

Report Summary & Recommendations

Denial and Delay

The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States



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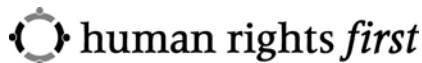
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“You testified in your interview for Asylum that you were a member of one of the political factions fighting the Taliban in Afghanistan.”

Reason given by the U.S. Department of Homeland Security for denying permanent residence under the terrorism bars to an Afghan refugee (2008)

IMMIGRATION LAWS that target individuals who have engaged in or supported the commission of terrorist acts serve two very legitimate goals: to exclude from the United States people who threaten our national security, and to penalize people who have engaged in or supported acts of violence that are inherently wrongful and condemned under U.S. and international law. Both of these purposes are consistent with the United States’ commitment to protect refugees who have fled political, religious and other forms of persecution. Indeed, the 1951 Refugee Convention and its Protocol explicitly exclude from protection persons who have committed a range of serious crimes, including acts of terrorism. The Refugee Convention also allows a country to expel a refugee who poses a danger to its security, or who has been convicted of a particularly serious crime in that country and constitutes a danger to the community.

But over the past eight years, thousands of legitimate refugees who pose no threat to the United States have had their applications for asylum, permanent residence, and family reunification denied or delayed due to overly broad provisions of U.S. immigration law that were intended to protect the United States against terrorism. Changes to the immigration laws as part of the USA PATRIOT Act in 2001 and the REAL ID Act in 2005 greatly expanded provisions relating to “terrorism.” The enactment of these new provisions also drew attention to the longstanding over-breadth of the immigration law’s pre-existing definition of “terrorist activity.”

Under these new and old laws, as they have been expansively interpreted by the federal agencies charged with enforcing them, refugees who were victimized by armed groups, including by groups the U.S. has officially designated as terrorist organizations, are being treated as “terrorists” themselves. Any refugee who ever fought against the military forces of an established government is being deemed a “terrorist.” The fact that some of these refugees were actually fighting alongside U.S. forces shows how far removed the immigration law’s “terrorist” labels have become from actual national security concerns. Refugees who voluntarily helped any group that used armed force are suffering the same fate—regardless of who or what the group’s targets were and regardless of whether the assistance the refugee provided had any logical connection to violence.

Over 18,000 refugees and asylum seekers have been directly affected by these provisions to date. Currently, over 7,500 cases pending before the Department of Homeland Security are on indefinite hold based on some actual or perceived issue relating to the immigration law’s “terrorism”-related provisions. The overwhelming majority of these cases are applications for permanent residence or family reunification filed by people who were granted asylum or refugee status several years ago and have been living and working in the United States since then. In fact, in order to keep a person’s case on hold based on the immigration law’s “terrorism bars,” the Department of Homeland Security must believe that the

person does *not* pose a danger to the United States—this is a requirement of the agency’s “hold” policy.

In 2007, Congress attempted to address the impact of these provisions on a few groups of refugees through piecemeal statutory changes, and also broadened the discretionary authority of the Secretaries of State and Homeland Security to grant “waivers” to exempt individual refugees from the impact of these provisions. These changes were helpful to particular groups of refugees who benefited from the partial implementation of the government’s expanded waiver authority.

But the failure to address the flawed definitions and legal interpretations at the root of this problem, and the reliance on a cumbersome and duplicative “waiver” process as the exclusive means of resolving their unintended effects, have left many refugees in limbo – labeled as “terrorists,” threatened with deportation back to persecution, separated from their families, and in some cases detained for lengthy periods. The implementation of “waivers,” whose positive impact has mainly benefited refugees overseas, has not kept pace with the growing backlog in the United States.

Human Rights First, which has continued to monitor the impact of the immigration law’s “terrorism”-related provisions on asylum seekers and refugees, is regularly receiving new reports of asylum seekers and refugees who are being affected by these provisions. Some of these recent or ongoing examples include:

- A refugee from Burundi was detained for over 20 months in a succession of county jails because the U.S. Department of Homeland Security and the immigration judge who would otherwise have granted him asylum took the position that he had provided “material support” to a rebel group because armed rebels robbed him of four dollars and his lunch.
- A young girl kidnapped at age 12 by a rebel group in the Democratic Republic of the Congo, used as a child soldier, and later threatened for advocating against the use of children in armed conflict, has been unable to receive a grant of asylum, as her application has been on hold for over a year because she was forced to take part in armed conflict as a child.

- A man who fled political and religious persecution in Bangladesh has had his application for permanent residence placed on indefinite hold because he took part in his country’s successful struggle for independence—in 1971.
- The minor children of members of the democratic opposition from Sudan who were granted asylum in the United States years ago have been prevented from becoming permanent residents because the peaceful political activities of their parents have been deemed to constitute “material support to a terrorist organization.”

