

# COMMON OBSTACLES WHEN REPRESENTING AFGHANS

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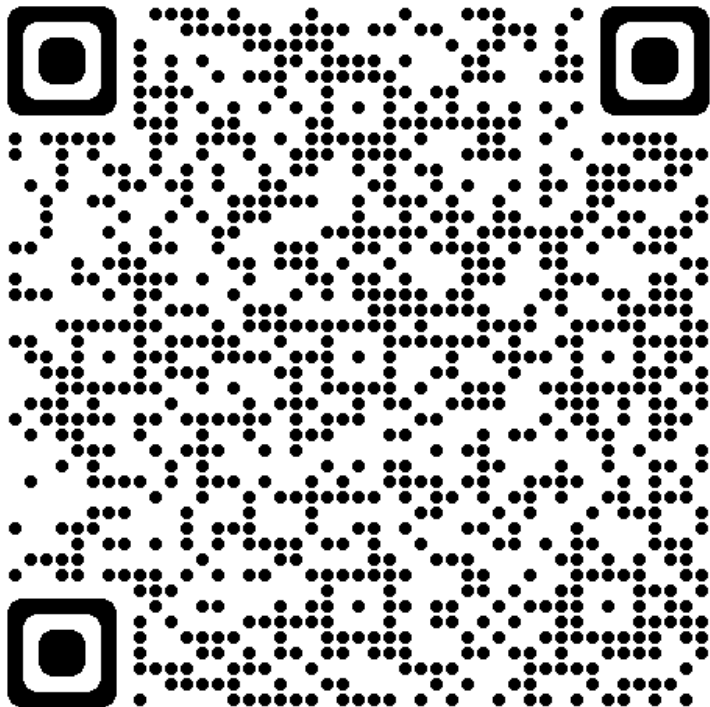
# INTRODUCTION

▶ Source: Politico.eu



Afghans gather on a roadside near the military part of the airport in Kabul on August 20, 2021, hoping to flee from the Taliban. Photo by Kohsar/AFP via Getty Images

PRACTICE ADVISORY: COMMON  
OBSTACLES WHEN REPRESENTING  
AFGHANS IN IMMIGRATION  
PROCEEDINGS



**PRACTICE ADVISORY:**

Common Obstacles  
when Representing  
Afghans in  
Immigration Proceedings

September, 2023



# THIS WEBINAR

- ▶ Terrorism Related Inadmissibility Grounds (TRIG)
- ▶ Persecutor Bar
- ▶ Serious Non-Political Crimes Bar
- ▶ Firm Resettlement Bar
- ▶ Questions and Answers

# TERRORISM-RELATED INADMISSIBILITY GROUNDS





# TERRORISM BAR

- ▶ Engaged in or incited terrorist activity
- ▶ Reason to believe a person is or will engage in terrorist activity
- ▶ Current membership in a Tier I or Tier II organization
- ▶ Current member of a Tier III organization unless lack of knowledge
- ▶ Endorses or espouses terrorist activity or persuades others
- ▶ Has received military type training from or on behalf of a terrorist organization
- ▶ INA §212 (a) (3) (B) (i) (I –VIII); INA §237(a) (4) (B)).



## WAS IT MATERIAL SUPPORT?


- ▶ “An [noncitizen] who affords **material support** for the commission of a terrorist activity to a terrorist organization, or to an individual who has committed or plans to commit a terrorist activity.” . . .
- ▶ There must be knowledge
- ▶ includes safe house, transportation, communications, funds, transfer of funds, or other material financial benefit, false documentation etc. INA §212(a)(3)(B)(iv)(VI).
- ▶ Consider: amount of support (de minimus is enough); to whom; use of support and intent (irrelevant).



