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Victimized Twice: Asylum Seekers and the Material-Support Bar

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VICTIMIZED TWICE: ASYLUM SEEKERS AND THE MATERIAL-SUPPORT BAR

Steven H. Schulman⁺

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Kumar was taken hostage and forced to pay his own ransom by the Tamil Tigers in Sri Lanka. When he arrived in the United States, the Department of Homeland Security (DHS) jailed Kumar for nearly thirty months, contending that his ransom payment constituted “material support” for terrorism under 8 U.S.C. § 1182(a)(3)(B)(iv)(VI). Now, more than five years after his arrival, his asylum claim is still pending.

Louis was threatened with death and robbed of four dollars and a sack lunch by a Burundi rebel group. After landing at Dulles Airport, DHS detained Louis for more than twenty months, arguing that these robberies constituted “material support” for terrorism. The Board of Immigration Appeals (BIA) finally granted him asylum, reversing the decision of an immigration judge.

Gilmer was forced by armed insurgents in El Salvador to move unmarked boxes. Gilmer successfully defended a challenge to an immigration judge’s decision to grant his release on bond over the objection of DHS.

Kumar, Louis, and Gilmer are my clients. Each man qualifies for refugee protection, has never committed a crime, and presents no danger to the United States. Nonetheless, their cases have been some of the most difficult of my twelve-year career representing asylum seekers. This Essay discusses the unique challenges of representing clients who have been accused of providing “material support” for terrorism, despite the fact that they are undisputedly victims of terrorism. Like they have done with so many other immigration laws, DHS and the Department of Justice (DOJ) have interpreted the material-

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support bar to admissibility (and thus to asylum and other refugee relief) so broadly that Congress's clear intent—to keep financiers and supporters of terrorism from entering the United States—has been entirely lost in the provision's enforcement. The inability of the U.S. immigration system to distinguish between terrorism's victims and actual terrorists not only disservices refugees, but also calls into question the system's efficacy in identifying those who threaten our national security.

The purpose of this Essay is to provide guidance to lawyers representing asylum seekers potentially affected by the material-support bar. The Essay begins with a brief history of the material-support bar to admissibility, and then discusses how DHS and DOJ have expanded the statutory language to include thousands of terrorism victims. The next section presents the challenges faced by lawyers representing these clients, and suggests strategies for approaching these cases at various stages.

I. TRADITIONAL BARS TO ASYLUM: EXCLUDING PERSECUTORS AND THOSE WHO ARE DANGEROUS

Practitioners representing asylum seekers must now vigilantly explore any potential basis for application of the material-support bar. Traditionally, my colleagues and I would ask our clients about the broad topics of potential ineligibility, including criminal activity and persecution of others. Refugee law has long recognized that those individuals who present a danger to the host country, those who have engaged in serious non-political crimes, and those who have persecuted others must be excluded from protection. The Refugee Convention of 1951 requires that these individuals, even if facing persecution, be excluded from protection.¹ U.S. law, incorporating the Refugee Convention after the United States acceded to the Refugee Convention's 1967 Protocol, specifically bars from refugee protection (that is, protection through asylum or withholding removal) those who participate in the persecution of others; those who commit serious non-political crimes abroad or are convicted of particularly serious crimes in the United States; and those who engage in terrorism, are representatives of terrorist groups, or otherwise pose a threat to national security.²

Under both U.S. and international law, bars to refugee relief are thus predicated on the personal culpability of the actor and the risk to the nation in

1. United Nations Convention Relating to the Status of Refugees, art. 1(F), July 28, 1951, 19 U.S.T. 6263, 189 U.N.T.S. 156; U.N. Protocol Relating to the Status of Refugees, art. 1(2), Jan. 31, 1967, 19 U.S.T. 6225, 606 U.N.T.S. 268.

2. Immigration and Nationality Act (I.N.A.) § 208(b)(2), 8 U.S.C. § 1158(h)(2) (2006); I.N.A. § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (2006); see HUMAN RIGHTS FIRST, DENIAL AND DELAY: THE IMPACT OF THE IMMIGRATION LAW'S "TERRORISM BARS" ON ASYLUM SEEKERS AND REFUGEES IN THE UNITED STATES 1, 15–16 (2009) [hereinafter DENIAL AND DELAY], available at <http://www.humanrightsfirst.info/pdf/RPP-DenialandDelay-FULL-111009-web.pdf>.

which the individual is seeking protection.³ Unfortunately, this touchstone has been forgotten almost entirely in the application of the material-support bar.⁴ A recent report by Human Rights First, a non-governmental organization, describes in detail the development of the relevant statutory provisions and their interpretation, calling this twenty-year journey “the road to absurdity,”⁵ an apt description considering how DHS and the BIA have interpreted the statute broadly to encompass asylum seekers who have been victimized by or have had only incidental contact with members of armed groups.

