Court Decision Ensures Asylum Seekers Notice of the One-Year Filing Deadline and an Adequate Mechanism to Timely File Applications

Frequently Asked Questions[1]
Updated August 2, 2018

Introduction

Judge Ricardo S. Martinez of the U.S. District Court for the Western District of Washington issued a significant decision regarding the one-year filing deadline for asylum applications. The decision has nationwide implications for thousands of asylum seekers. On March 29, 2018, in *Mendez Rojas v. Johnson*, 2018 WL 1532715 (W.D. Wash. Mar. 29, 2018), the court held that the government's failure to provide adequate notice of the one-year deadline constitutes a violation of the immigration statue, the Administrative Procedure Act (APA), and class members' due process rights under the Fifth Amendment. In addition, the court held that the government's failure to provide a uniform mechanism through which class members can timely file their asylum applications also violates the immigration statute and the APA.

Defendants have appealed the decision to the Ninth Circuit Court of Appeals. During the appeal, pursuant to a joint interim stay agreement, Defendants have agreed to treat as timely filed all pending and newly filed asylum applications that are adjudicated during the stay filed by class members who do not have final orders of removal. Class members should provide notice to the adjudicator of their membership in the class. Sample Notices of Class Membership for each of the *Mendez Rojas* certified classes are enclosed with this advisory as Attachments A and B.

Who is covered by the *Mendez Rojas* certified classes?

To benefit from the district court decision, an individual must be a member of one of the two classes certified in the case:

Class A comprises individuals who:

- Have been or will be released from Department of Homeland Security (DHS) custody after having been found to have a credible fear of persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v); and

[1] The information contained in this FAQ is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. We are grateful for the assistance of Patrick Taurel, of Clark Hill, PLC, for drafting a Notice of Class Membership which is adapted and attached to this FAQ.

- Did not receive a notice from DHS of the one-year filing deadline for asylum applications; and
- Either
    - Have not filed an asylum application; or
    - Filed an asylum application more than one year after their arrival in the United States.

Additionally, Class A is divided into two sub-classes: 1) those who *are not* in removal proceedings; and 2) those who *are* in removal proceedings.

Class B comprises individuals who:

- Have been or will be detained by DHS upon their arrival into the country;
- Express a fear of return to their home country to a DHS official;
- Have been or will be released from DHS custody without a credible fear determination;
- Are issued a Notice to Appear (NTA);
- Did not receive a notice from DHS of the one-year filing deadline for asylum applications; and
- Either
    - Have not filed an asylum application; or
    - Filed an asylum application more than one year after their arrival in the United States.

Additionally, Class B is divided into two sub-classes: 1) those who *are not* in removal proceedings; and 2) those who *are* in removal proceedings.

What did the district court decide in the March 29, 2018 *Mendez Rojas* decision?

The court found that the government's failure to provide adequate notice of the one-year deadline violated class members' statutory right to apply for asylum under the Immigration and Nationality Act (INA), providing for relief under the APA. *Mendez Rojas*, 2018 WL 1532715 at *3, 5.

Moreover, the court found that the notice the government claimed was provided to class members through a variety of documents and through the statute was insufficient. *Id.* at *7-8. The court concluded that such notice was not "reasonably calculated, under all of the circumstances of this case," to afford class members adequate notice of the one-year deadline, in violation of their due process rights. *Id.* at *6.

Finally, the court found that the immigration courts' refusal to accept applications until an NTA is filed with the court, coupled with USCIS's refusal to accept asylum applications from class members whose cases were not yet pending with an immigration court, operated to deprive class members of the opportunity to timely file their asylum applications. *Id.* at *8-9. These refusals constituted a violation of class members' statutory right to apply for asylum under the INA, and the court provided for relief under the APA. *Id.* at *9.

What did the district court order in the March 29, 2018 *Mendez Rojas* decision?

