

# Hussain v. Canada (Minister of Citizenship and Immigration), 2004 FC 1196 (CanLII)

Date: 2004-08-31

Docket: IMM-4400-03

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[Reflex Record](#) (noteup and cited decisions)

Date: 20040831

Docket: IMM-4400-03

Citation: 2004 FC 1196

BETWEEN:

FAYYAZ HUSSAIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

## REASONS FOR ORDER

### **GIBSON J.:**

#### INTRODUCTION

[1] These reasons follow the hearing of an application for judicial review of a decision of a member of the Immigration Division (the "Member") of the Immigration and Refugee Board wherein the Member found Fayyaz Hussain (the "Applicant") to be a person who is a member of an organization that there are reasonable grounds to believe engages, has engaged, or will engage in terrorism. In the result, the Applicant was determined to be inadmissible to Canada and a deportation order was issued against him. The decision under review is dated the 6<sup>th</sup> of June, 2003.

#### BACKGROUND

[2] The background facts are essentially not in dispute. The Applicant is a citizen of Pakistan. He is a Shia Muslim. He joined the Shia student group Imamia Students Organization in late 1995 after gaining admission to the Government College of Technology in Lahore, Pakistan. He ceased his membership in that organization in January of 1997. In March of 1997, he joined Tehrik-e-Jafria (the "TJP"), "...an organization representing the interests of Shia Muslims who are in a minority in Pakistan". While it would appear not to be in dispute that he has now ceased to be a member of that organization, the time at which he ceased to be a member and from which

he no longer had any contact with the TJP is uncertain. The Applicant denies being aware that the TJP was alleged to be involved in terrorist activities.

[3] The Applicant arrived in Canada on the 19<sup>th</sup> of July, 2000 and made a refugee claim. A report was made to the Minister of Citizenship and Immigration (the "Respondent") in respect of the Applicant under subsection 44(1) of the *Immigration and Refugee Protection Act*<sup>[1]</sup> ("*IRPA*"). The report expressed the opinion of the officer who made it that the Applicant is inadmissible to Canada. Based on the Respondent's conclusion that the officer's opinion was well-founded, the Respondent referred the report to the Immigration Division for an admissibility hearing, pursuant to subsection 44(2) of *IRPA*. The decision under review followed the admissibility hearing.

[4] The Applicant is neither a Canadian citizen nor a permanent resident of Canada.

#### RELEVANT LEGISLATIVE PROVISIONS

[5] The relevant provisions of *IRPA* are set out in Schedule A to these reasons.

[6] In *Suresh v. Canada (Minister of Citizenship and Immigration)*<sup>[2]</sup>, the Supreme Court of Canada, in the context of the predecessor to *IRPA*, grappled with the definition of "terrorism", the critical term for the purposes of this matter that appears in paragraph 34(1)(c) of *IRPA*. The Court, in its reasons, noted at paragraphs [93] and [94]:

The term "terrorism" is found in s. 19 of the *Immigration Act*, dealing with denial of refugee status upon arrival in Canada. The Minister interpreted s. 19 as applying to terrorist acts post-admission and relied on alleged terrorist associations in Canada in seeking Suresh's deportation under s. 53(1)(b), which refers to a class of persons falling under s. 19. We do not in these reasons seek to define terrorism exhaustively -- a notoriously difficult endeavour -- but content ourselves with finding that the term provides a sufficient basis for adjudication and hence is not unconstitutionally vague. We share the view of Robertson J.A. that the term is not inherently ambiguous "even if the full meaning ... must be determined on an incremental basis" ... .

One searches in vain for an authoritative definition of "terrorism". The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, "the term is open to politicized manipulation, conjecture, and polemical interpretation": ... [citation omitted]

Like its predecessor, *IRPA* does not define "terrorism".

[7] The Supreme Court of Canada, in *Suresh*, continued at paragraph [96]:

We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated *International Convention for the Suppression of the Financing of Terrorism*, ..., approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(1)(a), defining "terrorism" as "[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex". The annex lists nine treaties that are commonly viewed as relating to terrorist acts, ... . Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2(1)(b) defines "terrorism" as:

Any ... act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

[citations omitted]

[8] The *Criminal Code*<sup>[3]</sup> provides a very detailed definition of "terrorist activity" and of a related term "terrorist group". Those definitions, contained in subsection 83.01(1), are set out in Schedule B to these reasons.

