

ARTICLE

BARRED FROM JUSTICE: THE DURESS WAIVER TO THE MATERIAL SUPPORT BAR

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ABSTRACT

Under the Material Support Bar, an individual who has fled his or her home country due to persecution may be barred from obtaining asylum protection in the United States for providing “material support” to a terrorist organization. This bar can apply even though the individual provided such support against their will. This Article recommends legislative, administrative, and practical solutions to this unjust outcome.

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I. INTRODUCTION

Currently, terrorists known as ISIS or ISIL (Islamic State of Iraq and the Levant) are kidnapping, raping, and torturing young Yazidi women by using them as sex slaves and domestic servants.¹ Under asylum law, the Yazidi women’s victimization under these horrific conditions would normally all but guarantee them the protections of asylum as classic refugees.² But because of certain illogical and draconian interpretations of the “material support bar” provision³ of U.S. asylum law, these persecuted Yazidi women would not only be denied, but actively barred from obtaining asylum based on the fact that they provided “material support” to these terrorists by having provided coerced services to the terrorists.⁴

Generally, a victim of persecution from a country outside the United States can apply for certain legal protections under the doctrine of asylum in U.S. immigration law if he or she is able to prove that he or she falls under the definition of “refugee” as defined in

1. See Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N. Y. TIMES (Aug. 13 2015), http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?_r=0; Khaleda Rahman, *Young Yazidi Woman Who was Kidnapped and Raped by ISIS Gang but Managed to Flee Tells the Story of Her Terrifying Ordeal, Her Escape and Her Fears for Her Mother They Still Hold*, DAILY MAIL (Jan. 29, 2015), <http://www.dailymail.co.uk/news/article-2931082/Young-Yazidi-woman-kidnapped-raped-ISIS-gang-managed-flee-tells-story-terrifying-ordeal.html>; see also Sara Malm, *The Virgins Were Taken to a Room with 40 Men. They Lined Us up and Pointed Who They Wanted: Yazidi Girl, 17, Made Pregnant by ISIS Fighter Reveals Her Nine-Month Ordeal as a Jihadi Sex Slave*, DAILY MAIL (May 29, 2015), <http://www.dailymail.co.uk/news/article-3099560/The-virgins-taken-room-40-men-lined-pointed-wanted-Yazidi-girl-17-pregnant-ISIS-fighter-reveals-nine-month-ordeal-jihadi-sex-slave.html>.

2. Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A), states that a refugee is

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

3. INA § 212(a)(3)(B)(iv)(VI).

4. See *Annachamy v. Holder*, 733 F.3d 254, 260 (9th Cir. 2013) (finding no duress exception to material support provision); *Alturo v. U.S. Att’y Gen.*, 716 F.3d 1310, 1314 (11th Cir. 2013) (same); *Barahona v. Holder*, 691 F.3d 349, 354 (4th Cir. 2012) (same). *But see Ay v. Holder*, 743 F.3d 317, 319 (2d Cir. 2008) (declining to decide whether a duress exception exists and remanding the case to the Board of Immigration Appeals (BIA) to decide the issue).

section 101(a)(42) of the Immigration and Nationality Act (INA).⁵ However, this “material support bar” would render the victim ineligible if the government is able to prove that he or she committed an act that he or she “kn[ew], or reasonably should [have] know[n], afford[ed] material support . . . to a terrorist organization.”⁶ “Material support” includes a wide range of actions from providing a safe house to simply cooking food for a terrorist.⁷ Incredibly, the material support bar appears to apply even if such “support” was provided under duress.⁸

Theoretically, a person who provided material support under duress could obtain a “duress exemption,” also known as the “duress waiver,”⁹ which states that if a person was under duress at the time that he or she provided the material support to a terrorist, then the material support bar may be waived.¹⁰ However, although this duress waiver exists in the law, in reality, there remains no formalized application procedure for asylum seekers to obtain the waiver. This is so even though Congress authorized the U.S. Department of Homeland Security (DHS) to create a duress exemption almost ten years ago.¹¹

This article will address the duress waiver, analyze the effectiveness of the current procedure to apply for this waiver, and offer recommendations, including proposed changes to legislation and amendments to the current application process.

II. BRIEF OVERVIEW OF ASYLUM AND THE MATERIAL SUPPORT BAR

A. *U.S. Asylum Law*

Asylum law provides immigration relief to persons coming to the United States after fleeing persecution in their homeland.¹² If

5. INA § 101(a)(42)(A).

6. *Id.* § 212(a)(3)(B)(iv)(VI).

