



CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

August 2020 Litigation Update to the Vera Unaccompanied Children Legal Services Program

Ongoing Litigation

I. Detention

[Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK \(Px\) \(C.D. Cal. Jan. 17, 1997\)](#): *Flores v. Reno* was filed in 1985 on behalf of immigrant children detained by the federal government. At that time, the Immigration and Naturalization Service (INS) had no nationwide policy on the care and custody of children in its custody. Children were often held in juvenile detention centers for children who had been adjudicated delinquent, in hotels and even in adult detention facilities. Further, there was no consistent policy or uniform procedure governing release of children in INS custody. The lawsuit challenged the conditions of confinement and lack of release procedures. After twelve years of litigation, a federal District Court in the Central District of California approved a class-wide settlement agreement in *Flores v. Reno* on January 28, 1997. The settlement agreement set the national standard for the detention, treatment and release of children in federal immigration-related custody. The settlement agreement requires the government to make prompt and continuous efforts to release children in its custody to a “sponsor” who may include the child’s parent, legal guardian, another adult relative or an adult individual or entity designated by the child’s parent or legal guardian. If prompt release is not possible, the government is required to place children in non-secure facilities that are licensed to provide care of children.

The *Flores* case remains under the supervision of a federal district judge until the government issues final regulations implementing the 1997 agreement. There have been numerous lawsuits filed to enforce the agreement, the most recent of which is *Flores v. Barr*, which is discussed below.

***Flores v. Barr*, No. 0:19-CV-56326, (9th Cir.)**: On November 15, 2019, the government appealed the district court’s [ruling](#) that the regulations issued by the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) on August 23, 2019 on the [Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children](#), 84 Fed. Reg. 44,392–44,535 (Aug. 23, 2019) do not have the effect of terminating the *Flores* Agreement, the government has not met its burden to show an alternative reason to terminate the Agreement and the government is permanently enjoined from implementing the

new regulations. Briefing in this case is ongoing. On January 28, 2020, CLINIC and its nonprofit partners submitted a brief in *Flores v. Barr* to provide the court with their on-the-ground expertise regarding the adverse impact on children should the government be permitted to go forward with its new regulations. Oral argument was held in this case on May 19, 2020.

***Flores v. Barr*, No. 2:85-CV-04544, (C.D. Cal):** On March 28, 2020, United States District Judge Dolly Gee issued a nationwide temporary restraining order (TRO) requiring that the Trump administration "make every effort to promptly and safely release" from custody the *Flores v. Barr* class members. Class members in the *Flores* case include all children detained by ICE in family detention centers and all unaccompanied children detained by ORR. The restraining order also requires that by April 6 the Government provide the court, the court-appointed Special Master, and the lawyers representing the children data on all minors not released by then including their names, dates of apprehension, places of detention, and why they have not been released in eight states that have 3000 or more confirmed COVID-19 cases as of the date of the restraining order. The states are California, Illinois, Louisiana, Massachusetts, Michigan, New Jersey, New York, and Washington. The order also requires that by no later than April 9, 2020, juvenile coordinators "shall provide the Court and the Special Monitor with a report regarding whether their facilities are at, above, or below capacity levels (with specific numbers) and the status of implementation of CDC-compliant guidance.

On April 24, Judge Gee ordered ORR and ICE to make every effort to release class members with suitable custodians, including custodians who are in the MPP program or are in removal proceedings absent a specific and individualized determination that they are a flight risk or danger to themselves or others. On June 26, 2020 citing the severity of the coronavirus pandemic, Judge Gee ordered the release of all children held in the three family detention centers to relatives living in the U.S. to whom detained parents want their children released by July 17, 2020. A status conference is set for September 4, 2020 to discuss expedited motions, the August Juvenile Coordinator reports and compliance with the Court's Orders.

