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Matter of M-S- and the Continuing Battle Over 'Zero Tolerance'

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Asylum seekers who have passed their credible fear interviews—those whom immigration officers find have viable asylum claims—may no longer have access to an important protection against prolonged imprisonment.

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Asylum seekers who have passed their credible fear interviews—those whom immigration officers find have viable asylum claims—may no longer have access to an important protection against prolonged imprisonment. Attorney General William Barr's decision in *Matter of M-S-*, an immigration case involving the detention status of an asylum seeker who had passed his credible fear interview, declares that immigration judges do not have the authority to conduct bond hearings in which respondents can seek release from detention. This change is set to take effect on July 15, after which time Immigration and Customs Enforcement (ICE) will have sole authority to determine whether these asylum seekers are detained or released. In the meantime, *Matter of M-S-* is being challenged in the U.S. District Court for the Western District of Washington.

Bond Hearings and the Legal Background of Barr's Order

Bond hearings are the immigration system's equivalent to bail in criminal law. An immigration judge decides whether respondents are a danger to the community and if they are likely to show up to future hearings, and can order them released on a minimum bond of $1,500. There is no maximum bond, and the actual bond amounts set by immigration judges vary wildly by region and immigration court—the bond for the respondent in *Matter of M-S-* was originally set at $27,000. At bond hearings, respondents can appear with counsel, submit evidence and argue for their release from detention.

The technical term for this proceeding is a custody redetermination hearing, because the Department of Homeland Security (DHS) makes the first decision about custody status upon apprehending the individual. In that initial determination, DHS has several options besides imprisonment, including release on bond, release under some form of monitoring and parole. In the typical pattern for a noncitizen who is apprehended in the interior of the country, ICE makes the arrest, declines to set a bond, and then the detainee requests a custody hearing and appears before a judge who can either agree with ICE's recommendation of "no bond" or set a bond amount.

The people affected by Attorney General Barr's decision entered the United States between ports of entry and, while being processed for expedited removal, expressed a fear of persecution in their home country that was found credible by the U.S. Citizenship and Immigration Services's asylum office. As a result, their cases were transferred to an immigration judge for "regular" non-expedited removal proceedings. (For a more detailed description of that process and the legal standards that apply, see here.) Mostly single adults will be affected, as children still cannot be subjected to prolonged detention under the *Flores* settlement.

Under a previous Board of Immigration Appeals decision, *Matter of X-K-*, asylum seekers who were apprehended crossing irregularly and had established credible fear were eligible for bond hearings. In that case, ICE (whose attorneys act as prosecutors in immigration cases) challenged an immigration judge's grant of bond to a respondent, arguing that ICE still had full jurisdiction over custody and the immigration judge was not authorized to order a release. The Board disagreed, holding that the detention provisions of the expedited removal section did not apply, because the immigration judge was conducting non-expedited removal proceedings and thus could exercise her usual bond authority, which authorizes release under § 236(a) of the Immigration and Nationality Act (INA). Those who passed their credible fear hearings were thus treated like almost all other noncriminal respondents who appeared before immigration judges in removal proceedings. The Board reasoned that the regulations implementing § 235 listed specific classes of aliens who are ineligible for bond and that asylum seekers who received a positive credible fear finding and were transferred to an immigration judge did not appear on that list. Among those who are explicitly made ineligible for bond in the regulation were asylum seekers who presented at a port of entry, whom the INA classifies as "arriving aliens."

The board in *Matter of X-K-* made sense of an apparent paradox—that "arriving aliens" who presented themselves at a port of entry were ineligible for bond hearings but those who were apprehended beyond ports of entry were eligible—by pointing out that those who are detained away from ports of entry may in fact have deeper ties to the country that would make them more likely to show up for hearings and thus be better candidates for release on bond. Regulations authorize detention of people within the 100-mile border zone who cannot show they have been present in the United States for 14 days, and those who are apprehended between ports of entry may in fact be people who have long resided in the 100-mile border zone but cannot prove they have been in the country more than 14 days. In this important respect, "arriving aliens" are not similarly situated to those apprehended in the 100-mile border zone in that they are less likely to have ties to the country that would support a bond application. Still, this perceived oddity—that those who present themselves at ports of entry are not eligible for bond hearings but those who cross between ports of entry are—gave fodder for critics of *X-K-*, including Attorney General Barr.

