National Immigration Litigation Alliance
Immigrant justice through the courts

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CILA Children's Immigration Law Academy

Litigation for Unaccompanied Children: Updates and Foundational Cases

A webinar series presented by:
The ABA Children's Immigration Law Academy (CILA) and
The National Immigration Litigation Alliance (NILA)

Webinar 2 of 4, Written Materials

Tuesday, April 26, 2022

Cases reviewed:

W.A.O. v. Jaddou

No. 2:19-cv-11696 (D.N.J. final settlement approval granted Apr. 20, 2022) (establishing that DHS will not apply a policy of denying or delaying SIJ petitions from New Jersey on the basis that the relevant state court lacked authority to order reunification of an 18- to 21-year-old with a parent or guardian; providing remedies for individuals including currently unidentified potential class members)

Facts and Case History:

In April 2019, four individuals, whose special immigrant juvenile (SIJ) findings by a New Jersey state court (the New Jersey Family Part) were entered between their 18th and 21st birthdays and who subsequently submitted SIJS petitions to U.S. Citizenship and Immigration Services (USCIS), filed a class action lawsuit. The case challenged USCIS' policy of denying or delaying such SIJS petitions on the basis that the relevant New Jersey court did not have jurisdiction to order reunification with a parent or guardian at the time it issued the SIJ findings because of plaintiffs' ages. Like class actions filed in several other locations around the country, the plaintiffs challenged the USCIS policy, which it had begun to apply in 2018, as, inter alia, contrary to the immigration statutes, which require USCIS to defer to state courts on matters of state law in SIJ cases. *See* 8 U.S.C. § 1101(a)(27)(J).

The court granted plaintiffs' motions for class certification and for preliminary injunction, requiring USCIS to stop denying or delaying SIJ petitions on the basis that the New Jersey court lacked jurisdiction to make SIJ findings for 18- to 21-year-olds if New Jersey law provided for such jurisdiction.

Subsequently, USCIS adopted an Administrative Appeals Office decision clarifying that "USCIS does not require that the juvenile court had jurisdiction to place the juvenile in the custody of the unfit parent(s) in order to make a qualifying determination regarding the viability of parental reunification." *Matter of D-Y-S-C-*, Adopted Decision 2019-02 at 6 n.4 (AAO Oct. 11, 2019).

However, the change in policy did not resolve all issues in the case. Instead, the parties sought to identify class members who had been impacted by the policy, and USCIS adjudicated or re-adjudicated more than 700 petitions by potential class members. The parties then proposed a settlement agreement which the court granted final approval to on April 20, 2022.

Notable Holding and Rationale:

In the settlement agreement, defendants agreed not to delay, deny, question, or revoke SIJ petitions of individuals from New Jersey on the basis of the policy at issue in the case. The parties also set forth remedies for any potential class members that had not yet been identified, which will be available if they seek relief within six months of February 28, 2022. Additionally, the settlement provides for assistance to class members who are in removal proceedings while awaiting current priority dates, who reach their priority dates, or who receive approved SIJ petitions, including an agreement that defendants will join or not oppose motions to continue, place a case on the status docket, or administrative close; motions to terminate; or motions to reopen, respectively.

Practice Pointers:

- Practitioners who have clients who may benefit from the *W.A.O.* settlement should reach out to class counsel.

- Practitioners should be aware of similar decisions and agreements in other courts, including *J.L. v. Cissna*, 341 F. Supp. 3d 1048 (N.D. Cal. 2018) (granting preliminary injunction); *Moreno-Galvez v. Cuccinelli*, 492 F. Supp. 3d 1169 (W.D. Wash. 2020) (granting plaintiffs' motion for summary judgment); *A.O. v. Cuccinelli*, 457 F. Supp. 3d 777 (N.D. Cal. 2020) (granting preliminary injunction; class-wide settlement approved on Nov. 29, 2021); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350 (S.D.N.Y. 2019) (granting, inter alia, plaintiffs' motion for summary judgment).

