

East Bay Sanctuary Covenant v. Barr

On appeal to 9th Circuit from ND CA No. 3:19-cv-04072 (Tigar, J.)

BRIEF FOR PROFESSORS OF IMMIGRATION LAW AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE (Oct. 14, 2019)

Shoba Sivaprasad Wadhia, Peter S. Margulies, Alan E. Schoenfeld, Tara E. Levens

- New rule is inappropriately general, given the asylum law’s already specific guidance on asylum seekers’ passage through third countries.
 - Statutory construction: *specific governs the general*. (*RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (Scalia, J.))
 - “Under the specificity canon, the requirement that a rule be ‘consistent with this section’ entails reckoning with the asylum provision’s specific limits. Instead of reconciling this authority with the asylum provision’s specific guidance on asylum seekers’ passage through third countries, the new rule disregards that guidance.” (2)
- Already in INA: 2 specific bars to asylum:
 - Firm resettlement: 8 U.S.C. § 1158(b)(2)(A)(vi)
 - Requires third country’s offer of safe, permanent legal status to refugee
 - More than passing through or even just physical presence in a country
 - “...required a showing that the refugee had accrued a robust stake in a country by incurring ‘rights and obligations’ equivalent to those enjoyed by the country’s own nationals.” (3-4)
 - *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 n.5 (1971)
 - Safe third country agreements: 8 U.S.C. § 1158(a)(2)(A)
 - Countries must have full and fair asylum procedures
 - Formal agreement between the foreign state & U.S. gov’t
 - Only one country meets this standard so far: Canada

Argument

- I. The INA prioritizes protection of asylum seekers
 - a. Credible fear screening (10% chance of persecution on protected ground)
 - i. “A more demanding initial test would filter out too many colorable claims for asylum and increase the risk that the United States would return claimants to a country in which they could be” persecuted. (5-6)
 - ii. Not = certainty or even preponderance of evidence:
 - iii. “Instead, Congress opted for a standard that prioritized safety for asylum seekers during preliminary screening.” (6)
- II. The Third Country Asylum Rule is inconsistent with the statutory scheme of the INA
 - a. Congress already got down to the details, balancing the interests of many parties.
 - b. You upset that balance by making up sweeping general rules.
 - c. A.G. does have authority to promulgate new rules, but they must be consistent with what is already there. 8 U.S.C. § 1158(b)(2)(C).
- III. 70-year history of Firm Resettlement
 - a. Developed after WWII by new UN: International Refugee Organization
 - i. Firm resettlement = “connoted durable rights, possessions, and ties that were utterly foreign to refugees’ tenuous existence. . . a permanence of status and

- protection that would require concerted and diligent efforts” by resettlement organization.
- ii. U.S. Displaced Persons Act (1948)
 - iii. “Under international law, firm resettlement’s functional ‘rights and obligations’ prong contemplated permanence and stability. Any more ephemeral or contingent test would have undermined the meaning of the firm resettlement criterion and eroded refugee protections.” (11)
- b. *Rosenberg v. Yee Chien Woo*, 402 U.S. 49, 56 n.5 (1971)
- i. Firm resettlement doesn’t have to mean citizenship.
 - ii. Country must have given them enduring rights, though.
 - iii. Court distinguished between someone who has *fled* from a country of persecution and a person who is *in the process of fleeing*.
 - iv. “To stress the narrow scope of the firm resettlement bar, the Court recognized the peripatetic nature of refugees’ reality.” (13)
 1. Sometimes that flight happens in stages.
- c. Firm resettlement as a factor in judicial discretion (70s-early 90s)
- i. Not a categorical bar
 - ii. Consider totality of circumstances
- d. 1996: statutory provision governing firm resettlement
- i. 8 U.S.C. § 1158(b)(2)(A)(vi): ineligible if firmly resettled in a third country prior to arriving in U.S.
- e. 2000: defining “firm resettlement”
- i. “An alien is considered to be firmly resettled if, prior to arrival in the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement.” 8 C.F.R. § 208.15.
 - ii. At a minimum: *offer* of permanent residency
 1. Exceptions to offer:
 - a. No significant ties, just passing through
 - b. Conditions in that country substantially restricted by that gov’t so not really “resettled”
 2. “Even in situations where the noncitizen has received an offer of permanent residence, then, the first exception underscores an intent to protect those who passed through a third country during the course of their flight and entry into the United States.” (17)
- f. “By issuing the third country asylum rule, the government has in one fell swoop decimated these finely crafted exceptions, as well as the firm resettlement doctrine’s focus on safety and permanence. Indeed, the new rule devastates the overall system of asylum adjudication established by Congress, precluding asylum for anyone who has entered or sought to enter the country at the southern border. It strains credulity to believe that Congress would have regarded such a sea change in asylum adjudication as ‘consistent with this section.’” (18)

- IV. Third Country Asylum Rule does not meet rigorous criteria for safe 3rd country agreements
- a. “The United States has been exceptionally sparing in entering into such agreements, concluding a pact with only one country: Canada.” (18)
 - b. Safeguards, methodical monitoring to protect refugees
 - c. Adjudication of exceptions, procedural protections
 - d. “Unlike the safe third country agreements authorized under § 1158, the new third country asylum rule does not entail an agreement between states or U.S. findings that a third country will be safe for refugees and will employ ‘full and fair’ procedures in adjudicating asylum or other protection.” (21)
 - i. No bilateral agreement
 - ii. No assessment whether the country can actually protect asylum seekers
 - iii. Concerns about MX by UNHCR: absence of screening protocols, dangerous routes controlled by gangs, sexual and gender-based violence for women—not consistent with INA’s purpose.