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Mohiuddin A.K.M. AHMED, Alien No. A75 474 811, Petitioner, v. Alberto R. GONZALES, Attorney General of the United States, Respondent.

2005 WL 3126377

United States Court of Appeals, Ninth Circuit.

Appellate Petition, Motion and Filing

2005 WL 3126377 (9th Cir.)

For opinion see [2007 WL 582369](#)

[Briefs and Other Related Documents](#)

United States Court of Appeals,
Ninth Circuit.

♦**Mohiuddin**♦ A.K.M. ♦**AHMED**♦ Alien No. A75 474 811, Petitioner,
v.

Alberto R. GONZALES, Attorney General of the United States, Respondent.

No. 03-74603.

September 1, 2005.

On Petition for Review from a Final Order of the Board of Immigration Appeals

Respondent's Brief

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Petitioner Mohiuddin A.K.M. Ahmed ("Mohiuddin") seeks review of a November 18, 2003, decision entered by the Board of Immigration Appeals ("BIA" or "Board") affirming the immigration judge's decision denying Mohiuddin's applications for asylum, withholding of removal, and protection under the Convention Against Torture ("Torture Convention"). Administrative Record ("A.R.") 2-5, 172. The Board's jurisdiction arose under [8 C.F.R. § 1003.1\(b\)\(3\) \(2003\)](#), which grants the Board authority to review decisions of *2 immigration judges in removal cases.

This Court has jurisdiction to review final orders of the BIA pursuant to section 242(a) of the Immigration and Nationality Act ("INA"), [8 U.S.C. § 1252\(a\)](#), as amended by section 106 of the REAL ID Act of 2005 ("RIA"), [Pub. L. No. 109-13](#), Div. B, 119 Stat. 231, 302 (2005). This Court has jurisdiction to review claims for protection under the Convention within the context of a petition for review of a final order of removal pursuant [8 C.F.R. § 1208.18\(e\)\(1\) \(2004\)](#) and section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, [Pub. L. No. 105-277](#), 112 Stat. 2681, 2681-822 (1998). See RIA § 106(a)(1)(B) (codified as amended at [8 U.S.C. § 1252\(a\)\(4\) \(Supp. V 2005\)](#)).

The petition for review was timely filed on December 17, 2003, within thirty days of the Board's November 18, 2003, final order. See [8 U.S.C. § 1252\(b\)\(1\)](#). Because the immigration judge completed proceedings in California, A.R. 130, venue is proper in this Court. See [8 U.S.C. § 1252\(b\)\(2\)](#).

Notwithstanding the foregoing, and as set forth more fully below, the Court lacks subject matter jurisdiction over the Board's determination that petitioner is ineligible for asylum and withholding of removal because the Board's ruling rests upon the Attorney General's discretionary authority to decide that an alien has assisted in the persecution of others on account of political opinion. Petitioner *3 assisted or otherwise participated in the persecution of others on account of political opinion when he took part in the August 15, 1975, coup d'etat in Bangladesh in which forty-six people, including President Mujib, his two older sons, daughters-in-law, and ten-year-old son were shot to death. See INA §§ 208(b)(2)(A)(i), 241(b)(3)(B)(i), [8 U.S.C. §§ 1158\(b\)\(2\)\(A\)\(i\), 1231\(b\)\(3\)\(B\)\(i\)](#) (authorizing the Attorney General to bar asylum and withholding of removal when he "determines" that the alien "assisted or otherwise participated in the persecution of any person"). The Attorney General's "determin[ation]" under the persecution bar falls within the jurisdictional bar in INA § 242(a)(2)(B)(ii), [8 U.S.C. § 1252\(a\)\(2\)\(B\)\(ii\)](#), over any "decision or action of the Attorney General for which is specified ... to be in the discretion of the Attorney General." See [Matsuk v. INS, 247 F.3d 999 \(9th Cir. 2001\)](#) (construing INA § 242(a)(2)(B)(ii)'s jurisdictional bar to apply to the INA's preclusion of withholding of removal when the Attorney General "determin[es]" that an alien has committed a "particularly serious crime"). Where the Court is barred from reviewing the denial of asylum and withholding of removal on one of the three ineligibility categories applied by the Board in this case, it need not address the other two. Accordingly, the Court must dismiss the petition for review as to Mohiuddin's asylum and withholding of removal claims because his *4 ineligibility for assistance in persecution is not subject to review.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the Court lacks jurisdiction to review the Attorney General's discretionary determination that petitioner is ineligible for asylum and withholding of removal based upon his assistance and participation in the massacre of nearly fifty individuals during the August 15, 1975, coup d'etat in Bangladesh?
2. Whether, assuming jurisdiction, substantial record evidence supports the denial of petitioner's applications for asylum, withholding of removal, and protection under the Torture Convention?

STATEMENT OF THE CASE AND FACTS

This immigration case arises out of the events in Bangladesh on August 15, 1975, when two regiments of the Bangladesh military, led by a group of majors including the petitioner, Major Mohiuddin A.K.M. Ahmed, staged a coup d'etat in which they shot and killed the first president and founder of Bangladesh, Sheikh Mujibur Rahman (known as "Mujib," or "Bangabandhu," meaning "Bangalis' friend," AR 1862). Bangabandhu led the independence movement in 1971 that created Bangladesh from what had been East Pakistan. AR 131, 2262. Beyond *5 overthrowing Bangabandhu, however, the coup participants massacred forty-five people including Bangabandhu's wife, his two adult sons and their wives, Bangabandhu's ten year-old son, and the pregnant wife and four grandchildren (ages 5, 10, 11, and 15) of one of Bangabandhu's cabinet ministers. AR 1933-35. [FN1]

FN1. The record contains numerous accounts of the coup and massacre, among them the report of journalist Anthony Mascarenhas in his book, *BANGLADESHA Legacy of Blood* (Hodder and Stoughton 1986), a chapter of which the State Department attached to its May 22, 1997 advisory opinion in Mohiuddin's asylum case. See AR 3242-60; see also *id.* at 1854-1959 (historical and political context on the coup); AR 2241 (description of the coup from Marcus Franda, *BANGLADESH The First Decade* (South Asian Publishers Pvt Ltd. 1982); *id.* at 2235-52 (causes and aftermath of coup).

Ironically, the coup effected only marginal change in the existing form of government, given that the majors installed as president one of Bangabandhu's own cabinet ministers and fellow political party member, Khandaker Mushtaque, who continued the martial law originally and recently imposed by Bangabandhu and also held in place various extra-democratic measures the coup had ostensibly been designed to eliminate. AR 2265; see AR 1938-41; AR 2254-67 (*Bangladesh: A Country Study* (Federal Research Division, Library of Congress 1989)). As "chief martial law administrator," AR 2265, Mushtaque issued the "Indemnity Ordinance, 1975," which amounted to "a comprehensive pardon for the men who had slaughtered the Founding Father of the nation and 21 members *6 of his family." AR 1943.

Mushtaque's regime was short-lived, ending in a counter-coup less than three months later. AR 2265-66. Just prior to the November 1975 counter-coup, however, Mushtaque helped shuttle petitioner Mohiuddin and sixteen other coup leaders and participants out of the country to diplomatic assignments abroad. AR 888-94. "For over 21 years no one was brought to trial for the murders." AR 131.

In elections held in June 1996, the Awami League won a majority in parliament, and its leader, Sheikh Hasina Wajed - the daughter of slain President Mujib, spared by her absence from Bangladesh during the August 1975 coup - became Prime Minister. AR 132. Sheikh Hasina declared her intention to bring to trial the suspects in the August 1975 killings. AR 132. Criminal charges were subsequently filed against Mohiuddin and nineteen other alleged coup plotters and participants. *Id.*; see AR 1520, 3273. The State Department observed that while the decision to bring charges against the coup participants may have been related to Sheikh Hasina's election, "this need not, in our view, lead to the conclusion that the Government of Bangladesh is seeking to persecute this applicant." AR 3243. The State Department noted that the Prime Minister had obtained her post in "elections which were widely described as free and fair by a variety of international and domestic election observers," and that the "Bangladesh judiciary, *7 especially at the higher levels, displays a high degree of independence and often rules against the government, even in politically controversial cases." AR 3243 (citing 1996 State Department Country Report for Bangladesh).