7. *Id.*

8. *See supra* note 4.

9. ANWEN HUGHES, HUMAN RIGHTS FIRST, DENIAL AND DELAY 2 (Nov. 2009), <https://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>.

10. Memorandum from Michael Chertoff, Sec’y, U.S. Dep’t of Homeland Sec., Exercise of Authority Under INA Sec. 212(d)(3)(B)(i) (Apr. 27, 2007) (available on AILA InfoNet at Doc. 07050168 (available by subscription)); *see also USCIS Fact Sheet on Secretary Chertoff’s 4/27/07 Material Support Memo*, AM. IMMIGR. LAW. ASS’N (May 11, 2007), <http://www.aila.org/infonet/uscis-fact-sheet-material-support-memo>.

11. *See Sesay v. Att’y Gen.*, 787 F.3d 215, 223 n.7 (3d Cir. 2015) (“As the Government acknowledged at argument, almost ten years after Congress granted the Executive Branch the power to grant waivers, there remains no published process for requesting one. . . .”).

12. For an overview of asylum law, see DEBRA ANKER, LAW OF ASYLUM IN THE UNITED STATES (2015).

a person is successful in obtaining asylum, he or she does not have to return to the country of persecution and is accorded certain legal rights in the United States.¹³

The major sources of law used in asylum proceedings are international agreements and instruments and U.S. domestic law.¹⁴ Asylum law is based on the 1951 United Nations Convention Relating to the Status of Refugees¹⁵ (Refugee Convention) that defines who is a refugee and the kinds of legal protections the refugees should receive by the countries that are signatories to the Refugee Convention.¹⁶ Under the 1951 Refugee Convention, a refugee is defined as an individual who,

. . . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁷

Later, the 1967 United Nations Protocol Relating to the Status of Refugees, adopted by the U.S., amended the definition of refugee to alleviate the global problem of displacement.¹⁸ Finally, the INA, which is the basic source of U.S. asylum law,¹⁹ incorporated the definition of refugee and codified this definition as the eligibility requirement for an asylum claim.²⁰

Under U.S. asylum law, a person can obtain asylum if he or she is able to prove that he or she faces persecution based on one of five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.²¹ In the above situation of the Yazidi women, most experienced asylum practitioners would attempt to formulate a “particular social group”²² under one of the five grounds such as “Yazidi

13. *Id.*

14. *Id.* at 13–22.

15. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in scattered sections of 8 U.S.C.); see Deborah Anker & Michael Posner, *The Forty Year Crisis*, 19 SAN DIEGO L. REV. 9, 11 (1981).

16. U. N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S., <http://www.unhcr.org/3b66c2aa10.html>.

17. *Id.*

18. See ANKER, *supra* note 12, at 5; GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 35–36 (3d ed. 2007).

19. See ANKER, *supra* note 12 at 13.

20. See INA § 208(b)(1)(B), 8 U.S.C. § 1158(b)(1)(B).

21. INA § 101(a)(42)(A).

22. For background on the definition of a particular social group, see ANKER, *supra* note 12, at 361–441.

women who are coerced into providing services to ISIS terrorists.”

B. The Material Support Bar

Even if an asylum seeker meets the definition of a refugee, there are several independent grounds for that person to nonetheless be excluded from the United States.²³ One such ground is the material support bar.²⁴ The 1996 Antiterrorism and Effective Death Penalty Act²⁵ (AEDPA) introduced the bar in response to the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing.²⁶ The provision bars from asylum anyone who provided material support to an organization engaged in terrorist activity or who was a member of a foreign terrorist organization (FTO).²⁷

The material support bar provision is one of the broadest grounds for exclusion and is likely to exclude the largest number of asylum seekers.²⁸ The broad interpretation of the term “material support” allows it to encompass forms of support that have no connection to violence.²⁹ For example, in *Singh-Kaur v. Ashcroft*, the Board of Immigration Appeals (BIA) held that a man who belongs to the Sikh faith provided material support by setting up tents for religious services that were then attended by, among others, some members of an Indian guerrilla organization.³⁰

The USA PATRIOT Act³¹ also amended the definition of “material support” to include “transfer[ing] of funds, or other material financial benefit” as well as the provision of a safe house, transportation, communications, false documents, weapons, or

23. See INA § 212(a).

24. See *id.* § 212(a)(3)(B)(iv)(VI).

25. See Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (adding INA § 219), <http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/html/PLAW-104publ132.htm>; 1 SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 350 (1999–2001). AEDPA appears to be the first incorporation of the phrase “material support” in U.S. legislation.

