Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

The Biden Administration's Final Rule on Arriving Aliens Seeking Asylum (Part Two)

September 21, 2023

In May 2023, the Department of Homeland Security (DHS) and Department of Justice (DOJ) issued a final rule that would, for at least a two-year period, make some aliens ineligible for asylum if they arrive at "the southwest land border or adjacent coastal borders" without valid entry documents after having traveled through another country. This Legal Sidebar, which discusses the legal issues raised by the rule's limitations on asylum eligibility, pending legal challenges to the rule, and options for Congress, is the second in a two-part series discussing the rule. The first Sidebar, which discusses the rule itself and prior executive branch polices limiting asylum access, is available here.

Legal Considerations

When the Biden Administration proposed what has now become the final rule , some Members of Congress and immigration advocacy groups argued that it violated international treaty and federal statute by making certain arriving aliens barred from asylum. This section explores each of those arguments in turn.

International Treaty Obligations

The United States is a party to the 1967 Refugee Protocol. The Refugee Protocol incorporates Articles 2 through 34 of the Refugee Convention. Under Article 33 of the Refugee Convention, member states may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" because of a protected ground (i.e., race, religion, nationality, membership in a particular social group, or political opinion).

Some have argued that the rule would violate an individual's right to seek asylum under Article 33's "non-refoulement" provision. However, the extent to which the Refugee Protocol's provisions are legally binding under U.S. law depends upon whether it is a self-executing or non-self-executing treaty. A "self-executing" treaty is considered to have the force of U.S. domestic law without the need for Congress to pass implementing legislation. A non-"self-executing" treaty, though, is not directly enforceable in U.S. courts. Federal courts have held that the Refugee Protocol is not self-executing for domestic law

Congressional Research Service
https://crsreports.congress.gov
LSB11045

purposes. For that reason, the Refugee Protocol, in itself, creates no judicially enforceable rights or duties beyond those granted by implementing legislation.

Moreover, as DHS and DOJ discussed in their *Federal Register* notice, Congress has implemented the "non-refoulement" obligations under Article 33 of the Refugee Convention through legislation, codified at 8 U.S.C. § 1231(b)(3). That statute concerns *withholding of removal*, a mandatory form of protection unlike asylum, which is a discretionary form of relief. Under the final rule, aliens ineligible for asylum can still pursue withholding of removal as well as CAT protection, consistent with Article 33 and the U.N. Convention Against Torture. The Supreme Court previously explained this distinction, noting that, while withholding of removal corresponds to Article 33, asylum is based on Article 34 of the Refugee Convention, which only requires contracting states to "facilitate the assimilation and naturalization of refugees." The Court construed Article 34 as a discretionary provision that "does not require the implementing authority actually to grant asylum to all those who are eligible." Because the Refugee Protocol recognizes parties' broad discretion over asylum, there are reasonable grounds to believe the rule would not violate U.S. treaty obligations.

Federal Statute Governing Asylum

Although it likely does not conflict with treaty obligations, there might be questions over whether the rule conflicts with existing federal statute. A provision governing asylum, 8 U.S.C. § 1158(a)(1), provides that "[a]ny alien who is physically present in the United States *or who arrives in the United States* (*whether or not at a designated port of arrival* . . .), *irrespective of such alien's status*, may apply for asylum" (emphasis added). Another provision, 8 U.S.C. § 1158(a)(2), however, bars certain aliens from applying for asylum. Those excepted from applying for asylum include aliens that can be removed to a "safe third country" under an agreement where they have a "full and fair opportunity" to seek asylum, those who failed to demonstrate that their application was filed within one year of their arrival, and those who failed to establish that they have not previously applied for asylum.

A separate provision, 8 U.S.C. § 1158(b)(1)(A), grants the Secretary of Homeland Security or the Attorney General the authority to "grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by" DHS or DOJ if it is determined that such alien is a refugee. Those ineligible for asylum include aliens who have engaged in the persecution of others; aliens convicted of certain crimes; aliens regarded as a danger to the security of the United States; or aliens who have firmly resettled in another country prior to their arrival in the United States. Under 8 U.S.C. § 1158(b)(2)(C), the Attorney General or the Secretary of Homeland Security has authority to promulgate regulations "establish[ing] additional limitations and conditions, *consistent with* [8 U.S.C. § 1158], under which an alien shall be ineligible for asylum" (emphasis added). Section 1158(d)(5)(B) also allows the Attorney General to promulgate regulations "for any other conditions or limitations on the consideration of an application for asylum not inconsistent with" the Immigration and Nationality Act.

Previously, reviewing courts considered whether the Trump Administration's 2018 rule that barred aliens from asylum if they unlawfully entered the United States, as well as the 2019 rule barring aliens from asylum if they failed to seek protection in a third country through which they traveled, conflicted with 8 U.S.C. § 1158. DHS and DOJ argued in support of both rules that they promulgated that the rules are "additional limitations and conditions" on asylum under 8 U.S.C. § 1158(b)(2)(C). Both the Ninth Circuit and the U.S. District Court for the District of Columbia held that the 2018 rule was not "consistent with" 8 U.S.C. § 1158(a)(1) because that statute permits aliens to seek asylum regardless of their manner of entry. The Ninth Circuit also held that the 2019 rule conflicted with 8 U.S.C. § 1158's provisions that limit asylum eligibility based on third-country considerations only if there is a safe third-country agreement or firm resettlement. In another case, the D.C. district court determined that the 2019 rule was unlawful because DHS and DOJ failed to comply with certain procedural requirements under the Administrative Procedure Act.

