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Office of Policy and Strategy  
U.S. Citizenship and Immigration Services  
Department of Homeland Security

Lauren Alder Reid, Assistant Director  
Office of Policy  
Executive Office for Immigration Review  
Department of Justice

**RE: Interim Final Rule on “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers”**

**DHS Docket No. 1 USCIS-2021-0012  
A.G. Order No 5369-2022**

Dear Ms. Cutlip-Mason and Ms. Alder Reid:

On behalf of Immigrant Justice Corps (“IJC”), we write in response to the publication on March 29, 2022 of the above-referenced Interim Final Rule (“IFR”) published by the Department of Homeland Security (“DHS”) and the Department of Justice (“DOJ”). While IJC agrees that improvement to the asylum system is necessary, we have grave concerns about how the system the IFR creates would impact asylum seekers.

IJC is a fellowship program wholly dedicated to meeting the need for high-quality legal assistance for immigrants seeking lawful status, pursuing U.S. citizenship and fighting deportation. Our mission is to recruit, train and populate the immigration field with the highest quality legal advocates to create a new generation of leaders with a lifelong commitment to justice for immigrants. IJC Community Fellows are recent college graduates for whom we apply for DOJ partial accreditation in the first year of their two-year fellowship, allowing them to practice immigration law before the Department of Homeland Security. IJC Justice Fellows are recent law graduates who represent noncitizens in removal proceedings, as well as complex affirmative immigration benefit applications. Our Fellows provide representation in 33 cities across 11 states.

Our Fellows represent individuals and families in various stages of the asylum process who seek safety in the United States after fleeing persecution in countries throughout the world.



Some IJC Fellows work exclusively at the southwest border, specifically assisting individuals with the credible fear process. Many more IJC Fellows and staff have participated in rapid response initiatives at the border. Even more IJC Fellows and staff represent individuals and families in affirmative and defensive applications for asylum before USCIS, in immigration court, before the Board of Immigration Appeals and before federal circuit courts.

IJC's broad and deep understanding of the asylum system and the challenges asylum seekers face positions us well to expose the problems with the Interim Final Rule.

## Executive Summary

- **New asylum regulations must consider the best interests of asylum seekers – including their access to counsel.** The new asylum regulations are a docket cleansing measure that will likely fail to achieve their aim without violating due process and international obligations. These regulations do not take into account the experiences of those seeking asylum or the impact of the streamlined process on asylum seekers' ability to obtain counsel and present a compelling case.
- **The increased focus on Credible Fear Interviews (CFIs) is problematic,** given the lack of a program to provide accurate information about cases designated for this and the lack of federal representation for asylum seekers. In addition, CFIs occur under circumstances that make it hard for an asylum seeker to feel safe telling their story.
- **There is no increase in the capacity of legal representatives to play a role in the asylum process,** even though the IFR puts increased emphasis on the decisions of asylum officers. Representation makes a huge difference, since asylum applicants are five times more likely to be granted asylum if they have representation.
- **The IFR's reduced time frame makes finding counsel impossible and presentation of one's asylum claim incredibly difficult.** The new process stacks the deck against asylum seekers to an even greater extent, and due process violations are likely as a result. Access to federally funded representation is critical to mitigate due process concerns and meaningfully comply with international obligations.

### **New asylum regulations must consider the best interests of asylum seekers – including their access to counsel**

The U.S. government is introducing sweeping changes to our asylum system aimed at increasing the efficiency of asylum case proceedings by limiting the number of cases that proceed to Immigration Court. While Immigrant Justice Corps (IJC) appreciates efforts to improve the asylum process, we are concerned that the proposed changes do not consider the best interests of those most affected by this system – asylum seekers. In particular, there are no provisions that make it easier for asylum seekers to access legal counsel, which is critically



important given that asylum applicants are five times more likely to be granted asylum if they have representation.<sup>1</sup> The proposed changes to the asylum system are aimed at quickly processing recent arrivals in order to slow the growth of the backlog of immigration court cases, but it is not at all clear if these changes will result in better outcomes for asylum seekers. It is probable that under the new system, many more cases of people with viable claims to asylum will be denied because of the process's extremely short timeframe, along with lack of access to counsel. We agree that it is necessary to take measures to address the backlog of cases in immigration court (EOIR), but not at the expense of due process. More must be done to ensure that applicants with a viable claim to asylum are heard.

