U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: R[redacted], S[redacted]

A[redacted]-362

Date of this notice: 8/29/2018

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:
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]-362 – Calexico, CA Date: AUG 29 2018

In re: S[redacted] R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Visuvanathan Rudrakumaran, Esquire

ON BEHALF OF DHS: John D. Holliday
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Sri Lanka, appeals from the Immigration Judge's decision dated March 14, 2018, denying his applications for asylum, withholding of removal, and protection under the Convention Against Torture. *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.16-.18. The Department of Homeland Security ("DHS") has filed a cross appeal, arguing that the respondent is barred from asylum and withholding of removal due to having provided material support to a terrorist organization. The DHS's appeal will be dismissed in part, and the record will be remanded.

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

We will affirm the Immigration Judge's determination that the respondent is not barred from asylum and withholding of removal due to having provided material support to a terrorist organization, to wit, the Liberation Tigers of Tamil Eelam ("LTTE").[1] Section 208(b)(2)(A)(v) of the Act bars the Attorney General from granting asylum to an alien who is inadmissible under sections 212(a)(3)(B)(i)(I), (II), (III), (IV) or (VI), 8 U.S.C. § 1182(a)(3)(B)(i)(I), (II), (III), (IV) or (VI), or is removable under section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B). The Attorney General is also barred from granting withholding of removal to an alien when "there are reasonable grounds to believe that the alien is a danger to the security of the United States." Section 241(b)(3)(B)(iv) of the Act. For purposes of that provision, an alien who is described in section 237(a)(4)(B) of the Act--that is, inter alia, any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity, as that term is defined in section 212(a)(3)(B)(iv)--"shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States." Section 241(b)(3)(B) of the Act.

[1] The parties do not dispute the Immigration Judge's finding that the LTTE is a designated terrorist organization (IJ at 6).

Section 212(a)(3)(B)(iv)(VI) of the Act provides that a person engages in terrorist activity when he "commit[s] an act that he knows, or reasonably should know, affords material support" to a terrorist organization, as that term is defined in section 212(a)(3)(B)(vi). If the evidence indicates that the terrorism bar applies to an alien, he or she has the burden of proving by a preponderance of the evidence that the bar is not applicable. *See* 8 C.F.R. § 1240.8(d); *see also Matter of M-B-C-*, 27 I&N Dec. 31, 36-37 (BIA 2017); *Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006), *remanded*, 24 I&N Dec. 289 (A.G. 2007), *clarified*, 24 I&N Dec. 475 (BIA 2008). Duress is not an exception to the material support bar. *Annachamy v. Holder*, 733 F.3d 254, 260 (9th Cir. 2013), *overruled on other grounds by Abdisalan v. Holder*, 774 F.3d 517 (9th Cir. 2015) (en banc); *see also Matter of M-H-Z-*, 26 I&N Dec. 757 (BIA 2016).

Here, the respondent testified that he lived in an area controlled by the LTTE, who captured him and a group of about 20 other Tamil individuals in January and February 2008 (IJ at 4; Tr. at 24-25). The captives were told to cut wood for the LTTE, but the respondent told them he could not do so because of a heart condition (IJ at 4; Tr. at 25). The respondent testified that while the other captives were working, he filled vessels from a public well and gave them to his fellow captives to drink (IJ at 4; Tr. at 24-25, 48-49). He did not provide any water to the LTTE members (IJ at 4; Tr. at 48). He testified that on each occasion, he did this for a maximum period of a few hours (Tr. at 48, 51). The Immigration Judge determined that the respondent had not provided material support to a terrorist organization because the water he handed to the captives was from a communal well and because he did not provide any of the water to the LTTE members (IJ at 7).

While the respondent's appeal was pending, we issued a precedent decision clarifying the contours of the material support bar. *See Matter of A-C-M-*, 27 I&N Dec. 303 (BIA 2018). In that decision, we held that "an alien provides 'material support' to a terrorist organization, regardless of whether it was intended to aid the organization, if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree." *Id.* at 308. The alien in that case provided forced labor in the form of cooking, cleaning, and washing clothes for members of a Salvadoran guerrilla organization who had kidnapped her. *Id.* at 304. We held that the alien in that case afforded material support to the guerrillas because, while her assistance may have been relatively minimal, "if she had not provided the cooking and cleaning services she was forced to perform, another person would have needed to do so." *Id.* at 310.

