09-3032

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BEKHZOD BAKHTIYAROVICH YUSUPOV,

Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REVIEW OF THE FINAL ORDER OF THE BOARD OF IMMIGRATION APPEALS

AMENDED BRIEF OF *AMICUS CURIAE* COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE IN SUPPORT OF PETITIONER AND REMAND

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Columbia Law School Human Rights Institute is not a corporate entity for which a corporate disclosure statement is required (*See* Fed. R. App. P. 26.1).

STATEMENT OF INTEREST

Amicus curiae Columbia Law School Human Rights Institute ("Institute") allows students to work in partnership with attorneys and institutions engaged in human rights activism. The Institute is dedicated to the implementation of human rights norms and believes that the issues raised in this case significantly impact human rights protections in the United States.

All parties have consented to the filing of this *amicus* brief, which is respectfully submitted in support of the Petitioner and grant of the petition for review pursuant to the second sentence of Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

At issue in this case is whether an applicant who has established an uncontested and a clear probability of future persecution and torture may be divested of refugee protection where, to discharge its burden of establishing reasonable grounds to regard the applicant as a danger to U.S. security, the

Government proffers evidence so speculative as to upend the purpose of refugee protection and subvert fundamental values in U.S. and international law. *Amicus* submits this brief to bring the Court's attention to the serious departure from international law and the practices of our sister nations which the BIA's decision marks.

The stakes of sustaining erroneous and overzealous applications of the national security bar are high. The bar deprives bona fide refugees of necessary protection by relegating them to deferral of removal, a temporary and easily revocable form of relief. The national security determination precludes applicants from ever gaining any stable immigration status and can be invoked as grounds for indefinite detention and severely restrictive conditions of release. This Court's review is a crucial bulwark against the serious consequences of misapplying the bar.

The BIA's tenuous analysis in this case contravenes this Court's direction that the bar only be applied "to individuals who (under a reasonable belief standard) actually pose a danger to U.S. security." *Yusupov v. Att'y Gen.*, 518 F.3d 185, 201 (3d Cir. 2008). The character of this narrow class of individuals is delineated by the practice of our sister nations, which have applied security findings in exceptional cases: where individuals are alleged to have direct links to terrorists and terrorist activity.

Here, in striking contrast, no such direct link is even alleged against Yusupov. Instead, the BIA's decision consists of half-enunciated speculation and a tersely recited array of unconnected facts. The strongest of these is the politically motivated extradition request by the Uzbek government, which has a history of invoking broadly worded criminal provisions against individuals who pose the slightest threat to its authoritarian rule and which likely targeted Yusupov on the basis of information it elicited by torturing one of his fellow religious followers. This reliance defeats the purpose of asylum, which is rooted in the tradition of providing sanctuary from despotic governments' persecution of political dissenters.

Similarly perverse is the BIA's reliance on Yusupov's non-violent, politically expressive activity and associations. Yusupov viewed speeches by Al Qaeda figures and videos depicting violence in Chechnya out of curiosity, but rejected such violence as contrary to his understanding of Islam. He lived with an individual who received an email that included the term "jihad." Asylum embodies the principle that individuals should be protected from persecution for precisely this kind of politically disfavored expression or by virtue of their innocent affiliations with controversial figures. The BIA's reasoning turns this principle on its head: it removes Yusupov from the ambit of protection by relying on precisely the kind of activity which refugee law was formulated to protect.

Sustaining the Government's generalized allegations against Yusupov thus defeats the purpose of international refugee protection and renders meaningless this Court's direction that the BIA find reasonable grounds to believe Yusupov "*actually* posed a danger to U.S. security." *Id.* at 201 (emphasis added).

ARGUMENT

I. THIS COURT'S REVIEW IS A CRUCIAL CHECK ON EXPANSIVE APPLICATION OF THE NATIONAL SECURITY BAR, WHICH MAY ERRONEOUSLY DEPRIVE BONA FIDE REFUGEES OF IMPORTANT PROTECTION AND IMPOSE SEVERE CONSEQUENCES.

The national security bar has serious consequences for applicants who, like Yusupov, would otherwise be entitled to asylum or withholding of removal because they have established a clear probability of persecution or torture.[1] *See* 8 U.S.C. §§ 1101(a)(42), 1158(b), 1231(b)(3); 8 C.F.R. § 208.16(c). Because the stakes are high and the cost of misapplication great, this Court's review is a crucial bulwark against expansive and overzealous application of the bar.

