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CRUEL DISTINCTIONS OF THE I.N.A.'S MATERIAL SUPPORT BAR*

Courtney Schusheim**

INTRODUCTION

A refugee who gives a small amount of money to a “terrorist group,”¹ or performs cooking or laundry services involuntarily²—whether or not the United States supports the group’s goals—automatically becomes trapped in a material support web. The so-called “material support bar” is one of the grounds for inadmissibility to the United States named in the Immigration and Nationality Act (“INA” or “the Act”).³ It has the potential to exclude otherwise eligible non-citizens from asylum, permanent residency, naturalization, and many other forms of immigration relief.⁴ Although the purpose of the bar is to exclude persons who actively support terrorist groups by providing material aid, in reality the bar excludes far more—leaving victims of terrorist groups, asylum seekers seeking relief inside the United States, and recognized refugees outside of the country⁵ promised resettlement in the United

* The term “cruel distinctions” has its origins in a *New York Times* editorial discussing material support. While the article was published prior to the Secretary of Homeland Security’s April 27, 2007, Exercise of Authority, the term “cruel distinctions” still fittingly describes the result—even with an additional waiver category. See Editorial, *Shutting Out Terrorism’s Victims*, N.Y. TIMES, Mar. 9, 2007, at A22 (criticizing the first set of material support waivers: “the administration recently agreed to consider selective waivers of the material support ban. But the waivers would apply only if the groups doing the intimidating were not on any of the State Department’s lists of terrorist organizations. That is a cruel and irrelevant distinction. Duress is duress, no matter which group coerced the cooperation.”).

** The author would like to thank Professor Andrea McArdle for her support and enthusiasm for this piece. She would also like to thank Brent and Nancy Schusheim for their support given throughout law school as well as her best friend Daniel P. Monahan.

¹ See, e.g., *In re S-K*, 23 I. & N. Dec. 936, 945 (B.I.A. 2006).

² See, e.g., REFUGEE COUNCIL USA, THE STORIES: REFUGEES HURT BY THE MATERIAL SUPPORT BAR ON ADMISSION (2006), available at <http://www.rcusa.org/uploads/pdfs/ms-caseexamples-2006.pdf>.

³ Immigration and Nationality Act § 201(b), 8 U.S.C. § 1158 (2008).

⁴ But see *In re S-K*, 23 I. & N. Dec. at 946 (suggesting that the Respondent might be eligible for deferral of removal under the United Nation’s Convention Against Torture (“CAT”)).

⁵ The Immigration and Nationality Act (“INA”) distinguishes the term “asylee” (or “asylum seekers”) and “refugees.” The distinction is minimal—asylees apply for asylum status from within the United States; refugees apply for asylum status from abroad. Compare 8 U.S.C. § 1157 with 8 U.S.C. § 1101(a)(42). See also Press Release,

States⁶—without relief.

The material support bar in its present incarnation is the product of several additions made to the INA as part of a legislative response to the September 11th attacks on the United States.⁷ The provision uses extremely broad terms and has no exception for involuntary support to terrorist organizations or even trivial amounts of support provided in the course of every day bargain and exchange. For years, major non-governmental actors in the asylum arena have lobbied for legislative reforms, urging that Congress write duress and *de minimis* exceptions into the statute. The government, for the most part, ignored the advocacy groups' efforts. In February 2007, the Department of Homeland Security ("DHS") announced it would issue waivers for refugees who had given support under duress to unnamed groups of terrorists.⁸ This waiver applied to so few refugees⁹ and made such arbitrary distinctions,¹⁰ however, that even the government felt compelled to act more quickly. After just two months, the administration of President George W. Bush issued another waiver—this time for applicants

Executive Office for Immigration Review, Asylum Protection in the United States (Apr. 28, 2005), *available at* <http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm>.

⁶ Press Release, Refugee Council USA, Relief Agency Says Material Support Law Hurts Terror Victims (Sept. 12, 2006); Editorial, *Terrorists or Victims?*, N.Y. TIMES, Apr. 3, 2006, at A16; Press Release, Senate Committee on Homeland Security and Governmental Affairs, Kennedy, Lieberman Express Concern on D.H.S. Unfairly Barring Legitimate Refugees from Resettlement (Mar. 1, 2006), *available at* <http://hsgac.senate.gov/public/> (search "kennedy"; then follow "Kennedy, Lieberman Express Concern on D.H.S. Unfairly Barring Legitimate Refugees from Resettlement" hyperlink) [hereinafter Press Release, Kennedy, Lieberman].

⁷ The provision of material support to a terrorist organization has been a ground for inadmissibility under the INA since the amendment of the Act in 1990. Pub. L. No. 101-649, 104 Stat. 4978 (1990). Since its first appearance, however, the provision has gained increasing significance as it underwent a series of expansions following the enactment of increasingly restrictive immigration legislation. Following the September 11, 2001 terrorist attacks, Congress signed into law the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001), making broad and significant changes to the material support bar. Notably, the USA PATRIOT Act expanded the terrorist grounds of admissibility under INA § 212(a)(3)(B), broadening the definition of a "terrorist organization" and the scope of the term "terrorist activities" under the INA Pub. L. No. 107-56, 115 Stat. 272 (2001). Then, in May 2005, the REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005), was signed into law, broadening the definition of "terrorist activity" once again. *Id.*

⁸ The Department of Homeland Security ("DHS") designated these groups Tier III organizations. *See infra* notes 73–82 and accompanying text.

⁹ REFUGEE COUNCIL USA & CHURCH WORLD SERV., THE MATERIAL SUPPORT PROBLEM: PUNISHING REFUGEE VICTIMS OF TERROR, Mar. 8, 2007, *available at* <http://www.rcusa.org/uploads/pdfs/ms-backgrd-info3-8-07.pdf> [hereinafter MATERIAL SUPPORT PROBLEM].

¹⁰ *Id.*

who had provided material support to named groups of terrorists.¹¹

At first blush, the waivers would appear to be a much welcomed change for refugees and their advocates; however, they provide only a slender reed for refugees to rely upon. Only a legislative fix that addresses the indiscriminate nature of the material support issue will keep genuine refugees out of its web. As of 2007, there are an estimated 7,000 cases on hold for material support reasons; the waiver will likely apply to only ten to twenty of those cases.¹² This Comment will help explain the discrepancy between those figures by illustrating how the waivers (also known as “exemptions”) are designed to keep the number of refugees admitted to a minimum. It will briefly present the tangled statutory history and language leading up to the current material support bar. This history is helpful in understanding the bar’s expansive reach and the tensions immigration advocates have faced trying to curb its reach. The Comment will then use the facts from the cases of three applicants previously found ineligible for immigration benefits under material support provisions, *In re S-K*,¹³ *Choub v. Gonzales*,¹⁴ and *Singh-Kaur v. Ashcroft*¹⁵ to demonstrate the absurd and arbitrary nature of the exemptions.

I. MATERIAL SUPPORT: A WIDE BAR TO ASYLUM

The first part of this section explains the history of the material support provision in the INA. The second part demonstrates that the material support provision’s impact is due in part to its broad applicability to benign acts of support to designated terrorist groups.

A. Background

The statutory changes to the INA’s material support provision are largely undefined, in spite of advocacy groups’ efforts to define it. This lack of specificity has contributed to a narrow interpretation of the material support provision that ignores the circumstances of the asylum seeker’s request.

The passage of the Antiterrorism and Effective Death Penalty

¹¹ This dealt with Tier I and II organizations. See *infra* notes 73–82 and accompanying text.

¹² MATERIAL SUPPORT PROBLEM, *supra* note 9.

¹³ 23 I. & N. Dec. 936, 941 (B.I.A. 2006).

¹⁴ No. 04-74189, 2007 WL 2316919, at *1 (9th Cir. Aug. 14, 2007).

¹⁵ 385 F.3d 293, 294 (3d Cir. 2004).

Act (“AEDPA”) in 1996,¹⁶ the USA PATRIOT Act in 2001,¹⁷ and the REAL ID Act in 2005,¹⁸ changed the material support provisions in the INA. Its former simple prohibition of material support to an organization engaged in a “terrorist activity” was transformed into a complex provision with a heavy burden on the asylum seeker to disprove the alleged support.¹⁹ Each legislative act added more language to the provision and included a multi-tiered system that defined the term “foreign terrorist organization.”²⁰ However, despite its length, it failed to define other key terms, most notably the term “material support.”

Thus, for years, the major non-governmental actors in the asylum field, including Human Rights First,²¹ Amnesty International, and the American Immigration Lawyers Association,²² urged the

¹⁶ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 28 U.S.C., and 42 U.S.C.).

¹⁷ USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8 U.S.C., 15 U.S.C., 18 U.S.C., 22 U.S.C., 31 U.S.C., 42 U.S.C., 49 U.S.C., and 50 U.S.C.).

¹⁸ 8 U.S.C. § 1182 (2005).

