8-29-2019

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# What Ending the Flores Agreement on Detention of Immigrant Children Really Means

By **Peter Margulies** Thursday, August 29, 2019, 5:39 PM

Last week, the Department of Homeland Security (DHS) issued its final rule on custody of two groups of noncitizen children, establishing different procedures for the treatment of children accompanied by at least one parent at the border prior to arrest and "unaccompanied alien children" (UACs) who crossed the border and were arrested without a parent. Opponents of the DHS rule have asserted that it would eliminate safeguards for *all* immigrant children and allow "indefinite" detention. Indeed, this is the stance taken in the lawsuit filed by California and other states against the new DHS rule. But while the new DHS final rule raises some serious legal and policy questions, the arguments used by opponents of the new rule oversimplify the issues.

The core of the DHS final rule echoes a position taken earlier by the Obama administration: Protections for UACs in the 1997 Flores Settlement Agreement (FSA) do *not* apply to accompanied minors. For both the Obama and Trump administrations, this distinction between UACs and accompanied minors reflected the longtime reading of the FSA itself—as well as Congress's view that UACs warrant special protections because of the absence of parental supervision, while the treatment of accompanied minors must balance their welfare with the orderly enforcement of U.S. immigration law. If the states' lawsuit reaches the Supreme Court, the justices will likely uphold the final rule's core distinction between accompanied minors and UACs.

## The FSA's Key Safeguard for UACs

The key protection under the FSA, as codified in two statutes—the Homeland Security Act (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA)—limits UACs' time in detention. Under current law, DHS can detain UACs only for 72 hours. After that time, DHS sends UACs to the Office of Refugee Resettlement (ORR), which is part of the Department of Health and Human Services. Under the TVPRA, codified at 8 U.S.C. § 1232(c)(2), a UAC must be "promptly placed in the least restrictive setting that is in the best interests of the child." In 2015, Judge Dolly Gee of the U.S. District Court for the Central District of California agreed to the government's request that ORR be given 20 days to place a child (Final Rule p. 44410).

ORR prioritizes release of each UAC to a safe, acceptable community sponsor, who is often a relative of the UAC, such as a parent (or legal guardian), a sibling or grandparent, or an aunt, uncle, or cousin. If such a relative is unavailable, ORR under the new rule will do what it has done under the FSA: release the UAC to a state-licensed program or to another suitable adult or entity if there is "no other likely alternative to long term custody." The new rule leaves these crucial protections intact (Final Rule pp. 44532-33), although it terminates court jurisdiction over treatment of UACs—an important mechanism for ensuring compliance with the TVPRA and with the FSA's limits on detention.

## The FSA's Origins and Development

Until 2015, courts accepted the distinction between UACs and the families of accompanied minors, whose time in detention was not limited. The FSA stemmed from a lawsuit brought on behalf of UACs, which the Supreme Court in its 1993 decision in *Reno v. Flores* described as litigation triggered by the immigration arrest and detention of "juveniles who are *not accompanied* by their parents" (emphasis added; p. 296). The court was deferential in *Flores*, upholding a federal rule that provided for government custody of UACs who could not be released to a parent, legal guardian or other close adult relative in the United States. The court's deferential tone and approach will surely inform any Supreme Court ruling on the new DHS final rule.

Litigation in *Flores* continued for some years on related issues not resolved by the Supreme Court's decision, resulting in the 1997 FSA, which established ground rules for UACs' custody, detention and release. While the FSA defined the class protected by the settlement as "[a]ll minors who are detained in the legal custody" of immigration officials (¶ 10), the structure and context of the FSA indicate that UACs were the only persons included in this category.

