

From: (b)(6); (b)(7)(C)
To: OPLA HQ Personnel; OPLA Field Personnel
Subject: Updated Guidance: PI Entered and Nationwide Class certified in J.O.P. v. DHS - UAC Determinations
Date: Monday, December 28, 2020 10:01:31 AM
Attachments: JOP 12 21 2020 144-ORDER granting 117 Motion for Class Certification (003).pdf
JOP 12 21 2020 143-Memorandum Opinion.pdf

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Disseminated on behalf of Ken Padilla and Adam V. Loiacono . . .

This message provides updates to the December 22, 2020 broadcast message below.

Updates to the original message appear in red.

On December 21, 2020, a federal district court entered an order that prevents OPLA attorneys from taking certain actions in immigration court in cases involving members of a class action lawsuit, entitled *J.O.P. v. DHS*, No. 19-1944 (D. Md. filed July 1, 2019). **Please read this message carefully, as it is applicable immediately to members of the J.O.P. class.**

As you will recall, under section 208(b)(3)(C) of the Immigration and Nationality Act, asylum officers have “initial jurisdiction” over any asylum application filed by an unaccompanied alien child (UAC), as that term is defined in 6 U.S.C. § 279(g)(2). In May of 2013, U.S. Citizenship and Immigration Services (USCIS) instituted a new policy whereby it would adopt the UAC determination made by U.S. Immigration and Customs Enforcement (ICE) or Customs and Border Protection (CBP) when considering whether it had such initial jurisdiction over an asylum application. *See* Ted Kim, Acting Chief, Asylum Division, *Updated Procedures for Determining Initial Jurisdiction over Asylum Applications Filed by Unaccompanied Alien Children* (May 28, 2013). On May 31, 2019, USCIS changed its policy. *See* John Lafferty, Chief, Asylum Division, *Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children* (May 31, 2019). Under that policy change, which was informed by the Board of Immigration Appeals (BIA) decision in *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018) (holding that immigration judges have initial jurisdiction over the asylum applications of former UACs who filed their applications after turning 18), USCIS indicated that it was “returning to making independent factual inquiries in all cases in order to determine whether the individual met the UAC definition on the date of filing the asylum application.”

Yesterday’s decision by the U.S. District Court for the District of Maryland certified a nationwide class and amended an existing Preliminary Injunction (PI) to prohibit OPLA attorneys from advocating against USCIS initial jurisdiction over the asylum applications of class members. The class is defined as:

All individuals nationwide who prior to the effective date of a lawfully promulgated policy prospectively altering the policy set forth in the 2013 Kim Memorandum (1) were determined to be a [UAC]; and (2) who filed an asylum application that was pending with [USCIS]; and (3) on the date they filed their asylum application with USCIS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody; and (4) for whom USCIS has not adjudicated the individual’s asylum application on the merits.

The district court has held that no policy prospectively altering the 2013 Kim Memorandum has been lawfully promulgated at this time. Accordingly, the class will continue to expand until such time as such a policy is promulgated.

(b)(5)

• (b)(5)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

J.O.P., et al.,

Plaintiffs,

v.

**U.S. DEPARTMENT OF
HOMELAND SECURITY, et al.,**

Defendants.

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Case No.: GJH-19-1944

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ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is ordered by the United States District Court for the District of Maryland that:

1. Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, ECF No. 117, is **GRANTED**;
2. Defendants' Motion for Extension of Time to Respond to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, ECF No. 123, is **GRANTED**;
3. The Court **CERTIFIES** a class pursuant to Rule 23 defined as: All individuals nationwide who prior to the effective date of a lawfully promulgated policy prospectively altering the policy set forth in the 2013 Kim Memorandum (1) were determined to be an Unaccompanied Alien Child ("UAC"); and (2) who filed an asylum application that was pending with the United States Citizenship and Immigration Services ("USCIS"); and (3) on the date they filed their asylum application with USCIS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody; and (4) for whom USCIS has not adjudicated the individual's asylum application on the merits;
4. Plaintiffs J.O.P., M.A.L.C., M.E.R.E., and E.D.G. **ARE APPOINTED** as class representatives;
5. Plaintiffs' Motion to Amend the Preliminary Injunction, ECF No. 124, is **GRANTED**, in part, and **DENIED**, in part;

