SPLC
Southern Poverty
Law Center

May 31, 2022

Rená Cutlip-Mason
Chief, Division of Humanitarian Affairs
Office of Policy and Strategy
U.S. Citizenship and Immigration Services
Department of Homeland Security

Lauren Alder Reid
Assistant Director
Office of Policy
Executive Office for Immigration Review
Department of Justice

Re: Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers, Interim Final Rule, DHS Docket No. USCIS-2021-0012.

Dear Ms. Cutlip-Mason and Ms. Alder Reid:

We appreciate the opportunity to comment on the Department of Homeland Security's (DHS) and Department of Justice's (DOJ) (collectively, the Departments) interim final rule (IFR) regarding Procedures for Credible Fear Screening and Consideration of Asylum, Withholding of Removal, and CAT Protection Claims by Asylum Officers. 87 Fed. Reg. 18,078 (Mar. 29, 2022) (to be codified in 8 C.F.R. pts. 208, 212, 235, 1003, 1208, 1235, 1240).

Each of our organizations represents people in expedited removal proceedings. This experience informed our comments on this Rule when it was proposed (the NPRM), as well as our comments below.[1] Our earlier comments discussed the fundamental unfairness of credible fear interviews (CFI) and subsequent immigration judge (IJ) reviews of negative credible fear (CF) determinations. We argued that, as part of this rulemaking, the Departments should reform credible fear screenings, and we continue to believe the Departments should do so. We also encouraged the Departments not to eliminate the opportunity to request reconsideration (RFR) of

---

[1] The prior comments were submitted by a coalition that includes several of the organizational signatories to this comment. They are in the Departments' record for IFR, and are also available at https://democracyforward.org/wp-content/uploads/2021/10/RAICES-Comment-10.20.21.pdf (Comments on NPRM).

negative CF determinations from the U.S. Citizenship and Immigration Service (USCIS), as the NPRM had proposed, because this process provides an essential, although by itself inadequate, safeguard against removing asylum seekers with potentially valid claims.

We applaud the Departments' decision to modify the IFR to continue to permit RFRs. We are troubled, however, by the Rule's addition of strict procedural limitations on this process. We encourage the Departments to reconsider those limitations, and instead establish and make public clear guidelines for RFRs. These guidelines should include a longer time frame for filing and set forth the bases on which USCIS will exercise its discretion to reverse a negative CF finding. We also continue to believe that reforming the CF screening process generally—returning to in person CFIs, for example—is essential. These reforms, which would reduce the number of errors at the front end, would make RFRs less necessary.

I. Our organizations.

Florence Immigrant & Refugee Rights Project (FIRRP) provides free legal and social services to adults and unaccompanied children in immigration detention in Arizona. We work in four detention centers in Arizona— Eloy Detention Center, La Palma Correctional Center, Florence Correctional Center, and Florence Detention Center. In addition, in 2017 we partnered with the Kino Border Initiative, a binational organization in the U.S.-Mexico border region. As part of that partnership, we provide services to hundreds of asylum seekers every year who arrive at Kino's humanitarian aid center in Nogales, Mexico.

Refugee and Immigrant Center for Education and Legal Services (RAICES) provides affirmative, defensive, and litigation services to low-income immigrants, including for asylum seekers in expedited removal proceedings. Our staff works in detention centers in Texas, including the South Texas ICE Processing Center (known as Pearsall), the Karnes County Family Residential Center, and detention centers in and around Dallas, Houston, and Laredo.

The **Southern Poverty Law Center (SPLC)** is a nonprofit organization that works to make the nation's constitutional ideals a reality for everyone. The SPLC's Immigrant Justice Project has represented thousands of noncitizens throughout the South in civil rights matters and is currently engaged in impact litigation to promote and protect the rights of asylum seekers at our southern border. The SPLC's Southeast Immigrant Freedom Initiative provides pro bono legal representation to detained immigrants, including many asylum seekers, at five immigrant detention centers in Georgia and Louisiana.

Collectively, we have provided legal services to tens of thousands of asylum seekers[2] who have undergone expedited removal proceedings, across the Southwest border of the United States.

---

[2] We use the term "asylum seeker" to refer to individuals seeking humanitarian protection in the form of asylum, withholding of removal (including under the Convention Against Torture (CAT)), and/or deferral of removal under CAT.

II. The decision to retain the RFR process was necessary, but the procedural limitations imposed are too restrictive.

A. RFRs provide an essential safeguard against removal of asylum seekers with a credible fear of persecution given significant problems in the credible fear screening process.