Huisha-Huisha v. Mayorkas (Title 42 Case)

27 F. 4th 718 (D.C. Cir. 2022) *(holding that plaintiffs were likely to succeed on claim that they could not be expelled under Title 42 to a country in which it was likely they would be persecuted or tortured but reversing preliminary injunction on all other claims).*

Facts and Case History:

On behalf of a nationwide putative class of similarly situated individuals, six asylum-seeking families sued the Department of Homeland Security (DHS) and other government officials and entities over their expulsion from the United States. These expulsions were carried out under the Center for Disease Control and Prevention's (CDC) COVID-19 order adopted pursuant to 42 U.S.C. § 265. This provision authorizes the Department of Health and Human Services (of which the CDC is a component) to suspend the introduction of persons and property into the country to avert the spread of a communicable disease. The CDC's COVID-19 order suspended the entry of "covered" noncitizens—essentially, those without valid entry documents—into the United States. DHS's implementation of the order included the expulsion of individuals apprehended near the border.

The plaintiffs challenged the CDC order on several grounds, including that (1) § 265 authorized only the suspension of entries into the United States, not the expulsion of those in the country; (2) the expulsion of asylum seekers before they had a chance to apply for asylum violated 8 U.S.C. § 1158(a)(1); and (3) noncitizens could not be expelled to countries in which they faced a likelihood of persecution or torture. The district court certified a nationwide class and granted plaintiffs' motion for preliminary injunction on these claims. The defendants appealed the grant of a preliminary injunction.

Notable Holding and Rationale:

The D.C. Court of Appeals narrowed the district court's preliminary injunction, finding that the plaintiffs' demonstrated a likelihood of success on the merits—one requirement for a grant of a preliminary injunction—only with respect to the third claim.

With respect to the first claim, the court held that § 265 would be "rendered largely nugatory" if the government could not take action against a person who disregarded the order "and managed to set foot on U.S. soil." 27 F. 4th at 729. The court further found that, even though such individuals would be on U.S. soil and entitled to certain statutory protections, they may not have been "introduced" into the United States as that term is used in 42 U.S.C. § 265. *Id.*

The court also found that plaintiffs had not shown a likelihood of success on the merits of their second claim—that they could not be expelled without an opportunity to apply for asylum. Notably, the court stated that this issue presented "the closest question"—one that "deserves attention" from the district court when it considers the merits. 27 F. 4th at 730. At the preliminary injunction stage, however, the court found that the plaintiffs had not made a sufficient showing. Specifically, the court relied heavily on the discretionary nature of asylum, finding that the government had indicated its intent to exercise its discretion by foreclosing a grant of asylum to those covered by the CDC order. *Id.* at 731.

In contrast, the court relied on the mandatory nature of both the withholding of removal and Convention Against Torture statutes. Under these, defendants were foreclosed from expelling

persons to a country in which they faced a likelihood of persecution or torture. *Id*. at 731-32. For this reason, the court upheld this aspect of the preliminary injunction.

Texas v. Biden (Title 42 Case)

No. 4:21-cv-0579-P, -- F. Supp. 3d --, 2022 WL 658579 (N.D. Tex. Mar. 4, 2022) *(preliminarily enjoining the CDC's Title 42 Order exempting unaccompanied minors from the suspension of entry aspects of the COVID-19 Order)*

Facts and Case History:

In response to the coronavirus pandemic, the Center for Disease Control and Prevention (CDC) issued a series of orders pursuant to 42 U.S.C. § 265 which suspended the entry of "covered" noncitizens—generally those without valid entry documents—into the United States and allowed for the expulsion of those who were apprehended immediately after entry (the Title 42 process). The orders included a number of exceptions which were to be implemented on a case-by-case basis, such as, for example, a humanitarian exception. Beginning in February 2021, the CDC issued several amendments to these orders which categorically exempted unaccompanied children (UAC) from the Title 42 process. The State of Texas sued President Biden and various government agencies and sought a preliminary injunction, claiming, inter alia, that the exemption of UACs from the Title 42 process was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 701, et seq.