Mohiuddin's Role and Participation In The Coup. Extensive background materials detail Mohiuddin's role in the coup, such as journalist Anthony Mascarenhas's book, *Legacy of Blood*, based on interviews with the two principal leaders of the coup, Major Farook Rahman ("Farook") and Major Abdur Rashid ("Rashid"), who admitted - indeed, celebrated - their organizing role in the coup. AR 1858; see also Pet. Br. at 22 (conceding that "Farook and Rashid, admitted their participation in broadcast interviews as early as 1976"). "[A]ll the available evidence demonstrates that the coup was "conceived and commanded by 12 to 20 military and ex-military men, none of them above the rank of major." AR 2241. Two regiments, artillery and "Lancers" or tanks, respectively, were involved, with Mohiuddin commanding one of four Lancers squadrons. AR 1927-37. Mohiuddin and another major "were assigned the task of knocking off Sheikh Mujib." AR 3247. "Their instructions were that they should kill Sheikh Mujib ... [b]ut were given latitude to proceed according to developments and, if necessary "wipe out anything en route." *Id.* In executing the plan, the "main killer team led by Majors Mohiuddin, Noor and Huda ... blocked off the surrounding area." AR *8 3249-50. "Then the majors and the men went in." *Id.* at 3250. As the coup leaders described it to Mascarenhas, Mohiuddin "was one of the officers who stormed the President's residence." AR 3242. [FN2]

FN2. Multiple witnesses in the Bangladesh trial describe Mohiuddin storming Mujib's residence, "firing continuously." AR 1534; AR 1549 (Mohiuddin's Lance Sergeant, L.D. Bashir, testified he saw Mohiuddin "entering Bangabandhu's house [and] later heard the sound of gun shots and the screams of men and women inside Bangabandhu's residence."); see also AR 1535-36, 1550, 1585.

By his own account, Mohiuddin's role was less dramatic, though no less integral. In his written application for asylum, filed prior to the initiation of removal proceedings, Mohiuddin admitted that his "task was to block the roads leading to Sheikh Mujib's house from the north and the west to stop any outside interference." AR 3270. At his asylum interview, he stated that the majors anticipated possible interference from the President's special security forces (the Rakkhi Bahini) who were based "one and a half miles from presidential palace." AR 1078. His assignment, he said, was to "[b]lock a road close to [the] president's house." AR 1073. Thus, he stated, he positioned his squadron on the road about "150 yards from the residence," *id.* at 1074, and was prepared to "stop [the Rakkhi Bahini] by force if necessary." AR 1079.

In denying Mohiuddin's affirmative asylum request, the Asylum Officer concluded that he should be barred from asylum "because he participated in the *9 persecution of others on account of their political opinion." AR 1355 (Asylum Officer's denial and referral for removal proceedings, August 29, 1997). "Even without answering the

allegations reported by the State Department" on Mohiuddin's role in attacking the presidential residence, his "own testimony revealed that he played a key role in the 1975 coup d'etat." AR 1354. The Asylum Officer found that Mohiuddin admitted that "he and all members of his squadron ... were prepared to use force if necessary to accomplish the coup, thereby causing death, severe injuries to the President and his family." *Id.* "As a result of his support and participation in the coup d'etat, the President... his wife, young children and other close family members and trusted aides were killed," she found. *Id.* She rejected Mohiuddin's contention that he was "only following orders," noting that it "did not relieve him of the responsibility for his role in the carnage," and that Mohiuddin "was not required to follow the order of the coup leaders, because he too was a major ... the same military rank as ... Maj. Farook and Maj. Rashid." *Id.*

Following his asylum denial, Mohiuddin was placed in removal proceedings for overstaying his tourist visa. AR 4344. At a hearing on his renewed application for asylum, Mohiuddin downplayed his role in the coup further. He testified that he was ordered to participate in what he understood would only be a ***10** "peaceful coup," and that the possibility of violence and killings "simply did not strike my mind." AR 735. At the same time, he asserted that if he had resisted the plan he would have been "straightaway shot." AR 485. Mohiuddin testified that he was assigned to block traffic on a road, but he claims he did not know the significance of this mission or the road's close proximity to the president's house. AR 814. He said he was not even sure where the president's house was located. AR 860. Asked how he could be unaware of that location when soldiers from his own regiment performed routine security duties there, Mohiuddin denied knowledge of any such security duties. AR 864-66; *compare* AR 3250 (noting that "Lancer sentries" at the president's house "quietly stepped aside" when their comrades approached). He also asserted that his earlier written statement that his mission was "to block the roads leading to Sheikh Mujib's house," AR 3270, reflected information he learned only later. AR 817; *see id.* (claiming that only knowledge "gathered over the last 21 years" informed him that his mission was to "stop any outside interference," AR 3270).

When confronted with the Asylum Officer's report that Mohiuddin stated his job was to prevent the president's security forces from disrupting the coup, Mohiuddin dismissed his prior statement as "hypothetical," and then refused during the hearing "to answer hypothetical things." AR 820.

***11** Mohiuddin repeatedly asserted that during and after the coup he had no "active role other than obeying ... orders." AR 886; *see e.g.* AR 471, 481, 895. He said he remained at his post until ordered to return to base and resume his routine duties. AR 881. He said he only learned of the coup's success from soldiers under his command who "heard the radio." AR 878.

Mascarenhas and others reported that after the coup, the group of majors went to the "radio station" to announce the coup and broadcast declarations of allegiance to the new government. AR 1938; *see* AR 1938-41. Witnesses in the Bangladesh trial testified that Mohiuddin was among the majors at the "radio center" on the day of the coup, and further place him "in conference in the President's office" later that day for the oath-taking ceremonies of the new president and cabinet. AR 1568, 1579.

Mohiuddin said nothing of these momentous actions at his asylum hearing. However, he did acknowledge his role in events leading to a counter-coup which took place less than three months after the establishment of the new government. The Library of Congress study observes that certain elements in the Bangladesh military "were deeply resentful of the majors," and that one of the "Mujib loyalists, Brigadier Khaled Musharraf, launched a successful coup on November 3, 1975." AR 2265. In Mohiuddin's written asylum statement, he said that two of ***12** General Khaled's officers attempted to persuade soldiers in Mohiuddin's regiment to join the counter-coup. AR 3271. Instead, Mohiuddin's soldiers arrested the officers. AR 3271. Mohiuddin wrote: "Brig. Khaled ordered me to release them or face dire consequence but I did not comply with his order." AR 3271. At the removal hearing, Mohiuddin again downplayed his responsibility in the matter, asserting that his soldiers acted on their own, that he was "sleeping at home" at the time, that he was called in to the regiment after the fact, and that he refused the Brigadier General's order because he was simply "trying to sort of understand what was going on." AR 900; *see* AR 901.

With the counter-coup imminent, and because the August coup plotters were "afraid," AR 889, President Mushtaque assisted Mohiuddin and the "other officers who are now being named or accused or convicted," in leaving Bangladesh, initially to Thailand, and then to various diplomatic assignments abroad. AR 890. These assignments were continued by General Zia who quashed the counter-coup and later assumed the presidency. AR 890; *see* AR 888-892, 2265. When asked on cross-examination how he ended up on the airplane with the coup plotters if, as he claimed, his own role was so limited, Mohiuddin replied that it was "an order that I received," and some officers "just escorted me to the aircraft." AR 897.

