# THE ASYLUM TRANSIT BAN AFTER CAIR COALTION V. TRUMP

*Obtaining Relief in Asylum Transit Ban Cases*

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## I. Introduction

In its attacks on asylum, the Trump administration has combined procedural hurdles, intended to prevent asylum seekers from accessing the asylum system with substantive ones, intended to interpret asylum eligibility narrowly or add new bars to asylum relief. The former category includes the "Migrant Protection Protocol" (MPP), metering and turnbacks of asylum seekers at the U.S. border, and safe third country agreements to summarily deport asylum seekers to Central American countries that lack functioning asylum systems. The latter includes precedential Attorney General and Board of Immigration Appeals (BIA) decisions[1] and the proposed expanded criminal bars to asylum.[2] It also includes the Third Country Asylum Rule, also known as the transit ban. The rule added a new bar to asylum for anyone who has transited through another country before entering the United States through the southern border. Going beyond any previous attacks, the transit ban threatened to virtually end asylum at the southern U.S. border and shut out thousands of asylum seekers from the legal protection they are owed.

Advocates challenged the transit ban in court as soon as it was issued. Although it was initially enjoined and blocked from taking effect, the Supreme Court reversed the injunction allowing the transit ban to go into effect while the legal challenges to it remained pending. The transit ban took effect on September 11, 2019. On June 30, 2020, the transit ban was found unlawful and struck down nationwide in *CAIR Coalition v. Trump*.[3] It is currently no longer in effect, although the government may appeal the decision or try to reintroduce the transit ban in a new form. In the time the Court allowed it to take effect, the government applied it to wrongfully deny thousands of people asylum.

This advisory discusses the asylum transit ban, its current posture, and possible strategies for people who have been denied under the ban to reopen their cases and receive asylum. A sample Motion to Reopen a case that was denied based on the transit ban is included with this advisory courtesy of the Northwest Immigrants Rights Project. Note that this advisory is not comprehensive. For additional information on the Transit Ban and information on litigation challenging its validity, the Center of Gender and Refugee Studies has recently published a practice advisory about the bar.[4] For more information on the current administration's other policies affecting asylum seekers at the southern U.S. border, the American Immigration Council has published a fact sheet giving an overview of these policies.[5]

## II. What is the Transit Ban?

In recent years, the Trump administration has made numerous regulatory and administrative changes attacking asylum protections, especially at the southern U.S. border.[6] Some of these regulations clearly contradict the asylum statute or undermine the asylum process to the point of making its benefits illusory. By the time federal courts review these measures and enjoin or vacate them, they have been in place for several months and have resulted in hundreds or thousands of denials and deportations. When past unlawful asylum restrictions have been struck down, the administration has quickly replaced them with distinct but functionally similar new ones. Individual measures are replaced like tiles in a mosaic, but the overall picture remains undisturbed. The Trump administration has been able to erect and maintain increasingly comprehensive barriers to asylum relief.

Through these restrictions, the United States has turned away and deported thousands of refugees whom it had a legal obligation to protect. The human toll of these policies is staggering. The restrictions have created a humanitarian crisis along the southern U.S. border. Many asylum seekers who have been prevented from presenting their claim live in makeshift camps or other forms of inadequate shelter. Many of them have suffered kidnapping, trafficking, and other forms of violence.

### A. Asylum Ban 1.0: The November 2018 Ban

The transit ban is not the first attempt to end asylum at the southern border. In November 2018, DHS published a rule barring asylum for applicants who had entered through the southern border between ports of entry, on or after November 8, 2018.[7] This rule coincided with the increased use of metering and turnbacks of asylum seekers at the U.S. border. The precarious conditions for metered asylum seekers waiting along Mexico's northern border forced many asylum seekers who had planned or attempted to present their claim at a port of entry to attempt to enter without inspection. The November 2018 transit ban attempted to bar these applicants from asylum relief. Advocates immediately challenged the ban and secured a nationwide injunction before it took effect. While still enjoined, the ban was struck down by the DC District Court.[8] Because the nationwide injunction was ordered and allowed the remain in place until the court ruled that it was unlawful, the first transit ban never went into effect. While it is possible that the administration may attempt to revive this ban, it appears to be focusing its efforts into other asylum restrictions.

