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Re: Comments on Proposed Rulemaking: 86 FR 46906

RIN: 1125-AB20; 1615-AC67

Docket No. CIS No. 2692-21; USCIS-2021-0012; A.G. Order No. 5116-2021

Procedures for Credible Fear Screening and Consideration of Asylum

**Introduction**

The Round Table of Former Immigration Judges is composed of 51 former Immigration Judges and Appellate Immigration Judges of the Board of Immigration Appeals. We were appointed by 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.

Our members issued decisions encompassing wide-ranging interpretations of our asylum laws during our service on the bench. Whether or not we ultimately reached the correct result, those decisions were always exercised according to our “own understanding and conscience,”[[1]](#footnote-1) and not in acquiescence to the political agenda of the party or administration under which we served.

We as judges understood that whether or not we agreed with the intent of Congress, we were still bound to follow it. The same is true of the Attorney General, Secretary of Homeland Security, and for that matter, the President.

**Comments on Specific Sections of the NPRM:**

**III.C. The Asylum Application**

We view favorably the proposal to allow USCIS Asylum Officers to complete asylum applications on behalf of asylum seekers, allowing the latter to have their asylum applications on file within days of their credible fear interview, both satisfying the one-year filing deadline and commencing the employment authorization clock.

Under the present system, DHS delays in filing Notices to Appear with the Immigration Courts have led to large numbers of asylum seekers who have been paroled into the U.S. finding themselves unable to file their asylum applications with the Immigration Court because they are not yet in the EOIR system, and unable to file with USCIS for lack of jurisdiction. This proposal will rectify the current problem.

**III.D. Initial Determination by USCIS Asylum Officers**

We understand that EOIR and DHS seek to reduce the backlog of cases presently pending before the Immigration Courts.**[[2]](#footnote-2)** Implementing a new preliminary level of adjudication of asylum claims by USCIS Asylum Officers offers the possibility of significantly reducing the flow of new cases into the Immigration Court system, provided that the asylum officers are chosen carefully and trained properly.

USCIS statistics for Fiscal Years 2009 through 2017 show that Asylum Officers granted asylum at a rate varying from a low of 34 percent (in FY 2017) to a high of 46 percent (in both FY 2013 and 2014).**[[3]](#footnote-3)** Grant rates in this range would mean that at worst, more than one out of three credible fear cases previously destined for Immigration Court would no longer need to be placed into proceedings by virtue of being granted asylum affirmatively; while a grant rate at the higher end of that spectrum would eliminate closer to half of incoming cases of this type from the courts’ docket.

Furthermore, the preliminary asylum officer adjudications provide the potential to significantly reduce hearing times even for those cases that are denied asylum and referred to Immigration Court.

First, unlike Immigration Judges and ICE trial attorneys, USCIS asylum officers may proactively assist in developing the asylum claims they hear. The UNHCR Handbook recognizes that it is not the duty of the asylum applicant to analyze the claim; that duty lies with the examiner.**[[4]](#footnote-4)** However, the prosecutorial stance of ICE and the position of Immigration Judges as neutral arbiters in an adversarial system does not allow ICE attorneys or IJs to take on the participatory role envisioned under the Convention and Protocol. This is particularly problematic given the increased number of pro se claimants, who may be unable to articulate the legal basis for their claims.

By making credibility findings, identifying potential grounds for asylum, delineating particular social groups or bases for finding imputed political opinions, and identifying the specific criteria that were and were not satisfied by the asylum seeker, the asylum officer notes will allow the parties to conference cases in advance of Immigration Court hearings, and to reach stipulations on issues not in dispute, thus significantly narrowing the issues in dispute before the IJ.

As a recent memo from EOIR’s Acting Director emphasized, “the role of the Immigration Court and the BIA, like all other tribunals, is to resolve disputes.”**[[5]](#footnote-5)** As former Immigration Judges and BIA Members with centuries of combined experience on the bench, we are particularly qualified to attest to the streamlining effect and increased efficiency of such an approach. Where, for example, the parties can inform the Immigration Judge that, based on the asylum officer notes, there are stipulations as to credibility and well-founded fear of persecution, and that the sole issue in dispute before the court is nexus to protected ground, hearings may be completed in a fraction of the time of a full hearing.

**III.E. Limitation on Immigration Judge Review**

We strongly oppose the proposal to severely restrict the right of those denied asylum by USCIS to a full de novo merits hearing before an Immigration Judge. Given these significant increases in efficiency mentioned above, the proposed restrictions are unnecessary to reduce the backlog. Regardless, even if EOIR and DHS disagree with this assessment, regulations may neither contradict the Congressional intent of statutes they seek to interpret, nor deny due process in the name of efficiency. Yet the proposed rule would violate both of these principles in the changes they propose to the Immigration Court procedures.

