droits\_homme/advancing\_rights-promouvoir\_droits.aspx?lang=eng](http://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/advancing_rights-promouvoir_droits.aspx?lang=eng)>.

1. Article 1 of the UN Charter declares that one of the purposes of the United Nations is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. Canada has also ratified the *International Covenant on Civil and Political Rights*, which aims to promote civil and political rights in order to protect “freedom, justice and peace in the world”. These international legal obligations and Canada’s commitment to advance democratic values globally demand the promotion of democratic interests.

*Charter of the United Nations*, 24 October 1945, 1 UNTS XVI (entered into force 24 September 1973) art 1.

*International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999 at 173 (entered into force 23 March 1976) preamble.

1. The scope of the presumption that political parties exercising legitimate democratic functions are not engaging in subversion by force is narrow. This presumption aligns with Canada’s international legal obligations. As such, the analysis under s 34 of the *IRPA* should be modified to ensure that Canada’s commitment to the global promotion of democracy is reflected in its approach to inadmissibility.

#### **Jurisprudence**

1. A separate standard for political parties performing legitimate democratic functions has not yet been articulated by this Court. However, it would be entirely consistent with the jurisprudence to implement one. In *Najafi v Canada (Public Safety and Emergency Preparedness)*, it was found that s 34(1)(b) should apply to undemocratic and despotic regimes, not to legitimate political parties. This conclusion should be extended to create a presumption against subversion by force when political parties are performing legitimate democratic functions.

*Najafi v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 876 at para 68, aff’d 2014 FCA 262, leave to appeal to SCC refused, 36241 (23 April 2015) [*Najafi*].

1. Further, under s 34(1)(b.1) of the *IRPA*, Parliament has articulated a different standard for democratic governments, institutions, or processes, in order to provide them with greater protection. Unlike s 34(1)(b), where subversion by force is required to overthrow any government, under s 34(1)(b.1), force is not a requirement to find subversion against democratic governments. In *Qu v Canada (Minister of Citizenship & Immigration)*, this was interpreted to include the protection of democratic entities which transcend governments. Importantly, *Qu* demonstrated that the provisions under s 34(1) are aimed to protect democratic institutions.

*Qu v Canada (Minister of Citizenship & Immigration)*, 2001 FCA 399 at paras 45-49 [*Qu*].

1. These cases demonstrate that democratic institutions ought to be treated differently under the *IRPA*. Safety and security concerns under the inadmissibility provisions are not undermined when a political party is exercising its legitimate democratic political functions. Therefore, the focus is on how this Crown Court ought to treat democratic institutions. The implementation of the presumption as submitted by the Respondent aligns with the scope of s 34 of the *IRPA* and provide greater protection for democratic institutions.

### **The Officer’s Finding that the BNP is an Organization Engaging in Subversion by Force within the Scope of Section 34(1)(b) was Unreasonable**

#### **Hartals in the Bangladeshi Context**

1. To understand the use of *hartals* in Bangladesh, it is important to consider the political and cultural context in which they take place. *Hartal* is a Hindi word used in South Asia, which directly translates to “locking of shops”. In Bangladesh, *hartals* are mass strikes used to promote political goals through the shutdown of markets and businesses.

Katherine Barber, *Canadian Oxford Dictionary*, 2nd ed, (Oxford: Oxford University Press, 2004) sub verbo “hartal”.

Reasons of Immigration Officer, *supra* para 7 at para 29.

1. *Hartals* are a part of the political landscape in Bangladesh. The Officer’s characterization of *hartals* failed to consider their broader cultural function as a means of political protest. Relevant to the case at bar, the BNP called for *hartals* to protest the AL’s decision to abolish the neutral election caretaker. Also, it is important to note that the BNP was not the only party to call for *hartals*. For instance, when the BNP was elected in 2001, the AL refused to recognize its authority to rule, staged boycotts of parliament and organized *hartals* to pressure the BNP to step down.

Reasons of Immigration Officer, *supra* para 7 at para 29.

*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987 at para 27.

Immigration and Refugee Board of Canada, *Bangladesh: The Awami League (AL); its leaders; subgroups, including its youth wing; activities; and treatment of AL supporters by the authorities (2004-2006)*, (Responses to Information Request, 27 July 2006), Document No. BGD101503.E, online: *Immigration and Refugee Board of Canada* <[irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=450371](https://irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=450371)>.

1. The Officer failed to adequately consider the political and cultural context of *hartals* in Bangladesh. *Hartals* are a part of Bangladesh’s political sphere and serve as a means of protest and dissent, which is essential in a democracy. Without this relevant context, the Officer wrongly concluded that the BNP intended for the violence to occur as a result of the *hartals*.

#### **Definition of Subversion**

1. The BNP’s activities do not fall within the various definitions of “subversion” used by the courts. Subversion is not defined in the *IRPA*, nor is there consensus on its definition from past jurisprudence. The courts have articulated that subversion requires intent to overthrow the government. Following *Al Yamani v Canada (Minister of Citizenship & Immigration)*,the intent to overthrow the government must include two elements: clandestine and undermining from within. There must also be intent to use force as per *Oremade v Canada (Minister of Citizenship and Immigration)*.In addition, *Qu* elaborates on the requisite intention to use force, which involves illicit or unlawful means.

Lorne Waldman, *Inadmissible to Canada: The Legal Barriers to Canadian Immigration*, 2nd ed (Toronto: LexisNexis, 2018) at 55.

*Suleyman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 780 at paras 58-63.

*Tshimanga v Canada (Minister of Citizenship and Immigration)*, 2014 FC 137 at para 50.

*Najafi*, *supra* para 30at para 48.

*Oremade v Canada (Minister of Citizenship & Immigration)*, 2005 FC 1077 at para 29 [*Oremade*].

*Al Yamani v Canada (Minister of Citizenship & Immigration)*, [2000] 3 FC 433 at para 85, 72 CRR (2d) 259 [*Al Yamani*].

*Qu*, *supra* para 31at para 49.

#### **There was no Intent by the BNP to Overthrow the Government**

1. As stated briefly above, subversion requires intention to overthrow the government, which was not demonstrated by the BNP’s call for *hartals*. The BNP was not trying to overthrow AL; they were simply attempting to protect democracy in Bangladesh by ensuring that election safeguards remained in place.

*Oremade*, *supra* para 36at para 29.

1. The BNP boycotted the January 2014 general elections in response to AL’s refusal to allow for a “neutral caretaker” to oversee the election. The “neutral caretaker” position had been implemented in 1996 and was a key safeguard against election fraud. In addition, this was a position that was originally demanded by the AL while the BNP was in power. As such, advocating for a neutral caretaker is not evidence of an intent to overthrow the government. It is evidence of an intent to encourage free and fair democratic elections.

Immigration and Refugee Board of Canada, *Bangladesh Nationalist Party (BNP), including its structure, Leaders, membership and membership documents, factions, associated organizations and activities; treatment of members and supporters by authorities* (document BGD105262.E, 31 August 2015), online: *Immigration and Refugee Board of Canada* <irb-cisr.gc.ca/en/country-information/rir/Pages/index.aspx?doc=456079&pls=1>, at 4.1.1 [IRB Report on the BNP].

1. Further, the BNP’s call for *hartals* do not fit the definition of subversion set out in *Al Yamani*. There is no clandestine element as the calls for *hartals* were done publicly and not in secret. In *Canada (Minister of Public Safety and Emergency Preparedness) v OLV*, the Patriotic Union of Kurdistan (“PUK”) was found to have met the clandestine element through their engagement in guerilla warfare. In comparison, calling for *hartals* does not inherently involve the clandestine “planning, movement, and execution of operations” that guerilla warfare does.

*Qu*, *supra* para 31 at para 12.

*Al Yamani*, *supra* para 36 para 85.

*Canada (Minister of Public Safety and Emergency Preparedness) v OLV*, [2010] IDD No 11 at para 14 [*OLV*].

1. Additionally, the BNP’s call for *hartals* do not meet the second element set out in *Al Yamani*. In *OLV*, the PUK’s campaign was found to have met this element of “undermining from within” as they were a domestic force seeking Kurdish autonomy within Iraq. In the case at bar, there is no element of “undermining from within” because the BNP, although acting domestically, was not seeking autonomy within Bangladesh.

*OLV*, *supra* para 39 at para 14.

*Al Yamani*, *supra* para 36 at paras 54, 85.

1. In sum, the BNP was not seeking to overthrow the government. Instead, they were calling for a public form of protest to protect a neutral caretaker that ensured free and fair elections. This does not meet the element of undermining from within as the BNP was not seeking autonomy or independence, nor does it qualify as clandestine as they called for a public forum of engagement to showcase dissent of the ruling government’s decisions.

*OLV*, *supra* para 39 at para 14.

#### **The BNP did not Intend to Use Force**

1. An essential element of subversion is the intent to use force, which was not demonstrated by the evidence before the Officer. The use of force includes violence and other forms of coercion. Although violence was a result of the *hartals*, there was no evidence that the BNP intended to create or use violence when calling for *hartals*.

*Oremade*, *supra* para 36at para 14.

IRB Report on the BNP, *supra* para 38at 4.1.1, 4.1.3.

Reasons of Immigration Officer, *supra* para 7 at para 29.

1. The Court in *Rana* qualified that a “causal connection between the hartals and blockades and acts of violence is insufficient to establish terrorism or subversion by force”. The case at bar is analogous to *Rana*. The violence that occurred was found to be “often linked to criminal activities rather than political motives”. The BNP cannot be held responsible for the violence of vigilantes who were operating with criminal motives. The BNP’s motive in calling for *hartals* was strictly political.

*Rana*, *supra* para 14 at paras 66-67.

Reasons of Immigration Officer, *supra* para 7 at paras 29, 33

1. Additionally, in *AK v Canada (Minister of Citizenship and Immigration)*, the court considered whether an officer reasonably arrived at the conclusion that the BNP is an organization engaging in terrorism pursuant to s 34(1)(c) of the *IRPA*. The presiding judge overturned the officer’s decision and found it difficult to characterize a general strike called to prorogue Parliament or convene by-elections to fall within the definition of terrorism. It was further held that there was no intention to use violence to achieve political ends, and that this kind of political conduct is outside the scope of s 34(1)(c).

