The *Flores* Litigation and the Impact on Family Detention

On July 24, 2015, a federal district court ruled in *Flores v. Johnson* that the federal government's policy of incarcerating children with their mothers in family detention centers violates the national *Flores* Settlement Agreement ("Agreement"). This Agreement, in place for nearly two decades, establishes binding standards for the detention and treatment of immigrant children in government custody. Following the July 24 ruling, the government asked the court to reconsider its decision, but on August 21, 2015, the court denied that request, upheld the prior order, and clarified the remedies.

The court ordered the government to implement these remedies by October 23, 2015. The CARA Family Detention Pro Bono Project, which provides legal services to mothers and children detained in Dilley and Karnes City, Texas, intends to monitor the government's compliance with the court's order. CARA is a collaboration of the American Immigration Council (Immigration Council), American Immigration Lawyers Association (AILA), Catholic Legal Immigration Network, Inc. (CLINIC), and Refugee and Immigrant Center for Education and Legal Services (RAICES).

Key points from the court's order:

- **All minors are protected.** The Agreement applies to *all* minors in Department of Homeland Security (DHS) custody – accompanied and unaccompanied.

- **Children have a right to release.** Under the Agreement, children have a right to be released, preferably to a parent, *including their accompanying parent*, regardless of the parent's immigration status, and before considering another relative or community sponsor. Children must be released "without unnecessary delay."

- **Accompanying parents should be released.** To effectuate the right to release, DHS must release children *with their mothers* unless the mother poses a significant flight risk or public safety threat that cannot be mitigated by any of a wide variety of alternatives to detention, including bond and orders of supervision, or is subject to mandatory detention. Mandatory detention, however, applies only in very limited circumstances.

- **Secure facilities are prohibited.** The Agreement generally prohibits DHS from holding children in secure facilities (i.e., facilities that they are not free to leave) or in facilities that are not licensed for the care of dependent children. None of the three current family detention facilities – in Karnes City and Dilley, Texas, and Berks County, Pennsylvania – meet these standards. Only in rare circumstances defined by the Agreement may the government detain a child in a secure facility, and Judge Gee indicates that five days after apprehension is the outer limit of temporary detention for children when a parent, suitable guardian or licensed facility is not yet available.

- **The government has limited flexibility in "emergency" and "influx" situations.** When there is no parent or other suitable adult to whom a child can be released, there is no licensed, unsecure facility available, and the government is faced with the unusual circumstance of an "emergency" or "influx" of children awaiting placement in a licensed facility, the Agreement can permit the government to

briefly extend detention of a child beyond five days. Even in these circumstances, the government must work to release the child "as expeditiously as possible." Although the court did not spell out precisely what "as expeditiously as possible" means, it suggested that "[a]t a given time," if there are "individualized" and "extenuating" circumstances that prohibit the government from processing a child any faster, detaining a child for twenty days may not necessarily run afoul of the Agreement. But the court emphasized that the government must act in good faith and with due diligence in such circumstances to complete its work as quickly as possible, and that evidence suggests DHS may still be "unnecessarily dragging their feet now."

- **Conditions in short-term custody are deplorable.** Short-term Border Patrol detention facilities are "deplorable" and violate a child's right under the Agreement to be held, at a minimum, in "safe and sanitary" conditions.

What constitutes an "influx" that would permit DHS flexibility to detain a child beyond five days when no suitable adult or licensed facility is available?

The *Flores* Agreement defines "influx" as a circumstance where the government has "at any given time, more than 130 minors eligible for placement in a licensed program under Paragraph 19 [of the Settlement Agreement], including those who have been so placed or are awaiting placement." As a threshold matter, only those children who have nowhere else to go – that is, who cannot be released to a parent or other family member or friend pursuant to Paragraph 14 of the Agreement – are in fact "eligible for placement in a licensed program" under Paragraph 19. Because this does not describe the children held in family detention – who have not only the mother with whom they were apprehended, but very often other family or friends here in the United States willing to sponsor them – these children should not be counted toward the "influx" exception.

Isn't the government arguing that it cannot release families within five days because mothers are subject to "mandatory detention"?

