

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 25894/94

Shammsuddin Bahaddar

against

the Netherlands

REPORT OF THE COMMISSION

(adopted on 13 September 1996)

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I. INTRODUCTION	
1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.	
A. The application	
2. The applicant is a Bangladeshi citizen, born in 1966, and residing in the Netherlands. He was represented before the Commission by Mrs. R. Niemer, a lawyer practising in Amsterdam.	
3. The application is directed against the Netherlands. The respondent Government were represented by their agent, Mr. H. von Hebel, of the Netherlands Ministry of Foreign Affairs.	
4. The case concerns the applicant's complaint that his expulsion to Bangladesh would expose him to a serious risk of being arrested, tortured or killed. The applicant invokes Articles 2 and 3 of the Convention.	
B. The proceedings	
5. The application was introduced on 2 December 1994 and registered on 9 December 1994.	
6. On 9 December 1994 the Commission decided, in accordance with Rule 36 of the Commission's Rules of Procedure, to indicate to the Government of the Netherlands that it was desirable in the interest of the parties and the proper conduct of the proceedings not to expel the applicant to Bangladesh until the Commission had an opportunity to examine the application in the light of the parties' submissions. On 19 January, 2 March, 22 May, 6 July, 14 September, 26 October, 7 December 1995, 7 March, 18 April and 4 July 1996 the Commission decided to prolong the application of Rule 36.	
7. Also on 9 December 1994 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.	
8. The Government's observations were submitted on 17 February 1995. The applicant replied on 7 and 10 April 1995.	
9. On 22 May 1995 the Commission declared the application admissible.	

10. The text of the Commission's decision on admissibility was sent to the parties on 2 June 1995 and they were invited to submit such further information or observations on the merits as they wished. The Government submitted further observations on 4 July 1995. The applicant did not avail himself of the opportunity to submit further observations.

11. On 7 December 1995 the Commission decided to put a question to the Government and to transmit their reply to the applicant's representative for comments.

12. The Government submitted their reply to the question on 7 February 1996 after an extension of the time-limit fixed for that purpose.

13. The applicant did not submit any comments on the answer provided by the Government.

14. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

15. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

Mr. S. TRECHSEL, President
 Mrs. G.H. THUNE
 Mrs. J. LIDDY
 MM. E. BUSUTTIL
 G. JÖRUNDSSON
 A.S. GÖZÜBÜYÜK
 A. WEITZEL
 J.-C. SOYER
 H. DANELIUS
 F. MARTINEZ
 C.L. ROZAKIS
 L. LOUCAIDES
 J.-C. GEUS
 M.P. PELLONPÄÄ
 B. MARXER
 G.B. REFFI
 M.A. NOWICKI
 I. CABRAL BARRETO
 B. CONFORTI
 N. BRATZA
 I. BÉKÉS
 J. MUCHA
 D. SVÁBY
 G. RESS
 A. PERENIC
 C. BÎRSAN
 P. LORENZEN
 K. HERNDL
 E. BIELIUNAS
 E.A. ALKEMA
 M. VILA AMIGÓ

16. The text of this Report was adopted on 13 September 1996 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

17. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

18. The Commission's decision on the admissibility of the application is annexed hereto as an Appendix.

19. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

20. The applicant applied for asylum or, alternatively, a residence permit for humanitarian reasons in the Netherlands on 13 July 1990. He was interviewed by an official of the Ministry of Justice (Ministerie van Justitie) on 22 May 1991 and submitted that he was a Buddhist and belonged to the Chakma tribe in the Chittagong Hill Tracts region of Bangladesh. His parents had been killed by the army when he was eight years old and he had then been adopted by a Muslim family. From 1974 he had been a member of the illegal organisation "Shanti Bahini". He had only been eight years old at that time, but children were taught at an early age to be on the alert for army presence in the area. His activities for Shanti Bahini had consisted of the gathering of information concerning movements of Government forces and the mapping of army routes. He had been able to indulge in these activities undetected since it was generally unknown that his foster parents were not his real parents and he was therefore considered a Muslim. In 1987 he had also joined the legal Bangladeshi National Party (BNP).

21. On 16 April 1990 the applicant had taken part in a BNP demonstration against sub-district elections which were to be held from 10 to 26 April 1996. In these elections, businessmen who had settled in the region were allowed to stand as candidates whereas for native inhabitants this was not automatically the case. The election of non-native inhabitants would frustrate the desired autonomy of the region. Following the dispersal of the demonstration by police, the applicant had gone to a friend's house from where he had telephoned his foster father. His foster father had informed him that the police, acting upon a complaint that the applicant had damaged goods and wounded people in the course of the demonstration, had searched the house. In the course of this search the police had come upon papers drawn up by the applicant for Shanti Bahini which contained information about movements of Government forces.

22. The applicant had prepared to leave his country when he learned, after a few days, that a warrant for his arrest had been issued in connection with his activities for an illegal organisation. Until his departure he stayed with a friend and with relatives of his foster father. On 30 June 1990 he crossed the border with India on foot and then travelled to Bombay from where he boarded a flight to the Netherlands, using a false passport.