26. WADA & YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 63.04.

27. AEDPA § 301(b). A Foreign Terrorist Organization (FTO) is an organization designated by the Secretary of State in accordance with section 219 of the INA.

28. ANKER, *supra* note 12, at 533.

29. See Melanie Nezer & Anwen Hughes, *Understanding the Terrorism-Related Inadmissibility Grounds*, in AM. IMMIGR. LAW. ASS'N, IMMIGRATION AND NATIONALITY LAW HANDBOOK 577, 579–80 (2009–2010), <http://www.aillawebcile.org/resources/Resources%20for%208-16-11%20Seminar.pdf> (providing a general overview of the broad language of the material support provision).

30. *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 300 (3d Cir. 2004).

31. Uniting and Strengthening America by Providing Appropriate Tools Required to Obstruct Terrorism (USA PATRIOT) Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

training.³² The list of material support enumerated in the INA has been held to be non-exhaustive.³³ In the above example, the Yazidi women would likely be found ineligible if the government decided to allege that by providing a safe house, or facilitating messages or communication, or even by providing sex to the terrorists, these women were providing “material support.”³⁴

The consequences of the bar are harsh. If the material support bar argument were successful, the asylum seeker would be rendered inadmissible.³⁵ The asylum seeker must be “admissible” by obtaining “admission”—lawful entry into the United States after inspection and authorization by an immigration officer of U.S. Customs and Border Protection (CBP).³⁶ Not surprisingly, the broad language of the material support provision works to exclude victims who were coerced by their persecutors to provide support from obtaining asylum relief.³⁷

III. THE DURESS WAIVER

The “duress waiver”³⁸ is the most applicable remedy for asylum applicants who have been accused of providing material support but provided such support against their will.³⁹ The duress waiver allows the material support bar to be waived if the applicant is able to show that the support was provided under duress.⁴⁰

A. *Factors in the Adjudication of the Duress Waiver*

In order to be eligible for the duress waiver, at a minimum, the material support must be provided in response to a

32. USA PATRIOT Act § 411(a)(1)(F) (amending INA § 212(a)(3) and codified at 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)).

33. See ANKER, *supra* note 12, at 533.

34. See, e.g., Jennie Pasquarella, *Victims of Terror Stopped at the Gate to Safety*, 13 HUM. RTS. BRIEF, no. 3, 2006, at 28–33, <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1278&context=hrbrief>.

35. See INA § 212(a)(3)(B)(i).

36. *Id.* § 101(a)(13)(A). Section 101(a)(13)(A) states in full: “The terms ‘admission’ and ‘admitted’ mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.” For a discussion of the definition of “admission,” see WADA & YALE-LOEHR, *supra* note 26, §§ 51.03, 63.01.

37. See HUGHES, *supra* note 9, at 3.

38. See *id.* at 2.

39. There are several other remedies that might be available to asylum seekers who have provided material support under duress, but only the duress exemption deals directly with the issue of duress. This article will not discuss the other remedies.

40. Memorandum from Jonathan Scharfen, Deputy Dir., U.S. Dep’t Homeland Sec., *Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Support to Certain Terrorist Organizations* 5 (May 24, 2007), http://www.uscis.gov/sites/default/files/files/pressrelease/MaterialSupport_24May07.pdf.

“reasonably-perceived threat of serious harm.”⁴¹ A U.S. Citizenship and Immigration Services⁴² (USCIS) officer adjudicates the duress waiver. The USCIS officer considers the following factors to determine whether the asylum seeker performed the offending acts under duress:

- (1) whether the applicant reasonably could have avoided, or took steps to avoid, providing the material support;
- (2) the severity and type of harm inflicted or threatened;
- (3) to whom (third parties) the harm or threat of harm was directed;
- (4) the perceived imminence of the harm threatened from the persecutors; and
- (5) the perceived likelihood that the threatened harm would be inflicted.⁴³

Once USCIS determines that the asylum seeker has met the initial burden of duress, it then considers whether the “totality of the circumstances” justifies the waiver.⁴⁴ In doing so, it considers the following factors:

- (1) the amount, type, and frequency of the support provided;
- (2) the nature of the activities committed by the terrorist organization;
- (3) the individual’s awareness of those activities;
- (4) the length of time since the support was provided;
- (5) the individual’s conduct since that time; and
- (6) any other relevant factors.⁴⁵

The above factors are found in administrative memorandum by USCIS.⁴⁶

B. Problems with Applying for the Duress Waiver

There is no formal published procedure available to the public on how to apply and obtain this waiver.⁴⁷ Even the U.S.

