Dec 13 EOIR Creates More Obstacles for Families

In a November 16 memo to immigration judges, EOIR's Director, James McHenry, announced that after a nearly two-year reprieve, "Family Unit" cases are again being prioritized, under conditions designed to speed them through the immigration court system, ready or not, with or without representation, due process be damned.

"Family Unit" is a term created by the Department of Homeland Security as an "apprehension classification" which consists of an adult noncitizen parent or legal guardian, accompanied by his or her own juvenile noncitizen child. Of course, many of the highly-publicized cases of children separated from their parents at the border fall within this category.

Under the new procedures, all Family Unit (or in EOIR parlance, "FAMU") cases must be completed within 365 days of the commencement of removal proceedings. Just as a point of comparison, many immigration judges in New York are

presently setting non FAMU cases for hearings in late 2021. So EOIR wants FAMU cases to be completed in a third of the time of other cases.

In order to accomplish this, such cases (at least in the New York court) are to be scheduled for their first Master Calendar hearing before an immigration judge within 30 days of the court's receipt of the charging document that commences proceedings. The parent and child are then to be given only one continuance of 40 to 45 days in order to try to obtain counsel. After that, the cases are to be set for a final merits hearing another five to six months out. That only adds up to about 8 months, I imagine to allow another four month "safety zone" just in case. Immigration judges are further directed to make sure they complete the cases in 365 days, and to get them done as soon as possible.

To further increase the odds of success, the FAMU cases are being assigned to brand new immigration judges, for the following reasons. First, the new judges are mostly former ICE prosecutors. Secondly, the new judges are on probation for two years, making them more likely to obey rules in a desire to keep their jobs. The new judges have also just been through training at which they were instructed by the Attorney General that sympathy has no place in their work, that those fleeing domestic violence and gang violence are undeserving of asylum, and that it is more important for them to be efficient than fair.

Judges are expected to bump non-FAMU cases if necessary to meet the completion goals. In other words, those who have patiently waited three years or longer for their day in court, and who have their evidence and witnesses lined up in the hopes of finally obtaining legal status in this country, now run the risk of having their hearings bumped for who knows how much longer in order to speed through the case of a parent and child who likely need more time to obtain counsel and prepare their claims.

I have checked with legal service providers in New York City, and have been told that the 40 to 45 days being provided by EOIR is generally not a sufficient amount of time for the respondents in such cases to retain counsel. Outside of large cities like New York, this time frame is even less realistic, due to the fewer number of NGOs receiving funding to do this type of work.

The new policy therefore lessens the likelihood that families will be able to be represented in their removal proceedings. Unfortunately, recent changes in the law achieved through the certification of cases by the Attorney General (which has continued even under interim AG Whitaker) has made the need for legal representation far more important. It is a daunting task for an unrepresented victim of domestic violence to clearly state a detailed particular social group, defined by an immutable characteristic (but not by the feared harm), and establishing the group's particularity and social distinction in society; to then establish that the persecutor was motivated by her membership in such group; and then demonstrate both that the government was unwilling or unable to protect her and that she could not reasonably relocate within her country

As I noted in an earlier blog post, https://www.jeffreyschase.com/blog/2018/1/26/0sg8ru1tl0gz4becqimcrtt4ns8yjz (https://www.jeffreyschase.com/blog/2018/1/26/0sg8ru1tl0gz4becqimcrtt4ns8yjz) the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status states at paragraph 28 that "a person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition...Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee." So the above requirements for particular social group claims are essentially an obstacle course that someone who is already a refugee must negotiate in order to have our government grant them the legal status to which they are entitled. The recent AG decisions have increased the difficulty of the course, and the new FAMU directive will mean that these most vulnerable refugees will have to negotiate the course at breakneck speed, and likely without the assistance of counsel. It bears noting that whatever particular social group definition the asylum-seeker offers the judge is crucial; if it contains one word too many or too few, pursuant to a recent BIA precedent decision, it cannot be corrected on appeal, even if by that stage the applicant has managed to procure representation.

Through these methods, the present administration is playing a game which will result in fewer grants of asylum. The lower grant rate will then allow the administration to claim that those seeking refuge at our southern border are not really refugees, which in turn will allow them to create even greater obstacles, which will in turn lead to even fewer asylum grants.

Tragically, the stakes in this game are high. A recent Washington Post article https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/?fbclid=IwAR1vLkNYocAUDPMpfHYgCGKq9jgudMgoTZE5_akRomir-Xk-u4US3crFX88&utm_term=.b7a523fb913e (https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/?fbclid=IwAR1vLkNYocAUDPMpfHYgCGKq9jgudMgoTZE5_akRomir-Xk-u4US3crFX88&utm_term=.b7a523fb913e) reported on an asylum-applicant who, after being deported to Honduras, was killed by MS-13, just as he had predicted during his hearing in immigration court. The same article stated that Columbia University's Global Migration Project has tracked more than 60 deportees who were harmed or killed upon return to their countries. As the process is sped up, the number of mistakes leading to wrongful deportations will only increase.

As a former immigration judge, I can say with authority that it takes time and effort to reach the correct result in these cases; furthermore, the accuracy of asylum decisions greatly increases with the involvement of those with knowledge of the legal requirements. In its speed over accuracy approach, and its gaming of the system to deny more asylum claims for its own political motives, the present administration is telling refugee families that only the first and last letters of "FAMU" apply to them.

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