

## Asylum Under Threat

### Impact of President Trump's Immigration Executive Orders and the Department of Homeland Security's Memoranda on Asylum Seekers

On January 25, 2017, President Trump issued two executive orders addressing U.S. immigration policies, entitled "Border Security and Immigration Enforcement Improvements" and "Enhancing Public Safety in the Interior of the United States."

Human Rights First expressed its strong opposition and concern about many of the provisions included in these orders which undermine U.S. treaty commitments and global leadership relating to human rights and refugee protection.

On February 20, 2017 Secretary of Homeland Security John Kelly, issued two memoranda—one concerning border security and the other on enforcement of immigration laws—to implement the executive orders. The memoranda include many provisions impacting a range of immigrants and asylum seekers, including: the expansion of the controversial 287(g) program that turns police officers into immigration agents; a direction to begin designing and building the "wall" between the United States and Mexico, and; a dramatic expansion of the use of expedited removal, rather than immigration court removal, proceedings in the interior of the United States.

As detailed below, a number of provisions outlined in the February 20 Department of Homeland Security (DHS) memoranda, like the underlying executive orders, would multiply the many challenges already faced by refugees attempting to navigate the U.S. asylum process.

In particular, the executive order and the DHS memoranda appear to subject asylum seekers to even tougher initial screenings, lengthy periods in immigration detention, expanded summary processing, and some kind of rocket docket asylum adjudications. Another provision, if applied to asylum seekers, would attempt an end run around U.S. law and treaty obligations relating to refugees and asylum by turning them back to Mexico at the U.S. southern border.

The United States has the capacity to both secure its borders and address the humanitarian refugee and displacement crisis in ways that comply with U.S. treaty commitments and uphold U.S. global leadership.

The February 20 memoranda, and the underlying orders:

#### **Limit Access to Asylum by "Enhancing" Credible Fear Determinations**

Section I of the DHS border security memorandum adds what is framed as an enhancement to the credible fear screening process. The credible fear process is a safeguard created by Congress to ensure that bona fide asylum seekers are not summarily deported under the expedited removal process and instead are allowed to file applications for asylum for assessment through the regular adjudication process.

While U.S. law states that the "the credibility of the statements made" by the asylum seeker should be taken into account during the screening assessment, the memorandum appears to add requirements relating

to “credible evidence” that signal an attempt to turn the screening process into something closer to an actual full-fledged asylum assessment aimed at blocking more asylum seekers from access to asylum, to legal representation, and to the time needed to gather the necessary evidence in support of an asylum application.

Asylum seekers who have just arrived after often arduous journeys, are overwhelmingly unrepresented by legal counsel in their credible fear interviews, do not speak English, and are held in immigration detention. They do not have the ability to gather the kinds of evidence needed to support their claims and the credibility of their statements in the days that typically separate their arrival from the credible fear interview.

In addition, the memorandum references the need to assess eligibility for asylum at the credible fear stage based on “established legal authority,” which suggests a desire to deport without a full hearing asylum applicants whose bona fide claims may raise unsettled legal issues. Detained asylum seekers cannot, without legal counsel, provide the legal analysis required to establish asylum eligibility including with respect to views on “established law” on issues where the law is unclear, complex or in flux. A summary interview is not the place to resolve legal issues that are the basis of legitimate debate before the court, and doing so risks violating the asylum seekers’ due process rights.

Human Rights First is concerned that the addition of this language may be an attempt to block access to asylum hearings for women and children who have legitimate, but in some cases legally complex, asylum claims relating to the persecution they have suffered

at the hands of individuals that their governments cannot or will not control, such as in cases relating to domestic or gang violence.

### **Expedite Conduct of Asylum Hearings**

Section 2 (c) of the border security executive order states that it is the policy of the executive branch to

“expedite determinations of apprehended individuals’ claims of eligibility to remain in the United States.” Section J of the border security memorandum references the “expedited resolution” of asylum claims by the immigration courts in detention facilities near the border, a reference that could signal the imposition of rocket-dockets that would deprive asylum seekers of the time needed to secure legal counsel and gather evidence needed to meet the many technical requirements and complexities of U.S. law.

Human Rights First has repeatedly urged Congress and the executive branch to take steps to ensure timely but fair hearings, and to refrain from rocket dockets that undermine due process. Rushing asylum cases through the process would turn the U.S. asylum adjudication process into a farce by preventing refugees from gathering the very evidence they need to establish eligibility for asylum and forcing them to navigate the complex process and legal analysis without legal counsel.

