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Attorney General Barr Strips Bond Eligibility From Asylum Seekers: Matter Of M-S- Analysis And Q&A

April 17, 2019

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In Matter of M-S- (<https://www.justice.gov/eoir/file/1154747/download>), 27 I&N 509 (AG 2019), decided on April 16, 2019, U.S. Attorney General William Barr unilaterally overturned a 2005 decision of the Board of Immigration Appeals (Matter of X-K- (Matter of X-K-, 23 I&N Dec. 731), 23 I&N Dec. 731 (Matter of X-K-, 23 I&N Dec. 731)). The Attorney General's new decision strips immigration judges of the authority to grant bond to asylum seekers who entered the United States without being inspected at a port of entry but passed their threshold asylum screening interviews. These asylum seekers will now be subject to detention without bond for the duration of their asylum proceedings, separated from their loved ones and community. The political machinations behind this decision are immediately apparent: in a footnote, the Attorney General himself notes that the Department of Homeland Security (DHS) intends to use this decision to justify expanding its already bloated jail system (<https://www.thedailybeast.com/ice-is-detaining-50000-people-a-new-all-time-high>). The M-S- decision leaves completely intact DHS's ability to release asylum seekers using a mechanism known as "parole," but the agency has proven over and over again that it is unwilling to utilize its discretion, preferring to flout its own guidance and subject asylum seekers to prolonged jailing. DHS's use of mandatory and prolonged detention for asylum seekers has always been and will continue to be a choice, not a legal mandate nor evidence-based policymaking.

Q&A:

What Did The Attorney General Hold?

- The Attorney General held that asylum seekers who enter the United States between ports of entry and subsequently pass the threshold test for asylum eligibility (referred to as a "credible fear interview") cannot seek release on bond from

an immigration judge.

- In a footnote, the Attorney General delayed implementation of the decision for 90 days “so that DHS may conduct the necessary operational planning for additional detention and parole decisions.” This footnote ominously suggests that DHS is already planning to use this decision as justification to expand its detention system--already at historically unprecedented highs (<https://www.immigrantjustice.org/staff/blog/dhss-secret-detention-expansion-dangerous-immigrants-and-democracy>), with overcrowding and health concerns (<https://www.cbsnews.com/news/mumps-outbreak-quarantine-at-immigration-detention-centers/>) resulting.
- Technically, nothing in the Attorney General’s decision limits or impacts DHS’s continued ability to release asylum seekers on parole. If this option were utilized, it would mean that asylum seekers could remain in the community with their families and have a far greater opportunity to obtain legal representation during their asylum proceedings. Though *legally* the Administration maintains clear discretion to release asylum seekers under INA 212(d)(5)(A), *in practice*, DHS regularly refuses to do so, unlawfully creating categories of de facto mandatory detention that should not exist by law. The decision effectively leaves DHS as the sole arbiter of release for asylum seekers, a deeply problematic shift that will result in even more unnecessarily prolonged jailing of asylum seekers given the Administration’s record of denying access to parole (which resulted in the *Damus* litigation (<https://www.aclu.org/cases/damus-v-nielsen>), described in greater detail below).

Who Will Be Affected And How?

- The decision will impact asylum seekers who enter the United States between ports of entry and then either present themselves to an immigration officer or agent or are apprehended within 14 days of their entry and within 100 miles of the border. This is the class of individuals considered to be subject to expedited removal proceedings under section 235 of the Immigration and Nationality Act. Upon passing their credible fear interview, these individuals will now be forced to remain in immigration jail for the duration of their asylum proceedings unless DHS exercises its authority to consider release on parole. Detained individuals are far less likely to be represented by counsel and, therefore, far less likely to successfully present their claims for asylum or other types of relief (read more here (<https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court>)).

Who Will Not Be Affected?

- Asylum seekers who present themselves at ports of entry are already precluded from seeking bond from an immigration judge.
- Unaccompanied children who seek asylum in the United States must be transferred from DHS custody to the custody of the Office of Refugee Resettlement within the Department of Health and Human Services (HHS). There, HHS is lawfully required to release and reunify children with loved ones in the community as expeditiously as possible. Read more here. (<https://supportkind.org/wp-content/uploads/2019/04/KIND-TVPRAs-talking-points-4.1.19-FINAL.pdf>)
- Families detained by DHS remain subject to the requirements of the Flores settlement, which provides critical and fundamental restrictions on the detention of children. Read more here. (<https://www.womensrefugeecommission.org/rights/resources/1647-the-flores-settlement-and-family-separation-at-the-border>) Given President Trump’s fixation on reconstituting the harmful family separation policy, it is possible DHS will attempt to implement a policy it refers to as “binary choice,” which would force parents under duress to choose between separating from their children or prolonged family detention in violation of the Flores settlement.

Does DHS Need More Money For More Detention Beds Because Of This Decision?

