U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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(b) (6) [redacted]

(b) (6) [redacted]

Date of this notice: 03/29/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

F.F. Krider

Frank Krider
Chief Clerk

Enclosure

Panel Members:
HOLMES, DAVID B.
HURWITZ, GERALD S.
MILLER, NEIL P.

(b) (6) [redacted]

File: (b) (6) - San Francisco Date: MAR 2 9 2006

In re: (b) (6)

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marc Van Der Hout, Esquire

ON BEHALF OF DHS: Helen Bouras
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law

APPLICATION: Asylum; remand

The Department of Homeland Security (the "DHS") appeals the decision of the Immigration Judge dated March 31, 2004, in which the Immigration Judge granted the respondent's application for asylum under section 208 of the Immigration and Nationality Act (the "Act" or the "INA"); 8 U.S.C. § 1158. The request for oral argument is denied. The record will be remanded.

THE IMMIGRATION JUDGE'S DECISION TO SEAL THE RECORD

At the outset, we address the Immigration Judge's decision, following the respondent's motion, to seal the record in its entirety. Initially, the respondent filed a motion to seal certain portions of the record, and that motion was opposed by the DHS on the basis that the Immigration Judge had no authority to seal evidence except as under 8 C.F.R. § 1003.46(a)-(b), which was inapplicable to the respondent's motion (Tr. at 331-32). The Immigration Judge did not rule on the motion at that time. On June 13, 2003, the respondent withdrew the initial request and moved that, due to the sensitive nature of the witness testimony and the written statements and affidavits in the record, the entire record should be closed to the public and sealed (Tr. at 587-88). The DHS affirmed that the respondent was entitled to a closed hearing and stated that the DHS had no objection (Tr. at 589). Thereafter, the Immigration Judge granted the motion and stated on the record:

> The entire record of this case from the very beginning until it becomes final is closed to the public and no parties will have access to the record, notes, transcript, documents in this case, other than the Court and the parties to the hearing. And actually, every request to review the case will have to be approved by the Court.

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(I.J. at 590). The DHS did not object. The Immigration Judge agreed with the respondent that it would be appropriate to take special care to mark the entire file "sealed" (Tr. at 591-92). The DHS did not object. During the hearing, the respondent's two witnesses were assured that their testimony would be kept confidential (Tr. at 506, 591, 618, 718, 788). The record contains a written order dated June 13, 2003, granting the respondent's motion to seal the record and citing 8 C.F.R. §§ 1003.27(b), (c) and 1208.6 (Exh. 43). On appeal, the DHS contends that the authority to seal the record is found at 8 C.F.R. § 1003.46, that the Immigration Judge had no authority to seal the record or any portions of the record, and that the DHS did not fail to object but clearly explained its objections to any sealing of evidence during the hearing (DHS Br. at 41-42). The DHS requests that the Board declare in this decision that the record is not sealed (DHS Br. at 42).

The DHS is correct that 8 C.F.R. § 1003.46 provides a procedure to allow the DHS, but not the alien, to file "a motion for an order to protect specific information it intends to submit or is submitting under seal." *See* 8 C.F.R. § 1003.46(b). The Immigration Judge may issue a protective order barring disclosure of such information "upon a showing . . . of a substantial likelihood that specific information submitted under seal will, if disclosed, harm the national security . . . or law enforcement interests of the United States." *See* 8 C.F.R. § 1003.46(a); *see also* 8 C.F.R. § 1003.32(d) (providing that documents filed under seal shall not be examined by any person except pursuant to authorized access to the administrative record). We agree that 8 C.F.R. § 1003.46 does not apply in the case before us. Furthermore, there is no other provision, either regulatory or statutory, for "sealing" the record at the request of the alien. Accordingly, we find that the Immigration Judge erred in declaring that the record was "sealed."

This does not mean that the testimony and other evidence in the record will not be afforded protection. The regulations provide that for the purpose of protecting witnesses, parties, or the public interest, the Immigration Judge may limit attendance or hold a closed hearing. *See* 8 C.F.R. §§ 1003.27. Thus, the Immigration Judge has some authority to limit access to the record. The hearing in this case was, in fact, closed. Furthermore, specific provision is made in the regulations for disclosure of information contained in or pertaining to an asylum application only with the written consent of the asylum applicant and to limited third parties. The provisions addressing third party disclosure are found at 8 C.F.R. § 1208.6 and include, for example, disclosure to any United States Government official or contractor having a need to examine information in connection with the adjudication of asylum applications. *See* 8 C.F.R. § 1208.6(c)(1)(i). The respondent's evidence is, therefore, protected under the regulatory provisions set forth above.

THE RESPONDENT'S ASYLUM APPLICATION

We now turn to the merits of the respondent's case. (b) (6) [redacted] Tr. at 55, 63). In December 1971, Pakistan surrendered and Bangladesh became an independent state. *See* United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Profile of Asylum Claims and Country Conditions - Bangladesh*, 1-2 (Feb. 1998) ("*1998 Profile*") (Exh. 12).