***13** *The Bangladesh Trial and Convictions*. Trials against nineteen accused coup participants, six in custody, and thirteen fugitives including Mohiuddin, commenced on March 13, 1997. AR 3243. Mohiuddin and the other fugitives tried *in absentia* had state-appointed defense counsel. *Id.* The trial lasted eighteen months and was "comprised of 149 hearings, involving 61 witnesses, documentary evidence, 10 attorneys for the state, and 18 attorneys for the defense, and was monitored by the international press." AR 144. It resulted in a 100-page judgment of the Bangladesh High Court on November 8, 1998. *See* AR 1495 (State Department report); AR 1517-1616 (High Court Judgment). The High Court convicted Mohiuddin and fourteen others of the August 1975 coup murders, and sentenced them to death. AR 1495. [FN3] Of the nineteen defendants, four were acquitted, including two defendants who were tried *in absentia*. *Id.*; *see also* AR ***14** 1275 (from State Department Country Report on Bangladesh, February 2001).

FN3. The November 1998 Judgment lists Mohiuddin among the accused at the beginning of the lengthy decision as ""Major A.K.M. Mahiuddin Ahmed, (Lancers), absconding." AR 1520. Throughout the body of the decision, Mohiuddin is identified as ""Major Mohiuddin of Lancers," or ""Major Mohiuddin (Lancers)," to distinguish him from other officers with the name ""Mohiuddin," including co-defendant ""Major Mohiuddin (Artillery)." See, e.g. AR 1535, 1546, 1568. Mohiuddin testified that while ""Mohiuddin" is a common name, he was the only ""[a]bsconding Mohiuddin." AR 949.

Following the coup, several of the majors were promoted to the rank of lieutenant colonel, and are listed in the judgment accordingly, such as " Lt. Col. Sayed Faruk" and ""Lt. Col." Rashid. AR 1520. Although the record lacks similar indication of a promotion for Mohiuddin, the Judgment's order references Mohiuddin as ""absconding Lieut. Colonel A.K.M. Mohiuddin Ahmed (Lancers)." See AR 1615.

In an advisory letter to the immigration judge, dated October 18, 1999, the State Department conveyed the assessment of the trial made by the U.S. Embassy in Bangladesh, noting the Embassy's belief that the ""18-month trial process, the acquittal of four of the defendants, and the independence of the High Court now considering the appeals, demonstrate that the defendants received due process." AR 1495. The Embassy also noted its ""belie[f] that the prosecution presented credible evidence that [Mohiuddin] participated in the conspiracy that led to these multiple, politically motivated murders in 1975." *Id.* Based on the Embassy's trial assessment, the State Department highlighted several indicia of the trial's fairness: (1) the trial was ""conducted under a public spotlight," (2) it was ""conducted under normal Bangladeshi judicial procedures," (3) ""defense lawyers agreed that the judge allowed them the opportunity to put forward the questions and arguments they wanted," (4) the length of the trial was partly attributable to ""the judge's tolerance for protracted cross-examination by the lawyer for Farook Rahman, the main defendant in custody," and (5) ""[w]hile it could be argued that the accused could have obtained more effective legal counsel had they chosen to return," the trial judge ""acquitted two defendants represented by state-appointed counsels." AR 1496-97.

***15** All the convictions underwent ""confirmation" review by the High Court ""to ensure that death sentences are supportable on a factual and legal basis." AR 1497. In addition, the four defendants in custody filed their own appeals for simultaneous review by the High Court. *Id.* The State Department noted that one such appeal, by a defendant who was then-recently returned to Bangladesh by Thailand, was ""particularly relevant, since it also includes challenges to the *in absentia* prosecution." *Id.*

The State Department's 2000 country report reflects that the High Court's confirmation review resulted in a split decision in which the senior judge " upheld the convictions and death sentences of 10 of the 15 previously convicted persons," while the junior judge upheld all convictions and sentences. AR 1274. In the spring of 2001, a third judge ""reconfirmed the death sentences of... those originally sentenced, including [Mohiuddin]." AR 133. The State Department also observed that while there is ""no automatic right to a retrial if a person convicted in absentia later returns," the absent defendants ""may not file appeals until they return to the country." AR 1275. Transcripts and summaries of the evidence and witness testimony taken in the Bangladesh trial, as well as certified copies of the High Court's judgment and the State Department's periodic assessments of the eighteen month trial were ***16** admitted at Mohiuddin's removal hearing. Mohiuddin attacked the evidence as ""absolutely biased," ""spurious and false," ""fabricated," and ""a complete frame-up." AR 516, 549, 633, and 668, respectively. He alleged that the criminal case against him was ""motivated by the personal vengeance of Prime Minister Sheik Hasina, backed by the political power of the ruling Awami League, to achieve a preordained verdict against him." AR 148. Mohiuddin attempted to support this wholesale condemnation of the evidence and judgment against him by citing problems with the translations of the Bangladesh trial testimony supplied by the Bangladesh government. He claimed that the Bangladesh government ""selectively provided and even altered the witness testimony in its translations to intentionally mislead [the immigration] court." *Id.*

Mohiuddin's arguments were addressed and rejected in an exhaustively detailed decision issued by Immigration Judge Henry P. Ipema, Jr. on May 29, 2002, denying Mohiuddin's applications for asylum, withholding of removal, and protection under the Torture Convention. See AR 130-72.

The Immigration Judge's Decision. The immigration judge denied Mohiuddin's applications for relief in a thorough, forty-two page decision. He determined that Mohiuddin was barred under the statute and regulations from both asylum and withholding of removal because: (1) he assisted or otherwise ***17** participated in the persecution of others on account of political opinion; (2) he committed a serious non-political crime before arriving in the United States; and (3) there are reasonable grounds to believe that Mohiuddin is a danger to the security of the United States. See INA §§ 208(b)(2), 241(b)(3), [8 U.S.C. §§ 1158\(b\)\(2\), 1231\(b\)\(3\)](#); AR 139 (citing [8 C.F.R. §§ 208.13\(c\)\(2\), 208.16\(d\)\(2\)](#)). He further determined that Mohiuddin was ineligible for Torture Convention protection because he failed to show that it was more likely than not that he would be subjected to torture upon return to Bangladesh. See AR 169-71 (citing [8 C.F.R. § 208.17\(a\)](#)).

The immigration judge found, under the regulations, that because the evidence indicates that the foregoing bars to asylum and withholding of removal may apply, Mohiuddin had the burden to prove by a preponderance of the evidence that the bars did not apply. *Id.* at 139. The record evidence invoked the bars and Mohiuddin's burden to disprove their application, the immigration judge reasoned, because ""at the very least, *in absentia* convictions properly constitute probable cause to believe that the petitioner is guilty of the crimes in question." *Id.* at 142 (quoting [Esposito v. INS, 936 F.2d 911, 914 \(7th Cir. 1991\)](#)); see also Pet. Br. at 13-14 (citing *Esposito*, and

conceding that Mohiuddin's murder conviction imposed a burden of "proving by a preponderance of the evidence that *18 his action did not warrant mandatory denial of relief."). As in *Esposito*, the immigration judge found that *in absentia* convictions are not "in all circumstances beyond reproach; [rather, the] presumption that they are probative of probable cause is a rebuttable one." AR 142 (quoting *Esposito*, 936 F.2d at 914). Accordingly, he determined that Mohiuddin could 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 [immigration court] would be precluded from giving it any weight at all." *Id.* Thus, he ruled, Mohiuddin's opportunity to prove that the asylum and withholding bars did not apply, "includes [his] opportunity to rebut the presumption of probable cause discussed in *Esposito*." *Id.* at 143. *Esposito*, the immigration judge noted, emphasized that the petitioner could not "retr[y] the criminal case." *Id.* at 144. However, he may examine the underlying facts in order to prove he has "not been afforded the rudiments of due process." *Id.* (internal citation omitted). "This falls far short of retrying the case," the immigration judge ruled, "but is consistent with ensuring the respondent's right to fundamental fairness." *Id.* [FN4]