The Obama Administration inherited this situation nine months ago, and is reviewing the range of potential solutions. The Administration should avoid the temptation to continue to take a piecemeal approach to this problem. Unless the core problems with the law and its interpretation are addressed, many of the issues raised in this report will go unresolved. Refugees who seek asylum in this country will continue to risk delayed adjudications, prolonged separation from family, and deportation in violation of the Refugee Convention. Attempts to deal with the overbreadth of the “terrorism bars” through a waiver process will continue to swallow the time of senior officials at U.S. Citizenship & Immigration Services, Immigration & Customs Enforcement, the DHS Offices of General Counsel and Policy, the Executive Office for Immigration Review and other components of the Department of Justice, the Department of State, and the National Security Council. And there will be no end to the jarring contradictions—with historical reality and other law—that our immigration system’s understanding of “terrorism” continues to generate on a daily basis.

A more effective approach would be to fix the underlying statutory definitions and agency legal positions that have created this problem. Not only would such an approach allow the protection of the victims of persecution who seek refuge in this country, it would also help to ensure that the United States is no longer labeling medical professionals who treat the wounded, parents who pay ransom to their children’s kidnappers, and refugees who engaged in or supported military action against regimes— from Saddam Hussein in Iraq to the oppressive military junta still in power in Burma—that had blocked peaceful avenues for political change, as “terrorists” or supporters of terrorism by virtue of those facts alone.

The specific recommendations outlined at the end of this summary would not compromise security. Rather, they would help focus the scope and application of the immigration law's "terrorism"-related provisions on the people Congress intended those provisions to target. Implementing these recommendations would also free administrative resources that for the past four years have been focused overwhelmingly on people who do not pose a threat to the United States—resources that would be better spent on those who do.

The Immigration Law's Overly Broad Definitions

“We also believe that the definitions of terrorist activity, terrorist organization, and what constitutes material support to a terrorist organization in the Immigration and Nationality Act (INA) were written so broadly and applied so expansively that thousands of refugees are being unjustly labeled as supporters of terrorist organizations or participants in terrorist activities. . . We urge the committee to re-examine these definitions and to consider altering them in a manner which preserves their intent to prevent actual terrorists from entering our country without harming those who are themselves victims of terror—refugees and asylum seekers.”

Cardinal Theodore McCarrick, testifying before the Senate Subcommittee on Immigration, Refugees, and Border Security, October 8, 2009

The Overly Broad Definition of “Terrorist Activity”

“[F]ighting against the Iraqi Regime [of Saddam Hussein] meets the definition of engaging in terrorist activity.”

Stated basis for DHS's denial of permanent residence to a refugee from Iraq (2008)

The immigration law's current definition of “terrorist activity” is so broad that it sweeps in people who are neither guilty of criminal wrongdoing nor a threat to the United States. This provision, which has been in place since 1990, defines terrorist activity to include any unlawful use of a weapon against persons or property, for any purpose other than mere personal monetary gain. A law that defines any military action against a dictatorial regime as “terrorism” is just as likely to ensnare the United States' friends as its enemies. Nor does this definition of terrorist activity target the kind of criminal wrongdoing the term “terrorism” typically describes. The immigration law's definition can be read to cover everyone from George Washington to survivors of the Warsaw Ghetto uprising. The definition has been used against modern-day refugees who fought alongside U.S. forces to overthrow Saddam Hussein.

Compounding the problem, several provisions included in the USA PATRIOT Act of 2001 created new definitions of “terrorist organizations” and of “material support” that were based on this already overbroad definition of “terrorist activity.” These amendments, which were further expanded in 2005 with the passage of the REAL ID Act, have dramatically extended the reach of the immigration law's original definition of “terrorist activity.”

The “Tier III” Embarrassment: “Undesignated” Terrorist Organizations

“[O]ur own history is based on an armed response to a government that we could not change democratically.”

Immigration judge in *Matter of S-K*, expressing concern at breadth of the Tier III definition (2006)

The USA PATRIOT Act created a new and sweeping definition of a “terrorist organization” under the immigration laws. This three-part definition includes the “foreign terrorist organizations” (commonly referred to as “Tier I” groups) that were designated as such by the Department of State under pre-existing provisions of law, as well as a second tier of organizations (commonly referred to as “Tier II” groups) that are also publicly listed as such by the Secretary of State. But it also includes a third category of groups, defined as “terrorist organizations” solely for purposes of the immigration laws. This third category includes “any group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” acts that the immigration law defines as “terrorist activity”—essentially, any unlawful use of a weapon for purposes other than personal enrichment. These groups are commonly referred to as “Tier III” or “undesignated” terrorist organizations.

In 2006, the U.S. Board of Immigration Appeals, in a case involving a Baptist member of a Burmese ethnic minority who had contributed to the Chin National Front, a group that fought the Burmese military junta, held that the targets and possible justifications of such use of force are legally irrelevant. The result of this holding is that the “Tier III terrorist organization” definition will apply to a group that has used force in self-defense against the army of a military regime that does not allow its citizens to change their government by peaceful means.

