NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

Practice Advisory: *Mendez Rojas v. Wolf*, the Asylum One-Year Deadline, and Asylum Jurisdiction

INTRODUCTION:

In June 2016, a group of asylum seekers represented by the Northwest Immigrant Rights Project, Dobrin & Han, PC; the National Immigration Project of the National Lawyers Guild, and the American Immigration Council filed a class action complaint in *Mendez Rojas v. Johnson* (now captioned *Mendez Rojas v. Wolf*). The complaint involved the Department of Homeland Security's (DHS) failure to provide asylum seekers with notice of the one-year filing deadline for asylum eligibility and the failure of DHS and the Executive Office for Immigration Review (EOIR), the agency that houses the immigration courts and the Board of Immigration Appeals, to establish a uniform procedure for asylum seekers to meet the one-year deadline. The U.S. District Court for the Western District of Washington granted plaintiffs' motion for class certification and later, plaintiff's motion for summary judgement.[1] Although the defendants appealed the Court's decision, the parties subsequently agreed to stay the proceedings and entered into a settlement agreement, which was ultimately approved by the District Court on November 3, 2020.[2]

The *Mendez Rojas* settlement agreement contains critical protections for certain asylum seekers who failed to file for asylum prior to their one-year filing deadline and significant changes to the process by which U.S. Citizenship and Immigration Services (USCIS) determines its jurisdiction over asylum applications. Attorneys representing clients in the following situations should review this practice advisory to determine whether *Mendez Rojas* impacts their clients' cases and if so, how to benefit from the settlement agreement:

- Asylum seekers who filed for asylum after the one-year deadline and whose cases remain pending
- Asylum seekers who have not yet filed for asylum, but are past the one-year deadline
- Asylum seekers denied asylum at least in part due to their failure to meet the one-year deadline
- Asylum seekers who have not yet filed for asylum and have not yet been scheduled for an immigration court hearing

[1] The decision was issued under the complaint's prior name, *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. 2018).

[2] For a more detailed overview of the case and procedural history, case documents can be found on the American Immigration Council's website here.

BACKGROUND:

The *Mendez Rojas* settlement responds to two different issues in the immigration system that have created substantial obstacles for asylum seekers attempting to pursue their claims. The first issue involves the one-year filing deadline. Pursuant to the asylum statute, all asylum seekers must file their asylum application within one year of their last entry to the United States, unless they qualify for one of two very limited exceptions: a change in circumstances that affects the individual's eligibility for asylum or extraordinary circumstances that prevented the individual from timely filing.

> *An asylum seeker has the burden of proving "[b]y clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or . . . that he or she qualifies for an exception for the 1-year deadline." 8 C.F.R. § 1208.4(a)(2).*

Despite the consequences of this harsh rule, asylum seekers who expressed a fear of return or a desire to seek asylum to an immigration agent after being apprehended at the U.S. border were frequently not informed of the need to file for asylum within one year. In fact, in NIJC's experience, many asylum seekers spent months – and in some cases, years – interacting with DHS officers as part of reporting requirements, believing that they were complying with all necessary steps to pursue their cases, while never receiving any notice from DHS of the one-year deadline. The *Mendez Rojas* settlement attempts to correct this DHS failure by making asylum seekers in this situation exempt from the one-year deadline and requiring that DHS provide notification of the one-year deadline to asylum seekers in the future.

The second issue relates to a jurisdictional obstacle that occurs when an asylum seeker is served with a Notice to Appear (NTA) charging document, but DHS fails to file the NTA with the immigration court. DHS must file the NTA with the court in order to initiate removal proceedings. If the NTA has not been filed, then the individual is not in removal proceedings and the court does not have any jurisdiction over the individual's asylum claim. Thus, an asylum application can only be filed with the immigration court after an NTA has been filed with the court; if the NTA has not been filed, then the application must be filed with USCIS.

> *The immigration court has exclusive jurisdiction over asylum applications "filed by an alien who has been served [a Notice to Appear] after the charging document has been filed with the Immigration Court." 8 CFR § 1208.2(b).*

USCIS previously took the position that if an individual was served with an NTA after having passed an initial asylum screening called a credible fear interview, USCIS did not have jurisdiction over the asylum application (even if the NTA had not yet been filed with the court). This frequently left asylum seekers in limbo, unable to file for asylum with the court or USCIS and therefore, unable to meet their one-year filing deadline. The *Mendez Rojas*

settlement attempts to correct this problem by establishing that USCIS will accept jurisdiction, for the purposes of the one-year deadline, over the asylum applications of applicants whose NTAs have not yet been filed and docketed with the immigration court.

