



ROUND TABLE
of Former Immigration Judges

March 27, 2023

Submitted via: <https://www.regulations.gov>.

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Re: Comment on the Proposed Rule by the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) on Circumvention of Lawful Pathways, CIS No. 2736-22; Docket No: USCIS 2022-0016; A.G. Order No. 5605-2023

Dear Acting Director Delgado and Assistant Director Alder Reid:

The Round Table of Former Immigration Judges is composed of more than 50 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 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.

The 30-Day Comment Period Provides Insufficient Time to Comment on the Rule

The Biden administration has provided only 30 days for the public to comment on the proposed rule, effectively denying the public the right to meaningfully comment under the notice and comment rulemaking procedures required by the Administrative Procedure Act. This timeframe is insufficient for a sweeping proposed rule that would deny many people access to asylum in violation of U.S. law. On March 1, 2023, 172 organizations wrote to the agencies urging them to provide at least 60 days to comment on the complex 153-page rule that would have enormous implications for asylum access at the border and in USCIS and immigration court asylum proceedings.

Executive Orders 12866 and 13563 state that agencies should generally provide at least 60 days for the public to comment on proposed regulations. A minimum of 60 days is especially critical given the rule’s attempt to ban asylum for many refugees in violation of U.S. law and international commitments and return many to death, torture, and violence. While the agencies cite the termination of the Title 42 policy in May 2023 as a justification to curtail the public’s right to comment on the proposed rule, this reasoning is specious especially given that the administration itself sought to formally end Title 42 nearly a year ago and has had ample time to prepare for the end of the policy.

¹ See *Accardi v. Shaughnessy*, 347 U.S. 260, 266-67 (1954).

Because of the insufficient time frame provided for comments, we will regrettably have to limit our comments to a few specific issues.

Comments on Specific Issues:

The rule creates a bar, and not a rebuttable presumption.

The proposed rule refers to the bar it seeks to create as a “rebuttable presumption of asylum ineligibility.” This term is a misnomer. The rule seeks to create an outright bar to asylum, with three very narrow exceptions that most applicants will not be able to fall within.

The Merriam Webster online dictionary includes as definitions for the word “presumption” “an attitude or belief dictated by probability: Assumption; the ground, reason, or evidence lending probability to a belief; a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact.”²

Asylum law does contain actual rebuttable presumptions. For example, 8 C.F.R. § 1208.13(b)(1) creates a presumption that one who has suffered past persecution has a well-founded fear of persecution, while 8 C.F.R. § 1208.13(b)(3)(ii) creates a presumption that where the persecutor is the government or is government sponsored, internal relocation would not be reasonable. These presumptions are logically drawn from established facts. For example, it is logical to presume that where conditions have not changed, one who has already been persecuted might be persecuted again in the future. It is also reasonable to assume a national government’s reach is country-wide and cannot be avoided by moving within the country it governs.

However, as to the proposed rule, there is nothing about the fact of arriving at the border without having procured an appointment that would give rise to a logical presumption that one is either not a refugee, or is undeserving of or no longer in need of protection.

The proposed rule is actually akin to the one-year bar found in section 208(a)(2) of the I&N Act. Significantly, that requirement was made by Congress through the legislative process, while the present rule attempts to create an additional bar through regulation alone. Although section 208(2)(D) creates two exceptions (for changed or extraordinary circumstances), we have never heard the one-year bar referred to as a rebuttable presumption; it is rather a bar to asylum.

² <https://www.merriam-webster.com/dictionary/presumption>.

While it may sound less harsh to refer to the rule as a “rebuttable presumption,” the term is misleading and inaccurate. And because the proposed bar conflicts with international law and Congressional intent, and will invariably result in wrongful removals, the rule should be withdrawn in its entirety.

The proposed bar conflicts with international law.

In a precedential *en banc* decision, the Board of Immigration Appeals (which at the time included three current members of our Round Table) stated:

In enacting the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, Congress sought to bring the Act’s definition of “refugee” into conformity with the United Nations Convention and Protocol Relating to the Status of Refugees and, in so doing, give “statutory meaning to our national commitment to human rights and humanitarian concerns.” See S. Rep. No. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144. Such an approach is designed to afford a generous standard for protection in cases of doubt.

Matter of S-P-, 21 I&N Dec. 486, 492 (BIA 1998) (en banc) (quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144). *See also Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

Given the explicit intent of Congress in passing the 1980 Refugee Act of bringing our domestic laws into compliance with international law, it is particularly necessary for the agencies to construe section 208 of the Act in conformity with such law. *See 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*); *Lauritzen v. Larsen*, 345 U.S. 571, 578-79 (1953); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

With this goal, for more than 35 years, our courts have sought guidance from UNHCR’s Handbook on Procedures and Criteria for Determining Refugee Status in interpreting the 1980 Refugee Act. *See INS. v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987).