(b) (6) [redacted]

Following the war for independence, Awami League leader Sheikh Mujibur Rahman (Sheikh Mujib) became the first Prime Minister of Bangladesh (Exh. 28 at 19). Sheikh Mujib was hailed as a hero at first, but he adopted an increasingly authoritarian position and his government acquired "a reputation for ineptness and corruption" (Tr. at 85; Exhs. 28 at 19, 30-I, 30-G). He created the Rakkhi Bahini, a paramilitary force armed with machine guns, that terrorized the countryside, arrested people without warrants, and served as a repressive instrument for the government (Tr. at 87-88; Exhs. 16 at 3, 30-D). In December 1974, Sheikh Mujib declared a state of emergency, and suspended the constitution and all fundamental rights (Tr. at 483). *See* Amnesty International, *Amnesty International, Annual Report 1974/75*, 83 (1975) (Exh. 30-F). Provisions were instituted for indefinite detention without trial, and approximately 2000 persons were arrested pursuant to this provision (*Id.*). (b) (6) [redacted]

In January 1975, the government was changed so that Sheikh Mujib became president "as if elected" to that office; all executive powers were vested in him; and parliament was made subservient to the president (Exhs. 30-E, 30-F, 30-I). Sheikh Mujib then created a one-party state and banned opposition parties (Tr. at 483; Exhs. 17, 30-E at 83). Opposition members were forced to join the one-party system or lose their seat in Parliament (Tr. at 483-85). During this time, "political assassination was widespread." *See* United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Report on Human Rights Practices - Bangladesh,* 528 (Feb 8. 1979) ("*1979 Country Report*") (Exh. 30-L).

A political coup took place in Bangladesh in the morning hours of August 15, 1975. (b) (6) [redacted]

Following the coup, Khondakar Moshtaque Ahmed was installed as the leader of the country (Exh. 30-J). He had been a close associate of Sheikh Mujib and an advisor, but he was reported to have been opposed to the creation of the one-party state (Exh. 30-J; *1998 Profile* at 3). He was removed by another coup in November 1975, which was led by Brigadier General Khaled Musharrif (Exh. 16 at 21). Musharrif was killed on November 7, 1975, in another coup (*Id.*). Finally, General Ziaur Rahmed (General Zia) was brought into power (*1998 Profile* at 3; *1979 Country Report* at 528).[1]

(b) (6) [redacted]

[1] General Zia was assassinated in 1981 (*1998 Profile* at 3; Exh. 28 at 154).

(b) (6) [redacted]

(b) (6) [redacted]

In 1975, the Indemnity Act was passed to shield participants in the coup from official repercussion (Exhs. 4, 4-A). The Indemnity Act was later incorporated into the constitution, while the country was under the leadership of General Zia (Exhs. 4, 9-I at 6, 9-J).

In 1996, the Awami League gained a parliamentary majority and Sheikh Hasina Wajed (Shiekh Mujib's eldest daughter), became Prime Minister. *See* United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Report on Human Rights Practices for 1998 Bangladesh*, (Feb. 26, 1999) ("*1998 Country Report*") (Exh. 9-R). (b) (6) [redacted]. Once in the United States, the respondent obtained information about events in Bangladesh that led him to file an application for asylum (Tr. at 162, 165). (b) (6) [redacted]. (b) (6) [redacted]

On (b) (6) [redacted], the police in Bangladesh evicted the respondent's (b) (6) [redacted], (b) (6) (b) (6) [redacted] from their home (Tr. at 174; Exh. 30-O). In 1997, the Indemnity Act was repealed by a simple majority vote in parliament, (b) (6) [redacted]

(b) (6) [redacted]

At the respondent's removal hearing, both parties introduced extensive evidence. This included testimony and documents concerning the history of Bangladesh from its beginnings; the conditions in the country at the time of the August 1975 coup; the details of the coup itself; the daughter of Sheikh Mujib and her assumption of power in Bangladesh; the respondent's criminal trial, conviction, and sentence; the witnesses and statements introduced at the trial and how the testimony and statements were obtained; incidents of torture and other violence that occurred during the trial; the recantation of witness statements and testimony; the judicial process in Bangladesh; the opinion of the United States Department of State concerning the trial's validity; the conditions of prisons in Bangladesh; incidents of torture and other mistreatment in the prisons; and recent developments in the country's political scene. The Immigration Judge considered and weighed the evidence, applied the relevant law to the evidence, and ultimately determined that the respondent was eligible for

asylum and should be granted asylum as a matter of discretion. The DHS contests that decision and in the alternative requests a remand.

WELL-FOUNDED FEAR OF PERSECUTION

The respondent's application for asylum is based upon his claim of a well-founded fear of persecution in Bangladesh if he were required to return to that country. The DHS contends that the respondent does not have a well-founded fear of persecution on account of any of the protected grounds under the Act. The DHS argues that the respondent fears only prison and the death sentence handed out to him following a conviction for the common law crimes of conspiracy and murder, and that this does not qualify the respondent for asylum.

