



THE RIGHTS OF CHILDREN IN THE IMMIGRATION PROCESS (JULY 2014)

INTRODUCTION

In recent years, the number of immigrant children arriving in the United States has increased dramatically, with many children from Central America fleeing extreme violence and persecution in their home countries.¹ As a result, the U.S. government is facing serious logistical challenges in dealing with the increased flow of migration. In this time of humanitarian crisis, it is critical that the government's immigration enforcement objectives be balanced against the need to ensure that these children are treated in a manner that accords with the fundamental American values of fairness and due process embodied in our Constitution and laws, and is consistent with international human rights obligations.

This memorandum summarizes three critical categories of legal protections that must be provided to immigrant children, whether they are travelling alone or accompanied by a parent or guardian, who are apprehended by the government and placed in immigration detention: (1) access to relief in full and fair immigration proceedings; (2) detention in the least restrictive and most humane settings possible; and (3) legal representation in their immigration proceedings. This memorandum also sets forth prescriptions for how the federal government – specifically the Office of Refugee Resettlement (“ORR”) within the Department of Health and Human Services, the Department of Homeland Security (“DHS”) and its subunits, including U.S. Customs and Border Protection (“CBP”), and the Executive Office of Immigration Review (“EOIR”) within the Department of Justice – must treat children in the immigration process in order to comply with the law.

For children, the governing U.S. legal standards come from various overlapping sources. Two of the primary sources of law discussed in this memorandum are (1) the Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA”), which applies to all “unaccompanied alien children” under the age of 18;² and (2) the 1996 settlement agreement in *Flores v. Meese*

¹ See generally, United Nations High Commissioner for Refugees, *Children on the Run* (March 2014), available at http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Ful1%20Report.pdf.

² The TVPRA defines an “unaccompanied alien child” as a child under 18 who has no lawful status in the United States, and either has no parent/legal guardian in the United States, or has no parent/legal guardian available to provide care and physical custody. 6 U.S.C. § 279(g)(2).

(“*Flores* Settlement”), which covers all children (whether accompanied or not) under the age of 18 who are in federal government custody. Other sources of law, including statutes, regulations, injunctions, and provisions of the U.S. Constitution, afford further safeguards to immigrant children who are taken into government custody and subjected to removal proceedings.

ACCESS TO RELIEF IN FULL AND FAIR IMMIGRATION PROCEEDINGS

Protections for Unaccompanied Children Under the TVPRA

For unaccompanied children, the TVPRA is an important source of statutory rights and government obligations. Congress enacted the TVPRA in response to documented incidents of mistreatment of immigrant children in the custody of the former Immigration and Naturalization Service (“INS”) as well as lawsuits that eventually culminated in the *Flores* Settlement.³ In recognition of INS’s wrongful and unlawful treatment of unaccompanied children, Congress, via the Homeland Security Act of 2002, divided INS’s former functions in this area between DHS and ORR. ORR was given responsibility over the care and custody of unaccompanied children. Although this change resulted in some improvements, advocates continued to voice concerns that the U.S. government was returning children facing persecution without conducting any assessment of the dangers they faced upon return.⁴ In response, Congress enacted the TVPRA, which now sets forth certain legal requirements for U.S. government treatment of unaccompanied children.

The TVPRA treats children differently depending on their nationality. For unaccompanied children from countries not contiguous with the United States (i.e. from all countries other than Mexico and Canada), the TVPRA requires that, barring “exceptional circumstances,” after any federal department or agency determines that it has an unaccompanied child in its custody, that child must be transferred to ORR custody within 72 hours. If the government wants to expel these children from the United States, the government must place them in regular removal proceedings before an immigration judge (commonly referred to as “INA 240 proceedings”). See 8 U.S.C. § 1229a. There, they must be offered a “full and fair hearing” of their claims, including the ability to present defenses to removal or apply for any forms of immigration relief for which they may be eligible. Importantly, this protection prevents unaccompanied children from noncontiguous countries from being expelled via any sort of streamlined or truncated removal procedures, such as expedited removal or pre-hearing voluntary departure.

³ For more information, see Women’s Commission for Refugee Women & Children, *Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children* (May 2002), available at <http://www.refworld.org/pdfid/49ae53f32.pdf>, and U.S. Dep’t of Justice, Office of the Inspector General, *Unaccompanied Juveniles in INS Custody, Report Number I-2001-009*, ch. 2 (Sept. 28, 2001), available at <http://www.justice.gov/oig/reports/INS/e0109/chapter2.htm#restraint>.

