



PRACTICE ALERT ON *FLORES V. SESSIONS*

Ninth Circuit Holds that All Detained Children Have the Right to a Bond Hearing

By Rachel Prandini & Alison Kamhi

On July 5, 2017, the Ninth Circuit issued a landmark holding in *Flores v. Sessions*,¹ confirming that all detained immigrant youth have a right to a “bond hearing” before an immigration judge. The Ninth Circuit held that intervening federal legislation, including the Homeland Security Act (HSA) and the Trafficking Victims Protection Reauthorization Act (TVPRA), did not modify the *Flores Settlement Agreement*.² The *Flores Settlement Agreement* is a 1997 settlement between the federal government and the plaintiff class of detained children establishing a “nationwide policy for the detention, release, and treatment of minors in the custody of the [former Immigration and Nationality Service] INS.”³ In particular, the Ninth Circuit held that Paragraph 24A of the *Flores Settlement Agreement*, which guarantees all minors in deportation proceedings a bond redetermination hearing before an immigration judge, remains in effect despite changes to the statutory scheme governing the detention and release of unaccompanied minors (UC). Although the HSA and TVPRA assigned custody of detained UCs to the Office of Refugee Resettlement (ORR), the Ninth Circuit found that the plain text of neither the HSA nor the TVPRA terminated UCs’ right to a bond hearing, and further held that the statutory scheme did not give ORR *exclusive* control over the detention of children, but rather left room for immigration judges to conduct bond hearings. The Court also found that this reading was supported by the intent of the HSA and TVPRA, both passed to better protect the uniquely vulnerable population of unaccompanied children. Accordingly, pursuant to *Flores v. Sessions*, all minors nationwide in immigration detention – including “unaccompanied children” in the custody of ORR – have the right to a bond hearing. Per *Flores v. Sessions*, this is a right that must be afforded unless affirmatively waived.⁴

I. Why was *Flores v. Sessions* Necessary?

Currently, ORR, a division of the U.S. Department of Health and Human Services, administers the immigration detention system for UCs and is charged with making care and placement decisions for UCs. This is a change in the law that was made by the HSA and amended by the TVPRA. (Previously, UCs were detained by the INS.) The government was using this change in law as a justification for not permitting detained UCs to seek bond redetermination hearings, arguing that Paragraph 24A was no longer in effect as to UCs given that ORR is now charged with making decisions about their placement and release.

Without the rights afforded in the context of a bond hearing, detained children were left to rely upon an internal procedure within ORR to challenge their detention. The process outlined by ORR is significantly more opaque than what is provided through a bond hearing and lacks basic procedural protections, such as the right to present evidence and examine the evidence being used to justify continued detention.⁵

Accordingly, counsel for the plaintiff class in *Flores* moved to enforce the *Flores Settlement Agreement* and require that the government allow bond redetermination hearings for all youth.

II. What Practical Impact Will *Flores v. Sessions* Have for Detained Children?

Detained children now very clearly have the right to request a bond hearing before an immigration judge (IJ). ORR has created a form, available on its website, that children may use to request a bond hearing.⁶

In the context of unaccompanied minors, this is an important right, but a limited one. This is because these proceedings do not provide UCs the same rights that are ordinarily available through a bond hearing. Namely, a favorable finding in a bond hearing for a UC does not necessarily entitle the minor to release. ORR maintains the responsibility to ensure that there is a safe and secure placement to which the child can be released. In other words, even if an IJ finds that a child does not pose a flight risk and is not a danger to the community, the child still might not be released unless or until ORR can ensure that they have a safe and suitable placement to whom they can release the child (e.g., a parent, relative, or adult friend who has been vetted to serve as the child's "sponsor"). An important exception to this is when ORR has already approved a sponsor but has not released the child due to their determination that the child is dangerous. In this case, unless the IJ sustains a finding of dangerousness in the bond hearing, the youth must be released by ORR where that agency has already identified an approved sponsor.

Bond hearings for detained UCs may not be necessary in all cases. For example, for children in less secure detention settings whom ORR has determined not to be a danger, a bond hearing may not be necessary, as ORR may follow its normal reunification process to release the child to a sponsor. Bond hearings for UCs may be most necessary for children who have a suitable sponsor identified to whom they can be released, but whom ORR is failing to release because of a determination that the child is a danger to the community, as discussed above.

Despite these limitations, bond hearings still promise to provide important protections to detained UCs. First, they provide the child with meaningful rights, including:⁷

- the right to be represented by counsel;
- the right to have detention assessed by an independent IJ, outside of the ORR system;
- the right to present evidence;
- the right to examine and rebut the government's evidence;
- the right to build a record regarding their custody.

Second, for children in secure detention (the highest level of security for UC detention), the bond hearing may provide them the opportunity to contest the basis for their level of confinement – their alleged risk to themselves or others or commission of a criminal offense.⁸ This is incredibly important as children in secure facilities often languish in this high level of detention without an opportunity to review the government's evidence against them or rebut it in a meaningful way.