As we discussed in our earlier comments, RFRs have saved many of our clients with potentially valid asylum claims from being forced to return to dangerous conditions.[3] RFRs are an essential safeguard in part because they are often the only opportunity for asylum seekers in expedited removal to provide a complete, organized explanation of the basis for their asylum claim.

The Departments' own statistics support this conclusion. For the offices that tracked RFRs, the rates of reversal of CF determinations from negative to positive were significant. Specifically, they were 11 percent (FY 2019), 7 percent (FY 2020), and 15 percent (FY 2021). 87 Fed. Reg. at 18,132.[4] Over these three years, at least 569 people—more than ten percent of applicants—were saved from erroneous removal by the RFR process. *Id*. This number is almost certainly too low, given that several offices do not track RFRs, even on an informal basis. *Id*. In addition, as explained in our prior comments, for detained asylum seekers, only those with representation can effectively access the RFR process.[5] The thousands of people with negative CF determinations who did not file RFRs were not necessarily ineligible, but rather were functionally excluded from this process.

In our earlier comments we provided numerous examples of asylum seekers with credible fears of prosecution whose erroneous removal was only prevented by a successful RFR.[6] We provide below additional examples of our clients' experiences to emphasize the importance of this protection.

Nicaragua. A man from Nicaragua had a political asylum claim based on his participation in anti-government political marches. The local police held and tortured him for two days. He was beaten and stabbed by the police, including a hit to the side of his head which caused a lasting brain injury with persistent symptoms.

---

[3] Comments on NPRM at 20-22.

[4] If asylum seekers regularly submit multiple RFRs, the Departments' statistics appear to provide a reversal rate (negative CF determination changed to positive) that is too low. The Departments are comparing the total number of RFRs received, not the total number of individuals who submitted RFRs (which would be a smaller number if individuals regularly submit multiple RFRs), with the total number of individual migrants whose CF determinations were reversed.

[5] Comments on NPRM at 20-21.

[6] Comments on NPRM at 13-14.

The man was unrepresented during his CFI. The CFI did not elicit information about the man's brain injury or symptoms. Nor did it elicit information about his participation in political protests or the full scope of his physical abuse by the police. The copy of the CFI notes provided was incomplete, so counsel could not review the basis for the denial. The man was also unrepresented at the IJ review, and we do not know the basis of the IJ affirmation.

The first RFR on this man's behalf, submitted by RAICES, identified his severe brain injury, which qualified him for accommodations and a Notice to Appear (NTA), and further substantiated his political persecution claim. This RFR was summarily denied. A second RFR on his behalf provided additional evidence regarding his brain injury, including a medical evaluation describing his limitation in verbal comprehension, memory loss, and delayed mental processing speed, and a declaration from the client. In response to this RFR, USCIS scheduled a new interview for further information gathering (FIG) during which RAICES provided representation. Thereafter, USCIS reversed the prior denial and issued an NTA.

Burkina Faso. A man from Burkina Faso had a religious persecution asylum claim based on his conversion from Islam to Christianity. His family members had attacked him and threatened to kill him; and there was no meaningful police presence to protect him. His experience was consistent with a pattern and practice of violence against individuals who leave the Islamic religion in Burkina Faso.

The man was unrepresented in his CFI, which lasted 90 minutes. The interview used a French interpreter, even though the asylum seeker explained it was not his best language (which was Mossi). At several points during the CFI, the man stated he did not understand the asylum officer's questions. He explained that he was banished by his family, threatened, and attacked. He also explained the motive for these threats and attacks (his conversion from Islam to Christianity). The asylum officer did not elicit why the man had not sought police protection, but only that he believed the police could not help him. USCIS denied the CFI on the ground that the harm faced did not reach the requisite level of past persecution and did not establish a significant possibility of future persecution. This individual was unrepresented before the IJ, and we do not know the basis of the subsequent IJ affirmation.

RAICES submitted two RFRs on his behalf. The first addressed his religious persecution claim and language access concerns and was summarily denied. The second provided additional, newly gathered information, namely that the individual's family was still looking for him and again emphasized the language access issues. USCIS scheduled a FIG. After coordinating this session with counsel, who pushed for the presence of a Mossi interpreter, USCIS changed course and issued an NTA, as RAICES requested.

