

# Supporting Asylum Seekers in Detention

## *An Immigration Attorney's Guide*

Natalie Hansen

The United States currently detains immigrants at an unprecedented rate. The detention of asylum seekers who are fleeing persecution in their home countries exacerbates mental and physical trauma.<sup>1</sup> Detention also shapes the legal process, making winning an asylum case exponentially more difficult. Detained asylum seekers are less likely to obtain legal representation, and for the small percentage who do acquire representation, detention poses extraordinary challenges.

Among the many challenges of representation of asylum seekers are physical barriers. Detention centers are often in isolated areas, which means that applicants have limited access to their attorneys. Advocates may need to drive hours to reach the detention center and, once they arrive, may wait for hours for one of a limited number of private attorney-client rooms to become available. Furthermore, telephone and email communications are fraught with issues that make it difficult to consult with clients, even about simple matters such as information on seeking bond.<sup>2</sup> Poor living conditions in detention—overcrowding; inadequate food; and poor hygiene, medical treatment, and mental health care—also pose obstacles to meaningful representation of detained asylum seekers.<sup>3</sup> Compounding these issues, the pace of asylum cases for detained individuals is expedited, which decreases the time for applicants to prepare for their immigration hearings.<sup>4</sup>

Considering these obstacles, the work of expert witnesses is especially important for detained asylum seekers. This chapter provides an overview of the immigration detention system, discusses detention conditions, and, finally, discusses release from detention, as well as the legal process for individuals detained for

the entirety of their cases. The chapter serves experts working with detained asylum seekers by providing concrete practice tools to overcome barriers imposed by detention.

#### DETENTION LANDSCAPE AND ALTERNATIVES TO DETENTION

The federal government has broad power over regulating immigration to the U.S., including the power to arrest and detain noncitizens. The Immigration and Nationality Act (INA) authorizes, and sometimes requires, the U.S. Department of Homeland Security (DHS) to detain noncitizens while their removal proceedings are pending. In 1996, Congress made sweeping reforms to the INA by passing the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). This law laid out new detention priorities, among them the requirement that certain classes of noncitizens be detained, including individuals arriving in the United States through a port of entry, such as an airport or an international bridge, without a visa or lawful status to enter the country.<sup>5</sup> Many asylum seekers fall into this category.

Immigration detention expanded over fivefold between 1995 and 2011.<sup>6</sup> In 1995, the average daily population of detained immigrants was approximately 5,000; in 2019, it was over 50,000.<sup>7</sup> In 2009, Congress imposed an arbitrary bed quota that remained in place until 2017.<sup>8</sup> The bed quota mandated that 34,000 immigration detention beds be filled at all times.<sup>9</sup> Even after national bed quotas were eliminated, they continue to be included in local contracts with immigration detention centers.<sup>10</sup> In 2019, before the COVID-19 pandemic, the average daily population of DHS detainees was over 52,000.<sup>11</sup> Due to pandemic restrictions, the number of detainees fell to a record low of 13,500 in early 2021. Since then, however, the numbers of detainees have continued to rise, reaching 22,000 in March 2022.<sup>12</sup>

DHS detains immigrants at different types of detention centers: (1) facilities operated directly by DHS, called Service Processing Centers (SPCs);<sup>13</sup> (2) facilities operated by private contractors; (3) local jails; (4) family detention centers; and (5) children-only detention facilities.<sup>14</sup> Most detained immigrants are held in private facilities rather than government Service Processing Centers. In 2018, 70 percent of individuals in immigration detention were held in facilities operated by private prison companies, compared to just 9 percent of the total prison population in the United States.<sup>15</sup> By January 2020, the proportion of detained immigrants in private facilities had risen to 81 percent, and as of September 2021, four in five people detained each day by DHS are held in private facilities.<sup>16</sup> Private corporations, both large and small, have a financial interest in maximizing the number of immigrants held in detention centers. According to the Detention Watch Network, private prison companies' dependence on the immigration detention system to maintain corporate profits has increased over the past decade. In 2020,

the two largest corporations, GEO Group, Inc. (GEO) and CoreCivic (formerly Corrections Corporation of America), administered 81 percent of detention beds; in 2009, they operated 49 percent of detention beds.<sup>17</sup> The private prison lobby devotes substantial resources to advocating for immigration policies that increase the number of detained immigrants in the U.S.<sup>18</sup>

Children's detention is handled differently from that of adults. In 2002, Congress transferred the responsibility of custody of unaccompanied minors to the Health and Human Services Office of Refugee Resettlement (ORR).<sup>19</sup> In FY 2019, 76,000 unaccompanied minors were arrested by DHS, up from 50,000 in FY 2018; in 1990, 8,500 minors were arrested, not all of whom were unaccompanied.<sup>20</sup> Though CBP reported a 60 percent decrease in arrests of unaccompanied minors in FY 2020, a record number of 147,000 unaccompanied migrant children were apprehended in FY 2021.<sup>21</sup>

Unaccompanied minors are a particularly vulnerable population. The legal landscape for the detention of immigrant minors is largely influenced by a 1997 binding legal settlement agreement between the government and Jenny Flores, a young Salvadoran girl. Jenny Flores came to the U.S. as an unaccompanied minor in 1985 and was detained by the U.S. in deplorable conditions. Further, the government policy at that time made it difficult for her to be released to her family in the United States. She sued the government, and her lawsuit argued (1) that the government improve conditions in which it held minors to meet minimum child welfare standards; and (2) that INS screen for other adults to whom children could be released rather than restrict release to parents or legal guardians. After many years of litigation, including an appeal to the Supreme Court, the parties signed a binding agreement that extended to almost all unaccompanied minors in 1997.<sup>22</sup>

