No. 99-340

In the Supreme Court of the United States

ISMAIL HOSSAIN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in upholding the Board of Immigration Appeals' determination that petitioner lacked a well-founded fear of persecution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the judgment is noted at 172 F.3d 876 (Table). The decision and order of the Board of Immigration Appeals (Pet. App. 16-36) and the decision and order of the immigration judge (Pet. App. 7-15) are unreported.

JURISDICTION

The court of appeals entered its judgment on March 10, 1999. A petition for rehearing was denied on May 26, 1999 (Pet. App. 37). The petition for a writ of certiorari was filed on August 24, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act of 1952 (INA), 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" the country of his nationality "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 & Supp. IV 1998). 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). An alien claiming eligibility for 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 fear of persecution. 8 C.F.R. 208.13(a). Once an alien has established eligibility for asylum, the decision whether to grant or deny asylum falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[1]

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[1] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI, Subtit. A, 110 Stat. 3009-690, significantly revised the INA's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694. The changes in asylum effected by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. C, § 421(a), 110 Stat. 1270, do apply to this case because the AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA § 421(b), 110 Stat. 1270. The AEDPA amendment, however, is not pertinent to petitioner's claim.

If an alien proves that he or she was a victim of persecution in the past, a presumption arises that the alien has a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1)(i). The burden then shifts to the Immigration and Naturalization Service (INS) to rebut that presumption through showing, by a preponderance of the evidence, that "since the time the persecution occurred conditions in the applicant's country of nationality * * * have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return." *Ibid.* If the INS rebuts the presumption, the application for asylum "shall be denied," 8 C.F.R. 208.13(b)(1)(ii), unless the "severity of the past persecution" provides "compelling reasons" for the applicant's fear of returning, *ibid.*[2]

In addition, "if the Attorney General determines" that an 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) (1994). 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) (applicant bears the burden of proof of eligibility for withholding of deportation). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[3]

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[2] Petitioner does not contend that the latter exception is at issue in this case.

[3] IIRIRA substantially revised the INA's withholding-of-deportation provisions, see IIRIRA, Div. C, Tit. III, Subtit. A, § 305(a)(3), 110 Stat. 3009-602, which are now codified at 8 U.S.C. 1231(b)(3) (Supp. IV 1998). IIRIRA does not govern the present case because its provisions apply only to withholding applications

2. Petitioner is a native and citizen of Bangladesh, where he was a member of the Jatiyo Party. At the time petitioner joined, the head of the Jatiyo Party was the President of Bangladesh. Pet. App. 7, 9. Petitioner attended meetings, participated in demonstrations, and distributed literature for the Party. *Id.* at 2. In 1991, the Bangladesh National Party gained control of the government, and members of that party and the police began to disrupt Jatiyo Party meetings. *Ibid.*

Petitioner testified that, on one occasion, National Party members attacked members of the Jatiyo Party during a peaceful demonstration in which petitioner was participating. During that incident, National Party members beat petitioner with sticks until he was "too hurt to move." Pet. App. 2. When police arrived on the scene, they arrested petitioner and then immediately took him to a medical clinic for treatment of his injuries. *Id.* at 11. After his medical treatment, the police detained petitioner for one month. *Ibid.*[4] Although petitioner does not allege that he was mistreated by the Bangladeshi police, approximately five times during his month-long incarceration police officers "demanded or requested" that he cease his activities with the Jatiyo Party, and indicated that he would not be released until he disavowed his party affiliation. *Id.* at 11-12. In the

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filed by aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, § 309(a), 110 Stat. 3009-625. AEDPA's changes to the withholding provision (see Pub. L. No. 104-132, Tit. IV, Subtit. B, § 413(f), 110 Stat. 1269) do apply because the Board's final decision was not issued until after AEDPA's date of enactment. See § 413(g), 110 Stat. 1269-1270; see also *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1443 (1999). The AEDPA amendments, however, are not pertinent to petitioner's claim.

[4] That period of detention apparently was authorized under Bangladeshi law. Pet. App. 3 & n.2.

four months following his release, National Party members threatened petitioner and his parents with harm if petitioner did not cease his Jatiyo Party activities. *Id.* at 12.