23. His requests for asylum or a residence permit for humanitarian reasons were refused on 16 July 1991 by the State Secretary for Justice (Staatssecretaris voor Justitie). The applicant requested the State Secretary to review (herziening) this decision. He submitted, inter alia, that he had joined the BNP to cover up his activities for Shanti Bahini. He further clarified that his foster parents were not aware of his involvement with Shanti Bahini.

24. The State Secretary denied suspensive effect to the applicant's request for a review of his decision. In order to obtain an injunction on his expulsion pending the review proceedings, the applicant instigated interim injunction proceedings (kort geding) before the President of the Regional Court (Arrondissementsrechtbank) of The Hague sitting at 's-Hertogenbosch (nevenzittingsplaats 's-Hertogenbosch).

25. On 14 November 1991 the President granted the injunction requested. The President found the applicant's story consistent and credible and considered that an investigation was called for into the authenticity of untranslated documents submitted by the applicant which might support his allegations. Although it had appeared that the sub-district elections had taken place from 12 to 25 March 1990 and not from 10 to 26 April 1990 as submitted by the applicant in his interview with the official of the Ministry of Justice, the President held that this interview had taken place more than a year later and that therefore the conclusion that the applicant's account of events was untrue was unjustified. The President also had regard to a letter from Amnesty International of 24 October 1991, which stated that, if it was true that the applicant had provided Shanti Bahini with information about military operations and the military were aware of this, he risked detention and torture upon his return to Bangladesh.

26. The applicant was heard by the Advisory Committee on Alien Affairs (Adviescommissie voor Vreemdelingenzaken) on 21 December 1992. Asked about his activities for Shanti Bahini the applicant said that he had been aware of the existence of the organisation from an early age. From 1974 he had been involved with them albeit marginally. From 1986 he had started to supply this organisation with information about movements of the Government forces. He would obtain this information by looking at the destination indicated on boats transporting rations for the military. Shanti Bahini would be informed of the destination of the boats and clashes ensued when the military came to collect the rations. He would furthermore draw sketches on which he indicated distances between the town of Rangamati and army camps. These sketches would later be made into detailed maps by Shanti Bahini.

27. The applicant also told the Advisory Committee that in the years 1982/1984 he had begun to collect funds for Shanti Bahini from the local population. The Bengali settlers in particular did not want to contribute to an illegal organisation but the applicant would tell them that they had moved into an area which did not belong to them and that therefore they had to pay a sort of tax. In 1990, after the police had started looking for the applicant, a Bengali fisherman, Mr. Omar K., had filed a complaint against him, in which he was accused of extortion. The applicant said that from 1984 he used to go to Omar K. to collect the taxes with three other people. However, the applicant denied that he had ever exerted pressure on Omar K.

28. Asked about the demonstration in April 1990 the applicant said that since Shanti Bahini were an illegal organisation and therefore unable to demonstrate publicly the name of the BNP had been used. Some members of the BNP had been present at the demonstration but the majority of participants had consisted of Shanti Bahini members.

29. After the demonstration had ended in clashes with police, the latter had made enquiries into who had been present at the demonstration. To this end they had interviewed a Ward Commissioner, Mr. Mujibfor A., who lived in the same street as the applicant and who had recognised him at the demonstration. The applicant, who had gone to a friend's house after the demonstration, had telephoned his foster parents and had found out that the police, accompanied by Mr. A., had gone to the house and had found the sketches he had drawn up for Shanti Bahini in a locked drawer which had been forced open by the police. His foster father had been taken to the police station where he had been questioned about the applicant and the applicant's background. With the assistance of a lawyer, the applicant's foster father had obtained his release on bail.

30. When the applicant had learned that the police wanted to question him about his activities for Shanti Bahini, the leader of this organisation had said that he would be ill-treated at the police station until he had told them all about his activities for Shanti Bahini, endangering not only himself but also other members of the organisation. For this reason it had been decided that the applicant should leave the country. Shanti Bahini had initially wanted the applicant to go to India where he would be trained in the use of fire arms. However, the applicant had refused to go there, since he knew some other men who had died in Bangladesh after they had returned from such a training in India.

31. The applicant finally told the Advisory Committee that if he was expelled to Bangladesh he would be arrested and ill-treated by police. It would be possible to prove his involvement with Shanti Bahini through the complaint of extortion which had been filed against him.

32. On 21 December 1992 the Advisory Committee expressed as its opinion that the applicant was not a refugee within the meaning of the Geneva Convention and that he was not eligible to receive a residence permit for humanitarian reasons. The Advisory Committee held that on essential points the applicant's account was vague and contradictory. Thus it had not become established that the applicant was a member of Shanti Bahini. In this respect the Advisory Committee referred to an investigation carried out by the Netherlands Ministry of Foreign Affairs from which it appeared that the declaration submitted by the applicant and purportedly issued by Shanti Bahini was not authentic. The Advisory Committee further found that it had not become clear in what way the applicant had been able to obtain information of value to Shanti Bahini concerning the movement of army troops.