We note that paragraph 28 of the UNHCR Handbook states:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

We therefore ask the agencies to explain how it is consistent with international law (and thus, Congressional intent) to deny the opportunity to even seek recognition and protection to those considered refugees under international law solely because they attempted to enter without first successfully procuring an appointment through a government app.

The proposed rule creates a ban to asylum that does not fall within any of the cessation clauses or exclusion clauses found in Articles 1(C) and 1(F) of the 1951 Refugee Convention. While Congress may have the authority to create additional restrictions (as it did in creating the one-year filing requirement), we question what authority Executive Branch agencies have to create additional bars in the guise of interpreting a statute which Congress sought to be consistent with international law.

The rule's impact on credible fear determinations contradicts Congressional intent.

In 1996, Congress created an expedited removal process that denied clearly inadmissible noncitizens access to the immigration court system. However, Congress was careful to create an exception for those with meritorious claims for asylum.

As noted by a U.S. District Court Judge, “it is the will of Congress—not the whims of the Executive—that determines the standard for expedited removal.” *Grace v. Whitaker*, 344 F. Supp. 3d 96, 105 (Dist. D.C. 2018).³

Grace continued to summarize Congress's intent on the subject:

³ Reversed in part by *Grace v. Barr*, 965 F.3d 883 (D.C. Cir., 2020).

Expediting the removal process, however, risks sending individuals who are potentially eligible for asylum to their respective home countries where they face a real threat, or have a credible fear of persecution. Understanding this risk, Congress intended the credible fear determinations to be governed by a low screening standard. See 142 CONG. REC. S11491-02 ("The credible fear standard ... is intended to be a low screening standard for admission into the usual full asylum process"); see also H.R. REP. NO. 104-469, pt. 1, at 158 (1996)(stating "there should be no danger that an alien with a genuine asylum claim will be returned to persecution").

Id. at 107.

Current regulations require application of the same low level “credible fear” standard to fears of torture as well. Thus, although a grant of protection pursuant to the Convention Against Torture (“CAT”) requires a higher probability of harm than a claim for asylum, both forms of relief require the same low “credible fear” screening standard in order to be spared from expedited removal and be afforded the right to a full evidentiary hearing before an Immigration Judge (and full right to further administrative and federal court review) on their applications for relief.

However, the proposed rule would toss aside these statutorily mandated protections for anyone arriving at the border without having procured an appointment and who does not satisfy one of the three narrow exceptions. In addition to barring such individuals from even seeking asylum, regardless of the merits of their claim, the rule also seeks to raise the present credible fear standard applied to claims for withholding of removal under both section 241(b)(3) of the Act and under the Convention Against Torture (“CAT”). While such change would align with the whims of the Executive, it does not reflect the will of Congress.

The rule undermines the entire purpose of credible fear review

The new regulation would exploit flaws in the current credible fear system. These flaws exist due to changes in the circumstances under which the regulation is applied, which have arisen since the time of its enactment.

Congress created expedited removal in 1996 in response to reports of exploitation of our asylum system occurring at U.S. airports. Congress sought to prevent the use of clearly fraudulent asylum claims to gain entry to the U.S.⁴

Perhaps because credible fear initially targeted fraud, EOIR's Immigration Court Manual denies asylum seekers the right to counsel in Credible Fear Review hearings before Immigration Judges.⁵

Today, credible fear determinations turn far less frequently on adverse credibility findings. It is more common at present for a credible fear determination to be denied due to a far more complex legal issue such as the cognizability of a particular social group, whether a persecutor may have imputed a political opinion to the asylum seeker's words or actions or, for CAT purposes, whether torture will occur with "government acquiescence."

Those determinations are made by USCIS asylum officers. In the credible fear context, Immigration Judges who normally function as trial judges play the role of appellate judges, reviewing the reasonableness of the asylum officer's decision.

Appellate courts hear the legal arguments of lawyers, and not the testimony of the litigants themselves. Yet for some reason, EOIR's rules continue to deny the right to counsel in Credible Fear Review hearings. While there are Immigration Judges who will nevertheless allow attorney participation, many others simply direct lawyers to sit down and remain silent. Thus, often the only person in the courtroom capable of arguing why the asylum officer erred as a matter of law is prohibited from doing so.

As a result, Credible Fear Review hearings can be shockingly brief. While it will vary depending on the particular Immigration Judge presiding, an April 2018 episode of HBO's "Last Week Tonight With John Oliver" played the transcript of

⁴ See, e.g., Congressional Record - House, March 19, 1996, at H2385 (Remarks of Rep. McCollum), <https://www.congress.gov/congressional-record/volume-142/issue-38/house-section/article/H2378-5>.