In *Matter of M-S-*, Attorney General Barr overruled *Matter of X-K-*, relying on INA § 235(b)(1)(B)(ii), which provides that a person who establishes a credible fear of persecution "shall be detained for further consideration of the application for asylum." He reads this "shall" as foreclosing the possibility of release on bond and chided the Board for "ignoring" this provision in its *X-K-* decision. His reading relies on last year's Supreme Court decision in *Jennings v. Rodriguez*, in which the court held that the Ninth Circuit misapplied the canon of constitutional avoidance in

holding that detention under § 235(b)(1) includes bond hearings at six-month intervals. Courts apply the canon of constitutional avoidance so that they can avoid striking down statutes where there is a plausible interpretation of the statute that doesn't create grave constitutional concerns—in this case, the concern being that respondents would be deprived of liberty without any process in the absence of an individualized bond hearing. In his majority opinion, Justice Alito stated that § 235(b)(1) "mandate[s] detention of applicants for admission until certain proceedings have concluded."

Amici for M-S- argued that this portion of the *Jennings* majority opinion was dicta (nonbinding language that is not necessary to the court's decision). The precise holding of *Jennings* was that the statute cannot be plausibly read to include a requirement of bond hearings every six months; therefore, the Supreme Court sent the case back to the Ninth Circuit so that it could decide the constitutional question directly—whether prolonged detention without a bond hearing violates the Due Process Clause of the Fifth Amendment—and Alito's reading of § 235(b)(1) as "mandating detention" was not necessary to this decision.

The Only Remaining Procedural Protection Against Detention: Parole and Its Problems

Barr's order holds out the possibility of parole granted by DHS as the only remaining option for release. When DHS is holding someone in detention, it has the option of releasing that person on parole, which confers no immigration benefits or status other than to allow the person to be temporarily free from incarceration while his or her case is pending. Parole may come with certain conditions, such as an ankle monitor and/or periodic check-ins with ICE deportation officers. Under this new system, DHS has sole jurisdiction over custody determinations.

The INA provides that parole release can be for "humanitarian" reasons or for "significant public benefit," and regulations further interpret this to authorize release where "detention is not in the public interest." Under a directive issued in 2009, ICE officers were encouraged to exercise this broad discretion to act in the public interest by releasing asylum seekers who had established a credible fear of persecution. The policy included minimum procedures for parole adjudications: a person who had passed the credible fear screening was to receive notice and, within seven days, a parole interview with an ICE officer, during which the officer would verify the individual's identity and establish that the detainee was not a danger to the community nor a flight risk. Someone who satisfied these criteria was presumed eligible for release. In 2017, DHS Secretary John Kelly issued his own guidance that was slightly different in that it authorized ICE officers to grant such releases but did not say they "should" grant release under certain circumstances, as the 2009 parole guidance had.

Soon after the beginning of the current administration, several ICE field offices began categorically denying all parole requests. In *Damus v. Nielsen*, the U.S. District Court for the District of Columbia found that ICE was using a check-box style procedure to deny bond to respondents based solely on broad criteria, such as recency of entry, that naturally swept up everyone in custody. The parole grant rates for the five offices at issue in the case had swung dramatically from more than 90% to nearly 0%. The court ordered ICE to comply with its own policy and provide those minimum procedures laid out in the 2009 guidance, which the government conceded was still in effect. Some ICE offices appear to be continuing to impose a policy of blanket denials, despite this injunction.

