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Legal Sidebar

# Asylum Bar for Migrants Who Reach the Southern Border through Third Countries: Issues and Ongoing Litigation

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*Update: As a result of litigation following the original publication of this Sidebar, the Trump Administration may implement the interim final rule (IFR) to limit asylum eligibility in Texas and New Mexico but not in California or Arizona. On August 16, 2019, a motions panel of the U.S. Court of Appeals for the Ninth Circuit granted the Administration a partial stay of the preliminary injunction against the IFR, narrowing the injunction to apply only in states within the Ninth Circuit. The panel held that the Administration had not shown that it was likely to succeed on the merits of its arguments about the legality of the IFR, but that the "nationwide scope of the injunction is not supported by the record as it stands." The circuit court indicated, however, that additional proceedings in the district court might "further develop the record in support of a preliminary injunction extending beyond the Ninth Circuit." One judge on the panel dissented from the decision to narrow the injunction.*

*As a consequence of the stay decision, no federal court order currently bars implementation of the IFR along the part of the U.S.-Mexico border that is outside of the Ninth Circuit (i.e., in Texas and New Mexico). New legal developments could come quickly, however. Proceedings in the district court in the Northern District of California remain ongoing and could produce another nationwide injunction, as indicated above. Meanwhile, a merits panel of the Ninth Circuit is set to review the original preliminary injunction in December. Furthermore, either party could appeal the circuit court's stay decision to the Supreme Court. Litigation also remains ongoing in the U.S. District Court for the District of Columbia, where a different set of plaintiffs continues to challenge the IFR after the district court rejected their motion for a temporary restraining order blocking implementation pending further proceedings.*

*The original post from August 2, 2019 is below:*

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On July 16, 2019, the Department of Homeland Security (DHS) and the Department of Justice (DOJ) jointly issued an interim final rule (IFR) that, if allowed to go into effect, would render non-U.S. nationals (aliens) ineligible for asylum in the United States if they arrive at the southern border without first seeking protection from persecution in other countries through which they transit. The IFR would apply both to unlawful entrants and to aliens who present themselves at ports of entry on the southern border. The IFR would probably foreclose the asylum claims of almost all non-Mexican nationals who reach the southern border and would make it easier for DHS to swiftly remove such aliens without full proceedings in immigration court if they lack visas or other valid entry documents.

However, the IFR is not currently in effect. On July 24, 2019, the U.S. District Court for the Northern District of California issued a preliminary injunction blocking the IFR's implementation nationwide while a lawsuit challenging its legality moves forward. In contrast, the U.S. District Court for the District of Columbia declined on the same day to issue an order blocking the IFR's implementation pending the outcome of a similar lawsuit there. (The judge for the D.C.-based district court reportedly issued his decision from the bench, and a written version of the decision does not appear to have yet been made available.)

As has occurred with other Trump Administration asylum policies in the past year, the Administration's ability to implement the IFR in the near-to-medium term will likely depend upon decisions by the federal courts of appeals and perhaps the Supreme Court. Earlier this year, the U.S. Court of Appeals for the Ninth Circuit allowed the Trump Administration to enforce its Migrant Protection Protocols (also known as the MPP or the Remain in Mexico policy), pending further court proceedings, after a district court had initially barred the Administration from doing so. On the other side of the ledger, late last year the Ninth Circuit blocked the Administration from implementing a different rule that would have barred asylum claims by unlawful entrants at the southern border (again, pending further proceedings about the rule's legality); the Supreme Court, by a five to four vote, denied the Administration's request for a stay of the Ninth Circuit's decision.

Depending on the litigation strategy that the Administration pursues, the Ninth Circuit could decide in the coming weeks whether to allow the Administration to enforce the IFR pending further proceedings in the litigation.

# Background on the IFR and Related Law

Asylum is a discretionary form of humanitarian protection for certain aliens who face persecution in their country of origin (or last habitual residence) on account of one of five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. Under the asylum statute, aliens encountered or apprehended at the southern border may generally apply for asylum (subject to certain exceptions), even if they enter the country unlawfully between ports of entry. The statute gives the executive branch some authority to curtail eligibility for asylum by regulation. But as explained later, whether this authority goes far enough to sustain the IFR is a disputed legal issue.

