CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

# COUR EUROPÉENNE DES DROITS DE L'HOMME
# EUROPEAN COURT OF HUMAN RIGHTS

## FOURTH SECTION

## DECISION

## AS TO THE ADMISSIBILITY OF

Application no. 28320/03
by Rob Abdur Al Haj LITON
against Sweden

The European Court of Human Rights (Fourth Section), sitting on 12 October 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO,
Mrs E. FURA-SANDSTRÖM,
Ms L. MIJOVIĆ,
Mr D. SPIELMANN, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the interim measure indicated to the respondent Government under Rule 39 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

# THE FACTS

The applicant, Mr Rob Abdur Al Haj Liton, is a Bangladeshi national who was born in Bangladesh in 1969 and is currently in Sweden. He is represented before the Court by Mr P-E Nilsson, a lawyer practising in Bromma, Stockholm. The respondent Government are represented by their Agent, Ms I. Kalmerborn of the Ministry for Foreign Affairs.

The facts of the case, as submitted by the parties, may be summarised as follows.

## *A. The proceedings for asylum*

The applicant applied for asylum to the Migration Board (*Migrationsverket*) on 9 April 2001, claiming that he had arrived in Sweden three days earlier. He presented a Bangladeshi passport to the authorities but he could produce neither his ticket to Sweden nor the required visa.

On 10 April 2001 the Migration Board held an initial interview with the applicant in which he briefly recounted his family background and up-bringing in the city of Karanigonj. He further stated that he had travelled to Stockholm on 5 April 2001 via Delhi and Moscow and that the passport he had given to the Swedish authorities was forged. It had been paid for by his father and the Jatiya Party and given to him by a smuggler. Asked by the Migration Officer about his reason for asylum, the applicant submitted that he had been reported to the Bangladeshi police on false accusations of possessing illegal weapons and of having murdered a supporter of the Bangladeshi Government. He claimed to have been arrested once by the police and detained for two months. In response to further questions, the applicant stated that he had been the treasurer of the Jatiya Party, to which he belonged, and that he had been arrested by the police in 1991 and in 1999, allegedly to prevent the party from continuing with its activities and returning to power. He also claimed that he had been tortured by the police, which had caused damage to his knee and ankle joint and left him with difficulties in walking and lapses of memory. Furthermore, the police had been constantly looking for him in Bangladesh. At the end of the interview, the Migration Officer noted that the part of the record concerning the reasons for asylum had been re-read to the applicant and that he had had nothing to object or add to it. The applicant had moreover confirmed that he had understood the interpreter well during the interview.

On 9 May 2001 the Migration Board held a second interview with the applicant where his legal representative was present and given the opportunity to ask questions. During this interview the applicant submitted, *inter alia*, the following. He had held the post as treasurer of a welfare fund within the Jatiya Party, the purpose of the fund being to provide support for education of the poor and to provide food in case of famine. His office had been located in Dhaka. He had been arrested twice, both times in his home

town Karanigonj, because of false accusations from supporters of the Awami League (the ruling party at the time). Neither arrest had been followed by a trial against him nor had he been appointed a lawyer. The first arrest occurred on 30 March 1999, following a report to the police by the Awami League that he had murdered a person named Anwar. He had been detained for two months during which time he had been beaten with bottles filled with water, sandbags and rifle butts, mostly on his legs. He had been released because he fell ill from the maltreatment. The second arrest had occurred on 10 August 2000, again after false accusations by the Awami League which this time had affirmed that he was, or had been, in possession of illegal weapons. He had been released on 30 August 2000, again due to ill health following physical abuse. Upon release he had been urged by the police to abandon his contacts with his party or he would be killed. During both arrests, he had been held at the central prison in Dhaka. After his release in August 2000 he had lived on the run until he left for Sweden and, consequently, he had not continued to work for the Jatiya Party. However, despite several questions from the Migration Officer, the applicant could not give a clear answer as to where he had lived following his release in August 2000. He stated both that he mainly lived at home with his parents and that he rarely did so since the police had come looking for him almost every other day for more than six months. With reference to the records from the initial interview where he had stated that he had been arrested in 1991, he claimed that it must have been a misunderstanding and that he had said that he began his political activities in 1991. He further claimed that he had already in the initial interview mentioned that he had been arrested in August 2000 and that it was also a mistake that this had not been included in the record.

