

Expedited Removal and Family Detention: Denying Due Process

What is Expedited Removal?

INA § 235(b),¹ states that an immigrant unable to provide documentation may be denied entry to the U.S. at a port of entry, or detained and deported if encountered within the U.S.,² unless the immigrant expresses fear of persecution. If the immigrant does not express fear of persecution, the immigrant is detained and deported without further review. Expedited removal authorizes immigration officers to deport individuals without a hearing before a judge and triggers detention while an asylum seeker undergoes a protection screening process.

What is the Connection between Expedited Removal and Family Detention?

Since announcing its proposed reforms to family detention in June, the Department of Homeland Security (DHS) has elected to put many immigrant mothers through the expedited removal process and in detention as their cases are being processed. If an immigrant is placed in expedited removal, they are detained while they are in the United States. As families cannot be detained in the normal adult detention facilities, while they go through the expedited removal process, they are detained in the family detention facilities that are located in Texas and Pennsylvania. The detention and use of expedited removal of families is inappropriate as many of the detained immigrant women and children have experienced trauma and persecution and should be able to seek protection. Expedited removal, with its emphasis on quick removals and no opportunity for a case to be reviewed before an immigration judge prevents women and children from accessing due process. While the government has been decreasing amount of time families are spending in detention due to a judicial-mandated order, the number of families the government has placed into the expedited removal process and subsequently detained has increased. Currently DHS is on track to hold as many as 45,000 children and parents in family detention this year (compared to 6,000 last year) at a cost of approximately \$400 million.³

History of Expedited Removal

Until 1996, immigrants arriving at a U.S. port of entry without required documentation were afforded the opportunity of a hearing before an Executive Office for Immigration Review (EOIR) immigration judge.⁴ Expedited removal was first proposed under the term “summary exclusion” with the goal of limiting the hearing, judicial review and appeal processes at ports of entry in order to address perceived abuses by asylum seekers.⁵ The government’s use of expedited removal has been accelerating for over a decade.⁶ In Fiscal Year (FY) 2004, Expedited Removal accounted for only about 21% of removals, with 44% of removals consisting of standard and other removal types.⁷ In Fiscal Year (FY) 2013, expedited removals accounted for 44% of removals, while standard removals, voluntary departures, and expedited removals of criminal immigrants⁸ made up only 17% of removals. This complete reversal has resulted in a growing share of immigrants being detained and deported without due process.

The underlying logic of expedited removal policy is that (i) immigration officers are just as good as or better than an immigration judge in determining whether an immigrant has a well-founded fear of persecution; and (ii) that the due process available in court proceedings is not necessary to protect immigrants who do not affirmatively avail themselves. While unaccompanied children are generally protected from expedite removal,⁹ accompanied children with their mothers and other vulnerable groups are not. Due to the administrative nature of immigration proceedings, vulnerable immigrants, including mothers and children, while increasingly being detained like crime suspects, have in criminal proceedings.¹⁰ This deprives many immigrants with valid claims of due process as to decisions on their deportation and detention.

Why Wouldn't Immigrant Mothers with Children Express Their Fear of Persecution to Customs and Border Patrol Officers?

Even trained mental health professionals face substantial barriers in eliciting traumatic experiences from immigrants, as many immigrants feel ashamed in relating the horrors of persecution and vulnerability to a stranger.¹¹ Given that mental health professionals themselves have faced such barriers, it is quite likely that a uniformed law enforcement officer in a border patrol facility will not be able to quickly elicit such information with just four questions.¹²

The violence that immigrant families face is well-documented. Recently, the U.S., Mexico, Panama, Nicaragua, Costa Rica and Belize have all seen particularly large increases in asylum applications filed by children and adults from El Salvador, Honduras and Guatemala, the Northern Triangle of Central America.¹³ Children and families in these Northern Triangle countries have rarely experienced what it is like to have confidence in the police, military, or other government agencies.¹⁴ Many women themselves or their families have experienced violence at the hands of law enforcement. Mistrust in law enforcement or abuse stemming from law enforcement makes it harder for these families to quickly open up to an immigration officer. As a result of this fear coupled with the limited screening opportunities under expedited removal, many refugees are not given a legitimate chance to relate their fears of persecution.