Cote D'Ivoire. A man from Cote D'Ivoire had a well-founded fear of returning to that country based on his political opinions. He had suffered past persecution for his support of former President Gbagbo and participation in the associated political party. A group of men associated with President Outarra's party attacked him for his political opinions, repeatedly slicing him with a machete. The men repeatedly targeted him thereafter. Country conditions research shows that this threat is consistent with violent trends in Cote D'Ivoire.

USCIS conducted the CFI with a French interpreter, rather than a Jula interpreter, the man's best language. While the asylum officer identified a nexus between the harm the man suffered and his political opinion, the decision mischaracterized the violence as a beating with sticks, not slicing with a machete, as the man described. Despite the man's description of being persistently targeted, the asylum officer found no credible fear on the ground that there was no past persecution or threat of future persecution. The man was unrepresented before an IJ, so we do not know the basis for the affirmation of the negative CF finding.

The first RFR submitted by RAICES explained that the man met the low credible fear standard. It was summarily denied. The second RFR more explicitly detailed the errors in the CFI, including USCIS's failure to conduct the CFI in the client's best language, ignoring and mischaracterizing facts set forth by the client, and applying a higher evidentiary standard than required by law. The second RFR also provided additional background on conditions in Cote D'Ivoire. Based on the second RFR, USCIS issued the man an NTA.

Nicaragua. A man from Nicaragua was persecuted based on his political opinion, including prior participation in anti-government protests. Paramilitary groups affiliated with the government threatened him with death and rape. Even after he had relocated four hours away, they found him and threatened him and his family with AK-47s.

During the CFI, the asylum officer failed to elicit the fact that the man had a traumatic brain injury that, as a doctor later concluded, likely limited his ability to recall details of his experience in Nicaragua and his reasons for seeking asylum. The asylum officer issued a negative CF determination on legally incorrect grounds, concluding that the paramilitaries' threats against the individual likely did not constitute a threat of future harm. The IJ affirmed the negative CF determination on the ground that the individual had allegedly stated at one point that he did not fear return to Nicaragua. The IJ did so even though this statement, allegedly made to U.S. Customs and Border Protection during an initial brief screening at the border, was not signed. Such statements typically are signed. While the asylum seeker testified to both the asylum officer and the IJ that he never made the statement, the IJ rejected that testimony based on the unsigned statement.

The first RFR was denied quickly, but RAICES submitted a supplemental RFR two months later, which included an evaluation by a mental health provider identifying and explaining the traumatic brain injury. After this RFR, USCIS granted FIG, which in turn resulted in an NTA.

Angola. A man from Angola, who had crossed the border with his child, had been persecuted for his political beliefs in his home country. He was an active member of the Movement for Democracy and Freedom of Expression, and an opposing political party threatened and assaulted him several times.

His CFI did not use an interpreter in his best language. Even so, he explained that his wife had been raped by members of the opposing political party and told that they would have

killed her husband (the applicant) he been at home that night. He further told the interviewer that three other members of his political party were killed that same night, and more were hunted down and murdered afterwards. He explained that he made six reports to the police against his persecutors, but the police proved useless. Inexplicably, and incorrectly, the asylum officer issued a negative CF determination, concluding "the death threats the applicant received could amount to persecution, however the presumption of well-founded fear has been rebutted." Upon review, the IJ affirmed the determination, finding that the family's testimony was not credible because they provided additional details in the IJ hearing that were not reflected in the asylum officer's notes.

RAICES submitted an RFR the same day as the IJ decision, which was denied the next day. RAICES submitted a second RFR three days later, expanding further on why the family met the low bar for credible fear and why they should have been interviewed in their best language. USCIS granted this RFR, issuing NTAs for the family.

Mauritania. A man from Mauritania came to the United States to seek asylum after he was persecuted on account of his race and political opinion. He was physically harmed after he participated in a peaceful protest advocating for better rights and country conditions. He was also unable to register in government programs, attend school, or otherwise meaningfully participate in society on account of his race.

The man was unrepresented at his CFI, and the Houston Asylum Office determined that he did not establish a credible fear. He also proceeded *pro se* before the IJ, and the IJ affirmed the asylum officer's decision.

The man was later transferred to Stewart Detention Center in Lumpkin, Georgia, and SPLC was able to take on his case. SPLC filed an RFR, and the Houston Asylum Office scheduled a FIG. The FIG interview was substantially longer than the CFI. This time, the man was accompanied by an SPLC attorney who attended the FIG interview telephonically and submitted additional evidence, including country condition reports. A few days after the FIG interview, the Asylum Office issued the man an NTA.

