



The “Material Support to Terrorism” Bar: Despite Recent Modifications, Bona Fide Refugees Still Find No Safe Haven

— by HADEER SOLIMAN

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Introduction

Since 1996, U.S. law has barred aliens from admission into the U.S. and from obtaining asylum based on broadly defined terrorist activities, even if those aliens do not pose a national security or public safety risk.¹ According to the statute, “engag[ing] in terrorist activity” includes the commission of an act that the “actor knows, or reasonably should know, affords material support, including a safe house, transportation, communication, funds, . . . false documentation, . . . weapons . . . , explosives, or training.”² This list is non-exhaustive and contains no limiting terms.³ The USA PATRIOT Act of 2001, which defined “Tier III” terrorist organizations as groups of “two or more individuals, whether organized or not, which engage in, or [have] a subgroup which engages in” terrorist activity as defined in the statute, made providing material support to a group that used violence against persons or property for any purpose, no matter how justifiable, a practical bar to asylum.⁴

Because the statute is over-expansive, there have been calls for a de minimis exemption to the material support bar.⁵ However, since legislative attempts to limit the application of the material support bar have been unsuccessful, asylum seekers now depend on discretionary waivers from the U.S. Department of Homeland Security (“DHS”).⁶ The governing regulation, published in 2007, permits a waiver for aliens who gave material support to a Tier III organization under duress if they satisfy a list of four other requirements.⁷ The authority to grant the waiver lies solely in the hands of the Secretaries of State and Homeland Security, who make this exception only if it is “warranted by the totality of the circumstances.”⁸

In 2014, the Secretaries of State and Homeland Security published a regulation stating that the material support bar “shall not apply with respect to aliens who provided limited material support.”⁹ The type of limited material support covered by the notice

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involves “certain routine commercial transactions or certain routine social transactions;” “certain humanitarian assistance;” or support provided under “substantial pressure that does not rise to the level of duress,” provided that the alien satisfies

a list of eleven conditions.¹⁰ The 2014 regulations allows U.S. Citizenship and Immigration Services (“USCIS”), U.S. Immigration and Customs Enforcement (“USICE”), and U.S. consular officers “to ascertain . . . that the particular alien meets each of the criteria,” but does not extend that authority to immigration judges.¹¹

Although this regulation signals a belief that the definition of “material support” casts too wide a

net, the list of requirements in the 2014 regulation continues to bar admission to individuals who need it most, including asylum applicants who provided “de minimis” material support to organizations prior to their being classified as terrorist organizations. Further, the definition of “limited” material support is still a subjective one, and the term “certain” with respect to humanitarian assistance or routine commercial transactions is also unclear.

This article examines cases in which asylum was denied under the material support provision of 8 U.S.C. § 1182 and determines whether the results of those cases would differ under the 2014 regulation published by the DHS and the Department of State.

The analysis demonstrates that the recent DHS regulation does little to protect those who provided de minimis material support to Tier III terrorist organizations or organizations that were later designated as terrorist organizations. It also provides no recourse for those who provided support to designated terrorist organizations under duress. With its undefined terms, the regulation adds confusion to the already muddied waters of material support law in the U.S. The regulation seems to be available in the case that an officer would like to use it, but the discretion the regulation allows makes it impossible to hold officers accountable to its application.

Case Studies: Before and after the 2014 Determination

A. *In re S-K-*

In *In re S-K-*, the applicant was a citizen of Burma, a Christian, and ethnic Chin.¹² The applicant claimed she would face persecution and torture if she returned to Burma because the government committed human rights abuses against ethnic and religious minorities and, in fact, arrested

and detained her family members.¹³ She donated 1100 Singapore dollars over the course of eleven months and attempted to donate other goods to the Chin National Front (“CNF”), an anti-government organization working to secure freedom for the ethnic Chin group in Burma.¹⁴ Although the immigration judge found that she established a well-founded

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fear of persecution in order to qualify for asylum, he found that she was statutorily barred from asylum and withholding of removal because she provided money to an organization which she knew, or had reason to know, endangered the safety of others.¹⁵ While she argued that the Burmese government is illegitimate and the National League of Democracy, with which the CNF is associated, is recognized by the U.S., the court found that it did not have the authority to provide a waiver based on the legitimacy of an organization.¹⁶ The applicant also argued that her support of the CNF was not “material,” since it was not relevant to the planning of a terrorist act, but the court found that the statute provided no limitation on the term “material support.”¹⁷ The court found that the amount of money that she donated over several months was sufficiently substantial to have some effect on the ability of the organization to accomplish its goals.

