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Persistent Discord: The Adjudication of National Security Deportation Cases in Canada (2018–2020)

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This study asks two research questions. First, how many people get deported from Canada for security reasons and what are those reasons? This empirical study of deportation cases (2018–2020) finds that the number of national security and terrorism deportation cases in Canada is at a record high and that Canada's deportation tribunal is the country's busiest national security tribunal. Despite this volume, most cases (sixty per cent) turned on the same allegation. During the period under study, Canada regularly moved to deport members of the Bangladesh National Party (BNP), claiming that the group intentionally used terror-based tactics.

The second research question focuses on adjudicative consistency. Most security deportation cases were not just similar, they were functionally identical. The government tended to lead the same evidentiary package across cases and adjudicators tended to recycle their reasons between cases. Even though most cases were the same, first-instance adjudicators sometimes reached opposite conclusions: some always found that the BNP engaged in terrorism, while others always concluded that it did not. Using a bespoke computer program, this study tracked how each terrorism case was treated by the Federal Court of Canada on judicial review. Startingly, even when different judges reviewed cases that were functionally word-for-word identical on the core issue, they reached different conclusions. This study raises rule of law concerns: does the BNP engage in terrorism? It depends on the adjudicator or judge you ask. This article ends with recommendations aimed at helping tribunals and courts develop a consistent and coherent jurisprudence.

Cette étude pose deux questions de recherche. Premièrement, combien de personnes sont expulsées du Canada pour des raisons de sécurité et quelles sont ces raisons? Cette étude empirique des cas d'expulsion (2018–2020) constate que le nombre de cas d'expulsion pour des raisons de sécurité nationale et de terrorisme au Canada atteint un niveau record et que le tribunal d'expulsion du Canada est le tribunal de sécurité nationale le plus occupé du pays. Malgré ce volume, la plupart des cas (soixante pour cent) tournent autour de la même allégation. Au cours de la période étudiée, le Canada a régulièrement pris des mesures pour expulser des membres du Bangladesh National Party (BNP), affirmant que le groupe utilisait intentionnellement des tactiques basées sur la terreur.

La deuxième question de recherche porte sur la cohérence décisionnelle. La plupart des cas d'expulsion pour raisons de sécurité n'étaient pas seulement similaires, ils étaient fonctionnellement identiques. Le gouvernement avait tendance à présenter le même ensemble de preuves d'une affaire à l'autre et les juges avaient tendance à recycler leurs motifs d'une affaire à l'autre. Même si la plupart des cas étaient identiques, les juges de première instance parvenaient parfois à des conclusions opposées : certains concluaient toujours que le BNP se livrait au terrorisme, tandis que d'autres concluaient toujours que ce n'était pas le cas. À l'aide d'un programme informatique sur mesure, cette étude a suivi la manière dont chaque affaire de terrorisme a été traitée par la Cour fédérale du Canada dans le cadre d'un contrôle juridictionnel. Il est surprenant de constater que même lorsque des juges différents ont examiné des affaires qui étaient identiques, mot pour mot, sur la question centrale, ils sont parvenus à des conclusions différentes. Cette étude soulève des questions relatives à l'État de droit : le BNP s'engage-t-il dans la lutte contre le terrorisme?

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Introduction: Persistent discord in the adjudication of terrorism deportation cases

This study finds that different adjudicators and different judges decide similar terrorism deportation cases differently. How big of a problem is this? "A lack of unanimity is the price to pay for the decision-making freedom and independence" of administrative adjudicators, the Supreme Court of Canada explained in *Domtar*.[1] But how much discord can the law bear? Parties reasonably expect that like cases will be treated alike and that outcomes will not turn on the identity of an individual decision-maker. The public expects the laws passed by legislatures to mean the same thing to litigants who appear in different places and at different times.

For these reasons, administrative bodies are empowered and directed to resolve internal conflicts.[2] Institutions may use tools and internal practises (distributing past reasons, holding plenary meetings and training, and using templates) to ensure coherence and avoid conflicting results. When adjudicators depart from past practice, they must explain this departure in their reasoning. Ultimately, inconsistency may be acceptable, but it must be rare, principled, and considered.[3] Where discord becomes persistent, reviewing courts "may find it appropriate to telegraph the existence of an issue in its reasons" and indicate that "it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord."[4]

But what if neither the tribunal nor the courts notice the inconsistency? And what if the reviewing court's own jurisprudence unwittingly fortifies the discord? This study of national security-based deportation orders finds that, between 2018 and 2020, both the Canadian deportation tribunal and the Federal Court of Canada treated members of the same alleged terror group differently, even though their cases were functionally the same. This study finds that the Immigration Division ("the Division" or "the ID") of the Immigration and Refugee Board ("IRB") finalized 73 deportation cases concerning members of the Bangladesh National Party ("BNP"), an

1. *Domtar Inc v Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 SCR 756 at 800 (SCC).

2. *Ibid*. See also, *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 51: "[I]f the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality." For a discussion on the obligation for administrative tribunals to address inconsistent decision-making see Joseph Robertson, "Administrative Deference: The Canadian Doctrine that Continues to Disappoint," (18 April 2018) at 41-45, online: <canlii.ca/t/stvr> [perma.cc/VKC6-XEHJ].

3. *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 129-132 [*Vavilov*].

4. *Ibid* at para 132.

opposition group and former governing party. In each case, the Canadian government alleged that the group used terror-based tactics to achieve political ends and all its members were therefore legally unwelcome in Canada. Even when the cases featured word-for-word identical evidence, some adjudicators always ordered deportation and some adjudicators did not. Would a particular member of the BNP be ordered deported? It depended on the identity of the adjudicator assigned to their case.

Through the mechanism of judicial review, the Federal Court of Canada is charged with supervising deportation decision-making to, amongst other functions, ensure the law's coherence. During the period under study, the Court's interventions entrenched inconsistency. Frequently, first-instance adjudicators recycled their reasons across different cases. This meant that some cases that appeared before the Federal Court of Canada had functionally identical sets of reasons and identical underlying records. Unfortunately, it appears that the Court did not realize that it was hearing many versions of the same case. When different judges considered the same evidence and reviewed the same reasons, they reached different conclusions: sometimes the deportation order was properly issued, sometimes it was not.

This study raises rule of law concerns. The Supreme Court of Canada recently reaffirmed that "the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker."[5] At least during the period under study, neither the Canadian public nor prospective deportees could be expected to understand the law of terrorism and deportation. Were members of the BNP deportable for security reasons? The answer was both 'yes' and 'no.'

This conclusion is particularly unsettling when we consider the stakes. In almost every case examined here, the person was in Canada claiming refugee protection. In most cases, their claim was terminated after the Division concluded that they were deportable for belonging to a terrorist organization. Labelling a person a member of a terrorist group and terminating their claim for protection is a grave matter and this part of the law ought to be careful, not cavalier.

How did the discord develop and fester? My diagnosis directs our attention to problems occasioned by scale. When Parliament established the Immigration Appeal Board in 1966 (the predecessor body to the IRB), it capped the number of adjudicators at nine.[6] After operating for a year, the tribunal issued a single slender volume of jurisprudence that

5. *Ibid* at para 71.
6. *Immigration Appeal Board Act*, SC 1966, c 90, s 3.

was then distributed to each law school in the country.[7] Today, the IRB is one of the world's largest administrative tribunals, employing hundreds of decision-makers across a range of subject areas, and issuing tens of millions of words worth of decisions each year. No human and no court can be expected to synthesize and understand a jurisprudence of this scale: discordant signals get lost in a cacophony of noise.

When everything else is stripped away, this paper is first an empirical analysis of security-based deportation orders. This project began because I was curious, and this inspired my first research question, to learn how many people Canada sought to deport for espionage, terrorism, or other national security reasons. I therefore begin with a high-level discussion of national security deportation law to orient the reader. In the following section, I outline my methodology and report on the study's findings. This part will be of particular interest to readers who are interested in the on-the-ground operation of Canadian national security deportation law. It was during this larger investigation that I developed serious concerns, the exploration of which inspired my second research question, about the consistency of decision-making regarding BNP cases. I turn to these administrative law concerns in my third section before concluding with recommendations.

Perhaps the most useful and practical remedial suggestions emerge, however, from this study's nature. This project was enabled by modern computational research methods, without which it would have been impossible to notice the connections between cases and across tribunals. We may not be able to read millions of words, but perhaps we can use computers to usefully organize legal data so that we can spot and surface inconsistencies and problems in jurisprudence that would otherwise go unnoticed. Ultimately, I encourage Courts and tribunals to supplement their traditional research toolkits with new computational methodologies.

I. *Canadian national security deportation law*

The *Immigration and Refugee Protection Act* ("*IRPA*") explains that all non-Canadians are either admissible or inadmissible.[8] An admissible person may enter and stay in Canada and an inadmissible person may not. If a person already in Canada is inadmissible or becomes inadmissible, they must leave the country. If they do not leave on their own, the Canadian government (represented by the Minister of Public Safety and Emergency Preparedness) can initiate deportation proceedings.[9]

7. Immigration Appeal Board, *Immigration Appeal Cases: selected judgments* (Ottawa, 1969).
8. *Immigration and Refugee Protection Act*, SC 2001, c 27, Part 1, Divisions 3 and 4 [*IRPA*].
9. *Ibid*, ss 4(2), 44.

There are many bases for inadmissibility, ranging from non-compliance with immigration law to criminality to health reasons.[10] Depending on the type of status a non-citizen has (they may, for example, be a permanent resident, a temporary resident, or a protected person) they may be vulnerable to different types of inadmissibility. Regardless, all non-citizens are equally subject to national security inadmissibility law. Section 34 of the *IRPA* explains that all non-citizens are deportable for:

> (a) engaging in an act of espionage that is against Canada or that is contrary to Canada's interests;
>
> (b) engaging in or instigating the subversion by force of any government;
>
> (b.1) engaging in an act of subversion against a democratic government, institution or process as they are understood in Canada;
>
> (c) engaging in terrorism;
>
> (d) being a danger to the security of Canada;
>
> (e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada; or
>
> (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).[11]

The burden of proof for inadmissibility matters is attenuated, at least relative to criminal or civil matters. A person is deportable if evidence establishes that there are "reasonable grounds to believe" that the inadmissibility allegation is true.[12] The Supreme Court of Canada explains that

> this standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information.[13] [citations omitted]

Unlike criminal or civil matters, the *IRPA* authorizes the government to initiate an inadmissibility proceeding for conduct and facts that "have occurred" or "are occurring" but also for conduct and facts that "may occur."[14] Put differently, a person can be removed from Canada if they

10. *Ibid*, Part 1, Division 4.
11. *Ibid*, s 34.
12. *Ibid*, s 33.
13. *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114.
14. *IRPA, supra* note 8, s 33.

are assessed as a future risk to Canadian security even if they have not committed a crime or engaged in identifiable problematic conduct.