33. The Advisory Committee further took into account that the sub-district elections which had allegedly been the cause of the demonstration of 16 April 1990 had at that time already taken place. Finally, from the investigation carried out by the Netherlands Ministry of Foreign Affairs it had further appeared that the applicant was only wanted by the Bangladeshi authorities in connection with a complaint filed against him by a private person and concerning the civil offence of extortion for which, under Bangladeshi law, the applicant could obtain his release on bail and which carried a maximum sentence of three years' imprisonment.

34. Adopting the Advisory Committee's proposal and reasoning, the State Secretary for Justice rejected the request for a review on 26 March 1993.

35. On 31 March 1993 the applicant filed an appeal against the State Secretary's decision of 26 March 1993 with the Judicial Division of the Council of State (Afdeling Rechtspraak van de Raad van State), adding that the grounds for the appeal would be submitted as soon as possible.

As this appeal was denied suspensive effect, the applicant instigated interim injunction proceedings before the President of the Regional Court of The Hague sitting at Amsterdam.

36. In these interim injunction proceedings the applicant argued, *inter alia*, that the declaration of Shanti Bahini, submitted by him in support of his request for asylum, was authentic but had been issued by a regional branch of this organisation, which may not have been known to the Netherlands Ministry of Foreign Affairs when it examined the authenticity of the document.

37. Following a hearing on 22 October 1993 the President, on 11 November 1993, granted the applicant an injunction on his expulsion pending the proceedings before the Judicial Division. The President in his decision had regard, *inter alia*, to a second declaration issued by Shanti Bahini and a certified copy of a complaint filed with the Court of the Upazila Magistrate against the applicant in which he is accused of having collected funds for Shanti Bahini through extortion of the person making the complaint and of taking part in the struggle of Shanti Bahini against the State of Bangladesh. The President considered that, even though the complaint against the applicant was filed by a private person, given that the authenticity of these documents had not been disputed it must be assumed that the interest of the Bangladeshi authorities in the applicant has been aroused. Taking into account further the letter of Amnesty International of 24 October 1991, the President concluded that in all reasonableness the possibility that the applicant had a well-founded fear of persecution could not be excluded.

38. In the meantime, the applicant's lawyer was informed by the Judicial Division on 28 June 1993 that she had not so far submitted the grounds for the appeal with the Judicial Division and she was given the opportunity to comply with this requirement before 29 July 1993. The applicant's lawyer submitted grounds for the appeal on 20 October 1993, without providing an explanation for the delay.

39. On 7 March 1994 the President of the Administrative Law Division (Afdeling Bestuursrechtspraak, the successor of the Judicial Division) in simplified proceedings (*vereenvoudigde procedure*) declared the applicant's appeal inadmissible for not having complied with a formal requirement. The applicant filed an objection (*verzet*) against this decision with the Administrative Law Division on 11 March 1994.

40. In the hearing on the applicant's objection, which took place on 22 September 1994, the applicant argued that it had not been possible to submit grounds for the appeal before 20 October 1993 since it had been necessary, given that the State Secretary for Justice had disputed the authenticity of documents submitted by him, to try and obtain further proof of his allegations from Bangladesh and that this had taken a long time.

41. The Administrative Law Division rejected the applicant's objection on 29 September 1994, holding that he had been given ample opportunity to submit grounds for his appeal, that he had been informed of the possible consequences in case of non-compliance with the requirement that appeals should be motivated and that he had not requested an extension of the time-limit for the submission of the grounds.

42. Neither the Administrative Law Division nor its President in his decision of 7 March 1994 examined the merits of the applicant's appeal.

43. On 5 December 1994 the applicant filed new requests for asylum and a residence permit, arguing that the second declaration issued by Shanti Bahini and the certified copy of the complaint filed against

him, as well as information provided by his lawyer in Bangladesh, constituted new facts which the State Secretary for Justice had not been able to take into account when deciding on the applicant's first requests for asylum and a residence permit.

44. The State Secretary for Justice declared the applicant's new requests inadmissible on 12 January 1995 in accordance with Section 15b para. 1 (b) of the Dutch Aliens Act (Vreemdelingenwet), as he was of the opinion that no relevant new facts had been presented.

45. Appeal proceedings against the decision of 12 January 1995 are currently still pending but have no suspensive effect.

B. The evidence before the Commission

46. The Commission had regard to the following documents, which had already been produced in the domestic proceedings.

i. Letter of 5 November 1991 from the applicant's lawyer in Bangladesh, Mr. J.B. Chakma, to the applicant's lawyer in the Netherlands

47. Mr. Chakma writes that the applicant's foster father came to see him recently, saying that the police had come to him and had shown him a warrant for his son's arrest. Mr. Chakma made enquiries and found out that there is a case with number C.R. 30/91 pending against the applicant in the Sub-District Court of Rangamati under Section 384 of the Bangladesh Penal Code for which the applicant may be sentenced to three years' imprisonment for extortion. Mr. Chakma further writes that there is also an allegation of the applicant's involvement in the insurgent activities of the Shanti Bahini. If this allegation is found to be well-founded, the applicant may be imprisoned for life under Section 121 of the Bangladesh Penal Code for waging war against the State of Bangladesh.