# EXEMPTIONS AND EXCEPTIONS TO THE MATERIAL SUPPORT BAR

- ▶ Situational Exemptions (authority under INA §212 (d)(3)(B)(i))
  - ▶ **Duress** (material support (Tier III), military training and solicitation – All Tiers).
  - ▶ Group based Exemptions
  - ▶ Voluntary Activity (medical care)
  - ▶ Certain Limited Material Support
  - ▶ Insignificant Material Support
  - ▶ Iraqi Uprisings
  - ▶ Afghan Civil Service
  - ▶ Afghan Allies
- ▶ Exceptions:
  - ▶ Lack of knowledge (demonstrate clear and convincing evidence that did not know or reasonable should not have known...).
    - ▶ Tier III (Membership, solicitation and material support)
    - ▶ All Tiers (Material support – if applicant did not know or should not have known they *afforded material support*)





# CERTAIN LIMITED MATERIAL OR INSIGNIFICANT SUPPORT

- ▶ Limited material support may include:
- ▶ Certain **routine commercial transactions**;
- ▶ Certain **routine social transactions**;
- ▶ Certain **humanitarian assistance**; and
- ▶ Material Support provided under substantial pressure that does not rise to the level of duress (“**sub-duress pressure**”).
- ▶ **Now applies to Tiers I, II, and III**



# INSIGNIFICANT MATERIAL SUPPORT

- ▶ Material support is “insignificant” only if: (1) it is **minimal in amount**; and (2) the applicant reasonably believed that it would be **inconsequential in effect**. Adjudicators will evaluate whether the material support provided was minimal by considering its relative value, fungibility, quantity and volume, and duration and frequency.
- ▶ **Example:** Amina was at her home, located on the outskirts of Kabul, when three members of the Taliban came to her house and asked for a glass of water. They were not carrying weapons, and she did not feel pressured, nevertheless, she believes in helping all people, so she gave them water and they were on their way.



# AFGHAN CIVIL SERVANTS

- ▶ Exempted the application of TRIG resulting from employment as civil servants in Afghanistan at any time from September 27, 1996 to December 22, 2001, or from August 15, 2021, or thereafter, subject to certain limitations.



# AFGHAN ALLIES – ACTIONS OR ACTIVITIES

(1) Directed against the **Afghan Taliban or Afghan Taliban-affiliated militia groups**;

(2) Directed against any other organization that was engaged in violent activities that targeted the United States or allied entities, including:

(a) **any entity or contractor of the United States government or any individual** employed by or on behalf of the United States government,

(b) **the International Security Assistance Force (ISAF)** or any successor name of such force

(c) **the United Nations**, or

(d) **the government of the Islamic Republic of Afghanistan or the Afghan Transitional Authority** during the time period from **December 22, 2001, to August 15, 2021**; or

(3) Directed against the army of the **Union of Soviet Socialist Republics (USSR)** or the government of the **Democratic Republic of Afghanistan (DRA)** between **April 27, 1978, and April 28, 1992**.



# MATERIAL SUPPORT IN ACTION

- ▶ **Ahmed** and his family are from Herat. In 2010, following the bombing of his town he and his family fled to Kabul. En route they were stopped by the Taliban who told them to pay money to pass through a check point.
- ▶ **Jasper** is from Kabul. While working for a telecom company, his friend asked him to tap a phone line. He did this for his friend, but later found out the person he spied on was arrested by the Taliban.

PERSECUTOR BAR



# ELEMENTS OF PERSECUTOR BAR


- ▶ Act of Persecution
  - ▶ Severe economic deprivation, physical abuse, serious threats, force abortion/sterilization, rape, sexual assault, FGM, etc.
  - ▶ Self-defense is not persecution
- ▶ Nexus: “On Account of”
- ▶ Proximity (JLC word)
  - ▶ Not tangential, indirect or otherwise inconsequential
  - ▶ If no direct involvement, “degree of relation... acts has to persecution itself” or was person role “material or integral”
  - ▶ Example: Supply officer or HR rep.
- ▶ Scierter or Knowledge
  - ▶ Did the person know or should they have known?
  - ▶ Look at country reports to see if should have known.