To support his statements the applicant submitted a certificate dated 7 January 2001 and signed by a Mr Akther Hossain, member of the central committee of the Jatiya Party, which certified that the applicant was a member of the party and had worked for it since 1992, currently holding the post of welfare secretary within the unit of the Karanigonj area. It further stated that he had been arrested more than twice and detained in the Hazat jail where he had been severely tortured. According to the certificate, the police were looking for him and the party had therefore recommended him to leave the country. Last, Mr Hossain requested the Government of Sweden to grant the applicant political asylum.

On 11 July 2001 the Migration Board rejected his application for asylum and ordered that he be expelled to his home country. It first noted that the applicant had not been able to substantiate how he had travelled from Bangladesh to Sweden and consequently it remained unclear how long he had been in Sweden before applying for asylum. It then went on to state that the general situation in Bangladesh was not such as to entitle him to asylum *per se*. Moreover, there was freedom of political opinion in Bangladesh and

the applicant had worked for a party that was legal. The Migration Board considered that his political activities had been very limited and that it was not probable that his political affiliation alone would give rise to a risk of persecution. With regard to the false accusations against the applicant, the Migration Board observed that he had been released both times and that there had been no trial. It was acknowledged that false accusations occurred as part of political life in Bangladesh but this was not found to be a sufficient reason in itself to be granted asylum. What the applicant had submitted in the present case did not give reason to believe that he was in need of protection on account of the accusations. Neither did his submissions provide support for his claim that he would be at risk of renewed arrest if he had to return to his home country. Furthermore, the Migration Board did not question that the applicant had been exposed to ill-treatment or torture during his previous arrests, but considered that he did not risk such ill-treatment, or being punished by death or corporal punishment, if returned. Thus, it was concluded that the applicant was neither a refugee who could be granted asylum nor a person otherwise in need of protection who could be allowed to stay on humanitarian grounds. The latter conclusion was reached after consideration by the Migration Board even though the applicant had not expressly requested it.

The applicant appealed to the Aliens Appeals Board (*Utlänningsnämnden*), renewing his request for asylum and requesting that he be granted a residence and work permit. He maintained his earlier claims and added that there was a warrant for his arrest and proceedings pending against him before the national courts in Bangladesh. The pending cases concerned the previously mentioned accusation by political opponents. He submitted several documents, most of them in Bengali, to support his statements. Among the documents there was a warrant for his arrest, in English, dated 26 January 1999, and two letters from his defence lawyer in Bangladesh, Mr Bijoy Panna Bhadra. The first letter, written in English, dated 15 April 2001, informed the applicant that Mr Bhadra would be representing him in court against the charges of attempted murder. The second letter, in Bengali, dated August 2002, stated, according to the applicant, that he had been convicted of attempted murder and sentenced to seven years' imprisonment and to pay a fine.

Moreover, the applicant submitted a medical certificate, dated 16 May 2002, to the Aliens Appeals Board in which the chief physician of Western Stockholm's Psychiatric Sector stated that the applicant suffered from Post Traumatic Stress Disorder (PTSD), was depressed and had shown suicidal tendencies. He considered that the applicant was in need of advanced psychiatric treatment.

On 5 July 2002 the Aliens Appeals Board rejected the appeal. It gave the following reasoning:

> "The Aliens Appeals Board shares the Migration Board's assessment of the reasons that [the applicant] has invoked before the Migration Board. His submissions now, that legal proceedings have been instituted against him, does not entail that he can be considered to be persecuted or in need of protection. ....
>
> The Aliens Appeals Board, which does not question that [the applicant] has been subjected to ill-treatment in his home country and that his psychological health is poor, cannot however find that a residence permit should be granted to him on this ground. Nor, even when taking into consideration all the circumstances of the case, are they of such an exceptional character that a residence permit for humanitarian reasons should be granted."

### *B. Application for a residence permit on humanitarian grounds*

At the end of August 2003 the applicant lodged a new application with the Aliens Appeals Board for a residence permit on humanitarian grounds, according to Chapter 2, section 5b, of the Aliens Act, and requested that his expulsion be stayed until the new application had been considered and a new medical examination had been carried out.

He submitted a medical certificate, dated 1 October 2002, which stated that he was very depressed and lacked the ability to care for himself. He was diagnosed as suffering from PTSD with anxiety and suicidal thoughts.

Before the Court, the applicant claimed that he had also invoked a document stating that he had been convicted to 14 years' imprisonment, *in absentia*, by a court in Bangladesh. However, this has been disputed by the Government which claim that no such document had been invoked before the national authorities at any time during the proceedings. The alleged document has not been produced before the Court.