Pursuant to its decision, the court ordered that:

- The government had until June 27, 2018, to adopt notice of the one-year deadline and thereafter provide notice to all current and future class members;
- The government must accept as timely filed any asylum application from a class member that is filed within one year of the date of adoption of the notice; and
- The government has until July 27, 2018, to adopt, publicize, and immediately implement uniform procedural mechanisms that will ensure class members are able to file their asylum applications in a timely manner.

Please note that the district court order in *Mendez Rojas* has temporarily been stayed pursuant to a joint interim stay agreement. During this period, Defendants have agreed to treat as timely filed all pending and newly filed asylum applications that are adjudicated during the stay by class members who do not have final orders of removal. Class members should provide notice to the adjudicator of their membership in the class.

Should Plaintiffs prevail on appeal, the district court is likely to set new dates for required notice and adoption of a uniform filing mechanism.

Has the government filed an appeal?

Yes. The government filed an appeal on May 25, 2018. The status of the district court order while the case is on appeal is discussed below.

Is the Court's order effective now?

No. While the court's decision became effective on the date that it was issued, March 29, 2018, subsequently the parties reached an interim stay agreement that will remain in place until the government's appeal to the Ninth Circuit Court of Appeals is resolved. *See* Attachment C to this advisory (August 2, 2018 Agreement in *Mendez Rojas v. Nielsen*).

Under the stay agreement, EOIR and USCIS have agreed to "find all class members' asylum applications were timely filed in pending adjudications before an Immigration Judge, the Board of Immigration Appeals, and USCIS during the stay." The interim stay agreement defines pending adjudications as all cases "that do[] not yet have a final administrative order, which includes cases that are filed during the stay, so long as the adjudication also takes place during the period of the stay." Furthermore, during the pendency of the interim stay agreement, the government has agreed to use a broad reading of the class definition, which will include individuals who fall within one of the class definitions "regardless of when class members were released from custody, by which component they were detained, the length of their detention, or when the NTA was issued."

The government has agreed to post temporary notices regarding the March 29, 2018 *Mendez Rojas* decision in immigration courts and USCIS Asylum Office waiting rooms while the interim stay agreement is in effect. Furthermore, where individuals with pending asylum adjudications who appear to be *Mendez Rojas* class members are pro se before USCIS or an immigration court, adjudicators should affirmatively provide them with notice of potential *Mendez Rojas* class membership. Any class member who appeared before USCIS or EOIR after August 2, 2018

without legal representation and did not receive notice of potential class membership can contact class counsel at mendezrojas@nwirp.org.

What can be done for individuals who qualify as class members while the interim stay agreement is in effect?

For class members with cases pending before EOIR or USCIS (and who, therefore, do not have a final administrative removal order), practitioners should notify the relevant decision maker of the decision in *Mendez Rojas*, the interim stay agreement in that case, and their client's class membership. Absent evidence that indicates an individual is *not* a class member, DHS should accept credible testimony or a signed affidavit outlining each element of class membership as sufficient evidence. Accompanying this advisory as Attachments A and B are samples Notices of Class Membership for each of the *Mendez Rojas* certified classes.

Practitioners should send such notice to the USCIS asylum office, the immigration judge, or the BIA, depending on where their client's case is currently pending. Under the interim stay agreement, USCIS and EOIR should accept asylum applications filed by individuals in this category as timely filed. **This means that no class member should be denied asylum for failure to file within one year for as long as the interim stay agreement is in place—that is, for as long as the government's Ninth Circuit appeal is pending.** Any class member or their attorney who believes that their case was wrongly denied on this basis can contact class counsel at mendezrojas@nwirp.org.

The interim stay agreement also applies to class members who are not yet in proceedings (i.e., who have been issued an NTA that has not yet been filed with an immigration court) as long as they do not already have a final order of removal. Individuals in this situation must receive the benefit of the interim stay agreement as discussed above.

Furthermore, class members do not need to be represented by attorneys to receive the benefit of the interim stay agreement.