B. The new procedural limitations on RFRs are too restrictive.

We appreciate the Departments' acknowledgement that RFRs are a necessary "last resort" to prevent refoulement. 87 Fed. Reg. at 18,133. That conclusion was certainly accurate for the six cases discussed in detail above and for many other individuals we have collectively represented. While we understand the Departments' interest in balancing these grave consequences against the goal of a "more efficient and streamlined process," *id*., the new procedures adopted by the Rule strike the wrong balance. As many of our examples above reveal, a second RFR and/or an RFR filed more than seven days after the IJ's decision is necessary to prevent an erroneous removal.

First, the IFR's time limit on RFRs, which requires receipt by USCIS no more than seven days after the IJ's affirmance of a negative CF determination or prior to removal, whichever

comes first, is too short. The Departments do not justify the selection of a seven-day deadline beyond emphasizing the goal of a streamlined process. Nor do they assess the logistical feasibility of meeting this deadline, particularly for detained asylum seekers without counsel. In fact, many obstacles to meeting that timeline exist. Among these, our staff are often connected with clients seven or more days after an IJ affirmation of a negative CF determination, making the submission of a timely RFR impossible under the Rule. In some cases, individuals are only transferred to detention centers that we serve after their CFI or IJ review. Even if these applicants obtain representation before the seven-day deadline, a myriad of access to counsel issues cause further delays.[7] Difficulty communicating with detained individuals and delays in receiving documents from them impair quick and effective representation. For example, certain detention centers (including recently in Arizona) arbitrarily block or significantly delay access to copy and fax machines for people being held. Without the copy machine, our clients cannot send their CFI records to us or other counsel without losing their only copy. Without access to fax machines or scanners, counsel cannot receive documents in a timely fashion. These documents are necessary for counsel to identify key procedural errors for an RFR. These access to counsel issues are even more damaging when detained asylum seekers are relocated to other detention centers without warning, which is a frequent occurrence—it often takes days for counsel to locate them. Without knowing the individual's new location, it is impossible to send an RFR to the correct regional asylum office in time. Further, it is time consuming to put together certain information necessary to substantiate an RFR (such as the medical reports discussed above or declarations, especially when interpreters are required for rare language speakers), when that information was not originally elicited in the CFI. In our earlier comments we discussed many of these, and other, difficulties that asylum seekers in detention face in quickly and effectively advocating for themselves. The Departments should account for them and rescind the seven-day deadline when finalizing the IFR.

Similarly, the decision to limit RFRs to only one is unnecessarily restrictive, especially when coupled with the seven-day time limit. As we discussed in our original comments and revealed by the examples above, advocates often find it necessary to submit one RFR immediately to forestall removal of an applicant, while simultaneously preparing a second, more detailed, RFR to substantiate the errors in the original CF screen. So long as individuals with a negative CF determination may be removed at any point, they will face an impossible choice—submit an RFR as soon as possible to prevent an immediate return to danger or put together a submission that substantiates procedural errors fully, while risking taking too much time to do so.

Further, as discussed in our original comments, and not remedied by the IFR, the process for submitting RFRs is not transparent or consistent. This results in the effective exclusion of

[7] We discussed access to counsel issues throughout our earlier comments. *See also* Rebuttal Memorandum from National Immigrant Justice Center, American Immigration Council, ACLU of Southern California, and Southern Poverty Law Center to U.S. House and Senate Appropriations Subcommittees on Homeland Security (Mar. 22, 2022), https://immigrantjustice.org/sites/default/files/content-type/commentary-item/documents/2022-03/NGO-Rebuttal-to-ICE-Legal-Access-Report-March-22-2022.pdf.

unrepresented detained individuals: RFRs must be submitted to the relevant asylum office via email, and individuals in detention are rarely given access to email nor are the email addresses for submitting RFRs publicly available. Nor would detained asylum seekers be able to submit a request by mail in a timely way, even if a recipient address were made public, given the logistical constraints of being detained. The Departments do not grapple with any of these logistical realities, meaning that the RFR process will remain available only to those asylum seekers lucky enough to have found counsel on a short timeline who are sufficiently experienced to be aware of this non-public process. The Departments should amend the IFR to address these issues.

The Departments also failed to consider more limited alternatives to a single RFR limit, such as our suggestion that USCIS make clear that it would not consider duplicative RFRs submitted without new information.[8] The Departments could also allow asylum seekers to submit notices of intent to file an RFR, after which the person would not be removed for a set period, and then accept a complete RFR within that period. Neither of these alternatives would require meaningful additional time or effort by USCIS staff but would provide important protections for asylum seekers.

