U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: [redacted] **A** [redacted]

Date of this notice: 11/3/2016

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

schwarzA
Userteam: Docket

File: [redacted] – Orlando, FL Date: NOV - 3 2016

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Philip M. Zyne, Esquire

ON BEHALF OF DHS: Ian D. Fiske
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The Department of Homeland Security ("DHS") has appealed from the Immigration Judge's January 11, 2016, decision granting the respondent's application for asylum. The respondent has filed a brief in opposition to the appeal. The appeal will be dismissed.

We review findings of fact, including credibility findings, for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of J-Y-C-*, 24 I&N Dec. 260 (BIA 2007); *Matter of S-H-*, 23 I&N Dec. 462 (BIA 2002). We review questions of law, discretion, or judgment, and all other issues de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent is a native and citizen of Bangladesh (I.J.1 at 1; Exh. 1).[1] He testified that he joined the student wing of the Bangladesh National Party ("BNP") in 2005 (I.J.1 at 3; Tr. at 22). That party is one of Bangladesh's major political parties (I.J.2 at 6; Exh. 5 at 68). When the respondent joined the BNP in 2005, it controlled the government (I.J.1 at 3-4; Tr. at 24-25). By 2006, however, the BNP lost control of the government (I.J.1 at 4; Tr. at 25). Since 2008, the rival Awami League has been the prevailing party in Bangladesh (I.J.1 at 4; Tr. at 25-26).

[1] The Immigration Judge issued two decisions relevant to this appeal. The first, dated June 25, 2015, concluded with the Immigration Judge intending to grant asylum to the respondent pending adjudication of the terrorist organization bar discussed *infra*. We will refer to this decision as I.J.1. The second decision, dated January 11, 2016, concludes that the terrorist organization bar does not apply to the respondent and grants asylum. We will refer to this decision as I.J.2.

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While a member of the BNP, the respondent rose to become the president of his local student group (I.J.1 at 4; Tr. at 26). He raised money, assisted in elections, and recruited new members, among other tasks (I.J.1 at 4; Tr. at 27-30). The respondent testified that there were dozens of BNP members in his local group (I.J.1 at 4; Tr. at 28). He attended and helped organize peaceful rallies and meetings (I.J.1 at 4; 27-30).

The respondent testified about three instances of harm to him (I.J.1 at 4-5). First, several members of the Awami League overheard him discussing the BNP in public (I.J.1 at 5; Tr. at 40). These people told him to stop working for the BNP or they would cut off his hands and legs and kill him (I.J.1 at 5; Tr. at 41). They did not physically harm him (I.J.1 at 5; Tr. at 41). Second, during a national holiday, the respondent was laying flowers by a tomb on behalf of the BNP (I.J.1 at 5; Tr. at 42-43). Approximately 10 Awami League members descended upon him and began beating and kicking him (I.J.1 at 5-6; Tr. at 43-49). They used a metal rod to strike him during the attack (I.J.1 at 6; Tr. at 45). He was knocked unconscious and has several scars from the attack (I.J.1 at 6; Tr. at 45-49). The respondent provided medical records and a newspaper article as corroborating evidence (I.J.1 at 6; Exh. 3 at 118-21, 131-42). The respondent testified that he and his father reported this attack to the police, but were rebuffed and told that they not would investigate a claim against the Awami League (I.J.1 at 6-7; Tr. at 56-57; Exh. 3 at 147-50).

Third, after this attack, the respondent moved to his grandfather's house, approximately 45 minutes distant (I.J.1 at 6; Tr. at 54). He stayed there for just over a month, and during that time, members of the Awami League told the respondent's parents that he must quit his role as president of the local BNP chapter or die (I.J.1 at 6; Tr. at 54-55; Exh. 3 at 147-50). The respondent moved to his uncle's home, over 3 hours away, but members of the Awami League found him and attacked him (I.J.1 at 6-7; Tr. at 58-59). He was kicked and beaten, but managed to escape (I.J.1 at 7; Tr. at 58-59). Afterward, the respondent left Bangladesh and traveled to the United States (I.J.1 at 7; Tr. at 61).

The DHS raises six arguments on appeal regarding the Immigration Judge's decision to grant the respondent asylum. We discuss each in turn and conclude that none gives us reason to disturb the Immigration Judge's decision.

First, the DHS argues that the Immigration Judge clearly erred in finding that the respondent testified credibly (DHS Brief at 8-9). We acknowledge the inconsistencies in the respondent's testimony as set forth in the DHS's appellate brief. However, while any inconsistency can form the basis for an adverse credibility determination based upon the totality of the circumstances and all relevant factors, *see* section 208(b)(1)((B)(iii) of the Act, 8 U.S.C. § 1158(b)(1)(B)(iii), it does not follow that the Immigration Judge clearly erred in crediting the respondent's explanations regarding the inconsistencies and finding his testimony credible (I.J.1 at 8-9). *See Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (noting that the Board may not overturn factual findings simply because the Board would have weighed the evidence differently or decided the facts differently).