The applicant in *In re S-K-* would likely not have been granted relief under the recent 2014 regulation. The applicant may have argued that she was under “substantial pressure” to provide material support to CNF and therefore falls within section (3) of the 2014 regulation. That section does not require that the pressure amount to duress, but gives no definition of the meaning of “substantial.” Here, after the applicant learned that the Burmese government was responsible for the detainment of

her family members, she was arguably in a state in which she felt pressured to contribute financially to an organization that opposed the Burmese government. While this constitutes some form of pressure, an immigration officer would likely find that it does not rise to the level of substantial pressure. Since no guidelines or definitions of the term exist, the applicant’s qualification for waiver would be based on the whim of the USCIS or USICE officer receiving the case.

Even if found to be material support given under substantial pressure, S-K-’s support would still have to satisfy the eleven conditions listed in the regulation. This includes that she is otherwise eligible for protection, she has undergone and passed the relevant security checks, and she has fully disclosed her material support. Having satisfied these conditions, an officer would also look for evidence that she did not provide the material support with the intent or desire to assist any terrorist organization. An officer would not have granted the waiver because there is evidence that S-K- actually provided the donations with the intent to support the organization because of its anti-government stance.

Although the regulation carves out some exceptions for applicants who provided limited material support like S-K-, the broad terms, lack of definitions, and discretion afforded to officers combine to make the regulation almost useless in a case with facts like those in *In re S-K-*.

B. *Singh-Kaur v. Ashcroft*

In *Singh-Kaur v. Ashcroft*, Charangeet Singh, a citizen of India, asserted that if he returned to India he would be arrested and persecuted on account of his Sikh faith.¹⁸ A U.S. federal appellate court found that he was inadmissible, holding that providing food and setting up tents for members of the Babbar Khalsa Group and the International Sikh Youth Federation constituted “material support.”¹⁹ Babbar Khalsa and the International Youth Federation were

not on the Federal Terrorist Organization list, but were placed on the Department of Treasury's list of Specially Designated Global Terrorist ("SDGT") organizations in 2002, thirteen years after Singh entered the U.S.²⁰ The appellate court did not reach the issue of whether the lower court was correct in retroactively applying a terrorist designation to the organizations, however, because it was able to find that Singh provided material support to a group "who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity."²¹ However, the record is void, as the dissent points out, of any evidence as to what terrorist acts these unnamed individuals planned to commit.²² Although Singh testified that the purpose of the organizations was to promote the Sikh faith and that the meeting at which he provided food and a tent was held in order to "propagate religion," the court found that the organizations "engage in terrorist activity" because the International Sikh Youth Federation was a "radical off-shoot" of the Khalistan Commando Force (KCF), which was a notorious terrorist group responsible for killings in India.²³ Because Singh was found to have provided material support, the *Singh-Kaur* court found he was ineligible to remain in the United States.²⁴

The dissent in *Singh-Kaur* notes that providing food and setting up tents for a religious meeting are "not of the degree and kind contemplated by the 'material support' provision," especially because there was no adverse credibility finding, meaning Singh's affidavit and testimony should have been assumed to be true.²⁵ In its strongest argument, the dissent argues that by determining that provision of food and tents at a religious meeting constitutes

"material support," the court transforms mere "support," which may include the necessities for life but not necessarily the necessities for terrorism, into "material support."²⁶ While logical, this view did not persuade the majority of the appellate court.

