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Editor's note: This post has been updated to address the Guatemala Safe Third Country Agreement that United States and Guatemalan officials announced on Friday, July 26.

On July 24, Judge Jon Tigar of the U.S. District Court for the Northern District of California issued a preliminary injunction in the matter of *East Bay Sanctuary Covenant v. Trump* against the new third country asylum rule recently announced by the Department of Homeland Security (DHS), which would bar foreign nationals who cross the U.S.-Mexican border from seeking asylum if they transited through a third country while en route to the United States without doing so. Tigar's decision came shortly after Judge Timothy Kelly of the U.S. District Court for the District of Columbia District declined a similar request to issue a temporary restraining order (TRO) against the DHS rule. Unlike Kelly's decision, the preliminary injunction issued by Tigar applies nationwide and thus has effectively halted implementation of the new asylum rule.

While Kelly has not issued a written opinion, news reports indicate that he found that the refugee organizations challenging the DHS rule did not show the irreparable harm required for a TRO. (That said, he may revisit that issue when he considers the motion for a preliminary injunction that the plaintiffs in that matter will most likely file following his denial of the TRO.) In contrast, Tigar found that the refugee group plaintiffs in *East Bay* had shown that they would suffer irreparable harm absent injunctive relief while the harm to the government of providing that relief would be minimal. He also concluded that the plaintiffs were likely to succeed on the merits, because the DHS rule likely clashed with the detailed statutory scheme Congress had outlined through the Immigration and Nationality Act (INA) and the rule appeared to violate the requirements of the Administrative Procedure Act (APA). Thus, according to Tigar, the plaintiffs had made a showing that a preliminary injunction should issue.

The DHS rule that Tigar enjoined Wednesday would effectively gut asylum in the United States for virtually everyone who tried to enter the country at the U.S.-Mexican border. Under the rule, the government would deny asylum to claimants at the southern border who passed through a third country on their way to the United States but did not seek asylum in that country. The central condition in the rule is that the country through which the asylum seeker traveled must purport to offer protection from persecution and torture, even where that putative protection abjectly fails to match conditions on the ground.

Since almost every country, no matter how repressive or corrupt, is a signatory to the 1951 Refugee Convention, the 1967 Refugee Protocol, or the Convention Against Torture, this condition is not a sound metric for a country's safety. Both Mexico and Guatemala meet the new rule's lax standard, despite being plagued by epidemics of crime and violence. The new DHS rule categorically denies asylum to all foreign nationals who fail to apply for protection in these troubled countries or other countries they travel through en route to the United States. In effect, this would deny asylum to practically *all* refugees entering the United States at its southern border.

While the spiking numbers of new entrants at the southern border—particularly those from Central America—undoubtedly presents a policy challenge, Tigar correctly concluded that the new DHS rule is a bridge too far. In making this finding, Tigar observed that the INA already has in place categorical bars to asylum involving an asylum applicant's stay in another country prior to seeking asylum in the United States. However, the provisions in the INA also include careful limits that protect refugees whose stays in other countries are merely temporary and do not allow for fair adjudication of asylum claims. The new DHS rule ignores those limits, driving Tigar to conclude that the rule undermines the INA's statutory scheme.

One of the INA's mandatory bars denies asylum to a foreign national who en route to the United States passes through a country with which the United States has a safe third country agreement. As 8 U.S.C. § 1158(a)(2)(A) explains, such agreements must be express, meaning each country must formally agree on the specific terms of the agreement and publicize the pact. In addition, to remove a foreign national to another country that is a party to such an agreement with the United States, U.S. officials must specifically determine that the foreign national will *not* be at risk for persecution and *will* receive a "full and fair" hearing on his or her asylum claim within the territory of another state party to the pact.

Now *those* are robust conditions. While denying asylum under a safe third country agreement may seem harsh, at least that result stems from rigorous criteria based on international law, such as procedural fairness and the ability to live in safety. Testifying to the rigor of these standards, the *only* current U.S. safe third country agreement is with Canada, a country whose rule-of-law institutions resemble those of the United States. Few other countries match the United States and Canada in that crucial attribute, and Mexico and Guatemala have a long way to go before they are in that number. Bona fide asylum seekers don't have that much time.

While Mexico continues to resist making a safe third country agreement with the United States, Guatemalan and U.S. officials have apparently entered into such an agreement. I say "apparently" because the agreement is not yet public and Guatemalan Interior Secretary Enrique Degenhart has suggested that it is not a "safe third" agreement. Moreover, the pact apparently still requires approval by the Guatemalan legislature. If both

parties finalize the agreement, it will permit the United States to deny asylum claims by any person who has traveled through Guatemala and is not an unaccompanied minor, but has not sought protection in Guatemala. As a practical matter, the agreement will result in blanket denials of claims in the U.S. by asylum seekers from El Salvador and Honduras, virtually all of whom pass through Guatemala.

Despite its agreement with the United States, Guatemala will face extraordinary challenges in protecting asylum seekers from persecution and providing them with a "full and fair procedure" for asylum adjudication, as the INA requires. The U.S. State Department has concluded that Guatemala suffers from dire human rights and governance problems, including "harsh and life-threatening prison conditions; widespread corruption; trafficking in persons; violence [against minorities]… and use of forced or compulsory or child labor." The State Department report also noted that police "ignored writs of habeas corpus in cases of illegal detention." In addition, the State Department detected a "culture of indifference to detainee rights" that made excessive detention a regular practice. In short, if the State Department is a reliable narrator, making Guatemala safe and its legal processes fair is emphatically a long-term proposition. However, that challenging state of affairs will not diminish the agreement's impact on U.S. asylum. Under the INA, safe third country agreements and U.S. official findings based on such agreements are not subject to judicial review. See 8 U.S.C. § 1158(a)(3).