The immigration law’s prohibition of “material support” to a “terrorist organization” makes anyone who contributes “material support” to a group liable for the worst acts of the group. The USA PATRIOT Act and subsequent amendments by the REAL ID Act also expanded the concept of “material support” to cover contributions not only to listed or designated “Tier I” or “Tier II” organizations, but to any group

deemed to meet the new “Tier III” definition. These changes to the immigration laws also made a broad range of other associations with these groups bars to refugee protection, permanent residence, and admission to the United States.

The result has been to label as “terrorist” an ever-expanding range of individuals and groups who pose no threat to the United States and have not engaged in any conduct that would be considered criminal under international law. Many of these refugees have been unjustly targeted by the immigration law’s “terrorism”-related provisions due to their affiliation with groups that were U.S. allies or whose objectives the United States supports. For example:

- Saman Kareem Ahmad, an Iraqi former interpreter, now language and culture instructor, for the U.S. Marine Corps, was informed that his past connection to a Kurdish group allied with the United States made him inadmissible because the group was considered a “Tier III terrorist organization” under the immigration law. He was only granted a waiver of inadmissibility after he was profiled on the front page of the *Washington Post* in March 2008.
- Meanwhile, another member of Iraq’s Kurdish ethnic minority who likewise served as an interpreter to U.S. forces in Iraq was also deemed inadmissible based on a past connection to the same Kurdish group that immigration adjudicators have concluded is a “Tier III terrorist organization.” Unlike Saman Kareem, this former U.S. interpreter still has not been granted a waiver. The only obvious difference between the two cases is that this second man has been unable to publicize his situation due to fears for the safety of his family still in Iraq. While this second interpreter should benefit from the recent announcement of discretionary “waivers” for voluntary associations with the Kurdish group in question, the underlying problem of the Tier III definition remains. And the fact that this man has been left in limbo for a year and a half longer than his colleague shows how discretionary “waiver” authority that had been touted as a tool for flexibility has instead acted as a straitjacket.
- Multiple members of the Movement for Democratic Change (MDC), the main democratic opposition party in Zimbabwe, which has been on the receiving end of political violence in that country, had their applications for

permanent residence placed on hold or were informed that the U.S. Department of Homeland Security was considering terminating their asylum status because it considered the MDC to be a “Tier III terrorist organization.” At the same time, in June 2009, President Obama was meeting with MDC leader Morgan Tsvangirai, currently Prime Minister of Zimbabwe, and expressing his “extraordinary admiration” for Tsvangirai’s “courage and tenacity” in navigating the very difficult political situation in his country.

While the Department of Homeland Security is reviewing some of its more outlandish “Tier III” characterizations (the MDC included), the fundamental problem is the “Tier III terrorist organization” definition itself, which will inevitably result in similar embarrassments in the future. In contrast to the other categories of “terrorist organizations” that are publicly designated as such on lists posted on the website of the U.S. Department of State, this new undesignated “Tier III” category is not listed anywhere. Groups that have been characterized as “terrorist organizations” under the immigration law’s “Tier III” definition—and which the U.S. government does not consider “terrorist organizations” in any other context—include:

- All Iraqis, and Iraqi groups, who rose up against Saddam Hussein in the 1990’s, including those who took part in the failed uprising at the end of the Gulf War of 1991 that was encouraged by the first President Bush;
- All Iraqis, and Iraqi groups, that later fought against Saddam Hussein’s armies in conjunction with the Coalition forces that ultimately overthrew his regime in 2003;
- All of the Afghan *mujahidin* groups that fought the Soviet invasion in the 1980’s, with U.S. support;
- The Democratic Unionist Party and the Ummah Party, two of the largest democratic opposition parties in Sudan, many of whose members were forced to flee the country in the years after the 1989 military coup that brought current President Omar Al-Bashir to power;
- The Sudan People’s Liberation Movement/Army (SPLM/SPLA), the South Sudanese armed opposition movement that after years of civil war in pursuit of southern self-determination is now the ruling party of an autonomous Government of South Sudan;

- Virtually all Ethiopian and Eritrean political parties and movements, past and present;
- Every group ever to have fought the ruling military junta in Burma that was not included in the legislation that removed the Chin National Front and others from the scope of the Tier III definition;
- Any group that has used armed force against the regime in Iran since the 1979 revolution;
- The Movement for Democratic Change (MDC), the main political opposition to President Robert Mugabe of Zimbabwe.

This is not to say that an individual’s activities in connection with these groups are irrelevant to a decision about that individual’s eligibility for refugee protection or residence in the United States. But any activities that would be a legitimate basis for excluding a person are already covered by other provisions of the immigration law that do not rely on the overly broad “Tier III” definition.

The number of groups being characterized as “undesignated terrorist organizations” is growing daily, invisible to the public eye. Human Rights First receives regular inquiries from immigration lawyers and refugee advocates as to whether a particular organization “is a Tier III group.” The problem with the Tier III definition is that there is no answer to that question. A group “is a Tier III group” when some immigration adjudicator, somewhere, says that it is, in the context of an individual case. And when that happens, there is no public announcement.