The Immigration Judge found the respondent's testimony in support of his application to be credible (I.J. at 19). The DHS does not specifically challenge the credibility finding. However, it contends that the respondent's testimony regarding the extent of his participation in the coup is contradicted by the judgment of conviction following his *in absentia* trial (DHS Br. at 10, Note 8; Exh. 11-B at 98-100). The DHS faults the Immigration Judge for failing to accord sufficient weight to the conviction records (DHS Br. at 31). The DHS contends that the conviction is probable cause to believe that the respondent is guilty of the crime for which he stands convicted and that the respondent did not rebut the presumption raised by the conviction records by a showing of exceptional procedural infirmities (DHS Br. at 31-32).

In *Matter of Thomas,* 21 I&N Dec. 20 (BIA 1995), the Board concluded that "[w]hen an alien's conduct results in his having had contact with the criminal justice system or being placed in criminal proceedings, the nature of those contacts and the stage to which those proceedings have progressed should be taken into account and weighed accordingly" and "the probative value of and corresponding weight, if any, assigned to evidence of criminality will vary according to the facts and circumstances of each case and the nature and strength of the evidence presented." *See Matter of Thomas, supra*, at 24, (citing *Esposito v. INS*, 936 F.2d 911 (7th Cir. 1991) (finding that an alien's *in absentia* convictions may at the very least constitute probable cause to believe he is guilty of the crimes in question)). In *Esposito v. INS, supra,* at 915, the Seventh Circuit Court of Appeals held that before an *in absentia* conviction will be ignored, a respondent must show evidence of "exceptional procedural infirmities." "[A] petitioner may present evidence that calls into question the fundamental fairness of the proceedings which generated an *in absentia* conviction, and if that evidence is sufficiently compelling, the Board would be precluded from giving it any weight at all." *Id.* at 914. We are not persuaded by the arguments of the DHS that the respondent's evidence was "woefully inadequate to establish exceptional procedural infirmities" with respect to his *in absentia* conviction (DHS Br. at 32).

The respondent's evidence of exceptional procedural infirmities includes documentation that the Assistant Superintendent of Police of the Criminal Investigation Department recommended against prosecution due to insufficient evidence (Exh. 30-N); the fact that the respondent is not named anywhere in the book, *Bangladesh: A Legacy of Blood*, by Anthony Mascarenhas, which documents the specifics of the coup and its leaders (Exh. 28); written statements and testimony that witnesses in the trial, and specifically the witness who identified the respondent as a participant in some of the

murders, were beaten and tortured into giving false evidence (Tr. at 595-603; Exhs. 38, 39, 40, 41); testimony and a written statement showing that at least one defense attorney was twice attacked at the courthouse and after the second attack was simply advised by the court to stay away (Tr. at 595, 599; Exhs. 22, 23); and testimony that the Foreign Minister at the time of the trial opined that the respondent was falsely accused (Tr. at 503).

In contrast, the DHS offers the conviction record and four letters from the United States Department of State as evidence that the respondent received due process during his hearing (Exhs. 5, 5-A, 6, 8, 11-B). The final of the four State Department letters, which is dated (b) (6) [redacted], provides an embassy opinion that the 18-month trial process, the acquittal of four of the defendants, and the independence of the High Court considering the appeals, demonstrated that the respondent received due process (Exh. 8). Apart from the issue of due process, the Embassy believes that the prosecution presented credible evidence that the applicant participated in the conspiracy that led to these multiple, politically motivated murders in 1975 (Exh. 8).

In reviewing the Department of State letters, we note that while the final letter gives the length of the trial as one of three reasons to find due process was carried out, a prior letter indicates that the "slow pace of the trial" was due to the frail health of the judge (Exh. 6). Furthermore, the letters do not address whether testimony against the respondent was forced by beatings and torture, and they do not address the fact that the trial record itself includes statements by other accused coup participants that they were beaten into signing confession statements (Exh. 11-B at 8-12). Additionally we observe that the record contains evidence that torture by police is routine (*1998 Country Report* at 1). To the extent the letters express an opinion concerning the independence of the High Court, we find relevant a country report from the Department of State dated February 2001 reporting, with respect to the trial, that the High Court began its automatic review of the sentences in April 1999; that the first two judges assigned to the case recused themselves; that after the second recusal, government supporters marched to the High Court building wielding sticks and clubs and calling for the execution of the sentences; that the judges were reported to have been threatened; and that Sheikh Hasina expressed her sympathy with the protesters. *See* United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2000 - Bangladesh, 8 (Feb. 2001) ("*2000 Country Report*") (Exh. 18-A). Furthermore, the (b) (6) [redacted] State Department's conclusion that, because some of the accused were acquitted, the respondent received due process does not address the evidence estimating that approximately 60% of persons involved in court cases in Bangladesh have paid bribes to court officials. *See* United States Dept. of State, Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices - 2002 - Bangladesh*, 9 (Mar. 2003) ("*2002 Country Report*") (Exh. 42).

