**CROWN COURT OF CANADA**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**AND:**

**M.D. Janna N. CHOWDHURY**

**Respondent**

**APPELLANT’S MEMORANDUM OF ARGUMENT**

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Counsel for the Appellant Counsel for the Respondent

**OVERVIEW**

1. Mr. Chowdhury voluntarily joined an organization that attempted to subvert the government of Bangladesh through violence. He was found to be inadmissible to Canada because he posed a security risk based on those actions. On judicial review of the inadmissibility decision, Justice Jagger erred by: (1) relying on legal authorities previously rejected by the Federal Court and Federal Court of Appeal; (2) substituting her own, incorrect, membership determination; and (3) applying the incorrect case law on the applicability of duress to s. 34(1)(f) determinations. The original inadmissibility decision was reasonable and should not be set aside. If Mr. Chowdhury believes that, despite his inadmissibility, he should still be granted permanent residence, he can submit an application for Ministerial Relief.

# I. FACTS

## Background

1. Mr. Chowdhury is a citizen of Bangladesh. He has a wife and child who are also citizens of Bangladesh and continue to reside there. Mr. Chowdhury is gay, but has not openly disclosed that fact.

Officer’s reasons at paras 2-4.

## Bangladesh National Party

1. The BNP is one of Bangladesh’s largest political parties. It is currently the main opposition party in the country, and it was formerly the ruling party. During the election of January 2014, the BNP called for *hartals*.

Officer’s reasons at paras 14, 28.

1. The BNP used *hartals* as a political strategy knowing of the violence that would result. The BNP leadership did not act to prevent the resulting violence.

Officer’s reasons at para 33.

1. Mr. Chowdhury was affiliated with the Bangladesh National Party (BNP) between 2011 and November 2013. He initially became involved because he “felt strongly about supporting democratic principles and choice in Bangladesh.” He believed that the BNP intended to restore democracy. He spent several hours each week distributing pamphlets about the right to vote and recruiting voters, many of whom later became BNP members.

Officer’s reasons at para 16.

1. In December 2013, Mr. Chowdhury became a formal member of the BNP. A high-ranking member had asked him to do so and take on greater responsibilities. After Mr. Chowdhury declined the request, the member threatened to disclose Mr. Chowdhury’s sexual orientation to his family. Mr. Chowdhury feared losing his son if his wife found out, so he formally joined the BNP due to the pressure from the member.

Officer’s reasons at para 17.

1. Mr. Chowdhury began attending official BNP meetings. He did not participate in any election preparations or any election day activities in the January 2014 elections, which were accompanied by violence.

Officer’s reasons at para 18.

1. In February 2014, Mr. Chowdhury fled Bangladesh due to the threats he received from the BNP and from Muslim fundamentalists. The same month, Mr. Chowdhury resigned his membership in the BNP.

Officer’s reasons at paras 7, 18.

## Refugee Claim

1. Mr. Chowdhury made a refugee claim upon entering Canada on 23 January 2016 based on the persecution he faced from his employment and based on threats from a member of the BNP. In his Basis of Claim (BOC) form, Mr. Chowdhury mentioned his BNP affiliation.

Officer’s reasons at para 7.

1. Mr. Chowdhury had a refugee hearing on 10 February 2017, where he testified about his role and activities with the BNP. On 14 December 2017, the Refugee Protection Division (RPD) made a positive decision on his claim.

Officer’s reasons at para 8.

## Officer’s Decision

1. On 14 February 2018, Mr. Chowdhury submitted an application for permanent residence as a protected person. He provided the same information in his application about his involvement with the BNP as he had in his BOC form.

Officer’s reasons at para 9.

1. On 15 June 2019, Mr. Chowdhury received a procedural fairness letter from a Senior Immigration Officer regarding his potential inadmissibility pursuant to section 34(1)b) by way of section 34(1)(f) of the *Immigration and Refugee Protection Act* (*IRPA*).

Officer’s reasons at para 10.

1. On 25 November 2019, Mr. Chowdhury received a letter from Immigration Officer A. Ali (“the Officer”) refusing his application for permanent residence. The Officer found Mr. Chowdhury inadmissible under s. 34(1)(f) and 34(1)(b) due to his membership in the BNP.

Officer’s decision letter.

1. The Officer’s reasons indicate that he had reasonable grounds to believe Mr. Chowdhury was a member of the BNP based on his close affiliation with the group between 2011 and November 2013 (the “first period”) and then his formal membership in the group between December 2013 and February 2014 (the “second period”).

Officer’s reasons at para 20.

1. The Officer adopted the Federal Court’s broad view of membership in finding that during the first period, Mr. Chowdhury was still within the scope of membership contemplated by s. 34(1)(f).

Officer’s reasons at paras 20, 23.