Non-citizens who are members of organizations that have, are, or may engage in espionage, subversion, or terrorism are inadmissible. Noting that it is "trite to say that terrorist organizations do not issue membership cards," the Federal Court concluded that the term membership ought to be given an "unrestricted and broad interpretation."[15] That said, the Federal Court reminds adjudicators that it is not appropriate "to classify anyone who has had any dealings with a terrorist organization as a member of the group" and that "[c]onsideration has to be given to the facts of each case including any evidence pointing away from a finding of membership."[16] For example, the Court says that it is usually not appropriate to find children inadmissible because of membership in a terrorist group or hold persons who were coerced to join terrorist groups responsible for their role in the organization.[17]

In some cases, the timing of a person's decision to leave a problematic group may be relevant. Even though the *IRPA* makes people accountable for future acts, Justice Mandamin concluded that it is unfair to make people responsible for all future acts of organizations that they were ever members of:

> If an individual joins an organization that is not engaged in terrorism or has not engaged in terrorism in the past, there cannot be any adverse implication that can be drawn from the individual's membership in the organization. Where an individual becomes a member in an organization, then leaves and the organization subsequently becomes associated with terrorism, the nexus between the individual and terrorism is at best merely that of suspicion, less than the prescribed standard "reason to believe."[18]

This broad approach to targeting members of problematic organizations is different than the mechanism used by Canadian criminal law, which does not make it an offence to be a member of a group but criminalizes some behaviours that might assist terrorist organizations.[19]

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15. *Canada (Minister of Citizenship and Immigration) v Singh*, 1998 CanLII 8281 at para 52 (FC).
16. *Toronto Coalition to Stop the War v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 957 at para 118.
17. For a larger discussion on this point, and an excellent summary of inadmissibility law, see Jamie Chai Yun Liew & Donald Galloway, *Immigration Law*, 2nd ed. (Toronto: Irwin Law, 2015) at 483-487.
18. *El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612 at para 76.
19. *Criminal Code*, RSC 1985, c C-46, ss 83.18 and ff.

1. *Bases for security inadmissibility*

The *IRPA* does not provide precise definitions for each category of inadmissibility. For example, the terms terrorism, security, and espionage are not defined in the statute. This means that the definitions have largely been elaborated by tribunals and courts.

Both immigration and criminal law sets out a high *mens rea*, or mental element, for terrorism, subversion, and espionage. For people to be inadmissible for security reasons, there must be reasonable grounds to believe that they must *intend* to commit the problematic activity. This high *mens rea* excludes from culpability people or groups that know that their acts might have problematic consequences or who act negligently.[20]

a. *Espionage against Canada or against Canadian interests*

Espionage is the intentional "covert or surreptitious act of gathering information."[21] This immigration law definition is broader than the criminal law definition of espionage because it "does not require any element of hostile intent and can be occasioned even when carried out lawfully on behalf of a foreign government or agency."[22]

Not all surreptitious collections of information rise to the level of espionage. Because the statute only renders a person deportable for espionage conducted against Canada or Canadian interests, some collections of information are of no concern to immigration law. Justice Norris warns that adjudicators must not confuse espionage against Canada's interests with espionage against "things Canada is interested in."[23] For example, Canada may be interested in protecting the rights of all journalists around the world, but if a person or organization spies on a journalist in another country, this conduct will not engage the espionage provisions of the *IRPA*.[24]

b. *Subversion of any government by force or subversion of any democratic government by any means*

Non-citizens are inadmissible for subverting any government or subverting democratic governments by force.[25] Subversion has been defined as "accomplishing change by illicit means or for an improper purpose

20. *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 98 [Suresh].
21. *Afanasyev v Canada (Citizenship and Immigration)*, 2012 FC 1270 at para 19 [*Afanasyev*] (citing *Peer v Canada*, 2010 FC 752 at para 3, aff'd 2011 FCA 91).
22. *Afanasyev, supra* note 21.
23. *Weldemariam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 631 at para 51.
24. *Ibid.*
25. *IRPA, supra* note 8, ss 34(1)(b)-(b.1). For a discussion of this provision's history see Jared Porter, "No Rebels Allowed: The Subversion Bar in Canada's Immigration Legislation" (2018) 8:1 Sask L Rev 25.

related to an organization" and as "[a]ny act that is intended to contribute to the process of overthrowing a government."[26] Force also has a broad definition. In *Oremade*, the Federal Court said that force was "coercion or compulsion by violent means, coercion or compulsion by threats to use violent means, [and] reasonably perceived potential for [the] use of coercion by violent means."[27]

Lawful acts taken against governments can, despite their legality, still render a person inadmissible for subversion. As Justice Gauthier of the Federal Court of Appeal explains:

> As noted by the Division, the word "subversion" is not defined in the Act, and there is no universally adopted definition of the term. *The Black's Law Dictionary's* definition to which the Division refers at paragraph 27 (particularly, the words "[t]he act or process of overthrowing…the government") is very much in line with the ordinary meaning of the French text ("*actes visant au renversement d'un gouvernement*"). *Although in certain contexts, the word "subversion" may well be understood to refer to illicit acts or acts done for an improper purpose, the words used in the French text do not convey any such connotation. I am satisfied that the shared meaning of the two texts does not ordinarily include any reference to the legality or legitimacy of such acts.*[28] [emphasis added]

Accordingly, people who join lawful campaigns against despotic governments can, for example, be found inadmissible.

c. *Terrorism*

In *Suresh*, the Supreme Court of Canada defined terrorism as:

> [a]ny…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.[29]

This immigration law definition of terrorism is potentially different from the definition of terrorism set out in the *Criminal Code*. In the *Criminal Code*, terrorism criminal offences are tethered to definitions of "terrorist groups" and "terrorist activity." This means that terrorist offences in the *Criminal Code* and terrorism in immigration law may differ in at least two different ways. First, Canadian law does not criminalize *membership* in a

26. *Suleyman v Canada (Minister of Citizenship and Immigration)*, 2008 FC 780 at para 63; *Shandi (Re)*, [1991] FCJ no 1319, 17 Imm LR (2d) 54.
27. *Oremade v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1077 at para 27.
28. *Najafi v Canada (Public Safety and Emergency Preparedness)*, 2014 FCA 262 at para 65.
29. *Suresh, supra* note 20 at para 98.

terrorist organization. While non-citizens face immigration consequences for belonging to problematic groups, a person can only be convicted of a terrorist offence if they intentionally assist a terrorist group. Second, "terrorist activity" in the *Criminal Code* may have a broader reach than the immigration law definition. For example, "terrorist activity" includes "serious interference with or serious disruption of an essential service, facility or system" except for interference that is "a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred [in other parts of the definition]."[30] This idea that "serious interference" could amount to terrorism is, at least in some readings, beyond that contemplated in the *Suresh* definitions.

Primarily for this reason, Justice Norris reminds adjudicators to attend to the differences between the two bodies of law: "[i]mporting criminal law concepts like 'terrorist activity' into the immigration context…risks expanding the reach of…the *IRPA* beyond what Parliament intended."[31] Importantly, however, the case law is ambiguous and it may be a mistake to overstate the differences between the definitions. Justice Gagné, writing after Justice Norris, explains that "I do not see a significant difference between these two definitions. In my view, the first definition is not broader or narrower than the other; the *Criminal Code* definition is simply more detailed while the *Suresh* definition is more general."[32]

d. *Residual grounds*

The *IRPA* makes people who are "a danger to the security of Canada" and people who engage "in acts of violence that would or might endanger the lives or safety of persons in Canada" inadmissible.[33] There is considerable uncertainty about the meaning of these sections. In 2020, the Federal Court of Canada observed that, at least until very recently, there was "very little jurisprudence considering the scope of" these residual grounds.[34] It appears that this is because the Canadian government made very few allegations under these sections.

Regarding the danger to the security of Canada provision, the Supreme Court of Canada has said in obiter that the scope of the provision reaches past security considerations. To decide whether it would be "detrimental to the national interest, the Minister must consider more than just national

30. *Criminal Code, supra* note 19, s 83.01(1)(b)(ii)(E).
31. *Rana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1080 at para 49 [*Rana*].
32. *Saleheen v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 145 at para 38 [*Saleheen*].
33. *IRPA, supra* note 8, ss 34(1)(d)-(c).
34. *Dleiow v Canada (Citizenship and Immigration)*, 2020 FC 59 at para 5 [*Dleiow*].

security and whether the applicant is a danger to the public or to the safety of any person."[35]

In 2022, the Supreme Court of Canada heard arguments regarding the specific residual section that allows for the deportation of persons who engage in "acts of violence that…might endanger the lives or safety of persons in Canada."[36] At issue is whether these sections apply to all non-citizens who engage in dangerous conduct or whether the relevant "acts of violence" must have some nexus to Canadian security. In 2023, the Court found that the sections had to be interpreted narrowly, requiring a connection to a concern regarding Canadian security.[37]

2. *Adjudication*

The *IRPA* sets out two procedural routes for Canadian immigration authorities to seek a finding of inadmissibility and to obtain a removal order. First, by bringing a case before the Immigration Division (the "ID" or the "Division") of the IRB or, second, by asking the Federal Court of Canada to uphold a "security certificate" as reasonable.

This paper is only concerned with the first route and the reason for this interest is simple: the security certificate regime is a major, complex, but seldom used procedure. Very briefly, the security certificate process is designed to allow the government to obtain a removal order without disclosing all the evidence it relies upon to the potential deportee while installing several mechanisms to nonetheless protect the deportee's right to a fair process.[38] Since 1991, Canadian authorities have issued certificates 27 times.[39] No certificates were issued during the period under study.

While it is beyond the scope of this article to explain why the government prefers one mechanism over another, I pause to note that the jurisprudence and scholarly literature regarding the security certificate regime is massive.[40] Many security certificate cases go on for years and require the expenditure of significant state resources. In contrast, most cases brought before the Division resolve quickly, often in a single sitting, and only sometimes are the subject of an appeal or judicial review. Security certificates are expensive, challenging, and the subject of significant public

35. *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 82.
36. *IRPA, supra* note 8, s 34(e).
37. *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 [*Mason*].
38. *IRPA*, *supra* note 8, Part 1, Division 9.
39. Public Safety Canada, "Security Certificates" (last modified 1 December 2015), online: <publicsafety.gc.ca/cnt/ntnl-scrt/cntr-trrrsm/scrt-crtfcts-en.aspx> [perma.cc/39G7-RCEK].
40. See e.g. *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9.

scrutiny, while proceedings before the Division are comparatively cheap, quick, and quiet.

