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Shining a light

Pro bono attorneys fight to expose how asylum seekers are labeled as terrorists

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The terrorism bar

A government standard shrouded in secrecy has labeled many asylum seekers as terrorists — and a group of pro bono Chicago attorneys are fighting to keep them here

by Roy Strom

Anative of Ethiopia now in his mid-40s escaped torture in his civil war-torn East African country to find safety in America. He has legally lived here for roughly eight years, but instead of savoring freedom, he's been fighting a stigma.

The U.S. government labeled him a terrorist.

Known to Chicago's federal court and the public only by the pseudonym "F.H.T.," he has been free to work, pay taxes and even father a child in Indiana. But for four of those years — since 2009 — the government has considered him a terrorist and has been fighting to deport him.

F.H.T. resides in a veritable no-man's land. He has been dubbed a threat to Americans, yet he is allowed to live among them for the years it takes to determine that label's veracity. Former U.S. Sen. Richard Lugar of Indiana even intervened on his behalf when his work visa lapsed, helping to save his job.

His case and thousands of others like it are the result of a post-9/11 definition of "terrorist" that many see as overly broad and too widely applied.

The issue sparks more pro bono legal work than the sporadic news coverage it also generates — such as Nelson Mandela being taken off a terrorist list in 2008 or an outcry the same year when Iraqi translators who worked for the U.S. Army faced deportation despite letters of recommendation from military members.

The basic concern, said Ashley Huebner of the Chicago-based National Immigrant Justice Center, is that the definition of terrorism adopted in the 2001 Patriot Act and broadened by the 2005 Real ID Act denies safety in America to otherwise eligible asylum applicants who have fled persecution in their homelands.

In many cases, Huebner said, the very reasons why the clients — such as F.H.T. — the NIJC represents are seeking asylum is the same reason they will be labeled a terrorist. Children soldiers who were coerced into military service and subsequently escaped to America are a common example.

"It's very clear that (NIJC's clients) are not a danger to national security. And they're not people that anybody would ever interpret as being a terrorist," Huebner said.

The Department of Homeland Security did not respond to repeated calls and e-mails seeking comment for this story.

Two pro bono cases winding through Chicago courtrooms could shine a light on the shrouded bureaucracy behind "terrorism bars" — the procedure used to block terrorists from American soil.

One case seeks to answer at least two basic questions: Who in the U.S. government determines who should be labeled a terrorist? And what information do they use?

A second case asks what happens when the government screws up, which T.J. Maas, F.H.T.'s pro bono attorney, says happened to his client.

"At the time (F.H.T.) was growing up, essentially your choice was you either get killed by the Ethiopian army; join the Ethiopian army to kill your countrymen; or you're going to join the rebels, the freedom fighters," said Maas, a Katten Muchin Rosenman associate.

"So you basically have a situation where most of the country would be barred from asylum."

Terrorism defined

F.H.T. grew up amid a gruesome civil war that resulted in a sliver of Ethiopian land bordering the Red Sea becoming its own country — Eritrea — in 1993.

As a 15-year-old, F.H.T. assumed a nonviolent, "logistics-only" role in the war, Maas said. For nine years, he drove supply trucks and did other odd jobs for the Eritrean People's Liberation Front on its way to winning independence.

"His role was entirely nonviolent," Maas said. "There's really been no question about that."

Despite his service, the new government imprisoned F.H.T., accusing him of being a "political dissident," Maas said. F.H.T. escaped and traveled to America, where he applied for asylum shortly after his arrival.

Maas and a group of other pro bono attorneys at Katten — including Alex Vesselinovitch, Mike Lusardi, Christina Morrison and Jonathan Baum — worked on the case with the NIJC beginning in 2007. The lawyers proved F.H.T. met the U.N. Convention Against Torture's requirement for asylum: that the asylum seeker would "more likely than not" face torture if returned to his or her home country.

F.H.T.'s case stumbled, though, when in 2009 DHS said his involvement in his coun-

try's civil war counted as providing "material support" to a terrorist organization. On May 22, 2012, the Board of Immigration Appeals confirmed the DHS finding.

"Because he was involved with this group at a young age," Maas said, "he could basically never get asylum."

Since the Patriot Act's passage more than 10 years ago, the U.S. has used a three-tiered system to designate terrorists and terrorist groups.

