

**TESTIMONY OF  
ANWEN HUGHES**

**SENIOR COUNSEL  
REFUGEE PROTECTION PROGRAM  
HUMAN RIGHTS FIRST**

**HEARING ON THE “MATERIAL SUPPORT” BAR**

**BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON HUMAN RIGHTS AND THE LAW**

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## **Introduction**

Chairman Durbin, Ranking Member Coburn and Members of the Subcommittee, thank you for inviting me here today to offer the views of Human Rights First on the effects of our immigration law's terrorism bars on people who seek refuge in the United States from persecution in their home countries.

My name is Anwen Hughes, and I am an attorney with the Refugee Protection Program of Human Rights First. For nearly 30 years, Human Rights First has worked to protect and promote fundamental human rights and to ensure protection of the rights of refugees. Our organization also operates one of the largest pro bono representation programs for asylum seekers in this country, providing free legal services to refugees who cannot afford counsel. Our views on the U.S. asylum system are informed by many years of working directly with the refugees that system was set up to protect.

Human Rights First is committed to ensuring that the protections guaranteed to refugees and asylum seekers under the 1951 Refugee Convention and its 1967 Protocol remain available to those who seek safety in the United States. At the same time, we have a longstanding commitment to the proper application of the "exclusion" clauses of the Refugee Convention, which place refugees who have committed serious violations of the human rights of others or other serious crimes, outside the protection of the international refugee regime.

I am here today to discuss the ways provisions of our immigration laws intended to bar terrorists and their supporters from the United States are wreaking havoc with our system of refugee protection and barring as "terrorists" the victims of the people and groups these immigration law provisions had intended to target.

### **Exclusion from Refugee Protection: The Way the Refugee Convention and the Immigration and Nationality Act are Supposed to Work**

In the wake of World War II, the United States played a leading role in building an international refugee protection regime to ensure that the nations of the world would never again refuse to offer shelter to people fleeing persecution. The United States has committed to the central guarantees of the 1951 Refugee Convention and its 1967 Protocol. The United States passed the Refugee Act of 1980 in order to bring our nation's laws into compliance with the Refugee Convention and Protocol. That legislation incorporated into the Immigration and Nationality Act ("INA") provisions establishing the domestic asylum and refugee resettlement systems that in the years since then have helped over two million refugees escape persecution and begin new lives in this country.

We incorporated into our law the Refugee Convention's promise to provide protection to refugees, but also the Convention's principle that some individuals who meet this definition should nonetheless be excluded from protection. Under the Refugee Convention, these "exclusion clauses" apply to people who have committed heinous acts

and crimes so grave as to make them undeserving of international protection as refugees, despite a well-founded fear of persecution. A separate provision of the Convention allows the return of refugees who pose a danger to the security of the host country. The Immigration and Nationality Act incorporated bars to asylum that track the broad categories of the Convention's exclusion clauses and reflect the same underlying principles. People who engaged or assisted in or incited the persecution of others, people who have been convicted of a particularly serious crime in the United States or have committed a serious non-political crime abroad, people who have engaged in terrorist activity, who are representatives of foreign terrorist organizations, or who otherwise pose a danger to the security of the United States, have long been barred from asylum. Refugees seeking resettlement from abroad are subject to an overlapping set of requirements that they be admissible to the United States.

The purpose of these provisions—which is an important purpose, and one that we support—was to ensure that perpetrators of heinous acts and serious crimes are identified and cannot use the refugee protection system to avoid being held accountable for their actions, and that refugees who threaten the safety of the community in their host countries can be removed. Under the Refugee Convention, exclusion from protection of a person who meets the refugee definition must be predicated on the individual refugee's individual responsibility for serious wrongdoing. Either the refugee must have individually committed an excludable offense (which would include acts of terrorism as that term is commonly understood), or he or she must have contributed to its commission in a significant way, and have done so knowingly and voluntarily.

