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The Administration's New Asylum Rule Exceeds Statutory Authority

By Peter Margulies Tuesday, July 16, 2019, 5:10 PM

On July 15, the Department of Homeland Security posted an interim final rule (IFR) that limits asylum by barring applications from 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 third country rule, which became effective on July 16, will sharply restrict asylum claims from Central Americans who have passed through Guatemala and/or Mexico in fleeing violence and severe economic hardship in their countries of origin.

As policy, the third country rule is a poor substitute for a coordinated strategy addressing the rise in Central American asylum claims. And as a legal matter, the new rule fails to fit the text of the Immigration and Nationality Act (INA) and undermines the intricate architecture of the INA's asylum provisions.

The rise in Central American asylum claims is a serious concern that vexed the Obama administration and has similarly challenged Trump administration officials. As this chart (p. 9) from the Justice Department's Executive Office for Immigration Review (EOIR) shows, in recent years EOIR's immigration judges on an annual basis have denied from at least 50 percent to *almost 75 percent* of all asylum claims made by individuals who pass DHS's initial screening. In other words, a majority of asylum claims have legal or factual flaws that fail the test established by Congress. This disparity between claims and results stems in part from the INA's longtime substantive limits on asylum, which protect those at risk for distinctive persecution based on race, religion, nationality, political opinion or membership in a particular social group, and preclude asylum grants for victims of mere generalized violence (no matter how serious) or economic deprivation.

In their statements on the new rule, Acting DHS Secretary Kevin McAleenan and Attorney General William Barr are correct that the substantial increase in asylum claims ultimately found to lack merit has clogged immigration courts, incentivized increased immigration from Central America and increased profits for the smugglers all too happy to exploit their customers' desperate circumstances. If the ability to claim asylum in the United States and obtain work authorization here is a "pull factor" spurring Central American immigration—along with the "push factors" of violence, economic hardship and climate change—requiring asylum seekers to first apply in Guatemala or Mexico might in theory reduce that pull.

That said, the question still remains: Is the new third country rule sound legally and from a policy perspective? First consider the law—specifically, the text and structure of the INA's detailed asylum provision, which by its terms allows "[a]ny alien" at a U.S. border to "apply for asylum" under 8 U.S.C. § 1158(a)(1). Courts have read the asylum provision's reference to "any alien" broadly in the litigation over the administration's asylum ban, which the new rule resembles. In the asylum ban lawsuit, Judge Jay Bybee of the U.S. Court of Appeals for the Ninth Circuit cited the breadth of this statutory language in declining to stay the district court's injunction against the asylum ban, which would have required a denial of asylum to foreign nationals who entered the United States at points along the southern border not officially designated to receive asylum seekers. Citing the asylum provision in the INA, Bybee noted that the statute expressly authorized claims by asylum seekers, "*whether or not* at a designated port of entry" (emphasis added).

As under the new rule, the asylum ban would have eliminated all U.S. remedies for those fleeing persecution, except for withholding of removal and protection under the Convention Against Torture (CAT). Compared with asylum, CAT and withholding are both tougher to obtain (because of a higher standard of proof) and easier to lose (because they do not allow for acquisition of lawful permanent resident [LPR] status). Congress knew the difference between these more restrictive remedies and asylum, and specifically legislated broad eligibility for the latter—a choice both the asylum ban and the new third country rule seek to undermine. (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 Wadhia.) Bybee understood the import of the INA as written, which is why he denied the government's stay request. Notably, the Supreme Court also denied the government's request for a stay. (See Steve Vladeck's important analysis of the administration's efforts to expedite Supreme Court consideration.)

In addition to the text of the INA on broad asylum eligibility relied on by Bybee in the asylum ban case, the INA's *structure* also indicates that the new third country asylum rule exceeds the power that Congress delegated to immigration officials. Under 8 U.S.C. § 1158(b)(2)(C), which the new IFR cites, the government may impose "limitations and conditions" on asylum. However, those restrictions must be "consistent with this section." Section 1158 already includes a prominent exception that addresses the concerns raised by the government under the new rule. Specifically, § 1158(a)(2)(A) provides that the United States may enter into "safe third country agreements" with other states. Under such an agreement, the government may determine that within the territory of another state party to the pact, a foreign national will *not* be at risk for persecution and *will* receive a fair hearing on her asylum claim. Foreign nationals covered by a safe third country agreement will thus not be able to avail themselves of the broad access to asylum otherwise contemplated by the statute.

