TERRORIST VICTIM OR PERPETRATOR?: FOREIGN SOLUTIONS TO CHALLENGES POSED BY THE U.S.'S TERRORIST BARS TO ASYLUM

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ABSTRACT

This article analyzes the challenges presented by the U.S.'s Terrorism-Related Inadmissibility Grounds ("TRIG") for asylum applicants and looks overseas for potential solutions. TRIG is the method by which the U.S. government bars terrorists and those who materially support terrorism from obtaining asylum and related protections. TRIG, however, is overbroad and inefficient, encompassing terrorist victims who currently pose and never posed any threat to U.S. security. Specifically, TRIG does not consider duress, or the provision of trivial support, when analyzing whether applicants should be barred from asylum because of material support of terrorism. Additionally, current law defines a terrorist organization for immigration purposes to include any group of two or more people who violently oppose a governing regime, even if that group poses (and posed) no threat to U.S. security. While there is a subsequent "waiver" process to mitigate some of these incongruous results, this process is highly inefficient and time-consuming, making it largely unrealistic as a sound option for those denied asylum due to TRIG.

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In searching for potential solutions, this article considers the United Kingdom and Australia—two key U.S. allies who similarly confront international terrorism—to see if their terrorism-related bars to asylum are more narrowly-tailored and efficient to capture individuals who actually pose a present threat to their respective societies. This article concludes that our allies' processes, while far from perfect, provide a more efficient, just, and accurate method of identifying genuine terrorist threats. Hence, the U.S. should consider adopting aspects of their approaches and revising TRIG so it encompasses present threats to the U.S.'s security instead of relying on overbroad generalizations that actually ensnare terrorist victims along with actual terrorists.

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I. INTRODUCTION

In May 2019, Customs and Border Protection ("CBP") arrested and took into custody more than 144,200 migrants along the southwestern border, a 32% increase from the prior month and the highest monthly total in seven years.[1] As the humanitarian crisis at the southern border unfolds, the United States ("U.S.") needs an effective and efficient way to determine who legitimately merits asylum under U.S. and international law, and of those who qualify for asylum, who should be barred because of ties to terrorism.

The U.S. and other democracies must balance humanitarian concerns with ensuring national security when assessing and granting asylum to refugees, as required by international convention. The U.S.'s asylum process is procedurally and substantively complex with different qualifying standards and different governmental entities deciding who qualifies for asylum—or other relief—based on a myriad of requirements that are not seen in other Western democracies such as the United Kingdom ("U.K.") and Australia. Some of these standards in the U.S. include where the noncitizen is geographically situated when requesting asylum, and whether that noncitizen is in removal or expedited removal proceedings, or in some other lawful status when making the request. While the U.K. and Australia all have processes for ensuring that noncitizens who materially support terrorism do not receive asylum, the U.S.'s process for determining Terrorism-Related Inadmissibility Grounds ("TRIG")[2] is convoluted, inefficient, and

1 Dave Kovaleski, *CBP Apprehended More Than 144,000 Migrants in May*, HOMELAND PREPAREDNESS NEWS (June 10, 2019), https://homelandprepnews.com/stories/34287-cbp-apprehended-more-than-144000-migrants-in-may/.

2 *See generally Terrorism-Related Inadmissibility Grounds (TRIG)*, U.S. CITIZENSHIP & IMMIGR. SERV. (last updated Nov. 11, 2019), http://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig (describing the reasons individuals can be denied entry into the United States, including, but not limited to, individuals who engaged in, incited, or endorsed terrorist activity, are representative or members of a terrorist group, receive training from a terrorist organization, etc.).

risks undermining the very principles of asylum that it is trying to uphold.[3]

One of the main problems with the U.S. asylum process is that the U.S. does not recognize a "duress" exception to the material support of terrorism and allows *de minimis* support to qualify as "material." It also allows any group of two or more people who violently oppose a governing regime to qualify as a "terrorist" group, even if that group poses absolutely no threat to the country's security, and even if those people were on the side of the U.S. during a conflict. Hence, individuals who are forced to cook or clean for terrorist groups; provide a safe house, medicine, or transportation at gunpoint; pay a ransom to save a family member; or who revolt against an oppressive regime (even a regime that the U.S. opposed, such as that of Saddam Hussein in Iraq) are barred from receiving asylum.[4] While the U.S. provides a "waiver" process to mitigate these distressing results, this "waiver" process can occur years later and is often carried out by a different governmental body that decides whether the person is qualified for asylum in the first instance, thus resulting in a grossly inefficient and duplicative use of resources at a time when the U.S. immigration system is already over capacity.[5] Furthermore, labeling vulnerable people who have sometimes suffered horrendous abuse by terrorists as "material supporters" of that very same terrorism—at least initially until a "waiver" is potentially applied—undermines the very core principles of asylum. Essentially the same facts that merit asylum (i.e., persecution) also merit an exclusion (i.e., material support of terrorism but under duress). The terrorist threat posed by refugees in America, while real, is not so formidable that it merits an overbroad

3 TRIG is applied not only to individuals requesting asylum (and related protections) but also to those already in the U.S. who want a change in immigration status. This article only discusses the former (asylum), but the same challenges and potential solutions equally apply to the latter (change in immigration status).

4 *See infra* Section II(E)(iii).

5 *See* Press Release, Off. of the Press Sec'y, The White House, Fact Sheet: President Donald J. Trump Is Working to Stop the Abuse of Our Asylum System and Address the Root Causes of the Border Crisis (Apr. 29, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-working-stop-abuse-asylum-system-address-root-causes-border-crisis/ (In April 2019, President Donald Trump stated that the immigration system had reached its "breaking point."); *see also* Ana Campoy, *The Many Ways Trump Has Made the Situation at the U.S.-Mexican Border Worse*, QUARTZ (Apr. 8, 2019), https://qz.com/1585758/trumps-immigration-policy-is-worsening-the-border-crisis/ (In April 2019, the deputy administrator of CBP characterized the situation as an "unprecedented crisis.").

and convoluted system that wastes resources and treats terrorist victims as a threat—even if only temporarily.

This article will analyze U.S. law and policy with respect to TRIG, focusing on some of the current shortcomings of American law and policy in this area. Additionally, the article will assess the U.S. asylum process for terrorism suspects and compare this with the approaches taken by the U.K. and Australia in order to identify best practices in those countries that can be used to suggest some potential enhancements to U.S. law and procedure.

This article is organized into four parts. Part I discusses how the U.S. asylum process fits within an international framework. Part II discusses the general asylum processes and procedures in the U.S. and then turns to an analysis of TRIG and some of its criticisms. Part III compares the general asylum process in the U.S. and TRIG to the approaches taken by two other Western democracies: the U.K. and Australia. Part IV analyzes some of the best practices of British and Australian approaches to barring terrorist refugees to see if the American system can be improved. As will be shown, both the U.K. and Australia are more likely to perform individualized inquiries of whether the asylum applicant poses a genuine threat and do not rely on overbroad understandings of the material support of terrorism or "terrorist organization" when barring refugees for terrorist affiliations. Hence, this article recommends that the U.S. adopt a more narrowly tailored approach to TRIG (like our allies), which will be more efficient, less complex, transparent and, ultimately, more effective than the status quo.

II. INTERNATIONAL FRAMEWORK

Before discussing TRIG and its waiver process, it is necessary to understand how the U.S asylum process generally works and how it fits within an international framework. U.S. asylum law stems from international law, specifically the 1951 United Nations Convention Relating to the Status of Refugees[6] and the 1967 United Nations Protocol ("Refugee Convention and Protocol"),[7] which define "refugee" as a person who is unable or unwilling to return to his or her home country, and cannot obtain protection in that country due to past persecution or a well-founded fear of being persecuted in the future "on

6 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S 137.

7 Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, U.S.T. 6223, 606 U.N.T.S. 267 (entered into force Nov. 1, 1968).

account of race, religion, nationality, membership in a particular social group, or political opinion."[8] These treaties also delineate the legal protections refugees should receive from those countries who are signatories.

To meet its international obligations, Congress enacted the Refugee Act of 1980,[9] which incorporated and codified the aforementioned definition of refugee into U.S. law,[10] and provided the substantive legal requirements individuals must fulfill to qualify for asylum. Under this Act, an applicant must show a "well-founded fear of persecution," a nexus between the harm and a protected ground, and government involvement or abdication to the harm.[11] As discussed above, the fear of persecution has to be related to race, religion, nationality, membership in a particular social group, or political opinion, and the government at issue must be either unable or unwilling to protect the individual from this harm.[12]

Article 33 of the UN Refugee Convention prohibits "*refoulement*," or forcibly returning refugees to areas where they are likely to be persecuted for the aforementioned reasons.[13] However, crucially, *refoulement* does not apply if there are "reasonable grounds" for regarding the refugee to be a danger to the security of the country or community in which he/she resides.[14] Therefore, as one expert notes, "a terrorist cannot, by definition, be a refugee and can either be refused entry or expelled from any State-Party to the Convention."[15] Each signatory to the Convention has the autonomy to decide how to

8 Convention Relating to the Status of Refugees, *supra* note 6, art. 1(A)(2), 19 U.S.T. at 6261, 189 U.N.T.S 152.

9 Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. §§ 1101-1537).

10 The source of immigration law in the U.S. is the Immigration and Nationality Act ("INA") of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537); *see* 8 U.S.C. § 1101(a)(42)(A) (2018) (codification of international refugee definition into U.S. law).

11 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1), (b)(2)(i).

12 8 U.S.C. § 1101(a)(42)(A).

13 Convention Relating to the Status of Refugees, *supra* note 6, art. 33(1), 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

14 *Id.* at art. 33(2), 19 U.S.T. at 6276, 189 U.N.T.S. at 176 (noncitizens who have committed serious human rights abuses, serious non-political crimes, and acts contrary to the UN are also excluded from refugee status); *see id*. at art. 1(F), 19 U.S.T. at 6261, 189 U.N.T.S at 156.

15 L. M. Clements, *Asylum in Crisis, An assessment of UK Asylum law and policy since 2002*: *Fear of Terrorism or Economic Efficiency*, 11WEB J. CURRENT LEGAL ISSUES (2007), http://www.bailii.org/uk/other/journals/WebJCLI/2007/issue3/clements3.html.

define what constitutes a danger to the country in the context of its own domestic laws.

Not surprisingly, despite the absence of any universally accepted definition of terrorism,[16] the U.S., U.K., and Australia all have defined terrorism as a threat to national security and a bar to asylum.[17] Because these western democracies share the same goal of providing asylum to genuine refugees while ensuring the security of their respective countries, it will be helpful to compare their processes and procedures to see if any best practices can be gleaned to improve the American system of accurately and efficiently identifying true security threats.

III. UNITED STATES

A. General Asylum Process

Throughout this article, an "asylum seeker" is someone who has applied for asylum and is awaiting a ruling on whether she will be granted refugee status.

The U.S. legal framework for asylum is complex and technical and relies on multiple governmental agencies. Under the Refugee Act of 1980, the U.S. makes a distinction between "asylum seekers" and "refugees" based on geographic location. Refugees apply outside the U.S.,[18] while asylum seekers apply in the U.S.[19] While both substantive standards for qualification and the exclusionary bars are the same, the procedures for the adjudication of the claims are very different. Refugee applications are processed in one of the overseas processing locations.[20] Asylum applications, by contrast, are processed in one of

16 *See* James C. Simeon et al., *Terrorism and Exclusion from Asylum in International and National Law* 56, 57-59 (U. London Refugee L. Initiative Working Paper Series, Paper No. 31-36,2019).

17 *See* Margaret L. McCarthy, The Terrorism Bar: An Analysis of Potential Modifications to the Tier III and Related Inadmissibility Provisions 9-10 (Apr. 2011) (Senior Honors Scholar B.A. thesis, University of Connecticut), https://opencommons.uconn.edu/srhonors_theses/174. *See generally infra* Parts II and III (there is no official U.S. government definition of terrorism; rather, each agency has its own definition that corresponds to its objectives. Nonetheless, the Departments of State, Justice, and Homeland Security all use the same definitions of "terrorist activity" and "terrorist organization" for purposes of immigration law.).

18 *See* INA § 207, 8 U.S.C. § 1157 (2018) (application for those overseas and provision of an overseas refugee process); 8 C.F.R. §§ 207.1-9 (2019).

19 *See* INA § 208, 8 U.S.C. § 1158 (2009) (application is processed under this section if the applicant is located in the U.S. and providing a process for asylum applications); 8 C.F.R. §§ 208.1-30 (2019).

20 *See* 8 C.F.R. § 207.1(a) (2011); 8 U.S.C. § 1231(b)(3)(A) (2006).

the asylum offices within the U.S.[21] (called "affirmative asylum") or are raised as a defense in a removal proceeding before an immigration judge (called "defensive asylum").[22]

Those who obtain asylum under U.S. law receive a host of benefits including being able to legally remain in the U.S.,[2324] eligibility for certain benefits,[25] and being able to request derivative asylum status for a spouse and/or children.[26] After one year in the U.S., an asylee also may apply for lawful permanent residence ("LPR"),[27] and, after five years, the asylee may apply to become a U.S. citizen.[28]

A noncitizen asserting refugee status in the U.S. must apply for asylum under the requirements of 8 U.S.C. § 1158. Applicants may apply for employment authorization 180 days after they file for asylum.[29] As discussed above, there are two paths in which a noncitizen may apply for asylum in the U.S.: the "affirmative" process and the "defensive" process.[30] Asylum seekers who arrive at a port of entry (i.e., a border or an airport), or enter the U.S. without inspection generally apply though the defensive process, whereby asylum is a defense to removal in an adversarial proceeding before an immigration judge ("IJ") who is part of the Department of Justice ("DOJ").[31] The noncitizen is not entitled to an attorney but may procure one on her own.[32] Conversely, a person who is in the U.S. but not in removal proceedings may affirmatively apply for asylum through U.S. Citizenship and Immigration Services ("USCIS"), part of the Department of

21 *See* 8 C.F.R. § 208.4(b) (2019).

22 *Fact Sheet: U.S. Asylum Process*, NAT'L. IMMIGR. F. (Jan. 10, 2019), https://immigrationforum.org/article/fact-sheet-u-s-asylum-process [hereinafter *Fact Sheet*]; *see also* U.S. DEP'T OF JUSTICE, FACT SHEET: ASYLUM AND WITHHOLDING OF REMOVAL RELIEF CONVENTION AGAINST TORTURE PROTECTIONS 3-4 (Jan. 15, 2009), https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf.

23 8 U.S.C. § 1158(c)(1)(A) (2009).

24 8 U.S.C. § 1158(c)(1)(B).

25 8 U.S.C. § 1613(b)(1) (2015).

26 8 U.S.C. § 1158(b)(3).

27 8 U.S.C. § 1159(b) (2018).

28 8 U.S.C. § 1427(a) (2018).

29 *See Fact Sheet*, *supra* note 22; *see also* 8 U.S.C. § 1158(d)(2) (2009).

30 *See generally* U.S. DEP'T OF JUSTICE, FACT SHEET: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, AN AGENCY GUIDE 3, U.S. DEP'T OF JUSTICE (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

31 *Fact Sheet*, *supra* note 22, at 4.

32 *See* 8 U.S.C. § 1158(d)(4).

Homeland Security ("DHS").[33] If the asylum officer (who is not a judge) does not grant the applicant asylum, and the applicant no longer has lawful status in the U.S., USCIS refers the applicant to immigration court for removal proceedings where the applicant may renew his/her request for asylum through the "defensive" process before an IJ.[34] In March 2018, "there were more than 318,000 affirmative asylum applications pending" where the initial interview could reach four years.[35]

In both the affirmative and defensive asylum processes, the burden of proof is on the asylum seeker to establish that she meets the definition of "refugee." [36] An applicant may sustain this burden through testimony alone, "but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee."[37] Asylum also cannot be granted until the identity of the asylum seeker has been checked against all appropriate records or databases maintained by both Attorney General ("AG") and Secretary of State ("SOS") and no other statutory bars (like terrorism) apply.[38] The. U.S. Supreme Court has said that this fear of persecution may be well-founded where there is as little as a 10% chance of persecution.[39] If an applicant successfully establishes refugee status and is not excluded from relief by any bar,[40] the AG "may grant asylum," but is not required to do so.[41] Asylum is a form of "discretionary relief."[42]

33 *See* 8 U.S.C. §§ 1158(d)(5)(A)(ii)–(iii) (for affirmative asylum cases, in the absence of exceptional circumstances, an applicant is entitled to an initial interview or hearing within forty-five days of filing the application and to a final administrative adjudication of the application within 180 days).

34 *See Fact Sheet*, *supra* note 22, at 3.

35 *Asylum in the United States*, AM. IMMIGR. COUNCIL (May 14, 2018), https://www.americanimmigrationcouncil.org/research/asylum-united-states.

36 8 U.S.C. §1158(b)(1)(B) (2009).

37 *Id.* at §1158(b)(1)(B)(ii) (the trier of fact may also require the applicant to provide other evidence of record and weigh the testimony along with this evidence. An applicant is not entitled to a presumption of credibility; the trier of fact makes a credibility determination "[c]onsidering the totality of the circumstances, and all relevant factors.").

38 § 1158(d)(5)(A)(i); § 1158(b)(2).

39 INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

40 8 U.S.C § 1158(b)(2).

41 §1158(b)(1)(A).

42 Moncrieffe v. Holder, 569 U.S. 184, 187 (2013); *see* INS v. Aguirre-Aguirre, 526 U.S. 415, 420 (1999).

Applicants must apply for asylum within one year of entering the U.S.;[43] if not, unless they can establish "changed" or "extraordinary circumstances," they will be barred from receiving asylum.[44] However, an applicant who can no longer apply for asylum, or who is statutorily barred from receiving asylum because of certain crimes, can apply for statutory "withholding of removal," which is non-discretionary relief that does not provide as many benefits as does asylum, and is more difficult to obtain (requiring more than 50% chance of persecution verses 10% for asylum).[45] In fact, applications for withholding of removal are made on the same form as asylum applications (i.e., form I-589) and are made simultaneously with the asylum application.[46] In fiscal year 2016, the immigration courts granted only 6% of withholding applications.[47]

Applicants can also apply for withholding or deferral[48] of removal under the Convention Against Torture ("CAT").[49] Such relief is available only if it is more likely than not (more than 50% chance) that an individual will suffer from torture "inflicted by or at the instigation of

43 8 U.S.C. §1158(a)(2)(B) (2009); 8 U.S.C. §1158(a)(2)(E) (the one-year rule does not apply to unaccompanied alien children [UACs]).

44 8 U.S.C. §1158(a)(2)(D); Rojas v. Johnson, 205 F. Supp. 3d 1176, 1176 (2018) (holding that the government's failure to provide adequate notice of the one-year deadline constitutes a violation of the INA, the Administrative Procedure Act ("APA"), and class members' due process rights under the Fifth Amendment).

45 8 C.F.R. § 208.13(c)(1) (1997); INS v. Stevic, 467 U.S. 407, 429-30 (1984) (to qualify for withholding of removal, a noncitizen must demonstrate that "it is more likely than not [50%] that the alien would be subject to persecution" in the country to which she would be returned on account of her race, religion, nationality, membership in a particular social group, or political opinion); *Aguirre-Aguirre*, 526 U.S. at 419-20 (if this standard is met, the IJ must grant withholding of removal, unless there is a statutory exception. While withholding only bars deporting a noncitizen to a particular country or countries, a grant of asylum permits a noncitizen to remain in the U.S. and to apply for permanent residency after one year).

46 8 C.F.R. § 208.3(b) (2012).

47 *Withholding of Removal and the U.N. Convention Against Torture—No Substitute for Asylum, Putting Refugees at Risk*, HUMAN RTS. FIRST (Nov. 9, 2018), https://www.humanrightsfirst.org/resource/withholding-removal-and-un-convention-against-torture-no-substitute-asylum-putting-refugees [hereinafter *Withholding of Removal and the U.N. Convention Against Torture*].

48 The differences between withholding of removal and deferral of removal under CAT are beyond the scope of this article.

49 *See* 8 C.F.R. § 208.13(c)(1); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 3, April 18, 1988, 1465 U.N.T.S. 85, 114 (pursuant to CAT art. 3, the U.S. enacted statutes and regulations to prohibit the transfer of noncitizens, even those who pose a national security risk, to countries where they would be tortured); 18 U.S.C. § 2340 (2012); 8 C.F.R. § 208.13(c)(1) (the U.S. ratified CAT and incorporated into its domestic law).

or with the consent or acquiescence of a public official or other person acting in an official capacity."[50] Unlike asylum and withholding of removal, the torture does not have to be based on any protected ground.[51] It is difficult to make this legal showing (more than 50%), and in 2016 less than 5% of CAT applications were granted.[52]

As discussed *infra* page 613 (and continuing to the end of section), there are several statutory bars to asylum, mainly dealing with noncitizens who would pose a danger to the U.S.[53] This article focusses on TRIG. Before discussing TRIG, it is necessary to understand how the removal and detention process generally works before the government applies any terrorism bar.

B. Removal of Aliens

When DHS seeks to remove a noncitizen found in the interior of the U.S., it initiates "formal" removal proceedings under INA § 240, which are conducted by an IJ within DOJ's Executive Office for Immigration Review.[54] An adverse decision may be appealed to the Board of Immigration Appeals ("B.I.A."), the highest level of administrative appeal available to asylum seekers.[55] Because the IJs and B.I.A. are under the executive branch (not judicial) and part of the DOJ, the AG can always overrule any decision made by an IJ or B.I.A.[56]

Under INA § 235(b)(1), undocumented aliens arriving at a port of entry or who cannot show that they have been physically present in the U.S. continuously for the two-year period immediately prior to the date of the determination of inadmissibility[57] are subject to a process

50 8 C.F.R. § 1208.18(a)(1) (1999); *see also* Khouzam v. Ashcroft, 361 F.3d 161, 170-71 (2d Cir. 2004) (noting that an applicant for protection under CAT must show that torture will be perpetrated with a government official's consent, acquiescence, or willful blindness).

51 *Withholding of Removal and the U.N. Convention Against Torture*, *supra* note 47.