### **Definitional disasters**

Unfortunately, the passage of the USA PATRIOT Act in 2001 and the REAL ID Act in 2005, combined with the longstanding but until then little noticed over-breadth of the INA's definition of "terrorist activity," has turned these principles upside down. Under these new and old laws, as they are being expansively interpreted by the federal agencies charged with enforcing them, refugees who were victimized by groups the U.S. has designated as terrorist organizations are being treated as terrorists themselves. Thus "Mariana," a nurse from Colombia, saw her asylum claim rejected because she had been kidnapped by FARC guerrillas in her country who had forced her, often at gunpoint, to provide medical care to their wounded. DHS concluded that the medical care Mariana had provided constituted material support to terrorists.

Refugees who voluntarily helped any group that included an armed wing have suffered the same fate—regardless of the circumstances in which that group used force, regardless of who or what its targets were, and regardless of whether the assistance the refugee provided had any logical connection to the use of force. A schoolteacher from Burma, for example, was denied asylum because he had allowed representatives of an ethnic Chin political movement, the Chin National Front (CNF), to stay at his school and speak to villagers about democracy. Because the CNF includes an armed wing that has fought the army of the Burmese military junta, the help the schoolteacher gave to the

visiting CNF members was deemed to be “material support to a terrorist organization.” How did we get to this point?

The roots of this situation lie in the Immigration Act of 1990, which first incorporated a definition of “terrorist activity” into the INA. This was, even then, an extremely broad definition. Since 1990, the INA has defined terrorist activity to include “the use of any explosive or firearm (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.” The unintended consequences we are currently experiencing stem from the interaction of this definition of terrorist activity with the subsequent changes introduced by the USA PATRIOT and REAL ID Acts. The USA PATRIOT Act broadened the 1990 definition of “terrorist activity” even further to include the use of any “weapon or dangerous device” for the virtually undefined range of purposes described in the 1990 text. More significantly, however, the USA PATRIOT Act expanded the INA’s definition of “terrorist activity” to include “material support” to any organization that has engaged in “terrorist activity.” It also defined a “terrorist organization,” for immigration-law purposes, to mean not only any organization designated as such by the U.S. government, but also any group of two or more people, “whether organized or not,” that has used armed force.

The first two categories of “terrorist organizations” are those whose names appear on lists that are publicly available on the State Department’s website. These include organizations designated as terrorist organizations under section 219 of the INA (what many people working on this issue have been referring to as “Tier I” organizations), and organizations placed on the “Terrorism Exclusion List” by publication in the Federal Register (commonly referred to as “Tier II” organizations). The third category of “terrorist organizations” created by the USA PATRIOT Act is not listed anywhere. Groups are deemed to be “Tier III” terrorist organizations in an ad hoc fashion, in connection with a particular refugee applicant’s case. There is no central control over the application of this definition, which is triggered simply by an adjudicator’s assessment that the group or some of its members at some point used armed force.

It is the breadth of the “terrorist activity” definition that accounts for the sweeping and indiscriminate impact of the USA PATRIOT and REAL ID Act amendments. We do not believe this was the result Congress intended. The USA PATRIOT Act changes passed with hardly any debate, and supporters of the REAL ID Act publicly stated their intent that the U.S. should continue to give “hope and shelter to people who can legitimately claim and receive asylum.”

But once these changes were enacted, the relevant federal agencies—the Department of Homeland Security, the Department of Justice, and the Department of State—began to apply all of these provisions very literally, including the 1990 “terrorist activity” definition. This provision is being read to define as terrorism any use of any weapon or dangerous device against persons or property outside of a context of state authority, carried out for any purpose other than “mere personal monetary gain.” Taken together with the amendments made by the USA PATRIOT and REAL ID Acts, this

means that any group that has used armed force, or has a subset that has used armed force, is now considered a “terrorist organization,” and that anyone who provides material support to any such group is now considered a “terrorist.”

DHS’s current interpretations of the statute are being applied not only to asylum seekers with pending cases, and to refugees abroad seeking resettlement in the U.S., but also to the later applications and petitions of asylum seekers and refugees who had previously been granted protection here without any question. When these refugees and asylees have applied for permanent residence or petitioned for their spouses and children to join them, those applications have been placed on hold if the applicant or petitioner’s case is now deemed to trigger one of the “terrorism bars.” The number of cases on hold in this last category has been growing exponentially over the past year.