The Departments provide general justifications for the IFR's new procedural limitations, but none of them are persuasive. First, the Departments argue that these new limitations are necessary to avoid undercutting the statutory scheme of expedited removal. 87 Fed. Reg. at 18,133. This argument ignores the ways in which the expedited removal process now works in practice and how that is inconsistent with Congress' intent. As discussed in our earlier comments,[9] at the time of its creation, most migrants who would be subject to expedited removal were not asylum seekers. Still, Congress intended that expedited removal create "no danger" of being summarily "returned to persecution" to the relatively few people caught up in expedited removal "with a genuine asylum claim."[10] But as migration patterns have changed, many more asylum seekers with genuine claims are subject to expedited removal than Congress ever intended. As discussed, our organizations' experiences and the Departments' own data indicate that, contrary to congressional intent, the expedited removal process creates a very real danger that individuals who can establish a credible fear are nevertheless being removed due to errors in the CFI and IJ review. A ten percent error rate is simply inconsistent with a system that is meeting its non-refoulement obligations. It is this outcome that is inconsistent with the original statutory scheme, not the RFR process. To address this concern, and conform its policies to Congress's intent, USCIS should continue using its inherent authority to reconsider its own decisions when errors are brought to its attention, and should do so with transparent, accessible procedures.[11]

---

[8] Comments on NPRM at 31.

[9] Comments on NPRM at 3.

[10] H.R. Rep. No. 104-469, pt. 1, at 158 (1996).

[11] Comments on NPRM at 29-30.

The Departments also argue that limitations on RFR submissions are appropriate because review before IJs is meant to be the primary method of correcting erroneous CF determinations. As we explained in our earlier comments, and again in the examples above, but unacknowledged by the Departments, IJ reviews systematically fail to be an effective check.[12] For example, the nominal right to consult with counsel is often illusory given the lack of notice about hearing scheduling; many IJs prohibit counsel from participating in the hearing; IJs frequently defer excessively to asylum officer determinations; and IJ review typically does not grapple with the inadequacy of the record, and often does not permit new evidence *or consideration of procedural errors* in the CFI. The IFR accounts for none of these routine ways in which review before an IJ fails to provide asylum seekers with a meaningful opportunity to correct erroneous CF determinations. An IJ review does not ensure a real safeguard against erroneous removal, putting more pressure on RFRs to meet that need.

With respect to IJ review, the Departments also ignore the increased importance that the Rule places on the CFI written record—now that it forms the basis for the asylum application—and the associated importance that the record be clear and complete. We previously discussed in detail the inadequacies of the written records of CFIs under the current process.[13] Given those deficiencies, allowing a robust RFR process, with sufficient time to put together a comprehensive description of any errors in the CFI, is more necessary than ever to ensure that USCIS is aware of errors in the CFI process. Indeed, to avoid having asylum seekers who were saved from removal by an RFR proceed with the inadequate record generated by the CFI, USCIS should create a worksheet with guidelines for when RFRs should be granted. Asylum officers should use this worksheet to explain the basis for the RFR decision, a necessary supplementation of the record for asylum seekers proceeding through the merits review process.

The Departments also seek to justify the new procedural limitations on RFRs by pointing to the time and resources that USCIS has had to devote to them. Notably, as the Departments admit, the basis for the claim that RFR review is time consuming is entirely anecdotal. 87 Fed. Reg. at 18,132-33.[14] In our experience, many RFRs are reviewed and decided quickly—we frequently receive denials with no substantive explanation within hours of submitting an RFR, as in example five above. Fundamentally, however, the Departments' argument misses the point. RFRs are time consuming precisely because a meaningful percentage reveal errors in the initial screening process that require a new CF interview. As the Departments admit, the most time-consuming RFRs are the meritorious ones. *Id.* (observing that an RFR that results in a new interview—necessarily because of some error in the original interview—takes upwards of four hours to complete). Time spent ensuring that an immigrant with a valid asylum claim is not

---

[12] Comments on NPRM at 17-20.

[13] Comments on NPRM at 15-17.

[14] Similarly, according to the Departments' characterization, the single commenter who supported elimination of the RFR process did not substantiate their claim that RFRs were an "overwhelmingly popular" delay tactic. 87 Fed. Reg. at 18,134. As we have previously discussed, RFRs are functionally unavailable to the many migrants who lack access to counsel. And given the substantial success rate, they can hardly be dismissed as a mere delay tactic.

unlawfully removed is time well spent. On the other hand, using the worksheet mentioned above, an asylum officer need not spend much time on a plainly meritless RFR.