Notable Holding and Rationale:

The district court preliminarily enjoined the federal defendants from enforcing the categorical exemption of UACs from the Title 42 process pending completion of the lawsuit. It further indicated, however, that its order did not prevent DHS from exercising its discretion with respect to any individual.

The injunction was premised on the court's conclusion that the CDC's categorical exemption of UACs from the Title 42 process was arbitrary in that it was not the result of reasoned decision-making. First, the court noted that an agency is free to change its policy but must justify any change. Here, the court found that there were no facts in the record justifying the change from the earlier orders—which did not categorically exempt UACs. The court also found that, although the order exempting UACs addressed mitigation efforts by CBP designed to limit the spread of COVID-19 within its facilities, CDC failed to address the spread of the virus in the interior of the United States by UACs who were released from immigration custody. Further, the court faulted the CDC for not considering the reliance of Texas and local border communities on the earlier CDC orders, citing to the evidence that Texas presented regarding the financial and other impacts that noncitizens with COVID-19 had on local border communities.

For these reasons, the court determined that Texas was likely to prevail on the merits of its APA claim, thus satisfying the first prong of the standard for a preliminary injunction. It additionally held that the other three prongs of the test were met because (1) Texas faced a substantial threat of irreparable injury; (2) that the threatened injury if an injunction is denied outweighed any harm that would result if an injunction was granted; and (3) that an injunction would not disserve public interest.

Subsequent Developments

- After these decisions, the CDC announced the termination of the Title 42 process effective May 23, 2021. However, this week news outlets have reported that the Biden Administration is contemplating overriding the CDC termination order, in whole or in part. Thus, it is unclear whether and to what extent the entire process may change in May.
- The district court in *Texas v. Biden* rejected Texas' motion to amend its complaint to challenge the CDC's announced termination of the Title 42 process.
- Since then, however, 21 other states have sued the CDC and other federal agencies over the planned termination of the Title 42 process. *Mississippi v. CDC*, No. 6:2-cv-00885-RRS-CBW (W.D. La. amended complaint filed Apr. 14, 2022).

B.R. v. Garland

26 F. 4th 827 (9th Cir. 2022) (holding that DHS can cure improper service of a notice to appear, including service in violation of Flores-Chavez v. Ashcroft, 362 F.3d 1150 (9th Cir. 2004), absent a showing of prejudice).

Facts and Case History

When he was 16 years old, DHS placed petitioner in removal proceedings. He was detained and DHS purported to serve him with a notice to appear (NTA). However, upon his release, DHS did not serve his mother with a copy of the NTA. Petitioner attended initial removal hearings, but he was subsequently incarcerated on criminal charges and did not attend a later removal hearing, resulting in an *in absentia* removal order.

The immigration court reopened proceedings, and petitioner, now an adult, moved to terminate based on DHS' failure to serve a copy of the NTA on the adult to whom he had been released (his mother) after his release from immigration detention. Rather than doing so, DHS re-served the NTA on petitioner himself.

Petitioner also sought suppression of evidence, arguing that it was obtained using confidential juvenile records, and applied for deferral of removal under the Convention Against Torture.

The court denied petitioner's motions to terminate and suppress evidence and also denied his application for CAT deferral. The BIA affirmed, and petitioner filed a petition for review with the Ninth Circuit Court of Appeals.

Notable Holdings and Rationale

Although 8 C.F.R. § 103.8(c)(2)(ii) requires service on "the person with whom . . . the minor resides" and "whenever possible, . . . the near relative, guardian, committee, or friend[;]" only in cases of "a minor under 14 years of age," the Ninth Circuit has imposed additional service requirements in certain juvenile cases. In *Flores-Chavez v. Ashcroft*, 362 F.3d 1150, 1163 (9th Cir. 2004), the Court held that DHS regulations regarding the release of juveniles from immigration custody require service of the charging documents "to the adult to whom the juvenile is released from custody," even for 15- to 17-year-olds.