48. Mr. Chakma does not rule out that there are other cases pending against the applicant but explains that pursuant to Section 332 of the Bengal Records Manual an accused or his lawyer is not entitled to receive copies of a first information report, an arrest warrant or a judgment until the accused appears before a court.

ii. Certified copy of undated petition of complaint with number C.R. 30/91 filed by Mr. Omar K. with the Court of the Upazila Magistrate

49. Omar K. states that he is a fish merchant and that he was compelled to pay illegal taxes to Shanti Bahini to ensure the safety and security of the fishermen working for him and of his boats. The applicant used to collect these taxes. Omar K. did not report this matter to the law enforcing authorities for a long time as he feared for his life. Ultimately, however, the applicant's involvement with Shanti Bahini was detected by the law enforcing authorities and they started looking for the applicant in order to arrest him. It has further come to Omar K.'s knowledge that the applicant is living in the Netherlands.

50. For these reasons Omar K. lodged his complaint against the applicant for extortion, illegal collection of money and for participation in illegal war against the state under Sections 384 and 121 of the Bangladesh Penal Code.

iii. Letter dated 24 October 1991 from Amnesty International in the Netherlands to the applicant's lawyer in the Netherlands

51. Apart from general information in respect of the situation in the Chittagong Hill Tracts (see paras. 54-55), the letter states that the applicant risks being arrested and tortured upon his return to Bangladesh if it is indeed the case that he provided Shanti Bahini with information concerning military operations and the military are aware of this.

C. The Bangladeshi background to the present case

52. In their submissions the parties have provided the Commission with some information regarding the Bangladeshi background to the present case. The Commission has further taken note of publications of the United States Department of State and Amnesty International.

53. The Commission had particular regard to the following documents:

i. Letter dated 24 October 1991 from Amnesty International in the Netherlands to the applicant's lawyer in the Netherlands

54. The letter states that the Chittagong Hill Tracts is the most sparsely populated area of Bangladesh and that it was originally inhabited by mainly Buddhist tribal groups of which the Chakma is the largest. Subsequent Bangladeshi Governments have encouraged large numbers of Bengali, who are mainly Muslim, to settle in the area, causing the original population to fear a loss of identity. Bangladeshi Governments have also tried forcefully to relocate the tribal population to so-called "protected villages" near bases of the security forces, since this was deemed to be in the interest of the social and economic development of the area but this practice formed part of the Government's policy against armed resistance at the same time.

55. Shanti Bahini, which means "Peace Troops", is the armed wing of the Jana Sanghati Samiti (JSS, People's Solidarity Association). It was founded in 1972 at the same time as the JSS following the rejection of tribal leaders' demands for autonomy by the then Prime Minister. Shanti Bahini strives for regional autonomy of the Chittagong Hill Tracts and uses violent methods to achieve its aim. Its members come from different tribal groups but the Chakmas constitute the majority.

ii. "Country Reports on Human Rights Practices for 1993", United States Department of State, February 1994

56. The chapter on Bangladesh reports that the Government of Bangladesh claims to hold no political prisoners. However, some arrests under the Special Powers Act were for essentially political reasons, including those of tribals arrested for allegedly aiding and abetting the insurgent group Shanti Bahini (page 1322).

iii. "Country Reports on Human Rights Practices for 1994", United States Department of State, February 1995

57. The chapter on Bangladesh reports, inter alia, that in December 1994 the Bangladeshi Government extended an amnesty for Shanti Bahini insurgents until 31 March 1995 (page 1208).

iv. Amnesty International Report 1996, which covers the period January - December 1995

58. The chapter on Bangladesh reports, inter alia, that the talks between the Government of Bangladesh and the tribal representatives in the Chittagong Hill Tracts failed to bring a political solution to the long-standing conflict between non-Bengali tribal inhabitants and the Government of Bangladesh. However, a cease-fire was periodically extended. The repatriation of some 50,000 tribal refugees living in

camps in India was not restarted. The Government of Bangladesh rejected demands by the tribal population that their repatriation should be placed under international supervision (page 89).

59. It is furthermore stated that there were continuing reports from the Chittagong Hill Tracts of ill-treatment, harassment and arbitrary detention of tribal people with the acquiescence or active participation of the police (page 89).

60. Finally, as regards the general situation in Bangladesh, the report states that torture and ill-treatment in police custody and in jails were widespread (page 89).

v. "Country Reports on Human Rights Practices for 1995", United States Department of State, April 1996

61. The chapter on Bangladesh reports that the army and paramilitary forces are responsible for security in the Chittagong Hill Tracts, where a tribal force has waged a low-level insurgency for twenty years. In 1995 the Bangladeshi Government continued talks with Shanti Bahini's political wing, the JSS, and the two sides agreed at short, regular intervals to extend their cease-fire, which generally held throughout the year, although each side accused the other of extensive violations. The latest extension of the cease-fire included in the Report was set to last until 31 March 1995 when talks between the two groups were scheduled to resume. The Government of Bangladesh also extended the amnesty for insurgents as long as the dialogue with Shanti Bahini continued (pages 1294, 1296).

