NATIONAL IMMIGRATION PROJECT

Amica Center for Immigrant Rights

ACLU Virginia

PRACTICE ADVISORY
Seeking Release of Clients Detained in Virginia Who Have Won Fear-Based Relief Under *Rodriguez Guerra v. Perry* (E.D. Va.) Settlement[1]

July 29, 2024

I. Introduction

The National Immigration Project, Amica Center (formerly CAIR Coalition), and the ACLU of Virginia sued the Washington Field Office of Immigration and Customs Enforcement (ICE) on behalf of nine individuals whom ICE arbitrarily detained—and in one case, continues to arbitrarily detain—for months after they won immigration relief protecting them from deportation to their countries of origin where they face persecution, torture, or death.[2] The case, *Rodriguez Guerra v. Perry*, No. 1:23-cv-1151 (E.D. Va.), was brought in the U.S. District Court for the Easter District of Virginia on behalf of a class of noncitizens detained after winning fear-based relief within the jurisdiction of the Washington Field Office (WAS ICE), namely within the Farmville Detention Center and Caroline Detention Facility in Virginia.

On July 29, 2024, the parties submitted a settlement agreement for Court approval. *See* Attachment A. Some of the terms of the agreement go into effect before the Court approves the class settlement. This practice advisory describes the settlement terms and provides tips to attorneys representing class members and detained noncitizens who benefit from this settlement.

II. Background

A long-standing ICE policy, referred to as Directive 16004.1 and reiterated several times since the first issuance,[3] favors the prompt release of noncitizens granted fear-based relief from

---

[1] Publication of the National Immigration Project (NIPNLG), 2023. This practice advisory is released under a Creative Commons Attribution 4.0 International License (CC BY 4.0). The advisory is intended for authorized legal counsel and is not a substitute for independent legal advice provided by legal counsel familiar with a client's case. Counsel should independently confirm whether the law has changed since the date of this publication. The authors of this practice advisory are Yulie Landan, Justice Catalyst Fellow at NIPNLG, Amber Qureshi, Staff Attorney at NIPNLG, Sophia Gregg, Immigrants' Rights Attorney at the ACLU of Virginia, and Austin Rose, Senior Attorney, Immigration Impact Lab, Amica Center for Immigrant Rights (formerly CAIR Coalition).

[2] *See Rodriguez Guerra et al. v. Perry et al.*, https://www.acluva.org/en/cases/rodriguez-guerra-et-al-v-perry-et-al.

[3] There have been four iterations of ICE's policy since 2000, each time reiterating and elaborating on a policy favoring release of noncitizens granted relief from removal, including those with final grants of withholding of removal and CAT relief. See Message from Tae Johnson, ICE Acting Dir., REMINDER: Detention Policy Where an Immigration Judge has Granted Asylum, Withholding of Removal, or Convention Against Torture Protection, and DHS has Appealed (Jun. 7, 2021) ("2021 Memo"); Message from Gary Mead, ICE ERO Executive Assoc. Dir., Reminder on Detention Policy Where an Immigration Judge Has Granted Asylum, Withholding of Removal, or CAT (Mar. 6, 2012); Memorandum from Michael Garcia, ICE Ass't Sec'y, Detention Policy Where an Immigration Judge Has Granted Asylum and ICE Has Appealed (Feb. 9, 2004); Memorandum from Bo Cooper, INS General Counsel, Detention and Release During the Removal Period of Aliens Granted Withholding or Deferral of Removal (Apr. 21, 2000), all available at https://www.acluva.org/sites/default/files/field_documents/all_ice_policies_on_post-relief_release_2000-20211.pdf.

removal, including asylum, withholding of removal, and relief under the Convention Against Torture (CAT).[4]

Pursuant to Directive 16004.1, detained individuals who have won fear-based relief in front of an Immigration Judge should be released "absent exceptional circumstances, such as when the noncitizen presents a national security threat or a danger to the community, or any legal requirement to detain[.]"[5] The policy states that "[i]n considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat or danger to the community. Rather, the individual facts and circumstances of the case, including extensiveness, seriousness, and recency of the criminal activity, along with any evidence of rehabilitation, should be considered in making such determination."[6]

