

THE "MATERIAL SUPPORT" PROBLEM: AN UNCERTAIN FUTURE FOR THOUSANDS OF REFUGEES AND ASYLUM SEEKERS

by Melanie Nezer

Under a relatively new policy, DHS has been applying the "material support" to terrorism ground of inadmissibility¹—which was greatly expanded by the USA PATRIOT Act of 2001² and the REAL ID Act of 2005³—to bona fide refugees and asylees. As a result, the U.S. refugee admissions program for Colombians has been nearly shut down, and approximately 10,000 ethnic and religious minority refugees from Burma who are ready to begin the process for resettlement in the United States may also be denied protection. In addition, some 500 asylum seekers with legitimate claims whose cases are complicated by material support issues are "on hold" and waiting for final decisions on their cases. Immigration judges have denied requests for asylum on the "material support" ground.

Ironically, for many of these refugees, the very circumstances that form the basis of their refugee or asylum claim have been interpreted in a way that has made them ineligible for protection in the United States. For example, refugees and asylum seekers who are coerced or who have acted under extreme duress in providing "support" to groups engaged in terrorist activity are being denied protection by the U.S. government. For other refugees, their support of a group that is associated with armed resistance against a government—even when that government is the one that has repressed and brutalized the refugee's ethnic or religious group—has rendered them ineligible for protection in the United States.

Legislative History: The USA PATRIOT Act and REAL ID Act

Recent legislation has included provisions that have expanded the already broad definitions of "terrorism," "terrorist organization," and "terrorist activity." In 2001, the USA PATRIOT Act expanded the grounds of inadmissibility and deportability relating to "material support" to terrorism to include support provided to groups that were not designated as terrorist organizations under the Immigration and Nationality Act (INA) or through publication in the *Federal Register*, but were deemed to be "terrorist organizations" because they engaged in "terrorist activity." Under the law, "terrorist activity" includes any use of a weapon or "dangerous device" (or threat, attempt, or conspiracy to do the same) with the intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property for any motive other than "mere personal monetary gain." In 2005, the REAL ID Act further expanded the definition of a "non-designated" terrorist organization to include a "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" any form of "terrorist activity."

As Congress expanded the terrorism definition, it included provisions in both the USA PATRIOT Act and the REAL ID Act to allow the government to exclude individuals from the broad scope of the terrorism definition in cases where it "should not apply." This discretion, in its current form, permits either the Secretary of Homeland Security or the Secretary of State, after consulting with each other and the Attorney General, to determine that an individual should not be barred from admission under some of the expanded terrorism provisions, including the material support provision.⁴ This discretion also allows the Secretaries of Homeland Security and State to conclude that an organization will not be considered a terrorist organization "solely by virtue of having a subgroup" that meets the terrorist organization definition.⁵ As previously noted, *any* group that endangers *any* person or property for *any* reason other than financial gain can be considered a "terrorist organization."

¹ INA §212(d)(3).

² The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 [hereinafter the USA PATRIOT Act of 2001], Pub. L. No. 107-56, §412, 115 Stat. 272 (codified at INA §236A(a)(3)).

³ REAL ID Act, Div. B, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, §103, 119 Stat. 231 (May 11, 2005).

⁴ INA §212(d)(3) as amended by REAL ID Act §104.

⁵ *Id.*

In brief, Congress has statutorily authorized the Secretaries of Homeland Security and State to use their discretion to ensure that innocent refugees and immigrants are not barred from admission to the United States. The law allows the Secretary of Homeland Security and Secretary of State to conclude that the material support provision does not apply to individuals who provided "support" under severe duress, such as under threat of torture or death to themselves or to family members. It also permits DHS and the State Department to determine that the definition of a "terrorist organization" does not apply to specific groups that are associated with an armed subgroup engaged in a liberation movement or self-defense against a repressive authoritarian regime. To date, this discretion has not been exercised.

Colombian Refugees: No Exception for Duress

The first group to feel the impact of the new policy was Colombian refugees, many of whom have been coerced under extreme duress to make payments to armed groups on the State Department's list of foreign terrorist organizations (FTOs), including the United Self-Defense Forces of Colombia (AUC), the Revolutionary Armed Forces of Colombia (FARC), and the National Liberation Army (ELN). These groups pervade nearly all aspects of Colombian life, and payments to these groups, often made under threat of torture or death to oneself or a loved one, are a necessity of survival for many Colombians. UNHCR estimates that at least 70% of the Colombian refugees who would otherwise be suitable for referral to the U.S. refugee program have been forced by the FARC or other designated FTO to pay "taxes" or other types of coerced payments.

