

## **Federal Court Requires Immigration Courts to Continue to Provide Bond Hearings, Despite *Matter of M-S-***

### **Frequently Asked Questions<sup>1</sup> Updated August 30, 2019**

On July 2, 2019, in a nationwide class action, Judge Marsha J. Pechman of the U.S. District Court for the Western District of Washington [issued a decision](#) on the parties' respective motion to vacate and motion to modify the existing preliminary injunction in *Padilla v. U.S. Immigration & Customs Enforcement*, No. 2:18-cv-00928-MJP (W.D. Wash.). **Under that decision, immigration courts must continue to provide bond hearings to individuals who enter the United States without inspection, are placed in expedited removal proceedings, and establish a credible fear of persecution or torture.**

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In *Padilla*, Plaintiffs challenge delays in credible fear interviews and bond hearings for certain asylum seekers. The district court previously certified [two nationwide classes](#), including a Bond Hearing Class and a Credible Fear Class.

On April 5, 2019, the court granted a [preliminary injunction](#) that ordered the government either to provide members of the Bond Hearing Class with a bond hearing before an immigration judge with new procedural protections within 7 days of their request, or to release them from detention.

On April 16, 2019, before the court's order took effect, Attorney General Barr issued a decision in *Matter of M-S-*, 27 I&N Dec. 509 (AG 2019), that would have eliminated bond hearings for all members of the Bond Hearing Class. *Matter of M-S-* was set to take effect on July 15, 2019. Plaintiffs challenged the *Matter of M-S-* in the *Padilla* litigation. On July 2, 2019, the district court issued a modified preliminary injunction, affirming that immigration courts must (A) continue to provide bond hearings to *Padilla* class members despite *Matter of M-S-* and (B) provide bond hearings within 7 days of a request with the additional procedures that the Court previously ordered.

On July 5, 2019, Defendants appealed the injunction to the Ninth Circuit, and on July 9, filed an emergency motion for a stay of the injunction pending their appeal. On July 12, the Ninth Circuit temporarily stayed the District Court's July 2 and April 5 orders in order to allow for completion of briefing on the Defendants' motion for stay. During this time, *Matter of M-S-* briefly took effect, and the government temporarily stopped providing bond hearings for class members.

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**On July 22, the Ninth Circuit granted in part and denied in part Defendants’ motion for stay. The court stayed the portion of the preliminary injunction requiring bond hearings within 7 days of a request and procedural protection for asylum seekers in bond hearings, but declined to stay the portion of the preliminary injunction requiring bond hearings. At this time, the immigration courts must provide bond hearings for class members, but need not implement the timeline and procedural protections mandated by the original injunction.**

On August 28, 2019, the district court [clarified](#) that the Bond Hearing Class includes individuals who otherwise meet the criteria for class membership and who were determined to have a credible fear of torture, not just individuals who were determined to have a credible fear of persecution.

The Northwest Immigrant Rights Project, the American Immigration Council, and the ACLU Immigrants’ Rights Project represent the Plaintiffs and class members in *Padilla*.

### **1. What did the district court hold in the July 2, 2019 preliminary injunction decision?**

The district court held that immigration courts must provide bond hearings to individuals who enter the United States without inspection, are placed in expedited removal proceedings, and pass their credible fear interviews. The court found that class members were likely to succeed on their claim that the elimination of bond hearings violated their due process rights; that they faced irreparable harm absent access to bond hearings; and that the balance of hardships and public interest favored an injunction.

The court also found that, as required by the prior preliminary injunction, those bond hearings must take place within 7 days of a request and include certain procedural protections.

Specifically, the district court ordered that the immigration courts:

- Conduct bond hearings for Bond Hearing Class members within 7 days of request, and release any class member detained beyond that period of time without a bond hearing;
- Place the burden of proof on DHS to demonstrate why a class member should not be released on bond, conditional parole, or other conditions;
- Record the hearing and make a recording or transcript of the recording available upon appeal; and
- Produce a written decision with individualized findings at the conclusion of the hearing.

In sum, pursuant to the district court’s order, the government may not implement *Matter of M-S-*. However, while the Ninth Circuit appeal of this order is pending, the government is not required to implement the timeline or additional procedural protections in bond hearings.

### **2. Who is covered by the July 2, 2019 preliminary injunction decision?**

The preliminary injunction covers all members of the nationwide Bond Hearing Class in *Padilla*:

All detained asylum seekers who entered the United States without inspection, were initially subject to expedited removal proceedings under 8 U.S.C. § 1225(b), were determined to have a credible fear of persecution, but are not provided a

bond hearing with a verbatim transcript or recording of the hearing within seven days of requesting a bond hearing.

The government has acknowledged in communications with class counsel that the class also includes those who have been determined to have a credible fear of *torture*. As a result of the preliminary injunction, all individuals who enter the United States without inspection, are placed in expedited removal proceedings, and establish a credible fear of persecution or torture continue to be entitled to bond hearings in immigration court.

**The decision does not cover individuals who pass credible fear interviews after being inspected at a port of entry.** These individuals are eligible for release on parole, pursuant to ICE Directive 11002.1, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture* ¶ 6.2 (Dec. 8, 2009), [https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole\\_of\\_arriving\\_alien\\_found\\_credible\\_fear.pdf](https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf) (providing for parole in the public interest where an asylum seeker establishes her identity and shows she poses no flight risk or danger to the public).

### **3. What if a class member is denied a bond hearing?**

If you are aware of any instances in which a class member is **denied** a bond hearing, please contact class counsel at [sydney@nwirp.org](mailto:sydney@nwirp.org).

Please also contact class counsel if (1) you are aware of any class member who was denied a bond hearing between July 15 and July 22 (when the district court's preliminary injunction was stayed) and who have still not received a new bond hearing, or if (2) you are aware of any class member who was denied a bond hearing because they had a credible fear of torture rather than persecution.