62. All sides - indigenous tribes, settlers and security forces - have accused each other of human rights violations. According to the Report, it is difficult to verify facts in specific incidents because Bangladeshi Government travel restrictions, tight security, difficult terrain, and unsafe conditions created by the insurgency limit access to the area (page 1296).

63. As regards the general situation in Bangladesh the Report states that the Government of Bangladesh continue to restrict or deny many fundamental rights (page 1294). Although the Constitution prohibits torture and cruel, inhuman or degrading punishment, police routinely employ psychological and physical torture and other abuse during arrests and interrogations. The Government of Bangladesh rarely convict and punish those responsible for torture, and a climate of impunity allows such police abuses to continue (page 1295).

D. The Government's reply to the question put by the Commission

64. On 7 December 1995 the Commission decided to put the following question to the Government:

"Is it correct that an amnesty for Shanti Bahini insurgents is at present in force in Bangladesh, and, if so, what are the implications of this amnesty in relation to the application?"

65. In their reply of 7 February 1996 the Government submitted that the Government of Bangladesh promulgated an amnesty in February 1994 with respect to all refugees returning from Tripura (India) and that this amnesty was still in force. However, it could not be automatically assumed that all members of Shanti Bahini may profit from this amnesty, given the fact that the Government of Bangladesh refer only to clemency for those Shanti Bahini members who were convicted during the previous regime.

E. Relevant domestic law and practice

66. Pursuant to Section 15 of the Aliens Act (Vreemdelingenwet), foreigners originating from a country where they have a well-founded reason to fear persecution on account of their religious or political conviction or their belonging to a certain race or a certain social group may request the Minister of Justice (Minister van Justitie) to grant them admittance to the Netherlands as a refugee (vluchteling).

67. The definition of "refugee" enacted in the Dutch legislation has been interpreted by the judiciary as referring to the same category of persons as the definition contained in the Geneva Convention on the Status of Refugees (cf. Judicial Division Council of State, decision of 16 October 1980, Rechtspraak Vreemdelingenrecht 1981, 1).

68. A request for admittance as a refugee will be rejected as being inadmissible if the alien has previously requested admittance on the same grounds and the decision rejecting this earlier request has become final (Section 15b para. 1 sub (b) Aliens Act).

69. A residence permit may be refused on grounds of public interest (Section 11 para. 5 Aliens Act). In general, an application for a residence permit in the Netherlands is granted only if the individual's presence serves an essential national interest or if there are compelling reasons of a humanitarian nature (klemmende redenen van humanitaire aard).

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

70. The Commission has declared admissible the applicant's complaints that his expulsion to Bangladesh would expose him to a real risk of death, torture or inhuman or degrading treatment.

B. Points at issue

71. The points at issue in the present case are as follows:

- whether the expulsion of the applicant to Bangladesh would be in violation of Article 2 (Art. 2) of the Convention;
- whether the expulsion of the applicant to Bangladesh would be in violation of Article 3 (Art. 3) of the Convention.

C. As regards Article 2 (Art. 2) of the Convention

72. Article 2 (Art. 2) of the Convention provides as follows:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- a. in defence of any person from unlawful violence;
- b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- c. in action lawfully taken for the purpose of quelling a riot or insurrection."

73. The applicant submits that, if he is expelled to Bangladesh, he is in danger of being killed on account of his activities for Shanti Bahini.

74. The Commission recalls the case-law of the Convention organs according to which the right of an alien to reside in a particular country is not as such guaranteed by the Convention. However, the decision of a Contracting State to expel or extradite a person may give rise to an issue under Article 3 (Art. 3) of the Convention, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he is to be returned (Eur. Court HR, *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 34, paras. 102-103).

75. The question arises whether analogous considerations apply to Article 2 (Art. 2), in particular whether this provision can also engage the responsibility of a Contracting State where, upon expulsion or other removal, the person's life is in danger.

76. The Commission recalls that Article 2 (Art. 2) contains two separate though interrelated basic elements. The first sentence of paragraph 1 sets forth the general obligation that the right to life shall be protected by law. The second sentence of this paragraph contains a prohibition of intentional deprivation of life, delimited by the exceptions mentioned in the second sentence itself and in paragraph 2 (cf. No. 17004/90, Dec. 19.5.92, D.R. 73 p. 155).

77. The Commission finds nothing to indicate that the expulsion of the applicant would amount to a violation of the general obligation contained in the first sentence of paragraph 1.

78. As to the prohibition of intentional deprivation of life, the Commission does not exclude that an issue might be raised under Article 2 (Art. 2) in circumstances in which the expelling State knowingly puts the person concerned at such high risk of losing his life as for the outcome to be a near-certainty. The Commission considers, however, that a "real risk" - within the meaning of the case-law concerning Article 3 (Art. 3) (see paras. 74 and 88) - of loss of life would not as such necessarily suffice to make expulsion an "intentional deprivation of life" prohibited by Article 2 (Art. 2), although it would amount to inhuman treatment within the meaning of Article 3 (Art. 3) .