There is a practical reason that explains why this is the case. As we shall see, the subject of almost every national security deportation case is a refugee claimant in Canada. When a person claims protection in Canada, they are required to self-disclose facts and evidence to substantiate their claims.[41] Often in security cases, the evidence that the person discloses forms the basis of the government's case against them. If a person, for example, claims that they are being persecuted by members of a group that they used to belong to, their own admission that they *were* a member of the group might establish an inadmissibility case. Security certificate proceedings make sense when Canada believes it is necessary to protect the means, methods, and evidence it obtains through covert channels, there is no such imperative when a person willingly turns over the evidence that will be used against them.

a. *Adjudication before the Immigration Division*

Every security inadmissibility case brought before the Division begins the same way. Section 44 of the *IRPA* allows immigration officers who are of the "opinion that a permanent resident or a foreign national who is in Canada is inadmissible" to write a "report setting out the relevant facts."[42] That report is referred to a delegate of the Minister of Public Safety and Emergency Preparedness who, if they determine that the report is well-founded, may refer the matter, along with all relevant evidence in the Minister's possession, to the Division for adjudication.[43]

The decision to refer may have collateral consequences for the prospective deportee. If the person has a pending claim for refugee protection, that application will be suspended pending the resolution of the inadmissibility case.[44] If immigration officials believe that the person poses a danger to the public or is unlikely to attend their own inadmissibility hearing, they may arrest the person and initiate immigration detention proceedings to hold the person in custody pending the resolution of their deportation matter.[45]

Once the Division receives the report, it must hold a hearing where the immigration authorities begin by presenting their evidence and calling any witnesses. The prospective deportee may be represented by counsel, lead

41. *Refugee Protection Division Rules*, SOR/2012-256, ss 6-9, 11.
42. *IRPA, supra* note 8, s 44.
43. *Ibid*; *Immigration Division Rules*, SOR/2002-229, s 3.
44. *IRPA, supra* note 8, s 103.
45. *Ibid*, ss 55-58.

their own evidence, and make representations explaining why the Division ought not to accept the Minister's case.[46] People subject to inadmissibility proceedings do not have a right to silence and can be required to testify against their own interests.[47] If the Division determines that there are reasonable grounds to believe that the report's allegations are established with evidence, it must issue a deportation order.[48] If the Division finds that the report is not well-founded, it issues a "favourable decision."[49]

b. *Appeals before the Immigration Appeal Division*

Deportees and immigration officials have asymmetric access to appeal rights. If the Division issues a favourable decision, the Minister of Public Safety may appeal to the Immigration Appeal Division (the "IAD"), another specialized section of the IRB.[50] The Minister's appeal rights are broad, and the IAD can allow the appeal, dismiss it, or substitute its own decision if it finds that the original decision was "wrong in law or fact or mixed law and fact" or made in breach of the duty to be fair.[51] In contrast, deportees may not appeal to the IAD.[52]

c. *Judicial review before the Federal Court of Canada*

If a deportee disagrees with the decision of the Division, or the deportee or the immigration officials disagree with how the IAD resolved its appeal, they may apply to judicially review the decision before the Federal Court.[53] A judicial review is not an appeal, but an administrative law process. Reviews are adjudicated with reference to the norms and principles of administrative law. Judges may not allow a judicial review simply because they think the underlying decision was wrongly decided, instead it is their remit to assess whether the decision was reached through a fair process and whether the decision is reasonable. The Supreme Court of Canada explains that a reasonableness review requires judges to determine whether there "is a failure of rationality internal to the reasoning process" in the decision or if the decision is "untenable in light of the relevant factual and legal constraints that bear on it."[54]

Neither immigration officials nor deportees have an automatic right to judicial review. The *IRPA* requires parties to first apply to the Court for

46. *Ibid*, ss 162-167.
47. *Bruzzese v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1119 at paras 17-18.
48. *IRPA, supra* note 8, s 45.
49. *Immigration Division Rules, supra* note 43, s 7.
50. *IRPA, supra* note 8, s 63(5).
51. *Ibid*, s 67(1)(a)-(b).
52. *Ibid*, s 64(1).
53. *Ibid*, s 72.
54. *Vavilov, supra* note 3 at para 101.

leave to bring an application. The purpose of the leave requirement is to screen out frivolous applications for judicial review. Applications are to be granted when there the case discloses "a fairly arguable case."[55]

Parties that disagree with a leave decision have, except in the rarest of circumstances, no right to further review or appeal.[56] Parties that disagree with a final judicial review decision of the Federal Court can only appeal that decision if the judge that decided the case certifies that the case raises "a question of general importance."[57] If the judge does certify a question, parties are authorized to make an appeal to the Federal Court of Appeal.

3. *Relief available for inadmissible non-citizens*

Once the Division (or the IAD on a government-initiated appeal) finds a person inadmissible, a removal order is made and it becomes immediately enforceable.[58] If the deportee has permanent or temporary status, it is immediately revoked and, if a person is in Canada seeking refugee protection, their claim is automatically terminated.[59] The law says the person "must leave Canada immediately."[60] If they do not, the government must enforce the order "as soon as possible."[61]

People who wish to nonetheless stay in Canada have two procedural options available to them. First, the *IRPA* allows deportees to apply directly to the Minister of Public Safety and Emergency Preparedness for a declaration that the matters at issue do not, despite the issuance of a removal order, constitute inadmissibility. The Minister may only issue this declaration if they are satisfied that to do so would not be "contrary to the national interest."[62]

Second, Canadian and international law generally forbids the deportation of persons to places where they face risk.[63] If a refugee is found inadmissible for security reasons, their case is referred to the Minister who, after hearing from the deportee, determines whether "the person

55. *Bains v Canada (Minister of Employment and Immigration)*, [1990] 47 Admin LR 317, 109 NR 239 (FCA).
56. *Canada (Citizenship and Immigration) v Tennant*, 2018 FCA 132, Stratas J (the Federal Court of Appeal can hear some cases in the absence of a certified question if the case discloses "a flaw that is 'fundamental,' strikes at 'the very root' of the judgment or 'the very ability' of the Court to hear the case, in some circumstances has 'substantial particularity,' and raises 'serious concerns' regarding the rule of law" at para 18).
57. *IRPA, supra* note 8, s 74(d).
58. *Ibid*, ss 45(d), 66, 69.
59. *Ibid*, ss 46(c), 103(1)(a).
60. *Ibid*, s 48.
61. *Ibid.*
62. *Ibid*, s 42.1(1).
63. *Ibid,* ss 96, 97, 115; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGA, 39th Sess, UN Doc A/RES/39/51 (1984) GA Res 39/46.

should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada."[64] If this risk-balancing process resolves in favour of the refugee, their removal order is stayed.

National security deportees who have not been recognized as refugees or protected persons are entitled to advance a claim that they will be killed, seriously harmed, or tortured if deported. This claim is advanced immediately prior to their deportation through a mechanism called the pre-removal risk assessment application ("PRRA"). If their claim is assessed positively, it is referred to the risk-balancing process described above.[65]

II. *Empirical study of security deportation cases (2018–2020)*

Two research questions inspired this study. First, I was interested in continuing an investigation begun by Dr. Angus Grant. Dr. Grant's doctoral dissertation examined all national security inadmissibility cases decided by the division between 2002 and 2012. This major longitudinal study found: (1) the number of terrorism deportation cases steadily increased during the period under study; (2) that terrorism allegations were usually made against refugee claimants with citizenships in the Global South; and (3) that terrorism allegations almost never related to in-Canada conduct.[66] I was curious to determine whether, almost a decade later, these trends continued.

Second, immigration law practitioners were suggesting that the Federal Court was deciding BNP terrorism cases in an unpredictable and problematic manner.[67] Sometime in or around 2015, immigration officials started to regularly allege that members of the BNP, a massive Bangladeshi political party, were all inadmissible because the party had a history of using terror-based tactics.[68] Eventually, some of these cases reached the Federal Court on judicial review and, on its face, it did appear that something was amiss.

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64. *IRPA, supra* note 8, s 115.
65. *Ibid*, ss 112-115.
66. Angus Grant, *Confronting (In)Security: Forging Legitimate Approaches to Security and Exclusion in Migration Law* (PhD dissertation, Osgoode Hall Law School, 2016), online: <digitalcommons.osgoode.yorku.ca/phd/24/> [perma.cc/7RG7-YAKF].
67. For examples of discussions on immigration law blogs regarding this issue see Steven Meurrens, "The Bangladesh Nationalist Party" (13 August 2019) online (blog): <meurrensonimmigration.com/the-bangladesh-nationalist-party/> [perma.cc/HKP5-FUJS]; Raj Sharma, "The Bangladesh National Party (BNP) is (Not) a Terrorist Organization" (18 April 2017) online (blog): <sshlaw.ca/the-bangladesh-national-party-bnp-is-not-a-terrorist-organization/> [perma.cc/F72N-ML2F].
68. The earliest reference to a BNP-related terrorism proceeding in public jurisprudential databases indicates that an s 44(1) report was signed on January 23, 2015, alleging the applicant was inadmissible for their membership in the BNP (see *Chowdhury v Canada (Citizenship and Immigration)*, 2017 FC 189 at para 4 [*Chowdhury*].