Known as the *Flores* settlement, this agreement requires that the government detain minors separate from adult non-family members and from juvenile criminal offenders. The government also agreed to hold minors in safe and sanitary conditions and in most cases to transfer them to a licensed temporary facility within three days of apprehension. There a minor is detained until she can be released to a family member. Over time, *Flores* has been expanded and defined through litigation; it now covers both accompanied and unaccompanied minors and limits the detention of minors to twenty days, regardless of whether they are accompanied by a family member.<sup>23</sup> *Flores* is binding on the government until it promulgates final regulations that implement the agreement.<sup>24</sup> Over twenty years later, this has not happened.<sup>25</sup>

The government contracts with organizations to jail unaccompanied minors, allegedly pursuant to the detention and release standards dictated by *Flores*. While these organizations are often nonprofits or other "antipoverty" groups, they have come under criticism for essentially jailing immigrant minors on behalf of the government. Many advocates see a conflict of interest between accepting money from the government for the detention of minors and working for their release.<sup>26</sup>

Family groups, usually a mother and her child or children, are another sector that has been detained in designated detention centers. In December 2021, the Biden administration repurposed the three remaining family detention centers into detention centers for single adults: Berks Family Residential Center in Pennsylvania and the Karnes Residential Center and the South Texas Family Residential Center, both in Texas.<sup>27</sup> Women and children held in the three family detention centers, for months or even years, endured harsh conditions that violated their human rights.<sup>28</sup>

Families seeking asylum at the southern border continue to face obstacles. In 2017, the Trump administration separated children from their parents, to detain and deport the parents separately. After public outcry, the Trump administration officially ended its policy of family separation in June 2018, though reports of family separation in smaller numbers continued.<sup>29</sup> At the end of 2021, the parents of 270 children separated at the border still were not found.<sup>30</sup> In March 2020, amid the unfolding COVID-19 pandemic, the Trump administration invoked Title 42 of the Public Health Service Act to expel asylum seekers at the southern border. The Biden administration has continued the Title 42 expulsion policy, which has resulted in further family separation.<sup>31</sup> Desperate parents, who face starvation, disease, and violence in Mexico, send their children unaccompanied across the U.S. border, where they are held in a growing number of child detention facilities.<sup>32</sup>

While *Flores* has placed some limits on the abusive detention of children and families, the general conditions for detainees involve systematic abuse, including sexual assault and medical neglect. The current detention standards and oversight process are based on the standard adopted at each detention facility. There are four versions of ICE detention standards: the 2000 National Detention Standards (NDS) revised in 2019 and the 2008 and 2011 Performance-Based National Detention Standards (PBNDS) revised in 2016. These standards are not legally codified, so it is difficult for detained immigrants to hold DHS accountable for violations of these policies. Many important aspects of life for detained individuals are not covered by these standards, and even when a standard does exist, there are rarely consequences for the government or the facility that violates them.<sup>33</sup> Even in the most egregious cases, such as sexual assault or medical neglect of detainees, DHS is rarely held accountable.<sup>34</sup>

In addition to detention, DHS implements other restraints on asylum seekers' freedom of movement, called "alternatives to detention" (ATDs), under programs that amount to functional custody. DHS argues that they are necessary to ensure people attend their court dates and, in some cases, comply with subsequent deportations. These programs have been criticized for their punitive nature.<sup>35</sup> ATDs currently include parole/release on the immigrant's own recognizance, bond, in-person check-ins at DHS offices, home visits, telephonic monitoring, and GPS monitoring by means of ankle bracelets. Parole and bond are discussed below. ATDs are primarily run by private prison companies, many of which also profit

from immigrant detention. The Biden administration greatly expanded the use of ATDs, including a pilot program launched in February 2022, run by a subsidiary of GEO, that would place hundreds of immigrants under house arrest with electronic monitoring.<sup>36</sup> Despite the government's claim that asylum seekers will not attend immigration hearings if released from detention, reports show that this is untrue.<sup>37</sup> Research indicates that the great majority of asylum seekers released from detention attend their hearings, and the number increases to almost 100 percent when individuals are represented by legal counsel.<sup>38</sup> Access to free or affordable counsel is critical to ensure that asylum applicants have the capacity to navigate the asylum system.<sup>39</sup>

### DETENTION CONDITIONS

Negative detention conditions act as barriers to meaningful legal representation for asylum seekers. Advocates should be familiar with common problems within immigration detention so that they can be prepared to competently represent individuals in detention and to advocate for improved conditions on behalf of their clients. Common detention conditions that advocates and experts should be aware of when representing detained asylum seekers are discussed in this section.

First, access to and communication with detained individuals is limited in various ways that make representation difficult. Detained immigrants generally lack access to the internet or email, which makes it difficult for them to locate and communicate with attorneys and to acquire the documentation necessary to support their asylum claims.<sup>40</sup> Access to telephones is, thus, critical for asylum seekers. In February 2019, the California Department of Justice launched an investigation into detention conditions after reports of wrongful deaths and other deplorable conditions.<sup>41</sup> The report details the common issues with the phone systems in detention, finding that detainees have little access, or none at all, to private areas to speak with their attorneys.<sup>42</sup> Detainees usually access telephones in their housing units, where other detainees and facility staff can overhear their conversations. This lack of privacy makes it difficult for detained individuals to share sensitive information critical to preparing their asylum cases, such as prior experiences of violence, with their attorneys.<sup>43</sup> For example, it can be unsafe or traumatic for a woman to reveal to her attorney that she is transgender or discuss the details of a sexual assault in a space where this information is easily overheard. In addition, with limited exceptions, calls are monitored and recorded and can be prohibitively expensive. The California report found that detained individuals have restricted and inconsistent access to telephones and that most facilities do not accept messages from attorneys.<sup>44</sup> These issues are not unique to California and should be expected across the country when working with asylum seekers. Experts rely on information in the asylum declarations, typically provided by the attorney. In the nondetained context, it is easy to clarify information in the declaration by having

the attorney meet with or call the applicant, using an interpreter if needed. However, because communication with attorneys or experts and use of interpreters are limited for detainees, experts should assume that clarifications will take time, or in some instances are not possible. It is important to plan accordingly and to do the best you can given the real limitations of detention work.

