

Case Summary: *O.A. v. Trump*

This year the Trump Administration has engaged in an unprecedented assault on asylum seekers and refugees seeking protection at the southern border. From criminally prosecuting asylum seekers to orchestrating delays and turn-backs at the ports of entry to family separation, the administration is pursuing an anti-immigrant agenda, including an attempt to send thousands of asylum seekers back to the violence and persecution that they fled.

In response to the administration's latest attack on asylum, Human Rights First, the National Immigrant Justice Center, and Williams & Connolly, has filed a lawsuit to protect the rights of asylum seekers.

Background

O.A. v. Trump challenges the Trump Administration's policy of barring individuals who cross into the United States at the southern border between official ports of entry from accessing our asylum system. On November 9, 2018, the Department of Justice (DOJ) and the Department of Homeland Security (DHS) jointly issued an interim final rule significantly limiting asylum eligibility in the United States. The same day, President Trump signed a presidential proclamation purporting to suspend the entry of individuals who enter the United States between official ports of entry. Together, the rule and the proclamation bar refugees who cross into the United States without inspection at the southern border from seeking asylum, thereby shuttering access to vital protections for thousands of men, women, and children.

Under U.S. immigration law, refugees fleeing violence and persecution in their home countries can request asylum and two related forms of protection from an immigration judge: withholding of removal and protection under the U.N. Convention Against Torture (CAT). The Immigration and Nationality Act permits individuals to seek asylum without regard to the manner in which they entered the United States. By barring asylum seekers who cross the U.S. southern border between ports of entry from seeking asylum, these refugees only have access to these two more limited forms of protection.

While the administration claims that this policy is meant to drive asylum seekers to request protection at official ports of entry, the administration has instituted policies making it more difficult to cross at ports of entry. Asylum seekers are frequently turned away from ports of entry or experience significant delays before gaining access. As a result, asylum seekers are often forced to wait in difficult and dangerous conditions in northern Mexico. DHS's Office of Inspector General has confirmed that these practices have led some individuals to cross between ports of entry.

Beyond the violations of U.S. law raised in the lawsuit, this asylum ban also violates U.S. legal obligations under the Refugee Convention, which prohibits member States from penalizing asylum seekers for their manner of entry and returning asylum seekers to countries where they face violence or persecution.

Summary of case

The Trump Administration's regulation is illegal. It violates the Immigration and Nationality Act and the Administrative Procedure Act. This lawsuit is asking the federal district court in Washington, D.C. to put a halt to this illegal policy before more vulnerable asylum seekers are harmed.

Congress established a process in the **Immigration and Nationality Act (INA)** for asylum seekers to apply for asylum once in the United States. Under the INA, an asylum seeker has the right to have her claim evaluated regardless of her manner of entry (i.e. at an official port of entry or between ports of entry). This new policy violates the INA because it renders ineligible for asylum individuals who arrive in the United States between official ports of entry.

The INA also requires the government to follow specific processes when an individual expresses a desire to seek asylum or fear of returning to her home country. The policy violates the INA because it upends this credible fear screening system that Congress enacted to ensure that U.S. domestic law complied with its international legal and treaty obligations. In its place, the policy directs affected asylum seekers to a reasonable fear screening process, which carries a significantly higher screening standard than the credible fear screening process. Asylum seekers who could demonstrate a credible fear of persecution, but who may not satisfy the higher reasonable-fear standard, therefore, are now at risk of losing the opportunity to seek protection-based relief in the United States.

The policy also violates the **Administrative Procedure Act (APA)**, which requires the government to act reasonably, and follow certain procedures, when enacting new rules. For example, the APA requires the government to adequately consider the effects of a new policy and allow the public the opportunity to comment prior to enacting it. Here, the administration has departed from longstanding policy enacted by Congress without adequate justification for that departure. Furthermore, as demonstrated by numerous statements made by the president and others in his administration, the change is motivated by animus toward asylum seekers entering at the southern border.

The policy is also unlawful under the **William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA)**, a law enacted to provide asylum protections to children due to their unique vulnerabilities. The TVPRA grants asylum officers the authority to adjudicate unaccompanied children's asylum claims so that when they recount the sensitive and often traumatic facts of their claims, they do so in non-adversarial settings. Under the new policy, however, unaccompanied children who enter the country between official ports of entry are automatically ineligible for asylum and asylum officers do not have the authority to grant withholding of removal or protection under the Convention Against Torture. Therefore, unaccompanied children will only present their claims in adversarial proceedings before an immigration judge, violating the TVPRA and risking re-traumatization of already vulnerable individuals.

Lastly, the new policy is invalid because it was, in part, enacted by someone who does not properly hold the office of Attorney General. Matthew Whitaker purportedly took over as Acting Attorney General on November 7, 2018, but he was never confirmed by the Senate, as is required under statute and under the U.S. Constitution. Because Whitaker lacked the authority to issue the policy due to his illegal appointment, the policy is also illegal.