¹⁹ Immigration and Nationality Act §212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006). The statute states:

(iv) Engage In Terrorist Activity Defined.—

As used in this Chapter, the term ‘engage in terrorist activity’ means, in an individual capacity or as a member of an organization—

(VI) to commit an act that the actor knows, or reasonably should know, affords *material support*, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training—

(aa) for the commission of a terrorist activity;

(bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity;

(cc) to a terrorist organization described in subclause (I) or (II) of clause (vi) or to any member of such an organization; or

(dd) to a terrorist organization described in clause (vi)(III), or to any member of such an organization, unless the actor can demonstrate by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization.

Id.

²⁰ See *infra* notes 72–76 and accompanying text.

²¹ HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM 11–12 (2006), available at <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf> [hereinafter ABANDONING THE PERSECUTED].

²² See Friends Committee on National Legislation, “Material Support” Rules Misapplied to Refugees and Asylum Seekers: Sign-On Letter to Secretary Chertoff (Jan. 6, 2006) available at <http://www.chinland.org/statements/mtsp.pdf> (urging the Admin-

legislature to define the parameters of "material support." Specifically, they advocated for legislative reforms to the provision that would allow for duress and *de minimis* exceptions to be read or written into the statute.²³ The Refugee Council USA, a coalition of twenty-three refugee advocacy groups, specifically called for the Department of Homeland Security ("DHS") or the Secretary of State to adopt an interpretation of material support in which "[m]aterial support under the threat of death or torture [would] not be grounds for inadmissibility"²⁴ and called for a statutory exception if this interpretation would not be adopted explicitly.²⁵ The coalition envisioned the piecemeal adjudication of the duress exemption only as a short-term solution.²⁶

Many non-governmental organizations also advocated for a *de minimis* exception, whereby refugees otherwise eligible for asylum who gave minimal or insignificant support, such as water, bread, or an invitation to a purely religious ceremony,²⁷ would not be excluded from asylum protection.²⁸ They asserted that to interpret "material support" as constituting *any* support would, in effect, nul-

istration to develop a legal interpretation of "material support" in line with a "common sense reading" of the statute).

²³ A duress exception would provide a defense analogous to the well-established duress defense in criminal law. Duress is a recognized defense to a number of legal offenses, such as a crime, tort and contractual breach. See BLACK'S LAW DICTIONARY 426 (8th ed. 2005). The Georgetown University Law Center, in its fact-finding report on the application of the material support bar, contrasted the lack of a duress exception to material support with the use of a duress defense in criminal law: "[i]n the criminal context, an individual forced to give money or goods to an armed group would be considered a victim of criminal extortion, not a participant in the crime under U.S. criminal law." GEORGETOWN UNIVERSITY LAW CENTER, UNINTENDED CONSEQUENCES: REFUGEE VICTIMS OF THE WAR ON TERROR, 23 n.157 (May 2006) [hereinafter UNINTENDED CONSEQUENCES].

²⁴ REFUGEE COUNCIL USA, THE IMPACT OF THE MATERIAL SUPPORT BAR: U.S. REFUGEE ADMISSIONS PROGRAM FOR FISCAL YEAR 2006 AND 2007, 24 (Sept. 2006) [hereinafter U.S. REFUGEE ADMISSIONS].

²⁵ *Id.*

²⁶ *Id.* at 25 (stating that "[i]n the meantime the Administration can and should recognize and adjudicate duress cases upon including that the applicants have demonstrated that they meet the statutory definition of refugee").

²⁷ In *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004), the Third Circuit held that an alien who set up tents and gave food to members of an undesignated terrorist organization (where there was a conflicting terrorist organization designation between the U.S. State and Treasury Departments) provided material support. See also *In re S-K*, 23 I. & N. Dec. 936, 945 (B.I.A. 2006) ("As the D.H.S. contends, it is certainly plausible, in light of the decision in *Singh-Kaur v. Ashcroft* and recent amendments to the Act, that the list in section 212(a)(3)(B) was intended to have an expanded reach and cover virtually all forms of assistance, even small monetary contributions.").

²⁸ See, e.g., ABANDONING THE PERSECUTED, *supra* note 21, at 12.

lify the term “material” from “material support.”²⁹

Congress was largely unsympathetic toward their concerns. In a May 2006 Senate debate, both Democratic and Republican members senators questioned the efficacy of the duress defense to material support.³⁰ Although individual politicians had responded to the advocacy campaigns of refugee groups,³¹ their efforts failed to address the underlying and ongoing threat posed by the material support bar to valid refugees.³²

Similarly, the BIA and immigration courts were reluctant to interpret “material support” beyond its narrow, facial meaning.³³ Immigration judges took a highly deferential approach to the statute, interpreting anti-terror legislation narrowly,³⁴ as a possible consequence of the so-called “purge” of liberal, pro-immigrant judges from the BIA by the Bush administration in 2003.³⁵ Courts

²⁹ This argument found support in the dissent in *Singh-Kaur*, 385 F.3d at 301-04. Judge Fisher noted, “the majority’s holding ignores the plain language of the statute by reading ‘material’ out of ‘material support[.]’ ” *Id.* at 301. Judge Fisher concluded that the support must be both important and relevant to terrorism. *Id.* at 301-04.

³⁰ 152 CONG. REC. S4952 (2006). Senator Arlen Specter (R-PA) asserted:

Kurdish terrorists in Turkey might be admitted under this amendment because they pose no threat to the United States of America. Basque terrorists in Spain might be admitted because they pose no threat to the United States of America. Hamas, which poses a deadly threat to Israel, might be admitted to the United States because they arguably pose no threat on the face of it to our national security. So we have an amendment which is very broad and changes really fundamental definitions, in redefining material support. . . . And to narrow the definition of what is a terrorist organization, so that organizations which would be considered terrorist without this amendment but not terrorist under this amendment, is just not the sort of thing that ought to be done by the U.S. Senate

Id. at S4942.

³¹ See, e.g., Press Release, Kennedy, Lieberman, *supra* note 6. Kennedy and Lieberman’s letter focuses on D.H.S.’s implementation of the bar and failure to exercise its waiver authority. The letter does not attempt to address the need for legislative guidelines or amendments. Moreover, in the current anti-immigration political climate, Congress has had difficulty passing far less controversial immigration legislation, such as the Unaccompanied Alien Child Protection Act (introduced to the House in March 2005). Any attempt to soften anti-terror legislation would likely stir even greater public disapproval. Therefore, the possibility of an amendment to the material support provision in the near future looks bleak.

³² *Id.*

³³ See, e.g., *Singh-Kaur v. Ashcroft*, 385 F.3d 293 (3d Cir. 2004).

³⁴ See Susan Benesch, *Due Process and Decision Making in U.S. Immigration Adjudication*, 59 ADMIN. L. REV. 557, 567 (2007).

³⁵ Nat’l Immigration Law Ctr., *Five Veteran B.I.A. Members Forced to Resign*, IMMIGRANTS’ RTS. UPDATE (June 3, 2003), available at <http://www.nilc.org/immlawpolicy/removpsds/removpsds122.htm> (“In a move that some observers called a purge, Bush administration officials have pressured five of the longest-serving and most ‘pro-immi-

used statutory construction analysis to dismiss arguments for an exception to the material support provision,³⁶ particularly arguments engaging in refugee rights discourse.

In doing so, courts did not steer away from the U.S.-centric political debate driving the material support ground and were not inclined to consider international law on refugee rights. For example, in a cursory discussion, the BIA readily dismissed an interpretation of material support articulated in international law conventions that considers the circumstances under which the refugee supplied the material support. In *In re S-K*, The BIA rejected the reasoning advanced in an amicus brief from the United Nations High Commissioner for Refugees ("UNHCR"), which urged material support to be assessed in conjunction with the alien's claim of persecution as mandated by the 1951 Convention Relating to the Status of Refugees Convention.³⁷ In doing so, it undermined the general concept of international refugee protection at a time when even the Supreme Court could not deny the United States's international obligations regarding the far more controversial issue

grant' members of the Board of Immigration Appeals to resign, according to a Mar. 12, 2003, *Los Angeles Times* article.").

³⁶ See *id.*

³⁷ *In re S-K*, 23 I. & N. Dec. 936, 943-44 (B.I.A. 2006). The Drafters of the Convention relating to the Status of Refugees ("1951 Convention") made clear that the main objective of the Convention was to protect refugees qualifying under the Convention's refugee definition contained in Article 1A and, therefore, exclusion would occur only under exceptional circumstances. The primacy of non-refoulement and the exceptional circumstances under which it can be disregarded is widely accepted by the international community. Article 33 prohibits the return of a refugee in any manner whatsoever where his life or freedom would be threatened, except where there are reasonable grounds for regarding the refugee as a security danger to the country or where the refugee has been convicted of a particularly serious crime. Convention relating to the Status of Refugees, art. 33, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention]; see also Doherty, Regional Representative for the United States and the Caribbean, United Nations High Commissioner for Refugees, Advisory Opinion, 8 (June 15, 2005) (explaining that "the exclusion clauses need to be interpreted restrictively. . . . A restrictive view is warranted in view of the serious possible consequences of exclusion for the applicant.").