This scheme, in which the only protection against detention in practice amounts to an ICE officer checking a box without performing any kind of individualized determination, implicates the Fifth Amendment's prohibition on depriving a person of liberty without due process of law. Immigration detainees have a constitutionally protected liberty interest, but they are often consigned to prolonged detention without any process whatsoever. The procedures in the 2009 directive, even if followed, provide thin protection for this liberty interest: They consist of an interview with the same agency that detains noncitizens and prosecutes them. Access to an unbiased tribunal has traditionally been seen as a bare minimum element of due process.

Padilla v. ICE: The Ongoing Fight Against Zero Tolerance

Attorney General Barr's recent order is already being contested in federal court in the context of a broader challenge to immigration detention that predates the order in *Matter of M-S-*. That case, *Padilla v. ICE*, started in June 2018 as a class action brought by detained asylum seekers to the Trump administration's practice of forcibly separating children from their parents. (Full Disclosure: The author is working this summer with the American Immigration Council, one of the organizations representing the plaintiffs.) After a federal court enjoined family separation, the plaintiffs returned to court with an amended complaint bringing claims under the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment, alleging that the Trump administration was continuing its zero-tolerance putsch through practices that are less headline grabbing than family separation. First, they alleged the government was intentionally dragging its feet when scheduling credible fear determinations in order to prolong detention and deter asylum seekers. Several of the named plaintiffs had waited more than a month in ICE detention for an official to interview them and screen their asylum claims. Second, the plaintiffs alleged that the government was intentionally delaying responses to requests for bond hearings for the same purpose (this was before Barr's recent order, when asylum seekers were clearly eligible for such hearings). Third, they challenged aspects of those hearings that they argued deprived plaintiffs of due process, including the placement of the burden of proof

on the respondent and the failure to provide audio recordings or transcripts of hearings to facilitate appeals. (In immigration bond hearings, unique in civil and criminal imprisonment settings, the respondent carries the burden of proof, which is often a fatal disadvantage to people who are imprisoned in remote locations and have difficulty gathering evidence that would enable them to carry their burden.)

On April 5, the U.S. District Court for the Western District of Washington ordered the government to provide bond hearings within seven days to all class members. The court also ordered the government to provide the additional procedures for which the plaintiffs had argued: shifting the burden of proof to the government, recording or transcribing hearings, and requiring immigration judges to write findings explaining their decisions. This order had been set to take effect in early May but was delayed due to the release of Attorney General Barr's *M-S-* opinion. The court in that case has solicited additional briefing and argument following the new order.

On May 5, the plaintiffs filed a proposed amended complaint challenging Barr's order, bringing claims under the Administrative Procedure Act, the Fifth Amendment and the INA. They argue that, under *M-S-*, plaintiffs are deprived "of any custodial hearing before a neutral arbiter to make an individualized determination of whether they present a danger to the community or a flight risk." Additionally, the plaintiffs answer Barr's repeated insistence in *M-S-* that INA § 235(b)(1)(a)(iii) requires mandatory detention by arguing that this section on detention in expedited removal does not apply when respondents have passed their credible fear screenings and are therefore no longer subject to expedited removal. Finally, they argue that the rule laid down in *M-S-* should have been promulgated through notice-and-comment rulemaking rather than through agency adjudication. Notice-and-comment rulemaking is a process laid out in the Administrative Procedure Act that enables executive branch agencies to promulgate legislative rules.

DHS requested in its briefing in *Matter of M-S-* that the attorney general delay the effect of his decision because the denial of bond hearings would have "an immediate and significant impact on [DHS] detention operations." The attorney general obliged with a 90-day delay to allow the agency time to adjust, making the effective date July 15. Barring any intervening decision in *Padilla* or a new challenge, asylum seekers covered by *Matter of M-S-* can expect to face very prolonged detention. They will now receive the same treatment as asylum seekers classified as "arriving aliens." In his dissent in *Jennings v. Rodriguez*, Justice Breyer noted that the "arriving alien" plaintiffs in that case were detained for well over a year (in one case for more than two years) before their cases were resolved.

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