For several years, WAS ICE was not providing detained noncitizens who won fear-based relief with individualized custody reviews pursuant to Directive 16004.1. The National Immigration Project, Amica Center, and ACLU of Virginia initiated the *Rodriguez Guerra v. Perry* lawsuit alleging that WAS ICE was failing to follow Directive 16004.1 and ICE's own policies and sought class-wide declaratory relief on behalf of noncitizens who remained in detention following a grant of fear-based relief. Plaintiffs sought individualized habeas relief under *Zadvydas v. Davis*, 533 U.S. 678 (2001) for release of the named plaintiffs from detention, and class-wide relief pursuant to *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) for ICE's failure to follow their own policy.

On April 26, 2024, the U.S. District Court for the Eastern District of Virginia certified the following class: "All persons who, now or at any time in the future, are held in civil immigration detention within the area of responsibility of WAS ICE and who have a grant of asylum, INA withholding, or CAT relief from an Immigration Judge that is either final or pending ICE's appeal."[7] The parties engaged in extensive discovery and depositions during which the government admitted that WAS ICE was not following the directive. On July 29, 2024, the parties executed a settlement agreement which is pending court approval.

III. The Settlement Terms

The settlement agreement has two different phases of relief, and the phases cover different categories of detained individuals.

Stage 1 (Present – December 31, 2024): Covers ALL Detained Individuals Who Have Won Asylum, Withholding, or CAT, Regardless of Whether DHS Appeals the Grant

Who gets a custody review under Directive 16004.1 in this stage?

In the first stage, from the present through December 31, 2024, all detained individuals who have won fear-based relief are entitled to a custody review under Directive 16004.1. If your

[4] *See also* Amica Center, ACLU of Virginia, and National Immigration Project, Continued Detention of Noncitizens Who Win Immigration Relief (Feb. 2024), https://amicacenter.org/app/uploads/2024/07/Continued-Detention-Brief-Amica-Version.pdf.
[5] 2021 Memo, *supra* note 4.
[6] *Id.*
[7] *See* Order Certifying Class, *Rodriguez Guerra v. Perry et al.*, No. 1:23-cv-1151, Dkt. 65 (Apr. 26, 2024), https://www.acluva.org/sites/default/files/field_documents/order_certifying_class.pdf.

client has won asylum, withholding of removal, or CAT protection, regardless of whether DHS has appealed that grant, your client must get an individual custody review under the policy.

What is the timing of the custody review in this stage?

If your client is already a class member, they must receive this review within 10 business days of the settlement agreement's execution, July 29, 2024. For others, the review must take place within **10 business days** from when OPLA receives the Immigration Judge's order granting the noncitizen asylum, withholding of removal, or CAT relief.

Stage 2 (January 1, 2025 – June 1, 2026): Covers Only Noncitizens Where OPLA Has Approved an Appeal of the Grant of Relief

Who gets a custody review under Directive 16004.1 in this stage?

From January 1, 2025, until June 1, 2026, detained noncitizens will be entitled to an individual custody review pursuant to Directive 16004.1 *only where OPLA has decided to appeal* the Immigration Judge's grant of fear-based relief to the Board of Immigration Appeals (BIA). At this stage, detained noncitizens who win a grant of fear-based relief and where OPLA decides *not* to appeal the grant are no longer entitled to this individualized custody review pursuant to Directive 16004.1.[8] The same exceptional circumstances standard from Stage 1 continues to apply in Stage 2.

What is the timing of the custody review in this stage?

The review will take place within **7 business days** of OPLA deciding to appeal the grant of relief. OPLA's decision to appeal should be made within 14 days of the Immigration Judge's order granting relief. Please note that the decision whether to appeal is distinct from, and will likely be made earlier than, when OPLA *files* a notice of appeal to the BIA, typically 30 days after the grant of relief. We recommend that you reach out to OPLA as soon as your client receives the relief grant to determine whether they intend to appeal and follow up if you do not hear back within 14 days.

