

Asylum Process Rule Includes Welcome Improvements, But Critical Flaws Remain to Be Resolved

On March 29, 2022, the Biden administration published an [Interim Final Rule](#) (IFR) that creates a new process for asylum seekers entering the United States. The IFR contains significant improvements—including preserving access to immigration court removal hearings and establishing a status conference mechanism that encourages narrowing of issues—following comments from [members of congress](#), [UNHCR](#), [Human Rights First](#), and many legal services organizations. Under the IFR, asylum seekers who are placed in the expedited removal process—wherever they enter or are processed into the United States—and who establish a credible fear of persecution may be assessed in an initial, full asylum interview (“Asylum Merits Interview”) by an asylum officer from the U.S. Citizenship and Immigration Services (USCIS). Cases not granted by the Asylum Office are referred to immigration court removal proceedings, as are other asylum cases that are not granted by the Asylum Office. The IFR, which is scheduled to take effect on May 31, 2022, follows an August 2021 [Notice of Proposed Rulemaking](#) (NPRM) in which the Departments of Homeland Security (DHS) and Justice requested public comment on the proposed rule. Comments on the IFR must be [submitted](#) on or before May 31, 2022.

The U.S. asylum system should be timely, fair, accurate, and consistent with refugee and human rights law, with adjudications carried out in the least-traumatizing setting possible. The IFR in its current form does not achieve these goals. Despite welcome changes to some aspects of the rule, the IFR imposes new concerning deadlines for the Asylum Office interview process that were not included in the initial proposed rule, similarly creates new immigration court rocket dockets, and continues to effectively gut a crucial safeguard in the credible fear process. The rule also remains rooted in the fundamentally [flawed](#) expedited removal [process](#) that has been shown time and again to return refugees to persecution and [death](#). Unless these concerning provisions are removed, asylum seekers will be rushed through adjudication without adequate time to secure legal representation, gather necessary evidence, and take other steps to prepare their cases given the complexity and requirements imposed by U.S. law and the adjudicating agencies. These timelines would—as have other “[streamlining](#)” initiatives, such as those imposed on the Board of Immigration Appeals by former Attorney General John Ashcroft—lead instead to counterproductive, [mistaken denials](#), increased appeals filed in the [federal courts](#), and growing immigration court [backlogs](#).

The current delays and backlogs in the asylum system developed despite the existence of many timelines and deadlines in the asylum and immigration removal systems. While urgent action is required to restore timely adjudication, imposing new deadlines will discourage legal representation and spur inaccurate decisions, require additional adjudications that would not have been necessary if an accurate decision had been reached initially, and result in the return of refugees to persecution and torture. This factsheet addresses these and other concerning provisions of the IFR and recommends solutions that move the United States toward an asylum system that will provide more accurate, timely, and fair decisions.

Rushed Asylum Merits Interviews Will Result in Erroneous Denials of Protection and Needless Immigration Court Referrals

- **Providing asylum seekers initial full asylum eligibility interviews with USCIS, as should be done in the rest of the asylum system, is a welcome step toward a less-traumatizing, more timely process.** Such a system could reduce delays for asylum seekers and limit cases that need to be referred for immigration court hearings, thus reducing the number of cases requiring removal hearings in the backlogged immigration courts. But these interviews should not be conducted after asylum seekers are subjected to the expedited removal process, as discussed below, and must not be conducted in detention, as this would undermine asylum seekers’ ability to prepare and present their claims by limiting access to

counsel and often inflicting physical and psychological harms that may interfere with the ability of asylum seekers to share the reasons they have been forced to flee.

- **The IFR’s newly imposed deadlines for the Asylum Office interview process are not reasonable and will prevent asylum seekers from finding counsel and fairly presenting their requests for refugee protection.** The rule mandates that USCIS conduct the Asylum Merits Interview 21 to 45 days after a positive fear determination (which, under the IFR, is deemed the asylum application), bars rescheduling of the interview without showing “exigent circumstances,” and directs asylum seekers to generally submit evidence 14 days before the interview—potentially just seven days after the fear determination. These deadlines will not provide adequate time for asylum seekers to secure legal representation, make any needed corrections to the credible fear record, or to collect and submit evidence. Many legal service providers have weeks or months-long waits for an initial legal consultation and simply will not be able to assist asylum seekers forced into this rushed process.