As we have previously recommended,[15] but the Departments have not acknowledged, increased transparency would promote efficiency in RFR review. USCIS should establish, if they don't already exist, and make public guidelines for RFRs, including the time frame for consideration and the bases on which it will exercise its discretion to reverse a negative CF finding. We suggested previously, and continue to believe, that one such appropriate standard could be that a plausible showing of error be required. Such standards would regularize the process for USCIS review and would inform migrants and their counsel about when an RFR would be a worthwhile endeavor and when it would likely be fruitless. They should also inform unrepresented asylum seekers about what is required to submit a potentially successful RFR. These changes would improve efficiency in the RFR process as well as fairness, in a way that the Departments' arbitrary limitations do not.

III. Under the IFR, CF screenings will still result in negative CF determinations for individuals with valid asylum claims. The Departments should reform these processes.

The IFR is premised on the understanding that CFIs are typically effective and comply with existing procedural protections, and that IJ reviews typically correct any errors. Unfortunately, his understanding is wrong. So too are other commenters who claim the current CF screening process provides "loophole[s]."[16] Rather, as our earlier comments and the examples above show, credible fear screenings have many limitations and result in frequent procedural and substantive errors. While our organizations oppose the use of expedited removal entirely, unless and until Congress eliminates it, we believe that there are available and feasible reforms that the Departments should undertake to limit its worst effects. We discussed many of these reforms in detail in our earlier comments,[17] and we continue to urge the Departments to implement them.

The limitations of the credible fear screening process are further reinforced by an April 27, 2022 complaint that several of us, along with other organizations, submitted to the Department of Homeland Security's Office of Civil Rights and Civil Liberties and Office of the Inspector General (April 2022 CRCL CFI Complaint).[18] This complaint describes systemic violations of due process rights as well as of statutory and other legal protections in the credible fear screening process in the Houston Asylum Office. As described in more detail in the complaint, and consistent with trends described in our earlier comments,[19] the Houston Asylum

---

[15] Comments on NPRM at 31.

[16] 87 Fed. Reg. at 18,129.

[17] Comments on NPRM at 22-31.

[18] Complaint from American Gateways et al. to the Dep't of Homeland Sec. et al. (Apr. 27, 2022), *available at* https://nipnlg.org/PDFs/2022_27April-CFI-complaint.pdf.

[19] Comments on NPRM at 14-15.

Office: routinely imposes too high a legal standard; fails to provide appropriate language interpretation and fails to pull an asylum seeker out of expedited removal (by issuing an NTA) when an interpreter in the asylum seeker's best language is not available; fails to comply with agency guidelines regarding vulnerable populations (children, survivors of trauma and torture, and LGBTI asylum seekers); and conducts CFIs in conditions that impair access to counsel and prevent the asylum officer from eliciting all relevant and useful information.[20]

The Departments do not dispute that the protections we discuss, such as language access and competency assessments, are required. Indeed, they claim that the existing mechanisms to ensure asylum seekers receive these protections are generally working. Accordingly, they reject our requests to reform the CF screening process, arguing that such reform is unnecessary.[21] But our point, backed up by the evidence discussed in our earlier comments, is that asylum seekers in detention regularly do not receive these required protections. Instead, reforms and accountability measures are required to make these formal protections a widespread reality. It is arbitrary to continue relying on the existence of formal protections, when the Departments have information showing that those protections are not consistently working. The Department should account for the information we have provided in any final rule and reform the CF screening process as we have suggested.

First, in our earlier comments we discussed how trauma impedes asylum seekers' ability to pass a credible fear screening.[22] In addition to our own experience, we provided substantial evidentiary support regarding the impacts of trauma on asylum seekers. *Id*. And we have provided examples of asylum officers' failure to use trauma-informed interview techniques.[23] But the Departments made no changes to the credible fear screening process to ensure that asylum officers consistently use these techniques.

We have also provided the Departments with extensive information about the barriers faced by rare and indigenous language speakers.[24] Indeed, three of the additional examples discussed above involve asylum seekers who were issued negative CF determinations that were affirmed by IJs, after being interviewed in the wrong language. These are not isolated instances. They are "systematic," as an ICE Advisory Committee found.[25] In the IFR, the Departments "agree with commenters on the need to provide competent interpretation." 87 Fed. Reg. at 18,119. But the Departments point only to the existing ineffective language access requirements,

---

[20] Comments on NPRM at 7-14.