An applicant entitled to protection but for the national security bar is relegated to deferral of removal, a temporary and revocable form of relief

[1] While Yusupov's asylum application was denied as untimely, he otherwise established his asylum claim where the IJ found he met the higher burden under withholding of removal. *See* Joint Appendix, Vol. I ("JA.I") at 42-44 (IJ Decision at 8-10); *Lukwago v. Ashcroft*, 329 F.3d 157, 182 (3d Cir. 2003).

that places applicants under constant threat of removal. *See* 8 C.F.R. §§ 208.16(d)(2), 208.17(a). The Government may move to terminate deferral at any time and the Immigration Judge ("IJ") must grant its motion if "it is accompanied by evidence that is *relevant to the possibility* that the alien would be tortured in the country to which removal has been deferred." 8 C.F.R. § 208.17(d)(1) (emphasis added).[2] Under this ambiguous and low standard, the Government could terminate proceedings by offering any evidence, even if it is not new or previously unavailable, and even if it supports rather than weakens the applicant's claimed fear of torture. *See id.* In contrast, to revoke asylum or withholding of removal the Government is required to "satisfy extensive requirements for reopening immigration proceedings." *See Khouzam v. Att'y Gen.*, 549 F.3d 235, 240 n.3 (3d Cir. 2008); 8 C.F.R. §§ 1003.2, 1003.23.

Upon termination of deferral, the IJ conducts a *de novo* review, requiring the applicant to re-establish that he faces clear probability of torture. *See* 8 C.F.R. § 208.17(d)(3). This re-litigation may re-awaken trauma in applicants who have experienced or fear persecution and torture, increasing the humanitarian cost of misapplication of the national security bar. *See* Linda Piwowarczyk, *Seeking*

[2] In addition, the Secretary of State can terminate deferral and end proceedings by acquiring "sufficiently reliable" diplomatic assurances from the country to which the applicant is to be removed. *See* 8 C.F.R. § 208.18(c).

Asylum: A Mental Health Perspective, 16 Geo. Immigr. L.J. 155, 171 (2001) (explaining that asylum applicants "may be caught in a quagmire that exacerbates their [past trauma] symptoms as they attempt to fulfill their legal obligations"); Rachel D. Settlage, *Affirmatively Denied: The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers*, 27 B.U. Int'l L.J. 61, 102-03 (2009) ("[A]n asylum seeker also faces unique stressors related to her uncertain immigration status and fears of being ultimately returned to a country where she will face further abuse."). Asylum-seekers often cannot afford adequate counsel; re-litigation exacerbates that problem, precluding applicants from re-establishing their claim to protection against persecution and torture. *See* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 339-41 (2007).

Moreover, deferral of removal is an "in-limbo" status incompatible with the recognized needs of bona fide refugees like Yusupov. "It has never been envisaged that there should be any group of underprivileged refugees, subject to the whims of the authorities." Atle Grahl-Madsen, The Status of Refugees in International Law 442-43 (vol. II, 1972). The modern regime of international refugee protection developed to provide refugees sure protection against expulsion and envisioned the grant of "an equitable and stable status," enabling them to "lead a normal existence and become assimilated rapidly." James C. Hathaway, The Rights of Refugees

Under International Law 93 (2005) (*citing* Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems, UN Doc. E/AC.32/2, Jan. 3, 1950).

The agency's security determination does far more than bar an applicant from asylum and withholding of removal; it closes other avenues to stable status for Yusupov and similarly situated applicants. The Government could invoke the security determination made in the asylum context to bar applicants from ever gaining lawful permanent residency, even on the basis of their marriage to U.S. citizens. *See* 8 U.S.C. § 1182(a)(3)(B) (rendering inadmissible, *inter alia*, "any alien who has engaged in terrorist activity").

Moreover, the security determination can serve as justification for serious deprivations of liberty. The agency can apply its security finding, made initially in the asylum context, to detain an applicant indefinitely as a national security threat. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) § 412(a), 8 U.S.C. § 1226a(a)(6) (2000 ed., Supp. II) (authorizing detention for an infinitely renewable period of six months beyond the removal period of any alien whose removal is not reasonably foreseeable and whom the Attorney General certifies, based on "reasonable grounds," as engaging, *inter alia*, in activity that "endangers national security"); 8 C.F.R. § 241.14 (a) (authorizing detention of applicants

whose removal is not reasonably foreseeable, based on "security or terrorism concerns"). Indeed, the Government has considered doing that in this case. Decision to Continue Custody dated July 19, 2006 (Doc. No. 16), attached as Ex. C to Petition for Writ of Habeas Corpus (Doc. No. 1), *Yusupov v. Lowe*, 06-CV-1804 (M.D. Pa. 2006). Additionally, the agency's security determination can be invoked to justify severely restrictive conditions of supervised release. *See* 8 U.S.C. § 1231(a)(3)(D). Here, for the last two years Yusupov has been required to live under a curfew, wear an electronic monitoring device, report weekly to the local Immigration Customs Enforcement office, and seek the government's permission to travel beyond 50 miles of his home—permission which has been denied several times. *See* U.S. Immigration and Customs Enforcement Release Notification, Jan. 16, 2007 (available upon request).

II. THE COURT SHOULD CONSIDER INTERNATIONAL LAW AND PRACTICE IN REVIEWING THE BIA'S APPLICATION OF THE NATIONAL SECURITY BAR.