79. It is not necessary for the Commission to decide in what precise circumstances the risk of the person being killed might constitute a violation of Article 2 (Art. 2) in a case like the present one, since in any event the facts of the case do not disclose such a risk.

80. The Commission notes that it appears from his submissions that the applicant fears that he may die as a result of torture applied to him in detention. However, for the reasons given in para. 78, the Commission finds that this issue falls to be considered under Article 3 (Art. 3) (see paras. 82-102). Noting, furthermore, that the offences of which the applicant is allegedly accused under Sections 384 and 121 of the Bangladesh Penal Law do not carry the death penalty, the Commission considers that the applicant has not sufficiently substantiated that his expulsion could constitute a violation of Article 2 (Art. 2) .

CONCLUSION

81. The Commission concludes, unanimously, that in the present case the expulsion of the applicant to Bangladesh would not be in violation of Article 2 (Art. 2) of the Convention.

D. As regards Article 3 (Art. 3) of the Convention

82. Article 3 (Art. 3) of the Convention reads as follows:

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

83. The applicant submits that, if he is expelled to Bangladesh, he is in danger of being arrested and tortured on account of his activities for Shanti Bahini. Amnesty International in the Netherlands have confirmed that there is a real risk of such treatment if it is the case that the applicant provided Shanti Bahini with information about troop movements and the Bangladeshi authorities are aware of this. The applicant argues that he has sufficiently substantiated his involvement with Shanti Bahini and the Bangladeshi authorities' knowledge of this involvement, *inter alia*, by submitting documents whose authenticity has not been disputed.

84. The Government submit that there are no indications militating against the applicant's expulsion since the applicant has been unable to demonstrate convincingly that his fear of persecution is well-founded.

85. As regards the legal proceedings in which the applicant is accused of extortion, the Government contend that the applicant has failed to substantiate that these proceedings are politically motivated. In this respect they submit that the applicant maintains that these proceedings were instituted on the basis of statements of his foster father, whereas the applicant has also claimed that his foster father was unaware of his involvement with Shanti Bahini. In the opinion of the Government, the applicant's fear of ill-treatment is inspired solely by general remarks made by his acquaintances on the general methods of interrogation used by the police and in this respect there is no direct connection with any kind of political motive.

86. The Government further argue that at various stages of the domestic proceedings the applicant made conflicting statements with regard to his membership of Shanti Bahini. Only at a very late stage in the appeal proceedings was the applicant able to produce a document which could be considered to constitute evidence of his membership of this organisation. This document is the only concrete indication of the applicant's political affinity with Shanti Bahini. However, the applicant's relations with Shanti Bahini were only of a very marginal character. He has not, in the Government's view, provided consistent information on the subject of the gathering of information for Shanti Bahini but, in any event, these activities at no time occasioned his arrest. Furthermore, the protest demonstration in which the applicant allegedly took part was organised by a legal political party and was not in any way related to the position of Shanti Bahini.

87. The Commission refers to para. 74 above, where it has reiterated to which extent an expulsion may give rise to an issue under Article 3 (Art. 3) of the Convention.

88. In its assessment of the risk of ill-treatment the Commission has considered the following principles to be relevant:

- i. In determining whether substantial grounds have been shown for believing that a real risk of treatment contrary to Article 3 (Art. 3) exists, the Commission will assess the issue in the

light of all the material placed before it or, if necessary, material obtained proprio motu (cf. Eur. Court HR, Cruz Varas and Others v. Sweden judgment of 20 March 1991, Series A no. 201, p. 29, para. 75).

ii. The assessment of the existence of the risk must be made on the basis of information currently available (cf. No. 22414/93, The Chahal Family v. the United Kingdom, Comm. Rep. 27.6.95, currently pending before the Eur. Court HR). The Commission may thus have regard to developments which have taken place in Bangladesh subsequent to the rejection of the applicant's requests for asylum.

iii. Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 (Art. 3). The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case (cf. Vilvarajah and Others v. the United Kingdom judgment, loc. cit., p. 36, para. 107).

89. In order to determine whether the applicant has shown that there are substantial grounds for believing that he faces a real risk of being subjected to treatment contrary to Article 3 (Art. 3) of the Convention upon his return to Bangladesh, the Commission has first examined the submissions made by the applicant in the course of the asylum proceedings.

90. The Commission notes that according to the applicant he has been involved with Shanti Bahini since 1974, children being taught from an early age to be on the alert for any army presence in the area (para. 20). He had begun collecting funds for Shanti Bahini in 1982/1984 and from 1986 he had supplied this organisation with information about movements of Government forces (para. 26). The domestic authorities initially doubted whether the applicant had indeed been a member of Shanti Bahini as the declaration purportedly issued by this organisation was found not to be authentic (para. 32). However, the applicant maintained that this declaration was genuine but that it had been drawn up by a regional branch of Shanti Bahini (para. 36). He subsequently submitted a declaration whose authenticity does not appear to be in dispute between the parties. From the foregoing the Commission considers it established that the applicant was a member of Shanti Bahini.