52 *Id.*

53 *See* 8 U.S.C. § 1158(b)(2) (2009).

54 FACT SHEET: EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, *supra* note 30, at 1-2.

55 *Id.* at 1 (most appeals heard by B.I.A. concern orders of removal and related protections, and B.I.A. can designate certain orders as precedent decisions, which are then published and applied to immigration cases nationwide); *see also* 8 C.F.R. § 1003(b) (1958); 8 C.F.R. § 1003(d).

56 8 C.F.R. §1003.1(h).

57 8 U.S.C. § 1225(b)(1)(A)(iii) (1997); 8 C.F.R. § 235.3(b)(1)(ii) (1997); *see* Notice Designating Aliens Subject to Expedited Removal § 235(b)(1)(A)(iii) of the

called "expedited removal,"[58] which is an accelerated process allowing DHS to quickly deport inadmissible aliens without a hearing or further review[59] and without counsel.[60] Specifically, the expedited removal statute provides that when a noncitizen seeks admission to the U.S. after arriving at a port of entry and does not have entry documents, misrepresents the noncitizen's identity or citizenship, or presents fraudulent identity or immigration documents, the immigration officer shall order the noncitizen removed from the U.S. without further hearing or review unless the noncitizen indicates either an "intention to apply for asylum" or a "fear of persecution."[61] In other words, under expedited removal, the noncitizen is removed without a hearing[62] unless the noncitizen indicates she wants to apply for asylum or is being persecuted.[63]

If the undocumented alien indicates that she wants to apply for asylum or is being persecuted, the expedited removal process is halted and the noncitizen is then referred to an asylum officer for a "credible fear" or "reasonable fear" screening interview.[64] "Credible fear" is

INA, 67 Fed. Reg. 68 (Nov. 13, 2002); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877 (Aug. 11, 2004) (per policy, DHS had applied the expedited removal to undocumented aliens apprehended within fourteen days of crossing the border (not two years) and within one hundred miles of the border); *see also* Vanessa Romo, *Trump Administration Moves To Speed Up Deportations With Expedited Removal Expansion*, NAT'L PUB. RADIO (July 22, 2019), https://www.npr.org/2019/07/22/744177726/trump-administration-moves-to-speed-up-deportations-with-expedited-removal-expan (however, in July 2019, the Trump Administration stated that—going forward—all geographic limitations would be lifted and DHS would use the full two years provided for in the statute and not limited to one hundred miles of the border, and the ACLU plans to challenge this change in court).

58 *See generally* 8 U.S.C. § 1225(b) (1997); 8 U.S.C. § 1232(a)(5)(D) (2008) (expedited removal does not apply to UACs; instead they are generally placed in formal removal proceedings under INA § 240).

59 *See* 8 U.S.C. § 1252(a)(2)(A) (2019); *see also* 8 U.S.C. § 1225(b)(1)(A)(i) (1997).

60 *See* 8 C.F.R. § 287.3 (1997).

61 8 U.S.C. § 1225(b)(1)(A)(i) (1997); 8 U.S.C. § 1225(b)(1)(A)(ii).

62 As an alternative to expedited removal, the agency may permit the noncitizen to voluntarily return to her country if she is able to depart from the U.S. immediately. *See* 8 U.S.C. § 1225 (a)(4). Furthermore, if the noncitizen claims under oath that she is a U.S. citizen, lawful permanent resident, was previously admitted as a refugee, or was previously granted asylum, the immigration officer must attempt to verify the noncitizen's claim before issuing an expedited removal order. *See* 8 U.S.C. § 1225(b)(1)(C).

63 The agency has promulgated regulations governing the procedures for expedited removal. *See* 8 C.F.R. § 1235.3(b)(2)(i) (2019).

64 8 U.S.C. § 1225(b)(1)(A)(ii); §1225(b)(1)(B)(ii); 8 C.F.R. § 235.3(b)(4); *see also Fact Sheet*, *supra* note 22, at 5.

defined as a "significant possibility, taking into account the credibility of the statements made by the noncitizen in support of the noncitizen's claim and such other facts as are known to the officer, that the noncitizen could establish eligibility for asylum."[65] This is a deliberately low standard that approximately ninety percent of noncitizens satisfy.[66] If the noncitizen is found to have a credible fear, then the noncitizen is entitled to a full adversarial removal hearing before an IJ under INA § 240 where the noncitizen may file an application for asylum (and related protections).[67] As discussed previously (see page 598), this process is called "defensive asylum," as asylum is a defense in an adversarial removal proceeding.

If the asylum officer does not find credible fear, the noncitizen is ordered removed, unless the noncitizen appeals the negative credible fear determination to an IJ who performs an abbreviated review (not the same as a full removal hearing).[68] If the IJ upholds the "negative credible fear finding," then the noncitizen is removed (there are no other appeals).[69] If the IJ overturns a negative credible fear finding, then the expedited removal order is vacated, and the noncitizen is placed in a full adversarial removal proceeding under INA § 240 where the individual can apply for asylum or other relief from removal.[70] In fiscal year 2017, USCIS found 60,566 individuals to have credible fear.[71]

Noncitizens who re-entered the U.S. unlawfully after a prior deportation order or were convicted of certain crimes are subjected to a different expedited process called "reinstatement of removal." If the noncitizen expresses a fear of returning home or persecution, however, the asylum officer will afford the noncitizen a "reasonable fear" interview.[72] Unlike a "credible fear" interview where the standard is "significant possibility," the standard for a "reasonable fear" interview is

65 § 1225(b)(1)(B)(v) (1997).

66 *See* Dara Lind, *Attorney General Barr Just Handed ICE More Power to Keep Asylum Seekers in Detention*, VOX (Apr. 17, 2019), https://www.vox.com/2019/4/17/18411929/william-barr-attorney-general-immigration-detention-asylum-bond.

67 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 208.30(f) (2019).

68 8 C.F.R. § 208.30(g) (according to 8 U.S.C. § 1225(b)(1)(B)(iii) "such review shall include an opportunity for the [noncitizen] to be heard and questioned by the [IJ], either in person or by telephonic or video connection," and must be completed within seven days).

69 8 C.F.R. § 1208.30(g)(2)(iv)(A) (2019)

70 8 C.F.R. § 1208.30(g)(2)(iv)(B).

71 *Asylum in the United States*, *supra* note 35.

72 8 C.F.R. § 1208.31(a) (2019).

"reasonable possibility" that the person will be persecuted for the qualifying reasons.[73] As with the "credible fear" process, if the asylum officer finds that the noncitizen has met the reasonable fear standard, the noncitizen will be referred to immigration court, but the noncitizen cannot apply for asylum. Rather, the noncitizen must apply for withholding of removal, which affords less benefits than asylum and does not provide a pathway for lawful permanent residence.[74] As with credible fear, however, if the asylum officer does not find the reasonable fear standard met, the noncitizen may appeal the negative decision to an IJ.[75] If the IJ upholds the decision, the noncitizen is removed.[76] If the IJ reverses the decision, the noncitizen is placed in full removal proceedings where she can seek the aforementioned protections from removal (but not asylum).[77] In 2017, USCIS found 3,018 noncitizens to have reasonable fear.[78]

For defensive asylum, as of June 2019, there were 909,034 cases pending before IJs, with the average removal proceeding pending more than two years for undocumented immigrants not being held in detention.[79]

C. Detention

DHS has the option to detain a noncitizen while formal removal proceedings are pending, but may release the noncitizen on bond or grant conditional parole as a matter of discretion (however, detention is mandatory if the noncitizen is removable on certain criminal or terrorist-related grounds except in limited circumstances).[80] If the noncitizen requests bond, it can be granted by Immigration and Customs Enforcement ("ICE") or an IJ in a custody hearing.[81] ICE or the IJ conduct a "risk classification assessment" looking at how likely the person is to appear for court hearings, community ties, prior appearances at hearings, manner of entry and length of time in the U.S., and

73 § 1208.31(c).
74 § 1208.31(e).
75 § 1208.31(f).
76 § 1208.31(g)
77 *See id.*
78 *Asylum in the United States*, *supra* note 35.
79 Romo, *supra* note 57.
80 8 U.S.C. § 1226(a)(2) (2018); *see generally* 8 C.F.R. §§ 236.1 (2019); 8 C.F.R. § 1236.1 (2019).
81 *See* In re X-K-, 23 I&N Dec. 731 (BIA 2005); 8 C.F.R. § 1236.1.

whether they are a danger to the community.[82] If the individual cannot afford the bond set by ICE, she may request reconsideration before an IJ in a bond hearing.[83] The IJ can either impose a monetary amount (the minimum being $1500) or a non-monetary condition, such as electronic ankle monitoring.[84] In rare cases, the IJ can choose to release the individual on conditional parole.[85]

There is a different process in place for "expedited removal." Any noncitizen who arrives at a port of entry without valid travel documents or with fraudulent documents, or is apprehended between ports of entry, and claims asylum, is placed into mandatory detention until there has been a final determination of credible (or reasonable) fear.[86] If no credible fear is found, then these asylum seekers remain detained until removed.[87] If credible fear is found, these asylum applicants remain detained until an IJ adjudicates their defensive asylum claims;[88]

82 *See Report to Congressional Committees: Alternatives to Detention, Improved Data Collection and Analyses Needed to Better Assess Program Effectiveness*, U.S. GOV'T ACCOUNTABILITY OFFICE (GAO) 8 (Nov. 2014), https://www.gao.gov/assets/gao-15-26.pdf (describing the ICE Risk Classification Assessment tool, which "recommends each alien for detention or release" and is then reviewed by an ICE officer "along with other factors," after which the ICE officer makes a custody determination with supervisory approval). According to an investigative report by *Reuters* in 2017, ICE modified its risk assessment software so that it "always recommends detention for apprehended immigrants to conform to Trump's' 'zero tolerance' stance on illegal immigration." Daniel Oberhaus, *ICE Modified Its 'Risk Assessment' Software So it Automatically Recommends Detention*, VICE (June 26, 2018), https://www.vice.com/en_us/article/evk3kw/ice-modified-its-risk-assessment-software-so-it-automatically-recommends-detention. Nonetheless, ICE states that an ICE officer still makes a final decision on whether to detain a noncitizen or release the individual.

83 *See* 8 C.F.R. § 236.1(d). Note, however, that arriving aliens (i.e., those who present at a port of entry and request asylum) are not eligible for bond hearings. *See* 8 C.F.R. §1003.19(h)(ii).

84 *See* 8 U.S.C. § 1226(a) (2018); *see also Report to Congressional Committees*, *supra* note 82, at 9-11 ("ICE may require participation in the ATD program as a condition of the alien's release during immigration proceedings, or upon receipt of the alien's final order of removal or grant of voluntary departure.").

85 *See* 8 U.S.C. § 1226(a).

86 8 U.S.C. at § 1225(b)(2)(A) (1997).

87 *See id.* at § 1225(b)(1)(B)(iii)(IV) ("Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed."); *see also* 8 C.F.R. § 235.3(c) (2019) (requiring mandatory detention of inadmissible aliens with parole opportunities).

88 *See* 8 U.S.C. § 1225(b)(2)(A) ("[I]if the examining immigration officer determines that [an arriving alien] is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for [removal] proceeding[s] . . . .").

however, they are no longer in expedited removal proceedings[89] and can request "parole" into the country instead of detention.[90]

The AG through DHS decides "parole" on "a case-by-case basis [and allows parole only] for urgent humanitarian reasons or significant public benefit."[91] The applicable regulations describe five categories of noncitizens who may meet the parole standards, assuming they do not pose as a security or flight risk: (1) noncitizens who have serious medical conditions; (2) pregnant women; (3) certain juveniles; (4) noncitizens who will be witnesses; and (5) noncitizens who continued detention is not in the public interest.[92] A noncitizen's term of parole expires when the purposes of such parole have been served, at which point the noncitizen must return or be returned to custody.[93] Parole does not constitute lawful admission or determination of admissibility.[94] Importantly, noncitizens detained pursuant to § 1225(b) "expedited removal" have no statutory right to a bond hearing.[95] Their only

89 *See* 8 C.F.R. § 208.30(f) (2019).

90 *See* 8 U.S.C. § 1182(d)(5)(A) (2018) (authorizing parole); *see also* 8 C.F.R. § 208.30(f). Parole is where DHS temporarily allows noncitizens to physically enter the U.S. if they are applying for admission but are either inadmissible or do not have a legal basis for being admitted to the U.S.

91 8 U.S.C. § 1182(d)(5)(A) (authorizing parole in limited, humanitarian situations). *But see* 8 C.F.R. § 235.3(b)(24)(iii) (2019) (stating that arriving aliens who have not been determined to have a credible fear will not be paroled unless parole is necessary considering a "medical emergency or is necessary for a legitimate law enforcement objective.").

92 8 C.F.R. § 212.5(b) (2019).

93 *Id*. at § 212.5 (e)(2)(i).

94 8 U.S.C. § 1101(a)(13)(B) (2018).

95 *See* 8 C.F.R. § 1003.19(h)(2)(i)(B) (2019); *see also* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) ("[N]either §1225(b)(1) nor §1225(b)(2) says anything whatsoever about bond hearings."); *In re X-K*, 23 I&N Dec. 731, 736 (holding that all undocumented aliens caught between ports of entry and then transferred from expedited to full proceedings after establishing a credible fear are eligible for bond). In 2019, however, AG William Barr overturned *In re X-K* in this respect and held that the INA § 235(b)(1)(B)(ii) (2007) mandates detention after a favorable screening interview. *See* Matter of M-S, 27 I&N Dec. 509, 519 (BIA 2019). In reaching this conclusion, AG Barr relied on the 2018 Supreme Court case *Jennings v. Rodriquez*, which held that the INA does not give a noncitizen the right to a bond hearing between a favorable screening interview and removal proceedings because the statute says, "shall be detained." *Jennings v. Rodriquez*, 138 S.Ct. at 842. Rather, as discussed *supra*, the noncitizen can only be released from detention under the "parole" authorities. *See* 8 U.S.C. § 1182(d)(5)(A) (2018). However, in July 2019, a federal judge blocked AG Barr's decision to automatically deny bond to those who are apprehended between ports of entry. *See* Noah Lanard, *Judge Blocks Trump Administration's Attempt to Subject Thousands of Asylum Seekers to Indefinite Detention*, MOTHERJONES (July 3, 2019),

option is parole, which is decided by ICE and cannot be appealed.[96] ICE has the discretion to set conditions for parole, such as demanding that the individual participate in an appearance support program or wear an electronic ankle bracelet.[97] On February 27, 2018, the United States Supreme Court confirmed that the language within § 1225(b) "mandate[s] detention of applicants for admission until [removal proceedings] have concluded" and that the "express exception to detention [parole] implies that there are no other circumstances [such as bond] under which aliens detained under § 1225(b) may be released."[98]

In 2009, ICE issued a policy directive entitled "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture," to interpret "public interest." The parole directive states that, "in the public interest," asylum seekers who establish credible fear should be released from detention during the pendency of their asylum claims if they establish their identity and demonstrate that they are not a flight or security risk.[99] Hence, while § 1225(b) "expedited removal" provides for mandatory detention unless paroled, DHS, by policy, had made parole instead of detention more of the default. As such, in 2010, the executive branch began allowing many asylum applicants who were found to have a credible fear to be released into the U.S. pending their asylum hearing instead of remaining in detention.[100] As elaborated *infra* page 608, this trend has been largely reversed under the Trump Administration.[101]

On January 25, 2017, President Donald Trump issued an Executive Order ("EO") entitled "Border Security and Immigration Enforcement Improvements," directing DHS to allocate "all legally available resources" to construct and operate immigration detention facilities

https://www.motherjones.com/politics/2019/07/judge-blocks-trump-administrations-attempt-to-subject-thousands-of-asylum-seekers-to-indefinite-detention/.

96 *Parole vs. Bond in the Asylum System*, HUMAN RTS. FIRST (Sept. 5, 2018), https://www.humanrightsfirst.org/resource/parole-vs-bond-asylum-system.

97 *See* 8 C.F.R. § 212.5(d).

98 *Jennings*, 138 S. Ct. at 842, 844.

99 *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Dec. 8, 2009), https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_aliens_found_credible_fear.pdf.

100 *See* Will Weissert & Emily Schmall, '*Credible Fear' for U.S. Asylum Harder to Prove Under Trump*, CHI. TRIB. (July 16, 2018, 11:10 AM), https://www.chicagotribune.com/nation-world/ct-credible-fear-asylum-20180716-story.html.

101 *See* Maria Sacchetti, *ACLU Sues Trump Administration over Detaining Asylum Seekers*, WASH. POST (Mar. 15, 2018, 11:43 AM), https://www.washingtonpost.com/local/immigration/aclu-sues-trump-administration-over-detaining-asylum-seekers/2018/03/15/aea245e2-27a2-11e8-bc72-077aa4dab9ef_story.html.

and hold immigrants there for the duration of their court proceedings.[102] Of note, with respect to the exercise of parole, the EO states that the secretary should take "appropriate action to ensure that parole authority . . . is exercised . . . only when an individual demonstrates urgent humanitarian reasons or a significant public benefit derived from such parole."[103] It also states that parole authority should be exercised "sparingly."[104] Nonetheless, former DHS Secretary John Kelly stated in a February 20, 2017 memorandum implementing this EO that the 2009 ICE parole directive was still "in full force and effect." [105] Yet, the February 20 memorandum also states that DHS should detain immigrants for the duration of their immigration proceedings and calls for the issuance of regulations to that effect.[106]

The effect of the EO is that many more individuals are detained pending their removal hearings than use to be paroled into the country.[107] According to Human Rights First, in the eight months since the EO, ICE largely refused to release asylum seekers from detention on parole.[108] In 2017, ICE detained more than 43,000 noncitizens—more than three times the number of detainees in the year prior.[109]

In April 2018, with the influx of migrants at the southern border, the Trump Administration announced a "zero tolerance" policy to criminally prosecute noncitizens who unlawfully entered the country

102 *See* Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017); *see also* Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

103 82 C.F.R. 8793 § 11(d) (2010).

104 *See* 82 C.F.R. 8793 § 11(d).

105 Memorandum from U.S. Dep't of Homeland Sec. Sec'y John Kelly to various Executive Branch Officials regarding Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [hereinafter John Kelly Memo]; *see also* HUMAN RIGHTS FIRST, JUDGE AND JAILOR: ASYLUM SEEKERS DENIED PAROLE IN WAKE OF TRUMP EXECUTIVE ORDER (Sept. 2017), https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf [hereinafter JUDGE AND JAILOR].

106 *See* John Kelly Memo, *supra* note 105.

107 *Fact Sheet: Summary of Executive Order "Border Security and Immigration Enforcement Improvements"*, AM. IMMIGR. COUNCIL (Feb. 27, 2017), https://www.americanimmigrationcouncil.org/research/border-security-and-immigration-enforcement-improvements-executive-order.

108 *See* JUDGE AND JAILOR, *supra* note 105 (In May 2019, the ACLU and Southern Poverty Law Center sued the Trump Administration for denying parole to nearly all asylum seekers in five Southern states. For instance, between 2016 and 2018, the New Orleans office's parole rate dropped from 75% to just 1.5%, the lowest in the country.); Lanard, *supra* note 95.

109 *See* Oberhaus, *supra* note 82.

without inspection,[110] which is a misdemeanor.[111] These individuals were detained pending their trial.[112] Because children cannot be detained more than twenty days pursuant to the terms of a settlement agreement governing the care of children in immigration custody,[113] children were designated as unaccompanied alien children ("UACs") and separated from their parents while the parents awaited prosecution for unlawful entry.[114] This policy caused popular outrage,[115] and on June 20, 2018, the Trump Administration started paroling families with children into the U.S. instead of detaining them.[116] In first few months of 2019, families and unaccompanied children made up

110 *See Statement from DHS Press Secretary on April Border Numbers*, DEP'T OF HOMELAND SECURITY (May 4, 2018), https://www.dhs.gov/news/2018/05/04/statement-dhs-press-secretary-april-border-numbers.

111 *See* 8 U.S.C. § 1325(a) (2018) (improper entry by alien). Note that noncitizens can still apply for asylum even though they are being prosecuted for unlawful entry. *See* 8 C.F.R. § 208.14(c)(1) (2019) (allowing an IJ or asylum officer to grant asylum to aliens even if they entered the U.S. on fraudulent documents or in secret as defined in the INA §§ 212(a), 237(a)). However, in November 2018, the Trump Administration announced a new policy that would make aliens who enter the U.S. unlawfully instead of at a port of entry ineligible for asylum. In November 2018, a federal district judge issued a temporary restraining order, holding that the U.S. must accept asylum applications from any alien, no matter how they enter the country. *See also* Miriam Jordan, *Federal Judge Blocks Trump's Proclamation Targeting Some Asylum Seekers*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/judge-denies-trump-asylum-policy.html.

112 *See* John Bacon, *Detention Crisis: Trump Defends 'Zero Tolerance' Immigration*, USA TODAY (June 18, 2018), https://www.usatoday.com/story/news/nation/2018/06/18/detention-crisis-what-we-know-now/710718002/.

113 Under a 2015 revision to the 1997 *Flores v. Sessions* settlement, families with children cannot be held in immigration detention indefinitely, and the default seems to be twenty days. Flores v. Sessions, 862 F.3d 863 (9th Cir. 2007). *See* Lind, *supra* note 66.

114 *See* Jeremy Stahl, *District Court Judge Denounces Forced Child Separation as "Brutal" and Clear Constitutional Violation*, SLATE (June 6, 2018), https://slate.com/news-and-politics/2018/06/district-court-judge-rules-that-trump-administration-child-separations-would-be-unconstitutional.html.

115 *See* Samantha Schmidt, *ICE Releases Mother It Detained for Months Far Away from 7-Year-Old Daughter*, WASH. POST (March 7, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/03/07/ice-releases-mother-it-detained-four-months-far-away-from-7-year-old-daughter/?utm_term=.f6fe9784e6b0.