6. Defendants, during the pendency of this litigation and until further Order of this Court, are:

a. **PRELIMINARILY ENJOINED** and restrained from relying on the policies set forth in USCIS's May 31, 2019 Memorandum (the "2019 Redetermination Memorandum") as a basis to:

i. Decline jurisdiction over asylum applications of individuals previously determined to be UACs; or

ii. Subject an asylum applicant to the one-year time limit for filing described at 8 U.S.C. § 1158(a)(2)(B);

or for any other purpose;

b. **PRELIMINARILY ENJOINED** and restrained from rejecting jurisdiction over any asylum application filed by Plaintiffs and members of the class whose applications would have been accepted under the 2013 Kim Memorandum;

c. **PRELIMINARILY ENJOINED** and restrained from deferring to EOIR determinations in assessing jurisdiction over asylum applications filed by Plaintiffs and members of the class; and

d. **PRELIMINARILY ENJOINED** and restrained during the removal proceedings of any Plaintiff or member of the class (including EOIR proceedings before immigration judges and members of the Board of Immigration appeals) from seeking any of the following where such individual's asylum application is pending before USCIS:

i. Denials of continuances or other postponements in order to await adjudication of an asylum application that has been filed with USCIS;

ii. EOIR exercise of jurisdiction over an asylum claim where USCIS has initial jurisdiction under the terms of the 2013 Kim Memorandum;

or otherwise taking the position in such individual's removal proceedings that USCIS does not have initial jurisdiction over the individual's asylum application;

7. Defendants USCIS **SHALL RETRACT** any adverse decision rendered on or after June 30, 2019 that is based in whole or in part on any of the actions enjoined and restrained by subparagraphs 6(a), 6(b), or 6(c) above.

8. Plaintiffs' request to file a Second Amended Complaint, ECF No. 134 at 15, in order to encompass USCIS's alleged expansion of the "affirmative act" exception from the 2013 Kim Memorandum is **GRANTED**;

9. Plaintiffs is granted leave to file a second amended complaint within 21 days;
10. Parties' Joint Motion to Stay Summary Judgment Schedule, ECF No. 135, is **GRANTED**;
11. Parties **SHALL CONTACT** chambers to schedule a status call;
12. Parties' Joint Motion for Entry of Parties' Proposed Protective Order, ECF No. 136, is **GRANTED**; and
13. The Parties' Proposed Protect Order, ECF No. 136-1, is **ENTERED**.

Date: December 21 , 2020

/s/
GEORGE J. HAZEL
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**
Southern Division

J.O.P., et al.,

Plaintiffs,

v.

**U.S. DEPARTMENT OF
HOMELAND SECURITY, et al.,**

Defendants.

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Case No.: GJH-19-1944

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MEMORANDUM OPINION

Pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“APA”), and the Due Process Clause of the Fifth Amendment to the United States Constitution, a group of undocumented immigrants who entered the United States as unaccompanied children (“Plaintiffs”), on behalf of themselves and a class of all others similarly situated, brought this action against the U.S. Department of Homeland Security (“DHS”) and several of its officials and components (“Defendants”). Plaintiffs allege that the government unlawfully modified policies governing treatment of asylum applications by unaccompanied immigrant children (“UACs”) in a May 2019 Memorandum.

On August 2, 2019, the Court granted Plaintiffs’ Motion for Temporary Restraining Order (“TRO”), enjoining enforcement of the May 2019 Memorandum, ECF Nos. 54, 55, and on October 15, 2019, granted Plaintiffs’ consent motion, converting the Order into a preliminary injunction. ECF Nos. 70, 71. Pending before the Court now is Plaintiffs’ Motion for Class Certification and Appointment of Class Counsel, ECF No. 117, Plaintiffs’ Motion to Amend the

Preliminary Injunction, ECF No. 124, a Joint Motion to Stay Summary Judgment Schedule, ECF No. 135, and a Joint Motion for Entry of Parties' Proposed Protective Order, ECF No. 136.¹ No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2018). For the following reasons, Plaintiffs' Motion for Class Certification is granted; Plaintiffs' Motion to Amend is granted, in part, and denied, in part; the Joint Motion to Stay is granted; and the Joint Motion for Entry of Parties' Proposed Protective Order is granted.

I. BACKGROUND

Because of the complexity of this case and the number of motions now pending before the Court, the Court begins by outlining the procedural history before turning to the statutory and regulatory regime at issue and Plaintiffs' specific allegations.

