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Summary of February 13, 2017 Asylum Division Lesson Plan Implementing Executive Orders

Possible Impacts on Survivors of Domestic and Sexual Violence

The Tahirih Justice Center is the largest multi-city direct services and policy advocacy organization focused on assisting immigrant women and girls. Over the last 20 years, Tahirih has provided free legal representation to over 20,000 immigrant women and children fleeing human trafficking, domestic abuse, rape, and other gender-based violence.

This report analyzes the Updated Asylum Division Officer Training Course Lesson Plans: *Credible Fear of Persecution and Torture Determinations*, and *Reasonable Fear of Persecution and Torture Determinations*, issued through a memorandum signed on February 13, 2017, by John Lafferty, Chief of the Asylum Division at the U.S. Department of Homeland Security.¹ The new lesson plans implement the executive order focused on border control signed by President Trump on January 25, and a memorandum signed by DHS Secretary John Kelly on February 20.² The new lesson plans went into effect on February 27.

I. Lesson Plans are Critical in the U.S. Asylum Protection Scheme

DHS lesson plans are used to train all asylum officers conducting credible fear interviews (CFIs) and reasonable fear interviews (RFIs) and establish the interviews' scope, tone, and content.³ The impact of the lesson plans on all asylum seekers, including those who have suffered gender-based violence, is immense, as CFIs and RFIs are critical gateways into the asylum protection system.

Derived from the 1951 United Nations Convention and Protocol Relating to the Status of Refugees (the "Refugee Convention") – to which the United States is a party – U.S. asylum laws are intended to provide safe harbor to individuals in the United States or at our borders who have experienced or fear persecution in their countries of nationality.⁴ The treaty adopts a binding principle of international law called *non-refoulement*, which prohibits any country from sending a refugee back to face persecution. Victims of gender-based harm such as human trafficking, domestic violence, female genital mutilation, and forced marriage may qualify for asylum protection.⁵

If a person is already in the interior of the United States and applies for asylum, a specially trained asylum officer conducts a full adjudicative interview and can either grant asylum or refer the case to an immigration judge. In other words, even when they conduct full adjudications, asylum officers are only

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given the authority to grant protection, not to deport anyone. If they do not grant protection, asylum officers must refer the case to an immigration judge who then conducts a new proceeding to determine whether to grant asylum or order the applicant deported. If ordered deported, the applicant still may appeal to the Board of Immigration Appeals, then a federal circuit court, and finally, the U.S. Supreme Court. Because deportation from the United States and to persecution is at stake, asylum officers do not hold the authority to deport someone.

The process is very different for an individual who is apprehended at an airport, seaport, or land border. In these circumstances, generally speaking, an apprehended individual is placed into a process called “expedited removal” and could be deported within hours without any opportunity to find a lawyer or see a judge to request protection.⁶ To gain access to the asylum process, a person in expedited removal who fears harm in her country of nationality must declare her fear to a uniformed DHS enforcement officer. The enforcement officer is then required by law to refer the individual for a CFI or RFI screening with an asylum officer as a step in the process toward seeing an immigration judge. Of course, this process is exceptionally challenging given exhaustion, language barriers, and other factors present for all refugees seeking protection, but the difficulty is exacerbated for survivors of violence and trauma who may be encountering uniformed, armed U.S. officials for the first time.

In the expedited removal process, the stakes are very high: if a person who fears harm does not get through the screening interviews, she could be turned away and deported to face persecution, torture, or death.⁷ This process has been widely criticized since its inception because it can result in the wrongful, avoidable deportation of people who may be eligible for protection under the law, including trauma survivors, before they have had a chance to speak with a lawyer who can explain the immigration process and their rights.⁸ In enacting the expedited removal provisions, Congress determined that immigration judges would be the only adjudicators with the power to deny asylum applications in all scenarios, and that their decisions would be reviewable by the Board of Immigration Appeals, federal circuit courts, and the Supreme Court. Yet, if the bar is set prohibitively high for initial asylum officer screening interviews, then applicants who may legitimately merit asylum may never see a judge before they are deported.⁹

As explained above, the CFI and RFI lesson plans, which guide the implementation of the expedited removal process, have a significant impact on how the United States lives up to its international treaty obligations to protect survivors of violence and other persecution. Any changes to the lesson plans must not, therefore, compromise the U.S.’s ability to meet its obligations under the Refugee Convention – rather, the lesson plans must strive to ensure that we are upholding these obligations to the fullest extent given that lives are at stake. In addition, with the recent executive order and DHS memo contemplating the expansion of expedited removal to cover not only land borders and airports but the entirety of the United States, the application of changes to the CFI and RFI lesson plans could have an even further-reaching impact than before.

II. Problematic Changes in the Updated Lesson Plans

In particular, the lesson plan changes included in the February 13 memo will have a significant, detrimental impact on those fleeing domestic violence, sexual assault, and human trafficking in the following ways:

1) Effectively turns CFI and RFI threshold screening interviews into full-blown asylum adjudications, with no procedural protections for applicants.

