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MY COMMENT ON PROPOSED DRACONIAN CHANGES TO ASYLUM REGULATIONS – DO YOU HAVE ONE TOO?

Posted on July 14, 2020 by David Isaacson

The Department of Homeland Security and the Executive Office of Immigration Review (the agency within the Department of Justice that runs the immigration courts) have jointly proposed a new rule entitled "Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review" that would drastically change the law in the United States governing applications for asylum and other protection from persecution and torture. The proposed rule is very lengthy, but its common theme is the creation of many different reasons to deny protection to asylum-seekers, sometimes even without a hearing.

If the new rule were finalized as proposed and were to take effect, applications for asylum could be denied for reasons such as being based on gender or domestic violence, being based on a political opinion that doesn't match the new narrow definition of what a political opinion should be, or because the applicant had traveled through too many countries on the way to the United States, or had not been able, as an undocumented immigrant, to pay all of their taxes exactly correctly. People could be deported without a full hearing because the court of appeals for the area where they happened to be detained had issued a decision disfavoring their kind of claim, even if other courts of appeals had ruled differently and the Supreme Court might resolve the conflict in their favor. People could also be deported without a hearing because the immigration judge reading their paper application thought they had no claim for asylum without hearing from them directly at all.

These changes have been strongly criticized by the American Immigration Lawyers Association and the National Immigrant Justice Center, among other groups. They can be criticized in a meaningful way by anyone with an interest in

this area, as well, because the government has, as required under the Administrative Procedure Act (APA), invited public comment regarding the proposed rule.

Public comments on the proposed rulemaking "must be submitted on or before July 15, 2020", and can be submitted online "prior to midnight eastern time at the end of that day." The link to submit a comment online is https://www.regulations.gov/comment?D=EOIR-2020-0003-0001 . Comments can also be submitted by mail, if postmarked by July 15, for those who may prefer that method of communication, in which case they should be directed to Lauren Alder Reid, Assistant Director, Office of Policy, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 1800, Falls Church, VA 22041. Comments must be "identified by the agency name and reference RIN 1125-AA94 or EOIR Docket No. 18-0002".

The main online comment field is restricted to 5,000 characters. I have drafted a comment that currently uses 4,996 of those characters. There is much to criticize about the rule beyond what I could fit under that limit, and I am considering whether to attach a longer criticism to my final online comment as a PDF document. There may be no guarantee that DHS and EOIR would read my attachment, but then again there is no guarantee, other than the prospect of litigation under the APA, that they will truly consider any of the comments, and I do not think there would be any legal merit to a refusal to consider a comment just because part of it was submitted as an attached PDF. Anyone else who has more to say than the 5,000 character limit may want to consider providing an attachment as well.

But whether or not you have more than 5,000 characters to say about this outrageous attack on asylum, I would strongly recommend that you say something. The more substantively different comments that are received (duplicates will be given little weight), the more objections DHS and EOIR will need to consider and address before promulgating a final rule.

The current version of my comment, which I may revise before the Wednesday deadline but am posting now in the hope that it may inspire other comments, is as follows:

As a lawyer whose practice has included asylum work for nearly 15 years, I write to comment on DHS/EOIR RIN 1125-AA94. The common thread of this proposal is disregard for the law in an effort to limit access to asylum and

related relief however possible.

It is inappropriate for credible fear reviews, per proposed 8 CFR 1003.42(f), to consider only "decisions of the federal courts of appeals binding in the jurisdiction where the immigration judge conducting the review sits" and not those of other courts of appeals. The credible fear process is meant to ascertain if "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum". INA §235(b)(1)(B)(v). There may be a "significant possibility" that venue will be changed to the jurisdiction of a different court of appeals before a decision on the asylum application: credible fear reviews will often be conducted near the border or an international airport, while aliens released on bond or parole may not remain nearby. Or, if there is a conflict between courts of appeals, there may be a "significant possibility" that the Supreme Court could resolve the conflict, see Supreme Court R. 10(a), in favor of a different circuit. As formerly set out in guidance for asylum officers, aliens should be given the benefit of favorable case law from a different circuit than the one where a determination is made. When a claim has a significant chance of success under the law of any circuit, there is a significant possibility that the alien could ultimately establish eligibility for asylum.

Requiring applicants in credible fear proceedings to establish "a reasonable possibility" of persecution or torture is inappropriate. Credible fear review is meant as a brief screening process. High standards increase the risk that people may be sent to their deaths or torture. It is bad enough to run this risk in INA §238 proceedings for people with aggravated felony convictions, who might themselves pose risk, or in reinstatement of removal, for people who have theoretically had a prior opportunity to seek protection. It is worse to do so for non-criminals who face a policy-based bar to asylum during their first opportunity to request U.S. protection.

The regulation should not exclude, from the definition of particular social group, claims involving "interpersonal disputes" or "private criminal acts" "of which governmental authorities were unaware or uninvolved." Private harm based on membership in an otherwise qualified particular social group, which the government is unable or unwilling to prevent, is persecution, see, e.g., Rosales-Justo v. Sessions, 895 F.3d 154 (1st Cir. 2018); Pan v. Holder, 777 F.3d 540, 543 (2d Cir. 2015), even if governmental authorities were unaware or

uninvolved.

Nor is it appropriate to preclude claims based on domestic violence or gender. This is inconsistent with, for example, Canadian refugee law. See, e.g., Kauhonina v. Canada (Minister of Citizenship and Immigration), 2018 FC 1300; Jeanty v. Canada (Minister of Citizenship and Immigration), 2019 FC 453.

Proposing to "define political opinion as one . . . in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof" is also indefensible. An opinion about what policy should be, as opposed to who should control the state, is still political. As a matter of English usage, we would not say that everyone who supports the same candidates for President, governor, Congress, state legislature, etc., must have all the same political opinions. People may differ on such matters as whether abortion should be legal, but vote for the same party—there are pro-choice Republicans like Senator Lisa Murkowski, or pro-life Democrats like Senator Bob Casey. If Senator Murkowski would vote for the same Republican candidates as someone who believes abortion should be illegal, this does not mean the two have no differing political opinions. Persecution of Senator Murkowski for her view on abortion would be based on political opinion even if the persecutor agreed with her votes for Republican candidates.

The list of 9 adverse factors supporting denial of asylum as a matter of discretion is inappropriate. The better, well-established rule is that "the danger of future persecution can overcome all but the strongest adverse factors." Huang v. INS, 436 F.3d 89, 100 (2d Cir. 2006). Basing denial on how many countries an alien traveled through (perhaps to change planes) is absurdly arbitrary; the other 8 are little better.

The reduction in confidentiality, besides being inappropriate, should not apply retroactively. Those subject to the prior regulatory promise of secrecy should retain its benefits.

5,000 characters is not enough to rebut this 43-page monstrosity.