

MIGRANT PROTECTION PROTOCOLS AND DUE PROCESS: THE SOUTHERN DISTRICT OF CALIFORNIA RULES MIGRANTS SUBJECT TO MPP HAVE RIGHT TO ACCESS RETAINED COUNSEL BEFORE AND DURING A NON-REFOULEMENT INTERVIEW

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In November 2019, the ACLU of San Diego and Imperial Counties (“ACLU”) filed a class action lawsuit against several U.S. government agencies, including U.S. Customs and Border Protection (“CBP”), for denying their clients, detained asylum-seekers, access to retained counsel.¹ Under the January 2019 Migrant Protection Protocols (“MPP”), colloquially known as the “Remain in Mexico” policy, asylum-seekers who entered the U.S. from Mexico may be returned to Mexico to wait for the duration of their U.S. immigration court proceedings. Migrants who express a fear of being returned to Mexico are supposed to be given an interview, called a “non-refoulement interview,” in which they are allowed to explain why they are afraid of returning to Mexico before they are returned to Mexico by the government.² However, CBP has categorically denied asylum-seekers access to an attorney before and during this critical interview.³

The District Court for the Southern District of California first granted a temporary restraining order to the plaintiffs, asylum-seekers who fled Guatemala and traveled through Mexico, in November 2019, allowing them to access their retained counsel before and during their non-refoulement interview while in custody of CBP.⁴ On January 14, 2020, the court granted class certification to their lawsuit and the plaintiffs’ motion for a classwide

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1. Doe v. McAleenan, No. 3:19-cv-2119, 2019 WL 6605880 (S.D. Cal. Nov. 11, 2019); see also Wendy Fry, *ACLU Sues Over Detained Immigrants’ Access to Attorneys*, SAN DIEGO TRIBUNE (Nov. 5, 2019, 4:28 PM), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-11-05/aclu-sues-over-detained-immigrants-access-to-attorneys>.

2. See, e.g., Fry, *supra* note 1.

3. Doe, 2019 WL 6605880 at *2.

4. *Id.*

preliminary injunction.⁵ The court ruled that migrants subject to MPP have a right to access retained counsel before and during a non-refoulement interview, and held the federal government cannot conduct non-refoulement interviews for migrants subject to MPP without affording them access to retained counsel.⁶

This ruling comes a year after the Department of Homeland Security (“DHS”) announced and implemented the MPP in January 2019.⁷ According to Human Rights First, over 50,000 migrants have been sent to Mexico per MPP to await their asylum hearings.⁸ However, only eleven asylum-seekers subject to MPP have been granted asylum as of December 2019, almost one year after the policy was implemented.⁹

The implementation of MPP by the government has concerned human rights organizations, civil liberties groups, and immigrant advocacy groups. These organizations argue that the program’s implementation has been dangerous for migrants and that the program has made the asylum process more cumbersome.¹⁰ Human rights organizations have documented hundreds of cases of rape, kidnapping, sexual exploitation, assault, and other violent crimes against asylum-seekers returned to Mexico under MPP.¹¹ Accordingly, organizations like the ACLU claim that the MPP unnecessarily subjects asylum-seekers to danger by requiring that they await asylum hearings in Mexico.¹² Further, the Associated Press has documented that CBP has provided asylum-seekers incorrect court dates before sending them to Mexico.¹³ Groups like the ACLU argue that the dangers and problems that migrants face in MPP in Mexico have been exacerbated by the government’s policy of denying migrants in custody access to retained counsel before their highly consequential non-refoulement interviews.¹⁴

5. *Id.* at *5.

6. *Id.*

7. DEP’T OF HOMELAND SEC., MIGRATION PROTECTION PROTOCOLS (2019), <https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols>.

8. Eleanor Acer et al., *Orders from Above: Massive Human Rights Abuses Under Trump Administration Return to Mexico Policy*, HUM. RTS. FIRST (Oct. 2019), <https://www.humanrightsfirst.org/sites/default/files/hrfordersfromabove.pdf>.

9. Gustavo Solis, *Remain in Mexico has a 0.1 percent asylum grant rate*, SAN DIEGO UNION-TRIB. (Dec. 15, 2019), <https://www.sandiegouniontribune.com/news/border-baja-california/story/2019-12-15/remain-in-mexico-has-a-0-01-percent-asylum-grant-rate>.

10. Edward Sifuentes & Sandy Young, *Family Subjected to MPP Will Not Be Returned to Mexico to Pursue Their Asylum Claim*, AM. CIV. LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES (Nov. 14, 2019), <https://www.aclusandiego.org/family-subjected-to-mpp-will-not-be-returned-to-mexico-to-pursue-their-asylum-claim/>.

