

# Fact sheet on family separation for asylum seekers

CLINIC would like to thank Rachel Effron Sharma for her contributions to this fact sheet.

In April 2018, the Trump Administration began a “Zero Tolerance” policy that led to the Department of Homeland Security (DHS) separating asylum-seeking parents from their children.<sup>1</sup> This policy affected both families who presented themselves at a port of entry and those who entered unlawfully between ports of entry. Much confusion ensued as advocates tried to understand how DHS was separating families and how to respond to this new crisis. This fact sheet explains how the Trump Administration carried out family separation and the recent federal court ruling in *Ms. L v. ICE*.

## Step 1

Families attempted to enter the United States at the port of entry to seek asylum or attempted to enter without inspection and asked for asylum upon apprehension. Many Central American families who presented themselves at a port of entry were turned away for “lack of space,” even though U.S. entries were down. Meanwhile, Customs and Border Protection (CBP) processed a select few, sometimes only from certain countries. Many slept in the open on the Mexican side of the border and tried over and over to present themselves to CBP at the port of entry. Some were routed to other ports of entry. A lawsuit—*Al Otro Lado v. Nielsen*—was filed last year to challenge CBP’s practice of turning away asylum seekers at ports of entry.

## Step 2 | Parents

Before the Zero Tolerance policy, those unlawfully crossing the border into the United States who expressed fear were generally sent to Immigration and Customs Enforcement (ICE) detention and, after passing a credible fear interview before an asylum officer, would be scheduled for a hearing before an immigration judge for civil immigration proceedings. However, through the “Zero Tolerance” policy, some of the parents who were apprehended while crossing the border were criminally prosecuted before a federal district court judge for violating immigration laws. The parents were prosecuted under 8 USC § 1325 (misdemeanor) for “improper entry by alien” or under § 1326 (felony) for “re-entry by removed alien.” The misdemeanor statute allows for a sentence of up to six months and a small monetary fine. However, the parents were detained for approximately two weeks pending trial. The choice to prosecute depended on the capacity of the federal jails. Some of those prosecutions were fast-track, group prosecutions pursuant to Operation Streamline, which was recently expanded into California. At trial, the accused often pleaded guilty because judges and federal defenders stated that completing criminal charges as soon as possible would allow them to reunify with their children faster. After they pleaded guilty, they were sentenced to time served and released to DHS custody.

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<sup>1</sup> However, in the fall of 2017, there were reports that families were being separated by Customs and Border Protection officers after arriving in the Rio Grande Valley in Texas. See <https://www.houstonchronicle.com/news/houston-texas/houston/article/Trump-moves-to-end-catch-and-release-12383666.php>. Further, the Trump Administration claims it piloted “Zero Tolerance” in the summer of 2017. See <https://www.vox.com/policy-and-politics/2018/5/8/17327512/sessions-illegal-immigration-border-asylum-families>.

## Step 2 | Children

While parents were prosecuted, immigration authorities took their children from them, sometimes under false pretenses like being given a “bath.” According to DHS, the prosecution of the parent(s) rendered the children “unaccompanied minors.” CBP did notify some parents that they were taking their children, but did not notify them where they were taking them. With or without actual notice of what was happening to their children, parents were distraught, with one [Honduran father committing suicide](#). Parents were told to call ICE if they wanted information on their children’s whereabouts, but [parents did not have access to phones](#) at the time. CBP placed some [children in the equivalent of cages](#) as they awaited transfer to the Department of Health and Human Services Office of Refugee Resettlement (ORR).