As this Court has recognized, "courts often look…to international law to the extent that it has been incorporated into our law." *Yusupov*, 518 F.3d at 204 n.31. Here, international law is especially salient because in enacting the Refugee Act, "Congress intended to protect refugees to the fullest extent of our Nation's international obligations." *Id.* at 203; *Negusie v. Holder*, 129 S.Ct. 1159, 1165-66 (2009). Moreover, the practices of foreign courts are instructive because the U.S.

law at issue is nearly identical to Article 33 of the 1951 Convention Relating to the Status of Refugees ("Refugee Convention"), which they also apply. *See Negusie*, 129 S. Ct. at 1175 (Stevens, J., concurring) (discussing other state parties' narrow application of "the persecutor bar," another exception to the *non-refoulement* obligation); Refugee Convention, art. 33, July 28, 1951, 189 U.N.T.S. 150.

This Court previously recognized the relevance of international law and practice to this case when addressing the issue of statutory construction. *See Yusupov*, 518 F.3d at 203-04. The Court should also consider whether the BIA's application comports with international refugee law principles and globally shared values. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005) (finding "confirmation" of its assessment of the death penalty in the practices of other nations); *Lawrence v. Texas*, 539 U.S. at 576-77 (noting that same-sex intimacy is an "integral part of human freedom in many other countries"); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (discussing the consensus of "the world community" against imposing the death penalty on mentally retarded offenders).

III. THE BIA'S APPLICATION OF THE NATIONAL SECURITY BAR IGNORES THIS COURT'S REQUIREMENT OF A 'MORE CERTAIN DETERMINATION' AND RUNS COUNTER TO INTERNATIONAL LAW AND PRACTICE.

The BIA violated this Court's mandate that it make a "more certain determination than that 'the alien "might" or "could" be' a danger." *Yusupov*, 518 F.3d at 201. As this Court recognized, Congress intended to bar from relief only

the limited class of applicants who (under a reasonable person standard) "actually pose a danger to U.S. security," rather than those who "could be such a danger or have the ability to pose such a danger (a category nearly anyone can fit)." *Id.*

This is consonant with the United Nations High Commissioner for Refugees' (UNHCR) repeated direction that the bar only be applied in "extreme cases" and "with the greatest caution." Office of the UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status para. 154 (reedited Jan. 1992); Office of the UNHCR, *Note on the Principle of Non-Refoulement*, (Nov. 1997); Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, *in* Refugee Protection in International Law 87, 134 (UNHCR 2003) (bar should be applied with "particular caution"); Office of the UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection, UNHCR's Perspective*, para. 22, Rev. 1 (Nov. 29, 2001) (the threshold for applying an exception to non-refoulement is "particularly stringent").[3]

International practice illustrates the character of this limited class of applicants who "actually pose a danger." *Yusupov*, 518 F.3d at 201. Our sister nations, particularly the U.K. and Canada, face the same challenges of giving appropriate consideration to the government's assertion of security risk in light of the very real

[3] The Supreme Court has repeatedly looked to the UNHCR for guidance. *See Negusie*, 129 S. Ct. at 1175.

danger posed by international terrorism and the large number of asylum-seekers at their shores; yet they apply the bar only in a narrow range of cases, typically where the applicant is alleged to have directly and intentionally assisted terrorists or engaged in terrorist activities. Accordingly, their security determinations are often based on evidence fundamentally more concrete than that proffered against Yusupov, who is not even *alleged* to have any such direct link to terrorist activity. The Canadian Supreme Court has held that the national security bar may only be applied "in an exceptional case" where the alleged danger is "grounded on objectively reasonable suspicion based on evidence." *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, para. 90.[4]

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[4] In *Zaoui II*, the New Zealand Supreme Court "adopt[ed] essentially the test stated by the Supreme Court of Canada," concluding that Article 33(2) imposes a "high standard" and requires the security danger "be based on objectively reasonable grounds." *Att'y Gen. v. Zaoui (Zaoui II)*, [2005] NZSC 38, paras. 44-45. Likewise, Australia's Federal Court (a federal appellate court) has emphasized that Article 33(2) "prescribes an objective test and not necessarily only a substantial opinion or a report." *Kaddari v. Minister for Immigration & Multicultural Affairs*, [2000] 98 F.C.R. 597, 601. However, security determinations in both countries are made in unpublished administrative decisions, making it difficult to assess state practice. It is noteworthy, however, that subsequent to *Zaoui*, the New Zealand government withdrew its security determination against the applicant, a prominent member of a controversial Algerian political party who was convicted on terrorism-related charges in proceedings in Belgium and France which the New Zealand refugee agency deemed tainted. *See Decision on Security Risk Certificate Against Mr Zaoui* (New Zealand Security Intelligence Service Sept. 13, 2007), http://www.nzsis.govt.nz/pdf/Final.pdf; *Refugee Appeal No. 74540* (New Zealand Refugee Status Appeals Authority Aug. 1, 2003), http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20030801_74540.pdf

Accordingly, Canadian courts have upheld applications of the national security bar where there is concrete evidence of applicants' connections to terrorist groups or activities. *See Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72, 2002 SCC 2, paras. 3, 4, 18 (upholding security finding where applicant had received assassin training and traveled abroad on false passports as member of Iranian Ministry of Intelligence Security, which sponsors terrorist activities); *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2006] F.C. 1503, paras. 15, 54 (upholding security finding where applicant had "constant and high level contacts with members of Osama bin Laden's terrorist network all over the world" and "likely facilitated the planning of terrorist attacks and provided logistical support").