A. Procedural Background

Plaintiffs J.O.P. (by and through next friend, G.C.P.), M.A.L.C., M.E.R.E., and K.A.R.C. filed a Complaint on July 1, 2019,² against DHS, its then-Acting Secretary Kevin McAleenan, U.S. Citizenship and Immigration Services ("USCIS"), and USCIS's Acting Director Kenneth Cuccinelli, alleging that a change in Defendants' policy with respect to asylum applications filed by unaccompanied alien³ children violated the APA and the Due Process Clause of the Fifth Amendment of the U.S. Constitution. ECF No. 1. Plaintiffs simultaneously filed a Motion for TRO. ECF No. 14.

The Court held a hearing on the Motion for TRO on July 19, 2019, ECF Nos. 43, 53, and

¹ Also pending is Defendants' Motion for Extension of Time to Respond to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel. ECF No. 123. This Motion is granted.

² Plaintiffs filed motions to seal an unredacted version of their Complaint, ECF No. 5, and to proceed under pseudonyms, ECF No. 12, which the Court granted, ECF Nos. 55, 114.

³ The Court recognizes that "many consider 'using the term 'alien' to refer to other human beings' to be 'offensive and demeaning.' [The Court uses] . . . the term only where necessary 'to be consistent with the statutory language' that Congress has chosen and 'to avoid any confusion in replacing a legal term of art with a more appropriate term.'" *See Trump v. Hawaii*, 138 S. Ct. 2392, 2443 n.7 (2018) (Sotomayor, J., dissenting) (quoting *Flores v. U.S. Citizenship & Immigration Servs.*, 718 F.3d 548, 551–52 n.1 (6th Cir. 2013)).

issued a Memorandum Opinion and Order granting the Motion on August 2, 2019, ECF Nos. 54,

55. In its Order, the Court:

a. enjoined and restrained [Defendants] from applying their new asylum eligibility policy, as set forth in USCIS's May 31, 2019 memorandum, to bar individuals previously determined to be unaccompanied alien children ("UACs") from seeking asylum before the agency; and

b. enjoined and restrained [Defendants] from rejecting jurisdiction over the application of any UAC (as defined in the Homeland Security Act, 6 U.S.C. § 279(g)(2)) under the Trafficking Victims Protection Reauthorization Act ("TVPRA") whose application would have been accepted under the USCIS policy predating the May 31, 2019 memorandum;

...

[and ordered Defendants to] retract any adverse decision already rendered in an individual case applying the 2019 UAC Memorandum . . . and reinstate consideration of such case applying the 2013 UAC Memorandum[.]

ECF No. 55. On August 9, 2019, Defendants filed a Motion for Extension of Time to Comply with Court Order because of logistical challenges in reviewing decisions that may have been rendered under the May 2019 Memorandum. ECF No. 57. Following a teleconference, ECF No. 59, the Court extended the TRO to September 3, 2019, ECF No. 60, and accordingly denied Defendants' Motion as moot, ECF No. 116. The Court extended the TRO two additional times at the parties' joint request. ECF Nos. 63, 66. On October 9, 2019, Plaintiffs filed a consent motion to convert the TRO into a preliminary injunction, ECF No. 70, which the Court granted on October 15, 2019, ECF No. 71.

Plaintiffs filed an unopposed Motion to File an Amended Complaint on November 21, 2019. ECF No. 74. A month later, on December 20, 2019, Plaintiffs filed the Amended Complaint, adding a new Plaintiff, E.D.G., replacing former Defendant McAleenan with new Acting DHS Secretary, Chad Wolf, and adding as Defendants U.S. Immigration and Customs Enforcement ("ICE") and ICE's Acting Director, Matthew T. Albence. ECF No. 91. As with the

original Complaint, Plaintiffs filed a motion for permission for new Plaintiff E.D.G. to proceed under a pseudonym and omit his home address from the caption of the pleading, ECF No. 92, and a motion to seal a copy of the Amended Complaint containing that information, ECF No. 93. On June 3, 2020, this Court granted all three procedural motions, ECF Nos. 74, 92, 93, and held that Plaintiffs' Amended Complaint, ECF No. 91, will be treated as the operative pleading for this action. ECF No. 115 at 2, 5;⁴ ECF No. 116.

On November 22, 2019, Plaintiffs filed a Motion to Enforce the Preliminary Injunction, asserting that Defendants were failing to fully comply with the Court's Order by continuing to implement some portions of the May 2019 USCIS Memorandum—namely Footnote 5, which directs USCIS asylum officers to defer to Executive Office for Immigration Review ("EOIR") determinations that an applicant was not an UAC at the time of filing. ECF Nos 75, 76. The Court issued a Memorandum Opinion and Order denying Plaintiffs' Motion on June 3, 2020. ECF Nos. 115, 116. However, the Court denied Plaintiffs' Motion without prejudice "to Plaintiffs' right to move for emergency equitable relief to enjoin the enforcement of the [immigration judge ("IJ")] deferral policy if Plaintiffs believe such enforcement threatens impending irreparable harm." ECF No. 115 at 24–25.