On April 21, 2001, upon finding that the State Department letters did not provide enough information, the Immigration Judge made a request to the Department of State for more specific information and updated information, asking such questions as "what exactly did [the respondent] do during the coup?" and "how do we know?" and requesting an updated assessment of the trial in terms of due process (Tr. at 302). No response was received (Tr. at 303). Based upon our review of the evidence presently before us, we conclude that the respondent sufficiently established exceptional procedural infirmities in his trial that rebut a presumption of guilt of the charges for which he stands convicted.

The DHS does not further contest the Immigration Judge's credibility finding but only makes reference to the respondent's testimony as "self-serving" and states that the Immigration Judge erred in making certain findings based upon the respondent's testimony (DHS Br. at 26-27). We find no adequate basis upon which to disturb the Immigration Judge's credibility finding. *See Zahedi* v. INS, 222 F.3d 1157 (9th Cir. 2000).

The respondent's testimony included his account of a subjective fear of persecution. Furthermore, accepting the truth of the respondent's testimony, the Immigration Judge properly concluded that the respondent established an objective fear of persecution that is well-founded. First, the record firmly supports the claim that the respondent has a well-founded fear of being harmed should he be returned to Bangladesh. The evidence establishes that the respondent has been sentenced to death. The evidence further establishes that should the respondent be returned to Bangladesh, he will be imprisoned, like his fellow coup participants, until such time as his sentence might be carried out.

Prison in Bangladesh has been described by the Supreme Court Chief Justice as a "sub-human" life (*2000 Country Report* at 5). Prison deaths from abuse and disease are common (*1998 Country Report* at 2; *2000 Country Report* at 5). Prisoners are known to be kept in complete isolation from their families and are deprived of medicine, beds, and proper nutrition. They are regularly threatened, beaten, and often die in custody from torture or extrajudicial executions (Tr. at 507, 519, Exh. 14 , *1998 Country Report* at 1-2; *2000 Country Report* at 5; *2002 Country Report* at 1). Accordingly, the respondent has reasonable grounds to fear serious mistreatment in prison in addition to the ultimate carrying out of the death sentence imposed against him. *See Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (addressing well-founded fear without a showing of past harm).

Nevertheless, "[a]n alien who succeeds in establishing a well-founded fear of being harmed will not necessarily be granted asylum." *Matter of Maldonado-Cruz*, 19 I&N Dec. 509, 512 (BIA 1988), *rev'd on other grounds, Maldonado v. Cruz, v. INS*, 883 F.2d 788 (9th Cir. 1989). The DHS is correct that, generally, fear of being subjected to harm by way of a lawful sanction is not considered a well-founded fear of persecution on account of a protected ground. *See e.g. Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992) (holding that criminal prosecution standing alone does not establish persecution). There are exceptions, however, to the general rule that prosecution does not amount to persecution. Exceptions exist when there is disproportionately severe punishment or when the prosecution is pretextual. *See id.* Additionally, fear of punishment for participation in a coup may be distinguished from fear of punishment for the commission of common crimes, in that participation in a coup is usually a politically motivated act (the "political offense" exception). *See Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996); *Matter of Izatula*, 20 I&N Dec. 149 (BIA 1990).

In the case before us, the Immigration Judge found that, notwithstanding the fact that the respondent's fear was of prison and a death sentence following his conviction at a criminal trial, the respondent's fear was of persecution because (1) he fell within the political offense exception; (2) he established that his punishment would be disproportionately severe; and (3) he established that his prosecution was a pretext for political persecution (I.J. at 25-28).

(b) (6) [redacted]

We first address the conclusion that the respondent's prosecution was a pretext for political persecution. We find there is significant and persuasive evidence in the record to support the Immigration Judge's conclusion. At the outset, we observe that the criminal charges and the trial took place under extremely unusual circumstances. Following the 1975 coup, the respondent spent (b) (6) [redacted]. This lasted through a series of different governments in Bangladesh (*1998 Profile* at 3). The Indemnity Act, which was enacted in 1975, was later made a part of the constitution. The law was in place for a generation. Only after the daughter of the slain president became Prime Minister did she and her fellow Awami League members seek a repeal and that repeal was carried out by a simple majority vote.

We have considered the repeal of the Indemnity Act for the purpose of trying the August 1975 coup participants in light of the settled law and settled expectations of the country. We have also considered the evidence that the Bangladeshi Assistant Superintendent of Police of the Criminal Investigation Department specifically recommended that the respondent not be prosecuted because there was not sufficient evidence against him. We have considered the evidence that witnesses were tortured into giving false evidence at the trial; that one of these witnesses was the prosecution witness who identified the respondent as a participant in the murders; and that at least one defense attorney was attacked and beaten. We have considered the record of the *in absentia* trial and the letters from the Department of State. The weight of the evidence that is specific to the respondent, when considered alongside the evidence of country conditions, supports the Immigration Judge's conclusion that the respondent's prosecution was a pretext for both personal revenge and political persecution.