In the U.K., the Special Immigration Appeals Commission ("U.K. Commission"), the tribunal specially designated to decide security-related immigration matters, has likewise applied the Article 33(2) security bar typically where applicants were alleged to have assisted, committed or attempted to commit terrorist activity. *See Omar Othman v. Sec'y of State*, [2007] SC/15/2005, para. 36 (S.I.A.C.) (Article 33(2) bar applied where applicant had "long-established connections with Osama Bin Laden and Al Qa'eda" and fund-raised for "terrorist groups"); *W v. Sec'y of State*, [2007] SC/34/2005 (S.I.A.C.) (Article 33(2) bar applied where applicant allegedly assisted in attempt to cause fear, alarm and

disruption through deployment of poisons); *Z v. Sec'y of State*, [2007] SC/37/2005, para. 3 (S.I.A.C.) (Article 33(2) bar applied where applicant admitted to being the leader of a "functioning terrorist organisation" and purchasing chemicals and military manuals); *DD v. Sec'y of State*, [2007] SC/42 and 50/2005, para. 4 (S.I.A.C.) (Article 33(2) bar applied where applicants allegedly provided "extensive support to a range of Islamic extremists," including by producing false documents); *U v. Sec'y of State*, [2007] SC/32/2005 (S.I.A.C.) (Article 33(2) bar applied where applicant admitted to receiving military training in Afghan camp and to being in the U.K. to arrange others' receipt of military training to fight in Chechnya).

The character of this limited class of barred applicants is also delineated by U.K. Commission decisions declining to apply a security finding, where, upon appropriate scrutiny, the evidence did not establish the applicants' intent to further terrorist activity. In *Sihali* the Commission declined to apply the Article 33(2) security bar to an applicant who lived with terrorist "K" and lied at his criminal trial and before the Commission about assisting "K" in activities that he claimed not to know had a "terrorist purpose," including opening several bank and credit card accounts with false names. *Sihali v. Sec'y of State*, [2007] SC/38/2005, para. 9 (S.I.A.C.). The U.K. Commission found that "the trust which K reposed in [applicant] is not, by itself, powerful evidence that the [applicant] knew what K

was up to" and accordingly that his assistance, while demonstrating he was an "unprincipled and dishonest individual," was insufficient to bar him from refugee protection. *Id.* at paras. 16-17.

In *M*, the Commission declined to deport an asylum-seeker as a risk to U.K. security where the applicant was a member of what U.K. authorities described as an "Islamic extremist group," but had disavowed interest in Al Qaeda or "attacks on the West."[5] *M v. Sec'y of State*, [2004] SC/17/2002, para. 8 (S.I.A.C.). Emphasizing the necessity to submit "all the evidence to a close and penetrating analysis," the Commission concluded that while the applicant was "likely to be at least acquainted" with "active terrorists," his "association with them must not be taken necessarily to mean that [he] is supporting or knows what they are doing." *Id.* paras. 7, 19.

The facts alleged here are fundamentally less particularized than in *Sihali* and *M* and yet the BIA's analysis was far less searching. The BIA merely recited a series of unconnected facts and pieces of indirect evidence, including Yusupov's viewing of Internet news clips and the content of an email his roommate received. This and other cited evidence is so attenuated from any specific danger to U.S.

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[5] The U.K. sought M's deportation pursuant to the Anti-terrorism, Crime and Security Act, 2001, c. 24, § 21 (U.K.), which permits the government to deport any non-citizen, including an asylum-seeker, whom the Secretary of State reasonably believes is a "risk to national security"; this language is substantially similar to that of Article 33(2).

security that it could be compiled against "nearly anyone." *Yusupov*, 518 F.3d at 201. Accordingly, even considered cumulatively such evidence could not suffice to put Yuspov in the narrow class of applicants who (under a reasonable belief standard) "actually pose a danger." *Id.*

IV. THE BIA'S SPECULATIVE ANALYSIS IS ANTITHETICAL TO THE PURPOSES OF INTERNATIONAL REFUGEE PROTECTION AND DEPARTS FROM INTERNATIONAL PRACTICE.

A. The BIA's Reliance on the Extradition Request Subverts Traditional Values of the American Asylum System and International Refugee Law.

The BIA cited Uzbekistan's request to extradite Yusupov to face criminal charges, along with an INTERPOL notice of the same charges, in support of its security determination. JA.I at 5 (BIA Decision at 2). Perversely, the extradition request formed the very basis for Yusupov's unchallenged claim that he faces a clear probability of persecution and torture if returned to Uzbekistan; the BIA thus turned Yusupov's undisputed claim for protection into a ground for denying him protection. In particular, the IJ found Yusupov established a clear probability of persecution and torture where the criminal charges he faced in Uzbekistan were a pretext for persecuting him on account of his religious beliefs and imputed political opinion. JA.I at 43 (IJ Decision at 9). The IJ found that the extradition request could not be "taken at face value to the extent that it alleges certain criminal

misconduct" given the Uzbek government's undisputed record of using its criminal code "against its political opponents." *Id.* at 44 (IJ Decision at 10), 46 (State Department Letter). The BIA left these findings undisturbed but found that "[t]he mere possibility that the extradition [is] at least in part, politically motivated does not diminish the evidence that the respondent also poses a security risk to the United States." *Id.* at 6 (BIA Decision at 3). But it then repeated, without elaboration, that the extradition request supported its conclusion. *Id.* at 7 (BIA Decision at 4).

