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May 31, 2022

Rená Cutlip-Mason, Chief, Division of Civil Rights
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Dept. of Homeland Security
5900 Capital Gateway Dr.
Camp Springs, MD 20588

Lauren Alder Reid, Assistant Director
Office of Policy
Executive Office for Immigration Review
Dept. of Justice
5107 Leesburg Pike
Falls Church, VA 22041

Via Electronic Submission

Re: Comments in Response to DHS Notice Requesting Comments on “Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers,” Docket Number USCIS 2021-0012

Dear Ms. Cutlip-Mason & Ms. Adler Reid:

The Texas Civil Rights Project (TCRP)¹ submits this comment in response to the proposed interim final rule (IFR) revisions regarding the changes to our asylum processes. While we recognize the Department of Homeland Security (DHS) and the Department of Justice’s (DOJ) (collectively the Departments) latest amendments to address public comments and concerns, we urge the Departments to again amend the proposed IFR to ensure that asylum seekers have access to counsel and due process safeguards.

The Texas Civil Rights Project is a 501(c)(3) legal advocacy organization with offices all across Texas. TCRP is dedicated to defending the rights and dignity of all those in Texas in the courtroom, in partnership with our communities, and with an eye towards meaningful policy changes. Since our founding in 1990, TCRP has fought for the rights of immigrants. We are lawyers and advocates for Texas communities, boldly serving the movement for equality and justice.

¹ See *About TCRP*, TEXASCIVILRIGHTS.ORG (2019), <https://txcivilrights.org/about-us/>.



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More specifically, TCRP’s Beyond Borders Program² is dedicated to advancing human dignity, protecting freedom of movement, and advocating on behalf of Texas border communities, including individuals exercising their right to migrate. As U.S. border policies have changed dramatically in the last years, and continue to do so, TCRP has been at the forefront of protecting the right to seek asylum. During the height of the family separation crisis in 2018, TCRP interviewed asylum seekers and separated families, and we continue to work with them in the aftermath of their separation. Furthermore, to date, we still interview and represent separated families, as family separations have not ceased.

In January 2021, TCRP, along with the ACLU and other partner organizations, sued the Biden Administration on behalf of families and vulnerable individuals who were expelled and denied asylum under Title 42.³ As part of this litigation, TCRP conducted hundreds of intakes with asylum-seeking families, and we continue working to ensure justice inside and outside the courts.

Because of our on-the-ground work with asylum seekers, we have witnessed the rampant harms caused by faults in the asylum process. We recognize the government’s attempt to increase asylum claim processing; however, the IFR has many shortcomings - which will result in the expedited removal or deportation of people with credible fear of returning to their home countries. Of specific concern to TCRP, the changes in the asylum rules fail to address lack of access to counsel and fail to provide due process safeguards for all people navigating the proposed asylum process.

I. The IFR is rife with a lack of due process safeguards, specifically at the credible fear interview stage.

The IFR lacks procedural due process safeguards. Appeal rights for a negative credible fear finding are illusory.⁴ Under the IFR, an asylum seeker must first pass a credible fear determination before proceeding to an asylum merits interview. The IFR states that an asylum officer must give the person written notice of their credible fear finding.⁵ If there is a negative credible fear finding, the asylum officer must ask the person whether they want the finding reviewed by an immigration judge.⁶ This review must occur “to the maximum extent practicable within 24 hours,” but no later than 7 days after a negative CFD.⁷ This is an extremely tight turnaround, potentially giving an attorney or pro se individual only a day to prepare their case for review. Counsel or pro se individuals would have days or just hours to obtain and review their original interview transcript—

² *Beyond Borders: Our Bold Vision For A New Tex.*, TCRPMAG (Mar. 10, 2022), <https://news.txcivilrights.org/2022/03/10/beyond-borders-launch/>.

³ See *Huisha-Huisha v. Mayorkas*, 27 F.4th 718 (D.C. Cir. 2022); *Ord. Suspending Introduction of Certain Persons from Countries Where a Quarantinable Communicable Disease Exists*, 85 Fed. Reg. 201 (Oct. 16, 2020), https://www.cdc.gov/quarantine/pdf/CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf. The Trump Administration relied on 42 USC § 265 to close the border and restrict immigration access, citing a public health emergency in light of the COVID-19 pandemic.

⁴ See 8 CFR § 208.30(g).

⁵ *Id.* at (g)(1).

⁶ *Id.*

⁷ 8 USC § 1225(b)(1)(B)(iii)(III).



