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7-8-2020

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Recommended Citation

Peter Margulies, Asylum Update: Ninth Circuit Upholds Injunction Against Third Country Rule, Lawfare (July 8, 2020, 1:22 PM), https://www.lawfareblog.com/asylum-update-ninth-circuit-upholds-injunction-against-third-country-rule

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Asylum Update: Ninth Circuit Upholds Injunction Against Third Country Rule

By **Peter Margulies** Wednesday, July 8, 2020, 1:22 PM

On July 6, the U.S. Court of Appeals for the Ninth Circuit upheld a preliminary injunction in *East Bay Sanctuary Covenant v. Barr* against the third country asylum rule announced in July 2019 by the Department of Homeland Security (DHS). The third country rule would deny asylum to foreign nationals who cross the U.S.-Mexico border if they failed to ask for asylum in a third country they had transited through while en route to the United States. As I discuss at the close of this post, the ruling's practical impact may hinge on proceedings in other courts, including the Supreme Court, which in September 2019 stayed the injunction issued by Judge Jon Tigar of the U.S. District Court for the Northern District of California, which barred DHS from enforcing the rule in four states bordering Mexico: California, Arizona, New Mexico and Texas.

The Ninth Circuit panel was unanimous that the third country rule, as explained by DHS and the Department of Justice, conflicted with applicable federal law. But the panel diverged on the nature of that conflict. Two judges—William Fletcher (a Clinton appointee) and Richard Clifton (a George W. Bush appointee)—found that the rule exceeded power that Congress had delegated to the agencies under the Immigration and Nationality Act (INA). Judge Eric Miller (a Trump appointee) found that the agencies' explanation for the rule failed to show the deliberation required by the Administrative Procedure Act (APA).

According to Miller, DHS and the Justice Department had failed either to make findings regarding asylum-seekers' safety or to expressly balance the trade-offs between ensuring asylum-seekers' safety and streamlining asylum adjudication. This absence of administrative findings was notable, according to Miller, since he framed the rule as a "major change in policy—perhaps the most significant change to American asylum policy in a generation." On the scope of the remedy, Miller would have narrowed the injunction to cover only clients of the immigrants' rights groups that brought the case.

Miller's assessment of the rule impact was on target, since the rule would effectively eliminate asylum for virtually all foreign nationals who try to enter the United States via our border with Mexico. Under the rule, the government would deny asylum to claimants at the southern border who traveled through a third country, including Mexico, but did not seek asylum in that country. The rule's only concession to traditional asylum law is the requirement that the third country must purport to offer protection from persecution and torture. As each member of the panel acknowledged, that nominal protection masks considerable risk to refugees, when—as in the case of Mexico—the provisions in law "on the books" contrast markedly with conditions on the ground.

Almost every country, no matter how repressive or corrupt, is a signatory to the 1951 Refugee Convention, the 1967 Refugee Protocol, the Convention Against Torture or a combination thereof. But actual conditions in such countries vary widely—a fact not recognized anywhere in DHS's explanation of the third country rule. For example, as all the judges in *East Bay* agreed, Mexico happens to meet the new rule's lax standard, despite a raging epidemic of crime and violence. Yet the new DHS rule categorically denies asylum to all foreign nationals who fail to apply for protection in either Mexico or a host of other countries with dysfunctional legal systems. That categorical determination provoked skepticism in all three judges, albeit for divergent reasons worth unpacking. Fletcher and Clifton viewed this as a case of statutory interpretation, hinging on the new rule's clash with the INA, while Miller viewed it as an administrative law case, hinging—like the Supreme Court's recent DACA decision (see my analysis here)—on DHS's failure to adequately deliberate about trade-offs.

Fletcher and Clifton, along with the amicus curiae brief by distinguished professors of immigration law on which I served as co-counsel alongside Shoba Sivaprasad Wadhia of Penn State Law and Alan Schoenfeld andTara Levens of WilmerHale, followed Tigar in concluding that the new rule conflicted with the INA's carefully wrought framework. Fletcher, in an opinion joined by Clifton on this point, relied on a long-standing canon of statutory interpretation that disfavors reading statutory language as superfluous. Under this rule, courts assume that Congress intends all of its language to actually mean something.