Defendants filed a Motion to Dismiss the Amended Complaint on January 3, 2020. ECF No. 101. Through its June 3, 2020 Memorandum Opinion and Order, the Court denied that Motion as well. ECF Nos. 115, 116. Moreover, the Court ordered Defendants to produce an administrative record so that the Court could consider the record before the agency at the time the agency acted. ECF Nos. 115, 116.

Plaintiffs filed a Motion for Class Certification and Appointment of Class Counsel on

⁴ Pin cites to documents filed on the Court's electronic filing system (CM/ECF) refer to the page numbers generated by that system.

June 15, 2020, requesting that this Court certify the following class with named Plaintiffs as class representatives:⁵

All individuals nationwide who prior to the effective date of a lawfully promulgated policy prospectively altering the policy set forth in the 2013 Kim Memorandum (1) were determined to be an Unaccompanied Alien Child; and (2) who filed an asylum application that was pending with the United States Citizenship and Immigration Services (“USCIS”); and (3) on the date they filed their asylum application with USCIS, were 18 years of age or older, or had a parent or legal guardian in the United States who is available to provide care and physical custody; and (4) for whom USCIS has not adjudicated the individual’s asylum application on the merits.

ECF No. 117. Defendants responded in Opposition on July 13, 2020. ECF No. 126. Plaintiffs replied in support of the Motion for Class Certification on July 27, 2020. ECF No. 130.

Additionally, on July 7, 2020, Plaintiffs filed a Motion to Amend the Preliminary Injunction, requesting that the Court enjoin Defendants from engaging in three practices that allegedly threaten to irreparably harm prospective class members before the Court has the opportunity to rule on the merits in this case—(1) USCIS’s deferral to IJ determinations that an asylum application was not one filed by a UAC; (2) ICE’s advocacy in immigration courts for IJs to exercise jurisdiction over prospective class members despite the preliminary injunction in this case; and (3) USCIS’s alleged practice of treating agency records that indicate nothing more than that a UAC had turned 18 or been reunited with a parent or legal guardian as an “affirmative act.” ECF No. 124. Defendants responded in Opposition on July 21, 2020. ECF No. 127. Plaintiffs replied in support of the Motion to Amend the Preliminary Injunction on August 4, 2020. ECF No. 134.

Finally, the parties have filed two Joint Motions: (1) a Joint Motion to Stay Summary

⁵ In light of named plaintiff K.A.R.C. being granted asylum, Plaintiffs request that the Court specifically identify remaining named plaintiffs as the class representatives. ECF No. 130 at 7 n.1. Plaintiffs’ revised proposed order reflects this request. ECF No. 130-3.

Judgment Schedule, ECF No. 135, requesting that briefing on the parties' motions for summary judgment be stayed pending the resolution of the parties' disputes regarding the contents of the administrative record; and (2) a Joint Motion for Entry of Parties' Proposed Protective Order, ECF No. 136. These motions were filed on August 10, 2020, and August 25, 2020, respectively. ECF Nos. 135, 136.

B. Statutory and Regulatory Framework, Initial Complaint, and Enjoined Policy

While the Court has described the statutory and regulatory regime at issue in this case in previous Memorandum Opinions, *see, e.g.*, ECF Nos. 54, 115, it is useful to review it again here. In 2002, Congress enacted the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 ("HSA"). Among other provisions, the HSA assigned the care of "unaccompanied alien children who are in Federal custody by reason of their immigration status" to the Director of the Office of Refugee Resettlement of the Department of Health and Human Services ("HHS"). *See id.* § 462(a), (b), *codified at* 6 U.S.C. § 279(a), (b). The statute defines "unaccompanied alien child" ("UAC") as a child who: "(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom-- (i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody." *Id.* § 462(g), *codified at* 6 U.S.C. § 279(g).

In 2008, Congress enacted the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"). Pub. L. No. 110-457, 122 Stat. 5044. Among a variety of provisions establishing protections for at-risk immigrant children, the statute provides that any federal agency that apprehends or discovers a UAC must notify HHS within 48 hours and must transfer custody of the child to HHS within 72 hours. *Id.* § 235(b), *codified at* 8 U.S.C. § 1232(b)(2), (3). Importantly, the TVPRA also provides that USCIS asylum officers "shall have