FN4. The immigration judge observed that the Seventh Circuit rejected *Esposito*'s particular attacks on the credibility of the witnesses against him and the sufficiency of the evidence supporting his convictions because "the Court is neither capable of nor inclined to undertake" a retrial of a foreign criminal case. AR 144 (quoting 936 F.2d at 915). "To hold otherwise would entail disrespect for the judgments of [foreign] sovereign [s], and thus undermine the principle of international comity. More significantly, such collateral attacks, as a practical matter could not reasonably provide a fair forum for ascertaining the [validity of the conviction]." *Id.* The Seventh Circuit's reasoning is consistent with this Court's opinion in *Brice v. Pickett*, 515 F.2d 153, 154 (9th Cir. 1975), holding that an alien is not entitled to re-litigate the question of whether he was guilty of a crime of which he was convicted in a foreign court. As long as the deportation hearing was fair, the Court found, "we find no requirement that a foreign court's proceedings or conviction must conform to United States constitutional standards." *Id.*

*19 Within this framework, the immigration judge found that Mohiuddin had failed to rebut application of all three bars to asylum and withholding of removal. AR 163-69. The immigration judge rejected Mohiuddin's challenges to the translations of the evidence used at the Bangladesh trial and to the fundamental fairness of the process by which the High Court reached its judgment against him. See AR 144-62. [FN5] Thus, he determined that the evidence and judgment demonstrated probable cause to believe that Mohiuddin had persecuted others on account of their political opinion, that he had committed a serious nonpolitical *20 crime in Bangladesh, and that his actions are reasonably regarded as a danger to the national security of the United States. *Id.*

FN5. The immigration judge's eighteen-page, point-by-point analysis and rejection of Mohiuddin's attack on the fairness of the trial and the integrity of the evidence and judgment supporting his conviction, see AR 144-62, need not be summarized in this memorandum because Mohiuddin does not challenge it here. See *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259- 60 (9th Cir. 1996), cert. denied, 522 U.S. 809 (1997) (issues not raised or supported in opening brief deemed abandoned).

Next, the immigration judge ruled that Mohiuddin failed to meet his burden to show by a preponderance of the evidence that the three bars to relief should not apply to him. *Id.* at 162-68. *The Persecution Bar.* The immigration judge rejected Mohiuddin's argument that the harm caused to the "non-political members" of Mujib's family was merely "incidental[]" in the context of a civil war." AR 163. He ruled that "forceful entry by an armed contingent in the middle of the night into [Mujib's] home and killing the occupants" was not a "protected act." *Id.* Mohiuddin's claim that he simply followed orders in what was supposed to be a peaceful coup also did not exempt him from responsibility, the immigration judge found, because his actions were "not peaceful" and the participation and assistance of an alien in persecution "need not be of his own volition to bar him from relief." *Id.* (citing *Fedorenko v. U.S.*, 449 U.S. 490 (1981)). The immigration judge also rejected Mohiuddin's argument that his "mere membership" in an organization, even one which engages in persecution, is not sufficient to bar him from relief. *Id.* Mohiuddin "played an active role," he found, even apart from the actions described in the High Court's judgment, or his *21 admissions to the Asylum Officer, because he admitted in his asylum application and in testimony at his removal hearing that "he participated in blocking the road to the Presidential mansion on the night of the killings." *Id.* "This constitutes assistance and participation," the immigration judge ruled. AR 164. The immigration judge found that Mohiuddin lacked credibility when he denied any knowledge of the purpose of his assignment on the night of the coup. The Asylum Officer was "a credible witness" who had not "created the facts that placed [Mohiuddin] only 150 yards from the presidential residence," he found. *Id.* Thus, Mohiuddin's attempt to "distance himself even further from the presidential residence, such as by stating he was not even sure where it was, demonstrated his lack of credibility," the immigration judge ruled. *Id.* [FN6]

FN6. Mohiuddin's incorrectly claims that the "'IJ found that Petitioner testified in a sincere and genuine manner.'" Pet. Br. at 11.

Finally, the immigration judge found that Mohiuddin's reliance on the cases of [Matter of Izatula, 20 I. & N. Dec. 149 \(BIA 1990\)](#), and [Dwomoh v. Sava, 696 F. Supp. 970 \(S.D.N.Y. 1988\)](#), to argue that the 1975 coup d'etat was not persecution of others because it was "'the only way to change the government" was misplaced. *Id.* Both such cases were distinguishable, he found, because the aliens had been involved in an unsuccessful coup and were facing return to "'the very government *22 they had tried to overthrow." *Id.* (emphasis in original). He also found it "'essential" to those holdings that the aliens were facing return to "'totalitarian governments which did not exhibit the desire or fundamentals to provide a fair trial." *Id.* Contrary to those aliens, procedures were available to Mohiuddin in Bangladesh to "'adjudicate the charges and any defenses .. including the defense that there was no other alternative to changing the government," and the argument that Sheik Hasina's government should be "'constructively considered as stepping into the shoes of [her father's government] and trying the case as if it were a totalitarian government, with no respect for due process ... is too attenuated and is not borne out by the facts of the record." AR 165. Accordingly, the immigration judge found that the persecution bar precluded Mohiuddin's applications for asylum and withholding of removal.

The Serious Nonpolitical Crime Bar. Relying upon the Supreme Court's decision in [INS v. Aguirre-Aguirre, 526 U.S. 415 \(1994\)](#), the immigration judge held that Mohiuddin had committed a "'serious nonpolitical crime" barring him from asylum and withholding of removal. AR 165. He noted the Supreme Court's instruction that the assessment of a crime's political character turns on whether "'the political aspect of the offense outweigh[s] its common-law character," and emphasized that this would not be the case "'if the crime is grossly out of *23 proportion to the political objective or if it involves acts of an atrocious nature." AR 165. The immigration judge observed that despite a causal link between the coup plotters' crime and its alleged political objective, that objective "'was also found to be infested with personal motive and gain." AR 166 (citing the High Court's conclusion that "'aberrated, dismissed, and offended personnel of the army, in collusion with politically ambitious people, for the purpose of satisfaction of personal and joint motives conspired to kill [Bangabandhu]," at AR 1519). In addition, the immigration judge ruled that the "'slaughter of the President and his family members in their bed clothes ... was not essential to the political objective nor acceptable in the name of reform." *Id.* at 166. "'The slaughter is correctly described as both atrocious and grossly disproportionate to the political objectives," he found, barring Mohiuddin from relief on the basis of his commission of a serious nonpolitical crime. *Id.*

National Security Danger Bar. Regarding the third potential bar to relief, the immigration judge determined that Mohiuddin's participation in the coup constituted "'reasonable grounds to believe" that he poses a "'danger to the national security of the United States," barring him from asylum and withholding of removal. *Id.* at 167 (citing [8 U.S.C. §§ 1158\(b\)\(2\), 1231\(b\)\(3\)](#)).

First, the immigration judge observed that the case law equated the *24 "' reasonable grounds" standard with "'probable cause." AR 168. Second, he found that Mohiuddin's actions were squarely encompassed within the INA's definitions of engaging in terrorist activity. *Id.* Third, and finally, he reasoned that with Mohiuddin's conviction serving as probable cause to believe he is guilty of the charges against him, that conviction "'supports a reasonable cause to believe that [Mohiuddin] engaged in an act, attempt, or conspiracy to commit or incite a terrorist activity; or to prepare or plan a terrorist activity," providing reasonable grounds to believe that he is a danger to the security of the United States, as defined by statute. *Id.* Accordingly, he determined that the national security bar was also applicable to Mohiuddin.