Here, a short primer on reading statutes may be helpful. As Justice Brett Kavanaugh has observed, courts do not uniformly apply the canon disfavoring superfluity, because reading a long statute with multiple provisions necessarily involves deciding which section is most relevant to the case at hand. The less relevant provision may appear superfluous, but that result is not a product of flawed interpretation. Rather, it is endemic to the process of judging.

However, courts reach more uniform results when the canon disfavoring superfluity dovetails with a related rule, the specificity canon. Justice Antonin Scalia opined in RadLAX Gateway Hotel v. Amalgamated Bank (2012) that specific provisions of a statute reflect Congress's detailed understanding of a particular issue. Specific text should therefore prevail over more general provisions if the two appear at odds. (Scalia's classic study, "Reading Law," co-authored with Bryan Garner, makes the same point.)

East Bay illustrates this convergence of canons on the disfavoring of superfluity and prioritizing of specificity. The INA already imposes categorical bars to asylum that apply to an asylum applicant's stay in another country prior to seeking U.S. asylum. But those provisions also include protections geared to refugees whose stays in other countries are fleeting and do not permit full and fair adjudication of asylum claims. The new DHS rule disregards those specific limits.

One of the INA's mandatory bars denies asylum to a foreign national who passes through a country with which the United States has a safe third country agreement. Such agreements must fulfill certain criteria that Congress imposed to safeguard asylum-seekers. Under 8 U.S.C. § 1158(a)(2)(A), each country must formally agree in writing on specific terms. In addition, U.S. officials must specifically determine that the foreign national will not be at risk for persecution in the third country and will receive a "full and fair" hearing on her asylum claim.

As a measure of the historic rigor accompanying such agreements, prior to the Trump administration, the United States's only safe third country agreement was with Canada, a country whose rule-of-law institutions resemble those of the United States. (The Trump administration has entered into "asylum cooperative agreements" with Guatemala, Honduras and El Salvador—countries whose legal institutions do not match those of the United States or Canada—but those agreements are not at issue in the *East Bay* case.) According to Fletcher and Clifton, the third country rule's failure to meet the safeguards of statutory "safe third" agreements highlighted the rule's clash with the INA. Since DHS's third country rule flouted those safeguards, it could not be "consistent" with the INA's asylum provision, as the statute requires. See 8 U.S.C. § 1158(b)(2)(C).

Fletcher and Clifton also found that the DHS rule clashes with the INA because of another categorical statutory bar—this one at 8 U.S.C. § 1158(b)(2)(A)(vi), denying asylum for foreign nationals who have "firmly resettled" in another country. The firm resettlement doctrine also includes far more robust safeguards for refugees than the new DHS rule. As the Supreme Court noted in Rosenberg v. Yee Chien Woo (1971), the doctrine's applicability turns on permanence, safety and stability—qualities largely absent in Mexico today.

Under the *Rosenberg* decision, legal protections cannot be undermined by the fragile and evanescent prospect of relief offered by 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." Firm resettlement required a far more durable status, in which a country accorded the refugee the same "rights and obligations" that it granted its own nationals.

The demanding test for firm resettlement is a far cry from the facile test in the new DHS rule. Merely passing through a country does not signify the offer to live safely and permanently that firm resettlement entails. Only that firm offer should trigger a denial of U.S. asylum. The DHS rule's mandate of the same result based on the refugee's mere transit through a third country effectively guts the INA's statutory scheme.