*AK v Canada (Citizenship and Immigration)*, 2018 FC 236 at paras 17, 41.

1. As a recognized political party that has formed government through engagement with a fair democratic process, the BNP was merely calling for *hartals* as a part of that engagement. In *Qu*, it was found that subversion means achieving change through illicit or unlawful means for improper purposes. *OLV* demonstrated examples of illicit means, such as forced recruitment, use of torture, kidnapping of foreign civilians, execution of captured/surrendered soldiers, or extrajudicial executions of its rivals. In the case at bar, the BNP is attempting to uphold fair elections through the call for *hartals*, which are a form of political activism in Bangladesh. The BNP’s calls for *hartals* are not illicit nor unlawful.

*Qu*, *supra* para 31at para 49.

*OLV*, *supra* para 39 at para 14.

1. Lastly, *Oremade* held that there must be a “reasonably perceived potential for the use of coercion by violent means” for a finding of subversion by force. Calling for *hartals* is not equivalent to calling for violence; it is akin to calling for mass protests or strikes. The Court in *Oremade* found that the use of armed soldiers to attempt a “bloodless coup” was a reasonable apprehension of the use of force, which demonstrates intent to cause violence. The case at bar can be differentiated from *Oremede* as there was no use of soldiers or calls for the arming of civilians. The BNP was merely calling for traffic blockades and business shutdowns, which is unlike the use of soldiers. This does not create a reasonably perceived potential for violence. Although violence did occur at the fringes of the *hartals*, it was not the BNP’s intention.

*Oremade*, *supra* para 36at paras 26-28.

#### **The Applicable Standard of Review of the Officer’s Decision**

1. The applicable standard of review in this case is reasonableness. Following *Canada (Minister of Citizenship and Immigration) v Vavilov*, administrative decisions are reviewed on the standard of reasonableness unless there is clear legislative direction that a different standard is intended. A measure of deference to the Officer’s decision should be given, but the decision still needs to be reasonable. The Officer’s decision did not meet the requirement of “internally coherent reasoning” because his conclusion did not logically follow from the evidence.

*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65 at paras 85-86 [*Vavilov*].

1. Some Federal Court decisions have upheld findings that the BNP is an organization that engages in terrorism under s 34(1)(c) of the *IRPA*. However, these decisions can be distinguished for the following reasons. Firstly, these decisions deal with a different, albeit similar, provision of the *IRPA* aimed at terrorism and not subversion by force. Secondly, as found in *Rana*, the reviewing court must base its decision on “the particular records before the Court” and upon the Officer’s reasons. The inherent nature of judicial review under the reasonableness standard means that “perfect consistency across cases of mixed fact and law will not always be achieved”. It is imperative that this appeal examine the particular circumstances of this current case when conducting the reasonableness review.

*Gazi v Canada (Minister of Citizenship and Immigration*), 2017 FC 94.

*A(S) v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 494.

*Kamal v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 480.

*Alam v Canada (Citizenship and Immigration*), 2018 FC 922.

*Rana*, *supra* para 14 at para 7.

1. As illustrated by the analysis in the above section, the facts of this case do not allow for a clear finding that the BNP intended to use force to subvert the Bangladeshi government when it called for *hartals* in support of its democratic political activities. As a result, it was unreasonable for the Officer to find that the BNP was engaging in subversion by force under s 34(1)(b) of the *IRPA*.

#### **The Evidence Before the Officer did not Meet the Evidentiary Standard**

1. The applicable evidentiary standard for determining whether the BNP is engaging in subversion by force under s 34(1)(b) of the *IRPA* is “reasonable grounds to believe,” pursuant to s 33 of the *IRPA*. This standard requires more than a mere suspicion and less than the civil standard. The evidence presented must be credible and demonstrate reasonable probability.

*Chiau v Canada (Minister of Citizenship & Immigration)*, [2001] 2 FC 297 at para 60, 195 DLR (4th) 422.

Bellissimo, *supra* para 22 at 1.3.

1. In the case at bar, this evidentiary standard was not met. There is no evidence that the BNP intended for violence. Although the Officer acknowledged evidence of violence as a result of the *hartals*, he failed to consider the lack of evidence of a connection between this violence and the BNP’s intent. In order to create a link between the violence and the BNP’s intent, the Officer relied on the mere suspicion that the BNP intended for violence to occur, and not credible evidence.

Reasons of Immigration Officer, *supra* para 7 at paras 29-33.

1. In summary, the Officer’s decision did not present internally coherent reasoning because his conclusion did not logically follow from the evidence. The evidence before the Officer did not allow for a finding that the BNP intended to use force to subvert the Bangladeshi government. Therefore, the Officer’s decision was unreasonable and should be set aside.