Reaching a safe third country agreement with either Mexico or Guatemala would be a game-changer under U.S. immigration law. To begin with, the government's resort to such agreements is not reviewable in court under § 1158(a)(3). An agreement with Guatemala would effectively mean that asylum seekers in El Salvador and Honduras, who typically pass through Guatemala on their way to Mexico and then the United States, would have to apply for asylum in Guatemala or be relegated in this country to withholding of removal and CAT relief. An agreement with Mexico would

be an even bigger deal, effectively putting virtually all Central American asylum seekers in the "apply in Mexico" bucket. However, despite urging by the Trump administration, both Guatemala and Mexico have to date resisted such agreements, which would impose heavy burdens on each country to both protect asylum seekers and establish fair and orderly procedures for adjudicating asylum claims.

Mexico's and Guatemala's hesitation is understandable, given the very high historical bar for such pacts. The only safe third country agreement the U.S. currently has is with Canada, a country whose rule-of-law institutions and commitments parallel those of the United States. Moreover, the U.S.-Canada agreement included substantial consultation with the U.N. High Commissioner for Refugees (UNHCR), who reviewed each of the agreement's terms as well as their proposed implementation. There is no indication that the UNHCR has had similar involvement in the negotiations with Mexico and Guatemala.

Legally, the administration's third country rule is an inadequate substitute for the safe third country agreement provided for in the INA. Indeed, the rule is neither safe nor an agreement. It is an arbitrary provision requiring that an asylum seeker apply in another country, whatever the state of that country's institutions and processes for asylum adjudication. Under familiar canons of statutory interpretation, courts view Congress as erecting a particular design based on legislative investigation of the virtues and risks of both that design and its alternatives. Congress's specific provision for one process with elaborate requirements signals disfavor of a unilateral executive action that imposes the same result with *fewer* requirements. A unilateral administrative resort to a different design undermines Congress's own textual and structural choices.

As in the asylum ban case, Congress's provision for broad asylum eligibility and strictly tailored exceptions, such as safe third country agreements, mean that executive officials lack the power to unilaterally impose categorical restrictions. Passage through a third country may be one factor among many in determining eligibility for the discretionary remedy of asylum, but it cannot be the *sole* test. Yet that exclusive test is what the new third country rule purports to create.

In this case, limits on executive power also make policy sense. As part of a coordinated strategy, building state capacity to accommodate asylum seekers in both Mexico and Guatemala would be valuable. However, given the embattled position of rule-of-law institutions in both countries and the prevalence of gang activity and official corruption, those steps are best taken carefully and deliberately. Otherwise, fragile institutions in these countries may break down, and thousands of asylum seekers—including many with meritorious claims—would be at risk. Moreover, each step will require substantial U.S. financial, expert and logistical support. Presumably, the promise of such support was a carrot that McAleenan dangled in his negotiations with Mexico and Guatemala on a possible safe third country agreement. But unilateral executive action is a poor substitute for this methodical planning and implementation.

The American Civil Liberties Union, which has thus far prevailed in the asylum ban litigation, has just filed a challenge to the new third country rule in the U.S. District Court for the Northern District of California. If the district court enjoins operation of the new rule, the administration will have to seek a stay, as it has sought without success thus far in the asylum ban case. The course of litigation over the new asylum rule may well track the asylum ban challenge. Although neither the Ninth Circuit nor the Supreme Court have ruled definitively on the merits of the asylum ban case, the Supreme Court's stay denial provides at least a preliminary indication that the government could face an uphill battle. The same fate may befall the third country asylum rule, with the caveat that an intervening safe third country agreement with either Mexico or Guatemala would materially change the litigation landscape.

Topics: Immigration

Tags: Immigration and Nationality Act, Asylum

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