1. The Officer determined that duress is not relevant to a finding of membership, and therefore any coercion Mr. Chowdhury may have experienced in the second period did not negate the membership finding. In any case, duress would not be relevant to the membership determination because Mr. Chowdhury voluntarily became a member in the first period.

Officer’s reasons at paras 26-27.

## Federal Court Decision

1. Mr. Chowdhury sought leave for judicial review of the Officer’s inadmissibility decision in Federal Court. Justice Jagger granted the judicial review and remitted the inadmissibility matter for reconsideration by a different officer on 27 August 2020.

*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987 at paras 1-2 [*Chowdhury*].

1. Justice Jagger held that the Officer erred in finding that duress did not apply to Mr. Chowdhury’s circumstances, making the decision unreasonable. Justice Jagger held that duress can be considered in a membership determination. Whether Mr. Chowdhury was acting under duress in joining the BNP was relevant to the “genuineness” of his membership.

*Chowdhury*, *supra* para 17 at para 13.

1. Justice Jagger explained that, in criminal law, duress can excuse morally involuntary behaviour, where an individual has no choice but to act wrongfully due to threats of serious harm. She found that the Officer erred by failing to consider evidence relating to duress in the membership determination. She did so by explaining that *IRPA* inadmissibility provisions are to be interpreted in conjunction with criminal law principles and by relying on case law that examined the defence of duress in a membership inquiry.

*Chowdhury*, *supra* para 17 at paras 14-17.

1. Justice Jagger also found the Officer’s analysis of membership inadequate based on his lack of engagement with membership factors prior to the second period. She noted that the Officer failed to do an independent analysis of Mr. Chowdhury’s situation, instead relying on the RPD’s findings. If Mr. Chowdhury’s affiliation with the BNP during the first period was insufficient to meet the threshold of membership, then duress considerations become even more important.

*Chowdhury*, *supra* para 17 at paras 19-21.

1. Justice Jagger certified the following two questions:
2. Can an organization that performs a legitimate democratic function as a political party fall within the scope of paragraph 34(1)(b) of the IRPA as an organization for which there are reasonable grounds to believe is engaging in or instigating the subversion by force of any government?
3. Can evidence of duress negate a finding of membership under s. 34(1)(f)?

# II. POINTS IN ISSUE

1. The Appellant submits that the certified questions raise the following issues:
2. Did the Federal Court err by failing to consider Ministerial discretion in the context of a determination under s. 34(1)(b)?
3. Does the nature of an organization as a recognized political party give rise to a presumption that the organization is not involved in subversion by force under s. 34(1)(b)?
4. Was the Officer’s membership determination reasonable?
5. Is duress a relevant consideration in a s. 34(1)(f) inadmissibility determination?

# III. ARGUMENT

## Legislation

1. The relevant portions of the *IRPA* read as follows:

**33** The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

**34 (1)** A permanent resident or a foreign national is inadmissible on security grounds for

…

**(b)** engaging in or instigating the subversion by force of any government;

…

**(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).

**42.1 (1)** The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

**…**

**(3)** In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public

or the security of Canada.

## Standard of Review

1. Both parties have previously agreed that the appropriate standard of review is reasonableness.

*Chowdhury*, *supra* para 17 at para 13.

## The Federal Court erred by neglecting to consider the impact of Ministerial relief

1. Justice Jagger erred by neglecting to consider the impact of Ministerial relief under s. 42.1 of the *IRPA* when assessing the reasonableness of the Officer’s finding of inadmissibility.

### Parliament intended s 34(1)(b) and (f) to be applied broadly

1. The Federal Court of Appeal in *Najafi* recognized Parliament’s intent that s. 34(1)(b) and (f) be applied broadly. This was consistent with the Supreme Court’s assertion in *Medovarksi*: “Viewed collectively, the objectives of the IRPA and its provision concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.”

*Najafi v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 262 at para 33 [*Najafi*].

*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 10.

1. Parliament’s passing of the *Faster Removal of Foreign Criminals Act* in 2013 signalled an intention to prioritize national security within its immigration regime. This legislation amended the *IRPA* in two substantial ways. First, it amended s. 24(1) to exclude individuals found inadmissible on security grounds from filing humanitarian and compassionate applications.Second, it replaced s. 34(2) with s. 42.1 of the *IRPA*. Section 34(2) of the *IRPA* permitted the Minister to exempt an applicant from being inadmissible under s. 34 where the “foreign national . . . satisfie[d] the Minister that their presence in Canada would not be detrimental to the *national interest*” [emphasis added]. Section 42.1 restricts Ministerial discretion to considerations of “national security” and “public safety.”

*Faster Removal of Foreign Criminals Act,* SC 2013, c 16.