There are several changes in the updated lesson plans that bring these initial screening interviews closer to becoming final adjudications.

- **The New Lesson Plan Directs Officers to Find in Favor of Removal, Not in Favor of Judge Adjudication.** The new lesson plan makes a shift away from giving the benefit of the doubt to applicants. Previously, in Section 5(C)(3) of the 2014 lesson plan, asylum officers were instructed: “When there is reasonable doubt regarding the outcome of a credible fear determination, the applicant likely merits a positive credible fear determination. The questions at issue can be addressed in a full hearing before an immigration judge.”¹⁰ Given the fact that asylum officers are not allowed to deport applicants for asylum in any other circumstance, and to avoid violating the *non-refoulement* principles of international law, it is critical that asylum officers refer cases to judges wherever they have a “reasonable doubt” as to whether someone might have a credible fear of persecution.

However, the new lesson plan completely deletes this paragraph. This paragraph was a critical reminder to officers that they were not the final adjudicators of the application and that they should pass on cases to an immigration judge whenever there was room for doubt. Given the preliminary, screening nature of CFIs and RFIs, the prior approach was more appropriate. With the change, however, asylum officers are instead empowered to make negative final determinations, even where there is a reasonable doubt.

- **Removal of “Significant Possibility” Standard for Determining Credible Fear.** Although the prior lesson plan indicated that asylum officers need only determine that there was a “significant possibility” that an applicant would eventually succeed in obtaining asylum from a judge, the updated version removes this language throughout the document. For example, the 2014 lesson plan states: “As long as there is a significant possibility that the applicant could establish in a full hearing that the claim is credible, unresolved questions regarding an applicant’s credibility should not be the basis of a negative credible fear determination.” Numerous similar paragraphs are removed throughout; the “significant possibility” standard was critical in prior instructions and will no longer be applicable to any credible fear determinations. Instead, the revised lesson plan offers guidance to officers as they ask questions “to determine whether the alien has a credible fear of persecution or torture,” something usually reserved for those making a final adjudicative decision when they should have – ideally – the benefit of an informed, supported applicant with legal representation and evidence to support her claim. Now, the asylum officer is no longer making a threshold determination, but a final one, while the individual has no opportunity to compile evidence and develop her case.
- **Removes Language Explaining the Threshold Nature of the Process.** The new plans delete paragraphs that informed officers as to the very limited role of CFIs and RFIs, such as the following: “Because the credible fear determination is a screening process, the asylum officer does not make the final determination as to whether the applicant is credible. The immigration judge makes that determination in the full hearing on the

merits of the claim.” And: “The nature of expedited removal and the credible fear interview process—including detention, relatively brief and often telephonic interviews, etc.— further limits the reliability of and ability to evaluate.” In addition to the changes mentioned above, this shift will lead officers trained with the new lesson plans to believe that their credibility determination should be the full and final review of their eligibility for asylum, and that they are empowered to turn away potentially eligible applicants instead of giving the benefit of the doubt and leaving the deportation decisions to immigration judges.¹¹

- **Requires Increased Level of Detail to be Provided During CFIs/RFIs.** Although the 2014 version of the CFI and RFI lesson plans included guidance as to how officers might review credibility, the new version adds language that places heavy emphasis on provision of details at this early screening stage of the process. Section 6(C)(4) allows officers to make a negative finding based on even trivial inconsistencies during the screening interview. Such discrepancies may easily be the result of language barriers or inability to recount the details of trauma on the spot. Any emphasis on detail and precision is impractical, unnecessary, and highly detrimental to survivors of trauma at this early screening stage.
- **Requires Increased Weight to be Given to Unreliable, Inaccurate Border Interviews.** The new lesson plan instructs asylum officers to give inappropriate weight to the brief interviews conducted by enforcement personnel during the expedited removal process. Advocates and attorneys have long noted that transcripts from these interviews are unreliable because applicants are just arriving after long, arduous journeys and are exhausted, sick, or recently traumatized; the interviews are often conducted in a language in which the applicant is not fluent; male officers interview female applicants about sexual trauma which can reduce the likelihood of disclosure; and the interviews are grossly inaccurately transcribed. As a result, increasing the weight of these transcripts in the credibility determination will lead to negative credible fear determinations for individuals who should be given a chance to see an immigration judge.

Survivors of gender-based violence will be heavily impacted by these changes to the CFI and RFI lesson plans. Victims of trauma such as human trafficking and domestic violence may not be able to discuss their history of trauma at all during an initial screening interview, let alone well enough to succeed under these new guidelines. As explained above, this could be because of language access issues, the impact of trauma on memory, depression and anxiety, lack of trust, shame or fear in describing and discussing violence of a personal or intimate nature, and other reasons historically acknowledged in our asylum laws and policies. As detention is mandatory during the expedited removal process, survivors of violence are confined between the time of arrival and their CFIs or RFIs, a situation that is itself re-traumatizing. Without regular access to a mental health counselor who specializes in domestic violence and sexual trauma, most survivors of violence would struggle to tell their stories effectively in a formal interview setting even after a few months, let alone just days after arrival in a new country and after a journey which is itself often traumatizing.