Because of these communication barriers, as well as the inability to earn money, detained individuals have a much harder time than nondetained applicants obtaining documentation to support their cases. This not only includes evidence from their home countries such as police reports or witness statements but also country conditions evidence like human rights reports, media reports, and expert witness affidavits. Some experts have provided affidavits that are not specific to an individual applicant's case but rather give expert analysis of a common issue affecting many applicants. For example, a generalized affidavit of country conditions explaining forced marriage in Guatemala can be helpful in multiple cases. Experts can make these generalized affidavits (sometimes referred to as universal affidavits) available to local nonprofit legal organizations to disseminate to detainees. Generalized affidavits can be powerful tools that help many applicants. Consider your expertise: Is there a subject on which you could provide a meaningful generalized expert affidavit? What local legal nonprofit serves a detention center in your area? Consider asking the attorneys there if a generalized affidavit you could provide would be helpful.

Access to interpreters and translators for asylum seekers in detention is another barrier to meaningful representation and working with experts. According to the Center for American Progress, "although DHS comes into contact with the broadest range of foreign-language speakers of any federal agency, it lags far behind in providing real-time interpretation for many of the people placed most at risk when their needs are ignored."<sup>45</sup> People who speak Indigenous languages are particularly vulnerable, and language needs are routinely ignored or made impossible to meet by other barriers, such as lack of access to telephones or private meeting rooms.<sup>46</sup>

Health care in detention is woefully inadequate, and when persons' basic health care needs are neglected, it is difficult for them to focus on or have the strength to meaningfully prepare a complex legal case. The Civil Rights and Civil Liberties Office in DHS found in 2020 that ICE had "systematically provided inadequate medical and mental health care and oversight to immigration detainees in facilities throughout the U.S."<sup>47</sup> Human Rights Watch found that detained women are routinely denied gynecological examinations, proper prenatal care, counseling after sexual assault, sanitary pads for menstruation, and hormonal contraceptives.<sup>48</sup> A recent whistleblower report reveals allegations of coerced sterilization of immigrant women by DHS health care providers in Georgia.<sup>49</sup> The lack of accountability regarding health care in detention centers leaves detained immigrants in duress, sometimes choosing deportation over continued suffering from extreme medical neglect or harm.

Mental health services in detention are also extremely problematic. Asylum seekers in DHS custody are fleeing persecution and commonly have recently experienced rape and/or beatings, witnessed the murder of a loved one, and/or experienced torture. This trauma is ignored by DHS. In 2016, ICE reported that only 21 of 230 DHS detention facilities offered in-person mental health services.<sup>50</sup> DHS has not prioritized screening and treatment of mental illness in its detained population and uses solitary confinement as a means of controlling mentally ill detainees. Reports indicate that at least 40 percent of detainees in solitary confinement have a mental illness.<sup>51</sup>

DHS also does little to respond to acts of sexual or physical violence perpetrated against detainees. For example, a *Los Angeles Times* investigation showed that of 265 calls to the police reporting physical and sexual violence in immigrant detention centers, only 3 cases resulted in a suspect being charged, and two of the three suspects were deported before being arrested.<sup>52</sup> Accusations of sexual assault of detainees by DHS officers and contracted staff are commonplace.<sup>53</sup>

Other problems in detention centers include poor food quality, overcrowding and hygiene issues, and changing visitation policies that impede attorneys' access to facilities. DHS is not held accountable for these systematic human rights abuses. The Office of the Inspector General reported in 2019 that ICE did not hold contractors accountable for meeting performance standards in detention centers.

Instead of holding facilities accountable through financial penalties, ICE issued waivers to facilities with deficient conditions, seeking to exempt them from complying with certain standards. However, DHS has no formal policies and procedures to govern the waiver process, has allowed officials without clear authority to grant waivers, and does not ensure that key stakeholders (such as human rights groups, attorneys, journalists, or faith organizations) have access to approved waivers.<sup>54</sup>

Because conditions in immigrant detention facilities are harsh, regularly violate detainees' human rights, and impede access to legal representation, many immigration advocates and professionals argue that immigration detention should be abolished and that the federal government should redirect the billions of dollars budgeted for detention centers to providing migrants with legal representation and social services.<sup>55</sup>

## THE DETAINED ASYLUM PROCESS AND RELEASE FROM CUSTODY

In your work as an expert, you may become involved in an asylum case at various legal stages. In this section, I discuss the asylum case process and the ways that individuals can be released from detention at different stages of that process. Understanding the general process and context of asylum cases is important because experts can be utilized at different stages of an asylum case.

