

1 non-exclusive examples. Funding is one of them. The Congress
2 did not say significant levels of funding. It just said funding
3 and funding per se is material support. In this regard --

4 MR. OSUNA TO MR. MARTIN

5 So, if someone provides a pocket full of change knowing that
6 the organization might be a terrorist organization, that's
7 sufficient in your view?

8 MR. MARTIN TO MR. OSUNA

9 That, that, that's correct, Your Honor, and for that I would
10 cite to Bowling v. Carottic, Literary Institute, which was cited
11 in the Department's Immigration Court brief which is at Exhibit 8
12 and I would also give you a hypothetical in that regard. Say
13 that a member of a terrorist cell were to ask to borrow \$5.00
14 from someone to buy a simple electronic component that was
15 necessary to complete a trigger device on a, on a bomb. If there
16 was a de minimis exception, that would not constitute material
17 support because it's only, after all, five dollars. There is no
18 de minimis exception to funding.

19 MR. OSUNA TO MR. MARTIN

20 Thank you.

21 MR. MARTIN TO MR. OSUNA

22 I'll first address the question the Board posed to the
23 parties whether in light of Matter of Ibatoola and Matter of
24 Rodriguez-Mojano, to what extent the Board should factor in an
25 organization's purpose and goals in order to assess whether an

1 organization like the CNF is engaged in terrorist activity. In
2 other words, is the use of justifiable force against illegitimate
3 regime and the right of people to self-determination a valid
4 purpose which does not fall within the definition of terrorist
5 activity under the Act even if the assistance provided may result
6 or contribute to the possibility of harmed innocent civilians?
7 In response to this question, the Department respectfully submits
8 that Matters of Rodriguez-Mojano and Ibatoola are (indiscernible)
9 to the specific legal issue and statutory framework at hand
10 today. As a general matter, both of those precedent decisions
11 were issued by the Board prior to the Immigration Act of 1990 in
12 which Congress first promulgated the 212 material support
13 terrorist activity statutory framework. As far as my research
14 indicates, there are no clear statements in the legislative
15 history to the 1990 Act or any of the other subsequent amendments
16 to the statutory framework demonstrating that Congress intended
17 to include some form of a justifiable force against the
18 illegitimate regime exception deriving from Rodriguez-Mojano and
19 Ibatoola and contrary to plain meaning of the statutory language.
20 Moving on to specifically examine Matters of Rodriguez-Mojano and
21 Matters of Ibatoola -

22 MR. OSUNA TO MR. MARTIN

23 Counsel, let me just interrupt you for a second. So, so,
24 under that reading then there is no exception at all for the
25 nature of the organization or the nature of the regime against

1 which it's, it's, it's fighting. Let's say we have a situation
2 where somebody comes in and applies for asylum and it comes up
3 that they supported the Northern Alliance against the Taliban
4 during the 1990's, clearly a regime that was illegitimate in our
5 eyes and in the eyes of, you know, I think every government
6 except two in the world. Is it your contention that that former
7 member or supporter of the Northern Alliance is ineligible for
8 asylum?

9 MR. MARTIN TO MR. OSUNA

10 Your Honor, I would note that that the note that the
11 question of a member of such a group is not before the Board
12 today.

13 MR. OSUNA TO MR. MARTIN

14 Oh, I'm sorry. I meant that provided material support,
15 let's say, somebody provided funding for the Northern Alliance in
16 the 1990's against the Taliban.

17 MR. MARTIN TO MR. OSUNA

18 Under the Department's reading of the statute enacted by
19 Congress, that would be, that would constitute material support
20 and that person would be potentially barred but would have other
21 avenues of protection such as CAT deferral or the exercise of the
22 Section 212(d)(3) exception.

23 MR. PAULEY TO MR. MARTIN

24 Would the same apply to a person who provided material
25 support to the Taliban to fight the Northern Alliance?

1 MR. MARTIN TO MR. PAULEY

2 Your Honor, in that, in that case, wouldn't you have to get
3 into the question whether it was unlawful and if, if, if the
4 Taliban was the government of Afghanistan at that time and it was
5 legal under the laws of Afghanistan, whether we agree with them
6 or not, I think there would be an issue as to whether that would
7 be material support barring one.

8 MR. PAULEY TO MR. MARTIN

9 What about the example that Mr. Neufville gave or it's in
10 the brief I think about, let's say, somebody who provided
11 material support to the ANC, let's say in the early '60's when
12 they ANC was, was, you know, an organization that (indiscernible)
13 engaged in forced or in violent activities let's say, is that
14 person today ineligible for asylum?