Third, as discussed above, bond hearings may entitle a child to release if ORR has already approved the child's sponsor but has not released the child due to their determination that the child is a danger to self or others, and the IJ subsequently determines that the child is *not* a danger.

Given the peculiarities of bond hearings for detained UCs, it remains to be seen how they will play out in practice. Some advocates are working to suggest best practices to the Executive Office for Immigration Review's (EOIR) Assistant Chief Immigration Judge for Vulnerable Populations. Already, we have seen conflicting interpretations of the Ninth Circuit's opinion. ORR published guidance on its website about the right to a bond hearing for detained UCs following the Ninth Circuit's decision in *Flores v. Sessions*; however, ORR's policies seem to be in flux and many open questions remain.⁹ For example, ORR's guidance indicates that an IJ cannot rule on a UC's placement while in ORR custody, which runs directly contrary to the Ninth Circuit's indication that a child in secure detention could use the bond hearing as an opportunity to challenge the basis of their detention in a secure facility.¹⁰ Please check the ILRC's website and consult local practitioners in your area for updates on the implementation of this decision.

III. What Do Attorneys Representing Detained Children Need to Know about *Flores v. Sessions*?

The right to a bond hearing pursuant to the *Flores Settlement Agreement* is not tied to a specific statutory provision, such as INA § 236(a). This means that the standards for a UC bond hearing have not been clearly spelled out in the law. As a result, advocates have an important opportunity to advocate for especially protective standards for detained UCs seeking a bond hearing. These may include:

- Arguing that the government bears 1) the burden of production (producing the information ORR has relied upon to make its decision not to release the child, including a full, unredacted copy of the ORR case file), as well as 2) the burden of proof to demonstrate that the child poses a danger or is a flight risk.¹¹ This is in line with the Ninth Circuit's view that these hearings "compel the agency to provide its justifications and specific legal grounds for holding a given minor."¹² It is also consistent with the *Flores Settlement Agreement's* requirement that the government place detained children in the "least restrictive setting appropriate to the minor's age and special needs," and its presumption of a general policy favoring release.¹³
- Arguing that the government must demonstrate that the child is a danger to the community or flight risk by clear and convincing evidence.¹⁴
- Arguing that bond proceedings for UCs should be recorded.¹⁵ If advocates are not successful in convincing IJs that these proceedings should be recorded (most bond hearings for adults are not recorded), it is incredibly important to create a strong written record through declarations and other written evidence.
- Arguing that children should have the right to automatic, recurring bond hearings if they remain detained long-term. This would be a departure from the adult context, where an individual is generally required to show a material change in circumstances to receive a new bond hearing.¹⁶ Nevertheless, such a policy is merited given the special vulnerabilities of children and the *Flores Settlement Agreement's* policy favoring release.
- Arguing that bond hearings should be scheduled at least as quickly as they are set for adult detainees.
- As a child's juvenile record may play a role in ORR's and/or the immigration judge's determination that the child poses a danger, advocates are also encouraged to bear in mind that juvenile records and information are confidential in many states, and should be suppressed unless the government followed the proper procedures under state law to obtain this information.¹⁷ Further, in some states, the government is not allowed to introduce evidence of dismissed charges in juvenile proceedings and a similar rule should apply here.¹⁸
- If a detained UC seeks a bond hearing and achieves a favorable outcome, advocates are encouraged to argue that ORR should defer to the decision of an IJ regarding whether the child is a danger to self or others or presents a flight risk. ORR's newly released guidance states that "[a]n immigration judge's decision that the unaccompanied alien child is not a danger to the community supersedes an ORR determination on that question, unless the immigration judge's decision is overturned by the Board of Immigration Appeals."¹⁹
- Taking advantage of all opportunities to challenge the detention of a minor. In addition to being able to challenge the level of security through a bond hearing, paragraph 24B of the *Flores Settlement Agreement* also creates a right for any minor who disagrees with the government's determination to place them in a particular type of facility to seek judicial review in a U.S. District Court.²⁰ In cases where a bond hearing for a UC is unsuccessful, or is not the preferred route for some other reason,²¹ this provides an additional way to challenge the level of a child's detention, such as their placement in a secure facility.
- If advocates encounter issues in seeking any of the above protections for children, they may contact plaintiffs' counsel in the *Flores* case by emailing Carlos Holguin at crholguin@centerforhumanrights.org, and Holly Cooper at hscooper@ucdavis.edu.

End Notes

¹ No. 17-55208, 2017 U.S. App. LEXIS 11949 (9th Cir. July 5, 2017).

² Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996) [hereinafter, *Flores Settlement*].

³ *Flores Settlement* at ¶ 9.

⁴ *Flores*, No. 17-55208, 2017 U.S. App. LEXIS 11949, at *33.

