



May 6, 2022

## ***Status Brief: Havlish Case and the Fate of Da Afghanistan Bank (DAB) Funds***

### **Purpose of Status Brief**

Given the complexity of the issues surrounding the current status of billions of dollars in assets owned by Afghanistan's central bank, Da Afghanistan Bank (DAB), and held within U.S. financial institutions, several months ago the Afghan-American Foundation ("AAF") requested that its outside counsel monitor developments in this area and advise AAF on pathways to ensure that Afghan and Afghan-American equities were represented. In that time, a number of developments have taken place, including President Biden's February 2022 issuance of an Executive Order relating to the property of DAB.

Along with the Executive Order, there have been significant developments in the decades-long litigation involving families of victims of the September 11, 2001 attacks. These developments have included the intervention by or on behalf of a number of parties with a purported interest in this litigation, particularly given the implications it could have on the frozen DAB assets. With the assistance of counsel and based on requests from within the Afghan-American community for a distillation of these matters, AAF has reviewed the relevant briefings and prepared this status brief intended to offer a high-level summary of the litigation and the main issues now before the court.

### **Legal Background**

Numerous lawsuits arose out of the September 11, 2001 terrorist attacks ("9/11 attacks"), including suits from family members and legal representatives of victims against those that supported al-Qaeda to carry out the attacks. One such case was brought by 150 family members and legal representatives of victims, known as the *Havlish* Plaintiffs, against a number of sovereign and non-sovereign Defendants, including Osama Bin Laden, al-Qaeda, the Taliban, the Islamic Republic of Iran, and the Supreme Leader of Iran, among others. The *Havlish* Plaintiffs sought and obtained a default judgement, meaning that the judge ruled in favor of the Plaintiffs because none of the Defendants appeared in the case and presented a defense, on December 22, 2011.

The *Havlish* case is part of a multi-district litigation ("MDL") involving approximately 350 cases related to the 9/11 attacks. There has been limited success by the various plaintiffs to recover funds to satisfy their default judgments until the Taliban takeover of Afghanistan in 2021. Since then, a number of plaintiff groups have sought to use the nearly \$7 billion of Da Afghanistan Bank ("DAB") funds held in the Federal Reserve Bank of New York to satisfy their judgments. They argue that their judgments against the Taliban can be enforced against the assets of the government of Afghanistan, such as the funds of its central bank, because the Taliban has seized control of the country and claimed control over the government's property. The *Havlish*

Plaintiffs were the first to file a writ of execution on these funds, but numerous other plaintiff groups are asserting claims and argue that the funds should be equitably divided amongst the numerous 9/11 victims and their family members since the various claims in the MDL far exceed the frozen DAB funds.

### **United States Government's Involvement in the *Havlish* Case**

The Biden administration intervened in the *Havlish* case shortly after the *Havlish* Plaintiffs served the writ of execution, which essentially paused the proceedings. Months later, they filed a Statement of Interest ("SOI") in the *Havlish* case and issued an Executive Order addressing how the DAB funds were to be handled. In short, effectively one half of the frozen funds were allocated to support humanitarian aid in Afghanistan and the other half to remain in the United States, "subject to ongoing litigation by U.S. victims of terrorism."

Whether the later portion of assets can be used to satisfy judgments in the *Havlish* or other MDL cases was not settled by the SOI. The SOI said, "The question remaining for the Court is therefore whether the unlicensed DAB Assets are 'blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party).'" The SOI does not take a position on how that question should be answered, but identifies a number of issues for the court to consider that some commentators suggest would make it hard for the *Havlish* and other plaintiffs to prevail.

### **Subsequent Filings & Amici**

Unsurprisingly, the *Havlish* Plaintiffs replied to the SOI by saying they are still entitled to the DAB funds and largely side-stepped the considerations presented in the SOI.

Besides the plaintiff groups and government, other groups and individuals have filed petitions for permission to file a brief in the case as an *amicus curiae* or "friend of the court." These groups and individuals are not parties in *Havlish* or the other MDL cases, but offer unique information or perspectives intended to influence the court's decision. In federal district courts, there are no rules or standards for obtaining leave to file an amicus brief and it is within the court's discretion whether to deny or allow such briefs. The amici briefs that sought permission to file all spoke to the interests of the Afghan people. Because the state of Afghanistan has not been a party to any of the cases and there is no current government that is recognized and can speak to the interests of these people, the amici briefs offered a voice for and perspective from those who are likely to be impacted by the court's decision.

Three amici briefs were filed and accepted in both *Havlish* and the MDL, along with one letter to the MDL judge that was treated as an amicus brief. Those briefs were written by the Women's Forum of Afghanistan, Unfreeze Afghanistan, a collection of Afghan civil society and grassroots organizations, and Naseer A. Faiq. One additional brief sought, but was denied permission to file. That amicus came from Peaceful Tomorrows, which was founded by families of victims of the 9/11 attacks to advocate for peaceful and nonviolent solutions to international conflict. Their brief was rejected because a number of the group's members are parties to the MDL.

It is important to note that none of the amici briefs challenged the *Havlish* judgment, but instead argued that the DAB funds do not belong to the Taliban and are not funds that can be used to resolve the case. All of the amici briefs struck a respectful tone and recognized the tragedy of the

9/11 attacks. They also touched upon the humanitarian crisis that is plaguing the country and people of Afghanistan and the economic implications, both nationally and internationally, of using the DAB funds to satisfy judgments against the Taliban. The amici briefs made a number of legal arguments as to why the DAB funds do not belong to the Taliban and cannot be used to satisfy judgments against the Taliban. They spoke to the considerations raised in the government's SOI, but also raised new arguments and suggested ways to prevent the Taliban from misappropriating aid funds.

### **Next Steps**

The judge in the MDL has closed the window to request permission to file an amicus brief. The *Havlish* Plaintiffs and potential other plaintiff groups of the MDL are likely to file replies to the amici briefs and have until May 13, 2022 to do so. At this time, it is unknown whether the Biden administration would again weigh in on the situation.

The central question as posed in the SOI and addressed in subsequent briefs from the *Havlish* Plaintiffs and amici is “whether the unlicensed DAB Assets are ‘blocked assets of [a] terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party).’” The resolution of this issue is likely to directly impact the hundreds of cases that are part of the MDL and millions of Afghan people. Further, the government SOI suggested and amici briefs argued that the resolution would impact separation of powers, foreign sovereignty, and settled principles of international law. Given these complications, it is unclear when the judge will make a decision as to whether the DAB funds can be used to resolve the *Havlish* judgments or other cases.



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