**CROWN COURT OF CANADA**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Appellant**

**AND:**

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

**Respondent**

**RESPONDENT’S MEMORANDUM OF ARGUMENT**

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Counsel for the Respondent

 **OVERVIEW**

1. A protest to ensure democratic rights cannot constitute subversion by force. This case is an appeal of a Federal Court decision setting aside the negative determination of an Immigration Officer on the Respondent Mr. Chowdhury’s permanent resident application. Justice Jagger of the Federal Court certified two questions in her decision.
2. The questions were not properly certified. The Respondent asks this Court to dismiss this appeal outright as a result of the absence of a valid certified question. Alternatively, if the Court finds that either or both of the questions were properly certified and the appeal is allowed to proceed, the Respondent asks this Court to uphold the Federal Court’s decision to set aside the Officer’s determination and to remit the matter for redetermination by a differently constituted panel.
3. The Bangladesh National Party (BNP) is not an organization that falls under s. 34(1)(b) of the *IRPA*. The legitimate democratic function of the BNP in Bangladesh’s democratic political system creates a presumption that it is ***not*** an organization that has engaged in or instigates subversion by force of the Bangladesh government. Moreover, the evidence does not establish the required intention of the BNP to use force in its alleged subversion conduct.
4. Mr. Chowdhury was not a member of the BNP pursuant to s 34(1)(f) of the *IRPA*. Evidence of duress is relevant to an inadmissibility proceeding. The defence of duress is thus available to Mr. Chowdhury for the period of his forced membership. Furthermore, Mr. Chowdhury’s period of affiliation with the BNP, prior to being subject to duress, does not satisfy a reasonable finding of membership.

**PART I: FACTS**

1. Mr. Chowdhury is a citizen of Bangladesh and a Convention Refugee residing in Canada. His wife and four-year-old son continue to reside in Bangladesh. Mr. Chowdhury is gay, but due to social norms and constraints in Bangladesh, has never lived openly as such. He occasionally had same-sex relationships, which he believed were in secret.

Officer’s reasons at paras 2, 3, 8.

1. Mr. Chowdhury worked as the Executive Director of a women’s rights organization in Bangladesh. The mandate of the organization was to promote gender equality, women’s leadership, women’s human rights, and to combat violence against women and children. Mr. Chowdhury received threats from Muslim fundamentalists as a result of his employment.

Officer’s reasons at para 5.

1. Mr. Chowdhury became affiliated with the BNP in 2011 because he felt strongly about supporting democracy in Bangladesh. The BNP is a recognized political party in Bangladesh, with a legitimate democratic function. It performs political activities in a democratic system. The BNP was founded in 1978 and since then has served twice as the ruling party in Bangladesh. Mr. Chowdhury expressed his belief that the BNP intended to restore democracy – and that the Awami League (“AL”) had repressed these principles by trying to prevent free and democratic elections.

Officer’s reasons at paras 14, 16.

1. From 2011 to November 2013, Mr. Chowdhury spent several hours each week handing out pamphlets on the right to vote, and registering and encouraging people to vote. In December 2013, Mr. Chowdhury was pressured into becoming a formal member of the BNP. A high ranking BNP member threatened to expose his sexuality to his wife should he refuse to become a member. Fearing he would lose his son should his wife find out, Mr. Chowdhury agreed. He began attending official BNP meetings.

Officer’s reasons at paras 17, 18.

1. In February 2014, Mr Chowdhury fled Bangladesh after resigning his membership from the BNP. Mr. Chowdhury did not participate in BNP preparations for the election, nor was he involved in any election day activities.

Officer’s reasons at para 18.

1. The BNP called for hartals in the January 2014 general election. Hartals are general and national strikes or protests, including stoppage of traffic and closure of markets, shops, and offices for a period of time. The use of hartals is not exclusive to the BNP.

Officer’s reasons at paras 18, 29.

1. Mr. Chowdhury made a claim for refugee protection in Canada on January 23, 2016. The claim was accepted on December 14, 2017. On February 14, 2018, Mr Chowdhury applied for permanent residence as a protected person, with his wife and son listed as accompanying dependents.

Officer’s reasons at paras 7-9.

1. On November 25, 2019, Mr Chowdhury received a letter from Immigration Officer Ali (“the Officer”) refusing his application for permanent residence on grounds of inadmissibility pursuant to s 34(1)(b) and (f) of the *IRPA*.
2. The Officer found that the BNP is an organization that has engaged in, or instigated, the subversion by force of the Bangladesh government. The Officer determined that the BNP’s status as a political party engaged in the democratic process is not relevant in the application of s. 34(1)(b). He further determined that the BNP purposefully called for hartals with the sole intent of overthrowing the ruling government through the accompanying violence.

Officer’s reasons at paras 1, 29.

1. The Officer found that Mr. Chowdhury was a member of the BNP. The Officer determined that duress cannot be used as a defence in a finding of membership under s. 34(1)(f). Based on the facts before him, the Officer found that Mr. Chowdhury’s involvement with the BNP from 2011 to November 2013 constituted membership.

Officer’s reasons at paras 24-26.

1. Mr. Chowdhury applied for judicial review of the Officer’s decision to the Federal Court. Justice Jagger set aside the decision, holding that the Officer erred in finding that duress did not apply to the circumstances of Mr. Chowdhury’s case, and further, in finding that the BNP is caught by under s. 34(1)(b). Justice Jagger certified two questions in her decision.

*Chowdhury v Canada (Citizenship and Immigration),* 2020 FC 1987[*Chowdhury*]*.*

1. Justic Jagger held that duress is a relevant consideration under s. 34(1)(f) and further, that duress applies to Mr. Chowdhury’s circumstances.