41. *See id.* at 4–5.

42. USCIS is an agency within the U.S. Department of Homeland Security.

43. *See id.* at 5.

44. *See id.* at 4–5.

45. *See id.* at 5.

46. *See id.*

47. *Ay v. Holder*, 743 F.3d 317, 321 (2d Cir. 2008) (“At oral argument in the case at bar . . . the Government was unable to identify any published process for seeking such a waiver.”); *see also* *Sesay v. Att’y Gen.*, 787 F.3d 215, 223 n.7 (3d Cir. 2015) (“As the Government acknowledged at argument, almost ten years after Congress granted the Executive Branch the power to grant waivers, there remains no published process for requesting one . . .”).

government admits that, “almost 10 years after Congress granted the Executive Branch the power to grant waivers, there remains no published process for requesting one.”⁴⁸ The Second Circuit, in discussing the duress waiver, also opined that “nothing, still, suggestive of an application process” exists and the relief that the waiver offers “appears to be limited.”⁴⁹

The authority to grant the duress waiver rests primarily with the Department of Homeland Security (DHS).⁵⁰ However, the actual procedure for obtaining the waiver is vague, convoluted, and confusing. USCIS is assigned with the task of adjudicating these waivers.⁵¹ USCIS has traditionally adjudicated all administrative asylum applications (non-litigation) submitted by asylum seekers directly to USCIS, known as “affirmative asylum” cases.⁵²

Other asylum cases (such as those for people detained) are normally adjudicated before immigration judges (IJs) in hearings called removal proceedings, known as “defensive asylum” cases.⁵³ However, in such removal proceedings, the consideration for eligibility of the duress waiver cannot be adjudicated by the IJ.⁵⁴ In these types of cases, the IJ must enter an order of removal (i.e., the applicant is ordered deported from the United States by the IJ and does not appeal, or is ordered deported by the BIA)⁵⁵ for the case to be considered “administratively final.”⁵⁶ Only then can the asylum seeker be considered for the duress waiver.⁵⁷

An example of the negative consequences of this counter-intuitive procedure can be seen in *FH-T v. Holder*.⁵⁸ The asylum seeker in *FH-T* had been barred from asylum by the BIA under the material support bar despite the fact that the BIA determined that

48. *Sesay*, 787 F.3d at 223 n.7.

49. *Ay*, 743 F.3d at 321.

50. Nezer & Hughes, *supra* note 29, at 582. This discretionary authority may be exercised by either the Secretary of Homeland Security or the Secretary of the Department of Homeland Security after consultation with one another and the Attorney General. However, because of DHS’s role in refugee adjudications abroad, as well as asylum benefits granted in the United States, DHS is primarily responsible for adjudicating duress waivers.

51. *Id.*

52. ANKER, *supra* note 12, at 25.

53. *Id.*

54. INA § 212(d)(3)(B), 8 U.S.C. § 1182(d)(3)(B).

55. HUGHES, *supra* note 9, at 31–32.

56. *Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal*, USCIS (Oct. 23, 2008), http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/USCIS_Process_Fact_Sheet_-_Cases_in_Removal_Proceedings.pdf.

57. *Id.*

58. *FH-T v. Holder*, 723 F.3d 833 (7th Cir. 2013).

he had provided such support under duress.⁵⁹ Because the BIA declined to adjudicate the merits of his asylum claim, the asylum seeker could not apply for the duress waiver.⁶⁰ On petition for review, the Seventh Circuit declined to overrule the BIA, stating that it lacked the authority to order the BIA to adjudicate the asylum claim.⁶¹ Thus, the asylum seeker faced a procedural bar to obtaining a duress waiver because the case was not administratively finalized, leaving him in limbo.⁶² Since 2009, the government has considered him a terrorist and has been fighting to deport him.⁶³

The consequence of such unclear laws and lines of authority has been that many asylum cases that have potential material support issues have been placed on hold by USCIS for several years.⁶⁴ Further, because the courts do not have discretion over whether the duress waiver applies⁶⁵ and the current procedure in place appears to be ad hoc, the asylum seekers and their attorneys are left to guess how to navigate their asylum cases.