Mistreatment that comes solely from personal revenge is not persecution on account of a protected ground under the INA. *See INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Zayas-Marini v. INS*, 785 F.2d 801 (9th Cir. 1986). However, it appears that in this case, the criminal prosecution of the respondent was the result of both a desire for revenge and a desire to politically punish the respondent. In this regard, we find relevant a statement made by Shiekh Mujib's daughter, Sheikh Hasina, with respect to another political matter. When six student members of the Awami League were killed in 2000, she called for her supporters and the police to kill ten opposition members for every death of a member of the Awami League (*2000 Country Report* at 3). The students who had died were not family members for whom Sheikh Hasina sought personal revenge. Moreover Sheikh Hasina did not simply desire to punish those who had carried out the killings. Instead, it appears she called for the random killing of persons of a different political persuasion. Similarly, in the respondent's case, it appears that the respondent's trial was not for the purpose of seeking justice with respect to those who killed Sheikh Hasina's father and other family members. The respondent was tried even though the police specifically advised that there was not sufficient evidence against him. Furthermore, lacking actual evidence, the prosecution apparently sought false testimony and false written statements by way of beatings and torture. Beatings were also used by the Awami League members to deter the efforts of a defense lawyer. Given the record presented here, we agree that the respondent's prosecution was a pretext, and a pretext not just for personal revenge but also for political persecution. *See Sagaydak v. Gonzales*, 405 F.3d 1035 (9th Cir. 2005) (addressing mixed motives of revenge and political persecution).

We next address the Immigration Judge's finding that the respondent falls within the political offense exception. In *Matter of Izatula, supra*, at 154, *citing Dwomoh v. Sava*, 696 F.Supp. 970 (S.D.N.Y. 1988), the Board held that the general rule, that prosecution for an attempt to overthrow a lawfully constituted government does not constitute persecution, is inapplicable in countries where a coup is the only means of effectuating political change. As evidence that the coup was the only possible means to effectuate political change, the Board in *Matter of Izatula, supra*, cited documentation of mistreatment and torture of political opponents, the existence of at least several thousand political prisoners and no basis in the record to conclude that any punishment imposed by the Afghan government would be a legitimate exercise of sovereign authority. *See Matter of Izatula, supra*, at 153-54.

In *Chanco v. INS, supra*, the Ninth Circuit Court of Appeals ultimately found that it did not need to decide whether a coup plotter against a regime which prohibited change would be entitled to asylum. This was because the alien's home country tolerated diverse political views. *See Chanco v. INS, supra*, at 302. The court did, however, indicate agreement with theories recognizing that the fear of prosecution must be evaluated in the context of the legitimacy of the law being enforced. *See id.* "When a government does not respect the internationally recognized human right to peacefully protest, punishment by such a government for a politically motivated act may arguably not constitute a legitimate exercise of sovereign authority and may amount to persecution." *Id.*

The Immigration Judge in this case made a factual finding that peaceful means were not available to the opponents of Sheikh Mujib's regime (I.J. at 26). The DHS offers a conclusory comment on appeal that the respondent "wholly failed to establish that the coup was the only way to change the government" (DHS Br. at 25). Yet, the DHS cites no evidence in the record that would contradict the Immigration Judge's finding.[2] Furthermore, we find that the record contains adequate evidence both to establish that the government of Shiekh Mujib was totalitarian and to support the Immigration Judge's finding that peaceful means to change the government were not available. Accordingly, we are not persuaded that the Immigration Judge erred in ruling that the respondent falls within the political offense exception enunciated in *Matter of Izatula, supra.*

Thus, we find not only that the respondent has a well-founded fear of severe harm in Bangladesh, but also that he has a well-founded fear of persecution because he falls within the political offense exception and within the exception for asylum applicants whose criminal prosecutions were pretextual. We disagree, however, with the Immigration Judge's additional finding that the respondent would suffer punishment that is disproportionate to the crime for which he was convicted. If the respondent had been legitimately convicted of murder, capital punishment would not be disproportionate to the crime. *See e.g.* 8 C.F.R. § 1208.18(a)(2) (providing that torture does not include pain and suffering arising only from lawful sanctions, including the death penalty, as long as the sanctions do not defeat the object and purpose of the Convention Against Torture).

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[2] The DHS's statement that Sheikh Mujib was the first democratically elected president of Bangladesh does not appear to appropriately characterize the manner in which Sheikh Mujib actually took the position of president.

BARS TO ASYLUM

Having found that the respondent established a well-founded fear of persecution, we next look to see if he is barred from a grant of asylum. As the Immigration Judge properly found, the respondent's asylum application is subject to the provisions found at 8 C.F.R. § 1208.13(c)(2) because the application was filed before April 1, 1997. *See* 8 C.F.R. § 1208.13(c)(2).

An alien is barred from a grant of asylum if he, among other things, (1) can reasonably be regarded as a danger to the security of the United States; (2) ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; or (3) is described within section 212(a)(3)(B)(i)(I), (II), or (III) of the INA as it existed prior to April 1, 1997, and as amended by the Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), unless it is determined that there are no reasonable grounds to believe that he is a danger to the security of the United States (terrorist bar). *See* 8 C.F.R. § 1208.13(c)(2)(i)(C), (E), (F).