*Chowdhury, supra* para 15 at para 22*.*

1. Justice Jagger held that the BNP should be presumed to be acting in its legitimate political function through the exercise of democratic functions and political activities, and not an organization that falls under s. 34(1)(b). She further held that the evidence does not establish that the BNP intended the accompanying violence when it called for hartals.

*Chowdhury, supra* para 15 at paras 23, 26*.*

**PART II: POINTS IN ISSUE**

1. This appeal raises the following issues:
2. Were the questions on appeal properly certified by the Federal Court?
3. Did the Federal Court err in finding that the BNP does not fall within s. 34(1)(b)?
4. Did the Federal Court err in finding that duress is a relevant consideration under s. 34(1)(f) and to Mr. Chowdhury’s circumstances?

**PART III: ARGUMENT**

1. **The questions were not properly certified**
2. Justice Jagger certified two questions. Neither of the questions were properly certified. Question (1) is not dispositive of the case. Question (2) raises an issue of settled law.
3. An appeal to this Court is governed by s. 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”), which provides that an appeal on an immigration matter can only be made by way of a certified question:

**74** Judicial review is subject to the following provisions:

**(d)** subject to section 87.01, an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question. [Emphasis added]

1. The Federal Court of Appeal and Federal Court have interpreted the s. 74(d) requirement on multiple occasions. The threshold for certifying a question is now settled law. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance.

*Lunyamila v Canada (Public Safety and Emergency Preparedness*), 2018 FCA 22at para 46.

1. ***Question (1) was not properly certified because it is not dispositive of the appeal***
2. Justice Jagger certified the first question as follows:

(1) 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?

1. This question does not capture the facts that are dispositive of the issue. In *Alam*, a contested issue was whether the factual findings could establish that the BNP had the intention to use violence to achieve its goals. The issue was dispositive in determining whether the offiicer reasonably concluded that the BNP enaged in acts of terrorism. Justice Fothergill declined to certify a proposed question, because it omited any reference to violence and therefore did not capture the facts dispositive of the issue. The proposed certified question in Alamread as follows:

Can a strike, or other similar organized activity, which is a legal act in a particular country and legal in Canada, that results in economic disruption or which is intended to influence a government action in such country, be considered an act of terrorism or subversion under section 34 of the *Immigration and Refugee Protection Act*?

*Alam v Canada (Citizenship and Immigration),* 2018 FC 922 at paras 39, 46 [*Alam*].

1. In the case at bar, whether the BNP intended the violence accompanying the hartals is a dispositive fact and should be captured in a certified question. In *Oremade*, the Federal Court held that the intention to use force must be established in a finding of inadmissibility under s. 34(1)(b). The issue of the intention to use force is contested in the case at bar. The Officer found that the BNP intented the accompanying violence in calling for hartals, whereas Justice Jagger held that the evidence did not establish that the BNP intended the accompanying violence when it called for hartals. Question (1) omits any reference to the intention to use force. Similar to the proposed question in *Alam*, question (1) fails to capture the facts that are dispositive of the issue. The question is therefore not dispositive of the appeal. It was not properly certified.

*Oremade v Canada (Minister of Citizenship and Immigration),* 2005 FC 1077 at para 25 [*Oremade*].

Officer’s reasonsat para 28.

*Chowdhury, supra* para 15 at para 26*.*

1. ***Question (2) was not properly certified because the law on the issue is settled***
2. Justice Jagger certified the second question as follows:

(2) Can evidence of duress negate a finding of membership under s. 34(1)(f)?

1. This question pertains to an issue on which the law is settled. A question that raises a settled issue does not meet the s. 74(d) requirement on “general importance”. The Federal Court of Appeal held in *Lewis* that “all properly certified questions lack decided binding authority.” In *Krishan*, the Federal Court found that a proposed question was not a serious question of general importance because the law around the question is well laid out.

*Lewis v Canada (Public Safety and Emergency Preparedness)*, [2017 FCA 130](https://advance.lexis.com/document/documentlink/?pdmfid=1505209&crid=fc0ee71e-476f-4a6d-aa27-c4416a0f567c&pddocfullpath=%2Fshared%2Fdocument%2Fcases-ca%2Furn%3AcontentItem%3A5V08-FGG1-FG12-61BC-00000-00&pdcontentcomponentid=281025&pddoctitle=2018+FC+1203&pdissubstitutewarning=true&pdproductcontenttypeid=urn%3Apct%3A221&pdiskwicview=false&ecomp=wgg8k&prid=72b87342-7e1f-4296-96f1-3adf13f350a4) at para 39.

*Krishan v Canada (Minister of Citizenship and Immigration*), 2018 FC 1203 at para 98*.*

1. Question (2) asks if evidence of duress can negate a finding of membership under s. 34(1)(f). The law around duress in the context of inadmissibility, and in particular the availability of duress as a defence to defeat membership allegations, is well laid out.
2. In *B006*, Justice Kane held that duress can be raised in the context of a determination of inadmissibility. In coming to this conclusion, Justice Kane rejected the argument that the Federal Court of Appeal’s reasoning in *Agraira* means that duress can only be considered in an application for ministerial relief. *Agraira* does not rule out that coercion or duress could be raised in the context of a determination of admissibility. Justice Kane took notice that the defence of duress “has been raised in the admissibility context and has been considered by the Federal Court on several occasions.” For example, in *Ghaffari*, Justice Phelan held that officer had erred in rejecting the defence of duress during an inadmissibility determination.

*B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033 at paras 98-104 [*B006*].

*Agraira v Canada (Public Safety and Emergency Preparedness),* 2011 FCA 103 at para 64*.*

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

1. The Federal Court has consistently held that duress and membership are interrelated and should be considered together. It is trite law in both Canadian criminal law, and the common law more generally, that duress is an excuse for the commission of a wrongful act. An individual should not be held liable for acts that are not carried out of their own free will.

