



# ASYLUM

- Persecution of Others
- Material Support to Terrorist Organizations
- Letters and Evidence from an Applicant's Home Country
- FOIA: Waste of Time?

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# Persecution of Others

# Burden of Proof

- The regulations provides that an "applicant shall not qualify as a refugee if he ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. If the evidence indicates that the applicant engaged in such conduct, he shall have the burden of proving by a preponderance of the evidence that he did not so act." 8 C.F.R. § 208.13(c)(2)(ii).

# Burden of Proof (cont.)

- The regulations require the Service to provide evidence which indicates that the applicant has engaged in the prohibited conduct.
- Once such evidence has been provided, the burden is on the applicant to prove by a preponderance of the evidence that he did not so act. 8 C.F.R. § 208.13(c)(2)(ii); *see also INA* §§ 243(h)(2)(A), 101(a)(42).

# "Assisted" in Persecution

- The BIA has determined that "assisted" may include involuntary or compelled assistance. *Matter of Laipenieks*, 18 I&N Dec. 433, 464-65 (BIA 1983):
  - E.g. *Fedorenko v. U.S.*, 449 US 490, 512 and n.34 (1981) (No basis for an involuntary assistance exception regarding persecution of others).
  - *Miranda Alvarado v. Gonzales*, 441 F.3d 750, 759-67 (9th Cir. 2006) (Interpreter for torturers of persons suspected of assisting the Sendero Luminosa in Peru was found to have assisted in the persecution of others since his conduct was a necessary part of the interrogation).

# Scope of Assistance (cont.)

- As stated by the BIA in *In re A--- H---*:

The plain meaning of the statute is broad enough to encompass aid and support provided by a political leader to those who carry out the goals of his group, including statements of incitement or encouragement and actions that further the violent activities of the group. Case law teaches that:

- (1) the terms to "assist," "aid" and "participate" are to be given broad application,
- (2) they do not require direct personal involvement in the acts of persecution,
- (3) it is highly relevant whether the alien served in a leadership role in the particular organization, and
- (4) in certain circumstances statements of encouragement alone can suffice, It is appropriate to look at the totality of the relevant conduct in determining whether the bar to eligibility applies.

23 I. & N. Dec. 774 (Jan. 26, 2005) (internal citations omitted).

# Other Examples of Assistance in Persecution

- *U.S. v. Hansl*, 439 F.3d 850 (8th Cir. 2006) {Upheld denaturalization of member of Death's Head Battalion who guarded concentration camp as "personally assisting" in the persecution of others whether or not it was involuntary).
- *Higuít v. Gonzales*, 433 F.3d 417, 420-32 (4th Cir. 2006) (Military intelligence officer for Marcos government who acknowledged that people he provided information about were imprisoned or killed assisted or otherwise participated in the persecution of others even if he was not directly involved in their physical harm).
- *Kir v. INS*, 434 F.3d 136 (2nd Cir. 2006) (Transporting captive women to undergo forced abortion in China was assistance in persecution even if it was not voluntary).

# Defenses

- Self-defense does not constitute persecution of others, and persecution of others cannot be imputed from membership in a particular social group. *Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1252 (9th Cir 2004).
- Activity directly related to a civil war such as forced recruitment, destruction of property, military attacks, or mere membership in an organization that involves such activities is not persecution. *Matter of Rodriguez-Mujano*, 19 I&N Dec. 811 (BIA 1988).
- "There must be a clear and recognizable nexus between the action of the alien and the persecution suffered by the victim." *In re Anwar Haddam*, 2000 BIA LEXIS 20 (BIA 2000).

# Material Support to Terrorist Organizations

# Introduction

The material support provisions, contained within the USA Patriot Act and REAL ID Act have prevented many refugees from receiving asylum. Many immigration lawyers and human rights NGOs have argued that the government's concept of "material support" is overly broad.

## Secretary Chertoff: CIS Fact Sheet on Material Support (04/27/2007)

Secretary Chertoff established a framework for potential exemptions from inadmissibility to persons who provided material support (as charged under 212(a)(3)(B)(iv)(VI)) to undesignated terrorist organizations under duress. The Memo discusses duress-related factors, as well factors considered when evaluating the "totality of the circumstances."