EOIR and DHS claim that the statutory language of 8 U.S.C. § 1225(b)(1), requiring “further consideration of the application for asylum” to those found to have a credible fear of persecution, is ambiguous. In fact, the legislative history of that statute demonstrates that Congress intended for all of those found to possess a credible fear of persecution to be afforded full Immigration Court hearings.  At a 1996 hearing on the bill, Senator Alan Simpson (R-WY) assured that “[a] specially trained asylum officer will hear his or her case, and if the [noncitizen] is found to have a ‘credible fear of persecution,’ he or she will be provided a full—full—asylum hearing.”**[[6]](#footnote-6)** EOIR and DHS are asked to note Sen. Simpson’s repetition of the word “full.”

  This same sentiment was echoed by Senator Patrick Leahy (D-VT), who stated that those who establish credible fear “get a full hearing without any question,”**[[7]](#footnote-7)** and Rep. Lamar Smith (R-TX), who emphasized that those with a credible fear of persecution “can go through the normal process of establishing their claim.”**[[8]](#footnote-8)** The regulatory proposal is thus improperly violative of Congressional intent.

As to due process, in a 2013 decision, *Oshodi v. Holder*,**[[9]](#footnote-9)** the U.S. Court of Appeals for the Ninth Circuit held that limiting an asylum seeker’s testimony to events that were not duplicative of the written application, on the belief that the written record would suffice for deciding veracity, was a violation of the asylum seeker’s due process rights.  Yet the proposed regulations seek to codify what according to *Oshodi* the Constitution specifically forbids.

The court in *Oshodi* stated that “the importance of live testimony to a credibility determination is well-recognized and longstanding.”**[[10]](#footnote-10)** Our own experience supports this conclusion. Immigration Judges have long decided cases that were first heard by Asylum Officers.  The outcomes of those cases offer strong reason to question the logic of what is now being proposed.  EOIR’s Statistical Yearbook for 2016 (the last year such stats were made available) shows that 83% of cases referred by asylum officers were granted asylum that year by Immigration Judges conducting de novo hearings.

Having heard as Immigration Judges many cases referred from the Asylum Office, we believe that the right to a full de novo court hearing, in which attorneys were free to offer documents and briefs, and to present testimony as they saw fit, was the reason for the large disparity in outcomes.  The current system itself recognizes this; it is why asylum officers, who need not be attorneys, are limited to granting clearly meritorious cases, and must refer the rest to courts better equipped to delve into the intricacies of a highly complex field of law.

We can vouch from our experience on the bench to the importance of hearing live testimony in reaching the correct decision. We decided many cases in which in-person demeanor observations were instrumental to our credibility findings. Credibility is often a threshold issue in applications for asylum and related relief. In 2005, Congress specifically amended the criteria Immigration Judges may rely on in deciding credibility.[[11]](#footnote-11) While those criteria include their observations of the “demeanor, candor, or responsiveness of the applicant or witness” (observations which cannot be made unless testimony is witnessed), there is no provision in the statute for reaching credibility findings by reviewing an asylum officer’s opinion on the topic. The court in *Oshodi* cited language in a House conference report on the REAL ID Act of 2005,[[12]](#footnote-12) containing the following quote: "An immigration judge alone is in a position to observe an alien's tone and demeanor, to explore inconsistencies in testimony, and to apply workable and consistent standards in the evaluation of testimonial evidence. He [or she] is, by virtue of his [or her] acquired skill, uniquely qualified to decide whether an alien's testimony has about it the ring of truth."[[13]](#footnote-13)

We can also state from experience that critical “Eureka” moments arise unexpectedly in the course of hearing testimony.  A question from counsel, or sometimes from the judge, will elicit an answer that unexpectedly gives rise to a new line of questioning, or even a legal theory of the case.  An example is found in last year’s Second Circuit decision in *Hernandez-Chacon v. Barr*.[[14]](#footnote-14)  In that case, the Second Circuit found that a woman’s act of resisting rape by an MS-13 gang member could constitute a political opinion based on one sentence not contained in the written application, and uttered for the first time at the immigration court hearing: when asked why she resisted, the petitioner responded: “Because I had every right to.”  From that single sentence, the Second Circuit  found that the resistance transcended mere self-protection and took on a political dimension.

Under the proposed rules, the attorney would likely never have been able to ask the question that elicited the critical answer.  At asylum office interviews, attorneys are relegated to sitting in the corner and quietly taking notes. Some of us teach trial advocacy skills to immigration attorneys, where we emphasize the importance of attorneys formulating a theory of their case, and then presenting documentary evidence and testimony in a manner best designed to support that theory. During our time on the bench, we looked forward to hearing well-presented claims from competent counsel; good attorneys increased efficiency, and usually led us to reach better decisions. And as former asylum officers have indicated that the concept of imputed political opinion was not available to them as a basis for granting asylum, questioning in support of such theory will not be covered in an asylum office interview.

But under the proposed procedures, attorneys are largely relegated to passive observer status. At asylum office interviews, attorneys are only provided a brief opportunity to speak after the interview has been completed. And in cases referred to the Immigration Court, the new restrictions may prevent attorneys from presenting any testimony at all.