Beyond being insufficient as a matter of law,[6] the BIA's analysis is at odds with the traditional values of our asylum system. Asylum traditionally operated as a defense to extradition, to give fugitives refuge from the wrongful exercise of authority by despotic governments. *See* Guy S. Goodwin-Gill & Jane McAdam, The Refugee in International Law 356 (3d ed. 2007); Matthew E. Price, *Politics or Humanitarianism: Uncovering the Political Roots of Asylum*, 19 Geo. Immigr. L.J. 277, 286 (2005). The U.S. has a strong tradition of granting asylum to individuals sought by authoritarian governments for extradition based on politically motivated

[6] As Petitioner argues, where the BIA failed to articulate any basis in the record for a characterization of the extradition request contrary to the IJ's, its conclusion should not be upheld. *See Shah v. Att'y Gen.*, 446 F.3d 429, 437 (3d Cir. 2006) (emphasizing that where an IJ "selectively consider[s] evidence, ignoring that evidence that corroborates an alien's claims and calls into question the conclusion the judge is attempting to reach," the Court "will not uphold that conclusion"); Petitioner's Brief at 41-42.

charges. In the 1790s, Thomas Jefferson argued against U.S. adoption of extradition treaties, emphasizing that "until a reformation of the criminal codes of most nations, to deliver fugitives from them, would be to become their accomplices." Price, *supra*, at 304 (*citing* 1 State Papers and Public Documents of the U.S.: 1789-96, at 146 (1815)). Jefferson was particularly concerned about the extradition of individuals wanted for political offenses. Arguing against the extradition of fugitives charged with treason, he wrote: "[R]eal treasons are rare, oppressions frequent . . . . We should not wish, then, to give up to the executioner the patriot who fails and flees to us." *Id.* at 306-307 (*citing* 1 American State Papers, Documents, Legislative and Executive, of the Congress of the U.S. 258 (1832)).

The BIA's reasoning runs counter to this tradition. It implicitly equates the Uzbek extradition request with endangerment of U.S. security, notwithstanding the Uzbek government's undisputed record of using its broadly worded criminal code "against its political opponents," and the U.S. State Department's assessment that the charges "do not include terrorism-related activities." JA.I at 44 (IJ Decision at 10); 45-46 (State Department Letter); *compare Refugee Appeal No. 74540* (N. Z. Refugee Status Appeals Authority Aug. 1, 2003) (declining to find applicant barred from refugee protection on Article 1F grounds due to his conviction for terrorist

acts in Algeria, in light of the state's history of persecuting political opponents and the "vague wording" of its criminal code).

That the BIA's analysis is contrary to the object of refugee protection is underscored by the incorporation of the *non-refoulement* principle into present-day extradition treaties, including several anti-terrorism conventions. These treaties provide that extradition shall not be granted where there are "substantial grounds" for believing the purpose is "prosecuting or punishing a person on account of," *inter alia*, their religion or political opinion. 1997 International Convention for the Suppression of Terrorist Bombings, art. 12, *opened for signature* Jan. 12, 1998, 37 I.L.M. 249 (1998), 2149 U.N.T.S. 284; *see also* 1999 International Convention for the Suppression of the Financing of Terrorism, art. 15, 39, *opened for signature* Jan. 10, 2000, I.L.M. 270 (2000), 2178 U.N.T.S. 229 (almost identical provision); 2002 Inter-American Convention Against Terrorism, art. 14, *opened for signature* Mar. 6, 2002, 42 I.L.M. 19 (2003) (almost identical provision).

The BIA's reliance on the extradition request and INTERPOL notice is especially egregious in light of Yusupov's testimony that he was identified and charged on the basis of information Uzbek officials extracted by torturing his former roommate and fellow religious follower Otobek Oripov, who was sentenced to 13 years in prison upon his return to Uzbekistan. JA.II at 111-14, 196-97. This reliance is in sharp contrast to rejection of such "fruit of the poisonous tree" in

security determinations by our sister nations. *See Othman*, [2007] SC/15/2005, at para. 73 (explaining that in seeking to deport applicants as security threats, the U.K. government ordinarily "withdraws reliance on material" which was arguably obtained by torture or "generally from detainees in countries where there is arguably a real possibility" of torture); *A v. Sec'y of State*, [2005] UKHL 71, [2006] 2 A.C. 221 (appeal taken from Eng.) (U.K.) (holding that in making security determinations, the U.K. Commission may not rely on evidence obtained through torture); *see, e.g.*, *Mahjoub*, [2006] F.C. 1503 (Can.) at paras. 26-39 (confirming "reliance on evidence likely to have been obtained by torture [would be] error in law," where agency declined to rely on applicant's tainted terrorism-related conviction in Egypt); *In re Harkat*, [2005] F.C. 393 (Can.), paras. 122-23 (where applicant was sought for deportation as a security danger, giving no weight to evidence against him based on interrogation of detainee who may have been tortured), *overruled on other grounds by In re Charkoui* [2007] 1 S.C.R. 350 (Can.).