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and obtaining the transcripts alone can be time consuming. Often these transcripts are long because the interviews can take hours, thus requiring a lengthy process for review. Then, the attorney must also prepare the individual, and themselves to argue before an immigration judge—all within a few days at best, sometimes within hours. If it takes longer than two weeks to get a client on the phone while they are detained,⁸ it is impractical to assume that 24 hours or even a week is enough time to prepare for the case’s review. And even if an individual is not detained, capacity constraints under such a tight turnaround will make it extremely difficult for the individual to find an attorney and for that attorney to adequately prepare for the case.

In addition, the only other opportunity for review, aside from an IJ, is a discretionary review by USCIS, and that is not enough.⁹ First, the asylum seeker must know that they can request this review and must do so within seven days of the IJ’s decision, or prior to their removal, whichever comes first.¹⁰ While USCIS may also initiate the IJ’s review, this is—again—discretionary. Without meaningful access to counsel, it is incredibly difficult for asylum seekers to navigate the byzantine process, including the process to appeal an IJ’s negative credible fear finding. It is also incredibly difficult for an individual to prepare any additional evidence within a week. And again, even if they request an appeal, USCIS still has discretion to deny it.¹¹ In other words, asylum seekers are not guaranteed appeal rights at the CFI stage, and their asylum claim can be effectively denied if an IJ so rules it.

TCRP urges the Departments to amend this rule and mandate a review of an IJ’s decision, should the IJ concur with USCIS and issue a negative credible fear finding. The IFR also does not identify procedural safeguards to ensure DHS officials are substantively complying with the requirements to provide written notice of CFI decision and informing individuals of their limited appeal rights. There should also be requirements to ensure that, at the CFI stage, individuals are informed about their limited appeal rights in their native language. To ensure a more appropriate appeal process, we also recommend requiring asylum officers issue a reasoning for their denial. Otherwise, individuals or their attorneys will be unable to directly address the concerns regarding their request for relief, which are necessary to best prepare their appeal. Failure to safeguard these due process rights will leave individuals at the peril of unreasonable timelines and agency discretion that will result in wrongful denials and removals. If individuals’ asylum claims are denied, we know from our hundreds of intakes that they are faced with returning to torture, persecution, and death. It is, therefore, imperative that there is a mandated mechanism for review of an IJ’s decision.

II. The IFR processes inhibit access to counsel for people seeking asylum.

a. The IFR timeframes for the asylum merits interview will make finding an attorney extremely difficult.

⁸ See Section II for additional details regarding communication issues with individuals in detention.

⁹ 8 CFR § 208.30(g)(1)(i).

¹⁰ *Id.*

¹¹ *See id.*



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The arbitrary timelines for conducting asylum interviews makes it almost impossible for individuals to access counsel. The IFR requires that the USCIS asylum officer conduct the asylum merits interview within 21-45 days of a positive credible fear determination.¹²

At best, this arbitrary timeframe gives individuals only 45 days to prepare for the full evidentiary hearing that is their asylum merits interview. Because the IFR does not specifically recommend a presumption of release for individuals granted a credible fear interview,¹³ even absent derogatory information, it is likely that many will be detained during their CFI, and could possibly be moved to different detention facilities or released during their asylum process. Thus, the 45 days includes days where the individual could be transitioning between detention facilities or if released, traveling to their final destination in the U.S. These may be crucial days lost to DHS administrative processing for release or transfer, bus travel, locating that person in their new detention center, or acclimating them to their new residence in the U.S.

This timeframe is concerning for both released and detained individuals. Even in the best circumstances when someone is quickly released after their credible fear interview, or was released even before that interview, they will have, at best, 45 days to arrive at their destination, identify legal resources, obtain and supplement their asylum application, and prepare for their full merits hearings. However, securing legal representation and preparing for their interview within the proscribed 45 days is almost impossible, especially given the capacity constraints that private and pro bono attorneys face. For instance, the legal aid organizations with whom TCRP has collaborated frequently struggle with capacity—individuals routinely cannot get a consult until at least two weeks out. If individuals seeking asylum happen to find an attorney quickly, the attorney will be on an unrealistic time crunch to: meet with their client and become familiar with the facts of their case; obtain the full record from DHS and supplement the record as necessary; and prepare case arguments and their client for a full evidentiary hearing.