### The function of Ministerial relief informs the scope of s. 34(1)(b)

1. The availability of Ministerial relief has been cited by the Federal Court of Appeal and Federal Court on numerous occasions to support the view that Parliament intended a broad application of s. 34(1)(b).

*Najafi, supra* para 26 at para 80.

*Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 at paras 32-33 [*Oremade*].

*Zahw v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 934 at para 55 [*Zahw*].

*Al Yamani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC

1457 at para 13.

*Maqsudi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1184 at para 50.

1. Though *Oremade* and *Al Yamani* predate the replacement of s. 34(2) with s. 42.1 by the *FRCA,* the Federal Court in *Zahw* deemed s. 42.1 to have the same effect as s. 34(2).

*Zahw*, *supra* para 28 at para 39, 55.

1. Section 34(1)(b) is properly understood to encompass a two-stage process. At the first stage, an individual’s application is reviewed for inadmissibility under s. 34(1)(b). At the second stage, a declaration of Ministerial relief under s. 42.1 may provide a Ministerial exemption from inadmissibility.

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

1. Section 42.1 of the *IRPA* provides two avenues for Ministerial relief for persons found inadmissible under s. 34. A foreign national may apply for a declaration of relief under s. 42.1(1). Alternatively, the Minister may, on his or her own initiative, grant relief under s. 42.1(1). In both scenarios, a declaration of Ministerial relief would negate the effects of the inadmissibility finding.
2. The Federal Court of Appeal explained in *Najafi* how Ministerial relief operates as a safety-valve within the *IRPA*’s inadmissibility regime: “This mechanism can be used to protect innocent members of an organization but also members of organizations whose admission to Canada would not be detrimental or contrary to national interest.”

*Najafi, supra* para 26 at para 81.

1. Following Parliament’s intended process, if the Minister was of the opinion that, in all circumstances, Mr. Chowdhury’s prior involvement with the BNP was not “contrary to the national interest,” then the Minister could determine that the circumstances giving rise to the inadmissibility finding “do not constitute inadmissibility” pursuant to s. 42.1 of the *IRPA*.
2. The Respondent will likely argue that the infrequency of decisions on applications for Ministerial relief under s. 42.1 weighs against citing the provision to support a broad application of s. 34(1)(b).
3. The Federal Court has rejected this argument. The Court in *Stables* found that it was difficult to identify any substantial pattern from statistics on rates of grants of Ministerial relief, given the individualized inquiry Ministerial relief entails. Referring to s. 34(2), the Court concluded, “the timeliness or acceptance rates of ministerial relief cannot equate to a finding that relief . . . is illusory”. The Court’s reasoning would reasonably extend to Ministerial relief under s. 42.1

*Stables v Canada (Minister of Citizenship and Immigration*), 2011 FC 1319 at paras 54, 60.

## The Federal Court erred in finding that the status of the BNP created a presumption that it was not involved in subversion by force

1. Justice Jagger concluded that the evidence did not clearly indicate the BNP’s calls for *hartals* were intended to instigate subversion by force of the government. She arrived at this conclusion by holding that “as a recognized political party, the BNP should be presumed to be acting within its legitimate political function and should not be found to be an organization that has engaged in or instigated subversion by force pursuant s. 34(1)(b), unless there is clear and convincing evidence to the contrary.”

*Chowdhury*, *supra* para 17 at para 33.

1. Justice Jagger erred by finding that the BNP’s status as a recognized political party gave rise to a presumption against finding its actions to constitute subversion by force under s. 34(1)(b). This presumption necessarily implies at least one of two propositions: either (1) the nature of the organization is a relevant consideration under s. 34(1)(b) of the *IRPA*, or (2) the legitimate nature of the BNP’s activities is a relevant consideration under s. 34(1)(b). Both propositions have been rejected by the Federal Court of Appeal.
2. **The nature of the BNP is not a relevant consideration under s**

**34(1)(b) and (f)**

1. Both the *IRPA* and case law indicate that an organization is caught by s. 34(1)(b) based on the nature of its activities, not the nature of the organization.
2. An organization is caught by s. 34(1)(f) of the *IRPA* if “there are reasonable grounds to believe [it] engages, has engaged, or will engage in acts referred to in paragraph (a), (b), (b.1), or (c)”. The term “organization” is used generically in the provision. No language refers to an organization’s nature or socio-political function. The Officer appropriately focused on the BNP’s actions and disregarded Mr. Chowdhury’s argument that s. 34(1)(b) should be construed so as to exclude political parties operating in their democratic function.

Officer’s reasons at para 28 [emphasis added].

1. The Officer found that the BNP was caught by s. 34(1)(b) based on evidence of its call for *hartals* during the 2014 Bangladesh election functioning as a means of applying political pressure on the Bangladesh government. The Officer noted that the BNP called for *hartals* in 2010, 2012, and 2014. The Officer identified that *hartals* in Bangladesh commonly result in supporters performing acts of political violence aimed at coercing the government.

