
Immigration Court Asylum Hearings Versus “Review” of Asylum Officers’ Decisions

Recent [media reports](#) and [government documents](#) indicate that the Biden administration may publish an Interim Final Rule (IFR) to create a new process for asylum cases originating at the southern border, raising concerns that the public will not have an opportunity to weigh in through the notice and comment process prior to implementation. Non-governmental organizations have [recommended](#) that the Biden administration take steps to make asylum adjudications more humane, fair, effective, and timely, including referring asylum seekers for full asylum interviews with U.S. Citizenship and Immigration Services (USCIS) asylum officers in their destination locations. These full asylum office adjudications should not be conducted within the expedited removal process, which [undermines](#) due process.

While some of the potential changes described in the media may have positive impacts, other aspects of the new procedure may raise significant due process concerns, including the use of expedited removal and language in media reports indicating that, if an asylum officer decides not to grant asylum, an immigration court could “[review an asylum officer’s decision](#)”— rather than referring to an immigration court hearing.

An effective and fair asylum adjudication system must provide an opportunity for a de novo immigration court hearing after an asylum seeker’s case is not granted by a USCIS asylum officer, rather than an immigration court “review” of the asylum officer’s decision. Depriving asylum seekers of immigration court hearings in such situations would diminish the efficiency and non-adversarial nature of asylum office interviews and risk erroneous decisions that return refugees to persecution and torture. Years of representing refugees who are erroneously denied asylum by the asylum office have illustrated to Human Rights First that immigration court hearings are critical to ensuring accurate refugee protection decisions. Human Rights First’s concerns about limiting immigration courts to “review” of asylum officer interviews include:

- **Asylum officers often fail to grant asylum to refugees who qualify for protection and who subsequently receive asylum in de novo immigration court proceedings.** At Human Rights First, we have represented many refugees whose cases were erroneously referred to immigration court by the asylum office and later granted asylum by an immigration judge. In fiscal year 2016—before the Trump administration implemented a slew of policies to rig adjudications against asylum seekers—immigration courts granted asylum to [83 percent](#) of asylum seekers whose cases had been referred by the asylum office. Human Rights First has seen many cases referred by the asylum office because the applicant did not suffer past persecution, even though past persecution is not required for an applicant to qualify as a refugee. While the asylum office has long prided itself on the fact that all cases undergo supervisory review, Human Rights First has worked on cases where that review was clearly deficient, as well as cases where the asylum office’s failure to grant the case was based on a failure to develop the factual record. That individual inexperienced or unskilled officers would make wildly incorrect decisions is to be expected in any large bureaucracy, but that these would slide through what is supposed to be an active supervisory review process is troubling and would have far worse consequences in a system where such decisions were not subject to de novo review in immigration court.
- **Asylum officer decisions do not constitute a sufficient basis for review by an immigration judge.** Any “review” of the asylum seeker’s claim will be based on the same errors and omissions

made by the asylum officer in creating their informal interview notes. There is no transcript or recording of the interview nor generally a detailed decision with citations to applicable law or supporting case law explaining the basis for referring the case to immigration court. The “decision” referring an asylum seeker’s case to the immigration court is typically a one-line sentence with little explanation. As a result, any misunderstanding or omission in notetaking by the asylum officer creates an inaccurate record of the interview. A limited review process would provide an insufficient opportunity for asylum seekers to correct errors or omissions. Additionally, asylum officers generally do not accept oral testimony from additional witnesses, experts, and other external sources necessary for comprehensive review on appeal.

- **A “review” process of asylum officer decisions by the immigration courts would unfairly convert asylum office interviews into adversarial proceedings, undermine the advantages of asylum officer interviews, and protract an interview process that already takes excessively long periods of time to complete.** The changes required to make these adjudications amenable to judicial review would transform the asylum interview from a non-adversarial interview effectively into an adversarial hearing. An asylum seeker would, for example, need to formally object to impermissible questions or reliance by the asylum officer on extra-record information to preserve the applicant’s rights on “review.” The resulting adversarial interview would be contrary to the purpose and nature of asylum office interviews and, in addition, add significantly to the time each asylum officer would take to render and write a formal decision. [Non-adversarial](#) asylum office interviews are less [traumatizing](#) for asylum seekers, can be conducted more quickly and efficiently, and are less burdensome on the government, since cases can be adjudicated by a single fact finder instead of during an adversarial hearing with an immigration judge, DHS trial attorneys, and other court staff.