In 2017 and 2018, the Court decided eight BNP-related terrorism cases, most of which concerned deportation decisions made by the Division. The Court upheld decisions concluding that the BNP engaged in terrorism in five cases.[69] There were three cases where the Court remitted the decision back as unreasonable.[70] In one of those three cases, Justice Mosley explained his rationale for finding the decision unreasonable this way:

> I have considerable difficulty with the notion that a general strike called by a political party in an effort to force the party in power to take steps such as proroguing Parliament or convening by-elections, falls within the "essence of what the world understands by 'terrorism'". It is not an overstatement to suggest, as the Applicant has in these proceedings, that the Respondent's interpretation of the statute could capture political activities which, if carried out in Canada, would be protected under s 2 of the *Canadian Charter of Rights and Freedoms*, absent an intention to use violence to achieve the political ends.[71]

For the most part, however, the judges of the Court largely insisted that there was nothing improper about the apparently conflicting outcomes. As discussed above, the institution of judicial review tolerates some discord because judges are not asked to determine whether each case was rightly decided, but whether each case's decision comports with the requirements of reasonableness. If different cases featured different facts or different reasoning chains, it would make sense for different judges to assess different cases differently. And to be sure, in their decisions on BNP cases, this is how the judges explained any apparent discrepancies:

- **Justice Gagné**: "[E]ach case must be decided on its particular record and on the findings of fact made in the impugned decision."[72]
- **Justice MacDonald**: "Upon closer examination of these decisions however, it is clear that they are made in relation to particular findings and the particular evidentiary record before the Court. They are not broad proclamations on the status of BNP that bind future decisions."[73]

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69. *Gazi v Canada (Citizenship and Immigration)*, 2017 FC 94; *SA v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 494; *Kamal v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 480; *Alam v Canada (Citizenship and Immigration)*, 2018 FC 922 [*Alam*]; *Intisar v Canada (Citizenship and Immigration)*, 2018 FC 1128.
70. *Chowdhury, supra* note 68; *AK v Canada (Citizenship and Immigration)*, 2018 FC 236 [*AK*]; *Rana, supra* note 31.
71. *AK, supra* note 70 at 41.
72. *Saleheen, supra* note 32 at para 26.
73. *Rahman v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 807 at para 33.

- **Justice Fothergill**: "[E]very case is determined based on the record before the tribunal. This accounts for the different outcomes."[74]
- **Justice Norris**: "While perhaps regrettable, it is inherent in the nature of judicial review under the reasonableness standard that perfect consistency across cases on questions of mixed fact and law will not always be achieved."[75]
- **Justice Grammond**: "These different outcomes may perhaps be explained by the different reasoning adopted by the ID in each case or by differences in the record before the ID."[76]

These points would be doctrinally sound, if it was indeed true that the underlying records and findings were dissimilar. I decided to investigate the extent to which they were.

My interest was also motivated by earlier scholarship about inconsistent, and potentially unfair adjudication before the Federal Court. In a pair of studies, Professor Sean Rehaag quantitatively analyzed tens of thousands of Federal Court leave decisions and found wide discrepancies between different judges' leave grant rates: some judges frequently granted leave, some rarely did. This led Professor Rehaag to conclude that at least some outcomes before the Court turned on the "luck of the draw."[77]

Not everyone was persuaded by this type of analysis. At least one judge disputed the value of this sort of quantitative methodology. Justice Zinn, in a decision where he was asked to consider a similar study by Professor Rehaag regarding refugee decision-making, dismissed the value of quantitative studies. While he acknowledged that Professor Rehaag's studies might "raise an eyebrow," he said that the judiciary and the public should approach this sort of research cautiously, because:

> the informed reasonable person, thinking the matter through, would demand a statistical analysis of this data by an expert based upon and *having taken into consideration all of the various factors and circumstances that are unique to and impact on determinations of refugee claims before he or she would think it more likely than not that the decision-maker would not render a fair decision.*[78] [emphasis added]

74. *Alam, supra* note 69 at para 45.
75. *Rana, supra* note 31 at para 7.
76. *MN v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 796 at para. 9 [*MN*].
77. See Sean Rehaag, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38:1 Queen's LJ 1; Sean Rehaag, "Judicial Review of Refugee Determinations (II): Revisiting the Luck of the Draw" (2019) 45:1 Queen's LJ 1.
78. *Turoczi v. Canada (Citizenship and Immigration)*, 2012 FC 1423 at para 15.

To anticipate and answer Justice Zinn's concern, I decided that my investigation ought to supplement the quantitative with the qualitative. For this reason, I elected to review every case, and every decision, in detail.

1. *Methodology*

This study has three stages, (1) data collection through access to information requests, (2) high-level analysis of the data using a customized coding program, and (3) a qualitative review of the cases. First, using access to information law, I obtained every national security inadmissibility decision issued by the Division between 1 January 2018, and 15 July 2020. I chose this time range because of its currency and because I wanted to work with a manageable dataset. I assumed that two years would give me good coverage while not inundating me with data. I extended the period slightly beyond the two-year mark to see whether there was any meaningful impact on tribunal operations because of COVID-19, given that I knew some tribunals paused their adjudication during period of the pandemic. Second, using a large database of Federal Court of Canada dockets and a customized computer program, I traced the outcomes of each case as it moved, via judicial review, from the Division to the Federal Court. Third, once I associated each case before the Division with its counterpart file (if any) at the Federal Court, I obtained and reviewed the full Federal Court file.

a. *Access to information request*

The *Access to Information Act* gives all Canadian citizens and permanent residents a general right, subject to specific statutory qualifications, to access and review records under the control of Canadian federal institutions.[79] One such qualification precludes bodies from releasing private information. Because the IRB is a public adjudicative body, its proceedings and decisions are presumptively public and accessible, with one major caveat: when a case concerns a refugee or refugee claimant, the proceeding is held in camera to protect the person from malignant actors.[80] To ensure that protected information is not inappropriately released, analysts at the IRB review each request and, if necessary, apply redactions. For this reason, it can take some time for the IRB or any governmental body to process a request.

In August 2020, I asked the IRB to forward me all decisions associated with security and, for a separate study, war crimes and crimes against humanity inadmissibility cases, finalized by the Division between 1

79. *Access to Information Act*, RSC 1985, c A-1, s 4.
80. *IRPA, supra* note 8, s 166.

January 2018 and 15 July 2020. In March 2021, I received 3,628 pages of disclosure from the IRB.[81] Once I received the package, I read each decision and coded it for the name of the decision maker, the date of the decision, the prospective deportee's name, their counsel's name (if any), their country of citizenship, their reason for being in Canada, the allegation made against them, and the outcome.

As I was reviewing the dataset, I became concerned for two reasons that it was incomplete. First, the IRB publishes high-level statistical information about its cases on its website. This data suggested that 123 national security deportation cases were finalized in 2018 and that 97 cases were finalized in 2019. In contrast, the disclosure package provided included 58 decisions for 2018 and 44 for 2019. This suggested that there was a large body of jurisprudence the IRB had not disclosed. I made inquiries with the IRB and was advised that the website data included cases that were "withdrawn or [where] the individual failed to appear."[82] This addressed my concern as my study is focused on cases where a final decision was issued.

Second, as I reviewed each decision, I checked for cross-references in CanLII, Canada's main public repository for case law. During my examination, I found two Federal Court decisions that concerned national security cases decided by the Division during the period under study that had not been disclosed.[83] I made further inquiries and learned that the IRB disclosed all cases marked in its internal database as "closed." It appears that because the Federal Court returned the matters for re-adjudication during the period under study, the IRB's database re-coded these decisions as "open." I understood that these were the only two cases that were not disclosed because of this feature of the IRB's database. With answers to these concerns, I resumed my analysis, confident that the dataset is, although not fully complete, all but complete.

b. *Development of a Python program to analyze Federal Court of Canada dockets*

Until recently, it was not possible to comprehensively associate first-instance IRB cases with the associated (if any) judicial review file at the Federal Court. The Court does not publish its decisions on leave applications. This

81. Simon Wallace, "The New Canadian Law of Refugee Exclusion: An Empirical Analysis of International Criminal Law Deportation Orders, January 2018 to July 2020" (2022) 22:4 Intl Crim L Rev 721.

82. Jessica Arrechi, Immigration and Refugee Board analyst, "A-2020-00383" (28 May 2021) via email [communicated to author].

83. *Dleiow*, supra note 34; *SR v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1118.

means that researchers can only determine how a leave application was disposed of if they already know the court file number or party name, which can be used to query the Court's docket. This information is often difficult to obtain because many of the IRB's decisions concern refugee claimants. When these decisions are disclosed to researchers, names and identifying information are, as discussed above, redacted from the decision, making it impossible to look up how an individual case was treated.

As I analyzed the decisions, however, I observed that the Division's internal case file number was properly never redacted from decisions. I also knew from experience that when litigants file applications for leave to judicially review a decision of the Division, they are required to provide that file number to the court.

During Professor Rehaag's research into Federal Court decision-making, he developed his own massive database of information extracted from the Court's official dockets. I approached Professor Rehaag about accessing this database of dockets that he reconstructed. Using a customized program coded in the Python programming language, the computer searched the database of every Federal Court docket to find all cases with a similar internal Division file from one of the cases under study here.[84] This customized program was necessary because the metadata required was neither on CanLII or another public facing database, and because the program needed to search the textual data of the dockets. Because the Federal Court supervises many different tribunals with thousands of decisions, there was some overlap between file naming conventions. I manually reviewed each docket to isolate cases that concerned judicial reviews against Division matters.

In this study, using a minimal amount of case metadata and a small computer program, a cross-adjudicative database of cases was created to enable a previously impossible type of qualitative analysis. It is worth pausing to consider the significance of this methodological innovation. A feature of Canadian federalism and the separation between adjudicative institutions means that each department, each ministry, each court, and each tribunal maintains its own separate databases, often concerning the same people or the same matter. Because information is kept in silos, it is difficult for researchers to reconstruct a full picture.

84. Python is an open-source programming language (see "Python," (date last accessed 25 November 2023), online: <www.python.org> [perma.cc/C55D-X7XK].

c. *Reviewing each Federal Court of Canada case file*

Finally, I sought access to each Federal Court of Canada case file. In principle, all files in the Federal Court are accessible to the public.[85] Unfortunately, it took considerable time to access the files discovered by the Python program because COVID-19 restrictions prevented me from attending Court facilities until the Fall of 2021. In the meantime, Court staff were kind enough to scan and digitally forward several small files for my review.

2. *High-level analysis of the dataset*

Between January 2018 and July 2020, the Division adjudicated 128 national security inadmissibility allegations.[86] Some cases featured multiple allegations, explaining why the number of allegations (128) exceeds the number of cases (125). The Division found the person inadmissible and issued a removal order in seventy-two per cent of the matters. As Figure 1 shows, most allegations turned on a person's alleged membership in a group that engaged in espionage, terrorism, or subversion.

Figure 1. National security inadmissibility cases, by allegation

	Deportation order	Favourable decision	Total
Espionage	0	1	1
Subversion by force	3	0	3
Democratic gov't subversion	0	0	0
Terrorism	0	0	0
Being a danger to the security of Canada	1	0	1
Engaging in acts of violence that would or might endanger people in Canada	0	1	1
Membership in a problematic organization	89	33	122

85. Federal Court, "Policy on Public and Media Access" (last modified 29 March 2023), online: <www.fct-cf.gc.ca/en/pages/media/policy-on-public-and-media-access> [perma.cc/NM6U-X2TS].