On 2 September 2003, the Aliens Appeals Board decided not to stay the execution of the expulsion order and, on 12 September 2003, it rejected the application. It first observed that the decision to expel the applicant had gained legal force through its decision of 5 July 2002 and that the decision could not be appealed against or re-examined. However, according to Chapter 2, section 5b, of the Aliens Act, the Aliens Appeals Board could examine a new application for a residence permit lodged by an alien who was to be expelled following a final decision. Under this provision, such a new application could be granted only if it was based on circumstances which had not already been examined and if the alien was in need of protection or if it otherwise would be contrary to humanitarian standards to implement the expulsion order. Turning to the issue before it, the Aliens Appeals Board noted that it did not concern a need for protection pursuant to the Aliens Act (i.e. a new request for asylum). It then observed that the medical certificate which the applicant had invoked was almost one year old and that he had not submitted more recent medical certificates. It went on to find that the medical evidence invoked did not show that the applicant's current health condition was of such a character that it would be contrary to

humanitarian standards, within the meaning of the Aliens Act, to enforce the expulsion.

On 5 September 2003 the applicant's representative requested the Court to indicate to the Swedish Government under Rule 39 of the Rules of Court to suspend the applicant's expulsion. On the same day, the applicant allegedly tried to commit suicide by swallowing an unspecified number of cigarettes following which he was taken to hospital. After having received treatment, he was placed in a closed psychiatric care unit. On 8 or 9 September 2003 he escaped from the hospital and went into hiding.

On 17 September 2003 the President of the Chamber to which the case had been allocated decided, under Rule 39 of the Rules of the Court, to indicate to the respondent Government that it was desirable in the interest of the parties and the proper conduct of the proceedings before the Court not to expel the applicant to Bangladesh until the Chamber had had an opportunity to examine the application. On 23 September 2003 the Chamber decided, under Rule 54 § 2 (b) of the Rule of the Court, that the Government should be invited to submit written observations on the admissibility and merits of the case. Moreover, it decided to prolong, until further notice, the interim measure indicated under Rule 39.

Following the Court's indication under Rule 39 of the Rules of Court on 17 September 2003, the Migration Board decided on the same day to stay the enforcement of its decision to expel the applicant until further notice. The Migration Board's decision is still in force.

On 28 March 2004, after the Court had received both parties' observations on the admissibility and merits of the case, it received a fax signed by Mr Bijoy Panna Bhadra in which he disputed all the Government's claims concerning him personally as put forward in their observations. He stated that he was a Bar Council licensed lawyer and working at the address mentioned in the letterhead of his letters. As regarded the court case in Bangladesh against the applicant in which he had been convicted of attempted murder, Mr Bhadra stated that it was a mystery that it had disappeared but that sometimes court officials kept files secret, which must have happened in the present case.

## COMPLAINT

The applicant complained that, if expelled from Sweden to Bangladesh, he would face a real risk of being arrested and subjected to treatment contrary to Article 3 of the Convention.

# THE LAW

The applicant complained that the expulsion to Bangladesh would constitute a violation of his is right under Article 3 of the Convention as he would face a real risk of being arrested, tortured and ill-treated if forced to return. This provision reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

## *A. Whether the applicant had respected the six-month time limit in Article 35 § 1 of the Convention*

The respondent Government contended that the applicant had failed to observe the six-month rule contained in Article 35 § 1 of the Convention. They argued that the final decision in the present case was the decision on appeal delivered by the Aliens Appeals Board on 5 July 2002 since it could not be appealed against and gained legal force immediately. The fact that the applicant had lodged a so-called new application with the Aliens Appeals Board had no bearing on the issue of compliance with the six-month rule since a new application did not constitute an ordinary remedy. The Government referred to the case of *Razaghi v. Sweden* ((dec.), no. 64599/01, 11 March 2003, unreported) in which they contended that the Court had indicated that domestic remedies should be considered exhausted if the original application for asylum had been determined by the Migration Board and the Aliens Appeals Board.

In the present case, the Government stressed the fact that the Aliens Appeals Board's examination of the new application did not involve any consideration relating to the question of the applicant's need for asylum but only concerned whether he should be granted a residence permit in Sweden on humanitarian grounds. Thus, the issue of whether the applicant would be at risk of being subjected to torture or other ill-treatment if he had to return to Bangladesh was in fact finally settled by the Aliens Appeals Board's decision on 5 July 2002, more than one year before the applicant lodged the application with the Court on 5 September 2003.