*Expedited Removal and Reinstatement of Removal*

In 1996, the IIRAIRA not only increased immigration detention but also created an “expedited removal” process whereby an individual coming to the U.S. without authorization could be removed “without further hearing or review.”<sup>56</sup> Prior to 1996, an individual who entered the United States without authorization generally received a full immigration court hearing, in which they could apply for asylum or other forms of relief before they could be removed from the country. Now the law requires mandatory detention of individuals who are seeking initial entry into the United States or who have entered the United States outside an official point of entry and are believed to be subject to removal.<sup>57</sup>

Expedited removal is a process that allows DHS to rapidly remove noncitizens coming to the United States. Noncitizens arrested by DHS within fourteen days of their arrival in the country and within one hundred miles of the border who have not been admitted or paroled are subjected to this streamlined removal process under expedited removal.<sup>58</sup> The Trump administration expanded this program to include any noncitizen apprehended anywhere within the United States who entered the country without lawful immigration status, who has not been admitted or paroled at a port of entry, and who cannot prove that he or she has been present in the United States for two years or more.<sup>59</sup> In March 2022, the Biden administration rejected the expansion of expedited removal, but a month later it changed course and announced a plan to expand this form of fast-track deportation.<sup>60</sup> A similar fast-track removal process is initiated for individuals who have been previously deported (or previously subjected to expedited removal). In this case, DHS places the individual in a process called “reinstatement of removal.” Like expedited removal, reinstatement of removal puts the individual in a process that fast-tracks their removal and does not provide a hearing before an immigration judge.<sup>61</sup>

The IIRAIRA created an exception to removal (both expedited and reinstatement) for individuals who indicate “an intention to apply for asylum” or “a fear of persecution” upon returning to their home countries.<sup>62</sup> The exception provides certain protections for individuals who show that they could potentially win an asylum case, withholding of removal, or CAT relief before an immigration judge. The process that individuals undergo to obtain protection from fast-track removal under expedited or reinstatement of removal is similar but slightly different. I discuss both processes here: first, for individuals arriving in the United States for the very first time who are placed in expedited removal; and second, for individuals with prior deportations or expedited removal orders but who also fear return to their home countries.

*Credible and Reasonable Fear Interviews*

Under the IIRAIRA exception to expedited removal for individuals who fear return to their home countries, once a person tells an immigration officer that they are afraid to return to their home country, the officer refers the individual



for an interview by an asylum officer to determine if they have a “credible fear of persecution.”<sup>63</sup> A “credible fear of persecution” is “a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum.”<sup>64</sup> To establish eligibility for asylum, an applicant must show that there is at least a 10 percent chance that they will be persecuted based on one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.<sup>65</sup> The asylum officer asks the individual a series of questions in order to determine if the individual meets this standard. The credible fear interview (CFI) screens only for potential asylum eligibility, not other forms of relief. If the individual passes the CFI, DHS suspends their expedited removal and they are entitled to a full asylum hearing before an immigration judge.<sup>66</sup> If not, the individual is ordered removed from the United States without “further hearing or review,”<sup>67</sup> a decision the individual can appeal and have reviewed by an immigration judge.<sup>68</sup>

The original intent of Congress when it created the CFI process was that it be a screening standard for admission into the full asylum process with a low threshold of proof.<sup>69</sup> DHS conducts trainings for asylum officers to carry out these interviews. The trainings instruct officers on how to make determinations regarding whether an individual should “pass” the interview. Over time, training materials have guided officers to impose stricter standards, making it harder for individuals to pass the interview and enter the full asylum process.

Previous versions of the Refugee, Asylum, and International Operations (RAIO) Directorate Asylum Officer Basic Training Manual describe the credible fear standard as a broad net designed to protect bona fide asylum seekers and avoid the chance of deporting someone with a potentially legitimate asylum claim. The Trump administration made changes to the CFI process that greatly decreased the number of people who pass this initial screening.<sup>70</sup> Changes to training guidance include (1) deemphasizing the broad legal threshold for passing CFIs; (2) requiring that an applicant establish her identity “by a preponderance of the evidence”; (3) allowing officers to require country conditions materials as evidence; (4) eliminating language that indicated that the officer should consider the impact of cross-cultural issues, trauma, and the effects of detention on credibility assessments, as well as other previously listed factors that might explain or mitigate inconsistencies; and (5) eliminating the explicit duty to elicit information relevant to the nexus determination.<sup>71</sup> Because of added emphasis on country conditions evidence that had never previously been part of the CFI process, some expert witnesses produce expert affidavits for submission at this stage.<sup>72</sup>

In addition, the law requires the CFI to be conducted by an “asylum officer,” defined as an immigration officer with the requisite training.<sup>73</sup> In 2019, reports emerged that DHS began to replace trained USCIS asylum officers with officers

from Customs and Border Patrol, which, according to the suit filed against CBP by the American Immigration Council, is “a law enforcement agency with a history of abuse of and misconduct towards asylum seekers.”<sup>74</sup> CFI denial rates skyrocketed, and in March 2020, immigrant women detained at the Dilley, Texas, family detention center litigated against the government: “Plaintiffs allege that since mid-July the number of women and children at Dilley family detention center in Texas who pass the first interview necessary to apply for asylum has dropped from 97% of applicants to fewer than 10%.”<sup>75</sup> On August 31, 2020, the U.S. District Court for the District of Columbia issued a preliminary injunction, halting the practice of using CBP officers until the case is fully decided.<sup>76</sup>

If, on the other hand, a person who is arrested by DHS has previously been to the United States and was ordered deported by an immigration judge or deported under expedited removal, she will proceed according to a similar but slightly different process. DHS will reinstate her prior removal order, which, like expedited removal, does not allow her to petition an immigration judge for permanent protection in the United States. However, if she claims fear to return to her home country, she is entitled to an initial screening by the asylum office, called a “reasonable fear interview” (RFI), and the process is essentially the same as the CFI process. One notable difference is that RFI interviews often take longer for the asylum office to schedule. If the person passes, she will be allowed a hearing before an immigration judge. However, she is not eligible to apply for asylum because of her prior deportation order and can only apply for related forms of relief: withholding of removal and/or protection under the Convention Against Torture. These forms of relief have more stringent legal standards than asylum. To pass the RFI, an individual must “credibly establish that there is a ‘reasonable possibility’ she would be persecuted in the future on account of her race, religion, nationality, membership in a particular social group, or political opinion.”<sup>77</sup> A “reasonable possibility” requires her to demonstrate that there is at least a 51 percent likelihood that she will be persecuted, as opposed to the 10 percent likelihood stipulated by the asylum standard.

