U.S. Department of Justice

Executive Office for Immigration Review

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

A [redacted]-258

Date of this notice: 2/12/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Wendtland, Linda S.
Pauley, Roger

Userteam: Docket

File: [redacted] 258 – Los Angeles, CA Date: FEB 12 2018

In re: A[redacted] A[redacted] [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Erin T. Hall, Esquire

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Somalia, has appealed from the Immigration Judge's October 26, 2016, decision denying his application for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b), 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b), 241(b)(3) (2012); 8 U.S.C. §§ 1208.16(c), 1208.17, 1208.18 (2017). The appeal will be sustained and the record will be remanded for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including issues of law, judgment, and discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The only issue on appeal is the respondent's eligibility for asylum, withholding of removal, and protection under the Convention Against Torture. The respondent claims that he is eligible for these forms of relief and protection because members of Al-Shabaab repeatedly robbed him at gunpoint and threatened to kill him because they perceived him to be a supporter of the Somali government and a Sufi Muslim (IJ at 2-3; Tr. at 38-64; Exhs. 2, 6). On appeal, the respondent challenges the Immigration Judge's determination that he is barred from seeking asylum and withholding of removal under the Act and the Convention Against Torture because he is subject to the material support bar in section 212(a)(3)(B) of the Act, 8 U.S.C. § 1182(a)(3)(B) (Respondent's Br. at 8-14). The respondent also contests the Immigration Judge's conclusion that he has not established the requisite likelihood of future persecution and torture in Somalia (Respondent's Br. at 14-19).

The respondent testified that, on multiple occasions, members of Al-Shabaab took his livestock at gunpoint without his permission after they threatened to kill him (IJ at 6-7; Tr. at 39-43, 53, 67).[1] Based on this record, we cannot affirm the Immigration Judge's determination that he "engaged in terrorist activity" within the meaning of section 212(a)(3) of the Act (IJ at 6-7). Section 212(a)(3)(B)(iv)(VI) of the Act defines "engage in terrorist activity" as, among other

[1] The Immigration Judge found the respondent's testimony in this regard to be credible (IJ at 5). The Department of Homeland Security ("DHS") does not challenge the Immigration Judge's positive credibility finding on appeal.

things, "to *commit an act* that the actor knows, or reasonably should know, affords material support . . . to a terrorist organization."[2] (Emphasis added.) We have recently held that an involuntary act committed under duress qualifies as the commission of "an act" within the meaning of this provision. *Matter of M-H-Z-*, 26 I&N Dec. 757, 764 (BIA 2016) (holding that "the material support bar in section 212(a)(3)(B)(iv)(VI) of the Act includes no exception for duress"); *see also Annachamy v. Holder*, 733 F.3d 254, 267 (9th Cir. 2013) (stating that "the material support bar does not include an implied exception for individuals . . . who provide support under duress"), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517, 526 (9th Cir. 2014).

More precisely, in *Matter of M-H-Z-*, 26 I&N Dec. at 758, we concluded that an alien had committed "an act" within the meaning of section 212(a)(3)(B)(iv)(VI) of the Act when she "supplied foodstuffs and other products" to a terrorist organization after receiving threats from that group. By contrast, remaining silent while others steal one's property—especially when one lacks the ability to prevent the theft—does not constitute the commission of "an act" in any meaningful sense under section 212(a)(3)(B)(iv)(VI) of the Act. *See Matter of Arrabally & Yerrabelly*, 25 I&N Dec. 771, 779 n.8 (BIA 2012) ("A word in a statute may or may not extend to the outer limits of its definitional possibilities. However, interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)).

We conclude that section 212(a)(3)(B)(iv)(VI)'s requirement that an alien commit "an act"—in other words, that "something [be] done or performed" by the alien—does not include, and should not be conflated with, an alien's *failure* to act. *See Barahona v. Holder*, 691 F.3d 349, 356-58 & n.1 (4th Cir. 2012) (Wynn, J., dissenting) (citing Black's Law Dictionary 27 (9th ed. 2009) (internal quotation marks omitted)). "To apply [section 212(a)(3)(B)(iv)(VI) of the Act] to a failure to act . . . runs contrary both to our justice system's longstanding distinction between committing an act and failing to act . . . and to the well-established tenet that we should construe statutes to avoid absurd results." *Id.* at 358; *see also Matter of Sosa Ventura*, 25 I&N Dec. 391, 396 (BIA 2010) (noting that the plain language of a statute's text should not be read in a manner that leads to absurd results inconsistent with congressional intent).

