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"THE PROCESS BY WHICH REMOVABILITY WILL BE DETERMINED": HOW THE RECENT DISTRICT COURT DECISION ORDERING THE REINSTATEMENT OF MPP CONTRADICTS ITSELF

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On Friday, August 13, U.S. District Judge Matthew J. Kacsmaryk of the U.S. District Court for the Northern District of Texas issued an Opinion and Order ruling in favor of the states of Texas and Missouri in a lawsuit that they had brought against the Biden Administration, seeking to force the Administration to reinstate the so-called "Migrant Protection Protocols" (MPP) created by the Trump Administration. Human Rights First, among others, had previously observed that MPP was more aptly described as Migrant Persecution Protocols; I will use only the initials from this point on, since they can apply either way.

The gist of MPP was the return of asylum applicants to Mexico, pursuant to 8 U.S.C. § 1225(b)(2)(C), while their applications were pending. As the American Immigration Council explained, many applicants were placed in grave danger in Mexico, and many were unable to return to the United States for their hearings at the appointed time. Upon taking office, the Biden Administration suspended new enrollments into the program on January 20, 2021, and terminated the program on June 1. Texas and Missouri sued to overturn that decision.

The Opinion and Order, the effect of which was stayed for seven days to allow an emergency appeal, held that the termination of MPP violated the Administrative Procedure Act and 8 U.S.C. § 1225. Judge Kacsmaryk therefore vacated the June 1 memorandum terminating MPP, and ordered the government

> *to enforce and implement MPP in good faith until such a time as it has been lawfully rescinded in compliance with the APA and until such a time*

> *as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1255 without releasing any aliens because of a lack of detention resources.*

Opinion and Order at p. 52, ¶ 3.

There are a great many problems with the reasoning supporting the Opinion and Order, which I am sure will be elucidated in the coming days by others. Rather than seeking to give a comprehensive account of everything wrong with the Opinion and Order, however, I want to focus here on one particular issue: assuming that it is meant to have significant practical effect, the Opinion and Order is internally contradictory. While it is not completely clear what exactly the government is being ordered to do, the only way for the answer not to be, "almost nothing", is for various statements in the Opinion and Order to be incorrect.

To see the problem, it is necessary to look at the text and structure of 8 U.S.C. § 1225, one of the two statutes that Judge Kacsmaryk held the government to be violating by terminating MPP. In particular, the relevant section is 8 U.S.C. § 1225(b), which divides applicants for admission into two groups, those processed under 8 U.S.C. § 1225(b)(1) and those processed under 8 U.S.C. § 1225(b)(2):

> ***(b) Inspection of applicants for admission***
>
> ***(1) Inspection of aliens arriving in the United States and certain other aliens who have not been admitted or paroled***
>
> ***(A) Screening***
>
> ***(i) In general***
>
> *If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title, the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution.*
>
> ***(ii) Claims for asylum***

> *If an immigration officer determines that an alien (other than an alien described in subparagraph (F)) who is arriving in the United States or is described in clause (iii) is inadmissible under section 1182(a)(6)(C) or 1182(a)(7) of this title and the alien indicates either an intention to apply for asylum under section 1158 of this title or a fear of persecution, the officer shall refer the alien for an interview by an asylum officer under subparagraph (B).*
>
> ***(iii) Application to certain other aliens***
>
> ***(I) In general***
>
> *The Attorney General may apply clauses (i) and (ii) of this subparagraph to any or all aliens described in subclause (II) as designated by the Attorney General. Such designation shall be in the sole and unreviewable discretion of the Attorney General and may be modified at any time.*
>
> ***(II) Aliens described***
>
> *An alien described in this clause is an alien who is not described in subparagraph (F), who has not been admitted or paroled into the United States, and who has not affirmatively shown, to the satisfaction of an immigration officer, that the alien has been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility under this subparagraph.*
>
> ***(B) Asylum interviews***
>
> ***(i) Conduct by asylum officers***
>
> *An asylum officer shall conduct interviews of aliens referred under subparagraph (A)(ii), either at a port of entry or at such other place designated by the Attorney General.*
>
> ***(ii) Referral of certain aliens***
>
> *If the officer determines at the time of the interview that an alien has a credible fear of persecution (within the meaning of clause (v)), the alien shall be detained for further consideration of the application for asylum.*
>
> ***(iii) Removal without further review if no credible fear of persecution***
>
> ***(I) In general***