Attempts to implement “waivers” of the immigration law provisions relating to “Tier III” groups have been highly centralized and controlled, and have failed to keep pace with the completely decentralized process by which these groups are characterized as “undesignated terrorist organizations.” While prompt implementation of an individualized waiver process for persons affected by this overbroad law is urgent and necessary, the “Tier III” definition will continue to create unnecessary suffering and embarrassment.

Targeting Refugees Rather Than Terrorists

“Our laws call on the Secretary of State to designate certain groups as terrorist groups. Other groups take up arms to resist tyrannical regimes, just as our founding fathers engaged in armed resistance to a relatively benign despotism. While we have been told that the current law does not allow such distinctions, there must be a way to distinguish between genuine terrorists and legitimate resistance groups. If current law does not do so, then we need to fix it.”

Rep. Chris Smith, hearing before the House Subcommittee on Africa, Global Human Rights and International Operations, Committee on International Relations, May 10, 2006

The government does not need the provisions of the immigration law that build on the “Tier III terrorist organization” definition as the basis to deport people it actually seeks to expel for security reasons. The immigration law allows the deportation or denial of entry to non-citizens based on a very broad range of human rights violations and common crimes. It also makes people lawfully admitted to this country deportable for reasons ranging from failing to maintain their visa status to failing to register a change of address.

The overly broad “terrorism”-related provisions of the immigration law are also bars to asylum or refugee resettlement for refugees currently seeking protection from persecution. But here too, the “Tier III” definition provides no additional security benefits, because other parts of the law already bar relief for anyone who poses a threat to the security of the United States or is guilty of acts of terrorism or other serious crimes. Indeed, U.S. law has long barred from both asylum and withholding of removal:

- People who engaged in or assisted in or incited the persecution of others;
 - People who have been convicted of a particularly serious crime in the United States or have committed a serious non-political crime abroad;
 - People who have engaged in terrorist activity (as noted above, the current definition of this term is overbroad, but a narrower definition would have a proper place in immigration enforcement and be consistent with U.S. commitments to refugee protection);
 - People who are representatives of foreign terrorist organizations; or
 - People who otherwise pose a threat to the security of the United States.
- Moreover, refugees seeking resettlement from overseas, and refugees and asylees applying for permanent residence after their arrival, can be denied based on provisions of the immigration law that bar from the United States:
- People who are believed to be seeking to enter the U.S. to engage in unlawful activity;
 - People whose entry or proposed activities in the United States the Secretary of State believes would have potentially serious adverse foreign policy consequences for the United States;
 - People who have been members or affiliates of a totalitarian party;
 - People who have been involved in genocide, torture, or extrajudicial killings;
 - People who have been associated with a terrorist organization and intend to engage in activities in the United States that could endanger the welfare, safety, or security of the United States;
 - People who are believed to have trafficked in controlled substances or colluded with others in doing so;
 - People who admit having committed a crime involving moral turpitude;
 - People who have sought to procure a visa or other immigration benefit or admission to the United States through fraud or willful misrepresentation of a material fact;
 - People who have encouraged or assisted another person in trying to enter the U.S. illegally; as well as

- People who have voted in violation of any Federal, State, or local law, have engaged in prostitution, have engaged or assisted in international child abduction, or are coming to the United States to practice polygamy.

Extreme and Inflexible Legal Positions

Over the last five years of the Bush Administration, the Departments of Homeland Security and Justice adopted interpretations of the immigration law's terrorism-related provisions that are extreme, inflexible, and inconsistent with this country's commitments under the Refugee Convention and Protocol. These legal positions have greatly exacerbated the impact of these terrorism-related provisions on legitimate refugees who were never their intended targets. These overly expansive legal positions include:

- Treating victims of armed groups as supporters of the very groups that extorted goods or services from them under threat of violence;
- Applying the "terrorism bars" to the acts of children in the same way as to adults, and as a result, barring a number of former child soldiers and child captives of armed groups;
- Treating minimal contributions—a few dollars, a chicken, a bag of rice—as "material support;"
- Interpreting "material support" to cover virtually anything, including non-violent speech and other purely political activity—e.g. writing for a student newspaper or distributing political flyers—that a person did in connection with his or her membership in a group the Department of Homeland Security deems to be a "terrorist organization" under the immigration laws, including a "Tier III" group;
- Treating medical care as "material support;" and
- Retroactive application of the USA PATRIOT Act's definition of a "Tier III" organization to groups that no longer exist or that have given up violence, stretching back as far as four decades.