The DHS contends that the respondent is barred from a grant of asylum because he assisted in or participated in the persecution of others. The DHS contends that the 1975 coup constituted persecution of others based upon political opinion and that the respondent's actions constituted assisting in or participating in that persecution.

Pursuant to 8 C.F.R. § 1208.13(c)(2)(ii), if the evidence indicates that there is a mandatory bar based upon the persecution of others, the asylum applicant shall have the burden of proving by a preponderance of the evidence that he or she did not so act. *See* 8 C.F.R. § 1208.13(c)(2)(ii). The Immigration Judge considered the respondent's *in absentia* conviction insofar as it was sufficient evidence that the respondent was guilty of the crime for which he stood convicted so as to shift the burden to the respondent to establish by a preponderance of the evidence that he did not so act (I.J. at 20). *See Esposito v. INS*, *supra*. The Immigration Judge then concluded that, notwithstanding the conviction, the respondent met his burden of establishing that he did not participate in the persecution of others (I.J. at 23).

Persecution is the infliction of suffering or harm upon those who differ in a way regarded as offensive. *See Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997). The evidence of record establishes that the basis for the August 1975 coup was the overthrow of an oppressive regime rather than to punish persons of a particular political viewpoint. Significantly, the leader installed at the end of the coup was Khondakar Moshtaque Ahmed, an associate of and advisor to the slain leader (Exhs. 30-G, 30-J, 17). Moreover, the bulk of the evidence of record supports the respondent's claim that he was not personally involved in the deaths that occurred during the coup and further that he had no advance knowledge that killings of government officials or their family members were planned or expected. To the extent that anyone participating in a coup should anticipate that violence will result, we have held that revolutions historically contain strong currents of violence, threats, destruction, intimidation, and ruthlessness and that individuals harmed by such violence or threats are not necessarily persecuted on account of a basis protected under the INA. *See Matter of Maldonado-Cruz*, *supra*, at 513; *see also Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 815 (BIA 1988) (in the context of a civil war, one must examine the motivation of the group carrying out the

harm). Accordingly, we are not persuaded that the Immigration Judge erred in ruling that the respondent is not barred from asylum for having assisted in or otherwise participated in the persecution of others.

We turn next to the issue of whether the respondent is barred from a grant of asylum under 8 C.F.R. § 1208.13(c)(2)(i), as amended by 65 F.R. 76133, (Dec. 6, 2000), based upon his participation in terrorist activity.[3] Under the amendment, an alien is barred from a grant of asylum if he is:

> described within section 212(a)(3)(B)(i)(I), (II), and (III) of the Act as it existed prior to April 1, 1997, and as amended by the Anti-terrorist and Effective Death Penalty Act of 1996 (AEDPA), unless it is determined that there are no reasonable grounds to believe that the individual is a danger to the security of the United States.

Section 421(a) of the AEDPA amended section 208(a) of the Act and added the following:

> The Attorney General may not grant an alien asylum if the Attorney General determines that the alien is excludable under subclause (I), (II), or (III) of section 212(a)(3)(B)(i) or deportable under section 241(a)(4)(B), unless the Attorney General determines, in the discretion of the Attorney General, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.

This amendment became effective on April 24, 1996, the date of enactment of the AEDPA, and applies to asylum determinations made on or after such date. *See* section 421(b) of the AEDPA. Therefore, the Immigration Judge correctly decided that the amendment applied to the respondent's case. Section 208 was subsequently reorganized and substantially amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. 104-208, 110 Stat. 3009-625 (Sept. 30. 1996). However, these changes were effective only for applications for asylum filed on or after April 1, 1997. *See* section 604(c) of the IIRIRA. Therefore, the Immigration Judge analyzed section 208 of the Act as amended by the AEDPA, but not the IIRIRA. *See Cheema v. Ashcroft*, 383 F.3d 848, 855 (9th Cir. 2004).

Sections 212(a)(3)(B)(i) and 241(a)(4)(B) of the Act include descriptions of aliens who have engaged in terrorist activity. Section 212(a)(3)(B)(ii) of the Act defines "terrorist activity" so as to include any activity that is unlawful under the laws of the place where is it committed (or that, if committed in the United States, would be unlawful under the laws of the United States or any State) and that involves an assassination or a threat, attempt, or conspiracy to commit an assassination. The DHS contends that the respondent engaged in terrorist activity in Bangladesh in that he engaged in unlawful activity involving an assassination or an attempt or conspiracy to commit an assassination. The DHS further contends that there are reasonable grounds to believe the respondent is a danger to the security of the United States.

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[3] A comparison of the amendment found in the Federal Register with the Code of Federal Regulations (C.F.R.) reveals that a printing error occurred in the C.F.R., such that the amendment was inserted in an erroneous location.

The Immigration Judge found that, while it was undisputed the respondent took part in the military coup, the evidence was much less convincing that he indeed participated in an assassination (I.J. at 23). The Immigration Judge further found that there was no reasonable ground to believe the respondent is a danger to the security of the United States (I.J. at 24).