The applicant maintained that he had lodged his application within the required six month time-limit. He claimed that the new circumstances which were invoked in the new application before the Aliens Appeals Board had a clear connection with his earlier experiences and his fear of being forced to return to his home country. Thus, even though he was prevented from invoking the same grounds as had already been examined, these grounds formed an integral part of the new application. Moreover, in order to exhaust domestic remedies, he was obliged to have all the circumstances of his case examined by the national authorities before lodging a complaint with the Court.

The Court does not agree with the Government's interpretation of its decision in the *Razaghi v. Sweden* case. An important consideration for its finding that the applicant in that case had satisfied the requirement of exhaustion of domestic remedies was that he had lodged a new application with the Aliens Appeals Board, submitting new claims and new evidence, which had been pending for more than two years before the Board. Moreover, the Court found it unlikely that a decision would be taken as long as the case was pending before it. Thus, under those particular circumstances, the Court did not consider that the new application provided the applicant with an effective remedy which had to be exhausted before the Court could consider the case.

In the present case, the applicant lodged a new application with the Aliens Appeals Board, invoking his deteriorating state of health as a reason to be granted a residence permit on humanitarian grounds. The Aliens Appeals Board –being empowered under Chapter 2, section 5b, of the Aliens Act to examine new applications in order to ensure that all the circumstances of the case are examined before expulsion –had regard to a new medical certificate invoked by the applicant and found that it did not show that his current health condition was of such a character that it would be contrary to humanitarian standards to enforce the expulsion order. Thus, it considered the case on the merits, and in light of the applicant's situation at the time, before rejecting it.

In these circumstances, the Court is satisfied that the applicant has complied with the six-month time limit in Article 35 § 1 of the Convention.

### *B. Alleged potential violation of Article 3 of the Convention*

#### 1. The Government's submissions

The Government submitted in the alternative that the application should be declared inadmissible as being manifestly ill-founded. They acknowledged that the general human rights situation in Bangladesh was problematic with police reportedly using physical and psychological torture during arrests and interrogations. However, respect for human rights had steadily improved in the country following the introduction of democratic rule in the early 1990's. In any event, the Government observed that it had to be established whether the applicant personally would face a real risk of treatment contrary to Article 3 of the Convention if returned to Bangladesh. In examining this question, the applicant's credibility was of vital importance and the Government considered that great weight had to be attached to the opinion of the Swedish immigration authorities since they were in a very good position to assess this.

In this regard the Government disputed the authenticity of the documents submitted by the applicant to the Aliens Appeals Board and the Court, in particular the warrant of the applicant's arrest and the two letters from his

lawyer, Mr Bhadra. The Government had requested the Swedish Embassy in Dhaka to investigate the matter and, according to letters signed by an attorney-at-law in Dhaka whom the Embassy had engaged to carry out the investigation, no advocate with the name of Mr Bijoy Panna Bhadra was enrolled with the Bar Council of Bangladesh or could be found at all. Moreover, no such person had ever lived at the address given in the letterhead of the letters submitted by the applicant and allegedly written by Mr Bhadra. Furthermore, no case with the number (37/2001) referred to in Mr Bhadra's letter to the applicant existed before the 2nd Assistant Sessions Judge Court in Dhaka. From this, the Government concluded that the applicant's claims that he had been sentenced *in absentia* to seven (or 14) years' imprisonment was not true and they called into question his general credibility and the veracity of his claims.

The Government further disputed the applicant's claim that he would risk persecution in Bangladesh due to his political activities in general. They noted that after the latest elections held in Bangladesh in October 2001, the Awami League was no longer in power. Thus, also having regard to the applicant's own statement that he had not been politically active since 2000, the Government claimed that the applicant would no longer be at risk of persecution for political reasons if he returned. In any event, the Government observed that the applicant had held a rather low, and local, position as welfare secretary within the Karanigonj area which was unlikely to upset the party's opponents. Should a real risk of ill-treatment still be considered to exist, the Government recalled that the applicant could relocate within the country to ensure his safety.

The Government also called into question whether the applicant had at all been arrested and tortured in Bangladesh, and the police's alleged interest in him, drawing attention to the lack of medical examinations to establish any marks or scars on the applicant and his very brief account of events in Bangladesh, without details but with several inconsistencies.

#### 2. The applicant's submissions

The applicant maintained that there was a real risk that he would be arrested and tortured if he were to be sent back to Bangladesh.