Unfortunately, the Department of Homeland Security under the Obama Administration has thus far not altered the legal positions it inherited from its predecessors. These same positions continue to be adopted by immigration judges and the Board of Immigration Appeals in some individual cases. The Department of Homeland Security continues to use the "terrorism"-related provisions of the immigration law in a very expansive way to exclude refugees from protection or permanent residence, ironically based on the same facts these refugees themselves voluntarily disclosed to the U.S. government in making their claims for asylum or refugee protection. For example:

- The asylum application of a woman from Ethiopia has been on hold for over three years because she took food to her son when he was arbitrarily detained for political reasons in a jail where prisoners were not fed. The son was involved in the political wing of a group DHS considers to be a "Tier III terrorist organization." But the mother was not, nor had she ever supported the group in any tangible way.
- A young man who was granted asylum after fleeing persecution in Afghanistan over 20 years ago has yet to be granted permanent residence because he carried supplies as a child for a *mujahidin* group fighting the Soviet invasion in the 1980's. His childhood actions have been deemed "material support to a terrorist organization" under the USA PATRIOT Act. The *mujahidin* group in question dissolved years ago, and its former leaders have been key U.S. allies in post-Taliban Afghanistan.

The “Waiver” Process— Cumbersome and Inadequate

“[I]n my position I have responsibility for literally every policy matter that comes across the Department’s plate, ranging from immigration and refugees to border screening and preparedness. And I personally have spent more time on this issue than on any other by far in volume, and that will continue to be the case, I think, until this issue is finally resolved.”

Paul Rosenzweig, Deputy Asst. Secretary for Policy, U.S. Department of Homeland Security, September 19, 2007

Since 2006, the Executive Branch has openly acknowledged that the immigration law’s “terrorism bars” are having an unintended impact on refugees, and that this is a problem. Rather than rethink their interpretation of some of these provisions and support legislation to correct the underlying legal definitions, the immigration agencies insisted that the sole solution was for them to grant discretionary “waivers” to individual applicants. This power has been vested by Congress in the Secretary of Homeland Security and the Secretary of State, in consultation with the Attorney General.

But attempts to fully implement this discretionary authority, enacted in 2005 and expanded in 2007, have fallen victim to unprecedented levels of official paralysis, while the number of refugees suffering from the impact of these provisions continues to grow. Attempts by the Secretary of Homeland Security, the Secretary of State, and the Attorney General to implement the statutory waiver authority have shown why a process that requires consultation among three Cabinet-level officials is not a realistic method of conducting refugee status determinations and other routine immigration adjudications. Discussions over basic frameworks to implement waiver authority have required protracted negotiation among very high-level government officials who also have many other urgent claims on their time. Granting waivers related to particular “Tier III” groups—some of them so long defunct that their consideration has required archival research—has likewise foundered, as the debate over whether or not to grant a group-based waiver becomes a referendum on the

group that is often quite disconnected from the facts and equities of the individual asylum seekers and refugees affected.

Where waivers have been implemented, the Department of Homeland Security has been approving cases. Since implementation began in late 2006, waivers have been granted in 8,961 refugee cases overseas, 1,821 applications for permanent residence and family reunification filed by refugees and asylees already granted protection, and 253 asylum seekers whose affirmative applications for asylum were pending before the Department of Homeland Security’s Asylum Office. But these cases have only been approved after two levels of often duplicative adjudication, first on the merits of the application for asylum or other status, and then on whether or not to grant a waiver. Applicants are given no clear information about what is happening to their cases and those who are granted a waiver receive no notice of this fact. This opaque and often duplicative process results in significant delay, and provides no opportunity to appeal a mistaken decision. Some cases in immigration court are not being considered for waivers at all, while those that are considered face extraordinary delays.

The Department of Homeland Security and the Department of State should make progress toward full implementation of discretionary waiver authority an urgent priority. The experience of the past four years, however, has confirmed that waivers cannot be the exclusive means of addressing the overbreadth of the “terrorism bars.” Legislative change is needed to ensure that refugees can have their cases decided effectively and without delay, with essential safeguards like the opportunity to appeal a mistaken decision. Legislative change would also allow these federal agencies to focus their application of the immigration law’s “terrorism”-related provisions on those Congress intended to target.

More Progress Needed on “Duress” Waivers

The Departments of State and Homeland Security have now finally implemented their authority to grant exceptions to the “material support” bar to applicants who were forced to give goods or services to all categories of armed groups. The implementation of these waivers in cases pending before the Department of Homeland Security is making an enormous

difference to the individual refugees affected. Nearly all the asylum seekers who have been granted waivers of any of the immigration law’s “terrorism bars” since waiver implementation within the United States began in 2007 have been duress cases.

But implementation of duress waivers has extended only to the “material support” bar, leaving out equally deserving refugees whose victimization fell under some other legal heading. Several child soldiers who fled to the United States in search of refuge are among those caught in this gap in waiver implementation, because they were actually sent into combat or received “military-type training” from their captors. Moreover, as discussed below, refugees otherwise eligible for a duress waiver of the “material support” bar who are in immigration court proceedings—rather than before the Asylum Office—face years of delay before they can be considered for relief.