[9] Section 83.05 of the *Criminal Code* provides a mechanism for establishment of a list of "terrorist" organizations. Subsections (1) and (1.1) of that section are also set out in Schedule B to these reasons. Much was made before the Member and this Court of the fact that the TJP is not included on the "list". The result of this application for judicial review does not turn on that fact.

## THE ISSUES

[10] The issues on this application for judicial review are described in the Applicant's Record, generally in the following terms:

- first, did the Member err in law in failing to provide an adequate evidentiary foundation to support the TJP being engaged in acts of terrorism; and
- secondly, did the Member err in law in coming to a perverse conclusion, specifically, in relying on the *Criminal Code* definition of terrorist activity in coming to the conclusion that the TJP was engaged in terrorist activity and then ignoring or discounting the fact that the Solicitor General did not include the TJP as a terrorist group pursuant to that definition.

[11] As earlier indicated, I am satisfied that this application for judicial review turns on the first issue question, and not on the second.

## ANALYSIS

[12] As earlier noted, it was not in dispute that the Applicant had been a member of the TJP, up to an indeterminate point in time that might well have been after he came to Canada and after the report under subsection 44(1) of *IRPA* was made against him. The evidence before the Member did not support a conclusion that the Applicant himself had engaged, or might in future engage, in terrorism. The principal issue thus became, are there reasonable grounds to believe that the TJP has engaged in or will engage in terrorism. The Member dealt with this issue rather summarily. She wrote:

That the ...TJP, has engaged in activities which mirror the definition of terrorism is abundantly documented by the evidence, particularly in Exhibit Number Six presented by the Minister.

To cite some examples, on page 51 of that exhibit, in the "Foreign Affairs Magazine", November/December 2000 issue, it states "the ten year old sectarian war between Pakistan's Shia and Sunni, is real and deadly. The ... TJP, was formed to protect the interests of Pakistan's Shia Muslims."

Further on it reads, "Iran helped fund the TJP, probably in hopes of using it as a vehicle for an Iranian-style revolution in Pakistan."

Still further it continues, "the SSP [a Sunni organization] was funded by both Saudi Arabia and Iraq. Since then violent gangs have formed on both sides."

Among the numerous press reports contained in Exhibit Number Six, and detailing incidents of violence, "Agence France Presse" ... reported on January 20<sup>th</sup>, 1997, that in Lahore, Pakistan, "A Shiite activist has confessed to carrying out a Lahore bomb blast, which killed 26 people, including a Sunni Muslim leader."

In that article the perpetrator is identified as Mehram Ali ..., a member of the TJP. Reference may be found to this on page 314 of Exhibit Number Six.

It is noteworthy perhaps, that that incident occurred only two months before the subject of this hearing, Fayyaz Hussain, joined the TJP.

Despite that and despite his claimed membership until December 2001, he has denied at this hearing of being aware that the TJP is or was involved in terrorist activities.

Indeed on March the 25<sup>th</sup> 2003 he testified "I find it inconceivable that this is a terrorist organization."

In my view, given the many examples in Exhibit Number Six, of sectarian terrorism attributed to the TJP, Mr. Hussain's claimed ignorance of activities of such a nature is simply self-serving and not credible.

The fact that the TJP or its own militant wing called the Sipah Mohammad, or SM, "have not indulged in major acts of terrorism.", a reference which may be found on page 57 of Exhibit Number Six, as noted by B. Rahman ... in Musharaf's Ban: An Analysis, January 18<sup>th</sup>, 2002, or the fact that Fayyaz Hussain himself denies having been involved in any violent activities, as noted from page 22 of the March 25<sup>th</sup> transcript, does not negate evidence to the contrary with respect to the TJP.

