No. 98-1090

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANCISCO CHAVEZ MISOLA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board of Immigration Appeals' determination that petitioner failed to meet his burden of proving eligibility for asylum and withholding of deportation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the decision is noted at 162 F.3d 1155 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 8-10) and the immigration judge (A.R. 61-71)[1] are unreported.

[1] Petitioner did not reproduce the immigration judge's decision in the petition appendix. It may be found, however, on the indicated pages of the Certified Administrative Record, which was filed with court of appeals and is part of the court of appeals' record in this case. In this brief, "A.R." refers to that record. In addition, we have lodged a copy of the immigration judge's decision with the Clerk of this Court.

JURISDICTION

The court of appeals entered its judgment on September 2, 1998. On December 1, 1998, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including January 4, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994).[2] If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a). The decision to grant or deny asylum, however, falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a). An alien seeking asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a) (1996).[3]

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[2] In this brief, unless otherwise indicated, all references to Title 8 refer to the 1994 main edition, which was in effect at the time this case arose.

[3] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI-A, 110 Stat. 3009-690, significantly revised the Immigration

In addition, "if the Attorney General determines" that the alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (1996) (applicant bears the burden of proof of eligibility for withholding). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[4]

2. Petitioner is a native and citizen of the Philippines. Pet. App. 2; A.R. 61. While in the Philippines, petitioner was a landowner, businessman, and farmer who earned approximately $110,000 per year, and who em-

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and Nationality Act's asylum provision. Those amendments, however, do not govern the present case because they apply to applications for asylum filed on or after April 1, 1997. IIRIRA, Tit. VI-A, § 604(c), 110 Stat. 3009-694; see also Pet. App. 1-2. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-C, § 421(a), 110 Stat. 1270, do apply to this case because the AEDPA amendments govern asylum determinations made on or after the amendments' effective date of April 24, 1996. AEDPA, Tit. IV-C, § 421(b), 110 Stat. 1270. For purposes of petitioner's claim, however, the AEDPA amendments to the asylum provision did not alter the pre-AEDPA provision in any material way.

[4] IIRIRA substantially revised and rewrote 8 U.S.C. 1253. See IIRIRA, Div. C, Tit. III-A, § 305, 110 Stat. 3009-602. The withholding provisions are now codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996). That amendment does not govern the present case because its provisions apply only to withholding applications of aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625.

ployed permanent and temporary farmworkers. A.R. 87-88. Petitioner was not active in Philippine politics; he testified that he supported neither the rebel movements nor the government. A.R. 89. According to petitioner's testimony, in the late 1980s, the military arm of the Philippine Communist party, the New People's Army, became an active presence in his region of the country and extorted "war taxes" to finance the group's anti-government operations from "the citizens * * * especially the businessmen, landowners, the rich people, and even the peasants themselves." Pet. App. 3-4; A.R. 90-92. People who did not pay their war taxes allegedly were threatened or killed. Pet. App. 3. Petitioner further testified that the New People's Army executed his cousin for failing to pay war taxes. Pet. App. 3 & n.3.

Petitioner testified that, in June 1989, the New People's Army demanded money from him. Pet. App. 3; A.R. 96-97. He claimed that the son of one of his part-time workers gave him a letter that bore a black ribbon and demanded 50,000 pesos; the black ribbon allegedly denoted a death threat. A.R. 96. Petitioner did not pay because he did not want to help the New People's Army. A.R. 97-98. Petitioner did not indicate, however, that the New People's Army was aware of his desire not to be affiliated with it. A.R. 97-98; Pet. App. 3. After deciding not to pay the war taxes, petitioner abandoned his farm and fled with the assistance of some members of the local police. A.R. 97-99. Petitioner then lived in various parts of the Philippines unthreatened by the New People's Army until December 1991. Pet. App. 5; A.R. 99, 101-103, 115-116, 133-138.[5]

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[5] Petitioner submitted a new affidavit to the Board of Immigration Appeals in which he claimed that he received the death threat

3. Petitioner entered the United States on December 31, 1991, with authorization to remain for a temporary period as a nonimmigrant foreign government official. A.R. 67, 214. When petitioner failed to maintain that status, the Immigration and Naturalization Service initiated deportation proceedings against petitioner, pursuant to 8 U.S.C. 1251(a)(1)(C)(i). A.R. 75, 216. Petitioner conceded deportability, and sought asylum and withholding of deportation, claiming that he feared persecution by the New People's Army. A.R. 61.

