



ROUND TABLE
of Former Immigration Judges

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Re: Comments in Opposition to Proposed Rulemaking: 85 FR 41201
RIN: 1125-AB08; 1615-AC57
Docket No. USCIS 2020-0013; A.G. Order No. 4747-2020
Security Bars and Processing (DHS and EOIR)

DRAFT

Dear Ms. Alder-Reid and Mr. Davidson:

The Round Table of Former Immigration Judges is composed of 46 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed and served under both Republican and Democratic administrations. We have centuries of combined experience adjudicating asylum applications and appeals. Our members include nationally-respected experts on asylum law; many regularly lecture at law schools and conferences and author articles on the topic.

We view the proposed rule as an improper attempt to legislate through rule making. The proposed rule is inconsistent with Congressional intent and with our nation's

obligations under international law. The rule is also overly broad, and as worded, could be applied to virtually anyone. It requires determinations to be made based on pure speculation by officials lacking any required expertise in the subject. And the rule fails to consider much lesser, more humane approaches to address the issue.

The rule is inconsistent with statute and international law

We are well aware that our government's obligations towards refugees derive from our nation's international treaty obligations. The U.S. is a signatory to the 1967 Protocol Relating to the Status of Refugees. The U.S. is also a signatory to the U.N. Convention Against Torture.

In the words of the Supreme Court:

If one thing is clear from the legislative history of the new definition of "refugee," and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees..."

INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987).

As a result, the Supreme Court, U.S. Courts of Appeal, the BIA, and individual Immigration Judges have looked to the 1951 Convention on the Status of Refugees, and to its interpretation by the United Nations High Commissioner for Refugees (UNHCR), for guidance. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 179–87; *INS v. Cardoza-Fonseca*, *supra* at 438-39; *Fei Mei Cheng v. Att’y Gen. of U.S.*, 623 F.3d 175, 193 (3d Cir. 2010); *Aguirre-Aguirre v. INS*, 121 F.3d 521, 523 (9th Cir. 1997); *Matter of C-A-*, 23 I&N Dec. 951, 956 (BIA 2006) (citing to UNHCR, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002); *Matter of L-S-*, 25 I&N Dec. 705, 715 (BIA 2012); *Matter of T-Z-*, 24 I&N Dec. 163, 172-73 (BIA 2007); *Matter of S-M-J-*, 24 I&N Dec. 722, 724-25 (BIA 1997) (all citing to the UNHCR Handbook).

Our laws are made by Congress. However, agencies have been accorded limited deference in filling in gaps in those laws where (1) the statutory language is actually ambiguous; and (2) where the agency's interpretation of the ambiguity is reasonable. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467

U.S. 837, 843-44 (1984). The Supreme Court more recently reemphasized the need to determine that a genuine ambiguity exists, by employing all tools of construction, before deferring to an agency's interpretation. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

Agencies thus lack the authority to conjure their own meaning of statutes or regulations out of thin air. The limits of agency interpretation are narrowly proscribed. There must first be a rigorous determination as to whether the statutory language is in fact ambiguous, after which the agency may only resolve such ambiguity with an interpretation that is reasonable.

The agencies are misguided in their reliance on the decision of the U.S. Court of Appeals for the Tenth Circuit in *R-S-C- v. Sessions*, 869 F.3d 1176, 1187 n. 9 (10th Cir. 2017). *R-S-C-* involved two directly conflicting statutes: in one, Congress guaranteed a right to apply for asylum, but elsewhere, barred deportees who return without authorization from applying for any relief. At the point of intersection, only one of these statutes could prevail.

By contrast, the proposed Security Bar rule does not aim to resolve a statutory conflict. The question is whether the agencies are within their right to impose the proposed interpretation on the statute in question. The answer is unambiguously no.

Since 1804, the Supreme Court has required statutes to be interpreted consistently with international law whenever possible. *See Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (noting that construing federal statutes to avoid violating international law has 'been a maxim of statutory construction since the decision' in *Charming Betsy*). *See also Lauritzen v. Larsen*, 345 U.S. 571, 578-79 (1953); *MacLeod v. United States*, 229 U.S. 416, 434 (1913). As noted above, Congress stated its intent in enacting the 1980 Refugee Act to bring our nation's asylum laws into conformity with the 1967 Protocol. An examination of the international law source of the domestic statute is thus in order.

The "danger to the security of the United States" bar to asylum derives from Article 33(2) of the 1951 Convention, which states that the prohibition against *refoulement* shall not apply to refugees "whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

However, Article 33(2) applies to those who have been recognized as refugees, and have committed crimes in the country of refuge.¹ The 1951 Convention applies the exclusion clauses listed under Article 1F to those seeking refugee status based upon actions committed outside of the country of refuge prior to arrival.²

In its overview of the grounds for exclusion from refugee protection contained in the 1951 Convention, the UNHCR Handbook explains that such grounds apply to three groups: those who are already receiving protection or assistance; those who are not considered to be in need of protection; and those “categories of persons who are not considered to be deserving of international protection.” UNHCR Handbook at ¶ 141. Those posing a danger to the community fall into the final category.