Similarly, the fact that the TJP was officially proscribed by the president of Pakistan only in January 2002, does not eliminate the documentation surrounding its goals and the methodology of pursuing them, including acts of violence and terrorism, prior to that time.<sup>[4]</sup>

[13] It was not in dispute before me that the appropriate standard of review on a matter such as this, and more particularly in this case, of the establishment that the TJP is a terrorist organization, is one that, while falling short of a balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence.<sup>[5]</sup>

[14] That being said, in *Fuentes v. Canada (Minister of Citizenship and Immigration)*<sup>[6]</sup>, my colleague Justice Lemieux, on parallel but different facts, noted at paragraph [69] of his reasons:

... That evidence lacks the specificity of who, what, when and where and in what circumstances which is necessary to meet the test of sufficiency in assessing the Minister's burden of proof gauged in relation to its appropriate standard.

[15] I am satisfied that precisely the same might be said here. While the foregoing quotation from the Member's reasons is rife with references to Exhibit Number Six that was before her and was presented by the Minister, it is remarkably thin on specificity as to who, what, when and where and in what circumstances the TJP could, itself and as an organization, be identified as engaging in acts of terrorism. Indeed, the extensive documentary evidence that was before the Member contains references that were at least arguably to the contrary and identified a splinter-group from the TJP, not necessarily an affiliate of the TJP, as the source of much of the violence attributed to the Shia minority in Pakistan.

[16] While the evidence that was before the Member might, if much more fully analysed, have supported the conclusion of the Member, I am satisfied that the analysis provided by the Member simply did not satisfactorily support her conclusion, against the appropriate standard of review, that the Minister had met his or her burden in this matter.

## CONCLUSION

[17] Based on the foregoing brief analysis, this application for judicial review will be allowed, the decision under review will be set aside and the matter will be referred back for reconsideration and redetermination.

## CERTIFICATION OF A QUESTION

[18] At the close of the hearing of this matter, I reserved my decision and indicated to counsel that reasons would be circulated and an opportunity provided to counsel to make submissions on certification of a question before an Order would issue. These reasons will be circulated. Counsel for the Respondent will have seven (7) days from the date of these reasons to file and serve representations regarding certification. Thereafter, if counsel for the Respondent has served and filed such submissions, counsel for the Applicant will have seven (7) days to serve and file responding submissions. In the event that responding submissions are served and filed, counsel for the Respondent will have a further seven (7) days to serve and file reply submissions.

[19] Once the Court has had full opportunity to consider any such submissions, an Order herein will issue.

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J. F.C.

Ottawa, Ontario

August 31, 2004

#### **SCHEDULE A**

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.

33. Les faits - actes ou omissions - mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

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

...

(c) engaging in terrorism;

...

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) or (c).

34. (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants\_:

...

c) se livrer au terrorisme;

...

f) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle est, a été ou sera l'auteur d'un acte visé aux alinéas a), b) ou c).

(2) The matters referred to in subsection (1) do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest.

(2) Ces faits n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national.

...

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

...

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

## **SCHEDULE B**

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83.01 (1) The following definitions apply in this Part.

83.01 (1) Les définitions qui suivent s'appliquent à la présente partie.

...

...

"terrorist activity" means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(i) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the Convention on the Physical Protection of Nuclear Material, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988,

« \_activité terroriste\_ »

a) Soit un acte - action ou omission, commise au Canada ou à l'étranger - qui, au Canada, constitue une des infractions suivantes\_:

(i) les infractions visées au paragraphe 7(2) et mettant en oeuvre la Convention pour la répression de la capture illicite d'aéronefs, signée à La Haye le 16 décembre 1970,

(ii) les infractions visées au paragraphe 7(2) et mettant en oeuvre la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signée à Montréal le 23 septembre 1971,

(iii) les infractions visées au paragraphe 7(3) et mettant en oeuvre la Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques, adoptée par l'Assemblée générale des Nations Unies le 14 décembre 1973,

(iv) les infractions visées au paragraphe 7(3.1) et mettant en oeuvre la Convention internationale contre la prise d'otages, adoptée par l'Assemblée générale des Nations Unies le 17 décembre 1979,