Torture Convention Protection. Finally, the immigration judge determined that Mohiuddin was ineligible for Torture Convention protection. AR 169-70. Aliens who are subject to the provisions for mandatory denial of withholding of removal are nonetheless eligible for deferral of removal to the country where they are "'more likely than not to be tortured." AR 169. However, he found that while the record reflected concerns of the State Department in the early stages of the Bangladesh trial regarding the treatment of individuals detained in connection with the proceedings, "'[p]ressure from the international community brought improvement to th[eir] treatment." *Id.* The immigration judge quoted the State *25 Department's 1998 opinion "'that the risk of mistreatment for all the accused coup plotters has diminished over time," and further quoted its most recent opinion that reported abuses in the "'initial few weeks of detention ... stopped after that period." *Id.* (quoting State Department Advisory Opinion, July 6, 1999). "'There has been no further evidence of abuse directed at the prisoners, and they have been afforded adequate medical care and the ability to meet with attorneys and family," the State Department wrote. *Id.* Accordingly, the immigration judge concluded that Mohiuddin had failed to show that it was more likely than not that he would be tortured if returned to Bangladesh. AR 170. [FN7]

FN7. Mohiuddin does not contest that finding here. See Pet. Br. (omitting argument on the Board and immigration judge's denial of Torture Convention relief).

The Board's Decision. On November 18, 2003, the Board dismissed Mohiuddin's appeal from the immigration judge's decision. AR 2-5. The Board "'agree[d] with the immigration judge's decision that [Mohiuddin] is ineligible

for asylum, withholding of removal," and tracked the immigration judge's reasoning in affirming his decision against Mohiuddin. AR 4. Thus, the Board upheld the denial of relief on each of the three bars to relief considered by the immigration judge, finding: (1) pursuant to *Esposito*, that Mohiuddin had failed to demonstrate that his *in absentia* conviction did not "comport with due process standards;" (3) *26 under *Aguirre-Aguirre*, that the common-law character of Mohiuddin's crime in Bangladesh was an "atrocious act" which "outweigh[ed] and [was] grossly out of proportion with any political objective," and (4) there are "reasonable grounds to believe that [Mohiuddin] is a danger to the security of the United States" because his actions are "considered a terrorist activity" under the INA. AR 3-4.

Moreover, like the immigration judge, the Board rejected Mohiuddin's torture claim, finding that "lawful sanctions imposed by the country of removal," including "criminal detention and the death penalty," do not amount to torture under the Convention. AR 4.

Finally, the Board rejected Mohiuddin's claim that the immigration judge had violated his due process rights. *Id.* The Board found that the immigration judge had "properly considered documentary evidence in the record and provided [Mohiuddin] with adequate opportunity to present testimony and evidence" in support of his applications for relief. AR 4-5. Thus, the Board upheld the removal order. *Id.*

SUMMARY OF ARGUMENT

The INA, as well as the Court's *Matsuk* decision, precludes jurisdiction over the Board's determination that Mohiuddin is barred from asylum and withholding of removal because he assisted and participated in the persecution of others on *27 account of political opinion. While the Board found Mohiuddin barred from such relief under three separate categories of ineligibility, the non-reviewability of the first such category - assistance in persecution - obviates the need to examine the other two.

Assuming jurisdiction however, substantial record evidence supports the Board's and the immigration judge's conclusions that Mohiuddin is barred from asylum and withholding of removal under all three ineligibility categories; namely, because of his political persecution of others in the August 1975 massacre, his commission of a serious nonpolitical crime in Bangladesh, and because his crime - a "terrorist activity" under the INA - provides reasonable grounds to believe that he presents a danger to the national security of the United States. Accordingly, the Court should dismiss and otherwise deny the petition.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER THE DENIAL OF ASYLUM AND WITHHOLDING OF REMOVAL

The Court determines its "own jurisdiction *de novo*." *Luu-Le v. INS*, 224 F.3d 911, 914 (9th Cir. 2000). This Court lacks jurisdiction over the Board's determination that Mohiuddin is ineligible for asylum and withholding of removal because he persecuted others *28 on account of their political opinion. The Board's determination rests upon a Congressional delegation of authority to the Attorney General to bar asylum and withholding of removal to an alien if he either "decides" - in the case of INA § 241 (b)(3)'s withholding provision - or "determines" - under INA § 208(b)(2)(A)'s asylum provision - that an alien has "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." 8 U.S.C. §§ 1158(b)(2)(A), 1231(b)(3). This "determin[ation]" or "deci[sion]" clearly falls within the jurisdictional bar in INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii), over "any ... decision or action of the Attorney General the authority for which is specified ... to be in the discretion of the Attorney General." See *Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001). [FN8]

FN8. Although § 242(a)(2)(B)(ii)'s jurisdictional bar does not apply to the "granting of relief under [section 1158\(a\)](#) [asylum]," this exception does not encompass the asylum *ineligibility* categories such as the persecution bar applicable to Mohiuddin. Asylum is a two-stage process. First, the alien has the burden to prove his eligibility as a "refugee" under the INA, which includes his burden to show that he is not subject to any of the statutory ineligibility categories in § 208(b)(2). Second, if the alien proves his eligibility, the Attorney General then considers whether he merits a *grant* of asylum as a matter of discretion. See, e.g. *Sale v. Hatian Centers Council, Inc.*, 509 U.S. 155, 159 (1993) ("When an alien proves that he is a 'refugee,' the Attorney General has discretion to *grant* him asylum pursuant to § 208 of the Act.") (Emphasis added). Thus, Congress's use of the term "grant," as well as its particular reference to subsection "1158(a)" as opposed to the subsection containing the ineligibility categories, [§ 1158\(b\)\(2\)](#), demonstrates that § 242(a)(2)(B)(ii)'s exception on the "granting" of asylum relief pertains to the second stage of the asylum decision, not the first. 8 U.S.C. § 1252(a)(2)(B)(ii). Therefore, the Board's determination that Mohiuddin was barred from asylum under the persecution bar is not subject to review by this Court.

*29 In *Matsuk*, this Court held that it lacked jurisdiction to consider whether the petitioner had committed a "particularly serious crime," which triggers the withholding eligibility bar in INA § 241(b)(3)(B)(ii), [8 U.S.C. § 1231\(b\)\(3\)\(B\)\(ii\)](#), and 8.C.F.R. [§ 1208.16\(d\)\(2\)](#). In its subsequent decision in *Spencer Enterprises v. United States*, 345 F.2d 683, 689-90 (9th Cir. 2003), the Court addressed *Matsuk* and emphasized that the authority granted by Congress to the Attorney General under INA § 241 (b)(3)(B)(ii) to decide whether an alien has committed a "particularly serious" crime "was sufficient to specify that the Attorney General's authority was discretionary" and therefore immune from review under INA § 242(a)(2)(B)(ii). See also *Singh v. Ashcroft*, [351](#)

[F.3d 435, 438-39 \(9th Cir. 2003\)](#) (emphasizing that § 242(a)(2)(B)(ii) refers not to ""discretionary decisions," but to ""acts the *authority* for which is *specified* under the INA to be discretionary") (emphasis in original). It follows that the decision by the Board (the Attorney General's delegate) construing pursuant to Congressional authority the sister provisions at INA §§ 208(b)(2)(A)(i) and 241(b)(3)(B)(i) governing assistance or participation in the *30 political persecution is likewise not subject to judicial review with respect to asylum and withholding. Because the authority over statutory ineligibility in both the ""particularly serious crime" provision and its companion asylum and withholding assistance-in-persecution provisions is specified with the equivalent terms of ""determine" or ""decide," a similar jurisdictional result is required. [FN9]

FN9. The jurisdictional inquiry on whether Mohiuddin assisted or participated in political persecution, within the meaning of the INA, is satisfied with reference to Argument II of this memorandum, demonstrating that Mohiuddin's actions fall within the statutory assistance-in-persecution bars.