Officer’s reasons at para 30.

1. Given the history of *hartals* resulting in public violence, the Officer reasonably inferred that the BNP intended its call for *hartals* during the 2014 Bangladesh elections to instigate subversion of the government. The Officer’s reasoning is consistent with the principle for inferring intent provided in *Oremade*, where the Court held that “it is appropriate to presume that a person knows or ought to have known and to have intended the consequences of their action.”

Officer’s reasons at paras 32-33.

*Oremade*, *supra* para 28 at paras 25-26, 30, 32-33.

1. The presumption in *Oremade* has been applied to infer that an organization intended to subvert the government for the purposes of s. 34(1)(b). In *Canada v USA*, the Federal Court cited the presumption when determining that the Movement for the Actualization of the Sovereign State of Biafra’s (MASSOB) seizure of tankers constituted subversion by force of the Nigerian government. The Court found the taking of control of a fundamental aspect of the Nigerian economy had the obvious consequence of undermining the legitimacy of the central government.

*Canada (Minister of Citizenship and Immigration) v USA,* 2014 FC 416 at paras 47-48.

1. The Officer reasonably determined that the BNP’s status as a political party engaged in the democratic process was not relevant to the question of whether the BNP engaged in or instigated acts falling under s. 34(1)(b) of the *IRPA*. Consistent with the plain language of the *IRPA* and judicial interpretation of s. 34(1)(b), the Officer based his determination on the nature of the BNP’s acts.
2. **The legality or legitimacy of an act is not a relevant consideration under s. 34(1)(b)**
3. Justice Jagger’s reasoning departs from precedent by necessarily implying that the legitimate democratic and political nature of an organization’s activities is relevant to an analysis under s. 34(1)(b).
4. The Federal Court of Appeal in *Najafi* rejected the legality or legitimacy of an act as a relevant consideration under s. 34(1)(b) of the *IRPA*. Mr. Najafi was a member of the Kurdish Democratic Party of Iran [KDPI], and argued that the alleged acts of subversion committed by the KDPI should be exempt from s. 34(1)(b) of the *IRPA* because they were legal under international law.

*Najafi, supra* para 26 at paras 33, 65.

1. Upon consideration of the language of s. 34(1)(b), a unanimous court in *Najafi* held that s. 34(1)(b) does “not ordinarily include any reference to the legality or legitimacy of such acts.” However, the Court noted that the legality and legitimacy of an organization may be a consideration at the Ministerial relief stage.

*Najafi, supra* para 26 at paras 65, 89-90.

1. The Federal Court in *Zahw* cited *Najafi* for the proposition that neither the motivation nor the public support for an action is relevant to an assessment under s. 34(1)(b). The Court found the applicant’s argument to be premised on the “legitimacy of the military’s intervention”, concluding that it “essentially [echoed] the arguments rejected in *Najafi*”. Whether the BNP’s purpose was to perform a legitimate democratic function is not relevant to an assessment of whether it instigated or engaged subversion by force of any government for the purposes of s. 34(1)(b).

*Zahw*, *supra* para 28 at para 56.

## Membership Assessment

1. Justice Jagger misapplied the law about membership. In so doing, Justice Jagger identified several errors in the Officer’s analysis of Mr. Chowdhury’s membership in the BNP for the first period. She found that the Officer did not properly consider the required factors in his analysis and that Mr. Chowdhury’s involvement did not rise to the requisite level to ground a finding of membership.

*Chowdhury*, *supra* para 17 at paras 18-20.

1. Justice Jagger explained that, but for this flawed analysis, Mr. Chowdhury’s membership in the BNP would only have occurred in the second period. The defence of duress would therefore be central to the membership determination, as Mr. Chowdhury only formally became a BNP member in the second period after he faced pressure to do so.

*Chowdhury*, *supra* para 17 at para 21.

1. **The principles of membership under s. 34(1)(f)**
2. The *IRPA* has no definition of “member.” Courts have therefore developed principles to help guide the interpretation of this term. Of these principles, one of the most widely accepted is that “member” should be interpreted in an “unrestricted and broad” manner. This is because the security inadmissibility provisions deal with security, subversion, and terrorism, which are some of the most serious concerns of the government.

*Poshteh v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 85 at paras 26-32 [*Poshteh*].

*Ismeal v Canada (Minister of Public Safety & Emergency Preparedness)*, 2010

FC 198 at para 20 [*Ismeal*].

1. The standard of proof for a determination of membership in an organization is “reasonable grounds to believe.” This standard is low, requiring more than a mere suspicion but less than a balance of probabilities. The belief must have an objective basis, formed by compelling and credible information.