### B. Asylum Ban 2.0: The Transit Ban

On July 16, 2019, DHS published another rule, referred to by advocates as Asylum Ban 2.0 or the transit ban. The rule barred asylum seekers entering the United States through the southern U.S. border after that date who had transited through a third country prior to entering the United States.[9] It contained very broad language creating a bar for a large proportion of U.S. asylum seekers and applied regardless of immigration status at entry. The American Immigration Council pointed out that someone entering the United States on a tourist visa at a southern port of entry or a student residing in the United States and briefly visiting Mexico could find themselves permanently barred from asylum.[10] Because the rule applied to the southern U.S. border, all non-Mexican asylum seekers entering through it will have necessarily transited through a third country on their way to the United States.

DHS argues that the ban is supported by the asylum statute, which allows for additional conditions and limitations on asylum that are "not inconsistent with" the INA.[11] It claims that the transit ban protects the "'core regulatory purpose' of asylum law by prioritizing applicants 'with nowhere else to turn.'"[12] To support

this argument DHS points to two existing statutory bars to asylum, the firm resettlement bar and the safe third country bar.[13] It claims that like those barred under these two statutory bars, those subject to the transit ban are "effectively choosing among several countries."[14] There is no discussion of the difference between transiting through a country and having an offer to remain there permanently or access to asylum protections that the firm resettlement and safe third country bars require. There is no acknowledgement of the reality that asylum procedures are not available to most refugees in many transit countries.[15]

The transit ban contains only two exceptions.[16] An asylum applicant can show that they are a victim of a severe form of trafficking in persons, as defined by 8 C.F.R. § 214.11.[17] Being a victim of a severe form of trafficking in persons, defined as labor or commercial sex trafficking, is one of the eligibility criteria for T visa relief. This presents a difficult standard for asylum seekers to meet. The other exception is receiving a final order denying protection in at least one transit country.[18] Many transit countries that migrants cross while traveling to the United States do not have functioning asylum systems. As such, it was impossible for many asylum seekers to apply for asylum, let alone receive a final denial. The broad applicability and exceedingly narrow exemptions highlight how harmful the transit ban was to asylum seekers. It virtually eliminated asylum protections at the southern U.S. border for most entering asylum seekers.

Advocates challenged the ban in federal court immediately.[19] Although they were able to secure an initial injunction against it going into effect, the Supreme Court lifted the injunction on September 11, 2019, allowing the bar to take effect.[20] Some of the arguments that advocates advanced against the ban were that it violated the INA by contradicting the asylum statute, violated the Administrative Procedure Act because it was arbitrary and capricious and was issued in violation of the thirty-day notice and comment period. On June 30, 2020, the District Court for the District of Columbia struck down the transit ban in *CAIR Coalition v. Trump*.[21] The rule has been vacated nationwide and is no longer in effect currently.

## C. Additional Recent Asylum Restrictions

In recent months, the federal government has used its COVID-19 response as a pretext to unlawfully erect even more barriers to asylum relief.[22] It has expelled thousands of immigrants arriving at the U.S. border since the pandemic began, citing an order issued by the Centers for Disease Control and Prevention.[23] Asylum seekers and UCs are not exempted and have been expelled without being able to make a claim for protection. On July 9, 2020, the administration issued a proposed rule that would bar asylum to people based on public health grounds if they were exposed to an infectious disease or came from a country or region where it was prevalent.[24] The comment period for the proposed rule has closed, but it has not yet been issued in its final form.

On June 15, 2020, the Department of Justice and Department of Homeland Security (DHS) published proposed regulations on asylum. These regulations would upend decades of established asylum precedent; gut due process protections for asylum seekers; and in an unprecedented step, seek to exclude entire categories of asylum applicants.[25] The proposed regulations would also codify elements of the asylum transit ban into other areas of asylum law, including discretion. The final regulations have not yet been issued, but they threaten to virtually end asylum in the United States.

### D. What is the Current State of the Transit Ban?

The transit ban has been struck down nationwide. However, the Supreme Court allowed it to go into effect between September 11, 2019 and the district court's final ruling on June 30, 2020. It is difficult to overstate the devastating impact that the transit ban has had on asylum seekers in just a few months. The bar has been applied at all levels of the asylum process and has led to thousands of asylum denials. Its impact is most visible at the southern border. Many people affected by the ban have already been deported from the United States after having their asylum applications or credible fear interviews denied.

