



Frequently Asked Questions on Family Separation Litigation

Q: What is meant by “family separation” and “zero tolerance”?

A: This spring the Trump Administration began criminally prosecuting all adults who crossed the border unlawfully. For first time offenders, unlawful entry is a misdemeanor. The Trump Administration has referred to this universal prosecution as a “zero tolerance” policy. The Administration claimed that because parents would be placed into federal criminal custody, it would have to separate their children from them. Parents were often lied to by federal officials when their children were taken from them. Though they would generally be sentenced to “time served” for the day or two it took for the federal criminal processing, the federal government had no plan in place to reunite the parents with their children once the criminal “sentence” had ended. Children were placed in shelters run by Health and Human Services’ Office of Refugee Resettlement (ORR) and parents were placed in immigration detention facilities under contract with the Department of Homeland Security (DHS).

Q: What is a credible fear or reasonable fear interview?

A: Under U.S. immigration law, if a noncitizen presents himself or herself at a port of entry without a visa or is apprehended within 100 miles of the border and within 14 days of entering the United States, he or she is subject to expedited removal. This means that the noncitizen can be sent back to his or her country without seeing an immigration judge (IJ), unless he or she expresses a fear of return to his or her country. Once he or she expresses a fear of return, he or she must undergo a credible fear interview with a United Citizenship and Immigration Services (USCIS) asylum officer who determines whether he or she has a “significant possibility” of succeeding on the application for asylum or related forms of relief. Individuals who have a prior order of removal undergo a similar process called a reasonable fear interview, but must meet a higher standard.

Those who are successful at this interview stage will be placed into regular removal proceedings before an IJ. Those who are unsuccessful at the interview stage can seek review of the denial before an IJ. If they are again unsuccessful, they are removed from the United States.

Earlier this year, there were three separate lawsuits filed related to family separation practices. These lawsuits are called: *Dora v. Sessions*, *Ms. L v. ICE*, and *M.M.M. v. Sessions*. *Ms. L* challenged the separation itself, and sought reunification of parents and children. *Dora* challenged the impact the separation had on parents’ credible fear interviews, and sought fair proceedings for the parents. *M.M.M.* challenged the government’s plan to deport children after



reunification without giving them any avenues for accessing asylum, and sought due process for the children.

After a federal court granted a TRO in *M.M.M.*, and after *Dora* was filed, plaintiffs' counsel in all three cases began negotiating a settlement with the government, with the goal of obtaining fair immigration and asylum procedures for families affected by family separation. The parties agreed on relief for two separate classes: the *Ms. L/Dora* class (or the parent class), and the *M.M.M.* class (or the child class).

Q. Who is included in the classes?

For those families who are still in the United States, the classes are defined as follows. The class members in *Dora* and *Ms. L* are parents who entered the United States with their child(ren) and: (1) were detained in immigration custody by DHS; (2) have a child who was or is separated from them by DHS and, on or after June 26, 2018, was housed in ORR custody, ORR foster care, or DHS custody, absent a determination that the parent is unfit or presents a danger to the child; and (3) have been (and whose child(ren) have been) continuously physically present within the United States since June 26, 2018, whether in detention or released. Parents who are denied reunification with their children, but the Court later orders reunified, can also benefit from the settlement.

The class members in *M.M.M.* are children under the age of 18 at the time the agreement is entered into who: (1) entered the United States at or between designated ports of entry with an alien parent, and who were separated from their parents, on or before the effective date of this settlement agreement; (2) have been or will be reunified with that parent pursuant to the preliminary injunction issued by the Court in *Ms. L v. U.S.*; and (3) have been continuously physically present in the United States since June 26, 2018.

Q: How does the settlement affect parents who did not pass their credible fear interview?

A: Recognizing how difficult it was for parents traumatized by having their children taken away from them to focus on their own immigration cases immediately afterwards, USCIS asylum officers will review negative credible fear determinations, conduct further fact-finding interviews with the parents, and allow them to submit further evidence in support of their claim, including any evidence obtained from the child. If the parent is found to have a credible fear, he or she will be placed in removal proceedings and the child's case will be consolidated with the parent's in immigration court.

If the parent's credible fear determination is still negative, the child(ren) will be screened independently for credible fear with the assistance of their parent. If the child is found to have a



credible fear, both parent and child will be placed in removal proceedings in a single consolidated case in immigration court.

Q: What if the parent re-entered the United States after previously being removed?

A: If the parent is currently detained with his or her *M.M.M.* class member child, is subject to reinstatement of a prior removal order, and did not pass his or her reasonable fear interview after having his or her children taken away, USCIS will review negative reasonable fear determinations, conduct further fact-finding interviews with the parents, and allow them to submit further evidence in support of their claim. If the parent passes the RFI, he or she will be placed in “withholding only” proceedings and the child will be given his or her own credible fear interview.