Al-Qaida, Hamas, Hezbollah and about 40 other organizations believed to be a threat to national security are designated by the State Department as "Tier I" terrorist groups. There's a similar list of "Tier II" groups determined by the State Department — the difference is, they aren't explicitly labeled a "threat to national security."

Most of the concern about the breadth of the terrorism definition stems from the "Tier III" classification — "Any group of two or more individuals, whether organized or not, which engages in, or has a subgroup that engages in, terrorist activity."

Broadening that net even further is the so-called "material support" provision of "terrorist activity." The U.S. Citizenship and Immigration Services website sums up material support as "any action that can assist a terrorist organization or one of its members in any way."

The USCIS website alludes to the problem Huebner and others have long railed against: "The (Immigration and Nationality Act) defines terrorist activity quite expansively such that the term can apply to persons and actions not commonly thought of as terrorists and to actions not commonly thought of as terrorism."

The NIJC's Huebner sees at least one solution: Eliminate the Tier III definition.

"It doesn't do anything the law couldn't already do," she said.

DHS did not respond to questions about whether it considered Tier III problematic or if it had considered enforcing it differently.

In F.H.T.'s case, DHS argued that his involvement with the EPLF — which was later found to have committed murders during the war — constituted material support. He currently faces deportation to a country other than Eritrea; his homeland is still too dangerous for him to return to.

"When the allegation was made ... you're trying to figure out what that means."

— Raven Moore



That finding also threw F.H.T. into a sort of bureaucratic black hole that is now the subject of an appeal before the 7th U.S. Circuit Court of Appeals. The case, *F.H.T. v. Eric Holder Jr.*, No. 12-2471, was argued in mid-April and was awaiting a decision as of early July.

Broadly defined, widely applied

F.H.T.'s case turned out to be a far-from-typical one. As one 7th Circuit judge described it, F.H.T. was in a bureaucratic Catch-22 — seeking relief from DHS and an immigration court, but both telling him to go to the other.

His situation, though, is not uncommon. There are thousands of people living in America who are labeled as terrorists.

The government has periodically provided statistics on terrorism bar exemptions — refugee applicants and asylum seekers (the difference is that refugee applicants are not yet living in America) that have had an initial terrorist bar claim against them waived.

DHS did not respond to a request to update the statistics, but as of Feb. 29, 2012, there were 4,623 cases on hold that were seeking an exemption. The number is probably bigger, or at least set to grow, because it can take a number of years for these cases to reach the exemption process.

Consider a pro bono case handled by Raven Moore, currently a McDonald's Corp. in-house lawyer, who began work on the NIJC's

behalf in 2005 when she was a Reed Smith associate. She has been handling the same case ever since.

Moore's client, whom she declined to identify, is an Ethiopian woman who was captured by her government and tortured for her role as a member of a political opposition group. Moore said the group — which has an explicit nonviolent mission — is registered within the U.S. and has offices in the nation's capital.

"You've got organizations that are being alleged to be Tier III organizations that have registered with the federal government; that have offices within the United States; and whose members obtain visas and come here to visit. And here we have a situation where that organization is alleged to be a terrorist organization," Moore said.

Moore's client fled to America in the early 2000s after escaping imprisonment. She applied for asylum shortly after arrival. She was denied in 2005. Three years later, Moore was informed her client met the Tier III definition of a terrorist.

"We did not expect it," Moore said. "When the allegation was made that she's a member of a Tier III organization, you're just in a situation where you're trying to figure out what that means."

What it means is the government met its burden to show in Moore's client's case that the evidence indicated Moore's client was a

member of a terrorist group.

"So what does that mean? It sounds like a pretty low threshold," Moore said. "In most instances, you'll find that burden is satisfied."

In early July, an immigration judge cited a terrorism bar and denied Moore's client's request for asylum. The client now faces deportation to a country other than Ethiopia.

What is frustrating for Moore and other attorneys involved in the process is how long these cases take and how little information the government offers on how the Tier III terrorism bar is used.

For instance, why did it take three years to determine that the organization Moore's client was a part of was a terrorist group? Who made that decision? And what did they base it off of? These questions are not answered in a typical terrorism bar case, the NIJC's Huebner said.

"The government (has) a lot of power to use it against almost anybody," she said.

Seeking answers

A pro bono lawsuit in Chicago's federal court, meanwhile, is attempting to uncloak the workings of the terrorism bar bureaucracy and find answers to some of those questions.

