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Legal Sidebar

Safe Third Country Agreements with Northern Triangle Countries: Background and Legal Issues

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The Department of Homeland Security (DHS) recently began implementing an agreement with the government of Guatemala that allows DHS to transfer some asylum seekers to that country instead of evaluating their claims for protection in the United States. According to a report, DHS had transferred at least 230 Honduran and Salvadoran asylum seekers to Guatemala under the agreement as of late January 2020. Reports suggest that DHS has contemplated plans to apply the agreement to Mexican asylum seekers as well, but thus far it appears that only nationals of Honduras and El Salvador have been transferred to Guatemala under it. The agreement does not apply to Guatemalan nationals, unaccompanied alien children, and some other categories of aliens.

Agreements of this nature are typically known as "safe third country" agreements (STCAs), from the heading of the Immigration and Nationality Act (INA) provision that authorizes them. DHS and the government of Guatemala have opted to call their agreement an "Asylum Cooperative Agreement," although DHS acknowledges that such agreements are "alternatively described as safe third country agreements." DHS has also signed STCAs with the governments of Honduras and El Salvador. Those agreements, unlike the Guatemala agreement, have yet to be implemented, but DHS has said that it hopes to implement the Honduras agreement "within the coming weeks." At least one lawsuit filed in federal court challenges the legality of the STCAs and their implementing regulations and ultimately seeks an injunction blocking their implementation.

The STCAs are the latest in a series of Trump Administration policies that have changed the processing of asylum seekers at the U.S.-Mexico border. Earlier policies currently in effect include metering, the Migrant Protection Protocols (MPP, otherwise known as the "remain in Mexico" policy), and the July 16, 2019 interim final rule (IFR) rendering aliens ineligible for asylum if they transit through third countries to reach the southern border. A CRS infographic illustrates how these policies fit together with the STCAs. At least two key features distinguish the STCAs from the earlier policies. *First*, under the Guatemala agreement (the only STCA currently in effect), U.S. immigration officials will not consider an alien's claim for asylum or related protections; instead, so long as no exceptions or limitations apply, officials will send the alien to pursue relief in Guatemala. The earlier policies, in contrast, require U.S.

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immigration officials to consider the alien's claims, albeit under modified rules. *Second*, the Guatemala agreement contemplates that U.S. officials will remove aliens to a third country rather than to their country of origin or last habitual residence. Under the MPP and July 16, 2019 IFR, in contrast, orders of removal generally result in removal to the alien's country of origin.

Legal Background on STCAs

In general, any alien arriving or physically present in the United States may apply for asylum under the INA. This general rule has exceptions, however, including one provision, 8 U.S.C. 1158(a)(2)(A), that authorizes the executive branch to enter into "bilateral or multilateral agreement[s]" for the removal of asylum seekers to third countries. Those agreements must satisfy two primary requirements: (1) the third country must provide access to "full and fair" asylum procedures; and (2) must be a place "in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion" (i.e., where the alien would not face persecution).

Until recently, the executive branch had used this statutory authority to execute one STCA: an agreement with Canada, signed in 2002 and implemented two years later by regulation (following notice and comment procedures). That agreement has a narrow scope. It applies only to aliens (other than nationals of the United States or Canada) who present themselves at ports of entry on the U.S.-Canada land border and to aliens in transit during removal from the U.S. or Canada. The agreement does not cover aliens who cross the border surreptitiously between the United States and Canada. (Reports indicate that this feature of the agreement has influenced migration trends—aliens in the United States who wish to apply for asylum in Canada sometimes attempt to cross the border between ports—and that Canada wishes to amend the agreement to cover such aliens.) The U.S.-Canada agreement also has several exceptions, perhaps most notably for family ties. In many cases, under the terms of the agreement, an asylum seeker arriving in the United States from Canada cannot be removed to Canada if he or she has close relatives in the United States, and vice versa. The U.S.-Canada STCA has not been the subject of significant legal challenges in U.S. federal courts. In Canadian courts, it has been the subject of lawsuits, including one pending case in which challengers argue that the United States has become unsafe for asylum seekers, primarily because changes in asylum policies make it more likely those persons will be repatriated to a third country.