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in June 1991, rather than 1989, and thus lived in the Philippines for only six months following the threat. A.R. 31-33; see also A.R. 200 (affidavit in support of application for asylum dates the threat in June 1991). In the affidavit submitted to the Board, petitioner ascribes the reference to the earlier date in his testimony as either a transcription error or a misstatement attributable to "nervous-[ness]" while testifying. A.R. 32. However, petitioner, whose native language is English (A.R. 74, 88), repeated or otherwise reaffirmed the June 1989 date at least seven times during his testimony at the hearing. A.R. 96, 97, 114, 115, 116, 119, 120. He also testified in some detail that he resided in other parts of the Philippines following the threat (A.R. 101) for periods of time ranging from eight to eighteen months (A.R. 115, 135, 136-138), which is inconsistent with his current claim that he fled to the United States six months after the threat. The immigration judge found that the threat was received in June 1989 (A.R. 65); the Board did not disturb that finding; and the court of appeals adopted it (Pet. App. 5). Accordingly, that finding should govern disposition of this petition. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"); cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, * * * cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."), aff'd on reh'g, 339 U.S. 605 (1950).

The immigration judge rejected petitioner's application. A.R. 61-71. The immigration judge held that petitioner failed to establish his eligibility for asylum or withholding of deportation, concluding that the record contained no objective evidence supporting his claim that he will be persecuted in the Philippines on the basis of political opinion or any of the other protected grounds. A.R. 69. The immigration judge further found that, because petitioner had resided safely in other parts of the Philippines for a lengthy period of time after the threat, petitioner had not met his burden of showing that his fear of persecution was countrywide and could not be redressed through internal relocation. A.R. 70. In this regard, the immigration judge noted that State Department reports in the record indicated that the New People's Army "is diminishing in size and resources, and is also diminishing in its ability to carry out threats." *Ibid.*

The Board dismissed petitioner's appeal. Pet. App. 9-10. While the Board accepted petitioner's testimony that he feared retribution from the New People's Army for failing to comply with its demands for money, the Board explained that the record contained "no evidence that such harm was politically motivated," and that "[a]ttempts to extort money do not constitute persecution, where it is reasonable to conclude that those attempting the extortion are not motivated by the victim's political opinion." *Id.* at 10.

4. In an unpublished decision, the court of appeals denied the petition for review, concluding that substantial evidence supported the Board's decision that petitioner had not established the requisite fear of persecution based on political opinion or other protected characteristics. Pet. App. 1-6. The court explained that there was "no evidence" that the New People's

Army singled petitioner out "because of his political views or his membership in a social group." *Id.* at 4. Because petitioner testified that the New People's Army extorted money from "landowners, business people and peasants alike," petitioner "failed to establish that those attempting extortion were motivated by their victims' real or perceived political opinion." *Ibid.* Although petitioner claimed that he did not support the goals of the New People's Army, the court found no evidence that the New People's Army was aware of petitioner's views. *Ibid.* "Nor," the court continued, "is there evidence that the [New People's Army] actually imputed any political opinion to [petitioner] and sought to persecute him based on that imputed opinion." *Id.* at 5. Relying on this Court's decision in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), the court held that the mere "existence of a generalized political motive of the [New People's Army] is insufficient to establish [petitioner's] fear of persecution on account of political opinion under the applicable statute." Pet. App. 5. Finally, the court ruled that substantial evidence supported the conclusion that petitioner's fear of persecution was not country-wide. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 6-10) that review is necessary to redress an alleged conflict in the circuits concerning the type of evidence that will support application of the imputed political opinion doctrine. That claim does not merit this Court's review.

a. Under the imputed political opinion doctrine, an alien may establish a fear of persecution based on political opinion by introducing evidence that a persecutor has undertaken its actions because of the persecutor's perception that the alien is a political opponent, even if

the alien in reality does not hold such views. See, *e.g.*, *Sangha* v. *INS*, 103 F.3d 1482, 1489 (9th Cir. 1997) (generally discussing asylum based upon imputed political opinion); see also *INS* v. *Elias-Zacarias*, 502 U.S. 478, 482 (1992) ("Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal [to fight with them] was politically based."). This case presents no issue concerning the application of the imputed political opinion rationale, however. The Board and the court of appeals agreed that petitioner had produced no evidence that the New People's Army imputed any political opinion to petitioner. See Pet. App. 5 ("Nor is there evidence that the [New People's Army] actually imputed any political opinion to [petitioner]."); *id.* at 10 ("no evidence" that threats were politically motivated). Thus, even if we assume, *arguendo*, that courts have varied somewhat in determining whether particular factual records contain sufficient evidence to compel a finding that persecution was based on imputed political opinion, the unpublished decision of the court of appeals in this case presents no occasion for consideration of that issue.