The IFR would make aliens ineligible for asylum if they arrive at the southern border after traveling through at least one "third country" (that is, a country other than the alien's country of citizenship or last habitual residence) without seeking protection from persecution in the third country. Thus, if Border Patrol apprehends a national of Guatemala at the southern border who has traveled through Mexico without applying to the Mexican government for protection from persecution, the Guatemalan national would be ineligible for asylum in the United States under the IFR. The same would be true of a Honduran national who transits through Guatemala and Mexico: if he does not seek protection from at least one of those two countries, he would be ineligible for asylum in the United States. If the IFR goes into effect,

aliens arriving at the southern border who would remain eligible for asylum under the IFR would be limited to (1) Mexican nationals, assuming they do not somehow transit through another country en route to the border; (2) nationals of other countries who reach U.S. territory without going through third countries (e.g., who travel to the U.S. side of the border by air directly from their home countries); and (3) aliens who transit through third countries where they could not have obtained protection due to one of three reasons identified in the IFR (because they received a final judgment denying them protection in at least one third country, because they were being trafficked, or because none of the third countries through which they transited grant protections from persecution under international agreements).

At the border, the bottom-line impact of the IFR would be to subject claims of persecution by non-Mexicans who lack valid entry documents to a stricter threshold assessment that would enable DHS to remove more of these aliens quickly, without full proceedings in immigration court. This is because DHS would apply the new eligibility bar during the expedited removal process, when asylum officers screen claims of persecution made by aliens who arrive at the border without valid entry documents to determine if the claims have sufficient merit to warrant formal removal proceedings before an immigration judge. Under the IFR, any alien subject to the third-country transit bar would automatically fail the screening test for asylum claims, known as the "credible fear" standard. DHS would then screen the aliens' claims of persecution under a stricter test, known as the "reasonable fear" standard, to assess the alien's eligibility for two other forms of humanitarian protection that have higher standards of proof: withholding of removal and relief under the Convention against Torture (CAT). Under current regulations, without the IFR in place, the stricter "reasonable fear" standard applies only to certain aliens with prior orders of removal or criminal convictions that subject them to removal procedures in which only withholding and CAT protection—and not asylum—are available. Under the IFR, however, the reasonable fear standard would become the operative screening standard for all aliens who express a fear of persecution and who are subject to the third-country transit bar. The impact could be considerable. According to recent DHS statistics, whereas about 78% of aliens who express a fear of persecution satisfy the credible fear standard, about 32% satisfy the reasonable fear standard. Thus, if the IFR were to go into effect, a much higher percentage of persecution-based claims made by non-Mexican nationals at the border would likely fail at the screening stage and result in swift removal without full proceedings in immigration court, because almost all of these claims would become subject to the stricter reasonable fear screening standard.

# Justifications for the IFR

In the preamble to the IFR, the agencies identify three primary justifications for it. First, they contend that the rule is necessary to combat a rise in "meritless asylum claims" that "places an extraordinary strain on the nation's immigration system." The agencies reason that asylum claims "may be" meritless if made by aliens who "transited through another country where protection was available, and yet did not seek protection." The agencies note that the countries through which aliens are most likely to transit to reach the southern border—Mexico and every Central American country—are parties to international agreements regarding the protection of refugees and asylees (although, as noted below, the California district court held that the agencies had ignored evidence of inadequacies in Mexico's asylum system). Second, the agencies maintain that the IFR has a humanitarian purpose: it "prioritizes individuals who are unable to obtain protection from persecution elsewhere" and "aims to reduce human smuggling and its tragic effects" by "reducing the incentive for aliens without an urgent or genuine need for asylum to cross the border." Third, the agencies contend that the rule will give the United States leverage in diplomatic negotiations with Mexico and the Northern Triangle countries "regarding migration issues in general . . . and the urgent need to address the humanitarian and security crisis along the southern land border."

# Legal Issues and District Court Rulings

The primary legal issue that the IFR raises is whether it exceeds the authority that Congress gave to the executive branch under the Immigration and Nationality Act (INA) to restrict asylum eligibility by regulation.

The asylum statute contains various provisions about eligibility. At the outset, it provides that "[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival . . .), irrespective of such alien's status, may apply for asylum in accordance with this section." It goes on to specify certain restrictions on eligibility, such as for aliens convicted of aggravated felonies and aliens who have been denied asylum in the past.