Screening interviews for both CFIs and RFIs are usually conducted by telephone with an asylum officer through a telephonic interpreter. The asylum seeker has a right to an attorney, but most people do not have attorneys present. The asylum officer asks a series of questions pertaining to the individual’s identity, past experiences in her home country, and her fears of returning. The interview is recorded and then later transcribed into English and given to the asylum seeker with the written interview results. This is called the CFI/RFI transcript. If an individual passes the interview, the full asylum court process is initiated, and the individual may be eligible for release from detention. The CFI/RFI transcripts become part of the applicant’s official records and are additional documents that attorneys may provide to experts to include in their analyses.

*Release from Detention*

Once an individual passes her CFI, DHS has broad discretionary authority to release the individual from detention under conditional parole, referred to as release on recognizance, or under a bond.<sup>78</sup> If she is released, she will argue her asylum case before a nondetained court in the jurisdiction where she lives. If she is not released from detention at this point, she can continue the process to argue her asylum case from detention, which is described in the next section.

Conditional parole allows release of an individual from detention without requiring her to pay a monetary bond.<sup>79</sup> However, DHS may place other conditions of release on the individual, such as regular check-ins at DHS offices or GPS ankle monitoring. Parole practices vary widely across detention centers and jurisdictions but are on the decline. DHS has broad authority to parole individuals otherwise subject to detention for “urgent humanitarian reasons or significant public benefit.”<sup>80</sup> However, this tool is increasingly ignored, which results in asylum seekers’ prolonged detention.<sup>81</sup> DHS also has the authority to release a detained individual from detention under a bond of at least \$1,500.<sup>82</sup> In making release determination, DHS is required to consider whether the individual poses a danger to property or people outside of detention and whether the individual is likely to appear for future hearings.<sup>83</sup> However, some DHS field offices have not followed this criteria and have automatically denied all requests for parole.<sup>84</sup> DHS sometimes sets bonds impossibly high—\$10,000, \$20,000, or \$30,000—and many asylum seekers are unable to pay the bond and must remain in detention.<sup>85</sup>

Custody determinations by DHS may be reviewed by an immigration judge (IJ) at any time before a final removal order.<sup>86</sup> If DHS does not issue an initial bond or release under conditional parole, an asylum seeker can ask an IJ to review the decision. The IJ has authority to lower the immigration bond or set an initial bond if no bond was set by DHS. Usually the asylum seeker requests a bond hearing in writing to the immigration court. She can be represented by counsel or represent herself. If DHS or the immigration judge set a bond, it can be paid at a DHS office anywhere in the United States, and DHS usually releases the asylum seeker from custody within a day or two. When she attends her hearings, DHS returns the bond amount, with interest, to the person who paid it. Sometimes people without resources to pay a bond will have a private bail bond company pay for them, resulting in high interest rates or even GPS ankle monitoring by the company.<sup>87</sup>

Certain people are not eligible for release and/or a custody determination review with an IJ. If an asylum seeker is classified as an “arriving alien,” which means that she presented herself to immigration officers at an official point of entry, she is not eligible for IJ review.<sup>88</sup> She is reliant on DHS to release her on bond or conditional parole. In addition, people with prior removal orders are not eligible for IJ review of DHS custody determinations. Finally, anyone subject to “mandatory detention” under INA section 236(c)(1) is not eligible for release by

DHS.<sup>89</sup> Mandatory detention applies to people suspected of terrorism and people with certain criminal convictions. In June 2022, the Supreme Court determined that the government is not required to provide bond hearings for immigrants, who thus may be detained indefinitely.<sup>90</sup>

### *Detained Asylum, Withholding of Removal, and CAT Cases*

The full asylum court process for detained and nondetained individuals follows the same basic pattern, but detained individuals experience certain differences that again make their representation more difficult. The first step in the asylum hearing process is a preliminary hearing with an IJ, called a master calendar hearing (MCH). If the individual is detained, the detention center might have a dedicated immigration court to which the individual is escorted for her hearings. More often, however, the facility does not have an in-facility court, and an IJ located in an immigration court outside of a detention center, usually in a large city, conducts the hearing with the asylum seeker by video conference. There is a series of MCH hearings during which the IJ establishes the person's identity, confirms the facts and allegations against her in the Notice to Appear (NTA), and accepts any applications for relief from deportation, such as the asylum application. Once the individual submits her asylum application at an MCH, the IJ schedules the final hearing to decide whether she qualifies for asylum, withholding of removal, or CAT protection.

A detained asylum hearing presents unique challenges to the asylum seeker. First, remote participation in televideo hearings can lead to miscommunications and translation lags. Privacy is also a concern. Because asylum applicants are forced to recount traumatic past experiences, such as rapes and torture, the hearings should be guarded and private and are legally required to be closed hearings. However, in practice, guards and other detained immigrants can sometimes overhear the proceedings due to the poor room quality, and detention staff conversations nearby can interfere with communication between hearing participants. Expert witnesses can testify telephonically in these hearings, but because telephonic testimony is always discretionary, IJs may deny this request.

Another challenge to detained hearings is the speed of the docket. Detained dockets take priority over those for nondetained individuals, and cases progress at relatively rapid paces. This can present real challenges to the asylum applicant and her attorneys to prepare her case in time. Gathering evidence from her home country, obtaining legal counsel, and working with experts takes time. The barriers of being detained makes these tasks even more difficult, given limited or totally restricted access to phones, email, and legal libraries. If an asylum seeker asks the IJ for more time to prepare her case, she is subjecting herself to additional weeks or months of detention, often in inhumane conditions. Asylum applicants are put in the difficult position of balancing their case preparation time frame with the realities of continued or prolonged detention.