The DHS appears to argue in its brief that, if there is a probable or reasonable cause to believe the respondent committed the act for which he was convicted, the respondent must be found to have engaged in terrorist activity because the conviction was, in part, for participation in an assassination (DHS Br. at 36). The DHS further contends that the *in absentia* conviction serves as the probable or reasonable cause (DHS Br. at 36). Under this argument, there is no room for evidence to be submitted to refute the legitimacy of the conviction by raising issues concerning due process. The DHS does not support its argument with any citation to controlling law, and its theory is clearly at odds with the principles enunciated in *Esposito v. INS*, *supra*.

Based upon its conclusion that the respondent has engaged in terrorist activity, the DHS further contends that the record should be remanded to allow the DHS to submit evidence that the respondent is a danger to the security of the United States. The DHS argues the remand is necessary due to a change in law within the jurisdiction of the United States Court of Appeals for the Ninth Circuit concerning what it means to be a danger to the security of the United States. The DHS request for a remand is based upon the Ninth Circuit case of *Cheema v. INS*, 350 F.3d 1035 (9th Cir. 2003). This case was decided after the respondent's hearing concluded but before the Immigration Judge issued his decision in the case. The decision was amended thereafter. *See Cheema v. Ashcroft*, 383 F.3d 848 (9th Cir. 2004). In *Cheema v. Ashcroft*, *supra*, the court agreed with the Board's decision dated May 8, 2002, which concluded that there is a two-part analysis required when an alien is alleged to be barred from relief based upon participation in terrorist activity: (1) whether an alien engaged in terrorist activity and (2) whether there are reasonable grounds to believe the alien is a danger to the security of the United States. A finding that the alien engaged in terrorist activity does not compel a finding that the alien is a danger to the security of the United States and is, without more, insufficient for the alien to be barred from a grant of asylum. *See Cheema v. Ashcroft*, *supra*, at 855. The court also agreed with a test formulated by the Board for deciding what it means to be a danger to the security of the United States. *See id.* The court then disagreed with the manner in which the test was applied and remanded the record to the Board for further proceedings. *See id.* at 857-560.

The respondent contends that remand is not warranted because the *Cheema* standard was established before the Immigration Judge issued his decision and was cited by the Immigration Judge. The respondent further argues that *Cheema v. Ashcroft, supra*, simply applied the two prong test set out in section 421(a) of the AEDPA and that, as such, the case did not establish new law that would warrant a remand. We conclude, however, that even if the two-prong test was not new law, the standard for deciding whether an alien is a danger to the security of the United States as set out by the Board's unpublished decision in (b) (6) [redacted], *supra,* and then affirmed by the court, was new. *See Cheema v. Ashcroft*, *supra* at 856 ("the Board created its own test"). Specifically, the Board determined that:

> an alien poses a danger to the security of the United States where the alien acts "in a way which 1) endangers the lives, property, or welfare of United States citizens; 2) compromises the national defense of the United States; or 3) materially damages the foreign relations or economic interests of the United States."

Cheema v. Ashcroft, *supra*, at 856, quoting from (b) (6) [redacted]. The court added guidance on how the standard should be applied and what specific evidence would be necessary to establish that there are reasonable grounds for regarding the alien as a danger to the security of the United States.

Given the failure of the DHS to establish error in, or even meaningfully contest, the Immigration Judge's findings that the respondent was credible and that there was not convincing evidence submitted to establish that the respondent participated in an assassination, remand would not be warranted except for the fact that there is an additional bar to a grant of asylum where, notwithstanding any showing or failure to show terrorist activity on the part of the alien, the alien is barred because he "can reasonably be regarded as a danger to the security of the United States." *See* 8 C.F.R. § 1208.13(c)(2)(i)(C); *see also Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005) (addressing the phrase "reasonable grounds for regarding the alien as a danger to the security of the United States" as used in former section 243(h)(2)(D) of the Act). In view of the test set out in *Cheema v. Ashcroft*, *supra*, and the Attorney General decision in *Matter of A-H-*, *supra,* we find it appropriate to remand the record to the Immigration Judge for further proceedings to consider whether the respondent falls within the bar for those who can reasonably be regarded as a danger to the security of the United States. Accordingly, a remand will be ordered.

DISCRETIONARY CONSIDERATIONS FOR SERIOUS NONPOLITICAL CRIME

In addition to establishing eligibility for asylum, the respondent must establish that he merits asylum as a matter of discretion. *See Matter of Pula*, 19 I&N Dec. 467, 474 (BIA 1987) (an applicant for asylum has the burden of establishing that the favorable exercise of discretion is warranted) *overruled on other grounds by Andriasian v. INS*, 180 F.3d 1033 (9th Cir. 1999). In this regard, we will first address the argument of the DHS that the respondent should be denied asylum in discretion because he committed a serious non-political crime outside the United States. An asylum applicant warrants discretionary denial of his request for asylum for having committed a serious nonpolitical crime outside the United States.[4] *See* Supplementary Information section of April 6, 1988 revised rule, 53 FR 11302 (Apr. 6, 1988) ["I]n the asylum context, evidence of the commission of such non-political crimes will now be a discretionary factor to be considered together with the totality of the circumstances and equities on a case-by-case basis . . . ."; *see also Matter of H*, 21 I&N Dec. 337, 347 (BIA 1996) ("Factors which fall short of the grounds of mandatory denial may constitute discretionary considerations.").