One of the first asylum seekers thus redefined was a refugee from Burma publicly known by her initials S.K. I am not giving her full name here to protect the safety of her family. In Burma, Ms. K had peacefully protested against the military regime. She wanted a democratically elected government and equal treatment for the country’s ethnic and religious minorities—of which she, as an ethnic Chin and a Baptist Christian, was a member. After the Burmese military junta violently suppressed the pro-democracy protests, Ms. K gave support to the Chin National Front (CNF), an ethnic Chin political movement that includes an armed wing. The U.S. government has repeatedly condemned the Burmese military regime and its treatment of ethnic and religious minorities, and the CNF has never been designated as a terrorist group by the Department of State. Nonetheless, Ms. K was denied asylum in the United States on the grounds that her contributions to the CNF constituted material support to a terrorist organization. The Immigration Judge who denied her case reacted to this outcome with discomfort, noting that “our own history is based on an armed response to a government that we could not change democratically.” The Immigration Judge, however, ultimately adopted the Department of Homeland Security’s interpretation of the law, and this decision was then affirmed by the Board of Immigration Appeals, which held that the material support bar made no exception for “cases involving the use of justifiable force to repel attacks by the forces of an illegitimate regime.”

Read this way, the Immigration and Nationality Act labels as terrorists a spectrum of people ranging from Osama Bin Laden to surviving participants of the Warsaw ghetto uprising to modern-day refugees who took up arms against the military forces of Saddam Hussein or the Burmese military junta. There is something absurd about this lack of differentiation, which we believe is ultimately counterproductive even as an enforcement measure. If everything is terrorism, then the term loses all moral force, as well as the deterrent impact these INA provisions were intended to have. It also becomes impossible for refugees and all other non-citizens to know what they may and may not do. If we are going to make “terrorist activity” grounds for mandatory deportation with no eligibility for relief, we must be able to define the conduct that term actually intends to target.

## Denying defenses

Even as the terrorism bars have expanded over the past six years, the Department of Homeland Security has also adopted a uniformly expansive reading of all of their component terms. DHS has essentially read the “material” out of “material support,” interpreting this term to include forms of assistance that bear no logical relation to “terrorist activity,” and refusing to recognize any exception for *de minimis* contributions. Our volunteer attorneys are providing legal representation to the elementary schoolteacher from Burma mentioned earlier, for example, who had allowed three members of the Chin National Front to stay for two nights at the school where he taught in order to speak to the villagers about democracy. While they were there, the schoolteacher and other villagers gave the three men food and refreshments. Because he provided this limited and entirely peaceful assistance to members of the CNF, the Burmese military regime burned down the teacher’s home, berated him for his belief in democracy, beat him severely, and held him prisoner for two years, first in a local jail and later in a forced labor camp. Because he provided this limited and entirely peaceful assistance to members of the CNF, the U.S. government has now denied the schoolteacher asylum.

DHS has also taken the position that emergency medical care to an injured person constitutes “material support to terrorism” if the injured person has engaged in terrorist activity. “Mariana,” a nurse from Colombia who is also a witness at this hearing, was kidnapped and physically assaulted by guerrillas from the Revolutionary Armed Forces of Colombia (FARC). They threatened her life and the lives of her family members and forced her, often at gunpoint, to give medical treatment to their members. When “Mariana” fled to the U.S. and applied for asylum, her claim was rejected on the grounds that the medical care she had provided constituted “material support” to a terrorist organization. A Nepalese healthcare worker who was placed in the same situation by the Maoist guerrillas in his country was granted asylum by an immigration judge, but DHS has appealed that decision to the BIA where his case has been pending since 2005. Leaving aside the fact that both these people provided medical care to their captors under duress, DHS’s position that emergency medical care constitutes “material support” to terrorism is deeply disturbing and in fundamental conflict with principles of medical ethics.

DHS and the Department of Justice’s Office for Immigration Litigation (OIL) have also taken the position that the material support bar applies to refugees who were coerced into providing support to armed groups. A fisherman from Sri Lanka who was kidnapped by the Liberation Tigers of Tamil Eelam (LTTE) and made to pay ransom for his own release, has been denied asylum on this basis. A student activist from Bhutan living as a refugee in Nepal taught at a school that took money from him, some of which the school may have paid as protection money to Maoist rebels. As a result of this, his asylum application has been on hold for over a year, prolonging his separation from his wife and little daughter. Hundreds of other asylum seekers are in the same situation, as are thousands of refugees who have been deemed ineligible for resettlement on this basis.

There is nothing natural or inevitable about this interpretation of the law. Similar criminal statutes are read to include an implied defense of duress, as are analogous civil statutes, and before 2005, a good number of trial attorneys representing DHS in immigration court took the position that the INA should be read the same way. DHS's current uniform position to the contrary treats victims of groups like the FARC, the Maoists, and the LTTE as terrorists themselves and helps swell the numbers of refugees whose lives are being endangered or placed on indefinite hold by the "material support" bars.

### **Waiting for waivers**

The statute provides authority for the Secretaries of State (in overseas cases) and Homeland Security (in cases arising in the United States), in consultation with the Attorney General and each other, to waive application of some, though not all, of the terrorism-related bars in particular cases. New legislation would expand this authority to cover most of the terrorism-related bars, including the membership and "terrorist activity" bars, subject to certain exceptions. Statutory authority for the Executive, in its sole unreviewable discretion, to decline to apply these bars has been the Executive's preferred solution to the current crisis, and there has finally been some progress in recent months in implementing portions of this statutory waiver authority, particularly in overseas refugee cases. Only nine asylum seekers have been granted waivers to date, however, and over two years after this authority was enacted, there is still no process in place to grant waivers to asylum seekers in immigration court. Without wishing to diminish the efforts of those at DHS who have worked to make this possible, or the practical impact on those refugees who have been granted waivers, we remain deeply concerned that using unreviewable discretionary waivers as the sole means of resolving a significant portion of refugee and asylum cases is neither legally appropriate nor workable in the long term.

From a practical standpoint, implementation of the waiver process has been extremely slow and unevenly distributed. In the overseas resettlement context, about 3,000 refugees have been granted waivers, almost all of whom provided varying forms of assistance to particular groups (including Burmese ethnic minority movements like the Karen National Union, the Chin National Front, and others) whose donors were exempted from application of the material support bar by the Secretary of State in 2006. The remainder of the refugees granted waivers to date have been people subjected to duress by "Tier III" groups, i.e. groups that have never been designated or listed as terrorist organizations by the U.S. government. This represents progress, but that progress has come only at the end of protracted delays, and refugees who were subjected to coercion by "Tier I" or "Tier II" organizations such as the FARC and other armed groups in Colombia, the Maoists in Nepal, the LTTE in Sri Lanka, and others, have yet to be granted waivers. In cases involving coercion by "Tier I" and "Tier II" groups, DHS has set up a process that requires an initial decision whether victims of a particular organization should be allowed to be considered for duress waivers, before waiver determinations may be made in an individual refugee case. No Tier I or Tier II

organizations have so far cleared this first phase of the administrative decision-making process.

For asylum seekers, waiver implementation has proceeded at a glacial pace. Over two years after statutory authority for such waivers was enacted in its present form as part of the REAL ID Act, only nine asylum seekers have actually been approved for waivers, while over 440 asylum seekers who applied for asylum affirmatively (i.e. without being in removal proceedings) remain on hold at the Asylum Office. A high proportion of asylum seekers whose cases have been deemed to trigger terrorism-bar concerns are people who were subjected to coercion by Tier I or Tier II organizations, whose victims DHS has not yet begun to consider for waivers.

Moreover, there is still no process in place to implement waiver authority for asylum seekers whose cases are before the immigration courts, the Board of Immigration Appeals, or the federal courts. This means that asylum seekers who are otherwise eligible for waivers in the various categories DHS has already announced—people who provided support against their will to “Tier III” organizations, as well as contributors to groups already deemed not to pose terrorism-bar concerns—are not able to be granted this relief. Ms. K, for example, is identically situated to refugees overseas who, like her, gave money to the Chin National Front, and are now being resettled in the U.S. after being granted waivers of inadmissibility. But because her case originated in immigration court, there is still no process in place to grant Ms. K a waiver. The same is true of the Chin Burmese schoolteacher described earlier, as well as two other Burmese Chin refugees whose asylum claims were denied around the same time. Attorney General Alberto Gonzales certified the BIA’s decisions in all of these Chin cases to himself in March of this year, which prevented them from pursuing federal appeals of the BIA’s decisions but provided them with no relief.