*Chowdhury, supra* para 15 at paras 14-16.

1. It is an established principle that evidence of duress can be relied on to defeat evidence of membership. In *Thiyagarajh*, for example, the Federal Court affirmed the principle that an applicant “could be excused for his actions if he could show that he acted to avoid imminent peril” in a finding of membership.

*Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339 at para 11 [*Thiyagarajah*].

1. In short, the issue raised by Question (2) is settled in law. Evidence of duress is relevant to an inadmissibility determination. Evidence of duress can negate a finding of membership. With well-established rules on the issue raised, question (2) was not properly certified.
2. ***The appeal should be dismissed in the absence of a valid certified question***
3. Neither of the questions were properly certified in the case at bar. In *Lopes*, the Federal Court declined to answer an improperly certified question and dismissed the appeal. In the same vein, this appeal should be dismissed in the absence of a valid certified question.

*Lopes v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 25.

1. **The Federal Court did not err in finding that the BNP does not fall under s. 34(1)(b)**
2. In the alternative, if the Court finds that either or both of the questions were properly certified and this appeal is allowed to proceed, the Respondent submits that the Federal Court’s finding that the BNP does not fall under s. 34(1)(b) should be upheld.
3. Section 34(1)(b) of the *IRPA* provides:

**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; […]

1. ***The Federal Court’s interpretation of s. 34(1)(b) is correct***
2. The Officer acknowledged that the BNP is a legitimate and recognized political party, yet failed to take the legitimate democratic function of the BNP into consideration when finding that it falls under s. 34(1)(b). On judicial review of the Officer’s decision, Justice Jagger disagreed with this view, holding that the BNP’s legitimate democratic function is a relevant factor in the s. 34(1)(b) determination.

Officer’s reasonsat para 37.

*Chowdhury, supra* para 15 at para 23.

1. The question before this Court is what consideration, if any, should be given to the legitimate democratic function of an organization in the interpretation of s. 34(1)(b). The Federal Court’s interpretation of s. 34(1)(b) creates a rebuttable presumption (“the presumption”) whereby a recognized political party with a legitimate democratic function is presumed to be acting in its legitimate political function, and not an organization that falls under s. 34(1)(b).

*Chowdhury, supra* para 15 at para 23.

1. The Federal Court’s interpretation of s. 34(1)(b) is correct. It is in line with the modern approach to statutory interpretation. It addresses the absurdity created by the current overbroad interpretation of the provision. Moreover, it is in line with parliamentary intent and Canada’s international obligations. Finally, the availability of ministerial relief does not preclude this Court from adopting the interpretation.
	* + 1. ***The interpretation of s.34(1)(b) should take into account the ordinary meaning of “subversion”***
2. The interpretation of s. 34(1)(b) should take into account the meaning of “subversion” in the text of the provision. The word “subversion” is not defined in the *IRPA*, and there is no universally adopted definition of the term. According to modern principles of statutory interpretation, the words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

*Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27, [1998] SCJ No 2 at para 21.

1. The Federal Court of Appeal in *Najafi* endorsed the Black’s Law Dictionary definition of subversion as “the act or process of overthrowing…the government”. As a result, for an organization to fall under s. 34(1)(b), its conduct must involve intent to overthrow the government.

*Najafi v Canada (Minister of Public Safety and Emergency Preparedness),* 2014 FCA 262 at para 65 [*Najafi*].

1. The presumption carefully provides guidance in answer to this key question. A recognized political party in a legitimate democratic system is presumed to be carrying out its legitimate political function absent evidence to the contrary. Similarly, the intent of a reconized political party in carrying out its legitimate political function is presumed not to relate to the overthrowing of the government. In other words, the conduct of a recognized political party is presumed not to constitute “subversion”, unless there is evidence to the contrary.
	* + 1. ***The current broad interpretation of s. 34(1)(b) creates absurdity***
2. The current interpretation of s. 34(1)(b), elaborated upon in *Najafi* and followed in *Zahw,* is overly broad. The *Najafi/Zahw* interpretation casts a wide net and captures a broad array of (often legitimate political) activity against any type of government without considering the particular facts and circumstances, including the legitimacy or legality of the activity, the legitimacy of the government, the motivation behind the acts, or the degree of public support for the intervention of the organization in issue. Consequently, individuals who are members of recognized political parties in democracies are treated the same as individuals who are members of non-legitimate violent organizations. This is contrary to the basic democratic values that Canada upholds as a democratic icon of the contemporary world.

*Najafi, supra* para 40 at paras 65, 69, 70, 78.

*Zahw v Canada (Public Safety and Emergency Preparedness),* 2019 FC 934 at para 56[*Zahw*]*.*

1. A consideration of the facts of the case at bar reveals the absurdity of the *Najafi/Zahw* approach. The BNP is a legitimate political party in Bangladesh. Bangladesh has a democratic political system. It is common practice for ***both*** major political parties in Bangladesh to callfor hartals as a means of applying political pressure (see, e.g., *AK v Canada (Minister of Citizenship and Immigration)*, 2018 FC 236 at para 24). The BNP calls for hartals for the same reason that many other legitimate political parties in a democratic system engage in various political activities – to seek a peaceful transition of power by winning against the present ruling party. There is no evidence on record that the calling of hartals, either in this case or on previous occasions when hartals have occurred, has led to the nondemocractic overthrow of the Bangladeshi government.
2. Although the case law does not expressly preclude taking into account the legitimate democratic function of an organization in a determination under s. 34(1)(b), the Officer failed to give the nature of the BNP as a legitimate political party significant weight, and instead reached an absurd conclusion: that a recognized political party carrying out a legitimate political activity – a strike – is considered to be engaging in subversion of a government. In so doing, the Officer committed an error, and insofar as he did so by following the *Najafi/Zahw* approach, this Court should reconsider the overbroad interpretation of 34(1)(b) created by *Najafi/Zahw*.
3. The mere fact that legitimate political protests or strikes are followed by incidents of violence should not be sufficient to render those activities “subversion by force” for purposes of s. 34(1)(b). As the Officer acknowledges in his decision, the purpose of the *hartals* was to “disrupt and affect the result of democratic elections” – a legitimate goal for a legitimate political party. The characterization of legitimate political protests as subversion by force simply because those protests were followed or accompanied by incidents of violence would mean that any member of the American Republican Party or the Black Lives Matter movement would be found inadmissible pursuant to this provision, as both of those organizations have engaged in protests that, on occasion (and foreseeably), devolved into violence.