In one case, which was "deferred" (placed on indefinite hold) by the U.S. refugee program, but ultimately accepted for resettlement of the applicant in Sweden, Mr. R paid a ransom to obtain the release of his father, who had been kidnapped by the FARC. After his release, the father admitted that he had earlier been forced into making payments to the FARC. The kidnapping occurred after the father had refused to continue to make payments. After Mr. R's father was released, the FARC began to make threatening phone calls to Mr. R and in one call threatened to kidnap Mr. R's son. Mr. R and his family fled to Costa Rica. The United States deferred the case because DHS determined that Mr. R's payment of money to the FARC to obtain the release of his father constituted material support to terrorism.⁶

In another case, FARC guerrillas visited Mr. and Mrs. H's farm and demanded payments. Because the family

did not have money to give them, the guerrillas took some livestock instead. When the guerrillas later returned and found that Mr. and Mrs. H had not obtained money for payments and had nothing left worth taking, they shot and killed Mr. H and raped Mrs. H. Mrs. H reported the killing of her husband to the police, but no action was taken. Mrs. H., along with her sister who also lived at the farm, fled to another city in Colombia where they had relatives. However, after receiving warnings that there were FARC members in the area who might know them, they escaped to Ecuador. DHS deferred the case because the livestock Mrs. H provided to the FARC was deemed to be material support. Mrs. H and her sister were ultimately resettled in Canada.⁷

Burmese Refugees: A Different "Material Support" Issue

More recently, the "material support" bar to admissibility has been applied to ethnic and religious minority refugees and asylum seekers from Burma. These refugees have been denied protection because they have contributed to ethnic and religious organizations that are associated with subgroups that oppose the repressive Burmese authorities. While these parent groups and subgroups are not designated by the State Department as FTOs, the activities of certain associated subgroups that advocate the overthrow of the military rulers of Burma have been construed as "terrorist activity" as broadly interpreted from the INA definition.⁸

The military junta that has ruled Burma since 1988 is widely acknowledged to be among the most repressive and brutal regimes in the world, and the United States long ago severed all formal ties with the government.⁹

⁷ *Id.*

⁸ The Chin National Front (CNF) is one such group in Burma that opposes the government. According to the USCIS Resource Information Center (RIC), "The State Department does not have information suggesting that the CNF or CNA (Chin National Army) have been involved in terrorist activities or in abuses against civilians on any large or systematic scale." Other experts cited in the RIC's response stated that the CNA "does not control large amounts of territory, and its main targets have been military since its inception"; that it is generally viewed as a "benign and unifying force" among the Chin; that "one rarely hears of specific abuses by CNF/CNA personnel, but such abuses usually seem to involve extortion — excessive tax collection from villagers, an interference with cross-border trade," and that while the taxation may be part of CNF/CNA policy, "the abuse of civilians is certainly not, and is a divergence from discipline by individual soldiers." RIC Query Response # MMR04001.ZMI (Feb. 26, 2004).

⁹ DOS International Religious Freedom Report (2004); DOS Human Rights Report (2004). On November 1, 2005, President Bush met with a leader of an opposition group in Burma (the Shan Women's Action Network or "SWAN") and praised her

⁶ Examples of Material Support Cases, compiled by UNHCR Regional Office, Washington, D.C. (Oct. 2005).

However, Burmese refugees have been denied refugee protection for their "material support" of groups that oppose the government. For example, the U.S. government deferred the case of Mr. X, a Christian Chin, who was tortured by Burmese soldiers for twenty-three days solely because of his relationship to his uncle who was a member of the Chin National Front (CNF)—a political organization that opposes the current regime through means that sometimes extend to armed resistance. After Mr. X was released, he allowed his uncle to sleep at his house for one night. The next morning, government officials opened fire on Mr. X's house, killing his brother, and burned down Mr. X's house. Mr. X escaped, finally reaching Malaysia. Despite his brutal treatment by the Burmese government, Mr. X was found to be ineligible for resettlement in the United States because the act of providing shelter to his uncle was deemed by DHS adjudicators to constitute "material support."

Material Support in the Asylum Context

It is clear that DHS has taken a hard line on "material support" in refugee admissions and that DHS is enforcing this bar in affirmative asylum cases. As noted above, some 500 asylum cases are "on hold" at DHS headquarters with material support issues.¹⁰

It is less clear how consistently DHS trial attorneys are raising the material support bar when asylum claims are presented in removal proceedings, but DHS has opposed the granting of asylum on this basis in a number of cases. Immigration Judges (IJs) have varied in how they interpret the material support bar and in determining whether a duress exception exists.