Put briefly, the U.S. statutory provisions establishing eligibility for asylum contain exclusions consistent with international law, including a provision that requires the denial of an application by an individual who has “engaged in a terrorist activity” as that phrase is defined in 8 U.S.C. § 1182(a)(3)(B)(i).⁶ “Terrorist activity” has been defined since the Immigration Act of 1990 as

any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves . . . [t]he use of any . . . explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.⁷

At the same time, within the definition of “engage in terrorist activity,” Congress included providing material support, defined as “commit[ting] 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. . . .”⁸

Both of these terrorism provisions were made bars to asylum and other refugee relief in 1996 when Congress expanded the list of bars to all forms of refugee protection,⁹ specifically including an exclusion for “engag[ing] in

3. DENIAL AND DELAY, *supra* note 2.

4. *Id.* at 16–17.

5. *Id.* at 19–22.

6. 8 U.S.C. § 1158(b)(2)(A)(v) (2006); I.N.A. § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(i) (2006).

7. Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5069–70 (1990) (codified as amended at 8 U.S.C. § 1182(a)(3)(B)(iii)(VI) (2006)).

8. I.N.A. § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iii)(VI) (2006).

9. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 604, 110 Stat. 3009-546, 690–91 (1996) (codified as amended at 8 U.S.C. § 1158(h)(2)(A)(V) (2006)).

terrorist activity.”¹⁰ Despite this statutory revision, for the next several years, neither fighters who battled military forces nor asylum seekers who had been victimized by terrorist groups were barred from asylum in the United States.¹¹

The major statutory change that has led to today’s morass for victims of terrorism came via the USA PATRIOT Act of 2001, which created a new category of “terrorist organizations” to include any “group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in” terrorist activity as defined in 8 U.S.C. § 1182(a)(3)(B)(iv).¹² This new so-called “Tier III” designation created, for the first time, a U.S. statutory definition of “terrorist organization” beyond those groups formally listed by the U.S. government.¹³ Providing material support to one of these unlisted Tier III organizations—interpreted to include any group that uses violence against persons or property for any purpose, no matter how justifiable, unless solely for monetary gain—or simply to one of its members or subgroups thus became a bar to asylum.¹⁴ The statute’s only exception for support of a Tier III organization (as opposed to the listed Tier I and Tier II organizations) is a demonstration by “clear and convincing evidence” that the person providing material support “did not know, and should not reasonably have known, that the organization was a terrorist organization.”¹⁵ With no agency guidance, the definition of what constitutes a Tier III organization has been left to individual immigration judges, asylum officers, and other adjudicators.

Despite multiple laws adding to the statutory framework, virtually no legislative history exists to indicate the intent of Congress when the statute is applied to asylum seekers.¹⁶ In this vacuum, DHS interprets the statute

10. IIRIRA § 604, 8 U.S.C. § 1182(a)(3)(B) (2006).

11. See DENIAL AND DELAY, *supra* note 2, at 20. The material-support statute is also a bar to admissibility into the United States, meaning that it can preclude, for example, an individual’s attempt to enter the United States as a refugee or to adjust status in the United States—such as an asylee attempting to become a legal permanent resident, or a legal permanent resident seeking to naturalize. This Essay focuses specifically on the application of the bar to those seeking refugee protection in the United States.

12. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) of 2001, 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2006).

13. See USA PATRIOT Act, Pub. L. No. 107-56, § 411(a)(1)(G), 115 Stat. 272, 347 (2001) (codified as amended 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (2006)); OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP’T OF STATE, 2001 REPORT ON FOREIGN TERRORIST ORGANIZATIONS (Oct. 5, 2001), <http://www.state.gov/s/ct/rls/rpt/fto/2001/5258.htm>.

14. I.N.A. § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (defining “material support”).

15. 8 U.S.C. § 1182(a)(3)(B)(i)(IV) (2006).

