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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Ilsa Saravia, et al.,

Petitioners/Plaintiffs,

v.

Jefferson B. Sessions, et al.,

Respondents/Defendants.

Case No. 3:17-cv-03615-VC

PLAINTIFFS' EMERGENCY APPLICATION FOR RELIEF RE HEARINGS FOR ALL CLASS MEMBERS AND IMMEDIATE RELEASE OF SOME CLASS MEMBERS

INTRODUCTION AND RELIEF REQUESTED

On Monday evening, November 20, 2017, the Court issued its Order Granting Preliminary Injunction ("PI Order") (Dkt. 100), requiring that by Wednesday, November 29, all currently-detained Class Members be granted a hearing before an Immigration Judge at which the Government would have the burden to justify their continued detention (a "*Saravia* hearing"). Since that time, counsel for the Plaintiff Class have been working intensively to locate class members, their sponsors and their immigration attorneys, and to assist them in preparing for these hearings.

Counsel for the Government has provided some information concerning Class Members, as a result of which it is now known that there exist at least 32 Class Members detained in 12 facilities in four states. Unfortunately, however, the Government's actions, combined with the shortness of time to convene and conduct the hearings, threaten to deny Class Members timely notice of hearings in a form that complies with the P.I. order; to deprive them of information they require to defend themselves; to deprive their sponsors of the ability to participate in the hearings; and to deprive Class Members of meaningful access to counsel. Just last night, Class Counsel received copies of totally insufficient notices for hearings to be held tomorrow and the day after tomorrow. In addition, several Class Members remain in detention even though they have had hearings before Immigration Judges who made findings that entitle them to be released.

This Court's emergency intervention is necessary to prevent Class Members from being prejudiced in the conduct of *Saravia* hearings in the next two days – the very hearings that the Court ordered for the protection of their due process rights. Plaintiffs respectfully request the Court order that the Defendants:

1. Give proper notice for *Saravia* hearings to all Class Members, their sponsors, individual attorneys of record, and Class Counsel by 5:00 p.m. on Monday, November 27, 2017, and at least 36 hours before the time set for the hearing, setting forth in detail the time and place of the hearing and the alleged factual basis for each Class Member's rearrest and detention;

2. Provide Class Counsel with the names and contact information of attorneys who have entered an appearance in any of the Class Members' immigration cases;
3. Permit any Class Member who requests it to obtain a brief extension of time for the commencement of the hearing, or following the conclusion of the Government's presentation of its evidence, in order to prepare for the hearing and/or secure legal representation;
4. Instruct all facilities where Class Members are being held to immediately allow their attorneys to have access to them in person, by video conference and/or by telephone, and provide Class Counsel with contact information for facility staff to facilitate access to the Class;
5. Immediately release from detention any Class Member who has already had a *Flores* hearing after being rearrested, at which the Immigration Judge ruled that the Class Member has not been shown to be a danger or a flight risk, including three class members O.C., J.G.R. and L.V.; and
6. Hold all *Saravia* hearings in the jurisdiction in which the Class Member was living or was arrested, except to the extent that the Class Member elects to have the hearing conducted in the jurisdiction in which he is detained.

This application is supported by the Declarations of Julia Harumi Mass and Stephen B. Kang, submitted herewith; the P.I. Order; and the papers and pleadings on file with the Court. As set forth in the Mass Declaration (at ¶ 10 and Ex. 1), Plaintiffs have complied with Paragraph 4 of this Court's Standing Order for Civil Cases by giving notice of their intention to seek the relief set forth herein by email to counsel for Defendants at 12:06 p.m. on Saturday, November 25, 2017.

A [Proposed] Order is also submitted herewith.

THE RELIEF SOUGHT BY PLAINTIFFS IS URGENTLY NEEDED

Since the Court issued its PI Order less than one week ago, Plaintiffs' counsel have been working diligently to assist the Class Members in preparing for the *Saravia* hearings ordered by

the Court. (Kang Dec., ¶¶ 2-3; Mass Dec., ¶ 2.) Counsel learned for the first time on Wednesday afternoon, November 22, that the class consists of at least 32 minors detained in 12 separate facilities in four states. (Kang Dec. ¶¶ 4-5 and Ex. 1.) Plaintiffs' counsel have attempted to notify members of the legal community that represent children in immigration proceedings about the upcoming hearings and have sought to contact Class Members' individual attorneys of record, their sponsors, and the children themselves to verify the Class Members have retained counsel. (Kang Dec. ¶¶ 2-3; Mass Dec. ¶¶ 2, 13-15). Where a Class Member is not known to have an individual attorney representing him in immigration proceedings, or Plaintiffs' counsel have been unable to verify that the attorney is available to represent the Class Members at a *Saravia* hearing, Class Counsel have been attempting to locate an attorney to represent the Class Member. (*Id.*)

The Court properly ordered the Government to provide *Saravia* hearings on an expedited basis, in view of the fact that some of the Class Members had already been detained for over five months without a hearing since their re-arrests. P.I. Order at 31-32, 43-44. However, the Government's failure to provide proper notice of the hearings and access to the detainees now presents the Class Members with the threat of losing any meaningful opportunity to rebut the Government's charges, thus compounding the deprivation of their liberty and the denial of due process. Plaintiffs make this application in order to prevent such unintended consequences.