The government's duties under the FSA all referred to UACs. For example, para. 14 included detailed provisions authorizing release of minors *to* parents, legal guardians or other close adult relatives, while also permitting release to licensed programs and to other adults and entities at the discretion of immigration officials. Another provision of the FSA barred transportation of minors with unrelated adults. These provisions addressed the care and safety of UACs; they would have been irrelevant to *accompanied* minors who remained with their parents. Moreover, between 1997 and 2011, the overwhelming majority of unauthorized immigrants at the southern border were either single adults or UACs (Final Rule pp. 44399-400). Immigrant families were a tiny fraction of the total. Under the circumstances, an agreement regarding *accompanied* minors would have been largely unnecessary; it is reasonable to assume that an agreement covering this small group would have expressly noted the presence of the children's parents, instead of referring as the FSA did to "[a]ll minors" in immigration custody.

## A Surge in Border Crossings From Central America Brings Changes

Starting in 2011, unauthorized border crossings by immigrant families accelerated, with a spike in FY 2014 from a few thousand to 68,445 family unit apprehensions; an even steeper climb in FY 2018 to 107,212 units; and a sharp upturn thus far in FY 2019 to a staggering 390,308 family unit apprehensions. While the cause of this increase is subject to debate, "push factors" such as escalating violence, economic hardship and climate change in Guatemala, Honduras and El Salvador clearly played a role (see Stephanie Leutert's fine analysis of severe problems with coffee bean cultivation in Guatemala). A substantial number of unauthorized immigrants sought asylum in the United States, claiming as a defense to removal under the U.S. Immigration and Nationality Act (INA) that they had a well-founded fear of persecution in their home countries based on any one of five grounds: race, religion, nationality, political opinion or membership in a particular social group.

To adjudicate these asylum claims and manage the increase in unauthorized family immigration from Central America, the Obama administration sought to apply the expedited removal provisions in the INA, which Congress enacted in 1996 to address mass migration at the southern border. Expedited removal does not apply (p. 4, sec. (3)) to UACs. Under expedited removal, if an otherwise inadmissible foreign national states a fear of persecution in his or her home country, a trained asylum officer determines through an interview whether that individual has a "credible fear" of persecution based on one of the five INA grounds. If the asylum officer makes a positive finding, the claimant gets a full hearing before a Department of Justice immigration judge. Official decisions about whether a foreign national is removable or can claim relief from removal, such as asylum, are often relatively quick—completed within 30 days. But a longer period is possible for a claimant who has received a positive credible fear finding from an asylum officer and then is scheduled for a full, adversarial hearing before an immigration judge. For individuals released from detention, the burgeoning immigration court backlog created in part by the uptick in Central American asylum claimants has resulted in extended waits of two to three *years*. The court calendar moves much more quickly for detained individuals. But completion of a full immigration judge hearing can take more than a year, even in detained cases.

In other words, the expedited removal process often takes longer than the 20 days allowed for detention under current interpretations of the FSA. Moreover, Obama administration officials asserted (p. 11) at one point that a factor favoring detention pending a final asylum grant was deterrence of border crossers who lacked bona fide claims. That stance also lengthened immigrant families' detention. Since no one would argue that detention is beneficial for children, immigration advocates were concerned that exceeding the FSA deadline created an anomaly: UACs were processed and released within 20 days, but accompanied minors—along with their parents—were held for longer periods. Immigration advocates sued. Judge Dolly Gee then found in 2015 that the FSA covered accompanied minors as well as UACs—a decision upheld by the U.S. Court of Appeals for the Ninth Circuit in 2016. This holding that the FSA covers both UACs *and* accompanied minors is the move that the new DHS rule seeks to reverse.

**Adjudicating Family Asylum Claims**

For both the Obama and Trump administrations, extending FSA coverage to minors in immigrant families was problematic, particularly because well over half of the asylum claims from these families ultimately fell short on the merits. Receiving asylum is difficult, in part because of the requirement noted by the Supreme Court in *INS v. Elias-Zacarias* that a claimant show a nexus between alleged harm in his or her home country and one of the five INA factors. Merely showing harm—even severe harm—is insufficient. Generally, a claimant must show a connection between that harm and a characteristic of the applicant, such as public expression of a political opinion or membership in a distinctive social group like the LGBTQ community.