### *Appeals*

If an IJ denies asylum, withholding of removal, or protection under CAT, the applicant has thirty days to submit an appeal notice to the Board of Immigration Appeals (BIA). This must be done using a specific legal form in English that is difficult for detained individuals to complete without assistance. If an applicant does successfully appeal the case, she usually remains detained until the BIA issues a decision. DHS is unlikely to reverse its decision to detain the applicant while the BIA considers her appeal. The appeal process could mean months, and sometimes years, of detention. Prolonged detention is a strong disincentive for appeal, and many people give up and accept deportation at this stage. The appeals courts generally do not accept new evidence, so experts are rarely involved at this stage.

In sum, detention work requires flexibility from all parties. There are many variables that can change the timeline of a detained case. The applicant might be released from detention on bond or parole a day before the expert was prepared to testify, and the hearing could be scheduled for months or years later. The applicant might move to another state and change attorneys. A detained hearing might be postponed for weeks or months for no apparent reason. You might call in for testimony at an asylum hearing only to find out that the court failed to schedule the proper interpreter, and the hearing will be postponed. There is little applicants, attorneys, or experts can do to control these situations, so flexibility is key. Plan on unexpected bumps and timeline mishaps when working with detained asylum applicants.

### FINAL THOUGHTS

Expert witnesses very often determine the outcome of an asylum, withholding of removal, or CAT case. Your importance cannot be overstated. Immigration judges often rely on expert witness testimony in their written and oral decisions granting relief, and decisions supported by expert testimony are more difficult for DHS attorneys to successfully appeal. This is true in the detained and the nondetained contexts, but the stakes are even higher for the detained applicant: enduring an appeal in DHS custody means being locked away from children and family and being subject to human rights abuses. While representation for detained individuals presents challenges, when experts work through these challenges and provide effective testimony, the applicant is more likely to win freedom. A nationwide list of nonprofit legal organizations, organized by state and immigration court jurisdiction, can be found on the Department of Justice's website, <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>. If you are interested in providing expert testimony for detained asylum seekers, you may contact your local nonprofit organizations and national organizations that provide support to local nonprofits, such as the Center for Gender and Refugee Studies and the Detention Watch Network.

## NOTES

1. Altaf Saadj, MD, et al., "Understanding US Immigration Detention: Reaffirming Rights and Addressing Social-Structural Determinants of Health," *Health and Human Rights Journal* 22:1 (June 2020): 187–97.
2. "The Right to Be Heard from Immigration Prisons: Locating a Right of Access to Counsel for Immigration Detainees in the Right of Access to Courts," *Harvard Law Review* 132:726 (December 2018); Emma Winger and Eunice Cho, "ICE Makes It Impossible for Immigrants in Detention to Contact Lawyers," ACLU, Sept. 29, 2021.
3. ACLU, "Understaffed, Unsanitary ICE Facility in New Mexico Fails Annual Inspection," Sept. 28, 2021.
4. Emily R. Summers, "Prioritizing Failure: Using the 'Rocket Docket' Phenomenon to Describe Adult Detention," *Iowa Law Review* 102:851 (2017).
5. INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i); 8 C.F.R. §§ 235.3(b)(2)(iii), 1235.3(b)(iii); see 8 C.F.R. § 1.2. for arriving alien definition.
6. Doris Meussner et al., "Immigration Enforcement in the United States: The Rise of a Formidable Machinery," Migration Policy Institute, January 2013, 139.
7. Detention Watch Network, "Immigration Detention 101," ca. 2021.
8. Detention Watch Network, "Detention Quotas," ca. 2021; National Immigrant Justice Center, "Immigration Detention Bed Quota Timeline," Dec. 2015.
9. Detention Watch Network, "Detention Quotas."
10. *Id.*
11. National Immigration Forum, "Fact Sheet: Immigration Detention in the United States," Jan. 27, 2021.
12. Wendy Sawyer and Peter Wagner, "Mass Incarceration: The Whole Pie 2022," Prison Policy Initiative, Mar. 14, 2022; TRAC, "Immigration Detention Quick Facts," July 2022 (Tracking Tool).
13. There are seven Service Processing Centers. They are located in Aguadilla, Puerto Rico; Batavia, NY (the Buffalo SPC); El Centro, CA; El Paso, TX; Florence, AZ; Miami, FL (the Krome SPC); and Los Fresnos, TX (the Port Isabel SPC).
14. American Immigration Council, "Immigration Detention in the United States by Agency," Jan. 2, 2020; U.S. Immigration and Customs Enforcement, "Detention Management."
15. Clyde Haberman, "For Private Prisons, Detaining Immigrants Is Big Business," *New York Times*, Oct. 1, 2018.
16. ACLU, "Justice Free Zones: Immigration Detention under the Trump Administration," 2020; Eunice Cho, "More of the Same: Private Prison Corporations and Immigration Detention under the Biden Administration," ACLU, Oct. 5, 2021.
17. Detention Watch Network, "Financial Incentives," ca. 2021.
18. Haberman, "For Private Prisons, Detaining Immigrants Is Big Business"; Dario McCarty, "Private Prison Industry Shifts Focus to Immigrant Detention Centers, Funding Immigration Hawks," Open Secrets, June 21, 2022.
19. Pub. L. No. 107-296, 116 Stat. 2135. (SECTION 462), Homeland Security Act of 2002; Office of Refugee Settlement, Unaccompanied Refugee Minors Program.
20. U.S. Customs and Border Protection, "U.S. Border Patrol Southwest Border Apprehensions by Sector Fiscal Year 2019"; for 1990 statistics, see *Reno v. Flores*, 507 U.S. 292, 295 (1993).
21. Camilo Montoya-Galvez, "U.S. Shelters Received a Record 122,000 Unaccompanied Migrant Children in 2021," CBS News, Dec. 23, 2021; TRAC, "Growing Numbers of Children Try to Enter the U.S.," June 28, 2022.
22. Human Rights First, "The Flores Settlement and Family Incarceration: A Brief History and Next Steps," Oct. 30, 2018.
23. American Immigration Lawyers Association (AILA), "Documents Relating to *Flores v. Reno* Settlement Agreement on Minors in Immigration Custody," June 22, 2022.