In applying Article 1F of the 1951 Convention, a balance must be struck between the nature of the alleged offense by the applicant and the degree of persecution feared. The notion of balancing is inherent in the fundamental rights character of non-refoulement and in the cautious language of the Convention itself. Article 1F requires the decision maker to exclude the applicant only if he or she has "serious reasons for considering" that the non-citizen falls under one of the three exclusion clauses. 1951 Convention, art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. In practical terms, it requires an inclusion analysis (a determination on whether the applicant meets the refugee definition criteria) to occur before exclusion. A decision maker must first determine whether a person has a well-founded fear of persecution and then determine whether the crime is so grave that it is necessary to exclude him or her.

of the detention of enemy combatants at Guantánamo Bay.³⁸ The court rejected the UNHCR assertion “which indicates that materiality must be assessed in conjunction with the alien’s claim of persecution and the question whether or not the alien presents a present or future danger to the security of the United States.”³⁹ The BIA’s interim decision stated, “[w]e are unaware of any legislative history which indicates a limitation on the definition of the term ‘material support[,]’ ”⁴⁰ and the court read the statute as not requiring intent to provide support. The BIA added in a footnote, “[i]t is also well established that Congress may enact statutes that conflict with international law.”⁴¹ In short, the BIA’s adherence to a literal reading of the statute trumped international law and precluded consideration of the international convention’s intent/causal connection requirement.

Thus, in effect, the material support provision erected a bar to admission that would be difficult to remove, in part because of the statutory-construction based reasoning. This bar has led to cruel and pernicious results. For many refugees and asylum seekers, it means that the very circumstances that form the basis for their claims of persecution are used against them to deny protection.

B. The Material Support Maze

The remarkably broad language of the material support bar results in a convoluted maze, trapping refugees in its corridor and then blocking relief at every turn. Entering the maze, the bar includes a list of items that constitute material support—but this list is non-exhaustive. Section 212(a)(3)(B)(iv)(VI) bars “[the provision of] a safe house, transportation, communication, funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training.”⁴² The BIA has suggested that

³⁸ See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (finding the U.S. military commissions violated Article III of the Geneva Convention); see also *The Paquete Habana*, 175 U.S. 677, 700 (1890) (stating that, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction”).

³⁹ *In re S-K*, 23 I. & N. Dec. at 944 (“We thus reject the respondent’s [UNHCR] assertion that there must be a link between the provision of material support to a terrorist organization and the intended use by that recipient organization of the assistance to further a terrorist activity.”).

⁴⁰ *Id.* at 943.

⁴¹ See, e.g., *id.* at 942, n.7.

⁴² Immigration and Nationality Act § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006).

material support was “intended to have an expanded reach and cover virtually all forms of assistance.”⁴³ The Third Circuit has followed suit, expanding upon the enumerated statutory list to include handing out food and setting up tents at a religious congregation that was attended by militants along with regular members from the community.⁴⁴ By this logic, “mere support” or even “tangential support” can replace “material support.”

There are many paths leading into the maze but the provider–recipient relationship is a compelling example. The current application of the material support bar is so broad that it applies to refugees who “gave support” by mere affiliation or relation to a known or unknown member of a terrorist group. This has included, for example, refugees who lived in or traveled to areas controlled by non-governmental, armed groups in order to receive schooling or for work opportunities.⁴⁵ It includes children who give support,⁴⁶ even if the child is obeying the orders of a parent or guardian affiliated with a terrorist group.⁴⁷ It also includes adults who, in their youth, provided support to a terrorist group or member.⁴⁸

The provider–recipient relationship, like the type and form of material support, is also defined broadly under the statute. Section 212(a)(3)(B) provides three categories of provider–recipient material support.⁴⁹ The provider establishes the first category by giving any type of support—monetary, domestic, religious, emotional—that may have “helped” (albeit in some remote way) to further the recipient’s commission of a terrorist activity.⁵⁰

The second category⁵¹ is more vague and extends to *any individual* the alien “knows, or reasonably should know, has committed

⁴³ *In re S-K*, 23 I. & N. Dec. at 945.

⁴⁴ *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 299–300 (3d Cir. 2004). Notably, current U.S. Supreme Court Justice Samuel Alito was in the majority.

⁴⁵ See generally Nicholas J. Perry, *The Breadth and Impact of the Terrorism-Related Grounds of Inadmissibility of the INA*, IMMIGRATION BRIEFINGS, Oct. 2006 [hereinafter *Breadth and Impact*]. See also PRELIMINARY FINDINGS, *supra* note 70; ABANDONING THE PERSECUTED, *supra* note 21, at 2.

⁴⁶ The material support bar may contravene the U.N. Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448.

⁴⁷ The Harvard clinic documented an eleven-year-old daughter of a Karen National Union soldier who drew water for soldiers and her family in 1995. See PRELIMINARY FINDINGS, *supra* note 70, at 9.

⁴⁸ See Immigration and Nationality Act § 212(a)(3)(B)(iv)(VI)(bb), 8 U.S.C. 1182(a)(3)(B)(iv)(VI)(bb) (2006).

⁴⁹ *Id.*

⁵⁰ *Id.* § 1182(a)(3)(B)(iv)(VI)(aa).

⁵¹ *Id.* § 1182(a)(3)(B)(iv)(VI)(bb).

or plans to commit a terrorist activity.”⁵² Here, the language of the statute encompasses the provider’s past, present, and future contributions,⁵³ as well as the recipient’s past, present, and future terrorist activity.⁵⁴ Thus, an applicant may have unwittingly given a campaign contribution to a group in the past that is implicated in terrorist activity years later. The language “reasonably should know” precludes instances where an alien intended the support to be used for peaceful means. As explained by the Ninth Circuit in *Humanitarian Law Project v. Reno*,⁵⁵ for instance, a monetary contribution intended for “nonviolent humanitarian” purposes constitutes material support since the donor has no ultimate control over how the funds are used.⁵⁶

Furthermore, the recipient need not belong to a terrorist organization but only to have been *linked* to a terrorist activity.⁵⁷ Since the benefit does not have to be linked to a terrorist activity, remote affiliation with a terrorist member will implicate this ground for inadmissibility.⁵⁸ Consequently, those who have “cooperated” with terrorist organizations or members in order to flee a conflict area have been found inadmissible under this ground.⁵⁹

The third provider-recipient category⁶⁰ is the catch-all category covering any support given to any “terrorist organization,” defined broadly as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which en-

⁵² *Id.*

⁵³ PRELIMINARY FINDINGS, *supra* note 70, at 4 (noting that no consideration is given to the temporal aspect of the contribution).

⁵⁴ *Breadth and Impact*, *supra* note 45.

⁵⁵ 205 F.3d 1130, 1134 (9th Cir. 2000).

⁵⁶ *Id.* at 1133–34. The court noted that:

Material support given to a terrorist organization can be used to promote the organization’s unlawful activities, regardless of donor intent. Once the support is given, the donor has no control over how it is used. . . . [And there is no requirement] that the government . . . demonstrate a specific intent to aid an organization’s illegal activities before attaching liability to the donation of funds. *Id.*

⁵⁷ *Breadth and Impact*, *supra* note 45.

⁵⁸ *Id.*

⁵⁹ THE IMMIGRATION AND REFUGEE CLINIC & INTERNATIONAL RIGHTS CLINIC, HARVARD LAW SCHOOL, PRELIMINARY FINDINGS AND CONCLUSIONS ON THE MATERIAL SUPPORT FOR TERRORISM BAR AS APPLIED TO THE OVERSEAS RESETTLEMENT OF REFUGEES FROM BURMA 4 (Feb. 2006) [hereinafter PRELIMINARY FINDINGS]. “[I]f an individual cooperates with a ‘terrorist’ organization simply to gain passage out of a conflict area or to flee human rights abuses, he or she is deemed to have participated in ‘terrorist activity.’” *Id.*

⁶⁰ Immigration and Nationality Act §212(a)(3)(B)(iv)(VI)(cc), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2006).

gages in, [terrorist] activities.”⁶¹ This definition is so vague that, as amici to the BIA in *In re S-K* noted, it would include members of U.S. troops currently stationed in Iraq.⁶² The statute does not take into account the political context of the organization⁶³ and, as such, has included organizations that the United States considers allies.⁶⁴

In an editorial to the *Miami Herald*, Robert Carey, the Vice President of the International Rescue Committee, reasoned that “[i]f John F. Kennedy were not a U.S. citizen and had to ask for refugee status in today’s United States, he would be turned back by Homeland Security Secretary Michael Chertoff.”⁶⁵ This outrageous example has a real life, present-day corollary. As Carey pointed out, Cuban women who brought food and medicine to their imprisoned relatives who, over 40 years ago, fought the Castro regime with equipment and training of the United States are now being denied access to U.S. resettlement programs.⁶⁶

The [Cuban] *alzados* were wiped out by 1966, yet now, eight presidents later—in the United States, not in Cuba—the DHS is applying a law that punishes them and those who helped them although their fear of persecution by Castro’s government is more than well founded.⁶⁷

While the *Alzados* subsequently received non-duress exemptions from Secretary Chertoff,⁶⁸ the Refugee Council USA asserts that the material support bar has the potential to reach international students, tourists, as well as the 23,418 non-citizens serving in U.S. Armed Forces, including those “involved in peaceful assemblies protesting human rights violations.”⁶⁹ For now, refugees and

⁶¹ § 1182(a)(3)(B)(vi)(III).