Long-standing case law applying the nexus requirement has made asylum an elusive goal for victims of mere economic deprivation or generalized gang violence, as the Ninth Circuit's 2012 decision, *Zetino v. Holder*, demonstrates. Reinforcing the difficulty of gaining asylum, this chart (p. 9) from the Justice Department's Executive Office for Immigration Review shows that in 2013 and following years, immigration judges on an annual basis have denied 50-75 percent of all asylum claims made by individuals who pass asylum officers' initial credible fear screening. Even conceding that better access to legal representation would improve these statistics, the high rate of asylum denials suggests that at the end of the day, a significant portion of asylum claims have serious legal or factual flaws. Since the immigrant families affected by the new DHS rule typically lack visas or any other basis for remaining in the United States legally, an asylum denial will most often lead to a final order of removal under the INA —meaning that DHS is legally authorized to physically transport a foreign national back to his or her home country, even if the foreign national wants to stay here.

**DHS's Rationales for the New Rule**

DHS argues that its distinction between UACs and accompanied minors facilitates immigration enforcement and the INA's overall statutory scheme in two ways. One is ex post, aiding in the adjudication of claims and the actual removal of foreign nationals who have already crossed the U.S. border. The other rationale is ex ante: It views immigration law and procedure as a "pull" factor that—along with "push" factors such as violence, climate change and economic hardship—encourages unauthorized immigration from Central America to the United States. Courts will ultimately defer to DHS on both the ex post and ex ante factors.

DHS's ex post rationale merits first mention, since it is more straightforward. Everyone acknowledges that *some* claimants from released immigrant families do not show up for merits hearings in immigration court, prompting the immigration judge in the case to issue an in absentia removal order (IARO). Disputes about IAROs concern their rate and cause. The DHS rule cites two metrics for the rate of family IAROs—one compares IAROs with all cases referred by DHS to immigration court in 2014-2018 (about 450,000 total cases), while the other compares IAROs to the much smaller number of completed cases (about 82,000) (Final Rule p. 44406). The rates of IAROs for these cohorts are 14 percent and 66 percent, respectively. According to DHS, the total absolute number of IAROs is 54,130 for this period.

As Ingrid Eagly, Steven Shafer and Jana Whalley have noted, DHS's figures may be exaggerated. Moreover, some IAROs result from government failures, such as court notices sent to incorrect addresses. In addition, as even DHS acknowledges in the final rule, alternatives to detention (ATD), such as family case management programs that provide outreach and assistance to immigrant families, can substantially reduce the IARO rate, as can legal counsel. However, as DHS notes, some families will continue to fail to appear in immigration court.

An even higher percentage of families will fail to cooperate in actual removal from the United States after the conclusion of court proceedings. Few foreign nationals who have invested time, risk and money—plus hopes and dreams—in emigrating to the United States will meekly comply with an order to leave, especially when the worst that can happen if they fail to comply is removal by the government. DHS estimates this group of noncooperators as comprising about 180,000 total noncitizens (including single adults and spouses as well as families with children) whom DHS initially encountered between 2014 and 2018 (Final Rule p. 44407). Among detained persons, the number of unremoved foreign nationals is a tiny fraction of this figure: about 6,000. That's just common sense: It's easier to remove an individual already in custody, compared with an individual whom immigration officers have to track down and apprehend.

Even considering the differences in rates and causes of IAROs between DHS and its critics, a substantial number of released family members will receive final removal orders but fail to comply under any presidential administration. For immigrant families that have crossed the border, eliminating the 20-day FSA deadline on detention will allow the completion of more removal proceedings and facilitate more actual removals. That's DHS's ex post case for excluding accompanied minors from the FSA. Recent decisions by the Supreme Court, such as the upholding of President Trump's travel ban in *Trump v. Hawaii*, suggest that DHS will receive deference regarding this ex post rationale for rolling back recent expansive judicial readings of the FSA.