> *Subject to subclause (III), if the officer determines that an alien does not have a credible fear of persecution, the officer shall order the alien removed from the United States without further hearing or review.*
>
> ***(II) Record of determination***
>
> *The officer shall prepare a written record of a determination under subclause (I). Such record shall include a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in the light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's interview notes shall be attached to the written summary.*
>
> ***(III) Review of determination***
>
> *The Attorney General shall provide by regulation and upon the alien's request for prompt review by an immigration judge of a determination under subclause (I) that the alien does not have a credible fear of persecution. Such review shall include an opportunity for the alien to be heard and questioned by the immigration judge, either in person or by telephonic or video connection. Review shall be concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no case later than 7 days after the date of the determination under subclause (I).*
>
> ***(IV) Mandatory detention***
>
> *Any alien subject to the procedures under this clause shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.*
>
> ***(iv) Information about interviews***
>
> *The Attorney General shall provide information concerning the asylum interview described in this subparagraph to aliens who may be eligible. An alien who is eligible for such interview may consult with a person or persons of the alien's choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General. Such consultation shall be at no expense to the Government and shall not unreasonably delay the process.*
>
> ***(v) "Credible fear of persecution" defined***

> *For purposes of this subparagraph, the term "credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 1158 of this title.*
>
> ***(C) Limitation on administrative review***
>
> *Except as provided in subparagraph (B)(iii)(III), a removal order entered in accordance with subparagraph (A)(i) or (B)(iii)(I) is not subject to administrative appeal, except that the Attorney General shall provide by regulation for prompt review of such an order under subparagraph (A)(i) against an alien who claims under oath, or as permitted under penalty of perjury under section 1746 of title 28, after having been warned of the penalties for falsely making such claim under such conditions, to have been lawfully admitted for permanent residence, to have been admitted as a refugee under section 1157 of this title, or to have been granted asylum under section 1158 of this title.*
>
> ***(D) Limit on collateral attacks***
>
> *In any action brought against an alien under section 1325(a) of this title or section 1326 of this title, the court shall not have jurisdiction to hear any claim attacking the validity of an order of removal entered under subparagraph (A)(i) or (B)(iii).*
>
> ***(E) "Asylum officer" defined***
>
> *As used in this paragraph, the term "asylum officer" means an immigration officer who-*
>
> *(i) has had professional training in country conditions, asylum law, and interview techniques comparable to that provided to full-time adjudicators of applications under section 1158 of this title, and*
>
> *(ii) is supervised by an officer who meets the condition described in clause (i) and has had substantial experience adjudicating asylum applications.*
>
> ***(F) Exception***
>
> *Subparagraph (A) shall not apply to an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft*

> *at a port of entry.*
>
> ***(G) Commonwealth of the Northern Mariana Islands***
>
> *Nothing in this subsection shall be construed to authorize or require any person described in section 1158(e) of this title to be permitted to apply for asylum under section 1158 of this title at any time before January 1, 2014.*
>
> ***(2) Inspection of other aliens***
>
> ***(A) In general***
>
> *Subject to subparagraphs (B) and (C), in the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title.*
>
> ***(B) Exception***
>
> *Subparagraph (A) shall not apply to an alien-*
>
> *(i) who is a crewman,*
>
> *(ii) to whom paragraph (1) applies, or*
>
> *(iii) who is a stowaway.*
>
> ***(C) Treatment of aliens arriving from contiguous territory***
>
> *In the case of an alien described in subparagraph (A) who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a proceeding under section 1229a of this title.*

8 U.S.C. § 1225(b).

The process described in 8 U.S.C. § 1225(b)(1), applicable to applicants for admission who are inadmissible under section 1182(a)(6)(C) or 1182(a)(7), is known as expedited removal. Such applicants for admission are given the opportunity to establish that they have a credible fear of persecution, but are otherwise removed without proceedings before an immigration judge.

Applicants for admission under 8 U.S.C. § 1225(b)(2), on the other hand, are, with limited exceptions for crewmen and stowaways, to be placed into removal proceedings before an immigration judge under 8 U.S.C. § 1229a, otherwise known as INA § 240.

The BIA held in *Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520 (BIA 2011), that DHS has prosecutorial discretion to place people into removal proceedings under INA § 240 even if they could also be placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1). For roughly a decade, therefore, and well before MPP was invented, the decision of whether to place an applicant for admission into expedited removal proceedings has been one for DHS to make.

The authority for MPP, as noted above, is 8 U.S.C. § 1225(b)(2)(C). This authority applies only to those who otherwise fall under 8 U.S.C. § 1225(b)(2). It does not apply to anyone subjected to expedited removal under 8 U.S.C. § 1225(b)(1). This is why all those placed in MPP were issued Notices to Appear and put into removal proceedings under INA § 240, otherwise known as 8 U.S.C. § 1229a: such proceedings were necessary in order for them to fall under 8 U.S.C. § 1225(b)(2). There has been dispute over whether DHS can, under the statute, permissibly treat asylum applicants in this way, but there does not appear to be any dispute that if asylum applicants can be returned to Mexico under 8 U.S.C. § 1225(b)(2)(C), it must be because they have been placed in INA § 240 removal proceedings pursuant to 8 U.S.C. § 1225(b)(2). (Under current regulations, those applicants who establish credible fear during expedited removal proceedings under 8 U.S.C. § 1225(b)(1) are also ultimately placed into INA § 240 removal proceedings, but the Administration that designed MPP did not think this an inevitable feature of the statutory structure, instead attempting to promulgate a rule that would have placed such applicants in asylum-only proceedings.)

The question, then, is what, if anything, Judge Kacsmaryk's Opinion and Order has to say about the initial decision whether to place a particular applicant for admission into expedited removal proceedings, under 8 U.S.C. § 1225(b)(1), or directly into 8 U.S.C. § 1229a removal proceedings, under 8 U.S.C. § 1225(b)(2). Logically, there are two possibilities. Either the Opinion and Order is meant to affect that decision, requiring it to be made "in good faith" under the auspices of the MPP program that the Opinion and Order sought to preserve, or it is not meant to affect that decision at all.

Taking the latter possibility first, if the Opinion and Order is not meant to affect the decision whether to place an applicant for admission into expedited removal proceedings under 8 U.S.C. § 1225(b)(1), then it would seem to have very little practical effect. If the government is just as free to place anyone into expedited removal proceedings under 8 U.S.C. § 1225(b)(1) as it was before the Opinion and Order was issued, then the Opinion and Order will only apply to those applicants whom the government independently decides to place straight into § 1229a removal proceedings under 8 U.S.C. § 1225(b)(2). Only those people would be properly subject to 8 U.S.C. § 1225(b)(2)(C), the underlying authority for the MPP. But if the government is not constrained by the Opinion and Order in making the decision whether to follow the § 1225(b)(1) track or the § 1225(b)(2) track, then there may be few people processed under § 1225(b)(2) at all. Perhaps the only applicants who will be so processed are those who cannot be subjected to expedited removal proceedings, such as those who are not inadmissible under 8 U.S.C. § 1182(a)(6)(C) (which covers fraud and false claims to U.S. citizenship), or 8 U.S.C. § 1182(a)(7) (which covers those without proper documents), but are thought to be inadmissible on some other basis—say, Lawful Permanent Residents with certain criminal convictions thought to render them inadmissible under 8 U.S.C. § 1182(a)(2). The effect of the Opinion and Order might then be largely academic, although still problematic in a limited number of cases.

One would think this probably was not what Judge Kacsmaryk had in mind. If so, however, then he must have meant for the Opinion and Order to have some impact on the decision whether or not to place particular applicants for admission into § 1225(b)(1) expedited removal proceedings, as opposed to processing them under § 1225(b)(2). The problem is that this would contradict several statements made in the Opinion and Order, statements which provided critical underpinnings for Judge Kacsmaryk's determination that he had the authority to issue the Opinion and Order in the first place.