16. See, e.g., *In re S—K—*, 23 I. & N. Dec. 936, 943 (B.I.A. 2006) (“We are unaware of any legislative history which indicates a limitation on the definition of the term ‘material support.’”).

broadly, losing all connection between the material-support bar and threats to national security or dangers to the community. By taking advantage of the lack of legislative history, DHS's overbroad interpretations harm the statutory scheme created by Congress. The term "material support" follows the definition of "engage in a terrorist activity," one of several enumerated grounds of inadmissibility set forth under the subheading "Security and Related Grounds."¹⁷ Among the other security-related bases for inadmissibility under that subparagraph are membership in a terrorist organization;¹⁸ proposed activities that "would have potentially serious adverse foreign policy consequences for the United States";¹⁹ membership in a totalitarian party;²⁰ and association with a terrorist organization with the intention to engage in activities "that could endanger the welfare, safety, or security of the United States."²¹ Each of those provisions is directed toward protecting the national security and foreign policy of the United States by excluding aliens who may pose a threat to those interests.

The material-support statute does include a "safety valve" that allows the Secretary of State, the Secretary of Homeland Security, or the Attorney General, after consultation with the other two cabinet-level officials, not to apply the material-support ground of inadmissibility upon a finding in his "sole unreviewable discretion, that [the material-support] clause [should] not apply."²² In 2007, the DHS Secretary announced specific exercises of his waiver authority, allowing officials within DHS to grant waivers for persons subject to the material-support bar, such as those who donated to certain Tier III "terrorist" groups²³ and victims of terrorist coercion.²⁴ DHS has interpreted its waiver authority to require it to subject any waiver applications to two levels of review; it also reserves the right to review any case at headquarters,²⁵

17. See I.N.A. § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3).

18. I.N.A. § 212(a)(3)(B)(i)(V), 8 U.S.C. § 1182(a)(3)(B)(i)(V).

19. I.N.A. § 212(a)(3)(C)(i), 8 U.S.C. § 1182(a)(3)(C)(i).

20. I.N.A. § 212(a)(3)(D), 8 U.S.C. § 1182(a)(3)(D).

21. I.N.A. § 212(a)(3)(F), 8 U.S.C. § 1182(a)(3)(F).

22. I.N.A. § 212(d)(3)(B)(i), 8 U.S.C. § 1182(d)(3)(B)(i). This waiver provision was added in 2005 by the REAL ID Act of 2005, Pub. L. No. 109-13, §§ 101(b), 103-104, 119 Stat. 231, 303, 306-09.

23. Press Release, Statement by Homeland Sec. Sec'y Michael Chertoff on the Intention to Use Discretionary Authority for Material Support to Terrorism (Jan. 19, 2007), http://www.dhs.gov/xnews/releases/pr_1169465766808.shtm. Those groups included the Karen National Union and Karen National Liberation Army, Chin National Front and Chin National Army, Chin National League for Democracy, Kayan New Land Party, Arakan Liberation Party, Tibetan Mustangs, Cuban Alzados, and Karenni National Progressive Party. *Id.*

24. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26,138, 26,138 (May 8, 2007).

25. Memorandum from Jonathan Scharfen, Deputy Director, U.S. Citizenship & Immigration Servs. to Assoc. Dirs., Chief, Office of Admin. Appeals, Chief Counsel, Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Material Support to

resulting in an unworkable bottleneck and statutory interpretations that may be entirely unreviewable by federal courts.

The delays in the waiver process have been particularly pronounced for those asylum seekers whose cases are litigated in immigration court.²⁶ DHS policy, announced in October 2008, requires that before a waiver application will be considered, immigration court proceedings must be “final”—that is, all administrative appeals must have been exhausted, even if there is no dispute about the grounds for waiver eligibility.²⁷ For Kumar, for example, this policy meant that his waiver application, submitted in May 2007, had not been adjudicated as of July 2010 because his case was not considered administratively final until February 2010.

More troubling, the waiver provision provides an easy way for DHS trial attorneys and the BIA to justify their overbroad interpretations by pointing to this putative escape-hatch. The BIA, in its only published decision on the issue of material support, *Matter of S—K—*, justified its determination that the statute must bar the asylum application of a woman who donated money to the Chin National Front—a Burmese organization that defends the Chin minority against the repressive Burmese regime—by pointing to the waiver provision, stating that “Congress attempted to balance the harsh provisions set forth in the Act with a waiver.”²⁸

Kumar, Louis, and Gilmer are hardly the only asylum seekers caught in this overbroad interpretation of the material-support bar and the government’s failure to establish a workable waiver process. Human Rights First has catalogued the victims of the material-support bar for several years. These include:

- A Columbian nurse whose life was threatened after she was forced at gunpoint by the Fuerzas Armadas Revolucionarias de Columbia (FARC), a guerrilla group, to provide medical care to injured FARC members;²⁹

Certain Terrorist Organizations 9 (May 24, 2009), available at http://www.USCIS.gov/files/pressrelease/MaterialSupport_24May07.pdf.

