



## **Convention Against Torture**

# **An Essential Backstop for Humanitarian Protection**

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### **OVERVIEW**

Relief under the Convention Against Torture (CAT) is even more important now that the Biden administration's new asylum ban and border regulations have significantly curtailed access to asylum for most individuals who are fleeing for their lives and seeking safety in the United States. These restrictions underscore the need for fair, consistent standards in adjudicating CAT claims.

For noncitizens facing deportation who fear torture and death in their home countries but are ineligible for asylum or most other forms of immigration relief, deferral of removal under CAT is meant to offer a last resort of humanitarian protection.

In its work providing legal services to thousands of immigrants facing detention and removal—including many individuals seeking protection under CAT—the Capital Area Immigrants' Rights (CAIR) Coalition has observed firsthand the significant obstacles people face in pursuing CAT protection.

This policy brief examines some of the substantive and procedural problems that exist around access to CAT protection, including within the context of the Biden administration's new asylum and border rules. The brief also includes recommendations that would ensure that CAT protection can properly function as originally intended and improve—as an effective safeguard to prevent deporting people to torture and death.

## What is the Convention Against Torture?

The Convention Against Torture (CAT) is an international treaty that bans torture and other acts of cruel, inhuman, or degrading treatment or punishment. So far, 173 countries have ratified CAT, including the U.S., which signed the treaty in 1988 and passed related implementing legislation in 1994. CAT not only bars our government from using torture directly, but also from deporting people to other countries where they will be tortured.

### With asylum increasingly out of reach under the Biden administration's ban, CAT is often the only viable form of relief available.

On May 11, 2023, the Biden administration implemented new asylum rules that will block the overwhelming majority of people at the U.S.-Mexico border from being able to seek asylum.[1] Under these rules, anyone who passed through a third country on their way to the border—essentially everyone not a Mexican citizen—will be categorically ineligible for asylum, unless they can satisfy one of the rule's very limited exceptions.[2]

Unfortunately, these new rules represent another blow to an asylum system that has been under attack for years. The Trump administration attempted to introduce similar rules, before using the COVID-19 pandemic to justify shutting down the asylum system under Title 42—policies that the Biden administration also continued for more than two years. And that's not even mentioning the many bars to asylum that have been codified in federal immigration statutes for decades, such as for people convicted of certain crimes or who do not file for asylum within a year of arriving in the U.S.

The government has justified these restrictions on asylum in part because people can still seek protection through the backstop mechanism of deferral of removal under CAT. CAT protection is meant to be a last resort to prevent being deported and returned to torture and death, even when applicants cannot qualify for asylum.[3] In recommending enactment of CAT, Congress explicitly recognized that CAT would prohibit the U.S. from removing someone to their home country “when it is ‘more likely than not’ that the individual would be tortured upon return.”[4] With these increasingly daunting impediments to asylum access, a functional and responsive framework for adjudicating CAT claims is more critical now than ever.

### Substantive and practical barriers prevent CAT protection from fulfilling its necessary purpose as a last resort against deportation.

On the ground, the immigration court system often resolves CAT claims in a way that falls far short of its intended purpose under U.S. and international law as a mandatory, last line of defense against removing people back to torture and death in their home countries, particularly for those held in U.S. Immigration and Customs Enforcement (ICE) immigration detention facilities.[5] According to the government's most recent statistics, only 0.007% of applicants are granted CAT protection annually.[6]

This abysmal grant rate reflects the fact that applicants for CAT relief often face insurmountable **substantive roadblocks** in pursuing CAT relief. These substantive issues often lead immigration judges and federal appeals courts to treat CAT relief as a kind of afterthought—even though CAT is meant to serve as an essential form of humanitarian relief for people desperate for protection from torture and death.

### Over-emphasizing subjective evidence over objective evidence

- At least in theory, immigration judges are supposed to rely heavily on *objective* evidence of the risk of torture based on country conditions documents in deciding CAT claims—rather than focusing primarily on an applicant’s *subjective* evidence of personal risk, such as from their own testimony.[7]
- In practice, however, many immigration judges end up over-emphasizing the subjective component of CAT relief, and summarily dismissing country conditions evidence.
- This includes scrutinizing minute details of the person’s subjective evidence for apparent contradictions and finding that their claims are “not credible.”
- As a result, immigration judges deny claims solely because applicants cannot produce specific personalized evidence of risks of torture, despite having often been away from their home countries for many years.[8]

### Only negative CAT case law

- Most of the case law on CAT from federal appeals courts is negative, discussing only why noncitizens failed to show that they are more likely than not to be tortured.
- Consequently, it is often difficult for CAT applicants and their counsel to understand what evidence or arguments would support a successful CAT claim.