However, the interim stay agreement excludes individuals with final orders of removal whose asylum applications were rejected due to failure to comply with the one-year deadline who would require a motion to reopen to present information about their *Mendez Rojas* class membership. Class members in this situation can email class counsel at mendezrojas@nwirp.org. The government has agreed to consider application of the interim stay agreement to any individual with a final order of removal "who is at immediate risk of deportation but who believes his or her asylum application would have been approved if it had been found to be timely filed."

We will continue to update this FAQ as we learn more about the government's implementation of the stay agreement and the outcome of the appeal.

ATTACHMENT A

[ADDRESS] **NOT DETAINED**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[LOCATION]

In The Matter of:	)	
[NAME]	)	
	)	**A ### ### ###**
Respondent,	)	
In Removal Proceedings	)	

Immigration Judge: * *****
Next Individual Calendar Hearing: [DATE] at [TIME]

RESPONDENT'S NOTICE OF *MENDEZ ROJAS* CLASS MEMBERSHIP

RESPONDENT'S NOTICE OF *MENDEZ ROJAS* CLASS MEMBERSHIP

The Respondent, by and through undersigned counsel, hereby notifies the Immigration Court that she is a member of a class certified in *Mendez Rojas v. Johnson*, No. 16-1024, 2017 WL 1397749 (W.D. Wash. Jan. 10, 2017) (order granting motion for class certification),[1] and that this Court must deem her asylum application to have been timely filed. *Mendez Rojas*, 305 F.Supp.3d 1176 (W.D. Wash. 2018) (order granting motion for summary judgment).[2]

Mendez Rojas is a class action lawsuit that challenged the government's failure to provide certain asylum seekers with adequate notice of the one-year filing deadline, and its failure to provide a uniform mechanism through which they can timely file their asylum applications. *Id*. Defendants in the case were both the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR).

On January 10, 2017, the court certified the following classes and subclasses:

CLASS A ("Credible Fear Class"): All individuals who have been released or will be released from DHS custody after they have been found to have a credible fear of persecution within the meaning of 8 U.S.C. §1225(b)(1)(B)(v) and did not receive notice from DHS of the one-year deadline to file an asylum application as set forth in 8 U.S.C. §1158(a)(2)(B).

> **A.I.:** 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.
>
> **A.II.:** 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.

CLASS B ("Other Entrants Class"): All individuals who have been or will be detained upon entry; express a fear of return to their country of origin; are released or will be released from DHS custody without a credible fear determination; are issued a Notice to Appear (NTA); and did not receive notice from DHS of the one-year deadline to file an asylum application set forth in 8 U.S.C. §1158(a)(2)(B).

[1] The order granting plaintiffs' motion for class certification appears at Exhibit A.
[2] The order granting plaintiffs' motion for summary judgment appears at Exhibit B.

> **B.I.:** 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.II.:** 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.

Mendez Rojas, 2017 WL 1397749 at *7.

On March 29, 2018, the court issued an order granting the plaintiffs' motion for summary judgment (hereinafter "Order"). *Mendez Rojas v. Johnson*, 305 F.Supp.3d 1176 (W.D. Wash. 2018). In granting plaintiffs' motion for summary judgment, the court found that the government's failure to inform class members of the asylum filing deadline and to provide a uniform mechanism through which class members may timely submit their applications violates class members' statutory and constitutional rights. *Id.* at 1183-1187, 1188. The Order requires, in pertinent part, that DHS adopt a notice of the one-year filing deadline, in consultation with class members, and thereafter provide notice to all class members who have already been released from DHS custody. *Id* at 1188. The Order further directs the defendants—which includes EOIR—to accept as timely filed any asylum application filed by a class member that is filed within one year of the date of the adoption of the notice. *Id*.