b. For the same reason, petitioner is incorrect in arguing (Pet. 9) that his case would have come out differently if decided in another circuit. Quite the opposite, within the Ninth Circuit, petitioner's claim would have been governed by *Sangha* v. *INS*, *supra*, where the Ninth Circuit, like the Fourth Circuit here, declined to apply the imputed political opinion rationale in the absence of any specific evidence that the persecutors acted out of an animus towards the alien's perceived political views. 103 F.3d at 1490 ("[T]here is no evidence to show that the [Bhindrawala Tiger Force] acted 'on account of' any political opinion it imputed to

Sangha."). In this case, as in *Sangha*, "it is equally likely that the [persecuting group] acted for other reasons," *ibid.*, such as a desire to strengthen the organization and help it achieve its own military goals, or to impose discipline, *id.* at 1490-1491.[6]

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[6] The other Ninth Circuit decisions upon which petitioner relies (Pet. 8-9) are of no help to him. In *Garrovillas* v. *INS*, 156 F.3d 1010 (1998), the threats against Garrovillas by the New People's Army were directly traceable to his service as an informant against the organization and his "anti-communist beliefs and his activities," of which the New People's Army was aware. *Id.* at 1012, 1016. By contrast, petitioner testified that he engaged in no political activities, and "there is no evidence in the record that his [political] views were known to the [New People's Army]." Pet. App. 4. Similarly, in *Gonzales-Neyra* v. *INS*, 122 F.3d 1293 (1997), amended by 133 F.3d 726 (1998), "Gonzales-Neyra provided evidence that he was persecuted, that he had a political opinion, that he expressed it to his persecutors, and that they threatened him only after he expressed his opinion," and that "the Shining Path representatives made it quite clear to Gonzales-Neyra that his political views motivated their hostility and threats." *Id.* at 1296. Petitioner introduced no such evidence in this case. See also *Vera-Valera* v. *INS*, 147 F.3d 1036, 1039 (9th Cir. 1998) (record evidence showed that "[t]he Sendero Luminoso members threatened Vera-Valera with his life because they felt his advocacy for the construction project represented political opposition to Sendero's goals[, and] * * * Sendero Luminoso believed that Vera-Valera was aligned with the government, whose opposition to the construction project was clearly political"). Furthermore, when presented with the virtually identical claim of persecution by a Philippine native opposed to paying the New People's Army's exactions, the Ninth Circuit rejected the claim because it concluded, like the Fourth Circuit here, that the threats were motivated by the victim's economic ability to pay, not his or her political opinion. See *Borja* v. *INS*, 139 F.3d 1251, 1254-1255 (1998). That the decision in *Borja* has now been withdrawn pending rehearing en banc, see 150 F.3d 1223 (1998), underscores the absence of a current conflict between the court of appeals' decision in this case and any rulings of the Ninth Circuit.

Nor do the decisions of the Second and Third Circuits that petitioner cites (Pet. 9-10) suggest that they would reach a different outcome in this case. In *Osorio* v. *INS*, 18 F.3d 1017 (2d Cir. 1994),[7] the court concluded that, while Guatemalan authorities persecuted union leaders in part for economic reasons, "substantial evidence * * * compel[led] the view that Guatemalan authorities persecuted Osorio because he and his union posed a political threat to their authority via their organized opposition activities," *id.* at 1029; that "Osorio's activities clearly evince[d] the political opinion that strikes by municipal workers should be legal and that workers should be given more rights," *id.* at 1030-1031; and that "Guatemala's persecution of Osorio was motivated in large part because it wanted to silence the expression of these political beliefs," *id.* at 1031. Petitioner, by contrast, introduced no evidence (and cites no record authority for his claims now (Pet. 9, 10, 12)) either that the New People's Army acted with such dual motivations when it threatened or harmed those who failed to comply with its monetary demands, or that the New People's Army read a political message into petitioner's failure to pay.

Likewise, in contrast to the present case, the evidence in *Chang* v. *INS*, 119 F.3d 1055 (3d Cir. 1997), "compel[led] the conclusion that China's motives in enforcing its rules against Chang are based on Chang's political opinion," *id.* at 1062, and, in particular, Chang's effort to protect others from punishment by the

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[7] Petitioner mistakenly attributes this case to the First Circuit (Pet. 9).

Chinese government, *id.* at 1063, and "opposition to the policy of the Chinese government," *id.* at 1065.[8]

2. Petitioner seeks (Pet. 11-16) this Court's review of the court of appeals' application of the substantial evidence standard to the facts of his case. This Court has long recognized, however, that "Congress has placed in the keeping of the Courts of Appeals" the task of evaluating whether an agency's decision is supported by substantial evidence. *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974). "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.*; see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That principle should apply with particular force when, as here, both levels of the administrative agency and the court of appeals concurred in their analysis of the record and its application to the governing law.