24. Sara Herman Peck and Ben Harrington, "The 'Flores Settlement' and Alien Families Apprehended at the U.S. Border: Frequently Asked Questions," Congressional Research Service, Sept. 17, 2018; "Stipulation Extending the Settlement Agreement and for Other Purposes, and Order Thereon," *Flores v. Reno*, No. CV 85-4544-RJK (Px) (C.D. Cal. Dec. 7, 2001); *Flores v. Sessions*, 862 F.3d 863, 869 (9th Cir. 2017) ("The Flores Settlement was intended as a temporary measure, but in 2001 the parties stipulated that it would remain in effect until days following defendants' publication of final regulations"); *Flores v. Lynch*, 828 F.3d 898, 905–8 (9th Cir. 2016).
25. Dalia Castillo-Granados et al., "Time to Rebuild and Reimagine: Reflecting on Four Hard Years in Children's Immigration Law," American Bar Association, Jan. 11, 2021.
26. Sabrina Gunter, "Migrant Children Are Still Being Detained in Chicago," *In These Times*, Feb. 11, 2020.
27. U.S. Immigration and Customs Enforcement, "Detention Management"; Andrea Castillo, "Biden Administration Halts Immigrant Family Detention for Now," *Los Angeles Times*, Dec. 17, 2021.
28. The documentary, *Las Madres de Berks*, includes testimonials of four mothers held at the Berks family detention center for over two years; <https://www.lasmadresdeberks.com>.
29. Detention Watch Network, "Family Detention," ca. 2021.
30. Priscilla Alvarez, "Parents of 270 Children Separated at Border under Trump Have Still Not Been Found, Court Filing Says," CNN, Nov. 3, 2021.
31. Human Rights Watch, "Q&A: US Title 42 Policy to Expel Migrants at the Border," Apr. 8, 2021.
32. Zolan Kanno-Youngs, "A Surge in Migrant Children Detained at the Border Is Straining Shelters," *New York Times*, Apr. 22, 2021.
33. Detention Watch Network, "Detention Oversight," ca. 2021.
34. Andrea Castillo and Paloma Esquivel, "California Police Got Hundreds of Calls about Abuse in Private ICE Detention Centers: Cases Were Rarely Prosecuted," *Los Angeles Times*, Oct. 18, 2020.
35. Detention Watch Network, "Alternatives," ca. 2021.
36. Ted Hessen and Mica Rosenberg, "Private Prison Company to Test U.S. House Arrest Program for Immigrants," Reuters, Feb. 16, 22.
37. Human Rights First, "Asylum Seekers Regularly Attend Immigration Hearings," Jan. 25, 2019.
38. TRAC Immigration, "Record Number of Asylum Cases in FY 2019," Jan. 8, 2020. This report found that 99 percent of nondetained asylum seekers attended their immigration court hearings.
39. Jacob Czarnecki and Haley Hamblin, "Legal Representation for Asylum Seekers: An Overlooked Area of Reform for a System in Crisis," Niskanen Center, Aug. 24, 2021.
40. ACLU, "Justice Free Zones."
41. California Department of Justice, "Immigration Detention in California," Feb. 2019.
42. Immigration Justice Campaign, "Lawsuit Challenges ICE's Repeated Denial of Free Legal Phone Calls in El Paso Region," May 4, 2020.
43. California Department of Justice, "Immigration Detention in California," 127.
44. *Id.*
45. Tom Jawetz and Scott Shuchart, "Language Access Has Life-or-Death Consequences for Migrants," Center for American Progress, Feb. 20, 2019.
46. Katie Shepherd, "Indigenous People Face Persistent Language Access Challenges in Immigration Detention," American Immigration Council, Oct. 12, 2020.
47. Peter E. Mina and Dana Salvano-Dunn, "CRCL Expert Recommendations Regarding ICE Health Service Corps (IHSC) Medical/Mental Health Care and Oversight," DHS, June 23, 2020; Eunice Cho, "The Trump Administration Weakens Standards for ICE Detention Facilities," ACLU, Jan. 14, 2020.
48. Human Rights Watch, "Detained and Dismissed: Women's Struggles to Obtain Health Care in United States Immigration Detention," Mar. 17, 2009.
49. Maya Manion, "Immigration Detention and Coerced Sterilization: History Tragically Repeats Itself," ACLU, Sept. 29, 2020.



50. Renuka Rayasam, “Migrant Mental Health Crisis Spirals in ICE Detention Facilities,” *Politico*, July 21, 2019.

51. Spencer Woodman and Maryam Saleh, “40 Percent of Ice Detainees Held in Solitary Confinement Have a Mental Illness, New Report Finds,” *Intercept*, Aug. 14, 2019; DHS, “ICE Needs to Improve Its Oversight of Segregation Use in Detention Facilities,” Oct. 13, 2021; José Olivares, “ICE Review of Immigrant’s Suicide Finds Falsified Documents, Neglect, and Improper Confinement,” *Intercept*, Oct. 23, 2021.

