

Challenge To Refugee Office Procedures Mostly Survives

By **Suzanne Monyak**

Law360 (November 15, 2018, 8:46 PM EST) -- A Virginia federal court on Thursday preserved a challenge to the Office of Refugee Resettlement's family reunification procedures lodged by a proposed class of Central American children and their families, while also cutting the individual claims for the kids who have already been released from government custody.

U.S. District Judge Leonie M. Brinkema held that the proposed class can move forward with its claims that ORR's procedures to place unaccompanied immigrant children with family members violate their procedural due process rights and that the agency's information-sharing policy violates the Administrative Procedure Act.

That policy mandates that all adults living with an unaccompanied immigrant child's sponsor must submit to fingerprinting and other biometric testing in order for the detained child to be released into the home.

"A policy that systematically elevates immigration enforcement over child welfare, one whose effects are to destabilize would-be sponsors' home environments and to discourage potential sponsors from applying for reunification, is flatly inconsistent with ORR's statutory responsibility to care for unaccompanied minors in its custody and release them promptly to safe and stable environments," the opinion said.

Judge Brinkema also dismissed three of the four plaintiff children from the suit, holding that their claims are moot now that they have been released from ORR custody to their sponsors. The judge additionally nixed the substantive due process claim, finding that the proposed class had failed to show that ORR's conduct toward unaccompanied immigrant children "violates basic principles of human decency."

The group of immigrant minors in ORR custody and their relatives filed an amended proposed class action in August against ORR and its umbrella organization, the U.S. Department of Health and Human Services, claiming that the agency's family reunification procedures are inconsistent with the Trafficking Victims Protection Reauthorization Act and the kids' substantive and procedural due process rights, according to the opinion.

The proposed class also argued that ORR's information-sharing policy should be struck down under the APA, saying the agency had not followed the proper rulemaking procedures and that the policy is "arbitrary and capricious," the opinion said.

The named plaintiffs included minors from Honduras and Venezuela who were held in ORR custody for months during the sponsorship application process. One of those minors is still in ORR custody, according to an attorney for the proposed class.

The federal government moved to dismiss the lawsuit for failure to state a claim and lack of jurisdiction, according to the court docket. Those motions, as well as the proposed class' complaint and briefs, are not publicly available.

In Thursday's decision, Judge Brinkema agreed with the proposed class that the agency's information-sharing policy is a "legislative" rule, meaning it is subject to the APA's notice-and-comment requirement. The judge also found that the proposed class had plausibly alleged that the policy was implemented primarily for immigration enforcement purposes, allowing the class to proceed to discovery on that claim.

The court additionally held that the proposed class had sufficiently stated a claim that the policy infringes the requirement that immigrant minors be released from custody "without unnecessary delay," which was established by the Flores agreement, a 1997 court settlement that set standards of care for immigrant children detained in government custody.

Rebecca R. Wolozin of the Legal Aid Justice Center, who is representing the proposed class, told Law360 that Thursday's opinion is a win for them, adding that more children in ORR custody may be added to the lawsuit as it moves into class certification now that three of them were dismissed from the suit.

"We're really pleased about this order," Wolozin said. "It's a huge victory for immigrant kids and their families, because basically the court has said that the government can't run roughshod all over immigrant kids' and their families' rights."

A representative for ORR did not immediately respond to a request for comment late Thursday.

The proposed class is represented by Rebecca R. Wolozin and Angela A. Ciolfi of the Legal Aid Justice Center and John C. Rozendaal and Salvador M. Bezos of Sterne Kessler Goldstein & Fox PLLC.

The government is represented by Catherine M. Yang of the U.S. Attorney's Office.

The case is J.E.C.M. et al. v. Lloyd et al., case number 1:18-cv-00903, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Haylee Pearl.