***Saravia v. Sessions, et al.*, No. 3:17-CV-03615 (N.D. Cal):** Complaint alleges that A.H. is present in the U.S. as an unaccompanied alien child, is pursuing (and entitled to) SIJS, was arrested, transported across the country and incarcerated in a secure facility in violation of his constitutional and statutory rights, and the *Flores* decree. The lawsuit was amended in August 2017 to add two additional minor plaintiffs in ORR custody – and also seeks to represent a class of similarly situated minors in ORR custody. Complaint seeks: (1) a declaration that the arrest, transportation, and detention of A.H. are in violation of A.H.'s First and Fifth Amendment rights, the TVPRA, the INA, and the Flores Decree; (2) a declaration that: (a) A.H. is entitled to immediate release by Defendants to the custody of Plaintiff; or, in the alternative, (b) a declaration that A.H. is entitled to be transferred to an ORR facility close to Plaintiffs' home and afforded a prompt hearing in which ORR has the burden of justifying A.H.'s detention and A.H. has the right to be represented by counsel, notice of and access to the evidence on which ORR

relies, and an opportunity to cross examine witnesses and present A.H.'s response before a neutral decision maker; or, in the alternative, (c) a declaration that A.H. is entitled to a bond redetermination hearing; (3) a temporary restraining order and a preliminary and permanent injunction ordering Defendants, and all persons acting under their direction: (a) to immediately release A.H. to the custody of Plaintiff; or, in the alternative (b) to transfer A.H. to an ORR facility close to Plaintiffs' home and afford him a prompt hearing in which ORR has the burden of justifying A.H.'s detention and A.H. has the right to be represented by counsel, notice of and access to the evidence on which ORR relies, and an opportunity to cross examine witnesses and present A.H.'s response before a neutral decision maker; or, in the alternative, (c) to conduct a bond redetermination hearing within three (3) court days of the issuance of the injunction. Settlement conference was held on December 9, 2019. The parties reached agreement on all material terms of the settlement (subject to the contingency of agency and DOJ approval). The process for finalizing the draft settlement and obtaining the necessary approvals likely will extend into January. As of August 12, 2020, there is no further information available on PACER.

Lucas R., et al. v. Azar, et al., No. 2:18- CV-05741 (C.D. Cal.): Class action seeking declaratory and injunctive relief. The complaint challenges the federal government's (1) refusal to release children to parents or other available custodians; (2) detention of children in secure or medium secure facilities, or Residential Treatment Centers; and (3) administration of psychotropic medication to children without procedural safeguards. On November 2, 2018, the court granted the Defendants' motion to dismiss in part, dismissing any claims seeking enforcement of the Flores settlement as duplicative. Plaintiffs can, however, pursue claims based on the Defendants' failure to provide sufficient safeguards for unaccompanied minors to exercise their Flores rights, as well as their TVPRA, APA, and due process claims. The court granted plaintiffs' motion for class certification, certifying five separate classes of all minors in ORR custody. On March 10, 2020, the court issued an order approving the parties' joint stipulation to modify the trial schedule. The bench trial is now set for January 19, 2021. The final pretrial conference is set for December 22, 2020. There are no updates to report this quarter.

Ramirez et al. v. U.S. ICE, et al., No. 1:18-CV-00508 (D.D.C.): Class action seeking declaratory and injunctive relief. The complaint alleges that the federal government placed the plaintiffs in adult detention after they turned eighteen without considering less restrictive placements in violation of the TVPRA and the Administrative Procedures Act (APA). The bench trial began on December 2, 2019 and concluded on January 15, 2020. In April 2020, the plaintiffs and defendants filed proposed findings of fact and conclusions of law, along with separate briefing on remedies. On July 2, 2020, the court found in favor of the plaintiffs, finding that the ICE violated the APA by acting in a manner "arbitrary, capricious, an abuse of discretion" by failing to consider least restrictive placements. The court is considering remedies and the parties are negotiating the terms for a court appointed Monitor. The court also ordered ICE to submit a proposed broadcast message to be distributed from ICE Enforcement &

Removal Operations to all ICE field offices instructing field officers that the Risk Classification Assessment tool never recommends release, that it should not be run as part of an age-out custody determination, and that its recommendations should only be considered in custody level determinations not, decisions concerning whether to detain or release. The court further ordered ICE to propose: revisions to the Age-Out Review Worksheet; new and revised training materials for ICE field officers concerning age-out custody determinations; and a list of materials and/or reports that ICE would propose the Government would make available to Plaintiffs' counsel and to any Monitor that the Court might appoint.