It is therefore very likely that, as a result of the new lesson plans, many survivors of trauma will fail during their CFIs and RFIs even if they actually qualify for protection under the law. For

survivors to succeed, officers must exercise the benefit of the doubt in their favor and at the very least give them a chance to have a full asylum determination hearing before a judge. Anything less undermines our obligations to provide protection under the Refugee Convention as referenced above.

2) Eliminates the Role of Interviews in Eligibility for Release on Parole.

The lesson plan updates further implement the executive order and DHS memorandum, which called for the indefinite detention of all border-crossing asylum seekers through the termination of their cases. The lesson plans indicate that screening interviews showing a fear of return will no longer be considered a gateway to parole out of DHS custody. In the prior version of the lesson plans, the role of the CFI as an indicator for a release from detention was clearly laid out. Section 2(C)(6) indicates: “After a positive credible fear determination, Immigration and Customs Enforcement (ICE) may exercise discretion to parole the alien out of detention, and has issued pertinent guidance on consideration of parole for arriving aliens found to have a credible fear. Therefore, the credible fear interview process also provides a mechanism for DHS to gather information that may be used by ICE to make parole determinations.” This paragraph and several others that reference the function of the CFI in assisting officers in determining whether to parole applicants has been completely deleted.

All immigrants suffer in the confines of detention centers, but survivors of violence may be further harmed as detention has been shown to be re-traumatizing to those who have experienced abuse.¹² The mental and physical health of women and children who are held in detention centers declines over time. Forcing survivors and their families to stay in detention with no option for parole will make it highly likely that many deserving applicants will either give up their claims because the conditions of detention are intolerable or will fail to obtain protection from the court due to lack of mental health counseling or legal representation, both of which are critical for survivors of trauma to succeed in an asylum case.

Overall, the 2017 lesson plans make a significant shift in the authority of asylum officers to make full adjudications, which could put survivors of gender-based violence such as human trafficking and domestic violence in danger of being returned to persecution without a full and fair opportunity to be heard by an immigration judge.

The Tahirih Justice Center will continue to monitor executive orders and their impact on survivors of gender-based violence such as trafficking, domestic abuse, and sexual violence.

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¹ Available at: https://drive.google.com/file/d/0B_6gbFPjVDoxY0FCczROOFZ4SVk/edit.

² “Border Security and Immigration Enforcement Improvements,” January 25, 2017, available at www.whitehouse.gov and “Implementing the President's Border Security and Immigration Enforcement Improvements Policies,” February 20, 2017, available at www.dhs.gov.

³ Credible fear interviews are offered to individuals who express a fear of return to an apprehending officer during a first encounter with the expedited removal process, while reasonable fear interviews are offered to individuals who have been removed or have certain criminal convictions.

⁴ The United States ratified the 1967 protocol to the 1951 International Refugee Convention. For more information about the rights and obligations conferred by the Refugee Convention upon refugees and states parties, see <http://www.unhcr.org/en-us/1951-refugee-convention.html>.

⁵ The law of asylum is contained in the Immigration and Nationality Act and has been developed through regulations, executive actions, executive agency rules and policies, and case law from the Board of Immigration Appeals, federal circuit courts, and the Supreme Court of the United States. For background, see American Immigration Lawyers Association, *Asylum Primer 7th Edition*, 2015. <http://www.unhcr.org/3b66c2aa10>.

⁶ See 8 U.S.C. s. 235(b)(1)(A)(ii).

⁷ While there are no available statistics about the number of people who have come to the United States and had CFIs or RFIs based on human trafficking, domestic violence, or sexual assault, reports have shown that for the last several years there has been an increase in the number of women and children coming across the southern border who are apprehended and offered credible and reasonable fear interviews.

⁸ Human Rights First, “Frequently Asked Questions: Asylum Seekers and the Expedited Removal Process,” November 2015, available at <http://www.humanrightsfirst.org/sites/default/files/FAQ-asylum-seekers-and-the-expedited-removal-process.pdf>.

⁹ Applicants for asylum whose CFI or RFI results in a negative finding can request immigration judge review. However, most applicants are not represented at the CFI/RFI stage of the process and may not be aware of or prepared for this request and the ensuing procedure.

¹⁰ DHS 2014 Credible Fear Lesson Plan, available at: <http://www.aila.org/infonet/uscis-asylum-revised-credible-fear-lesson-plan>.

¹¹ The new lesson plans at least retain this language in Section III, Function of a Credible Fear Interview: “Essentially, the asylum officer is applying a threshold screening standard to decide whether an asylum [or torture] claim holds enough promise that it should be heard through the regular, full process or whether, instead, the person's removal should be effected through the expedited process.” Bo Cooper, *Procedures for Expedited Removal and Asylum Screening under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1503 (1997).

¹² Tahirih Justice Center, “Righting the Wrong: Why Detention for Asylum Seeking Mothers and Children Must End Now,” 2015, available at <http://www.tahirih.org/news/new-report-righting-the-wrong/>.