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New Homeland Security Asylum Rule Allows Removal to Central American Countries That Have Signed Agreements With the U.S.

By Peter Margulies Thursday, November 21, 2019, 10:03 AM

In a new rule, the Department of Homeland Security has taken key steps to implement what it calls asylum cooperation agreements (ACAs) signed earlier with Guatemala, Honduras and El Salvador. The rule authorizes removal of asylum seekers at the southern border of the United States to any of the above-named countries, as long as the removed individuals are not nationals of the particular country that will receive them. Moreover, because Homeland Security has issued the rule under 8 U.S.C. § 1158(a)(2)(A), a provision of the Immigration and Nationality Act (INA) authorizing safe-third-country agreements, the operation of the new rule will be largely immune from judicial review. Although questions surround the implementation of the rule in the Central American countries that have signed ACAs, the new rule will likely reshape asylum claims at the southern border.

Once fully implemented, the ACA rule will potentially apply to any foreign national seeking asylum at the southern border, not merely asylum seekers who have transited through one or more of the countries that have signed ACAs. In other words, under the rule, Homeland Security could send a national of India to Guatemala, Honduras or El Salvador, if that individual wishes to claim asylum at the southern border. In this way, the ACA rule complements Homeland Security's "Asylum Ban 1.0," which bars asylum for anyone seeking to cross the southern border at a location not officially designated as an entry point by immigration officials (*see my post here*), and the department's "third-country asylum rule" (sometimes called Asylum Ban 2.0), which bars asylum to anyone who passed through a third country on the way to seeking asylum in the United States (*see my post here*). Courts, including the U.S. Court of Appeals for the Ninth Circuit, are weighing challenges to the two earlier asylum measures. A preliminary injunction has halted Asylum Ban 1.0, while the Supreme Court issued a stay of the preliminary injunction against Asylum Ban 2.0. In each case, the courts will have to consider whether the ACA rule supersedes either policy, limiting asylum claims independent of the validity of the earlier measures.

The ACA rule has one crucial statutory prerequisite and three major exceptions. Prior to implementation, under the INA the attorney general and the secretary of Homeland Security must determine that an ACA state has a "full and fair" asylum process. Publication of the rule suggests that the attorney general and the secretary of Homeland Security will announce these findings soon. Regarding exceptions, first, the ACA rule does not apply to unaccompanied alien children. Second, officials will not remove an individual if that person can show that it is more likely than not that he or she would be tortured in the ACA destination-country, or would suffer persecution there based on race, religion, national origin, political opinion or membership in a particular social group. Third, officials may determine that removal of an asylum seeker would not serve the public interest. An asylum officer (now sometimes a Customs and Border Protection officer detailed to the asylum process) will determine whether an individual fits within the exceptions—according to the rule, the asylum officer's findings on the second and third exceptions will not be subject to review in immigration court or federal court (the rule does not specifically address review of a finding that an asylum seeker is not an unaccompanied alien child).

While efforts to achieve the ACA rule's stated goal of sharing responsibility for asylum adjudication is sound immigration policy, the rule's implementation will likely place many asylum seekers at risk. Unlike Canada, which as of this month was the only state with which the U.S. had completed and implemented a safe-third-country agreement, the ACA destination countries lack functional rule of law institutions. For example, the U.S. State Department has found 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" and that Guatemalan officials had displayed a "culture of indifference to detainee rights." For this reason, the U.N. High Commissioner for Refugees, a key player in crafting the U.S.-Canada agreement, has expressed "serious concerns" about the current round of ACAs. Absent 180-degree shifts in each ACA country, the new rule will result in outsourcing U.S. asylum adjudication to partners without a track record of even rudimentary adherence to the rule of law.

But the INA will hinder judicial responses to these risks. Because the INA expressly states that official determinations under safe-third-country agreements are not subject to judicial review, any lawsuits challenging the new rule will face significant obstacles. One possible argument is that, prior to publication of the final rule, officials should have subjected it to the notice and comment process generally required under the Administrative Procedure Act. However, the administration may be able to counter that the new rule falls under the foreign affairs exception to the notice and comment process, because the cooperation of other countries is integral to the ACAs' operation.

The new rule's highest hurdle may be the difficulty of cooperation between the United States and its ACA partners, which may limit the rule's implementation, at least at first. The modest processing capacity and delicate political situation in each ACA country may tamp down numbers. Moreover, Guatemalan and U.S. officials are apparently not on the same page regarding destinations within Guatemala for asylum seekers, with reports indicating that Guatemala would prefer to send asylum seekers to remote locations with little infrastructure, while the U.S. wants

Guatemala to locate asylum seekers in more accessible spots closer to routes leading back to El Salvador and Honduras. A small-scale ACA program may also have less of an impact on asylum processing in the United States. Coming days and weeks will reveal more about the ACA rule's implementation and its effect on court challenges to earlier Trump administration asylum limits.

Topics: Immigration

Tags: Donald Trump, Immigration and Nationality Act, Trump Administration

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