116 On June 20, 2018, President Trump issued an Executive Order announcing that it is "the policy of this Administration to maintain family unity, including by detaining families together where appropriate and consistent with law and available resources." Sarah Herman Peck, *Family Separation at. the Border and the* Ms. L. *Litigation,* CONG. RES. SERV. (2018), https://fas.org/sgp/crs/misc/LSB10180.pdf (The Trump Administration is trying to get Congress to override the *Flores* settlement agreement that only allows children to be detained twenty days. Until that were to happen, ICE must release families on parole to comply with Flores.); *see* Lind, *supra* note 66.

approximately sixty percent of asylum seekers apprehended at the border.[117]

In January 2019, the Trump Administration introduced a policy called "Migrant Protection Protocols" or "Remain in Mexico," where certain asylum applicants from Central America—specifically, Guatemala, El Salvador, and Honduras—will wait in Mexico while their asylum claims are adjudicated in the U.S.[118] Although many civil rights groups sued the Administration over this policy, in May 2019, the Ninth Circuit held that this policy could continue.[119]

D. Appeals

For refugees applying for asylum overseas, there is no right to appeal under the principle of consular non-reviewability.[120] In 2015, the Supreme Court affirmed that a refugee who is barred by TRIG is not entitled to any kind of appeal or review.[121] In this case, the plaintiff was a U.S. citizen who claimed that her right to due process had been violated by the government's refusal to provide either her or her husband, who had been a civil servant under the Taliban and was a citizen and resident of Afghanistan, with a facially legitimate and bona fide reason for denying his visa application. The Supreme Court held that, assuming that a U.S. citizen had a procedural due process right to an explanation of the grounds for the denial of her husband's visa application, that right was satisfied when a consular officer informed her that her husband was inadmissible[122]

117 *See* Lind, *supra* note 66.

118 Dara Lind, *Remain in Mexico: Trump's Quietly Expanding Crackdown on Asylum Seekers, Explained*, VOX (Mar. 22, 2019, 2:04 PM), https://www.vox.com/2019/3/5/18244995/migrant-protection-protocols-border-asylum-trump-mexico [hereinafter Lind, *Remain in Mexico*] (migrants are given an immigration court date 45 days from when they presented themselves to CBP. This policy does not apply to UACs.).

119 *See* Richard Gonzales, *Appeals Court Rules Trump Administration Can Keep Sending Asylum-Seekers To Mexico,* NAT'L PUB. RADIO (May 8, 2019, 4:20 AM), https://www.npr.org/2019/05/08/721293828/appeals-court-rules-trump-administration-can-keep-sending-asylum-seekers-to-mexico.

120 *See* 8 C.F.R. § 207.4 (2011) (no administrative or judicial review under the principle of consular non-reviewability); *see, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 766 (1972); *see also* Saavedra Bruno v. Albright, 197 F.3d 1153, 1157-58 (D.C. Cir. 1999).

121 Kerry v. Din, 135 S. Ct. 2128 (2015).

122 *Din*, 125 S. Ct. at 2128. Some courts will review constitutional claims concerning a denial of a visa. *See* Am. Acad. of Religion v. Napolitano, 573 F.3d 115, 125 (2d Cir. 2009) (holding that the First Amendment requires limited judicial review of a consular officer's decision to deny a visa).

Conversely, for asylum seekers applying in the interior of the country at one of the asylum offices (affirmative asylum) or requesting asylum as a defense to removal before an IJ (defensive asylum), there is both administrative (B.I.A.) and judicial review (federal courts).[123] As explained above, asylum is a form of "discretionary relief."[124] While discretionary relief is not usually subject to judicial review (except for constitutional claims), there is an exception for denials of asylum.[125] Thus, within thirty days of the B.I.A.'s decision, an asylum applicant may seek judicial review of a final order of removal in the federal judicial circuit in which the removal proceedings took place.[126] Judicial review is limited to whether the denial of asylum is "manifestly contrary to the law and an abuse of discretion."[127] Significantly, however, there is no judicial review for terrorism grounds of inadmissibility;[128] that determination is made solely by the Executive branch.[129] Hence, a denial by the B.I.A. based on TRIG[130] is effectively final and unreviewable. In a 2019 case, the Ninth Circuit affirmed that it had no jurisdiction to review TRIG-barring issues.[131]

E. National Security

Arriving aliens (i.e., seeking admission at any port of entry) who are suspected of being inadmissible based on TRIG are subject to an abbreviated procedure with little opportunity for review.[132] An immigration officer may order an arriving alien removed immediately upon arrival if the inspecting officer "suspects that an arriving alien may be

123 *Compare* 8 U.S.C. § 1158(d)(5) (2009) (providing for administrative review), *with* 8 C.F.R. § 1003.3(a) (2019) (providing for judicial review).

124 *Moncrieffe*, 569 U.S. at 187; *see Aguirre–Aguirre*, 526 U.S. at 420.

125 8 U.S.C. § 1252(a)(2)(B) (2019) (providing that the discretionary relief is not subject to judicial review, with the exception of asylum).

126 *See generally id.* at § 1252(b).

127 *Id*. at § 1252(b)(4)(D).

128 8 U.S.C. § 1158(b)(2)(D) (2009) (prohibiting judicial review of determinations made by the discretionary denial of asylum under §1158(b)(2)(A)(v), which is the terrorism bar).

129 *See id.*

130 There may be an exception for judicial review of constitutional claims and questions of law. *See* 8 U.S.C. § 1252(a)(2)(D). Rayamajhi v. Whitaker, 912 F.3d 1241, 1244 (9th Cir. 2019) (citing Bazua-Cota v. Gonzales, 466 F.3d 747, 748 (9th Cir. 2006) (per curiam)).

131 *Rayamajhi*, 12 F.3d at (2019 9th Cir.) (citing *Bazua-Cota*, 466 F.3d at 748.

132 *See* Michael John Garcia & Ruth Ellen Wasem, *Immigration: Terrorist Grounds for Exclusion and Removal of Aliens*, CONG. RES. SERV. 18 (Jan. 12, 2010), https://fas.org/sgp/crs/homesec/RL32564.pdf.

inadmissible" on terrorism grounds.[133] While there is no opportunity for administrative or judicial review, the AG has the authority to review these orders and rely on confidential evidence during this review.[134] If the AG "after consulting with appropriate security agencies of the United States Government concludes that disclosure of the information would be prejudicial to the public interest, safety, or security," she can order the noncitizen removed without a hearing.[135] In other words, the AG can use confidential information that the noncitizen does not see to reach her determination of inadmissibility with no ability for the noncitizen to appeal.[136] While such noncitizens are barred from receiving asylum or statutory withholding of removal, they can still make a claim under CAT.[137]

For noncitizens who are in the country, "the Attorney General may certify an alien" as a threat to national security if he or she has "reasonable grounds to believe" that the noncitizen is involved in terrorism or any other activity that threatens the national security of the U.S.[138] After the certification, DHS detains the noncitizen and the AG has two options: either charge her with a criminal offense or initiate a removal hearing, and this must be done within seven days or the noncitizen is to be released.[139] However, the noncitizen cannot be indefinitely detained. If the noncitizen is not going to be removed in the reasonably foreseeable future, they "may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person."[140] The AG must also review the certification every six months.[141] Such a certification by the AG usually bars the noncitizen from asylum and statutory withholding of removal (but not CAT relief).[142] Under certain circumstances, however, certified noncitizens may seek judicial review of their detention on collateral review by habeas corpus.[143]

133 8 U.S.C. § 1225(c)(1) (1997).

134 § 1225(c)(2).

135 § 1225(c)(2).

136 *See* § 1225(c)(2)(B).

137 *See* Garcia & Wasem, *supra* note 132, at 18.

138 8 U.S.C. § 1226a(a)(3) (2019) (certification authority cannot be delegated to anyone except the Deputy Attorney General).

139 *See* § 1226a(a).

140 § 1226a(a)(6).

141 § 1226a(a)(7).

142 8 U.S.C.§ 1158(b)(2)(A)(v) (2009).

143 *See* 8 U.S.C. § 1226a(b).

For affirmative asylum requests by an applicant in the country (but not in removal proceedings), an asylum officer may refer cases involving a potential terrorism bar to an IJ.[144] The IJ then decides whether a terrorism bar applies, just as an IJ would do in a defensive removal proceeding.[145] The decision of the IJ (whether from an initial affirmative asylum request or a defensive one) may be appealed to the B.I.A.[146] As explained above, while the determination of the B.I.A. is subject to judicial review, there is no judicial review of TRIG.[147]

Even if one qualifies as a "refugee" and receives asylum, there are several statutory bars, such as involvement with terrorist activities, that exclude that person from obtaining such relief.[148] Prior to 1990, the INA did not have any terrorism-related bars to asylum.[149] The Immigration Act of 1990 was the first statute to contain an inadmissibility bar relating to terrorism, although it did not explicitly mention "material support" per se.[150] In 1996, in response to the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing, Congress enacted the 1996 Antiterrorism and Effective Death Penalty Act, which contained the first version of a material support bar.[151] 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").[152] After September 11, Congress enacted the USA Patriot Act of 2001, which greatly expanded the reach of the material support bar by broadening the definitions of "terrorism," "terrorist activity," "engaging in terrorist activity," and "foreign terrorist organization."[153] As discussed *infra* page 617, the Patriot Act

144 8 C.F.R. § 208.14(c)(1) (2019).

145 *See* § 208.9-19 (2019).

146 *See* 8 U.S.C. § 1158(d)(5) (2009); *see also* 8 C.F.R. § 1003.3(a) (2019).

147 *See* § 1158(b)(2)(D).

148 § 1158(b)(2). Other bars—such as health related issues, persecution of others, posing a risk to the security of the U.S., and committing serious human rights or criminal law violations—are beyond the scope of this article, which focuses on TRIG.

149 *See* John Flud, *Duress and Material Support Bar in Asylum Law: Finding Equity in the Face of Harsh Results*, 59 S. TEX. L. REV. 537, 549 (2018).

150 *See* Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

151 *See* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (adding INA § 219).

152 *Id.* at AEDPA § 301(b). A Foreign Terrorist Organization ("FTO") is an organization designated by the Secretary of State in accordance with INA § 219.

153 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001, Pub. L. No. 107-56, § 411, 115 Stat. 272, 345-50 (2005) (codified as amended at 8 U.S.C. §§ 1182, 1227, 1158, 1182, 1189 (2018)).

created the three-tiered definition for "terrorist organization" that is used today.

In 2005, Congress passed the REAL ID Act, again broadening the breadth of the material support bar in several significant ways.[154] First, it expanded the definition of a terrorist organization to essentially include any armed group, even groups opposing an oppressive regime and even groups that pose (or posed) no threat to the United States.[155] Second, it modified and narrowed the "knowledge" defense from an individual not knowing or reasonably knowing that an act "would further the organization's terrorist activity" to not knowing or reasonably knowing that "the organization was a terrorist organization."[156] Finally, the Act broadened "engaging in terrorist activity" to include endorsing and/or espousing terrorist activity and receiving military-type training from a terrorist organization.[157]

Under the INA, any noncitizen who has "engaged in terrorist activity"[158] or is a member of "terrorist organization" is inadmissible and is precluded from several forms of relief, including asylum and withholding of removal (but not deferral of removal under CAT).[159] Specifically, the "material support bar" renders the applicant ineligible if the government is able to prove that he or she committed an act that he or she "kn[e]w, or reasonably should [have] know[n], afford[ed] material support . . . to a terrorist organization."[160]

There are three fundamental problems with the U.S.'s material support bar that are not seen in the U.K. and Australia. First, material

154 *See* Emergency Supplemental Appropriations (REAL ID) Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109-13, sec. 103(a)-(c), 119 Stat. 302, 306-09 (2005) (codified as amended at 8 U.S.C. § 1182(a)(3)(B) (2018)).

155 *See* 8 U.S.C. § 1182(a)(3)(B).

156 8 U.S.C. § 1182(a)(3)(B). As discussed *infra* (beginning on page 619) the knowledge defense has to do with Tier III undesignated terrorist organizations as there is no knowledge defense for Tier 1 and 2 designated organizations.

157 8 U.S.C. § 1182(a)(3)(B); REAL ID Act § 103(a)(i)(VII-VIII) (2018). As discussed *infra* (beginning on page 623, section iv), the Act also introduced a "waiver" provision to waive certain bars to asylum including the material support bar. *See id.* at § 104.

158 *See generally* 8 U.S.C. §1182(a)(3)(B)(iv) ("Engaged in terrorist activity" includes planning or executing a terrorist activity, soliciting others to do so, providing material support to a terrorist organization or member of a terrorist organization, and soliciting funds or recruiting members for a terrorist organization).

159 8 U.S.C § 1182(a)(3)(B)(i) (the U.S.'s treaty obligations under CAT are different from those implicated in the material support bar to asylum and withholding of removal under the Act. The material support bar does not preclude deferral of removal under CAT pursuant to 8 C.F.R. § 1208.17.).

160 8 U.S.C. § 1182(a)(3)(B)(iv)(VI) (2018).

support includes de minimis support like cooking and cleaning. Second, the definition of a "terrorist organization" is so broad that it includes groups that are not posing and have never posed any security risk to the U.S., such as groups using justifiable force against an illegitimate regime. Third, there is no exception in the statute for "duress" (even if someone provides support at gunpoint). According to an immigration expert, the material support bar is one of the broadest grounds for exclusion and is likely to exclude the largest number of asylum seekers.[161]

1. Material Support

While "material support" is not defined in the statute, the INA does provide a non-exhaustive list to include a wide range of non-violent activities such as providing transportation, funds, communications, false documents, training, medicine, religious services, or a safe house to terrorists.[162] "Material support" has been interpreted to even include simply cooking food and cleaning for a terrorist,[163] providing unpaid translation services,[164] allowing the use of a home for shelter and meal preparation,[165] and setting up tents for a religious service.[166] The B.I.A. has held there is no exception in the material support bar for de minimis activities on behalf of a terrorist organization.[167]

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161 Teresa Pham Messer, *Barred from Justice: The Duress Waiver to the Material Support Bar*, 6 HOU. L. REV. 63, 67 (2015) (*citing* DEBRA ANKER, LAW OF ASYLUM IN THE UNITED STATES 533 (2015)).

162 8 U.S.C. § 1182(a)(3)(B)(iv)(vi) identifies acts that afford material support as "including" the following: "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." *See, e.g.*, Alturo v. U.S. Att'y Gen., 716 F.3d 1310, 1314 (11th Cir. 2013) (per curiam) (citing Singh-Kaur v. Ashcroft*,* 385 F.3d 293, 298-990 (3d Cir. 2004) (holding that the term is broadly defined and is not limited to the enumerated examples in the statute under § 212(a)(3)(B)(iv)(VI) of the Act)).

163 Matter of A-C-M, 27 I&N. Dec. 303 (BIA 2018).

164 Jabateh v. Lynch, 845 F.3d 332, 343 (7th Cir. 2017).

165 Barahona v. Holder, 691 F.3d 349, 357-58 (4th Cir. 2012).

166 *See Singh-Kaur*, 385 F.3d at 300; *see also* Tahir v. Lynch, 654 F. App'x 512, 515 (2d Cir. 2016) (designing and printing communications materials, such as brochures, posters, and banners constitutes material support).

167 *Barahona*, 691 F.3d at 353; *see also* Matter of SK-, 23 I&N Dec. 936, 945 (BIA 2006) (observing that "Congress has not expressly indicated its intent to provide an exception for contributions which are de minimis."). The B.I.A. has indicated, however, that at least some acts could be considered de minimis. *See* Matter of L-H-, Immig. Rptr. LEXIS 963, at *6 (B.I.A. 2009) (holding that a packed lunch and the equivalent $4 cannot be considered material); B.I.A. Unpublished Decision Finds Child Soldier's Sweeping Terrorist Organization's Camp Was Not Material

The recent 2019 case of *Rayamajhi v. Whitaker*[168] is telling. In 2003, Rayamajhi took an administrative position with Doctors Without Borders, an international nongovernmental organization, in Nepal.[169] Soon, he became a target of the Maoists, a designated terrorist organization at the time, who beat him twice, demanded that he give them money and join their political party, and threatened him and his family. In February 2009, a Maoist approached him while at a taxi stand and demanded money. Rayamajhi recognized the Maoist as one of the men who had beaten him in the past, and fearing what he might do if he did not comply, gave him money the equivalent of about $50.[170] In 2009, he applied for asylum and withholding of removal in the U.S. and an IJ ruled that the material support of terrorism bar (because of the $50) precluded asylum and withholding of removal, but allowed deferral of removal under CAT as he would likely face torture if he returned to Nepal.[171] On appeal, the B.I.A. found there was no de minimis exception to the material support bar.[172]

Similarly, the *Matter of A-C-M* case is also problematic. In this case, the applicant was found to have provided material support in 1990 to the guerillas in El Salvador because she provided forced labor in the form of cooking, cleaning, and washing their clothes. The B.I.A. held that even such de minimis support aided the guerillas in continuing their mission of armed and violent opposition to the Salvadoran Government.[173] The B.I.A. noted: "we conclude that an alien provides 'material support' to a terrorist organization, regardless of whether it was intended to aid the organization, if the act has a logical and reasonably foreseeable tendency to promote, sustain, or maintain the organization, even if only to a de minimis degree."[174] The B.I.A. held that there is no quantitative limit to the material bar statute noting that "[i]f an alien affords material support to a terrorist organization, he or

Support Barring Asylum, 90 No. 30 Interpreter Releases 1650 at 1 (BIA 2013) (holding that sweeping the floor of a terrorist camp is "conduct which has no logical and reasonably foreseeable tendency to promote, sustain, or maintain a terrorist organization" and, therefore, does not constitute material support). Since this decision is unpublished, it is unclear what weight it may carry, if any, for future decisions.

168 *Rayamajhi*, 912 F.3d at 1244.

169 *Id.* at 1242.

170 *Id.* at 1243.

171 *Id.*

172 *Id.* The B.I.A. also found there was no exception for duress. For a discussion of duress, *see infra* page 620.

173 *Matter of A-C-M-,* 27 I & N. Dec. at 310..

174 *Id.* at 308.

she is subject to the bar, regardless of how limited that support is in amount."[175]

2. Definition of "Terrorist Organization"

In addition to the open-endedness of what is considered "material support," the definition of "terrorist organization" is complex and overbroad. The INA classifies terrorist organizations into three tiers. Tier I organizations are those the SOS has designated by name as terrorist organizations by following the requirements and procedures outlined in 8 U.S.C. § 1189 (Designation of foreign terrorist organizations).[176] A Tier I foreign terrorist organization threatens the interest and security of the U.S. and it has the capability to do so.[177] Tier II are terrorist organizations otherwise designated by the SOS, in consultation with or upon the request of the AG or the Secretary of DHS, after finding that the organization "engages in terrorist activity."[178] This designation is subject to public scrutiny through publication in the Federal Register.[179]

Conversely, Tier III terrorist organizations are *undesignated* and not specifically named and published by the SOS like Tiers I and II organizations. A Tier III organization can consist of any "group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" certain enumerated terrorist activities.[180] The definition of terrorist activities encompasses those not only endorsing or espousing terrorist activity but also being a spouse or

175 *Id.* at 307.

176 8 U.S.C § 1189 (2108). A complete list of Tier I organizations can be found on the U.S. Department of State website at https://www.state.gov/j/ct/rls/other/des/123085.htm [https://perma.cc/B9B4-8H2J].

177 8 U.S.C. § 1189(a)(1)(B)-(C).

178 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(III) (2018).

179 8 U.S.C. § 1182(a)(3)(B)(iv)(II).

180 8 U.S.C. § 1182(a)(3)(B)(iv)(I)-(III). "Terrorist activity" is defined under the INA 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 U.S., would be unlawful under the laws of the U.S. or any State.). *See* 8 U.S.C. § 1182(a)(3)(B)(iii). It includes preparing, advocating, inciting, or soliciting funds for the commission of terrorist activity. *See* 8 U.S.C. § 1182(a)(3)(B)(iv). It also includes activities generally associated with terrorism such as hijacking, kidnapping, and assassination. *See* 8 U.S.C. § 1182(a)(3)(B)(iii). It also includes the use of a weapon "with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b).

child of one who does.[181] Here, the power is vested in IJs and USCIS adjudicators to determine whether an "organization" or group constitutes a Tier III terrorist organization, and this determination is only made at the time the asylum application is being adjudicated.[182] As Anwen Hughes from Human Rights Watch observes, "[t]here is no central control over the application of [the Tier III] definition, which is triggered simply by an individual adjudicator's assessment that the group or some subgroup within it has engaged in the use of armed force."[183]

Many scholars have criticized the Tier III designation process. As one member of the B.I.A. stated, "[t]he statutory language is breathtaking in its scope. Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization."[184] Even groups opposing illegitimate regimes and those on the side of the United States during a conflict, such as the Free Syrian Army (a western-backed armed group opposing the Syrian government and ISIL)[185] and Nelson Mandela's anti-apartheid African National Congress ("ANC")[186] have been considered Tier III organizations.[187] Motive and ideology are irrelevant under the definition of a Tier III terrorist organization. As Hughes notes, "[a]ny refugee who ever fought against the military forces of an

181 *See* 8 U.S.C. § 1182(a)(3)(B)(ii) (explaining the child or spouse bar to admissibility has an exception for those who did not know or should not have known).

182 Anwen Hughes, *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*, HUMANS RTS. FIRST, 3, 5 (2009), https://humanrightsfirst.org/wp-content/uploads/pdf/RPP-DenialandDelay-FULL-111009-web.pdf (noting that a "Tier III" organization is a group designated as a terrorist organization solely for purposes of immigration law and that any group can become a Tier III group "when some immigration adjudicator, somewhere, says that it is," with no public announcement required).

183 *Id.* at 21.

184 In re S-K-, 23 I&N Dec. 936, 948 (B.I.A. 2006) (Osuna, concurring).

185 Suzanne Nossel, *The Gross Misconduct of Radwan Ziadeh's Asylum Denial*, FOREIGN POL'Y (July 25, 2017).

186 *See* Hughes, *supra* note 182, at 4-5.