*Immigration and Refugee Protection Act*, SC 2001, c 27, s. 33.

*B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146 at para 30.

1. The Officer’s finding that Mr. Chowdhury was a member of the BNP was firmly grounded in credible, objective evidence. The Officer explained the evidentiary foundation upon which he based his conclusion and adequately applied the information before him to the law on membership.

Officer’s reasons at paras 9, 11-12, 15, 20-22.

1. The Officer relied on Mr. Chowdhury’s admission of affiliation and membership in the BNP in his refugee and permanent resident applications. Courts have regularly held that self-admission is sufficient to ground the objective basis for a reasonable belief of membership.

*Gazi v Canada (Minister of Citizenship and Immigration*), 2017 FC 94 at para 6.

*Rahman v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 807 at para 24.

*Intisar v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1128 at para 23.

1. Based on the standard of proof for a finding of inadmissibility under s. 34(1)(f) and the broad definition of ‘member,’ the Officer referenced the appropriate evidence in support of his determination and came to a reasonable conclusion.

**ii. Membership factors**

1. The Officer was not required to review Mr. Chowdhury’s individual circumstances. Thus, lack of analysis of Mr. Chowdhury’s participation in the BNP could not ground Justice Jagger’s finding of unreasonableness.
2. Generally, in making a membership finding, a decision maker must evaluate an applicant’s participation in the organization. The factors in this analysis include the nature of the applicant’s involvement in the organization, the length of time of involvement, and the degree of commitment to the organization’s goals.

*Nassereddine v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85 at paras

58-59 [*Nassereddine*].

1. However, as noted above at para 53, it is well established in jurisprudence that where an applicant admits to membership in a group, no further analysis is required. The admission of membership is conclusive. If an applicant admits to membership in an organization, then they are a “member” for the purposes of s. 34(1)(f), with all of the implications carried with membership.

*Saleh v Canada (Minister of Citizenship & Immigration)*, 2010 FC 303 at para

1. [*Saleh*].
2. Justice Jagger characterized the Officer’s decision as unreasonable for failing to engage with the membership factors. This characterization misapplies the law. Because Mr. Chowdhury admitted to membership, and this admission formed the foundation of the Officer’s reasonable belief, no engagement with other criteria was required. Mr. Chowdhury’s admission was sufficient to render him a member. Lack of engagement with the membership factors where there is self-admission cannot ground a finding of unreasonableness.

*Chowdhury*, *supra* para 17 at para 19.

1. Justice Jagger erred by finding that intent is a relevant factor in making a membership determination. She concluded that the Officer ignored Mr. Chowdhury’s goal of restoring democracy in his involvement with the BNP. However, case law has held repeatedly that a person’s intent in joining an organization is irrelevant to a membership determination.

*Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 157 at paras 93-94 [*Mahjoub*]*.*

*Garces Caceres v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 4 at

para 45 [*Garces Caceres*].

1. Moreover, even if intent were relevant, Justice Jagger ignored the portion of the Officer’s reasons where he specifically addressed Mr. Chowdhury’s reason for his initial affiliation with the BNP. In sum, the Officer considered the entire factual matrix of Mr. Chowdhury’s situation and addressed it in his reasons.

*Chowdhury*, *supra* para 17 at para 20.

Officer’s reasons at para 16.

1. The Officer’s determination on membership was reasonable. Justice Jagger misapplied the case law as it pertains to membership in finding that the Officer had failed to consider the relevant factors when making the membership determination. The Officer’s membership decision should be restored.
2. **Level of involvement**
3. Another well-established principle of membership is that it extends to persons who simply belong to an organization. Neither proof of formal membership nor personal participation in specific acts of the organization are required to establish membership. While mere passive membership may be insufficient, there is no requirement for complicity or a significant contribution by an individual to the activities of an organization to justify a finding of membership. Informal participation or support for a group, depending on the nature of these actions, may suffice.

*Chiau v Canada (Minister of Citizenship & Immigration)* (2000), [2001] 2 FC 297 at

para 25, 195 DLR (4th) 422.

*Ismeal*, *supra* para 50 at paras 19-20.

*Mahjoub, supra* para 59 at para 92.

*Sumaida v Canada (Minister of Citizenship and Immigration)*, 2018 FC 256 at para 17 [*Sumaida*].

1. Membership can be inferred from activities that materially support a group’s objectives, even if the activities do not directly link to one of the prohibited actions listed under s. 34(1). One example of this type of activity is recruiting new members. Another example is collecting funds and goods for an organization. Someone without formal membership status whose activity was limited to distributing pamphlets, and who never raised funds or recruited members, could still be considered a member. Having no position in the organization, no authority, and only participating minimally by distributing leaflets and holding banners on the streets has previously been described as “bare bones,” yet nevertheless constitutive of membership.