All of these concerns are present, and aggravated, when a person is detained.¹⁴ The IFR not only fails to provide safeguards against detention and for detained individuals, but the tight timeframes do not consider possible administrative delays routinely present due to DHS detention. For example, TCRP has worked with individuals transferred to ICE custody or between CBP and/or ICE detention centers, and these transfers usually mean days lost due to transfer-related administrative processes. It usually takes a few days for even an attorney of record to confirm where their client is located and at least another few days, if not weeks, to be allowed a legal phone call with their client. This pattern and practice is especially concerning given the tight timeframe established by the IFR—this administrative lag means that the individual and their family cannot quickly look for, much less secure, an attorney because they will not know where the individual is

¹² 8 CFR § 208.9(a)(1).

¹³ See 8 CFR § 212.5(b) (stating that parole “would generally be justified only on a case-by-case basis for “urgent humanitarian reasons” or “significant public benefit. . .”).

¹⁴ See *Asylum Process Rule Includes Welcome Improvements, But Critical Flaws Remain to Be Resolved*, HUM. RTS. FIRST, 4 (May 2022), <https://www.humanrightsfirst.org/sites/default/files/AsylumProcessIFRFactSheet.pdf> (“Government data shows that detained individuals are two-and-a-half times less likely to be represented by counsel compared to individuals who have been released from detention.”).



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being held. These 45 days will also be the constraint for these individuals to identify legal resources in their geographic area, secure an attorney, ensure they have their complete asylum record from DHS, supplement their record as needed, and prepare for their asylum merits interview.

This tight timeframe is simply unreasonable and harmful for the preparation of an asylum case. Furthermore, we must also consider that, in addition to the legal work required for a case, these individuals are also processing big life changes, as well as the trauma of the harms incurred in their home country and the harms experienced during their journey—all of which make preparing for a legal case on such a quick timeframe extremely difficult.¹⁵ If individuals are detained while they wait for their asylum interview, substantively preparing for their case will be more challenging. As previously underscored, detention will make it even harder for them to communicate with loved ones and their attorney and obtain legal resources—all factors necessary to ensure appropriate preparation for these cases. Yet, given these challenges, individuals will still be expected to find an attorney within 45 days of their positive CFI to prep for their asylum merits interview.¹⁶

TCRP urges the Departments to reconsider and extend these timeframes so individuals may have more time to locate an attorney and prepare their case.

b. The IFR deadline for evidence submissions will make it difficult for individuals to prepare their asylum case.

The IFR proposes that evidence for asylum claims must be submitted at least 14 days before the asylum merits interview,¹⁷ which may be just seven days after a positive fear determination. While asylum officers may grant an extension for individuals to submit additional evidence, this extension is fully discretionary, and an asylum determination must still be issued within 60 days of the positive credible fear determination.¹⁸ Rescheduling any asylum merits interview is only permitted in select exigent circumstances.¹⁹

Pro se individuals will have difficulty navigating this evidence extension request or any other request to USCIS, including supplementing their asylum application. When considering just the issue of language access, we note extensive hurdles to the process set out by the IFR. For example, USCIS requires documents to be translated to English,²⁰ but, as individuals are unlikely to have their own interpreters and the IFR does not require interpreters outside of the interviews on asylum

¹⁵ See e.g., *Helping Asylum-seekers Find Sanctuary*, PHYSICIANS FOR HUM. RTS. (Mar. 1, 2022), <https://pfr.org/our-work/resources/helping-asylum-seekers-find-sanctuary/> (detailing trauma endured by asylum seekers and how triggering it is to retell their stories); “*I’m a Prisoner Here*”: *Biden Admin. Policies Lock up Asylum Seekers*, HUM. RTS. FIRST (Apr. 2022), <https://www.humanrightsfirst.org/sites/default/files/I%27maPrisonerHere.pdf> (detailing how detention exacerbates trauma).

¹⁶ 8 CFR § 208.9(a)(1).

¹⁷ *Id.* at (e)(1).

¹⁸ *Id.* at (e)(2).

¹⁹ *Id.* at (a)(1).

²⁰ 8 CFR § 103.2(b)(3) (“Any document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.”).



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applications,²¹ individuals are likely to have difficulties meeting this requirement. This will be hard even for released individuals, especially in light of the time constraints, and likely insurmountable for detained individuals. In addition, if a time extension for evidence submission is granted, asylum officers must still make application decisions within the confines of the rule—no more than 60 days after a positive CFD—which means that they will have less time to review evidence. With less time to review evidence, individuals face an uphill battle to reach a favorable and fair asylum decision. They are put in the position of having to balance obtaining a full record that adequately represents their harm with ensuring the adjudicator has enough time to review that record—difficult choices to make even with legal representation, and even more so for pro se individuals.