The Standard for the Custody Reviews Under Directive 16004.1

In both stages, when conducting a review under Directive 16004.1, the WAS ICE Field Office Director must determine whether there are exceptional circumstances to continue detention.[9] The Field Office Director's decision should be guided by the policy's guidance: "[i]n considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat or danger to the community. Rather, the individual facts and

---

[8] If you are representing a client who has a final grant of relief and they are no longer covered by the settlement agreement, there remain avenues to advocate for their release through the post-order custody review process. *See* Attachment B, Austin Rose, American Immigration Lawyers Association, Practice Pointer: Continued Detention of Non-Citizens Who Won Immigration Relief.
[9] If jurisdiction over your client's custody determinations has moved to ICE Headquarter (ICE HQ), see *infra* Custody Reviews Under Directive 16004.1 When ICE HQ Has Jurisdiction.

circumstances of the case, including extensiveness, seriousness, and recency of the criminal activity, along with any evidence of rehabilitation, should be considered in making such determinations."

Notice Regarding Custody Reviews Under Directive 16004.1

ICE will notify class members that they will receive a custody review pursuant to Directive 16004.1. In **Stage 1**, ICE must notify the noncitizen after OPLA receives the Immigration Judge's grant of relief. In **Stage 2**, ICE will notify the noncitizen after OPLA-WAS has decided to notice an appeal of the grant of relief. ICE, however, may conduct the custody review within the prescribed timeframe—within 10 business days of the grant of relief in stage 1, or 7 business days of the decision to appeal the grant—irrespective of when notice is provided to the noncitizen.

The notice to the noncitizen will describe the standard of review and factors used for the custody review under Directive 16004.1 and will include class counsel's contact information. The notice does not entitle the noncitizen to submit any evidence to ICE, but advocates may nevertheless submit evidence.[10]

Noncitizens and their clients, if represented, will receive written notice of the result of the custody determination under Directive 16004.1.

Custody Reviews Under Directive 16004.1 When ICE HQ Has Jurisdiction

Federal regulations may vest authority over a detained noncitizen's custody status with ICE HQ, such as if the noncitizen remains detained after the 90-day removal period.[11] When ICE HQ has jurisdiction over the noncitizen's custody, WAS ICE will continue to make an initial custody determination under Directive 16004.1 as described in Stage 1 or Stage 2 of the settlement agreement. The Field Office Director will provide ICE HQ's Removals and International Operations Division (RIO) with a written determination of the custody review. ICE HQ RIO must then make a final determination regarding the noncitizen's custody status within **10 business days** of receiving WAS ICE's recommendation. In making this final custody determination, ICE HQ will apply the same exceptional circumstances standard and factors as described above, and it will consider the field office director's recommendation.

IV. Practice Tips

Timing of Submitting Release Requests Under the *Rodriguez Guerra v. Perry* Settlement

The settlement and Directive 16004.1 do not entitle detained noncitizens to submit evidence to ICE under a specific procedure or timeline to aid in the custody determination. However, we recommend that advocates submit evidence of positive equities in a timely manner so that the ICE field office has additional evidence on hand when making the 16004.1 custody determination. Note that while the settlement includes the time limits referenced above, WAS

---

[10] *See infra* section IV. Practice Tips.
[11] *See* 8 C.F.R. § 241.4.

ICE may conduct these reviews earlier than the deadline, and so it is important the evidence be submitted as soon as possible.

Contents of Release Requests Under the *Rodriguez Guerra v. Perry* Settlement

We recommend that counsel submit a release request letter with exhibits. In this letter, counsel should delineate why the noncitizen should be released: (1) that there are no exceptional circumstances to continue their detention and (2) that there is no legal requirement to detain. Two sample letters are included in this practice advisory, one for when custody remains with the field office, and the second for when jurisdiction rests with ICE HQ. *See* Attachment C.