*Sumaida*, *supra* para 62 at para 16.

*Ali v Canada (Minister of Citizenship and Immigration*), 2018 FC 1187 at para 19.

*Poshteh, supra* para 50.

*Islam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 912 at paras 5-6.

1. During the first period, Mr. Chowdhury dedicated several hours a week to BNP activities. He distributed pamphlets. He also successfully encouraged people to vote, and in doing so recruited many new members to the BNP. The Officer highlighted Mr. Chowdhury’s activities and involvement in the BNP.

Officer’s reasons at para 16.

1. Because formal membership is not required for purposes of s. 34(1)(f), it was reasonable for the Officer to determine that Mr. Chowdhury was a member of the BNP in the first period. Guidance from case law about situations with similar levels of involvement points to the reasonableness of concluding that Mr. Chowdhury was a member of the BNP based on his activities.
2. Justice Jagger questioned whether Mr. Chowdhury’s “involvement in low-level activities” should trigger a s. 34(1)(f) finding of membership. In so doing, Justice Jagger misapplied the reasonableness standard. Her role was not to substitute what she believed constituted membership, but to decide if the Officer’s membership determination was justified and reasonable.

*Chowdhury, supra* para 17 at para19.

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 96.

1. A reviewing court cannot interfere with the factual findings of a decision maker and must refrain from “reweighing and reassessing the evidence considered by the decision maker.” Justice Jagger did not explain how, based on the legal principles that have been established to determine membership, the Officer’s decision was unreasonable. In the absence of this explanation, her finding amounts to a redetermination of admissibility based on the evidence that was before the decision maker, which she cannot do.

*Vavilov, supra* para 66 at para 125.

## Duress is not a relevant consideration in a s. 34(1)(f) inadmissibility determination

1. The Court has been asked to examine the general question of whether duress can be considered in a membership determination. Because the Officer did not apply the test of duress to the evidence, whether Mr. Chowdhury’s circumstances would have satisfied the test is not under review.
2. Justice Jagger misapplied the law on duress, making her intervention in the Officer’s decision unreasonable. She found that the Officer erred in concluding that the defence of duress cannot be considered in the context of a membership determination under s. 34(1)(f). Furthermore, she found that the Officer needed to consider whether Mr. Chowdhury acted under duress in joining the BNP.
3. There is no mention of duress, its definition, its purpose, or its applicability in the *IRPA*. The *IRPA* is also silent on common law or criminal law defences more widely. There is support in the case law for the Officer’s finding that duress is not a relevant consideration in a s. 34(1)(f) membership determination, as well as in the context of other inadmissibility provisions. As such, the Appellant submits that the Officer adhered to the correct line of authority, while Justice Jagger’s assessment of the Officer’s decision relied on a divergent, incorrect line of case law.

### Duress and s. 34(1)(f)

1. The Federal Court in *Mella* explained the role of duress in criminal law. Duress is “an excuse for the commission of a wrongful act in circumstances where that act was morally involuntary.” In situations of moral involuntariness, it would be unjust to hold the accused criminally liable. Because the defence of duress is concerned with the assignment of blame, it is not relevant in provisions of the *IRPA* where intent or motivation play no role.

*Mella v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1587 at paras

28-29.

1. Section 34(1)(f) of the *IRPA* does not specify a *mens rea* for membership. It merely sets out the status of membership. There is also no element of knowledge or complicity necessary to establish membership. Rather, s. 34(1)(f) is triggered simply by the fact of membership in an organization captured by any of the other subsections. Given that intent is not required for membership, duress is not a relevant consideration.

*Mahjoub*, *supra* para 59 at para 94.

*Khan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 397 at paras

29, 35-37 [*Khan*].

1. Justice Jagger applied a line of authority that incorrectly imports duress as a factor into membership determination. These cases have mistakenly concluded that intent and knowledge do play a role in a determination on membership, thereby making defences such as duress relevant. Justice Jagger relies on *Jalloh*, quoting from *Thiyagarajah*, for the principle that duress must be considered alongside the evidence on membership when making a s. 34(1)(f) finding. Insofar as *Jalloh* stands for the proposition that duress can negate the *mens rea* of membership, it is wrong and should be disregarded. As explained above, this principle contradicts the Federal Court’s direction on the purpose of the defence of duress and its applicability to *IRPA* provisions.

Officer’s reasons at para 26.

*Chowdhury*, *supra* para 17 at para 16.

1. Furthermore, the evidence before the Officer was that Mr. Chowdhury voluntarily became affiliated with the BNP in 2011. Mr. Chowdhury was not pressured to become involved, but acted upon his own volition. The Officer correctly concluded that duress was not a relevant consideration in the membership determination for Mr. Chowdhury’s activities during the first period.

Officer’s reasons, at para 27.