Congress has recognized that asylum seekers need time to secure legal representation and prepare their cases, such as gathering declarations from witnesses and assessments from experts that adjudicators often expect to receive in order to confirm the persecution and torture they suffered. In fact, Congress [rejected](#) efforts to impose a 30-day asylum application filing deadline, setting a one-year deadline instead. Senator Ted Kennedy [explained](#) in rejecting the 30-day deadline: “Many [asylum seekers] are so traumatized by the kinds of persecution and torture that they have undergone [that] they are psychologically unprepared to [participate in any legal process].” Even that longer [deadline](#) has been [shown over](#) and [over](#) again to lead to mistaken asylum denials, adding to backlogs and contributing to delays. Indeed, recognizing the counterproductive and harmful nature of the one-year deadline, the [Biden administration](#) and a bipartisan Senate immigration [bill](#) both called for its elimination. Rushed deadlines only will lead to more mistaken decisions and referrals to the immigration courts.

- **The Asylum Office must resolve its longstanding [failure](#) to grant asylum [cases](#) that are overwhelmingly later granted by the immigration courts and [punting](#) of cases that could have been [resolved](#) by the Asylum Office, rein in [needlessly lengthy](#) day-long interviews, and establish reasonable expectations about the form and extent of corroborating evidence asylum seekers must produce.** Disparities in grant rates between [asylum offices](#) and by nationality also raise significant concerns about the fairness of Asylum Office adjudications. If the Asylum Office does not address these concerns, the initial full asylum eligibility interviews created by the IFR will result in delayed, inaccurate decisions that continue to exacerbate the immigration court backlog. In addition, it is critical that the asylum office be staffed with sufficient officers to conduct Asylum Merits Interviews within months, not years, to avoid the growth of new backlogs and further delays.
- **Recommendations for the IFR:** The IFR’s rushed deadlines for the Asylum Merits Interview, which were not included in the NPRM, should be removed. These interviews should not be scheduled for at least 90 days after the credible fear screening, and USCIS should modernize scheduling by adopting an electronic scheduling system that allows asylum seekers, or their legal counsel, to set and reschedule, if needed, these interviews.

Many asylum seekers will want to move ahead as quickly as possible with their interview once they have secured legal counsel and the necessary evidence. Indeed, to receive legal recognition as refugees and begin the process to bring their spouse and children to safety in the United States, they must complete these interviews. Some, however, may require additional months to secure legal representation and gather necessary evidence. To ensure accurate, efficient decision-making at the earliest part of the process and avoid violating Congress’s intent to provide asylum seekers sufficient time to search for counsel and prepare their case before filing an asylum application, the Asylum Office must accept all

requests for rescheduling and evidentiary filing extensions within the first year of the individual's most recent date of entry. Continuances thereafter should be decided under the "good cause" and "exceptional circumstances" standards—in line with U.S. [law](#) and existing USCIS [policy](#).

Under the IFR process credible fear records are considered the application for asylum. But these records, which are composed of notes taken by the asylum officer, are often incomplete or inaccurate given the preliminary nature of these interviews, lack of adequate interpretation, and general absence of counsel to raise information left unaddressed by the officer or address complex legal questions such as setting forth the particular social group to which an asylum seeker belongs. Asylum seekers are likely to need to make substantive corrections and additions to the credible fear record, including specifying additional grounds on which the individual qualifies for asylum that were not elicited by the asylum officer during the initial fear screening. In recognition of the inherent limitations of relying on the credible fear record as the asylum application, the rules should provide that asylum seekers may not be penalized through negative credibility or factual findings because they correct mistakes in the credible fear record and/or offer additional information to fully explain the reasons they are seeking asylum.