He stressed that the Migration Board and the Aliens Appeals Board were administrative authorities, not courts, and claimed that they therefore did not ensure legal certainty during the proceedings. He submitted that the reasoning of the Migration Board and the Aliens Appeals Board was summarily written and did not clearly show the considerations taken into account or the assessment carried out by the authorities, making it difficult to adequately respond to them.

The applicant further questioned the authorities' special ability to correctly assess the credibility of asylum seekers and also questioned the veracity of the attorney-at-law whom the Swedish Embassy in Dhaka had

hired. Since he was not mentioned by name, the applicant could not control or answer his allegations. The applicant pointed out that the Government had not even sent him copies of the attorney's letters spelling out his findings. Thus, the applicant considered that the attorney's alleged findings should not be afforded any importance. He maintained that his documents were authentic and that he would face a real risk of being arrested and ill-treated if returned to Bangladesh.

As concerned the situation in Bangladesh, he pointed out that police brutality was common and carried out with impunity and that the general human rights' situation in the country was very poor.

**3. The Court's assessment**

The Court observes at the outset that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens. However, the expulsion of an alien by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country. In these circumstances, Article 3 implies the obligation not to deport the person in question to that country (see, among other authorities, *H.L.R. v. France*, judgment of 29 April 1997, *Reports of Judgments and Decisions* 1997-III, p. 757, §§ 33-34).

While aware of the occurrence of reports of continuous human rights violations in Bangladesh, including police brutality and torture and ill-treatment of persons in detention and prison, the Court has to establish whether the applicant's personal situation is such that his return to Bangladesh would contravene Article 3 of the Convention.

The Court, like the Swedish immigration authorities, does not question that the applicant might have been subjected to ill-treatment in Bangladesh before he left the country.

However, it stresses the fact that the applicant has not been politically active since August 2000 when, allegedly, he was last arrested. Further, the Court observes that in October 2001 there were general parliamentary elections in Bangladesh where the Awami League lost power and the Bangladeshi National Party (BNP) together with three smaller parties formed a new coalition government. Thus, the applicant's alleged political opponents, who he claimed had been responsible for the false accusations against him, are no longer in power. He has not claimed before the Court that the BNP has harassed him in the past or that it would now show any interest in him. Moreover, it can be noted that the Jatiya Party [Ershad], to which the applicant belonged, was a lawful party which gained 14 seats (out of 300) in the elections and thereby became the fourth largest party in

Parliament. Furthermore, the Court finds it established that the applicant did not hold a prominent position within the party but rather carried out work on a local level, making him less prone to be the subject of harassment by members of other parties.

Nor is the Court persuaded by the applicant's submission that he would risk being arrested and imprisoned upon return to Bangladesh because of his alleged conviction. He has filed several documents to support his claim that he was arrested, charged and convicted of attempted murder, although the charges were based on false accusations by the Awami League. Most documents are in Bengali and all but one have been translated (the Court requested the applicant to submit a translation of the last document, but he has not done so). The Government have maintained their view, based on the information obtained by the Swedish Embassy in Dhaka that the documents are falsifications, whereas the applicant has maintained that they are authentic.

The Court for its part finds it highly unlikely that if a warrant for the applicant's arrest was made in January 1999 the police would release him following his arrest in August 2000, in particular having regard to the very serious charges against him of attempted murder. It further points out that the applicant has not submitted the alleged judgment to the Court but only the letter by his defence lawyer informing him about the conviction and the sentence. Moreover, it appears strange that no appeal was lodged against the judgment and that the lawyer did not even inform the applicant about the possibility of lodging an appeal. Furthermore, it observes that Mr Bhadra, in his fax to the Court, acknowledged that the case file no longer could be found before the Bangladeshi court, suggesting that the case either has never existed or has been destroyed. Under these circumstances, the Court is not convinced that there is in fact a judgment against the applicant which could, or would, be enforced if he returned to Bangladesh.

Having regard to the above, the Court finds that the applicant would not face a substantial risk of being persecuted, arrested or ill-treated, contrary to Article 3 of the Convention, if he were to be returned to Bangladesh.

Lastly, the Court observes that, in his submissions to it, the applicant has not claimed that his state of health would be an impediment to his expulsion from Sweden. However, he has submitted two medical certificates stating that he suffers from PTSD and depression. These certificates are from May and October 2002, respectively. Neither he nor his legal representative have submitted more recent certificates to substantiate that his state of health is still poor. Under these circumstances, the Court finds no indication that the applicant's present state of health would be an impediment to the enforcement of the expulsion order.

It follows that the application must be rejected as being manifestly ill-founded pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

*Declares* the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President