Officer’s reasonsat para 33.

1. Hartals are general and national strikes or protests in Bangladesh. Calling for hartals is a common political strategy for both major political parties in the country. By characterizing such strikes as subversion by force without any consideration for the legitimate democratic function of these strikes, a broad and unrestricted application of the provision essentially “sanction[s] a legitimate political party’s attempt to change the government or alter government policy through legitimate and appropriate activities within the confines of that democratic system.”

*Chowdhury, supra* para 15 at para 32.

1. The same activities, if they were to take place in Canada, would be protected under section 2 of the *Charter*. In this sense, an interpretation of s. 34(1)(b) that does not take into consideration the legitimate democratic function of an organization is inconsistent with *Charter* values. It is expressly set out in s. 3(3)(d) of the *IRPA* that the Act must be applied in a manner that is consistent with the *Charter*. The broad interpretation cannot be said to have been intended by Parliament. A presumption in favour of legitimate political parties recognizes the fundamental right of all individuals to participate in legitimate political activities, preventing acts that are in keeping with *Charter* values from being punished by the *IRPA*.

*Canadian Charter of Rights and Freedoms*,s 2, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11 [*Charter*]*.*

1. It is hard to imagine that the absurd results created by the *Najafi/Zahw* approach were intended by Parliament when it enacted the current version of s. 34(1)(b). It is incumbent upon this Court to ensure that reasonable safeguards are incorporated into the interpretation of s. 34(1)(b) and justice is served in every case, including the case at bar. The Federal Court’s interpretation of s. 34(1)(b) should be adopted. The presumption prevents legitimate political activities, such as protests, from being labelled as subversion by force without clear and convincing evidence to the contrary. The overly broad interpretation of s. 34(1)(b), on the other hand, should be rejected because it creates absurd and unprincipled results that are contrary to basic democratic values.
	* + 1. ***The Federal Court’s interpretation of s.34(1)(b) is in line with parliamentary intent and Canada’s international obligation***
2. The incorporation of the presumption into s. 34(1)(b), per the Federal Court’s interpretation, is ***not*** contrary to parliamentary intent to prioritize security. Parliament indicated an intent to prioritize security (s. 3(1)(h)) when it enacted s. 34(1)(b). The admissibility provisions further the right of the Canadian government to control its borders and to deny entry to persons who may pose a threat to its security. The presumption does not limit the government’s control over its borders. It is rebuttable rather than dipositive. If the presumption is rebutted, an individual may still be captured by ss. 34(1)(b) and (f), even if the organization of which the individual is a member is a legitimate democratic one. The level of discretion granted to the government under the provision is unfettered. The presumption does not diminish the priority of security as a consideration in the application of s. 34(1)(b).

*Najafi, supra* para 40 at para 71.

*Chowdhury, supra* para 15at paras 23-25.

1. The presumption does not mean that a legitimate democratic party cannot fall under s. 34(1)(b). Where there is clear and convincing evidence to the contrary, the presumption is rebutted and a legitimate political party can still be caught by s. 34(1)(b). Where the evidence establishes that the conduct of a legitimate democratic organization constitutes an act to overthrow the government, the presumption will be rebutted, and if the evidence subsequently establishes that there is intentional use of force in carrying out the act of subversion, the “subversion by force” requirement is met.

*Chowdhury, supra* para 15 at para 33.

1. The presumption ensures that the application of s. 34(1)(b) does not run contrary to the other objectives of the *IRPA*, as set out in s. 3(1). The broad and unrestricted interpretation, on the other hand, runs contrary to Parliamentary intent by prioritizing security at the expense of all the other objectives of the *IRPA*, such as promoting immigration and protecting refugees, as well as its compliance with *Charter* values.
2. The presumption also upholds Canada’s obligations under international law. If interpreted broadly such that political protests that on occasion devolve into violence are considered to constitute subversion by force, s. 34(1)(b) would negatively impact the ability of impacted individuals to exercise freedom of political opinion and their right to participate freely in political processes.
3. Canada is a state signatory to the International Covenent on Civil and Political Rights (the *ICCPR*). Article 25 of the *ICCPR* provides for the right of every individual to vote, and to “take part in the conduct of public affairs”. Article 26 provides for the protection of political opinion. By criminalizing legitimate protests or strikes, the overbroad interpretation of s. 34(1)(b) runs contrary to Canada’s obligations under the *ICCPR*.

*International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 arts 25, 26 (entered into force 23 March 1976) [*ICCPR*].