### Conflation of legal standards

- Immigration judges often conflate the legal standards required for CAT with the criteria for other forms of immigration relief, such as asylum and withholding of removal.[9]

Several serious **procedural issues** further exacerbate these challenges in obtaining CAT relief, even for noncitizens with strong, viable



CAT claims. These problems are particularly onerous for the many CAT applicants held in ICE immigration detention facilities during their immigration proceedings.[10]

### Impediments to gathering evidence and communicating

- Noncitizens in ICE immigration detention centers may struggle to assemble both the subjective and objective evidence that they need to win their CAT cases.
- While detained, noncitizens are typically restricted from accessing the Internet, do not have the capacity to gather documents, and cannot readily contact family members or other witnesses.
- For noncitizens who can retain an attorney while detained, many are effectively unable to communicate with them because of logistical complications around making phone and video calls, sending and receiving legal mail, and scheduling attorney visits.[11]

### Difficulties securing legal representation

- However, most noncitizens held in detention are unable to afford or even find lawyers willing to work on their cases at all.[12]
- Legal representation is a critical factor for success in CAT cases, given that immigrants who are detained with an attorney are over 10 times more likely to win their cases than immigrants who are detained and are unrepresented.[13]
- The harmful effects of detention on physical and mental health, combined with the existing trauma that many CAT applicants already carry from having experienced torture and threats in their home countries, also make it even harder to find an attorney and obtain CAT relief.[14]

### Rapid schedule in detained cases

- Finally, the brisk pace at which the immigration court system adjudicates cases for people in detention further compounds the pressure to find an attorney and prepare their cases, with most detained cases being resolved within just six weeks.[15]

- The timeline for people in detention during expedited removal proceedings (for example, if they have recently arrived at the border) is even shorter. In those cases, noncitizens have less than a week to find an attorney to appeal any negative fear interview decisions.[16]

Unfortunately, these substantive and procedural roadblocks undermine the promise of CAT protection from wrongful deportation to places where applicants will be tortured or killed, in violation of U.S. domestic and international legal requirements. If the government chooses to restrict access to asylum at least in part because of the availability of CAT protection, then it must ensure that the framework for obtaining this relief is clear, viable, and accessible to those who need it most and that barriers are reduced and eliminated for individuals who are detained.



***“Protecting access to CAT relief for people facing deportation to torture and death is more urgent than ever—particularly as asylum becomes further and further out of reach.”***

— Peter Alfredson, Esq., Senior Attorney, Immigration Impact Lab, Capital Area Immigrants' Rights (CAIR) Coalition

# RECOMMENDATIONS

## For Strengthening CAT Protection

With these concerns in mind, there are several key steps that both Congress and the immigration court system should take to strengthen access to CAT protection as an essential last resort against torture and death.

### Recommendations to Congress:

- Pass the Fairness to Freedom Act (H.R. 2697/S. 1187), ensuring that all noncitizens facing deportation and pursuing CAT relief have access to effective legal representation, regardless of their ability to afford an attorney.
- Utilize congressional lawmaking and oversight authority to require the immigration court system to develop workable, well-defined standards for CAT relief across federal judicial circuits, and implement those standards through increased training and guidance for immigration judges and court staff.
- Divest appropriations funding from private prison companies that run expensive, prison-like immigration detention facilities and reallocate investment to proven community-based alternatives to detention, so that noncitizens seeking CAT relief can focus on preparing their cases without the additional trauma of detention and having to overcome barriers in communicating with their attorneys and loved ones.

### Recommendations to the immigration court system:

- Develop clear, well-defined standards for resolving CAT claims, including requirements to avoid conflation with other forms of relief and give proper weight to objective country conditions evidence, and ensure that immigration judges and court staff receive regular training on these standards.
- Ensure access for noncitizens who are detained and are seeking CAT relief to gather country conditions evidence, as well as to communicate with their attorneys and/or families and witnesses while preparing their CAT claims.
- Publish more Board of Immigration Appeals decisions in which noncitizens were successfully granted CAT relief, for other noncitizens and their attorneys to review, as well as redacted versions of selected immigration judge decisions granting CAT relief.



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# ABOUT CAIR COALITION

The Capital Area Immigrants' Rights Coalition is the leading service provider for immigrant adults and children at risk of detention and deportation in the Capital region area and beyond. We do direct legal representation, know-your-rights presentations, impact litigation, advocacy, and the enlistment and training of attorneys to defend immigrants. Our programs include:

## **Detained Children**

Provides legal services to children detained by the Office of Refugee Resettlement in Virginia and Maryland and those released locally to a sponsor in Virginia, Maryland, and D.C.

## **Detained Adults**

We provide information, legal support, and representation to adults in detention. We use a trauma-sensitive and client-centered approach.

## **Social Services**

We provide a holistic service model that addresses our client's basic needs—such as housing, food, and clothing, as well as referrals to medical, mental health, and educational support services.

## **Immigration Impact Lab**

The Lab uses impact litigation to challenge barriers to asylum, minimize the consequences of criminal convictions, and protect due process rights for detained children and adults.



“

*At first, I had no hope. But while we were working on my case my attorney explained my rights and how to fight. Then I felt more encouraged.*

”

*A CAIR Coalition client.*



## **CONTACT US**

For more information about our work. Contact us at [info@caircoalition.org](mailto:info@caircoalition.org) or [www.caircoalition.org](http://www.caircoalition.org).