TCRP urges the Departments to extend the evidentiary submission deadline, as well as the 60-day deadline for asylum officers to decide a case. An extension will allow asylum officers time to review new evidence before the merits interview.

c. The likelihood of detention exacerbates access to counsel issues under the IFR.

As we noted previously, detention exacerbates the issues identified with the IFR’s current process. Many public comments on this IFR also point to access to counsel issues, as exacerbated by the likelihood of detention.²² It is important for TCRP to fully highlight the scope of the problems individuals will experience if they are detained through any part of this IFR process.

On April 27, 2022, ten immigration advocacy organizations, including Southern Poverty Law Center and the Immigrant Legal Resource Center, filed a complaint with the DHS Office of Civil Rights and Civil Liberties urging the Department to investigate the Houston Asylum Office’s handling of CFIs. Among the issues reported included “no or very little notice to counsel” of upcoming CFIs and “when counsel attempt[ed] to contact the Houston Asylum Office prior to the CFI . . . counsel regularly receives no response.”²³ The complaint underscored “the lack of legal orientation, difficulties with language access, and biased and deficient individualized fear determinations.”²⁴ The CRCL complaint also recognized that “while these violations affect all asylum seekers, they disproportionately affect those who are detained.”²⁵ Finally, advocates

²¹ See 8 CFR § 208.9(g).

²² See e.g., Denise Gilman & Elissa Steglich, *RE: RIN 1615-AC67; Pub. Comment on Proposed Rules on Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers*, THE UNIV. OF TEX. SCHOOL OF LAW (Oct 19, 2021), <https://law.utexas.edu/wp-content/uploads/sites/11/2021/10/2021-IC-asylum-regs-comments.pdf>; Hum. Rts. First Comment on Dep’t of Homeland Sec. & Dep’t of Just. Exec. Office for Imm. Rev., “*Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal and CAT Protection Claims by Asylum Officers*,” 86 FR 46906 (Oct. 18, 2021), HUM. RTS. FIRST, <https://www.humanrightsfirst.org/sites/default/files/HRFCommentAsylumNPRM10.2021.pdf>.

²³ *Systemic Deficiencies at the Houston Asylum Office in Assessments of Credible and Reasonable Fear Cause Harm and Irreversible Damage to Asylum Seekers*, 11 (Apr. 27, 2022), https://nipnl.org/PDFs/2022_27April-CFI-complaint.pdf.

²⁴ *Id.* at 2.

²⁵ *Id.* at 2.



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complained “of CFIs being conducted in an adversarial manner, shortly after multiple detention transfers, with no information given to the asylum seeker about asylum or the purpose of the CFI process, and no access to counsel for preparation.”²⁶ Notably, the first IFR pilot locations are in two Texas detention facilities that fall under the purview of the Houston Asylum Office.²⁷ This is extremely concerning, given the allegations set out in the CRCL complaint.

We know from our experience with conducting hundreds of intakes with individuals that navigating resources to find an immigration attorney is daunting. Individuals first have to understand the context of the asylum process and why having an immigration attorney is important.²⁸ However, they generally do not have a thorough understanding of the asylum process, including the CFI, because they are not given an adequate explanation or breakdown of these processes when detained. Even when DHS releases individuals from detention, they are often given confusing paperwork with no explanation of the asylum process or immediate next steps in their case. Many individuals have told TCRP that they were either not given forms or documents in their native language, or the documents provided were not explained in their native language. They especially are not told about the urgency of the asylum process, including the need to look for an attorney immediately.

TCRP can also attest to detention making it more difficult to access counsel. For one, communicating with detained clients is a huge challenge. Something as simple as securing a phone call with a client in detention can take up to a month. Recently, TCRP worked with a parent separated from his three-year-old child. We conducted an intake prior to the parent’s transfer to ICE custody. We needed to follow-up with a second call, but once he was transferred to ICE custody, it took two weeks for us to find where he was detained because CBP and ICE do not coordinate and systems are not updated daily—including the ICE Detainee locator.²⁹ In our case, it took ICE nearly three weeks to update the ICE detainee locator, and many of the detention centers we called rarely answered the phone.

When we finally located our client at the Port Isabel Detention Center (PIDC), it took another two weeks to get a phone call with him—and that was after multiple phone calls to PIDC by two of our attorneys. We asked for our client to call us, explained that we were his attorneys, and stated that it was imperative that we speak with him before DHS took possible removal action. Many times, the detention center would not answer—this is not an issue unique to PIDC—and we would repeatedly call throughout the day. Even when PIDC answered, officers gave us conflicting information, such as how calls were scheduled and whether we needed to submit an email or fax

²⁶ *Id.* at 13.