⁵ EOIR's Immigration Court Practice Manual at Chapter 7.4(d)(4)(C) states that "the noncitizen is not represented at the credible fear review. Accordingly, persons acting on the noncitizen's behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments."

one such hearing in its entirety; it lasted one minute and 43 seconds, and consisted of two questions asked of the asylum-seeker.⁶ The Immigration Judge’s decision in its entirety was: “The government of the U.S. doesn’t afford your protection [sic] for this reason. I affirm the asylum officer’s decision.”⁷

Furthermore, a significant number of Immigration Judges hired over the past several years lacked prior immigration law experience. As one commentator has noted,

attorneys do not need immigration law experience to become an immigration judge.

You read that correctly: Aspiring immigration judges need not have actual experience — just strong credentials in skills necessary to be a judge. The government will “train” them in the law. The problem is the training program for new judges does not spend enough time teaching immigration law to give them the knowledge they will need as immigration judges.⁸

Should the new rule take effect, many Credible Fear Review hearings will involve CAT claims. Based on our extensive experience, the legal issues that arise in these cases involve determinations of complex legal issues, such as what entities constitute state actors, when state actors are acting under color of law, and when torture by non-state actors occurs with government acquiescence. These are not determinations suited for a two-minute hearing involving unrepresented noncitizens and judges new to asylum law.

⁶ “Last Week Tonight With John Oliver,” (HBO) Season 5, episode 6 (April 1, 2018); script available at https://sublikescript.com/series/Last_Week_Tonight_with_John_Oliver-3530232/season-5/episode-6-Immigration_Courts.

⁷ *Id.*

⁸ Nolan Rappaport, “How Many of Our Immigration Judges Are Amateurs at Immigration Law?” *The Hill*, Nov. 23, 2020, <https://thehill.com/opinion/immigration/527104-how-many-of-our-immigration-judges-are-amateurs-at-immigration-law/>. The author served as Immigration Counsel to the House Judiciary Committee, and as an Attorney Advisor at the Board of Immigration Appeals.

Furthermore, there is no right to appeal a Credible Fear Review decision.⁹ Even if an Immigration Judge gets the facts or law completely wrong, the incorrect decision is the final one.

In spite of these systemic flaws, a recent study found that Immigration Judges reverse negative credible fear findings twenty-five percent of the time. Over the past two years, Immigration Judges have reversed USCIS credible fear denials in 28% of claims from El Salvador and Honduras, in 26% of claims from Mexico, and in 22% of claims from Guatemala.

The safeguard that is most likely responsible for this significant reversal rate is the low credible fear threshold. Congress was aware that asylum seekers subject to credible fear review are newly arrived, detained, and thus hampered in their ability to obtain legal counsel and evidence to support their claims. And IJ error committed at the full hearing stage is subject to correction on review by the BIA or the circuit courts.

However, the low standard is the precise safeguard the new rule seeks to take away. What was designed to be a preliminary method to screen out clearly fraudulent claims will, under the proposed rules, become a recipe for error not subject to review, and for speedy removals in violation of our country's international treaty obligations.

The proposed rule's exception to the bar imposes a higher legal standard than that required for asylum eligibility

One of the three stated exceptions to the asylum bar under the rule would require the applicant to demonstrate that they “faced an imminent and extreme threat to life or safety, such as an imminent threat of rape, kidnapping, torture, or murder.”

The NPRM further clarifies that “[t]he term ‘imminent’ refers to the immediacy of the threat; it makes clear that the threat cannot be speculative, based on generalized concerns about safety, or based on a prior threat that no longer poses an immediate threat. The term ‘extreme’ refers to the seriousness of the threat; the threat needs to be sufficiently grave, such as a threat of rape, kidnapping, torture, or murder, to trigger this ground for rebuttal.” (NPRM at Fn. 27)

⁹ See *DHS v. Thuraissigiam*, 140 S.Ct. 1959 (2020).

The new rule would thus impose a higher degree of risk for excusing an improper border entry than is required for asylum eligibility itself.

For example, several circuits have held that threats alone may constitute past persecution. In rejecting a requirement that the harm threatened must be “imminent,” the Third Circuit has explained:

"Imminence" is a misnomer here. We have neither required that the threat portend immediate harm nor that it be in close temporal proximity to other acts of mistreatment... Indeed, our interest is not the imminence of the threat at all, but rather the likelihood of the harm threatened—a concept subsumed in the inquiry as to whether the threat is “concrete.”

Herrera-Reyes v. Attorney Gen. of the U.S., 952 F.3d 101, 108 (3rd Cir. 2020).