### The role of duress in in the inadmissiblity regime

1. In determining whether duress is applicable in the context of s. 34(1)(f), consideration of its applicability in the context of the *IRPA*’s other inadmissibility and exclusion provisions is helpful.
2. Because of the broad nature of the membership provision, defences are not applicable in the same way they are for other inadmissibility provisions that rely on knowledge, complicity, or active participation. For example, s. 34(1)(c), which comports inadmissibility for engaging in terrorism, uses language that contemplates actual participation, while s. 34(1)(f) is concerned with mere membership. Because the provisions are connected, there is no complicity requirement in the latter subsection.

*Nassereddine*, *supra* para 56 at para 74.

*Tijueza v Canada (Citizenship and Immigration)*, 2009 FC 1260.

1. Another example comes from section 98 of the *IRPA*, which incorporates Article 1(F)(a) of the Refugee Convention. 1F(a) excludes from refugee protection individuals who have committed war crimes, crimes against humanity, or crimes against peace. In order to be captured by this provision, which does not differentiate modes of commission, the individual’s knowing and significant contribution to the crime must be made voluntarily. The Supreme Court in *Ezokola* endorsed a full contextual analysis, including all defences, in this type of exclusion determination.

*Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 at paras 86, 100.

1. Section 35(1)(a) of the *IRPA* is the domestic inadmissibility provision that incorporates Article 1(F)(a). The Federal Court of Appeal explained in *Kanagendren* that in the context of s. 35(1)(a), inadmissibility arises from the commission of an offence, making complicity relevant. However, in s. 34(1)(f), inadmissibility arises from membership, and a complicity analysis is irrelevant because the provision does not contemplate the individual commission of an offence. The section does not require intent of membership with significant contributions to the group’s actions. Moreover, Ministerial relief is not available to individuals who are found inadmissible under section 35(1)(a) since inadmissibility flows from the commission of an offence rather than from a status or designation.

*Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86 at paras 19-28.

1. Section 35(1)(b) has no *mens rea* component, and inadmissibility follows automatically, with no further analysis, once it is established that an individual held a prescribed position in a government described in subsection 35(1)(a). *Ezokola* has no application to this inadmissibility provision because the concern is not with the commission of an offence, but rather the individual’s position. Here again, a Ministerial Relief application exists as recourse to those captured by this broad provision.

*Canada (Minister of Citizenship and Immigration) v Kljajic*, 2020 FC 570 at paras 134,

138.

1. Section 37(1)(b), which covers inadmissibility for organized criminality in people smuggling, has a *mens rea* of both specific knowledge that a smuggled person lacked entry documents and the more general *mens rea* of intending to organize or assist with the smuggled person’s entry. Because of the nature of the conduct and *mens rea* that triggers inadmissibility under this provision, defences can be raised against an inadmissibility finding under this provision.

*Canada (Public Safety and Emergency Preparedness) v JP,* 2013 FCA 262 at para 87.

*Canada (Public Safety and Emergency Preparedness) v Aly*, 2018 FC 1140 at paras 44-

46.

1. The inadmissibility provisions were drafted to capture different acts, different types of intent, and different forms of relief. Case law has shown that defences are applicable where the act triggering inadmissibility comports a *mens rea*. However, where there is no requisite intent, and mere membership or status can trigger inadmissibility, defences have no role. Instead, Ministerial Relief functions as a safety valve. The Officer’s decision is consistent with this line of authority.

### Ministerial Relief

1. Justice Jagger erroneously overlooked the role of Ministerial Relief by omitting any mention of s 42.1 of *IRPA* in her decision. Where an applicant is determined to be a member for purposes of s. 34(1)(f), relief is available in the form of a Ministerial relief application, and not through the discretion of an officer or the court.
2. The Ministerial Relief regime renders the membership admissibility provisions constitutional by providing discretionary recourse to those caught by the membership definition. By inserting this relief provision into the statutory scheme, the legislature intended for the membership determination principles to broadly apply to anyone who meets the criteria, regardless of their motivation for becoming a member.

*Khan*, *supra* para 72*,* at paras 37-38.

*Haqi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1167 at para 48.

*Poshteh*, *supra* para 50 at paras 62-63.

1. Courts have held in prior reviews of membership determinations that certain considerations are more appropriate to an application for Ministerial Relief than to a s. 34(1)(f) finding. For example, duress can be relevant in an application for Ministerial Relief under s. 42.1(1). Another example of a consideration that should fall under a s. 42.1 decision rather than a s. 34(1)(f) determination is actual knowledge of an organization’s activities. Additionally, joining an organization that is captured under one of the s. 34(1) provisions after the group has renounced the use of violence is also not a factor that is relevant to a s. 34(1)(f) analysis, but could be a consideration in a Ministerial Relief application under s. 42.1.

*Saleh*, *supra* para 57at para 19.

*Garces Caceres, supra* para 59 at paras 15, 40.

*Khan*, *supra* para 72 at para 39.

*Anteer v Canada (Minister of Citizenship and Immigration)*, 2016 FC 232 at para 34.

1. Another defence that has been raised in the s. 34(1)(f) context is that of superior orders for military personnel. However, the Federal Court has determined that this defence is also an irrelevant consideration under s. 34(1)(f). Again, this defence is one that could be considered in a s. 42.1 Ministerial Relief application instead.

*Gacho v Canada (Minister of Citizenship and Immigration)*, 2016 FC 794 at paras 38-39.

1. The Officer did not need to consider duress, as duress would only be relevant in the context of Ministerial Relief application, if Mr. Chowdhury chose to apply. Even if the Officer should have considered duress, Mr. Chowdhury’s involvement in the BNP during the first period, when he was indisputably not under duress, would still trigger the inadmissibility finding. Regardless, Mr. Chowdhury can apply for Ministerial Relief from his inadmissibility and raise any duress arguments there.

## Conclusion

1. The Officer’s inadmissibility finding on the grounds of membership in an organization that was engaged in subversion by force of any government was reasonable. Justice Jagger erred by failing to interpret s. 34(1)(b) broadly in light of Ministerial relief under s. 42.1 and by creating a legal presumption requiring either the nature of an organization or the legitimacy of its activities to be a relevant consideration under s. 34(1)(b). On both fronts, Justice Jagger departs from precedent.
2. The Officer’s membership determination was reasonable. The Officer correctly relied on Mr. Chowdhury’s self-admitted membership and level of participation in the BNP to make a finding of membership. The Officer also correctly determined that duress is not a relevant factor in a membership determination under s. 34(1)(f) because no *mens rea* is required. Additionally, Mr. Chowdhury began participating in BNP activities voluntarily. Justice Jagger misapplied the standard of reasonableness and the law on membership in setting aside the Officer’s decision. She sought to substitute her own membership determination for that of the Officer and she applied an incorrect line of authority about the applicability of duress to Mr. Chowdhury’s situation. The Officer’s decision should not have been set aside on those grounds.

# IV. ORDERS SOUGHT

The Appellant respectfully requests that this Honourable Court order the following:

1. Allow the appeal;
2. Overturn the Federal Court decision of Justice Jagger;
3. Reinstate the inadmissibility decision of the Officer; and
4. Answer both certified questions in the negative.

All of which is respectfully submitted this 22nd day of January 2021.

# APPENDIX: LIST OF AUTHORITIES

**Statutes and Legislation**

*Immigration and Refugee Protection Act*, SC 2001, c 27, ss 3(1)(h), 33-34, 42.1

*Faster Removal of Foreign Criminals Act,* SC 2013, c 16.

**Case Law**

*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987

*Najafi v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 262

*Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51

*Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077

*Zahw v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 934

*Al Yamani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1457

*Maqsudi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 1184

*Stables v Canada (Minister of Citizenship and Immigration*), 2011 FC 1319

*Canada (Minister of Citizenship and Immigration) v USA,* 2014 FC 416

*Poshteh v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 85

*Ismeal v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 198

*B074 v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1146

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

*Rahman v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 807

*Intisar v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1128

*Nassereddine v Canada (Minister of Citizenship and Immigration)*, 2014 FC 85

*Saleh v Canada (Minister of Citizenship & Immigration)*, 2010 FC 303

*Mahjoub v Canada (Minister of Citizenship and Immigration)*, 2017 FCA 157

*Garces Caceres v Canada (Minister of Public Safety and Emergency Preparedness)*, 2020 FC 4

*Chiau v Canada (Minister of Citizenship & Immigration),* (2000), [2001] 2 F.C. 297, 195 DLR (4th) 422

*Sumaida v Canada (Minister of Citizenship and Immigration)*, 2018 FC 256

*Ali v Canada (Minister of Citizenship and Immigration*), 2018 FC 1187

*Islam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 912

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65

*Mella v Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 1587

*Khan v Canada (Minister of Citizenship and Immigration)*, 2017 FC 397

*Tijueza v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1260

*Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40

*Kanagendren v Canada (Minister of Citizenship and Immigration)*, 2015 FCA 86

*Canada (Minister of Citizenship and Immigration) v Kljajic*, 2020 FC 570

*Canada (Minister of Public Safety and Emergency Preparedness) v JP,* 2013 FCA 262

*Canada (Minister of Public Safety and Emergency Preparedness) v Aly*, 2018 FC 1140

*Haqi v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1167

*Anteer v Canada (Minister of Citizenship and Immigration)*, 2016 FC 232

*Gacho v Canada (Minister of Citizenship and Immigration)*, 2016 FC 794