Typically, a serious nonpolitical crime is a crime that was not committed out of genuine political motives, was not directed toward the modification of the political organization or structure of the

[4] While commission of a serious nonpolitical crime outside the United States was added as a mandatory bar to asylum by the IIRIRA, the amendment applies only to applications filed on or after April 1, 1997.

state and in which there is no direct, causal link between the crime committed and its alleged political purposes and object. *See McMullen v. INS*, 788 F.2d 591, 595 (9th Cir. 1986) *overruled in part by Barapind v. Enomoto*, 400 F.3d 744 (9th Cir. 2005) (addressing extradition). In addition, even if these standards are met, a crime should be considered a serious nonpolitical crime if the act is disproportionate to the objective, or if it is atrocious or barbarous. *See id.*

There does not appear to be any dispute that the 1975 coup in Bangladesh was a political event (Exh. 8). The only serious questions are whether the coup (and specifically the respondent's participation in the coup) was disproportionate to the objective and whether it was atrocious or barbarous. First, as previously discussed, the coup itself appears to have been a targeted event aimed at ridding the country of an oppressive ruler. We have found no evidence that civilians were injured at random or that social chaos was promoted. *Compare INS v. Aquirre-Aquirre*, 526 U.S. 415, 430 (1999) ("group's political dissatisfaction manifested itself disproportionately in the destruction of property and assaults on civilians"); *McMullen v. INS, supra*, (applicant had committed serious nonpolitical crimes as active member providing material support for terrorist organization that carried out random acts of violence against citizens of Northern Ireland).

Additionally, we agree with the respondent that the DHS's allusions on appeal to "more appropriate and proportionate" means that could have been employed to change the government are unsupported by any citation to evidence in the record or any attempt at a relevant comparison to conditions in Bangladesh in 1975. We agree it is not possible to analyze the coup outside of a broader understanding of Bangladesh. The record establishes that just 4 years prior to the coup, Bangladesh had its birth in a violent revolution. During the rule of Shiekh Mujib, there was rampant violence, numerous assassinations, and a terrorizing paramilitary force in place. Two more coups followed directly after the August 1975 coup and one of the leaders installed was also killed. The man who ultimately replaced Shiekh Mujib, General Zia, was later assassinated. To this day, political violence in Bangladesh is a regular occurrence. For example, a recent report from the Congressional Research Service states:

> Fears of some that Bangladesh is moving towards anarchy have been furthered by recent events. On January 27, 2005, five opposition Awami League members were killed in a grenade attack during a political rally. This incident led to a series of nationwide strikes called by the Awami League in February 2005. On August 21, 2004, grenades were hurled at the opposition leader and former Prime Minister Sheikh Hasina in an attempted assassination which killed 18. This led to rioting and a mass strike by Hasina's Awami League supporters which paralyzed the country. Over the past five years, over 140 people have been killed and more than 800 wounded in similar attacks.

CRS Report for Congress, *Bangladesh: Background and U.S. Relations* (Bruce Vaughn, Congressional Research Service, updated February 7, 2005). In light of the evidence before us, we conclude that the coup was not disproportionate to the objective.

Moreover, the respondent's limited role of (b) (6) was neither disproportionate to the objective, nor atrocious or barbarous. There has been no evidence identified establishing that persons were harmed during the incident (b) (6).

Upon our review of the record, we find that the respondent's actions were committed out of genuine political motives, were directed toward the modification of the political organization of the state, had a direct causal link to their political purposes and object, were not disproportionate to the objective, and were not atrocious or barbarous. Accordingly, we find the evidence does not establish that the respondent committed a serious nonpolitical crime.

We also note our agreement with the Immigration Judge that on the record before us now, the respondent merits asylum as a matter of discretion.

In summary, we conclude that the respondent has established a well-founded fear of persecution on account of a protected ground for purposes of his application for asylum; is not barred from a grant of asylum on the basis that he participated in the persecution of others; is not barred from a grant of asylum on the basis that he participated in terrorist activity; and should not be denied asylum as a matter of discretion on the basis of having committed a serious non-political crime.

The remand ordered below is (1) for the purpose of allowing additional proceedings in which the parties may submit evidence concerning whether the respondent can reasonably be regarded as a danger to the security of the United States and is barred from asylum on that basis; (2) for a further evaluation, if necessary, concerning whether the respondent should be granted asylum as a matter of discretion in light of any additional evidence presented; (3) for the parties to submit any additional evidence relevant to the respondent's eligibility for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3), and for protection under the Convention Against Torture ("CAT") (*see* 8 C.F.R. § 1208.16(c)); and (4) and for the Immigration Judge to issue a new decision in accordance with this opinion addressing the respondent's application for asylum and also specifically determining whether the respondent is eligible for withholding of removal under the Immigration and Nationality Act or protection under the CAT.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD