UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA,
ATHEER FAWOZI ALI,
ALI AL-DILAMI,
HABIL NISSAN,
JIHAN ASKER
MOAYAD JALAL BARASH,
SAMI ISMAEL AL-ISSAWI, on behalf of themselves and all those similarly situated,

Petitioners,

v.

REBECCA ADDUCCI, Director of the Detroit District of Immigration and Customs Enforcement,,

Respondent.
_____/

Civil No. 17-11910

Honorable Mark A. Goldsmith
Mag. Judge David R. Grand

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION TO EXPAND ORDER STAYING REMOVAL TO PROTECT NATIONWIDE CLASS OF IRAQI NATIONALS FACING IMMINENT REMOVAL TO IRAQ

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COUNTER-STATEMENT OF ISSUES PRESENTED

1. Should this Court permit Petitioners to add new respondents to this action who are not immediate custodians for the purpose of applying a Temporary Restraining Order nationwide that was entered only so this Court can determine if it has jurisdiction?

2. Should this Court dismiss this action where it lacks jurisdiction to enjoin the execution of Petitioners' removal pursuant to 8 U.S.C. § 1252(g) and no Suspension Clause violation exists?

MOST CONTROLLING AUTHORITY

Roman v. Ashcroft, 340 F.3d 314 (6th Cir. 2003)

8 U.S.C. § 1252(g)

I. INTRODUCTION

Petitioners' motion is an attempt to forum shop because they received a Temporary Restraining Order in this district. According to Petitioners, the Director of U.S. Immigration and Customs Enforcement and the Secretary of the Department of Homeland Security are proper respondents to this action. Yet, Petitioners chose not to name them until they received a TRO. Rather than risk a different result in another district court, Petitioners seek to improperly extend this Court's TRO nationwide by adding additional respondents. This Court lacks jurisdiction not only to hear Petitioners' claims, but also to enforce its order nationwide on a class that has not been certified and respondents who have not been served.

Petitioners' claims that they are entitled to injunctive relief from this Court while they seek relief from their orders of removal in the immigration court falls squarely within 8 U.S.C. 1252(g) of the REAL ID Act of 2005, and this Court lacks subject matter jurisdiction. This does not deprive Petitioners of a venue to seek to reopen their removal proceedings as they may seek such relief, and have, in the immigration court or Board of Immigration Appeals (BIA). Many have also obtained stays of their removal from the immigration court. Petitioners are also not deprived of judicial review, because the REAL ID Act provides that the court of appeals can review the decision on their motion to reopen their removal

proceedings and that such review continues even after removal. Petitioners cannot argue 1252(g) cannot be applied under the Suspension Clause because they have an adequate and effective opportunity for judicial review, and the compressed time frame to obtain that review is not caused by application of 1252(g), but by Petitioners' decision not to seek available relief sooner.

Although Respondent contends the plain language of 1252(g) controls, the Court entered a temporary restraining order staying Petitioners' removal for up to 14 days while it determines if it has subject matter jurisdiction. In a case where the district court admittedly is unsure whether it even has subject matter jurisdiction to enter any lawful orders, Petitioners ask the Court to find there are "extraordinary circumstances" that permit the Court to ignore the "immediate custodian" rule, and order that this Court's TRO enjoin removal of all Iraqi nationals nationwide. As argued by Respondent in response to Petitioners' motion for TRO (Dkt. #17), this Court lacks subject matter jurisdiction to hear Petitioners' claims under any provision of law pursuant to the REAL ID Act. Even if the Court had subject matter jurisdiction, it lacks personal jurisdiction to apply the TRO nationwide. Accordingly, Respondent requests this Court deny Petitioners' motion and dismiss this case for lack of jurisdiction and lack of service to the proposed respondents.

II. BACKGROUND

Respondent realleges and incorporates the background section contained in

her response in opposition to Petitioners' motion for TRO. (Dkt. #17). On June 22, 2017, this Court entered a TRO staying removal of Petitioners identified in the Petition (Dkt. #1), so that the Court could determine if it has subject matter jurisdiction. (TRO, Dkt. #32). On Saturday, June 24, 2017, Petitioners filed an amended petition to add petitioners not under the jurisdiction of Respondent, to add Thomas Homan, Acting Director of ICE and John Kelly, Secretary of the U.S. Department of Homeland Security as respondents, and on the basis of their addition as respondents, seek application of this Court's TRO nationwide. *See* Dkt. #35-36. Petitioners have not served proposed respondents with their amended petition. Nonetheless, citing time constraints, Petitioners sought a hearing on their motion for Monday, June 26, 2017. (Pet. Mot., Dkt. #36, Pg ID 554). Respondent seeks denial of Petitioners' motion and immediate dismissal of their claims for lack of subject matter jurisdiction.

III. LAW AND ANALYSIS

A. Roman v. Ashcroft is dispositive of this motion and requires denial of Petitioners' motion to extend this Court's TRO nationwide.

Petitioners' motion should be denied because they cannot add the Director of ICE or the Secretary of DHS as respondents to a habeas petition because those individuals do not have "immediate custody" of detainees. In *Roman v. Ashcroft*, 340 F.3d 314 (6th Cir. 2003), the Sixth Circuit reversed a district court finding that

the Attorney General was the proper respondent in a habeas petition seeking relief from an order of removal. The court noted that a writ of habeas corpus is directed to "the person having custody of the person detained." *Id*. at 319 (citing 28 U.S.C. § 2243). Therefore, "a court has jurisdiction over a habeas corpus petition only if it has personal jurisdiction over the petitioner's custodian." *Id*. "As a general rule, a petitioner should name as a respondent to his habeas corpus petition 'the individual having day-to-day control over the facility in which the alien is being detained.'" *Id*. Known as the "immediate custodian rule," it recognizes that "only the petitioner's immediate or direct custodian" is the proper respondent. *Id*. at 319-20. Accordingly, the court held that for purposes of "alien habeas corpus petitioners…the INS District Director for the district where the detention facility is located" is the proper respondent. *Id*. at 320-21.

Despite the immediate custodian rule, the petitioner in *Roman* sought to name the Attorney General as respondent because he was transferred several times during his detention, making it difficult to pursue his habeas petition in one jurisdiction as the proper respondent was subject to change. *Id*. at 321. The petitioner also claimed the backlog of cases in the proper jurisdiction would deprive him of adjudication of his petition before removal. Id. He argued that a broader definition of "custodian" should apply "where a detainee would otherwise be deprived of his right to habeas review." *Id*. at 323. The court noted that applying

a broader definition of custodian to include "other officials with control over the alien's detention and release – such as the Commissioner of the INS or the Attorney General" would make habeas petitions "considerably more difficult to administer" because "several courts would have personal jurisdiction over an alien's custodians." *Id*. at 322. The court was concerned that with such a broad interpretation "[a]liens could then engage in forum shopping, choosing among several different districts as long as personal jurisdiction existed over at least one of the various custodians." *Id*.

Although the court applied the immediate custodian rule in *Roman*, it did note the "possibility of exceptions" under "extraordinary circumstances." *Id*. at 322-23. The petitioner in *Roman* argued that such extraordinary circumstances existed in his case because he was transferred several times during his detention and "there was a risk that [he] might be removed from the United States before his petition could be heard on the merits." *Id*. at 325. The court held that "under extraordinary circumstances where it is necessary to preserve a person's access to habeas corpus relief, we may recognize the Attorney General as a respondent to an alien's habeas corpus petition." *Id*. The court cited a case where the Attorney General was the proper respondent because the petitioner was held at an undisclosed location and his attorneys were unaware of the location. *Id*. at 325 (citing *Demjanjuk v. Meese*, 784 F.2d 1114, 1116 (D.C. Cir. 1986)). However, in

Demjanjuk, jurisdiction over the Attorney General terminated once the petitioner's presence in a particular jurisdiction was known. *Id*.

In *Roman*, the court found that the petitioner's claim that he was transferred several times since detention and his habeas petition may not be heard before his removal, did not amount to "extraordinary circumstances." *Id*. at 325-26. "[W]e do not believe that the possibility of an alien's removal prior to the adjudication of his habeas petition amounts to an effective denial of the petitioner's opportunity to seek meaningful habeas corpus relief." *Id*. at 327. The court held that "the mere possibility of successive transfers would [not] justify an exception to the immediate custodian rule." *Id*. at 326. The court noted that an exception may be appropriate where "the government improperly manipulated its authority in an attempt to deny [the petitioner] a meaningful opportunity for relief" as in *Demjanjuk*. *Id*. at 326. But the court declined to apply an exception in *Roman* because "[a]liens remaining in detention for extended periods are often transferred several times during their detention," and the INS did not "exercise its transfer power in a clear effort to evade an alien's habeas petition[]." *Id*.

Roman is dispositive of this motion. Petitioners seek an exception to the immediate custodian rule to broaden the definition of custodian to include the Director of ICE and the Secretary of DHS, as a means of getting the TRO applied nationwide. (Pet. Mot., Dkt. #36). Petitioners exemplify the Sixth Circuit's concern

about forum shopping as they could have asserted those individuals as respondents when they filed the action if they were truly the proper respondents, but chose to wait until the result of their motion for TRO. *See Roman*, 340 F.3d at 322. Now that they received a stay of removal, albeit temporary, they allege that there are "extraordinary circumstances" because detainees' transfers make it more difficult to avail themselves of habeas relief and they could be removed before their claims are adjudicated. (Pet. Mot., Dkt. #36, Pg ID 567-71).

As the court found in *Roman*, these are not extraordinary circumstances. *See Roman*, 340 F.3d at 326. ICE, as a matter of course for operational needs, transfers detainees during detention. *Id*. There is no allegation that ICE transferred detainees to evade habeas relief. Indeed, for purposes of the Petition (Dkt. #1),[1] ICE voluntarily agreed to forgo personal jurisdiction defenses at the hearing on Petitioners' motion for TRO for those Petitioners who were no longer in Respondent's jurisdiction due to transfers. Nor do Petitioners allege ICE failed to disclose the location of any detainees in an attempt to deny relief. Any logistical difficulties facing detainees in seeking habeas relief during their detention is the same difficulty faced by any ICE detainee, and cannot support a finding of "extraordinary circumstances." Accordingly, this Court should deny Petitioners' motion to extend the TRO nationwide because the Director of ICE and the

[1] ICE has not made a similar concession for the Amended Petition.

Secretary of DHS are not proper respondents and the Court, therefore, lacks personal jurisdiction.

This analysis does not change because Petitioners now claim to be filing a "complaint" in addition to their habeas petition. (Am. Pet., Dkt. #35). First, the TRO was sought on the basis of Petitioners' habeas claims for relief and should not be applied to newly proposed parties on the basis of newly asserted claims in a complaint that has not been served. Second, Petitioners' claims for declaratory relief, mandamus, etc., are not new as they were asserted in the original habeas petition. (Pet., Dkt. #1, Pg ID 5, ¶ 10). Third, no class has been certified in this case. See Fed. R. Ci. P. 23.

Petitioners also presume to make an argument that a stay of removal is requested by all detainees, which may not be the case. Even if it is, a stay of removal is "not a matter of right, even if irreparable injury might result" and "[t]he propriety of its issue is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). There has not been an individualized finding as required by *Nken* that Petitioners are entitled to a stay of removal, and all Iraqi detainees cannot be presumed to have similar merits where they have individualized circumstances that impact their eligibility for relief in the immigration court. *See* Decisions Denying Motions to Reopen Removal Proceedings, attached as Ex. A. The relief Petitioners wish to seek, withholding or

deferral of removal pursuant to the Convention Against Torture, is an individualized form of relief that must be raised and eligibility established before an immigration court. See, e.g., *Vakeesan v. Holder*, 343 Fed.Appx. 117, 125 (6th Cir. 2009) ("To demonstrate a well-founded fear of future persecution, an alien generally must show that, if deported, a reasonable possibility exists that he or she will be singled out individually for persecution.") (emphasis added). Even where individuals seek reopening based on a fear of harm due to an alleged pattern or practice of harm against a specific class of persons, the individual is still responsible for establishing to the appropriate immigration court that such a pattern or practice exists and proving that he or she is a member of the targeted group. *See* 8 C.F.R. 1208.13(b)(2)(iii). Because the TRO was entered only so the Court could determine whether it has subject matter jurisdiction and did not make individualized findings, the Court should not extend the TRO nationwide.

B. This Court lacks subject matter jurisdiction and Petitioners' claims should be denied.

Although Petitioners claim the only issue in this motion is whether the irreparable harm concerns noted by the Court apply to all Iraqi nationals, whether this Court has subject matter jurisdiction is the foremost issue. *See Watson v. Cartee*, 817 F.3d 299, 302–03 (6th Cir. 2016) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Under the REAL ID Act of 2005, this Court lacks jurisdiction to hear Petitioners' claims,

and this action should be dismissed.