86. This is the number of national security deportation cases in the dataset disclosed to me. It does not include the two additional cases I discovered in public jurisprudential databases.

a. *The Immigration Division is Canada's busiest national security tribunal*

The Division is Canada's busiest national security law tribunal and it has been getting busier. Dr. Grant's earlier study of security-based deportation orders found that the number of cases increased from two in 2002 to 27 in 2012. [87] This study finds that the pace at which Canada has brought migration-related terrorism cases has accelerated further, finding that 59, 44, and 22 cases were finalized respectively in 2018, 2019, and the first half of 2020. This volume likely makes the Division the busiest national security tribunal in Canada. Indeed, the Division finalized more terrorism cases (59) in 2018 than Canadian criminal courts did between 2001 and 2018 (54).[88]

b. *Most national security cases were brought against asylum seekers from the Global South*

Most national security cases involved refugees or refugee claimants. In 110 cases, the person's identity was redacted from the decision. The fact of an in camera hearing is usually a good indicator that the person has a claim for protection or an appeal outstanding.[89] In a further eight cases, there were indications that the person was granted protection before Canada made deportation allegations. This means that ninety-four per cent of the cases concerned people who claimed that they would face persecution, torture, death, or cruel and unusual treatment if deported from Canada.

As Figure 2 shows, only a small percentage of persons subject to national security inadmissibility allegations had citizenships in countries from the Global North.

87. Grant, *supra* note 66 at 136.

88. Michael Nesbitt, "An Empirical Study of Terrorism Charges and Terrorism Trials in Canada between September 2001 and September 2018" (2019) 67:1/2 Crim LQ 95.

89. Hearings are presumptively conducted in public unless a person has an outstanding claim for protection pending or there are reasons to believe that a person could be endangered, there is a risk that a public security matter will be discussed or holding the hearing in public would prejudice the fairness of the proceeding (see *IRPA, supra* note 8, s 166).

Figure 2. Citizenships of persons subject to national security inadmissibility allegations

Country of citizenship	Deportation ordered	Favourable decision	Total
Bangladesh	55	19	74
Ethiopia	8		8
Iraq	4	1	5
Côte d'Ivoire	5		5
Burundi	4		4
Nigeria		4	4
Zimbabwe	1	2	3
El Salvador	2	1	3
India	1	1	2
Chad	1		1
Congo/Germany	1		1
Egypt	1		1
Ghana	1		1
Jordan	1		1
Sudan	1		1
Turkey	1		1
UK	1		1
USA	1		1
Venezuela	1		1
Colombia		1	1
Eritrea		1	1
Mali		1	1
Russia/USA		1	1
Saint Lucia		1	1
Somalia		1	1
Yemen		1	1

The cases concerning nationals of the United Kingdom and the United States both involved members of far-right racist groups. The case of a Russian-American dual-national concerned a woman accused of engaging in espionage.

There were only two cases where the government alleged problematic in-Canada conduct. One concerned a person from St. Lucia whose criminal charges associated with a shooting in Canada were stayed (a deportation order was not issued).[90] The other concerned a citizen of Jordan who used social media to encourage people to engage in terrorism against Canada (a deportation order was issued). Both individuals were long-term residents of Canada.

Not including the BNP (discussed below), the groups Canada most often made membership allegations against were the *Fédération estudiantine et scolaire de Côte d'Ivoire*, with five terrorism cases against nationals from the Ivory Coast, the Ethiopian Information Network Security Agency, with four espionage cases for Ethiopian nationals who allegedly worked for the Agency, and Ginbot 7, with three subversion by force cases against Ethiopian nationals.

A surprising class of allegations concerned the Iraqi KDP or Peshmerga. In four cases, people were ordered deported for belonging to groups that helped the allied American forces overturn Saddam Hussein's government. As one member of the Division reasoned, helping American forces topple the Iraqi government made members of these groups inadmissible because they engaged in subversion by force against a government. He explained: "[t]he Kurdish Peshmerga assisted by the US military were finally able to defeat the Iraqi military and topple its oppressive leadership."[91] It appears that no American soldiers were ordered deported from Canada for their participation in the same conflict.

III. *Case study of deportation cases concerning members of the Bangladesh National Party*

The most notable finding of this project is that most national security cases during the period under study turned on the same allegation: the deportee was a member of the BNP and the BNP engaged in terrorism. Of the 74 cases involving Bangladeshi nationals, Canada alleged that the person was a member of the BNP or a BNP-affiliated group 73 times.

In one other case concerning a Bangladeshi national, Canada alleged that the person was a member of the Awami League, the current governing party in Bangladesh, and that that party also engages or engaged in terrorism. Ultimately, the Division determined that the person in that case was not, in fact, a member of the party.

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90. This case has been the subject of significant subsequent litigation, see *Mason, supra* note 37.

91. Immigration and Refugee Board (Immigration Division), B8-00663 (6 February 2019), Rempel Member [on file with author].

1. *Evidentiary basis for the BNP terrorism allegation*

Bangladesh is a populous country located in the north-east of India. It is a predominantly Muslim nation. It was part of colonial India until 1947 when the country was partitioned. Modern Bangladesh was, in British India, part of the province of Bengal. The western part of the province had a Hindu majority and became part of India. The eastern part of the province, with its Muslim majority, became part of Pakistan. The new Pakistani state was not territorially contiguous. Even though East Pakistan was more populous, political, and economic power was centralized in West Pakistan. During the 1960s, the Bengali Awami League led a political movement that advocated for increased autonomy and independence for East Pakistan. In 1971, the Pakistan Army launched a large operation to suppress Bengali independence. In March 1971, the leader of the Awami League declared Bangladesh's independence. A war for liberation lasted until December 1971, when the Pakistani forces in Bangladesh surrendered.

The BNP was formed in 1978 and quickly became a bitter rival of the Awami League. Between 1975 and 1990, Bangladesh was under military government rule. In 1991, the country held its first democratic elections and the BNP formed government. The Awami League boycotted the next election, complaining that it was not fairly administered. To protest the election, the League called for a hartal, or a general strike, that paralyzed the country. Under pressure, the BNP agreed to a constitutional amendment that required the transfer of political power to a caretaker government before and during an election. In 1996, an election supervised by a caretaker government was held and the Awami League won. In 2001, after another election supervised by a caretaker government, the BNP was re-elected. In 2008, the Awami League returned to power.[92]

In 2011, the Awami League abolished the caretaker government mechanism. Led by the BNP, opposition parties protested the move. They called for general strikes that peaked in 2013 and 2014.[93] Some of these protests turned violent. In one case, Justice Norris summarized the evidence about the general strikes this way:

92. See generally Central Intelligence Agency, "Bangladesh" (last updated 16 November 2023), online: <cia.gov/the-world-factbook/countries/uropaesh/> [perma.cc/5W98-JZSW]; Australian Government, *DFAT Country Information Report: Bangladesh* (Department of Foreign Affairs and Trade, 2019), online (pdf): <dfat.gov.au/sites/default/files/country-information-report-bangladesh.pdf> [perma.cc/SES7-J7AQ].

93. European Asylum Support Office, *Country of Origin Information Report: Bangladesh Country Overview* (December 2017) at 29-30, online: <coi.euaa.europa.eu/administration/easo/Plib/Bangladesh_Country_Overview_December_2017.pdf> [perma.cc/SK8C-J7TS].

> The strikes and blockades had a significant impact on the economy. Transport links to Dhaka were blocked and almost all travel outside the major cities was prevented. *Hartals* and traffic blockades frequently turned violent, with clashes between supporters of the [Awami League] on the one hand and supporters of the BNP and other opposition parties on the other. Numerous instances of opposition party members and activists throwing petrol bombs at trucks, buses, and other vehicles that defied traffic blockades were documented. As well, attackers in several locations reportedly vandalized homes and shops owned by members of Bangladesh's Hindu community before and after the election. Opposition leaders denied their parties were involved in the violence, blaming government agents instead.[94]

After the opposition was defeated, it appears that many BNP members fled Bangladesh. The United States Department of State, Human Rights Watch, and Amnesty International report that the Awami League targets and persecutes BNP members.[95] Many individuals claimed protection in Canada.

Sometime in or around early 2015, the Canadian government started to make national security deportation allegations against BNP members.[96] Before the Division, the government said that the BNP's involvement in the hartals amounted to terrorism. In the words of one adjudicator:

> The BNP intentionally called for hartals to effect political change, however, with the passage of time, hartals have become increasingly violent leading to deaths, property damage and impacting the economy of Bangladesh; hartals resulted in 50 percent of all violence; at a minimum, the BNP was reckless and wilfully blind with regard to the consequences of continuously calling for hartals to achieve their political ends, aware of the ensuing violence that would inevitably put in danger the safety of the civilian population.[97]

For this reason, Canadian officials say that the BNP engages in terrorism and that, therefore, all the party's members are inadmissible to Canada.

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94. *Rana, supra* note 31 at para 14.

95. See United States of America, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices for 2020: Bangladesh* (Department of State, 2021), online: <state.gov/reports/2020-country-reports-on-human-rights-practices/Bangladesh> [perma.cc/A7Q8-LU4Z]; Human Rights Watch, "Bangladesh: Events of 2019" (2020), online: <hrw.org/world-report/2020/country-chapters/bangladesh> [perma.cc/LS8F-CWTJ]; Amnesty International, "Bangladesh. Human Rights in Asia-Pacific: Review of 2019" (30 January 2020), online: <amnesty.org/en/latest/news/2020/01/2019-in-review-bangladesh/> [perma.cc/P7R2-JXXW].

96. *Chowdhury, supra* note 68.

97. Immigration and Refugee Board (Immigration Division), B6-00407 (23 July 2018), Tordorf Member [on file with author]

2. Adjudication before the Immigration Division

Most of the national security allegations made during the period under study were made against members of the BNP. It appears that in every case, Canadian officials brought the case after the person self-disclosed information about their memberships and associations in a claim for refugee protection. The Division ordered the deportation of 55 of the 73 (seventy-five per cent) persons alleged to be members of the BNP.

Figure 3. BNP terrorism cases by site of adjudication

	Montreal	Toronto	Vancouver	Total
Deportation order	46	7	2	55
Favourable decision	11	3	4	18

Of the 18 cases where a favourable decision was issued, the Division rejected the government's request for a deportation order because it found that:

1. The Minister was unable to prove that the BNP engaged in terrorism (six cases);
2. The person concerned was not a member of the BNP (six cases); or,
3. The person left the BNP before it was possible to believe that the party would engage in acts of terrorism (six cases).

