



# BARRIERS TO PROTECTION

## THE TREATMENT OF ASYLUM SEEKERS IN EXPEDITED REMOVAL

### REPORT HIGHLIGHTS

#### CBP's Record Identifying Asylum Seekers

Unprecedented numbers of individuals worldwide are forcibly displaced by conflict or persecution or migrating in search of improved economic opportunities. These large, mixed flows of people require that nations have credible, effective immigration laws and processes to identify and protect bona fide refugees and asylum seekers. In the United States, the Expedited Removal process is one system intended to do this.

In August 2016, the U.S. Commission on International Religious Freedom (USCIRF) issued *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*, a report assessing the U.S. government's processing of non-citizens to identify those seeking asylum and its detention of asylum seekers. This document highlights USCIRF's findings and recommendations in *Barriers to Protection* related to U.S. Customs and Border Protection's (CBP) mandate to identify asylum seekers in Expedited Removal. Failure to properly identify asylum seekers in the Expedited Removal process place, vulnerable men, women, and children at risk of being repatriated to endure persecution or torture.

Within the Department of Homeland Security (DHS), CBP first encounters non-citizens when they apply for admission to the United States at U.S. ports of entry, or after they cross the U.S. border, and identifies those subject to Expedited Removal and, from that group, those seeking asylum. During this initial processing, CBP officials are required to explain Expedited Removal and its consequences, advise non-citizens to ask for protection without delay if they have any fear or concern about being returned home, and ask four questions related to fear of return.

In *Barriers to Protection*, USCIRF found that CBP's processing is rife with problems, including non-compliance with procedures, incorrect record keeping, inadequate training and quality control, lack of privacy, and questionable interpretation practices.

#### NON-COMPLIANCE WITH PROCEDURES

CBP first encounters non-citizens at ports of entry or after they cross the border and identifies those subject to Expedited Removal and from that group, those seeking asylum. Office of Field Operations (OFO) officers process non-citizens arriving at ports of entry and Border Patrol (BP) agents process non-citizens apprehended along the border through interviews taken as sworn statements on Form I-867. Form I-867 has two parts: (1) side A includes a required script explaining the Expedited Removal process and its consequences and advising non-citizens to ask for protection without delay if they have any reason to fear being returned home; and (2) side B includes four required questions relating to fear of return.

In its observations of CBP interviews, USCIRF found several examples of non-compliance with required procedures, including: failure to read back the answers to the interviewee and allow him to correct errors before signing, as required; interviewing individuals together instead of separately and in private; failure to read the required script from the I-867A; and failure to record an answer correctly. USCIRF also learned that some forms were completed with identical answers, and others with clearly erroneous ones. Additionally, some BP agents revealed both a lack of knowledge of, and non-compliance with, DHS policy on withdrawals of fear claims.

Of particular concern is that CBP officials may be denying non-citizens in Expedited Removal the opportunity to claim fear and have that claim assessed by a trained asylum officer. DHS asylum officers, who are responsible for determining if asylum seekers' fear claims are credible, told USCIRF anecdotally that the majority of their credible fear interview referrals come from U.S. Immigration and Customs Enforcement (ICE) officers, not CBP. ICE is the DHS agency that detains non-citizens in Expedited Removal until they are removed, and unlike

CBP, it is not required to screen them systematically to identify if they fear return. USCIRF observed asylum officers proactively asking each asylum seeker during the credible fear interview if CBP asked him or her about fear of return. Under the circumstances, USCIRF considers this to be a good practice.

In another troubling finding, USCIRF saw fear claims being examined beyond the four required questions, such as OFO officers and BP agents asking detailed questions about why the individual left his or her country or asking what an individual knows about the asylum process. U.S. law requires that CBP simply document that a person in Expedited Removal expressed fear and then notify and send that person's file to DHS' U.S. Citizenship and Immigration Services (USCIS), whose asylum officers are responsible for examining and assessing the fear claim.

## **VIRTUAL PROCESSING**

Since 2013, BP's central processing facility for non-citizens apprehended in the Rio Grande Valley sector, McAllen Station, has used virtual processing for interviews of most first-time apprehensions who speak English or Spanish. Agents in McAllen do the initial collection and checks of identifying information, and then assign the cases to a BP agent at the El Paso, Texas, or El Centro, California, stations, who complete the Form I-867. The non-citizen sits at a bank of computers in McAllen, in front of a monitor and, using a phone handset, is interviewed by an El Paso or El Centro BP agent through Skype and an internet-based communicator.