[21] 87 Fed. Reg. at 18,151.

[22] Comments on NPRM at 5.

[23] Comments on NPRM at 25; April 2022 CRCL Complaint at 9-10.

[24] Comments on NPRM at 25-26; April 2022 CRCL Complaint at 8-9.

[25] Comments on NPRM at 6-7 (citing U.S. Immigr. & Customs Enf't (ICE), Report of the ICE Advisory Committee on Family Residential Centers 79 (2016), https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf).

instead of making necessary changes to ensure that these requirements are realized. *Id*. They engage with none of the specific, widespread problems with interpreters that we identified in our comments.[26] So long as language barriers, especially for rare and indigenous language speakers, are not improved, the credible fear screening process will remain unfair, erroneous, and an inadequate basis on which to base the adjudication of an asylum applicant's claim.

Similarly, the Departments state in the IFR that they "take commenters' concerns about applicants with cognitive, mental, or physical impairments very seriously."[27] However, instead of making any changes to the CF screening process, they assert that "DHS already has a practice of placing individuals in section 240 removal proceedings when they are unable to testify on their own behalf due to possible cognitive or mental impairments, physical disability, or other factors . . . ." *Id*. As our earlier comments and the additional information provided herein show, this process is not consistent.[28] Two of the applicants described above had traumatic brain injuries that prevented them from explaining the basis for their credible fear but were pushed through the expedited removal process anyway. More protections are needed to protect asylum seekers with such impairments.

In our earlier comments, we also discussed the lack of notice that asylum seekers frequently have in advance of their CFIs, which impairs their ability to prepare and to consult with counsel, much less to ensure counsel will be available at the time of the interview.[29] Nevertheless, the Departments refused to consider systemic access to counsel issues at the CFI stage on the ground that they "are outside the scope of the present rulemaking, as they relate to the expedited removal process generally." 87 Fed. Reg. at 18,145. As we have emphasized repeatedly, however, the IFR presumes that an effective and fair credible fear screening process exists, in no small part because the CF record will form the basis for the later asylum application. Even if an asylum seeker receives a positive determination, a flawed interview record will create lasting problems for later asylum review (such as the credibility issues we discussed in our earlier comments and seen again in the example of the family from Angola, above). Access to counsel in the CFI process cannot therefore be segregated from the analysis of the IFR's provisions. The Departments' view on scope in this regard is also inconsistent with its decisions to address RFRs—which are directly related to CF screenings—in this rulemaking at the NPRM and IFR stages.

As to improving access to counsel, while we maintain that release of more detained asylum seekers is the most effective way to improve access to counsel at the CFI stage, we also suggested more limited measures, all of which would be an improvement, and none of which the Departments appear to have considered.[30] Finally, while the Departments repeatedly emphasize

---

[26] Comments on NPRM at 11-12.

[27] 87 Fed. Reg. at 18,145.

[28] Comments on NPRM at 20-22; *see also* April 2022 CRCL Complaint at 7-10.

[29] Comments on NPRM at 7-8; *see also* April 2022 CRCL Complaint at 10-12.

[30] Comments on NPRM at 23-24.

that they view the IJ review process as the primary check against erroneous negative CF determinations, they did not change that process to explicitly provide that counsel may participle fully in these IJ reviews, so that the review would better serve as a check, despite our discussion of the current inconsistent practice.[31]

Further, in our earlier comments, we discussed in detail the ways in which CFIs systematically fail to elicit all relevant and useful information, as required by current regulations.[32] We provided numerous examples of our clients' experiences in interviews, including being treated in an adversarial manner, interrupted and cut off, asked to describe only a handful of experiences and to avoid nuanced answers, and rushed through their narratives.[33] The asylum officers conducting the CFIs in the examples discussed above also failed to elicit key information, including essential factual details and potential competency concerns. Barriers to eliciting all relevant and useful information are caused by inadequate or inconsistent translation services, poor phone connections, and failure to use trauma informed interview techniques.[34] Nevertheless, and without addressing our comments, the Departments proceed with the rulemaking on the erroneous assumption that these existing regulations ensure that the CFI will effectively create the record for an asylum application.[35]

The same holds true for the inadequacy of the written record of the CFI, an issue we discussed at length in our earlier comments.[36] We urged the Departments "[t]o avoid reinforcing the unfairness caused by the current process … [and] make changes to any final rule to improve the quality and accessibility of the CFI record."[37] The Departments arbitrarily ignored our examples of the ways in which the records are inadequate, not addressing these concerns or making any changes in the IFR.