If the parent is found not to have a reasonable fear, but the child is found to have a credible fear, the child will be placed in removal proceedings in immigration court, and the parent will be allowed to remain in the United States to assist with the child’s asylum case.

Q: If the parent again does not pass his or her CFI or RFI can he or she seek review by an immigration judge?

A: No. This process is similar to a request for reconsideration by the asylum office and the CFI or RFI decision is not subject to IJ review. However, a negative CFI decision for the child can be reviewed by an IJ.

Q: How does the settlement affect children who were ordered removed before being reunited?

DHS will join in motions to reopen removal orders of class member children, whether detained or not, if they were ordered removed by an IJ prior to reunification with their parent provided the motions are made within 45 days of the settlement’s approval. The child can then be placed in removal proceedings with the parent if the parent passes the CFI interview, or will have his or her own CFI interview if the parent’s CFI is denied.



Q: How does the settlement affect children who were placed in removal proceedings or served with a Notice to Appear (NTA) that was not yet filed in immigration court, before being reunited?

A: For detained, reunited children, DHS will seek to cancel NTAs that have not yet been filed or move to dismiss those that have been filed in immigration court. Children's cases will then be joined with their parent's case. If the parent passes his or her CFI, the child will be placed in removal proceedings with the parent. If the parent does not pass his or her CFI, the child will have his or her own CFI, and if the child passes, then both the child and parent will be issued NTAs and go into removal proceedings.

Q: How does the settlement help parents and children who were released from detention and not currently in removal proceedings?

A: If a parent and child are not detained and were issued NTAs at the time of release, then they will go through ordinary removal proceedings under section 240 of the INA. If a parent and child are not detained, and either have not been served with an NTA, or an NTA in the case has not yet been filed with the immigration court, they may seek asylum affirmatively before the USCIS asylum office.

If a parent and child(ren) are not detained and the parent has received a negative credible fear determination and a final order of removal under 235 expedited proceedings, USCIS asylum officers will review the negative credible fear determinations, conduct further fact-finding interviews with the parents, and allow them to submit further evidence in support of their claim. If the parent is found to have a credible fear, he or she will be placed in removal proceedings and the child's case will be consolidated with the parent's in immigration court. If the parent's fear determination remains negative, the child will receive a credible fear interview, in which the parent may assist and provide testimony. If the child's credible fear determination is positive, both parent and child will be placed in removal proceedings together.

Q: How does the settlement affect child(ren) who were not reunited with their parents?

A: The statutory protections for unaccompanied children will apply to all children who are not reunited with their parents. If the child later reunifies with the parent, then the procedures outlined in the agreement will apply.



Q: How does the settlement affect families who wish to be removed?

A: Class counsel have sent a notice document to class members and their attorneys to allow families to knowingly waive their right to pursue immigration relief in the United States and seek removal. The notice form is available [in English](#) and [in Spanish](#).

Q: How does the settlement affect parents who were already removed?

A: The settlement does not generally require the U.S. government to bring back previously removed parents. It does allow class counsel to bring “rare and unusual” cases to the government’s attention within 30 days of the settlement taking effect for the government to consider returning such parents. The government agrees to allow parents to participate in children’s removal proceedings from abroad by providing telephonic testimony (with certain limitations) as well as accepting photocopies of documents relevant to the case.

Q: Is there anything else in the settlement that is not included in this FAQ?

A: Yes, the settlement agreement has other technical provisions. Before making any decision about case strategy, advocates should read the [full preliminary settlement](#).

Q: What happens next with the preliminary settlement?

A: The terms of the settlement have been preliminarily approved by the Court. The court has ordered the government to begin implementation immediately as to detained class members who have executed notice forms. For non-detained class members, the timeline will likely be somewhat more extended.

The Final Approval Hearing will be held on November 15, 2018 at 10:30AM (Pacific Time) at Courtroom 13A, 13th Floor, Suite 1310, 333 West Broadway, San Diego, CA 92101, to determine the fairness, reasonableness, and adequacy of the proposed Settlement.

Although class members cannot exclude themselves from the settlement agreement, they have the right to object to its terms. They can do so in writing by November 2, 2018 or in person at the Final Approval Hearing. Please see the Notice of Proposed Settlement [in English](#) or [in Spanish](#) for details about how to object.

If you have further questions about the settlement agreement, please contact class counsel at:

MMMSettlementQuestions@hoganlovells.com (Class counsel for child class)

parentsasylumclass@eversheds-sutherland.com (Class counsel for parents in the United States)

familyseparation@aclu.org (Class counsel for removed parents)