While this approach has increased BP's processing efficiency, USCIRF is concerned that this efficiency is coming at the expense of identifying and protecting asylum seekers. USCIRF is particularly concerned by the use of interviewing "templates" observed during the virtual processing. El Paso agents relied on Microsoft Word documents with standardized questions and responses, from which they copied and pasted text into the E3 software that BP uses for processing. In another effort to improve efficiency, McAllen Station created the templates, which are organized by county and case type (Expedited Removal, family Expedited Removal, etc.) and cover the narrative and sworn statement sections of the interview process. USCIRF observed that when a BP agent opened the templates to begin the interview, answers were already included and would require deletion by the agent.

While using a standard list of questions on its own could be a good practice, having prepared answers seemed to prompt the interviewers to use leading questions in important areas. This risks suggesting to the interviewee that what the agent said is the correct answer, as opposed to eliciting an independent response.

The impersonal nature of the virtual interviews also is problematic. Facial expressions and other non-verbal cues are important ways for BP agents to tell if an interviewee is uncomfortable articulating a fear claim at the counter and needs a private interview.

## **PRIVACY**

At the various OFO and BP facilities USCIRF visited, interviews are conducted in settings that range from private or semi-private offices to large rooms where multiple interviews are done simultaneously.

## **INTERPRETATION**

OFO uses other officers as interpreters whenever possible, rather than telephonic interpretation.

OFO occasionally uses airline employees as interpreters at airport ports of entry. This is potentially problematic. Airline employees are not professional interpreters, and an airline can be fined if a passenger is denied admission to the United States and returned.

All BP agents are required to speak Spanish as a condition of their employment. They conduct interviews in Spanish themselves, although some lawyers and NGOs with whom USCIRF met expressed concerns about their ability to do so adequately, particularly for interviewees who speak local dialects. For languages other than Spanish, BP agents are supposed to use professional telephonic interpretation, but this does not always occur.

USCIRF heard from BP, as well as USCIS, about ongoing difficulties in finding telephonic interpreters for Central American indigenous languages. BP agents at McAllen said that indigenous language speakers usually speak some Spanish, but get to a point in the interview where their Spanish is insufficient. The agent then switches from virtual processing to an in-person interview, using another "subject" (meaning another non-citizen being processed) to interpret. The agents also reported that sometimes they reach out to the relevant consulate, which they said usually can provide interpreters relatively quickly. Both of these approaches are inappropriate ways

to secure interpretation for a person who might be an asylum seeker.

## **INTERVIEWER TRAINING AND GUIDANCE**

The interviewing problems USCIRF observed raise questions about the adequacy of CBP's training and guidance on Expedited Removal processing. In response to USCIRF inquiries on these topics, OFO and BP provided some general information about their training, but USCIRF was not allowed to review the content and therefore could not assess its substance. However, USCIRF was concerned by the fact that the OFO and BP agents it interviewed in the field said that they had not received any specific training on interviewing or on working with victims of persecution or torture.

USCIRF was permitted to see CBP's current internal guidance on Expedited Removal fear claims. The OFO guidance accurately describes the process and the steps OFO officers are required to follow to give a non-citizen in Expedited Removal the opportunity to claim fear. The BP guidance, however, erroneously conflates the roles of BP agents and USCIS asylum officers. This 2014 guidance is incorrectly titled "Credible Fear Determination." Although the documents correctly state that BP agents must ask the four required fear questions and record the responses, they conflate this questioning with the credible fear process carried out by USCIS asylum officers, and instruct BP agents on the legal standards for determining credible fear. The guidance suggests that BP agents should go beyond the four required fear questions to have a "dialogue" with the interviewee in order to assess if s/he has credible fear. This is not the role of BP agents, but rather of USCIS asylum officers. USCIS, however, is not mentioned anywhere in the documents.

## **PROCESSING OF WOMEN AND CHILDREN**

CBP encounters large numbers of largely Central American women and children, many of whom could have protection needs, but it does not have enough female agents or officers to have women interviewing women and children. This is particularly true at BP, which is only 4.5 to five percent female, although it has been trying to recruit more women. As a result, the officers and agents who interview women and children to identify those with fear claims are overwhelmingly men who receive no specific training on working with children and families.