1. In sum, the presumption enhances the provision’s conformity with the overall objectives of the *IRPA*, including the government’s ability to control its border for security purposes, as well as with *Charter* values. It upholds Canada’s obligation under international law. It invites a decision maker to take into consideration all the relevant facts and circumstances, and make a fair and balanced decision, instead of adopting a blanket application of the provision, which could lead to absurd results that were never intended by Parliament.
	* + 1. ***Ministerial relief does not preclude this Court from adopting the Federal Court’s interpretation of s. 34(1)(b)***
2. The availability of ministerial relief does not save the overly broad interpretation of s. 34(1)(b). Ministerial relief is inadequate to address the detrimental consequences that result from the overbroad interpretation.
3. Pursuant to s. 42.1(2) of the *IRPA*, when an individual is caught by s. 34(1), they may make an application for ministerial relief. Ministerial relief is available for those individuals who can demonstrate that they merit relief based on a series of considerations. The inaccessibility of ministerial relief, however, renders it incapable of curing the harms that arise from a finding of inadmissibility.
4. First, the ministerial relief provision has been criticized as “illusory.” Because the authority to grant ministerial relief is non-delegable, a busy member of Cabinet is required to assess complicated immigration files on a case-by-case basis. Sitting politicians have little incentive to grant discretionary relief and possibily face criticism for being soft on subversives.

Jared Porter, *No Rebels Allowed: The Subversion Bar in Canada's Immigration Legislation*, (2018), 81 Sask L Rev 25-51 at 46.

1. Second, even if the relief can be granted, it takes a significant amount of time to obtain. In *Douze*, the applicant waited three years for a response to his request for ministerial relief, and the delay was found to be unreasonable. Affidavit evidence submitted by a senior program officer with the CBSA Ministerial Relief Unit indicates that ministerial relief requests generally take 5-10 years to process, because of the complex nature of the assessment and the Minister’s personal involvement.

*Douze v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1337 at paras 9, 31-33 [*Douze*].

1. The harm associated with such a wait is severe, including the risk of deportation and family separation. Individuals waiting for determinations on ministerial relief applications are often overseas, having faced deportation in the interim. This means family separation and the ensuing harms, including family breakdown and detrimental impact on family members’ lives.
2. Ministerial relief does not preclude the adoption of a better-informed interpretation of s. 34(1)(b) that avoids undesired outcomes and prevents harm from accuring to individuals who are undeserving of such harm. Adopting this interpretation will also improve the efficiency of the justice system by saving valuable time and resources that would otherwise be wasted on the steps involved in an application for ministerial relief.
3. ***The BNP does not fall under s. 34(1)(b)***
4. An application of the Federal Court’s interpretation leads to the conclusion that the Officer’s determination that the BNP falls under s. 34(1)(b) is unreasonable. The conduct at issue took place in the course of the BNP carrying out its legitimate democratic function within the bounds of the democratic operation of the Bangladesh political system. The BNP’s conduct did not constitute an act aimed at overthrowing the government. The BNP should therefore be presumed to have been acting in its legitimate political function through the exercise of democratic and political activities, and is therefore not an organization that has engaged in or instigates subversion by force. Moreover, there was insufficient evidence before the Oficer to rebut the presumption. As a result, the BNP does not fall within the scope of s. 34(1)(b). The appeal should be dismissed.
5. In the alternative, if this Court does not adopt the Federal Court’s interpretation of s. 34(1)(b), the Respondent submits that the evidence does not establish that the BNP intended the accompanying violence when it called for hartals. The Federal Court’s decision should therefore be upheld.
6. For an organization to be captured by s. 34(1)(b), the decisionmaker must make a finding that the organization intended to use force in subverting a government. The Federal Court in *Oremade* held that the intention to use force is critical to the applicability of the provision. The Officer erred in interpreting the evidence of violence, which accompanied the calls for hartals, as proof that the BNP intended to use force.

*Oremade, supra* para 25at para 25.

1. The use of force in the subversion must be more than an accident; it must be the intended means to affect the overthrow of the government. The Federal Court in *Rana* characterized the BNP’s calls for hartals as “a form of advocacy, protest, dissent or stoppage of work.” The mere fact that hartals have on occasion been accompanied by acts of violence in the past is insufficient to establish the required intention. In the case at bar, even if the BNP’s conduct is deemed to have the intent to overthrow the Bangladesh government (which the Respondent disagrees with), the required intention to use force is not established, because the evidence merely discloses a causal connection between the hartals and the acts of violence, which is insufficient to establish that the BNP ***intended*** the accompanying violence when it called for hartals.

*Rana v Canada (Minister of Public Safety and Emergency Preparedness),* 2018 FC 1080 at paras 66, 67[*Rana*]*.*

*Oremade, supra* para 25 at para 29.

1. In the absence of the intention to use force, the BNP does not fall under s. 34(1)(b) as an organization engaging in subversion by force of any government.
2. **The Federal Court did not err in finding that the defence of duress applied to the circumstances of the case**
3. The Federal Court did not err in its review of the Officer’s membership analysis. Evidence of duress is relevant to an inadmissibility determination under s. 34(1)(f) of the *IRPA*. The Officer was thus required to consider the defence of duress raised by Mr. Chowdhury for the period of his forced membership. Furthermore, Mr. Chowdhury’s period of affiliation with the BNP, prior to being subject to duress, did not amount to membership.
4. ***The Officer failed to assess the necessary factors in his analysis of membership***
5. It is trite law that the concept of membership should be interpreted broadly. The rationale for this is government concern for public safety and national security in the immigration context.

*Poshteh v Canada (Citizenship and Immigration),* 2005 FCA 85 at paras 27-29.

1. The standard of proof relevant to a membership determination is “reasonable grounds to believe.” This requires that evidence establish more than mere suspicion, but less than a balance of probabilities. Reasonable grounds will exist “where there is an objective basis for the belief which is based on compelling and credible information.”

*IRPA, supra* para 21 s 33.

*Mugesera v Canada (Minister of Citzienship and Immigration),* 2005 SCC 40 at para 114.

1. The test for membership requires an assessment of an individual’s participation in the organization. This includes consideration of three criteria: the nature of the individual’s involvement, the length of time of involvement, and the degree of the individual’s commitment to the organization’s goals and objectives. Where some factors suggest membership while other suggest the contrary, those factors must be reasonably considered and weighed. To this end, not every act of support for a group will constitute membership in that group.

