

Asylum Officers, Ex-Judges Back Suit On Biden Asylum Rule

By **Britain Eakin**

Law360 (June 8, 2023, 8:40 PM EDT) -- The union representing asylum officers, along with several dozen former immigration judges, threw their support behind a suit from immigrant rights groups trying to strike down the Biden administration's new asylum rule, saying it undermines the U.S. asylum system.

The new rule, which presumes migrants are ineligible for asylum unless they meet certain conditions or qualify for one of several narrow exceptions, "effectively eliminates asylum" at the southern border, according to an **amicus brief** filed Wednesday by National Citizenship and Immigration Services Council 119, which urged the district court to invalidate the U.S. Department of Homeland Security's rule.

The union, which represents government employees including asylum officers, said its members are on the front lines of adjudicating asylum applications, so they have a unique vantage point on whether the rule comports with U.S. and international refugee law. The brief argues that the rule doesn't pass legal muster because Congress placed no conditions on where or how asylum seekers arrive at the border.

Meanwhile, the rule requires migrants to first seek and get denied protection in a third country, make an appointment through a glitchy app to arrive at a port of entry, or make arrangements to enter the U.S. through a temporary parole program, the union says. Most migrants, including those with valid asylum claims, will not be able to meet the rule's conditions, the asylum officers said.

In that regard, the rule is creating a crisis of conscience for asylum officers by forcing them to send asylum seekers with legitimate claims back into harm's way, betraying the American tradition of providing safe haven for those fleeing persecution as well as their moral conscience and professional ethics, the brief said.

Michael Knowles, the spokesperson for the NCISC, told Law360 Thursday the rule is putting its members "in an impossible position" because they must either comply with it and violate the prohibition on returning refugees to dangerous conditions, refuse to implement the rule and risk losing their jobs, or resign.

"These officers are responsible for ensuring that the United States complies with its international treaty and domestic law obligations to protect each refugee who comes before them, but the rule requires that they treat nearly all asylum seekers at the southern border as ineligible for asylum without ever having even considered the merits of their claim," he said in an email.

DHS implemented the rule on May 12 after the Biden administration ended the Trump-era Title 42 policy, which allowed border officials to rapidly expel migrants without proper travel documents.

The administration has touted the rule as part of its overall effort to expand lawful migration pathways while imposing stiffer penalties for irregular migration as it transitions back to the usual Title 8 immigration procedures. Unlawful border-crossers now face a five-year reentry ban and potential prosecution for repeated attempts to cross the border illegally.

A coalition of immigrant rights groups that opposed Trump-era asylum restrictions wasted no time challenging the Biden rule, saying in a supplemental complaint on May 12 that it **flouts U.S.**

domestic and international refugee law.

Several dozen former immigration judges and Board of Immigration Appeals members agreed, saying in their own **amicus brief** on Wednesday that "the rule significantly and unlawfully curtails the role of immigration judges," who serve as the final reviewers in expedited removal proceedings.

The new rule cuts off the full asylum process, prohibiting immigration judges from evaluating complex factual and legal issues to determine whether asylum should be granted, and redirecting their efforts to examining if migrants complied with the DHS rule, according to the brief.

"The important statutory roles asylum officers and immigration judges are intended to serve in evaluating asylum claims in the expedited removal process are now severely diminished," the brief said.

The rule will also complicate subsequent proceedings, according to the brief, which said that asylum officers and immigration judges will also be required to consider alternative forms of relief, like withholding of removal and protection under the Convention against Torture, if migrants are deemed ineligible for asylum.

Those proceedings have a higher evidentiary standard but offer migrants weaker protections because, while protecting them from deportation, they deprive them of lawful status, the judges said.

The regulation therefore "imposes life-changing adverse consequences for migrants who are eligible for asylum under the INA but are precluded from applying for it under the rule," the brief said.

The U.S. Department of Justice, which is representing the government in the case, did not return a press inquiry Thursday about the amicus briefs.

The immigrant rights groups are represented by Katrina Eiland, Morgan Russell, Spencer Amdur, Oscar Sarabia Roman, Omar C. Jadwat, Lee Gelernt and Michelle (Minju) Y. Cho, of the American Civil Liberties Union, Keren Zwick, Richard Caldarone, Colleen Cowgill and Mary Georgevich of the National Immigrant Justice Center, and Melissa Crow, Anne Peterson, Blaine Bookey, Julie Bourdoiseau and Karen Musalo of the Center for Gender and Refugee Studies.

The government is represented by Erez R. Reuveni of the DOJ's Civil Division.

The former immigration judges are represented by Ashley Crawford of Akin Gump Strauss Hauer & Feld LLP.

The NCISC is represented by Kathleen Hartnett and Zoë Helstrom of Cooley LLP.

The case is East Bay Sanctuary Covenant et al. v. Biden et al., case number 18-cv-06810, in the U.S. District Court for the Northern District of California.

--Editing by Adam LoBelia.