In any event, substantial evidence supported the Board's decision. In his testimony, petitioner admitted that he engaged in no political activities, and he introduced no evidence that the New People's Army was aware of his political views. Pet. App. 3-5. Petitioner also testified that the New People's Army extorted "taxes" from landowners and peasants alike, *id.* at 4, and "that the purpose for the extortion was for the [New People's Army] to obtain financing to further its cause," *ibid.*, not to punish others for their political

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[8] This Court recently denied a petition for a writ of certiorari in a case where the petitioner, like petitioner here, contended that record-specific variations in the outcomes of imputed political opinion cases constituted a circuit conflict meriting this Court's review. See *LaBorde* v. *INS*, 119 S. Ct. 866 (1999).

views. The court of appeals' ruling is thus consistent with this Court's decision in *INS* v. *Elias-Zacarias*, *supra*, which recognized that a court reviewing the Board's denial of an asylum claim may not presume that an alien has shown persecution on the basis of political opinion, whether actual or imputed, merely because he or she refused to cooperate with an alleged persecutor and suffered some retribution as a result. See 502 U.S. at 482 (evidence of forced recruitment into a guerrilla group, or retaliation for resisting forced recruitment, alone is insufficient to establish persecution on account of political opinion, because "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of [non-political] reasons").[9]

Furthermore, as the immigration judge and the court of appeals noted (A.R. 70; Pet. App. 5), petitioner separately failed to demonstrate that he faces a country-wide risk of persecution, because he was able to live without further disturbance in other regions of the Philippines for a lengthy period of time after being threatened by the New People's Army.[10]

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[9] See also *Cuevas* v. *INS*, 43 F.3d 1167, 1171 (7th Cir. 1995) (refusal to sell land despite threats from New People's Army was based on economics, not on account of a political opinion); *Bartesaghi-Lay* v. *INS*, 9 F.3d 819, 822 (10th Cir. 1993) (alien's fear of retribution for his refusal to participate in illegal drug activities was not a well-founded fear of persecution on account of political opinion).

[10] See, *e.g.*, *In re A-E-M-*, Interim Dec. No. 3338, 1998 WL 99555 (BIA Feb. 20, 1998) (fear of persecution insufficient where it did not "exist throughout that country"); *In re C-A-L-*, Interim Dec. No. 3305, 1997 WL 80985 (BIA Feb. 21, 1997) ("This Board has found that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place within a country. He must show that the threat of persecution exists for him country-wide."); 63 Fed. Reg. 31,947

3. Finally, petitioner argues (Pet. 16-18) that this Court should "revisit" its decision in *Elias-Zacarias* because, he contends, that decision conflicts with the "political values" underlying the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, and the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) (UNHCR Handbook). That claim is without merit for three reasons.

First, assuming *arguendo* that petitioner has properly discerned the "political values" (Pet. 17) underlying the Protocol, courts are not bound by the unwritten values animating international instruments. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) ("[A] treaty cannot impose uncontemplated * * * obligations on those who ratify it through no more than its general humanitarian intent."). That is particularly true with respect to the Protocol, because it is not a self-executing treaty. See *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991); *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982). Nor is the UNHCR Handbook binding on the INS, Congress, or the courts. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N.

(1998) ("The Board and the Federal courts have long acknowledged the requirement of countrywide persecution as an integral component of the refugee definition, which cannot be met if the applicant reasonably could be expected to seek protection by relocating to another part of the country in question."). The Board found it unnecessary to reach the issue of whether the persecution petitioner claimed to face was country-wide. Pet. App. 9-10.

Handbook has the force of law or in any way binds the INS.").

Second, *Elias-Zacarias* is consistent with the Protocol. Nothing in the text of the Protocol regulates the evidentiary burdens signatory states apply in determining whether an individual satisfies the definition of "refugee." To the contrary, "the determination of refugee status under the 1951 Convention and the 1967 Protocol * * * is incumbent upon the Contracting State in whose territory the refugee finds himself." *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (quoting UNHCR *Handbook* Foreword (II)).

Third, petitioner makes no argument that any principles concerning exceptions to the doctrine of *stare decisis* support reconsideration of *Elias-Zacarias*. See *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). That doctrine applies with "special force" here, because the interpretation and application of statutory law is at issue and thus "Congress remains free to alter what [the Court] ha[s] done." *Hohn* v. *United States*, 118 S. Ct. 1969, 1977 (1998).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999