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

*Krishnamoorthy v Canada (Citizenship and Immigration),* 2011 FC 1342 at para 23.

1. Failure to consider the requisite criteria of membership renders a decision unreasonable. For instance, in *Helal*, the Officer erred in holding that the applicant, a 3-year web administrator for certain organizations, was a member pursuant to s. 34(1)(f). The Court noted that in failing to assess the applicant’s commitment to the organizations, the Officer failed to consider “arguably the most important of the factors to consider in the circumstances.”

*Helal v Canada (Citizienship and Immigration),* 2019 FC 37 at para 29 [*Helal*].

1. In this case, the officer made a similarly reviewable error by failing to assess Mr. Chowdhury’s level of commitment to the BNP’s goals and objectives.
2. There is insufficient evidence on record to demonstrate that the BNP seeks to achieve violent and subversive objectives. Even if the Court finds sufficient evidence of such objectives, the evidence makes clear that Mr. Chowdhury did not share those objectives, and nor did he demonstrate any commitment to such objectives through his acts. In fact, Mr. Chowdhury demonstrated the opposite.
3. First, Mr. Chowdhury has been steadfast in his commitment to non-violence and human rights protection. This is evident from his work directing a women’s rights organization, promoting gender equality, and combatting violence against women and children. Mr. Chowdhury championed these causes despite being threatened by Muslim fundamentalists.

Officer’s reasons at para 5.

1. Second, Mr. Chowdhury has been steadfast in advocating for democratic principles. Mr. Chowdhury’s first period of affiliation with the BNP, from 2011 to November 2013, was a product of his desire to support democracy in Bangladesh. His activities in this period consisted of handing out pamphlets on the right to vote, and signing up and encouraging people to vote.

Officer’s reasons at para 16.

1. Finally, Mr. Chowdhury has been steadfast in advocating for non-violence. Mr. Chowdhury only became a formal member of the BNP in December 2013, against his will. A senior BNP official threatened to expose Mr. Chowdhury’s sexuality if he refused to be a member. The threats against him were serious, and made worse due to homophobic social norms in Bangladesh and Mr. Chowdhury’s fear of losing his son should his wife find out. Despite these ongoing threats, Mr. Chowdhury resigned his membership in February 2014 due to the violence of the January 2014 general elections. Of note, Mr. Chowdhury did not participate in preparations for the election, nor was he involved in any election day activities. Mr. Chowdhury’s commitment to non-violence is made all the more clear by the fact that he resigned in the face of threats.

Officer’s reasons at paras 17, 18.

1. It was pertinent to Mr. Chowdhury’s membership determination that he was not committed to the goals and objectives of the BNP. It was unreasonable for the Officer to fail to consider this factor in an assessment of membership under s. 34(1)(f).
2. Furthermore, it was pertinent to the membership determination that Mr. Chowdhury did not intend to become a member of the BNP. In assessing membership, courts have considered the intent and purpose behind contributions to an organization as relevant factors. A genuine member is, at a minimum, someone who intentionally carries out acts in furtherance of the organization’s goals. This requires that membership “rest on indicia that the person’s intentions were consonant with the group’s objects.” Whether Mr. Chowdhury was acting under duress or coercion is directly relevant to the question of his intent and purpose.

*Jalloh v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317 at paras 37-38 [*Jalloh*].

1. ***Mr. Chowdhury’s activities in the first period do not amount to membership***
2. The evidence demonstrates that Mr. Chowdhury’s affiliation with the BNP between 2011 and November 2013 did not rise to the level of membership.
3. While it is true that formal membership is not required to establish membership, there must be evidence of an “institutional link” with, or “knowing participation” in, the group’s activities.

*Sinnaiah v Canada (Citizenship and Immigration),* 2004 FC 1576 at para 6.

1. Mr. Chowdhury’s activities in the first period do not establish such a connection to the BNP. Between 2011 and November 2013, Mr. Chowdhury encouraged people to vote and handed out pamphlets on the right to vote. These activities were not specific to any political party. Educating and encouraging people to vote is a normal activity to carry out in the context of an election in a democratic country. That some of those people later joined the BNP as affiliates or members is only incidental to Mr. Chowdhury’s actual activity.

Officer’s reasons at paras 15-16.

1. The fact that Mr. Chowdhury’s activities may have incidentally provided some material support to the BNP in the form of new members does not work to establish his membership. Absent an individual’s purpose to enhance the organization’s ability to carry out its activity, the mere assertion that material support was provided to an organization is not sufficient to ground membership.

*Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness),* 2010 FC 957 at para 110.

1. ***Criminal law principles of duress apply to inadmissibility under s. 34(1)(f)***
2. In criminal law, a well-founded defence of duress provides a complete bar to conviction. It can operate as an excuse, or by negating mens rea. This is rooted in the principle of fundamental justice that only voluntary conduct should attract the penalty and stigma of criminal liability.

*R v Hibbert,* [1995] 2 SCR 973 at paras 22, 48.

*R v Ruzic,* 2001 SCC 24 at para 47.

1. Inadmissibility under the *IRPA* does not operate in isolation from criminal law. In fact, inadmissibility often relies on criminal law for its very interpretation. The Supreme Court has recognized the need for this reliance*,* noting that “where an immigration tribunal is required to determine whether an applicant’s act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.”

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 112.

1. Furthermore, Canadian criminal law and the *IRPA* inadmissibility regime share common objectives. Both seek to address terrorism abroad. The Federal Court has held that the definition of “terrorist activity” in s. 83.01 of the *Criminal Code* may be imported into the *IRPA* for the purposes of a finding under ss. 34(1)(f) and (c). In making this finding, Justice Brown noted, “The Criminal Code’s application to terrorist conduct outside Canada supplies a key linkage to Canada’s immigration laws; it shows the common purposes of the two provisions.”

*Ali v Canada (Citizenship and Immigration),* 2017 FC 182 at paras 43, 44.

1. Per s. 8 of the *Criminal Code*, common law defences apply to all offences found in Acts of Parliament, “except in so far as they are altered by or are inconsistent with” any Act of Parliament. Because the *IRPA* does not explicitly displace the common law defences, we must presume that defences are applicable. In fact, defences have been applied in immigration law even prior to the enactment of the *IRPA*, and “the *IRPA* does not contain any provision which defines duress in a different way.” In other words, in enacting the *IRPA*, Parliament made the choice to not limit the application of defences, despite clear applications in the case law.

*Criminal Code,* RSC 1985, c C-46, s 8.

*Gil Luces v Canada (MPSEP),* 2019 FC 1200 at para 21.

1. Additionally, the Supreme Court has endorsed the consideration of all viable defences, including duress, by the Refugee Protection Division when deciding whether a person should be excluded from refugee status.

*Ezokola v Canada (Citizenship and Immigration),* 2013 SCC 40 at para 100 [*Ezokola*].

1. The case law is clear that the defence of duress applies to inadmissibility under s 34(1)(f). Here, the principles of the defence, as developed in the criminal law, are modified to the circumstances of inadmissibility.

*Mohamed v Canada (Citizenship and Immigration),* 2015 FC 622 at para 28.

*Ghaffari, supra* para 29at paras 19, 20.

1. Duress and membership are interrelated and ought to be considered together. The Federal Court found that an individual “cannot be considered to be a member of a group when his or her involvement with it is based on duress.” The evidence should be considered as a whole to determine whether the person was truly a member or whether his or her acts were coerced.

*Jalloh, supra* para 77 at paras 37, 38.

1. ***The operation of duress under s 34(1)(f) is supported by its applicability to other inadmissibility provisions under the IRPA***
2. A review of the way duress operates under other inadmissibility provisions of the *IRPA* reinforces the Federal Court’s finding that the defence must be made available to Mr. Chowdhury.
3. In considering human or international rights violations under s. 35(1), the Supreme Court has found that guilt by association or mere membership in a brutal, limited purpose organization is no longer an independent head of liability. A complicity analysis is necessary to determine whether a person made a “voluntary, knowing and significant contribution” to the crime or criminal purpose of a group. This requirement for voluntariness captures the defence of duress, which is well recognized in international criminal law.

*Ezokola, supra* para 86 at paras 81-90.

1. Subsequently, the Federal Court of Appeal found that a complicity analysis is not required in the context of assessing membership pursuant to s. 34(1)(f). However, this decision has no bearing on Mr. Chowdhury’s case. The issue at bar is not whether Mr. Chowdhury was complicit in his membership, but whether his membership was a matter of duress.

*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86at para 22.

1. Inadmissibility for serious criminality under s 36 also requires consideration of defences. For example, determining the equivalency of foreign and domestic offences requires a comparison of essential elements, including the defences particular to those offences.

*Li v Canada (Citizenship and Immigration*), 1996 FC 235.

1. Finally, the defence of duress is applicable in the context of membership in a criminal organization under s. 37. Here, the Minister unsuccessfully suggested that because there is no explicit mental element required, duress serves no function in the determination of membership. However, the Court is clear that the defence of duress is not limited to negating mens rea. Where the defence of duress operates to excuse the act of an individual—like for instance, the act of becoming a member of an organization—the mens rea of that act is irrelevant.

*Canada (Public Safety and Emergency Preparedness) v Lopez Gayton*, 2019 FC 1152 at

paras 28, 29 [*Lopez Gayton*].

1. ***Evidence of duress negates membership in Mr Chowdhury’s circumstances***
2. The Appellants maintain that Mr Chowdhury’s circumstances do not satisfy the *Ryan* test for the defence of duress. The test requires, among other things: an explicit threat of bodily harm, no safe avenue of escape, and proportionality between the harm threatened and the harm inflicted by the accused. The latter two requirements are assessed on a modified objective standard, meaning that the personal circumstances of the accused must be taken into account.

*R v Ryan,* 2013 SCC 3 at para 55 [*Ryan*].

1. Mr. Chowdhury’s formal membership in the period between December 2013 and February 2014 was a result of duress. A senior official of the BNP threatened to expose Mr. Chowdhury’s sexuality to his wife. Mr. Chowdhury’s circumstances contextualize the seriousness of his experience of duress. Homophobic social norms in Bangladesh have prevented Mr. Chowdhury from living as an openly gay man. Mr. Chowdhury’s wife does not know that he is gay, and he fears losing his son should she be informed. Furthermore, Mr. Chowdhury has received threats from Muslim fundamentalists as a result of his work in women’s rights. Mr. Chowdhury’s reality is thus one of heightened scrutiny and fear. These circumstances significantly constrain his ability to act freely and voluntarily.

Officer’s reasons at paras 4, 5, 17.

1. The Officer failed to account for evidence of duress, demonstrating an unreasonable assessment of the facts. It is well established that the test for membership requires a fact-based assessment of the evidence of a person’s conduct and intention, including evidence of duress. Further, the Immigration Board is obligated to deal with evidence that is inconsistent with or casts doubt on its evidentiary findings, including evidence of duress.

*TK v Canada (Public Safety and Emergency Preparedness),* 2013 FC 327 at paras 91, 92, 114.

*Thiyagarajah,* *supra* para 31 at para 20.

1. ***The consideration of duress is not limited to an application for ministerial relief***
2. As explained at paragraphs 56-60, an application for ministerial relief is inadequate as a form of recourse against inadmissibility. The non-delegable and discretionary nature of ministerial relief renders it inaccessible. Furthermore, even if relief is granted, it can take an unreasonably long time. The harm associated with such a wait is severe, including risks of deportation and family separation.