- (v) les infractions visées aux paragraphes 7(3.4) ou (3.6) et mettant en oeuvre la Convention sur la protection physique des matières nucléaires, conclue à New York et Vienne le 3 mars 1980,
- (vi) les infractions visées au paragraphe 7(2) et mettant en oeuvre le Protocole pour la répression des actes illicites de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signé à Montréal le 24 février 1988,
- (vii) les infractions visées au paragraphe 7(2.1) et mettant en oeuvre la Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime, conclue à Rome le 10 mars 1988,
- (viii) les infractions visées aux paragraphes 7(2.1) ou (2.2) et mettant en oeuvre le Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental, conclu à Rome le 10 mars 1988,
- (ix) the offences referred to in subsection 7(3.72) that implement the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997, and
- (x) the offences referred to in subsection 7(3.73) that implement the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999, or
- (b) an act or omission, in or outside Canada,
  - (i) that is committed
    - (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and
    - (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and
  - (ii) that intentionally
    - (A) causes death or serious bodily harm to a person by the use of violence,
    - (B) endangers a person's life,
    - (C) causes a serious risk to the health or safety of the public or any segment of the public,
    - (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or
    - (E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

(ix) les infractions visées au paragraphe 7(3.72) et mettant en oeuvre la Convention internationale pour la répression des attentats terroristes à l'explosif, adoptée par l'Assemblée générale des Nations Unies le 15 décembre 1997,

(x) les infractions visées au paragraphe 7(3.73) et mettant en oeuvre la Convention internationale pour la répression du financement du terrorisme, adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1999;

b) soit un acte - action ou omission, commise au Canada ou à l'étranger\_:

(i) d'une part, commis à la fois\_:

(A) au nom - exclusivement ou non - d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue - exclusivement ou non - d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à accomplir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas\_:

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte - action ou omission - commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international.

"terrorist group"

(a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or

(b) a listed entity,

and includes an association of such entities.

...

83.05 (1) The Governor in Council may, by regulation, establish a list on which the Governor in Council may place any entity if, on the recommendation of the Solicitor General of Canada, the Governor in Council is satisfied that there are reasonable grounds to believe that

- (a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or
- (b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in paragraph (a).

(1.1) The Solicitor General may make a recommendation referred to in subsection (1) only if the Solicitor General has reasonable grounds to believe that the entity to which the recommendation relates is an entity referred to in paragraph (1)(a) or (b).

« \_groupe terroriste\_ »

a) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter;

b) soit une entité inscrite.

Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition.

...

83.05 (1) Le gouverneur en conseil peut, par règlement, établir une liste sur laquelle il inscrit toute entité dont il est convaincu, sur la recommandation du solliciteur général du Canada, qu'il existe des motifs raisonnables de croire\_:

a) que, sciemment, elle s'est livrée ou a tenté de se livrer à une activité terroriste, y a participé ou l'a facilitée;

b) que, sciemment, elle agit au nom d'une entité visée à l'alinéa a), sous sa direction ou en collaboration avec elle.

(1.1) Le solliciteur général ne fait la recommandation visée au paragraphe (1) que s'il a des motifs raisonnables de croire que l'entité en cause est visée aux alinéas (1)a) ou b).

## **FEDERAL COURT**

### **NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**COURT FILE NO.:** IMM-4400-03

**STYLE OF CAUSE:** FAYYAZ HUSSAIN v. MCI

**PLACE OF HEARING** TORONTO, ONTARIO

**DATE OF HEARING:** August 10, 2004

**REASONS FOR ORDER** THE HONOURABLE MR. JUSTICE GIBSON

**DATED:** August 31, 2004

APPEARANCES:

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[1] [S.C. 2001, c. 27.](#)

[2] [2002 SCC 1 \(CanLII\)](#), [2002] 1 S.C.R. 3.

[3] R.S. 1985, c. C-46.

[4] Applicant's Record, pages 14 and 15.

[5] See: *Chiau v. Canada (Minister of Citizenship and Immigration)* [2000 CanLII 16793 \(F.C.A.\)](#), [2001] 2 F.C. 297 (F.C.A.) at paragraph [60].

[6] [2003 FCT 379 \(CanLII\)](#), [2003] 4 F.C. 249 (T.D.).