3. Petitioner attempted to enter the United States in September 1993 without a valid entry document and was immediately detained and placed in exclusion proceedings, pursuant to 8 U.S.C. 1182(a)(7)(A)(i)(I). Pet. 4. During those proceedings, petitioner applied for asylum and withholding of deportation. Pet. App. 7-8. The immigration judge rejected petitioner's application. *Id.* at 7-15. The immigration judge first found that petitioner was the victim of private "inter-party conflict" and "chaotic circumstances," rather than a victim of persecution at the hands of the government. *Id.* at 13. Second, the immigration judge ruled that, even if petitioner had been persecuted in the past, petitioner's "own testimony and the background materials that have been presented" demonstrated that he did not have a well-founded fear of further persecution, because the National Party is no longer in power in Bangladesh, a party friendly to Jatiyo is currently in control of the government, and the Jatiyo Party is well-represented in Parliament. *Id.* at 14.

The Board of Immigration Appeals affirmed. The Board first agreed with the immigration judge that neither the "lone assault during an instance of mob violence" nor the brief detention constituted past persecution. Pet. App. 18. The Board also adopted the immigration judge's "alternative" (*id.* at 17) holding that, even if he was persecuted in the past, petitioner lacks a well-founded fear of persecution in the future due to the political changes that have occurred in Bangladeshi politics since the early 1990s. *Ibid.* Beyond that, the Board concluded, petitioner's general-

ized concerns about party conflicts and political upset in Bangladesh "do not distinguish him from the population at large"; "a fear of civil strife is not grounds for asylum." *Id.* at 18-19.

4. The court of appeals affirmed. Pet. App. 1-6. Disagreeing with the Board and the immigration judge, the court held that the evidence in the record "compels the conclusion that [petitioner] suffered past persecution" when he was attacked by National Party members and detained by the police. *Id.* at 3. The court, nevertheless, affirmed because the Board "articulated sufficient reasons for us to conclude that the presumption of future [persecution] was rebutted." *Id.* at 4. In particular, the court agreed that "the record shows that conditions in Bangladesh have changed substantially" since petitioner's departure. *Ibid.* The court further agreed with the Board's finding that the remaining instability in Bangladesh was reflective of general civil strife, which did not form the basis for a viable asylum claim. *Ibid.*

Judge Thomas dissented on the ground that the appropriate course of action after finding past persecution was to remand the case to the Board to determine whether the presumption of a well-founded fear had been rebutted. Pet. App. 5-6.

ARGUMENT

The unpublished decision of the court of appeals presents no issue warranting review by this Court.

1. Petitioner contends (Pet. 12-14) that the court of appeals' failure, after finding past persecution, to remand for the Board to determine whether the resulting presumption of a well-founded fear of persecution had been rebutted conflicts with decisions of the First Circuit. No such conflict in circuit law exists. The general

rule is, as petitioner documents (Pet. 14-15 (citing *e.g.*, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947))), that courts of appeals should remand for the Board to evaluate the record and apply the law to individual applicants in the first instance. Contrary to petitioner's claim of a conflict, however, published case law in both the First and Ninth Circuits recognizes that, when the court finds past persecution but the Board did not, courts generally should remand to the Board to apply the presumption and to determine whether it has been rebutted. See, *e.g.*, *Surita* v. *INS*, 95 F.3d 814, 821 (9th Cir. 1996); *Singh* v. *INS*, 94 F.3d 1353, 1361 (9th Cir. 1996); *Gebremichael* v. *INS*, 10 F.3d 28, 36 n.22 (1st Cir. 1993).

The general rule that a court of appeals should remand to the Board when it finds a legal error in the Board's decision is not without exception, as petitioner himself admits (Pet. 12-13). Most importantly for present purposes, this Court "will *uphold* a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285-286 (1974) (emphasis added); *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). Here, the court of appeals affirmed the Board's decision on a second ground addressed by the Board after disagreeing with the Board on the first. There is nothing in the least remarkable about such a disposition. In other cases, courts of appeals—including the court in the case upon which petitioner predicates his claimed conflict (Pet. 12)—have *reversed* the Board's decision outright and declined to remand to the Board if, after concluding the Board's decision could not stand on the basis of its stated rationale, the court determined that "reconsideration by the agency would clearly be an empty

exercise." *Gebremichael*, 10 F.3d at 36 n.22 (citing additional cases). Indeed, in *Fergiste* v. *INS*, 138 F.3d 14 (1998) (cited at Pet. 13), the First Circuit independently determined "as a matter of law that * * * the INS did not rebut the presumption of future persecution," rather than remand for a determination by the Board in the first instance. *Id.* at 19.