SETTLEMENT AGREEMENT: ONE-YEAR DEADLINE PROVISION

Pursuant to the *Mendez Rojas* settlement agreement, DHS and EOIR will recognize as timely filed any asylum application from a class member that is filed on or before March 31, 2022[3]

I. Who is a Class Member?

There are two defined classes, each of which has two subclasses. Members of both Class A and Class B only include individuals "who were issued NTAs and/or were in removal proceedings on or after June 30, 2016."

1) **Class A (asylum seekers who have passed a credible fear interview)**: "All individuals who were encountered by DHS upon arrival or within fourteen days of unlawful entry; were released by DHS *after they have been found to have a credible fear of persecution or torture* . . . and did not receive individualized notice of the one-year deadline to file an asylum application." (Emphasis added.)
    a. Subclass AI: "All individuals in Class A who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival."
    b. Subclass AII: "All individuals in Class A who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival."

2) **Class B (asylum seekers released from DHS custody without having a credible fear interview)**: "All individuals who were encountered by DHS upon arrival or within fourteen days of unlawful entry; expressed a fear of return to their country of origin; *were released by DHS upon issuance of an NTA*; and did not receive individualized notice of the one-year deadline to file an asylum application." (Emphasis added.)
    a. Subclass BI: "All individuals in Class B who *are not* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival."
    b. Subclass BII: All individuals in Class B who *are* in removal proceedings and who either (a) have not yet applied for asylum or (b) applied for asylum after one year of their last arrival."

[3] The settlement agreement can be accessed here. Please note that the definition of class membership was modified slightly in the final order approving the agreement. The final order can be found here.

II. How to Determine if a Client Meets the Definition of a Class Member

Class membership turns on whether the individual (1) had a credible fear interview (CFI) or expressed a fear of return to DHS and (2) received individualized notice from DHS of the one-year deadline.

1) **Establishing the client had a CFI**: Attorneys should be able to easily determine whether a client previously had a CFI through the client's immigration documents. If the client had a CFI, the client's NTA often (but not always) will have a checked box on the first page indicating that the NTA was issued after the client received a positive CFI determination. The client may also have a copy of her CFI interview worksheet and determination. If the client does not have a copy of her CFI interview paperwork or the attorney is not sure whether the client had a CFI, the attorney can obtain this documentation by filing a USCIS FOIA request.

2) **Establishing the client expressed a fear of return to DHS**: Where the client did not have a CFI, establishing that the client previously expressed a fear of return to DHS can be more challenging. Although an affidavit from the client can be sufficient, attorneys should file FOIA requests to obtain records of the clients' interviews at the border and any government documentation that indicates the client expressed a fear of return. In doing so, attorneys should be aware that there are long-standing, documented issues with the reliability of border interviews.[4] It is not uncommon for a client to report having expressed a fear of return at the border, but for the border interview notes to assert that the client stated she came to the United States merely "to live and work."

> To file a FOIA request with USCIS, please see the information on USCIS's website and in NIJC's asylum manual.

3) **Establishing the client did not receive individualized notice of the one-year deadline**: Generally, this element will need to be established through a client affidavit. However, attorneys should plan to file a FOIA request to review the client's immigration records and confirm that nothing indicates that the client received any individualized notice of the deadline.

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[4] *See e.g.*, John Washington, "Bad Information," *The Intercept* (Aug. 11, 2019), available at https://theintercept.com/2019/08/11/border-patrol-asylum-claim. "Barriers to Protection," U.S. Commission on Int'l Religious Freedom (Aug. 3, 2016), available at http://www.uscirf.gov/reports-briefs/special-reports/barriers-protection-the-treatment-asylum-seekers-in-expedited-removal; Elise Foley, "Infants and Toddlers are Coming to the U.S. to Work, According to Border Patrol," *HuffPost* (June 16, 2015), available at https://www.huffingtonpost.com/2015/06/16/border-patrol-babies_n_7594618.html.

III. What Steps Must Class Members Take to Benefit from the Settlement Agreement?

To benefit from the agreement, class members must take steps to establish their class membership on or before March 31, 2022.

> All filings must comply with all requirements established in the Immigration Court or Board of Immigration Appeals Practice Manual unless otherwise noted.

1) **Asylum seekers with cases pending before the immigration court**[5]: File a notice of class membership with a short declaration from the asylum seeker, following the template available here.[6]
    a. The immigration court must receive this notice and declaration prior to the asylum seeker's merits hearing or on or before March 31, 2022, *whichever is earlier*.
    b. If the asylum seeker has not yet filed for asylum, the notice and declaration should generally be filed concurrently with the asylum application, if possible.
    c. In family units, a separate notice and declaration should be submitted for each asylum seeker with an independent claim. E.g., if a mother and son are seeking asylum and filed for asylum after their one-year deadline with the son listed as a derivative on his mother's case, but the son also has an independent asylum application on file, a separate notice and declaration establishing class membership should be submitted for the son.