²⁷ *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. DEP’T OF HOMELAND SEC. (May 26, 2022), <https://www.dhs.gov/news/2022/05/26/fact-sheet-implementation-credible-fear-and-asylum-processing-interim-final-rule>.

²⁸ *See Asylum Representation Rates Have Fallen Amid Rising Denial Rates*, TRAC IMMIGR. (Nov. 28, 2017), <https://trac.syr.edu/immigration/reports/491/> (“Statistically, only one out of every ten [asylum seekers] win their case. With representation, nearly half are successful.”).

²⁹ *Online Detainee Locator Sys.*, DEP’T OF HOMELAND SEC., <https://locator.ice.gov/odls/#/index> (last visited May 31, 2022).



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to confirm a scheduled call. Finally, after a long month, we spoke to our client, but this was *after* a month since our initial meeting.

When we had our second call with our client, he stated that he had signed legal documents, but he did not know exactly what he signed because the documents were not well explained. He was also very distraught about what he signed because he thought that it would lead to his being kept from his three-year old daughter. After speaking with him, we investigated to find out what he had signed. We had to call the detention center countless times, and again, many of our phone calls went unanswered. When the officers at the reception desk answered, they could provide no insight into our client's case. Instead, they'd transfer the line so we could speak with a deportation officer—who also did not immediately answer. When we were finally able to speak with a detention officer, he informed us about the signed documents. It took weeks for TCRP attorneys, who are experts in immigration detention and in representing individuals in detention, to locate an individual, to set up a call with him, and to be able to get the right DHS official on the phone to confirm where our client was in their specific process.

These detention center issues are not unique to this client or these named facilities. TCRP attorneys have experienced similar communication issues with multiple centers and DHS agencies, including La Villa Processing Center, Karnes County Detention Facility, various CBP detention facilities, and USCIS—which have led to a violation of individuals' rights. The lack of information sharing and responsiveness between agencies, and even within agencies, and subsequently with attorneys, is a real issue that interferes with our ability to effectively advocate for our clients.

For these reasons, TCRP urges the Departments to amend the IFR to include a presumption against detention and in favor of parole, as this would help alleviate *some* access to counsel issues.³⁰

III. Conclusion

As previously stated, TCRP continues to work with asylum seekers, and we are aware of the trauma and harms they have endured. Many of the families with whom we have spoken were forced to seek shelter in plazas patrolled and preyed upon by cartels; they suffered from lack of medical care, and traveled with minors at risk for human trafficking. They have shared their experiences of having their children kidnapped, trafficked, threatened, and physically and sexually assaulted. In addition, adults reported being robbed, extorted, threatened, and also experiencing physical and sexual violence. These families have witnessed people disappear or die, both at home and in Mexico. None of the individuals that we conducted intakes with had access to counsel.

While we condone the Departments' attempts to improve efficiency and clear the asylum backlog, we still request amendments to this IFR. Most importantly, we urge the Departments to add procedural due process safeguards to ensure that there is a right to appeal a negative credible fear determination following an IJ's decision. We also urge the Departments to extend the CFI and

³⁰ See 8 CFR § 212.5(b). While humanitarian parole may be an option under the IFR, this is not guaranteed.



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asylum merits interview deadlines to allow individuals ample time to find an attorney and to have meaningful access to that attorney.

Our goal should be to treat every individual seeking asylum with human dignity and respect. Indeed, President Biden’s Executive Order No. 14012 underscored our supposed character as a “nation of opportunity and welcome.”³¹ To ensure we are a nation of welcome, we should readily receive those who have fled persecution and violence. We should also recognize that individuals seeking asylum may risk reliving their trauma and returning to danger because of the flaws in the proposed IFR. The Departments should do their best to mitigate wrongful asylum denials by amending the rule accordingly.

Thank you for taking the time to review this comment.

Sincerely,

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³¹ See *Exec. Ord. No. 14012*, 86 Fed. Reg. 23, 8277 (Feb. 2, 2021) (stating “it is essential to ensure that our laws and policies encourage full participation by immigrants . . .” and “that immigration processes and other benefits are delivered effectively and efficiently). *But see A Shameful Record: Biden Admin.’s Use of Trump Policies Endangers People Seeking Asylum*, HUM. RTS. FIRST (Jan. 2022), <https://www.humanrightsfirst.org/sites/default/files/ShamefulRecord.pdf>.