Factum of the Respondent for *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1987 at paras 56-60.

1. The current ministerial relief provision is more restrictive than its predecessor. This is a result of amendments introduced in 2013. Pursuant to s. 42.1(3), the Minister is now only able to take into account “national security and public safety considerations” in making a determination. Additionally, amendments to s. 25 explicitly deny humanitarian and compassionate relief to persons found inadmissible on grounds of security.

*IRPA*, *supra* para 21 ss 25, 42.1(3).

1. The Canadian Bar Association was clear in its objection to the amendments. Of particular concern was the diminished ability to overcome inadmissibility without humanitarian and compassionate relief: “Ministerial discretion to consider humanitarian factors plays an important role in balancing the breadth of the inadmissibility sections with positive personal considerations. This amendment is inconsistent with basic Canadian values of fairness and due process.”

Sharryn Aiken et al, *Immigration and Refugee Law: Cases, Materials, and Commentary,* 3rd ed (Toronto: Emond Montgomery Publications Limited, 2020) at 415.

1. The new restrictions on the availability and scope of recourse make it more clear than ever that an overly broad interpretation of membership is dangerous. Evidence of duress must be considered in the inadmissibility proceeding itself. To limit an assessment of duress to an application for ministerial relief would only perpetuate harm.
2. In any event, the case law is clear that the ability to raise factors of duress in an application for ministerial relief does not preclude the applicant from raising duress in an inadmissibility proceeding. The Federal Court and Federal Court of Appeal have heard arguments that the jurisdiction to consider the defence of duress rests solely in an application for ministerial relief. In these cases, the Minister argued that to consider evidence of duress in an inadmissibility proceeding would be to deprive s. 42.1(1) of its function. These arguments have been firmly rejected. The defence has consistently been found applicable in inadmissibility proceedings. Courts have not held that duress or coercion may not be raised at an inadmissibility hearing.

*Lopez Gayton, supra* para 93at paras 18-24.

*B006, supra* para 29 at paras 98-103.

**PART III: ORDERS SOUGHT**

1. The Respondent respectfully requests that this Honourable Court order the following:

i. Dismiss the appeal, and

ii. If the questions are found to be properly certified, answer both questions in the positive.

1. All of which is respectfully submitted this 12th day of February 2021.

**APPENDIX: LIST OF AUTHORITIES**

**Legislation**

*Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c 11.

*Criminal Code,* RSC 1985, c C-46.

*Immigration and Refugee Protection Act,* SC 2001, c 7.

*International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976).

**Case Law**

*Agraira v Canada (Public Safety and Emergency Preparedness),* 2011 FCA 103*.*

*AK v Canada (Minister of Citizenship and Immigration)*, 2018 FC 236.

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

*Ali v Canada (Citizenship and Immigration),* 2017 FC 182.

*B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033*.*

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

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

*Canada (Public Safety and Emergency Preparedness) v Lopez Gaytan*, 2019 FC 1152.

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

*Douze v. Canada (Minister of Citizenship & Immigration)*, 2010 FC 1337.

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

*Gil Luces v Canada (PSEP),* 2019 FC 1200.

*Ghaffari v Canada (Minister of Citizenship and Immigration),* 2013 FC 674.

*Helal v Canada (Citizienship and Immigration),* 2019 FC 37.

*Jalloh v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 317.

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

*Krishan v Canada (Minister of Citizenship and Immigration*), 2018 FC 1203.

*Krishnamoorthy v Canada (Citizenship and Immigration),* 2011 FC 1342.

*Lewis v Canada (Public Safety and Emergency Preparedness)*, [2017 FCA 130](https://advance.lexis.com/document/documentlink/?pdmfid=1505209&crid=fc0ee71e-476f-4a6d-aa27-c4416a0f567c&pddocfullpath=%2Fshared%2Fdocument%2Fcases-ca%2Furn%3AcontentItem%3A5V08-FGG1-FG12-61BC-00000-00&pdcontentcomponentid=281025&pddoctitle=2018+FC+1203&pdissubstitutewarning=true&pdproductcontenttypeid=urn%3Apct%3A221&pdiskwicview=false&ecomp=wgg8k&prid=72b87342-7e1f-4296-96f1-3adf13f350a4)*.*

*Li v Canada (Citizenship and Immigration*), 1996 FC 235.

*Lopes v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 25.

*Lunyamila v Canada (Public Safety and Emergency Preparedness*), 2018 FCA 22.

*Mohamed v Canada (Citizenship and Immigration),* 2015 FC 622.

*Mugesera v Canada (Minister of Citzienship and Immigration),* 2005 SCC 40.

*Najafi v Canada (Minister of Public Safety and Emergency Preparedness),* 2014 FCA 262.

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

*Poshteh v Canada (Citizenship and Immigration),* 2005 FCA 85.

*R v Hibbert,* 2002 SCC 39.

*R v Ruzic,* 2001 SCC 24.

*R v Ryan,* 2013 SCC 3.

*Rana v Canada (Minister of Public Safety and Emergency Preparedness),* 2018 FC 1080*.*

*Rizzo & Rizzo Shoes Ltd (Re),* [1998] 1 SCR 27, [1998] SCJ No 2.

*Sinnaiah v Canada (Citizenship and Immigration),* 2004 FC 1576.

*Thiyagarajah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 339

*TK v Canada (Public Safety and Emergency Preparedness),* 2013 FC 327.

*Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness*), 2010 FC 957.

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

**Secondary Materials**

Jared Porter, *No Rebels Allowed: The Subversion Bar in Canada's Immigration Legislation*, (2018), 81 Sask L Rev 25-51.

Sharryn Aiken et al, *Immigration and Refugee Law: Cases, Materials, and Commentary,* 3rd ed (Toronto: Emond Montgomery Publications Limited, 2020).