187 In 2007, Congress permitted DHS to waive the application of Tier III designations to groups in some circumstances and created congressional exemptions for specific groups, such as the African National Congress. *See* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 691(a), 121 Stat. 1844, 2364 (2007) (codified as 8 U.S.C. § 1182(d)(3)(B) and Pub. L. No. 110-257, 122 Stat. 2426 (2008). As former Secretary of State Condoleezza Rice stated in 2008: "It is frankly a rather embarrassing matter that I still have to waive in my own counterpart, the foreign minister of South Africa, not to mention the great leader Nelson Mandela." Hughes, *supra* note 182, at 27. This waiver process is discussed more *supra* page 623, section IV.

established government is being deemed a 'terrorist.' The fact that some of these refugees were actually fighting alongside U.S. forces shows how far removed the immigration law's 'terrorist' labels have become from actual national security concerns."[188] To this end, the government even conceded at oral argument that Odeh al-Refaiel, an Iraqi lawyer who helped U.S. forces rescue a U.S. marine private from a hospital in Nassiriyah, would be excluded on terrorist grounds as he provided material support to a terrorist organization (i.e., the U.S. armed forces who used weapons against the laws of Saddam Hussein).[189] Essentially, the definition of Tier III encompasses any two people who take up arms in any situation other than service in their national armies or for personal enrichment.[190] In fact, "[t]he immigration law's definition can be read to cover everyone from George Washington to survivors of the Warsaw Ghetto uprising."[191]

Another troubling facet of the Tier III designation is that DHS applies the Tier III definition retroactively to groups that have given up violence, have long since joined the regular political process, or cease to exist altogether.[192] As Hughes from Human Rights First questions: "What security purpose is served by excluding—or denying refugee protection to—a person who does not pose a threat to this country and is not subject to any of the immigration law's long list of other bars, simply because he made a contribution long ago to a group that no longer exists or is now an established political party?"[193]

The knowledge (*mens rea*) requirement is very different for Tier I and II organizations compared to Tier III ones. For published Tier I and II organizations, the noncitizen does not have to know that the material support is being used for terrorist activities, or that the support is being provided to a terrorist organization.[194] If an applicant has provided material support to one of these designated terrorist organizations (Tier 1 or 2), it is a strict liability offense.[195] By contrast, the

188 *See* Hughes, *supra* note 182, at 1.

189 Won Kidane, *The Terrorism Bar to Asylum in Australia, Canada, the United Kingdom, and the United States: Transporting Best Practices*, 33 FORDHAM INT'L L.J. 300, 321-22 (2009) (citing Dahleen Glanton & Douglas Holt, *Commandos Storm Iraqi Hospital to Rescue POW*, CHI. TRIB. (Apr. 2, 2003)); Donna Leinwand et al., *POW Rescue Sets Off Celebration*, USA TODAY, at A5 (Apr. 3, 2003) (Mohamed Odeh al-Refaiel was granted a special visa and resettled in the U.S.).

190 *See* Hughes, *supra* note 182, at 3.

191 *Id.*

192 *See id.* at 24, 28.

193 *See id.* at 28.

194 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(cc) (2018).

195 *See* Flud, supra *note* 149, at 543.

knowledge requirement for Tier III organizations is a little more forgiving, mainly because there is no published list of such organizations and the adjudicator decides at the hearing. Once support for a Tier III organization has been established, an asylum applicant can overcome the bar by demonstrating "by clear and convincing evidence that the actor did not know, and should not reasonably have known, that the organization was a terrorist organization."[196] The burden of proving a lack of knowledge rests with the applicant but it is not a strict liability offense as it is with Tiers I and II.[197]

3. Duress

One of the most troubling aspects of the material support statute is that there is no exception for providing support under "duress"[198] or against the person's will.[199] In the criminal law context, if a defendant is faced with threat of death or seriously bodily injury to break the law, the defendant may choose to commit the crime because she will be experiencing less harm to herself or others by committing the crime than by resisting.[200] Hence, "duress" can be an affirmative defense that will excuse criminal conduct under the rationale that a defendant should not be criminally liable for acts that she does not voluntarily

196 8 U.S.C. §§ 1182(a)(3)(iv)(VI)(dd), (a)(3)(B)(i)(VI).

197 § 1182(a)(3)(B)(iv)(VI)(dd).

198 Black's Law Dictionary states that duress is "a threat of harm made to compel a person to do something against his or her will or judgment. . . . Duress practically destroys a person's free agency, causing nonvolitional conduct because of the wrongful external pressure." *Duress*, BLACK'S LAW DICTIONARY (10th ed. 2014).

199 *See* Matter of M-H-Z-, 26 I. & N. Dec. 757 (B.I.A. 2016) (concluding that the material support bar does not include an implied duress exception by relying on federal circuit courts that had addressed the issue); *see also* Sesay v. Att'y Gen. of U.S., 787 F.3d 215, 224 (3d Cir. 2015) (holding that "the material support bar does not distinguish between voluntary and involuntary support"); Annachamy v. Holder, 733 F.3d 254, 260 (9th Cir. 2013) *overruled on other grounds by* Abdisalan v. Holder, 774 F.3d 517, 526 (9th Cir. 2014) (as amended Jan. 6, 2015) (finding no duress exception to material support provision); Alturo v. U.S. Att'y Gen., 716 F.3d 1310, 1314 (11th Cir. 2013) (finding that because the material support bar contains no express duress exception, the Board reasonably declined to recognize one, and noting that "every circuit that has addressed the issue has concluded that there is no implied exception to the material support bar for support given involuntarily or under duress."); Barahona v. Holder, 691 F.3d 349, 354 (4th Cir. 2012). *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 B.I.A. to decide the issue).

200 United States v. Contento-Pachon, 723 F.2d 691, 693-94 (9th Cir. 1984).

commit.[201] Importantly, while the burden of proof for affirmative defenses is with the defendant, the duress defense is adjudicated at the *same* proceeding as the government's case in chief (i.e., that the defendant committed the crime beyond a reasonable doubt). As shown *infra* page 623, section IV, this is not the case with waiver/exemption process to duress for material support of terrorism where the analysis is done by a different government entity at a later time.

Although a recognized defense in criminal law, duress is not an exception under the material support statute,[202] essentially making material support a strict liability offense (even at gunpoint) where the noncitizen's state of mind or reason for providing the support is irrelevant.[203] This lack of a duress defense has resulted in distressing outcomes. For instance, in *Hernandez v. Sessions*,[204] Hernandez was a successful businesswoman in Colombia who provided food to the Revolutionary Armed Forces of Colombia ("FARC") following a series of threats against her, including being held at gunpoint. Later, the FARC burned down her hotel and store for housing Colombian police officers.[205] Following a contested removal hearing, the IJ determined that but for the material support bar, she would be eligible for asylum based on her past persecution by the FARC.[206] On appeal, the B.I.A.—relying on a prior precedential decision—held that the material bar statute does not contain an implied exception for duress.[207] On judicial review, the Second Circuit held that the material support statute was

201 Dixon v. United States, 548 U.S. 1, 6-7 (2006) (observing, in the criminal context, that the duress defense may excuse conduct that would otherwise be punishable for satisfying all elements of the offense).

202 Up until 2005, duress was recognized as a legitimate defense for providing material support. *See* Hughes, *supra* note 182, at 12, 23.

203 *Matter of M-H-Z*, 26 I&N Dec. at 761 (analyzing whether an implied duress exception should be read into the material support bar, noting that Congress had provided an explicit exception for duress in the INA section dealing with the statutory bar against noncitizens who were members or affiliated with a Communist or totalitarian party, but did not provide a similar duress exception under the material support statute). As the B.I.A noted, "[i]f Congress intended to make involuntariness or duress an exception for aliens who provided material support to a terrorist organization, it would reasonably be expected to have enacted a [similar] provision [in that section]." *Id.* at 761. Furthermore, B.I.A noted that the fact that Congress created a "waiver" process for deserving aliens to avoid the consequences of the terrorism bar, which undermines any argument that an implied duress defense should be read into the statute itself, as Congress's omission of the duress exception was intentional. *Id.* at 762.

204 Hernandez v. Sessions, 884 F.3d 107 (2d Cir. 2018).

205 *Hernandez*, 884 F.3d at 115 (Droney, J., concurring).

206 *Id.* at 115.

207 *Id.* at 109.

ambiguous in terms of whether duress could be asserted as a defense to the imposition of the material support bar.[208] Yet, under *Chevron* deference,[209] because B.I.A.'s interpretation was reasonable (i.e., that there was no duress exception), the court deferred to the B.I.A. interpretation of the statute.[210] The Second Circuit also pointed out that other circuits had held that there was no duress exception to the statute.[211] Furthermore, although Hernandez had argued that there was a duress exception in criminal proceedings, the Second Circuit stated that a deportation order is not punishment for a crime.[212] Finally, the court rejected her due process argument, stating that aliens have no constitutionally protected liberty or property interest in a discretionary grant of relief for which they are otherwise statutorily ineligible.[213] Hence, the Second Circuit rejected her petition for review.[214]

A similar troubling result occurred in *Sesay v. Attorney General of U.S.*,[215] where Mr. Sesay was detained in a windowless room, witnessed other captives being executed, saw victims without body parts, and was repeatedly beaten because he refused to join the Revolutionary United Front ("RUF") rebels in Sierra Lione.[216] After he refused to participate in weapons training, the rebels forced him to carry their weapons, ammunition, drinking water, and food under the supervision of an armed guard.[217] Nonetheless, the IJ found him ineligible for asylum and withholding of removal because he provided material support to the RUF—the same group that tortured him.[218] On a petition for review, the Third Circuit, while recognizing the harsh consequences of its holding, nonetheless affirmed that there was no duress exception

208 *Id.* at 110.

209 Under Chevron U.S.A Inc. v. Nat. Res. Defense Council, 467 U.S. 837 (1984), courts are to defer to the reasonable agency interpretations of ambiguous statutes.

210 *Hernandez*, 884 F.3d at 110.

211 *See Moncrieffe*, 569 U.S. at 187. The Second Circuit in *Hernandez* also noted that under INA § 212(d)(3)(B)(i), an alien who has not voluntarily and knowingly supported terrorist activities may apply for a discretionary waiver of the material support bar from the SOS or DHS via an interagency consultation process. *Hernandez*, 884 F.3d at 111. The court observed that this waiver option was added to the INA in 2007, which was fifteen years after the material support bar was enacted, illustrating that Congress legislated under the assumption that the material support bar otherwise applied to support given under duress. *Hernandez*, 884 F.3d at 111.

212 *Hernandez*, 884 F.3d 107 at 112.

213 *Id.* (citing Yuen Jin v. Mukasey, 538 F.3d 143, 156–57 (2d Cir. 2008)).

214 *Id.* at 113.

215 *Sesay*, 787 F.3d 215 at 224.

216 *Id.*at 218.

217 *Id.*.

218 *Id.* at 219.

to the material support bar, noting that it was compelled by policy decisions made by Congress and the executive branch.[219]

The material support bar does not distinguish between genuine terrorists and actual victims of terrorists. One expert notes that "aliens who provide support due to threats to their life, their family members' lives, or their livelihoods are treated just the same as aliens who provide support because they want to further the goals and objectives of the terrorist organization."[220] As asylum expert and attorney Steven Schulman asserts, "the overly broad statutory interpretation of the Material Support Bar is a disservice to asylum seekers who are actually terrorism victims."[221] According to Human Rights First, "thousands of refugees who pose no threat to the United States have had their applications for asylum, permanent residence, and family reunification denied or delayed due to overly broad immigration laws."[222]

4. Waiver Process[223]

In 2005[224] and expanded in 2007,[225] Congress, in order to deal with the distressing results from the overly broad material support statute, provided a "waiver" or "exemption" process that if a person was under duress at the time that she provided the material support to a terrorist, or the material support was insignificant, then the material support bar may be waived.[226] Besides individual waivers for duress

219 *Id.* at 224; s*ee also Barahona*, 691 F3d at 351-52 (finding that asylum applicant was statutorily barred from receiving asylum for material support when he allowed El Salvadoran guerillas to use his house for cooking after the guerillas killed his father and cousin).

220 *See* Flud, *supra* note 149, at 553.

221 *See generally* Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 CATH. U. L. REV. 949, 950 (2010).

222 *See* Hughes, *supra* note 182, at 22.

223 In this article, "waiver" and" exemption" are used interchangeably.

224 In 2005, Congress amended the INA to empower the Secretaries of State and Homeland Security with the "sole unreviewable discretion" to waive the material support bar's restrictions in limited circumstances. *See* Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub.L. No. 10913, § 104, 119 Stat. 231, 309 (2005).

225 In 2007, Congress amended the INA again, after many refugee advocates and Congressmen complained about the implementation (or lack thereof) of the 2005 waiver authority and the material support bar's overbroad harmful results in many cases. *See The "Material Support" Bar: Denying Refuge to the Persecuted?": Hearing Before the Sen. Subcomm. on Human Rights & the Law*, 110th Cong. § 1–186 (as reported by Sen. Comm. on the Judiciary) (Sept. 19, 2007).

226 *See* Exercise of Authority Under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9958-01 (announcing waiver scheme for Tier III

or insignificant support, Congress also issued "group" waivers, whereby Congress would directly exempt specific Tier III terrorist organizations (such as the ANC[227]) from the definition of a terrorist group. Congress also empowered DHS to waive the application of Tier III designations for other groups.[228] Congress stated that this unreviewable discretionary authority was to be exercised by either the SOS or the Secretary of the DHS[229] after consultation with one another and the AG.[230] Hence, three governmental agencies are involved in this waiver process. It took DHS until 2008 to create a process to implement that authority in immigration court cases.[231] As noted in *Matter of A-C-M*, "[b]y creating the waiver, Congress effectively addressed the over-inclusive nature of the bar by allowing the Secretary to consider each situation in a more holistic manner."[232] DHS assigned this waiver responsibility to USCIS, in consultation with ICE.[233] Pursuant to the Secretaries' exercise of authority, "USCIS will consider whether certain

terrorist groups); *see also* Memorandum from Sec'y Michael Chertoff, U.S. Dep't of Homeland Sec., Exercise of Authority Under INA Sec. 212(d)(3)(B)(i) (Apr. 27, 2007); Office of Commc'ns, U.S. Citizenship and Immigration Servs., Fact Sheet Concerning the Secretary's Exercise of Authority Under Sec. 212(d)(3)(B)(i), (May 11, 2007), https://www.aila.org/infonet/uscis-fact-sheet-material-support-memo.

227 *See* Hughes, *supra* note 182, at 4-5. For group-based exemptions, this discretionary authority is applicable even without duress. Memorandum from Deputy Dir. Jonathan Scharfen U.S. Dep't Homeland Sec., to U.S. CIS Associate Dirs. & Chief Counsel, Regarding Processing the Discretionary Exemption to the Inadmissibility Ground for Providing Support to Certain Terrorist Organizations 3, (May 24, 2007), http://www.uscis.gov/sites/default/files/files/pressrelease/MaterialSupport_24May07.pdf [hereinafter Scharfen Memo].

228 *See* Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 691(a), 121 Stat. 1844, 2364 (2007) (codified as 8 U.S.C. § 1182(d)(3)(B) and Pub. L. No. 110-257, 122 Stat. 2426 (2008). In 2008, Congress named ten organizations that were not to be considered Tier III terrorist groups. Pub. L. No. 110-257, 122 Stat. 2426 (2008). *See also Terrorism-Related Inadmissibility Grounds*, *supra* note 2.

229 Under 8 U.S.C. § 1182(d)(3)(B) (2018), the SOS exercises this authority over persons who are abroad, and the Secretary of DHS over persons in the U.S., both acting in consultation with the AG.

230 8 U.S.C. § 1182(d)(3)(B)(i); *see also* Consolidated Appropriations Act, Pub. L. No. 110-161, § 691(a), 121 Stat 2364-66 (amending INA § 212(d)(3)(B)(i) such that the SOS or the Secretary of DHS, in consultation with each other and the AG, may, in their "sole unreviewable discretion," issue waivers of the material support bar).

231 *See* Hughes, *supra* note 182, at 55. On October 23, 2008, DHS finally announced a way to implement its discretionary authority to provide exemptions from the "terrorism bars" in immigration court removal cases. *Id.*

232 *Matter of A-C-M-*, 27 I&N Dec. at 308-09.

233 *See* the Exercise of Authority under Sec. 212(d)(3)(B)(i) of the Immigration and Nationality Act, 72 Fed. Reg. 9955; *see also* Scharfen Memo, *supra* note 227, at 3.

aliens are eligible for and warrant a discretionary exemption for the provision of the following types of certain limited material support: certain routine commercial transactions; certain routine social transactions; certain humanitarian assistance; or material support provided under sub-duress pressure."[234] USCIS's decision is unreviewable and final; there is no administrative or judicial review.[235]

An applicant must meet certain "threshold" requirements before USCIS will consider whether a waiver should apply: (1) the noncitizen must establish that she is otherwise eligible or entitled to the immigration benefit or relief sought and undergo and pass all background checks; (2) fully disclose the nature and circumstances of the provision of material support;[236] and (3) establish that she poses no danger to the security of the U.S.[237] For applicants who meet these requirements, USCIS will then consider whether a group-based or an individual-based exemption for various situations is warranted.[238] As of 2019, USCIS may grant an exemption for the following situations: Material Support Under Duress, Solicitation Under Duress, Military-Type Training Under Duress, Voluntary Medical Care, Certain Applicants with Existing Immigration Benefits, Iraqi Uprisings, Certain Limited Material Support, and Insignificant Material Support.[239] A complete list of group-based exemptions is on USCIS's website.[240]

As discussed *supra* page 613, the IJ and B.I.A. are going to be deciding whether TRIG applies to block the asylum request. Significantly, neither IJs nor the B.I.A. are allowed to adjudicate whether a

234 *See* Exercise of Authority under Sec. 212(d)(3)(B)(i) of the INA, 72 Fed. Reg. 9958-01; U.S. CITIZENSHIP & IMMIGR. SERVS. POL'Y MEMORANDUM, PM-602-0112, IMPLEMENTATION OF THE DISCRETIONARY EXEMPTION AUTHORITY UNDER SECTION 212(D)(3)(B)(I) OF THE IMMIGRATION & NATIONALITY ACT FOR THE PROVISION OF CERTAIN LIMITED MATERIAL SUPPORT (May 8, 2015).

235 S*ee* 8 U.S.C. § 1182(d)(3)(B)(i) (stating the Secretary may determine in his or her "sole unreviewable discretion" to issue such a waiver). S.A.B. v. Boente, 847 F.3d 542 (7th Cir. 2017) (noting that 8 U.S.C.§ 1182(d)(3)(B)(i) grants the agency "sole and unreviewable discretion" with respect to the waiver process and dismissed the petition for lack of jurisdiction. In other words, there is no administrative or judicial review.). S*ee* 8 U.S.C. § 1182(d)(3)(B)(i) (for the proposition that the Secretary may determine with "unreviewable discretion" to issue any such waiver. This point was further noted in *Boente*, 847 F.3d at 542, where the court essentially found the statute provided no administrative or judicial review.).

236 *See Hernandez*, 884 F.3d at 116 (even though she provided food to the FARC under duress, she was not granted a waiver because she was found to have not fully disclosed her material support).

237 Scharfen Memo, *supra* note 227, at 5.

238 *Id.*

239 *See Terrorism-Related Inadmissibility Grounds Exemptions*, *supra* note 2.

240 *Id.*

waiver applies.[241] Rather, the IJ must enter an order of removal (i.e., the applicant is ordered deported from the U.S. by the IJ and does not appeal or appeals and is ordered deported by the B.I.A.) for the case to be considered "administratively final."[242] Only after it is "administratively final" does USCIS consider whether any waiver/exemption applies.[243] Specifically, for those noncitizens not in ICE custody, after an administratively final order is issued, ICE will forward to USCIS those cases where relief or protection was denied solely on the basis of TRIG and for which exemption authority has been exercised by the Secretary.[244] For those in ICE custody, ICE will provide the detained individuals a notice explaining that they must request a stay of removal within seven days for USCIS to adjudicate the exemption.[245] DHS explains that "[b]y adjudicating the exemption at this stage, all parties will have a chance to litigate the merits of the case up through the B.I.A., and DHS will be able to focus its resources on cases where the possible exemption is the only issue remaining in the individual's case."[246] Hence, according to DHS, it is being efficient by having USCIS adjudicate waivers/exemptions at this late stage in the process.

Yet, it is the IJs and B.I.A., which are part of DOJ, that decide whether the applicant qualifies for asylum or other relief at the outset, and whether that applicant is then subjected to TRIG. However, it is USCIS, part of DHS, that decides on whether the applicant qualifies

241 8 U.S.C. § 1182(d)(3)(B) (2018) (stating the Secretary may determine in his or her "sole unreviewable discretion" to issue such a waiver).

242 *See Fact Sheet: Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 23, 2008), https://www.hsdl.org/?view&did=19281 (considering an order "administratively final" after either a decision by the B.I.A. affirms an order of removal or the period in which the individual is permitted to seek review of such order by the B.I.A. has expired, whichever date is earlier).

243 *Id.* (noting that an order is still considered administratively final and the "exemption will be considered even if the individual files a Petition for Review with a Federal Circuit Court of Appeals.").

244 *Id.*

245 *See id.* (explaining for those in ICE custody, the individual will be provided with a Form I-246, Application for Stay of Deportation or Removal. The Notice of Referral will explain to detained individuals that they must file the attached Form I-246 if they wish to have USCIS consider their eligibility for the § 212(d)(3)(B)(i) exemption. To be considered for an exemption, the individual who is otherwise eligible for consideration must file the stay of removal request with Detention and Removal Operations ("DRO") within seven days of service of the letter. If that individual requests a stay of removal, his or her case will be forwarded to USCIS for consideration of the exemption authority.).