⁶² *In re S-K*, 23 I. & N. Dec. 936, 949 n.15 (B.I.A. 2006) (Osuna, Acting Vice Chairman, concurring).

⁶³ U.S. REFUGEE ADMISSIONS, *supra* note 24, at 10.

⁶⁴ See *infra* notes 83–85 and accompanying text; see also 152 CONG. REC. S4938–39 (daily ed. May 23, 2006) (statement by Sen. Leahy during discussion of the proposed amendment No. 4117). As Senator Leahy stated at a Senate debate in May 2006, “[the provision] defined ‘terrorist organization’ so broadly that groups that are not engaged in activities against civilians—freedom fighters that the U.S. Government once provided training and other material support to—like the Montagnards in Vietnam—are covered by this broad definition.” *Id.* See also *In re S-K*, 23 I. & N. Dec. 936, 947 (B.I.A. 2006) (Osuna, Acting Vice Chairman, concurring).

⁶⁵ See Robert Carey, Op-Ed, *PATRIOT ACT: Law Lumps Together Terrorists and Victims*, MIAMI HERALD, June 7, 2006, at A23.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See *infra* note 79.

⁶⁹ U.S. REFUGEE ADMISSIONS, *supra* note 24, at 55.

asylum seekers, the most vulnerable of all non-citizen groups, are trapped in the material support maze.

II. FREED FROM THE WEB OR FURTHER ENTANGLED? THE SECRETARY'S WAIVERS

On February 26, 2007, after more than two years of advocacy from non-governmental organizations⁷⁰ as well as pressure from individual members of Congress,⁷¹ the Secretary of Homeland Security, Michael Chertoff, finally exercised his power under the INA to issue a waiver to the material support bar.⁷² For advocates who struggled to make the United States uphold its 1951 Convention treaty obligation to protect refugees, the Secretary's announcement seemed like a step in the right direction. However, the exemption applied only to a small group of refugees—those who gave material support to a Tier III (or undesignated) terrorist organization⁷³ “under duress.” Thus, the broad material support bar starkly contrasted with the narrow applicability of the issued waivers. The first section will explore the narrow applicability of material support waivers and exemptions offered by the DHS. The second section highlights the lack of clear procedures for asylum seekers to obtain a duress-based waiver.

A. A Narrow Waiver to the Material Support Bar

The INA defines Tier III organizations broadly as “a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, [terrorist] activities.”⁷⁴ Yet most refugees seeking a waiver gave support to Tier I or II organizations.⁷⁵ Tier I organizations include groups designated terrorist

⁷⁰ See, e.g., REFUGEE COUNCIL USA, CURRENT LAW AND LEGISLATIVE HISTORY (2007). See also ABANDONING THE PERSECUTED, *supra* note 21, at 1 (“The definitions of [material support and terrorist organizations] are so exceedingly broad that the bar is, tragically, affecting refugees who do not support terrorism at all.”); MATERIAL SUPPORT PROBLEM, *supra* note 9 (“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 refugee or asylum status in the United States.”); PRELIMINARY FINDINGS *supra* note 59; UNINTENDED CONSEQUENCES, *supra* note 23.

⁷¹ Press Release, Kennedy, Lieberman, *supra* note 6.

⁷² Immigration and Nationality Act § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006); Notice of Determination, 72 Fed. Reg. 26138 (May 8, 2007) [hereinafter Exercise of Authority].

⁷³ Immigration and Nationality Act § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2006).

⁷⁴ *Id.*

⁷⁵ Colombians fleeing from the designated terrorist groups FARC and AUC are the most frequently represented nationalities with cases affected by the material sup-

organizations by the Secretary of State and listed under section 219 of the Act as a Foreign Terrorist Organization, and Tier II organizations include groups on the State Department's list of terrorist organizations published in the Federal Register.⁷⁶ There are currently forty-two designated groups on this list, including the Liberation Tigers of Tamil Eelam ("LTTE"), the Revolutionary Armed Forces of Colombia ("FARC"), and the Communist Party of the Philippines/New People's Army ("CPP/NPA").⁷⁷ Associational links to these groups alone account for the largest groups of refugees currently affected by the material support bar.⁷⁸

In addition to the duress exemption, the Secretary declared that the material support provision would no longer bar applicants who provided material support to one of eight specific Tier III terrorist organizations.⁷⁹ This second category of waivers, what the United States Citizenship and Immigration Services ("USCIS") calls "group-based exemptions," unlike the "duress exemption" category, applies to applicants who provided support to one of the eight listed organizations "regardless of whether the support was provided under duress."⁸⁰ Notably, none of the Tier I and II organizations listed above were on the list.

While the Secretary claims to have based his determination on

port bar. See Asylum Headquarters/NGO Liaison Meeting, Boston, MA (Mar. 6, 2007) (on file with the author).

⁷⁶ Under § 212(a)(3)(B)(vi)(I), an entity is a terrorist organization if listed under section 219 of the Act, which generally refers to foreign organizations that the Secretary has found to threaten the security of the United States. 8 U.S.C. § 1182(a)(3)(B)(vi)(I) (2006). Secondly, § 212(a)(3)(B)(vi)(II) covers any organization listed in the Federal Register as a terrorist organization. 8 U.S.C. § 1182(a)(3)(B)(vi)(II) (2006). And, thirdly, under § 212(a)(3)(B)(vi)(III) a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, activities deemed "terrorist activities." 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2006).

⁷⁷ Fact Sheet, Office of Counterterrorism, U.S. Dep't of State, <http://www.state.gov/s/ct/rls/fs/37191.htm>.

⁷⁸ Asylum Headquarters/NGO Liaison Meeting, *supra* note 75.

⁷⁹ Those eight organizations are: (1) Karen National Union/Karen National Liberation Army; (2) Chin National Front/Chin National Army; (3) Chin National League for Democracy; (4) Kayan New Land Party; (5) Arakan Liberation Party; (6) Tibetan Mustangs; (7) Cuban Alzados; and (8) Karenni National Progressive Party. Michael J. Garcia & Ruth E. Wasem, Congressional Research Service, Immigration: Terrorist Grounds for Exclusion and Removal of Aliens (2008), www.fas.org/sgp/crs/homesecc/RL32564.pdf.

⁸⁰ Interoffice Memorandum from Jonathan Scharfen, Deputy Dir., United States Citizenship and Immigration Services to Associate Directors, USCIS, Processing the Discretionary Exemptions to the Inadmissibility Ground for Providing Material Support to Certain Terrorist Organizations (May 24, 2007), *available at* http://www.uscis.gov/files/pressrelease/MaterialSupport_24May07.pdf [hereinafter USCIS Memorandum, May].

“an assessment related to national security and foreign policy interests,”⁸¹ his policy rationale seemed to have more to do with limiting the number of refugees admitted into the country than with national security concerns.⁸² For advocates, this raised more questions than answers.⁸³ Why did the waiver apply to refugees who gave material support to Tier III organizations but not to similarly situated refugees who gave support to Tier I and II organizations? Why was duress required for material support given to “Tier III” terrorist organizations generally but not for the eight specifically named organizations? How and when could asylum seekers and refugees apply for a waiver?

On April 27, 2007, only two months after his first pronouncement, Secretary Chertoff exercised his authority once again by opening up the waiver to Tier I and II organizations.⁸⁴ The pronouncement expanded the exemption to all categories of terrorist organizations and used the exact same language as the first Exercise of Authority.⁸⁵ Like its Tier III predecessor, the waivers of support to Tier I and II organizations appeared generous, considering that only a year before there was no waiver of any sort. However, nearly a year after their issuance, the waivers have failed to have a substantive impact.

Under the former incarnation of the material support bar, the DHS put hundreds of affirmative asylum applications on hold, detaining legitimate asylum seekers and separating families.⁸⁶ In Feb-

⁸¹ Exercise of Authority, *supra* note 72.

⁸² Refugee statistics greatly support this contention. Colombian refugees, for instance, make up the second largest refugee group in the world. See *Population Levels and Trends*, 2005 UNHCR STATISTICAL YEARBOOK 26, available at <http://www.UNHCR.org/statistics/STATISTICS/464049e53.pdf> (“Colombians were the second largest displaced population at the end of 2005 (2.5 million or 12 percent of the total) . . .”). Yet, in 2006, the United States resettled a little over 100 Colombian refugees, as over seventy percent of Colombian refugees who would otherwise be suitable for resettlement were barred because of material support issues. REFUGEE COUNSEL USA, THE ONGOING CRISIS FOR COLOMBIAN REFUGEES (Mar. 5, 2007), available at <http://www.rcusa.org/uploads/pdfs/ms-summ-colomref3-5-07.pdf>.

[I]n spite of the changes recently announced by the Administration, Colombians will continue to be excluded from U.S. Resettlement and asylum programs, because the duress exception announced by the Administration will not apply to those who have been victimized by the FARC or other groups terrorizing Colombians and forcing them to flee from their homes.

Id. at 1.

⁸³ See UNINTENDED CONSEQUENCES, *supra* note 23.

⁸⁴ Exercise of Authority, *supra* note 72.