There is a chance, however, that the dissenting judge's argument in *Singh-Kaur* could garner support under the 2014 regulation. Singh or a similarly situated applicant could argue, as the dissenting judge does, that the provision of food and a tent for the purpose of a religious meeting qualifies as "limited material support" because the "shelter" was minor, the food was a simple meal, and the provision was not relevant to any violent activity that the organization may later carry out. In fact, the statute does not list food and shelter at all in its list of items; the closest is a "safe house," which usually means providing a safe place of hiding. Here, the food and tent were provided in a village through which adherents to the religion passed, and no evidence suggests that Singh attempted to provide a safe hiding space for these individuals. An officer might find this support to constitute "limited material support."

Additionally, Singh could have argued that his activities qualify as a routine social transaction that is well established as a social or cultural obligation. Singh was formally inducted as a Sikh, and this induction ceremony in his village happened under the auspices of the Babbar Khalsa, which meant all those who were inducted were then "enrolled" in the Babbar Khalsa.²⁷ As a member, he attended meetings to propagate the Sikh religion, where he arranged tents and prepared food.²⁸ Thus, since the

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meeting was a normal occurrence for a member of the religion who was “inducted,” Singh’s provision of a tent and food was part of a cultural obligation.

Alternatively, Singh may also qualify because he provided the tent and food under “substantial pressure,” since this was expected of him as a member of the Babbar Khalsa, especially at a time immediately following the Indian government’s attack on a Sikh shrine, when members of the Sikh faith undoubtedly found it important to join groups that protected their faith.²⁹ Singh would qualify for this subsection only if he had otherwise been determined to be eligible for protection. Here, the immigration judge originally found that Singh established a credible fear, and he is therefore likely eligible for asylum. Singh also satisfies the other requirements, including that he did not provide the “material support” with the intent to assist terrorist activity. In fact, when asked by the judge whether he was ever involved in the violent activities led by those who wanted an independent Sikh state, Singh replied that he was not.³⁰ Further, he could argue he poses no threat to the security of the U.S. because the evidence shows no signs of malice. Of course, with little guidance from the DHS, immigration officers are likely to disagree on this point, and they may use their own discretion to find that by virtue of Singh’s former association with the Babbar Khalsa, he is a threat to national security. Although the stronger argument is on the side of the applicant, USCIS officers may find, as the court did, that the Babbar Khalsa is a “radical off-shoot” of a designated terrorist organization, which would disqualify the applicant from the waiver.³¹

While the decision would be left to the discretion of a USCIS or USICE officer, an applicant like Singh could be cautiously optimistic that his/her facts would make him/her a likely candidate for waiver under the regulation. Nevertheless, the determination’s loose and broad language allows immigration officers to ascertain to their own satisfaction that the individual meets the criteria,

making it difficult to predict results. The regulation is also applied on a case-by-case basis, meaning some applicants may be waived while others in a similar situation may not.

Conclusion

The UN Refugee Convention and its Protocol create a responsibility for the U.S. to provide protection for refugees around the world, but since the attacks on September 11, 2001, “ensuring that the US lives up to its moral commitment to those who flee persecution . . . does not seem to be viewed as an important responsibility, and certainly not as a priority, by many leaders of the various immigration bureaucracies.”³² This downgrade in priority is due to a number of factors beyond the scope of this article, but also partially to the breadth and lack of clarity of the material support to terrorism bar.

As shown in the cases discussed above, the regulation may provide a way out of the material support bar for an applicant like Singh in *Singh-Kaur*, who provided food and set up a tent at a religious meeting attended by a group with ties to militant violence. However, the regulation is not sufficient to protect asylum seekers like S-K- who have provided de minimis support to terrorist organizations, but are themselves victims of repressive regimes around the world. The regulation is written in a manner allowing an immigration officer to apply it whenever s/he feels inclined without violating the regulation’s broad guidelines. This, like many aspects of the American immigration system, provides excessive leeway for officers and thus the manner of application may vary from officer to officer.

Suggested solutions for concretizing the statute’s guidelines include defining the term “limited material support” as support that is de minimis and not relevant to the organization’s terrorist activity. This would provide admission for an applicant like Singh above, who simply provided a meal at a religious meeting to a group

that may have had a militant sect. Additionally, a definition of “substantial pressure” will help clarify which applicants satisfy the requirements of the regulation and may provide relief for an applicant like the one in *In Re S-K-*, who donated money to an anti-government organization after the government arrested and detained her family members.