26. DENIAL AND DELAY, *supra* note 2, at 8.

27. See U.S. Citizenship & Immigration Servs., Fact Sheet: Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal (Oct. 23, 2008), <http://www.uscis.gov/files/article/FACT%20SHEET%20DHS%20Exemption%20Authority%2020081023.pdf>.

28. *In re S—K—*, 23 I. & N. Dec. 936, 941 (B.I.A. 2006). The BIA has refused to publish its other decisions on material support, including those involving both Kumar and Louis. This has allowed DHS attorneys to advance, and immigration judges to accept, interpretations that the BIA has already rejected.

29. DENIAL AND DELAY, *supra* note 2, at 23 (citing *The “Material[-]Support” Bar: Denying Refuge to the Persecuted? Hearing Before the Subcomm. on Human Rights and the Law of the S. Comm. on the Judiciary*, 110th Cong. 23–24 (2007) (statement of “Mariana,” Columbian Refugee)).

- A Christian missionary worker who donated to an armed group that resisted the Burmese regime that had detained and beat him,³⁰
- A Nepalese journalist who had been beaten and extorted by Maoist rebels;³¹ and
- A Burmese teacher jailed by the Burmese military after permitting men connected to a resistance group to stay at her home and advocate for democracy in her classroom.³²

II. THE CHALLENGES FOR PRACTITIONERS

Given the paucity of judicial precedent, the absence of regulatory guidance, the apparent ability of both DHS trial attorneys and asylum officers to define statutory terms broadly, and a lengthy and opaque waiver process, the material-support bar presents many challenges for practitioners well beyond those encountered in the typical asylum case.³³ These challenges include determining any potential connection between the client and an armed group (even a distant familial connection); evaluating whether, when, and how to disclose such a connection; developing legal arguments to persuade the immigration judge or asylum officer that the material-support bar is inapplicable; and creating a record that will support both a finding of eligibility for asylum and a waiver request, and subsequently navigating the waiver process if the material-support bar is applied in a final judgment. For clients who are detained, representation may also include efforts to secure release, either through bond, parole, or habeas corpus relief.

One of the first questions I now ask any new asylum client is whether she has ever had contact with anyone who has belonged to a group that has even once engaged in any violent act. Because this is an impossibly broad question—particularly for the many refugees fleeing countries embroiled in armed conflict—I follow it with multiple questions to help the client determine whether she has had any connection to a group that an asylum officer, DHS trial attorney, or immigration judge could choose to define as a “terrorist”

30. HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM 2 (2006) [hereinafter ABANDONING THE PERSECUTED], available at <http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf>.

31. *Id.*

32. *Id.*

33. Unfortunately, given the breathtaking scope of the agencies' statutory interpretation, cases possibly implicating the material-support bar are rapidly becoming the norm. *See, e.g., In re L—H—*, No. A— 399 (B.I.A. July 10, 2009) (on file with author) (disagreeing with a determination by an immigration judge that an alien who, while under duress, provided lunch and approximately four dollars in cash to terrorists had provided material support); *In re S—K—*, 23 I. & N. Dec. 936, 945–46 (B.I.A. 2006) (affirming the decision of an immigration judge that an alien who contributed “approximately one-eighth of her monthly income” to the Chin National Front for eleven months provided material support).

organization under the statute. A discussion with my client about groups that could be categorized as terrorist organizations is just a start; I must also research the existence and history of all armed groups in my client's home country.

Once I discover a possible connection, I must explore the facts with my client. Unfortunately, when it comes to the application of the material-support bar, almost no relationship seems too attenuated. The meal she served to her brother's friend who ate dinner at her house one evening years ago could form the basis for application of the material-support bar if that friend belonged to a group that used violence or was simply a peaceful group affiliated with a violent group. Ironically, in many cases establishing the relationship between an armed group and the client is not difficult: the very reason many asylum seekers, including Kumar, Louis, and Gilmer, flee to the United States is to resist and escape threats by these groups. Their involuntary connections to these groups—a ransom payment, a stolen lunch, forced labor—are central to their stories of past persecution, but sadly can lead to their exclusion under the material-support bar.