⁸⁵ See Notice of Determination, 72 Fed. Reg. 9958 (Mar. 6, 2007).

⁸⁶ ABANDONING THE PERSECUTED, *supra* note 21, at 2.

ruary 2006, the DHS reported that 512 asylum cases were on hold because of the material support issue.⁸⁷ Over a year later in 2007, 621 affirmative cases remained on hold due to the material support bar.⁸⁸

B. Duress-exemption Waivers Present No Clear Procedures

It is likely that otherwise eligible asylum seekers waiting in detention facilities on material support grounds⁸⁹ will have difficulty accessing waivers because there is no clear mechanism available for requesting a waiver. In March 2007, Asylum Headquarters for the USCIS stated:

CIS may go forward on a handful of [material support] cases and grant [waivers] even before the procedures are finalized. HQ has been in discussion with DHS, ICE, etc. to figure out options for getting EOIR cases from the immigration judges to CIS to consider the waiver, but there are many options and models being discussed and no decision has been made.⁹⁰

Initially, the USCIS issued two memorandums on processing cases involving material support, but neither memo indicates how material support cases will be referred from the immigration courts to the USCIS.⁹¹ In March 2008, the USCIS directed adjudicators to withhold adjudication of cases that may be eligible for the Secretary's exemptions,⁹² but this memo included few details about refugee access to the review process. Similarly, otherwise eligible refugees slated for resettlement in the United States have limited access to an administrative review process. Thus, since the advent

⁸⁷ UNINTENDED CONSEQUENCES, *supra* note 23, at 14 (citing USCIS Headquarters Asylum Meeting with Community-Based Organizations (Nov. 8, 2005)).

⁸⁸ See Asylum Headquarters/NGO Liaison Meeting, *supra* note 75.

⁸⁹ See Press Release, Human Rights First, HRF: Congress Must Fix "Material Support" Laws, Stop Treating Victims Like Terrorists (May 2, 2007), [hereinafter Congress Must Fix "Material Support"], <http://www.humanrightsfirst.org/media/etn/2006/statement/260/> (last visited Sept. 4, 2008).

⁹⁰ Asylum Headquarters/NGO Liaison Meeting, *supra* note 75.

⁹¹ USCIS Memorandum, May, *supra* note 80; Interoffice Memorandum, Processing of Asylum Division Cases Involving Material Support, U.S. Citizenship and Immigration Services (June 1, 2007) available at <http://www.rcusa.org/uploads///pdfs/CIS%20Memo,%20Asylum%20MS%20Processing,%206-1-07.pdf>.

⁹² Interoffice Memorandum, Withholding Adjudication and Review of Prior Denial of Certain Categories of Cases Involving Association with, or Provision of Material Support to, Certain Terrorist Organizations or Other Groups, U.S. Citizenship and Immigration Services (Mar. 26, 2008) available at http://www.uscis.gov/files/native/documents/Withholding_26Mar08.pdf.

"[U]ntil further notice adjudicators are to withhold adjudication of cases in which the only ground(s) for referral or denial is a terrorist-related inadmissibility provision(s)" *Id.*

of the material support bar, the UNHCR, the international organization mandated with facilitating the resettlement of refugees around the world to safe third countries,⁹³ has “simply stopped referring [resettlement] cases to the United States.”⁹⁴

While the memos do not clarify how asylum seekers and refugees can access waiver review, they do make a half-hearted attempt to flesh out the criteria for determining waiver applicability.⁹⁵ To direct the USCIS in its implementation of the waivers, the DHS provided the USCIS with four criteria. First, the applicant must be “seeking a benefit of protection under the Act and [must have] been determined to be otherwise eligible for the benefit of protection.”⁹⁶ Like the INA’s “material support”—its statutory counterpart⁹⁷—this memo does not define its key term, “otherwise eligible,” leaving it unclear as to whether applicants who are already in removal proceedings would be considered otherwise eligible.⁹⁸ Second, the refugee must also pass certain background and security checks.⁹⁹ These “relevant” checks are not named or otherwise referenced¹⁰⁰ and the lack of guidance may give the USCIS a blank check to deny refugee protection. Third, the refugee must have fully disclosed the nature and circumstances of each provision of material support and fourth, pose no danger to the United States.¹⁰¹

The Department of Homeland Security has also provided the USCIS with a host of “duress-related” factors¹⁰² to “inform” its gate-

⁹³ UNITED NATIONS COMMISSION FOR REFUGEES RESETTLEMENT Handbook: Department of International Protection, ch. 1 (2004), <http://www.unhcr.org/protect/PROTECTION/46f7c0ee2.pdf>. “The 1950 UNCHR statute states that UNHCR ‘shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments . . . to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.’ ” *Id.* at 2 n.2 (emphasis original).

⁹⁴ See Anna Huskara, Op-Ed, *For Refugees, Duress Waiver Not Enough*, SOUTH FLORIDA SUN-SENTINEL, June 30, 2007, at 21A; see also *Hearing on Material Support Bar: Denying Refuge to the Persecuted? Before the S. Comm. on Human Rights & Law of the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Bishop Thomas G. Wenski, consultant to the U.S. Conference of Catholic Bishops’ Committee on Migration).

⁹⁵ See USCIS Memorandum, May, *supra* note 80.

⁹⁶ Exercise of Authority, *supra* note 72.

⁹⁷ See U.S. REFUGEE ADMISSIONS, *supra* note 24.

⁹⁸ The Interoffice Memorandum does not provide further guidance or explanation about the criteria. See USCIS Memorandum, May, *supra* note 80.

⁹⁹ Exercise of Authority, *supra* note 72.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

keeping role. The USCIS officer must consider “whether the applicant reasonably could have avoided, or took steps to avoid, providing material support.”¹⁰³ Similar to “duress” under the Model Penal Code, this factor employs a reasonable-person analysis.¹⁰⁴ Yet, unlike the Model Penal Code, which permits some subjectivity—at minimum, consideration of a person’s age, strength, and health¹⁰⁵—here, as noted by the Secretary’s Exercise of Authority, subjectivity should only come into play where an applicant received “threats alone.”¹⁰⁶ In such cases, the officer may consider “the *perceived* imminence of the harm threatened and the *perceived* likelihood that the harm would be inflicted.”¹⁰⁷ This effectively diminishes access to the waiver for the number of refugees whose experience of duress stems from association—such as an imputed political opinion, ethnicity, or membership in a particular social group—instead of by a direct or targeted threat.¹⁰⁸ Additionally, the individual officer may consider “the severity and type of harm inflicted or threatened and, to whom the harm was directed.”¹⁰⁹ However, the Secretary has yet to provide guidance for determining when harm or a threat rises to a level of inducing duress.

DHS did not stop there, however. It provided another set of factors for the USCIS to use when weighing the totality of circumstances for duress-based exemptions.¹¹⁰ The officer may consider the “amount, type and frequency of the material support provided, the nature of the activities committed by the terrorist organization, the alien’s awareness of those activities, the length of time since material support was provided, the alien’s conduct since that time, and any other relevant factors.”¹¹¹

¹⁰³ *Id.*

¹⁰⁴ JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 584 (West Group 2003) (1999) (“Model Penal Code § 2.09 measures the defendant’s conduct against the standard of ‘a person of reasonable firmness.’”).

¹⁰⁵ AMERICAN LAW INSTITUTE, MODEL PENAL CODE AND COMMENTARIES, cmt. to § 2.09 at 375 (1985).

¹⁰⁶ Exercise of Authority, *supra* note 72.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ UNHCR, THE HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES (1992), available at www.unhcr.org/publ/PUBL/3d58e13b4.pdf. The Handbook also acknowledges the importance of the applicant’s subjective fear when evaluating whether the applicant meets the refugee definition. *Id.* UNHCR, the entity responsible for the interpretation of the Refugee Convention, asserts that “[s]ince fear is subjective, the [refugee] definition involves a subjective element in the person applying for recognition as a refugee.” *Id.*

¹⁰⁹ Exercise of Authority, *supra* note 72.

¹¹⁰ *Id.*

¹¹¹ *Id.*

III. SPINNING A WIDER WEB FOR "OTHERWISE ELIGIBLE" REFUGEES

To date, there are few decisions discussing or interpreting the material support. The three most prominent appellate decisions are *In re S-K*,¹¹² decided by the BIA in June of 2006; *Singh-Kaur v. Ashcroft*,¹¹³ decided by the Third Circuit in 2004; and *Choub v. Gonzales*,¹¹⁴ decided by the Ninth Circuit in August 2007. At the time those cases were decided, there were no waivers available. Nevertheless, so few material support cases exist not because most refugees fall outside of the material support bar's wide sweep, but, rather, because so many refugees fall within it.¹¹⁵ Otherwise eligible asylum seekers wait in vain in detention facilities on material support grounds.¹¹⁶ It is unlikely that they have heard of the waivers and, even if they have representation on the outside advocating on their behalf, there is no clear mechanism available for requesting a waiver.

In light of the criteria and factors discussed in the previous section, all three appellate decisions—*Choub v. Gonzales*,¹¹⁷ *Singh-Kaur v. Ashcroft*,¹¹⁸ and *In re S-K*¹¹⁹—which originally denied asylum and withholding of removal relief to the applicants, would likely be deemed to be ARBITRARY IF THE CURRENT WAIVER PROVISIONS WERE APPLIED TODAY.

