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Appeals Court Considers Asylum Rights for Cuban Minor Elian Gonzalez

by LADB Staff

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The Eleventh Federal Circuit Court of Appeals in Atlanta heard arguments from both sides in the Elian Gonzalez case on May 11 and expects to announce its ruling within weeks. Elian's Miami relatives argued that the six-year-old boy rescued at sea last November (see NotiCen, 1999-12-23) wants political asylum, while the government argues that no valid asylum petition was ever filed since Elian is too young to make such a request on his own.

As plaintiffs, Elian's relatives asked the Appeals Court to reverse a lower-court ruling handed down in March that upheld the Immigration and Naturalization Service (INS) administrative decision to reject the asylum petition (see NotiCen, 2000-04-06).

The relatives argue that the INS is compelled to grant an asylum hearing because immigration law says "any alien" may apply and does not restrict that right based on age. In a brief submitted to the Appeals Court May 1, attorney Gregory Craig, representing Elian's father, Juan Miguel Gonzalez, said Elian was too young to understand the asylum application, which was written in English and which he signed with his first name only. Elian reads neither Spanish nor English.

"Lazaro has used this nation's legal system in an attempt to destroy Juan Miguel's family," said Craig. "He now threatens to rob Elian of a childhood at his home with his father, his family, and his friends."

Questioning by judges leaves doubts for both sides

Judge J.L. Edmondson warned at the start of the hearing that the line of questioning by each judge on the three-member panel was not an indication of how the court might rule. Attorney Kendall Coffey, representing the Miami relatives, asked the court to force an asylum hearing based on the petition submitted by Lazaro Gonzalez so that Elian might be "protected from potentially serious harm of a police state" if he returned to Cuba. He contended that the INS had no discretion to decide whether to respond to any asylum application.

Judge Charles R. Wilson appointed to the bench by President Bill Clinton posed a hypothetical question in which a teenaged baby sitter, against the wishes of the parents, takes a two-year-old alien child to the INS with the child's first name scribbled on an asylum application. "You're telling me that the INS doesn't have any discretion whatsoever, they have to go through the time and the expense of having a formal asylum hearing?," Wilson asked. Coffey responded that the INS would be obligated under its own regulations to process the request "They have to allow a baby sitter or a smuggler to speak for the child."

A core issue in the asylum question has been whether Elian applied for asylum in any meaningful sense or whether lawyers prepared an asylum petition based on the political views of Lazaro

Gonzalez toward Cuba and President Fidel Castro. To explore that issue, Wilson read a question from an INS asylum-application form. It asks if the asylum seeker had ever been a member of "any organization or group in your home country such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerilla organization, ethnic group, human rights group, or press or the media?" "You're telling me that a six-year-old is competent to answer questions like that?" Wilson asked. "I've read the answers, the answers on this asylum application, and they all appear to be written in the third person and reflect maybe a fear of prosecution on behalf of someone else."

Without directly answering the question, Coffey went on to assert that Elian could be persecuted in Cuba because his mother and her boyfriend who took the child on the ill-fated trip to Florida are viewed there as traitors.

Again pressing Coffey on the question of Elian's capacity to understand the complexity of asylum, Wilson cited the criteria used to determine asylum. In accordance with a Supreme Court ruling, the petitioner must show that he or she has been a victim of persecution, that he or she holds a political opinion, that the opinion is known to the persecutors, and that the persecution is or will be on account of that political opinion. "And you're telling me that the INS does not have the discretion to take a look at this asylum application and determine that this six-year-old is unable to meet those four prongs of the test?" Wilson asked.

Coffey answered that the INS may not prescreen applications and must grant a hearing. Judge worries about sending Elian to communist country Wilson's line of questioning appeared to support the lower court's ruling that the asylum petition was invalid. However, Judge Edmondson appointed by President Ronald Reagan appeared to lean toward the relatives' side.