Assuming the client has not already told the U.S. government of a connection to a "terrorist" group,³⁴ the next challenge is deciding whether to disclose the relationship affirmatively. In some situations, the asylum application form itself, Form I-589, will compel disclosure, particularly with Part B, Question 3.A, which asks whether the applicant or any

family members [have] ever belonged to or been associated with any organizations or groups in [their] home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media[. . .].³⁵

Form I-589, however, does not contain any questions specifically addressing material support;³⁶ thus the disclosure of any connections to a terrorist group that do not either form the basis of the asylum claim, like Kumar's, or involve familial relationships will not necessarily be required in the asylum application.

34. Arriving asylum seekers like Kumar and Louis are given credible fear interviews by DHS, typically before they have been able to secure lawyers. See 8 C.F.R. § 208.30(d) (2009) (outlining the procedure for a credible fear interview); *id.* § 235.3(b)(4) (2009) (providing for credible fear interviews for aliens in removal proceedings).

35. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGRATION SERVS. & U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, OMB NO. 1615-0037, I-589, APPLICATION FOR ASYLUM AND FOR WITHHOLDING OF REMOVAL (2009), available at <http://www.uscis.gov/files/form/i-589.pdf>.

36. See *id.*

If disclosure is not mandated by the I-589, and is not integral to the client's story, the client and lawyer may be faced with a difficult strategic choice: Should the client disclose that he may have provided material support and risk possible application of the bar, or hope that the asylum officer, DHS trial attorney, or immigration judge never asks a question that unveils the connection? This dilemma is more complicated than the typical litigator's choice of whether to disclose "bad facts" affirmatively or wait for cross-examination. Affirmative disclosure of the facts underlying possible material support could be viewed as a concession that the bar applies, putting the client's entitlement to refugee status in jeopardy, and making a waiver the only option for relief, a risky proposition for a process with an uncertain timeline and outcome, and without possibility of judicial review.³⁷ On the other hand, failure to disclose these facts, even if not relevant to the asylum claim, could put any possible waiver at risk. DHS has made clear that one factor in a waiver request is whether the applicant "[h]as fully disclosed, in all relevant applications and interviews with [the] U.S. Government . . . the nature and circumstances of each provision of such material support."³⁸

Consider, for example, a Darfuri client from Sudan who fled to the United States without her young children, leaving them in the care of her mother. She has no personal or familial connections to the various armed resistance movements defending against the Janjaweed; thus her asylum application contains no information indicating that she may have provided material support to a "terrorist" organization. In the attorney's discussions with her, however, she recalls a story of one night when she allowed three men with guns to sleep in her tent. She made them each a bowl of rice. She does not know anything else about these men and did not witness any fighting. This incident has no relevance to her persecution by the Janjaweed, and is thus unlikely to come up when she recounts her story to an asylum officer. Nor is it clear that the asylum officer will ask any questions that would require her to disclose this incident.

In this case, disclosing this incident would require a strong argument that the three bowls of rice did not constitute "material support," or that the client can prove by "clear and convincing evidence" that she did not know these men

37. See Melanie Nezer, *The "Material Support" Problem: An Uncertain Future for Thousands of Refugees and Asylum Seekers*, 10 BENDER'S IMMIGR. BULL. 1849, 1849 (2005), available at <http://www.rcusa.org/uploads/pdfs/ms-rptresearch-artbender5-12-05.pdf> ("[S]ome 500 asylum seekers with legitimate claims whose cases are complicated by material support issues are 'on hold' and waiting for final decisions on their cases."); REFUGEE COUNCIL USA, *THE MATERIAL SUPPORT PROBLEM: PUNISHING REFUGEE VICTIMS OF TERROR: MARCH 8, 2007* (2007), available at <http://www.rcusa.org/uploads/pdfs/ms-backgrd-info3-8-07.pdf> (explaining that, of seven thousand asylum cases on hold, only ten to twenty cases will be granted waivers).

38. Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26,138 (May 8, 2007).

belonged to a “terrorist group.” Given the track record of DHS, it is likely that only the sympathy of the asylum officer will prevent her case from being sent to U.S. Citizenship and Immigration Services (USCIS) headquarters for consideration and, consequently, lengthy delay. As long as her asylum application is pending, she will be unable to bring her children to the United States, even as they remain in grave danger in Darfur. Non-disclosure, however, could result in a denial of her waiver request, if waiver were available.

Ultimately, the choice of whether and when to disclose possible material support will depend on the facts of each case, but in any event a practitioner must be prepared with all arguments, both legal and factual, to persuade the asylum officer or immigration judge that the material-support bar does not apply. The good news and bad news for lawyers is that the field is quite open. The BIA’s sole published decision on the issue, *In re S— K—*, stands simply for the principles that the motivations of the group to which the asylum applicant provided material support are irrelevant and that the applicant need not intend to support violent activity for the bar to apply.³⁹ Neither the BIA nor any federal appellate court has issued a published decision addressing questions such as whether the support must be more than *de minimis*, whether the statute encompasses those who are robbed or who provided “support” under duress, or whether certain types of non-monetary assistance (such as medical care, meals, washing clothes, and other routine forms of hospitality) can be considered material support when provided to a member of a “terrorist” group but without direct connection to any terrorist activity. This area of the law accordingly invites creative legal arguments, particularly in cases where the denial of refugee status serves no equitable purpose.

The case of Louis is a good example of the opportunity to develop legal arguments in this arena. When my colleagues and I took the case on appeal to the BIA, we were required to fashion arguments based on the statutory text to overturn an immigration judge’s decision that the robbery of a sack lunch and four dollars and twelve cents constituted material support. Louis had been repeatedly threatened by the FNL, a Hutu rebel group in Burundi. On one occasion, FNL members stopped a bus, known as a “bush taxi,” on which he was a passenger and took the bus passengers’ lunches. When Louis was stopped another time by FNL members demanding he make a membership payment, one of the rebels noticed bills in his shirt pocket. The man took the bills from Louis, which amounted to about four dollars and twelve cents, and told him that this would not be considered membership dues, which he should pay if he did not want to be killed the next time the rebels saw him. Louis told

39. *In re S— K—*, 23 I. & N. Dec. 936, 940, 943 (B.I.A. 2006). The BIA has issued a number of unpublished decisions addressing the material-support bar, including the decisions in the cases of Kumar, Louis, and Gilmer, but these can be accessed only by unofficial channels and of course are not binding on the agencies.

the FNL members to buy themselves some beers with the money they took, and promised to pay membership dues soon. He fled to the United States shortly thereafter.

Our primary argument on appeal focused on the statutory text, which requires that an individual “commit an act” that provides “material support.”⁴⁰ We also contended that the word “material” must be given independent content, meaning important or “significant,” as defined by the dictionary⁴¹ and various federal statutes and regulations.⁴² The BIA agreed with both arguments and overturned the immigration judge’s decision in an unpublished opinion.⁴³

Fortunately, it did not take long for Louis to receive a final order granting his asylum application because the immigration judge had already determined that he was otherwise eligible for asylum. Not every asylum seeker is so lucky; many practitioners and immigration judges do not understand that it is critical to obtain a specific ruling on the client’s eligibility for asylum independent of a determination of whether the material-support bar applies to the asylum seeker. Without such a ruling, subsequent proceedings will be necessary either if the material-support bar is later determined to be inapplicable, as in Louis’s case, or the client seeks a waiver of the bar from DHS, which is conditioned on a showing of eligibility for an immigration benefit.⁴⁴ Accordingly, any initial immigration court decision should include specific and separate findings on the applicant’s eligibility for asylum or withholding of removal, as would be found in any decision on asylum or other refugee relief. Practitioners therefore must be prepared to demand that the immigration judge make a ruling on eligibility for asylum “but for” the

40. I.N.A. § 212(a)(3)(B)(iv)(VI), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2006).

41. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 765 (11th ed. 2003) (defining material as “of or relating to the subject matter of reasoning” and “having real importance or great consequences”); BLACK’S LAW DICTIONARY 1066 (9th ed. 2009) (defining “material” as “[o]f such a nature that knowledge of the item would affect a person’s decision-making; significant; essential”).

42. See e.g., Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77l(a)(2) (2006) (imposing civil liability on those who make false statements concerning a material fact in registration statements or with regard to the sale of securities); Securities and Exchange Act of 1934, 15 U.S.C. § 78i(a)(4) (2000) (forbidding manipulation of security prices by statements “false or misleading with respect to any material fact”); cf. FED. R. CIV. P. 56 (implying that, for purposes of a motion for summary judgment, an issue of fact is “material” if it might affect the outcome of the case under the applicable substantive law); Brady v. Maryland, 373 U.S. 83 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment. . . .”).

43. *In re L—H—, No. A—* 399 (B.I.A. July 10, 2009) (on file with author). Our request for publication was denied by the BIA.

44. See Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 26,138, 26,138 (May 8, 2007) (notice of determination).

material-support bar, even when the asylum seeker is found ineligible for relief because of the bar.