There were regional dimensions to the type of favourable decisions adjudicators made. Some adjudicators in Toronto and Vancouver reasoned that Canada did not lead sufficiently compelling evidence to prove that the BNP engaged in terrorism and, therefore, that Canada could not discharge its burden of proof. That argument was, during the period under study, never successful in Montreal.

Adjudicators also disagreed somewhat on the "no temporality" defence. A person can defend against a membership inadmissibility allegation by proving that they left the organization before it embraced terrorism. In each case where a person successfully advanced this defence, they left the party before 2012. However, there were two cases where adjudicators concluded that deportees were inadmissible even though they left the party in 2002 and 2011, respectively.

a. *Inconsistent outcomes and reasons between adjudicators*

Seventeen adjudicators made BNP-terrorism decisions. Four members, all of whom were in Montreal, decided three or more cases. No adjudicator changed their mind on a substantive issue during the period under study. The major debate amongst adjudicators was whether the BNP engaged

in terrorism. In the end, seventy-one per cent of the adjudicators who considered at least one BNP case found that the party engaged in terrorism while the remaining twenty-nine per cent of their colleagues disagreed. Put differently, even though some members heard many more cases than their colleagues because no member changed their mind on the core issue of whether the BNP engages in terrorism, we can see that there was a substantive split amongst adjudicators.

Figure 4. BNP cases by adjudicator and outcome

	Location	Deportation order	Evidence does not prove that BNP engaged in terrorism	No temporality	No membership	Total
Morin	Mtl	19			2	21
Milo	Mtl	10		1	2	13
Thibault	Mtl	10		2		12
Tordorf	Mtl	7		2	2	11
Seyan	Tor	2				2
Ko	Van	1		1		2
Kohler	Tor		2			2
Adamidis	Tor	1				1
Beecham	Tor	1				1
Cook	Van	1				1
Del Duca	Tor	1				1
Heyes	Tor	1				1
Seifart	Tor	1				1
Currie	Tor		1			1
McPhalen	Van		1			1
Rempel	Van		1			1
Tessler	Van		1			1

Adjudicators knew that they sometimes reached different conclusions than their colleagues regarding BNP cases. In at least 21 cases, lawyers presented written reasons from a case where the BNP inadmissibility allegation was rejected by another Division member. In each of those 21 cases, the presiding adjudicator declined to engage substantively with their colleagues' reasons. Instead, members explained that it would be improper

to guess what evidence their colleagues had before them when they reached the conclusion that the BNP did not engage in terrorism. For example, in every one of her ten decisions under study here, Member Thibault wrote that she was "unaware if similar evidence was before the [other decision maker]. Furthermore, that decision is not binding on the ID." It does not appear that any adjudicator tried to see whether the evidence before their colleagues was different or not.

b. *Canada led functionally identical evidence across cases*

I analyzed the full evidentiary records of each case (discussed further below) that was brought before the Federal Court. In every case reviewed decided in Montreal, 458 pages of the government's evidence were identical. The remaining twenty or thirty pages of evidence were specific to the person concerned and were used to substantiate the claim that the person was a member of the BNP. In both Toronto cases reviewed; Canada submitted the same 598-page package to substantiate its allegation that the BNP engaged in terrorism.

The evidentiary packages did not include traditional scholarly or expert evidence. This is how Justice Grammond described the evidentiary package led in Montreal:

> Apart from a number of newspaper articles, the evidence consisted mainly of two reports. One was written in 2005 by Bangladeshi academics under the auspices of the United Nations Development Program [UNDP] and analyses the causes and consequences of the frequent use of *hartals* in the political life of Bangladesh. The other was written in 2015 by Human Rights Watch and is mainly concerned with human rights violations committed by the country's security forces, although it also contains a smaller section devoted to "opposition violence."[98]

The same analysis holds for the Toronto package. It included, in addition to several human rights reports, news articles from the *Wall Street Journal*, the *Guardian*, *Huffington Post*, the *Toronto Sun*, *The Telegraph*, the *BBC*, *Reuters*, the *New York Times*, *Forbes*, the *Financial Times*, the *Dhaka Tribune*, and *Vice News*.

c. *Montreal-based adjudicators recycled their reasons across cases*

Montreal members did not rewrite their decisions after each case. Rather, they tended to add and subtract paragraphs and modified sentences over time. A close examination of two of Member Milo's decisions demonstrates this point. During the period under study, Member Milo issued ten BNP-

98. *MN, supra* note 76 at para 14.

membership deportation orders. The first and last decisions were decided, respectively, on 24 December 2018, and 14 July 2021. In both cases, the only substantive issue Member Milo addressed was the question of whether the BNP engaged in terrorism.

Despite the passage of time, and even though different lawyers represented the people subject to the deportation allegation, Member Milo's reasons in these two decisions are fundamentally similar. While Member Milo did write bespoke reasons describing the person's background, the critical sections on whether the BNP engaged in terrorism are functionally the same. The 2018 analysis of whether the BNP engaged in terrorism is 5,045 words long while the 2021 analysis is 5,190 words long. Each paragraph is virtually identical. The differences between the two sets of reasons are found in two additional paragraphs added to the latter decision. One paragraph references a recently issued Federal Court decision and the second dismisses a discrete argument made by the deportee's lawyer. The Federal Court only reviewed Member Milo's last set of reasons (it appears that no other person ordered deported as a member of the BNP by Member Milo sought judicial review of the reasons). This decision was remitted back as unreasonable.[99]

Sometimes members made minor adjustments to their stock reasons to respond to developments in the case law. For example, in 2018, Justice Norris released *Rana*, which reminded adjudicators that the *Suresh* and *Criminal Code* definitions of terrorism are different and should not be simply conflated.[100]

Immediately before *Rana*'s release, Member Morin ordered a person deported for their membership in the BNP.[101] In this case, he explicitly said that he used both the criminal law and immigration law definitions to determine whether the BNP engaged in terrorism. After *Rana*'s release, he modified his legal definitions paragraphs and explained that he would assess the case using only the *Suresh* legal definition. Despite saying that he was now applying a different and somewhat narrower legal test, the rest of his analysis remained word-for-word identical.[102] Just over a year later, Member Morin's stated assessment of the law changed again slightly. Pointing to the mixture of directions from the Federal Court, he explained:

99. *Foisal v. Canada (Citizenship and Immigration)*, 2021 FC 404.
100. *Rana, supra* note 31.
101. Immigration and Refugee Board (Immigration Division), B7-00792 (11 October 2018), Morin Member [on file with author].
102. Immigration and Refugee Board (Immigration Division), B8-00122 (6 December 2018), Morin Member [on file with author].

> On many occasions, the Federal Court concluded that the Criminal Code could be used to consider terrorism as stated recently in *Saleheen v. Canada (Minister of Citizenship and Immigration)* 2019 FC 145. Relying on *Saleheen*, the Federal Court recently affirmed the principle that "... the specific intention to cause death or serious injury must exist for a finding of terrorism, whether the decision-maker applies the Criminal Code or the Suresh definition (*Miah v. Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38). Given so, the foregoing analysis will take both definitions into account.[103]

Lawyers spend a considerable time parsing words and definitions to make their arguments. This vignette shows how court-level disagreements occasion ground level confusion. Despite trying to attend to changing case law, Member Morin kept a similar analysis but tried to explain how the same analysis could correctly orient to directions coming from the Court.

Member Morin also modified his decisions in response to another Federal Court decision concerning the quality of the evidence led in BNP cases. In *MN,* discussed above, Justice Grammond explained that he was concerned that the evidence before the decision maker (i.e. the standard Montreal evidentiary package) was not sufficient to "address the full range of circumstances" necessary to warrant a terrorism finding.[104]

In three of the seven BNP deportation decisions Member Morin made after the Court published *MN*, Member Morin included a new paragraph that appears to respond to Justice Grammond's discussion about the evidence. Even though it does not appear that the evidentiary package had substantively changed, Member Morin explained:

> The documents filed come from various sources such as newspapers, but also from human rights monitoring agencies. Those documents describe the situation in Bangladesh and cover roughly 2 decades, from 1996 to 2015. *The whole of this evidence provides a diversified yet coherent sum of information to allow the tribunal to draw conclusions on the issues that need to be decided in the present case*.[105] [emphasis added]

Member Morin does not explain how the 'whole of this evidence,' which troubled Justice Grammond, does not trouble him. In fairness, this may be a consequence of how judges issue reasons. While Justice Grammond criticized the package, he did not include an index of the documents

103. Immigration and Refugee Board (Immigration Division), B9-00685 (11 February 2020), Morin Member [on file with author].

104. *MN, supra* note 76 at para 14.

105. Immigration and Refugee Board (Immigration Division), B9-00611 (10 March 2020) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B9-00625 (14 July 2020) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B9-00707 (14 July 2020) Morin Member [on file with author].

considered. It may be that because the index was not highlighted in the reasons, it did not occur to Member Morin that he and Justice Grammond were looking at functionally the same material.

In *MN*, Justice Grammond reminded adjudicators to make sure that they were assessing whether the BNP *intended* to engage in terrorism, and not decide the cases on a lesser form of *mens rea* (such as knowledge or wilful blindness). In the 12 cases that preceded Justice Grammond's reminder, Member Morin explicitly said that he was deciding the case on a lesser form of *mens rea* (knowledge and wilful blindness):

> In the present case, the tribunal concludes that violence was used to achieve political objectives, the link between the calls for hartals and the perpetration of terrorist acts is established. Given the predictable consequences of calling a hartal, *it is difficult to find that political leaders did not know that deaths amongst the civilian population or serious bodily harm would result*. Calling for a hartal is almost synonymous to endangering people's lives. Political leaders bare a certain responsibility. Hartals, in the context of Bangladesh, go beyond the mere expression of political activity as generally understood. *Because of the history of decades of violence associated with such political demonstrations, only willful blindness would explain that political leaders were not aware of the human rights violations associated with such actions*. In fact, there is a clear and documented pattern that the hartals lead to violence and economic chaos. It is equally clear that the acts of violence perpetrated during those hartals amount to terrorism. Deaths, random bombings, economic shutdowns, serious injuries, all a direct result of a political decision to call a hartal.[106] [emphasis added]

After the Court published Justice Grammond's decision, Member Morin substituted this long paragraph about wilful blindness with two shorter ones about intention:

> In the present case, the tribunal concludes that violence was used to achieve political objectives, the link between the calls for hartals and

106. Immigration and Refugee Board (Immigration Division), B6-00497 (14 May 2018) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B7-00173 (28 June 2018) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B6-00449 (19 July 2018) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B6-00565 (15 August 2018) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B6-00700 (28 August 2018) Morin Member [on file with author]; B7-00792, supra note 101; B8-00122, supra note 102; Immigration and Refugee Board (Immigration Division), B8-00123 (7 December 2018) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B8-00371 (9 January 2019) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B6-00682 (29 January 2019) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), B8-00359 (29 January 2019) Morin Member [on file with author]; Immigration and Refugee Board (Immigration Division), (27 February 2019), Morin Member [on file with author].