# ELEMENTS OF PERSECUTOR BAR

- ▶ Command Responsibility (No Excuse)
- ▶ No Duress Exception
- ▶ Federal Circuits vary in finding persecution






## NOTED CASES (JLC LIST)

- ▶ *Matter of DR:*
  - ▶ Great discussion of the persecutor bar
- ▶ *Matter of Rodriguez-Majano:*
- ▶ Description of acts that are typical for war
  - ▶ Is persecutor attempting to “overcome a belief or characteristic”
- ▶ *Balachova v. Mukasey:*
  - ▶ Russian guard who would not participate in rape – not persecution
  - ▶ Would this meet nexus requirement?
- ▶ *Miranda Alvarado v. Gonzalez:*
  - ▶ Interpreted during torture – persecution
- ▶ *Fedorenko* footnote that cutting inmates hair is not persecution



# CASES IN APPENDIX (RFE)

- ▶ Reasons for Bar:
  - ▶ Hurt arms or legs in order to capture
  - ▶ Capture those knew had a high likelihood of being tortured
- ▶ Possible Arguments:
  - ▶ Hurting arms or legs is part of war
  - ▶ What did he know or what is hearsay
  - ▶ Where were the prisoners sent? Were they sent to a prison camp and later transferred to be interrogated/tortured.
  - ▶ Should only testify to what saw and did




# CASES IN APPENDIX (NOID)

- ▶ Reasons for Bar:
  - ▶ Persecuted based on Political reasons because war was politically motivated
  - ▶ Killed 30-40 Taliban
  - ▶ Part of the NDS and the NDS has been linked to human rights violation
  - ▶ Night raids
- ▶ Possible Arguments:
  - ▶ Most wars are politically motivated – it does not mean killing the enemy is persecution
  - ▶ The number killed is irrelevant
  - ▶ Membership is not enough
  - ▶ Fighting a night is irrelevant
  - ▶ "Band of Brothers" defense



# SERIOUS NON-POLITICAL CRIMES



INA §§  
208(B)(2)(A)(III)

- ▶ Only applies to crimes committed outside of the United States
- ▶ No conviction required, only “serious reasons for believing” crime committed. Same as probable cause. *McMullen v. INS*, 788 F.2d 591 (9th Cir. 1986)
- ▶ Seriousness of the crime v. political nature of crime

# IS THERE REASON TO BELIEVE?

- ▶ An admission can qualify for the “reason to believe” standard
- ▶ In the absence of an admission, courts have generally required specific evidence related to the applicant. Examples from case law:
  - ▶ Interpol Red Notice
  - ▶ Indictment from the home country
  - ▶ Arrest warrant from the home country
- ▶ Argue that general reports of alleged abuses committed by Afghan military or intelligence agencies is not enough

# IS THE CRIME SERIOUS?

- ▶ Violent offenses are serious:
  - ▶ Murder
  - ▶ Terrorism
  - ▶ Violent acts like burning buses
- ▶ Can consider common-law defenses
  - ▶ Knowledge
  - ▶ Duress
  - ▶ Juvenile



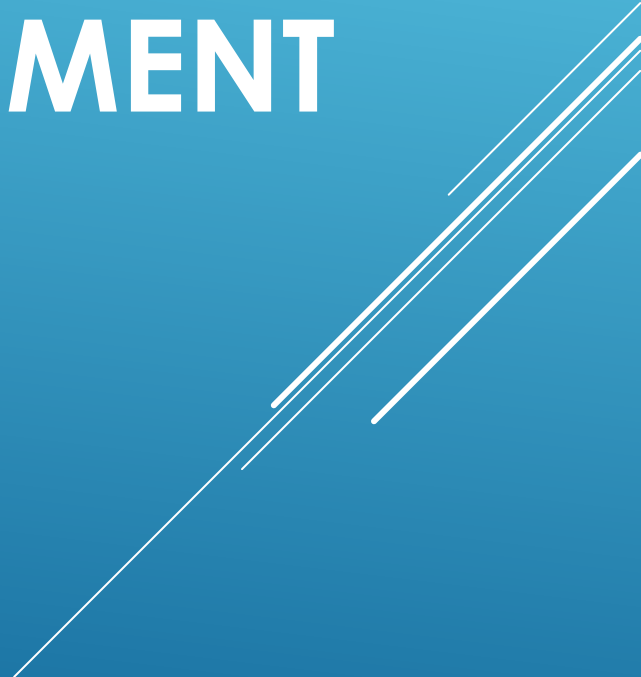
## IS THE CRIME POLITICAL?