15 MR. MARTIN TO MR. PAULEY

16 Your Honor, they potentially, if I'm understand your, your
17 question correctly, they may be potentially barred but, again,
18 they may well be eligible for a potential 212(d)(3) exception.

19 MR. OSUNA TO MR. MARTIN

20 As long as their not in, that's the waiver or --

21 MR. MARTIN TO MR. OSUNA

22 That's the exception created by Congress or revised by
23 Congress as part of the Real ID Act that after the institution of
24 removal proceedings, it was committed to the discretion of --

25 MR. OSUNA TO MR. MARTIN

1 Right.

2 MR. MARTIN TO MR. OSUNA

3 -- the secretary.

4 MR. OSUNA TO MR. MARTIN

5 So, as long as that person's not in removal proceedings,
6 they, they can get that waiver, is my understanding of the
7 statutory language.

8 MR. MARTIN TO MR. OSUNA

9 It, it, it, it depends who exercises the --

10 MR. OSUNA TO MR. MARTIN

11 Okay.

12 MR. MARTIN TO MR. OSUNA

13 -- authority.

14 MR. PAULEY TO MR. MARTIN

15 You're suggesting there are no limits on the statutory
16 language. We have had one appeal, Anicus, that U.S. troops could
17 be deemed to, to be involved in terrorist activities under the
18 scope of the statute and, and that someone who supported,
19 provided material support to, let's say, British military or the
20 British military at the time of the invasion of Iraq, I'd assume
21 that those actions would be unlawful from the prospective of the
22 then existing Iraqi regime. Would that person, in your opinion,
23 be a supporter of a terrorist organization?

24 MR. MARTIN TO MR. PAULEY

25 Your Honor, I, I hesitate -- I mean, you'd have to look at

1 all the facts of the situation and, respectfully, --

2 MR. PAULEY TO MR. MARTIN

3 But you have to look --

4 MR. MARTIN TO MR. PAULEY

5 -- in fact, that question is not, is not before the Board
6 today. If, if it were, if it were to come up, we'd have to
7 carefully look at much more than just the bare question. That,
8 that's too complex a question for you to (indiscernible).

9 MR. PAULEY TO MR. MARTIN

10 I think the question is valid in terms of are there any
11 limits to the scope of this language that we all agree is very
12 broad because if you read the language literally, there --

13 (indiscernible) situation of the, of the, of the Iraqi
14 national that provided information to the U.S. Marines who went
15 in to rescue Jessica Lynch (phonetic sp.). Did that person
16 provide material support to a terrorist organization?

17 MR. MARTIN TO MR. PAULEY

18 Indeed. I mean, the, the position of the Department is, is
19 extremely broad. The Congress intended it that way, to, to be
20 able to capture all potential forms of, of terrorist activity and
21 material support to terrorist activity. But, as part of that
22 same statutory framework, there is the 212(d)(3) exception to
23 except out cases in appropriate circumstances. Moving on to
24 specifically examine Matters of Rodriguez-Mojano and Matters of
25 Ibatoola. In those decisions, the Board was considering the

1 concept of engaging in persecution on account of one of the five
2 protected grounds in the context of civil war scenarios with
3 opposition groups fighting to overthrow ruling governments. This
4 is a fundamentally different issue, however, from whether an
5 organization has engaged in terrorist activity within the meaning
6 of the Act. The respective statutory frameworks are completely
7 separate and different. Further, the underlying, the potential
8 underlying factual scenarios may vary. Terrorist activity, for
9 example, can occur both within and without of the civil war
10 context. In addition, specific aspects of the Board's analysis
11 also make these two precedent decisions dispositive to the
12 material support terrorist activity framework. For example, the
13 Department would respectfully point out in Matter of Rodriguez-
14 Mojano, a key aspect of the Board's analysis was its finding that
15 "persecution requires some degree of intent on the part of the
16 persecutor to produce the harm that the applicant fears in order
17 that the persecutor may overcome a belief or characteristic of
18 the applicant". By contrast, Congress did not require any
19 showing that a terrorist organization or ones that provide
20 material support to such an organization possesses an intent to
21 produce harm to overcome a belief or characteristic or any
22 protected ground for that matter. Congress focused on the acts
23 themselves not on the presence or absence of any specific
24 underlying motivations or moral justifications. The analysis of
25 the Board in Matter of Ibatoola is also dispositive to the