1. Class Members have been denied timely, detailed notices of hearings.

The PI Order makes clear that "an unaccompanied minor placed with a sponsor" has already been the subject "[ORR's] determination that the minor is neither dangerous nor a flight risk"; that "because the minor cannot reasonably be rearrested absent a material change in circumstances, due process … requires that the minor receive a prompt hearing in which the government must show that these changed circumstances exist"; and that therefore the sponsor, the minor and Class Counsel must receive "*notice of the basis for the rearrest*", i.e., the "*changed circumstances*" allegedly justifying rearrest by the Government. PI Order at 31-32, 44

(emphasis added). The notice must also state "the details regarding the hearing" including its time and place. *Id.* at 44.

Since last Tuesday, November 21, Class Counsel have made repeated requests for information concerning the time and place of the hearings, and the "changed circumstances" that constitute the "basis for the rearrest" of each Class Member. Mass Dec. ¶¶ 3-10 and 13, and Ex. 1. For days, no such information was forthcoming. Finally, at 7:37 p.m. Pacific Standard Time last night, Sunday, November 26, counsel for Defendants sent Plaintiffs' counsel hearing notices for 18 Class Members that counsel mentioned "were sent out Friday." (Mass Decl. ¶¶ 12 and Exhs. 3-4-.) These notices did not include any information about any "changed circumstances" forming the basis for the government's re-arrest of any of the class members, in violation of the P.I. Order. Counsel's email also provided partial hearing information for nine additional class members – also without providing any information about "changed circumstances" – but Class Counsel still have no information whatsoever about the dates, times, or locations of five of the hearings that are due to take place within the next two days. Mass Dec. ¶ 12.

As we now know from the Government's files pertaining to the three original Named Children, the Government in each case has at least attempted to collect police reports or other alleged evidence purporting to justify their rearrests; to fail to even describe such evidence to the Class Members in advance of their hearings not only violates the P.I. Order, it violates the fundamental notion that a person should be given notice of the evidence against him and a fair opportunity to respond to it. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976); *see also, Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987) (due process in prison disciplinary hearing requires that inmate receives written notice of charges, and a statement of the evidence relied on by the prison officials). The government must provide notice of its evidence far enough in advance of the hearing to provide a Class Member with a reasonable opportunity to examine the evidence and prepare his rebuttal. *See, e.g.*, *Cinapian v. Holder*, 567 F.3d 1067, 1074 (9th Cir. 2009).

Class Members and their attorneys cannot reasonably *prepare* for hearings with no advance notice of the time or even the city in which the Government intends to hold the hearings, and

without any information concerning the alleged basis for their detention. As described in detail in the Kang Declaration, Class Counsel's efforts even to locate attorneys who could handle these hearings have been stymied by this lack of basic information from the Government. Kang Dec. ¶¶ 6-11.[1]

3. Class Members should be granted additional time to rebut the Government's case.

Whether intentionally or not, the Government's conduct since issuance of the PI Order has had the predictable consequence of making it extremely difficult, if not impossible, for Class Members to obtain counsel, locate evidence, secure the presence of witnesses, and prepare for their *Saravia* hearings. Kang Dec. ¶¶ 6-11; Mass Dec. ¶¶ 11-16. There is an obvious and necessary solution to this problem. Each Class Member must be able to obtain a brief continuance at the commencement of the hearing, or to obtain a continuance following the Government's presentation of its case, to provide him with a reasonable opportunity to meet the Government's proffered evidence.

Because the government has the burden to show changed circumstances that justified the re-arrest and detention, hearings may go forward if the child has counsel present.[2] Immigration judges can order release at the conclusion of the government's case if the government does not meet its burden. If release is not ordered following the government's case in chief, Class Members should have the opportunity to seek a brief adjournment to prepare their rebuttal to the government's allegations, learned for the first time at the hearing. This is necessary to cure the prejudice caused by inadequate notice and lack of time to prepare or find counsel, particularly where vital liberty interests are at stake, and to provide the Class Member and his attorney "a meaningful opportunity … to rebut the factual basis for the minor's rearrest and detention." P.I. Order at 32. Moreover, where the Class Member is unrepresented and will not know that he can

[1] Notably, Class Counsel have been unable to secure pro bono representation or confirm the participation of retained counsel for any of the six Class Members detained in Texas, including J.G., one of the minors who had sought to represent the Class. Kang Dec., ¶ 4 and Ex. 1.

[2] If individual counsel prefer to postpone the government's presentation of evidence in order to participate in the hearing or for any other reason, they should be permitted a brief continuance in response to a written request before or a verbal request at the outset of the hearing.

request a continuance, the Immigration Judge should inform the Class Member that he can request a continuance to obtain counsel, and can request a transfer of the hearing to the jurisdiction of his home or arrest.