### **Expand Detention and End Release Policies**

Section A of the border security memorandum reiterates the president’s call for non-citizens who have not been admitted to the United States to be held in detention facilities for the duration of their immigration and asylum proceedings and calls for the issuance or revision of regulations to the extent current regulations are inconsistent with the guidance.

The memorandum calls for an end to policies described as “catch-and-release” and identifies a very limited list of circumstances under which an immigrant or asylum seeker detained under the Immigration and Nationality Act (INA) Section 235(b) “who was apprehended or encountered after illegally entering or attempting to illegally enter the United States” can be considered for release on a case by case basis.

With respect to Immigration and Customs Enforcement (ICE) parole authority, Section K of the border security memorandum opines that parole authority should be used “sparingly.” The Section A list includes cases where release is required by statute, by a binding settlement agreement or order issued by a competent judicial or administrative authority, or when an arriving alien who has passed the credible fear screening process “affirmatively establishes” certain criteria.

As far as asylum seekers are concerned, those apparently covered by this section of this memorandum (those “deemed inadmissible or otherwise described in Section 235(b) of the INA”) fall into two categories: asylum seekers who present themselves at a U.S. port of entry and express a fear of return, and those who are detained after crossing the U.S. border without inspection.

With respect to those who request protection at the border, and then pass a credible fear interview, Section A of the Border Security memorandum continues to allow for the possibility of their parole, and Section K states that pending further review, evaluation and additional ICE guidance, ICE’s parole directive establishing standards and procedures for parole of asylum seekers who have established credible fear “shall remain in full force and effect,” and that the directive should be implemented “consistent with its plan language.”

The inclusion of language in Section A of this memorandum requiring that an asylum seeker “affirmatively establish” that he/she meets the requirements for parole, however, appears to signal that DHS is moving away from assessing whether each asylum seeker who passes the credible fear screening meets the criteria for release, a shift that would leave the many asylum seekers who do not have the resources to pay for legal counsel stuck in detention for the duration of their proceedings even if they meet the relevant release criteria.

The language of Section K in the Border Security memorandum clearly signals that ICE may issue additional or different guidance in the future, and states that “in every case, the burden to establish that his or her release would neither pose a danger to the community, nor a risk of flight remain on the individual [asylum seeker], and ICE retains ultimate discretion whether it grants parole in a particular case.”

With respect to asylum seekers detained inside the United States after entering without inspection—who are not covered by existing parole policies but are legally entitled to a redetermination of their custody before an immigration judge—the memorandum would square with the statute, under which asylum seekers in this situation are entitled to an individualized assessment, and redetermination if necessary, of the need for their detention.

### **Announce DHS Will Expand Expedited Removal in Interior of the United States**

The border security memorandum announces that the agency will issue a federal register notice on the expanded use of expedited removal, a summary process which would deprive many immigrants and asylum seekers of immigration court hearings and access to counsel, instead authorizing ICE officers to act in effect as judges by ordering deportations.

The enforcement of immigration laws memorandum works in concert with this provision expanding the use of expedited removal by broadening the priorities for enforcement and removing exemptions for groups that previously benefited from positive use of prosecutorial discretion. Depending on the extent of the expansion of expedited removal, ICE officers could order deportations of removable individuals they encounter anywhere in the interior of the United States who cannot establish to the officer’s satisfaction that they have been continuously present for the past two years, an unprecedented use of this summary process.

The implementation of expedited removal over the past few years has been highly flawed. The bipartisan U.S. Commission on International Religious Freedom has issued a series of reports documenting the failure of U.S. border officers to implement safeguards built in to the system to protect asylum seekers from improper deportation. DHS appears to justify this potentially unprecedented deprivation of due process based on the existence of substantial immigration court backlogs, a problem that Human Rights First and others have repeatedly called on Congress and the executive branch—over the course of many years—to take steps to address, through sufficient staffing rather than mass deprivation of procedural protections for non-citizens present in the United States.

### **Implement Returns to Mexico and Canada Pending Video Removal Proceeding**

Section H of the border security memorandum, citing INA Section 235(b)(2)(C), authorizes ICE and Customs and Border Protection (CBP) to “the extent appropriate and reasonably practicable” to return some arriving individuals to contiguous territories (Mexico and Canada) while they await removal proceedings, which will apparently be conducted by video teleconference.

