CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

December 2019 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. 2:85-CV-0544, (C.D. Cal.):** The court held 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. Judge Gee reasons that the *Flores* Agreement is a binding contract and a final judgment that was never appealed. Therefore, the government cannot choose not to follow the Agreement because they do not agree with its provisions. Judge Gee writes, "Defendants cannot simply ignore the dictates of the consent decree merely because they no longer agree with its approach as a matter of policy. The proper procedure for seeking relief from a consent decree is a Rule 60(b) motion by which a party must demonstrate that a change in law or facts renders compliance either illegal, impossible, or inequitable. Relief may also come from a change in law through Congressional action. Having failed to obtain such relief, Defendants cannot simply impose their will by promulgating regulations that abrogate the consent decree's most basic tenets. That violates the rule of law. And that this Court cannot permit." *Flores v. Barr,* No. 2:85-CV-0544, (C.D. Cal at 24).

***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 is scheduled for December 9, 2019.

***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 9/25/2019, the parties held a settlement conference before the magistrate judge. On October 15, 2019, the Court granted an Order approving the Joint Stipulation for Removal of Miguel Angel S. as Class Representative. The parties will hold a discovery conference on November 19, 2019. The parties will hold a settlement conference on December 11, 2019. On November 13, 2019, the Court adopted the stipulated case schedule setting the bench trial for October 20, 2020. The final pretrial conference is set for September 22, 2020.

***Garza v. Azar, et al.*, No. 1:17- cv-02122 (D.D.C.):** Class action seeking declaratory and injunctive relief. The complaint challenges the federal government's policies preventing unaccompanied children from seeking an abortion while in the custody of the Office of Refugee Resettlement (ORR). The complaint alleges that this practice violated the children's rights under the Establishment and Free Speech Clauses of the First Amendment, and the Fifth Amendment right to privacy, liberty, and informational privacy. The case remains in litigation. On October 2, 2019, the Court issued an order granting the parties agreement to a stay of proceedings of 105 days. Defendants are currently examining whether to issue a new policy regarding issue of parental notification, and respectfully request the Court to stay proceedings for 105 days until January 13, 2020 to complete this process. Plaintiffs have agreed to the stay request. The parties have further agreed to meet and confer on or around November 14, 2019, and December 20, 2019, to discuss the anticipated date of completion of Defendants' policy-making.

***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. On November 7, 2019, the Court denied the government's motion for partial summary judgment. The case is set for trial on December 2, 2019.

***J.E.C.M., et al. v. Hayes, et al.*, No. 1:18- cv-903-LMB (E.D. Va.):** Petition for writ of habeas corpus filed on July20, 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. A motion hearing is set for November 22, 2019.

II. Asylum

***J.O.P. v. DHS*, No. 19:1944 (D.C. Oct. 15, 2019)**: On October 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. Please see CLINIC's litigation webpage for more information about the litigation and case-related documents.

Advocates for clients in the following situations should contact Plaintiffs' counsel Mary Tanagho Ross, mross@publiccounsel.org, and Kevin DeJong, KDeJong@goodwinlaw.com:

- have received an adverse decision from USCIS dated **on or after August 3, 2019** based on USCIS's May 31, 2019 policy.
- have not yet received a retraction of an adverse decision from USCIS issued **before August 3, 2019 and** based on USCIS's May 31, 2019 policy.
- have received an adverse jurisdictional decision from USCIS **on or after August 3, 2019** based on a misapplication of the Kim Memo.
- have requested **on or after August 3, 2019** but to no avail that USCIS speed up adjudication of a case over which it has initial jurisdiction in the face up an upcoming immigration court hearing.

- have witnessed ICE advocating **on or after August 3, 2019** for an IJ to take jurisdiction over an asylum claim whose initial jurisdiction lies with USCIS under the terms of the Kim Memo.

III. Special Immigrant Juvenile Status

***J.L. et al. v. Cuccinelli, et al.* No. 5:18-CV-4914-NC (DMR), (N.D. Cal Oct. 25, 2019):** On October 30, 2019, the U.S. District Court for the Northern District of California granted Preliminary 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"). The Court set a Final Approval hearing for December 18, 2019.

The Court previously certified the following class: "Children who have received or will receive guardianship orders pursuant to California Probate Code § 1510.1(a) and who have received or will receive denials of their SIJ petitions on the grounds that the state court that issued the SIJ Findings lacked jurisdiction because the court did not have the authority to reunify the children with their parents." Per the terms of the Settlement, you also may become part of the Class if you have received or will receive a Section 1510.1 guardianship order from the Probate Court after your 18th birthday and before your 21st birthday and you file an SIJ petition by December 15, 2019. The adjudication timeline benefits of the Settlement may also extend to you if you were 18 or older when you submitted your SIJ petition and you submitted your SIJ petition before October 1, 2019.

The Settlement Agreement provides significant relief for the Class Members, including:

- Prohibiting the Government from applying the Reunification-Authority Requirement. *See* Agreement at III.A.
- Providing that "[a] Person is not disqualified from SIJ classification provided that (1) state law confers upon a state court the jurisdiction to declare the Person dependent, legally commit the Person to an individual or entity, or place the Person under the custody of an individual or entity regardless of age; and (2) the Person is unmarried and under the age of 21 when he or she petitions for SIJ classification." *See* Agreement at III.C.
- Requiring the Government to recognize California Probate Courts as "juvenile courts" for the purposes of the SIJ Statute and to recognize children under the age of 21 appointed guardians under California Probate Code § 1510.1 as eligible for SIJ. *See* Agreement at III.B, D.
- Prohibiting the Government from asserting new grounds for a request for evidence (RFE), notice of intent to deny (NOID), notice of intent to revoke (NOIR), denial, or

revocation for Class Members who had already received an RFE, a NOID, a NOIR, denial or revocation based solely on the Reunification-Authority Requirement, except where USCIS is aware of a change in the facts regarding Class Member's eligibility that has occurred since USCIS's previous action. *See* Agreement at V.D,E.