## Step 3 | Parents

Parents were transferred from criminal custody to ICE custody. Once in ICE custody, if the parent presented a fear of return to his or her country, DHS officers were supposed to provide an orientation to the credible/reasonable fear process and conduct interviews within 48 hours, unless the parent waived the 48-hour period.<sup>2</sup> Those parents whom the Asylum Office found to have a credible or reasonable fear were placed into immigration court proceedings and could apply for asylum and related relief before an immigration judge (IJ).<sup>3</sup> Those parents often sought bond or parole from custody. Those who were unable to obtain an affordable bond or DHS parole had to remain detained throughout their removal proceedings. If the Asylum Office determined that the parent did not have a credible or reasonable fear, the parent could request review by an IJ.<sup>4</sup> If the IJ affirmed the asylum officer’s credible or reasonable fear denial, ICE removed the parent.

## Step 3 | Children

Children were kept in ORR custody in non-secure facilities or in foster care pursuant to the *Flores* Agreement and, when possible, were subsequently released to a qualifying sponsor or family member in the United States. Whether in ORR custody or with a sponsor, children separated from parents must still apply for an immigration benefit in order to remain in the United States. However, their process typically moved more slowly than the parent’s process. If not reunited with their parents, it is unclear how the children will argue their case in immigration court, as even unaccompanied children are not entitled to government-appointed counsel, and the parent will often have the relevant information. Moreover, many of the separated children are too young to fully comprehend why they left their countries.

## Step 4 | Parents

If the detained parents received a removal order, they were supposedly given the choice of being removed with or without their child(ren). According to DHS, some parents opted for removal without their children. It is unclear whether deported parents made a knowing or voluntary choice to be removed without their children.

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<sup>2</sup> See USCIS, Questions & Answers: Credible Fear Screening, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/questions-answers-credible-fear-screening> (last visited Aug. 7, 2018).

<sup>3</sup> 8 CFR § 1003.42; INA § 208.30(f).

<sup>4</sup> INA § 235(b)(1)(B)(iii)(III); 8 CFR § 1003.42(e).

## Step 4 | Children

Those children who were not deported with their parent and remain in ORR custody continue to seek immigration benefits. If the child wins asylum, he or she cannot file derivative or follow-to-join benefits for the parent(s) and thus could not sponsor the parent(s) for immigration benefits until becoming a U.S. citizen and reaching the age of 21. If the child obtains benefits through Special Immigrant Juvenile Status, the child can never sponsor the parent(s.) Furthermore, some foster families may seek to adopt the children and it is unclear how ORR will ensure that the parent(s) will be notified and involved in this process.

Children reunified with their parents in the United States were often released together (see *Ms. L v. ICE* litigation description below) but could also be detained in family detention centers with the parent.

### Ms. L v. ICE Litigation Addresses Family Separation

On February 26, 2018, the ACLU filed the *Ms. L v. ICE* lawsuit. On March 9, 2018, the ACLU filed an amended complaint adding class allegations. The amended complaint sought compelled reunification of children taken from their parents. Approximately 700 children were separated from their parents prior to May 5, and an additional 2,300 were separated by June 9, 2018, totaling approximately 3,000 separated children.

On June 26, the court granted plaintiffs' motion for class-wide injunction and ordered DHS to reunify children under 5 with their parents within 14 days, and children over 5 within 30 days. The court had previously determined that taking young children from their parents in this manner "shocks the conscience," and the June 26 ruling mentioned specific details of the trauma inflicted on parents and children. The court noted the lack of contact parents had with their children after they were taken away and that many parents were asylum seekers. Further, DHS's separation of parents and children lacked any process for: 1) tracking the children, 2) ensuring they could communicate with their parents, and 3) planning for reunification. The order highlighted that DHS more efficiently keeps track of property than it kept track of these children and discussed the serious negative consequences on the children's health and development, including toxic stress on children and increased vulnerability to human trafficking.

DHS responded by stating it could not timely complete the reunification because there were numerous security measures that DHS and HHS had to complete under the Trafficking Victims Protection Reauthorization Act for unaccompanied minors. The government cited many hoops to jump through, including conducting DNA tests for every child and parent (and then [charging some for those DNA tests](#)), background checks on parents, and background checks on household members where the parent planned to stay. After a status conference, Judge Sabrow denied the government's request for extra time to complete these requirements. After all, the only reason these children were "unaccompanied" was through the actions of the government, and the court said the government needed to follow the same process it generally does when parents and children enter together.