"Streamlined" Immigration Court Hearings Are Due Process Deficient Rocket Dockets

- **Preserving immigration court removal hearings for asylum seekers not granted asylum by the Asylum Office is a critical due process safeguard.** This welcome improvement from the NPRM restores regular removal hearings for asylum seekers referred from the Asylum Office. However, the IFR's attempt to "streamline" these hearings raise serious due process concerns.
- **Unreasonable timelines created in the IFR for immigration court proceedings will deny asylum seekers, including those without legal counsel, due process and result in refugees returned to persecution and torture.** The IFR newly imposes counterproductive rocket dockets (outlined in detail below) described as "streamlining." A scheduling hearing must be scheduled within 35 days after asylum seekers are notified of the referral of their case to immigration court and any additional evidence and a list of witnesses to testify on their behalf submitted by the asylum seeker just 30 days later.

This highly accelerated timeline—especially the requirement to submit all evidence within 30 days—will make it nearly impossible for asylum seekers who did not have an attorney during the Asylum Office process to find an attorney and to prepare evidence to submit to the court. The asylum seeker and accompanying family members are generally the only people interviewed during Asylum Office adjudications. Many unrepresented asylum seekers will not understand which additional witnesses, such as country conditions and medical experts, should testify before the immigration court or be able to identify, secure, and name these witnesses with such minimal time to prepare.

The IFR's limits on continuances, which are generally granted in removal proceedings to ensure asylum seekers may be represented by counsel and have a reasonable opportunity to present their cases, are unfair and inefficient. Unrepresented asylum seekers are particularly unlikely to be able to meet the IFR's heightened showing of a constitutional or statutory violation to request additional continuances. In addition, imposing 10-day limits on initial continuances under the IFR will further clog court dockets without providing adequate time for asylum seekers to find legal representation or prepare.

- **The regulations should ensure that asylum seekers are not denied a full hearing on their asylum claim.** Human Rights First welcomes the IFR provision permitting immigration judges to grant asylum without a merits hearing where DHS waives cross examination and does not plan to present evidence, which will facilitate judges' management of their limited time and court resources. However, the IFR also permits immigration judges to forego merits hearings where neither party indicates an intention at the status conference to present additional evidence and prohibits hearings where the asylum seeker does

not contest the Asylum Office's decision on asylum eligibility. Given the highly rushed timeline for the status conference, many asylum seekers will be unrepresented and may not therefore have a fair opportunity to present their case or even understand the legal implications of contesting the asylum officer's decision. Denying asylum seekers an asylum eligibility hearing would violate [Congress'](#) intent, when bringing U.S. refugee law in line with U.S. treaty obligations, that asylum seekers subjected to the expedited removal process, like other asylum seekers, receive the safeguard of a hearing on their request for asylum before an immigration judge. In addition, deciding cases without hearing is inconsistent with judges' legal [duty](#) to develop the record, particularly where asylum seekers are unrepresented.

- **Recommendations for the IFR:** Eliminate arbitrary timelines for immigration court hearings to avoid due process deficient rocket docket, but, at a minimum, formally provide at least two extension/rescheduling requests (of the merits hearing and/or submission of evidence, witness lists, responses to DHS filings) of 60 to 90 days each for "good cause" (including to secure an attorney or prepare with newly retained counsel); and amend the rules to ensure that immigration judges fulfill their legal [duty](#) to develop the record through a merits hearing before denying asylum or other protection to an individual who previously established a credible fear of persecution through the expedited removal process.

People Seeking Asylum Should Not Be Subjected to the Flawed Expedited Removal Process, Critical Credible Fear Process Safeguard Should Not Be Hallowed Out