> the perpetration of terrorist acts is established. Hartals, in the context of Bangladesh, go beyond the mere expression of political activity or advocacy as generally understood. *Because of the history of decades of violence associated with such political demonstrations, there is a direct link between hartals and human rights violations*. Hartals, more often than not degenerate and as a result, people are killed or seriously injured during those protests. *A call for a hartal, in the context of Bangladesh, is intended to cause death or serious bodily harm*. There is a clear and documented pattern that the hartals lead to violence and economic chaos. It is equally clear that the acts of violence perpetrated during those hartals amount to acts of terrorism. Deaths, random bombings, economic shutdowns, serious injuries, all a direct result of a political decision to call a hartal.
>
> The tribunal infers that by calling a hartal, the *political leaders intended to cause chaos, social disturbances and violence*, they also expected that their sympathizers or members would enforce hartals with lethal force if necessary. Given the predictable consequences of calling a hartal, it is difficult to find that political leaders did not know that deaths amongst the civilian population or serious bodily harm would result. Calling for a hartal is synonymous to endangering people's lives. Political leaders bear a certain responsibility.[107] [citations omitted, emphasis added]

Despite reaching a different legal conclusion, these are the only paragraphs that changed in Member Morin's legal analysis. Put plainly, after Justice Grammond warned the Division that it was mistakenly applying the law, Member Morin kept the identical legal analysis but changed the operable words at the conclusion.

On its face, this appears to raise an integrity concern. That said, it is important to appreciate the difficult circumstances that Member Morin and other adjudicators of the Division were placed in. The Federal Court reviewed or decided leave applications regarding five of Member Morin's cases, upholding his decisions four times and remitting only one back. Faced with conflicting outcomes from the Court on similar reasons, a first-instance adjudicator would have tremendous trouble.

3. *Adjudication of judicial reviews before the Federal Court of Canada*

During the period under study, only 12 persons ordered deported for their membership in the BNP, out of a total of 55 persons, perfected applications for leave to judicially review the Division's inadmissibility finding. In every case, the deportee alleged that the Division unreasonably

107. Immigration and Refugee Board (Immigration Division), B8-01284 (1 October 2019) Morin Member [on file with author]; B9-00685, supra note 103; Immigration and Refugee Board (Immigration Division), B6-00624 (11 February 2020) Morin Member [on file with author]; B9-00611, supra note 105; B9-00707, supra note 105; B9-00625, supra note 105.

concluded that the BNP engaged in terrorism. Leave was granted in nine cases (seventy-five per cent). The final application for judicial review was granted in four cases and dismissed in five cases.

Nine of the perfected applications (see Figure 5) concerned the reasons of two adjudicators: Member Morin and Member Thibault. Because Canadian officials led the same evidence across cases, and because adjudicators recycled their reasons across cases, the judges of the Federal Court reviewed functionally identical records.

Figure 5. Federal Court treatment of decisions issued by Members Thibault and Morin

ID disposition date	Changes in reasons	Leave Judge	Leave	JR judge	JR granted	Court disposition date
Decisions of Member Thibault						
25 September 2018	Baseline: 4963 words	McDonald	y	Grammond	y	10 June 2019 (MN)[108]
16 October 2018	90 new words referencing case law	Brown	y	Shore	n	8 July 2018 (Khan)[109]
19 October 2018	70 new words referencing case law	Diner	y	Roy	y	19 July 2019 (Islam)[110]
20 December 2018	Minor redrafting led to a reduction of 177 words	Annis	y	Shore	n	29 August 2019 (Ferdous)[111]
Decisions of Member Morin						
11 October 2018	Baseline: 4436 words	Shore	n	-	-	19 March 2019 (Rahman)[112]

108. *MN, supra* note 76 (judicial review IMM-4992-18).
109. *Khan v Canada (Citizenship and Immigration),* 2019 FC 899 (judicial review IMM-5450-18) [*Khan*].
110. *Islam v Canada (Public Safety and Emergency Preparedness),* 2019 FC 912 (judicial review IMM-5497-18) [*Islam 2019*].
111. *Ferdous v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1115 (judicial review IMM-259-19) [*Ferdous*].
112. *Rahman v Canada (Public Safety and Emergency Preparedness),* (judicial review IMM-5383-18).

9 January 2019	445 new words referencing new case law; 155 new words summarizing the evidence	Gleeson	y	Mosley	y	2 February 2021 (Islam 2021)[113]
29 January 2019	310 additional words dismissing case-specific arguments	Roy	y	Walker	n	13 January 2020 (Miah)[114]
10 March 2020	370 new words summarizing the history of BNP; 74 words explaining why the evidence led is credible and reliable; 699 word long new summation of the evidence (replaces ~175 words)	Pamel	n	-	-	27 January 2021[115]
14 July 2020	Minor typographical changes	Pamel	n	-	-	27 January 2021[116]

In *MN*, Justice Grammond identified a discrete legal error in Member Thibault's stock reasons. In eight of Member Thibault's decisions in the dataset, she explained that "by calling for hartals, the BNP leadership knew or, at best, was wilfully blind to the fact that it would result in deaths and serious injuries." This, Justice Grammond explained, was an error:

> the fact that lethal violence takes place during protests called by a political party may or may not lead to a finding that the political party has engaged in terrorism. Such a finding would need to be based on an analysis of a number of factors, including the circumstances in which violent acts resulting in death or serious bodily harm were committed, the internal structure of the organization, the degree of control exercised by the organization's leadership over its members, and the organization's

113. *Islam v Canada (Public Safety and Emergency Preparedness),* 2021 FC 108 (judicial review IMM-701-19) [*Islam 2021*].
114. *Miah v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 38 (judicial review IMM-1201-19) [*Miah*].
115. *Uddin Mishu v Canada (Public Safety and Emergency Preparedness)*, (judicial review IMM-3345-20).
116. *Hossain v Canada (Public Safety and Emergency Preparedness)*, (judicial review IMM-3348-20).

> leadership's knowledge of the violent acts and public denunciation or approval of those acts. In this case, it appears that the ID focused exclusively on the last factor.[117]

In *Islam 2019*, concerning another case decided by Member Thibault, Justice Roy considered the same textual and zeroed in on the same problematic language discussed above. He allowed the judicial review and, explicitly agreeing with Justice Grammond, explained that "a lower [legal] standard was applied, one that is arguably close to recklessness or negligence as to what might ensue, and quite removed from the actual intent to cause death and serious injury."[118]

In *Khan* and *Ferdous*, Federal Court decision: 29 August 2019),[119] Justice Shore analyzed two sets of reasons by Member Thibault that were virtually identical—and contained the same language identified as problematic by Justices Grammond and Roy—to those considered in *MN* and *Islam 2019*. In both cases, Justice Shore dismissed the applications for judicial review and upheld the reasons. This outcome is puzzling. In *Ferdous*, Justice Shore cited the decision made by Justice Grammond, which considered the same line of reasoning made by the same adjudicator, with approval. Indeed, Justice Shore cited the exact paragraph where Justice Grammond directly quoted the specific problematic language that was in all of Member Thibault's decisions. To state it plainly, it appears that Justice Shore—even though he said that he agreed with Justice Grammond—did not realize that he was considering a virtually identical text to the one Justice Grammond analyzed.

After Justice Grammond's decision in *MN*, Member Thibault decided one more BNP case. In that decision, she partially rewrote her reasons and edited out the reference to wilful blindness. In her new reasons, she concluded that the evidence showed that "the BNP leadership had the intention to cause deaths and serious injuries to reach a political objective."[120] The deportee did not apply to the Federal Court for judicial review of this decision so we do now know how members of the Court might have considered these revised reasons.

Judges of the Federal Court also disagreed about the reasonableness of Member Morin's stock reasons. Of the 11 people Member Morin ordered deported for their membership in the BNP, five applied to the Court for

117. *MN, supra* note 76 at para 12.
118. *Islam 2019, supra* note 110 at para 31.
119. *Khan, supra* note 109; *Ferdous, supra* note 111 at para 6.
120. Immigration and Refugee Board (Immigration Division), B8-00368 (8 July 2019), Thibault Member [on file with author].

judicial review. Justices Shore and Pamel dismissed three applications for judicial review, meaning they did not think the case disclosed a "serious issue to be tried."

Of the remaining two Member Morin cases that were reviewed, different judges of the Court did grant leave, meaning that they thought that there was a "serious issued to be tried." The first full judicial review of Member Morin's reasons was heard by Justice Walker, who upheld the decision under review as reasonable. In her decision, Justice Walker quoted Member Morin:

> As illustrated by the documentary evidence, the 2012–2014 period in Bangladesh was one of the most violent in the history of Bangladesh. During that period, the BNP was the organization calling the hartals and promoting social disturbance to achieve political objectives. *It is not plausible that there was not an underlying intention to achieve these goals through violence. The consequences of calling a hartal as well as the use of such a method to achieve political goals leaves little doubt of the intentions of political leaders calling for such actions*. [emphasis added by Justice Walker].[121]

Justice Walker concluded that there was "no basis for the Court to intervene" because even if the reasons were "expressed in the negative, the ID imputed to the BNP and its political leaders the requisite specific intention to cause death and bodily harm."[122]

When Justice Mosley reviewed the same reasons, he focused on the same aspect of the stock reasons. In contrast to Justice Walker, Justice Mosley found that the reasoning was problematic. Referring to the exact same part of the text, he explained that the member ignored "that the law requires that the perpetrator intentionally caused death and serious bodily harm, and substituting [sic] a different element (the requirement that there was knowledge, or even wilful blindness, that the calling for hartals would result in death and injuries)."[123] He remitted the decision back for redetermination. Together, this means one judge of the Court found that the same reasons did not disclose a serious issue to be tried, another found that the reasons were proper, while another concluded the decision was unreasonable and needed to be reconsidered.