For instance, the respondent's testimony is inconsistent in some respects with his prior statements. In an interview with a Border Patrol agent shortly after arriving in the United States

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after a six month journey, the respondent indicated that he was coming to the United States to escape both political persecution and religious persecution (I.J.1 at 8; Exh. 4). Before the Immigration Judge, the respondent only claimed persecution on account of his political opinion (I.J.1 at 8; Exh. 2 at 5). Additionally, the respondent's application for asylum indicates that the Awami League members threatened to cut off his hands and feet, while, as noted above, he testified that they threatened to cut off his hands and legs (I.J.1 at 8; Tr. at 41; Exh. 2 at 12). The Immigration Judge did not clearly err by crediting the respondent's explanations for these inconsistencies, particularly in light of the extensive corroborating evidence provided by the respondent (I.J.1 at 8-9; *see generally* Exh. 3).

Second, the DHS contends that the respondent did not establish that the Bangladeshi government is unwilling or unable to protect the respondent (DHS Brief at 9-12). This argument is largely predicated on the assumption that the respondent did not testify credibly, as the DHS contrasts what it calls the respondent's "self-serving testimony" with general evidence of country conditions. *Id.* However, we have found no clear error in the Immigration Judge's finding that the respondent testified credibly. We note that credible testimony by itself can sustain an alien's burden of proof for asylum. *See* section 208(b)(1)(B)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(ii). The respondent credibly testified that the police were unwilling to help him or investigate the violent acts against him (I.J.1 at 6-7; Tr. at 56-57).

The Immigration Judge did not clearly err in accepting the respondent's testimony over the more general evidence of country conditions. *See Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011); *see also Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). This conclusion is bolstered by the fact that Bangladeshi police have falsely accused the respondent of a crime occurring after he arrived in the United States (I.J.1 at 7; Exh. 3 at 151-64). The Immigration Judge credited the respondent's testimony that the police are controlled by the Awami League (I.J.1 at 8; Tr. at 57, 65). In light of the Immigration Judge's factual findings, the respondent established that the government of Bangladesh is unwilling or unable to protect him.

Third, the DHS argues that the respondent could reasonably relocate within Bangladesh and thus is not eligible for asylum (DHS Brief at 12-14). The DHS notes that respondent could move to the district of Syhet, which has a low rate of political violence (DHS Brief at 12-13; Exh. 5 at 38-39). We acknowledge that some parts of Bangladesh have more violence than others. However, the respondent moved twice and was repeatedly subject to violence. The Immigration Judge noted that the respondent's picture has been published in a newspaper, raising the respondent's public profile (I.J.1 at 8; Tr. at 66; Exh. 3 at 118-21). The respondent also testified that he would be arrested at the airport upon his return to Bangladesh because of the police report noted above and then be turned over to the Awami League (I.J.1 at 8; Tr. at 65). We disagree with the DHS's argument that the respondent could reasonably relocate within Bangladesh.

The DHS's fourth and fifth arguments are interrelated. The DHS contends that the BNP is a Tier III terrorist organization and that the respondent is a member of it, making him ineligible for asylum (DHS Brief at 14-24). They also argue that the Immigration Judge improperly shifted the

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burden of proof to the DHS in this inquiry (DHS Brief at 24-29). We address this latter argument first. We acknowledge that the Immigration Judge gave extensive consideration to the question whether the evidence indicates that the terrorist organization bar may apply and ultimately concluded that the evidence did not indicate that the bar applied (I.J.2 at 2-7). *See* 8 C.F.R § 1240.8(d); *Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006). However, he assumed in the alternative that the evidence did indicate that the terrorism bar may apply and properly assigned the burden of proof to the respondent (I.J.2 at 7). Consistent with the Immigration Judge's alternate holding, we assume that some evidence indicates that the terrorism bar may apply and determine whether the respondent has established by a preponderance of the evidence that the bar does not apply. 8 C.F.R. § 1240.8(d).[2]

We affirm the Immigration Judge's conclusion that the BNP is not a terrorist organization. *See* section 208(b)(2)(A)(v) of the Act. Generally under the Act, a group is an undesignated "terrorist organization" if it is composed of "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in [terrorist] activities . . ." Section 212(a)(3)(B)(vi)(III) of the Act, 8 U.S.C. § 1182(a)(3)(B)(vi)(III). A member of such a terrorist organization is ineligible for asylum, unless that alien can show by clear and convincing evidence that he or she did not know, and should not reasonably have known, that the organization was a terrorist organization. Sections 208(b)(2)(A)(v), 212(a)(3)(B)(i)(VI) of the Act.

The crux of this issue whether the BNP has engaged in terrorist activities. Put another way, there is no disputing the respondent's membership in the BNP, given that he was a local leader in the party and raised funds for it. We thus are interpreting the scope of the statutory term "engages in terrorist activities." This is a question of law that we review de novo. 8 C.F.R. § 1003.1(d)(3)(ii). We nevertheless review the Immigration Judge's findings of fact underlying this determination for clear error. *See* 8 C.F.R. § 1003.1(d)(3)(i); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015) (holding that the Board "will accept the underlying factual findings of the Immigration Judge unless they are clearly erroneous, and . . . will review de novo whether the underlying facts found by the Immigration Judge . . . resolve any other legal issues that are raised").