Yesterday, the Attorney General remanded Ms. K’s case to the BIA “so that it may consider what, if any, further proceedings are appropriate in light of [Secretary Chertoff’s] February 20, 2007” decision not to apply the material support bar to people like Ms. K who gave to the CNF. But there is still no process in place for waivers to be granted to Ms. K, to the Burmese schoolteacher, to “Mariana” the nurse from Colombia, to the Sri Lankan fisherman, or to any other asylum seeker whose case is before the immigration courts, the BIA, or the federal courts of appeals. None of these people have any idea when they may see their cases resolved.

These delays come with real human costs. The schoolteacher’s family, for example, remains in a dangerous situation abroad, and he has no ability to extricate them from that danger and be reunited with them here until he is finally granted asylum. The same is true of the Sri Lankan fisherman, who will not be considered for a waiver until DHS agrees to authorize implementation of duress waivers for individual victims of coercion by the LTTE. He was detained for over two years while these administrative discussions dragged on. Ms. K was likewise detained for over two years in an immigration jail in Texas, even after being granted protection under the Convention Against Torture.



And these are the cases we know about. One of the most alarming things about the state of adjudication of these cases, from a refugee advocate's perspective, is that the Departments of Justice and Homeland Security, to the best of our knowledge, do not have mechanisms in place to track cases pending before the DOJ or the federal courts that are triggering the terrorism bars but that DHS has indicated it intends eventually to consider for waivers. As a result, there does not appear to be any reliable system in place to prevent such asylum seekers from actually being deported before this can happen. DHS has indicated that it is moving towards approving implementation of waivers for people subjected to coercion by the FARC—too late for one asylum seeker whose case we were involved in, who was deported back to Colombia on this basis in 2005 after a lengthy stay in immigration detention.

These are the results we have seen at the end of a two-year period in which refugee advocates have been intensely focused on waiver implementation and government officials at the highest levels of the relevant federal agencies have indicated that resolving this problem is a priority. Based on this experience, we have serious concerns about the long-term feasibility of this level of reliance on waivers as the sole means of resolving these kinds of cases, especially if DHS maintains its current interpretations of the core legal definitions in the INA (“material support,” “terrorist activity,” and “terrorist organization”) that are sweeping such a large number of cases into the terrorism-bar framework.

This scheme also raises fundamental due process concerns. Administrative agencies are not infallible, and our legal system normally does not expect them to be. This is not a perfect system, and many asylum seekers who enter into it are unrepresented by counsel, do not speak English, and struggle to communicate their stories through inadequate translation and across significant cultural and informational barriers. Whether or not a person should be subject to exclusion for “material support” to a group that is deemed to be a terrorist organization (or subject to any other terrorism-related bar) involves legal and factual determinations of the same kind as the other core aspects of decision-making in an asylum case and should be subject to the same process of administrative and judicial review. For the asylum seekers involved, what is at issue can be the difference between life and death. The stakes in our legal system do not get much higher than this, and these cases deserve the same procedural protections and review normally accorded to interests of this magnitude.

## **Conclusion**

Progress on implementing administrative waiver authority is a positive development, and should be pursued and closely monitored in asylum and adjustment of status as well as refugee cases, with urgent attention to the implementation of a process to grant waivers to asylum seekers in removal proceedings and to ensuring that no refugees are not deported back to persecution before such a process is in place. Expanding statutory waiver authority is an important step to help many refugees currently barred from protection. In order to bring U.S. laws and administrative procedures back into line

with the Refugee Convention and the U.S. tradition of extending protection to those who flee from persecution; and to ensure that no refugee is returned to persecution, Congress should also address the overbroad definitions that lie at the heart of the “material support” problem, and make explicit its intention to target people who make a moral choice to engage in terrorist activity.