## **ISSUE 2: IS MR. CHOWDHURY A MEMBER OF THE BNP UNDER SECTION 34(1)(F) OF THE *IRPA*?**

### **Duress is an Applicable Defence in Inadmissibility Proceedings that Negates A Finding of Membership**

#### **Post-Inadmissibility Proceedings do not Offer the Applicant Sufficient Considerations of Duress**

1. The *IRPA* does not exist in a vacuum. It should be read together with the Criminal Code, *Charter* principles, and common law principles. Section 3(3)(d) of the *IRPA* guides decision-makers in ensuring that the *IRPA* is construed and applied consistently with the *Charter*. The Respondent submits that the inadmissibility hearing is the appropriate stage to consider an applicant’s *Charter* rights and applicable defences, because the opportunity to consider such factors is drastically diminished after the inadmissibility proceeding.
2. An inadmissibility hearing is the appropriate stage to consider Mr. Chowdhury’s *Charter* rights and the defence of duress because it is the only meaningful opportunity to challenge a finding of inadmissibility. This finding, if upheld, will inexorably lead to removal. Although the Federal Court in *Moretto v Canada (Minister of Citizenship and Immigration)* held that “an admissibility hearing is but one step in a complex, multi-tiered inadmissibility determination and removal regime under the IRPA”. Yet, in reality, a finding of inadmissibility under s 34 of the *IRPA* leaves very little recourse for Mr. Chowdhury before his removal.

*Moretto v Canada (Minister of Citizenship and Immigration)*, 2018 FC 71 at para 64 [*Moretto*].

1. In Mr. Chowdhury’s case, he cannot apply to the Immigration Appeal Division (“IAD”) for a removal appeal nor a humanitarian & compassionate (“H&C”) exemption if he was found inadmissible for security reasons. Although Mr. Chowdhury can apply for Ministerial relief and pre-removal risk assessment (“PRRA”) application, they do not adequately protect his s 7 *Charter* rights. There is no guarantee that a PRRA application will be reviewed. In fact, the acceptance rate for a PRRA review is only seven percent when it is used as a last resort. Lastly, a successful PRRA application for applicants found inadmissible for security reasons leads to a stay of removal subject to periodic review. This means that the applicant’s stay may be cancelled, and the removal process will resume, at the discretion of administrative decision-makers.

“Step 1: How to Start a Removal Order Appeal” (last modified 30 August 2019), online: *Immigration and Refugee Board of Canada* <[irb-cisr.gc.ca/en/filing-immigration-appeal/Pages/immapp-bc1.aspx](https://irb-cisr.gc.ca/en/filing-immigration-appeal/Pages/immapp-bc1.aspx)>.

“Humanitarian and Compassionate: Intake and Who May Apply” (last modified 21 June 2019), online: *Government of Canada* <[www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/intake-who-may-apply.html#inadmissibilities](http://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/intake-who-may-apply.html#inadmissibilities)>.

“UNHCR’s Statement to the Committee on Citizenship and Immigration – 7 May 2019” (7 May 2019), online: *UNHCR* <[www.unhcr.ca/news/unhcrs-statement-to-the-committee-on-citizenship-and-immigration-7-may-2019/#:~:text=It%20is%20true%20that%20the,mandate%20in%20an%20effective%20manner](http://www.unhcr.ca/news/unhcrs-statement-to-the-committee-on-citizenship-and-immigration-7-may-2019/#:~:text=It%20is%20true%20that%20the,mandate%20in%20an%20effective%20manner)>.

“Processing PRRA Applications: Removals and Stays of Removal” (last modified 25 February 2013), online: Government of Canada <[www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/removal-risk-assessment/applications-removals-stays-removal.html](http://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/refugee-protection/removal-risk-assessment/applications-removals-stays-removal.html)>.

Colin Grey, “Thinkable: The Charter and Refugee Law after Appulonappa and B010” (2016) 76 SCLR 111 at 123.

1. Ministerial relief is rarely granted, and it may take years for the applicant to receive a response. In addition, s 42.1(3) of the *IRPA* states that the Minister may “only take into account national security and public safety considerations” when he or she is determining whether to grant relief. Even if the applicant has strong evidence supporting his duress defence, it is unlikely that duress will be given its due weight because national security and public safety are the primary considerations for Ministerial relief. These limitations leave Mr. Chowdhury with no realistic options before he is at the doorstep of deportation to a country where his life, liberty, and security of the person is threatened. Therefore, the Respondent submits that Mr. Chowdhury should receive a full and proper consideration of available defences to him, such as duress, at the inadmissibility proceeding.

*Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319 at paras 19-22.

*Tameh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 288.

Jennifer Bond, “The Defence of Duress in Canadian Refugee Law” (2016) 41:2 Queen's LJ 409 at 420.

1. Accepting the Respondent’s submission above does not undermine the Minister’s power in assessing Ministerial relief applications under s 42.1 of the *IRPA*. The legislature did not intend the availability of Ministerial relief to preclude duress in an inadmissibility hearing and the Federal Court has accepted duress as a defence on numerous occasions over the years. If the legislature intended to have the considerations of defences under s 34 carved out for the Minister, the Parliament would have amended the *IRPA* to reflect this intention. There were opportunities to address this concern, as the *IRPA* has been amended numerous times. However, it was not the case.