246 *Id.*

for a waiver/exemption to that statutory bar, usually years later in a non-transparent and non-appealable closed process, and does not allow the applicant to respond to USCIS's reasons for denying the waiver.[247] Importantly, as explained *supra* page 626, in order not to be deported after a final order of removal, a detained applicant must request within seven days an immediate stay of removal while USCIS adjudicates the waiver (a stay is not automatic; hence, applicants may be removed before USCIS considers them for a waiver).[248]

There are also huge delays associated with the waiver process. For defensive asylum cases it can take asylum seekers at least two years, and sometimes longer, to receive a final order from the B.I.A. or from an IJ which, as explained above, must be granted before their cases can be considered for a waiver.[249] And then the asylum seekers may wait months before USCIS decides on the waiver, and if USCIS grants the waiver, the asylum seekers can face even further delays, as both they and ICE have to make a motion to the immigration court to reopen their cases in order for them to be granted asylum.[250] However if B.I.A., instead of an IJ, had issued the final order of removal, this means that the applicant must file a motion to reopen to the B.I.A., only to have the B.I.A. remand the case to the immigration court to confirm that security and background checks are complete—a process that can add additional months to the already convoluted process.[251]

While the USCIS procedure is closed and unreviewable, DHS has published factors that USCIS should be considering when adjudicating a waiver.[252] According to a 2007 memorandum from the Deputy Director of DHS, in order to be eligible for the duress waiver, the material support must be provided in response to a "reasonably-perceived threat of serious harm."[253] The USCIS officer should then consider the

247 *See Hernandez*, 884 F.3d at 117 (describing the waiver process and its lack of due process).

248 *See Terrorism-Related Inadmissibility Grounds Exemptions*, *supra* note 2; *see also* Hughes, *supra* note 182, at 59.

249 *See* Hughes, *supra* 182, at 59.

250 *See id.* at 57.

251 *See id.*

252 *See* Scharfen Memo, *supra* note 227, at 3 (discussing how USCIS can also issue "group-based" exemptions for noncitizens who have supported certain specified groups as opposed to individual waivers based on duress).

253 *Id.* at 5 (stating the duress exemption was only available to those who provided support to a Tier III organization (undesignated)). However, in 2009, the duress exception was extended to Tier I and Tier II organizations. *See* Memorandum from Deputy Dir. Michael Aytes, U.S. Citizenship & Immigration Servs., Revised Guidance on the Adjudication of Cases Involving Terrorist-Related Inadmissibility

following factors when determining whether the asylum seeker was 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. 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.[254] 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.[255]

Despite this memorandum describing the factors USCIS considers, there is no formal published process for requesting a waiver.[256] As one immigration expert notes "the actual procedure for obtaining the waiver is vague, convoluted, and confusing."[257]

Proponents of the status quo believe that having broad TRIG exclusions coupled with a subsequent waiver/exemption process allows DHS the utmost discretion and flexibility in balancing national security with humanitarian protections. The question, however, is whether there could be a more efficient and just process that would similarly allow the U.S. to achieve these objectives. As discussed *supra* pages 596-597, Article 33(2) of the Refugee Convention allows a country to bar any potential refugees from asylum if there are "reasonable grounds" to believe they are a security threat.[258] The U.K. and Australia—two allies of the U.S. who also face an international terrorist threat—similarly must balance national security with human rights

Grounds and Amendment to the Hold Policy for Such Cases, (Feb. 13, 2009), https://immigrantjustice.org/sites/default/files/Revised%20Hold%20Memo_2_09.pdf

254 *See* Scharfen Memo, *supra* note 227, at 5.

255 *See id.* at 5.

256 *Ay*, 743 F.3d at 321 (2d Cir. 2014) ("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* 787 F.3d at 224 n.7 ("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 . . . .").

257 Messer, *supra* note 161, at 70.

258 Convention Relating to the Status of Refugees, *supra* note 6, art. 33(2), July 28, 1951, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

when adjudicating asylum cases. Thus, it would be helpful to analyze their process and procedures to see if any insights could be applied to the U.S.

IV. UNITED KINGDOM AND AUSTRALIA

A. General Asylum Process

1. United Kingdom

British law since 1891 provides that "no alien has any right to enter this country except by leave of the Crown."[259] To give this law a statutory basis, Parliament enacted the Aliens Restriction Act of 1914,[260] the Aliens Restriction (Amending) Act of 1919,[261] and the Rules and Orders made under these Acts[262] outlining the restrictions and rules on immigration. Currently, the Immigration Rules[263]—a set of rules about immigration and asylum[264]—are embodied in the Immigration Act of 1971.[265] This Act provides that those who are not British or Commonwealth citizens or members of the European Economic Area[266] must receive permission to enter the U.K. from an immigration officer upon their arrival.[267] As in the U.S., the Act makes it an offense for individuals to enter the U.K without obtaining permission.[268]

In the U.K., the Secretary of the State for Home Office, who is a member of the British executive branch, has primary responsibility for

259 *See* Musgrove v. Chun Teong Toy [1891] UKPC 16, [1891] AC 272; *see also* Schmidt v. Home Secretary [1968] EWCA (Civ) 1, [1969] 2 Ch 149.

260 *Refugee Law and Policy: United Kingdom*, LIBR. OF CONGRESS, https://www.loc.gov/law/help/refugee-law/unitedkingdom.php#Introduction (last visited February 14, 2020) (citing Aliens Restriction Act 1914, 4 & 5 Geo. 5 c. 12 (Eng.)).

261 *Id.* (citing Aliens Restriction (Amendment) Act 1919, 9 & 10 Geo. 5 c. 92 (Eng.).

262 *Id.* (citing Aliens Order Act 1920, Stat R & O 448 (as amended) (Eng.)).

263 *See generally* Immigration Rules, HOME OFFICE, ¶ 7 (Feb. 25, 2016) (UK), https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-1-leave-to-enter-or-stay-in-the-uk.

264 *Refugee Law and Policy*, *supra* note 260.

265 Immigration Act 1971, c.77 (Eng.).

266 *Refugee Law and Policy*, *supra* note 260 ("The European Economic Area consists of the Members of the European Union plus Norway, Iceland, and Liechtenstein.").

267 Immigration Act 1971, c.77 § 3 (Eng.); Immigration Rules, *supra* note 263, at ¶ 7.

268 Immigration Act 1971, c.77, § 24 (Eng.)).

virtually all issues relating to immigration, including asylum and exclusions.[269] Within the Home Office, there are numerous directorates that focus on areas of responsibility, such as Immigration Enforcement (like ICE in the U.S.) and the Border Force (like CBP in the U.S.).[270] Similar to the USCIS, the U.K. Visas and Immigration is responsible for processing applications for permission to enter or remain in the U.K., including asylum cases and applications for British citizenship.[271] Unlike the U.S., which has a process for refugees to apply outside the U.S. and a separate application process for those inside the U.S., the typical process in the U.K. is for the asylum seeker to apply for asylum after entering the U.K.[272] An asylum seeker can apply at the border, the Asylum Intake Unit in Croydon (Southeast of London), or from a detention center.[273] As of 2018, 90% of asylum seekers were not registered at a port of entry, but rather made their request from the interior of the country.[274]

Like the American practice, the U.K. has procedures in place to ensure those seeking asylum meet the threshold criteria (i.e., well-founded fear of persecution) while protecting the public from individuals who pose a danger to the security of the U.K. Initially, asylum seekers undergo a screening interview, which asks for basic information such as their name and other personal information.[275] Similar to the American policy for expedited removal, asylum seekers arriving at the U.K. border are processed via an abbreviated process to help reduce the massive caseload of asylum cases. If an individual comes from a country regarded "safe" or the claim is deemed "clearly

269 Melanie Gower & Hannah Wilkins, *Constituency Casework: Immigration, Nationality, and Asylum*, 3, 4 (House of Commons Libr., Briefing Paper No. CBPO3186, Nov. 21, 2018), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03186.

270 *Id.*

271 *Id.* at 4.

272 *Id.* at 7. The U.K., however, does offer a limited refugee resettlement program where the refugees do not have to go through the asylum process within the U.K. There currently is a program for Syrian refugees called Syrian Vulnerable Persons Refugee Scheme with the aim of resettling 20,000 by 2020. *See* Georgina Sturge, *Asylum Statistics* 4 (House of Commons Libr., Briefing Paper No. SN01403 Mar. 17, 2020), https://commonslibrary.parliament.uk/research-briefings/sn01403/.

273 ASYLUM INFORMATION DATABASE (AIDA), COUNTRY REPORT: UNITED KINGDOM 1, 20 (2019), https://www.asylumineurope.org/sites/default/files/report-download/aida_uk_2019update.pdf [hereinafter AIDA, COUNTRY REPORT: UK].

274 *Id.* at 18.

275 Robert Gibb & Anthony Good, *Do the Facts Speak for Themselves? Country of Origin Information in French and British Refugee Status Determination Procedures*, 25 INT'L J. REFUGEE L. 291, 293 (2013).

unfounded," then her application is summarily rejected, and she is detained and removed from the U.K. while she appeals the decision to deny asylum.[276] In other words, in many cases, the applicant must appeal the denial of asylum from another country. This process differs from the U.S., where there is a credible or reasonable fear screening interview before an asylum seeker is subjected to expedited removal, and denials of asylum can be appealed from within the U.S. If an individual can be safely returned to a third country, such as another European Union ("EU") member,[277] then the individual is returned to that country without a substantive review.[278] For other asylum applicants not similarly rejected or returned to a third country, the U.K. decides based on the substantive criteria of whether the individual has a well-founded fear of persecution or other harm based on race, religion, nationality, membership of a particular social group, or political opinion as defined in the Refugee Convention and Protocol.[279]

If the asylum seeker meets the substantive standards, then she receives refugee status and is granted asylum.[280] An applicant who does not qualify for asylum may still be allowed into the U.K. under "humanitarian protection" or a human rights claim.[281] These alternatives to asylum are like the other modes of relief offered in the U.S, such as statutory withholding of removal or withholding or deferral under the CAT.[282] Specifically, if the asylum applicant is not eligible for asylum,

276 SEC'Y OF STATE FOR THE HOME DEP'T, CONTROLLING OUR BORDERS: MAKING MIGRATION WORK IN BRITAIN, FIVE YEAR STRATEGY FOR ASYLUM AND IMMIGRATION 5, 18 (2005), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/251091/6472.pdf; *see also* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 17, 26 (the U.K. had operated the Detained Fast Track Procedure ("DTP") for cases where the Home Office had decided cases could be decided quickly; but due to legal challenges, DTP has been placed on hold as of 2015).

277 By statute, the EU (not including Croatia), Iceland, Norway, and Switzerland are considered safe third countries if it can be shown that the asylum applicant travelled through that country. *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 33.

278 This decision can be appealed with permission to the Upper Tribunal, which does not consider the merits but only whether the decisionmaker approached the matter in the right way. *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 17.

279 AIDA, COUNTRY REPORT: UK, *supra* note 273, at 59; *see also* Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

280 Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 19 U.S.T. at 6261, 189 U.N.T.S. at 152.

281 *See* Gower & Wilkins, *supra* note 269, at 7; *see also Sturge*, *supra* note 272, at 4.

282 *See* Gower & Wilkins, *supra* note 269, at 7.

she may be entitled to remain in the U.K. on "humanitarian protection" or "discretionary leave" if there are substantial grounds for believing that if the applicant returned to the country of origin she would face a "real risk of suffering serious harm" but for reasons not covered by the Refugee Convention and Protocol.[283] Both asylum and humanitarian protection give permission to remain in the U.K. for five years initially (and then the individual can apply for British citizenship), with the right to work and obtain welfare benefits.[284] Furthermore, as in the U.S., the applicant must also not fall within an exclusion or bar from asylum or humanitarian protection (such as those who would pose a danger to the U.K. or have committed certain crimes).[285]

If an individual is denied asylum and humanitarian protection, or other protected status in the U.K., but may not be returned to her home country in violation U.K. obligations under the European Court of Human Rights ("ECHR"), the individual may obtain "restricted leave" to remain.[286] The justification for restricted leave is to balance the public interest while upholding international commitments.[287] This process appears similar to the U.S. process for deferred removal under CAT. If the applicant is allowed into the U.K. for such reasons, this leave may be temporary and subject to conditions.[288]

U.K. Visas and Immigration assesses asylum applications and makes the determination on behalf of the Secretary of State for the Home Department,[289] using "relevant standards applicable in the field of asylum and refugee law."[290] If the asylum seeker meets the substantive standard under the Refugee Convention and Protocol, then like the U.S., there can be exclusions that can prevent the individual from obtaining refugee status.[291] If there are "reasonable grounds for

283 *See id.*

284 *See id.*

285 *See generally Refugee Law and Policy: United Kingdom*, *supra* note 260.

286 *Id.* (citing HOME OFFICE, ASYLUM POLICY INSTRUCTION: RESTRICTED LEAVE (Jan. 23, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397502/API_Restricted_Leave_Article_1F.pdf [https://perma.cc/659P-SFKL]).

287 *Id.*

288 *Id.*

289 *Id.* (citing FARID RAYMOND ANTHONY, QUESTIONS AND ANSWERS ON IMMIGRATION TO BRITAIN 127 at Qu. 264 (Routledge 2013) (1996).

290 *Id.* (citing Immigration Rules, *supra* note 263, at ¶ 339HA. The Secretary of State issued the Asylum Policy Instructions to provide guidance to caseworkers making decisions as to whether to grant or deny a claim of asylum. *Id.* (citing HOME OFFICE, ASYLUM POLICY INSTRUCTION: RESTRICTED LEAVE, *supra* note 286).

291 Immigration Rules, *supra* note 263, at ¶ 334.

regarding [the asylum seeker] as a danger to the security" or if the asylum seeker would be a "danger to the community" after having been convicted of a serious crime, the Secretary of State can deny asylum.[292] In other words, the Secretary of State can certify asylum seekers as terrorists and exclude them on national security grounds even if they otherwise meet all the asylum requirements.[293] Unlike the U.S. where an asylum seeker cannot challenge TRIG in any appeal, in the U.K., if the Secretary certifies the asylum seeker on national security grounds,[294] an appeal can proceed under a specific national security court called the "Special Immigration Appeals Commission" ("SIAC"), discussed *infra* starts page 645-646.[295]

Asylum decisions are provided in writing and must be made "as soon as possible."[296] According to the Immigration Rules, if a decision is not reached within six months, the Secretary of State must inform the applicant of the delay.[297] However, in February 2019, because of a massive backlog, the government announced that it was abandoning the six-month target and would publish new requirements.[298] If the application is denied, the applicant receives a written decision that includes the rationale for the rejection and details on how to appeal the decision.[299] If the applicant meets the standards, then the individual has permission to reside in the U.K. for five years and is able to work and access welfare benefits.[300] Similar to the U.S., after five continuous years the individual can apply for U.K. citizenship.[301]

The U.K. had over 111,000 asylum seekers in 2002, representing twenty-nine percent (29%) of asylum claims in the EU as a whole.[302] At end of 2019, the U.K had 22,549 cases pending, asylum seekers waiting for their first review[303] (compared to the U.S's backlog of 1.17 million in April 2020.[304]

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292 *Id.*

293 *See* Immigration, Asylum and Nationality Act 2006, c. 13, § 55(1) (Eng.).

294 *See* Nationality, Immigration and Asylum Act 2002, c. 41, § 97(1)-(3) (Eng.).

295 *See* Special Immigration Appeals Commission Act 1997, c. 68, § 2(1)(g) (Eng.).

296 Immigration Rules, *supra* note 263, at ¶ 333A.

297 *Id.* at ¶¶ 333, 333A.

298 *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 22.

299 Immigration Rules, *supra* 263, at ¶ 334.

300 *Refugee Law and Policy*, *supra* note 260 (citing Gower & Wilkins, *supra* note 269, at 23, 25, 27).

301 *See id.* (citing British Nationality Act 1981, c. 61, sch. 1(2)).

302 *See* Clements, *supra* note 15, at 6.

303 *See id.* at 22.

304 American Immigration Council, *supra* note 35.

2. Australia

Australia's geographic realities allow it to control immigration, given that it is effectively surrounded by ocean. Australia, like most other developed democracies, caps the number of people per year who are eligible to apply for asylum status.[305] Australia is one of the pioneers of offshore resettlement for refugees, having, in many cases, effectively (although controversially) outsourced refugee resettlement to other countries.[306] In 2001, Australia began processing asylum seekers offshore and in third countries, a practice commonly known as the "Pacific Solution."[307] The Australian Navy was authorized to interdict "boat people" and prevent them from reaching the mainland and return them to their points of departure.[308] Nauru and Papua New Guinea agreed to become "Regional Processing Countries" and detain and process asylum seekers.[309] Criticism of the policy led to its temporary suspension in 2007, but it was ultimately perceived as providing an effective solution, from the Australian perspective, that served to deter asylum seekers, and consequently it was revived in 2012.[310] In 2014, Australia added Cambodia to the list of Regional Processing Countries despite criticism that it, as well as Nauru and Papua New Guinea, do not have the infrastructure or the capacity in their respective justice systems to adequately determine who should be awarded refugee status.[311] This offshore approach seems similar to the Trump

305 Karishma Luthria, *Australia Rejects UN Immigration Pact, Sticks with Hardline Asylum-Seeker Policy*, REUTERS (Nov. 20, 2018), https://www.reuters.com/article/us-australia-politics-un/australia-rejects-u-n-migration-pact-sticks-with-hardline-asylum-seeker-policy-idUSKCN1NQ0CS.

306 Stavinder S. Juss, *Detention and Delusion in Australia's Kafkaesque Refugee Law*, 36 REFUGEE SURV. Q. 146-47 (2017).

307 Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: Offshore Processing, An Overview*, U.N.S.W. SYDNEY (last updated Aug 2018), https://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Offshore%20processing%20overview_Aug2018.pdf.

308 Madeline Gleeson, *The Australia-Cambodia Refugee Relocation Agreement Is Unique, But Does Little to Improve Protection*, ONLINE J. MIGRATION POL'Y INST., (Sept. 21, 2016), https://www.migrationpolicy.org/article/australia-cambodia-refugee-relocation-agreement-unique-does-little-improve-protection.

309 Andrew & Renata Kaldor Ctr., *supra* note 307 (Regional Processing Countries are designated by the Australian government as ones that will follow the provisions of the U.N. Convention on Refugees and accept asylum applicants).

310 Helen Davidson, *Offshore Detention: Australia's Recent Immigration History a 'Human Rights Catastrophe'*, THE GUARDIAN, (Nov. 12, 2016, 7:46 PM), https://www.theguardian.com/australia-news/2016/nov/13/offshore-detention-nauru-immigration-history-human-rights.

311 Gleeson, *supra* note 308.

Administration's recent policy of having Mexico house U.S. asylum applicants, but the U.S. policy has the United States doing the adjudication, whereas in Australia the asylum claim adjudication process is done offshore at the Regional Processing Centers.[312]

Before 1992 and the promulgation of the *Migration Amendment Act of 1958*, people arriving in Australia by boat could be detained or released depending on the discretion of the Minister of Immigration, Citizenship and Multicultural Affairs (hereinafter "Immigration Minister").[313] This policy changed in 1992 when mandatory detention was introduced for all noncitizens without a valid visa (considered unlawful non-citizens).[314]

Like the U.S., Australia's approach is to distinguish between individuals who make claims for asylum status when in the territory of another country and those who request asylum when already in Australia. As of 1994,[315] persons who arrive in Australia without a valid visa or other documentation can be held in detention for as long as it takes to process their asylum claim and determine whether they should be granted refugee status or removed from the country.[316] By contrast, those who arrive in Australia with a valid visa and subsequently overstay their visa and claim asylum are generally given bridging visas and not detained.[317] At times, Australian authorities have released some detainees into the country, primary women with children, while their claims are processed, but thousands more remain in detention.[318] The mandatory detention is somewhat analogous to the U.S., where asylum applicants subjected to expedited removal "shall be detained" unless DHS grants parole.[319] However, as discussed *infra* page 643, Australia's policy allows for indefinite detention of unlawful non-citizens who cannot be returned to their home countries because of

312 Andrew & Renata Kaldor Ctr., *supra* note 307.

313 Janet Phillips & Adrienne Millbank, *The Detention and Removal of Asylum Seekers*, PARLIAMENT OF AUSTL. (July 5, 2005), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/asylumseekers.

314 *Id.*

315 Between 1992 and 1994, detention was limited to 273 days. *See Australia's Immigration Detention Policy and Practice: A Last Resort?*, AUSTRALIAN HUMAN RTS. COMM'N (2004), https://www.humanrights.gov.au/our-work/6-australias-immigration-detention-policy-and-practice (last visited April 12, 2020).

316 Philips & Milbank, *supra* note 313.

317 *Id.*

318 *Australia's Immigration Detention Policy and Practice*, *supra* note 315.

319 *See* 8 U.S.C. § 1225(b)(2)(A) (2018) (in Australia, however, the concept of "parole" or alternatives to detention are not generally provided).

persecution, while in the U.S. the Supreme Court has held that noncitizens cannot be indefinitely detained if their removal is not "reasonably foreseeable," and that six months is the presumptive limit.[320]

Australia also distinguishes between refugees who arrive by air (who are processed in Australia) and those who arrive by sea. As noted concerning the above discussion of the "Pacific Solution," as of 2014, Australian policy holds that anyone trying to enter Australia illegally by sea will not be processed or resettled in Australia.[321] Neither the U.S. nor the U.K. has such a blanket policy.[322]

Since August 2012, refugees arriving by boat are processed in third countries such as Papua New Guinea and Nauru, which, as explained above, are Regional Processing Countries.[323] They have agreed to take in persons arriving to Australia by sea, and, if they are deemed to meet the criteria of refugees, are resettled in those Regional Processing Countries or other participating Pacific-island countries.[324] Australia's policy has been to prevent any migrants arriving by sea from setting foot in Australia, but a recent vote in Parliament gives physicians the right to transfer asylum applicants needing significant medical attention to Australian territory in order to receive treatment.[325] In response, the Australian government reopened a previously shuttered detention facility on Christmas Island (some 960 miles northwest of the Australian mainland) to house and treat these persons.[326]

320 Zadvydas v. Davis, 533 U.S. 678 (2001); Clark v. Martinez, 543 U.S. 371 (2005).

321 *See Refugee Law and Policy: United Kingdom*, *supra* note 260.