Although the Guatemala "safe third" pact will pave the way for denial of asylum claims by persons who pass through that country, it will not affect the legality of the DHS third country asylum rule as applied to Mexico. As noted above, Mexico to date has not signed a safe third agreement. In the absence of a Mexico agreement, the DHS rule's categorical denial of asylum to all persons who transit through Mexico continues to clash with the INA, as Judge Tigar found.

The DHS rule also clashes with the INA Because of another categorical statutory bar already in the INA that covers the same ground as the new DHS rule but has far more rigorous protections for those fleeing persecution: the bar at 8 U.S.C. § 1158(b)(2)(A)(vi) on asylum for foreign nationals who have "firmly resettled" in another country. Originally adopted by Congress as part of the Displaced Persons Act of 1948, the U.N.-sponsored International Refugee Organization had previously used the firm resettlement criterion to allocate resources for the millions left homeless by World War II's carnage and the relentless persecution perpetrated by Nazi Germany, its allies and its collaborators. As the Supreme Court noted in a case cited by Tigar, *Rosenberg v. Yee Chien Woo* (1971), since its first appearance in the context of the post-World War II refugee crisis, the term "firmly resettled" has been synonymous with permanence, safety and stability.

In *Rosenberg*, the Supreme Court acknowledged that disqualifying a victim of persecution from the chance to claim asylum could not spring from the fleeting and often illusory relief of mere "stops along the way" in the refugee's flight. As the court recognized, firm resettlement "does not exclude from refugee status those who have fled from persecution and who make their flight in successive stages." "[M]any refugees make their escape to freedom" in precisely that episodic fashion, the court acknowledged. Firm resettlement connoted a far more durable status, in which a country accorded the refugee the same "rights and obligations" that it contemplated for its very own citizens.

Congress's own handiwork illustrated that firm resettlement of World War II refugees was an elusive goal. After its legislation in 1948, Congress—pressed by Presidents Truman and Eisenhower—enacted follow-up provisions to aid World War II refugees in 1950, 1953, 1957 and 1960. President Eisenhower, who had firsthand knowledge of the horrors of war in Europe, pushed for and praised the 1960 Fair Share Refugee Act, which Congress enacted as part of U.N. World Refugee Year. Each of these measures used firm resettlement as an express or implicit limiting factor. Congress's action in *1960*—15 years after the end of World War II—to address the global conflict's grim bequest of homelessness illustrates firm resettlement's challenges.

The Refugee Act of 1980 implicitly incorporated firm resettlement in the course of enacting a comprehensive refugee statute to help ensure that the travails of the post-World War II crisis would never recur. As this leading agency decision noted, regulations promulgated in 1980 affirmed firm resettlement's focus on permanence. Congress expressly recognized the concept again in 1996, when it made firm resettlement a categorical bar to U.S. asylum. Based on the nearly *50 years* of refugee legislation that preceded the 1996 law and referred directly or indirectly to firm resettlement, Congress knew *exactly* what it was doing: importing the same rigorous focus on safety and stability that had driven Congress's legislation since 1948.

The rigorous criteria of firm resettlement are light years away from the facile test in the new DHS rule. Merely passing through a country does not signal the offer to live safely and permanently that firm resettlement entails. Only that generous offer should prompt a denial of U.S. asylum. The new DHS rule's decree of the same result based on the refugee's mere transit through a third country undermines the INA's statutory scheme.

Separately, Tigar also determined that the government had failed to satisfy its obligations under the Administrative Procedure Act to address obvious problems with its new policy, rendering the rule arbitrary and capricious. For example, Tigar noted that the U.N. High Commissioner for Refugees had found "severe problems to accessing the asylum procedure" in Mexico. Based on those obstacles, seeking asylum in Mexico was simply not a "feasible alternative" for asylum seekers who valued their safety. Tiger observed that, rather than address these fundamental concerns, the government had sought to "declare its way past the issue," substituting conclusory pronouncements for evidence supporting the rule's reasonableness.

The path of litigation on the third country asylum rule is likely to mirror the path of the administration's equally arbitrary asylum ban, which Tigar enjoined last year. In that case, Judge Jay Bybee of the U.S. Court of Appeals for the Ninth Circuit engaged in a similar structural analysis of the INA's scheme in declining to stay the district court's injunction. (See the amicus brief for immigration law scholars in which I served as co-counsel with Alan Schoenfeld and Alex Gazikas of WilmerHale and Penn State's Shoba Sivaprasad Wadhia.) In the asylum ban case, the Supreme Court also denied the government's request for a stay.

In the Northern District of California challenge to the new DHS rule, Judge Tigar will most likely seek the parties' views on whether he should modify the preliminary injunction in light of the Guatemala safe third agreement. The government will most likely argue that when and if the agreement becomes final, Judge Tigar's injunction should at a minimum exclude asylum seekers who pass through Guatemala from the injunction's coverage. Once Judge Tigar considers the impact of the Guatemala agreement, the Ninth Circuit will have a chance to weigh in if the government requests a stay of the injunction, as it did in the asylum ban case. Eventually, the Ninth Circuit may be joined by the D.C. Circuit addressing Judge Kelly's next ruling, which will decide motions for summary judgment brought by one or both parties. From there, it may not be long before the Supreme Court has its say on the remedies below, and ultimately on the merits of the challenges to DHS's new policy.

Topics: Immigration

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