*Canada (Minister of Public Safety and Emergency Preparedness) v Lopez Gaytan*, 2019 FC 1152 at para 24 [*Gaytan*]*.*

1. The highly discretionary function and the limited evidentiary scope of the Minister’s consideration in s 42.1(3) suggest that Ministerial relief is applied narrowly, and this power should be reserved for extraordinary cases. This is not a power that the Minister is expected to use routinely. As a result, accepting duress as a defence in inadmissibility proceedings does not diminish the Minister’s power under s 42.1. There will still be cases where the first-instance decision-makers rejects duress as a defence and the Minister can decide whether he should to grant Ministerial relief. This application of the Ministerial relief is consistent with the historical use of this power.

Bond, *supra* para 56 at 421.

#### **Distinguishing Cases that Do Not Apply Defences at the Inadmissibility Stage**

1. *Singh v Canada (Minister of Employment & Immigration)* held that the *Charter* applies in immigration and refugee protection hearings. However, the SCC did not give enough consideration to *Singh* when it decided *Hernandez Febles v Canada (Minister of Citizenship and Immigration)* and *B010 v Canada (Minister of Citizenship and Immigration)*. Instead, it held that the *Charter* is only engaged at the pre-deportation stage such as during a PRRA application.

*Hernandez Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para 67-68 [*Febles*].

*B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 at para 75 [*B010*].

*Singh v Canada (Minister of Employment & Immigration)*, 1985 CarswellNat 152 at para 98 [*Singh*].

1. In addition, the Federal Court in *Revell v Canada (Minister of Citizenship and Immigration)* and *Moretto* states that a negative inadmissibility decision is not sufficient to trigger an applicant’s s 7 *Charter* rights. The Respondent submits that these cases dilute the applicant’s fundamental guarantees of justice. As discussed in the above section, the inadmissibility hearing may be one of the many steps to deportation, but it is a final decision on inadmissibility, which itself has effects on the applicant’s legal rights. This Crown Court has the jurisdiction to distinguish the present case from these precedents and it is the Respondent’s submission that this Court should do so.

*Revell v Canada (Minister of Citizenship and Immigration)*, 2017 FC 905 at para 37-38 [*Revell*].

*Moretto*, *supra* para 54 at para 52.

1. The Respondent submits that the case at bar differs from *Revell* and *Moretto* because neither Mr. Revell nor Mr. Moretto faced the same degree of threat as Mr. Chowdhury upon deportation. Furthermore, Mr. Moretto also had the opportunity to apply for relief under H&C grounds. However, this is not the case for Mr. Chowdhury if he is found inadmissible under the security provision. Applying the current case laws and denying *Charter* considerations at the inadmissibility hearing means that Mr. Chowdhury may never get the opportunity to have his rights determined in accordance with the principles of fundamental justice.

*Moretto*, *supra* para 54 at paras 61-62.

1. In *Revell*, the applicant presented two arguments for his s 7 *Charter* claim: access to medical treatment and psychological harm suffered from being separated with his family in Canada. These reasons were held to be insufficient. In *Moretto*, the court held that mental health and addiction issues were also not enough to trigger his 7 *Charter* right because it did not arise to a risk to their life or cruel and unusual treatment.

*Revell, supra* para 60at paras 98, 128-130.

*Moretto*, *supra* para 54 at paras 8, 48.

1. Unlike the applicants in *Revell* and *Moretto*, Mr. Chowdhury faces a real threat from Muslim fundamentalists and the BNP if he is sent back to Bangladesh. Mr. Chowdhury’s employment with the NGO and his sexual orientation exposes him to threats of violence in a Muslim country that discriminates against homosexuals and women. During Mr. Chowdhury’s claim for refugee status, the Refugee Protection Division (“RPD”) found him to be credible. Additionally, the RPD also found that Mr. Chowdhury “would face a serious possibility of persecution due to his imputed political opinion if returned to Bangladesh”. Such finding of fact at first instance should be preserved.

Reasons of Immigration Officer, *supra* para 7 at para 8.

1. In conclusion, the Crown Court has an opportunity to distinguish jurisprudence that refuses to engage *Charter* questions until the pre-deportation stage. The reality that applicants found inadmissible under the security provision will not receive a proper consideration of *Charter* rights beyond the inadmissibility proceeding should be acknowledged.

### **The Test for Duress Should Consider Threat of Psychological Harm and the Social and Political Context of the Applicant’s Country of Origin**

1. There has been consistent Federal Court jurisprudence that applied the criminal law defence of duress in the s 34(1) context. In *Jalloh v Canada (Minister of Public Safety and Emergency Preparedness)*, the Court held that an applicant must be a “genuine member” who intentionally carries out acts in furtherance of the organization’s goals. If the applicant was involved with the organization while under duress, they are not a genuine member. The court in *Gaytan* affirmed that duress means moral involuntariness as understood in *R v Ryan*.Individuals who join an organization under duress are not acting voluntarily.

*Jalloh v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 317 at para 37 [*Jalloh*].

*Ghaffari v Canada (Minister of Citizenship and Immigration)*, 2013 FC 674 at para 20 [*Ghaffari*].