Congress divested district courts of subject matter jurisdiction over "any cause or claim…arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." *See* 8 U.S.C. § 1252(g). Inasmuch as Petitioners ask this Court to read 1252(g) as only applying where the decision is discretionary, that interpretation requires application of 1252(g). ICE has discretion to execute removal orders. The Supreme Court concluded that it was precisely ICE's discretion of whether and when to execute removal orders that precipitated the enactment of 1252(g) by Congress. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483 (1999) (noting that Congress enacted 1252(g) specifically to protect ICE's discretion in execution of removal orders because it was frequently sued where it deferred removal in certain cases and not others). The only decision in this case is ICE's decision to execute Petitioners' orders of removal. Because that is the very discretionary decision that Congress and the Supreme Court has found district courts lack subject matter jurisdiction to adjudicate under 1252(g), this action should be immediately dismissed.

C. The application of 1252(g) does not violate the Suspension Clause.

Petitioners cannot avoid Congress' clear mandate by asserting it would be a Suspension Clause violation to apply 1252(g) in this case. The Suspension Clause

requires only that if habeas relief is suspended, there be a collateral remedy that is adequate and effective. *See Swain v. Pressley*, 430 U.S. 372, 381 (1977) ("[W]e hold in this case, that the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."). The Suspension Clause does not require that a petitioner have the ability to fully exhaust any opportunities before removal. *Id*. In this case, the Sixth Circuit has already found that the REAL ID Act does not violate the Suspension Clause because it provides an adequate and effective remedy in the court of appeals. *See Muka v. Baker*, 559 F.3d 480, 485 (6th Cir. 2009).

Petitioners' only argument to avoid application of 1252(g) is that if it is applied to deny habeas relief in this case, they may not be able to exhaust their administrative remedies and seek judicial review (which may or may not ultimately be successful in avoiding their removal)[2] before removal to Iraq. This does not state a Suspension Clause violation. The Sixth Circuit holds that concerns about the ability to adjudicate requests for relief before removal do not equate to a denial of relief. *See Roman*, 340 F.3d at 327 ("[W]e do not believe that the possibility of an alien's removal prior to the adjudication of his habeas petition amounts to an

[2] *See* Exhibit A, attaching decisions from an Immigration Judge finding no material changed country conditions in Iraq for Chaldean Christians and declining to grant relief under the Convention Against Torture, that Petitioners claim is "mandatory" on June 19, 2017, and June 13, 2017.

effective denial of the petitioner's opportunity to seek meaningful habeas corpus relief."). Petitioners have had years to exhaust their remedies based on changed country conditions. It is not the REAL ID Act that created the circumstance where Petitioners may not get the relief they seek before their removal, it was Petitioners' decision not to seek relief sooner. While there may have been logical considerations in that decision, it does not permit an exception to application of 1252(g). Petitioners have, and most have pursued, an appropriate avenue for relief from removal. *See* Declaration of Robert Lynch, attached as Ex B (79 Petitioners have filed motions to reopen their removal proceedings and 27 have received stays of their removal orders). Accordingly, Petitioners cannot establish any exception to 1252(g) and this Court lacks subject matter jurisdiction.

IV. CONCLUSION

Petitioners cannot seek to add the Director of ICE or the Secretary of DHS to this action as additional respondents where they do not have immediate custody of the detainees and no extraordinary circumstances exist. Nor can Petitioners add detainees as petitioners over whom the Court lacks personal jurisdiction. Moreover, because this Court lacks subject matter jurisdiction to enjoin Respondent's decision to execute Petitioners' orders of removal, this motion and this action should be dismissed.

Respectfully Submitted,

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Dated: June 26, 2017

CERTIFICATION OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to all ECF participants in this case.

/s/ Jennifer L. Newby

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

RUSH

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IN THE MATTER OF [redacted]

FILE [redacted]

DATE: Jun 19, 2017

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

XX ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

__ OTHER: _____

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IMMIGRATION COURT

FF

CC: DHS/ICE/ATTORNEY GOULDING

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN[1]

File No.: [redacted]	)	JUNE 19, 2017
In the Matter of:	)	
[redacted]	)	**In Removal Proceedings**
Respondent	)	

Charges: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, a law relating to Sexual Abuse of a Minor.

Section 237(a)(2)(A)(i) of the Act, as amended, in that you have been convicted of a crime involving moral turpitude committed within five years of admission for which a sentence of one year or longer may be imposed.

Application: Motion to Reopen.

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ON BEHALF OF THE GOVERNMENT
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ORDER OF THE IMMIGRATION JUDGE

I. BACKGROUND

Respondent, [redacted], is a [redacted] male, native and citizen of Iraq. He is a Chaldean Christian. He was admitted to the United States at New York, New York, on September 25, 1998, as a refugee. On March 21, 2002, respondent adjusted his status to that of a Lawful Permanent Resident, such status being effective as of September 25, 1998. Exh. 1. On

[1] During prior proceedings, respondent was detained at the Monroe County Jail in Monroe, Michigan. Pursuant to 8 C.F.R. § 1003.11, all correspondence and documents pertaining to this case were filed with the administrative control court: Immigration Court, 477 Michigan Avenue, Suite 440, Detroit, Michigan 48226. The prior hearings in this matter were conducted in Detroit, Michigan, through video conference pursuant to INA § 240(b)(2)(A)(iii).