Guatemala, Honduras, and El Salvador STCAs

DHS signed the Guatemala, Honduras, and El Salvador STCAs between July and September 2019. Later, on November 19, 2019, DHS and the Department of Justice issued joint regulations establishing the procedures that immigration officials must follow when applying these STCAs—and any future STCAs—to individual asylum seekers. (These implementing regulations do not govern the U.S.-Canada STCA, which remains governed by a regulation promulgated in 2004.) Even with these regulations in place, however, at least two additional requirements imposed by the text of the STCA and the preamble to the regulations had to be satisfied before transfer of asylum seekers could begin under any of the agreements. *First*, the parties to each agreement must cause it to enter into force through an "exchange of notes" indicating compliance "with the necessary domestic legal procedures." *Second*, the Attorney General and the DHS Secretary must determine that the asylum procedures within the other STCA party are "full and fair" within the meaning of the INA.

The United States appears to have completed the implementation steps for the Guatemala agreement. The agreement entered into force through an exchange of notes on November 15, 2019, according to a Department of State notice. And the Attorney General and DHS have determined that Guatemala provides access to "full and fair" asylum procedures, according to a news report, although a lawsuit challenging the

legality of the STCAs notes that the Administration has not made that determination public. DHS reportedly began transferring some nationals of Honduras and El Salvador to Guatemala under the agreement in late November.

As for the Honduras STCA, Acting DHS Secretary Wolf said on January 9, 2020, that the United States and Honduras had "finalized the joint implementation steps" necessary to implement the agreement, but it remains somewhat unclear whether the exchange of notes has occurred and whether DHS and the Attorney General have determined that Honduras has "full and fair" asylum procedures. The Acting Secretary indicated that implementation could begin "in the coming weeks." With respect to the El Salvador STCA, implementation may be further off, as there have not been news reports suggesting progress on the formal requirements. For now, it appears that transfers of asylum seekers are occurring only under the Guatemala agreement.

The terms of the Guatemala STCA create exceptions for three categories of aliens: (1) nationals of Guatemala; (2) aliens who hold U.S. visas or who do not require visas to apply for admission to the United States (such as aliens eligible for the visa waiver program); and (3) unaccompanied alien children. A fourth, catchall exception comes from the text of the INA and is reflected in the STCA regulations: DHS will not remove an alien to Guatemala (or to any other recipient country under an STCA) if DHS determines that "it is in the public interest for the alien to receive asylum in the United States." The regulations state that DHS's United States Citizenship and Immigration Services (USCIS) officials will make this public interest determination "in the exercise of unreviewable discretion."

DHS Procedures for transfers under the STCAs

Under the provisions of the STCA implementing regulations, immigration officials may apply the Guatemala STCA (and other STCAs that go into force in the future) in two types of removal proceedings: (1) expedited removal proceedings, which are summary proceedings that can result in removal without hearings in immigration court; and (2) formal removal proceedings in immigration court.

Expedited Removal

Expedited removal typically applies to aliens encountered at or near the border without valid entry documents. When an alien in expedited removal claims asylum or a fear of persecution in his or her country of origin, DHS's Customs and Border Protection must typically refer the alien to an asylum officer, who then conducts a credible fear interview to screen the alien's potential eligibility for asylum or related protections. If a credible fear is found, the alien will be transferred to formal removal proceedings where claims for relief may be pursued.

The STCA regulations alter the procedures that the asylum officer follows. They provide that, before conducting a credible fear interview, the asylum officer must determine whether the alien is subject to an STCA and whether any exceptions apply (such as the exceptions for visa holders and unaccompanied alien children, or the catchall "public interest" exception). If the alien affirmatively states that he or she fears persecution or torture in the recipient country, then the asylum officer will assess whether the alien has demonstrated that it is "more likely than not" that the alien will face persecution or torture there. (If that threshold is met, as explained further below, the asylum officer continues with the credible fear interview under standard expedited removal proceedings.) The regulations do not require asylum officers to proactively ask aliens whether they fear persecution or torture in the recipient country, but it does require officers to give aliens written notice that they may request a fear assessment affirmatively.

The STCA regulations contain arguably unique features. Under them, aliens may not consult with counsel before or during the asylum officer's assessment of whether the alien may be removed to a third country under the Guatemala STCA (or any other STCAs that go into effect in the future). By comparison, both the regulations governing the U.S.-Canada STCA and the standard credible fear process (outside the

STCA context) do provide aliens an opportunity to consult counsel. Also, an asylum officer's decision that an alien may be removed to Guatemala under the STCA must be reviewed by a supervisory asylum officer but is not appealable to an immigration judge. By comparison, in standard credible fear proceedings (again, outside the STCA context) negative credible fear determinations are subject to immigration judge review. Removal orders under the U.S.-Canada STCA are not subject to such review, however.

If DHS determines that an alien should be transferred to a third country under an STCA, the regulations provide that an alien may "withdraw his or her request for asylum" to avoid this result. The preamble of the implementing regulations suggests that withdrawing an asylum request, for these purposes, entails accepting an order of removal to the alien's country of origin.