*Gaytan*, *supra* para 57 at paras 27-29.

*Mohamed v Canada (Minister of Citizenship & Immigration)*, 2015 FC 622 at paras 28-30 [*Mohamed*].

1. The SCC in *R v Ryan* held that for duress to apply as a defence in a criminal law context, the accused must show that: (i) there is an explicit or implied threat of death or bodily harm directed at himself or a third person; (ii) he reasonably believes that the threat will be carried out; (iii) there is no safe avenue of escape; (iv) there is a close temporal connection between the threat and the harm threatened; (v) there must be proportionality between the harm caused and the harm avoided; and (vi) the accused did not voluntarily put him in a position knowing that his participation will lead to a risk of coercion to compel him to commit an offence. *Ryan* also held that “proportionality” and “no safe avenue of escape” are measured on a modified objective standard of a reasonable person similarly situated in the circumstances. Following *R v Ruzic*, other elements of the test must also be interpreted and applied flexibly.

*R v Ruzic*, 2001 SCC 24 at para 86.

*R v Ryan*, 2013 SCC 3 at paras 53, 155-180 [*Ryan*].

1. The Federal Court has consistently followed the test set out in *Ryan* when assessing duress in the context of s 34(1) of the *IRPA*. This test examines facts from the point of view of a reasonable person similarly situated to the applicant and considers their reasonable belief. However, the law is not clear on whether the “death or bodily harm” aspect should include psychological harm because the majority of the cases only addressed physical harm to the applicant. In the criminal law context, the SCC has accepted that serious bodily harm means “any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of a victim”. Therefore, a similar approach should apply to the inadmissibility analysis, and the test for duress should include threat of both physical and psychological harm.

*Ryan*, *supra* para 66 at paras 64-65, 72, 155-180.

*R v McCraw*, [1991] 3 SCR 72 at para 43, 66 CCC (3d) 517 [emphasis added].

*Gaytan*, *supra* para 57 at paras 15-16.

*Mohamed*, *supra* para 65 at paras 28-30.

*Jalloh*, *supra* para 65 at para 37.

1. Psychological harm in the context of duress is not a novel issue in inadmissibility cases. While the court in *Jalloh* agreed with the IRB decision in finding that duress did not apply, neither the IRB nor the Court rejected the use of evidence of psychological harm.

*Jalloh*, *supra* para 65.

1. When decision-makers are considering the applicant’s circumstances in the inadmissibility context, they should consider the social and political conditions of the applicant’s country of origin. A reasonable and logical response by someone in a peaceful nation may not necessarily be applicable for an applicant in situations of volatility. Implied threat of physical or psychological harm may take different forms in countries with political instabilities. The applicant’s individual circumstances and the country’s omnipresent threat of violence are important considerations because they contribute to the applicant’s vulnerability and affect their understanding of harm. This reflects the holding in *Ghaffair*, which states that the test should be modified to consider the circumstances of the applicant in inadmissibility decisions.

Jennifer Bond & Meghan Fougere, “Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law” (2014) 14:3 Intl Criminal L Rev 471 at 492.

*Ghaffari*, *supra* para 65 at para 20.

1. In short, the test for duress should not be confined to threats of physical harm. This modified test should also consider the applicant country’s social and political context to fully appreciate the applicant’s reasonable belief in their circumstances.

#### **Mr. Chowdhury’s Circumstances Meets the Test of Duress**

1. In Mr. Chowdhury’s case, there are threats of psychological and physical harm directed at him by the high-ranking BNP member. If the BNP member disclosed Mr. Chowdhury’s sexual orientation to his wife, he would lose access to his son. In *New Brunswick (Minister of Health & Community Services) v* *G(J)* and *B(R) v Children’s Aid Society of Metropolitan Toronto*, the SCC held that the right to care for and nurture a child are part of a parent’s liberty interest, and that the threat of losing one’s child constitutes psychological harm. Therefore, the psychological harm that results from Mr. Chowdhury losing his son meets the first element of duress established in *Ryan*.

Reasons of Immigration Officer, *supra* para 7 at para 17.

*New Brunswick (Minister of Health & Community Services) v G(J)*, [1999] 3 SCR 46 at para 61, 177 DLR (4th) 124 [*G(J)*].

*B(R)* *v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 83, 122 DLR (4th) 1 [*B(R)*].

1. Additionally, Mr. Chowdhury may face physical harm due to Bangladesh’s social intolerance towards homosexuality. The Respondent submits that this Crown Court should take judicial notice of the following contextual factors to better understand Bangladesh’s social and political circumstances. Homosexuality is illegal under the country’s penal code and the punishment may be life imprisonment. When a gay man’s sexual orientation is disclosed, he may become the victim of physical and sexual violence and even death. The LGBTQ community faces a hostile environment in Bangladesh.

“Bangledash Events of 2020”, online: *Human Rights Watch* <[www.hrw.org/world-report/2021/country-chapters/bangladesh#e81181](http://www.hrw.org/world-report/2021/country-chapters/bangladesh#e81181)>.