Timing matters. Both deportation orders were issued in January 2019. Justice Walker's decision was issued on 13 January 2020, and Justice Mosley's decision was issued over a year later, on 2 February 2021. In

121. *Miah, supra* note 114 at para 42, citing B8-00359, *supra* note 106 at para 76.
122. *Ibid* at paras 43-44.
123. *Islam 2021, supra* note 113 at para 22.

the meantime, *MN* was released by Justice Grammond on 10 June 2019. By mid-2020, Member Morin's new reasons explicitly referenced *MN*. Two of these slightly revised decisions were considered by the Court. Justice Pamel dismissed leave applications, therefore upholding the decision, in January 2021. If part of the function of judicial review is to help adjudicators, here the adjudicator received multiple Federal Court directions, but in a delayed and unhelpful order. Are courts and tribunals supposed to engage in a dialogue? If they are, this is not a conversation that made much sense.

One final point. For all that was the same across cases, there was one important difference: many applications for leave and for judicial review were brought by different counsel. While every counsel did say that the Division's analysis of whether the BNP engaged in terrorism was unreasonable, not all counsel made their cases equally well or with equal force. Previous studies have argued that there may be a competence problem in some corners of the immigration and refugee bar.[124] Although an inquiry into counsel quality was not the subject of this project and not one that I am prepared to definitively comment on, it would be a mistake not to acknowledge that some advocates provided more assistance to the judges of the Court than others. For now, we can only hypothesize what might have been if the quality of lawyer's work was consistent and consistently high quality.

IV. *Discussion and recommendations*

Most people subject to BNP terrorism allegations were ordered deported. This general truth obscures a more important reality: outcomes in individual cases turned on the identity of the adjudicators and judges who considered the case. Some members thought the BNP engaged in terrorism, some did not. Some judges saw errors in identical reasons whereas others did not. It is worth pausing to note that despite all this evidence of discord, and all these competing directions, it does not appear that a single first instance adjudicator changed their mind once about the BNP during the time under study. Once a member found that the BNP engaged in terrorism, they were never shaken from that conclusion.

This project therefore qualitatively confirms the conclusions in Professor Rehaag's quantitative studies that show that outcomes are often tied to the identity of the decision-maker. By qualitatively examining

124. Jamie Chai Yun Liew et al , "Not Just the Luck of the Draw? Exploring Competency of Counsel and Other Qualitative Factors in Federal Court Refugee Leave Determinations (2005-2010)" (2021) 37:1 Refuge 61; Sean Rehaag, "The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment" (2011) 49:1 Osgoode Hall LJ 71.

the underlying texts—just as Justice Zinn suggested researchers ought to—I found that the texts were often the same, sometimes identical, but that different adjudicators and judges looked at those identical records differently.

On one level, this study suggests that individual adjudicators and judges ought to take more care with their decisions. There is nothing intrinsically wrong with first-instance adjudicators reusing reasons across cases when those cases are, in actual fact, largely the same. Indeed, we should hope that the same adjudicators would treat, and reason about, the same cases the same way. Yet there are moments, for example when a decision is overturned by a higher court, that require adjudicators to go back to the drawing board. The Canadian public should be concerned that some adjudicators, even when told by Federal Court judges that their decisions were problematic, only tinkered around the edges, changed a few keywords, and left the rest of their stock reasons untouched.

We must also appreciate the difficult position that the adjudicators of the Division found themselves in. It would be exceptionally challenging to re-engage in good faith when different judges of the Federal Court sent different messages about functionally the same texts. For deportees, their cases turn on the luck of the draw. In some senses, the same can be said for first-instance adjudicators who have their decisions reviewed by difference judges of the Federal Court, who might look at similar reasons differently. Whether the function of the judicial review is to strengthen reasoning, or to force re-evaluations of problematic reasons, here the project of effective judicial review was undermined by inconsistency.

For this reason, the primary conclusion of this paper concerns the Court. A core function of the institution of judicial review is to protect the consistency and coherence of the law. Here, the Court exacerbated inconsistency instead of improving it. Going forward, judges must take a greater interest in the decisions of their colleagues and closely examine the records before concluding that the case before them is idiosyncratic, unique, or unlike those considered by their colleagues. As this study shows, there is a chance that they all might be seeing the same reasons and the same evidence. To help judges and adjudicators better understand their own jurisprudence, I make several recommendations.

1. *Recommendation 1: Tribunal and court administrators should help decision-makers look beyond the four corners of each case*

In *Vavilov*, the Supreme Court of Canada reminded courts that a "review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the

proceedings."[125] Instead of focusing exclusively on the textual material before them on judicial review, judges should also consider "publicly available policies or guidelines that informed the decision-maker's work, and past decisions of the relevant administrative body."[126] So armed, courts will be equipped to understand whether "a particular decision is consistent with the administrative body's past decisions."[127]

In fairness to lower courts and judges, this is no easy task. As this study shows, many decisions are only publicly available in redacted form after an access to information request is actioned. It is not as if a lawyer can simply present the full jurisprudence to a judge to point out problems. While it is tempting to say that the answer is to just release more documents in publicly available datasets, there are practical reasons that make this difficult, including legitimate concerns about the free circulation of personal information, time-consuming and expensive process of redacting decisions, and the impossibility of translating every decision made by a federal Canadian tribunal or court for publication as required by the *Official Languages Act*.[128] In these circumstances, it is not reasonable to ask, as the Supreme Court of Canada does, for judges to familiarize themselves with the practices and decisions of each tribunal. There is simultaneously too much to read and not enough access to information.

For this reason, tribunals, and perhaps courts, should establish research departments to analyze jurisprudence at scale. If adjudicators and judges cannot in their day-to-day work read everything, tribunal administrators and executives should hire analysts to produce high-quality research products that present decision-making consistency and inconsistency alike. To a degree, this recommendation calls for a departure from a classic model of advocacy that makes lawyers responsible for framing the issues and presenting the relevant evidence. But, given how sprawling administrative law has become and how the public's access to some decisions is limited, lawyers will have less of a line of sight on consistency issues that tribunals or courts.

In practice, this means that tribunals should be ready to present basic statistical information about each case to advocates, parties, and courts. How many other similar cases has the tribunal decided? How were those cases decided? Are outcomes consistent or inconsistent? Equally, tribunals should ensure that parties and courts can at least partially access the records

125. *Vavilov, supra* note 3 at para 91.
126. *Ibid* at para 94.
127. *Ibid* at para 131.
128. *Official Languages Act*, RSC 1985, c 31 (4th Supp), ss 14-20.

and decisions in other cases to see where they are the same and where they are different. Recently, the Immigration and Refugee Board established "quality centres" to "mine… decisions, as well as Federal Court cases in order to identify specific legal questions that repeatedly occur."[129] This sort of initiative is positive and ought to be encouraged.

At the same time, judges should think about how their writing can be more useful to adjudicators. If specific language is problematic, it should be excerpted. If a collection of evidence is wanting, its index should be included in the judgement. This is to say that it would be useful for adjudicators and lawyers to have more direct access to the problematic documents that concern judges on judicial review and judges could immediately assist by explicitly highlighting and quoting problems in their reasons. If everyone can see and not just hypothesize about the problems in a first-instance text, we can better understand them.

2. *Recommendation 2: Supplement traditional research methodologies with computational methodologies*

The nature of this study points to one methodological avenue available to researchers, tribunals, and courts: computational methodologies for the study of law. This study was enabled by a simple but powerful network analysis that drew connections between case files across tribunals. Given Canada's federal structure and the separation between many tribunals, networking analysis techniques may be of particular use to shadow databases that link information across institutions. At the same time, recent innovations in artificial intelligence have allowed researchers to use computers to examine the contents of legal decisions and extract, at an extremely high degree of accuracy, actionable legal insights.[130]

Computational methods have arrived, and not a moment too soon. Consider this fact: in 2022, 90,000 people claimed refugee protection in Canada. Assuming that some people claimed together as family units, this means that the Refugee Protection Division will be asked to decide approximately 65,000 separate cases based on this intake alone. If each

129. Immigration and Refugee Board, *Quality Assurance Framework for Decision-Making* (Ottawa, 2021) at 19, online (pdf): <irb.gc.ca/en/transparency/qa-aq/Documents/Quality_Assurance_Framework_for_Decision_Making_2021.pdf> [perma.cc/J7JP-B8PP].

130. Indeed, at the time of writing, some of the most exciting technology is so new that the legal publication cycle has not caught up to the modern capabilities of artificial intelligence. See e.g., Sean Rehaag, "Luck of the Draw III: Using AI to Examine Decision-Making in Federal Court Stays of Removal" (2023) Osgoode Legal Studies, Refugee Law Lab Working Paper No 4322881, online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=4322881> [perma.cc/8VKL-C9FY]. For a recent, but already out of date, summary of legal computational methods research see Jens Frankenreiter & Michael A Livermore, "Computational Methods in Legal Analysis" (2020) 16 Annual Rev L & Soc Science 39.

decision issued by the tribunal is 2,000 words long, the resulting refugee law jurisprudence will be 130 million words long. No research team, no matter how well resourced, can read and synthesize this much text. Computers, however, can assist by categorizing, clustering, and extracting information from decisions.

The scholarship on how computational methods can assist researchers remains in its infancy, but these approaches are already opening "important new research opportunities for law scholars by expanding the analytic methods that can be applied to legal texts."[131] Courts, law schools, firms, and adjudicative bodies should all dedicate resources to train a generation of lawyers and tribunal administrators with the hard skills required to code, productively interact with modern artificial intelligence, and develop programs that can ingest and synthesize legal meaning at scale.

3. *Recommendation 3: Consolidate appeal routes*

As currently written, the *IRPA* does not facilitate effective judicial review. As discussed earlier, when the government disagrees with a decision, it may appeal to the Immigration Appeal Division. When a deportee disagrees with a decision, they can only apply for leave for judicial review in the Federal Court of Canada. Practically, this means that the Federal Court only sees cases where a deportation order was issued while the IAD only sees cases where there was no deportation order issued. This no doubt partly explains why the judges of the Federal Court struggled with the state of the jurisprudence: they only saw one side of it.

From an integrity of the justice system perspective, this is an undesirable arrangement and Parliament should consolidate appeal routes. A good template for legislators to use can be found in the refugee adjudication context where almost all decisions are appealed to the Refugee Appeal Division. A similar review process should be set up in the deportation context to help foster the development of a coherent jurisprudence. Alternatively, Parliament should re-route governmental appeals into the judicial review process so, at minimum, there is only one review body considering these cases.

131. Frankenreiter & Livermore, *supra* note 130 at 40.