- **Recognizing the government's [statutory authority](#) to release asylum seekers in expedited removal from detention on humanitarian and public interest grounds is a welcome improvement to the IFR.** This positive change from the NPRM could, if utilized, help to minimize unnecessary and traumatic detention of asylum seekers and improve access to legal counsel. Government data shows that detained individuals are [two-and-a-half times less likely](#) to be represented by counsel compared to individuals who have been released from detention. In addition, Human Rights First continues to urge the administration not to carry out the asylum process in the IFR following [fundamentally flawed](#) expedited removal proceedings, which raise serious [due process](#) concerns, [risk wrongful deportation](#) of refugees in contravention of U.S. obligations, and [divert](#) government resources by having the Asylum Office conduct fear screenings instead of full asylum interviews. Instead, as outlined in Human Rights First's [comment](#) on the NPRM, full initial asylum adjudication with USCIS should be implemented outside of expedited removal and while the individual is not in DHS custody.
- **Maintaining the Asylum Office's requests for reconsideration procedure to review its erroneous negative fear determinations is a vital change from the NPRM, but newly imposed limitations in the IFR hollow out this critical safeguard,** which prevents the deportation of refugees to life-threatening dangers, as Human Rights First [has](#) previously [documented](#). The IFR sets an unworkable seven-day deadline for submitting a request for reconsideration (following immigration judge review which must happen with [seven days](#) of the fear determination) and limits asylum seekers to a single request. Asylum seekers, particularly those in detention and/or without representation, are unlikely to be able to prepare and submit a substantive request for reconsideration (including providing critical evidence, medical evaluations, or even obtaining the credible fear interview notes to review errors) on this timeline. An asylum seeker who finds an attorney to file a request more than seven days after the immigration judge review or following a *pro se* request is barred from asking the Asylum Office for reconsideration of a [wrongful](#) negative determination.
- **Recommendations for the IFR:** Do not subject people seeking asylum to the inherently flawed and inefficient expedited removal process and then refer them for Asylum Merits Interviews. Instead, Asylum Office interviews can be scheduled for asylum seekers who are referred directly to full removal proceedings (avoiding expedited removal), or already in, immigration court removal proceedings after

those proceedings are terminated or adjourned with the consent of the applicant, as Human Rights First detailed in its initial [comments](#).

In addition, the rules should allow requests for reconsideration to the Asylum Office of an erroneous negative fear determination to be filed *any time* prior to removal as the current, arbitrary seven-day deadline would prevent nearly all such requests; permit at least one subsequent request as well as supplementation of an existing request with newly available evidence where a prior request was filed *pro se*; and require the Asylum Office to issue a reasoned explanation in writing for denials of requests to reconsider.

Dangerously Expedited Asylum Process Deadlines

Under the timelines imposed by the IFR, asylum seekers who establish a credible fear of persecution could be rushed through the new asylum process at the Asylum Office and denied protection after a hearing in immigration court in as few as 4 months (125 days)—a wholly inadequate timeline particularly given that it encompasses not only adjudication time but also all of the many initial steps that must occur before interviews and hearings. The IFR’s timelines for the Asylum Merits Interview and “streamlined” immigration court hearings are insufficient for asylum seekers to find and consult with an attorney who can assist them to collect additional evidence, secure medical evaluations, receive and translate documents from their country, and submit other crucial evidence in support of their request for protection.

The unreasonable timelines and deadlines created by the IFR for the Asylum Merits Interview and “streamlined” immigration court hearings are outlined here:

Asylum Merits Interview

- Asylum seekers who are placed into the IFR’s new process after receiving a positive credible fear determination are scheduled for an **Asylum Merits Interview** between 21 and 45 days after the fear determination. (8 CFR § 208.9(a)(1))
 - Amending application: a positive credible fear determination is considered the application for asylum; amendments must be submitted directly to the Asylum Office at least seven days in advance of the Asylum Merits Interview (or postmarked 10 days in advance), but asylum officers may consider late-made changes for good cause shown or grant an extension (but extensions cannot cause the Asylum Merits Interview decision to be issued more than 60 days after the credible fear interview) (8 CFR § 208.4(b))
 - Evidence: must be submitted 14 days prior to the interview, which could be as little as seven days after the credible fear determination is received; asylum officers have discretion to consider late-filed evidence (8 CFR § 208.9(e))
 - Rescheduling: permitted only in “exigent circumstances” including lack of asylum officer, lack of appropriate interpreter, illness of applicant, or closure of the asylum office (8 CFR § 208.9(a)(1))
 - Decision: within “about” 60 days of a positive credible fear determination, according to the IFR; typically, the Asylum Office schedules decisions to be provided 14 days after interview in affirmative asylum cases (8 CFR § 208.14)