A. *In re S-K*

The administration has failed to create procedures to deal with the many waiver-eligible cases in removal proceedings,¹²⁰ such as the case of Ma San Kwey.¹²¹ Ma San Kwey was barred from asylum and withholding of removal by an immigration judge in 2005 for having contributed \$1,100 Singapore dollars over an eleven

¹¹² 23 I. & N. Dec. 936 (B.I.A. 2006).

¹¹³ 385 F.3d 293 (3d Cir. 2004).

¹¹⁴ No. 04-74189, 2007 WL 2316919 (9th Cir. 2007).

¹¹⁵ According to the Asylum Headquarters Office, there are 621 affirmative cases, 1,491 adjustment applications of refugees, 3,699 adjustment applications of asylees, and relative petitions on hold due to the material support bar. Asylum Headquarters/NGO Liaison Meeting, *supra* note 75.

¹¹⁶ Congress Must Fix "Material Support," *supra* note 89.

¹¹⁷ No. 04-74189, 2007 WL 2316919 (9th Cir. 2007).

¹¹⁸ 385 F.3d 293 (3d Cir. 2004).

¹¹⁹ 23 I. & N. Dec. 936 (B.I.A. 2006).

¹²⁰ *Hearing on Material Support Bar: Denying Refuge to the Persecuted? Before the S. Comm. on Human Rights & Law of the S. Judiciary Comm.*, 110th Cong. (2007) (statement of Jennifer Daskal of Human Rights Watch), available at http://hrw.org/english/docs/2007/09/19/usint16941_txt.htm [hereinafter Daskal Statement].

¹²¹ *In re S-K*, 23 I. & N. Dec. 936 (B.I.A. 2006).

month period to the Chin National Front ("CNF").¹²²

San Kwe came to the United States from Burma to flee persecution and torture for her religious and ethnic-minority membership as a Christian Chin. As noted by the BIA, the Burmese government (a military dictatorship controlled by Burma's largest ethnic group) regularly commits human rights abuses against people of San Kwe's ethnic and religious background.¹²³ Indeed, San Kwe's family had been tormented by the Burmese military: the military arrested and detained her brother and killed her fiancé.¹²⁴ In 2001, following her fiancé's murder, San Kwe became acquainted with one of her late fiancé's friends, who was an undercover agent with the CNF.¹²⁵

The CNF, a known organization in Burma that advocates for democracy and freedom of ethnic Chin people, pledges to use force only in self-defense, and is allied with the National League of Democracy, which both the United Nations and United States have recognized as the legitimate representative of the Burmese people.¹²⁶ Understandably, given her family's suffering, San Kwe wanted to support the CNF's goals to secure freedom for the ethnic Chin and democracy for Burma. She donated money to the organization over the course of an eleven-month period and on one occasion provided her late fiancé's friend with a camera and binoculars.¹²⁷ These items were ultimately confiscated by the Burmese military, which also unearthed a letter written by San Kwe to the friend.¹²⁸ Following a raid on San Kwe's home, the friend strongly advised her to flee Burma as soon as possible, warning her that the Burmese military will torture anyone associated with a known member of the CNF and confirming for San Kwe that the military would know that she had provided the camera and binoculars.¹²⁹ At the time of the raid, San Kwe was working in Singapore.¹³⁰ Once her temporary work visa expired, however, she knew

¹²² *Id.*

¹²³ *Id.* at 937.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *id.* at 939 (noting Respondent's testimony from the Assistant Secretary of State, in which he describes the Burmese military as a "group of thugs," and the Burmese Freedom and Democracy Act of 2003, Pub. L. No. 108-61, 117 Stat. 864, which names the National League of Democracy—to which the CNF is aligned—as the legitimate representative of the Burmese people).

¹²⁷ *Id.* at 937.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

that her only option was to flee to a new country and ask for refuge.¹³¹

Since San Kwe's denial of relief, the Secretary of Homeland Security has included the CNF on its group-based waiver list.¹³² Nevertheless, San Kwe was not granted a waiver. On March 9, 2007, the Attorney General directed the BIA to refer to him its decision in *In re S-K* along with three other cases involving similar applicants, only to remand the case to the Board in September 2007 to "consider what, if any, further proceedings are appropriate in light of the Secretary's February 20, 2007 determination."¹³³ The Attorney General added that his action in no way affects the precedential nature of the Board's conclusions in its earlier decision with respect to "the applicability and interpretation of the material support provisions in section 212(a)(3)(B)(iv)(VI) of the Act."¹³⁴ The courts can only provide limited relief because the material support bar prevents the adjudicators from providing relief to refugees who should be eligible without a waiver by the executive. The material bar forces the refugee's determination into the arbitrary and political waiver process.

In the BIA's original decision, it repeatedly stressed in several footnotes that San Kwe should be eligible for a waiver.¹³⁵ The con-

¹³¹ *Id.*

¹³² Press Release, Department of Homeland Security, Statement by Homeland Security Secretary Michael Chertoff on the Intention to Use Discretionary Authority for Material Support to Terrorism (Jan. 19, 2007), available at http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm.

¹³³ *In re S-K*, 24 I. & N. Dec. 289, 290 (A.G. Sept. 14, 2007); see also *Attorney General Remands Matter of S-K to B.I.A.*, 84 No. 38 Interpreter Releases 2245 (Oct. 1, 2007).

¹³⁴ *Id.* at 291.

¹³⁵ The court stated:

[W]e do tend to agree with the D.H.S.'s assertion during oral argument that the new waiver provisions apply to this case . . . we believe it unlikely that Congress intended to create a gap in which there would be no waiver available for asylum cases pending prior to the effective date of the REAL ID Act.

In re S-K, 23 I. & N. Dec. 936, 941 n.4; see also *id.* at 942 n.6 ("We note that the ultimate outcome of the respondent's case is still undetermined in light of her ability to apply for a waiver.").

[W]hile the Immigration Judges and the Board do not have the authority to grant the respondent or similarly situated aliens discretionary waiver, other officials, including the Secretary of State, prior to the instigation of removal proceedings, or the Secretary of Homeland Security, at any time upon consultations with other agency officials; have been granted this power. We find no reason to assume they will not act consistently with our international treaty obligations in exercising their power to grant such a waiver. *Id.* at 943 n.7; *id.* at 946 n.14 ("D.H.S. also indicated that once granted deferral of removal under the Convention Against Torture, the respondent may be eligible for a . . . [waiver].").

curing opinion explained this point poignantly:

We are finding that a Christian member of the ethnic Chin minority in Burma, who clearly has a well-founded fear of being persecuted by one of the more repressive governments in the world, one that the United States Government views as illegitimate, is ineligible to avail herself for asylum despite posing no threat to the security of this country . . . I suggest that DHS may consider this respondent as someone to whom the grant of such a waiver is appropriate.¹³⁶

At the time of the BIA's initial decision, San Kwe clearly qualified for asylum,¹³⁷ nevertheless, it is unclear whether she would satisfy the "threshold requirements" in light of the waiver criteria. Specifically, under the waiver, the applicant must have passed security checks.¹³⁸

She may face obstacles under the second requirement, that she pass security checks. "The administration will not issue any Tier I and Tier II waivers until it has completed an intelligence assessment of the group."¹³⁹ The administration claims that this assessment is needed to help the adjudicators understand the group's general practices and better assess the refugee or asylum seeker's claim of duress.¹⁴⁰ This explanation holds little weight though as, under a group-based determination, which requires the same security assessment, discretionary authority is available *regardless* of whether the support was provided under duress.¹⁴¹

Almost a year and a half after the BIA urged the Administration to use its waiver authority to grant San Kwe relief, a year after Secretary of State Rice issued a waiver for Chin refugees from Burma, and nine months after Secretary Chertoff announced the Tier III waiver,¹⁴² San Kwe still had not been granted a waiver.

Meanwhile, the situation in Burma has become increasingly violent. As Tom Malinowski, Advocacy Director of Human Rights

¹³⁶ *Id.* at 947 (Osuna, Acting Vice Chairman, concurring).

¹³⁷ *Id.* at 937 (stating "the Immigration Judge found that the respondent had established a well-founded fear of persecution in order to qualify for asylum").

¹³⁸ See USCIS Memorandum, May, *supra* note 80, at 3–4. The remaining criteria are: the applicant must (a) be eligible for protection, (b) have "fully disclosed, in all relevant applications and interviews with U.S. Government representatives and agents, the nature and circumstances of each provision of such material support," and (c) pose no danger to the security of the United States. *Id.*

¹³⁹ Daskal Statement, *supra* note 120.

¹⁴⁰ *Id.*

¹⁴¹ USCIS Memorandum, May, *supra* note 80.

¹⁴² For a chronology of events, visit the Refugee Council USA's webpage on Refugee Waivers, <http://www.rcusa.org/index.php?page=refugee-waivers> (last visited Sept. 16, 2008).