In questions put to Assistant United States Attorney Edwin Kneedler, Edmondson raised the possibility that Lazaro Gonzalez could speak for Elian whether or not the father was absent. "I think a wider variety of people can act as next of friend other than the natural parent, even if the natural parent is present," said Wilson. "I think there is law in this country that in the matters of child custody, child welfare, and so forth, that relatives related to a degree of the fourth degree have in Kansas, at least by statute, an absolute right, an absolute right to appear and to argue the welfare of the child."

But Kneedler cautioned that something more profound than child custody in Kansas was at stake. "A third party is coming in and saying, 'I want to invoke a legal process on behalf of this child on something that is life-altering, life-determining in terms of where that child's lot will be cast in life.'" Edmondson also said he saw a conflict of interest "between the child in the United States and his father" because the father lives in a "communist totalitarian state." Kneedler replied he did not think it was "the sort of conflict of interest that would disqualify the parent from presumptively having a say." The parent-child bond "does not depend on where the parent or the child happens to be."

Speaking for Juan Miguel Gonzalez, Craig explained to Judge Joel F. Dubina appointed by President George Bush why the father took five months to come to the US. Craig recounted events of the first

days after Elian's rescue Nov. 25, noting that a Miami relative was quoted as saying, "Heaven has brought him to freedom, we will not let him go back." Next, the relatives hired a lawyer "for the purpose of blocking access to the boy by the father and blocking his ability to return the son to his father in Cuba." On the third day after Elian's rescue, exile leaders said Elian would not return to Cuba.

Craig also referred to "two very hostile bureaucracies" in Cuba and the US that obstructed the process of getting visas for the father. The INS slowed the process further by failing to complete its assessment of Juan Miguel Gonzalez's fitness as a father until Jan. 5 (see NotiCen, 2000-02-03).

Summing up the case for the father, Craig said, "To us, the issue here is whether a remote relative, over a father's wishes, can force the INS to accept and process an asylum application, which if granted could conceivably destroy the parental rights of Juan Miguel and dismember his family; and if denied, could conceivably cause such delay, up to six years."

On May 16, Juan Miguel Gonzalez asked the court to allow him to replace Lazaro Gonzalez as Elian's legal representative before the court. If granted, the father could withdraw the asylum request.

Responding with a brief, the Miami lawyers said that in Cuba, in years to come, Elian would be put into forced-labor camps and cane fields "to further indoctrinate him... and cement the bond between child and state."

Elian is in "concentration camp," says senator

Meanwhile, Elian is staying at the privately owned Wye River Plantation in Maryland with his family and visiting schoolmates from Cuba. Sen. Bob Smith (R-NH) echoed claims by some Miami exiles that Elian was being held prisoner by the federal government, which was cooperating with Castro agents to brainwash him. "Right now, this little boy is in a concentration camp on American soil," said Smith. "It's surrounded by communists. He's got his communist playmates there so they can reindoctrinate him."

Along the same lines, Coffey wrote to the INS asking that Cuban diplomats not be allowed to visit Elian. He said such visits were part of an indoctrination effort ordered by Castro. He also said the INS was allowing Cuban doctors to drug Elian as a part of the process. Spokespersons for the Miami relatives criticized the government for allowing Elian and his family to visit the home of Smith Bagley in Georgetown. Bagley is a prominent Democratic donor and fund raiser and is chairman of the Arca Foundation, which favors normalized trade with Cuba.

White House spokesman Joe Lockhart issued a veiled criticism of the Georgetown visit, indirectly comparing it to the "media-circus atmosphere" at the relatives' house in Miami. Elian "should not be exploited or paraded around for anyone," he said.

One reporter hinted that Democratic donors viewed the evening with Elian as a perk. "Why else would a bunch of 20 very rich Democratic fund raisers want to, you know, be at a house to meet

Elian Gonzalez?" (Sources: Transcript, US Circuit Court of Appeals, Atlanta, 05/01/00; The New York Times, 05/02/00; Spanish News Service EFE, 05/04/00; The Miami Herald, 05/02/00, 05/09/00; Reuters, 05/11/00; The Washington Post, 05/12/00; Associated Press, 05/08/00, 05/10/00, 05/16/00)

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