As immigration law practitioners, we want our country's asylum system to work for those who are most impacted by it. We know the power of representation in immigration proceedings and we recognize that legal representation will be even more important under the new IFR, because the measures designed to increase efficiency also threaten due process. Here, as elsewhere in the immigration system, federally funded representation is necessary. Likewise, support for organizations that develop a pipeline of quality immigration legal representatives is crucial.

### **The increased focus on Credible Fear Interviews (CFIs) is problematic**

A central part of the streamlining process in the IFR is the dramatically increased role of the credible fear interview ("CFI") as compared to the current asylum system. No changes are made to the CFI procedure, however, which support its increased role in the overall asylum process. Fear interviews at the border have been thoroughly documented as a dubious means of identifying many who have experienced – or fear – persecution. Many asylum seekers lack understanding about the purpose and import of the CFI, are not mentally or emotionally stable to fully present their claims for protection and/or lack trust in government institutions such that they don't feel safe recounting their story.<sup>2</sup> The current process recognizes the CFI's inherent limits by having the I-589 asylum application formally begin the process of asylum claim adjudication. In the IFR, however, the record of the CFI, which can only be amended on a strict time frame set forth by regulation, can serve to replace the I-589 application and therefore introduces a formalization of CFI failings early in the new process.<sup>3</sup> This raises the stakes on CFIs without any indication that the circumstances under which they are conducted will be any

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<sup>1</sup> *TRAC Immigration*. "Asylum Representation Rates Have Fallen Amid Rising Denial Rates," November 28, 2017, available at: <https://trac.syr.edu/immigration/reports/491/>

<sup>2</sup> Stuart Lustig. "Declaration of Stuart L. Lustig, M.D., M.P.H. Expert on Trauma and Asylum Seekers." March 7, 2017. Available by request at Center for Gender & Refugee Studies (<https://cgrs.uchastings.edu/>).

<sup>3</sup> See 8 C.F.R. 208.4(b)(2) (stating time frame within which the record of a CFI can be amended).

different than the current circumstances that we know lead to confusion, insufficient exploration of key facts in fear-based claims, and inability to adequately present a coherent narrative due to the impact of trauma.

Furthermore, it is unclear whether asylum seekers will continue to be subjected to inhumane detention conditions during the CFI process, which further exacerbate the difficulties of expressing a cognizable claim for protection. While there exist exceptions pursuant to 8 C.F.R. sec 1240.17(k) related to scheduling a hearing before an Immigration Judge (“IJ”) for those applicants who have vulnerabilities recognized under the regulation, they are not nearly broad enough to capture all applicants who are too vulnerable to meaningfully engage with the new asylum system. For example, people who are traumatized by events which caused them to seek protection may not be in a position to share their story but there is no exception that addresses this situation.<sup>4</sup> Moreover, the exceptions remediate strict adherence to a timeline before the IJ but do not address how vulnerabilities impact the earlier foundational stages of the process including the CFI and the asylum merits interview (“AMI”). The exceptions are too limited and too late in the process to be meaningful since the new system is built upon the asylum officer fully developing the asylum claim during those earlier stages. Without a government-organized process in place to provide comprehensive information and access to representation *prior to the CFI*, it is inappropriate for the CFI to play such a key role in the new system.

The AMI is also more formalized and impactful in the IFR without any adjustment to the processes asylum officers will follow or the standards they will employ for determination of credibility and need for corroboration. The system created by the IFR explicitly depends on asylum officers fully developing the asylum claim prior to it ever reaching an IJ but maintains significant roadblocks that prevent asylum officers from doing so. The structure of the system also suggests that despite the regulation’s indication that IJ review will be *de novo*, IJs will not in practice perform a full *de novo* review of the asylum claim because they are encouraged to rely upon prior development of the claim by asylum officers.<sup>5</sup> The AMI employs the same structure and guidelines of affirmative asylum interviews, without changes that recognize how the IFR’s shortened time frame complicates the need to obtain supporting evidence from country of origin, seek expert evaluation of trauma, or process trauma sufficiently to be able to speak about it with

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<sup>4</sup> Stuart Lustig. “Declaration of Stuart L. Lustig, M.D., M.P.H. Expert on Trauma and Asylum Seekers.” July 31, 2017. Available by request at Center for Gender & Refugee Studies (<https://cgrs.uchastings.edu/>).