Some, but not all, of the separated children were reunified with their parents by the court-imposed deadlines described above. Many of the parents who remained separated after the deadline had been deported without their children, while others were still in the United States. DHS also determined that a number of parents were not class members for various reasons, including the accompanying adult being a grandparent or uncle, the parent having a criminal record here or abroad, the [DNA checks not matching](#), or negative background checks on household members (the court later held that the background checks are not necessary). The *Ms. L v. ICE* ruling does not prevent parents and children from being removed from the United States together. But it prevents the government from removing class member parents from the country without their children unless they affirmatively, knowingly, and voluntarily choose not to be reunited with their child(ren) before being

deported or there is a determination that the parent is unfit or presents a danger to the child.

The *Ms. L v. ICE* litigation requires the government to reunify most parents with their children, but it does not require the government to release the families from detention. The government continues to use family detention centers to detain some families seeking asylum. Family detention centers or “residential centers” are currently located in the Texas towns of Dilley, Karnes, and Taylor (T. Don Hutto Residential Facility), and in Leesport, Pennsylvania (Berks), with a new facility to open in Fort Bliss, Texas. Judge Gee, who is presiding over enforcement of the *Flores* agreement, has stated that children detained in a secure facility that does not have an appropriate license cannot be held there longer than 20 days.

Families were reunited in detention facilities near the Mexico-United States border. The facilities used for reunification were largely Port Isabel, Eloy, Otero, El Paso, Harlingen, and Dilley/Karnes/Hutto. ORR transported the children to DHS custody where an HHS official interviewed the parent. Once the family was reunited and released from the DHS facility, the family traveled on a bus to a social services non-profit agency overseen by [U.S. Conference of Catholic Bishops \(USCCB\)](#) or [Lutheran Immigration and Refugee Service \(LIRS\)](#). The social services non-profits provided immediate shelter, a hot meal, a shower, assistance with travel to the next destination, and some initial legal intake as available. At some of these social services non-profits, attorney volunteers from agencies such as [Kids in Need of Defense](#) and [Tahirih Justice Center](#) and the private bar met with the families. [RAICES](#) through their 1-866-ESTAMOS hotline assisted over 450 families with financial assistance for transportation to their final destination.

Under the court’s monitoring, the government continues to work to reunite remaining families that it has determined are eligible, including those parents who were deported without their children. The status of the *Ms. L v. ICE* litigation, and of family reunification efforts generally, is fluid. For current information, individuals may wish to refer to the [ACLU’s webpage on the litigation](#), or to [CLINIC’s timeline on family separation](#).

## **What is Next for the Reunited and Released Families?**

A national post-release effort is underway to mobilize pro bono and low bono legal orientation and removal defense for these families. [CLINIC](#) and [Al Otro Lado](#) have created a closed [Facebook group](#) exclusively for the parents who were separated from their children, including the [463 parents](#) who were deported without their child(ren). Through this group, parents will receive legal orientation in Spanish just as the mothers released from family detention have received legal orientation in Spanish since October 2015 through the private Facebook group run by CLINIC and [Asylum Seeker Advocacy Project \(ASAP\)](#). Non-profits wishing to represent these families should complete this [CLINIC web form](#) (CLINIC affiliates should complete [this web form](#)). [AILA welcomes private attorney volunteers](#) to assist these families. Part of this effort includes AILA and American Immigration Council’s [Immigration Justice Campaign](#), which set up an online system to assist these families at ICE check-ins and, hopefully, beyond. USCCB and LIRS can provide information about the whereabouts of a family post-release to counsel who entered an appearance prior to the reunification and release process. Counsel should send a completed G-28 to [familyseparation@usccb.org](mailto:familyseparation@usccb.org).