In support of the 2023 rule, DHS and DOJ contend they have statutory authority to impose "additional limitations and conditions" on the granting of asylum pursuant to 8 U.S.C. § 1158(b)(2)(C), and authority to establish certain procedures for consideration of asylum applications, under 8 U.S.C. § 1158(d)(5)(B). Some have argued that the 2023 final rule is similar to the Trump Administration's 2018 and 2019 rules that were struck down by the courts. DHS and DOJ argue, however, that the 2023 rule is distinguishable because it is more limited in its application and does not categorically bar asylum. Unlike the previous rules, the agencies contend, an alien's manner of entry or travel through a third country are not dispositive factors, and the rule contains "a number of exceptions and means for rebutting the presumption" of asylum ineligibility. The agencies also argue that any regulatory limits on asylum based on a failure to seek protection in a third country do not have to be based on the same criteria specified in 8 U.S.C. § 1158's safe-third-country and firm-resettlement provisions (8 U.S.C. § 1158(a)(2)(A), (b)(2)(A)(iv)), and that they may supplement those existing provisions with additional or alternative conditions on asylum eligibility. Furthermore, the agencies have asserted that the rule is consistent with 8 U.S.C. § 1158(a)(1) because that statute requires only that an alien be permitted to "apply" for asylum, but does not require that an alien is entitled to *receive* asylum.

Pending Litigation

On May 11, 2023, the day the rule went into effect, some immigration legal services organizations sued to challenge the rule in the U.S. District Court for the Northern District of California, claiming that the rule essentially reinstates the Trump Administration's previous "asylum bans," and that it would "effectively eliminate asylum" for many non-Mexican asylum seekers. Specifically, the plaintiffs argued that the rule is invalid under the APA because it is contrary to law, arbitrary and capricious, or was issued without adequate opportunity for public comment. On July 25, 2023, the district court vacated the rule, concluding that it conflicts with 8 U.S.C. § 1158; relies on the availability of parole and other "lawful pathways" that Congress did not intend to be relevant to asylum eligibility; fails to consider that many asylum seekers do not qualify for the rule's exceptions; and provided inadequate opportunity for public comment on its policy changes.

The government appealed the district court's decision and, on August 3, 2023, the Ninth Circuit stayed that decision pending the outcome of the government's appeal. The court's order leaves the rule intact, and oral arguments have been scheduled for November 2023.

In a separate case, the State of Texas, on May 23, 2023, challenged the rule in the U.S. District Court for the Western District of Texas. The lawsuit contends that, by encouraging individuals who otherwise lack valid documents to enter the United States to schedule appointments at ports of entry using the CBP One app, the rule unlawfully "creates incentives to increase the amount of illegal immigration." The government has filed a motion to dismiss the lawsuit, arguing, among other things, that Texas lacks standing to challenge the rule because it has failed to establish an actual and legally cognizable injury resulting from DHS's use of the CBP One app, and because DHS's determination of how it should process arriving asylum applicants is a nonreviewable action committed to its discretion. To date, the district court has not issued a decision.

Legislative Options

The final rule raises questions about whether immigration authorities may deny asylum based on an applicant's failure to either seek protections in a third country or pursue "lawful pathways" to enter the United States. In the past, reviewing courts have construed 8 U.S.C. § 1158(a)(1) as prohibiting asylum denials based on manner of entry into the United States, or based on third-country considerations except in statutorily specified circumstances (e.g., if the applicant was firmly resettled in a third country). While

courts consider, in view of this precedent, whether the asylum limitations in the Biden Administration's final rule are lawful, the rule more broadly could raise questions about the extent to which the executive branch, in general, can limit an individual's ability to seek asylum through regulations.

There has been legislation introduced in the 118th Congress concerning whether aliens traveling through third countries on the way to the United States may pursue asylum. For instance, the Secure Border Act of 2023 (H.R. 2) and the Asylum Abuse Reduction Act (S. 348, H.R. 469) would make aliens who traveled through one or more third countries ineligible for asylum if they failed to apply for protections in one of those countries, unless they were subject to a "severe form of human trafficking." The Secure Border Act would also allow aliens to pursue asylum only if they arrive at a U.S. port of entry, and would authorize DHS to use the CBP One app or any other similar application only for inspection of perishable cargo. Another bill, the Stop the Cartels Act (H.R. 597), would make aliens ineligible for asylum if they are nationals or habitual residents of a country in Central America that has a "refugee application and processing center" designated by the Secretary of State. In addition to these bills, a resolution (H.J. Res. 83) has been introduced that would disapprove of the Biden Administration's asylum rule under the Congressional Review Act.

Alternatively, Congress could clarify the type of "additional limitations and conditions" in 8 U.S.C. § 1158(b)(2)(C) that the executive branch may impose on arriving asylum seekers, as well as clarify what "other conditions or limitations on the consideration of an application for asylum" under 8 U.S.C. § 1158(d)(5)(B) are statutorily consistent with the other provisions in § 1158.

Author Information

Hillel R. Smith
Legislative Attorney

Disclaimer