The Respondent in this case is a member of *Mendez Rojas* Subclass A.II., because:

1. She was released from DHS custody, after she was deemed to have a credible fear of persecution. [CITE EVIDENCE]
2. She did not receive notice from DHS of the one-year filing deadline. *See Mendez Rojas*, 305 F.Supp.3d 1176, 1187 (finding that DHS does "not provide sufficient notice of the one-year deadline to satisfy the Due Process clause").
3. She is in removal proceedings.
4. She applied for asylum more than one year after her last arrival.

[NOTE TO READER: THIS SAMPLE USES SUBCLASS A.II. AS AN EXAMPLE. BE SURE TO MODIFY IF THE CLIENT FALLS WITHIN ANOTHER CLASS OR SUBCLASS].

Pursuant to the Order, this Court must deem the Respondent's asylum application to have been timely filed because it was filed within one year—indeed, prior to—the notice mandated by *Mendez Rojas*.

Respectfully submitted,

_____ _____

XXX Date

Respondent or Counsel for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[LOCATION]

In The Matter of:	)	
[NAME]	)	**A ### ### ###**
Respondent,	)	**Next Individual Calendar Hearing [DATE] at [TIME] before Immigration Judge [NAME]**
In Removal Proceedings	)	

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EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[LOCATION]

In The Matter of:	
[NAME]	**A ### ### ###**
Respondent,	**Next Individual Calendar Hearing [DATE] at [TIME] before Immigration Judge [NAME]**
In Removal Proceedings	

PROOF OF SERVICE

On the date indicated below, I, [COUNSEL NAME], served a copy of Respondent's Notice of *Mendez Rojas* Class Membership and any attached pages to the U.S. Department of Homeland Security, Immigration and Customs Enforcement, Office of the Chief Counsel at the following address: XXXXX, by FedEx.

_____ _____

XXX
Counsel for Respondent

Date

ATTACHMENT B

[ADDRESS] **NOT DETAINED**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[LOCATION]

In The Matter of:	)	
[NAME]	)	
	)	**A ### ### ###**
Respondent,	)	
In Removal Proceedings	)	

Immigration Judge: * *****
Next Individual Calendar Hearing: [DATE] at [TIME]

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Mendez Rojas is a class action lawsuit that challenged the government's failure to provide certain asylum seekers with adequate notice of the one-year filing deadline, and its failure to provide a uniform mechanism through which they can timely file their asylum applications. *Id*. Defendants in the case were both the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR).

On January 10, 2017, the court certified the following classes and subclasses:

CLASS A ("Credible Fear Class"): All individuals who have been released or will be released from DHS custody after they have been found to have a credible fear of persecution within the meaning of 8 U.S.C. §1225(b)(1)(B)(v) and did not receive notice from DHS of the one-year deadline to file an asylum application as set forth in 8 U.S.C. §1158(a)(2)(B).

> **A.I.:** 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.
>
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CLASS B ("Other Entrants Class"): All individuals who have been or will be detained upon entry; express a fear of return to their country of origin; are released or will be released from DHS custody without a credible fear determination; are issued a Notice to Appear (NTA); and did not receive notice from DHS of the one-year deadline to file an asylum application set forth in 8 U.S.C. §1158(a)(2)(B).

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The Respondent in this case is a member of *Mendez Rojas* Subclass B.II., because:

1. She was detained upon entry, and expressed a fear of returning to her country of origin;
2. She was released without a credible fear determination and issued a Notice to Appear (NTA) [CITE EVIDENCE]
3. She did not receive notice from DHS of the one-year filing deadline. *See Mendez Rojas*, 305 F.Supp.3d 1176, 1187 (finding that DHS does "not provide sufficient notice of the one-year deadline to satisfy the Due Process clause").
4. She is in removal proceedings.

5. She applied for asylum more than one year after her last arrival.

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Pursuant to the Order, this Court must deem the Respondent's asylum application to have been timely filed because it was filed within one year—indeed, prior to—the notice mandated by *Mendez Rojas*.