At the credible fear interview stage, asylum seekers who triggered the bar were forced to meet the more exacting reasonable fear standard for withholding protection. The bar also contributed to the high denial rate of the MPP program, which after a year had a relief grant rate of under 1%.[26] Many of the applicants who were granted relief through MPP received withholding of removal rather than asylum because of the transit ban. As a result, even those asylum seekers who won relief have been prevented from petitioning for their derivative spouses and children who remain stranded at the border.[27]

## III. Reopening Transit Ban Denials

Because the transit ban was allowed to go into effect, thousands of people have been wrongfully denied asylum and received final orders of removal. Some have already had the orders carried out and were deported, or they received a final denial of asylum in MPP and were unable to enter the United States. Many of these applicants, especially those who have already been deported, will face significant challenges in reopening their cases and obtaining the relief that they should have been granted had the transit ban not been allowed to take effect.

This section will cover the requirements for motions to reopen in asylum cases and will cover some arguments advocates can make to reopen a transit-ban based asylum denial.

### A. Motions to Reopen Generally

The rules governing motions to reopen (MTR) before EOIR are restrictive and the decision to grant it is discretionary.[28] In general the requirements for an MTR are that it (1) be filed within ninety days of the date of entry of a final administrative order of removal; (2) be the first motion to reopen filed by the respondent; and (3) state material and previously unavailable facts, supported by affidavits and other evidentiary material, including new applications for relief, if applicable.[29] The MTR should be filed with the immigration court that last issued the removal order, or the BIA if the BIA issued the last removal order.[30]

For asylum MTRs based on changed circumstances, the MTR should include a complete description of the new facts that comprise those circumstances, a description of how those circumstances affect their asylum eligibility, and compelling evidence showing they are deserving of a positive exercise of discretion.[31]

### B. The Ninety-Day Deadline

Because the transit ban was in effect for almost a year, many applicants have received transit ban-related denials that are over ninety days old. As mentioned above, the MTR must generally be filed within ninety days of the entry of the last removal order subject to narrow exceptions. Although one of the exceptions is for asylum

and withholding of removal cases, it is expressly limited to changed country conditions.[32] The BIA has limited the exceptions to the ninety-day time limit to those expressly provided by statute or regulation.[33]

However, the deadline is also subject to the doctrine of equitable tolling, which occurs most frequently in ineffective assistance of counsel cases, but can apply when other types of extraordinary circumstances are present. To equitably toll the deadline for a motion to reopen, the moving party must show that they exercised due diligence in pursuing reopening and that the delay was due to extraordinary circumstances. Diligence is defined as "reasonable diligence," not "maximum feasible diligence" in discovering the extraordinary circumstances.[34] Proving diligence is fact-specific and will depend on the case. However, the applicant should generally include a declaration and corroborating evidence showing the timeline of when and how they discovered the extraordinary circumstances and filed the MTR. Circuit courts are split as to whether equitable tolling pauses or tolls the statute of limitations. Even where equitable tolling is available, the MTR should be filed as quickly as possible.

Although the vacatur of the transit ban does not constitute changed country conditions, it may constitute an extraordinary circumstance that warrants equitable tolling of the ninety-day deadline. Applicants who received asylum denials more than ninety days ago should argue for equitably tolling in light of the district court's ruling on June 30, 2020, which materially affected their asylum eligibility. They should also identify any other type of extraordinary circumstances that would support equitable tolling. Applicants should file an MTR promptly and be prepared to show that they exercised diligence in obtaining the information about their asylum eligibility and reopening their case.

### C. Applicants Who Were Already Deported from the United States

The regulations bar motions to reopen made on behalf of someone subsequent to their departure from the United States.[35] However, all circuit courts except the Eighth Circuit have found this post-departure bar to be unlawful.[36] There is no precedent the on the post-departure bar's effect on immigration judges' authority to reopen cases *sua sponte*. However, the regulatory language supports this authority, as a *sua sponte* reopening is on the judge's own motion, not "on behalf of" the respondent. The BIA has also specifically held that immigration judges have the authority to reopen removal orders issued *in absentia* resulting from lack of notice. Anecdotally, people have been able to reopen their proceedings after departing the United States. Those who do succeed on these types of MTRs also face additional challenges in securing their return to the United States. DHS lacks a consistent policy governing returns of people who have been previously deported.[37]

### D. Once the Removal Order is Reopened

After a case is reopened, there are different possibilities for what could happen depending on the previous procedural posture of the case. The adjudicator could make a decision on the existing record or the case could have to go back before the immigration judge for further proceedings. In some transit ban-based asylum denials, immigration judges have expressly indicated that the applicant met all of the asylum eligibility criteria and was deserving of a positive exercise of discretion, but was ineligible solely on account of the transit ban. In such cases, the applicant may be able to receive asylum after filing the MTR without going through another hearing.