In one post-REAL ID Act case (an unpublished case decided in October 2005) involving a Nepalese medical aide who was kidnapped by Maoist insurgents and forced to provide medical treatment to wounded Maoist fighters, DHS argued the "material support" bar should apply. DHS argued that because the Maoist insurgent group that kidnapped the asylum seeker is on the U.S. list of terrorist organizations, the medical care he provided constituted "material support." This was despite the fact that the asylum seeker established that he been forced to

dedication "to helping those who suffer under the military regime in Rangoon and to exposing the regime's abuses, particularly against women." *Bush meets critic of Myanmar regime, highlights rights violations*, Agence France Presse (Nov. 1, 2005).

¹⁰ USCIS has stated that 80% of the cases on hold are from Nepal, India, Sri Lanka, and Colombia. USCIS also indicated that cases with material support issues are referred to immigration court only if there is a mandatory bar present in the case, such as a criminal conviction or failure to meet the one-year filing deadline. USCIS Headquarters Asylum Meeting with Community Based Organizations (Nov. 8, 2005).

provide the treatment at gunpoint. The applicant fled Nepal after the Nepalese army accused him of being a Maoist sympathizer and tortured him.

DHS contended that the absence of provisions in the INA establishing a duress defense meant that the IJ had no discretion to waive the material support bar. DHS also argued that the applicant's "material support" gave the government "reasonable grounds" to consider him a threat to the national security of the United States and that he was deportable on that basis under the REAL ID amendments to the INA.

The IJ rejected DHS's arguments and granted asylum, ruling that a duress defense applies to the material support bar to admission and noting that the applicant provided medical treatment to another injured human being while acting under imminent threat to his own life. However, the IJ limited his ruling to the imminent death threat evidence before him, and distinguished the case from others where extortion of money and other support by terrorist organizations was accompanied by generalized threats of harm. This suggests that these types of circumstances may not create sufficient "duress" to justify excluding an applicant from the material support bar. The IJ also rejected DHS's argument that the government had reasonable grounds to believe the applicant was a danger to national security, noting that the applicant had been "at large" for at least two years following his admission to the United States and that DHS had never sought to detain him because of its alleged concerns. DHS reserved appeal in the case.

In other cases, the IJ has denied asylum based on the material support bar. An IJ denied asylum to a Baptist Chin from Burma who experienced the arbitrary arrests and killings of close relatives in retaliation for anti-government political activities and suffered from the ethnic and religious persecution of the military regime. Because of her experiences as a persecuted Christian Chin, the asylum seeker became sympathetic to the CNF and, believing that the CNF supported the freedom of the ethnic Chin people, made payments and donated supplies to the CNF over a period of several months. While the asylum seeker asserted that she was aware of the CNF's work for the liberation of the Chin people, she testified that she was not aware that they were engaged any combat activities at the time she provided support.

The IJ found that the asylum seeker had a well-founded fear of persecution and met the definition of refugee as described in INA § 101(a)(42)(A), and neither the IJ nor DHS disputed the brutality and illegitimacy of the Burmese military regime. However, the IJ ruled that, because the CNF has an armed wing that has used force against the Burmese military, and because the Burmese military is made up of individuals and owns property, either of which could be endangered by the CNF's use of force, the CNF engaged in "terrorist activity" as defined by the INA and was therefore a nondesignated terrorist

organization. The IJ concluded that the asylum seeker was barred from asylum for providing material support to a terrorist organization.

Conclusion

The overall statutory purpose of the INA as amended by the USA PATRIOT Act and the REAL ID Act is to protect refugees consistent with U.S. obligations under the 1951 Refugee Convention and 1967 Protocol while preventing terrorists from being granted asylum. The current policy, which fails to consider the amount or the circumstances of support and bars from admission refugees who provided "support" under extreme duress or to groups engaged in defending an oppressed minority that are unjustly included in the government's overly broad interpretation of "terrorism," fails to meet either of these important goals.

Practitioners should be prepared for DHS asylum officers to closely examine the circumstances of any support provided to groups that may be engaged in "terrorism" as broadly defined by the INA, and should expect that DHS trial attorneys will oppose asylum on the material support ground in cases where it could be applied. Practitioners should also be aware of the possibility that the material support bar could present an obstacle when other types of relief are requested in immigration court, or when adjustment of status applications (particularly those of asylees and refugees) are filed.

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