March 4, 2004, respondent was convicted in the 16th Circuit Court in Mount Clemens, Michigan, for two counts of Children -- Accosting for Immoral Purposes, committed on or about December 28, 2002, in violation of MICH. COMP. LAWS § 750.145a. Exh. 1A. The Department of Homeland Security ("DHS" or "Government") personally served respondent with a Notice to Appear ("NTA") on April 20, 2004, and initiated removal proceedings by filing that NTA with the Detroit Immigration Court on April 28, 2004. The Government also submitted a Form I-261, Additional Charges of Inadmissibility/Deportability. The I-261 replaced factual allegations five through seven of the original NTA with allegations five through nine; it did not change the charges of removability. At his initial master calendar hearing on April 30, 2004, respondent was not represented. He admitted the first eight factual allegations contained in the NTA, as modified by the I-261. Respondent neither admitted nor denied the ninth factual allegation contained in the NTA, as modified by the I-261. The Court did not make a finding as to that allegation because it was not relevant to the charges of removability before it. Based on the documents submitted regarding respondent's convictions, the Court sustained the charges of removability, finding they had been proven by the requisite clear and convincing evidence. That same date, the Court ordered respondent removed from the United States pursuant to the charges of removability contained in his NTA.[2]

On June 14, 2017, respondent, through counsel, submitted a Motion to Reopen. Respondent's Motion to Reopen (June 14, 2017). Respondent asks the Court to grant his motion to reopen based on changed circumstances in Iraq. He argues that ISIS and a number of other "armed and violent fundamentalist militia" are persecuting Christians in Iraq. He further argues

[2] This case was initially heard by Immigration Judge ("IJ") Robert D. Newberry. IJ Newberry retired on May 31, 2014. This Court assumed responsibility for the matter from that date. Pursuant to 8 C.F.R. § 1240.1(b), the undersigned IJ has reviewed and beeome familiar with the entire record.

that the government of Iraq is unable or unwilling to protect Christians from such persecution. Respondent thus asks the Court to allow him to reopen his proceedings in order to apply for Withholding of Removal under the Act. He argues that he is eligible for such relief despite his convictions, which do not constitute a particularly serious crime.

On June 16, 2017, the Government filed its opposition to respondent's motion to reopen. DHS's Answer to Respondent's Motion to Reopen (June 16, 2017). The Government argues that respondent has not proven material changed circumstances and as such, his motion is untimely. The Government further argues that respondent has been convicted of a particularly serious crime, and is thus ineligible for Asylum and for Withholding of Removal under the Act and the Torture Convention. The Government points to the Board of Immigration Appeals' finding that possession of child pornography can be a particularly serious crime because the depicted child is "indirectly victimized again when someone possesses child pornography and that the downloading and possession of child pornography contributes to further sexual abuse of children." *Matter of R-A-M-*, 25 I&N Dec. 657, 661 (BIA 2012). According to the Government, possession of child pornography is a "lesser crime" than that for which respondent was convicted – Accosting a Minor for Immoral Purposes, in violation of MCL § 750.145a. Thus the Government concludes that given the seriousness of respondent's offenses and because respondent caused *direct* harm to children, his convictions also constitute a particularly serious crime and he is ineligible for Asylum, Withholding of Removal under the Act, and Withholding of Removal under the Torture Convention

II. LEGAL STANDARDS

A. MOTION TO REOPEN

Generally, one motion to reopen may be filed before the Immigration Court and such

motion must be filed within ninety days of the final administrative order of removal, deportation, or exclusion. INA § 240(c)(7); 8 C.F.R. § 1003.23(b)(1). Any such motion "must state new facts that will be proven should proceedings be reopened, and must be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.23(b)(3). If the motion to reopen is for the purpose of acting on an application for relief, it must also be accompanied by the appropriate application and its supporting documents. *Id.* The decision to grant or deny any motion to reopen is within the discretion of the IJ and the motion may be denied even if the moving party has made out a *prima facie* case for relief. 8 C.F.R. § 1003.23(b)(1)(iv).

Notwithstanding the general ninety day rule, there is no time limit imposed if the "basis of the motion is to apply for relief under . . . the Convention Against Torture, and is based on changed country conditions . . . if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." 8 C.F.R. § 1003.23(b)(4). However, changed personal circumstances do not constitute "changed country conditions" within the meaning of 8 C.F.R. § 1003.23(b)(4). *Liu v. Holder*, 560 F.3d 485, 492 (6th Cir. 2009) (holding that changed personal circumstances are insufficient to establish changed country conditions in the case of an untimely motion to reopen) (citation omitted).

Finally, the IJ may upon his own motion at any time, or upon motion of either party, reopen or reconsider any case in which he has made a decision, unless jurisdiction in the case is vested in the Board. 8 C.F.R. § 1003.23(b)(1). Where the alien has failed to demonstrate that exceptional circumstances caused his absence or that he did not receive proper notice of the hearing, in limited circumstances, the Court may *sua sponte* reopen proceedings. 8 C.F.R. § 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976, 984-85 (BIA 1997). However, *sua sponte* reopening is "reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999); *J-J-*, 21 I&N

Dec. at 984-85. Respondent has the burden to establish that an exceptional situation exists. *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000); *G-D-*, 22 I&N Dec. at 1134; *J-J-*, 21 I&N Dec. at 984-85. The decision to grant such a motion remains within the discretion of the IJ. 8 C.F.R. § 1003.23(b)(1)(iv).

B. DEFERRAL OF REMOVAL UNDER THE TORTURE CONVENTION

An applicant who demonstrates a likelihood of torture, but who is subject to the statutory bars listed in section 241(b)(3)(B) of the Act and thus ineligible for withholding under the CAT, may be granted deferral under the Torture Convention. 8 C.F.R. § 1208.17. This includes applicants who have been "convicted by a final judgment of a particularly serious crime." INA § 241(b)(3)(B)(ii). Deferral is "a temporary form of protection that accords the recipient no lawful immigration status and prevents the alien's refoulement only until removal is possible." *Matter of C-C-I-*, 26 I&N Dec. 375, 385 (BIA 2014) (citations omitted); *see* 8 C.F.R. § 1208.17(b)(1). The IJ must notify the alien of such a grant, and provide the alien with notice of its conditions. 8 C.F.R. § 1208.17(b).

Deferral does not guarantee that the alien will be released from detention, 8 C.F.R. § 1208.17(c), nor does it defer removal to any country other than that in which it has been determined the applicant is likely to be tortured. 8 C.F.R. § 1208.17(b)(2). The Government may file a motion to terminate such deferral "at any time." 8 C.F.R. 1208.17(d). Such a motion must be accompanied by evidence "'relevant to the possibility' that the alien would be tortured in the country to which removal has been ordered." *C-C-I-*, 26 I&N Dec. at 378.

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 1208.18(a)(1). Torture does not refer to general violence. Additionally, "the existence of a consistent pattern of gross, flagrant, or mass

violations of human rights in a particular country does not . . . constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country." *Id.* (citation omitted); *see also Palma-Campos v. Holder*, 606 F. App'x 284 (6th Cir. 2015). The Sixth Circuit requires that an alien demonstrate a "particularized threat of torture" to receive protection under the Torture Convention. *See Almuhtaseb*, 453 F.3d at 751 (citation omitted); *Castellano-Chacon v. INS*, 341 F.3d 533, 551-52 (6th Cir. 2003) ("8 C.F.R. § 208.16(c)(4) focuses on the particularized threat of torture, rather than any other form of persecution, should the alien return to the country at issue, although the torture must be inflicted, instigated, consented to, or acquiesced in, by state actors.").