Watch in Washington recently expressed in an October 2007 article, “We should have no illusions about what is going on in Burma. Soldiers are hunting down leaders of the protest movement and torturing them. Revered Buddhist monasteries are being occupied; the monks are being defrocked, beaten and sometimes killed People are afraid.”¹⁴³ Finally, in March of 2008 the BIA granted a waiver based on the Secretary’s designation and the Congress’s action to remove Chin National Front from the terrorist list.¹⁴⁴

But the interpretation of material support provision remained and, indeed, was confirmed by the BIA. Notably the BIA stated that the decision was based on the Secretary’s and congressional action—not a re-interpretation of the material support.¹⁴⁵ Thus, its initial assertion “which set out parameters for addressing the material support bar for asylum and withholding of removal” remained law.¹⁴⁶ The material support bar would continue to be applied broadly.

B. Choub v. Gonzales

Choub v. Gonzales was decided on August 14, 2007, roughly six months after Secretary Chertoff announced the group-based and duress waivers. However, since he had been placed in removal proceedings prior to issuance of the waivers on October 21, 2002, Choub did not have the benefit of the waivers.¹⁴⁷ Like San Kwe, Samnang Choub was denied asylum and withholding of removal, but found eligible for deferral of removal under the Convention Against Torture (“CAT”).¹⁴⁸ Deferral of removal under CAT is a subsidiary form of relief reserved for individuals who would likely be subject to torture, but who are nevertheless ineligible for withholding of removal.¹⁴⁹ A less desirable form of relief, deferral of

¹⁴³ Tom Malinowski, *No Longer the Generals’ Burma*, THE WASHINGTON POST, Oct. 21, 2007, at B7.

¹⁴⁴ *In re S-K*, 24 I. & N. Dec. 475 (B.I.A. 2008). Congress passed the Consolidated Appropriations Act of 2008, which essentially codified Secretary Chertoff’s previously issued waivers. See Consolidated Appropriations Act of 2008, § 691(b), Pub. L. No. 110-161, 121 Stat. 1844, 2365 (enacted Dec. 26, 2007).

¹⁴⁵ *Id.* at 477–78. (“We accordingly clarify that our decision in *Matter of S-K* still applies to determinations involving the applicability and interpretation of the material support provisions in section 212(a)(3)(B)(iv)(VI) of the [INA].”); see also *In re S-K*, 24 I. & N. Dec. at 290–91.

¹⁴⁶ *Id.* at 477.

¹⁴⁷ *Choub v. Gonzalez*, No. 04-74189, 2007 WL 2316919, at *1 (9th Cir. Aug. 14, 2007).

¹⁴⁸ *Id.*

¹⁴⁹ News Release, Immigration Court Process in the U.S. Removal Proceedings,

removal under CAT can be terminated more easily than withholding of removal and does not protect the beneficiary from being detained by the DHS.¹⁵⁰

The Ninth Circuit reaffirmed the BIA's finding that Samnang's activities—"supplying information to Cambodian Freedom Fighters ("CFF") about the Cambodian government's plans to arrest CFF members and about the strength of Cambodia military in certain areas"¹⁵¹—constituted material support. Samnang never denied providing information to Cambodian Freedom Fighters ("CFF") but did assert that during immigration court proceedings, "[w]hen, how, and to exactly whom he provided this information, and what if any possible effects this information had upon the operation were not asked [of him]."¹⁵² Interestingly, the answer to these questions are all now highly relevant for the purposes of the waiver, as discussed further below.

The Ninth Circuit categorized CFF as a Tier III terrorist organization, briefly noting that "the group has undertaken activities . . . in an effort to overthrow the Cambodian government."¹⁵³ Since CFF is not one of the eight organizations under the group-based exemptions, Samnang's only possibility for relief would be the duress-exemption waiver. However, Choub's case is lacking one key fact: duress.

Samnang did not experience duress; rather, when a friend told him about CFF and its goals of freedom and democracy, he voluntarily joined the organization.¹⁵⁴ He states that he was not involved with the mission to overthrow the Cambodian government, but, nonetheless, politically supported CFF's efforts to free Cambodia from its totalitarian regime.¹⁵⁵ Moreover, Samnang would never be able to meet the elements of asylum if the latter were not true.

Had CFF been on the administration's list of group-based exemptions, Samnang would not have had to show duress.¹⁵⁶ It is unclear why Secretary Rice would issue a group-based waiver for

Bond Redeterminations, Asylum, Convention Against Torture, Exec. Office for Immigration Review, U.S. Dep't of Justice (Apr. 28, 2005) (on file with author).

¹⁵⁰ *Choub*, 2007 WL 2316919, at *1.

¹⁵¹ *Id.*

¹⁵² Petitioner's Opening Brief at 13, *Choub v. Ashcroft*, 2007 WL 2316919 (9th Cir. 2007) (No. 04-74189) (referring to the Administrative Record) [hereinafter Petitioner's Opening Brief].

¹⁵³ *Choub*, 2007 WL 2316919, at *1.

¹⁵⁴ Petitioner's Opening Brief, *supra* note 152, at 13.

¹⁵⁵ *Id.*

¹⁵⁶ USCIS Memorandum, May, *supra* note 80, at 2.

individuals who had provided material support to the CNF, but not for individuals who supported the CFF given the groups' democratic goals. The Secretary's decision highlights how refugees are subject to an arbitrary process to be eligible for group based exemptions. Even the Ninth Circuit drew on the parallel between these organizations in its decision, but ultimately found it unpersuasive. The court stated, "The fact that [Samnang] Choub and the CFF claim to be motivated by their desire to advance democracy in Cambodia is immaterial" and then cited language from *In re S-K* discussing the CNF: "Congress intentionally drafted the terrorist bars . . . to include even those people described as 'freedom fighters. . . .'"¹⁵⁷ Indeed, had Samnang provided the same assistance to the CNF, he would be eligible for a waiver and able to attain refugee status. This incongruity demonstrates that the breath of the bar coupled with the exemption process leads to the arbitrary exclusion of eligible refugees.

Samnang, an otherwise eligible refugee,¹⁵⁸ would clearly be unable to demonstrate duress and, therefore, has no waiver possibility. Putting the official criteria for waiver aside for a moment, is Samnang really the kind of individual the United States should want to exclude? Samnang wants to help bring democracy to his country, which is currently run by a government with an abysmal human rights record.¹⁵⁹ CFF, his membership organization, is an anti-communist organization with the mission of bringing peace to Cambodia.¹⁶⁰ Ironically, CFF is a registered Californian non-profit organization.¹⁶¹ The administration's piecemeal and random selection of organizations is yet another cruel and illogical distinction embedded in the material support bar, and Samnang is yet another victim.

C. *Singh-Kaur v. Ashcroft*.

Refugees from India are the second largest group affected by the material support bar.¹⁶² The vast numbers of people affected by conflicts, such as the attack on Golden Temple, and the complex nature of these conflicts have caused a large number of Indian

¹⁵⁷ *Choub*, 2007 WL 2316919, at *1.

¹⁵⁸ See Petitioner's Opening Brief, *supra* note 152, at 14–18 (discussing Choub's asylum eligibility).

¹⁵⁹ HUMAN RIGHTS WATCH, WORLD REPORT 2008 255–59 (2008), available at http://www.hrw.org/legacy/wr2k8/pdfs/wr2k8_web.pdf.

¹⁶⁰ Petitioner's Opening Brief, *supra* note 152, at 19.

¹⁶¹ *Id.*

¹⁶² Asylum Headquarters/NGO Liaison Meeting, *supra* note 75.

refugees to fall into the material support web. Charangeet Singh Kaur is one such refugee. His story, yet again, demonstrates that the waivers are not enough to adequately protect genuine refugees.

Charangeet was born into a Sikh family in Punjab, India. As a youth, he joined the Babbar Khalsa Group and the Sant Jarnail Singh Bhindrawala Militant Group ("Bhindrawala Group").¹⁶³ Babbar Khalsa was created to protect and promote the Sikh faith, while the Bhindrawala Group was created to fight for and protect religious and political cause of Sikh community.¹⁶⁴ After what the BBC called "one of the most momentous events in modern Indian history—the storming of the Golden Temple in Amritsar, the holiest shrine of the Sikh religion, by the Indian army"¹⁶⁵—Charangeet joined several Sikh organizations, along with thousands of Sikh young men both in India and abroad. As one Sikh-American recalls:

I was 13 years old at that time in the United States and remember the rallying of Sikhs in America to help in any way possible. I recall my parents crying like children, demonstrating in front of the United Nations and Indian Consulate in NYC. . . . I remember my Sikh friends joining the cause in Washington DC . . . I remember the forming of Khalistan organizations and meeting leaders of the movement. It is most horrific [sic] period in India's modern time that unfortunately the world really is not aware of. It was a period that was responsible for changing the perception of Sikhs. Before this time people would make sure they sat their families next to Sikhs on the trains and buses of India for safety. After this period they sat as far away from them as possible and questioned if they were terrorists.¹⁶⁶

Despite the widespread violence aimed at Sikhs, the State Department's Bureau of Human Rights and Humanitarian Affairs concluded that, for the purposes of asylum, the Indian government did not "persecute" Sikhs for *mere* affiliation with an organization.¹⁶⁷ To conclude otherwise would open the floodgates to Sikh asylum seekers. Instead, the government found "persecution" only where the asylum applicants could show that the police targeted them for their involvement in specific violent acts.¹⁶⁸ To meet this

¹⁶³ *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 294 (3d Cir. 2004).