Deference will also probably be the ultimate judicial response to DHS's ex ante rationale for narrowing FSA protections. The ex ante rationale posits that a decision to emigrate to the United States without legal authorization stems both from the "push" factors described above and from "pull" factors like the ease of release and gaining a work permit in the United States (Final Rule p. 44403). DHS concedes that "many factors influence migration" (p. 44405), making it "difficult to definitively prove a causal link" between possible "pull" factors and individual or family decisions to emigrate. Nevertheless, DHS offers evidence from the Obama administration's experience to support its claim. Once the Obama administration started detaining families, family-unit apprehensions at the southern border dropped by more than 40 percent (p. 44405). For DHS, this sequence of events provides at least some evidence that prospective immigrants conform their conduct to changes in U.S. immigration law and procedure.

Of course, some enforcement strategies may be illegal and inappropriate, whether or not they deter unauthorized migration. The Trump administration's catastrophic family separation policy clearly falls under this rubric. But less drastic responses may comport with law and policy, depending on their conception and execution.

On modifying supposed "pull" factors, some caution is required. Narrowing prospects for release and a work permit may not alter all emigration decisions. For example, Jonathan Hiskey has concluded based on extensive field interviews that victims of multiple crimes, for example, in urban areas of Honduras, will often seek to emigrate regardless of the difficulty of the journey or the legal landscape in the United States. For these individuals, the status quo in their country of origin contains so much risk that an alternative is preferable, even if that option is also risky. Changes in a "pull" factor such as U.S. immigration enforcement may not deter the most desperate prospective immigrants. Perhaps addressing only "push" factors like violence and poverty will decisively reduce unauthorized immigration. But deferential courts frequently say that government need not solve an entire problem; remedying part of the problem is sufficient to trigger deference. DHS has determined that neutralizing the "pull" factors of release and legal work in the United States will alleviate unauthorized immigration, even if it does not fully resolve the problem. If the new DHS rule gets to the Supreme Court, it is hard to imagine a majority of the justices second-guessing the government's reasoning.

**The New DHS Rule and the Impact of Detention on Children**

Even a tilt toward deference based on DHS's ex ante and ex post rationales must still reckon with the harm that detention poses for children. Many advocates have argued that detention of accompanied minors beyond the 20-day FSA limit will cause trauma and psychological damage. While precise studies of the extent and duration of harm are difficult to implement, the weight of clinical opinion suggests that detention of children causes harm, as DHS concedes (Final Rule pp. 444503-04). That harm is magnified by the remote location of the facilities DHS has designated for family detention; as Lindsay Harris has described, most of these facilities are hard to reach, impeding access by family, friends and legal counsel. Moreover, without the requirement of state licensing of facilities, which the new rule also eliminates, DHS has effectively become the "judge of its own case" on facility conditions. Absent a robust external check on conditions, DHS could let conditions in family detention deteriorate. At that point, detention would become an endurance contest. Families that dropped their asylum claims and agreed to return to their home countries would escape these poor conditions. In this way, the lack of a strong external check on conditions would discourage assertion of asylum claims, including claims that are meritorious.

DHS argues that while government must try to minimize this harm, advocates' preferred remedy of release for immigrant families would undermine the INA's framework. As noted above, critics of the DHS rule have asserted that it would permit "indefinite" detention of accompanied minors. Detention under the new rule would not be "indefinite," asserts DHS, any more than for a criminal defendant denied bail; at a maximum, the detention at issue lasts until the conclusion of adjudication in the underlying asylum case, as it would last until a trial's conclusion for the criminal defendant. In the eyes of the law, detention of this type is not "indefinite," even if officials cannot in every case specify an exact time for

release (Final Rule p. 44498). In contrast, according to DHS, advocates' preferred remedy of release after 20 days would enable the long-term presence of hundreds of thousands of unauthorized immigrant adults who will lose their asylum cases but linger in the United States indefinitely without a legal status.