Still No Waivers for Voluntary Support to “Tier III” Groups

“I recognize that the waiver authority Congress provided to the executive branch resulted in some positive changes in recent months. The executive branch is granting waivers to those whose ‘support’ under the overly broad definition of terrorist organization was provided only under duress. Some others, whose support was provided to groups exempt from the definition of terrorist organization, are also being granted protection. But that is not enough. The third tier of the law’s definition of terrorist organization continues to ensnare those deserving of our protection who pose no legitimate threat to the United States.”

Sen. Patrick Leahy, statement for the Congressional Record, August 5, 2009

Meanwhile, refugees whose legal problems stem from a *voluntary* connection to any non-governmental group that used armed force—a potential “Tier III” group—remain in limbo or worse. Despite three years of active discussion at

the highest levels of government, and of bipartisan Congressional concern, no comprehensive “waivers” have been implemented for voluntary associations with or support to groups that are now considered “Tier III terrorist organizations” for purposes of U.S. immigration law.

Attempts to implement this waiver authority on a group-by-group basis (i.e. by issuing announcements specific to associations with particular “Tier III” groups) have proved unworkable. In 2007, waivers were announced for “material support” to 10 named groups, many of whose members and supporters were slated for resettlement in the United States as refugees at about the same time the “terrorism bar problem” nearly shut down the U.S. resettlement program in 2006. Those 10 waivers, while helpful to the immediate needs of the U.S. refugee resettlement program and of several populations of refugees stranded overseas, had minimal impact on the asylum seekers, asylees, and refugees already in the United States who are the focus of this report. The 10 groups in question were later removed from the “Tier III” definition by the passage of legislation in late 2007; waivers were subsequently extended for people who had been combatants with those same groups or had other connections to them that barred them from protection in the United States.

The only group-based measure implemented since then has been the very recent announcement of waivers for persons associated with three Iraqi groups: the Iraqi National Congress, the Patriotic Union of Kurdistan, and the Kurdish Democratic Party. These waivers had been under discussion since the spring of 2008. This group-based approach leaves refugees associated with all other groups without relief, however non-violent their own activities may have been and however great their need.

- An Oromo woman from Ethiopia, for example, was granted asylum several years ago based on the persecution she suffered there due to her peaceful activities as a member of the Oromo Liberation Front (OLF). For those activities she was jailed without charges by Ethiopian security forces, and was beaten, whipped, and stomped on. She was also raped by one of her interrogators. She believes it was as a result of this rape that she became infected with HIV, as her husband was HIV-negative. In early 2008, this woman was denied permanent residence based on the same political activities she had

described in her application for asylum. Her daughter, still a minor, received a denial letter stating: “You are the child of an inadmissible alien. For that reason, you are inadmissible . . .” The family’s applications were later reopened, but due to the lack of waiver implementation for voluntary association with groups like the OLF that are considered “Tier III” organizations, they remain on hold a year and a half later.

While U.S. government officials have indicated that they are currently assessing implementation of additional aspects of their discretionary “waiver” authority, the continuing lack of a “waiver” for voluntary associations and activities that should not bar a person from refugee protection or subsequent integration is an urgent problem. Applicants for asylum or permanent residence who were involved in straightforward political activities in connection with groups the U.S. government does not treat as “terrorist organizations” in any other context face years of delay, and in some cases the threat of deportation. The lack of resolution of this problem also limits the ability of the U.S. government to resettle other refugee populations currently trapped in very difficult or dangerous situations overseas. And it causes regular public embarrassment as U.S. immigration law continues to define as “terrorist” numerous groups that do not merit this characterization and that the United States government actually supports.

The Immigration Court Waiver Process

“[C]ases involving material support provided to [Tier III] terrorist organizations are on hold with USCIS. However, the ICE/OPLA directive is to move forward with cases such as the respondent’s. As the respondent is not eligible for any of the exemptions in place at this time . . . there is no reason to continue this case indefinitely.”

Court filing by DHS Immigration & Customs Enforcement, urging immigration court not to delay deportation of Ethiopian asylum seeker (October 2009)

For asylum seekers and others in immigration court proceedings, waivers (whether based on duress or other grounds) are

simply not working. It took the Department of Homeland Security over three years from the time its statutory waiver authority was enacted in 2005 to devise a process to implement that authority in immigration court cases. And that process, finally implemented in late 2008, has proved so constricted in its scope, and so flawed in its implementation, that as of September 2009 it had led to the consideration of only a handful of cases nationwide. Asylum seekers who are actually facing deportation to countries where they would face persecution—and who thus have the most compelling and urgent of claims to the United States’ treaty obligations towards them—continue to face the greatest obstacles in even being considered for those waivers that have already been implemented, and to receive the lowest degree of government protection.