In his concurrence, Miller took an administrative law tack, arguing that the third country rule was arbitrary and capricious and thus violated the APA. Miller focused on DHS's failure to make any finding on an issue the judge viewed as crucial: asylum-seekers' safety in Mexico. DHS and the Justice Department did not concretely address the safety issue. Instead, in their explanation of the third country rule, DHS and the Justice Department merely stated in a single scant paragraph (see p. 38) that Mexico was now deciding more asylum claims than it had in the past. For Miller, the increased numbers of decided claims had "little relevance to the issue of safety." A higher number of decisions may pad a country's statistics, but for Miller, that uptick did not—at least without further explanation—counter substantial record evidence that conditions in Mexico are "dire enough to discourage applicants from seeking asylum … [and] that many who do [seek asylum] are subject to refoulement." The term "refoulement," as used by Miller, is a term of art in refugee law indicating a fundamental breach of an international norm incorporated by Congress in refugee legislation: the duty not to "refoule" (return) a refugee to a country in which the refugee was at risk of persecution.

Despite this sobering finding, Miller asserted that DHS and the Justice Department could nonetheless have adopted the third country rule, if the agencies had balanced "the safety risks to asylum seekers in Mexico" created by the rule against the advantages of streamlining an "overburdened immigration system" by eliminating some claims. Expanding on this deferential view, Miller maintained that the agencies could have found that the increase in decisional efficiency outweighed the risk to refugees. According to Miller, courts would have had to defer to this determination.

That allusion to deference teed up Miller's reference to the Supreme Court's DACA decision. In his opinion for the court in the DACA case, Chief Justice John Roberts found that DHS had not adequately addressed DACA recipients' interests in remaining in the United States, including interests in caring for family members or completing a course of study, a job or needed medical treatment. Following that reasoning, Miller concluded that the agencies had highlighted the need to ease pressure on asylum adjudication but, in doing so, had addressed "only one side of the balance … [but] said nothing at all about the other"—asylum-seekers' safety. That was the agencies' failure in a nutshell for Miller, who cautioned that the APA's standard for "[r]easoned decision making requires consideration of the tradeoffs that accompany an exercise of policy judgment." In the absence of that due consideration, Miller summed up, courts "cannot defer to a choice that the agencies did not acknowledge making." Relying on this administrative law rationale, Miller joined his colleagues in finding that the rule was not a valid exercise of executive discretion.

The rule's fate may depend on future proceedings in other courts. In September 2019, the U.S. Supreme Court stayed the injunction pending a Ninth Circuit decision and the outcome of any request by the government for certiorari by the high court. If the government seeks certiorari from the Supreme Court, a grant of certiorari would leave the stay in effect, while a denial of certiorari might be accompanied by the stay's revocation, which would allow Tigar's injunction to operate. The government could also seek a rehearing en banc from a larger group of Ninth Circuit judges. While the Ninth Circuit might not grant rehearing or decide in the

government's favor if it heard the case en banc, at the very least the government might get at least one strong opinion in its favor on the merits, which it failed to get from the panel that issued the July 6 decision. As an added complication, admissions at the southern border are now paused—ostensibly due to coronavirus contagion concerns—due to the Center for Disease Control and Prevention's order under a little-known 1944 provision of the Public Health Service Act (see Lucas Guttentag's excellent post here on why this order conflicts with the INA).

Adding to the intricacy of the third country rule's procedural posture, another court may soon be involved: the U.S. Court of Appeals for the D.C. Circuit. The Ninth Circuit's decision came shortly after Judge Timothy Kelly of the U.S. District Court for the District of Columbia District (another Trump appointee) vacated the rule. Kelly held that the government had violated the APA by not following its notice and comment process. While the agencies sought to implement the third country rule as an "interim final rule" that need not follow this path, Kelly also found that the rule did not fit APA criteria for bypassing the notice and comment process. To preserve the rule, the government will have to persuade Kelly, the D.C. Circuit or the Supreme Court to stay Kelly's ruling.

If none of these outcomes occurs, the government will have to appeal Kelly's ruling, or go through the notice and comment process that it sought to avoid. Notice and comment can take at least a year to complete. Given that timing, another factor here is the November 2020 election. In that sense, the fate of the third country rule shares common ground with many other Trump initiatives.

Topics: Immigration

Tags: Asylum, refugees, DHS, Mexico

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