IV. RECOMMENDATIONS

In light of the serious flaws that exist with the current application of the duress waiver, this Article has two recommendations: (A) that Congress enact legislation to specifically include an explicit duress exception to the material support provision of the INA; and (B) that the Department of Homeland Security and the immigration courts streamline and formalize an application procedure for asylum seekers to obtain a duress waiver.

A. *Enact a Duress Exception to the Material Support Bar*

Congress should enact legislation to incorporate an explicit duress exception to the material support bar provision of the INA. The current statute merely allows the DHS to create a waiver and

59. *Id.* at 838.

60. *Id.* at 835.

61. *Id.* at 848.

62. *FH-T v. Holder*, 743 F.3d 1077, 1082 (7th Cir. 2014) (Wood, J. dissenting).

63. Roy Strom, *The Terrorism Bar*, CHL. LAW. (Aug. 2013), <http://chicagolawyeromagazine.com/Archives/2013/08/01/The-Terrorism-Bar.aspx>.

64. Telephone Interview with Melanie Nezer, Vice President for Policy and Advocacy, Hebrew Immigrant Aid Soc’y (June 18, 2015).

65. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 691, 121 Stat. 1844, 2364–66 (2007) (amending INA § 212(d)(3)(B)(i) such that the Secretary of State or the Secretary of the Department of Homeland Security, in consultation with each other and the Attorney general, may, in their “sole unreviewable discretion,” issue waivers of the material support bar).

gives the DHS the authority to apply the waiver as it sees fit.⁶⁶ In the absence of a direct mandate from Congress, the DHS has used its wide discretion under the statute to create an ad hoc and unworkable system.⁶⁷ If instead the INA affirmatively stated that duress was an exception to the material support bar, the DHS would have no choice but to address the issue of duress in every case where the facts potentially supported a finding of duress. Further, by including an explicit duress exception within the INA, the immigration judges and other courts would have the authority to waive the material support bar for those who have provided support under duress. These court and administrative decisions will provide helpful guidance to asylum seekers and their counsel on how to interpret and address potential material support issues in their asylum claims. It will also provide more efficient adjudication of these asylum claims.

B. Amend the Duress Waiver Procedure

The current application procedure for the duress waiver is as inefficient as it is unjust. Evaluators need guidance on how to analyze information that the asylum seeker initially disclosed in their asylum application.⁶⁸ For instance, an asylum seeker who paid a ransom to save a loved one who was kidnapped may assert in the asylum application that this is why he or she faces persecution.⁶⁹ At the same time, this conduct can lead to the asylum seeker being barred from asylum or the asylum seeker's case being placed on hold.⁷⁰

Under the proposed legislation, the Department of Homeland Security and the immigration courts should design and publish a procedure that will enable asylum seekers to apply for the duress waiver. This procedure should give the asylum seeker an opportunity to apply for the waiver and present evidence on his or her behalf to defend against the government's allegations. There should be instructions for the asylum seeker on how to apply for the waiver.

This proposed procedure could be modeled after the current "212(h) waiver" procedure. The 212(h) waiver, if granted, waives certain criminal grounds of inadmissibility.⁷¹ Where an individual is inadmissible to the United States, he or she may be eligible to

66. *Id.*

67. *See supra* note 47.

68. Telephone Interview with Melanie Nezer, *supra* note 64.

69. *Id.*

70. *Id.*

71. Wada & Yale-Loehr, *supra* note 26, § 63.03.

apply for the 212(h) waiver by completing Form I-601, Application for Waiver of Grounds of Inadmissibility.⁷² Unlike the current duress waiver, the 212(h) waiver can be adjudicated by the DHS as well as by immigration judges and there need not be a final order of removal before the waiver can be adjudicated.⁷³ This proposed application procedure would ensure a more efficient and just process for asylum seekers alleged to have provided material support.

V. CONCLUSION

Currently, victims of persecution who fall under the overbroad material support provision are being denied the very protection that was designed for people like them.⁷⁴ Congress and federal agencies should immediately implement the above measures in order to remedy this injustice. Unlike a major overhaul of the law, like comprehensive immigration reform, the measures suggested above can be put into place easily and quickly. The benefit of such measures to numerous victims of violent crime, such as the Yazidi women of Iraq, would be immeasurable.

72. *Id.*

73. *Id.*

74. Lauren Gambino, *US Steps Up Syrian Refugee Admissions But Why Are Some Still Excluded?*, GUARDIAN (Mar. 11, 2015), <http://www.theguardian.com/world/2015/mar/11/us-accept-thousands-syrian-refugees>.