Immigration Court Hearings

- An initial scheduling hearing (**Master Calendar Hearing** (MCH)) must be scheduled between 30 to 35 days after service of the Notice to Appear (NTA) on an asylum applicant who is not granted asylum following the Asylum Merits Interview. (8 CFR § 1240.17(b))
- The IFR creates a formal **Status Conference** mechanism, which is scheduled 30 to 35 days after the MCH (i.e. 60 to 70 days after service of NTA on applicant). Applicants must respond to the allegations in the NTA, indicate whether they contest removal, submit evidence, and indicate the testimony they will

elicit during the merits hearing. If represented by counsel, the asylum seeker must at the status conference also describe any errors in the credible fear determination, provide any additional bases for asylum, and proffer additional avenues of relief (for example Convention against Torture and/or withholding of removal under the Immigration and Nationality Act). (8 CFR § 1240.17(f)(2))

■ Evidence submission:

- Applicant: must submit at or by the status conference, including a list of witnesses and the asylum seeker must indicate whether they intend to testify at the hearing (8 CFR § 1240.17(f)(2)(i)(A)(1))
- DHS: can submit evidence up until 15 days before merits hearing, or if no merits hearing within 15 days of the status conference (8 CFR § 1240.17(f)(2)(ii)(C)(3)(i))
- If DHS submits evidence, the asylum seeker can submit additional evidence (limited to responding to DHS evidence) up to five days before merits hearing, or if no merits hearing within 25 days of the status conference. (8 CFR § 1240.17(f)(2)(ii)(C)(3)(ii))

■ **Individual Merits Hearing** is to be scheduled 60 to 65 days after MCH (i.e. 90 to 100 days after service of NTA on applicant) and generally not more than 135 days after the MCH (i.e. 170 days after service of the NTA on applicant). (8 CFR § 1240.17(f)(2), (h)(2)(ii))

- Decisions: immigration judges are directed whenever practicable to issue an oral decision on the date of the final merits hearing or, if no hearing is held, within 30 days of the status conference. However, the immigration judge must issue an oral or written decision within 45 days of the final merits hearing or status conference (if no merits hearing is held). (8 CFR § 1240.17(f)(5))
- Where the immigration judge does not grant asylum and DHS challenges the determination of the Asylum Office that the asylum seeker is eligible for withholding of removal or protection under the Convention against Torture, the immigration judge may not issue a decision unless the asylum seeker has been given at least 10 days, but no more than 30 days, to respond to the evidence submitted by DHS. (8 CFR § 1240.17(f)(5))

■ Continuances of Merits Hearing:

- Within 90 days of the master calendar hearing: continuances of up to 10-days in length permitted unless the immigration judge determines a longer period would be more efficient on a showing by asylum seeker of 'good cause.' Good cause continuances cannot be granted that result in the merits hearing occurring more than 90 days after the master calendar hearing. (8 CFR § 1240.17(h)(2)(i))
- 90 to 135 days of the master calendar hearing: a continuance or extension that would result in the merits hearing occurring between 90 and 135 days of the MCH may only be granted where "necessary to ensure a fair proceeding" despite asylum seeker's "due diligence" (8 CFR § 1240.17(h)(2)(ii))
- Beyond 135 days from the MCH: continuances/extensions permitted only where asylum seeker shows that failure to grant "would be contrary to statute or the Constitution" (8 CFR § 1240.17(h)(2)(iii))
- DHS may request continuances of unrestricted duration and number on showing of "significant government need" (8 CFR § 1240.17(h)(3))

Public Comment Period

Human Rights First encourages members of the public, including asylum seekers, services providers working with refugees and survivors of torture, and other rights monitors, as well as members of Congress to [submit](#) comments on the IFR and its implication for people seeking refugee protection in the United States on or before the May 31, 2022 deadline.