Is There a Legal Obligation for DHS to Apply Expedited Removal to Immigrant Families?

No. Under law, DHS may apply expedited removal to any undocumented immigrant that has not been admitted or paroled¹⁵ into the United States who cannot show that she or he has been continuously present in the U.S. for two years.¹⁶ However, DHS has no legal obligation to place families in expedited removal. Rather, INA §235b grants DHS "sole and unreviewable discretion" as to the application of expedited removal to such immigrants. Further, §235b expressly authorizes DHS to modify its policies in this regard "at any time."¹⁷ Therefore, DHS has complete discretion to apply more humane alternatives for the families.

Catholic Social Teaching and Family Detention

Immigrant detention is an explicit concern of the Catholic Church. The U.S. Catholic Bishops have addressed immigrant detention in *Responsibility Rehabilitation and Restoration, A Catholic Perspective on Crime and Criminal Justice*: "We bishops have a long history of supporting the rights of immigrants. The special circumstance of immigrants in detention centers is of particular concern. [The government] uses a variety of methods to detain immigrants some of them clearly inappropriate." Additionally, Bishop Eusebio Elizondo, Chairman of the U.S. Conference of Catholic Bishops' Committee on Migration, wrote to DHS Secretary Jeh Johnson in 2015 opposing family detention, declaring that "it is inhumane to house young mothers with children in restrictive detention facilities as if they are criminals."

What Should Be Done to Ensure That Immigrant Women and Children Have a Legitimate Chance to Access Protection?

End family detention

Family detention is an inhumane and costly program that separates families and drains government resources. The average cost to detain a mother with two small children in one of the detention facilities is approximately \$900/night. The Obama administration must end detaining young children and their mothers in jail-like settings.

Process arriving women with children through standard removal proceedings

As stated above, DHS has the authority and discretion to stop placing immigrant mothers in expedited removal and instead place them in the more humane standard removal proceedings. This would allow traumatized families to access protection and receive due process. It would also cut the need for family detention facilities as families would likely not be detained during the pendency of their immigration case.

Expand the use of community-based alternatives to detention programs

The U.S. government should invest in community-based alternatives to detention programs that have meaningful access to social and legal services. DHS must engage in efforts to expand alternatives to detention programs in order to achieve a reduction in the exceedingly heavy detention cost burden borne by taxpayers.¹⁸ At a fraction of the cost of

detention, alternatives to detention programs have proven successful in utilizing case management-based models providing legal and social services as well as community support to vulnerable individuals such as asylum seekers, torture victims, pregnant women, families with young children, primary caregivers, elderly, and victims of crime who would otherwise be detained. These programs have a track record of ensuring both compliance with immigration law and humane treatment of immigrants.

Provide better access to legal compliance information

DHS must provide better legal orientation information to families released from detention. Women leaving detention, especially those were forced to take an ankle monitor, need better information about how to comply with their immigration case proceedings and if applicable, with their check-ins for the ankle monitor. More information must be given orally and in clear concise written form to the women in Spanish and indigenous languages.

Coordinate with legal assistance networks

Released families need legal assistance. While legal representation is best, it is also helpful to put arriving families in contact with legal service providers and pro bono attorneys.

Conclusion

DHS has discretion under the existing legal framework to place immigrant mothers and children in the removal proceedings under INA §240. Allowing mothers and their children standard removal instead of expedited removal will cut down on the need for harmful detention. When it comes to assessing immigration claims of vulnerable individuals such as families, the government should always ensure that an immigration judge makes the determination whether an immigrant qualifies for asylum. Due process is an American value imbedded into our laws and our society. Families who flee persecution should be given the opportunity to tell their stories before a judge and access protection.

