

GROUNDHOG DAY FOR ASYLUM SEEKERS

The Administration's July 2019 interim final rule on asylum allowed to go into effect

The Administration's July 2019 interim final rule on asylum is decidedly not as funny as Bill Murray's 1993 movie. But it certainly reflects the movie's premise of reliving something so many times, it becomes unbearable. The latest in a long line of assaults on refugee and asylum law and policy, the interim final rule forbids asylum seekers, including unaccompanied children, from applying for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country. See 84 Fed. Reg. 33829 at 33835, 33840.

Upon publication of the rule, sometimes called the "Asylum Ban" or the "Asylum Ban, Part Two," immigration advocates filed a lawsuit in the Northern District Court of California asking to have the rule declared illegal and seeking an injunction (i.e., an order that the rule could not go into effect). The district court found in their favor and stopped the rule nationwide. But the legal shenanigans continued in the federal appeals court, and the Administration, not getting what they wanted, went to the Supreme Court asking them to intervene. They did. The Supreme Court in *East Bay Sanctuary et al. v. Barr*, held on September 11, 2019, that this rule can go into effect across the country, despite continuing legal challenges in the lower courts.

So, now what? The United States bars anyone fleeing persecution from obtaining asylum in the United States if they passed through another country (a "transit" country) on their way here through the southern border. Not only Central Americans but people from Africa and Asia who pass through Mexico are not eligible for asylum.

Exceptions to the Rule

There are three exceptions to the rule. The rule does not apply to individuals who have applied for asylum in a third country and received a denial. It also does not apply to individuals who meet the definition of a "victim of a severe form of trafficking in persons" provided in 8 CFR 214.11. Finally, if the asylum seekers transited only through countries that are not parties to the 1951 Refugee Convention, 1967 Protocol or the U.N. Convention against Torture, they are exempt from the rule.

Objections to the Rule

USCRI objects to the way the Administration introduced the rule. The Administration introduced this rule as an "interim final rule" with a 30-day comment period. Although the Government asked for comments, the rule, as a final rule, was effective the day it was published, thereby providing no notice to the public and no real opportunity to comment on provisions that essentially eviscerate U.S. asylum law. Providing comments to an interim final rule has little effect because the rule is already effective.

As noted by Justice Sotomayor in the dissent to *Barr v. East Bay Sanctuary Covenant*, the district court found that the rule is likely unlawful. The rule is inconsistent with well-established U.S. asylum law and U.S. obligations under the 1951 Refugee Convention and the 1967 Protocol. Section 208(a)(1) of the Immigration and Nationality Act (INA) provides that "any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum . . ." Moreover, a person would not be found ineligible for asylum for merely traveling through a third country, but only if she or he "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). To remove an asylum seeker to a third country, the United States and that third country must have a bilateral or multilateral agreement, the removal must be pursuant to that agreement, and there must be a determination that the asylum seeker would



not face persecution and “would have access to a full and fair procedure for determining a claim to asylum.” 8 U.S.C. § 1158(a)(2)(A).

The New Asylum Labyrinth

In practice, noncitizens in expedited removal (the rapid deportation process conducted by Customs and Border Protection officials) who say they fear returning to their home country or wish to apply for asylum will be screened by an asylum officer under the new rule. If the asylum officer decides the person is subject to the bar under the rule, the asylum officer will deny asylum. The asylum officer will then apply the “reasonable fear” standard, which is higher than the “credible fear” asylum standard normally used, to assess the person’s claim for withholding of removal and Convention Against Torture (CAT) protection. If the asylum seeker passes the reasonable fear screening, he or she will be placed in removal proceedings and can apply for withholding of removal and/or CAT protection.

An asylum seeker can seek review of the asylum officer’s determination that he or she is subject to the eligibility bar before an immigration judge. If the immigration judge affirms the determination that the bar applies, and that the asylum seeker has failed to pass the reasonable fear standard, the applicant will be subject to removal without any opportunity for judicial review. The rule, however, stated that unaccompanied immigrant children “will not be returned to the transit country for consideration of these protection claims.” See 84 Fed. Reg. 33829, footnote 7.

Preventing deportation

As noted above, to prevent being deported, those barred from seeking asylum may apply for withholding of removal or protection under CAT. But these options provide no pathway to obtain lawful permanent resident status or citizenship, and no way to petition family members to join them in the United States. These are also nearly impossible standards to meet. In fiscal year 2017, only about seven percent of withholding and five percent of CAT applications were granted.

Deported to Danger?

It is unclear where the administration will send asylum seekers. In order to deport anyone, the U.S. government must have agreements with those countries. Last Friday, the United States and El Salvador signed an agreement to stop asylum seekers and migrants, requiring them to seek asylum in El Salvador before applying for asylum in the United States. Mexico and Guatemala have already agreed to aid the United States in implementing other immigration enforcement policies. In the likely case that the administration reaches agreements with transit countries, those countries are not equipped to fully and fairly process protection claims. Additionally, asylum seekers should not be expected to file asylum claims in countries that cannot protect them. The U.N. High Commissioner for Refugees has stated that “This will endanger vulnerable people in need of international protection from violence or persecution.”

What’s Next?

USCRI will continue to follow developments in the *East Bay Sanctuary* case.