The severe pain or suffering must be inflicted on the applicant for such purposes as: (1) obtaining information or a confession from him or her or a third person; (2) punishing him or her for an act he or she or a third person committed or is suspected of having been committed; (3) intimidating or coercing him or her or a third person; or (4) for any reason based on discrimination of any kind. 8 C.F.R. § 1208.18(a)(1). In order to constitute "torture," the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 1208.18(a)(6); *see also Matter of J-E-*, 23 I&N Dec. 291, 299 (BIA 2002). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from imposition of lawful sanctions. 8 C.F.R. §§ 1208.18(a)(2)-(3). However, lawful sanctions do not include those that defeat the object and purpose of the Torture Convention. 8 C.F.R. § 1208.18(a)(3).

Finally, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). "Acquiescence" requires that the public official have prior awareness of the

activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7); *see also Ali*, 237 F.3d at 597. Acquiescence includes the "willful blindness" of the public official to the activity. *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006). However, a government's inability to control private parties does not equate to willful blindness. *See Ali*, 237 F.3d at 597-98.

III. DISCUSSION AND ANALYSIS

The Court finds that respondent has not demonstrated material changed country conditions in Iraq. Moreover, he has failed to sufficiently demonstrate possible eligibility for Deferral of Removal under the Torture Convention. 8 C.F.R. § 1003.23(b)(4). Furthermore, the Court declines to use its *sua sponte* authority to reopen proceedings. Accordingly, the Court will deny respondent's motion to reopen.

Respondent alleges that changed circumstances in Iraq, namely the rise of ISIS and other non-governmental militias and their attempts to cleanse Iraq of Christians, warrant granting his motion to reopen. He further argues that he is entitled to withholding of removal under the Act. The Court first finds that respondent is not eligible for withholding of removal under the Act or under the Torture Convention. Respondent pleaded guilty to and was convicted of two counts of accosting a minor for immoral purposes, in violation of MCL § 750.145a. Exh. 3. The reporting reveals that both children were under twelve years old at the time, and that respondent solicited both of them, as well as a third twelve-year-old girl, for sex and showed them pornographic videos when they went into his gas station to buy candy. He asked them if they would allow him to perform sexual acts on them in exchange for money. Exh. 2. Respondent was sentenced to three years of probation, and was ordered to serve the first sixty days of his probationary period in the Macomb County Jail. The Court previously found that respondent's crimes constituted an

aggravated felony, and that he was removable as charged. Respondent is thus ineligible for Asylum. Even if respondent's crimes were not aggravated felonies, the Court would exercise its discretion to deny respondent Asylum. The Court now finds that even though respondent's crimes are not *per se* particularly serious crimes, as he was not sentenced to a term of imprisonment of five years or more, they are *de facto* particularly serious crimes. The Court further finds that the evidence in the record establishes that respondent's crimes are particularly serious, and that it does not need an additional evidentiary hearing to make such a determination. Exhs. 2 and 3. Thus respondent is not eligible for Withholding of Removal under the Act or under the Torture Convention. The only remaining relief potentially available to respondent is Deferral of Removal under the Torture Convention ("Deferral of Removal").

Given that respondent is eligible only for Deferral of Removal, he must establish that he will be tortured by the government or public officials, or that the government or public officials will acquiesce in his torture. *See* 8 C.F.R. § 1003.23(b)(4). On March 17, 2016, the United States government declared that ISIS's current actions against Christians in Iraq rise to the level of genocide. John Kerry, Sec'y of State, Remarks on Daesh and Genocide (Mar. 17, 2016), *available at* http://www.state.gov/secretary/remarks/2016/03/254782.htm. The Court notes that former Secretary Kerry's statement explicitly indicates that ISIS is responsible for the genocide against Chaldean Christians, not the government of Iraq. John Kerry, Sec'y of State, Remarks on Daesh and Genocide (Mar. 17, 2016). Thus while recognition by the United States that ISIS is committing genocide against Iraqi Christians constitutes new evidence which was previously unavailable to respondent, that evidence is not material to respondent's application for Deferral of Removal. Moreover, the Court notes that nearly all of the country condition evidence submitted is from 2014 and 2015, and does not speak to the current conditions in Iraq.

Even if respondent had successfully demonstrated a material change in country conditions, the Court would still deny his motion to reopen because it was untimely – respondent filed his Motion to Reopen over one year after former Secretary Kerry's remarks. *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (holding that waiting six months or longer after the changed circumstance is not reasonable, and that only in "rare cases" may a delay of one year or more be justified). In fact, respondent only filed his motion after he was detained by immigration authorities. His detention, and the fact that he is allegedly in danger of being removed to Iraq, is a changed personal circumstance not warranting reopening. *Liu*, 560 F.3d at 492.

Finally, the Court declines to use its *sua sponte* authority to reopen respondent's proceedings because he has failed to sufficiently demonstrate eligibility for deferral of removal under the Torture Convention. To establish eligibility for protection under the Torture Convention, respondent bears the burden of demonstrating that he faces a particularized threat of torture "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1); *Almuhtaseb*, 453 F.3d at 751 (internal citation omitted). While acquiescence includes the "willful blindness" of a public official, a government's inability to control private parties does not equate to willful blindness. *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006). Respondent has not alleged that he will be tortured and he has presented no evidence that he could meet that burden should the Court reopen these proceedings. There is no proffered evidence that any torture respondent might face at the hands of ISIS or the referenced militias would be conducted with the consent or acquiescence of the Iraqi government or public officials thereof. A showing of general conditions of violence in Iraq is insufficient to establish eligibility for this limited form of relief. The Court will therefore deny respondent's motion to reopen.