Further, the regulation should contain a clause disqualifying those who provided limited forms of material support to any terrorist organization if the limited material support was provided under duress. Failing to account for the applicant’s duress means that not only is the applicant subject to duress in his/her country of origin, but s/he is also subject to a form of victimization again in the U.S., where no relief is available to him/her because of that same duress.

These modifications would lead to change if they were written as an exception within the statute itself, rather than published as a regulation applicable only to officers of USICE and USCIS. This would give judges the opportunity to determine if an applicant qualifies for the waiver. By carving out an exception within the statute for those who provided a defined “limited material support,” each applicant would have a chance to build his/her case and make arguments before a judge regarding the irrelevance of his/her support to the organization’s terrorist activity.

The resulting clarity will create uniformity in the way the law is applied, leading to more respect for U.S. laws and practices. More importantly, revising the material support bar to include narrower and clearer definitions will restore the priority that the US has historically given to its commitment to providing refuge to individuals around the world fleeing persecution. ■

Author Biography

Hadeer Soliman holds a B.S. in Public Health Science and a B.A. in Spanish from the University of California, Irvine. She received her J.D. from Chapman University, Dale E. Fowler School of Law, graduating *cum laude* in 2015. She is licensed to practice law in California. She is currently pursuing her L.L.M. in London, U.K. Ms. Soliman wishes to add the following acknowledgement: “I am indebted to my parents and family for their unending support of my research interests. I thank Professor Marisa Cianciarulo, whose course inspired this article, for her guidance on refugee law and for reading and providing invaluable feedback on earlier versions of this article.” ■

Endnotes

- 1 8 U.S.C.A. §1182(a)(3)(B) (West 2013).
- 2 8 U.S.C.A. §1182 (a)(3)(B)(iv)(VI) (West 2013).
- 3 Kara B. Stein, *Female Refugees: Re-Victimized by the Material Support to Terrorism Bar*, 38 MCGEORGE L. REV. 815, 817 (2007).
- 4 Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material Support Bar*, 59 CATH. U. L. REV. 949, 952 (2010).
- 5 Eleanor Acer & Anwen Hughes, *The Post-September 11 Asylum System*, 32 No. 4 LITIGATION, 41, 42 (2006).
- 6 Charlotte Simon, *Change is Coming: Rethinking the Material Support Bar Following the Supreme Court’s Holding in Negusie v. Holder*, 47 HOUS. L. REV. 707, 732 (2010).
- 7 Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958-01 (Mar. 6, 2007).
- 8 *Id.*

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- 9 Exercise of Authority Under Section 212(d)(3)
(B)(i) of the Immigration and Nationality Act, 79 Fed.
Reg 6914-01.
- 10 *Id.*
- 11 *Id.*
- 12 *In Re S-K-*, 23 I. & N. Dec. 936, 937 (BIA
2006).
- 13 *Id.*
- 14 *Id.*
- 15 *Id.* at 937.
- 16 *Id.* at 940.
- 17 *Id.* at 943-44.
- 18 *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 294 (3d.
Cir. 2004).
- 19 *Id.*
- 20 *Id.* at 297.
- 21 *Id.* at 298.
- 22 *Id.* at 302 (Fisher, J., dissenting).
- 23 *Singh-Kaur v. Ashcroft*, 385 F.3d at 299-300.
- 24 *Id.* at 301.
- 25 *Id.* at 301 (Fisher, J., dissenting).
- 26 *Id.* at 304.
- 27 *Singh-Kaur v. INS*, WL 25287455 (2003),
Pet'r's. Br. 10.
- 28 *Id.*
- 29 *Id.* at 5.
- 30 *Id.* at 10.
- 31 Exercise of Authority Under Section 212(d)(3)
(B)(i) of the Immigration and Nationality Act, 79 Fed.
Reg. 6914-01.
- 32 Acer & Hughes, *supra* note 5, at 41. ■
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