The divergent outcomes that petitioner perceives thus do not reflect substantive inter-circuit disagreement on the law, but rather variations in outcome that can be expected to occur in both circuits when a general rule and an exception that turns upon the state of the record are applied to the specific facts of individual cases. The INS does not always agree with court decisions determining that remand is unnecessary and, in fact, believes that remand should be ordered in virtually all cases where the court of appeals sets aside a Board decision because of legal error, so that the Board can reconsider the case with the legal error corrected. Compare, *e.g.*, *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940). It would never be appropriate, in our view, for a court of appeals to find, in the first instance, that the presumption of future persecution has *not* been rebutted in a case in which the Board had decided the case without reaching that question and, perhaps, without developing a full record on that issue. That is because the INA accords refugee status to an individual only if the "Attorney General determines" that the requisite criteria are satisfied. 8 U.S.C. 1158(a).

In any event, petitioner's mere disagreement with the court of appeals' particularized, fact-bound resolution of his case does not warrant an exercise of this Court's certiorari jurisdiction.

2. Petitioner also argues (Pet. 14-16) that review is warranted because the court erred in affirming the Board on a ground that the agency did not invoke, rather than remanding. That claim is without merit. First, petitioner is ill-positioned to complain about the absence of a remand because he specifically argued to the court of appeals that a remand for the Board to decide whether the INS had rebutted the presumption of a well-founded fear of persecution would be inappropriate in this case. See Pet. C.A. Opening Br. 25 ("We do not believe that remand is appropriate in this case, because '[a] remand at this stage would permit the INS to argue its case . . . a second time.'").[5]

Second, it is highly doubtful that any such error occurred in this case. The Board explained that the immigration judge found no prior persecution (Pet. App. 17), and that the immigration judge found in the "alternative" (*ibid.*) that, even if prior persecution occurred, no well-founded fear of persecution existed due to changed country conditions (*id.* at 13-14). The Board agreed with the latter finding (as well as the finding that no persecution occurred in the first instance). *Id.* at 18. The government's brief to the court of appeals likewise read the Board's decision as determining that there had been an adequate rebuttal of any presumption that would have arisen from a finding of past persecution. See Gov't C.A. Br. 22. Thus, although not couched in terms of rebuttal analysis, the

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[5] Although petitioner now claims (Pet. 14) that the exception to the general practice of remanding that he so strongly advocated before the court of appeals is now "entirely inapposite," he fails to explain why this Court's certiorari jurisdiction should be exercised to review the court of appeals' decision to do precisely what petitioner asked it to do.

Board's decision, when read in light of the structure and wording of the immigration judge's decision that it unqualifiedly affirmed, can reasonably be read as holding that the preponderance of the evidence weighs against a finding of well-founded fear of persecution, and thus that the presumption would be rebutted. Cf. *In re H-*, Interim Dec. No. 3276 (BIA May 30, 1996), slip op. 16, *available in* 1996 WL 291910, at *20 (INS may rebut the regulatory presumption of a well-founded fear of persecution either by introducing additional evidence or by "resting upon evidence already in the record").

Third, even if the court of appeals erred in failing to remand for the Board to apply the rebuttal analysis in the first instance, the court did not usurp the Board's authority to find facts on changed country conditions because the Board expressly found those necessary facts. The court of appeals merely repeated and sustained the Board's findings as to those facts. In short, (i) the close congruity of the court's and Board's reading of the record; (ii) petitioner's failure to challenge before this Court either the Board's or the court's substantive finding of no well-founded fear; and (iii) the fact that petitioner does not argue here and did not argue in any of his filings with the court of appeals that remand is necessary for him to supplement the record before the Board, together render any procedural error by the court of appeals of insubstantial import in the circumstances of this case alone.

There is, in short, no reasonable basis for believing that a remand to the Board for further consideration of the prospect of future persecution would change the ultimate decision. Review of the unpublished decision below therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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