¹⁶⁴ *Id.*

¹⁶⁵ *Golden Temple attack—your memories*, BBC NEWS, June 9, 2004, http://news.bbc.co.uk/2/hi/south_asia/3754489.stm (last visited 12/4/08).

¹⁶⁶ *Id.*

¹⁶⁷ *Singh-Kaur*, 385 F.3d at 295.

¹⁶⁸ *Id.*

standard, however, an applicant such as Charangeet signals his or her own inadmissibility under the material support bar.

Indeed, Charangeet disclosed in an affidavit supporting his asylum application that the police began to target him because, in addition to participating in demonstrations and organizational activities of the group, he assisted the freedom fighters by giving shelter to those militants who physically moved weapons from village to village.¹⁶⁹ In a subsequent affidavit, he further explained that, as a member of the group, he “was expected to make charitable contributions to the community, including ‘provision of food and assistance to the poor.’”¹⁷⁰ Charangeet testified,

We—I used to help by putting that tent and organize the mondo or the tent . . . I never kept any weapons. Those Sikhs who were baptized, they used to come and they knew that I am also baptized and I just help them with the—giving them food.¹⁷¹

The Third Circuit was unmoved by the fact that Charangeet had never participated in any violence and that the meetings at which he sheltered militants were for the purpose of religious ceremony. The court denied his admission under the material support bar.¹⁷² Today, despite the Secretary’s exercise of his waiver authority, a court would still likely deny admission to Charangeet (like San Kwey and Choub) for material support reasons. In its decision, the Third Circuit demonstrated some hesitancy in articulating to which organizational tier Charangeet had provided support.¹⁷³ However, a court today would easily hold that any of the Sikh groups that Charangeet participated in was “a group of two or more individuals”¹⁷⁴ with intent to threaten or “endanger,

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 296.

¹⁷² *Id.* at 300–01.

¹⁷³ *Id.* at 297–98. The Court of Appeals considered,

None of the organizations to which Sing belonged, including Babbar Khalsa, are among the thirty-six Foreign Terrorist Organizations designated by the United States Department of State in accordance with INA § 219 . . . Babbar Khalsa and the International Sikh Youth Federation, however, were named by the Department of Treasury . . . as Specially Designated Terrorist.

We need, not, however . . . consider whether Babba Khalsa, Sant Jarnail Singh, the International Sikh Youth Federation or any other group was a terrorist organization within the meaning of INA § 212(a)(3)(B)(iv)(VI)(cc) or (dd).

Id.

¹⁷⁴ Immigration and Nationality Act § 212(a)(3)(B)(vi)(III), 8 U.S.C. § 1182 (2006).

directly or indirectly, the safety of one or more individuals or to cause substantial damage to property"¹⁷⁵ and, hence, would be considered a Tier III terrorist organization under the INA.

Since none of Charangeet's groups are on the group-exemption list, his only potential waiver is through a duress exemption. Yet, duress is a flexible concept vulnerable to the subjectivity of the individual adjudicator. The February pronouncement¹⁷⁶ does not define duress, although it does provide factors to help the USCIS officers make a determination. Black's Law Dictionary lists three definitions for duress.¹⁷⁷ The first and third¹⁷⁸ definitions derive from tort and criminal law, respectively. However, the second definition has a broader applicability "a threat of harm made to compel a person to do something against his or her own will or judgment."¹⁷⁹ According to this definition, Charangeet could have experienced duress as a result of the continual threat of violence by the government. This threat may have, in turn, compelled him to support Sikh groups. While this is unlikely the kind of "duress" contemplated by the Exercise of Authority, the language of the pronouncement does not exclude this interpretation.

The waiver requires that the duress be the catalyst for the provision of material support *to* the terrorist organization but not that the terrorist organization necessarily *be* the source of the duress.¹⁸⁰ Another entity, such as a government or militia, could be the source of the threat of harm driving the individual's belief that it is necessary to support a group that works against the threat of harm.

Charangeet might argue that he joined Sikh groups because of the great threat of harm Sikhs experienced around the time of the 1984 government attack on the most important Sikh holy site. As Charangeet explained in testimony through an interpreter, "When the Indian troops attacked the holy shrine of the Sikh community (the Golden Temple), killing members of the Sant Jarnail group, he, among others joined Babbar Khalsa."¹⁸¹

¹⁷⁵ § 212(a)(3)(B)(iii)(V), 8 U.S.C. § 1182.

¹⁷⁶ Notice of Determination, 72 Fed. Reg. 9958 (Mar. 6, 2007).

¹⁷⁷ BLACK'S LAW DICTIONARY, *supra* note 23, at 426.

¹⁷⁸ *Id.* ("1. Strictly, the physical confinement of a person or the detention of a contracting party's property. In the field of torts, duress is considered a species of fraud in which compulsion takes the place of deceit in causing injury. . . . 3. The use or threatened use of unlawful force—usu. that a reasonable person cannot resist—to compel someone to commit an unlawful act.").

¹⁷⁹ *Id.*

¹⁸⁰ See Exercise of Authority, *supra* note 72.

¹⁸¹ Brief of Petitioner at 5-6, *Singh-Kaur v. INS*, 385 F.3d 293 (3d Cir. 2003) (No. 03-1766).

Additionally, Charangeet would have good reasons to feel threatened. Kanwarpal Singh Bittoo, a Sikh man, who was a young student at Amritsar's Khalsa College on the night of June 5, 1984, described the fear and dread he experienced on the night of the attack:

[It] seemed like the end of the world had come. . . . We sat huddled together inside our homes as a never-ending succession of explosions and continuous gunfire ripped through the night. It was dark and terribly humid. The electric supply had been shut down and all telephone lines had been cut. Then suddenly, on the morning of June 6, a deathly silence enveloped the old city. Rumours circulated wildly. . . . "[T]he Indian army has destroyed the Golden Temple."¹⁸²

Moreover, the threat Charangeet experienced as a young Sikh living in Punjab in the mid-eighties eventually actualized. One night, the police dragged him out of the house and began to beat him mercilessly with riot sticks.¹⁸³ The police detained Charangeet for over a week.¹⁸⁴ Upon his release, he tried to protect his family from the police by staying away from his home and living on the streets.¹⁸⁵ After he was arrested for a second time, it was clear that he needed to flee.¹⁸⁶

In light of this expanded notion of duress, even if the USCIS were to accept such an argument—which is doubtful, as it begins to sound too much like an asylum analysis¹⁸⁷—the USCIS can still use the duress factors and its discretion to find an otherwise eligible refugee inadmissible.¹⁸⁸ In Charangeet's case, there would be several potentially detrimental factors. The USCIS might decide that Charangeet could have reasonably avoided or taken steps to avoid providing the material support.¹⁸⁹ Similar to the "internal flight alternative" doctrine,¹⁹⁰ a USCIS officer might expect an ap-

¹⁸² Kanwarpal Singh, *Flashbacks Golden Temple Attacks*, BBC NEWS, June 3, 2004, http://news.bbc.co.uk/2/hi/south_asia/3774693.stm (last visited Dec. 4, 2008).

¹⁸³ Brief of Petitioner, *supra* note 181, at 6.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See, e.g., John S. Kane, *Refining Chevron—Restoring Judicial Review to Protect Religious Refugees*, 60 ADMIN. L. REV. 513 (2008).

¹⁸⁸ See, e.g., Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007).

¹⁸⁹ USCIS Memorandum, May, *supra* note 80.

¹⁹⁰ The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), provides "internal relocation" (i.e. asylum-seeker's ability to avoid persecution in his or her home country by relocating to another area of that country) as a guideline for the exercise of discretion in determining an applicant's eligibility for asylum status.

plicant to first try to relocate to another state in India. In addition, his awareness of the "terrorist" organization's activities might be another detrimental factor.

The duress exemption's breath is potentially beneficial for refugees but the discretion of the USCIS factors coupled with the underlying policy of the material support provision make the waiver an empty vessel. These cases demonstrate that the waiver system is applied arbitrarily because it fails to take account of the context of the individual refugees' support, and that the material support provision will continue to dictate the fate of these refugees.

CONCLUSION: THE PROMISE OF PROTECTION

Today, even with the new waivers in place, not all bona fide refugees and asylum seekers will be protected. Colombian refugees who are the most frequently represented nationality with cases on hold for material support reasons are not on the list, nor are refugees from India, Nepal, Sri Lanka, and the Philippines, the next biggest groups affected by the material support bar.¹⁹¹ Their chances of accessing the general waiver are slim, given the role and expanse of the discretionary factors.

The waivers are yet another illusory promise made by the United States government for the sake of appearance. In reality, they provide the United States government with another tool for making cruel distinctions that keep genuine refugees from being granted status or sanctuary. Only a legislative fix that addresses the indiscriminate nature of the material support issue will disentangle refugees from the web.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; *see* Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208 (1998).

¹⁹¹ Asylum Headquarters/NGO Liaison Meeting, *supra* note 75.