2) **Asylum seekers with cases pending before the Board of Immigration Appeals**: File a notice of class membership with a short declaration from the asylum seeker. This notice and declaration must be received by the Board on or before March 31, 2022.

3) **Asylum seekers with cases before the USCIS Asylum Office**: Submit a notice of class membership with a short declaration from the asylum seeker, following the samples above.[7]
    a. The notice and declaration must be filed prior to or after the asylum interview (but before the decision), on or before March 31, 2022.

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[5] The settlement agreement contains a separate provision for asylum seekers who are in removal proceedings, but whose cases have been administratively closed. NIJC pro bono attorneys representing asylum seekers in this posture should contact their NIJC point-of-contact directly to discuss the best course of action.

[6] Pro se asylum seekers may make the request to establish class membership in writing or orally during a recorded court proceeding.

[7] Although the settlement notes that asylum seekers and/or their counsel could make this request orally during an interview, NIJC strongly encourages attorneys to submit written notice in order to best preserve the issue in the record.

b. Generally, this notice and declaration should be filed with the asylum seeker's pre-interview document package and not with the initial, skeletal asylum application filing.
c. In family units, a separate notice and declaration should be submitted for each asylum seeker with an independent claim. E.g., if a mother and son are seeking asylum and filed for asylum after their one-year deadline with the son listed as a derivative on his mother's case, but the son also has an independent asylum application on file, a separate notice and declaration establishing class membership should be submitted for the son.

4) **Individuals previously denied asylum at least partly due to a failure to meet the one-year deadline:** Class members who were issued a final order of removal on or after June 30, 2016, after being found ineligible for or denied asylum based wholly or in part on the one-year deadline, may file a motion to reopen on this basis.[8]
   a. The motion to reopen must be filed on or before March 31, 2022.
   b. No fee is required for this motion.
   c. The motion should follow the template available here, with a notice of class membership and an updated E-33 change of address form.

Reminder: class members (and their attorneys) MUST take action on or before March 31, 2022 in order to benefit from the settlement agreement. Please consult with your NIJC point-of-contact if you have any questions.

SETTLEMENT AGREEMENT: JUDRISDICTIONAL PROVISION

Pursuant to the *Mendez Rojas* settlement agreement, USCIS agrees to accept jurisdiction *for purposes of the one-year deadline* over the asylum applications of individuals who have been served a Notice to Appear, if that NTA has not yet been filed and docketed with EOIR. To confirm the appropriate filing location for asylum seekers who have been served an NTA, attorneys should follow the steps below:

1) Prior to filing the asylum application, go to the EOIR Automated Case Information System and enter the asylum seeker's A number.
   a. If case information appears, that means the asylum seeker's NTA has been filed and docketed with the court and removal proceedings have been initiated. The attorney must file the asylum application with the immigration court listed on the information system page.

[8] A motion to reopen filed on this basis is exempt from the statutory and regulatory time and number requirements. This provision does not apply to individuals who were ordered removed in absentia.

b. If a message in red says, "No case found for this alien number," that means the asylum seeker's NTA has not yet been filed and docketed with EOIR and the asylum application should be filed with USCIS. Print this page to PDF and save.

2) **If the asylum seeker's NTA has not yet been filed and docketed with EOIR**, the attorney should prepare a skeletal asylum application package for USCIS that contains a copy of the EOIR Automated Case Information page described above and a cover letter that explains the asylum seeker's procedural posture. A template cover letter can be found here.
   a. If, at the time USCIS receives the asylum application, USCIS determines that an NTA has been filed and docketed with EOIR, USCIS will take one of the following steps:
      i. If the NTA has been filed and docketed with EOIR for 21 calendar days or less, USCIS will accept the application; the receipt date will be considered the filing date for purposes of the one-year deadline; and then USCIS will transfer the filing date and the asylum application to the immigration court for adjudication
      ii. If the NTA has been filed and docketed with EOIR for 22 calendar days or more, USCIS will reject the filing and return the asylum application to the applicant and/or attorney with instructions to file with the immigration court.
   b. If, at some point after the asylum application is filed with USCIS, but before the application is adjudicated, DHS files the applicant's NTA with EOIR, it appears that USCIS will lose jurisdiction over the case and will then transfer the filing date and the asylum application to the immigration court for adjudication. However, the result of this scenario are not clear from the settlement agreement.

For more information on representing asylum seekers, including NIJC's asylum manual, please review the resources on NIJC's website at https://immigrantjustice.org/for-attorneys/legal-resources/topic/nijc-procedural-manual-asylum-representation. Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.