Exceptional Circumstances Under Directive 16004.1

The standard of review here is the same for all individuals impacted by the settlement agreement, in both stages of the agreement. "In considering whether exceptional circumstances exist, prior convictions alone do not necessarily indicate a public safety threat or danger to the community. Rather, the individual facts and circumstances of the case, including extensiveness, seriousness, and recency of the criminal activity, along with any evidence of rehabilitation, should be considered in making such determinations."

If your client has no criminal history, highlight that fact. If your client does have convictions or pending charges, submit individualized evidence to counteract the severeness of the crime, such as showing the lack of recency of any criminal activity; the lack of any injury to a victim or damage to property resulting from the criminal activity; that the offense was treated as minor by the criminal adjudicative body, for example that it was classified as a "petty" offense, misdemeanor, or that the client was not sentenced to any jail time; or any post-release plan that shows, for example, acceptance into a residential alcohol treatment program in the case of a client with a DUI.[12]

Practitioners should also submit any evidence of rehabilitation or plans for rehabilitation upon release, such as completion of alcohol or substance abuse classes and documentation of mental health counseling.[13]

Lastly, we recommend that practitioners include information about where the noncitizen will live upon release, who they might live with, whether they may have a job lined up, and any other information that shows the noncitizen will be released into a stable environment. While the policy does not delineate flight risk as an "exceptional circumstance," demonstrating these ties may mitigate concerns about perceived danger. A letter of support from a sponsor or family member may be included as an exhibit. Practitioners may also wish to include a declaration from their client with the release request.[14]

No Legal Requirement to Detain Under Directive 16004.1

[12] For additional practice tips on how to mitigate convictions, see the National Immigration Project's practice advisory regarding obtaining release from immigration detention. National Immigration Project, *A Guide to Obtaining Release from Immigration Detention* at 66–72 (May 28, 2024), https://nipnlg.org/work/resources/guide-obtaining-release-immigration-detention. While this guide primarily focuses on bond, which has a different standard than the review pursuant to review under Directive 16004.1, it has information on how to respond to arguments that a detained noncitizen poses a "danger to the community."

[13] *See id.* at 53–57.

[14] *See id.* at 57–58 (Practice Tip on Developing an Effective Declaration).

There are two legal requirements to detain that ICE may identify. First is INA 236(c), also found at 8 U.S.C. 1226(c). If you client is in removal proceedings under INA 240 (in other words, not in withholding-only proceedings) and has a criminal conviction that triggers one of the grounds of inadmissibility or deportability listed in INA 236(c), then they are mandatorily detained and will continue to be subject to mandatory detention if ICE appeals a decision granting them relief. If there is any doubt as to whether your client is subject to mandatory detention, you should make the argument within the release request that they are not mandatorily detained.

The second possible "legal requirement to detain" that ICE may identify is under INA 241 or 8 U.S.C. § 1231. When a noncitizen is granted withholding of removal or CAT protection and ICE does not appeal, they have a final removal order and their detention is therefore governed by section 241 of the INA, also found at 8 U.S.C. § 1231. The only legal requirements to detain pursuant to this section is during the 90-day removal period if the noncitizen has been found inadmissible under 8 U.S.C. § 1182(a)(2) (criminal grounds) or 8 U.S.C. § 1182(a)(3)(b) (security grounds) or found deportable under 8 U.S.C. § 1227(a)(2) (criminal grounds) or 8 U.S.C. § 1227(a)(4)(B) (security grounds).[15] If your client has not been charged with the criminal or inadmissibility grounds referenced in those provisions, or if they have already passed the 90-day removal period, there is no legal requirement to continue their detention.

The release request letter and exhibits should be submitted to the Field Office Director and the Deputy Field Office Directors of WAS-ERO, with OPLA-WAS Chief Counsel copied as well. If ICE HQ has jurisdiction over the noncitizen's custody, we recommend also submitting the information to the Unit Chief at ICE HQ RIO.

If you have any questions concerning this settlement or the review to which your detained client is entitled, please reach out to class counsel Austin Rose at Austin.rose@amicacenter.org.

[15] *See id.* at 16–17 (describing the inadmissibility and deportability grounds that trigger mandatory detention).