⁴ See, e.g., Betsy Cavendish & Maru Cortazar, Appleseed, *Children at the Border: The Screening, Protection, and Repatriation of Unaccompanied Mexican Minors* at 1 (2011) [hereinafter “*Children at the Border*”], available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Children-At-The-Border1.pdf>.

For unaccompanied children from “contiguous countries,” i.e. Mexico and Canada, the TVPRA imposes a special set of rules. For those children, within 48 hours of apprehension, CBP must determine: (1) whether the child is unlikely to be a victim of trafficking; (2) whether the child has no fear of returning to her country of origin; and (3) whether the child has the ability to make an independent decision to withdraw her application for admission into the United States. If the answer to all three questions is “yes,” then CBP can allow the unaccompanied child to withdraw her application for admission and immediately repatriate her. But if the answer to *any* of these questions is “no,” then CBP must transfer the child to the custody of ORR, and treat the child like any other unaccompanied child. This initial screening must take place within 48 hours of the child’s apprehension. If the results of the screening remain inconclusive after 48 hours, the child must be transferred to ORR custody and treated like other unaccompanied children. 8 U.S.C. § 1232(a)(4).

Troublingly, advocates have reported that CBP is failing to fulfill its statutory mandates to screen unaccompanied Mexican children and that they are still vulnerable to persecution, trafficking, and abuse. Among the reported problems are CBP’s lack of child-welfare expertise, its inadequate training and screening forms, and its failure to interview children “in a manner or in environments likely to elicit information that would indicate whether the minor is a potential victim of trafficking or abuse, and whether the child can and does voluntarily agree to return to Mexico.”⁵

Safeguards for Unaccompanied Children Under the Perez-Funez Injunction

Apart from the TVPRA, a longstanding court injunction in *Perez-Funez v. District Director*, 619 F. Supp. 656 (C.D. Cal. 1985), grants another layer of protection to unaccompanied immigrant children. The *Perez-Funez* litigation alleged that then-INS had a policy and practice of coercing children into accepting voluntary departure from the United States, thereby waiving their rights to a hearing and an opportunity to apply for relief.⁶ After trial, the court held that the government’s existing voluntary departure procedures violated the children’s due process rights, and interposed critical safeguards designed to minimize the risk of coercion. *Id.* at 669-70.

The *Perez-Funez* injunction, now implemented in regulations that apply to both DHS and EOIR, see 8 C.F.R. §§ 236.3(g)-(h), 1236.3(g)-(h), requires that unaccompanied children be both advised of their legal rights and guaranteed access to outside advice before voluntarily choosing to return to their countries of origin. Specifically, before the government can ask any unaccompanied child to voluntarily depart the United States or withdraw her application for

⁵ See *Children at the Border* at 2, 6-9 (2011); Ian Gordon, *4 Reasons Why Border Agents Shouldn’t Get to Decide Whether Child Migrants Can Stay in the US*, Mother Jones (July 1, 2014), available at <http://www.motherjones.com/politics/2014/06/unaccompanied-child-migrants-border-patrol-screening>

⁶ Voluntary departure permits the child to accept return to her country of origin, without resulting in an order of removal. See 8 U.S.C. § 1229c.

admission, the government must provide the child with (1) a written notice of rights; (2) a list of free legal service providers; and (3) access to telephones and notice that they may call a parent, close relative, friend, or attorney. Additionally, for unaccompanied children from noncontiguous countries (i.e. children not from Canada or Mexico), DHS must ensure that the child *in fact* communicates with a parent, adult relative, friend, or attorney. *Id.* §§ 236.3(g), 1236.3(g). If the child is under 14 years old, or is unable to understand the written notice of rights, the notice “shall be read and explained to the juvenile in a language he or she understands.” *Id.* §§ 236.3(h), 1236.3(h).

