

'Turnback' Asylum Policy Defies 5th Amendment, Judge Says

By Hailey Konnath

Law360 (September 2, 2021, 11:44 PM EDT) -- An unwritten U.S. Department of Homeland Security "turnback policy" turning away asylum-seekers at the southern U.S. border violates the Fifth Amendment's due process clause, a California federal judge ruled Thursday, though the judge also held that the policy doesn't clash with the Immigration and Nationality Act.

U.S. District Judge Cynthia Bashant said Thursday that the government is required to inspect and process asylum-seekers when they show up at ports of entry. Turning away asylum-seekers from ports of entry — or "metering" — constitutes an unlawful exercise of the government's authority to inspect and refer asylum-seekers both on U.S. soil and outside the international boundary line as asylum-seekers arrive at the ports of entry, Judge Bashant held.

"Because defendants' turning back of asylum-seekers unlawfully withholds their duties under statute, it violates the process due to class members," she said.

Judge Bashant also rejected DHS' argument that the Fifth Amendment doesn't apply to the case, finding "no basis in the case law" the government cited and ruling that it applies to conduct that occurs on American soil.

The findings came as part of an order in which Judge Bashant granted in part and denied in part portions of both the asylum-seekers' motion for summary judgment and DHS' cross-motion for summary judgment.

Notably, the judge agreed with the asylum-seekers that the policy violates the Fifth Amendment and the Administrative Procedure Act. However, Judge Bashant declined to grant them summary judgment on their Immigration and Nationality Act or their Alien Tort Statute claims.

Judge Bashant held that the government's conduct was inconsistent with its statutory duties under the Immigration and Nationality Act. And because she found that the agency action was unjustified under an APA review, she declined to do an independent statutory review of the INA.

Judge Bashant also denied both parties' requests for equitable relief, giving them until Oct. 1 to get back to the court on what remedy they believe is appropriate in light of her APA finding.

Baher Azmy, who's representing asylum-seekers in the case, celebrated the decision Thursday as "an

important victory" for Al Otro Lado, an organization that brought the case along with the asylum-seekers.

"This decision will protect thousands of vulnerable people at the border," said Azmy, the legal director of the Center for Constitutional Rights.

Melissa Crow, an attorney with the Southern Poverty Law Center, added in the statement that the court "properly recognized the extensive human costs of metering, including the high risk of assault, disappearance and death, when [U.S. Customs and Border Protection] officers flout their duty to inspect and process asylum-seekers and instead force them to wait in Mexico."

DHS representatives didn't immediately return a request for comment late Thursday.

In their suit, a certified class of asylum-seekers is claiming that DHS implemented an unwritten "turnback policy" to prevent individuals from seeking humanitarian protection in the U.S. According to the class, the U.S. has systematically violated its nonrefoulement obligations by blocking asylum-seekers at the border from seeking relief.

The government has argued that there is no turnback policy, and that all DHS did was implement a metering policy, which allowed a few asylum-seekers in at a time based on "bona fide operational needs" to manage overwhelmed CBP facilities.

At a hearing earlier this week, Judge Bashant indicated she was unpersuaded by DHS' statistics on asylum claims at the southern border, calling the government's evidence "abstract."

U.S. Department of Justice attorney Alexander Halaska had told the court that the number of noncitizens at ports of entry along the U.S.-Mexico border who were referred for credible fear screenings — an early step in the asylum process — increased four-fold between 2017 and 2019.

But Judge Bashant responded that "You don't know how many sought asylum. I mean, maybe there were 10 times more who sought asylum who didn't get access to asylum."

She also expressed skepticism about some of the asylum-seekers' arguments, in particular questioning their position on nonrefoulement: the principle that countries should not send people seeking humanitarian relief back into danger.

The asylum-seekers secured class certification a year ago, with Judge Bashant finding that the individual circumstances in which they were denied asylum access don't defeat the commonality of their claims.

Five immigrants in the suit claimed that CBP officers threatened, physically abused and lied to them so they wouldn't seek asylum, while eight other plaintiffs alleged CBP officers told them to wait in Mexico until they could apply for asylum.

In each of these instances, the 13 asylum-seekers in this suit were turned away by CBP officers at ports of entry on the U.S.-Mexico border instead of being referred to an asylum officer to be interviewed as required by the law, Judge Bashant said at the time.

The asylum-seekers are represented by Matthew H. Marmolejo, Ori Lev and Stephen Medlock of Mayer Brown LLP, Melissa Crow, Sarah Rich and Rebecca Cassler of the Southern Poverty Law Center, Baher

Azmy of the Center for Constitutional Rights and Karolina Walters of American Immigration Council.

The government is represented by Brian M. Boynton, William C. Peachey, Katherine J. Shinnery and Alexander Halaska of the DOJ's Civil Division.

The case is *Al Otro Lado Inc. et al. v. Alejandro Mayorkas et al.*, case number 3:17-cv-02366, in the U.S. District Court for the Southern District of California.

--Additional reporting by Jennifer Doherty. Editing by Emily Kokoll.

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