Asked about their interactions with children, BP agents at McAllen Station admitted that many children do not want to talk to a male agent in uniform.

Another concern relates to CBP's approach to processing family units with children under the age of 14. The agency's policy is to interview children over 14 individually. If a child is under that age, the mother or parent answers the questions for the child, and this is indicated on the form. This is potentially problematic, as a child could have a fear claim independent of his or her parents, or because of them. Asked about these scenarios, BP agents responded to USCIRF that they had never seen that come up and moreover, that they were confident that, since the child had made it to the safety of the United States, s/he would voice any concerns s/he had.

## **ATTITUDES TOWARD ASYLUM**

CBP has two vital roles in Expedited Removal: first, to ensure that inadmissible non-citizens are not permitted to enter the United States and second, to ensure that non-citizens who fear persecution or torture have the opportunity to seek asylum, even if they otherwise would be inadmissible. These dual roles are not easy to balance, especially in the post-9/11 era and under the strain of large numbers of arrivals. OFO officers and BP agents must be able to alternate between examining non-citizens who arrive without proper documents and identifying and providing protection to those who need it. Given these requirements, USCIRF was concerned by the skepticism some CBP officials openly expressed of asylum claims, either generally or from certain nationalities. Moreover, these officers and agents appeared to have little recognition of the potential negative implications their skepticism might have for case processing.

To be sure, not all claims of fear are credible or warrant asylum under U.S. law, and persecution is more common in some countries than others. Nevertheless, it is not CBP's role to assess the credibility or merits of fear claims, but rather to ask if a person is afraid of return, record the answer, and, if it is yes, refer the person to USCIS. The agency must do so fairly and accurately for all individuals it encounters.

## **INFORMATION**

One overriding impression from USCIRF's interviews of detained asylum seekers is their insufficient under-

standing of what is happening to them in the Expedited Removal process or their rights and responsibilities within it. As discussed above, non-citizens in CBP custody are supposed to be read the script from Form I-867A informing them of their right to raise a fear of return during their intake interview, but this may not always happen. At the end of the interview, those who raise a fear are given a form that explains the credible fear process, but this form is not written in layperson's terms and sometimes is not provided in the non-citizen's language. USCIRF met with many detained asylum seekers who reported that, despite having been given forms, they did not understand what was going to happen to them after they left CBP custody. Some still did not understand the process even after having credible fear interviews and, in some cases, immigration court appearances.

## RECOMMENDATIONS

To address the above issues, USCIRF recommends that CBP:

- Amend Form I-867 to include a prominently displayed notation that it is not a verbatim transcript of the interview and is not intended to document the individual's entire asylum claim in detail.
- Videorecord all Expedited Removal processing interviews at all OFO ports of entry and BP stations, including virtual processing interviews, and require supervisory and headquarters review of the recordings of a sampling of interviews for quality assurance purposes. Until videorecording is established, require supervisors to sit in on and observe a sampling of interviews, and use testers to further verify that proper interviewing procedures are being followed.
- Retrain all OFO officers and BP agents on their role in the Expedited Removal process, the proper procedures for interviewing non-citizens, and the special needs and concerns of asylum seekers and other vulnerable populations.
- Remove any and all language in internal guidance that suggests that OFO officers or BP agents have the authority to reject or assess claims of fear or eligibility for asylum.
- Establish a dedicated corps of specially-trained, non-uniformed interviewers to interview women and children to identify fear claims, and ensure that female interviewers are included. Until such a corps is established, use female OFO officers and BP agents to interview women and children whenever possible, and continue to work to increase the number of women in these positions.
- Track the results of interviews conducted by virtual processing against those conducted in person, to determine if the two methods are producing materially different outcomes.
- Ensure that all interviewees have access to completely private interviews and that parents are not interviewed with their children present.
- Use only professional interpreters, not officers, agents, or any other individual, during the I-867 interviews, and do not use airline employees as interpreters at any point in the inspection process.
- Develop a document that briefly and clearly explains the Expedited Removal process, its consequences, the right to seek protection for those who fear return, and the right to request a private interview, and provide this document to all individuals, in a language they understand, as soon as possible when they come into CBP custody.