The memorandum states that this effort will be subject to the provisions of the Trafficking Victims Protection Reauthorization Act relating to unaccompanied children

and “to the extent otherwise consistent with the law and U.S. international treaty obligations.” The Refugee Convention and Protocol bar the United States from returning refugees to persecution “in any manner whatsoever,” and U.S. immigration and refugee law has created processes for arriving asylum seekers to request protection and for the adjudication of asylum claims.

If Section H of this memorandum were applied to asylum seekers, the United States would adopt a policy of turning asylum seekers away to face danger,

persecution, torture and potential trafficking in Mexico, and would put non-Mexican asylum seekers at grave risk of onward *refoulement* to their countries of persecution. Such a system, applied to Mexican and/or non-Mexican asylum seekers would violate U.S. domestic law and treaty obligations, place already vulnerable refugees in grave peril, further erode U.S. global leadership and encourage other countries to shirk their responsibilities under international law and treaties.

### **Encourage Increase in Prosecutions for Illegal Entry and Re-entry**

The prosecution of asylum seekers for irregular entry or presence violates U.S. treaty commitments. Section N of the border security memorandum references the prioritizing of criminal prosecutions for “immigration offenses” committed at the border and calls for a task force “to target individuals and organizations whose criminal conduct undermines border security or the integrity of the immigration, including offenses related to ... illegal entry and reentry, visa fraud... unlawful possession or use of official documents ...”

The memorandum does not reference a May 2015 report from the DHS Inspector General, which found that the CBP was referring asylum seekers for criminal prosecution for illegal entry, an issue under Article 31 of the Refugee Convention. Under Article 31, the United States is prohibited from penalizing asylum seekers for illegal entry, including through imposition of criminal penalties.

### **Strip Unaccompanied Children of Procedural and Other Protections if Later Reunited with a Parent**

The law provides for protections for unaccompanied minors apprehended by U.S. immigration authorities, including placement in facilities suitable for children, access to social services, access to regular (rather than expedited) removal proceedings, and initial adjudication

of an unaccompanied minor's asylum claim by the U.S. Citizenship and Immigration Services (USCIS) Asylum Office, rather than the immigration court.

Currently, a child's treatment as an unaccompanied child for these purposes is determined at the time of apprehension; Section L of the Border Security memorandum would remove those protections from those who are subsequently reunited with a parent. While Section G of this memorandum exempts unaccompanied minors from expedited removal proceedings (in accordance with long-standing agency policy), it is not clear what would happen to those who are reunited with a parent after being placed in regular removal proceedings.

Many of these children remain "unaccompanied" as far as their immigration cases are concerned, in the sense that they are going through removal proceedings in which their parents are not participants, and they should not be stripped of the protections afforded other unaccompanied minors.

### **Encourages the Prosecution of Parents and Other Relatives Who Bring Children to the United States**

While recognizing the vulnerability of children to smuggling and trafficking, Section M of the border security memorandum fails to acknowledge that many parents who seek to bring their children to the United States from Central America are doing so to bring those children out of situations of life-threatening danger.

### **Undermine Privacy Protections**

Section G of the interior enforcement memo would withdraw Privacy Act protections from DHS records pertaining to people who are not U.S. citizens or legal permanent residents. This move would amount to a major departure from longstanding government

practice, rescinding policies dating from the administration of President George W. Bush, which, consistent with Office of Management and Budget (OMB) guidance dating back to 1975, has treated records in mixed systems (i.e. systems that contain records protected under the Privacy Act along with others that are not) as protected.

This change would make information about individuals that is currently protected from unauthorized disclosure available to the public unless its disclosure were prohibited under a different statute or subject to withholding under the exemption from the Freedom of Information Act that allows government agencies not to disclose personnel, medical, or other information whose disclosure would constitute a clearly unwarranted invasion of personal privacy.

Information in DHS databases about individual people—who provided such information to DHS on the understanding that it was protected from disclosure—that might not meet this test yet whose disclosure could do real damage to innocent people. This change could also allow state governments access to DHS databases for a broad range of purposes, as well as the contracting out of various forms of data mining, in ways that would make it even more difficult for individuals to understand what conclusions the government was drawing about them or on the basis of what information. Given that information about U.S. citizens and lawful permanent residents remains covered under the Privacy Act, there could be significant costs associated with this new approach, as DHS, rather than maintaining unified systems of records and treating them all the same way, would need to set up parallel systems.