First, in addressing why the jurisdictional bar of 8 U.S.C. § 1252(b)(9) purportedly does not preclude the exercise of jurisdiction over this suit, the Opinion and Order says:

> *42. Section 1252(b)(9) states: "Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought*

> *to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this Section." (emphasis added). This Section functions as a limit on where aliens can seek judicial review of their immigration proceedings.*
>
> *43. But the Supreme Court has recently stated: "As we have said before, § 1252(b)(9) does not present a jurisdictional bar where those bringing suit are not asking for review of an order of removal, the decision to seek removal, or the process by which removability will be determined." Regents , 140 S. Ct. 1907 (quoting Jennings v. Rodriguez, 138 S. Ct. 830, 841, 875–76 (2018) (plurality opinion) (internal marks omitted)). "And it is certainly not a bar where, as here, the parties are not challenging any removal proceedings." Id.*

Opinion and Order at 29.

If the Opinion and Order means to exert control over the determination whether applicants for admission should be placed in expedited removal proceedings under 8 U.S.C. § 1225(b)(1) or processed under 8 U.S.C. § 1225(b)(2) so that they can be subjected to MPP, however, then it makes no sense to say that "those bringing suit are not asking for review of . . . the decision to seek removal, or the process by which removability will be determined." They very much are. The states bringing suit, on this interpretation, are asking for review of the decision to place certain applicants for admission in expedited removal proceedings, where removability will be determined under 8 U.S.C. § 1225(b)(1) and they cannot be returned to Mexico while their cases are pending, as opposed to placing those applicants in immediate § 1229a removal proceedings under 8 U.S.C. § 1225(b)(2), so that the provisions of 8 U.S.C. § 1225(b)(2)(C) can apply and the applicants can be returned to Mexico under MPP. In this respect, the case is not like the challenge to the recission of Deferred Action for Childhood Arrivals (DACA) in *Regents*, which did not implicate a decision to seek removal or the process by which removability would be determined, given that the DACA recission did not involve commencement of removal proceedings against anyone. A broad interpretation of the Opinion and Order's mandate that MPP be implemented would necessarily involve the commencement of a specific type of removal proceedings, under § 1225(b)(2) and § 1229a, as opposed to the commencement of proceedings under § 1225(b)(1).

This is not the only such contradiction in the Opinion and Order. Later, addressing why the decision to terminate MPP is not "committed to agency discretion" and thus unreviewable, the Opinion and Order states:

> *Moreover, the MPP program is not about enforcement proceedings at all. Any alien eligible for MPP has already been placed into enforcement proceedings under Section 1229a. The only question MPP answers is where the alien will be while the federal government pursues removal — in the United States or in Mexico.*

Opinion and Order at 32. That is true if, and only if, the Opinion and Order does not mean to have any impact on the initial decision whether to place particular applicants for admission into expedited removal proceedings under 8 U.S.C. § 1225(b)(1), as opposed to regular removal proceedings under 8 U.S.C. § 1229a by way of 8 U.S.C. § 1225(b)(2). But in that case, as discussed above, the Opinion and Order would not accomplish what it seems intended to accomplish.

As a crowning touch, the Opinion and Order says near the end: "Nothing in this injunction requires DHS to take any immigration or removal action nor withhold its statutory discretion towards any individual that it would not otherwise take." Opinion and Order at 53. Again, it is not entirely clear what this means. But if DHS is truly not required to "take any immigration or removal action . . . that it would not otherwise take", then it cannot be compelled to operate the MPP, because a necessary predicate of the MPP is the action of placing applicants for admission into immediate § 1229a removal proceedings under 8 U.S.C. § 1225(b)(2) rather than placing them into expedited removal under § 1225(b)(1).

At bottom, the problem here may be that like the MPP itself, the Opinion and Order makes background assumptions that are not supportable when examined more closely. Like the MPP, the Opinion and Order seems superficially sensible when examined from a certain perspective. But like the MPP, the seeming logic of the Opinion and Order does not withstand closer scrutiny.