Accordingly, the Court must dismiss this petition for lack of jurisdiction as to the Board's denial of asylum and withholding of removal.

II. EVEN ASSUMING JURISDICTION, SUBSTANTIAL EVIDENCE SUPPORTS THE DENIAL OF MOHIUDDIN'S APPLICATION FOR ASYLUM AND WITHHOLDING OF REMOVAL

A. *Standard of Review*

This Court reviews questions of law *de novo*, [United States v. Male Juvenile](#), 280 F.3d 1008, 1019 (9th Cir. 2002), giving deference under [Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.](#), 467 U.S. 837 (1984), to the Board's interpretation of the INA. [Ramirez-Zavala v. Ashcroft](#), 336 F.3d 872, 875-76 (9th Cir. 2003); see [Aguirre-Aguirre](#), 526 U.S. at 424. The Court must give ""controlling weight" to the immigration judge's or BIA's interpretation of *31 immigration regulations, ""unless [the interpretation] is plainly erroneous or inconsistent with the regulation." [United States v. Larionoff](#), 431 U.S. 864, 872 (1997) (addressing the Department of the Navy's interpretation of Department of Defense regulations) (quoting [Bowles v. Seminole Rock & Sand Co.](#), 325 U.S. 410, 414 (1945)); see [Aguirre-Aguirre](#), 526 U.S. at 424-25.

The Court reviews factual findings in immigration cases for substantial evidence. [Singh v. INS](#), 134 F.3d 962, 966 (9th Cir. 1998). Under the substantial evidence standard, factual findings are conclusive unless the evidence ""presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." [INS v. Elias-Zacarias](#), 502 U.S. 478, 483-84 (1992); see 8 U.S.C. § 1252(b)(4)(B). In other words, to gain reversal of the Board's determination that an alien is statutorily ineligible for asylum, the alien must demonstrate ""that the evidence compels a [contrary] conclusion." [Oliva-Murales v. Ashcroft](#), 328 F.3d 25, 27 (1st Cir. 2003). This deferential standard governs review of the Board's denial of relief under the bars to asylum and withholding for aliens who have assisted in the persecution of others, committed nonpolitical crimes abroad, and pose a danger to the national security. See, e.g., [McMullen v. INS](#), 788 F.2d 591, 599 (9th Cir. 1986), *rev'd on other grounds*, [Barapind v. Enmoto](#), 400 F.3d 744, 751 *32n.7 (9th Cir. 2005) (applying substantial-evidence review to nonpolitical-crime bar to withholding of removal). For example, in reviewing the application of the non-political-crime bar in [McMullen](#), this Court held that probable cause to believe the bar is applicable is sufficient to preclude relief. See [McMullen](#), 788 F.2d at 599 (nonpolitical-crime exception to withholding ""requires only a finding of probable cause to believe the alien has committed the crime"); [In re A-H-](#), 23 I. & N. Dec. 774, 789-90 (A.G. 2005) (holding probable cause sufficient to trigger national-security bar to withholding of removal); *id.* at 789 (probable cause exists if ""information relied upon ... is not "" "intrinsically suspect' ") (quoting [Adams v. Baker](#), 909 F.2d 643, 649 (1st Cir. 1990)); see also 8 C.F.R. §§ 208.13(c)(2), 208.16(d)(2) (when asylum and withholding bar is triggered, burden shifts to alien to prove ""by a preponderance of the evidence" that the bar does not apply). Thus, where the evidentiary standard triggering application of the asylum or withholding bars is so low, this Court reviews only whether there is substantial evidence to satisfy that low, probable cause, threshold. See [McMullen](#), 788 F.2d at 599 (applying substantial-evidence review to probable cause standard). Finally, ""review is [normally] confined to the BIA's decision and the bases upon which [it] relied." [Martinez-Zelaya v. INS](#), 841 F.2d 294, 296 (9th Cir. 1988) (citations omitted). The Board's decision in this case reflects agreement *33 with and reliance upon the immigration judge's reasoning. See AR 2-5. Thus, while the Court reviews the Board's decision, the immigration judge's opinion is also relevant to the disposition of this appeal. See *id.*

B. *Substantial Evidence Supports The Board's Denial of Mohiuddin's Asylum and Withholding Applications.*

Substantial record evidence supports the Board's denial of asylum and withholding under each of the three grounds of statutory ineligibility found by the Board and the immigration judge to be applicable to Mohiuddin. All three such bars derive from one set of facts: Mohiuddin's participation in the slaughter of Bangabandhu, twenty-one members of his family, and tens of other individuals on the night of August 15, 1975. Mohiuddin's challenge on this appeal is essentially two-fold. First, he argues that while he participated in the coup, he merely followed orders, and his involvement was not of a degree sufficient to bring him within any of the bars to asylum and withholding. See, e.g., Pet. Br. at 14 (asserting he should not be barred, because he was ""not involved in the planning and orchestration of the coup and did not participate in the killings."). Second, he argues that the massacre itself ""while ugly and regrettable," was necessary to accomplish a valid political objective because it was ""directly related to revolution." Pet. Br. at 17. In pursuing these arguments, Mohiuddin advances the *34 identical arguments and cases rejected by the immigration judge, and further rejected by the Board.

In repeating his arguments before this Court, however, Mohiuddin has made several legal and factual concessions which are devastating to his case. On this appeal, he declines to challenge the bulk of evidence from which the Board and immigration judge found probable cause to believe that he is guilty of the Bangladeshi murder charges. Thus, for example, he does not discuss or confront the background material detailing his role in the killings. *Compare* Pet. Br. at 11-30 with AR 1405-19 (1982 United Kingdom "'Commission of Enquiry" on the coup), AR 1854-1960 (Mascarenhas account in *Legacy of Blood*), AR 2235-67 (Franda and Library of Congress studies on the coup and massacre), and AR 1367- 90 (television interview with Majors Farook and Rashid). Nor does he challenge hundreds of pages of Bangladesh trial witness testimony and the High Court's summary of the evidence, including accounts of his actions on the night of the massacre, such as blocking access to the presidential residence, storming the president's house, and acting in concert with the other majors to install the new government. See AR 1462-74, 2872-3214 (translations, summaries and transcriptions of witness testimony in Bangladesh trial, including, e.g. at 2877, 3089, 3161, 3205 "'cross examination in favour of Major A.K.M Mohiuddin *35 Ahamed"); and AR 1517-1616 (November 1998 Judgment of the High Court).

This has not always been the case. Mohiuddin mounted a challenge to this evidence at his removal hearing: (1) asserting he was misidentified in the High Court Judgment, (2) claiming the criminal case was solely the product of Sheik Hasina's vengeance; and (3) charging that the translations and transcripts from Bangladesh were "'tampered, altered, and tainted." See AR 148-56. Significantly, however - other than two cursory points addressed below - Mohiuddin has now dropped these arguments, as well as any attempt to confront the immigration judge's methodical rejection of them. See *Collins v. City of San Diego*, 841 F.2d 337, 339 (9th Cir. 1988) ("It is well established in this circuit that claims which are not addressed in the appellant's brief are deemed abandoned.").