- Prohibiting the Government from issuing any general RFEs to Class Members requesting that they affirmatively indicate any changes in factual circumstances that is not otherwise indicated in information available to USCIS. *See* Agreement at V.E.
- Prohibiting the Government from asserting any age-based related grounds (other than being under 21 years of age) for denying SIJS to Class Members. *See* Agreement at V.E.

The Settlement Agreement also sets forth a timeline for adjudication and re-adjudication of Class Members' SIJ petitions in accordance with its terms. *See* Agreement at V.A-D. Beginning on the Effective Date of the Settlement Agreement, USCIS must:

- Within **30 days**, adjudicate the SIJ petitions of all Class Members who previously received denials or revocations of their SIJ petitions;
- Within **60 days**, adjudicate the SIJ petitions of all Class Members in removal proceedings or who have received final orders of removal;
- Within **90 days**, adjudicate the SIJ petitions of All Class Members who previously received RFEs, NOIDs, or NOIRs;
- Within **180 days**, adjudicate all other Class Members' SIJ petitions.

After USCIS adjudicates all the Class Members' SIJ petitions in accordance with the Settlement Agreement, the Settlement Agreement will remain in force and the Court will retain jurisdiction over any further enforcement for one year.

See Public Counsel's webpage for more information about the litigation and the Settlement Agreement. **http://www.publiccounsel.org/SIJS-CA.** If you believe that USCIS's adjudication of your client's SIJ Petition violates the Agreement, please contact Plaintiffs' counsel at CASIJClassAction@manatt.com.

***Galvez v. Cissna, et al.*, No. 2:19-cv-00321 (W.D. Wash):** Class action seeking injunctive and declaratory relief. Complaint challenges the federal government's policy of refusing to adjudicate plaintiffs' SIJS petitions in accordance with the INA. On July 17, 2019, the Court granted plaintiffs' motion to certify the class and also granted plaintiffs' motion for preliminary injunction. The Court ruled that defendants are enjoined and restrained from: (1) denying SIJS on the ground that a Washington state court does not have jurisdiction or authority to "reunify" an immigrant with his or her parents; and (2) initiating removal proceedings against or removing any SIJS petitioner whose SIJS petition has been denied on the ground that the Washington state court did not have jurisdiction or authority to "reunify" an immigrant with his or her parents.

The Court ordered that USCIS shall, within 30 days, reopen and re-adjudicate any SIJS petition that was denied on the grounds that the Washington state court did not have jurisdiction or authority to "reunify" an immigrant with his or her parents. USCIS was also ordered to adjudicate all outstanding SIJS petitions based on a Washington state court order within 30 days if more than 150 days have already passed since the petition was filed. All other SIJS petitions based on Washington state court orders shall be adjudicated within the 180-day period set forth in the statute in the absence of an affirmative showing that the petition raises novel or complex issues which cannot be resolved within the allotted time. The Court denied the government's motion for reconsideration on August 23, 2019. The government filed an appeal of the injunction on October 21, 2019.

Notable U.S. District Court Decisions

***Jose L.P. v. Whitaker*, No. 18-17176 (KM), (D.N.J. Sep. 24, 2019):** The Court denied the petitioner's request for a writ of habeas corpus. The petitioner, an adult immigration detainee and former UAC, had previously been in the custody of the Office or Refugee Resettlement (ORR) as an unaccompanied alien child (UAC) and released to his sponsor father. He was later detained as an adult during an operation targeting suspected gang members. The petitioner argued that, as a former UAC, he was entitled to be detained in the "least restrictive setting" per the provisions of 8 U.S.C. § 1232 and that his continued detention pending his removal proceedings was unconstitutional for various reasons. The Court disagreed and found there was no failure to consider least restrictive placement under 8 U.S.C. § 1232 when the petitioner was "no longer a UAC," was already eighteen years old when placed in adult detention, and was not "transferred" from ORR custody to adult detention. The Court rejected the petitioner's constitutional arguments, finding that continued detention was lawful, where the petitioner was given a bond hearing and denied bond because the petitioner was found to be a danger to the community and a flight risk.

***N.B. v. Barr*, No. 19-cv-1536 JLS (LL), (S.D. Cal. Oct. 1, 2019):** The Court issued a preliminary injunction enjoining the government from detaining the petitioner with unrelated adults. The petitioner, a seventeen-year-old UAC from Guinea, petitioned the Court for a writ of habeas corpus, arguing that he was erroneously determined by the government to be an adult, solely based on a radiograph (forensic dental examination). The Court found that the government's exclusive use of the radiograph to determine the petitioner's age violated the TVPRA, which requires it to take into account multiple forms of evidence, including the non-exclusive use of radiographs, to determine the age of the UAC. 8 U.S.C. § 1232(b)(4). The government alleged that the age determination also relied on the petitioner's own statements that he was an adult and a passport he initially presented that also showed him to be an adult. The petitioner later produced a birth certificate and student identification card, both showing him to be a minor. The Court found that the government impermissibly determined that the petitioner was not a minor given the totality of the evidence presented.