- No. DHS maintains full discretion to release asylum seekers who have passed their credible fear interviews into the

community using the parole authority provided by section 212 of the Immigration and Nationality Act. Under the Trump administration, DHS has all but ignored this authority and violated (<https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf>) the 2009 Policy Guidance (https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf) (which DHS limits to those who arrive at ports of entry) by refusing to grant parole and detaining asylum seekers indefinitely in punitive conditions. Last year, Human Rights First, the Center for Gender and Refugee Studies, and the ACLU sued DHS in federal court for exercising parole rates of nearly zero in five field offices. Read more here. (<https://www.humanrightsfirst.org/press-release/groups-challenge-trump-administration-s-arbitrary-detention-asylum-seekers>) Even with a court injunction in place ordering DHS to comply with the 2009 Parole Directive, ICE continues to ignore its own policy and to deny parole requests. Documents revealed through litigation and public reporting show that DHS regularly prolongs the detention of asylum seekers who pose no community safety risk, have strong ties in the United States, and are eager to comply with obligations placed on them by the court or DHS. Read the illustrative story of Ansly Damus here. (https://www.washingtonpost.com/national/waiting-for-safe-haven/2018/12/16/158387fc-fe3b-11e8-862a-b6a6f3ce8199_story.html)

- Matter of M-S- in no way changes the fact that every time DHS detains an asylum seeker who has passed her credible fear interview, the agency is making a choice to deprive that person of her liberty during her asylum proceedings rather than releasing on parole. That choice is not mandated by law.
- There is no legal, international, or evidence-based policy justification for detaining asylum seekers through the duration of their proceedings. The U.S. could choose to welcome asylum seekers and ensure a fair asylum process, but with this decision continues to turn toward draconian attempts at deterrence instead. Despite erroneous claims from the administration to the contrary, asylum seekers show up to court nearly 100 percent of the time subsequent to release from immigration detention (read more here (<https://www.humanrightsfirst.org/resource/fact-check-asylum-seekers-regularly-attend-immigration-court-hearings>)). Community-based alternatives to detention present a cheaper, humane, and effective approach to migration management that allows asylum seekers to remain with their loved ones while they seek safety in the United States. This is the approach recommended (<https://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>) by the United Nations High Commissioner for Refugees and utilized by countries throughout the world (<https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf>); the United States is woefully behind.

Why Does The Attorney General Get To Overrule A Previous Decision Of The Board Of Immigration Appeals, Anyway?

- 8 CFR § 1003.1(h) provides the Attorney General the authority to refer cases of the Board of Immigration Appeals to himself for review. Long criticized as an unusual and potentially dangerous grant of judicial authority to the executive branch, this authority became a weapon in the hands of Attorney General Sessions. Attorney General Barr has now demonstrated in no uncertain terms his intention to continue using this authority to further the administration's anti-immigrant agenda.
- With full control over the immigration court system, the Attorney General has unilaterally stripped immigration judges of basic operational authorities, interfered with judicial independence, and rewritten asylum and detention laws.
- Historically practice of certification has been sparingly used (<https://www.judiciary.senate.gov/imo/media/doc/McHenry%20Responses%20to%20QFRs.pdf>), with an average of 1.7 certified decisions annually between 1999 and 2009. Under this administration, however, the Attorney General's decision in Matter of M-S- is the 6th decision. The cases already decided by Attorney General Sessions strike at the heart of a respondent's ability to have a full and fair hearing, and include:
 - *Matter of Castro-Tum* (<https://www.justice.gov/eoir/page/file/1064086/download>), 27 I&N Dec. 187, limiting the authority of an immigration judge to administratively close proceedings;

- *Matter of E-F-H-L-* (<https://www.justice.gov/eoir/page/file/1040936/download>), 27 I&N Dec. 245, undermining the right of an asylum applicant to have a full evidentiary hearing;
 - *Matter of A-B-* (<https://www.justice.gov/eoir/page/file/1070866/download>), 27 I&N Dec. 227, aggressively narrowing what qualifies as a “particular social group” for purposes of an asylum application, making it far more difficult--in many cases impossible--for survivors of domestic violence and gang persecution to apply for and qualify for asylum;
 - *Matter of L-A-B-R-* (<https://www.justice.gov/eoir/page/file/1087781/download>), 27 I&N Dec. 245, stripping immigration judges’ authority to grant a continuance for “collateral” matters to be adjudicated; and
 - *Matter of S-O-G- & F-D-B* (<https://www.justice.gov/eoir/page/file/1095046/download>), 27 I&N Dec. 462, preventing immigration judges and BIA members from terminating or dismissing cases.
- Attorney General Barr’s continued use of the certification procedure to pursue the White House’s political ends is deeply concerning.

What Will Be The Human Impact Of This Decision?

Antonio (pseudonym), a client of the National Immigrant Justice Center (NIJC), is a young gay man from Honduras who was so desperate to be released from detention that he was on the verge of giving up his case. NIJC helped him fight for a minimum bond, and identified a sponsor to house him and support him while he pursues asylum. Antonio now faces potential re-detention under the decision in *Matter of M-S*.

The stories of individuals who presented themselves at ports of entry, and who were thus already ineligible for a bond hearing illustrate what the problem will look like going forward and why it is problematic to rely on the parole process as the only release mechanism. For example, NIJC represents a political activist from the Democratic Republic of Congo (Moses), a lesbian from Uganda (Alice), a transgender woman from Honduras (Jessica), and a gay man from Guinea (Mohamed) who all presented themselves at the port of entry and asked for asylum. These individuals (all names pseudonyms) each faced more than a year of immigration detention. Each of them, with the exception of Jessica, is STILL in ICE custody today.

Jessica’s story, even though she’s been released, is particularly problematic. ICE refused to parole her even after she was granted asylum by an immigration judge, and as a result she faced an additional seven months in ICE custody (which ended after the filing of a habeas petition).

Numerous additional (<https://www.humanrightsfirst.org/resource/lifeline-lockdown-increased-us-detention-asylum-seekers>) reports (<https://www.womensrefugeecommission.org/rights/resources/1528-prison-for-survivors-women-in-us-detention-oct2017>) highlight, through countless case examples and based on numerous fact-finding detention visits, the increase in and impact of prolonged detention on those seeking asylum in the United States.

With questions, please contact:

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