322 However, in July 2019, President Trump announced a policy where asylum applicants arriving at the southern border must request asylum in the first country that they pass through, with some exceptions. However, in July 24, 2019, a federal judge blocked the Administration from enforcing these new restrictions. *See* Amy Taxin & Ashrat Khalil, *Judge Blocks Trump Asylum Restrictions at U.S.-Mexico Border*, AOL (July 24, 2019, 9:00 PM), https://www.aol.com/article/news/2019/07/24/judge-blocks-trump-asylum-restrictions-at-us-mexico-border/23777724/.

323 *See Refugee Law and Policy: United Kingdom*, *supra* note 260.

324 Agreement Concerning Regional Resettlement Arrangement Between Australia and Papua New Guinea, Austl.-Papua N.G., July 19, 2013, https://www.dfat.gov.au/geo/papua-new-guinea/Pages/regional-resettlement-arrangement-between-australia-and-papua-new-guinea.

325 Colin Packham, *Australia to Reopen Christmas Island Detention Center After Defeat on Refugee Policy*, REUTERS, (Feb. 12, 2019, 11:11 PM), https://www.reuters.com/article/us-australia-immigration/australia-to-reopen-christmas-island-detention-center-after-defeat-on-refugee-policy-idUSKCN1Q208O.

326 *Id.*

Australia's "Humanitarian Program" provides resettlement to those displaced as "a result of conflict, persecution or other humanitarian situations."[327] It has two components: offshore and onshore.[328] The offshore program itself is further divided into two categories: the refugee category,[329] and the Special Humanitarian Programme ("SHP").[330] The majority of noncitizens granted visas through the refugee category have been referred by the U.N High Commissioner for resettlement consideration.[331] SHP is for noncitizens who are subject to "substantial discrimination amounting to a gross violation" of human rights in their home countries and who are sponsored by Australian residents or citizens or organizations based in Australia.[332] This discrimination can be even for reasons beyond those covered by the Refugee Convention.[333] Those applying offshore must apply for a humanitarian XB visa. After providing documentation, applicants are subject to an interview, an assessment of health and character requirements, and a security assessment; the applicant must also sign an Australian Values Statement."[334] An Australian Values Statement includes respect for individual dignity, the rule of law, freedom of religion, tolerance, equal opportunity, and use of the English language.[335]

The onshore component is for those who apply for asylum after legally entering Australia with a valid visa and are found to need protection for the reasons under the Refugee Convention. If they qualify for refugee status and meet health and character requirements, they are granted a Permanent Protection Visa.[336] Conversely, asylum seekers who arrive in Australia without a valid visa and are found to qualify for refugee status may be offered a Temporary Protection Visa (which allows holders to live and work in Australia for up to three years), or a Safe Haven Enterprise Visa (a temporary visa that allows individuals to live and work in Australia for five years if they spend a minimum

327 Government of Australia, *Australia*, *in* UNHCR RESETTLEMENT HANDBOOK 1, 2 (revised Apr. 2018), https://www.unhcr.org/3c5e542d4.pdf.

328 *See Refugee Law and Policy: United Kingdom, supra* note 260.

329 Like the U.S. and U.K, Australia is a party to the Convention Relating to the Status of Refugees of 1951 (1951 Refugee Convention) and its 1967 Protocol.

330 *See Refugee Law and Policy: United Kingdom*, *supra* note 260.

331 *Id.*

332 *Id.*

333 *Id.*

334 *Id.*

335 *Meeting our Requirements: Australian Values*, AUSTRL. DEP'T OF HOME AFF., https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/australian-values (last visited April 11, 2020).

336 *Australia*, *in* UNHCR RESETTLEMENT HANDBOOK, *supra* note 327, at 4.

of time employed or studying in outlying areas of the country—also known as "regional Australia").[337]

Applicants (whether onshore or offshore) for asylum in Australia in the traditional refugee category must provide compelling reasons for receipt of an XB visa. The determination as to whether or not to provide such a visa is based on the degree of persecution faced by the applicant, the degree to which the applicant has a connection to Australia, whether or not the Australian authorities can find a suitable third country in which to settle the applicant, and Australia's capacity for resettlement of refugees.[338] As of 2017, since the end of World War II, more than 865,000 refugees and others of humanitarian concern have been resettled in Australia [339]

B. Removal Process

1. United Kingdom

Individuals who are not lawfully present in the U.K. may be removed and can be subject(ed) to a ban on re-entry for a period of up to ten years.[340] Importantly, however, any applicant (and her dependents) whose asylum application is pending cannot be removed.[341] Under the Immigration Act of 1971, an individual can be deported from the U.K. if he or she is not a British citizen, and the Secretary of State has deemed that the person's deportation is "conducive to the public good"; if the person is the spouse, civil partner, or child under eighteen of someone ordered to be deported; or if the court has recommended deportation in the case of a person over the age of seventeen convicted of an offense punishable with imprisonment.[342] In other words, similar to the U.S. AG who can certify and remove terrorist aliens, the Secretary of State may remove an applicant if he or she finds it "conducive to the public good,"[343] which can be based on the "character, conduct or associations" of the person, or a "serious offense"[344] (including

337 *See Refugee Law and Policy: United Kingdom*, *supra* note 260.

338 *Australia*, *in* UNHCR RESETTLEMENT HANDBOOK, *supra* note 327, at 4.

339 *Id.* at 2.

340 *See* Gower & Wilkins, *supra* note 269, at 6.

341 Immigration Rules, *supra* note 263 at ¶ 329.

342 *See* Immigration Act 1971, § 3(5); *see also* Immigration Rules, *supra* note 263, at ¶ 363.

343 Immigration Rules, *supra* note 263, at ¶¶ 320(6), 321A(4).

344 *Id.* at ¶ 322(5).

terrorist offenses).[345] If the Secretary of State rescinds an individual's refugee status for any one of these reasons, the individual must be provided the reasons in writing, and can respond either orally at an interview or in writing.[346] The Secretary of State has the power to revoke deportation.[347]

If asylum is denied and the appeal rights have been exhausted, the applicant must leave the U.K., either voluntarily or through enforced removal arranged by the Home Office (similar to enforced removal by ICE).[348] Once a final deportation issue has been issued, the Secretary of State can either order the individual's detention or provide restrictions on movement until she leaves the country.[349]

2. Australia

In Australia, the 1958 *Migration Act* allows for the removal of noncitizens. The Immigration Minister is given the authority by the Australian Parliament to determine who is to be removed from the country.[350] Deportation orders may be issued against noncitizens who have been permanent residents of Australia for less than ten years in the event that those individuals have been convicted of a crime where they were sentenced for at least one year.[351] Noncitizens may also be deported at any time if the person is deemed not to be "of good character."[352] A person fails the character test if the Immigration Minister finds that she has been sentenced to death or life imprisonment, if she is associated with others involved in criminal activity, or if she is deemed to present a risk for future criminal activity.[353] A person with a "substantial criminal record"—defined as a person who has been sentenced to a series of lesser terms of imprisonment that add up to

345 *Id.* at ¶ 320(19).

346 Immigration Rules, *supra* note 263, at ¶ 339BA.

347 Immigration Act 1971, § 5.

348 *See* Gower & Wilkins, s*upra* note 269, at 7.

349 Immigration Rules, *supra* 263, at ¶ 13 (regarding deportation).

350 *Chapter 7—The Role of the Minister*, PARLIAMENT OF AUSTRL., https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/minmig/report/c07 (last visited April 11, 2020).

351 *Migration Act 1958* (Cth) s 201 (Austl.).

352 Khan Hoang & Sudrishti Reich, *Managing Crime Through Migration Law in Australia and the United States: A Comparative Analysis*, 5 COMP. MIGRATION STUD. 1, 8 (2017), https://comparativemigrationstudies.springeropen.com/track/pdf/10.1186/s40878-017-0056-0.

353 *Id.*

twelve months or more—also fails the character test.[354] Furthermore, the character requirements provide that the Immigration Minister may cancel visas for those that present "a danger to the Australian community or a part of it" as well as those that "vilify a segment of the Australian community" or those "subject to an adverse security assessment by the Australian Security Intelligence Organization ("ASIO")."[355] However, with some exceptions not relevant here, the Immigration Minister has the discretion to grant a visa even if the noncitizen does not meet the character test.[356] As explained below, this discretionary power to deny or cancel a visa applies to adverse security assessments by ASIO.

If the Immigration Minister personally exercises the power to cancel the visa (as opposed to a delegate), then no merits review before the Administrative Appeals Tribunal ("AAT")[357] is available. This power, however, can only be exercised where the Immigration Minister considers that the cancellation is in the "national interest"—a term not defined in the legislation.[358] If the Immigration Minister denies the right to a merits review to noncitizens "in the national interest," she must inform both houses of Parliament within fifteen days from the issuance of the deportation order.[359] Importantly, the Immigration Minister can set aside a decision of the AAT not to cancel or refuse a visa where the Minister "reasonably suspects that the person does not satisfy the character test and is satisfied that the refusal or cancellation

354 *Id.* at 9.

355 *See Meeting Our Requirements: Character Requirements for Visas*, AUSTL. DEP'T OF HOME AFF., https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character (last updated Mar. 17, 2020) for additional grounds to fail a character test. When a determination has been made that a given individual is to be deported, the order can also be extended to his/her spouse/partner and dependent children. *Migration Act 1958* (Cth) s 205 (Austl.).

356 *Migration Act 1958* (Cth) s 205 (Austl.).

357 The AAT is an administrative tribunal that is part of the executive branch, it is not a court. In some respects, it appears like the B.I.A. in the U.S. *See About the AAT*, ADMIN. APPEALS TRIBUNAL, https://www.aat.gov.au/about-the-aat (last visited April 20, 2020).

358 Hoang & Reich, *supra* note 352, at 11.

359 *See* Joint Standing Committee on Migration, Parliament of Australia, *Deportation of Non-Citizen Criminals* 117 app 5 (Dec. 24, 1992) (Statement by Min;. for Immigr., Local Gov't & Ethnic Aff. on Australia's Crim. Deportation Policy),https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/mig/report/criminal_deportation/index.

is in the national interest."[360] This appears similar to the U.S., where the AG can override any decision by an IJ or B.I.A.

Judicial review in the courts for those who fail the character test can only rest on constitutional or jurisdictional errors, and the court does not have the power to assess the facts of the case, or to consider other mitigating factors.[361] This is similar to how there is no judicial review for TRIG in the U.S., barring constitutional issues.

C. Detention

1. United Kingdom

The Home Office can detain asylum seekers and other migrants who enter the U.K. without proper authorization[362]—just as in the U.S. where detention is mandated for those in expedited removal by the INA. However, in the U.K., policy states that detention for asylum seekers should not be used routinely and should be for the shortest period necessary.[363] Thus, most asylum seekers awaiting an asylum decision are released on immigration bail.[364] This seems similar to ICE's 2009 parole policy, which afforded broad grounds for release, but counter to current policy on detention where parole is to be used sparingly. In the U.K., detention is for administrative purposes and generally used to determine the applicant's identity and the basis of her claim, or where officers find there are reasons to believe that the individual will not comply with any of the conditions for release.[365] As in the U.S, there is no statutory maximum detention period, but according to case law, prolonged detention must be reasonable to

360 *See*, Joint Standing Committee on Migration, Parliament of Australia, Merits Review of Visa Cancellations Made on Criminal Grounds: Minister's Power to Overrule AAT ¶ 1.65 (Feb. 2, 2019), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Migration/Visacancellationprocess/Report/section?id=committees%2Freportjnt%2F024187%2F26187#footnote20ref.

361 Hoang & Reich, *supra* note 352, at 11-12.

362 Claire Feikert-Ahalt, *United Kingdom*, *in* REFUGEE LAW AND POLICY IN SELECTED COUNTRIES 275, 294-95 (Law Library of Congress, Mar. 2016), https://www.loc.gov/law/help/refugee-law/refugee-law-and-policy.pdf.

363 Terry McGuinness & Melanie Gower, *Immigration Detention in the UK: An Overview* 1, 4 (House of Commons Libr., Sept. 12, 2018), https://researchbriefings.files.parliament.uk/documents/CBP-7294/CBP-7294.pdf.

364 *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 83.

365 Feikert-Ahalt, *supra* note 362, at 294.

achieve the purpose for which the person is detained.[366] In the U.K., there is no automatic judicial oversight of detention decisions, but the lawfulness of detention may be subject to judicial review in the High Court, with its permission.[367]

Those awaiting deportation can also be detained.[368] Although they have a right to bail, they may not benefit from such a privilege if there is a substantial likelihood, on the balance of probabilities, that the individual will commit an offense punishable with imprisonment, will be a serious threat to the maintenance of public order, or has knowingly entered the U.K. with others in breach of immigration law.[369] Individuals may also be detained if it is in the interest of national security (see below), the individual is likely to abscond, or if the detention is conducive to the public good;[370] however, in such cases, the Secretary should provide a statement of reasons[371] for detention that should be reviewed monthly by immigration officers.[372] In 2018, there were 12,637 asylum seekers at some point in;[373] by the end of 2018, 1,085 remained.[374]

2. Australia

Australia's mandatory detention policy requires that aliens who have arrived in an unlawful manner be detained until they are either granted a visa or deported with no formal limits on the period of detention.[375] Such detention can include children, who are sometimes detained for months or years in remote areas of the country, with no limit

366 *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 97 (citing High Court, R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB)).

367 Feikert-Ahalt, *supra* note 362, at 294-95; s*ee also* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 97 (detainees may also challenge the lawfulness of detention in civil proceedings when damages may be awarded).

368 *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 84.

369 Immigration Act 1971, at § 5, sch. 3; *see also* Immigration Rules, *supra* note 263, at ¶ 362.

370 Immigration Act 1971, at § 3(6); *see also* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 84.

371 Immigration Act 1971, at § 5, sch. 3.

372 *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 96.

373 *Id.* at 83.

374 *Id.* at 80-81.

375 PARLIAMENT OF AUSTRL., *Chapter 9—Removal and Deportation*, *in* AUSTRALIA, ADMINISTRATION AND OPERATION OF THE *MIGRATION ACT 1958* 273 at ¶ 9.2 (Mar. 2, 2006.), https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2004-07/migration/report/c09.

to the period of detention and limited judicial review.[376] This policy is very different from the U.S where children can only be detained for twenty days.[377] Under the *Migration Act*, noncitizens with valid visas that may be cancelled due to suspected criminal activity can also be detained if the authorities believe them to be non-cooperative or represent a flight risk.[378] Migrants that arrive legally and overstay their visas and are later detained may be released within two working days if they apply for asylum, since they can be offered "bridging visas" that allow them to be released while their asylum application is pending.[379]

Conversely, unlawful non-citizens who are not able to obtain a visa due to security concerns, or those that fail the character test, can be detained indefinitely if they cannot be returned to their home country because of persecution and no safe third country will take them because of the negative security assessment.[380] Although technically under international law, the *non-refoulement* obligations do not apply to an individual who is a security threat,[381] Australia, by policy, will not return an alien to a country where he or she will be persecuted, which can result in indefinite detention.[382] In 2004, the Australian High Court held that it was *lawful* to indefinitely detain noncitizens who cannot be removed.[383] This policy of detention has been condemned by the U.N. as arbitrary and illegal, since some individuals are held for years without being charged, tried, or even facing an allegation.[384]

376 *Australia's Immigration Detention Policy and Practice*, *supra* note 315.

377 *See supra* note 113 regarding *Flores v. Sessions* settlement; Flores v. Sessions, 862 F.3d 863 (9th Cir. 2007).

378 *Migration Act 1958* s 192 (2018) (Austl.).

379 *Removal and Deportation,* THE LAW HANDBOOK, https://www.lawhandbook.org.au/2020_12_01_12_removal_and_deportation/ (last visited Feb. 14, 2020).

380 *Tell Me About: Refugees with Adverse Security Assessments*, AUSTRL. RTS. COMM'N (May 2013), https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-refugees-adverse-security.

381 *See* Convention Relating to the Status of Refugees art. 33(2), July 28, 1951, 19 U.S.T. at 6276, 189 U.N.T.S. at 176.

382 *See Tell Me About: Refugees with Adverse Security Assessments*, *supra* note 380.

383 Ben Doherty, *UN Body Condemns Australia for Illegal Detention of Asylum Seekers and Refugees*, THE GUARDIAN, (July 7, 2018), https://www.theguardian.com/world/2018/jul/08/un-body-condemns-australia-for-illegal-detention-of-asylum-seekers-and-refugees.

384 *Id.*

D. Appeals

1. United Kingdom

If an asylum seeker wants to appeal the denial of asylum from the Home Office, she may appeal facts and questions of law to the Immigration and Asylum Chambers of the First Tier Tribunal, which is in the Ministry of Justice and not the Home Office.[385] This appears similar to how immigration court and B.I.A. in the U.S. are part of the DOJ and not DHS. This first-tier tribunal consists of immigration judges who can hear and assess evidence that was not before the Home Office.[386] Appeals must generally be filed within fourteen days of the asylum denial.[387] This first-tier hears appeals in an adversarial proceeding against decisions that refuse, terminate, or withdraw accommodation or financial support to an asylum seeker.[388] Filing an appeal prevents the asylum applicant from being removed, unless certified as "clearly unfounded."[389] As of January 2019, an appeal took an average of twenty-nine weeks.[390]

Within fourteen days of a decision from the first tier, an asylum seeker can appeal points of law (not factual determinations) to the Immigration and Asylum Chamber of the Upper Tribunal.[391] Before applying, however, the asylum seeker must obtain permission from either the first-tier or Upper Tribunal itself.[392] Points of law from the Upper Tribunal can then be appealed—again with permission—to the Court of Appeal (a court of general jurisdiction).[393] If the Court of Appeal or Supreme Court certifies that there are questions of law that are of public importance, a final appeal can be made to the Supreme Court (another court of general jurisdiction).[394] While denials of asylum are generally subjected to these aforementioned procedures, for issues relating to detention, removal, and removal to safe third county, there is no right to appeal, but there is rather only the right to judicial review.[395]

385 *See* AIDA, COUNTRY REPORT: UK, *supra* note 273, at 23.

386 *Id.*

387 *Id.* at 16.

388 *See* Gower & Wilkins, *supra* note 269, at 4.

389 *See* AIDA, COUNTRY REPORT: UK*, supra* note 273, at 16, 18, 26.

390 *Id.* at 26.

391 *Id.* at 18.

392 *Id.* at 18, 27 (explaining if permission is denied, there is no appeal. However, an application may be made to the High Court to seek judicial review.).

393 *Id.* at 18.

394 *Id.* at 18, 27.

395 AIDA, COUNTRY REPORT: UK*, supra* note 273, at 27.

And judicial review does not examine the merits; instead it only examines whether the decision maker has acted correctly by considering relevant factors.[396] For sensitive cases involving national security or other public interest grounds, appeals are heard by the Special Immigration Appeals Commission ("SIAC"), discussed *infra*.[397]

In the early 2000s, however, the government started to curtail the gross volume of appeals by restricting the right to appeal to only certain categories.[398] The Immigration Act of 2014 removed the right of appeal in many application categories for decisions made by U.K, with Visas and Immigration denying asylum applications.[399] These applicants, however, may have their refusal "reconsidered" or subjected to an "administrative review," both of which are more limited in what relief they can provide.[400] There are also strict timeframes to request administrative review.[401]

Unlike the U.S. where there is no right to judicial review of TRIG (and the AG can even use confidential information that the individual never sees to bar an arriving alien), in the U.K., cases involving sensitive or confidential information are heard by SIAC.[402] SIAC hears appeals from decisions made by the Home Office to deport, or exclude, someone from the U.K. on national security grounds, or for other public interest reasons.[403] The SIAC consists of a panel of three members: one who has held high judicial office, one with experience serving on the Asylum and Immigration Tribunal, and one with experience in national security matters.[404] The individual appealing to the SIAC is entitled to counsel[405]—a vast difference compared to the U.S. where counsel is allowed but not provided. Because the SIAC is not a court of law but quasi-judicial, it can consider evidence in various forms that

396 *Id.*

397 *See* Gower & Wilkins, *supra* note 269, at 4.

398 *Id.*

399 Immigration Act 2014, c. 22 (Eng.).

400 *See* Gower & Wilkins, *supra* note 269 at 4.

401 *Id.*

402 Sturge, *supra* note 272, at 5.

403 Special Immigration Appeals Commission, Procedure Rules 2003 (No. 1034) 23, (last updated Apr. 10, 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/421503/Consolidated_text_of_SIAC_Rules_2003.pdf [hereinafter SIAC Procedure Rules].

404 *RB (Algeria) (FC) and another v. Secretary of State for the Home Department*, (2009) UKHL 10 (*see* section 12).

405 *Id.* at § 9A.

normally would not be allowed in court[406] and may rely on witnesses that the asylum seeker cannot cross examine.[407] If there is sensitive information (such as intelligence), the proceedings are closed to both the individual and his attorney; however, the individual may receive a summary of the evidence heard ex parte.[408] Additionally—unlike the U.S.—the applicant's interests are represented by a Special Advocate, a lawyer with a security clearance.[409] While this procedure is preferable to the U.S.'s, where there is no one representing the applicant's interests when the AG certifies a noncitizen as a terrorist, the fact remains that applicants in the U.K. can be deported on national security grounds based on evidence heard in a closed proceeding.[410]

The SIAC uses the civil standard of proof, the "balance of probabilities."[411] Questions of law may be appealed to an appellate court.[412] The SIAC considers whether the applicant has associations with and membership in terrorist organizations, to assess in part whether an individual is a threat to national security.[413]

2. Australia

Appeals in cases where asylum applications are rejected are handled by the AAT under the Administrative Appeals Tribunal Act of 1975 and the Administrative Appeals Tribunal Regulation 2015.[414] The jurisdiction of the AAT is far broader than just dealing with asylum appeals and extends to areas as varied as citizenship, bankruptcy, freedom of information, child support, passports, and a range of other issues.[415] The AAT can review some decisions made under the

406 PP v. Sec'y of State for the Home Dep't [2007] UKSIAC 54/2006, ¶ 4 (Nov. 23, 2007). This rule is contained in the Special Immigration Appeals Commission (Procedure) Rule 2003, SI 2003/1034, ¶ 44(2)(3).