Mohiuddin has similarly abandoned any contest regarding the fairness and independence of the Bangladesh judicial system that rendered and affirmed the judgment against him. He declines to criticize the State Department's consistent endorsement of the integrity of Bangladesh criminal procedure and the independence of its judiciary. See AR 2480-2500, 1265-1316, 2663-96, 1426- 56, 3215-32, and 3375-88 (State Department's Bangladesh Country Report on Human Rights Practices for 1996, 1997, 1998, 1999, 2000, and 2001). Nor does he challenge the State Department's individual letter opinions on the fairness of the *36 Bangladesh proceedings, judicial independence, credibility of evidence against Mohiuddin, and the unlikelihood of mistreatment if Mohiuddin is returned to Bangladesh. *Compare* Pet. Br. 11-30 with AR 1494-1502, 3233-41, 3242-44. Again, it is well to note that in his removal hearing he raised objections to the foregoing evidence before the immigration judge, but now utterly fails to confront the immigration judge's exhaustive and favorable review of the State Department submissions. *Martinez-Serrano*, 94 F.3d at 1259-60 (issues not raised and supported in petitioner's opening brief deemed abandoned). [FN10]

FN10. These concessions and Mohiuddin's due process argument, see Pet. Br. at 29, are mutually exclusive. Thus, the Board correctly rejected his due process argument. See AR 5.

Here, his sole challenge to the Bangladesh evidence consists of the argument, raised for the first time on this appeal, that the "'conviction record itself establishes that six people recanted their 'confessions' as being obtained under torture." Pet. Br. at 12. However, this new argument is also barred because Mohiuddin did not raise it to the Board. See AR 74-78; INA § 242(d), 8 U.S.C. § 1252(d) (requiring exhaustion of remedies); *Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004) ("[f]ailure to raise an issue in an appeal to the BIA constitutes a failure to exhaust remedies with respect to that question and deprives this court of jurisdiction to hear the matter") (citation omitted). In any case, Mohiuddin *37 undercuts this argument by conceding the voluntariness of the accounts given by two such "'confess [ors]" - principle coup leaders Farook and Rashid. See Pet. Br. at 22 (conceding that "'Farook and Rashid, admitted their participation in broadcast interviews as early as 1976"). Regarding Bangladesh criminal and judicial process, Mohiuddin offers a one-sentence critique, asserting that he was "'reliant on defense counsel appointed and compensated by a hostile government." Pet. Br. at 12. This implied charge of bias is overwhelmingly refuted, however, by: (1) the Board's and immigration judge's analysis and approval of the State Department's opinions on that issue, see AR 2-5, 156-63 (immigration court analysis of Bangladeshi judicial process); (2) the State Department's report that "'defense lawyers agreed that the judge allowed them the opportunity to put forward the questions and arguments they wanted," and further report that the trial judge "'acquitted two defendants represented by state-appointed counsels," see AR 1496-97; and (3) the Bangladesh High Court's opinion, in its November 1998 Judgment, commending "'learned counsels for the accused," for conducting the trial "'by detailed cross examination, arguments, and submissions even on behalf of the absconding accused," see AR 1614. In sum, substantial and abundant record evidence supports the Board's finding that the *in absentia* conviction, and the underlying evidence, provide probable cause to *38 believe that Mohiuddin is guilty of the crimes charged against him in Bangladesh.

Without the facts on his side, Mohiuddin attempts to argue the law. His arguments, rejected below, must also be rejected here. Regarding the persecution bar, Mohiuddin claims that he has not "'assisted or otherwise participated" in persecuting others within the meaning of INA sections 208(b)(2) or 241(b)(3) because his assistance was not "'active, personal, and knowing." Pet. Br. at 15 (quoting *Ofusu v. McElroy*, 933 F. Supp. 237, 239 (S.D.N.Y. 1995)). However, even apart from his abandoned challenge to the evidence demonstrating otherwise, by insisting to this Court that "'he decided to participate in the coup out of military duty and a concern

for his country's future and in response to appeals from his military colleagues," he hardly disproves an active, personal, and knowing participation. Pet. Br. at 15.

On a different tack, Mohiuddin argues that the slaughter of children, household servants, and others having no conceivable function in government, was a ""harm" resulting ""incidentally from behavior directed at another goal, the overthrow of a government." *Id.* at 16-17 (*Rodriguez-Majano*, 19 I. & N. Dec. at 814-15). The crux of his argument against both the persecution and nonpolitical crime bars is that his actions were justified by political necessity. See Pet Br. at 17 (arguing that ""ugly and regrettable" deaths of " "civilians" is not persecution if *39 ""directly related to revolution."); *id.* at 20 (individuals engaged in ""resistance activities against totalitarian regimes" are protected under asylum statute) (citing *Dwomoh*, 696 F. Supp. at 976); *id.* at 22 (""participation in a coup may be distinguished from common crimes ... [as] a politically motivated act") (citing *Chanco v. INS*, 82 F.3d 298, 301 (9th Cir. 1996)); *id.* at 23 (the coup massacre must not be deemed a " "political offense" because its purpose was to ""disrupt the political structure of a state, and not the social structure that established the government.") (quoting *Matter of McMullen*, 19 I. & N. Dec. 90, 99 (BIA 1984)); and *id.* at 24-28 (where there ""is no procedure by which citizens can freely and peacefully change their laws ... a coup attempt is a form of [political] expression ... the prosecution of which can qualify as "persecution.' ") (quoting *Dwomoh*, 696 F. Supp. at 979) (with further citation to *Izatula*, 20 I. & N. Dec. at 153-54).

The Board and immigration judge cogently and properly rejected these arguments, finding no factual or legal basis for the view that August 1975 massacre in Bangladesh of children, mothers, and house servants was directly related to revolution, the only means by which to change the government, or a purely political act. See AR 4 (holding that Mohiuddin's actions were ""grossly out of proportion with any political objective"); AR 164 (distinguishing *Izatula* and *Dwomoh*, where Mohiuddin is not facing return either to the government he tried *40 to overthrow, or to a totalitarian government which would not accord him fundamental fairness at trial); *id.* (rather, unlike *Dwomoh* and *Izatula*, procedures are available to Mohiuddin in Bangladesh to ""adjudicate the charges and any defenses ... including the defense that there was no other alternative to changing the government").

As the Board has held, ""while mere membership in an organization which engages in persecution is not sufficient, an alien whose action or inaction furthers that persecution in some way would be barred from relief." *Rodriguez-Majano*, 19 I. & N. Dec. at 814-15. Indeed, the statute speaks merely of an alien who ""assisted" in persecution. INA § 208(b)(2)(A)(i). By its terms, the statute does not require active or personal participation in persecution - despite substantial evidence on this record proving just that. See *Fedorenko v. United States*, 449 U.S. 490, 512 n.34 (1981) (persecution need not be voluntary); *Kulle v. INS*, 825 F.2d 1188, 1192 (7th Cir. 1987) (""Because the statute authorizes deportation of anyone who "assisted" in persecution, personal involvement in atrocities need not be proven."); *Hammer v. INS*, 195 F.3d 836, 843 (6th Cir. 1999), cert. denied, 528 U.S. 1191 (2000) (The government ""need not present evidence of personal involvement in specific atrocities"). It is sufficient that the alien's acts ""led to the persecution of individuals because of political belief." *41 *Laipeniaks v. INS*, 750 F.2d 1427, 1435 (9th Cir. 1985). [FN11] Thus, Mohiuddin is barred for his assistance in persecution, even if the overwhelming evidence of his active, knowing, and personal efforts during the coup were absent from the record.

FN11. *Laipeniaks*, *Hammer*, and *Kulle* all involved application of the Holtzman Amendment, 8 U.S.C. §§ 1183(a)(3)(E), 1251(a)(19) (1994), mandating the exclusion and deportation of aliens associated with Germany's Nazi government, and who ""ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion." *Fedorenko* involved a denaturalization action relating to the inadmissibility under the Displaced Persons Act of persons who ""assisted the enemy in persecuting civil [ians]." Thus, these provisions are particularly instructive because, like the asylum and withholding persecution bars, they address persons who " "assisted" in persecution.