For cases that were pretermitted without a full asylum hearing or where the decision did not make clear whether the transit ban was the only reason for the asylum denial, applicants may have to go through a full

merits hearing after the case is reopened to readjudicate the asylum claim. Although this would give applicants the opportunity to make a full case for asylum, they would also have to potentially relive the trauma of past persecution. Moreover, the backlog of cases in immigration court makes it uncertain when a merits hearing will be scheduled and go forward.

## IV. INA § 208(a)(2)(C) Previous Asylum Denial Bar

People who have been denied asylum under the transit ban and cannot reopen their removal order may end up reapplying for asylum. The previous asylum denial bar is a concern for these cases, but people whose cases were denied due to the transit ban should be permitted to reapply under the changed circumstances exception to the bar. Under INA § 208(a)(2)(C) a person who has had an asylum application denied may not reapply for asylum. However, this is subject to an exception for changed circumstances which materially affect the applicant's eligibility for asylum.[38] For asylum applications that were solely denied due to the transit ban, the striking down of the ban materially affected their asylum eligibility. Applicants who can demonstrate that their previous denial was due to the transit ban should be able to meet an exception to the previous asylum denial bar. This will probably be easier for applicants whose decisions indicate that the transit ban was the sole reason for the asylum denial. For those whose record of decision is less clear, it may be more difficult to demonstrate that the transit ban was the reason for the denial.

## V. Credible Fear Denials and Reopening an Expedited Removal Order

In addition to those who were denied asylum on the merits, many applicants received negative credible fear determinations because of the transit ban. Human Rights First found that during fiscal year 2020, the positive rate for credible fear interviews plummeted to thirty seven percent, fifty percent lower than last year, in part because of the transit ban.[39] Many asylum seekers who were denied credible fear under the transit ban now have orders of expedited removal that could be subject to reinstatement of the previous removal order if they return to the United States.

Review of expedited removal orders is limited. However, it is possible to move to reopen a DHS expedited removal order under 8 CFR § 103.5. Although the regulation provides that there is normally a thirty-day time limit to file a motion to reopen, it may be excused where the delay is reasonable and not caused by the petitioner. For more information on reinstatement proceedings and information on reopening an order of expedited removal, see American Immigration Council and National Immigration Law Project, Reinstatement of Removal, May 23, 2019:

https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/reinstatement_of_removal.pdf.

## End Notes

[1] E.g., *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

[2] 84 Fed. Reg. 69640.

[3] *CAIR Coalition v. Trump*, No. 19-2117 (D.D.C. Jun. 30, 2020).

[4] Annie Daher, Center for Gender and Refugee Studies, The Third Country Transit Bar, March 31, 2020 (available on request from CGRS).

[5] American Immigration Council, Fact Sheet: Policies Affecting Asylum Seekers at the Border, Jan. 29, 2020, https://www.americanimmigrationcouncil.org/research/policies-affecting-asylum-seekers-border.

[6] The Migration Policy Institute identified over 400 executive actions on immigration since January 2017. Sarah Pierce and Jessica Bolter, Migration Policy Institute, Dismantling and Reconstructing the U.S. Immigration System: A Catalog of Changes under the Trump Presidency (July 2020), https://www.migrationpolicy.org/research/us-immigration-system-changes-trump-presidency.

[7] 83 Fed. Reg. 55934

[8] *O.A. v. Trump*, 440 F. Supp. 3d 109 (D.D.C. 2019); *see also East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242 (9th Cir. 2020) (affirming preliminary injunction against November 2018 asylum ban).

[9] 84 Fed. Reg. 33829.

[10] American Immigration Council, Fact Sheet: Policies Affecting Asylum Seekers at the Border, Jan. 29, 2020.

[11] INA § 208(d)(5)(B).

[12] 84 Fed. Reg. 33834 (quoting *Matter of B-R-*, 26 I&N Dec. 119, 122 (BIA 2013)).

[13] *See* INA § 208(a)(2)(A), (b)(2)(A)(vi).

[14] 84 Fed. Reg. 33834

[15] *See, e.g.*, Human Rights First, Is Guatemala Safe for Refugees and Asylum Seekers?, Jun. 2019, https://www.humanrightsfirst.org/sites/default/files/GUATEMALA_SAFE_THIRD.pdf.

[16] The rule technically provides a third exception for persons who transited only through countries that are not parties to the 1951 Refugee Convention, the 1967 Protocol, or the Convention Against Torture. *Id.* at 33835. However, because Mexico is a party to all three agreements, it is impossible for anyone who has triggered the bar to qualify for it.