In this case, on panel rehearing, the Court held that a violation of the service requirements, including *Flores-Chavez* requirements, "can be cured if DHS later perfects service before substantive removal proceedings begin," absent a showing of prejudice from the improper service. 26 F.4th at 837. Where an individual has turned 18, cured service can be on that individual, rather than the adult who originally should have received service. *Id*. at 839.

However, the Court left open the question of whether such a service violation may, in certain circumstances, amount to "an egregious regulatory violation which works to prejudice [a noncitizen's] interests" with regard to 8 C.F.R. § 236.3—the regulation interpreted by *Flores-Chavez*. 26 F.4th at 840. Such a regulatory violation could warrant termination pursuant to *Sanchez v. Sessions*, 904 F.3d 643 (9th Cir. 2018). The Court remanded for the BIA to consider the argument in the first instance.

The Court also remanded for the BIA to consider petitioner's arguments regarding suppression of evidence which DHS alleged established alienage. Applying Ninth Circuit precedent holding that

the Fourth Amendment exclusionary rule applies in removal proceedings either where the agency "violates a regulation promulgated for the benefit of petitioners and that violation prejudices the petitioner's protected interests" or where an "agency egregiously violates a petitioner's Fourth Amendment rights." *Sanchez*, 904 F.3d at 64. The Court remanded so that the BIA could consider petitioner's argument that the evidence DHS produced was tainted by DHS' unlawful use of information from his confidential juvenile court record. 26 F.4th at 840-44.

Finally, the Court denied the petition for review in so far as it challenged the denial of petitioner's application for deferral of removal under CAT. *Id*. at 844-45.

Practice Pointers

- Absent proof of curing the service defect *before* issuance of the order, *Flores-Chavez* violations should remain a basis for motions to rescind in absentia orders in the Ninth Circuit.
    - Note that BIA does not apply the *Flores-Chavez*-specific service requirements outside of the Ninth Circuit and other courts have interpreted the regulation at issue not to require the additional service that case mandates. *See Matter of Cubor-Cruz*, 25 I&N Dec 470 (BIA 2011); *Llapa-Sinchi v. Mukasey*, 520 F.3d 897 (8th Cir. 2008); *Lopez-Dubon v. Holder*, 609 F.3d 642 (5th Cir. 2010).
    - Also note that, even in the Ninth Circuit, the *Flores-Chavez* requirements are not applied to children who were never placed in detention or who were not released from detention into the custody of an adult.
- However, termination based on *Flores-Chavez* requirements where a child attended in person hearings is likely to be more difficult—though not impossible in all cases. Look for prejudice or egregious violations of 8 C.F.R. § 236.3—i.e., violations that "involved conscience-shocking conduct, deprived the petitioner of fundamental rights, or prejudiced the petitioner." *Sanchez*, 904 F.3d at 655.

Romero v. Sec'y, DHS

20 F.4th 1374 (11th Cir. 2021) (petition for cert. pending, No. 21-1219) (holding that a noncitizen who departs the country during pending removal proceedings but before IJ issuance of an in absentia removal order has not self-executed the later-issued removal order)

Facts:

In January 1995, while in pending deportation proceedings, petitioner left the United States. In April 1995, after she had left the country, an immigration judge (IJ) issued an *in absentia* deportation order against her. Over a decade later, in 2016, petitioner entered the country without inspection and applied for a stay of deportation. Notably, DHS did not reinstate the prior order under 8 U.S.C. § 1231(a)(5) nor did petitioner file a motion to rescind the *in absentia* order pursuant to 8 U.S.C. § 1229a(b)(5)(C).

DHS granted the stay and issued an Order of Supervision (OSUP), which, among other conditions, required periodic check-ins and restricted travel. In 2019, DHS lifted the stay and indicated that it would deport petitioner based on the April 1995 in absentia order. Petitioner filed a habeas corpus petition claiming that she could not be deported based on the *in absentia* order because she already had executed it by departing in January 1995. The district court denied the petition and petitioner appealed to the Eleventh Circuit Court of Appeals.