There is no question that members of the BNP have engaged in violent activity. The DHS submitted, and the Immigration Judge noted substantial evidence that members of the BNP have engaged in bombings and other violence resulting in injuries and deaths to others (I.J.2 at 3-4; *see* Exh. 5). However, the Immigration Judge found that BNP did not authorize, ratify, or otherwise approve or condone this violence (I.J.2 at 5). He concluded that without such evidence, the BNP was not a terrorist organization within the meaning of the Act (I.J.2 at 5).

In reaching this conclusion, he found persuasive reasoning from the United States Court of Appeals for the Seventh Circuit, which noted that the phrase "a group . . . which engages in"

[2] By doing so, we moot the DHS's claim that the Immigration Judge improperly allocated the burden of proof to it, and we need not address this claim further.

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terrorist activity under section 212(a)(3)(B)(vi)(III) of the Act is ambiguous because it is unclear whether a group which contains some members who resort to terrorist acts, without the group's sanction, has "engage[d] in" terrorist activity. *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008). The Seventh Circuit has subsequently noted that "[a]n entire organization does not automatically become a terrorist organization just because some members of the group commit terrorist acts. The question is one of authorization." *Khan v. Holder*, 766 F.3d 689, 699 (7th Cir. 2014) (citing *Hussain v. Mukasey*, *supra*, at 538 (holding that "[a]n organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization")).

We concur with the Seventh Circuit's reasoning and hold that the phrase "a group . . . which engages in" terrorist activity under section 212(a)(3)(B)(vi)(III) of the Act requires some evidence that a group authorizes, ratifies, or otherwise approves or condones terrorist activity committed by its members. *Hussain v. Mukasey*, *supra*, at 538. Absent such evidence, a political party such as the BNP cannot be deemed an undesignated terrorist organization under section 212(a)(3)(B)(vi)(III) of the Act.

The DHS argues that they presented evidence that BNP leadership at the very least condones violence by its members and sometimes endorses it (DHS Brief at 19). The strongest piece of evidence noted by the DHS is a statement by the BNP's acting secretary general that tougher agitations will follow if the party's demands are not met (Exh. 5 at 55). These comments occurred after a BNP strike where BNP members set off molotov cocktails and damaged vehicles. *Id.* These comments are ambiguous in that they do not expressly endorse the violence occurring during the strikes. A fact finder could infer that the secretary general was endorsing violence. However, a fact finder was not required to make that inference and could reasonably conclude that the secretary general was referring only to tougher, yet more peaceful demonstrations. Moreover, it is not clear that violent actions occurred after these statements on account of these statements. This evidence thus does not demonstrate that the Immigration Judge clearly erred in finding that the BNP does not authorize, ratify, or approve or condone these acts of violence.[3] *See Matter of D-R-*, *supra*, at 454.

The DHS also points to evidence that BNP leaders have been arrested for engaging in acts of political violence (*see, e.g.*, Exh. 5 at 51, 64). Evidence that persons have been arrested for violent activity does not bridge the evidentiary gap to demonstrate that those persons actually committed those violent acts or crimes. The DHS also notes a human rights report with the brief and conclusory statement that BNP leaders perpetrate violence (Exh. 5 at 41). This statement is not supported by underlying proof that the BNP leadership actually condones or authorizes violence. Thus, this evidence does not cause us to find clear error in the Immigration Judge's factual findings.

[3] In this regard, we note the respondent's testimony that the BNP does not support violence and expels members who engage in violent activity (I.J.1 at 7-8; Tr. at 64-65).

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Given that the Immigration Judge did not clearly err in finding that the BNP does not authorize, ratify, or otherwise approve or condone of terrorist activities, we also affirm his decision that the BNP is not a Tier III terrorist organization (I.J.2 at 5, 7).

The DHS's sixth and final argument is that the Immigration Judge ignored evidence of violence attributed to the BNP occurring before the respondent joined the party in 2005 (DHS Brief at 29-30; I.J.2 at 3). The Immigration Judge did not consider this evidence, reasoning that it had no bearing on whether the BNP was a terrorist organization during the time of the respondent's membership (I.J.2. at 3). The DHS concedes that we should look at the BNP during the time when the respondent was a member, but claims that the evidence is probative of whether the respondent knew or should reasonably have known that the BNP was a terrorist organization (DHS Brief at 29-30). Even if the Immigration Judge erred in excluding this evidence, any error is harmless because we are affirming the Immigration Judge's decision that the BNP is not a terrorist organization within the meaning of the Act. Thus, we need not inquire whether the respondent knew or reasonably should have known that the BNP was a terrorist organization because the BNP is not terrorist organization under the facts and circumstances of this case.

In sum, we affirm the Immigration Judge's decision to grant the respondent asylum. The DHS's appellate arguments have not convinced us to reverse the Immigration Judge's decision or remand for further inquiry. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD