CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

AG BARR CANNOT IGNORE THE CONSTITUTION: THE AG'S LATEST ATTACK ON ASYLUM SEEKERS IN MATTER OF M-S-

Posted on April 23, 2019 by Cyrus Mehta

By: Sophia Genovese*

The Attorney General cannot selectively choose when to apply the rule of law. Yet when it comes to immigrants, the government feels emboldened to ignore the constitutional protections that are afforded to immigrants.

In his most recent self-certification, *Matter of M-S-,* 27 I&N Dec. 509 (A.G. 2019), the Attorney General unilaterally decided that asylum seekers who entered without inspection and who have been found to have a credible fear of persecution or torture are ineligible for release from detention on bond. Notably, in footnote 1, AG Barr proclaims "his opinion does not address whether detaining transferred aliens for the duration of their removal proceedings poses a constitutional problem, a question that Attorney General Sessions did not certify and that is the subject of ongoing litigation." 27 I&N Dec. at 509. In addition, because the ruling affects a "sizeable population" of asylum seekers, and also because it would have a significant impact on detention operations, the Attorney General ordered his ruling to take effect 90 days after his order, which falls on July 15, 2019. *Id.* at note 8.

Matter of M-S- overruled *Matter of X-K-, 23 I&N Dec. 731 (BIA 2005),* which held that an asylum seeker who is initially placed in expedited removal proceedings under INA § 235(b)(1)(A), but who then is placed in INA § 240 proceedings after a positive credible fear determination, is eligible for a bond hearing before an Immigration Judge. *Matter of X-K-* did not apply to "arriving aliens," i.e. those individuals who presented at a port of entry and claimed asylum; instead, it applied to the class of foreign nationals who have entered without inspection

and who have been present for fewer than 14 days within 100 miles of the border. In *Matter of X-K-*, the Board found that Immigration Judges have custody jurisdiction over foreign nationals in INA § 240 proceedings, "with specifically designated exceptions" as outlined in 8 C.F.R. § 1003.19(h)(2)(i). 23 I&N Dec. at 731. Because 8 C.F.R. § 1003.19(h)(2)(i) does not exclude asylum seekers who are placed in INA § 240 proceedings after a positive credible fear determination, the BIA concluded that Immigration Judges have jurisdiction over their bond proceedings.

The main bone of contention in *Matter of M-S-* is one of statutory interpretation. In *Matter of X-K-*, the Board explained that, "the Act provides for the mandatory detention of aliens who are being processed under section 235(b)(1) proceedings '*pending* a final determination of credible fear of persecution and, if found not to have such a fear, until removed.'" 23 I&N Dec. at 734. The BIA reasoned that because the regulations are silent on the bond eligibility of asylum seekers after there has been a final credible fear determination, authority over custody re-determinations vests with the Immigration Judge since the asylum seekers are placed INA § 240 proceedings and because they do not fit under any of the exceptions outlined in 8 C.F.R. § 1003.19(h)(2)(i).

The AG in *Matter of M-S-*, in contrast, looks to INA § 235(b)(1)(B)(ii), which states that, if it is determined that an asylum seeker possesses a credible fear of persecution "the alien shall be detained for further consideration of the application for asylum." 27 I&N Dec. at 510. The AG reasons that the plain language of the Act provides for the mandatory detention of asylum seekers, but that they remain eligible for release on humanitarian parole under INA § 212(d)(5)(A). *Id*.

Although the BIA does not opine on constitutional matters, it cannot issue unconstitutional rulings. The Attorney General's ruling in *Matter of M-S-* runs afoul of the Fifth Amendment of the US Constitution. Although asylum seekers will still be eligible for release on humanitarian parole under INA § 212(d)(5)(A), the standards are far different than bond eligibility where the asylum seeker must demonstrate that their parole is for urgent humanitarian reasons or significant public benefit. This is distinct from, and far more limited than, parole eligibility for arriving aliens under ICE Directive 11002.1, "Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture." As a reminder, under *Matter of Guerra, 24 I&N Dec. 37 (BIA 2006)*, the BIA interpreted INA § 236(a) to require an asylum seeker to establish that he or she does not present

a danger to others, is not a threat to the national security, and is not a flight risk in order to be released on bond. As a result of *Matter of M-S-*, far fewer asylum seekers will be able to obtain release from detention.

Padilla v. ICE

After then-Attorney General Sessions referred *Matter of M-S-* to himself, but before AG Barr rendered his decision, the United States District Court for the Western District of Washington issued a preliminary injunction in *Padilla v. US Immigration & Customs Enf't*, No. C18-928 MJP (W.D. Wash. Apr. 5, 2019). The Honorable Marsha J. Pechman ordered that by May 5, 2019, the EOIR must conduct bond hearings for class members (defined as all detained asylum seekers who entered the US without inspection, were initially placed in expedited removal proceedings, and who were determined to have a credible fear of persecution) within seven days, and place the burden of proof on DHS in those bond proceedings to demonstrate why they should not be released on bond, among other holdings. In so ordering injunctive relief, Judge Pechman found that *Padilla* and class members were likely to succeed on the merits, that they would suffer irreparable harm in the absence of the injunction, that a balance of equities favored the moving party, and that the injunction was in the public interest. *Id.* at 4.