Over the years, however, the affirmative interview process has become more complicated and cumbersome, for reasons relating in part to the imposition of additional requirements and hurdles that have been imposed by statute, rule or other directives and the escalating complication of U.S. statutes and caselaw in this area, with the result that some asylum interviews are *currently* running so long as to be exhausting for applicants, and decisions are frequently delayed by months thereafter. Rather than creating additional requirements that lengthen the time of asylum office interviews, reduce their ability to resolve significant numbers of cases more quickly, and/or otherwise undermine their advantages to the system and to traumatized asylum seekers, steps should be taken to enable officers to resolve more cases humanely through such interviews.

- **If the administration eliminates de novo immigration court hearings for cases referred from the asylum office, life-or-death asylum adjudications will lack necessary quality assurances and independent review.** Currently, immigration judges conduct “review” hearings of negative credible fear determinations by asylum officers. While this review is supposed to be de novo, the fact that the credible fear interview does not result in a fully developed record (along with other challenges, including the fact that the asylum applicant is typically detained and unrepresented at this stage of the process) has meant that such reviews are frequently cursory, inadequate, and function more as a [rubber stamp](#) of an asylum officer’s decision than as a comprehensive and independent review. As of June 2018, immigration judges conducting these “reviews” affirmed negative credible fear determinations in [85 percent](#) of cases. The consequences of cursory immigration court review of asylum office decisions are illustrated by the case of a [Honduran](#) asylum seeker who was deported through the expedited removal process after his denial of credible fear interview was affirmed following a cursory “review” by an immigration judge. This asylum applicant was murdered just weeks after being deported to Honduras last year.

- **Providing de novo immigration court hearings for cases referred from the asylum office is also crucial to protect the right of asylum seekers to be effectively represented by a lawyer in their proceedings.** Because legal counsel has [limited](#) ability to intervene in asylum office interviews, failure to provide a de novo immigration court hearing where legal counsel may take an active role in arguing the case raises due process concerns and would result in the erroneous and dangerous deportation of refugees to persecution, torture, or death.
- **In addition, as [detailed](#) elsewhere, conducting full asylum interviews within or after the expedited removal process is redundant and inefficient.** Diverting asylum officers away from conducting affirmative asylum adjudications to administer credible fear screenings, has already contributed to inefficiencies and backlogs. So too would a system that requires the conduct of such interviews, only to then have officers consider the same individual's complete asylum claim. Instead, asylum eligibility interviews should be conducted without and outside of expedited removal.
- **Without implementing funding for hiring additional asylum officers, requiring the fewer than 1,000 individuals currently serving as asylum officers, would exacerbate the asylum backlog and overwhelm asylum officers.** More than 394,000 asylum seekers already residing in the United States have waited years for their asylum interviews due to the extensive USCIS adjudication backlog. Without additional hires, the proposed rule would exacerbate this ongoing crisis.

Recommendations:

- **Improve the fairness of asylum office interviews and refer asylum seekers for full asylum interviews at their destination locations out of the expedited removal process.**
- **Continue to provide de novo immigration court hearings for cases that are referred** from the asylum office and ensure that asylum seekers have the opportunity to retain legal counsel, present evidence and legal arguments, call witnesses, and testify before the immigration judge.
- **Avoid creating an asylum process that treats asylum seekers requesting protection at the border differently,** as many asylum seekers do not have the resources or ability to fly to the United States and should not be deprived of a fair hearing on that basis.
- **Hire and train additional asylum officers** to conduct full adjudications, of asylum cases in order to ensure efficient resolution of cases and reduce the growing affirmative asylum [backlog](#), which delays protection, separates families, and undermines integration.
- **Issue guidance encouraging asylum officers to grant cases that meet the refugee definition under U.S. law** to avoid unnecessary referrals to immigration court.
- **Eliminate the use of [expedited removal](#),** which redeploys and diverts asylum office staff, triggering and exacerbating asylum office backlogs. The bipartisan [U.S. Commission on International Religious Freedom](#) and other [organizations](#) have long noted the serious deficiencies and due process concerns of the expedited removal process, which risks returning refugees to persecution and torture. U.S. immigration authorities are not required to use expedited removal on asylum seekers and other migrants at the border.
- **[Improve fairness](#) and enable timely adjudications in immigration court hearings,** including expanding and providing legal representation and legal orientation programs, rescinding rules, rulings, and policies that deny refugees asylum, and improving hearing efficiencies through the use of pre-hearing conferences and stipulations.