As to the criteria that must be met in order to supplement the record before the Immigration Judge, whether evidence is duplicative or necessary is a fuzzy concept.  For example, the law accords  greater deference to government sources, such as State Department reports,[[15]](#footnote-15) and at times, Immigration Judges may find other evidence deserving of “little evidentiary weight.”  Thus, sometimes duplicative evidence is necessary to persuade a judge who may otherwise not be sufficiently swayed by a single report.  But that need might not become apparent until the hearing is concluded, whereas decisions to exclude additional testimony and documentary evidence are made much earlier, at the outset of the proceeding.

**III.E. Jurisdiction to Review USCIS Grants of Withholding of Removal**

The NPRM explains that where a case is referred to the Immigration Court, “the IJ would have the authority to review not only the denial of asylum but also the grant of withholding of removal as well.”**[[16]](#footnote-16)**

Returning to the June 11, 2021 memo of the Acting EOIR Director cited above,**[[17]](#footnote-17)** the Immigration Courts and BIA, like all tribunals, resolve disputes between the parties. Where a DHS asylum officer grants withholding of removal or CAT, and where DHS (i.e. the same agency that granted that relief) is subsequently a party before the Immigration Court after referral of the case, it cannot be said that the grant of relief is in dispute. The same reasoning has long applied to the prohibition on DHS on seeking judicial review in Federal Court of BIA decisions: because the executive branch cannot contest a decision issued by the same executive branch.

The BIA has stated in a precedent decision that remains binding on DHS that “immigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done.”**[[18]](#footnote-18)** Given the international treaty obligation on our government to not return refugees to countries where they might suffer persecution or torture, it is concerning that the proposal could have a chilling effect on the decision to seek review of an asylum denial where doing so would require risking the loss of an already-issued protection.

The proposal allows a possibly overzealous ICE prosecutor to seek reversal of a protection order issued by a specially trained asylum expert (which was already subject to supervisory review and approval) employed within the same department. And requiring Immigration Judges to readjudicate grants of withholding of removal and CAT is not consistent with the aim of increasing efficiency and reducing hearing times.

1. *See Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954). [↑](#footnote-ref-1)
2. A June 2021 report by TRACImmigration (Syracuse University) stated that the backlog was approaching 1.4 million cases. https://trac.syr.edu/immigration/reports/654/. [↑](#footnote-ref-2)
3. Beginning in 2018, asylum grant rates were negatively impacted by Attorney General precedent decisions that have recently been vacated. [↑](#footnote-ref-3)
4. UNHCR Handbook on Procedures and Criteria Under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees (UNHCR 1979) at para. 66, 67. [↑](#footnote-ref-4)
5. “Effect of Department of Homeland Security Enforcement Priorities,” (Memo from EOIR Acting Director Jean King), June 11, 2021, https://www.justice.gov/eoir/book/file/1403401/download. [↑](#footnote-ref-5)
6. 104 Cong. Rec. S4457, S4461, https://www.congress.gov/104/crec/1996/05/01/CREC-1996-05-01-pt1-PgS4457.pdf. Note: the word “noncitizen” is substituted for the word “alien” wherever it appears due to the pejorative nature of the original term. [↑](#footnote-ref-6)
7. *Id*. at S4492. [↑](#footnote-ref-7)
8. 104 Cong. Rec. S4592, S4608, <https://www.congress.gov/104/crec/1996/05/02/CREC-1996-05-02-pt1-PgS4592.pdf>. [↑](#footnote-ref-8)
9. 729 F.3d 883 (9th Cir. 2013). [↑](#footnote-ref-9)
10. *Id*. at 891. [↑](#footnote-ref-10)
11. 8 U.S.C. § 1158(b)(1)(B)(iii). [↑](#footnote-ref-11)
12. H.R.Rep. No. 109-72, at 167 (Conf. Rep. on REAL ID Act of 2005). [↑](#footnote-ref-12)
13. *[Sarvia-Quintanilla v. INS,](https://scholar.google.com/scholar_case?case=8302905785553687401&hl=en&as_sdt=6,33&as_vis=1)* [767 F.2d 1387, 1395 (9th Cir.1985)](https://scholar.google.com/scholar_case?case=8302905785553687401&hl=en&as_sdt=6,33&as_vis=1). [↑](#footnote-ref-13)
14. 948 F.3d 94 (2d Cir. 2020). [↑](#footnote-ref-14)
15. *See*, *e.g.*, *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209 (BIA 2010) (stating that reports of the U.S. Department of State “are usually the best source of information on conditions in foreign nations,” and are accorded “special weight” (citing *Aguilar-Ramos v. Holder*, 594 F3d. 701,705 n.6 (9th Cir. 2010)). [↑](#footnote-ref-15)
16. *See* 8t6 FR 46920-21. [↑](#footnote-ref-16)
17. *See* fn. 5. [↑](#footnote-ref-17)
18. *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997). [↑](#footnote-ref-18)