Accompanied Children & Proposals for Summary Removal Proceedings

A different set of standards may apply to children who are placed in removal proceedings with their family members or legal guardians. Although regular proceedings before an immigration judge are critical for ensuring a fair process, the Immigration and Nationality Act (“INA”) does not affirmatively require that accompanied children be provided with such hearings. Perhaps because of this, various proposals to subject families with children to summary or abbreviated removal procedures have begun to emerge. According to media reports, one [senior ICE official](#) has indicated that the Administration aims to process and remove certain children travelling with their families within 10 to 15 days of their arrival in the U.S. Because few details of the Administration’s plans have been publicly released, it remains unclear exactly what type of proceedings the Administration intends to use to process these families with children.

The INA already contains provisions for “expedited removal,” which allow DHS to remove certain noncitizens without hearings if they are inadmissible on certain grounds and are either arriving at the border, or are recently arrived and found within 100 miles of the border.⁷ The law mandates that if an individual subject to expedited removal expresses a fear of persecution or an intent to apply for asylum, she must be referred for a “credible fear interview” and interviewed by an asylum officer before she can be summarily removed.⁸ As noted above, unaccompanied children may not be removed without a hearing, but in the past DHS has subjected some children to expedited removal when they have been apprehended with their families.

Whether the mechanism is the existing statutory “expedited removal” procedure or a newly developed procedure, any proposal to rush these children and their families through abbreviated proceedings would raise a number of serious legal concerns, and increase the likelihood that individuals who face persecution or torture in their home countries will be erroneously deported. Returning children to dangerous conditions in their native countries would violate U.S. obligations under the United Nations Refugee Convention, the United Nations Convention

⁷ See 8 U.S.C. § 1225(b)(1); 69 Fed. Reg. 48877 (Aug. 11, 2004) (authorizing the application of expedited removal to noncitizens who have not been admitted or paroled and who are found within 100 air miles of the border and cannot demonstrate that they have been continuously physically present for 14 days).

⁸ 8 U.S.C. § 1225(b)(1)(B); 8 C.F.R. § 235.3(b)(4).

Against Torture, and other international human rights laws and principles.⁹ Many immigrants may be unable to secure immigration lawyers in such a compressed time frame. In addition, most immigrants fleeing for their lives are unlikely to be carrying all of the documentation necessary to support their asylum claims. These detained families with children would not have enough time to gather such evidence in abbreviated proceedings. Without counsel, these families are unlikely to understand what information is necessary to support their legal claims. In addition, to the extent the government plans to conduct any hearings telephonically, or via videoconference, such procedures could undermine the ability of immigration judges to make accurate credibility determinations.

With respect to expedited removal (i.e. removal without any hearing), even when the mandated statutory procedures are followed, removing noncitizens without giving them any opportunity to contest their removal before a judge or appeal the resulting removal order raises serious problems under the Constitution and international human rights law. Many noncitizens in expedited removal have substantial ties to the United States, and although it has not yet been established in case law, the ACLU's position is that at a minimum due process demands that they be provided with a meaningful opportunity to challenge their removal. In addition, the Suspension Clause¹⁰ requires that noncitizens facing removal have access to federal court review of the legal validity of their removal orders. *See INS v. St. Cyr*, 533 U.S. 289 (2001). Further, in practice the statutory protections for expedited removal are not always followed: advocates have documented numerous failures of immigration officers to comply with statutory mandates, denying noncitizens the ability to apply for asylum, ignoring expressions of fear of persecution, or coercing them into giving up their claims.¹¹ Finally, expedited removal is wholly inconsistent

⁹ *See* Convention relating to the Status of Refugees (1951 Refugee Convention), 189 U.N.T.S. 150, entered into force April 22, 1954; Protocol relating to the Status of Refugees (1967 Protocol), January 31, 1967, entered into force Oct. 4, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, ratified by the United States on October 21, 1994.

¹⁰ The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., art. I, § 9, cl. 2.

¹¹ *See, e.g.*, Human Rights First, *How to Protect Refugees and Prevent Abuse at the Border*, at 10-13, and Appendix C (June 2014), *available at* <http://www.humanrightsfirst.org/sites/default/files/Asylum%20on%20the%20Border%20-%20final%206-5-2014.pdf>; United States Commission on International Religious Freedom, *Report on Asylum Seekers in Expedited Removal* (2005), *available at* <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.

with the requirement in human rights law that noncitizens receive a meaningful hearing before a neutral arbiter before they are deported.¹²

To avoid violating its obligations under the Constitution and international law, the government must:

- Ensure that all children are provided with a meaningful hearing before an immigration judge, with the right to judicial review, before they are removed. The simplest way to achieve this is to provide all children with regular INA 240 proceedings, rather than expedited removal proceedings or other summary removal procedures;
- Ensure that all children are given sufficient time and ability to seek any forms of relief for which they are eligible;
- Ensure that all children are given sufficient time to obtain, and the opportunity to consult with, legal counsel.