Kumar's is a tragic case-in-point. In 2005, when Kumar was represented by other counsel in his initial immigration court proceedings, the immigration court simply denied his asylum application on the grounds that Kumar's five-hundred-dollar ransom payment to his Tamil Tiger captors constituted "material support" without ever considering the merits of his underlying asylum claim. More than two years later, the BIA finally acted on his appeal, rejecting his argument that his coerced payment could not be considered "support" for terrorism. The BIA remanded his case to the immigration court for a determination of whether he was otherwise eligible for asylum and thus could qualify for a waiver from DHS on the ground of duress.⁴⁵ His second immigration court merits hearing was held in 2008. This time, the immigration court determined that Kumar was indeed eligible for asylum but for the material-support bar; a subsequent appeal to the BIA was not decided until 2009.

Kumar's waiver request to DHS is still pending in 2010, more than five years after he entered the United States and nearly three years after his first waiver application, which was filed immediately following the announcement of DHS waiver authority in cases of duress. In all this time since he told his story to DHS in his credible fear interview, the material facts supporting his requests for asylum and a waiver have not changed. Meanwhile, Kumar remains separated from his wife, whom he cannot bring to the United States until he obtains asylum status.

Detention presents another challenge for practitioners representing asylum seekers precluded by the material-support bar because the statutory categorization of material support as "terrorist activity" may be considered by DHS to be grounds to refuse release. Detention, which makes the representation of any immigration client difficult,⁴⁶ is often prolonged for asylum seekers in proceedings involving the material-support bar. Kumar was jailed in Elizabeth, New Jersey for nearly thirty months; Louis was detained in several jails in Virginia over a twenty-month period. DHS rejected parole applications for both Kumar and Louis and they were released only after my colleagues and I filed habeas corpus petitions in federal court. Gilmer was lucky; because he was not an arriving alien, he was entitled to a bond hearing

45. DHS will not act on waiver requests until administrative proceedings are final. See U.S. Citizenship and Immigration Svcs., *supra* note 27.

46. These difficulties are well documented in many reports. See, e.g., AMNESTY INTERNATIONAL USA, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 30–32 (2009), available at <http://www.amnestyusa.org/uploads/JailedWithoutJustice.pdf>; HUMAN RIGHTS FIRST, U.S. DETENTION OF ASYLUM SEEKERS: SEEKING PROTECTION, FINDING PRISON 55–62 (2009), available at <http://www.humanrightsfirst.org/pdf/090429-RP-hrf-asylum-detention-report.pdf>.

and was released by an immigration judge after a relatively short time in detention.

Lawyers representing asylum seekers accused of providing material support should be prepared to request parole under the Immigration and Customs Enforcement Agency's guidelines governing release of arriving asylum seekers not apprehended at the border or within a certain distance of the border.⁴⁷ Under this guidance, DHS should parole an asylum seeker who has passed a credible fear interview if he establishes his identity and can show that he "presents neither a flight risk nor danger to the community."⁴⁸ Lawyers representing asylum seekers accused of providing material support should pay particular attention to the definition of "danger to the community," which includes "activity contrary to U.S. national security interests."⁴⁹

It should be obvious that individuals, whose only connection to "terrorist" groups was as victims (like Kumar, Louis, and Gilmer), cannot reasonably be considered to have engaged in "activity contrary to U.S. national security interests" in any way that would make them a "danger to the community."⁵⁰ Unfortunately, DHS has often taken the position that, because providing material support is defined in the statute as "engaging in terrorist activity,"⁵¹ the government, regardless of the specific facts of the case, has "reasonable grounds to believe that the alien is a danger to the security of the United States."⁵² Any parole request for a client accused of providing material support should anticipate this argument, and provide facts to demonstrate that the client presents no danger to the community or to national security.⁵³

47. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DIRECTIVE NO. 11002.1, PAROLE OF ALIENS FOUND TO HAVE A CREDIBLE FEAR OF PERSECUTION OR TORTURE ¶ 1.1 (2009), available at <http://www.humanrightsfirst.org/asylum/pdf/ICE-parole-guidance.pdf>.

48. *Id.* ¶ 6.2.

49. *Id.* ¶ 8.3(3).