11. Acer et al., *supra* note 8, at 3.

12. Sifuentes & Young, *supra* note 10.

13. Elliot Spagat, *Asylum Seekers Get Attorney Access Before Return to Mexico*, WASH. TIMES (Nov. 13, 2019), <https://www.washingtontimes.com/news/2019/nov/13/asylum-seekers-get-attorney-access-before-return-t/>.

14. Edward Sifuentes & Sandy Young, *Judge Grants Preliminary Injunction in MPP Suit, Rules Asylum Seekers Forced Into MPP Must Have Access to Lawyers for ‘Fear of Return to Mexico’ Interviews*, AM. CIV. LIBERTIES UNION OF SAN DIEGO & IMPERIAL COUNTIES (Jan. 14, 2020), <https://www.aclusandiego.org/judge-grants-preliminary-injunction-in-mpp-suit-rules-asylum-seekers-forced-into-mpp-must-have-access-to-lawyers-for-fear-of-return-to-mexico-interviews/>.

In addition to identifying domestic law concerns, many argue that non-refoulement interviews are guaranteed to asylum seekers by international law.¹⁵ Codified in Article 33 of the 1951 Geneva Convention relating to the Status of Refugees and incorporated in its Optional Protocol to which the United States is a party, the principle of non-refoulement forbids a country that is party to the Convention from returning asylum-seekers to a country where they fear persecution on the basis of race, religion, nationality, membership in a particular social group, or political opinion.¹⁶ Both international and U.S. law were previously silent, however, about whether asylum-seekers have a right to access retained counsel before or during a non-refoulement interview—that is, until the Southern District of California held in the affirmative.

According to DHS, migrants subject to the MPP have a right to retain and access counsel.¹⁷ But DHS categorically denied migrants this right, before and during non-refoulement interviews, based on its own policy against allowing individuals subject to the MPP to access counsel while in DHS custody.¹⁸ Before the Southern District of California, the government explained that it is unable to provide access to retained counsel for migrants due to limited capacity and resources at ports-of-entry and Border Patrol stations, as well as because it has a need for orderly and efficient processing of migrants.¹⁹

In this lawsuit, the ACLU and other advocacy organizations challenged the DHS policy before the Southern District of California, arguing that the policy violated migrants' rights under the First Amendment, Fifth Amendment, and 5 U.S.C. § 555(B), a provision of the Administrative Procedure Act ("APA"), which provides that "a person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel."²⁰ The plaintiffs fled extortion, death threats, and rape in Guatemala.²¹ When the family traveled through Mexico, they encountered a group of people wearing masks and what appeared to be Mexican government uniforms who threatened the family at gunpoint, robbed them, stripped them of their clothing, and threatened them with death if they reported the incident.²² The family also survived a shootout

15. Bianca Bruno, *Judge Finds Asylum Seekers Have Right to Counsel*, COURTHOUSE NEWS SERVS. (Jan. 15, 2020), <https://www.courthousenews.com/judge-finds-asylum-seekers-have-right-to-counsel/>.

16. United Nations Convention Relating to the Status of Refugees, April 22, 1954, 189 U.N.T.S. 150; Cmnd. 9171, U.K.T.S.; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268; Seline Trevisanut, *The Principle of Non-Refoulement and The De-Territorialization of Border Control at Sea*, 27 LEIDEN J. OF INT'L L. 661 (2016), https://www.mphil.de/files/pdf3/mpunyb_05_trevisanut_12.pdf.

17. DEP'T. OF HOMELAND SEC., *supra* note 7.

18. *Doe*, 2019 WL 6605880 at *3.

19. *Id.* at *4.

20. *Id.* at *2.

21. *Id.*

22. *Id.* at *3.

in a temporary shelter while in Mexico.²³ For these reasons, the family feared returning to Mexico, and requested the advice of counsel before and during their non-refoulement interview to convey their fear to the federal government.²⁴ The court held in favor of the plaintiffs, ruling that 5 U.S.C. § 555(B) did provide plaintiffs a right to access retained counsel before and during their non-refoulement interview, and subsequently found that the right to access retained counsel before and during a non-refoulement interview applies to all migrants subject to the MPP.²⁵

By enjoining the government from denying migrants subject to the MPP access to retained counsel before and during a non-refoulement interview, this order could have an impact on the low rate of asylum-seekers subject to the MPP being granted asylum. For now, migrants subject to the MPP may not be prohibited to confer with their attorney before and during a non-refoulement interview. The government has a right to appeal the orders issued in this case, but the government has not indicated whether it will take such action.

23. *Id.* at *2.

24. *Id.* at *3–4.

25. *Id.* at *20.