DETENTION IN THE LEAST RESTRICTIVE AND MOST HUMANE SETTINGS POSSIBLE

If the government chooses to detain any child under the age of 18, it can only do so subject to certain rigorous legal standards. These standards ensure that children are detained in the least restrictive settings possible, and that the conditions of their detention are humane—a critical consideration when most DHS detention facilities are indistinguishable from jails and prisons. Here, two overlapping legal regimes are particularly important – the TVPRA, and the [Flores Settlement](#). As noted, the TVPRA specifically protects unaccompanied children, whereas the *Flores Settlement* reaches *all* children under the age of 18 in government custody, including those who are apprehended with their family members or legal guardians. This settlement remains in force today, and the ACLU previously invoked it to challenge inhumane and unlawful

¹² For more information, see American Civil Liberties Union, Written Statement Submitted to the Civil Society Consultation for the Universal Periodic Review of the United States of America Regarding Access to Justice in the U.S. Immigration System (April 1, 2014), *available at* <https://www.aclu.org/files/assets/140325%20UPR%20Access%20to%20Justice%20Final.pdf>. *See also, e.g.*, International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by the United States on June 8, 1992, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, arts. 13-14; American Convention on Human Rights (“Pact of San José, Costa Rica”), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm (*guaranteeing* each person “the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law”).

conditions at the T. Don Hutto Family Residential Facility in Taylor TX, via actions in federal district court.¹³

The government should detain children only rarely and as a last resort. Both the TVPRA and the *Flores* Settlement embody a strong policy in favor of releasing children from custodial settings into placements with family members or in the community. The TVPRA requires that unaccompanied children be “promptly” placed “in the least restrictive setting that is in the best interest of the child.” 8 U.S.C. § 1232(c)(2)(A). Similarly, the *Flores* Settlement mandates that the government “release a minor from its custody without unnecessary delay,” as long as detention is not required to ensure a child’s appearance at immigration court, or for safety reasons. *Flores* Settlement, ¶ 14. Taken together, these provisions demand that the government actively and continuously seek release of each child in custody, unless the child’s detention is necessary to secure her appearance in court or her safety. *See also* 8 C.F.R. § 236.3(b) (setting forth scheme for release of immigrants under 18 years old).

In addition, the *Flores* Settlement imposes certain minimum standards with respect to detention conditions for children. *Flores* Settlement, ¶ 12.A. Among other obligations, facilities that house children must be equipped with toilets and sinks and adequate temperature control and ventilation. The detained children must be provided with food, water, and medical assistance that is easily accessible in emergencies. Additionally, the government must adequately supervise any detention facilities to ensure that children are protected, and whenever possible, housed separately from unrelated adults.

The ACLU opposes any government initiative that seeks to detain entire families as a means of addressing this humanitarian crisis, in large part because the government has a poor track record of maintaining family detention facilities that comply with the law. As the ACLU previously stated in the *Hutto* litigation, keeping entire families in custody contravenes Congress’s intent to place children in the least restrictive settings possible, and with their family members.¹⁴ Family detention is not a viable means of effectuating this goal, and may result in detention conditions that violate both the TVPRA and the *Flores* Settlement.¹⁵

¹³ For more information on the *Hutto* litigation, see Case Summary in the ACLU’s Challenge to the Hutto Detention Center, <https://www.aclu.org/immigrants-rights/case-summary-aclus-challenge-hutto-detention-center>.

¹⁴ In addition, the ACLU Border Litigation Project, in conjunction with other organizations, has filed a complaint with DHS documenting numerous instances of abuse against children held in CBP custody. *See* ACLU, *Unaccompanied Immigrant Children Report Serious Abuse by U.S. Officials During Detention* (Jun. 11, 2014), <https://www.aclu.org/immigrants-rights/unaccompanied-immigrant-children-report-serious-abuse-us-officials-during>. These instances of mistreatment and harassment are further cause for serious concerns with the conditions in which the government detains immigrant children.

