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Asylum Ruling Halts Restrictions in New Rule

By Peter Margulies Friday, November 20, 2020, 4:48 PM

On Nov. 19, Judge Susan Illston of the U.S. District Court for the Northern District of California held that a new asylum rule exceeded the power of both the attorney general and the Department of Homeland Security and issued a nationwide temporary restraining order against the rule's implementation. The rule had imposed blanket, categorical bars on asylum for a whole host of crimes and conduct—such as all felonies, most uses of false identification and aiding close family members entering the U.S.—that had previously lacked this harsh effect. Illston cited on page 21 an amicus curiae brief in which I, along with Penn State Law professor Shoba Sivaprasad Wadhia and Susan Krumpltsch of DLA Piper, served as co-counsel for immigration law scholars.

Illston held that the new rule's restrictions conflicted with the protections for asylum in the Immigration and Nationality Act by failing to provide a concrete and specific explanation for adding to the range of conduct that barred asylum. In addition, Illston found that in issuing the final rule in October, the attorney general and the Department of Homeland Security had shifted their regulatory rationale and “changed course” from the authorities relied on in the proposed rule issued about a year ago. In the proposed rule, the attorney general and the Department of Homeland Security had relied on 8 U.S.C. § 1158(b)(2)(B)(ii) of the Immigration and Nationality Act for authority to designate certain crimes as “particularly serious” offenses that justified denying asylum. However, in the final rule, the attorney general and the Department of Homeland Security disclaimed reliance on this authority and, instead, relied solely on a neighboring subsection, 8 U.S.C. § 1158(b)(2)(C), which allows the attorney general to limit asylum in ways that are “consistent with” the asylum provision.

According to the court, that shifting rationale amounted to an agency bait and switch. The shift confused stakeholders who, under the “notice and comment” procedure of the Administrative Procedure Act, commented on the proposed rule's fit with the attorney general's authority to designate certain crimes as “particularly serious.” The attorney general and the Department of Homeland Security had already put potential sources of comments at a disadvantage with an unusually tight 30-day deadline for comments around the 2019 holiday season, instead of the more usual 60-day comment period.

The agencies' abrupt and unexplained pivot also meant that the attorney general and the Department of Homeland Security had “failed to consider an important aspect of the problem,” Illston writes on page 30, citing the Supreme Court's prominent administrative law decision, *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Company* (1983). Illston found that the attorney general and the Department of Homeland Security had neglected to consider whether the specific crimes and acts listed in the new rule fit the nature and impact of offenses considered to be “particularly serious” crimes. The language of the “particularly serious crime” provision—notably the adverb, “particularly”—suggested the need for a finding that the crime or conduct had either a special nature or an impact on public safety. According to the court, adding crimes and conduct that would not fit under the “particularly serious crime” rubric is not “consistent with” the asylum provision.

Perhaps the attorney general and the Department of Homeland Security could have explained how the new additions fit, but they failed to provide an explanation. Instead, they merely offered the conclusory claim, listed on page 29, that the new crimes and conduct were “similar” to crimes that were “particularly serious.” For Illston, that unsupported claim of similarity was not an adequate substitute for concrete analysis of the new rule's litany of crimes and conduct.

Illston will hold a hearing on Dec. 9 on the challenger's motion for a preliminary injunction against the rule.

Topics: Immigration

Tags: Immigration and Nationality Act, Asylum, Northern District of California

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