52. Castillo and Esquivel, “California Police Got Hundreds of Calls about Abuse in Private ICE Detention Centers.”

53. Lomi Kriel, “ICE Guards ‘Systematically’ Sexually Assault Detainees in an El Paso Detention Center, Lawyers Say,” *ProPublica*, Aug. 14, 2020.

54. Office of the Inspector General, “ICE Does Not Fully Use Contracting Tools to Hold Detention Facility Contractors Accountable for Failing to Meet Performance Standards,” Jan. 29, 2019.

55. César Cuauhtémoc García Hernández, “Abolish Immigration Prisons,” *New York Times*, Oct. 2, 2019; National Immigrant Justice Center, “Policy Brief | 5 Reasons to End Immigrant Detention,” Sept. 14, 2020.

56. 8 U.S.C. § 1225(b)(1)(A); 8 U.S.C. 2 Case 1:20-cv-00846-RJL Document 32 Filed 08/31/20 Page 2 of 22 § 1225(b)(1)(A)(i). See Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of 8 U.S.C.).

57. 8 U.S.C. § 1225(a)(1), (b)(1)(B), (2)(A); 8 C.F.R. § 235.3(b), (c).

58. INA § 235(b)(1); “noncitizens encountered within 100 air miles of the border and within 14 days of their date of entry regardless of the noncitizen’s method of arrival.” 69 FR 48877 (Aug. 11, 2004).

59. U.S. Customs and Border Patrol, “Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions 2018.”

60. Homeland Security, “Rescission of the Notice of July 23, 2019, Designating Aliens for Expedited Removal,” *Federal Register*, Mar. 21, 2022; Camilo Montoya-Galvez and Nicole Sganga, “Biden Officials Release Updated Post-Title 42 Plan amid Bipartisan Criticism,” CBS News, Apr. 26, 2022.

61. 8 CFR § 1241.8—Reinstatement of removal orders.

62. 8 U.S.C. § 1225(b)(1)(A).

63. 51225(b)(1)(A)(ii); 1225(b)(1)(A)(ii).

64. Id. § 1225(b)(1)(A)(v).

65. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439-40 (1987).

66. 8 U.S.C. § 1225(b)(1)(B)(ii).

67. 8 U.S.C. § 1225(b)(1)(B)(iii).

68. 8 U.S.C. § 1225(b)(1)(B)(iii)(III).

69. 142 Cong. Rec. S11491-02 (Statement of Senator Hatch); 62 Fed. Reg. 10312 (Mar. 6, 1997).

70. Immigration Policy Tracking Project, “USCIS Raises Standard for Initial Credible Fear and Reasonable Fear Interviews,” Feb. 13, 2017; Amanda Holpuch, “Asylum: 90% of Claims Fall at First Hurdle after US Process Change, Lawsuit Alleges,” *Guardian*, Nov. 13, 2019.

71. AILA, “Updated Credible Fear Lesson Plans Comparison Chart: 2006, 2014, 2017, 2019,” May 30, 2019.

72. Immigration Justice Campaign, “Credible and Reasonable Fear Interviews,” n.d.

73. 8 U.S.C. § 1225(b)(1)(E)(i); 8 C.F.R. § 208.1(b).

74. See Complaint, *American Immigration Council v. U.S. Customs & Border Prot.*, No. 1:19-cv-02965 at \*13; Molly O’Toole, “Border Patrol Agents, Rather Than Asylum Officers, Interviewing Families for ‘Credible Fear,’” *Los Angeles Times*, Sept. 19, 2019; Julia Ainsley, “Stephen Miller Wants Border Patrol, Not Asylum Officers, to Determine Migrant Asylum Claims,” NBC, July 29, 2019; Nick Miroff, “U.S. Asylum Screeners to Take More Confrontational Approach as Trump Aims to Turn More



Migrants Away at the Border,” *Washington Post*, May 7, 2019; “U.S. Will Assign Dozens of Border Agents to Migrant Asylum Interviews,” Reuters, May 9, 2019.

75. *A.B.-B., et al. v. Morgan, et al.*

76. *A.B.-B., et al. v. Morgan, et al.*, Memorandum of Opinion, Aug. 29, 2020.

77. USCIS, “Questions and Answers: Credible Fear Screenings.”

78. INA § 236(a)(2)(A); 8 U.S.C. § 1226(a)(2)(A).

79. INA § 236(a)(2)(B); 8 U.S.C. § 1226(a)(2)(B).

80. INA § 235(b)(1).

81. *Id.*

82. INA § 236(a)(2)(A). (In 1996, IIRAIRA increased the minimum bond amount from \$500 to \$1,500.)

83. 8 C.F.R. § 236.1(c)(8).

84. Jack Rodgers, “Blocked from Denying Parole to All Asylum Seekers,” *Courthouse News Service*, Sept. 5, 2019.

85. Sarah Betancourt, “Immigrants Pay Cripplingly High Bail Bonds to Be Released from Detention across US,” *Guardian*, Aug. 25, 2021.

86. 8 CFR § 236.1(d)(1).

87. Stephen Gandel, “Bail Bond Firm Duped Immigrants into Wearing ‘Shackles’ and Paying to Have Them Removed, Feds Say,” *Guardian*, Feb. 22, 2021.

88. “United States at a port-of-entry, or an alien seeking transit through the United States at a port-of-entry, or an alien interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains an arriving alien even if paroled pursuant to section 212(d)(5) of the Act, and even after such parole is terminated or revoked.”

89. INA § 236(c)(1).

90. Adam Liptak, “Supreme Court Rejects Bail Hearings for Jailed Immigrants,” *New York Times*, June 13, 2022.