As a consequence, we are not persuaded that Congress intended to apply section 212(a)(3)(B)(iv)(VI) of the Act to an alien whose livestock is stolen by terrorists at gunpoint where the alien is powerless to stop the theft (IJ at 6-7; Tr. at 39-43, 53, 67). Applying the material support bar under 212(a)(3)(B)(iv)(VI) of the Act to an alien under these circumstances is a strained reading of the phrase "commit an act," would effectively read that phrase out of the statute, and render it superfluous, an outcome with which we cannot agree. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003) (holding that a court "should not construe [a] statute in a manner that is strained and, at the same time, would render a statutory term superfluous"). Thus, for purposes of section 212(a)(3)(B)(iv)(VI) of the Act, we conclude that the respondent did not "commit an act" within the meaning of the material support bar under section

[2] It is undisputed that Al-Shabaab is a terrorist organization within the meaning of the Act (IJ at 6; Exh. 7).

212(a)(3)(B)(iv)(VI) of the Act when Al-Shabaab robbed him of his livestock in Somalia (IJ at 6-7; Tr. at 39-43, 53, 67). We will therefore reverse the Immigration Judge's determination that the respondent is inadmissible under section 212(a)(3)(B)(i)(I) of the Act, and thus ineligible for asylum under section 208(b) of the Act (IJ at 6-7).

With regard to the respondent's application for asylum, we also cannot affirm the Immigration Judge's alternative finding that the respondent has not shown that he experienced past persecution in Somalia (IJ at 8-9). To establish eligibility for asylum, the respondent must show that he has experienced past persecution, or that he has a well-founded fear of future persecution, and that such harm was or will be inflicted on account of a ground protected under section 101(a)(42) of the Act, 8 U.S.C. § 1101(a)(42), by either the government or forces the government is unwilling or unable to control. *See Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010). Upon de novo review, we conclude that the multiple death threats and robberies at gunpoint the respondent experienced in Somalia at the hands of Al-Shabaab, a notorious terrorist organization, cumulatively rise to the level of past persecution under the Act (IJ at 8-9). *See Ruano v. Ashcroft*, 301 F.3d 1155, 1159 (9th Cir. 2002) (concluding that an alien who was targeted for death threats and harassment by armed men had shown past persecution).

There is also clear error in the Immigration Judge's determination that this harm was not inflicted on account of a protected ground (IJ at 8-9). *See Matter of D-R-*, 25 I&N Dec. 445, 453 (BIA 2011) (holding that an Immigration Judge's findings regarding the motivations of a persecutor are findings of fact that we review for clear error), *remanded on other grounds*, *Radojkovic v. Holder*, 599 F. App'x 646 (9th Cir. 2015). The respondent testified that Al-Shabaab threatened him on account of his imputed religion, namely, Sufism, and accused him of belonging to the Somali government (IJ at 3; Tr. at 44-45). Because the record establishes that the religion and political opinion members of Al-Shabaab imputed to the respondent was at least one central reason for the harm he faced in Somalia, we cannot affirm the Immigration Judge's determination that the respondent was not persecuted on account of a protected ground (IJ at 3; Tr. at 44-45).

Finally, we cannot uphold the Immigration Judge's determination that the respondent has not shown that the Somali government was unable or unwilling to protect him (IJ at 8-9). Citing record evidence indicating that the Somali government is engaged in hostilities with Al-Shabaab, and has regained territory once held by this terrorist organization, the Immigration Judge found that the Somali government is able and willing to control Al-Shabaab (IJ at 8-9; Exh. 2 at Tab B). However, this same record evidence reflects that Al-Shabaab maintains control over certain towns and rural areas in Somalia, the Somali government was only able to take back key cities from Al-Shabaab with the assistance of African Union Forces, and the respondent testified that there were no governmental authorities in his area of the country from whom he could seek assistance (IJ at 8-9; Tr. at 48-49; Exh. 2 at Tab B).

Thus, while the record reflects that the Somali government may have been *willing* to protect the respondent from Al-Shabaab, we cannot affirm the Immigration Judge's finding that the government was *able* to do so. *See Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (concluding that an alien had shown that the Somali government was unable to protect her because it could not provide "any effective protection" for her in that country). Because the respondent has established that he experienced past persecution in Somalia that was inflicted on account of a

protected ground by forces the government was unable to control, he is entitled to a rebuttable presumption of future persecution pursuant to 8 C.F.R. § 1208.13(b)(1).

We will therefore remand the record for the Immigration Judge to assess, in the first instance, whether the DHS can successfully rebut this presumption of future harm. In light of this disposition, we need not reach the respondent's arguments regarding his application for withholding of removal and protection under the Convention Against Torture at this time. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion and for the entry a new decision.

FOR THE BOARD

File: [redacted] 258 – Los Angeles, CA Date: FEB 12 2018

In re: A[redacted] A[redacted] A[redacted] [redacted]

DISSENTING OPINION: Patricia A. Cole, Board Member

I respectfully dissent. I would uphold the Immigration Judge's determination that the respondent is barred from establishing eligibility for asylum and withholding of removal because of the terrorism bar, he "commit[ted] an act that [he knew], or reasonably should [have] know[n], afford[ed] material support . . . to a terrorist organization" within the meaning of section 212(a)(3)(B)(iv)(VI)(cc) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2012). *See Matter of M-H-Z-*, 26 I&N Dec. 757, 760-61 (BIA 2016) (citing sections 208(b)(2)(A)(v), 241(b)(3)(B) of the Act, 8 U.S.C. §§ 1158(b)(2)(A)(v), 1231(b)(3)(B); 8 C.F.R. § 1208.16(d)(2) (2017)).