IV. ORDERS

IT IS HEREBY ORDERED that respondent's motion to reopen be **DENIED.**

Hon. David H. Paruch
U.S. Immigration Judge

6/19/2017
Date

Appeal Due Date: JULY 19, 2017

RUSH

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

RUSH

Jajonie Daman, P.C.
Jajonie Daman, Eman Hayat
8424 E. 12 Mile Road
Suite 200
Warren, MI 48093

Date: Jun 13, 2017

File [redacted]

In the Matter of:
[redacted]

_____ Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee ($110.00).

_____ Enclosed is a copy of the oral decision.

_____ Enclosed is a transcript of the testimony of record.

_____ You are granted until _____ to submit a brief to this office in support of your appeal.

_____ Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

X Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

_____
Immigration Court Clerk UL

cc: DHS/ICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN[1]

File No.: [redacted]	)	JUNE 13, 2017
	)	
In the Matter of:	)	
	)	
[redacted]	)	**In Removal Proceedings**
Respondent	)	

Charges: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA" or "Act"), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, an offense relating to the illicit trafficking in a controlled substance, as describe in section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in section 924(c) of Title 18, United States Code, to wit: delivery/manufacture of 5-45 kilograms of marijuana.

Section 237(a)(2)(B)(i) of the Act, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana.

Application: Motion to Reopen; Emergency Motion to Stay.

ON BEHALF OF RESPONDENT
Eman H. Jajonie-Daman
Jajonie Daman, P.C.
8424 E. 12 Mile Road
Suite 200
Warren, Michigan 48093

ON BEHALF OF THE GOVERNMENT
Brian Burgtorf, Assistant Chief Counsel
Department of Homeland Security
Immigration and Customs Enforcement
333 Mount Elliott, Second Floor
Detroit, Michigan 48207

[1] During prior proceedings, respondent was detained at the Monroe County Jail in Monroe, Michigan. He is currently detained at Youngstown Correctional Facility in Youngstown, Ohio. Pursuant to 8 C.F.R. § 1003.11, all correspondence and documents pertaining to this case were filed with the administrative control court: Immigration Court, 477 Michigan Avenue, Suite 440, Detroit, Michigan 48226. The prior hearings in this matter were conducted in Detroit, Michigan, through video conference pursuant to INA § 240(b)(2)(A)(iii).

ORDER OF THE IMMIGRATION JUDGE

I. BACKGROUND

Respondent, [redacted] is a [redacted] male, native and citizen of Iraq. He is a Chaldean Christian. He was admitted to the United States as an immigrant on December 24, 1991. On May 14, 2004, respondent was convicted in the Sixth Judicial Circuit Court in Pontiac, Michigan, for the offense of delivery/manufacture of 5-45 kilograms of marijuana, in violation of MICH. COMP. LAWS § 333.7401(2)(d)(ii). The Department of Homeland Security served respondent with a Notice to Appear ("NTA") on January 3, 2005, and initiated removal proceedings by filing that NTA with the Detroit Immigration Court on January 10, 2005. At his initial master calendar hearing, respondent was represented. Through counsel, respondent admitted all four factual allegations contained in his NTA and conceded both charges of removability. The Court designated Iraq as the country of removal, should such action become necessary. Following a hearing on January 20, 2005, the Court ordered respondent removed as charged.[2]

On June 6, 2017, respondent, through counsel, submitted a Motion to Reopen and an Emergency Motion to Stay Removal pending adjudication of his Motion to Reopen. Respondent's Motion to Reopen (June 6, 2017); Respondent's Emergency Motion for Request to Stay Removal (June 6, 2017). Respondent asks the Court to grant his motion to reopen based on changed circumstances in Iraq. He argues that the country condition evidence overwhelmingly indicates worsening conditions in Iraq and continued ethnic cleansing of the Chaldean Christian community. He further argues that he is eligible for Deferral of Removal under the Torture Convention, and

[2] This case was initially heard by Immigration Judges ("IJ") Robert D. Newberry and Elizabeth A. Hacker. IJ Hacker retired on January 2, 2013. IJ Newberry retired on May 31, 2014. This Court assumed responsibility for the matter from that date. Pursuant to 8 C.F.R. § 1240.1(b), the undersigned IJ has reviewed and become familiar with the entire record.

that the Court, the Board of Immigration Appeals ("Board"), and the federal Circuit Courts "have all reopened several Christian Iraqi cases based on changed country conditions" in circumstances "nearly identical" to respondent. Respondent therefore requested his case be reopened so that he could file his claim for Deferral of Removal under the Torture Convention "due to the inability of the Iraqi government to protect the Christian minority of Iraq."

On June 7, 2017, this Court granted respondent's emergency motion to stay removal, pending its decision on respondent's motion to reopen. Order of the IJ (June 7, 2017). On June 12, 2017, the Government filed its opposition to respondent's motion to reopen and a motion to vacate the stay of removal. DHS's Opposition to Respondent's Motion to Reopen and Motion to Vacate Stay of Removal (June 12, 2017). The Government argues that respondent has not proven changed circumstances and that his motion to reopen is untimely, as there are no real differences between the 2005 and 2016 United States Department of State Human Rights Reports for Iraq. The Government further argues that respondent has failed to demonstrate *prima facie* eligibility for relief from removal. According to the Government, respondent has not alleged that the government will target and torture him, but rather that ISIS will harm him because he is a Chaldean Christian. Finally, the Government asserts that this Court cannot properly consider the constitutional challenges to executing respondent's removal because this Court may not rule on the constitutionality of the statutes that they administer nor may they address questions regarding the constitutionality of the Act. *Matter of Rodriguez-Carrillo*, 22 I&N Dec. 1031, 1035, 1036 (BIA 1999).

II. LEGAL STANDARDS

A. MOTION TO REOPEN

Generally, one motion to reopen may be filed before the Immigration Court and such

motion must be filed within ninety days of the final administrative order of removal, deportation, or exclusion. INA § 240(c)(7); 8 C.F.R. § 1003.23(b)(1). Any such motion "must state new facts that will be proven should proceedings be reopened, and must be supported by affidavits or other evidentiary material." 8 C.F.R. § 1003.23(b)(3). If the motion to reopen is for the purpose of acting on an application for relief, it must also be accompanied by the appropriate application and its supporting documents. *Id.* The decision to grant or deny any motion to reopen is within the discretion of the IJ and the motion may be denied even if the moving party has made out a *prima facie* case for relief. 8 C.F.R. § 1003.23(b)(1)(iv).

Notwithstanding the general ninety day rule, there is no time limit imposed if the "basis of the motion is to apply for relief under . . . the Convention Against Torture, and is based on changed country conditions . . . if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding." 8 C.F.R. § 1003.23(b)(4). However, changed personal circumstances do not constitute "changed country conditions" within the meaning of 8 C.F.R. § 1003.23(b)(4). *Liu v. Holder*, 560 F.3d 485, 492 (6th Cir. 2009) (holding that changed personal circumstances are insufficient to establish changed country conditions in the case of an untimely motion to reopen) (citation omitted).