Finally, the Departments reject the contention by multiple commenters, including us, that "IJs currently 'rubber-stamp' asylum officers' negative credible fear determinations."[38] This response does not engage with the systemic issues we identified in IJ review, including many IJs' refusals to consider procedural errors in the CFI, refusals to consider information outside of the record created in the CFI, and treatment of new information as raising doubts about the migrant's credibility.[39] The Departments claim that "if a credibility concern arises, such as potential

[31] Comments on NPRM at 24.

[32] Comments on NPRM at 10.

[33] Comments on NPRM at 13-14.

[34] Comments on NPRM at 10-13.

[35] 87 Fed. Reg. at 18,095.

[36] Comments on NPRM at 15-17.

[37] Comments on NPRM at 28.

[38] 87 Fed. Reg. at 18,169.

[39] Comments on NPRM at 17-18.

inconsistent testimony, the applicant will be given the opportunity to explain the inconsistency and the concern may be resolved if the applicant provides a reasonable explanation."[40] In our experience, however, applicants do not consistently receive this opportunity, depending on the practices of the IJ conducting their hearing. For the few who do receive it, they often cannot make use of it given language barriers and lack of representation. The Departments should engage with this information in any final rule.

IV. Conclusion and further recommendations.

We greatly appreciate the Departments' response to our earlier arguments that USCIS should retain RFRs. In our earlier comments, we also made several recommendations for reform of the credible fear screening process, given its centrality to the new asylum review procedures.[41] In this iteration of the rulemaking, we ask the Departments again to consider making the following improvements to credible fear screening, discussed in detail previously:

1) Enhance access to counsel before CFIs and IJ review hearings via release of more asylum seekers from detention, as well as by providing more timely notices of those events to detained asylum seekers, electronic notification of those events to counsel with entries of appearance on file, reducing logistical obstacles identified by the ICE Advisory Committee, and clarifying that counsel may participate fully in IJ review hearings.

2) Conduct CFIs in person, including the asylum seeker, the asylum officer, and any interpreter; and require that any CFIs still conducted over the telephone not include negative credibility findings. Permit counsel to appear either in person or via telephone.

3) Ensure asylum officers and IJs consistently use a trauma-informed approach to evaluating asylum applicants, including by requiring training for interviewing people who have experienced various types of traumas (e.g., sexual abuse, domestic violence, persecution as a member of the LGBTQIA+ community) and oversight specifically focused on the use of trauma-informed techniques.

4) Ensure that rare and indigenous language speakers and individuals with diminished capacity are issued NTAs in a timely fashion and proceed to Section 240 proceedings.

5) Ensure that CFIs are routinely conducted in a non-adversarial manner and elicit all relevant and useful information, by providing expanded and improved training for asylum officers and by providing asylum officers with enough time to conduct a complete, non-adversarial interview.

[40] 87 Fed. Reg. at 18,137.

[41] Comments on NPRM at 22-31.

6) Take the specific steps discussed in our earlier comments to ensure that asylum officers and IJs correctly apply the appropriate low screening standard for CF determinations and comply with associated procedural protections.[42]

7) Improve the quality and accessibility of the record of CF determinations as proposed in our earlier comments, such as by requiring that all materials on which the CF decision was based be provided to the applicant and any counsel in a timely manner.[43]

8) Improve IJ review hearings, including by clarifying that procedural errors in CFIs are within the scope of review, prohibiting credibility determinations based on omissions or errors in the CF record, and requiring an independent conclusion as to whether the applicant meets the credible fear standard.

9) Create a worksheet with guidelines for when RFRs should be granted—e.g., new evidence, failure to use the asylum seeker's best language, legal error, other procedural violation, etc. The worksheet should also include a space for a narrative response by the reviewing asylum officer. This worksheet would be used to guide asylum office review of RFRs and upon completion, should be provided to the asylum seeker to provide the reasons for the decision and when relevant, used to supplement the CFI record.

V. Conclusion.

Thank you for considering our comments during the Departments' consideration of whether to make any changes to the IFR. If you have any questions, please contact Robin Thurston, Democracy Forward Foundation (rthurston@democracyfoward.org), counsel for RAICES.

Sincerely,

Florence Immigrant & Refugee Rights Project

Refugee and Immigrant Center for Education and Legal Services

Southern Poverty Law Center

[42] Comments on NPRM at 26-29.

[43] Comments on NPRM at 27-28.