Judge Pechman relied on *Zadvydas v. Davis*, 533 U.S. 678 (2001) and *Hernandez v. Sessions, 872 F.3d 976* (9th Cir. 2019) in analyzing *Padilla*'s likelihood of success on the merits. In particular, she noted that "it has been long recognized that immigration detainees have a constitutionally-protected interest in their freedom" and that "freedom from imprisonment is at the 'core of the liberty protected by the Due Process Clause.'" *Padilla* at 6. Judge Pechman rejected the government's arguments that the class was not entitled to due process under *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206, 212 (1953), finding that Shaughnessy only applied to "excludable" immigrants. *Id*. Rather, she relied on *United States v. Raya-Vaca*, 771 F.3d 1995 (9th Cir. 2014) and *Zadvydas* in finding that "once an individual has entered the country, he is entitled to the protection of the Due Process Clause including their right to be free from indeterminate civil detention." *Padilla* at 7.

Where Do We Go From Here?

Going forward, practitioners should first keep in mind the effective dates of both *Padilla v. ICE* and *Matter of M-S-.* The *Padilla* injunction takes effect on May

5, 2019, and accordingly, practitioners should fully argue their bond motions under such authority. *Matter of M-S-* does not take effect until July 15, 2019. However, practitioners should be prepared to remind Immigration Judges that basing their bond denials on *Matter of M-S-*, or 'the spirit of *Matter of M-S-*,' is inappropriate. Indeed, several practitioners have already reported that Immigration Judges have cited to *Matter of M-S-* as reason for bond denial, despite the fact that it would have been appropriate for the IJs to find that they do not have jurisdiction over such motions in light of the decision.

Second, even after July 15th (if there has not already been an emergency stay of the implementation of *Matter of M-S-* by then), practitioners should argue that *Padilla* supersedes *Matter of M-S-*. The Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984) held that where there is an ambiguity in the law, courts should generally defer to the decisions of an executive agency charged with administering it. In so doing, courts must interpret the statute and the intent of Congress before engaging in deference. In *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005), the Supreme Court held that a prior court's construction of a statute that is in conflict with an agency's ruling can only supersede the agency's ruling if the statute in question is unambiguous. Additionally, under *Murray v. Schooner Charming Betsy* 6 U.S. 64 (1804), the Supreme Court held that statutes should be construed where possible to avoid conflict with international law.

Practitioners should seek to explain that *Padilla* is a nationwide injunction, and accordingly has greater judicial weight than a BIA case where this situation is distinguishable from *Brand X*. Moreover, in *Matter of X-K-*, although the BIA believed that there was a regulatory gap in jurisdiction over custody redetermination, it found that there was legislative history that suggested Immigration Judges do indeed have authority over bond proceedings. 23 I&N Dec. at 734; *see also* H.R. Conf. Rep. No. 104-828, at 209 (1996). One may also argue that INA § 235(b)(1)(A)(iii) unambiguously does not apply to asylum seekers who are not arriving aliens, as it refers to "certain other aliens," and once they are placed in INA § 240 proceedings, they should eligible for bond. Furthermore, under *Charming Betsy*, one can argue that the detention of asylum seekers in the *Padilla* class runs afoul of international law, and deference to *Matter of M-S-* should not be given. *See, e.g.*, Article 31 of the 1951 Refugee Convention ("The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees…"); Articles 3 and 9 if Universal

Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights (dealing with the fundamental rights to liberty). Practitioners should continue to ponder and challenge *Chevron* and even *Skidmore* deference to the Attorney General's self-certified cases. In so doing, they may find the late Supreme Court Justice Antonin Scalia's reasoning in his concurring opinion for *Crandon v. United States*, a criminal case, to be instructive:

> e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference to err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent Thus, to give persuasive effect to the Government's expansive advice-giving interpretation would the doctrine of lenity with a doctrine of severity.

494 U.S. 152, 177-788 (1990).

Lastly, practitioners should continue to argue in their bond motions (and subsequent appeals) that *Matter of M-S-* violates the Fifth Amendment. Specifically, practitioners can argue that due process requires "adequate procedural protections" to ensure that the government's justification for physical confinement "outweighs the individual's constitutionally protected interest in avoiding physical restraint." *Zadvydas*, 533 U.S. at 690–91; *see also, Rodriguez v. Hayes*, 591 F.3d 1105 (9th Cir. 2010). Practitioners should also raise due process concerns where immigration detention has proven to be a major barrier to access to counsel, and where medical and mental healthcare in detention are subpar, which can have a substantial impact on one's ability to prevail in their immigration proceedings (note, though, that practitioners may also want to seek humanitarian parole if their clients do have any sort of medical hardship in addition to seeking release on bond). Practitioners should be prepared to defend against the government's assertions that *Jennings v. Rodriguez*, 583 U.S. __ (2018) allows for the indefinite detention of asylum seekers and that they are not eligible for release. Practitioners may wish to point out that *Jennings v. Rodriguez* is actually on remand for the Ninth Circuit to consider the plaintiff's constitutional challenge to indefinite detention, which the Supreme Court did not address, and may also wish to point out that the case deals with a separate class of foreign nationals.

There is no shortage of battles to fight under Trump's regime. However, practitioners should continue to come together and zealously fight these egregious and unlawful policies. Practitioners are encouraged to check with their local immigration law chapters and litigious nonprofits to ensure that each and every one of our clients is advocated for. If we have learned anything over the past several years, it is that immigration advocates, backed by the power of the courts, will continue to uphold the law by ensuring that we provide safety and refuge to those fleeing persecution.

**Guest author Sophia Genovese is a Direct Services Attorney for the Southeast Immigrant Freedom Initiative (SIFI), a project of the Southern Poverty Law Center. Sophia works exclusively with immigrants and asylum seekers detained at the Irwin County Detention Center in rural Georgia. There, she represents immigrants in their bond and parole proceedings, as well as in their merits cases. Sophia previously worked as an Associate at Cyrus D. Mehta & Partners PLLC, where she gained critical insights into immigration law.*