Finally, the IJ may upon his own motion at any time, or upon motion of either party, reopen or reconsider any case in which he has made a decision, unless jurisdiction in the case is vested in the Board. 8 C.F.R. § 1003.23(b)(1). Where the alien has failed to demonstrate that exceptional circumstances caused his absence or that he did not receive proper notice of the hearing, in limited circumstances, the Court may *sua sponte* reopen proceedings. 8 C.F.R. § 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976, 984-85 (BIA 1997). However, *sua sponte* reopening is "reserved for truly exceptional situations." *Matter of G-D-*, 22 I&N Dec. 1132, 1134 (BIA 1999); *J-J-*, 21 I&N

Dec. at 984-85. Respondent has the burden to establish that an exceptional situation exists. *Matter of Beckford*, 22 I&N Dec. 1216, 1219 (BIA 2000); *G-D-*, 22 I&N Dec. at 1134; *J-J-*, 21 I&N Dec. at 984-85. The decision to grant such a motion remains within the discretion of the IJ. 8 C.F.R. § 1003.23(b)(1)(iv).

B. DEFERRAL OF REMOVAL UNDER THE TORTURE CONVENTION

An applicant who demonstrates a likelihood of torture, but who is subject to the statutory bars listed in section 241(b)(3)(B) of the Act and thus ineligible for withholding under the CAT, may be granted deferral under the Torture Convention. 8 C.F.R. § 1208.17. This includes applicants who have been "convicted by a final judgment of a particularly serious crime." INA § 241(b)(3)(B)(ii). Deferral is "a temporary form of protection that accords the recipient no lawful immigration status and prevents the alien's refoulement only until removal is possible." *Matter of C-C-I-*, 26 I&N Dec. 375, 385 (BIA 2014) (citations omitted); *see* 8 C.F.R. § 1208.17(b)(1). The IJ must notify the alien of such a grant, and provide the alien with notice of its conditions. 8 C.F.R. § 1208.17(b).

Deferral does not guarantee that the alien will be released from detention, 8 C.F.R. § 1208.17(c), nor does it defer removal to any country other than that in which it has been determined the applicant is likely to be tortured. 8 C.F.R. § 1208.17(b)(2). The Government may file a motion to terminate such deferral "at any time." 8 C.F.R. 1208.17(d). Such a motion must be accompanied by evidence "'relevant to the possibility' that the alien would be tortured in the country to which removal has been ordered." *C-C-I-*, 26 I&N Dec. at 378.

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person." 8 C.F.R. § 1208.18(a)(1). Torture does not refer to general violence. Additionally, "the existence of a consistent pattern of gross, flagrant, or mass

violations of human rights in a particular country does not . . . constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country." *Id.* (citation omitted); *see also Palma-Campos v. Holder*, 606 F. App'x 284 (6th Cir. 2015). The Sixth Circuit requires that an alien demonstrate a "particularized threat of torture" to receive protection under the Torture Convention. *See Almuhtaseb*, 453 F.3d at 751 (citation omitted); *Castellano-Chacon v. INS*, 341 F.3d 533, 551-52 (6th Cir. 2003) ("8 C.F.R. § 208.16(c)(4) focuses on the particularized threat of torture, rather than any other form of persecution, should the alien return to the country at issue, although the torture must be inflicted, instigated, consented to, or acquiesced in, by state actors.").

The severe pain or suffering must be inflicted on the applicant for such purposes as: (1) obtaining information or a confession from him or her or a third person; (2) punishing him or her for an act he or she or a third person committed or is suspected of having been committed; (3) intimidating or coercing him or her or a third person; or (4) for any reason based on discrimination of any kind. 8 C.F.R. § 1208.18(a)(1). In order to constitute "torture," the "act must be directed against a person in the offender's custody or physical control." 8 C.F.R. § 1208.18(a)(6); *see also Matter of J-E-*, 23 I&N Dec. 291, 299 (BIA 2002). Torture is an "extreme form of cruel and inhuman treatment" and does not include pain or suffering arising from imposition of lawful sanctions. 8 C.F.R. §§ 1208.18(a)(2)-(3). However, lawful sanctions do not include those that defeat the object and purpose of the Torture Convention. 8 C.F.R. § 1208.18(a)(3).

Finally, the pain or suffering must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1). "Acquiescence" requires that the public official have prior awareness of the

activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. 8 C.F.R. § 1208.18(a)(7); *see also Ali*, 237 F.3d at 597. Acquiescence includes the "willful blindness" of the public official to the activity. *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006). However, a government's inability to control private parties does not equate to willful blindness. *See Ali*, 237 F.3d at 597-98.

III. DISCUSSION AND ANALYSIS

The Court finds that respondent has not demonstrated material changed country conditions in Iraq. Moreover, he has failed to sufficiently demonstrate possible eligibility for Deferral of Removal under the Torture Convention. 8 C.F.R. § 1003.23(b)(4). Furthermore, the Court declines to use its *sua sponte* authority to reopen proceedings. Accordingly, the Court will deny respondent's motion to reopen. His motion to stay his removal is therefore denied.[3] Finally, the Court finds that it does not have jurisdiction to address issues regarding respondent's constitutional challenges. *Matter of Rodriguez-Carrillo*, 22 I&N Dec. at 1035, 1036 (BIA 1999); *see also Hadayat v. Gonzales*, 458 F.3d 659, 665 (7th Cir. 2006); *Daud v. Gonzales*, 207 F. App'x 194 (3d Cir. 2006).

Respondent alleges that changed circumstances in Iraq, namely the rise of ISIS and their attempts to cleanse Iraq of Christians, warrant granting his motion to reopen. On March 17, 2016, the United States government declared that ISIS's current actions against Christians in Iraq rise to the level of genocide. John Kerry, Sec'y of State, Remarks on Daesh and Genocide (Mar. 17, 2016), *available at* http://www.state.gov/secretary/remarks/2016/03/254782.htm. The Court notes that former Secretary Kerry's statement explicitly indicates that *ISIS* is responsible for the genocide against Chaldean Christians, not the government of Iraq. John Kerry, Sec'y of State,

[3] The Court granted respondent's Motion to Stay on June 7, 2017, pending a decision on his motion to reopen. With this decision, the stay is vacated.