The key flaws in the immigration court waiver process are that (1) it does not provide for waiver consideration until the applicant has already been ordered deported and that order is considered administratively “final,” resulting in years of unnecessary delay and, in some cases, prolonged detention, as well as significant expense to the government; (2) it does not apply to the unknown number of cases denied based on the “terrorism bars” between October 2001 and September 2008, unless and until the applicant is detained; (3) it provides no protection against actual deportation for people for whom the Department of Homeland Security has not yet implemented waivers—individuals in this situation whose applications for asylum are being adjudicated by the Department of Homeland Security are placed “on hold” pending waiver implementation, but those whose applications for asylum are adjudicated by the immigration courts are not. These defects are having a serious impact on asylum applicants whose cases have been before the immigration courts. For example:

- A young man from Somalia who fled to the United States seeking protection from a militant group that had kidnapped him has been detained in a U.S. immigration jail for over a year, and will likely remain detained for the duration of his administrative appeal, because he does not have a final order of deportation. The immigration judge, who found him credible, explicitly recommended that he be granted a waiver of the “material support” bar, but the process the Department of Homeland Security has put in place to do this does not consider a

person's case until administrative appeals are abandoned or exhausted. It does not appear from the facts of this man's case that the "material support" bar should actually apply (as he did nothing to assist the militants), but while he litigates this point, he remains in jail.

- A woman who applied for asylum from political persecution in Eritrea, and whose testimony was found to be credible, was denied all relief by an immigration judge based on the fact that she had provided support, in the late 1970's, to a group then fighting for Eritrea's independence from Ethiopia. Ethiopia at that time was ruled by the notoriously brutal Dergue regime, which jailed this woman and subjected her to repeated torture. Because he found that she was barred from asylum based on the "terrorism bars," the immigration judge did not decide whether the woman was otherwise statutorily eligible for refugee protection. The Board of Immigration Appeals agreed that the "terrorism bars" applied. This asylum applicant's appeal is currently pending before the federal court of appeals. If the court of appeals denies her appeal based on the "terrorism bars," this woman could be deported without ever having received a decision on the merits of her asylum claim and without ever having been considered for a waiver.

The U.S. government does not know how many refugees who have sought asylum before the immigration courts since 2001 have had their cases denied or delayed due to the immigration law's sweeping "terrorism"-related bars. Neither the Department of Justice, which includes the immigration courts, nor DHS's Immigration & Customs Enforcement (ICE), whose lawyers represent DHS in those courts, have tracked the number of persons seeking asylum in the immigration courts who have been denied asylum on this basis to date.

The Consequences: Divided Families, Lengthy Detentions and Delayed Integration

Refugees wrongly classified as "terrorists" or supporters of "terrorism" under the immigration law's overbroad definitions continue to suffer severe practical consequences. Those who

have already been granted asylum or refugee protection here are unable to reunite with their spouses and children who remain in what are often very difficult or dangerous situations abroad. For example:

- A mother from Cameroon was granted asylum based on her peaceful political activism for the rights of Cameroon's English-speaking minority. Her petition to bring her children to join her in the U.S. was placed on hold based on DHS's determination that the Southern Cameroons National Council (SCNC) should be considered a "Tier III" group. By the time DHS indicated it was reconsidering its assessment of the SCNC, one of her children had died of natural causes.

Others whose applications for protection are pending before the immigration courts can face prolonged detention. Human Rights First is aware of cases of refugees who have been detained for one or two years or more while they awaited resolution of an alleged "terrorism bar." For example:

- A Sri Lankan refugee who paid ransom to his own kidnappers still has not received a waiver of the "material support" bar after nearly five years in immigration proceedings. As a result he has remained separated from his wife even as conditions in their home country deteriorated dramatically. He himself spent the first two and a half years of his time in the United States in immigration detention, and now, two years after his release from those jail-like conditions, is still forced to wear a large, uncomfortable, and humiliating ankle bracelet.

For all those affected, these legal obstacles delay the full integration into the U.S. community that they all need and that many of these refugees have been working towards for years. Young people whose asylum applications are on hold are ineligible for the financial aid that would enable them to pursue higher education. Refugees with professional qualifications have seen job offers withdrawn because they lack permanent residence. Elderly and disabled persons have faced interruptions in their medical coverage for the same reason.

A Way Forward

After eight years of legislative expansion and expansive interpretation, the immigration law’s “terrorism”-related provisions continue to be used to deny or delay protection or permanent status to refugees who pose no threat to the security of the United States. In virtually all of these cases, the problems these refugees are facing under the “terrorism bars” stem from facts they themselves voluntarily described to the United States government in their applications for protection. In the largest number of the cases currently “on hold” with the Department of Homeland Security, the refugees in question were already granted asylum or refugee protection after disclosure of—and often based on—those same facts.

More than four years after discretionary “waiver” authority was enacted in 2005, the “waiver” approach has proved inadequate as the primary means of resolving these cases, and legislative tinkering in 2007 to address the needs of individual refugee groups has left others—refugees who are equally deserving—without relief. It is past time for the United States to bring its laws and administrative procedures back into line with its treaty obligations to protect refugees and with the U.S. tradition of extending protection to those who flee from persecution.