Furthermore, the BIA's reasoning is at odds with international interpretation of the national security bar insofar as it equates the alleged danger to Uzbek security with a danger to U.S. security. The UNHCR has emphasized that the national security bar should not be imposed where the evidence establishes only that the applicant is "a threat to her or his usual state of residence because of her or

his opposition to that regime." Geoff Gilbert, *Current Issues in the Application of the Exclusion Clauses, in* Refugee Protection in International Law 425, 459-60 (UNHCR 2003). Rather, an applicant is barred from protection only where he poses a danger to the country in which he seeks refuge. *See* Refugee Convention, Travaux Préparatoires, UN Doc. A/CONF.2/SR.16, at 8 (Jul. 11, 1951) ("Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against *the country of their asylum*, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency") (emphasis added); Atle Grahl-Madsen, Commentary on the Refugee Convention 1951, 236 (UNHCR 1997) ("'[T]he security of the country' is invoked against acts...endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned"). At least one court has concluded that a security determination "may be grounded in distant events that indirectly have a real possibility of harming" the state of refuge, but that principle is not availing here because the BIA proffered no link between the Uzbek government's reasons for targeting Yusupov and Yusupov's beliefs regarding the U.S. or his activities here. *See Suresh,* 1 S.C.R. 3 at para. 88.

B. The BIA's Reasoning Amounts to Impermissible "Guilt by Association," Putting the U.S. Out of Step With International Practice.

In 2002, Yusupov's roommate in Philadelphia, Erkijon Zakirov, received an email stating: "Your exit from there might bring some difficulties to the things we are taking care of here. Therefore, if you do not have very strong difficulties, for you to stay where you are and work for Islam is also a big *jihad*." *Yusupov*, 518 F.3d at 191. The BIA relied on this email to find "a fair probability" that Yusupov "supports or assists terrorist activity," noting, without elaboration, that Yusupov "shar[ed] his time, computer, and residence with others who discussed a violent jihad over email." JA.I at 6 (BIA Decision at 3). This "guilt by association" approach is counter to values in U.S. and international law and departs from the appropriately careful analytical approach of our sister nations.

In its previous decision, this Court directed the BIA to assess the weight and relevance of evidence that the term jihad "can have alternative meanings, including 'from an inward spiritual struggle to attain perfect faith to an outward material struggle to promote justice and the Islamic social system." *Yusupov*, 518 F.3d at 191 n.7. The BIA ignored this Court's direction. Instead, it assumed the email referred to a "violent jihad" that Zakirov engaged in, and attributed Zakirov's implied beliefs or conduct to Yusupov notwithstanding that their shared computer

did not disclose "any direct or causal link suggesting that [Yusupov] espoused violence."[7] JA.I at 40 (IJ Decision at 6).

On this record, the BIA's reasoning amounts to "guilt by association," contrary to U.S. jurisprudential traditions and international law. "Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (Douglas, J., concurring); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982) (guilt by association is "alien to the traditions of a free society"). Conduct may not be imputed to an individual "merely on the basis of his associations and sympathies, rather than because of some concrete personal involvement." *Scales v. United States*, 367 U.S. 203, 220 (1961).

Because "guilt by association" reasoning is inherently speculative, it is at odds with this Court's requirement of a "more certain determination." *Yusupov*, 518 F.3d at 201. Moreover, as the Second Circuit noted in rejecting "guilt by association" reasoning in the context of another exception to the *non-refoulement* obligation, the "persecutor bar" to asylum, it is particularly inappropriate because

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[7] The BIA's assumption that the email referred to a "violent jihad" is particularly puzzling given that it granted Zakirov, the recipient of the email, withholding of removal and found a "lack of persuasive evidence that [he] is a militant, terrorist, or an extremist." *See Yusupov*, 518 F.3d at 191 n.10 (quoting BIA decision).

these bars "authorize[] the deportation of individuals who have established that they would likely be persecuted if sent back to their native country." *Xu Sheng Gao v. Att'y Gen.* 500 F.3d 93, 98 (2d Cir. 2007); *see* 8 U.S.C. § 1158(b)(2)(A)(i) (barring an applicant from asylum or withholding of removal if he has "ordered, incited, assisted or otherwise participated in the persecution of any person"). In light of this severe consequence, "courts must be cautious before permitting generalities or attenuated links" to suffice. *Id.*; *see also* Lauterpacht & Bethlehem, *supra*, at 133-34 ("Given…the serious consequences to a refugee or asylum seeker of being returned to a country where he or she is in danger, the exceptions to non-refoulement must be interpreted restrictively and applied with particular caution."); *see also Diaz-Zanatta v. Holder*, 558 F.3d 450, 455 (6th Cir. 2009) (emphasizing that "the alien must have done more than simply associate with persecutors; there must have been some nexus between the alien's actions and the persecution of others"); *Singh v. Gonazales*, 417 F.3d 736, 739 (7th Cir. 2005) (requiring a showing of "genuine assistance in persecution" rather than an "inconsequential association").