Remarks on Daesh and Genocide (Mar. 17, 2016); *see also* Respondent's Motion to Reopen, Exhibit 9 ("Kerry said, '. . . Daesh is responsible for genocide against . . . Christians'") (emphasis added); Exhibit 10 ("U.S. officials have announced today that President Obama's administration will formally acknowledge that ISIS is responsible for committing genocide against Christians in Iraq and Syria") (emphasis added). Thus while recognition by the United States that Iraqi Christians are currently being subjected to genocide constitutes new evidence which was previously unavailable to respondent, that evidence is not material to respondent's application for deferral of removal under the Torture Convention, for which he must prove that he will be tortured by government officials or that the government will acquiesce in his torture. *See* 8 C.F.R. § 1003.23(b)(4).

Even if respondent had successfully demonstrated a material change in country conditions, the Court would still deny his motion to reopen because it was untimely – respondent filed his motion to reopen over one year after former Secretary Kerry's remarks. *Matter of T-M-H- & S-W-C-*, 25 I&N Dec. 193 (BIA 2010) (holding that waiting six months or longer after the changed circumstance is not reasonable, and that only in "rare cases" may a delay of one year or more be justified). In fact, respondent only filed his motion after he was detained by immigration authorities. His detention, and the fact that his removal is allegedly imminent given that authorities have begun moving forward with scheduled removal of certain aliens with final orders of removal to Iraq, is a changed personal circumstance not warranting reopening. *Liu*, 560 F.3d at 492.

The Court declines to use its *sua sponte* authority to reopen respondent's proceedings because he has failed to sufficiently demonstrate eligibility for deferral of removal under the Torture Convention. To establish eligibility for protection under the Torture Convention, respondent bears the burden of demonstrating that he faces a particularized threat of torture "by or

at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1); *Almuhtaseb*, 453 F.3d at 751 (internal citation omitted). While acquiescence includes the "willful blindness" of a public official, a government's inability to control private parties does not equate to willful blindness. *Amir v. Gonzales*, 467 F.3d 921, 927 (6th Cir. 2006). Respondent has presented no evidence that he could meet that burden should the Court reopen these proceedings. Respondent argues that "there is a clear probability that he would be persecuted" if returned to Iraq. Respondent's Motion to Reopen at 32 (emphasis added). However, respondent must prove that he will be tortured by the Iraqi government. The documentary evidence submitted by respondent indicates that the Iraqi government is currently waging an aggressive war against ISIS, and there is no proffered evidence that any torture respondent might face at the hands of ISIS would be conducted with the consent or acquiescence of the Iraqi government or public officials thereof. *See, e.g.*, Respondent's Motion to Reopen, Exhibit 4 ("On May 24 Prime Minister Haider al-Abadi stated that the government would take measures to protect civilians during the operation to retake Fallujah from ISIS" and also describing an operation to "retake Mosul"); Exhibit 11 (throughout the year, "government forces fought to liberate territory lost to Da'esh," also known as ISIS). A showing of general conditions of violence in Iraq is insufficient to establish eligibility for this limited form of relief. The Court will therefore deny respondent's motion to reopen.

IV. ORDERS

IT IS HEREBY ORDERED that respondent's motion to reopen be **DENIED**.

IT IS FURTHER ORDERED that this Court's June 7, 2017 order stayed removal is **VACATED**.

Mark Jebson
U.S. Immigration Judge

6-13-17
Date

Appeal Due Date: JULY 13, 2017

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA JAMIL HAMAMA,
ATHEER FAWOZI ALI,
ALI AL-DILAIMI,
HABIN NISSAN,
JIHAN ASKER,
MOAYAD JALAL BARASH,
SAMI ISMAEL AL-ISSAWI,

Petitioners,

v.

REBECCA ADDUCCI, Detroit Field Director, Immigration and Customs Enforcement,

Respondent.
_____/

Civil No. 17-11910
Hon. MARK A. GOLDSMITH
Mag. Judge DAVID R. GRAND

DECLARATION OF ROBERT K. LYNCH, JR.

I, Robert K. Lynch, Jr., make the following declaration.

1. I am a Deputy Field Office Director employed by the United States Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE), Enforcement and Removal Operations (ERO) in Detroit, Michigan. I have been employed with ICE and its predecessor (Immigration and Naturalization Service) since 1995. I have been in my current position as a Deputy Field Office Director with ICE/ERO at the Detroit Field Office since October 28,

2016. The Detroit Field Office consists of the States of Michigan and Ohio.

2. My duties include, among other things, to locate and/or apprehend aliens; prepare, present and defend deportation or exclusion proceedings, ensuring the physical removal of aliens from the United States at various stages of their deportation/exclusion proceedings, and ensuring the execution of final orders of removal. The subject matter of this declaration involves my official duties as an ICE Deputy Field Office Director, and is based on personal knowledge and information made known to me in the course of my professional duties.

3. I am aware of the case of Abdulkuder Hashim Al-Shimmery, A[redacted]. Al-Shimmery was arrested and detained by ERO in Nashville, Tennessee, for execution of his outstanding order of removal to Iraq. Tennessee is not within the jurisdiction of the Detroit Field Office. On or about June 15, 2017, Al-Shimmery filed a motion to reopen and stay with the BIA. These motions remain pending.

4. I am aware of the case of Qassim Hashem Al-Saedy, A[redacted] Al-Saedy was arrested and detained by ERO in Nashville, Tennessee, for execution of his outstanding order of removal to Iraq. Tennessee is not within the jurisdiction of the Detroit Field Office. On June 22, 2017, an immigration judge granted Al-Saedy a stay of removal pending review of a motion to reopen.

5. I am aware of the case of Abbas Oda Manshad Al-Sokaini A071 674

365. Al-Sokaini was arrested and detained by ERO in Albuquerque, New Mexico, for execution of his outstanding order of removal to Iraq. New Mexico is not within the jurisdiction of the Detroit Field Office.

6. According to information provided to me by ICE's Detroit Office of the Chief Counsel (OCC Detroit), as of June 25, 2017, approximately 79 Iraqi nationals arrested and detained in Michigan and Ohio for the purpose of executing their final orders of removal to Iraq, have filed motions to reopen their removal proceedings in the immigration court and/or the BIA, and 27 have received stays of their removal pending review of their motions to reopen.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct based upon reasonable inquiry, knowledge, information, and belief.

Executed this 25th day of June 2017 in Detroit, Michigan.

Robert K. Lynch, Jr.
Deputy Field Office Director
ICE Detroit Field Office