Like President Obama's senior immigration officials, DHS Acting Secretary Kevin McAleenan argues that if Congress had intended this major impact on immigration enforcement, it surely would have said so in the INA. If this question reaches the Supreme Court, the justices are likely to agree that Congress's failure to expressly address these major consequences suggests that Congress did not intend to require such a marked departure from the INA's enforcement scheme. See *FDA v. Brown & Williamson Tobacco Corp*. Rather, DHS's job (Final Rule p. 44504) is to balance the INA's enforcement framework with accompanied minors' psychological well-being.

As the Obama administration also believed, that balancing approach represents the best view of statutory requirements. The INA carefully enumerates pathways to legal status, including family ties to citizens and lawful permanent residents, skilled employment that does not displace U.S. workers, and asylum. Allowing indefinite stays in the United States for hundreds of thousands of families that do not fit within these categories would undermine Congress's plan. Congress could revise this plan through comprehensive immigration reform that would provide a legal status to the 11-12 million undocumented immigrants currently here—a move I would strongly support. Moreover, releasing families that will cooperate with both adjudication and removal is consistent with the statutory scheme. But reluctance to endorse the one-size-fits-all release imperative for immigrant families that lower courts imposed in 2015 reflects a sound appreciation of Congress's handiwork, even as it sets up difficult case-by-case choices.

**What Happens Next?**

Though judicial deference is the likely outcome of a direct challenge to DHS's distinction between protections owed to UACs and accompanied minors, the new rule might still be vulnerable to constitutional challenges. There is a plausible argument that the Due Process Clause requires release from detention if an asylum claimant makes some preliminary showing of likelihood of success on the merits (I've analyzed the interaction of due process, expedited removal and habeas corpus here). Moreover, the Constitution arguably requires some reasonable floor for conditions of confinement, which would ensure accountability for DHS.

In addition, despite the new rule, a judicial role is still required for UACs in order to vindicate the original purposes of the FSA. DHS and the Department of Health and Human Services have on occasion failed to meet FSA deadlines with respect to this group. In addition, the DHS rule proposes to end UAC status for foreign nationals who were under 18 years old when they crossed the border but filed an asylum application after they turned 18. That would require initial adjudication of the asylum claim in the daunting arena of immigration judge proceedings, instead of the more low-key environment of an asylum officer interview. A federal judge should have continued jurisdiction to modify such proposals, which are inconsistent with UACs' welfare.

In the administrative realm, the rule also leaves space for immigration advocates to press for release of families, when appropriate, and for expanded access to legal counsel. DHS's Homeland Security Advisory Council made similar recommendations in the Customs and Border Patrol/Families and Children Care Panel Report from April of this year.

In the political realm, Obama DHS Secretary Jeh Johnson has urged attention to "push" factors like violence, climate change and economic hardship through a concerted program of aid to Central America. Regional solutions that build capacity in Mexico and elsewhere are promising, if officials engage in careful planning and follow-through. Renewed attention should also be paid to ATD and conditions of confinement. The Democratic House holds the purse strings to DHS's budget, which provides powerful leverage for efforts to hold the department accountable.

DHS's core distinction between UACs and accompanied minors resonates with the history, structure, and context of the FSA and will likely receive deference if questions about the DHS rule reach the Supreme Court. Even if this comes to pass, however, advocates have a range of judicial, administrative and political cards to play in efforts to limit detention, ensure that conditions are adequate, promote access to legal counsel and spur attention to "push" factors driving unauthorized immigration from Central America. On many immigration actions by the Trump administration, advocates have had to proceed on multiple legal fronts. The DHS rule presents yet another example of this imperative.

**Topics: Immigration**

**Tags: immigration, DHS, Department of Homeland Security**

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