- This exemption may not be applied to individuals who provided material support to a terrorist organization designated under either INA 212(a)(3)(B)(vi)(I) or 212(a)(3)(B)(vi)(II)

# Exemption Requirements

The discretionary exercise of authority is warranted where the foreign national:

- a) Is seeking a benefit or protection under the Act and has been determined to be otherwise eligible for the benefit or protection;
- b) Has undergone and passed relevant background and security checks;
- c) Has fully disclosed the nature and circumstances of each provision of material support; and
- d) Poses no danger to the safety and security of the U.S.

# Duress?

When determining whether material support was provided under duress, the following factors may be considered:

- Whether the applicant reasonably could have avoided providing material support
- The severity or type of harm inflicted or threatened
- To whom the harm was directed, and
- In cases of threat alone, the perceived imminence of the harm threatened and perceived likelihood the harm would be inflicted

# Totally of the Circumstances

In addition to the duress related exceptions, the following factors may be considered when viewing the totality of the evidence:

- The amount, type, and frequency of material support provided
- The nature of the activities conducted by the terrorist organization
- The alien's awareness of those activities
- The length of time since material support was provided and the length of time since that time, and
- Any other relevant factor

# Knowledge

Note that an alien is not inadmissible for having provided material support to an undesignated terrorist organization if the alien "can demonstrate by clear and convincing evidence that the [alien] did not know, and should not reasonably have known that the organization was a terrorist organization." INA section 212(a)(3)(B)(iv)(VI)(dd).

# Precedent Cases

*In re S--- K---*, 23 I. & N. Dec. 936 (June 8, 2006).

- (1) The statutory language of INA § 212(a)(3)(B), 8 U.S.C. § 1182(a)(3)(B), does not allow a "totality of the circumstances" test to be employed in determining whether an organization is engaged in terrorist activity, so factors such as an organization's purposes or goals and the nature of the regime that the organization opposes may not be considered.
- (2) Neither an alien's intent in making a donation to a terrorist organization nor the intended use of the donation by the recipient is considered in assessing whether the alien provided "material support" under § 212(a)(3)(B)(iv)(VI) of the Act.
- (3) The respondent's contribution of \$1100 (Singapore dollars) over an 11-month period to the Chin National Front was sufficiently substantial to constitute material support to an organization, which despite its democratic goals and use of force only in self-defense, is defined by statute as a terrorist organization, so the respondent is barred from asylum and withholding of removal.

## Precedent Cases (cont.)

In *Singh-Kaur v. Ashcroft*, 385 F.3d 293, 298 (3d Cir. 2004). the Third Circuit found that the provision of very modest amounts of food and shelter to individuals who the alien reasonably should have known had committed or planned to commit terrorist activity constituted material support. The court also found that the listed examples in INA § 212(a)(3)(B)(iv)(VI) were not exhaustive but were "intended to illustrate a broad concept rather than narrowly circumscribe a term with exclusive categories."

# Letters and Evidence from the Home Country

# Practice Tips

- Do NOT send fill-in-the-blank style letters to family, friends back home. It's best to include a list of bullet points of relevant facts/dates
- Always remember to remind them that the letters must be signed and notarized

# Independent Corroboration

- Letters from prominent religious or political leaders, with knowledge of the applicant's persecution, are the most helpful and can be considered as corroborative independent evidence, pursuant to *Camara v. Ashcroft* 387 F.3d 261, 370 (4<sup>th</sup> Cir. 2004) ("Independent evidence, taken together, provided strong circumstantial evidence that Camara was imprisoned for political expression in opposition to the ruling government" and that the IJ erred by "completely ignoring" this evidence).

# Personal affidavits from family and friends

Courts assign greater importance to independent evidence, *supra*, over the personal affidavits from potentially biased family and friends.

*Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 359 (4th Cir. 2006).

- *But see . Matter of S-A-*, 22 I. & N. Dec. 1332 (describing the importance of Respondent's aunt's corroborative testimony, stating, "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available").

# Lack of Corroboration Not Necessarily Fatal

“The testimony of the applicant, if credible in light of general conditions in the applicant’s country of nationality of last habitual residence, may be sufficient to sustain the burden of proof without corroboration.” 8 C.F.R. § 208.13(a).

However, lack of corroboration will be fatal to an applicant’s claim for asylum where the evidence lacking was reasonably available to the respondent and the respondent introduced no documentary evidence other than the asylum application itself. *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989).