1. Mr. Chowdhury has reasonable grounds to believe that the threat from the high-ranking BNP member will be carried out, which satisfies the second element of *Ryan*. The fact that the BNP member knew about Mr. Chowdhury’s same-sex relationships implies that he had sought out secret information about Mr. Chowdhury and intends to use this information as leverage. Information from this high-ranking member would have greater influence on a person’s perception of Mr. Chowdhury because his statement would carry more weight and credibility than mere gossip.
2. There is no safe avenue of escape immediately available for Mr. Chowdhury when he was asked to become a member of the BNP, which satisfies the third element of *Ryan*. If Mr. Chowdhury rejected the membership request on the spot, the BNP member would have disclosed his sexual orientation. Moreover, Mr. Chowdhury might also be charged and arrested for being a homosexual, denying him the opportunity to escape. Therefore, the only option available for Mr. Chowdhury was to join as a member of the BNP, which enabled him time to plan an escape from Bangladesh.
3. There is a close connection between the threat of disclosing Mr. Chowdhury’s sexuality and losing his son and a target for violence, which satisfies the fourth element of *Ryan*. Once Mr. Chowdhury’s wife finds out about his sexuality and secret relationships, she would take away his son. Given the hostility of Bangladesh’s social and legal intolerance towards homosexuality, it is also reasonable to conclude that Mr. Chowdhury would become a target for violence as a result of this disclosure.

Reasons of Immigration Officer, *supra* para 7 at paras 4, 17.

1. The harm caused by Mr. Chowdhury in becoming a BNP member is less than the harm that he would suffer if he rejected the membership request, which satisfies the fifth element of *Ryan*. Disclosing Mr. Chowdhury’s sexual orientation to his family comes with deleterious consequences. Not only would Mr. Chowdhury lose his son, but he may also face social prejudice or even be sentenced to life in prison. These harms are greater than being a passive member of a political party, where he was never involved in any violence.
2. Lastly, Mr. Chowdhury did not voluntarily expose himself to receive the threat from the high-ranking BNP member, which satisfies the sixth element of *Ryan*. Mr. Chowdhury could not predict that his activities in distributing the pamphlets on the right to vote would expose him to the threat from the high-ranking BNP member.

Reasons of Immigration Officer, supra para 7 at paras 4, 17.

1. In summary, Mr. Chowdhury’s circumstances satisfy all elements of the test for duress, and as a result, he was not a “genuine member” of the BNP.

### **Mr. Chowdhury’s Actions between 2011 and November 2013 do not Amount to Membership under Section 34(1)(f) of the *IRPA***

1. There is no formal test for membershipand courts have applied the test broadly. However, the definition of “membership” must not be so unrestricted and expansive that it effectively categorizes anyone, regardless of how insignificant their connection is to the organization. This notion is reflected in *Poshteh v Canada (Minister of Citizenship and Immigration)*,where the courtheld that in assessing the factors of each case, any evidence that points away from a finding of membership should be considered.

*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paras 27, 38.

*Ismeal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 198 at para 20.

*Khan v Canada* *(Minister of Citizenship and Immigration)*, 2017 FC 397 at para 28 [*Khan*].

1. Membership should be determined on a case-by-case analysis. In this determination, courts have considered the nature of the applicant’s involvement in the organization, the length of time involved, and the degree of the applicant’s commitment to the organization’s goals and objectives as a whole. Not every act of support for an organization will amount to a finding of membership in that organization.

*Toronto Coalition to Stop the War v Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 957 at paras 118, 120.

*TK v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 327 at para 105.

*B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146 at para 29.

*Khan*, *supra* para 79 at paras 44-46.

*Krishnamoorthy v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1342 at para 23 [*Krishnamoorthy*].

1. Mere distribution of pamphlets that encourage citizens to exercise their voting rights does not amount to membership. In cases discussed below, where pamphlet distribution was found as evidence of membership, the pamphlets explicitly and directly promoted an organization’s goal or purpose. Additionally, in these cases, the applicants engaged in more substantial activities besides pamphlet distribution, which suggested a higher degree of commitment, time, and involvement.

*Krishnamoorthy*, *supra* para 80 at para 26.

1. In *Ugbazghi v Canada (Minister of Citizenship & Immigration)*,Ms. Ugbazghi distributed pamphlets to encourage people to join or donate to the Eritrean Liberation Front (“ELF”). These activities materially furthered the ELF’s goals. In addition, she actively participated in meetings, made donations, and was vocal about supporting the ELF’s efforts.

*Ugbazghi v Canada (Minister of Citizenship & Immigration)*, 2008 FC 694 at paras 38-39.

1. In *Motehaver v Canada (Minister of Public Safety & Emergency Preparedness),* Mr. Motehaver was introduced to the Mujahedin-e Khalq (“MEK”) in 1980 and secretly distributed MEK propaganda in 1989. Mr. Motehaver left Iran for Canada in 1995 to avoid being arrested for his involvement with the MEK. However, he continued to support the MEK’s goals by donating money to the Canadian chapter, voluntarily attending MEK’s meetings, and actively staying informed on MEK news through his MEK newspaper subscription.