It is of importance that no ground contained in the Convention excludes those in need of protection for health-related purposes. Furthermore, a person doesn’t become “undeserving” of protection because they may have been exposed to a communicable disease. The Convention’s focus is entirely on criminal or persecutory actions. If the agencies claim otherwise, they are requested to cite to either domestic case law or international law sources supportive of their position.

Looking to the legislative intent behind the 1951 Convention’s exclusion clauses, the drafters’ motives were primarily to not allow (1) for abuse by those “undeserving” of protection; (2) those guilty of serious crimes to use refugee status to escape culpability; and (3) grants to those guilty of heinous crimes to undermine the integrity of the asylum system.³

In adopting these international law provisions, Congress at 8 U.S.C. § 1158(b)(2) (A) listed its own exclusion clauses in the form of six exceptions to eligibility for

¹ See Geoff Gilbert, “Current Issues in the Application of the Exclusion Clauses,” UNHCR Jan. 2003, [https://www.unhcr.org/en-us/publications/legal/419dba514/refugee-protection-international-law-current-issues-application-exclusion.html?query=Article%2033\(2\)](https://www.unhcr.org/en-us/publications/legal/419dba514/refugee-protection-international-law-current-issues-application-exclusion.html?query=Article%2033(2)) at 459.

² See Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of *Nonrefoulement*: Opinion,” [https://www.unhcr.org/en-us/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html?query=Article%2033\(2\)](https://www.unhcr.org/en-us/publications/legal/419c75ce4/refugee-protection-international-law-scope-content-principle-non-refoulement.html?query=Article%2033(2)), at ¶¶ 149-150.

³ Jade Magrath, “Asylum for the Underserving: A Human Rights Perspective on the Refugee Convention’s Exclusion Clause,” 24 Auckland U. L. Rev. 205, 209 (2018) (citing to the 1951 Convention’s *travaux preparatoires* “and subsequent guidance issued by the UNHCR”).

asylum. Consistent with the 1951 Convention, all six clauses fall within the three categories listed in paragraph 141 of the UNHCR Handbook. The sixth and final category, covering persons firmly resettled in another country prior to arrival in the U.S., falls within the categories of those already receiving assistance or not in need of assistance.

The remaining five exclusion grounds under U.S. law fall within the category of those not considered to be deserving of protection. Those categories are: (i) persecutors of others; (ii) persons posing a danger to the community of the U.S. by virtue of having been convicted of a particularly serious crime; (iii) persons whom there are serious reasons to believe committed serious nonpolitical crimes prior to their arrival in the U.S.; (iv) persons whom “there are reasonable grounds for regarding...as a danger to the security of the United States,” and (v) persons convicted of specific crimes.

As stated, the agencies may only apply their own interpretation to the term “as a danger to the security of the United States” to the extent such term is ambiguous. But the courts have instructed that in determining whether a statute is in fact ambiguous, traditional tools of construction must be employed, including canons. *See, e.g., Arangure Jasso v. Whitaker*, 911 F.3d 333, 338-39 (6th Cir. 2018). The Supreme Court has recently applied the canon of *ejusdem generis* for such purpose. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1625 (2018). In that decision, the Court explained that “where, as here, a more general term follows more specific terms in a list, the general term is usually understood to ‘embrace only objects similar in nature to those objects enumerated by the preceding specific words.’” *Epic Sys. Corp., supra* at 625 (citing *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 149 (2001); *National Assn. of Mfrs. v. Department of Defense*, 138 S.Ct. 617, 628–629 (2018)).⁴

The Attorney General recently applied the *ejusdem generis* canon to the term “particular social group,” stating that pursuant to the canon, the term “must be read in conjunction with the terms preceding it, which cabin its reach...rather than as an “omnibus catch-all” for everyone who does not qualify under one of the other grounds for asylum.” *Matter of L-E-A-*, 27 I&N Dec. 581, 592 (A.G. 2019).

In 8 U.S.C. § 1158(b)(2)(A), the more general term “danger to the security of the United States” is surrounded by the more specific terminology, describing persecutors of others and those who have been convicted of serious crimes, that

⁴ We also point out the related canon of *noscitur a sociis* (the “associated words” canon).

would render someone capable of such behavior a threat to security in this country. These surrounding terms thus “cabin” the reach of the type of “risk to security” Congress intended, as opposed to allowing the agency to interpret the term as an omnibus catch-all for any type of harm an asylum-seeker might theoretically pose. It thus becomes clear that Congress intended a “risk to security” to relate to a similar criminal threat.

That the risk to security results from a criminal threat is consistent with the manner in which the term has been interpreted and applied by domestic and international case law. It is also consistent with the term’s interpretation in scholarly analysis.

The statute in question is thus not ambiguous, and thus not in need of agency interpretation. In the alternative, even if somehow found ambiguous, the agencies’ “interpretation” is clearly at odds with both Congressional intent and international law, and is thus not “reasonable.”