J.E.C.M., et al. v. Hayes, et al., No. 1:18-CV-00903-LMB-MSN (E.D. Va.): Petition for writ of habeas corpus filed on July 20, 2018, seeking release of a 13-year-old Honduran boy (J.E.C.M.) from the Northern Virginia Juvenile Detention Center to his brother-in-law. Defendants moved to dismiss for lack of jurisdiction and for failure to state a claim. The Human Trafficking Legal Center filed an amicus curie opposition to the motion to dismiss for failure to state claim. In November 2018, the Court granted the motion to dismiss as to the individual claims of plaintiffs, but denied the motion in all other respects. Petitioner successfully sought to certify the following two classes under Fed. R. Civ. P. 23(c)(1): (1) Minor Class: All children designated as unaccompanied alien minors who (a) were, are being, or will be held in the custody of the ORR anywhere in Virginia at any date on or after July 20, 2018, and (b) have been or will be held in ORR custody for 60 days or more. (2) Sponsor Class: All individuals, anywhere in the United States, who (a) have initiated the process to sponsor a member of the Minor Class (b) as a Category 1 or Category 2 sponsor (c) by either (i) returning a family reunification packet to ORR or to an ORR contracted caseworker or (ii) otherwise advising ORR or an ORR-contracted caseworker of their desire or willingness to sponsor the Minor Class member (d) to whom the Minor Class member has not been released. On May 15, 2020, the parties submitted a joint status report. On July 8, 2020, the parties submitted memorandums of updated authorities to their pending cross motions for summary judgment. Documents in this case are not available to the public.

II. Asylum

[J.O.P. v. DHS, No. 19:1944 \(D.C. Oct. 15, 2019\)](#): The U.S. District Court in Greenbelt, Maryland granted a preliminary injunction in this lawsuit challenging a [May 31, 2019 USCIS policy](#) limiting USCIS asylum jurisdiction over applicants previously determined to be “unaccompanied alien children.” The injunction adopts the terms of the previous TRO issued in this case, providing assurance that USCIS must continue to abide by its 2013 policy until the conclusion of the litigation or further order of the court. Plaintiffs’ motion to enforce the preliminary injunction was filed on November 22, 2019, an amended complaint was filed on December 20, 2019, and Plaintiffs’ reply in support of their motion to enforce the preliminary injunction was filed on January 22, 2020. On June 3, 2020, the court denied the government’s two motions to dismiss. Simultaneously, the court denied Plaintiffs’ motion to enforce the

court's standing nationwide preliminary injunction to prevent USCIS's deference to IJ jurisdictional determinations, holding that the motion raised issues of policy interpretation that must be decided on the merits after the government has produced the administrative record. Please see [CLINIC's litigation webpage](#) for more information about the litigation and case-related documents.

III. Special Immigrant Juvenile Status

[J.L. et al. v. Cuccinelli, et al. No. 5:18-CV-04914-NC \(DMR\), \(N.D. Cal Oct. 25, 2019\)](#): On December 18, 2019, the U.S. District Court for the Northern District of California granted Final Approval of the Settlement Agreement in *J.L. et al. v. Cuccinelli, et al.*, a lawsuit which challenged USCIS' requirement that a state court have the authority to return a child to the custody of her parent in order for that court to issue valid predicate findings in support of a Special Immigrant Juvenile Status ("SIJ") petition (the "Reunification- Authority Requirement"). On October 30, 2019, the Court had granted Preliminary Approval to the Settlement Agreement.

On February 14, 2020, the court issued an order holding the defendants in civil contempt and ordering sanctions. On March 27, 2020, the court issued an order granting the defendants' motion for reconsideration regarding compliance. A status conference was held on June 17, 2020. Case management conference set for September 16, 2020. *The Final Class Notice and other documents related to the case can be found on Public Counsel's webpage for more information about the litigation and the Settlement Agreement.*

<http://www.publiccounsel.org/SIJS-CA>.

N. B. D. v. Kentucky Cabinet for Health and Family Services (petition for writ of certiorari to the Supreme Court): The issue presented is whether federal law *requires* state courts to make predicate SIJ findings upon request. The Kentucky high court found that it does not, but there is a lack of consensus across states. Petitioners have requested review before the Supreme Court. The Court has not decided whether to grant the petition for *writ of certiorari*. On January 13, 2020, the Court asked the U.S. solicitor general to file a brief expressing the federal government's views on the issue. On May 31, 2020, the Solicitor General filed an *amicus curiae* brief on behalf of the United States. On June 9, 2020, the petitioner filed a supplemental brief. On June 29, 2020, the Supreme Court denied the petition.

