PennState Law Center for Immigrants' Rights Clinic

Third Country Asylum Rule: What You Need To Know

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What is the new policy?

On July 15, 2019, the Department of Homeland Security (DHS) and Department of Justice (DOJ) announced that it would issue an interim final rule affecting asylum seekers at the southern border of the United States. This policy adds a bar to asylum for all individuals who enter or attempt to enter across the southern border, if they did not seek protection from a third country while en route to the United States. The rule will be added to the regulatory framework that governs asylum seekers at the border and eligibility for asylum.

What is the current status of enforcement of the interim final rule?

On September 11, 2019, the Supreme Court reinstated the interim final rule nationwide in a brief unsigned order pending litigation on the merits in the courts. In dissent, Justice Sotomayor, joined by Justice Ginsburg, expressed concerns about upending "longstanding practices regarding refugees who seek shelter from persecution," the administration's bypassing of typical public notice and comment procedure in issuing the rule, and the importance of respecting lower courts' decisions and appeal processes.

What is the scope of the interim final rule?

The effective date of the rule was July 16, 2019 and will be invoked by asylum officers in DHS and immigration judges in DOJ. The rule does not impact two related forms of relief known as withholding of removal and protection under the Convention Against Torture. These forms of relief are narrower and without the same benefits of asylum protection.

What legal authority is the administration relying upon to issue the interim final rule?

The interim final rule points to sections in the immigration statute known as the Immigration and Nationality Act (INA). Two of these sections are summarized below.

- INA § 208(d)(5)(B) states that "[t]he Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this Act."
- INA § 208(b)(2)(C) states that the "Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1)."

Has the administration invoked these immigration statutory sections before?

Yes. Last November, DOJ and DHS issued a joint interim final rule to limit asylum to those who arrive at a place other than a port of entry and in doing so, invoked various sections of the immigration statute, including those outlined above. That rule was successfully challenged in the courts.

What are the legal concerns with the interim final rule?

There are several concerns, including that the interim final rule violates the immigration statute and other laws. While the interim final rule identifies some sections of the immigration statute, these sections cannot be read in isolation to the statute as a whole, nor can it conflict with the U.S. Constitution, statutes and other laws. To illustrate, Congress has set a framework for asylum seekers who pass through another country before arriving in the United States through doctrines known as "firm resettlement" and "safe third country." The interim rule exceeds this framework and in doing so may violate the INA. Further, INA § 208 states that any person physically present in the United States, regardless of *how* or where they entered is eligible to apply for asylum. The section states in part, "Any alien . . . who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) irrespective of such alien's status, may apply for asylum . . ." (emphasis added)

Why is the administration issuing these policies?

The position of the government is that the policy will aid in "deterring meritless asylum claims and de-prioritizing the applications of individuals who could have obtained protection in another country." The government has also indicated that the policy will reduce the number of people crossing the border "without an urgent or genuine need for asylum." Finally, the government believes the new rule will improve foreign relations between the United States and other nations on migration issue.

What are some of the countervailing views by some refugee advocates and scholars?

Many asylum seekers arriving at the southern border are from the Northern Triangle which is comprised of Guatemala, El Salvador and Honduras. The violence and danger in these countries is well documented. Further, the dangerous conditions in Mexico is well documented. Individuals who have suffered or will suffer individual harm for a specific reason are eligible to apply for asylum under the immigration statute and other laws. Many asylum claims made by those arriving from the Northern Triangle are with merit. Further, because withholding of removal and protection under the Convention Against Torture to not allow a person to petition for their families or apply for permanent status, there are concerns about how this rule will "rip even more families apart." Finally, advocates have tied the new rule to a larger narrative and set of policies enacted by the current administration to place restrictions on asylum seekers at the border and beyond.

What is an "Interim Final Rule"?

An Interim Final Rule becomes effective immediately upon publication in the *Federal Register* and is an exception to the general rule that public notice and comment must take place before the effective date of a regulation. DOJ and DHS have concluded that a "good cause" exception exists to publish this asylum regulation as an interim final rule because "this rule is essential to avoid a surge of aliens." Alternatively, the Departments have invoked the "foreign affairs exception" tying the flow of noncitizens to the southern border to national security and foreign policy interests of the United States. Written comments can be submitted by the public for a period of thirty days from the date of publication.

Has the interim final rule been challenged in court?

Yes. Lawsuits have already been filed challenging the rule. One lawsuit was filed by the ACLU, Southern Poverty Law Center, and the Center for Constitutional Rights in the federal district court for Northern California, arguing that the rule violates the Immigration and Nationality Act and the Administrative Procedure Act. The relief sought by the plaintiffs includes but is not limited to a declaration that the rule is unlawful and invalid and temporary and permanent injunction blocking the government from implementing the rule. A second lawsuit was filed in the federal district court for the District of Columbia on behalf of the CAIR Coalition and RAICES, arguing that the rule violates these same statutes as well as the Trafficking Victims Protection Reauthorization Act. The relief sought by the plaintiffs is a temporary restraining order followed by a preliminary injunction.

What is the current status of these lawsuits?

On July 24, 2019, the federal district court for the District of Columbia rejected the argument for a temporary restraining order and permitted enforcement of the interim final rule.[1] On the same day, Judge Tigar, a federal judge in the district court for Northern California, issued a nationwide injunction to block enforcement of the interim final rule throughout the country. On August 16, the Ninth Circuit, on appeal, narrowed the scope of this ruling to California and Arizona but permitted the district court to consider additional evidence. On September 9, Judge Tigar again expanded the scope of his ruling to the entire country, citing additional evidence warranting blocked enforcement of the interim final rule nationwide and administrability issues if enforcement were only blocked in certain states. On September 10, the very next day, the Ninth Circuit again temporarily stayed Judge Tigar's second nationwide injunction and sought additional information from both parties.

The administration filed an emergency application to the Supreme Court on August 26, 2019 – before Judge Tigar's second nationwide injunction based on additional evidence – seeking a stay of Judge Tigar's first ruling. On September 11, 2019, the Supreme Court, as explained above, issued a "stay" on both nationwide injunctions issued by Judge Tigar and in doing so reinstated the interim final rule in full while this litigation is pending.

[1] Transcript of Oral Ruling, *Capital Area Immigrants' Rights Coalition, et al. v. Trump, et al.*, No. 1:19-cv-02117-TJK, 2019 WL 3436501 (D.D.C. July 24, 2019).

Is this the first time the Supreme Court has allowed a new immigration policy to take effect before a decision has been made on the merits in the courts?

No. On December 4, 2017, the Supreme Court permitted the administration to enforce President Trump's September 24 proclamation banning nationals from several countries from entering the United States before the courts were able to reach a decision on the merits. The Supreme Court ultimately upheld the travel ban indefinitely when it made a decision on the merits on June 26, 2018.

Where can I find more resources?

See the Penn State Law Center for Immigrants' Rights Clinic website for updates on this and other immigration policies. Also visit:

- Department of Homeland Security
- American Immigration Lawyers Association
- American Immigration Council
- Human Rights First