The Immigration Judge did not clearly err when he found that the respondent provided livestock to members of Al-Shabaab, a designated terrorist organization, when members of this group robbed him at gunpoint (IJ at 2-3, 6-7; Tr. at 38-43; Exh. 2 at Tab A; Exh. 6 at 4-7; Exh. 7; Respondent's Br. at 4). The respondent testified that the members of Al-Shabaab who robbed him wanted to use his livestock for food, and thus his provision of livestock to Al-Shabaab was "material" within the meaning of section 212(a)(3)(B) of the Act (IJ at 2-3, 7; Tr. at 58). *See Haile v. Holder*, 658 F.3d 1122, 1129 (9th Cir. 2011) (concluding that an alien's provision of, inter alia, sugar, shoes, and cigarettes to a terrorist organization was "material" within the meaning of section 212(a)(3)(B) of the Act). Because this evidence indicates that the mandatory bar to relief under section 212(a)(3)(B) of the Act may apply, the respondent had the burden to establish that the bar was inapplicable by a preponderance of the evidence (IJ at 7). *See* 8 C.F.R. § 1240.8(d). I agree with the Immigration Judge that the respondent has not carried his burden of proof in this regard (IJ at 7).

The respondent conceded that he knew Al-Shabaab was a terrorist organization when he provided members of this organization with livestock (IJ at 7; Tr. at 38-39; Respondent's Br. at 4). Since the terrorists robbed the respondent of his livestock at gunpoint, the majority concludes that he did not "commit an act" within the meaning of section 212(a)(3)(B)(iv)(VI)(cc) of the Act. However, as the majority concedes, we have expressly held that the material support bar under section 212(a)(3)(B) of the Act contains no exception "for support given involuntarily or under duress." *Matter of M-H-Z-*, 26 I&N Dec. at 760 (citation omitted); *see also Annachamy v. Holder*, 733 F.3d 254, 260 (9th Cir. 2013) (holding that duress is not an exception to the material support bar), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2015) (en banc).

Apparently, the majority finds that there is a distinction between affording material support through a voluntary "act," albeit one committed under duress, and support afforded involuntarily, through omission—or, in the majority's words, a "failure to act." In the majority's view, support provided to a terrorist organization in the latter case is exempt from the material support bar. However, the majority does not cite to any court that has distinguished between material support provided by a voluntary act under duress and support provided as a consequence of an alien's

failure to act. In fact, circuit courts that have found no duress exception to the material support bar under section 212(a)(3)(B)(iv)(VI) of the Act have stressed that support provided under duress has been provided "involuntarily," against the alien's will, regardless of whether the alien failed to act. *See, e.g.*, *Sesay v. Att'y Gen. of U.S.*, 787 F.3d 215, 222 (3d Cir. 2015) (concluding that "*involuntary* material support, *even when provided under threat of death*, bars an alien from receiving asylum or withholding of removal" (emphases added)).

In support of its conclusion that section 212(a)(3)(B)(iv)(VI) of the Act distinguishes between the commission of an act and a failure to act, the majority relies on the dissenting opinion in *Barahona v. Holder*, 691 F.3d 349, 356-58 & n.1 (4th Cir. 2012) (Wynn, J., dissenting). However, *Barhona* does not support the majority's reasoning. The majority in *Barahona v. Holder*, 691 F.3d at 356, concluded that an alien, who had allowed a terrorist organization to use his kitchen for 1 year because the terrorist group had threatened to kill him if refused, had provided material support to that group within the meaning of section 212(a)(3)(B)(iv)(VI) of the Act "even though that support was rendered *involuntarily* and was provided to the [terrorist group] under duress—namely, the threat of execution." (Emphasis added.) The court reached this conclusion after observing that Congress "made no distinction between voluntary and involuntary conduct in the Material Support Bar." *Id.* at 355. Consequently, I cannot agree with the majority's determination that the respondent's provision of livestock to Al-Shabaab is distinguishable from the situation we faced in *Matter of M-H-Z-*, 26 I&N Dec. at 758, where we concluded that an alien, who had provided foodstuffs and other products to a terrorist organization after receiving "serious threats" from that group, was subject to the material support bar.

I would therefore conclude that the respondent "commit[ted] an act" that afforded material support to a designated terrorist organization within the meaning of section 212(a)(3)(B)(iv)(VI) of the Act when he provided his livestock to Al-Shabaab at gunpoint. Accordingly, I would uphold the Immigration Judge's conclusion that the respondent is ineligible for asylum and withholding of removal because he is subject to the material support bar and he has not carried his burden of establishing that the bar does not apply by a preponderance of the evidence.

Patricia A. Cole
Board Member