- ▶ *Matter of E-A-*, 26 I&N Dec. 1 (BIA 2012)
- ▶ E-A- was sent to events of the opposition Ivoirian Popular Front (“FPI”), in an attempt to make them look bad to the public.
- ▶ On a few occasions E-A-, dressed as an FPI member, burned passenger buses and cars, threw stones, pushed baskets of food off the heads of merchants as they walked on the streets, and threw merchandise off merchants’ tables.
- ▶ No one was ever hurt as a result, even when they set fire to the buses and parked cars.
- ▶ Balancing act of seriousness of crime against political nature. But no balancing needed if the crime is “atrocious”





# FIRM RESETTLEMENT





# THE FIRM RESETTELEMENT ANALYSIS

- ▶ Congress codified firm resettlement as a statutory bar to asylum by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996.
- ▶ As a result, under INA § 208(b)(A)(vi), an applicant is ineligible for asylum if he or she was “firmly resettled in another country prior to arriving in the United States.”
- ▶ Must be a refugee before being firmly resettled!



# BEWARE THE ENJOINED REGS!

- ▶ Code of Federal Regulations Currently Includes Enjoined Regulations on Firm Resettlement (Part of So-Called "Death to Asylum" rule that never went into effect)
- ▶ Challenging to pull up a current version of the regulations
- ▶ Tip—Go to <https://www.ecfr.gov/>
  - ▶ Enter the Regulation 8 CFR 208.15 and the date of December 1, 2020

# FIRM RESETTLEMENT FRAMEWORK

- ▶ Four elements to consider for firm resettlement:
  1. After Entry, an Offer or Pathway to an offer of Firm Resettlement
  2. Rebuttal Evidence
  3. Totality of the Circumstances
  4. Exceptions
- ▶ *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011).
  - ▶ *Does not apply to withholding*
  - ▶ Length of time in a country alone does not indicate firm resettlement if there is no offer of permanent status!



## MATTER OF K-S-E-

- ▶ Precedential decision later vacated by the Ninth Circuit and BIA (but still listed on EOIR website!)
- ▶ Argue that because vacated is no longer precedential; however, advocates should be aware of case if DHS tries to argue that reasoning applies to Afghans
- ▶ Follows the A-G-G- analysis and found a Haitian who resided in Brazil prior to seeking asylum in the U.S. subject to the firm resettlement bar

# FIRM RESETTLEMENT EXAMPLE

- ▶ Afghan asylum applicant Samira lived in Pakistan for eight years, from 2014-2022.
- ▶ Samira was undocumented in Pakistan and was never offered or obtained any type of permanent resident status in Pakistan. Samira was later granted humanitarian parole and enters the United States.
- ▶ **Was Samira firmly resettled?**

# REGULATORY EXCEPTIONS

- ▶ Restrictive Conditions. 8 C.F.R. 208.15(b)
- ▶ “the conditions of his/her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled.”
- ▶ No Significant Ties 8 C.F.R. § 208.15(a)
- ▶ Entry into country was a necessary consequence of his/her flight from persecution
- ▶ Remained only as long as was necessary to arrange onward travel
- ▶ Did not establish significant ties in that country



# FIRM RESETTLEMENT?

- ▶ After leaving Afghanistan, Abdul spent several months in Turkey, where he was offered refugee status. Conditions in Turkey were very difficult. He did not have freedom of movement and he was under constant surveillance by the government. He faced discrimination when looking for jobs and housing. He had no family in Turkey. As soon as Abdul could obtain a nonimmigrant visa, he traveled to the United States
- ▶ **Was Abdul firmly resettled?**



QUESTIONS?