Our sister nations have emphasized that membership or affiliation alone cannot suffice to establish that a person is a security danger; rather, "the person him or herself [must] constitute a danger to national security." *Att'y Gen. v. Zaoui*, [2004] NZCA 244, (N.Z.), para. 148; *see Suresh*, 1 SCR 3 at para. 83 (finding that

"danger to the security of Canada" must "mean something more than just [membership in a terrorist movement]"). For instance, the U.K. Commission has found applicants to pose a danger where, beyond affiliation, they provided assistance to others with the knowledge that it would further terrorist activity. *Compare Sihali*, SC/38/2005 (national security bar did not apply where applicant lived with suspected terrorist "K" and lied about assisting him because "the trust which K reposed in [applicant] is not, by itself, powerful evidence that the [applicant] knew what K was up to") *with B v. Sec'y of State*, [2008] SC/9/2005, para. 9 (S.I.A.C.) (applicant posed a security danger where he was a "trusted and senior member" of an active terrorist group who used a false name and worked with a suspected terrorist to purchase "a considerable amount of telecommunications equipment"); *PP v. Sec'y of State*, [2007] SC/54/2006 (S.I.A.C.) (applicant posed a security danger where his brothers were convicted of terrorism-related crimes in France and he assisted with related forgery and trafficking in false documents). Likewise, Canada's refugee agency declined to find an asylum-seeker inadmissible based on reasonable grounds for regarding him as a danger to Canadian security where he admitted to being friends with "people who considered themselves freedom fighters or terrorists" but disagreed with their aims. *See Matter of XXXXX*, No. A8-01297 (Immigration and Refugee Board of Canada 2009), *available at* http://www2.irbcisr.gc.ca/en/decisions/.

Our sister nations' practices demonstrate the aberrant nature of the BIA's speculative analysis: Yusupov is not even alleged to be a member of a terrorist group or associate with a suspected terrorist. Rather, he is alleged to have shared an apartment and computer with an individual who received an email from another individual who used the term "jihad," possibly to refer to a violent, anti-U.S. struggle. There is no evidence that he personally received similar emails or was otherwise involved in terrorist activity.[8] Sustaining the BIA's conclusion on this record would make the U.S. an outlier in its expansive invocation of national security.[9]

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[8] Even if the BIA may have permissibly attached some significance to Yusupov's association with his roommate, its conclusion was impermissibly speculative where it rested on a total disregard of Yusupov's individual factors, i.e. his credible testimony to the contrary and his history of neither espousing nor showing an interest in engaging in terrorist activity. *See, e.g., Perez v. Neubert*, 611 F.Supp. 830, 839-40 (D. N.J. 1985) (classification of prisoners as potential security threats was not supported by substantial evidence where it was based on "guilt by association," that is, whether the prisoner was a Marielito, and where it disregarded individual factors).

[9] This is particularly so because the BIA repeatedly failed to assert any causal connections between the facts it cited and the specific threat Yusupov posed. For instance, the BIA cited, without elaboration, Yusupov's June 2003 conviction for false representation on an employment eligibility form and his failure to attend school, as required by the terms of his visa. JA.I at 6-7 (BIA Decision at 3-4). But it failed to assert that specific terrorism-related conduct was suggested or enabled by Yusupov falsely indicating he was a U.S. citizen to gain employment or failing to abide by the terms of his visa, practices all too common among non-citizens in the U.S. who have absolutely no relation to terrorism.

C. The BIA's Reliance on Yusupov's Viewing of Internet Videos Thwarts International Refugee Law's Purpose of Protecting Political Expression.

The BIA also found that Yusupov's viewing of video speeches by Osama bin Laden and other Al Qaeda figures and of videos depicting violence in Chechnya supported its security determination. J.A.I at 5 (BIA Decision at 2). As a preliminary matter, that conclusion directly conflicts with the BIA's finding of "no clear error" in the IJ's decision to credit Yusupov's testimony that he viewed the videos out of curiosity about the region from which he hailed and that he rejected bin Laden's beliefs—explanations that necessarily undercut any inference that Yusupov espoused such beliefs. JA.I at 5-6 (BIA Decision at 2-3); *id.* at 41-42 (IJ decision at 7-8).[10] As the IJ noted, there was only a "tenuous connection between the [videos] and any risk to the United States" where "in spite of the number of years [Yusupov] has been present in this country, his computer did not produce any direct or causal link suggesting that he espoused violence, such as email messages of a questionable nature." JA.I at 40 (IJ Decision at 6). On this record, the BIA's conclusion that Yusupov was a danger based on his viewing activities and speeches he credibly disavowed is "more puzzling than plausible, more