Joshua M. v. Barr, No. 3:19-CV-00770, 2020 U.S. Dist. (E.D. Va.): On February 20, 2020, the court denied the government's motion to dismiss. The petitioner, who has an approved I-360 petition, filed a *habeas corpus* petition challenging his removal order and pending removal. The court noted that the petition implicates the cross-section between the Executive, Legislative, and Judicial branches, and raises questions regarding how the judicial branch may proceed when the executive branch has detained and ordered removed a person that has received a special legal status in accordance with statutes that the legislative branch enacted. "Ultimately, Joshua's success in prevailing against this motion to dismiss turns on his singular (and rarely evaluated by

courts) immigration status: he is a Special Immigrant Juvenile.” On May 5, 2020, the government filed a notice of appeal. The documents in this case are not available to the public.

***A.O. v. Cuccinelli*, No. 19-CV-06151-SVK, 2020 U.S. Dist. (N.D. Cal. May 1, 2020):** The court issued a preliminary injunction that enjoins the government from denying SIJS petitions on the grounds that a California juvenile court lacks authority to reunify an 18-to-20 year old youth with his or her parents. It also enjoins the government from initiating removal proceedings against or removing any SIJS petitioner who has been declared a dependent under California Welfare and Institutions Code Section 300 and whose SIJS petition has been denied on the grounds that the juvenile court lacks authority to reunify an 18-to-20 year old youth with his or her parents. The injunction orders the government to provide no less than 14-days’ notice to plaintiffs’ counsel before taking any adverse adjudicatory or enforcement action against any plaintiffs or members of the proposed class during the course of the litigation. As of August 13, 2020 the parties are engaged in settlement negotiations.

Notable Federal Court Decisions

***Imon v. Keeton*, No. CV-20-00037-PHX-DWL (JZB), 2020 U.S. Dist. (D. Ariz. July 24, 2020):** The court denied habeas corpus relief and a motion for a preliminary injunction. The petitioner sought to challenge the ORR age determination that concluded that he was an adult, and his subsequent detention in an ICE facility. The court found that ORR did not violate the TVPRA (8 USC § 1232(b)(4)) or its guidelines by basing its age determination on a combination of the petitioner's use of false identification documents and a radiograph indicating that the petitioner was an adult.

***C.T.M. v. Moore*, No. 3:20-CV-0540-B-BT, 2020 U.S. Dist. (N.D. Tex. Jul. 1, 2020):** The court denied habeas corpus relief and writ of mandamus. The petitioner sought release from adult custody and placement with ORR. A radiograph was used to assist in determining the petitioner’s age. The court found that the government did not violate the TVPRA (8 USC § 1232(b)(4)) or ORR’s Policy Guidance because it did not rely solely on the radiograph. Rather, there was evidence that other evidence was considered, including the petitioner’s statements and other documents she provided, such as a school certificate, report cards and a birth certificate. The court also denied the petitioner’s claims under the APA, 5th amendment due process, the Rehabilitation Act, the Flores settlement, international law and the Prison Rape Elimination Act.

***R.R. v. Orozco*, No. 20-564 KG/GBW, 2020 U.S. Dist. (D.N.M. June 30, 2020):** In this successful habeas corpus petition, the court issued a preliminary injunction preventing the government from applying an age determination that concluded that the petitioner was an adult. The age determination was not performed in accordance with the TVPRA (8 USC § 1232(b)(4)) and ORR’s Policy Guidelines. The examination relied upon by the government in the age

determination was a bone density exam. The examination report did not state whether it was performed by a medical professional experienced in age assessment methods, whether the medical professional considered the petitioner's ethnic and genetic background, or the probability percentage that the petitioner was a minor or an adult. The court also ordered that the petitioner remain in ORR care until that agency performs an age determination in accordance with the statute. The court found that it did not have jurisdiction to declare the petitioner an “unaccompanied alien child.”