Respectfully submitted,

_____ _____

XXX Date

Respondent or Counsel for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
[LOCATION]

In The Matter of:	)	
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PROOF OF SERVICE

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_____ _____

XXX
Counsel for Respondent

Date

ATTACHMENT C

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CONCELY DEL CARMEN MENDEZ ROJAS,	§	
et al.,	§	CIVIL No. 2:16-cv-01024-RSM
Plaintiffs,	§	
v.	§	
KIRSTJEN NIELSEN, Secretary of	§	
Homeland Security, et al.,	§	
Defendants.	§	
	§	

AGREEMENT

Plaintiffs and Defendants in the abovementioned action agree to file a joint stay motion, requesting a stay of the entirety of the March 29, 2018 Summary Judgment Order until further notice by the parties. The purpose of this stay is to allow time for the parties to discuss the scope of that order.

Defendants agree to find all class members' asylum applications were timely filed in pending adjudications before an Immigration Judge, the Board of Immigration Appeals, and USCIS during the stay. A pending adjudication is a case that does yet not have a final administrative order, which includes cases that are filed during the stay, so long as the adjudication also takes place during the period of the stay. It does not include cases that require a motion to reopen, although Defendants agree to consider exceptions for any individual who is at immediate risk of deportation but who believes his or her asylum application would have been approved if it had been found to be timely filed.

For the limited purposes of adjudications during the interim stay only, the Parties agree:

- to use a broad reading of the class definitions, regardless of when class members were released from custody, by which component they were detained, the length of their detention, or when the NTA was issued.

- that putative class members must notify the agency that they are members of the *Mendez-Rojas* class and state their reasons for inclusion in the class to benefit under this agreement. However, where the applicant is unrepresented, the adjudicator must provide the applicant with notice of potential class membership. Absent contrary evidence such as DHS records, however, credible testimony or a signed affidavit may be sufficient evidence to prove each element of class membership. Plaintiffs' proposed sample Notice of *Mendez Rojas* Class Membership is a helpful template. *See*

https://www.americanimmigrationcouncil.org/sites/default/files/mendez_rojas_v_johnson_faq.pdf, p. 4. Defendants also request that Plaintiffs' counsel draft and distribute a similar sample Notice of *Mendez Rojas* Class Membership for putative Class B members.

Defendant EOIR agrees to post a temporary notice of the *Mendez-Rojas* decision in Immigration Court and Defendant USCIS agrees to post such notices in Asylum Office waiting rooms or lobbies during the period of the stay.

Agreement to the terms of the stay does not constitute agreement by any party to apply these terms in ultimate implementation of the March 29, 2018 Order.

This agreement will go into effect once a joint stay motion, outlining the elements of the agreement, is filed with the Court. Additionally, Defendants note that it may take up to 72 hours to distribute the proper guidance to all adjudicators.

SIGNED THIS DATE: July 18, 2018

MATT ADAMS

GLENDA M. ALDANA MADRID
Northwest Immigrant Rights Project
615 Second Avenue, Suite 400
Seattle, WA 98104

VICKY DOBRIN, WSBA No. 28554
HILARY HAN
Dobrin & Han, PC
705 Second Avenue, Suite 610
Seattle, WA 98104

TRINA REALMUTO, pro hac vice
KRISTIN MACLEOD-BALL, pro hac vice
American Immigration Council
100 Summer Street, 23rd Floor
Boston, MA 02110

MARY KENNEY, pro hac vice
KAROLINA WALTERS, pro hac vice
American Immigration Council
1331 G Street, NW, Suite 200
Washington, D.C. 20005

Attorneys for Plaintiffs

CHAD A. READLER
Acting Assistant Attorney General

WILLIAM C. PEACHEY
Director

SIGNED THIS DATE: July 17, 2018

J. MAX WEINTRAUB
Senior Litigation Counsel
United States Department of Justice
Civil Division
Office of Immigration Litigation, District Court Section
P.O. Box 898, Ben Franklin Station
Washington, DC 20044

Attorneys for Defendants