In September, Anthony Eliseuson — a Dentons partner working pro bono with NIJC — sent a Freedom of Information Act request to DHS and a number of its suborganizations that carry out aspects of implementing the terrorism bar.

That letter initially led to correspondence between Eliseuson and a variety of agencies — mostly the USCIS, which agreed to a rolling production of terrorism bar-related documents and initially handed over some 800 pages, which Eliseuson called "the tip of the iceberg."

"If anything, that just signals there's a lot more substantive materials out there," he said.

But the flow of materials abruptly froze when Eliseuson received an e-mail telling him the NIJC was no longer considered a "media organization" and would not be given a fee waiver to produce the documents.

"They never actually said, 'Here are the amounts of search fees we want you to prepay.' But that's one way an agency can delay or thwart handing over records," he said.

The natural countermove? File a lawsuit,

which he did in federal court on Dec. 5.

Eliseuson's goal is somewhat difficult to describe because, as he said, "We're obviously handicapped by the fact that we don't know what documents or records the government has."

Nonetheless, the 24-page request (and ensuing lawsuit) sought a lot of material, Eliseuson said. Who has the power to label an organization a Tier III group? How does the government interpret the "evidence indicates" burden? What is the process for creating and implementing waivers to the terrorism bar? Whose authority does that process rest under?

As an example of the evasions he has received throughout the course of his pro bono work for NIJC, Eliseuson points to a question he has over the existence of a list of Tier III organizations.

While Tier I and Tier II terrorist groups are published, the government has never provided a public account of Tier III groups. Eliseuson is convinced such a list exists. It almost has to, he said.

"I don't know how there can't be a list," he said. "There's either some sort of database or I guess it would be a completely arbitrary process where government attorneys could sort of make up what a Tier III organization is on the fly."

Daniel Riess, a Justice Department attorney handling the FOIA lawsuit, said only that "the Justice Department doesn't comment on pending litigation."

If the lawsuit is successful at shining a light on DHS and USCIS procedures for implementing the terrorism bars, Huebner and Eliseuson said litigating against the government will become easier for the hundreds of pro bono attorneys who represent clients in these matters.

"On a broader level, we could argue against how the terrorism bar is being used," Huebner said. "If the government is relying on very poorly substantiated documentation, then that's going to make a significant difference."

'A complete Catch-22'

The biggest question remaining appears unlikely to be directly answered by the government: Why is this happening?

Nobody disputes the underlying principle behind terrorism bars — to prevent terrorists from entering America.

DHS says these people are dangerous to society but also lets them live here freely for years. DHS didn't respond to a request to address this scenario.

Huebner said the reality is more complex than potential hypocrisy. In the majority of cases on hold, Huebner said, DHS does not believe these people represent a danger to society. The problem is that immigration judges do not have the authority to issue waivers for terrorism bars. And DHS has not created a process to review and adjudicate the majority of waivers.

"The government actually doesn't believe they are a danger at all," she said. "What the government is saying is 'We think you're subject to a terrorism bar based on the statutory language. We think you're also subject to a waiver of that. But we can't make that determination yet.'"

Complicating things even further is the view that if the NIJC pushes DHS to move along with these cases, it could be forced to deport NIJC clients.

"In some of these cases, we believe the safest thing for our clients right now is hold off and wait. But obviously doing that for seven years is extremely difficult," she said.

This is that bureaucratic black hole that F.H.T.'s 7th Circuit appeal is arguing against. His lawyers contended DHS should grant him

a waiver of the terrorism bar because he meets all other requirements for asylum — the only stain on his file is the terrorism label they say is inaccurate.

DHS has a policy that the Board of Immigration Appeals needs to make that determination. But the board — citing judicial economy — said it did not need to consider the rest of his case because the terrorism bar was in place.

In oral arguments, Diane S. Sykes, a 7th Circuit judge on the panel reviewing F.H.T.'s case, summed it up this way: "It's a complete Catch-22. And how does that make any sense when the waiver opportunity is given on the one hand by Congress and taken away on the other hand?"

A Department of Justice attorney arguing the government's point said: "These are matters related to national security and foreign policy in which the executive branch must have latitude. Could it be that it might in some cases decide: 'Well, some cases we'll decide, some we'll deny and some we won't even decide.' The statute grants the executive branch the authority and the prerogative to do that."

The arguments, NIJC's Huebner concluded, amounted to "a lot of bureaucratic back and forth. And what gets missed in that is, these are humans." ■

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— T.J. Magos