91. As regards the activities which the applicant carried out for Shanti Bahini, the Commission notes that according to the Government these were of a marginal character. It further notes that in the asylum proceedings the domestic authorities found that it was not clear how the applicant could have provided Shanti Bahini with valuable information concerning troop movements (para. 32).

92. The Commission observes that it is difficult to assess the value of the information allegedly gathered by the applicant. In this respect the Commission notes that it appears that travel restrictions apply in the Chittagong Hill Tracts and that this area is subject to tight security (para. 62). In these circumstances it cannot be excluded that it would have been easier for the applicant, who was generally thought to be a son of Bengali settlers (para. 20), to note the destination of army boats and the location of army camps than for other indigenous inhabitants of the area.

93. It is true that the applicant was never arrested on account of his activities for Shanti Bahini. However, it is the applicant's contention that he left the country in order to escape such an arrest. The applicant submits that he was told that a warrant for his arrest had been issued after papers, drawn up by him and containing

information about movements of army troops, had been discovered in his house.

94. The Commission notes that the search of the applicant's house allegedly took place following his participation in a demonstration which had ended in clashes with the police. The Government appear to argue that it is unlikely that the authorities went to the applicant's house in these circumstances given the fact that the demonstration had been organised by a legal political party and was not related to Shanti Bahini. The Commission observes, however, that in his first interview in the asylum proceedings the applicant stated that the demonstration was directed against the automatic right of certain Bengali settlers to stand in sub-district elections which frustrated demands for regional autonomy of the Chittagong Hill Tracts (para. 21). At the later hearing before the Advisory Committee on Aliens Affairs the applicant specified that the name of the BNP was used for what had in reality been a demonstration by Shanti Bahini (para. 28). In view of the fact that Shanti Bahini is an illegal organisation which strives for regional autonomy of the Chittagong Hill Tracts (para. 55), the Commission finds the submissions of the applicant as regards this demonstration credible.

95. The Commission notes that the applicant has not provided any direct evidence of his allegation that the authorities have issued an arrest warrant. However, it also notes that according to the applicant's lawyer in Bangladesh it is not possible under Bangladeshi criminal law to obtain a copy of an arrest warrant until an accused appears before a court (para. 48). Furthermore, it is stated in the petition of complaint filed by Omar K. that prior to making this complaint the authorities had become aware of the applicant's involvement with Shanti Bahini and were seeking to arrest him (para. 49).

96. As regards the complaint filed by Omar K. against the applicant, the Commission notes the Government's submission that in the asylum proceedings the applicant had maintained that the legal proceedings concerning extortion had been instituted on the basis of statements made by his foster father. The Commission can find no substantiation of this claim by the Government in the documents submitted. On the contrary, it notes that the applicant told the Advisory Committee for Aliens Affairs that Omar K. had made the complaint and that it was true that he used to collect money from him for Shanti Bahini.

97. The Commission agrees with the Government that the complaint filed against the applicant was made by a private person who accused the applicant of the offence of extortion. However, it is clear from the text of the complaint petition that the applicant is alleged to have compelled Omar K. to pay illegal taxes to Shanti Bahini (para. 49). Thus, apart from accusing the applicant of extortion under Section 384 of the Bangladesh Penal Code, the complaint also expressly contains the allegation that the applicant "waged illegal war" within the meaning of Section 121 of the Bangladesh Penal Code. The Commission considers that this denotes a political background to the offence. It appears from the letter written by the applicant's lawyer in Bangladesh that the offence of waging war against the State of Bangladesh carries a penalty of life imprisonment (para. 47).

98. The Commission considers the applicant's account to be credible and on the whole consistent. It would agree with the President of the Regional Court of The Hague (para. 25) that the fact that in his interview with the Ministry of Justice the applicant did not correctly state the date of the elections is insufficient to discredit the account of the applicant. Accordingly, the Commission finds that the applicant has convincingly shown that he is suspected of being involved

with Shanti Bahini.

99. As regards the consequences of this suspicion and the treatment which the applicant would encounter if expelled to Bangladesh, the Commission observes in the first place that it appears that from 1994 efforts are being made to resolve the conflict in the Chittagong Hill Tracts. The Commission notes that in this context the Government of Bangladesh promulgated an amnesty for Shanti Bahini insurgents returning from India who were convicted during the previous regime. It is reported that the amnesty will stay in force as long as the dialogue between the Government of Bangladesh and Shanti Bahini's political wing, the JSS, continues. Furthermore, both parties to the conflict agree at regular intervals to extend a cease-fire (paras. 57, 58 and 61).

100. However, the Commission also notes that in 1995 no political solution had yet been reached. There were still continuing reports from the Chittagong Hill Tracts of ill-treatment, harassment and arbitrary detention of tribal people with the acquiescence or active participation of the police (para. 59). Furthermore, police in Bangladesh were reported routinely to employ psychological and physical torture and other abuse during arrests and interrogations (paras. 60 and 63).