[10] Because the BIA found "no clear error" in the IJ's credibility finding regarding Yusupov's viewings and did not otherwise address his general positive credibility determination, the Court should assume that the BIA deemed Yusupov credible notwithstanding its conflicting findings. *See Sandie v. Att'y Gen.*, 562 F.3d 246, 252 (3d Cir. 2009).

curious than commonsense," and should not be upheld. *See Dia v. Ashcroft*, 353 F.3d 228, 251 (3d Cir. 2009).[11]

Particularly in this light, the BIA's invocation of Yusupov's viewing of Internet videos upends a fundamental principle of international refugee law: protection of political expression. Yusupov viewed these videos out of curiosity, but rejected their violent messages as contrary to his understanding of Islam. *See* JA.I at 40 (IJ Decision at 6); JA.II at 146, 172. This seeking of information is precisely the kind of politically controversial expression which international refugee law seeks to protect. "[T]he very premise of the 1951 Convention [is] that individuals have a right to be free of persecution for reasons of their political beliefs," a freedom which "presupposes a freedom to express and act upon those beliefs." James C. Hathaway & Michelle Foster, *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination, in* Refugee Protection in International Law 385 (UNHCR 2003).

[11] The BIA's finding that Yusupov "attempted to evade detection" by failing to provide FBI investigators his roommate's address is likewise flawed where it is at odds with Yusupov's explanation that he did so only to avoid bringing trouble upon his roommate. J.A.II at 112 (IJ Hearing at 105). Where, as here, the BIA fails to explicitly address an IJ's credibility determination, it cannot base its conclusion on the incredibility of an applicant's testimony. *Cf.* 8 C.F.R. § 1003.1(d)(3)(i) (foreclosing BIA fact-finding and stating that the facts determined by the IJ, "including findings as to the credibility of testimony, shall be reviewed only to determine whether the findings of the [IJ] are clearly erroneous").

Indeed, the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 85-86 (1989) (Stevens, J. dissenting) (*citing Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); *see* Universal Declaration of Human Rights, art. 19, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 12, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to…seek, receive and impart information and ideas"); International Covenant on Civil and Political Rights, art. 19, 999 U.N.T.S. 171 (ratified by U.S. Sept. 8, 1992) ("Everyone shall have the right to freedom of expression…includ[ing] freedom to seek, receive and impart information and ideas of all kinds"); American Convention on Human Rights, art. 13, 1144 U.N.T.S. 123 (signed by U.S. June 1, 1977) (nearly identical provision). U.S. courts have emphasized that when government conduct deters or inhibits an individual from seeking or receiving information the government has condemned, although not directly prohibited, it is "at war with the uninhibited, robust and wide-open debate and discussion" crucial to free expression. *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 307 (1965) (*citing N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

Here, the BIA's reasoning would chill immigrants' non-violent expressive activity.[12] The BIA found Yusupov a security danger based on his viewing of the Internet videos despite his credible disavowal of agreement with their violent messages and the lack of evidence of his sympathy with or involvement in terrorist activity. Such reasoning essentially attributes the views of an author to his every reader, despite evidence to the contrary. It would chill immigrants from receiving any information of a political nature, for fear it could be attributed to them and used to support their deportation. This is an especially perverse outcome for refugees who, like Yusupov, fled their homes because they risked persecution for precisely this kind of political expression. *See* JA.I at 44 (IJ decision at 10).

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court grant the petition for review and remand this case for further consideration.[13]

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[12] "It is well settled that '[f]reedom of speech and press is accorded aliens residing in this country.'" *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 497) (1999) (Ginsburg, J., concurring) (quoting *Bridges v. Wixon*, 326 U.S. 135, 148 (1945)). Similarly, the free expression principles in international human rights law apply equally to non-citizens. *See* Hathaway, *supra*, at 120 ("[N]early all internationally recognized civil rights are declared to be universal and not subject to requirements of nationality").

[13] *Amicus* respectfully urges the Court to consider the arguments presented here when reviewing the Petition for Review in *Samadov v. Att'y Gen.*, No. 09-3074, a case that had been consolidated with this case for argument and decision in *Yusupov* based on their legal and factual similarities. In particular, the foregoing

(continued…)

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Respectfully submitted,

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arguments regarding the serious consequences of a denial of withholding, the international law limitations on the scope of the national security exception to a state's *nonrefoulement* obligations, and the international law proscriptions against reliance on evidence that is either purely associational or derives from a persecuting country's extradition request, all apply with equal force to *Samadov*.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I, Naureen Shah, hereby certify that:

1. This brief complies with Rules 29(d) and 32(a)(7)(B) because it does not exceed 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2004 in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I, Naureen Shah, hereby certify that the foregoing amended brief was filed and served electronically on December 11, 2009. All parties have consented to electronic service of this amended brief. I further certify that on the day of this filing, 10 copies of the foregoing amended brief were mailed to the clerk of the Court by Federal Express.

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CERTIFICATE OF BAR MEMBERSHIP

I, Naureen Shah, hereby certify pursuant to LAR 46.1 that my name appears on the foregoing brief, I was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit on October 8, 2009, and I am presently a member in good standing at the Bar of said Court.

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