50. *See id.*

51. I.N.A. § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv) (2006).

52. I.N.A. § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv) (2006). DHS made this argument before the BIA in both Louis's and Gilmer's cases. In Gilmer's case, DHS argued that "[b]y transporting weapons, [Gilmer] provided material support such that [guerrilla] fighters were able to refuel weaponry and continue bombing and killing individuals. Since [Gilmer] provided material support to [a terrorist organization] at a time when it was engaged in terrorist activities, [he] was subject to mandatory detention. . . ." Brief of Petitioner at 6, *In re G——— L———R———*, No. A——— 529 (B.I.A. July 6, 2009). DHS similarly argued in Louis's case, contending that Louis engaged in terrorist activities by admittedly providing food and five-thousand francs to a terrorist organization that he knew was "involved in violent activities" regardless of the fact that he was attempting to appease the group's repeated demands for money. Brief of Petitioner at 15, *In re L——— H———*, No. A——— 399 (B.I.A. Apr. 22, 2009).

53. It is worth pointing out that many persons subject to the material-support bar, including legal, permanent residents seeking naturalization, are not detained even though they meet the same statutory definition used by DHS to argue against parole for others subject to the bar.

Because parole decisions are discretionary determinations not directly appealable either administratively or judicially,⁵⁴ often the only option for release is to file a habeas corpus petition in federal court challenging prolonged detention. Although the Supreme Court in *Zadvydas v. Davis* held presumptively unconstitutional any detention after an alien had been ordered removed from the United States that is longer than six months,⁵⁵ it has rejected a habeas corpus challenge to immigration detention during removal proceedings in *Demore v. Kim*.⁵⁶ Nonetheless, the Court's reasoning in *Demore* emphasized that the detention of "a limited class of deportable aliens" who had committed aggravated felonies would have a finite end-date, given the "limited period" of removal proceedings.⁵⁷ Using this reasoning, in 2006 the Ninth Circuit affirmed a successful habeas corpus challenge to prolonged detention prior to removal of asylum seekers.⁵⁸ Although the law is still undeveloped in this area, a habeas corpus petition can lead to release on parole before entry of a judicial decision; indeed both Kumar and Louis were released shortly after filing their habeas corpus petitions.

For those detained asylum seekers eligible for a bond determination by an immigration judge, DHS may argue, as it did in Gilmer's case, that an alien accused of providing material support is a "criminal alien" subject to mandatory detention (and thus ineligible for bond) because he is unable to be admitted to the United States under 8 U.S.C. § 1182(a)(3)(B).⁵⁹ In response, the practitioner must be prepared at the bond hearing to present any and all arguments demonstrating that the material-support bar does not apply.

III. CONCLUSION

Representing an asylum seeker accused of providing material support for terrorism presents a range of interesting issues for a lawyer, some of which even the most seasoned immigration court practitioner may not have

Obviously, these persons present no threat to the U.S. despite the fact that DHS categorizes them as having "engaged in terrorist activity" pursuant to the statute.

54. I.N.A. § 236(2), 8 U.S.C. § 1226(e) (2006).

55. *Zadvydas v. Davis*, 533 U.S. 678, 689–701 (2001) (finding a "serious constitutional problem arising out of a statute" that "permits an indefinite . . . deprivation of human liberty" where proceedings are civil and "nonpunitive in purpose and effect"); see *Clark v. Martinez*, 543 U.S. 371, 378–81 (2005) (applying the statutory interpretation announced in *Zadvydas* to inadmissible aliens).

56. *Demore v. Kim*, 538 U.S. 510, 531 (2003) ("Detention during removal proceedings is a constitutionally permissible part of that process.").

57. *Id.* at 517–18, 531.

58. *Nadarajah v. Gonzales*, 443 F.3d 1069, 1080 (9th Cir. 2006) (affirming a writ of habeas corpus for an alien who had been detained for five years, reasoning that *Demore* "endorses the general proposition of 'brief' detentions, with a specific holding of a six-month period as presumptively reasonable").

59. See 8 U.S.C. § 1226(c)(1)(D).

encountered. Broad DHS interpretations of the material-support bar frequently raise the issue, and the paucity of BIA or agency guidance gives individual DHS trial attorneys virtually free rein to fashion arguments to their advantage. On the other hand, with only a single BIA opinion and no federal appellate court decisions addressing the material-support bar, a creative lawyer has a fair chance to make new law.

The excitement of this professional opportunity must, however, be tempered by the realization that the price of this ongoing intellectual debate is the abysmal failure of the United States to honor its commitment to those in need of refugee protection. To refugees like Kumar, Louis, and Gilmer, who are separated from their families while Washington bureaucrats examine the fine points of statutory construction, our inability to resolve this statutory morass comes at far too high a price. The agencies' failure to deal with this issue expeditiously and responsibly, and the misdirection of resources against relief for terrorism's victims, also calls into question the efficacy of legitimate terrorism-prevention efforts.