101. As to the position of the applicant, the Commission notes that he was not convicted during the previous regime in Bangladesh and it may therefore not be assumed that he will be able to benefit from the amnesty, even assuming that it is still in force. Moreover, the Commission considers the existence of a suspicion of the applicant's involvement with Shanti Bahini to constitute a special distinguishing feature in this case (cf. *mutatis mutandis* the *Vilvarajah and Others v. the United Kingdom* judgment, loc. cit., p. 37, para. 112). Having regard furthermore to the practices of the Bangladeshi police referred to above, the Commission finds that substantial grounds have been established for believing that the applicant would be exposed to a real risk of ill-treatment, contrary to Article 3 (Art. 3) of the Convention, if deported to Bangladesh.

CONCLUSION

102. The Commission concludes, by 26 votes to 5, that in the present case the expulsion of the applicant to Bangladesh would be in violation of Article 3 (Art. 3) of the Convention.

E. Recapitulation

103. The Commission concludes, unanimously, that the expulsion of the applicant to Bangladesh would not be in violation of Article 2 (Art. 2) of the Convention (para. 81).

104. The Commission concludes, by 26 votes to 5, that the expulsion of the applicant to Bangladesh would be in violation of Article 3 (Art. 3) of the Convention (para. 102).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

DISSENTING OPINION OF MRS. J. LIDDY, MM. E. BUSUTTIL,

J.-C. SOYER, K. HERNDL AND E.A. ALKEMA

We voted against the majority's finding in para. 102 of the Report that in the present case the expulsion of the applicant to Bangladesh would be in violation of Article 3 of the Convention.

According to the applicant he has been involved with the illegal organisation Shanti Bahini for a long time. He submits that the Bangladeshi authorities are aware of this involvement following the discovery in his house of papers drawn up by him. His activities for Shanti Bahini have also been brought to the attention of the Bangladeshi authorities by a complaint that a certain Omar K. has filed against him in which he is accused of having committed the offence of extortion on behalf of Shanti Bahini (paras. 20, 21, 26, 27 and 29).

We note in the first place that the declaration which the applicant initially submitted as evidence of his membership of Shanti Bahini was found by the Dutch authorities not to be authentic (para. 32). Furthermore, in his interview with an official of the Ministry of Justice, the applicant stated that the search of his house had taken place after he had been seen to participate in a demonstration organised by a legal party on 16 April 1990 (para. 21). However, the aim of this demonstration was connected to sub-district elections which at that time had apparently already taken place (para. 33). Although the President of the Regional Court of The Hague in his decision of 14 November 1991 did not rule out the possibility that the applicant had made a mistake in respect of the date of the demonstration (para. 25), it does not appear that at any stage of the asylum proceedings the applicant attempted to correct this mistake. If, on the other hand, it is to be assumed that the demonstration in fact took place on 16 March 1990, one is surprised to see that the applicant stayed in Bangladesh for another three and a half months after the demonstration without experiencing problems from the side of the authorities despite the fact that, as is submitted by him, they had issued a warrant for his arrest.

As regards the complaint by Omar K. that the applicant extorted money from him, we draw attention to the fact that Omar K. is alleged to have filed his complaint against the applicant six years after he had begun paying the taxes allegedly demanded by the applicant (para. 27). In this respect we also observe that at the hearing before the Advisory Committee on Aliens Affairs the applicant stated that he went to Omar K. to collect money with three other people (para. 27). It has not been submitted that these three other people have also left Bangladesh or that the Bangladeshi authorities had become aware of their involvement with Shanti Bahini. In these circumstances it appears rather unlikely that Omar K., who allegedly feared for his life, would have filed a complaint against the applicant at a moment when the three other people involved were still in the area.

We further note the fact that from 1994 onwards efforts were made to resolve the conflict in the Chittagong Hill Tracts. In this context the Government of Bangladesh promulgated an amnesty for Shanti Bahini insurgents who were convicted during the previous regime. It is reported that the amnesty will stay in force as long as the dialogue between the Government of Bangladesh and Shanti Bahini's political wing, the JSS, continues. Furthermore, both parties to the conflict agree at regular intervals to extend a cease-fire (paras. 57, 58 and 61).

Although in 1995 there were still reports from the Chittagong Hill Tracts indicating that the situation in the area continued to be unsettled (paras. 59, 60, 62 and 63), the amnesty combined with the ongoing dialogue between the political opponents provide a strong

indication that the situation in the area has improved. It is true that in such an unsettled situation the possibility still could exist that the applicant could be detained and ill-treated. However, we wish to recall in this context that a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3 (cf. *Vilvarajah and Others v. the United Kingdom* judgment, loc. cit., p. 37, para. 111).

In these circumstances, we find that no substantial grounds have been established for believing that the applicant would be exposed to a real risk of being subjected to treatment contrary to Article 3 of the Convention if returned to Bangladesh.

Accordingly, in our view, the expulsion of the applicant to Bangladesh would not be in violation of Article 3 of the Convention.