[17] *Id.*

[18] *Id.*

[19] *East Bay Sanctuary Covenant v. Barr*, 9-cv-04073-JST (N.D. Cal.); *I.A. v. Barr*, 19-cv-02530-TJK (D.D.C.); *CAIR Coalition v. Trump*, 19- 2117-TJK (D.D.C. Jun. 30, 2020); *Al Otro Lado v. Wolf*, No. 17-CV-02366-BAS-KSC (S.D. Cal.) (challenge of application to metered applicants); *M.M.V. v. Barr*, 19-cv-02773-ABJ (D.D.C.) (challenge to application in expedited removal).

[20] *Barr v. East Bay Sanctuary Covenant*, 585 U.S. ____ (2019).

[21] *CAIR Coalition v. Trump*, 19-2117 (D.D.C. Jun. 30, 2020).

[22] These expulsions directly violate the UNHCR's guidance that countries cannot use the COVID-19 pandemic to do away with asylum protection altogether. UN High Commissioner for Refugees (UNHCR), Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, Mar. 16, 2020, https://www.refworld.org/docid/5e7132834.html.

[23] *See* U.S. Centers for Disease Control and Prevention, Order Suspending Introduction of Certain Persons from Countries Where a Communicable Disease Exists (Mar. 20, 2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf.

[24] 85 Fed. Reg. 41201; *see also* Hamed Aleaziz, The Trump Administration Is Preparing To Treat Asylum-Seekers As Security Threats, BuzzFeed News, Aug. 14, 2020, https://www.buzzfeednews.com/article/hamedaleaziz/trump-immigrants-mexico-canada-draft-rule.

[25] 85 Fed. Reg. 36264.

[26] Transactional Records Access Clearinghouse, Details on MPP (Remain in Mexico) Deportation Proceedings, https://trac.syr.edu/phptools/immigration/mpp/.

[27] E.g., Adolfo Flores, *A Venezuelan Dad Was Allowed into the US, but His 18 Year Old Daughter Was Sent back to Mexico Alone*, BuzzFeed News, Feb. 17, 2020, https://www.buzzfeednews.com/article/adolfoflores/venezuelan-father-separated-teen-daughter-asylum-mexico.

[28] *See* INA § 240(c)(5)-(6); *Matter of S-Y-G-*, 24 I&N Dec. 247, 252 (BIA 2007).

[29] INA § 240(c)(7)(B); 8 CFR § 1003.2(c).

[30] 8 CFR §§ 1003.2, 1003.23.

[31] *See Matter of A-N- & R-M-N-*, 22 I&N Dec. 953, 955-56 (BIA 1999); Immigration Court Practice Manual, Chapter 5. 7(e) (Jul. 2, 2020).

[32] 8 CFR § 1003.23(b)(4)(i).

[33] *Matter of A-A-*, 22 I&N Dec. 140, 143-44 (BIA 1998).

[34] *See Holland v. Florida*, 560 U.S. 631 (2010).

[35] 8 CFR § 1003.2(d).

[36] *See Santana v. Holder*, 731 F.3d 50 (1st Cir. 2013); *Luna v. Holder*, 637 F.3d 85 (2nd Cir. 2011); *Prestol Espinal v. Att'y Gen.,* 653 F.3d 213, 217–24 (3d Cir.2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir.2007); *Garcia Carias v. Holder*, 697 F.3d 257, 263 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234, 235 (6th Cir. 2011); *Marin Rodriguez v. Holder*, 612 F.3d 591, 593 (7th Cir. 2010); *Martinez Coyt v. Holder,* 593 F.3d 902, 905–07 (9th Cir.2010); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2011); *Jian Le Lin v. U.S. Att'y Gen.*, 681 F.3d 1236 (11th Cir. 2012); *see also Gomez-Gutierrez v. Lynch*, 811 F.3d 1053, 1057 n. 3 (8th Cir. 2016) (recognizing that every other circuit has recognized the post-departure bar to be invalid but declining to consider it because BIA had not invoked it).

[37] The additional travel restrictions enacted during the COVID-19 pandemic may make securing relief outside the United States even more challenging for the foreseeable future.

[38] INA § 208(a)(2)(D).

[39] Human Rights First, Asylum Denied Families Divided: Trump's Administration's Illegal Third-Country Transit Ban, Jul. 15, 2020, https://www.humanrightsfirst.org/sites/default/files/AsylumDeniedFamiliesDivided.pdf.

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