Congress and the Administration must take a thorough and even-handed approach to address the roots of this problem. Specific recommendations for both Congress and the Administration are outlined below. These changes are critical in order to ensure that the immigration law’s “terrorism bars”—consistently with U.S. treaty obligations—target those who actually bear responsibility for serious wrongdoing or pose a threat to the security of the United States. They are also necessary so that legitimate refugees who seek asylum in this country are not left to suffer continued delays in adjudication, prolonged detention or separation from family, and possible deportation in violation of the Refugee Convention. These changes will also help to ensure that the United States is no longer labeling physicians who treat the wounded, victims of armed groups, and even its own founding fathers and its soldiers abroad, as “terrorists” or supporters of “terrorism.”

None of the targeted reforms described below would undermine national security. They would not affect the bars to refugee protection for anyone who is a threat to the security of the United States or who has persecuted other people or committed other serious crimes, including terrorist acts. Nor would these measures change the law’s expansive provisions that bar the entry, or allow the deportation, of non-citizens on a wide range of other grounds ranging from criminal activity to civil violations of immigration rules.

Recommendations to Congress

- Eliminate the statutory concept of a “Tier III” terrorist organization, which has led to numerous unintended consequences but is not needed as an enforcement tool against its intended targets. Individuals culpable of wrongdoing are captured by the other provisions of the immigration law that allow a person to be excluded or deported from the United States (including provisions based on support to “Tier I” and “Tier II” organizations, which would be unaffected by this change). Individuals who pose a threat to the security of the United States or are believed to be coming here for unlawful purposes would likewise be covered by other existing provisions of the law.
- Amend the immigration law’s definition of “terrorist activity” (currently understood to cover any unlawful use of armed force by a non-state actor, against anyone and anything) so that it (a) targets only the use of violence for purposes of intimidation or coercion (of a civilian population or of a government or an international organization), and (b) no longer applies to uses of armed force that would not be unlawful under international humanitarian law.
- If the relevant federal agencies continue to apply the “material support” bar to involuntary conduct, amend the immigration law’s definition of “material support” to make clear that it does not apply to acts done under coercion.
- Eliminate the provision that makes a person inadmissible simply for being the spouse or child of a person inadmissible under the immigration law’s “terrorism”-related grounds.

- Allow waiver decisions to be made at the same time the case as a whole is decided by the immigration court, by giving waiver authority to the Attorney General for cases pending before the Department of Justice, with the provision that the Attorney General delegate this authority to the immigration courts.

Recommendations to the Departments of Homeland Security, Justice, and State

(1) Support Statutory Reform

- Support the statutory amendments outlined in the recommendations to Congress above.

(2) Interpret Existing Law Consistently With Its Text and Purpose, to Target Those Who Advance Terrorist Activity

- Stop applying the “terrorism bars” to involuntary conduct and other circumstances where the common law would recognize a defense (e.g. the acts of children).
- Stop interpreting “material support” to apply to contributions of goods or services that are insignificant and/or bear no logical connection to the furtherance of terrorist activity.
- Stop applying the Tier III definition to defunct groups and groups that have given up violence. Individuals who were themselves responsible for criminal acts of violence, or who presently pose a threat to the security of the United States, would still be barred under other provisions of law.
- Confirm that a group was actually engaged in violence during the periods of time relevant to individual cases, and that any violent activities were authorized by the group, before a group is deemed to be a “Tier III terrorist organization.” (A failure to do this probably accounts for the sudden classification as “Tier III” groups of the Nepali Congress Party and Zimbabwe’s Movement for Democratic Change.)
- Define a larger group as a “Tier III terrorist organization” based on the actions of a subset of its members only in cases where the subgroup is actually an integral part of

a larger group and operates under the direction of the larger group. This will help avoid labeling peaceful political parties as “Tier III” groups because they form coalitions with other groups that include armed wings.

(3) A More Effective and Fair Approach to Waivers

- Authorize waivers for voluntary conduct in connection with a Tier III group that allow for an individualized assessment along the lines of the existing duress waiver.
- Authorize waivers in connection with later-filed applications (e.g. permanent residence and family reunification) filed by any person previously granted status or relief from removal in the United States, where the activities or associations that are now leading the person to be seen as inadmissible or deportable were disclosed in the application or proceeding that led to the prior grant of status or relief, there is no reason to believe the person poses a danger to the safety and security of the United States, and the person has undergone and passed relevant background and security checks.
- Authorize waivers for bars other than the “material support” bar in cases where the conduct giving rise to the bar was coerced.
- Until such time as the statute is changed to eliminate inadmissibility based solely on spousal or filial relationships, authorize waivers for spouses and children being affected solely by these provisions.
- As long as DHS retains waiver authority in immigration court cases, allow such authority to be exercised as soon as the person is found to be eligible for relief but for a “terrorism bar” and that finding is final.
- As long as DHS retains waiver authority in immigration court cases, ensure that persons in immigration court proceedings for whom DHS has not yet implemented waivers are not deported before implementation happens, by requiring that all removal cases subject to a “terrorism bar” and otherwise eligible for relief are forwarded by ICE to USCIS for waiver consideration.



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