Notable Holdings and Rationale:

An *in absentia* removal order issued against a person who already has left the United States is still operative, meaning DHS can deport the person under that order if they later return to the United States.

The court held that petitioner satisfied the "in custody" requirement of the civil habeas statute, 28 U.SC. § 2241. The court affirmed that a person who is not in "actual, physical custody" still can satisfy this requirement if there are significant restraints on the person's personal liberty. The court concluded that the conditions imposed by the OSUP were sufficiently restrictive to petitioner's liberty.

The court rejected the government's argument that the court lacked jurisdiction over the appeal because her claims should have been brought through a petition for review of a removal order pursuant to 8 U.S.C. § 1252(a)(5). The court found that petitioner's claim—i.e., that no operative removal order exists—was analogous to the claim that the court considered, and exercised its appellate jurisdiction over, in *Madu v. U.S. Att'y Gen.*, 470 F.3d 1362 (11th Cir. 2006).

Finally, the court considered whether petitioner had self-executed the April 1995 deportation order when she departed in January 1995. The court concluded that she did not self-execute the order and that, therefore, the order was still operative because no order existed at the time of her departure. In so holding, the court relied on 8 U.S.C. § 1101(g), which states that "any [noncitizen] ordered deported or removed . . . who has left the United States, shall be considered to have been deported or removed in pursuance of law."

Although the court acknowledged that § 1101(g)'s statutory language and the statutory context were ambiguous, the court determined that the statute had to be read sequentially, meaning the removal order must come before the departure. The court found that this reading was supported

by common sense considerations, the rule of lenity, and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Specifically, the court determined that its construction favored criminal defendants because it would limit prosecutions under 8 U.S.C. § 1326(a) (illegal reentry after deportation) to individuals who departed *after* issuance of a removal order. The court also found that its interpretation was reasonable because it is consistent with the "self-removal" regulation at 8 C.F.R. § 241.7.

The court noted that it was rejecting the positions of the Fifth and Seventh Circuit which interpreted § 1101(g) as providing that the removal order and departure are independent conditions, i.e., the timing of issuance of the order and departure need not be sequential. *See United States v. Ramirez-Carcamo*, 559 F.3d. 384 (5th Cir. 2009); *United States v. Sanchez*, 604 F.3d 356 (7th Cir. 201).

In light of this circuit split, petitioner has filed a petition for writ of certiorari to which the government must respond by May 9, 2022.

Practice Pointers:

- Clients contemplating departing the country while removal proceedings are pending should consult with counsel *before* departure as counsel may be able to help facilitate dismissal of proceedings or voluntary departure.
- DHS has discretion to subject clients who reenter the United States without inspection after a prior removal order either to a reinstatement order issued pursuant to 8 U.S.C. § 1231(a)(5) or removal proceedings pursuant to 8 U.S.C. § 1229a.
- Clients with in absentia removal orders should be screened to determine whether there is a basis for rescission of the order, *see* 8 U.S.C. § 1229a(b)(5)(C), reopening, *see* 8 U.S.C. § 1229(c)(7), or reconsideration, *see* 8 U.S.C § 1229a(c)(6).
- If DHS elects to issue a reinstatement order, be aware that the reinstatement statute purports to bar reopening of the prior order.
- Clients with in absentia removal orders who are subject to reinstatement and who have a basis for rescission *based on lack of notice* have arguments that the bar to reopening the prior order does not apply.
- All others who are subject to reinstatement, including those with arguments related to rescission based on exceptional circumstances, reopening, or reconsideration, likely will have their motions denied based on the reopening bar in § 1231(a)(5). Although arguments against application of the bar exist, several circuit courts have rejected them.

Jaco v. Garland

24 F.4th 395 (5th Cir. 2021)

CILA will be releasing a resource, "The Fifth Circuit's Opinion in *Jaco v. Garland* and Possible Arguments for Your Unaccompanied Child Client's Asylum Case," within the next few weeks.

Look out for an email or check CILA's website at https://cilacademy.org/resources/additional-resources/ Email cila@abacila.org if you need the password to access.