4. The Government must instruct facilities to provide Class Members access to counsel.

During the past several days, Class Counsel have encountered numerous difficulties in obtaining access to their clients who are detained in ORR contract facilities. These problems, which are described in detail at ¶¶ 11-16 of the Mass declaration, result from ORR's failure to instruct their contracted facilities to do everything reasonably possible to facilitate detainees' access to counsel. The Government is clearly required to do everything it can to facilitate access to counsel under both the TVPRA[3] and the *Flores* consent decree.[4] Denial of such access has materially compromised Class Members' efforts to prepare for their hearings.

5. Class Members who have already been determined not to be dangers or flight risks must be released.

As detailed in at ¶¶ 12-14 of the Kang Declaration, Class counsel are informed and believe that there are three Class Members who remain in ORR detention even though, subsequent to their re-arrests and detention by ORR, they had *Flores* hearings before Immigration Judges who determined that they were not dangers to themselves or their communities, or flight risks. J.G.R.'s *Flores* hearings took place on November 13, 2017; O.C.'s "combined" *Saravia* and *Flores* hearing took place on November 22 and 23, 2017; and L.V.'s *Flores* hearing took place on November 14.The orders issued after these hearings are attached as Exhibits 2-4 to the Kang Declaration.Because the *Flores* bond hearing currently puts the burden on the minor to show that he is not a danger or flight risk, an immigration judge's favorable finding at a *Flores* hearing necessarily means that the government has failed to meet its burden under this Court's Order. As

[3] "The Secretary of Health and Human Services shall ensure, to the greatest extent practicable … that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security … have counsel to represent them in legal proceedings or matters …."

[4] "Agreements for the placement of minors in non-INS facilities shall permit attorney-client visits …." Dkt. 11-5, ¶ 32(C).

this Court explained, the, purpose of *Saravia* hearings is "to ensure that changed circumstances indeed justify the arrest" and that the change in circumstances must be "material" to ORR's "[prior] determination that the minor is neither dangerous nor a flight risk." P.I. Order at 31. A decision by the immigration judge that the government has not made an adequate showing of changed circumstances material to ORR's prior release determination, or that the minor has successfully rebutted the showing, "requires release into the custody of the previous sponsor." *Id.* at 44. A minor who has obtained a favorable ruling at a *Flores* hearing means that he should be released under this Court's preliminary injunction.

Despite Class Counsel's request for these minors' release (Mass Dec. at ¶ 9 and Ex. 1), counsel for Defendants have neither released these Class Members nor attempted to justify or explain their continued detention. These Class Members should be released immediately.

6. All *Saravia* hearings must be held in the jurisdiction in which the Class Member was living or was arrested, except where the Class Member waives this requirement.

The P.I. Order makes clear that "[f]or all sponsored minors who will be arrested on the basis of gang affiliation, the government must provide this hearing within seven days of arrest, *in the jurisdiction where the minor was arrested or lives.*" P.I. Order at 44 (emphasis added). The Court was clear in stating the reasons for this requirement: "to provide a meaningful opportunity for the minor, his sponsor and any existing counsel to rebut the factual basis for the minor's rearrest and detention," and to "allow the parties to call necessary witnesses …." *Id.* at 32. Without any attempted explanation, counsel for the Government has taken the position that this requirement does *not* apply to *current* detainees. Mass Dec. ¶ 7. Nothing in the language or reasoning of the P.I. Order supports this distinction, however; current detainees have the same need for access to witnesses, and the same need for their sponsors and attorneys to have access to the proceedings, as future detainees. To the extent necessary, the Court should clarify that current detainees are also entitled to hearings in the jurisdiction of residence and/or arrest.

Plaintiffs acknowledge that issues of access to counsel may make it preferable for some current detainees to hold *Saravia* hearings in the jurisdiction where they are detained, and

therefore request that any order by the Court in this regard specify that an individual Class Member may waive this requirement.

CONCLUSION

Notwithstanding the compressed time frame for holding hearings relating to 32 Class Members, Plaintiffs' Counsel have worked virtually around the clock to protect Class Members' rights and to cooperate with the Government, all to ensure that their clients' due process rights are protected in the manner the Court intended. The Government, however, has not sufficiently assisted in this process, and as a result, Class Members are faced with the possibility that they will be harmed by the imposition of processes that, while fast, are anything but fair. Plaintiffs respectfully request the Court enter an immediate order granting the relief described in the Introduction section above, as set forth in the accompanying [Proposed] Order.

Dated: November 27, 2017

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA

/s/ William S. Freeman
William S. Freeman

Dated: November 27, 2017

COOLEY LLP

/s/ Martin S. Schenker
Martin S. Schenker

Dated: November 27, 2017

AMERICAN CIVIL LIBERTIES UNION IMMIGRANTS' RIGHTS PROJECT

/s/ Stephen B. Kang
Stephen B. Kang

Dated: November 27, 2017

LAW OFFICES OF HOLLY COOPER

/s/ Holly S. Cooper
Holly S. Cooper

Attorneys for Plaintiffs

ATTESTATION

Pursuant to Civil L.R. 5-1(i)(3) regarding signatures, I attest under penalty of perjury that concurrence in the filing of this document has been obtained from the other signatories.

Dated: November 27, 2017

/s/ William S. Freeman
William S. Freeman
Attorneys for Plaintiffs