Of course, one who has never been persecuted can also establish asylum eligibility based on a ten-percent likelihood of suffering persecution, a risk that falls far short of imminent danger. As the Second Circuit has explained, an applicant can establish a well-founded fear of persecution “even if it is improbable that he will be persecuted upon his return to his own country.” *Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 69 (2d Cir. 2002). Only “a slight, though discernible, chance of persecution” is required. *Tambadou v. Gonzales*, 446 F.3d 298, 302 (2d Cir. 2006). In an unpublished decision, the Second Circuit rejected the government’s argument that the failure of Albanian officials to fulfill their threats against an asylum-seeker in spite of having opportunities to do so rendered the petitioner’s fear unreasonable. Finding the government’s standard too exacting, the court found “[a]ny reasonable person so situated [as the petitioner] would fear that her luck will change.” *Qosaj v. Barr*, No. 17-3116 (2d Cir. Sept. 18, 2019) (unpublished).

Also, the concept of qualifying for asylum based on a “pattern or practice” of persecution is designed to grant asylum where persecution is not imminent, based on the likelihood that a member of a targeted group will eventually find themselves at risk. In the words of the Ninth Circuit:

Certainly, it would not have been necessary for each individual Jew to await a personal visit to his door by Nazi storm troopers in order to show a well-founded fear of persecution. Similarly, it would be unnecessary for members

of other systematically persecuted groups to show that they have been selected on an individual basis as subjects of persecution.

Kotas v. INS, 31 F.3d 847, 852 (9th Cir. 1994)

Grave risks of harm faced in Mexico will fail to satisfy the proposed standard.

A recent report of Human Rights First documented the extreme dangers facing asylum seekers forced to wait in Mexico as a result of the Title 42 ban. According to Human Rights First,

“As of the date this report was published in December 2022, Human Rights First has tracked at least 13,480 reports of murder, kidnapping, rape, torture, and other violent attacks against people blocked in or expelled to Mexico due to Title 42 since January 2021. This count is likely just the tip of the iceberg since many asylum seekers have not spoken with investigators, journalists, or attorneys.”¹⁰

A September 2022 report of Human Rights First on the impact of the “Remain in Mexico” (“RMX”) policy stated:

The devastating toll of violent attacks on people subjected to RMX continued to mount under the court-ordered reimplementation of the policy. Recent kidnappings, rapes, and other violent assaults on people after DHS returned them to Mexico under RMX 2.0 include: a Nicaraguan woman kidnapped and sexually assaulted; a Venezuelan asylum seeker beaten and shot at; a teenage girl sexually assaulted; and two Nicaraguans kidnapped by a cartel and forced to watch as cartel members put a gun in another man’s mouth and threatened to kill him. These attacks add to the at least 1,544 publicly reported cases of kidnappings, murder, torture, rape and other violent attacks against people returned to Mexico under RMX that Human Rights First tracked during the Trump administration. Given how few individuals in RMX have been interviewed by human rights investigators, journalists, and other researchers, the number of reported attacks is surely a

¹⁰ Human Rights First, “Human Rights Stain, Public Health Farce” (December 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/12/HumanRightsStainPublicHealthFarce-1.pdf>, at 10.

severe undercount of the true scale of the harms inflicted on people forced to wait in danger in Mexico under RMX.¹¹

Any asylum seeker forced to wait in Mexico until they can succeed in scheduling an appointment to proceed to a designated border post faces a very real risk of serious harm under the above-described conditions. However, the NPRM specifically states that fear based on general country conditions is insufficient to warrant an exception to the bar. Instead, the intending asylum applicant must remain at risk in Mexico until the threat of their being raped, kidnapped, tortured, or murdered is “imminent.” Of course, by then, it may well be too late to avoid such harm.

In considering eligibility for asylum itself, in the words of the Third Circuit, “To expect Petitioner to remain idle in that situation – waiting to see if his would-be executioners would go through with their threats – before he could qualify as a refugee would upend the “fundamental humanitarian concerns of asylum law.” *Doe v. Attorney Gen.*, 956 F.3d 135, 144 (3d Cir. 2020) (Citing *Matter of S-P-*, 21 I. & N. Dec. 486, 492 (BIA 1996)). But the new rule would upend those same concerns in requiring individuals who may well be refugees to do the same simply to not be barred from filing an application for asylum in the U.S.

Conclusion

For the reasons stated above, the proposed rule exceeds the agencies’ authority by seeking to create a ban on asylum that contradicts Congressional intent and international law. As former Immigration Judges, we can confidently predict that the rule would result in individuals being erroneously deported even where they face a genuine threat of persecution or torture. We urge that the rule be withdrawn in its entirety.

Respectfully submitted,

The Round Table of Former Immigration Judges

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¹¹ Human Rights First, “Fatally Flawed” (September 2022), <https://humanrightsfirst.org/wp-content/uploads/2022/10/FatallyFlawed.pdf>, at 2.