# Note on Authentication

When submitting official documents from an applicant's home country, they may be challenged for lack of authentication pursuant to 8 C.F.R. § 287.6, which provides for (1) the authentication of certain foreign official records by both the home country and the US Foreign Service, and (2) the authentication of other documents by the home country alone. Some courts have held that § 287.6 "is not the exclusive means of authenticating records before an immigration judge" in part, because "asylum applicants can not always reasonably be expected to have an authenticated document from an alleged persecutor." *Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 532 (3d Cir. 2004); *see also Abankwah 405 v. INS*, 185 F.3d 18, 26 (2d Cir. 1999) ("It must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation.").

# *Rebutting Forensics Reports/Damaging Evidence*

## *Not in the Record*

The IJ's conclusion that an applicant has filed a falsified document must be supported by substantial evidence. *See Borovikova*, 435 F.3d at 156-16. Evidence that is unreliable cannot provide the substantial evidentiary support necessary to sustain an IJ's finding. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 179 (2d Cir. 2004). An adverse credibility finding cannot rest on mere speculation or conjecture, such as an IJ's subjective opinion about the authenticity or probity of documents. *Wang v. INS*, 352 F.3d 1250, 1254 (9th Cir. 2003) (reversing adverse credibility finding based upon failure to authenticate documents solely because forensic expert could not determine authenticity. Rather, the record must include "evidence undermining their reliability," such that a reviewing court can objectively verify whether the IJ has a legitimate basis to distrust the documents. *Id.*

# The Freedom of Information Act (FOIA):

Is it a waste of time?

# Introduction

FOIA, found in Title 5 of the U.S. Code, § 552 was enacted in 1966 and provides that any person has the right to request access to federal agency records or information. All agencies of the Executive Branch are required to disclose records upon receiving a written request for them, except for those records (or portions of them) that are protected from disclosure by the nine exemptions and three exclusions of the FOIA.

# Response Times

Under the statute, all federal agencies are required to respond to a FOIA request within twenty business days, excluding Saturdays, Sundays, and legal holidays. 5 U.S.C. §552(a)(6)(A)(i). This time period does not begin until the request is actually received by the FOIA office of the DOJ component that maintains the records sought. Id. An agency is not required to send out the releasable documents by the last business day; it can send you a letter informing you of its decision and then send you the documents within a reasonable time afterward.

## Response Times (cont.)

An agency may unilaterally extend the response deadline by up to 10 working days in "unusual circumstances," but only upon giving written notice. 5 U.S.C. § 552(a)(6)(B)(i). This right may not be exercised if the agency has already exceeded its 10 day response deadline for the initial request. *Id.*

# Judicial Enforcement...?

When a determination on your request is not made within the applicable time period and you have not agreed to a different timetable, you may file suit in federal court to pursue a response. If, however, the court concludes that you have unreasonably refused to limit your request or to accept an alternate timetable, the court may find the failure to comply is justified. The court may excuse the lack of a timely response if it's demonstrated that it was caused by a backlog of requests, that the requests are processed on a first-come/first-served basis, and that reasonable progress is being made in reducing the backlog. In such cases, the court may postpone its consideration of your lawsuit until the agency reaches your request in its processing backlog.

# Or...

Alternatively, under Executive Order 13,392 (Dec. 14, 2005), FOIA requesters also may contact an agency's FOIA Requester Service Center to check on the status of their FOIA requests. The DOJ has established such a center for each of its 40 components, with a FOIA Public Liaison named for each, whom FOIA requesters may contact by telephone if they are dissatisfied with the response.

# Limited Expedited Processing

Under certain conditions you may be entitled to have your request processed on an expedited basis. The DOJ ordinarily will process a FOIA request ahead of others only in cases in which there will be a threat to someone's life or physical safety, or where an individual will suffer the loss of substantial due process rights if the records are not processed on an expedited bases. In most cases, a request will not be expedited merely on the basis that the requester is facing a court deadline in a judicial proceeding.

## Limited Expedited Processing (cont.)

A request for expedited processing must be accompanied by a statement setting forth the reasons why your request should be expedited. You should certify that the reasons you have given are true and correct. The component will be required to notify you of its decision about whether to grant expedited processing within no more than 10 calendar days after receiving your letter. If the component denies your request for expedited processing, you will be advised of your right to submit an administrative appeal of that denial, which will be handled expeditiously.