407 Per Lord Hope, A et al. v. Sec'y of State for the Home Dep't [2005] UKHL 71.

408 *See* Special Immigration Appeals Commission Act 1997, c. 68, § 5(3)(d) (Eng.).

409 *Id.* at § 6 (the role of the Special Advocate in these closed sessions is dictated by the Special Immigration Appeals Commission (Procedure) Rules 2003, SI 2003/1034, ¶ 35).

410 Feikert-Ahalt, *supra* note 362, at 290.

411 *Id.*

412 *See* Special Immigration Appeals Commission Act 1997, c. 68, § 7 (Eng.).

413 Feikert-Ahalt, *supra* note 362, at 290.

414 *Legislation and Jurisdiction*, ADMINISTRATIVE APPEALS TRIBUNAL: COMMONWEALTH OF AUSTRALIA (2019), https://www.aat.gov.au/resources/legislation-and-jurisdiction.

415 *Id.*

Migration Act of 1958 regarding the refusal or cancellation of visas by the Department of Immigration.[416]

When an individual appeals to the AAT, he or she is entitled to a hearing, and new evidence may be considered.[417] The AAT does not have the authority to review every decision to refuse or cancel a refugee visa.[418] As explained *supra*, if the Immigration Minister decides that, owing to the nature of a given asylum applicant, "it is in the national interest that the person be declared an excluded person" and that the Immigration Minister formally notifies each house of Parliament, the asylum applicant can be barred from settling in Australia with no recourse for appeal.[419] This is similar to the U.S., where the AG can certify an arriving alien as a terrorist or override any decision by the IJ or B.I.A. with no means to appeal (although the AG does not need to alert Congress). Decisions from the AAT can be appealed to Federal Court, but it only looks at whether there was a mistake of law and does not rehear the facts.[420]

E. National Security

1. United Kingdom

The Terrorism Act of 2000;[421] the Anti-Terrorism, Crime and Security Act of 2001;[422] the Nationality, Immigration and Asylum Act of 2002;[423] the Prevention of Terrorism Act of 2005;[424] the Immigration, Asylum and Nationality Act of 2006;[425] and the Terrorism Act of 2006[426] together provide the substantive and procedural framework for the determination of asylum status in the U.K., including the terrorism exclusionary grounds.[427] Under the Terrorism Act of 2000, terrorism is defined to encompass commission, association, and support.[428] With

416 *AAT/MRT/RRT Appeals*, ACACIA: IMMIGRATION AUSTRALIA (Jan 26, 2016, 9:34 PM), https://www.acacia-au.com/aat-mrt-rrt-appeals.php.

417 *Id.*

418 *Id.*

419 *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (Austl.).

420 *See AAT/MRT/RRT Appeals*, *supra* note 416.

421 Terrorism Act 2000, c. 11 (Eng.).

422 Anti-terrorism, Crime and Security Act 2001, c. 24 (Eng.).

423 Nationality, Immigration and Asylum Act 2002, c. 41 (Eng.).

424 Prevention of Terrorism Act 2005, c. 2 (Eng.).

425 Immigration, Asylum and Nationality Act 2006, c. 13 (Eng.).

426 Terrorism Act 2006, c. 11 (Eng.).

427 *See* Kidane, *supra* note 189, at 327-29.

428 *Id.*

respect to association, as in the U.S., the Secretary of State compiles a list of terrorist organizations for those that she believes "is concerned in terrorism,"[429] which law professor Won Kidane has argued is a low standard.[430] He equates the U.K.'s designation process as similar to the U.S.'s Tier II but without a consultative requirement.[431]

With respect to support of terrorism, Kidane notes, "support includes any kind of aid or assistance including but not limited to inviting support, arranging and managing meetings, encouraging support, fundraising, and receiving money when there is reason to suspect it will be used for terrorism."[432] This definition of support was broadened even further when the U.K. passed the Terrorism Act of 2006,[433] where detailed provisions were added in the areas of preparation, encouragement, incitement, and receiving terrorist training.[434] In fact, terrorism was defined in such a broad way as to encompass conduct that was not criminal.[435] These broad definitions at first blush seem similar to how the U.S. approaches material support of terrorism (although in the U.S., *any* financial contribution to a terrorist organization constitutes material support, even if the money is not used for terrorism purposes, wherein the U.K., the *mens rea* of the individual who provided the money is relevant).

Significantly, the U.K. requires that the material support be "voluntary" and "significant"[436] to bar asylum, in contrast to the U.S. where involuntary support (under duress) and insignificant support can constitute a terrorism exclusion. In the 2010 Supreme Court case *JS* (*Sri Lanka*),[437] the asylum applicant had joined the Liberation

429 *See* Terrorism Act 2000, c.11, §§ 3(4), 3(5)(a)-(d).(Eng.). For a current list of banned terrorism groups, *see* U.K. HOME OFFICE, PROSCRIBED TERRORIST ORGANIZATIONS (Feb. 28, 2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/869496/20200228_Proscription.pdf. "Concerned in terrorism" is defined to mean preparation, encouragement, participation, or commission of acts of terrorism. *See* Terrorism Act 2000, c.11, §§ 3(5)(a)-(d).

430 *See* Kidane, *supra* note 189, at 354-56.

431 *Id.*

432 *See id.* at 328-29; *see also* Terrorism Act 2000, c. 11, §§ 11-15 (Eng.) (emphasis added).

433 *See* Terrorism Act 2006, c. 11, §§ 13, 21-27, 29-30, 34, 37 (Eng.) (amending the Terrorism Act 2000).

434 *See id.* § 1.

435 *See* Clements, *supra* note 15, at 22.

436 *See* Simeon, *supra* note 16, at 74.

437 R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 15 (appeal taken from [2009] EWCA Civ 364, ¶ 38).

Tigers of Tamil ("LTTE") in Sri Lanka when he was ten years old and joined the intelligence division. The LTTE was a ruthless secessionist liberation organization before its defeat in 2009. In 2007, the applicant requested asylum in the U.K., and the Secretary of State, relying on past precedent, denied his application, finding that "voluntary membership in an extremist organization amounted to 'personal and knowing participation' or, at least, acquiescence to complicity in the crimes in question."[438] This is certainly similar to how the case would have been analyzed under U.S. law, as the LTTE was designated an FTO (Tier I) terrorist organization in 1997, making membership a strict liability offense.[439] The U.K. Supreme Court felt differently, however, questioning whether the LTTE was "predominantly terrorist in character," and whether there was "personal and knowing participation" or "complicity" by the asylum applicant in war crimes or crimes against humanity.[440]

In a unanimous decision, Lord Brown noted: "I would hold the accused disqualified under article 1F if there are serious reasons for considering him voluntarily to have contributed in a significant way to the organization to pursue its purpose of committing war crimes, aware that his assistance will in fact further that purpose."[441] And in a concurring opinion, Lord Hope stated:

> But it is a dangerous doctrine. It leads people to think, as the Secretary of State did in this case, that voluntary membership of such a group gives rise to a presumption of personal and knowing participation, or at least acquiescence, amounting to complicity. It diverts attention from a close examination of the facts and the need for a carefully reasoned decision as to precisely why the person concerned is excluded from protection under the Convention.[442]

Importantly, the Supreme Court held that instead of characterizing "organizations as exclusively engaged in terrorist activities," it would be prudent to focus the analysis on at least seven factors: (1)

438 *See* Simeon, *supra* note 16, at 73 (citing R (on the application of JS (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 15 (appeal taken from [2009] EWCA Civ 364, ¶ 38)).

439 *See* Flud, supra *note* 149, at 543.

440 *See* Simeon, *supra* note 16, at 74.

441 R (on the application of JS) (Sri Lanka) (Respondent) v. Secretary of State for the Home Department (Appellant) [2010] UKSC 15 (appeal taken from [2009] EWCA Civ 364, ¶ 38).

442 *Id.* at ¶ paragraph 44.

nature and size of the organization and the part of it that the person was most directly concerned; (2) whether and, if so, by whom the organization was proscribed; (3) how the person came to be recruited; (4) the length of time the person remained in the organization and what, if any, opportunities the person had to leave; (5) the person's position, rank, standing and influence within the organization; (6) the person's knowledge of the organization's war crimes activities, and (7) the person's personal involvement and role in the organization including particularly whatever contribution engaged in terrorist activities.[443] These considerations—which focus on the underlying facts of any situation—are simply irrelevant when the U.S. considers TRIG. In some respect, these factors seem similar to the ones that USCIS is supposed to consider when deciding whether to apply a waiver for duress or for insignificant support. The difference, however, is that in the U.K. these factors are to be considered at the *outset*. Conversely, in the U.S. these factors are often to be considered years later by a different governmental body (USCIS as part of the DHS) that adjudicated whether the person qualified for asylum in the first instance (IJ and B.I.A. as parts of the DOJ). As discussed in Part III, the U.K.'s approach seems far more efficient and just than the U.S.'s approach. Professor James Simeon notes that the *JS* decision was remarkable because most countries had considered the LTTE to be a terrorist organization. As he notes, the question the Supreme Court considered was "whether the LTTE was a terrorist organization and what degree of involvement within an organization that engages in terrorist activity can lead to exclusion from refugee protection."[444] This approach taken by the U.K. Supreme Court—which looks at the *actual* involvement of the applicant and whether the support was *knowing* and *voluntary*, is in stark contrast to the U.S.'s approach, where insignificant (and in some cases unknowing) support under duress merits an exclusion.

The Terrorism Act of 2006 also greatly increased the terrorism exclusion to include organizations that do not *directly* threaten U.K.'s national security.[445] As discussed *supra* beginning on page 618, this approach is somewhat like the U.S.'s Tier III definition, which includes groups that have never threatened the U.S. However, at least under the U.K.'s definition, there must be some possibility of an adverse effect on the U.K., which is not the case with Tier III organizations under the U.S. definition.

443 *Id.* at ¶ 30.

444 *See* Simeon, *supra* note 16, at 74.

445 *See* Kidane, *supra* note 189, at 31-32.

The case of *Secretary of State for the Home Department v. Rehman*[446] illustrates how the U.K. understands its definition of terrorism. In this case, the Secretary of State ordered Rehman, a Pakistani national, deported on national security grounds.[447] Rehman appealed to the SIAC, which reversed the Secretary's decision, noting that there was a lack of evidence showing a nexus between the alleged activities and British national security.[448] The Secretary then appealed to the Court of Appeals, which reversed the SIAC's decision.[449] Rehman then appealed to the House of Lords, which affirmed the decision of the Court of Appeals.[450] Notably, Lord Slynn stated: "I accept that there must be a real possibility of an adverse affect [sic] on the United Kingdom for what is done by the individual under inquiry but I do not accept that it has to be direct or immediate."[451] In other words, contrary to the U.S. understanding, in the U.K. there must be a nexus between the terrorist act and U.K.'s national security, although it can be indirect.[452]

2. Australia

Australian law bars asylum for individuals thought by the Attorney General to have committed war crimes, crimes against humanity, serious non-political crimes, or a crime against peace.[453] Additionally, according to the *Migration Act 1958*, noncitizens deemed to constitute a security threat (based on conduct in Australia or elsewhere or based on a negative security assessment), can be deported or held indefinitely if the person cannot be returned to his or her home country and if there is no safe third country willing to accept the person.[454]

Australia treats terrorism offenses under Part 5.3 of its Criminal Code Act of 1995. Terrorism is defined as an act that both is designed to ". . . coerce or influence the public or any government by intimidation to advance a political, religious or ideological cause," and that causes death, injury, property damage, public health risks, or

446 [2001] UKHL 47, [2003] 1 A.C. 153 (appeal taken from Eng.).

447 *Id.* at 156, [1].

448 *Id.* at 157, [2].

449 *Id.* at 157, [6].

450 *Id.* at 159, [13].

451 *Id.* at 159, [16].

452 *See* Kidane, *supra* note 189, at 52 (discussing nexus).

453 *See Migration Act 1958* (Cth) pt I s 5H (Austl.).

454 *See Tell Me About: Refugees with Adverse Security Assessments*, *supra* note 380.

disruption of critical infrastructure.[455] In essence, unlike the U.S. where motive is irrelevant, in Australia the motive has to be to coerce any government or the public on a political, religious, or ideological cause. The main specialized counterterrorism law in Australia is the 2002 Financing of Terrorism Act.[456] In addition to using the definition of the Criminal Code Act of 1995 to define terrorist acts and behavior, the 2002 law clarifies that terrorism does *not* involve ". . . advocacy, protest, dissent or industrial action" that is not intended to cause physical harm to individuals or risk to the public.[457] This understanding is very different than the U.S.'s approach where association (including advocacy) to a Tier I or II terrorist organization is a strict liability offense.

The Australia Security Intelligence Organization ("ASIO") is Australia's intelligence organization and provides advice on national security issues. As part of its responsibility, the ASIO conducts security assessments of refugees before they are granted a visa.[458] Noncitizens cannot see the underlying evidence behind the security assessments or the assessments themselves.[459]

ASIO issues security assessments to determine if an individual poses a "direct or indirect" risk to Australian security.[460] ASIO applies a wide definition of security, which includes protecting Australia and its people from domestic or external (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defense system; or (vi) acts of foreign interference.[461] Unlike the U.S. where individuals who pose no risk to U.S. security can still be barred from asylum, under Australian law, ASIO must—at least on paper—find a direct or indirect risk to Australian security (as does the U.K). In some ways, an adverse security assessment from ASIO is similar to TRIG in that it can bar noncitizens who

455 *Australia's Counter-Terrorism Laws*, AUSTRL. ATTORNEY-GENERAL DEP'TT, https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/AustraliasCounterTerrorismLaws.aspx (Apr. 12, 2020).

456 *Suppression of the Financing of Terrorism Act 2002* (Cth) (Austl.).

457 *See* Kidane, *supra* note 189, at 343.

458 *Recent Changes in Australian Refugee Policy*, REFUGEE COUNCIL OF AUSTRL. (July 7, 2018), https://www.refugeecouncil.org.au/recent-changes-australian-refugee-policy/4/.

459 *See* Kidane, *supra* note 189, at 346. Citizens subjected to a negative security finding (such as pursuant to a security clearance) have more rights and can appeal a negative security finding. *See Australian Security Intelligence Organization Act 1979 (the ASIO Act)* (Cth) s 36 (Austl.).

460 *ASIO Act* s 4 (Austl.).

461 *Id.*

qualify as a refugee from obtaining a visa. However, as discussed in *M47 v Commonwealth* below, a negative security assessment does not automatically result in a denial of a visa because the Immigration Minister technically retains discretion, whereas TRIG automatically bars asylum in the U.S. (at least until a waiver is applied).

While citizens have the right to a merits appeal before the AAT for an adverse security assessment from ASIO (such as for a security clearance), noncitizens have no right to a merits review of the adverse security assessment itself.[462] The Immigration Minister can use a negative security assessment to deny or cancel a visa, but—pursuant to *M47 v Commonwealth* discussed *infra*—she has discretion that cannot be usurped by ASIO.[463] Although noncitizens cannot obtain a merits review of an adverse security assessment itself, they typically can obtain merits reviews of visa denials (which happens to be based on the negative security assessment), unless the Immigration Minister has excluded administrative review and alerted Parliament, discussed *supra*.[464] Both citizens and noncitizens can appeal a negative security assessment to the courts (judicial review), but its jurisdiction is limited to constitutional or procedural errors—the courts will not review the evidence to determine whether the negative security assessment is justified.[465] For noncitizens who have received minimal, if any, information about the negative assessment, it is particularly difficult to seek judicial review as she is not aware of any procedural or legal errors, and the court is often precluded from reviewing the underlying evidence that substantiates the negative security assessment due to classified information.[466] The High Court has held that "procedural fairness can be reduced to 'nothingness'" when the ASIO Director-General determines disclosure to the courts would prejudice national security.[467]

The case of *M47 v Commonwealth* is instructive with respect to the role ASIO plays in determining whether a noncitizen with an

462 Ben Saul, *Dark Justice: Australia's Indefinite Detention of Refugees on Security Ground under International Human Rights Law*, 13 MELBOURNE J. INT'L L. 1, 10 (2012); Adam Fletcher, *The M47 Case*, ON LINE OPINION (Oct. 12, 2012), http://www.onlineopinion.com.au/view.asp?article=14219

463 Saul, *supra* note 462, at 11-12.

464 *Character Requirements for Visas*, AUSTRL. DEP'T OF HOME AFF. (Mar. 17, 2020), https://immi.homeaffairs.gov.au/help-support/meeting-our-requirements/character.

465 Saul, *supra* note 462, at 11-12.

466 *Id.* at 12.

467 *Id.* at 12 (citing *Leghaei v Director-General of Security* [2005] FCA 1576 (Austl.).

adverse security assessment can obtain a visa.[468] In this case, M47 was an intelligence officer for the Tamil Tigers who fled Sri Lanka in 2008 when the government defeated the Tamil Tigers. He had left the Tamil Tigers previously and refused to rejoin the group, and thus, in the wake of the ending of the civil war, he feared being targeted both by the government and by former Tamil Tigers.[469] M47 was deemed a security risk by ASIO in 2009 and 2011 and denied a Permanent Protection Visa due to the negative security assessment.[470] He was neither given the assessment nor a summary, and as typical in such cases, he was not able to see any of the underlying evidence.[471] He was interviewed, however, so he was aware of some allegations.[472] Furthermore, because he was also deemed to qualify as a refugee, Australia would not return him to Sri Lanka where he was likely to be persecuted .[473] And no safe third country was interested in taking him due to ASIO's negative security assessment (that neither he nor the third country could see).[474] As a result, he—as well as countless others—were subjected to indefinite detention that the High Court had previously ruled was lawful.[475]

This case concerned regulation 4002 that had stated that a noncitizen could not obtain a visa if ASIO issued an adverse security assessment.[476] In 2012, the High Court found that this regulation conflicted with the *Migration Act,* which empowered the Immigration Minister to make decisions on visas—not ASIO.[477] Furthermore, as discussed *supra*, an adverse security assessment for noncitizens is not entitled to a merits review before the AAT, but a denial of a visa by the Immigration Minister or her delegate typically is (unless specifically

468 *See Plaintiff M47-2012 v. Director General of Security*, [2012] CLR 46 (Austl.).

469 *See* Cindy Davids & Dilan Thampapillai, *Fear and Loathing: The Threat of Asylum Seekers and Terrorism*, *in* SPOOKED: THE TRUTH ABOUT INTELLIGENCE IN AUSTRALIA 88 (Daniel Baldino ed., 2013).

470 *Id.* at 89. *See also* Saul, *supra* note 462, at 3.

471 Saul, *supra* note 462, at 2, 9.

472 *Id.* at 9-10, 41.

473 *Id.* at 3, 33 (by calling A47 a "refugee," Australia did not apply the exclusion clauses of 1F of the Refugee Convention).

474 *Id.* at 3, 13, 27.

475 *Id.* at 6-7; *see also Al-Kateb v Godwin* [2013] 219 CLR 562 (Austl.) (holding that there are no limits on the power to detain a person pending removal).

476 Saul, *supra* note 462, at 8-9 (citing *Migration Regulations 1994* (Cth) sch 4 reg 4002 (Austl.) ("Public Interest Criteria and Related Provisions")).

477 *Id.* at 14.

excluded by the Minister and she alerts Parliament).[478] Hence, the High Court found that ASIO's non-reviewable security assessments could not be used under regulation 4002 to automatically deny refugee protection as well as a merits appeal.[479] Significantly, the High Court also ruled that a negative security assessment by ASIO could not be used for national security concerns that were not *relevant* to threats to Australia[480]

In its decision, the High Court pointed to a ruling by Canada's Supreme Court on a similar issue that found that the principle of *non-refoulement* cannot be overridden if the individual in question does not pose a serious threat to the country itself, based on ". . . objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible."[481] Importantly, the High Court's ruling does not question whether an individual may have been a terrorist or not at some point in time, but rather focuses on whether the individual poses a *current* threat to Australian society.[482] In other words, Australia is only going to forgo the principle of *non-refoulement* if the individual poses a real threat to Australian society at the present time. It should be noted, however, that visas can still be denied or revoked in cases where an individual fits the criteria for refugee status but has a negative character assessment or is found to have engaged in war crimes or crimes against humanity (even if not a current threat). While the Tamil Tigers were accused of engaging in war crimes, in the case of M47, there was no evidence to suggest that he had been directly involved in war crimes.[483]

Despite the High Court ruling that ASIO had exceeded its authority, M47 was not a huge victory for noncitizens being detained indefinitely because of a negative security assessment. First, the Court found that M47 could continue to be detained indefinitely while the Immigration Minister reviewed the adverse security assessment to decide whether to issue a permanent protective visa.[484] In this case, the

478 *Id.*

479 *High Court Considers an Adverse Security Assessment by ASIO*, HUMAN RTS. L. CTR. (Oct. 6, 2012), https://www.hrlc.org.au/human-rights-case-summaries/high-court-considers-an-adverse-security-assessment-by-asio.

480 Kellie Robson, *The State of Personal Liberty in Australia After M47: A Risk Theory Analysis of Security Rights*, 39 MONASH U. L. REV. 506, 511-512 (2013).

481 *Plaintiff M47-2012 v Director General of Security* [2012] CLR 46 (5 October 2012) (Austl.).

482 Human Rights Law Center *supra* note 479.

483 Robson, *supra* note 480, at 511-512.

484 Saul, *supra* note 462, at 14.

Minister refused M47 a visa based on the negative assessment, and as of February 2019 (nine years later, he is still detained with no end in sight.[485] As a commentator had predicted at the time, the M47 case is likely to be a pyrrhic victory for refugee rights.[486]

After this case, however, Australia did decide to provide more due process to those detained indefinitely with adverse security assessments. Starting in 2012 and continuing to the present time, Australia has an "Independent Reviewer," who is a retired Federal Court judge, in order to conduct an "advisory" review of ASIO security assessments of refugees.[487] Significantly, the reviewer will have access to the material relied on by ASIO and will make a determination of whether the assessment reaches an "appropriate outcome."[488] The reviewer will then share her opinion and reasoning to the Director-General of Security and provide an unclassified summary to the refugee (if provided by ASIO).[489] The Independent Reviewer reviews the adverse assessments every twelve months as does ACIO.[490] According to Professor Benjamin Saul, while the Independent Reviewer is an improvement, it still remains fundamentally flawed because—unlike review by the AAT—the reviewer only provides non-binding recommendations to ASIO.[491] In a way, the independent reviewer acts like the "waiver" process in the U.S. where another entity reviews the negative security information to decide whether the refugee truly poses a threat. But the U.S. waiver process is binding and made in a closed unreviewable proceeding. By comparison, the independent reviewer's recommendation is not binding but there is more transparency.