## ENDNOTES

[1] On July 25, 2023, a federal judge in the Northern District of California issued an order vacating the new asylum rules. However, on August 2, 2023, the Ninth Circuit granted the government's stay request, keeping the asylum rules in effect while the government appeals the lower court's decision. Litigation over the asylum rules is likely to continue for the foreseeable future.

[2] For a more detailed explanation of the new asylum rules, see Alexandra Villareal, Q&A: What to Know About the Biden Administration's New Asylum Restrictions, National Immigration Forum (May 11, 2023), <https://immigrationforum.org/article/qa-what-to-know-about-the-biden-administrations-new-asylum-restrictions/>.

[3] Consistent with the fact that CAT relief is meant to remain available when someone faces torture but doesn't qualify for any other forms of relief, CAT protection carries a much higher evidentiary standard than asylum, by requiring the person to show they face an over 50% likelihood of torture, as opposed to demonstrating a 10% chance of persecution under asylum. CAT relief also includes fewer benefits than asylum—recipients cannot use their status to get a green card and naturalize, sponsor family members, or travel abroad, and must reapply for a work permit every year.

[4] SEN. EXEC. RPT. 101-30, Resolution of Advice and Consent to Ratification, at 10 (1990).

[5] Despite their name, "immigration courts" are not independent courts within the Article III federal judiciary, but administrative tribunals in an executive agency called the Executive Office for Immigration Review (EOIR), which is part of the U.S. Department of Justice.

[6] In 2018 (the most recent year in which these statistics are fully available), noncitizens in immigration proceedings who initially sought deferral of removal under CAT won relief in just 177 cases, while EOIR denied another 25,694 CAT claims. While noncitizens initially sought CAT relief in 69,618 cases, a significant number of these cases ended in "other" outcomes or were withdrawn. See Dept. of Justice, Executive Office of Immigration Review, Statistical Yearbook 2018, at 30 (2018), <https://www.justice.gov/eoir/file/1198896/download>.

[7] 8 CFR § 208.16(c)(3). "In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to . . . (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (iv) Other relevant information regarding conditions in the country of removal."

[8] For more information on problems with IJs failing to fully consider subjective country conditions evidence, see Phillip Takhar, Michael Hazel, and Mairead Dolan, Using Country Conditions Evidence to Improve Appellate Review of Convention Against Torture Cases (April 5, 2021), 98 DENV. L. REV. 433 (2021), <https://ssrn.com/abstract=3820173>.

[9] For example, immigration judges often require noncitizens to show a "nexus" between future torture and a protected ground—the higher standard required for asylum and withholding—as opposed to just showing that they have an individualized risk of torture, which is the correct legal standard for CAT relief.

## ENDNOTES

[10] While the government may detain some CAT applicants because they have criminal convictions, other noncitizens seeking CAT might face detention simply because they lack immigration status or recently arrived at the border. As of July 30, 2023, more than 61% of the 30,438 people held in ICE detention had no criminal record at all, and many of the people who ICE classified as “convicted criminals” had only committed traffic violations or other minor offenses. See Immigration Detention Quick Facts, TRAC Reports, Inc. (Aug. 15, 2023), [https://trac.syr.edu/immigration/quickfacts/#detention\\_nocrim](https://trac.syr.edu/immigration/quickfacts/#detention_nocrim).

[11] For more information on detention-related barriers access to counsel, see the ACLU’s recent comprehensive research report, No Fighting Chance: ICE’s Denial of Access to Counsel in U.S. Immigration Detention Centers, ACLU (2022), [https://www.aclu.org/sites/default/files/field\\_document/no\\_fighting\\_chance\\_aclu\\_research\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/no_fighting_chance_aclu_research_report.pdf).

[12] As of July 2023, just 4,492 of the 12,486 detained noncitizens with pending immigration court cases—less than 36%—had an attorney representing them. See Immigration Court Backlog, TRAC Reports, Inc. (Aug. 15, 2023), <https://trac.syr.edu/phptools/immigration/backlog/>.

[13] Ingrid Eagly and Steven Shafer, Access to Counsel in Immigration Court, American Immigration Council, at 19 (Sep. 2016), [https://www.americanimmigrationcouncil.org/sites/default/files/research/access\\_to\\_counsel\\_in\\_immigration\\_court.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf). Unlike the right to a public defender for indigent defendants in criminal court, indigent noncitizens generally do not have the right to government-funded appointed counsel in their immigration cases. If noncitizens cannot find a pro bono attorney or paid private attorney to represent them, then they are forced to represent themselves.

[14] For more information on the negative health effects of the U.S. immigration detention system, see Chanelle Diaz, Veronica Ortiz, Lesly Sanchez, et al. Harmful by Design—a Qualitative Study of the Health Impacts of Immigration Detention, *Journal of General Internal Medicine*, 2030–37 (2023), <https://doi.org/10.1007/s11606-022-07914-6>.

[15] Dept. of Justice, Executive Office of Immigration Review, Adjudication Statistics: Median Completion Times for Detained Cases (Apr. 21, 2023), <https://www.justice.gov/eoir/page/file/1163621/download>.

[16] *Id.*