US refugee exclusion practices

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The issue of 'material support' provided to an organisation deemed to be involved in terrorism has been fraught with contention in US immigration law circles, most often over the issue of support provided under duress.

The average time between a refugee being referred to the United States Refugee Admissions Program by the UN Refugee Agency, UNHCR, and when they arrive in the United States (US) is 18-24 months. During this time, a myriad of governmental agencies conduct security screenings, health clearances and interviews, all aimed at determining whether this particular individual is acceptable to admit into the US. Even with this multi-layered vetting in place, there have been repeated calls from US citizens and elected politicians alike to suspend the refugee admissions programme in the name of national security. The validity of the fear behind these calls is not statistically supported; an exceedingly small fraction of the hundreds of thousands of refugees resettled in the US have been arrested on terrorism-related charges.

Barring someone who has assisted a terrorist organisation appears to be a practical measure towards ensuring national security, but a deeper look at the definitions contained in the Immigration and Naturalization Act (INA) reveals the flaws within this legislation. 'Engaging in terrorist activity' means committing an act "that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communication, funds, transfer of funds, or other material financial benefit..." to a terrorist organisation (or to a member of such an organisation). The Act's definition of 'terrorist organisation' covers 60 Tier I Foreign Terrorist Organisations[1] including ISIL ('Islamic State') and Boko Haram, Tier II individuals and organisations such as the Ulster Defence Association and the Real IRA, and Tier III organisations which consist of "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in" terrorist activities.

Given these definitions, a Sri Lankan man who cooks, provides small payments and performs manual labour after being kidnapped by the Liberation Tigers of Tamil

Eelam has provided support to a terrorist organisation. So too have the Salvadoran man who avoided execution by allowing FMLN rebels to use his kitchen (and giving them directions when required) and the Colombian businesswoman who provided foodstuffs and supplies from her shop in response to threats by the Revolutionary Armed Forces of Colombia (FARC). Her shop and her hotel were indeed later destroyed by the FARC despite her acceding to their demands.[2] These three individuals were all deemed inadmissible.

In an effort to address the injustice of people being denied humanitarian protection despite posing no real threat to US national security – and in fact being victims of the same terrorist groups we judge as a threat – the INA permits the Secretary of State and the Secretary of Homeland Security to waive the terrorism-related inadmissibility grounds in certain circumstances. Since these waivers are solely discretionary, attempts to appeal Department of Homeland Security (DHS) decisions through the judicial system have been largely unsuccessful. In 2014 the vast majority of material support waivers issued – 816 in total – excused actions taken while the applicant was under duress or coercion. 652 of those waivers went to applicants for resettlement, only 14 to asylum seekers. With US immigration rhetoric so focused on vetting, screening and verifying migrants, it is perhaps unsurprising that where such waivers are granted it tends to be in the context of resettlement, **before** individuals enter the country.

In the event that the DHS declines to issue a material support waiver, the consequences may be much less acute for a pre-admission applicant who could be redirected for resettlement elsewhere. If an asylum seeker is denied a waiver after they are in the US, they cannot be granted legal admission even if their persecution claims are valid.

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1. www.state.gov/j/ct/rls/other/des/123085.htm
2. All actual cases, not fabricated for illustrative purposes.