While perhaps a close case, we conclude that the instant case is distinguishable from *Matter of A-C-M-*. In that case, the alien provided services to the guerrilla members directly, which aided in "continuing their mission of armed and violent opposition to the Salvadoran Government in 1990." *Id.* at 309-10; *see also Singh-Kaur v. Ashcroft*, 385 F.3d 293, 301 (3d Cir. 2004) (affirming the conclusion that providing food and assisting in putting up tents for terrorist members constituted material support). By contrast, the respondent spent a few hours on two occasions manning a public well from which he provided his fellow captives with drinking water. While we acknowledge the DHS's argument that keeping the captive workers hydrated was necessary to keep them performing the tree-cutting labor, which in turn assisted the LTTE in camouflaging its operations, we conclude that the connection between any assistance the respondent rendered his fellow captives and the LTTE's mission is too attenuated to constitute "material support" within the meaning of the Act. On this record, we affirm the Immigration Judge's conclusion that the

respondent did not provide material support, de minimis or otherwise, to a terrorist organization. Accordingly, he is not barred from asylum or withholding of removal on this basis.

However, we conclude that it is necessary to remand the record for the Immigration Judge for additional fact finding and legal analysis regarding the respondent's applications for relief. Without determining whether the respondent suffered harm rising to the level of past persecution on account of a protected ground, the Immigration Judge concluded that the respondent was ineligible for asylum, withholding of removal, and protection under the Convention Against Torture because he could relocate within Sri Lanka safely (IJ at 9). The Immigration Judge based this finding on the fact that some of the respondent's relatives live, apparently unharmed, 100 kilometers from where the respondent once lived and that the respondent was able to travel once to India for heart surgery and once to the United States without incident (IJ at 9).

We will remand to the Immigration Judge to determine whether the respondent suffered past persecution and therefore benefits from a presumption that he has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1); *Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008) (stating that an Immigration Judge must make a specific finding that an asylum applicant has or has not suffered past persecution based on a statutorily enumerated ground and then apply the regulatory framework at 8 C.F.R. § 1208.13(b)(1)). Because the Immigration Judge did not make a determination regarding past persecution, it is unclear whether he properly allocated the burden of proof regarding whether the respondent has a well-founded fear of future persecution, as well as whether the respondent could reasonably relocate within Sri Lanka. Further, because the harm the respondent experienced and fears in the future was and would be at the hands of the Sri Lankan army, it is presumed that internal relocation would not be reasonable unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the respondent to relocate. 8 C.F.R. § 1208.13(b)(3)(ii). On remand, the Immigration Judge should allocate the appropriate burden of proof, and take into account all factors identified in our governing precedent, in determining whether the respondent has a well-founded fear of persecution and whether the respondent could reasonably internally relocate. *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).

We acknowledge, as did the Immigration Judge, the DHS's argument that the Sri Lankan army may have legitimate national security and law enforcement reasons for detaining and interrogating suspected members of the LTTE. *See Dinu v. Ashcroft*, 372 F.3d 1041, 1044-45 (9th Cir. 2004). Nevertheless, the Immigration Judge did not make a finding regarding whether a protected ground, including the respondent's imputed political opinion, Tamil ethnicity, or his Hindu religion, was (or would be) "one central reason" or "a reason" for any harm faced in Sri Lanka.[2] *See Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017); *Parussimova v. Mukasey*, 555 F.3d 734, 741 (9th Cir. 2009); *see also Ratnam v. INS*, 154 F.3d 990, 995-96 (9th Cir. 1998) (concluding that detention and torture of alien who was caught with LTTE was based, at least in part, on imputed political opinion); *Matter of S-P-*, 21 I&N Dec. 486, 496 (BIA 1996) (finding that a Tamil

[2] Although the DHS argues on appeal that the respondent's assertions regarding being forced to eat meat were not credible, we are unpersuaded of any clear error in the Immigration Judge's positive credibility finding (IJ at 2; DHS's Br. at 11 n.4).

respondent was detained and abused by Sri Lankan authorities not only to obtain information about the identity of LTTE members and location of their camps but also due to the belief that he was a political opponent). Given that a persecutor's motive is a matter of fact subject to our clear error review, we will remand the record for the Immigration Judge to make this determination in the first instance. *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). On remand, the Immigration Judge should also consider whether the respondent has demonstrated that he is a member of a disfavored group consisting of Tamils in Sri Lanka in assessing whether the respondent has a well-founded fear of persecution.

Finally, in assessing the respondent's eligibility for protection under the Convention Against Torture, the Immigration Judge should consider all evidence relevant to the possibility of future torture, including the background evidence regarding the Sri Lankan government's treatment of Tamil males.

Accordingly, the following order will be entered.

ORDER: The DHS's appeal is dismissed in part, and the case is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and the issuance of a new decision.

Linda J. Wendtland
FOR THE BOARD