<sup>5</sup> See 8 C.F.R. 1240.17(c) and (e); see *also*, 87 Fed. Reg. 18,098 (March 29, 2022) (asserting that asylum claims under the new IFR will can be adjudicated expeditiously if they proceed to “streamlined section 240 removal proceedings” because “IJs. . . will have the benefit of a fully developed record and decision prepared by USCIS.”)



an asylum officer.<sup>6</sup> There is no provision or time built in for thorough sharing of information about the process with applicants to promote understanding about the tremendous import of the AMI.

Furthermore, practically speaking, the Refugee, Asylum and International Operations Directorate (“RAIO”) is currently overburdened. Wait times at asylum offices nationwide last for years. The policy about which cases to prioritize is ever-changing and provides little to no predictability about when a case will be adjudicated. Having asylum officers take such a foundational role in the adjudication of asylum applications at the border will demand a tremendous influx of new officers, a robust training plan to ensure that officers know how to elicit information from traumatized individuals and develop the record as contemplated in the IFR, and active oversight by supervisors. In light of the inability to employ resources to appropriately process currently filed affirmative asylum cases, it seems unlikely that such a large-scale deployment of highly trained asylum officers will be possible. Without adequate numbers of highly trained asylum officers, the system set up by the IFR simply cannot function and will deny vulnerable asylum seekers due process and fair adjudication of their claims in violation of our statutory and international obligations.

### **There is no increase in the capacity of legal representatives to play a role in the asylum process**

In addition to creating a system that does not incorporate access to counsel, the IFR imposes inappropriate limits on representation for the few noncitizens who may manage to find legal representation. Though the CFI and AMI are of the utmost foundational importance in the new system, legal representatives’ role is cabined in the same way that it currently is in affirmative asylum interviews. There is no ability for a legal representative to take a more active role in the CFI and/or AMI given those interviews’ increased consequence in this new system. In fact, the IFR limits legal representation to allowing representatives to ask some questions during the AMI and make a closing statement, but only at the asylum officer’s discretion.<sup>7</sup> Though representation is still crucial and consequential even with these restrictions, broader latitude for a representative to assist in eliciting facts and a guarantee of being able to intervene to protect their clients’ best interests at all points in the process, is necessary.

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<sup>6</sup> Stuart Lustig. “Declaration of Stuart L. Lustig, M.D., M.P.H. Expert on Trauma and Asylum Seekers.” November 28, 2017. Available by request at Center for Gender & Refugee Studies (<https://cgrs.uchastings.edu/>).

<sup>7</sup> See 8 CFR 208.9(d)(1).



Research has shown that asylum seekers who have legal representation are five times more likely to be granted asylum.<sup>8</sup> Where representation is this consequential, restricting the ability of representatives to protect their clients' interests in service of systemic efficiency is unconscionable.

**The IFR's reduced time frame makes finding counsel impossible and presentation of one's asylum claim incredibly difficult.**

The entire asylum process set forth in the IFR is intended to be completed in approximately 150 days. This is a far shorter timeframe than any prior asylum adjudication program, including the Dedicated Docket which has been operating in 11 cities nationwide since May of 2021. The Dedicated Docket is specifically focused on recent arrivals – most of whom are seeking asylum – and aims to have their cases completed within a time frame of 300 days. It is well-established that finding a non-profit attorney is a time-intensive endeavor and depends upon the resources available in a geographic location. Indeed, the Biden administration recognized this when it indicated that it had chosen the Dedicated Docket courts to be in locations where there was a large immigration legal services infrastructure which would enable individuals and families to find counsel on the abbreviated timeframe of the Dedicated Docket.<sup>9</sup> The Dedicated Docket provides a proxy for determining the likelihood that individuals and families will be able to retain representation in a proceeding that occurs on an accelerated time frame. The answer is a resounding no.