¹⁵ In addition to these protections, a court injunction in *Orantes-Hernandez v. Gonzales* (“*Orantes* Injunction”) also applies to these facilities. The *Orantes* Injunction protects all citizens and nationals of El Salvador who are eligible for political asylum and are in, have been, or will

To comply with applicable legal safeguards and ensure that children and families are detained in the most humane conditions possible, the government must:

- Reject the use of detention as an enforcement tool for reducing the flow of immigrants into the U.S.
- Ensure that children are promptly placed in the least restrictive settings possible and that detention is used only as a last resort;
- Reject the detention of entire families and use alternatives to detention, including release on recognizance, when necessary to secure appearance for immigration hearings or removal;
- Ensure that any facilities where children are detained comply with minimum standards under the *Flores* Settlement.

GUARANTEED LEGAL REPRESENTATION IN IMMIGRATION PROCEEDINGS

Appointing counsel for immigrants facing removal ensures fair processes consistent with constitutional and statutory mandates. All persons in removal proceedings must have “a reasonable opportunity” to present, examine, and object to evidence. 8 U.S.C. § 1229a(b)(4)(B); 8 C.F.R. § 1240.10(a)(4). In addition, all persons in removal proceedings have the right to be advised of the charges against them. *See* 8 U.S.C. § 1229(a); 8 C.F.R. § 239.1. As the immigration agency has long recognized, these provisions embody a noncitizen’s general due process right to a full and fair hearing of claims. *See Matter of Exilus*, 18 I & N Dec. 276 (BIA 1982); *see also Yamataya v. Fisher*, 189 U.S. 86, 99-100 (1903). In order to effectuate this constitutional and statutory mandate, individuals in removal proceedings, particularly those who may have valid claims for relief (such as asylum, withholding of removal, or protection under the Convention Against Torture) must have a meaningful opportunity to gather evidence and present their arguments to an immigration judge. Particularly when facing immigration proceedings subject to an expedited or accelerated timetable, individuals should have legal representation to ensure that their proceedings are full and fair.

These concerns are even more heightened for children facing deportation. Because of their age and lack of maturity, children cannot vindicate their right to a full and fair hearing without the aid of an attorney. As the Supreme Court has stated in addressing the right to appointed counsel in juvenile delinquency proceedings, a child “needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child

be in DHS custody. The injunction affords a variety of safeguards to Salvadoran asylum seekers, including setting minimum standards of detention, informing them of their rights to apply for relief, granting them access to legal counsel, prohibiting coercion and abuse by immigration officers, and forbidding their transfer outside the geographic area of their apprehension for seven days. For more information on the *Orantes* Injunction, see *Orantes-Hernandez v. Gonzales*, 504 F. Supp. 2d 825 (C.D. Cal. 2007), *aff’d sub nom. Orantes-Hernandez v. Holder*, 321 Fed. Appx. 625 (9th Cir. 2009). The ACLU is among the class counsel in *Orantes*.

‘requires the guiding hand of counsel at every step in the proceedings against him.’” *In re Gault*, 387 U.S. 1, 37 (1967) (quoting *Powell v. State of Alabama*, 287 U.S. 45, 69 (1932)). The need for legal counsel is just as great, if not greater, in the immigration context, where the laws are notoriously complex.

Moreover, the TVPRA itself evinces Congress’s intent that children have legal representation in their immigration proceedings. The TVPRA directs the government to provide access to counsel for every unaccompanied child, and requires ORR to “ensure, to the greatest extent practicable” that all unaccompanied children in its care “have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.” 8 U.S.C. § 1232(a)(5)(D)(iii), (c)(5).

Although the government has taken some steps toward ensuring legal representation for children in immigration proceedings, including EOIR’s recently-announced partnership with the [Corporation for National and Community Service](#) to fund a limited number of lawyers and legal support staff for unaccompanied children, children are regularly forced to appear in court without counsel and defend themselves against trained government prosecutors.

To comply with constitutional and other legal safeguards, the government must:

- Ensure that individuals with colorable claims for relief, such as asylum, withholding of removal, or protection under the Convention Against Torture, are not forced to endure accelerated immigration proceedings;
- Ensure that each and every child in removal proceedings is appointed legal representation in his or her immigration proceedings.

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