While indefinite detention is controversial, most asylum seekers have not been deemed to be a security threat by ASIO. In 2008, a Parliamentary Committee found that of 72,000 visa security assessments conducted by ASIO during the 2007-08 period, only two people were

485 Helen Davidson, *High Court Rejects Attempt to Challenge Australia's Indefinite Detention Scheme*, THE GUARDIAN (Feb. 13, 2009), https://www.theguardian.com/australia-news/2019/feb/13/stateless-mans-court-challenge-to-indefinite-detention-goes-ahead.

486 Dilan Thampapillia, *M47 and ASIO Case May Not Prove a Victory for Refugees After All*, THE CONVERSATION (Oct. 10, 2012), https://theconversation.com/m47-and-asio-case-may-not-prove-a-victory-for-refugees-after-all-10077.

487 Saul, *supra* note 462, at 11 (citing Attorney-General's Department, Independent Review Function—Terms of Reference (16 October 2012)).

488 *Id.* at 11.

489 *See Australia's Immigration Detention Policy and Practice: A Last Resort*, *see supra* note 315.

490 Saul, *supra* note 462, at 11.

491 *Id.*

deemed to be security risks.[492] In November 2011, ASIO issued 54 adverse security assessments to offshore entry persons out of 7,000 cases considered.[493] In May of 2017, ASIO head Duncan Lewis noted that there was no evidence of a link between refugees and terrorism.[494] Arguably, Australia's approach—like that of the U.K.—looks at whether the individual poses a current threat to the country's security and looks at what role the individual played in the terrorist organization itself. As professors Khanh Hoang and Sudrishti Reich note, the "Australian system [compared to the United States] has greater scope for consideration of individual circumstances and mitigating factors, since most of the cancellation [of visa] decisions require an exercise of discretion by the decision-maker."[495] Furthermore, the decision-maker looks at "any risk that the person may pose to the Australian community."[496] Nonetheless, the United Nations, and many civil rights groups, condemn indefinite detention, arguing that many of those detained do not pose any genuine risk to Australian security.[497] On paper, it appears that Australia looks at whether the individual poses a current threat and whether the harm is "substantial or negligible.[498]" In reality, however, given the indefinite detention of refugees based on unreviewable security assessments, it is impossible to know whether the detained individuals are truly threats.[499] As a comparison to the United States, the most that can be said is that, at least on paper, Australia's process seems fairer and more just, in that its definition of terrorism is narrower than the U.S. and it looks for threats that are substantial and not negligible. Its indefinite detention regime where individuals can

492 *See* Cindy Davids & Dilan Thampapillai, *supra* note 469, at 95.

493 Saul, *supra* note 462, at 2 (citation omitted).

494 Australian Associated Press, *ASIO Head Tells Pauline Hanson There Is 'No Evidence' of Link Between Refugees and Terrorism*, THE GUARDIAN (May 25, 2017, 11:51 PM), https://www.theguardian.com/australia-news/2017/may/26/asio-head-tells-pauline-hanson-there-is-no-evidence-of-link-between-refugees-and-terrorism.

495 Hoang & Reich, *supra* note 352, at 14.

496 *Id.*

497 *See generally* Ben Doherty*, A Phonecall, a Meeting, then Indefinite Detention*, THE GUARDIAN (Feb. 27, 2015), https://www.theguardian.com/australia-news/2015/nov/28/a-phonecall-a-meeting-then-indefinite-detention-the-refugees-at-the-mercy-of-asio.

498 *Plaintiff M47-2012 v Director General of Security* [2012] HCA 46 (Austl.).

499 However, in 2017, fifty-seven refugees had their adverse security assessments revoked, which might suggest that these individuals were not current security threats. *See* Karen Middleton, *Exclusive: All 57 ASIO Refugee Case Warnings Revised After Review*, THE SATURDAY PAPER (Feb. 3-9, 2018), https://www.thesaturdaypaper.com.au/news/immigration/2018/02/03/exclusive-all-57-asio-refugee-case-warnings-revised-after-review.

be held for years when removal is not reasonably foreseeable is, however, much worse than the U.S., where six months is the presumptive limit.

V. ANALYSIS AND BEST PRACTICES

While the U.S. needs an effective way to protect against terrorism and ensure that asylees do not pose a risk to the security of the nation, the measures should be reasonable, effective, and commensurate with the risk allowing the U.S. to honor its international commitments and support international human rights. The U.S.'s terrorism-related exclusion bars are the most inefficient and overbroad of the three countries considered in this article. As Won Kidane notes, "it could be said that the substantive definition of terrorism of the United States is significantly broader than all of the other jurisdictions [U.K. and Australia] because of the addition of the tier III terrorist group category, the materials support bar linked to this particular category, the lack of a national security nexus requirement . . . ."[500] Hence, it would be prudent for the U.S. to look to its allies for best (or better) practices. To this end, the U.S. should consider adopting the U.K.'s limitation of material support as being significant, voluntary, and knowing, and its understanding that the asylum applicant must pose a risk to U.K. security, albeit the risk can be indirect. Similarly, the U.S. should consider adopting Australia's approach (borrowed from Canada), where the material support must be "substantial rather than negligible" and where the negative security assessment must relate to Australian security (at least on paper). In sum, both allies do not rely on overbroad generalizations that deny terrorist victims asylum with the hope that a subsequent procedure down the line will rectify any wrongs. Rather, both countries (at least on paper) do an individualized inquiry at the outset to see if the asylum applicant poses an actual current threat to their respective societies, which is consistent with their *non-refoulement* commitments under international treaties. As explained *supra* pages 596-597, a country does not have to grant refugee status to an individual if there are "reasonable grounds" to believe the individual poses a security risk to that country. By doing individualized inquiries and not relying on overbroad generalizations, the U.K. and Australia's processes are more consistent with their treaty obligations. Conversely, the U.S. bars asylum applicants who provide insignificant support to a terrorist group—sometimes by force, and sometimes

500 *See* Kidane, *supra* note 189, at 58.

unknowingly—or are members of an organization posing no threat to the U.S., and then relies on a down-the-road non-transparent discretionary waiver system, which lacks administrative and judicial review, to attempt to mitigate these nonsensical results. As many have noted, the U.S. processes and procedures may not be consistent with its international commitments, as the U.S. is not ensuring that there are "reasonable grounds" for denying asylum based on an actual security risk.[501]

A. Recommendations

Many immigration experts and scholars have criticized the U.S.'s material support statute and subsequent waiver process as ineffective, overbroad, and unsound. Anwen Hughes from Human Rights Watch states: "The over-inclusive nature of the material support bar casts a net too wide. Our law is using a sledgehammer to crack a nut. It needs to adapt by becoming more nuanced and refined in its approach to this issue."[502] Hughes also observes that a waiver process that requires the "consultation among three Cabinet-level officials is not a realistic method of conducting refugee status determinations and other routine immigration adjudications."[503] To this end, some experts have argued that Congress should enact legislation to specifically include an explicit duress exception to the material support provision of the INA instead of using a subsequent "waiver" process.[504] One expert notes that the fact that the waiver process is with DHS makes it "politicized and under the direct control of the President" resulting in "the entire waiver system subject to the political winds of change that come with

501 *Hernandez*, 884 F.3d at 113 (Droney, J., concurring) (noting that he was not sure that the waiver system complied with international law because the Protocol did not intend to allow DHS to remove otherwise eligible asylees who did not present genuine security threats to the. Rather, the Protocol states that countries can deny asylum based on *reasonable* grounds to deem an individual a security threat — not unreasonable ones.). The United Nations has also criticized the U.S. asylum process as being inconsistent with international obligations. *See* Shirley Llain Arenilla, *Violations to the Principle of Non-Refoulement Under the Asylum Policy of the United States*, 15 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 283, 296 (2015) (confirming that the United Nations Human Rights Committee ("UNHRC") and Independent Court of Human Rights ("ICHR") have both criticized the U.S. asylum process as being inconsistent with international obligations under the 1951 Convention Relating to the Status of Refugees.).

502 *See* Flud *supra* note 149, at 568.

503 Hughes*, supra* note 182, at 7.

504 *See* Messer, *supra* note 161, at 72; *see also* Flud, *supra* note 149, at 564.

different presidential administrations."[505] For instance, in 2017, President Trump issued an Executive Order[506] and memorandum[507] essentially recommending that the DHS (and SOS) rescind all of the group-based and individual exemption procedures that had been issued by them in the last ten years, including the waiver for duress.[508] Yet, according to a State Department official, no beneficiaries of exemptions have later committed terrorist acts.[509] While as of this date, the waivers have not been rescinded, the fact that they are under the direct control of the President (as opposed to a congressional statutory exception for duress) makes it vulnerable to repeal.[510]

If there was a statutory change to provide for an explicit duress waiver in the material support statute, IJs could decide at the outset during one hearing that TRIG did not apply because the support was provided under duress, thus eliminating a later "waiver" process by USCIS after a final order of removal has been issued.[511] In this way, the process would be efficient and not duplicative of resources as the evidence of material support and duress would be presented at the same hearing where the IJ assesses credibility of the noncitizen.[512] This would then be similar to the criminal case context where the affirmative defense of duress is argued at the same proceeding as the government's case in chief. Additionally, by having an express duress exception in the material support statute, a victim of terrorism would never be labeled a material supporter of terrorism—even temporarily—as

505 *See* Flud *supra* note 149, at 563.

506 Exec. Order No. 13,769: Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed. Reg. 8977, 8980 (Jan. 27, 2017).

507 Memorandum on Implementing Immediate Heightened Screening and Vetting of Applications for Visas and Other Immigration Benefits, Ensuring Enforcement of All Laws for Entry into the United States, and Increasing Transparency Among Departments and Agencies of the Federal Government and for the American People, 82 Fed. Reg. 16279 (Mar. 6, 2017).

508 *See* Flud, *supra* note 149, at 563.

509 Mica Rosenberg, *Trump Administration May Change Rules that Allow Terror Victims to Immigrate to U.S.*, REUTERS (Apr. 21, 2017), https://www.reuters.com/article/us-usa-immigration-terrorism-exceptions/trump-administration-may-change-rules-that-allow-terror-victims-to-immigrate-to-u-s-idUSKBN17N13C.

510 *See* Flud, *supra* note 149, at 563.

511 *See* Hughes, *supra* note 182, at 16 (according to Human Rights Watch, Congress could grant the AG waiver authority in cases before DOJ, which the AG could then delegate to the IJs and B.I.A.).

512 *See* Flud, *supra* note 149, at 564 (citing Teresa Pham Messer, *Barred from Justice: The Duress Waiver to the Material Support Bar*, 6 HOUS. L. REV. 63, 72 (2015) (arguing that—for efficiency—Congress could use the "substantive legal framework for adjudicating an explicit duress exception" that already exists in DHS's memorandum).

duress would excuse such a conclusion. The U.S. would "no longer mislabel victimized and heroic asylum seekers as terrorists."[513] Furthermore, having IJ decisions analyzing what constitutes duress will "provide helpful guidance to asylum seekers and their counsel on how to interpret and address potential material support issues in their asylum claims."[514] In other words, a body of law surrounding duress would develop that would be transparent, as opposed to the unreviewable and closed decisions by USCIS.

Creating a duress exemption in the statute itself—that could be considered at the same hearing as evidence of TRIG—would be similar to the individualized assessment of whether the asylum applicant poses a true threat as practiced in the U.K. and ostensibly in Australia. The U.K. focuses on whether the support is "knowing and voluntary" before labeling that person as a terrorist and barring them from asylum. Considering the U.K. found an individual who voluntarily joined the intelligence division of a terrorist group to not materially support terrorism, the U.K. would certainly rule that giving $50 to a terrorist by force, or cooking and cleaning for a terrorist by gunpoint, or paying a ransom, would not constitute material support. The U.S. similarly needs a process and procedure that efficiently arrives as the same results. Amending the material support statute to allow duress would ensure that at least the support was voluntary and knowing. And by having all the evidence of material support and duress heard by an IJ at the same hearing, the process would be efficient and not duplicative of resources.

Similarly, Congress should ensure that the word "material" is defined in the statute to exclude trivial and minimal support, such as sweeping and cleaning, or putting up religious tents. In the U.K., the support must be "significant" and in Australia (borrowing from Canada's language) the support must be "substantial rather than negligible." Alternatively, instead of statutory reform, there could be an "interpretive adjustment" by the relevant agencies to find meaning in the word "material."[515] The U.S. needs a process to ensure—as our allies do—that trivial support (alone) will not be a bar to asylum at the initial hearing before the IJ, instead of relying on a subsequent waiver process by a different governmental entity to assess whether the support was truly insignificant. Proponents of the status quo, however,

513 Marrisa Hills, *No Due Process, No Asylum, and No Accountability*, 31 AM. U. INT'L L. REV. 445, 469 (2016).

514 *See* Messer, *supra* note 161, at 72.

515 *See* McCarthy, *supra* note 17, at 55.

maintain that having an overboard material support statute coupled with a subsequent waiver process with no administrative or judicial review allows DHS the utmost flexibility in barring threats to the country.[516] Yet, the current INA has other provisions that would allow the government to ban an individual if, for instance, the AG or the Secretary of DHS disagreed with the IJ and B.I.A. about the true nature of the individual. As discussed *supra* page 612, the AG can certify a noncitizen as a security threat, detain her, and then charge that person with a crime or remove them. While that person could still make a CAT claim (as that person always can), that person would not be able to obtain asylum or withholding of removal. Similarly, there are other provisions under the INA that address security threats outside of TRIG, such as individuals who persecuted others or committed certain crimes.[517] In fact, the INA specifically allows the AG to bar asylum if there "are reasonable grounds for regarding the alien as a danger to the security of the United States."[518] Hence, DHS does not need the open-ended overbroad understanding of material support it currently has to keep this country safe. The U.K. arguably faces a worst terrorist threat;[519] yet it nonetheless requires that the support be voluntary, knowing, and significant from the outset, and that the person poses a genuine threat to the security of the U.K. There is no reason that the U.S. could not implement a similar process for TRIG.

In a concurring opinion in *Hernandez*, Judge Christopher Droney emphasized the problems with an overbroad waiver system, noting "this discretionary waiver system also allows DHS to make its own

516 *Id.* at 47-49, 79-81 (listing government officials such as Deputy Assistant Secretary for Policy at DHS Paul Rosenzweig, who argues that the broad definitions of terrorist activity and material support allow the U.S. to be proactive in its counter-terrorism efforts).

517 *See* 8 U.S.C. § 1158(b)(2) (2018)

518 8 U.S.C. § 1158(b)(2)(a)(iv).

519 The U.K. and EU face a greater foreign terrorist threat than does the U.S. According to the Heritage Foundation, almost 1,000 people in Europe have been injured or killed in terrorist attacks involving asylum seekers or refugees since 2014. Robin Simcox, *The Asylum–Terror Nexus: How Europe Should Respond*, 3314 BACKGROUNDER 1 (The Heritage Foundation, Washington, D.C.) June 18, 2018, https://www.heritage.org/. . ./report/the-asylum-terror-nexus-how-europe-should-respond. By comparison, according to the Cato Institute, four asylum seekers, or 0.0006% of the 700,522 admitted from 1975 through 2015, later turned out to be terrorists. The chance that an American will be killed in a terrorist attack committed by a refugee is 1 in 3.64 billion a year, while the chance of being murdered in an attack committed by an illegal immigrant is an astronomical 1 in 10.9 billion per year. Alex Nowrasteh, *Terrorism and Immigration: A Risk Analysis*, CATO INST. (Sept. 13, 2016), https://www.cato.org/publications/policy-analysis/terrorism-immigration-risk-analysis.

credibility determinations, without the protections afforded in removal proceedings before the immigration court."[520] While he acknowledges that cases may involve "sensitive information about terrorist organizations," and that the waiver system may "best balance[] the need for our Executive Branch to safeguard national security while ensuring that some applicants . . . do not present a genuine security risk," he questions whether every case genuinely poses a security risk necessitating a system without administrative of judicial review.[521]

In other words, while the Executive branch has a legitimate interest in protecting sources and methods, not all cases implicating a waiver involve such sensitive information. This is especially true for organizations like the FARC that pose no risk to the security of the U.S. And for those cases that do involve sensitive information, that information could be presented in a closed proceeding—or a statutory exception could be made for such cases to be reviewed by DHS and not an IJ—or the U.S. could consider implementing its never-before-used Alien Terrorist Removal Court, which has a process and procedure for balancing the need for secrecy with due process.[522] Hence, there are more narrowly tailored options to protect sensitive material without having to resort to an overbroad and inefficient waiver system. Experts have also argued that the U.S.'s definition of a Tier III terrorist organization should be narrowed to not include groups that pose no threat to U.S. security. One expert argues that Tier III organizations should be rescinded because Tier I and II organizations are designated by the SOS in consultation with the AG and DHS and are "subject to public scrutiny" when published in the Federal Register. Conversely, Tier III organizations, which the adjudicator can decide ad hoc at the time of hearing, are not subject to these checks and balances.[523] Hughes from Human Rights First also recommends that Congress eliminate Tier III definition in the INA.[524] He notes, "[a] law that defines any military action against a dictatorial regime as 'terrorism' is just as likely to ensnare the United States' friends as its enemies."[525] Furthermore, the Tier III definition provides no additional security

520 *Hernandez*, 884 F.3d at 116 (Droney, J., concurring).

521 *Id.*

522 A discussion of the Alien Terrorist Removal Court is beyond the scope of this article. *See generally* Stephanie Blum, "*Use it* and *Lose It": An Exploration of Unused Counterterrorism Laws and Implications for Future Counterterrorism Policies*, 16 LEWIS & CLARK L. REV. 677 (2012).

523 *See* Kidane, *supra* note 189, at 320.

524 *See* Hughes, *supra* note 182, at 2.

525 *Id.* at 3.

benefits, because other parts of the law already bar relief for anyone who poses a threat to the security of the United States or is guilty of acts of terrorism.[526] Having Congress narrow the definition of a terrorist group by eliminating Tier III groups would ensure that the ANC and the Free Syrian Army—and those Iraqi forces that fought alongside the U.S. against Saddam Hussein—would not be labeled as terrorists while waiting for a subsequent individual or group waiver. Rather, the U.S. should just rely Tiers I and II—which are designated and published—to identify terrorist organizations.

VI. CONCLUSION

This article has examined the U.S. asylum process, particularly with respect to the treatment of asylum applicants accused of material support for terrorism. The American asylum process is highly complex, both procedurally and substantively, and is plagued by a multiplicity of standards and overlapping authorities on the part of several governmental agencies. Moreover, the American process for determining TRIG is confusing, inefficient, overbroad, and sometimes leads to a travesty of justice. This article discussed three problems with TRIG. First, the U.S. does not recognize an exception to material support for terrorism in cases where individuals are under duress (even by threat of death) to support a terrorist group. Second, trivial and insignificant support, such as sweeping a floor or setting up a religious tent, is often considered "material." Finally, a terrorist organization is defined broadly to encompass groups that violently opposed a dictatorial regime and that may have even been allied with the U.S. and pose no security risk to the U.S. These problems have led to incongruous outcomes, such as barring asylum when an individual paid a small sum of money to a terrorist who had previously beaten him, or to an individual who was forced to provide labor (cooking, cleaning, and/or washing of clothes) to a guerilla organization. Despite the obvious illogic and injustice involved in these and similar cases, the U.S.'s asylum process fails to distinguish actual terrorists and their supporters from individuals who are actually victims of terrorism, not its perpetrators. Moreover, while it is still possible for such individuals to receive a last-minute "waiver" from the consequences of TRIG, this waiver can only be provided by DHS, which is a different governmental agency than the one which adjudicated the applicability of a

526 *Id.* at 6 (noting that U.S. law already bans those who persecuted others or who have been convicted of certain crimes).

terrorism bar in the first place (DOJ), sometimes years earlier. Furthermore, the ability to challenge a denial of a waiver does not involve a judicial process, but rather is pursuant to a closed administrative process, and not subjected to any appeal or review by a court. In contrast, the British and Australian asylum processes, and their processes for determining exclusion for applicants suspected of material support for terrorism, are less complicated and more efficient. In the 2010 U.K. Supreme Court case *JS (Sri Lanka)*, the Court found that even though the government had denied the asylum application of an individual who served in the LTTE, there were questions as to whether the LTTE was primarily a terrorist organization and whether the individual in question actually engaged in terrorism, war crimes, or crimes against humanity. Thus, the U.K. performs an individualized inquiry to see if the asylum applicant is a current threat to national security, which is consistent with its international *non-refoulement* obligations. Similarly in Australia, the Australian High Court determined that an applicant's asylum application cannot override the principle of *non-refoulement* if that individual does not represent a "substantial" threat to the country. Unlike the U.S., Australia also does not bar applicants based on advocacy, protest, or dissent and requires a motive for its terrorism definition.

In conclusion, this article recommends that Congress look to the British and Australian models in order to modify TRIG so that, like the U.K. and Australia, individualized assessment as to the actual threat posed by an asylum applicant can be made, particularly in cases where the material support provided was under duress, failed to reach a threshold in terms of significance, and/or was provided to an organization that poses and posed no threat to U.S. security. By adopting more narrowly tailored terrorism bars like our allies, the U.S. can forgo its inefficient, time-consuming, non-transparent, and unjust waiver process. Instead, the IJ and B.I.A. could perform an individualized holistic adjudication at the outset in one hearing and address the only relevant question with respect to TRIG: are there reasonable grounds that this applicant poses a security risk to the United States and should be barred from asylum?