*Motehaver v Canada (Minister of Public Safety & Emergency Preparedness)*, 2009 FC 141 at para 24.

1. In *Khan*,pamphlets were used to encourage public support for the Mohajir Quami Movement (“MQM”)’s violent activities. Mr. Khan was an active member of the MQM for more than nine years. During his involvement with the organization, he participated in monthly meetings and attended several MQM rallies. During one of those rallies, Mr. Khan voiced his support using a loudspeaker and encouraged others to listen to the MQM’s president.

*Khan*, *supra* para 79at paras 7-10.

1. In *Poshteh v Canada (Minister of Citizenship & Immigration)*, Mr. Poshteh joined the MEK as a minor to help achieve his father’s goal, which was to support the organization and overthrow the ruling government. Mr. Poshteh distributed MEK pamphlets that specifically focused on justifying the use of violence as a means to overthrow the government. Mr. Poshteh was persistent and did not stop distributing these pamphlets until he was arrested and detained for his involvement with the MEK.

*Poshteh v Canada (Minister of Citizenship & Immigration),* 2004 FC 310 at para 4.

1. In contrast to these cases, Mr. Chowdhury did not use pamphlets to recruit members for the BNP. He used pamphlets to educate people on the right to vote and encouraged them to exercise that right. Moreover, there was no evidence to show that Mr. Chowdhury explicitly associated himself with the BNP when he was distributing the pamphlets.

Reasons of Immigration Officer, *supra* para 7 at para 16.

1. Mr. Chowdhury’s advocacy for voting rights does not equate to membership recruitment for the BNP. There is no evidence showing that the people who chose to exercise their voting rights also chose to join the BNP as members. Although some people decided to join the BNP after speaking to Mr. Chowdhury, their reasons for joining are unknown.

Reasons of Immigration Officer, *supra* para 7 at para 16.

1. In addition, there is no evidence suggesting that Mr. Chowdhury had full knowledge of the BNP’s activities nor shared the same beliefs as the BNP. In fact, Mr. Chowdhury quickly resigned his formal membership in February 2014 and fled the country when he witnessed violence in the January 2014 general election.

Reasons of Immigration Officer, *supra* para 7 at paras 6-7.

1. Lastly, between 2011 and November 2013, Mr. Chowdhury only spent several hours a week encouraging people to exercise their voting rights. He did not donate any money, attend any meetings, nor participate in any activities that furthered the BNP’s objectives. Mr. Chowdhury’s affiliation with the BNP during this period was for the sole purpose of promoting democracy and the right to vote.

Reasons of Immigration Officer, *supra* para 7 at para 6.

### **The Officer’s Decision was Unreasonable**

1. A reasonable decision must be based on an internally coherent reasoning that is both rational and logical and must be justified in light of the legal and factual constraints of the decision.

*Vavilov*, *supra* para 47 at para 101.

1. The Officer’s decision to not consider duress in the membership analysis is not justified “in relation to the factual and legal constraints”. Mr. Chowdhury is entitled to a full consideration of his duress defence because the consequence of inadmissibility engages his s 7 *Charter* rights.

*Vavilov*, *supra* para 47 at para 85.

1. In addition, the Officer’s decision failed to meaningfully grapple with one of Mr. Chowdhury’s central arguments, which is that his affiliation with the BNP in 2011 to November 2013 was to promote the right to vote rather than furthering the BNP’s objectives. The Officer mistakenly equated Mr. Chowdhury’s intention to promote voting rights with recruitment for the BNP. He also falsely assumed that Mr. Chowdhury shares the BNP’s political views. As a result, the Officer’s decision did not meet the requirement of “internally coherent reasoning” because his conclusion did not logically follow from the evidence.

*Vavilov*, *supra* para 47 at para 128.

Reasons of Immigration Officer, *supra* para 7 at para 23.

1. In sum, the Officer’s decision was not justified in light of the legal and factual constraints and did not present internally coherent reasoning. The decision was unreasonable and should be set aside.

# **Part IV – ORDER(S) SOUGHT**

The Respondent requests that this appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 12th day of February, 2021

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Team No. 240

Counsel for the Respondent

# **Appendix – LIST OF AUTHORITIES**

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| **LEGISLATION** | **PINPOINT** |
| *Immigration and Refugee Protection Act*, SC 2001, c 27 | 3(1)(h), 3(1)(i), 3(3)(d), 34(1)(b), 34(1)(b.1), 34(1)(c), 34(1)(f), 42.1 |
| *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI (entered into force 24 September 1973) | Preamble, Art 1 |
| *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol 999 at 173 (entered into force 23 March 1976) | Preamble |

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| --- | --- |
| **JURISPRUDENCE** | **PINPOINT** |
| *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 | Para 78 |
| *Alam v Canada (Citizenship and Immigration*), 2018 FC 922. |  |
| *Al Yamani v Canada (Minister of Citizenship & Immigration)*, [2000] 3 FC 433, 72 CRR (2d) 259 | Paras 54, 85 |
| *AK v Canada (Citizenship and Immigration)*, 2018 FC 236 | Paras 17, 41 |
| *A(S) v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 494. |  |
| *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58 | Para 75 |
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