End notes

- ¹ INA § is a common abbreviation for a section in the INA. INA stands for the Immigration and Nationality Act.
- ² In addition to undocumented immigrants arriving at ports of entry, current DHS policy deems undocumented immigrants encountered in the interior of the U.S. to be “arriving aliens”, if (i) they arrive by sea and not admitted or paroled; or (ii) they are present in the United States without being admitted or paroled, and encountered by an immigration officer within 100 air miles of the U.S. international land border, and have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately preceding the date of encounter.
- ³ Family Detention, Still Happening, Still Damaging Human Rights First, October 2014 at 2-3 available at <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>
- ⁴ CRS Report RL33109, Immigration Policy on Expedited Removal of Aliens, by Alison Siskin and Ruth Ellen Wasem, 2005 at 3, available at: <http://trac.syr.edu/immigration/library/P13.pdf>.
- ⁵ Id.
- ⁶ Removal Without Recourse: The Growth of Summary Deportations from the United States, American Immigration Council available at <http://www.immigrationpolicy.org/just-facts/removal-without-recourse-growth-summary-deportations-united-states>
- ⁷ Id.
- ⁸ ERs of aliens convicted of aggravated felonies are stipulated in a separate section of the INA, i.e., INA § 238.
- ⁹ INA § 1232(a)(5)(D) requires that unaccompanied children are placed in the standard removal proceeding and provided access to counsel, unless they are arriving from Canada or Mexico and have agreed to be voluntarily returned. In very limited circumstances, an unaccompanied minor can be placed in expedited removal under a policy introduced in 1997, see Paul Virtue, Unaccompanied Minors Subject to Expedited Removal, Immigration and Naturalization Service, Policy Memorandum, Washington, DC, August 21, 1997; and supra note 5, at 8.
- ¹⁰ AILA Doc. No. 15102332, The Flores Litigation and the Impact on Family Detention, at 2, available at <http://www.aila.org/advocacy/media/press-releases/2015/fact-sheet-flores-litigation-family-detention>.
- ¹¹ American Journal of Orthopsychiatry, 71 (2), April 2001, When Immigration is Trauma: Guidelines for the Individual and Family Clinician, by RoseMarie Perez Foster, at 156, available at http://www.sjsu.edu/people/edward.cohen/courses/c3/s1/immigration_trauma.pdf.
- ¹² The four “protection questions” Customs and Border Protection inspectors, as well as other immigration officers are required to ask according to DHS immigration policy and procedures in order to identify anyone who is afraid of return are “Why did you leave your home country or country of last residence? Do you have any fear or concern about being returned to your home country or being removed from the United States? Would you be harmed if you were returned to your home country or country of last residence? (4) Do you have any questions or is there anything else you would like to add? See supra note 5.
- ¹³ Children on the Run, The United Nations High Commissioner for Refugees, Regional Office for the United States and the Caribbean, Washington, D.C., available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.
- ¹⁴ No Childhood Here: Why Central American Children Are Fleeing Their Homes, by Elizabeth Kennedy, at 4, available at http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf.
- ¹⁵ Under the INA, “admission” is the lawful entry of a noncitizen following inspection and authorization by an immigration officer, INA § 101(13), and “parole,” is a temporary permission to enter and be present in the U.S. under INA § 212(d)(5).
- ¹⁶ INA § 1225(b)(1)(A)(iii)(I) (Even though the INA refers to the Attorney General, due to the Homeland Security Act of 2002 (P.L. 107-296), expedited removal policy is being administered by the Secretary of Homeland Security).
- ¹⁷ Id.
- ¹⁸ The 114th U.S. Congress appropriated approximately \$2.4 Billion for Custody Operations in FY 2016. See Department of Homeland Security Appropriations Bill Committee Report – FY 2016, p. 36, available at <http://appropriations.house.gov/uploadedfiles/hrpt-114-hr-fy2016-hsecurity.pdf>.
- ¹⁹ See Unlocking Liberty – A Way Forward for U.S. Immigration Policy, Lutheran Immigration and Refugee Service, October 27, 2011, available at <http://www.lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf>.