⁵ See U.S. Department of Health and Human Services, *ORR Guide: Children Entering the United States Unaccompanied*, § 2.7, available at <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied> (last visited July 13, 2017).

⁶ See Office of Refugee Resettlement, “Notice of Right to a Bond Hearing,” available at https://www.acf.hhs.gov/sites/default/files/orr/notice_of_right_to_a_bond_hearing.pdf (last visited July 19, 2017).

⁷ *Flores*, No. 17-55208, 2017 U.S. App. LEXIS 11949, at *7.

⁸ ORR operates a spectrum of immigration detention facilities for children ranging from federal foster care (least secure) to secure facilities (most secure, typically through rented bed space in a juvenile hall facility). Children are required to be detained in the “least restrictive setting that is in the best interest of the child,” taking into account the child’s “danger to self, danger to the community, and risk of flight.” 8 U.S.C. § 1232(c)(2)(A). However, the TVPRA requires that children not be placed in secure facilities “absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.” *Id.* Placement in a secure facility must also be reviewed on a monthly basis (at a minimum) to determine if it remains warranted. *Id.*

⁹ See *supra* note 5, at § 2.9.

¹⁰ *Id.*

¹¹ Note that for adult detainees seeking release on bond pursuant to INA § 236(a), the burden of proof is on the detainee to prove that he or she is not a danger to the community or a flight risk. *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006). However, if the detention becomes prolonged, in certain circuits the detainee obtains a right to a bond hearing where the burden shifts to the government. See, e.g., *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015). ORR’s online guide for UCs states that “[t]he burden is on the requestor to demonstrate that the child can be released because he or she is not a danger to the community.” See *supra* note 5, at § 2.9. This policy should not control; as stated in *Flores*, the ORR policies “are posted on ORR’s website but are not promulgated through any formal agency rule-making process and do not appear to have any binding effect.” *Flores*, No. 17-55208, 2017 U.S. App. LEXIS 11949, at *15.

¹² *Flores*, No. 17-55208, 2017 U.S. App. LEXIS 11949, at *7.

¹³ *Flores Settlement* at ¶¶ 11, 14; § VI.

¹⁴ The issue of whether prolonged detainees have the right to a bond hearing, where the government must prove dangerousness to the community or flight risk by clear and convincing evidence is currently pending before the U.S. Supreme Court. See *Jennings v. Rodriguez*, 137 S. Ct. 471 (U.S. Dec. 15, 2016), *reh’g scheduled*. The clear and convincing evidence standard is the governing standard in almost all civil detentions, with the exception of immigration detention. Given that children’s liberty interests are at stake in the context of detained UCs, this higher standard of proof should be argued. See, e.g., *In Re Gault*, 387 U.S. 1 (1967). Even if the clear and

convincing evidence standard is not accepted by the IJ at the outset, advocates should urge the IJ to apply this standard once the child's detention becomes prolonged.

¹⁵ For further information on this issue, see *Singh v. Holder*, 638 F.3d 1196, 1208 (9th Cir. 2011). Note that while there is no right to a recording of a bond proceeding for adults under 236(a), advocates should request a record for juvenile cases. The lack of a record is incredibly problematic for appeals because there is no record of any testimony taken or of the judge's decision. Moreover, as these custodial review hearings are a new process for many IJs, the use of a recording may help ensure thorough adjudication and fairness for the juvenile.

¹⁶ 8 C.F.R. § 1003.19(e). The exception to this is adult detainees in prolonged detention in the Ninth Circuit. See *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), currently on appeal at the U.S. Supreme Court.

¹⁷ For further information about filing a motion to suppress based on a violation of state confidentiality laws protecting juvenile records, see Helen Lawrence, Kristen Jackson, Rex Chen, & Kathleen Glynn, *Strategies for Suppressing Evidence and Terminating Removal Proceedings for Child Clients* (March 2015), available at https://www.immigrationadvocates.org/nonprofit/library/item.556972-Practice_Advisory_Strategies_for_Suppressing_Evidence_and_Terminating_Remov (sample motions to suppress included).

¹⁸ For further information on this issue, see Randy Hertz et al., *Trial Manual for Defense Attorneys in Juvenile Delinquency Cases*, Chapter 20, at 84-85 (National Juvenile Defense Center 2016), available at <http://njdc.info/trial-manual-for-defense-attorneys-in-juvenile-delinquency-cases-by-randy-hertz-martin-guggenheim-anthony-g-amsterdam/>.

¹⁹ *Supra*, note 5, at § 2.9.

²⁰ The ability to seek review in a federal district court should include the district where the child is held in custody but might also include the child's state of residence. At a minimum it should include the Central District of California, home to the *Flores* litigation.

²¹ Per paragraph 24E of the *Flores Settlement*, exhaustion of other remedies is not required prior to seeking this judicial review. Accordingly, counsel will want to weigh the relative merits of pursuing review before an IJ but are unlikely to need to seek BIA review of a custodial determination.



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