In keeping with his strategy of ignoring the strength of the case against him, Mohiuddin omits any citation to or discussion of the Supreme Court's decision in *Aguirre-Aguirre*. Yet that case, together with this Court's decision in *McMullen*, presents controlling authority on the application of the bars at issue. In *Aguirre-Aguirre*, the Supreme Court upheld the Board's determination that an alien who had protested various government policies in Guatemala (such as bus fare increases) by burning buses, assaulting passengers, and vandalizing and destroying property after forcing the people out was ineligible for withholding of removal based upon his commission of a ""serious nonpolitical crime." *Aguirre-Aguirre*, 526 U.S. at 418. Application of the nonpolitical-crime bar, the Court *42 found, turns generally on whether " "the political aspect of an offense outweighs its common-law character," and may also involve the assessment of whether ""there is a gross disproportion between means and ends, and whether atrocious acts are involved." *Id.* at 429- 30. The Court emphasized that the criminal element of the an offense may outweigh its political aspect, ""even if none of the acts are deemed atrocious." *Id.* at 430. With reference to this Court's holding *McMullen* that an offense may be deemed political if there is a ""close and direct causal link between the crime committed and its alleged political purpose and object," *id.* at 432, the Court further emphasized that ""[e]ven in a case with a clear causal connection, a lack of proportion between means and ends may still render a crime nonpolitical." *Id.* Thus, where the Board determined that the bus-burner's acts

were not political based on the lack of proportion with his objectives, the Supreme Court held "[i]t was not required to do more." *Id.*

Aguirre-Aguirre is dispositive here. The massacre of innocents goes way beyond the destruction of property assessed in that case. Where the Board in that case was required to do no more than find a lack of proportion between means and ends, it must do no more here. Of course, it has done more. It has found that Mohiuddin's actions were both "atrocious" and grossly disproportionate to the *43 stated political objective. AR 4. Moreover, the immigration judge found that even the causal link between Mohiuddin's crime and its alleged political objective was "infested with personal motive and gain." AR 166. [FN12] In short, *Aguirre-Aguirre* conclusively establishes both the application of the persecution bar and the nonpolitical crime bar against Mohiuddin. [FN13]

FN12. Substantial record evidence supports that finding, as well. See AR 1519 (finding that "aberrated, dismissed, and offended personnel of the army, in collusion with politically ambitious people, for the purpose of satisfaction of personal and joint motives" carried out the coup and massacre); see also AR 2242 ("At least some leaders of the August coup were willing to participate because they had been demoted or dismissed by Mujib"); AR 2244 (Mujib's "constant shuffling of military personnel added salt to the wounds of soldiers already piqued by their subordination to the Rakhi Bahini.").

FN13. Again, even if the record consisted solely of Mohiuddin's self-serving testimony, he would still be barred by virtue of this Court's construction of the nonpolitical crime provision. See *McMullen*, 788 F.2d at 599 (refusing to interpret the "serious, nonpolitical crime" asylum bar "only to those who actually 'pulled the trigger' because we believe

that this interpretation is too narrow. In our judgment, the only reasonable interpretation of the exception is that it encompasses those who provide ... the physical and logistical support that enable modern terrorist groups to operate.").

Finally, regarding the last of the three bars, the national-security bar, the Court must also find that Mohiuddin failed to carry his burden show that the bar did not apply to him. *Aguirre-Aguirre*, 526 U.S. at 432 (emphasizing that "it was [the alien] who bore the burden of proving entitlement to withholding."). Mohiuddin argues that there is nothing in the record "to suggest that the August *44 15, 1975, coup d'etat in Bangladesh itself created a danger to the security of the United States, or was ever intended to do so." Pet. Br. at 20. However, his argument, as well as his reliance upon *Cheema v. INS*, 359 F.3d 1035 (9th Cir. 2003), is misplaced. *Cheema's* holding that a finding that an alien has engaged in terrorist activity does not compel the additional finding that the alien is a danger to the security of the United States, rests upon application of the bar to asylum for aliens who have engaged in specified terrorist activities, under INA § 208(b)(2)(A)(v), 8 U.S.C. § 1158(b)(2)(A)(v), not the broader exception to asylum and withholding of removal in INA §§ 208(b)(2)(A)(iv), 241(b)(3)(B)(iv), for aliens who pose a national-security danger, as applied by the Board to Mohiuddin. See *Cheema v. Ashcroft*, 383 F.3d 848, 855 (9th Cir. 2004), amending and superceding 359 F.3d 1035 (2003) (holding that INA § 208(b)(2)(A)(v) imposes a two-part analysis of whether the alien engaged in a terrorist activity and whether "there are not reasonable grounds to believe the alien is a danger to the security of the United States."). Here the immigration judge and the Board properly applied the plain language of the withholding provision which, by contrast with the provision addressed in *Cheema*, conclusively presumes that alien who has engaged in a terrorist activity "shall be considered to be an alien with respect to whom there are *45 reasonable grounds for regarding as a danger to the security of the United States." 8 U.S.C. § 1231(a)(3)(B)(iv); see AR 168 (citing 8 U.S.C. § 1231(a)(3)(B)(iv)). Clearly, where Congress has equated the two findings for purposes of barring withholding of removal, a mandatory form of relief, the Board has reasonably applied the same presumption to asylum, a discretionary form of relief. [FN14]

FN14. In other words, Congress's categorical view in § 241 that terrorist activity *per se* threatens U.S. national security supports - *a fortiori* - a similar view to be held in the context of discretionary relief. This is only underscored by the latitude accorded the Executive Branch in national security and foreign affairs. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir.), cert. denied, 532 U.S. 904 (2001) ("Because the judgment of how best to achieve that end is strongly bound up with foreign policy considerations, we must allow the political branches wide latitude in selecting the means to bring about the desired goal."); see also *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("Congress-in giving the Executive authority over matters of foreign affairs - must of necessity paint with a brush broader than that it customarily wields in domestic areas.").

Finally, as the Board and immigration judge have found, Mohiuddin's actions are fully embraced within the definitions of terrorist activity in the INA. See AR 4; AR 168 (citing and quoting from the definitions of "terrorist activity" in INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B)). [FN15]

FN15. That is, the Board and immigration judge found that Mohiuddin's criminal conviction supports probable cause to believe that he, ""in an individual capacity or as a member of an organization, under circumstances indicating an intention to cause death or serious bodily injury" committed, threatened, attempted, or conspired to commit, a ""violent attack upon an internationally protected person ... or upon the liberty of such a person," an ""assassination," or the use of any ""firearm, or other weapon or dangerous device" with intent to ""endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." *Id.* (quoting INA § 212(a)(3)(B)(iii), [8 U.S.C. § 1182\(a\)\(3\)\(B\)\(iii\)](#)).

***46 CONCLUSION**

The record overwhelming establishes reasonable grounds to believe that Mohiuddin participated in the assassination of Bangladesh's first president and the merciless slaughter of his family and other innocent people. The Attorney General's statutory authority to decide whether such acts constitute persecution of others on account of political opinion is not subject to review. But even if it were, the Court must deny the petition. Mohiuddin's pose as hapless victim doesn't square with the abundant record evidence to the contrary, and the Board's findings far exceed the substantial-evidence threshold required to sustain its ruling. Accordingly, the Court should dismiss and otherwise deny the petition for review.

***48 STATEMENT OF RELATED CASES**

Based upon a survey of available attorneys in the Office of Immigration Litigation, Counsel for Respondent is unaware of any related case(s) pending in this Circuit for purposes of Ninth Circuit Rule 28-2.6. Mohiuddin A.K.M. AHMED, Alien No. A75 474 811, Petitioner, v. Alberto R. GONZALES, Attorney General of the United States, Respondent.
2005 WL 3126377

Briefs and Other Related Documents ([Back to top](#))

- [2005 WL 4122123](#) (Appellate Petition, Motion and Filing) Reply Brief for Petitioner (Nov. 15, 2005)
- [2005 WL 1791726](#) (Appellate Petition, Motion and Filing) Opening Brief for Petitioner (Apr. 13, 2005)

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