AG revokes immigration judges' authority to release certain asylum seekers on bond

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Proceeding under a regulatory provision that allows the attorney general to unilaterally issue precedential decisions, on April 16 Attorney General William Barr issued *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), which limits immigration judges' custody redetermination, or bond, authority. Through the decision, the attorney general takes away immigration judges' authority to grant bond to asylum seekers who enter the United States between ports of entry and are transferred from expedited to full removal proceedings after having been found to have a credible fear of persecution or torture. The decision overruled a Board of Immigration Appeals, or BIA, precedent, *Matter of X-K-*, 23 I&N Dec. 731 (BIA 2005), which had recognized that immigration judges have authority to consider for release on bond noncitizens who enter the United States between ports of entry, are initially screened for expedited removal, and are placed into removal proceedings under the Immigration and Nationality Act, or INA, section 240 after showing they have a credible fear of persecution or torture. The attorney general delayed the effective date of the decision for 90 days "so that [the Department of Homeland Security] may conduct the necessary operational planning for additional detention and parole decisions." This means that until July 15, these individuals can still ask the immigration judge for a bond hearing.

The attorney general's decision asserts that an INA provision dictates that these asylum seekers are not eligible for release on bond, and that the BIA got the law wrong when it found otherwise in *Matter of X-K-*. According to the attorney general, the law "requires detention until removal proceedings conclude," unless DHS, in its discretion, decides to grant parole. The attorney general relies on a 2018 U.S. Supreme Court decision, *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018), which held that certain immigration statutes mandate detention. The Supreme Court remanded the case to the lower court to decide if the statutes themselves were unconstitutional. The *Matter of M-S-* decision does not address whether the detention statute violates the Constitution.

Impact of *Matter of M-S-*

If this decision goes into effect, its impact on asylum seekers will be grave. They will be forced to choose between prolonged detention while they pursue their asylum case or giving up their asylum claim and being returned to a country where they fear persecution or torture. The harmful psychological impact of detention on those seeking asylum is well documented, as are the obstacles detention creates to the ability to find representation. By removing the immigration judges' authority to consider whether release on bond is appropriate, the decision gives unfettered power to Immigration and Customs Enforcement, or ICE, as both jailor and judge, to decide whether and for how long to detain. While ICE has the power to release these asylum seekers on parole, the Trump administration has almost categorically denied parole to asylum seekers. This is in spite of a 2010 ICE directive that parole should generally be granted to asylum seekers who are determined to have a credible fear of persecution.

The decision does not apply to all asylum seekers. It does not affect bond rights for individuals who were placed into INA § 240 removal proceedings at the outset, as opposed to starting out in expedited removal proceedings. Nor does it change the fact that, due to federal court decisions interpreting the *Flores* settlement agreement, children typically must be released within 20 days of DHS detention. Unaccompanied children from non-contiguous countries are statutorily exempt from expedited removal proceedings, so they would not be impacted by the decision. Instead, the decision affects adults who enter the United States without inspection, are placed into expedited removal proceedings, assert a fear of persecution or torture, and are transferred into removal proceedings under INA § 240, after having been found to have a credible fear. Note also that by regulation, "arriving alien" asylum seekers—those who present themselves at a port of entry rather than entering between ports—are also not eligible for a bond hearing.

Challenges to *Matter of M-S-*

Shortly before *Matter of M-S-* was issued, a federal district judge in Washington, in a class action lawsuit, i.e., *Padilla v. ICE*, No. C18-929 MJP (W.D. Wash. Apr. 5, 2019), ordered that immigration judges' give class members a bond hearing with certain procedural safeguards within seven days of request, and release any class member whose detention exceeds that limit. The ruling applies to detained asylum seekers who entered the United States without inspection, were subjected to expedited removal and then found to have a credible fear of persecution, and who are not provided a bond hearing following certain procedures within seven days of request. The court had cited *Matter of X-K-* in recognizing that class members had a right to a bond hearing. After *Matter of M-S-* was issued, the government announced it would be moving to vacate the preliminary injunction in light of the attorney general's decision. The district court set a briefing schedule and stayed the government's compliance with the preliminary injunction until May 31, 2019. Given the developments in the *Padilla* case, the federal district court may rule on the issue before *Matter of M-S-* is scheduled to go into effect.

Practitioners with detained clients who fall within the *Matter of M-S-* decision—i.e., those who entered between ports of entry, were initially placed into expedited removal, and were transferred to INA § 240 removal proceedings after having been found to have a credible fear of persecution—should seek a bond hearing as soon as possible, before the decision is scheduled to go into effect, and should watch for updates in the *Padilla* litigation.

Attorney General Certifications During the Trump Administration

This is not the first time the attorney general's office under the Trump administration has invoked the regulatory certification provision to issue decisions that restrict immigration judges' authority and overturn BIA precedents. See the following examples:

- *Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462 (A.G. 2018), curtailing immigration judges' termination authority;
- *Matter of Castro-Tum*, 27 I&N Dec. 271 (A.G. 2018), revoking immigration judges' general administrative closure authority;
- *Matter of L-A-B-R- et al.*, 27 I&N Dec. 405 (A.G. 2018), curtailing immigration judges' continuance authority; and

- *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), overruling BIA precedent recognizing domestic violence-based asylum claims.

See CLINIC's practice pointer on *Matter of Castro-Tum* and the practice advisory on *Matter of L-A-B-R-* for more information on those two cases.

To learn more about immigration detention, including who can be subject to expedited removal proceedings and the difference between expedited and full removal proceedings, see CLINIC's Practitioner's Guide to Obtaining Release from Immigration Detention (May 2018).

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