Significantly, however, the statute also delegates to DHS and DOJ—the two agencies responsible for administering the statute—some authority to establish further restrictions on eligibility, above and beyond those that Congress established legislatively. Specifically, the statute says that the agencies "may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum." Put differently, the agencies have authority to restrict eligibility for asylum, but their restrictions cannot contravene any provision of the asylum statute. The question, therefore, becomes whether the third-country transit bar is "consistent with" the rest of the statute. (The litigation over the Administration's November 2018 rule that would have made unlawful entrants at the southern border ineligible for asylum has thus far turned on this same issue. The Ninth Circuit held that that bar likely was not "consistent with" the statutory provision specifying that aliens "physically present" in the United States may apply for asylum regardless of whether they arrive through "a designated port of arrival.")

The chief argument against the IFR is that it is not "consistent with" the asylum statute because the IFR undermines two statutory provisions that already limit eligibility based on considerations concerning third countries: the firm resettlement provision and the safe third country provision. The firm resettlement provision renders aliens ineligible if they were "firmly resettled in another country prior to arriving in the United States." An alien is only "firmly resettled" under this provision if a third country has offered him permanent legal status or some other form of permanent resettlement in the country. Next, the safe third country provision renders aliens generally ineligible to apply for asylum in the United States if they may be removed "pursuant to a bilateral or multilateral agreement" to a third country where they would not face a threat of persecution and where they would have access to a "full and fair" asylum application procedure. Opponents of the IFR argue that it makes an end-run around the protective limitations of these two statutory bars: instead of rendering aliens ineligible only when they've received permanent legal status in a third country (as under the "firmly resettled" bar), or only when the United States has entered into a formal agreement with a safe third country with fair asylum procedures (as under the safe third country bar), the IFR makes aliens ineligible based on the mere fact that they've transited through a third country without seeking protection from that country before traveling to the United States.

The U.S. District Court for the Northern District of California agreed with this argument, concluding that the bar for third-country transit likely violates the INA because it "fundamentally conflicts with the [approach] Congress took in enacting mandatory [eligibility] bars based on a safe option to resettle or pursue other relief in a third country." In contrast, according to reports, the U.S. District Court for the District of Columbia expressed "strong doubts" that this argument would succeed, although a written version of the district court judge's reasoning does not appear to be publicly available.

Plaintiffs in the lawsuits challenge the IFR on other grounds as well. They contend that the agencies' failure to follow notice and comment procedures before promulgating the rule makes it invalid on procedural grounds under the Administrative Procedure Act (APA). They also contend that the rule is substantively invalid under the APA because the agencies did not provide adequate justifications for the

rule, particularly in light of evidence that Mexico's asylum system does not offer a safe, alternative option for aliens who would be barred from asylum in the United States. The Northern District of California held that both of these arguments are likely to succeed on the merits as well.

# Considerations for Congress

Like other major immigration cases of recent years, the central question in the litigation over the validity of the new asylum rule is whether the executive branch has properly exercised the authority that Congress delegated to it in the INA, or whether the rule goes beyond that authority. There would be little question about Congress's authority to implement a similar rule through legislation or to otherwise amend the asylum statute or other aspects of immigration law as it sees fit.

Congress is currently considering various bills to amend the immigration laws in response to circumstances at the border. In the House, one bill under discussion (the Homeland Security Improvement Act, H.R. 2203) would address the treatment of aliens who claim a fear of persecution at the border, including by limiting family separation and imposing harder limits on the length of detention in temporary facilities. In addition, the bill would terminate the IFR, the Migrant Protection Protocols, and the Administration's metering policy for asylum seekers at ports of entry. Bills introduced in the Senate (the Stop Cruelty to Migrant Children Act, S. 2113; the Protecting Families and Improving Immigration Procedures Act, S. 1733) would also focus upon improving conditions for migrants at the border and restricting family separation. In a different vein, another bill in the Senate (the Secure and Protect Act of 2019, S. 1494) would, among other measures, require asylum seekers from the Northern Triangle countries to apply for protections at U.S. refugee processing centers abroad and render them ineligible to apply for asylum in the United States. That bill would also mandate the hiring of 500 new immigration judges and allow DHS to detain family units for up to 100 days, with an eye towards enabling DHS to keep families in custody until an immigration judge decides their asylum claims. At least one other bill would establish in-country refugee processing in the Northern Triangle without limiting asylum eligibility at the border.

Barring a legislative enactment addressing the situation at the border, the primary legal developments in response to that situation will continue to play out between the executive branch and the courts.