Research performed by Syracuse University's Transactional Records Access Clearinghouse (TRAC) found that representation rates for asylum cases generally far exceed those for asylum cases being processed on the Dedicated Docket. Only 15.5% of asylum seekers on the Dedicated Docket are represented by an attorney according to immigration court records as compared with 91.1% for asylum cases generally adjudicated during the same time period.<sup>10</sup> As TRAC notes based on its research, time is an important variable in finding representation but so is the capacity of individual immigration attorneys to handle these cases, especially on an expedited schedule. This is reflected in the declining rates of representation over time on the Dedicated Docket. As more DD cases flow into the program, finding

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<sup>8</sup> *TRAC Immigration*, "Asylum Representation Rates Have Fallen Amid Rising Denial Rates," November 28, 2017, available at: <https://trac.syr.edu/immigration/reports/491/>

<sup>9</sup> "DHS and DOJ Announce Dedicated Docket Process for More Efficient Immigration Hearings," available at: <https://www.justice.gov/opa/pr/dhs-and-doj-announce-dedicated-docket-process-more-efficient-immigration-hearings>

<sup>10</sup> *TRAC Immigration*, "Unrepresented Families Seeking Asylum on 'Dedicated Docket' Ordered Deported by Immigration Courts," January 13, 2022, available at: <https://trac.syr.edu/immigration/reports/674/>

representation becomes increasingly difficult.<sup>11</sup> It is well established that rates of representation correspond positively to improved outcomes in asylum cases.<sup>12</sup> Because having representation makes such a powerful positive impact on rates of asylum grants, funneling noncitizens into a program without adequate representation resources will result in more denials of asylum claims. This is a trend well documented right now.<sup>13</sup>

The IFR sets up an asylum system that is even swifter than the Dedicated Docket while also being located in border regions where the capacity of immigration legal service providers has already been exceeded by responding to current demand, including representation for noncitizens whose cases are assigned to the Dedicated Docket. It will be next to impossible for noncitizens in the new asylum system to find a representative prior to the completion of their case. As discussed above, the front-loading of factual development that the IFR contemplates makes it even less likely that asylum seekers will be able to find a representative at a point in the process when it would most advantage them. This points to the necessity of meaningful access to representation being incorporated into the structure of the new asylum system. With the knowledge that representation rates drop when timeframes are shortened, and that representation correlates with better outcomes in asylum cases, the decision to give the new asylum system such an accelerated time frame is at odds with fairness and due process.

## Recommendations

- In addition to improving the efficiency of the asylum system, **efforts should be made to bring the U.S. asylum system in line with international standards** and best practices from other countries, including by providing necessary support to asylum seekers who are involved in the asylum procedure.<sup>14</sup>
- **Counsel should be provided at government expense prior to the CFI** or, at the very least, a robust orientation process should be implemented and access to counsel facilitated such that asylum seekers who wish to have a legal representative have a meaningful opportunity to retain one.

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<sup>11</sup> *Ibid.* See Figure 1.

<sup>12</sup> *TRAC Immigration*, “Asylum Representation Rates Have Fallen Amid Rising Denial Rates,” November 28, 2017, available at: <https://trac.syr.edu/immigration/reports/491/>

<sup>13</sup> *TRAC Immigration*, “Unrepresented Families Seeking Asylum on ‘Dedicated Docket’ Ordered Deported by Immigration Courts,” January 13, 2022, available at: <https://trac.syr.edu/immigration/reports/674/>

<sup>14</sup> UN High Commissioner for Refugees (UNHCR), *Effective processing of asylum applications: Practical considerations and practices*, March 2022, available at: <https://www.refworld.org/docid/6241b39b4.html>



- **There should be more flexibility in the timing of the process across the board**, an exception for people who are experiencing heightened trauma that interferes with their ability to present their claim and guarantees that people will be kept in the least restrictive situation possible along with their family members.
- **Monitoring and reporting of the new asylum system is fundamental, particularly rates of representation.** Without this close monitoring, violations of due process can go unchecked and asylum seekers may be rushed through a system designed to prioritize efficiency over protection.
- There is a need to **support legal service providers and community based organizations** that provide direct representation to asylum seekers.

## Conclusion

Even with these proposed changes, meaningful access to representation *prior to the CFI*, is essential to the IFR achieving its stated aims. The shortened time frame of the IFR, as well as the lack of an articulated change to the stressful conditions under which fear interviews are conducted, make the increased emphasis on the results of CFIs and AMIs deeply problematic. Unless the IFR addresses the need for comprehensive legal education about the asylum process and access to counsel, we are concerned that asylum seekers will not have the due process that is necessary to comply with our obligations under the Immigration & Nationality Act and international law.

Sincerely,

Shannon McKinnon  
Legal Director  
Immigrant Justice Corps