This is a hurdle of the government's own making. DHS has taken the position that individuals in "expedited" removal proceedings (rather than ordinary removal proceedings before an immigration judge) are subject to mandatory detention prior to receiving positive credible fear determinations. But the type of removal proceeding DHS chooses to initiate is completely within its own discretion. AILA, the Immigration Council, and the CARA Project partners collectively have called upon DHS to place families in ordinary removal proceedings, to preserve the integrity of these vulnerable families, and to ensure that their due process rights are protected. This had been the government's regular practice for more than a decade prior to policy changes in the summer of 2014.

Moreover, the court's ruling clarified that regardless of the type of removal procedure DHS chooses, DHS still must demonstrate that it is making prompt and continuous efforts to release children, in the order of preference outlined in the Agreement: first to a parent, then to a legal guardian, then to another adult relative, then to an individual specifically designated by the parent, then to a child welfare licensed program, or, alternatively when family reunification is not possible, to an adult seeking custody whom the responsible government agency has deemed appropriate.

Has DHS already taken steps to do what the court ordered?

No. During the summer of 2015, DHS announced it generally would release children and mothers once they had received positive credible or reasonable fear determinations. This policy, however, still leads to lengthy, impermissible detention for many families.

DHS's decision to push thousands of detained families through the complicated expedited removal process has resulted in unnecessary case delays and has caused many cases to fall through the cracks. Staff with the CARA Family Detention Pro Bono Project report delays by the Government in conducting initial interviews, securing interpretation for indigenous language speakers, delivering interview results, filing Notices to Appear with the Immigration Court, and effectuating releases from detention. In the *Flores* proceedings, the government admitted that even under its new policy, forty percent of families are detained more than twenty days. As of October 23, 2015, the CARA Project's data indicates that approximately 195 families that we represent have been confined in family detention facilities in Texas for more than twenty days. The number of client families detained for longer than five days is even higher. We estimate that 507 families, represented by the CARA Project, have been detained for more than five days. These numbers only include family units represented by the CARA Project, so the numbers of children and mothers held in violation of the Flores ruling is likely significantly higher. ICE's release policy also is being executed in a wholly chaotic fashion that denies due process and has given rise to repeated instances of coercion and intimidation by immigration officers.

Will family detention deter others from coming to the United States?

No. Despite DHS's suggestion to the contrary, there is no evidence that detaining families actually deters future migration. The court characterized the government's arguments as "speculative at best, and, at worst fear-mongering." Moreover, in February 2015, another federal court blocked DHS from "considering deterrence as a factor in detention" in certain contexts, noting that a detention decision generally must be made based on an individualized determination regarding whether a person poses a danger or is a flight risk that requires detention. More importantly, it is both immoral and impractical to try to deter asylum seekers from fleeing to safety, when any other choice would result in their persecution or even their death.

What should DHS do to comply with this ruling?

DHS should comply with the court's ruling by promptly releasing families currently in custody and by immediately shutting down the family detention centers. According to DHS' own statistics, close to ninety percent of detained families ultimately prove that that they have a significant possibility of success on an asylum (or other protection) claim. Holding these families in detention for longer than necessary for processing and facilitating onward travel makes no sense. Going forward, DHS should place children and their mothers directly into immigration court proceedings before an immigration judge, rather than attempting to fast-track their deportation through expedited removal procedures. Further, DHS should partner with nongovernmental organizations that can connect the families with legal counsel and provide meaningful information about their rights and responsibilities. Doing so will put these families in the best position to fully present their claims for protection and to comply with reporting and other requirements under the immigration laws.

What will happen next in the *Flores* case?

The government must comply with the district court order by October 23, 2015. DHS already has appealed this order to the Ninth Circuit Court of Appeals, but a pending appeal alone does not stop the order from going into effect. To date, the government has not asked for a stay of the court's order. The order further requires DHS to provide opposing counsel "on a monthly basis statistical information collected" regarding minors who remain in custody for longer than 72 hours.

It is possible that Plaintiffs and the government will have differing views on what "compliance" with the court's order means. In other words, DHS may say it is in compliance, but Plaintiffs, looking at the same situation, may disagree. In that case, Plaintiffs would have to decide what to do next.

The government's brief on its Ninth Circuit appeal is due on February 29, 2016.

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Learn more about family detention and the CARA Family Detention Pro Bono Project at:

http://www.immigrationpolicy.org/family-detention

http://www.aila.org/detention

https://cliniclegal.org/CARA

https://www.raicestexas.org/pages/karnes