The proposed rule applies an impermissibly broad application of the bar

In addition to the nature of what may constitute a “risk to security” under the statute, there is also a question of how likely a risk the asylum-seeker must pose to trigger the bar.

In *Yusupov v. Att’y Gen. of U.S.*, 518 F.3d 185, 201 (3d Cir. 2008) (which the agencies have favorably cited in their notice of proposed rulemaking), the Third Circuit rejected the Attorney General’s reading of the statute as covering one who “may” pose a security threat. The court found the statutory language to unambiguously require that the asylum-seeker pose an actual, rather than a possible, threat to national security.

The Third Circuit in *Yusupov* also relied on the Refugee Act’s legislative history to conclude “that Congress intended to protect refugees to the fullest extent of our Nation’s international obligations,” allowing for exceptions “only in a narrow set of circumstances.” *Id.* at 203-204.

However, in explaining their motive for the proposed rule, the agencies state at p. 41208 that the entry of asylum-seekers “during a public health emergency *may* pose a danger” to others (emphasis added). The agencies’ reading is thus improperly broad, and thus at odds with the court’s ruling in *Yusupov*.

The agencies' explanation is also at odds with *Yusupov's* requirement that the exclusion clauses should apply only in a narrow set of circumstances. With well over 4.6 million confirmed cases and 154,000 COVID-related deaths in the U.S., we all *may* pose a danger to others. Dr. Deborah Birx, the White House coronavirus task force coordinator, stated on August 2 that the pandemic has reached a new phase, as the virus is now "extraordinarily widespread" in rural as well as urban areas.

Birx continued: "And that's why we keep saying no matter where you live in America, you need to wear a mask and socially distance, do the personal hygiene pieces," she said. "But more importantly, if you're in multigenerational households and there's an outbreak in your rural area or in your city, you need to really consider wearing a mask at home, assuming that you're positive, if you have individuals in your household with comorbidities." Rachel Treisman, "Birx Warns U.S. Coronavirus Epidemic Is In 'New Phase' As Cases and Deaths Climb," NPR, Aug. 2, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/08/02/898330198/birx-warns-u-s-coronavirus-epidemic-is-in-new-phase-as-cases-and-deaths-climb>.

The rule thus fails to draw a clear line as to who would be viewed as "posing a risk" when in fact everyone in this country presently poses a risk of spreading the virus. While the proposed rule mentions the specific risk to border security and law enforcement personnel, the agencies are asked to demonstrate with empirical evidence that asylum-seekers pose a greater risk to the named personnel than others who those officials regularly encounter in their home, community, and workplace. Furthermore, the agencies are asked to explain how finding an asylum applicant ineligible for asylum *after* interacting with the asylum-applicant in order to observe their symptoms and determine who they may have come in touch with might put the examining official at less risk.

The determination process proposed lacks reliability due to an absence of expertise or evidence

Furthermore, the proposed rule does not predicate a finding of "risk" upon an actual medical conclusion of a health professional. It is not predicated on scientific evidence or on an actual test result. The proposed rule empowers non-medical personnel, mainly, DHS employees, to essentially make a guess based on a broad variety of factors, including the individual's country or region of origin. It further empowers a layperson to somehow determine if the asylum-seeker is exhibiting

symptoms “consistent with” a particular disease, or whether they have “come into contact” with such disease.

As former judges, we can state with authority that such determinations would never pass legal muster in a court of law, and that those officials whom the rule would empower to make such determination would never be found qualified to testify as experts on the topic in court.

The proposed rule takes an unnecessarily extreme approach, and fails to consider lesser protective measures

Furthermore, according to UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees 5 (Geneva 2003), “Article 33(2) has always been considered as a measure of last resort... justified by the exceptional threat posed by the individual—a threat such that it can only be countered by removing the person from the country of asylum.” See *Hernandez v. Sessions*, 884 F.3d 107, 114 (2nd Cir. 2018) (Droney, concurring opinion).

However, the proposed rule fails to consider lesser, more humane alternatives that would honor our obligations to refugees. The statute creates a bar to dangerous criminals because the danger posed by such individuals are not time-sensitive; i.e. the danger presented is unlikely to pass in a brief period of time. By contrast, an individual suspected of infection with COVID-19 can be tested, and can quarantine and socially distance until they receive a test result. Even if they test positive, they can quarantine, socially distance, and follow other recommended protocol until they recover.

For example, in the above quote from Dr. Birx, the White House coronavirus expert stated that those who test positive should take safety measures, including wearing masks at home. Given that an asylum-seeker ruled ineligible for asylum would be at risk of suffering death, torture, rape, or other types of persecution in their country of origin, it is unclear why someone DHS suspects of possible exposure to the virus cannot simply be required to quarantine, wear a mask, and socially distance, while still remaining eligible for asylum. The risk presented by one infected with COVID-19 is likely to pass in two weeks’ time.

Conclusion

For all of the above reasons, the proposed rule is ill-conceived, at odds with statute, incapable of practical application, and in a word, unnecessary.

The Round Table of Former Immigration Judges

/s/

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