If the asylum officer determines that the alien may not be removed to a third country—because an STCA does not apply, because the alien qualifies for an exception to the STCA, or because the alien has demonstrated a likelihood of persecution in the receiving country—the asylum officer carries on with standard expedited removal procedures by conducting a credible fear interview. (At this point, a different regulation—the July 19, 2019 IFR establishing an asylum ineligibility for third-country transit—may kick in to make it more likely that the proceedings will result in an order of expedited removal to the alien's country of origin or last habitual residence.) A flowchart at the end of the USCIS training materials illustrates the sequence of decisions under the STCA regulations.

Formal Removal Proceedings

The STCA regulations also establish that the Guatemala STCA will apply in formal removal proceedings in immigration court. Formal removal proceedings often follow expedited removal proceedings because, as discussed above, DHS must refer aliens who establish a credible fear of persecution to formal proceedings. Aliens may also be placed directly into formal proceedings, either because they were not eligible for expedited removal or because DHS opted not to employ expedited removal.

If an alien in formal proceedings applies for asylum, under the STCA regulations the immigration judge may determine that the alien should be removed to a third country under an applicable STCA. In making this determination, the immigration judge must consider the same three questions that the asylum officer considers: (1) does an STCA apply to the alien?; (2) does the alien qualify for an exception to the STCA?; and (3) has the alien demonstrated he or she will likely face persecution or torture in the receiving country? But the STCA regulations do not grant the immigration judge jurisdiction to consider the catchall "public interest" exception. Instead, they reserve consideration of that exception for DHS and allow DHS to file notice in immigration proceedings when it decides to invoke the exception.

Unlike the procedure that the STCA regulations set up before the asylum officer, the alien does have a right to counsel retained at no expense to the government in formal removal proceedings. Thus, aliens facing removal to Guatemala under the STCA in expedited proceedings will not have access to counsel (at least not under the terms of the STCA regulations), but aliens facing such removal under the terms of the STCA in formal proceedings will have access to such counsel as they choose and are able to retain.

Legal Issues

The Guatemala STCA and the implementing regulations raise a number of legal questions. Does Guatemala provide access to "full and fair" asylum procedures within the meaning of the INA? Do the procedures set out in the regulations suffice to ensure that aliens removed to Guatemala under the agreement will not suffer persecution there? Does the Administration's implementation of the agreement violate the Administrative Procedure Act (APA), either because it is arbitrary and capricious or because DHS and DOJ promulgated the implementing regulations without notice and comment? (The Honduras and El Salvador STCAs would raise similar questions if they go into effect.) A lawsuit filed in the United

States District Court for the District of Columbia raises these and other issues. Plaintiffs contend, among other things, that Guatemala does not have an asylum system capable of adjudicating a new stream of claims fairly, that asylum seekers are at risk there due to dangerous conditions, and that the implementing regulations violate the INA and the APA by denying aliens the opportunity to consult with counsel before removal to Guatemala and by requiring them to raise their fear of persecution in Guatemala affirmatively. (The government is not scheduled to file a brief in the case stating its arguments on these issues until March 25, 2020.)

The lawsuit will face a threshold issue: do federal courts have jurisdiction to review the legality of the STCA and the implementing regulations? The INA provides that "[n]o court shall have jurisdiction to review any determination of the Attorney General" under the statutory exceptions to an alien's ability to apply for asylum, which include the safe third country provision. The district court will have to decide if this provision precludes review of the Administration's decisions to sign the Guatemala agreement and issue regulations for its implementation, as opposed to merely barring review of individual decisions to remove particular aliens to Guatemala under that agreement. In lawsuits challenging the legality of the Trump Administration's termination of designations of some countries for Temporary Protected Status (TPS), a federal district judge has held that the terminations are subject to review under the APA despite a similarly worded bar on judicial review of terminations of TPS designations. The district court reasoned that the bar did not preclude review of the "general policies or practices" employed by the Executive in making its determination. If the district court in the STCA challenge follows the same reasoning, it could determine that it may review the merits of the case notwithstanding the INA limitation on jurisdiction.

The parties in the STCA lawsuit have agreed upon a summary judgment briefing schedule that concludes on April 29, 2020. The plaintiffs have indicated that they will not seek a preliminary injunction blocking implementation of any of the STCAs before the court rules on summary judgment. Thus, a ruling in the case about the legality of the STCAs and their implementing regulations is not likely before May 2020 at the earliest.

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