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IN THE BEST INTEREST OF ELIÁN: LIBERTY OR LIFE

BROCK LYLE

The decision by the INS to deny Elián, an unaccompanied minor, an adult right to asylum was completely justified and fully within the domain of its authority.

A mother, in an attempt to free herself and her son from an oppressive regime tries to escape to a land of liberty. On the way, the ship capsizes and only the young boy survives, drifting at sea until he is finally rescued by passing fishermen. After the rescue of six-year-old Elián Gonzalez, a political tug-of-war ensues. His case, a landmark in many branches of the law, matched Clinton against Castro, Reno against Rodriguez, and freedom against the family. Despite the conflict, the decision by the INS to deny Elián, an unaccompanied minor, an adult right to asylum was completely justified and fully within the domain of its authority.

The INS

Two separate entities, combined to form the Immigration Service and the Naturalization Service, on June 10, 1933, as the result of Executive Order 6166. Its new purpose was to regulate the massive immigration into the United States by establishing a codified difference between legal and illegal aliens. In order to do this, it was given authority by the Executive Branch to create new policies for situations not covered by existing statutes. By 1952, Congress had amended the U.S. Code to include a definition of asylum. As this term has been

interpreted in the courts since in inception, *Black's Law Dictionary* defines it as "a sanctuary, or place of refuge and protection."¹ Aliens may apply for asylum in the United States if they have a well-founded fear of persecution in their home country. Due to this broad definition, "any alien . . . may apply for asylum."² In 1966, as a result of the vast number of Cuban refugees fleeing Fidel Castro's communist regime, the United States enacted the Cuban Adjustment Act. This provision allows Cubans to obtain residency in the U.S., regardless of whether they arrived by a legal port of entry, as long as they could prove that they had lived in the U.S. for over a year.³ This legislation still remains in force.

The Elián Gonzalez Story

Elián Gonzalez was born in December 1993 near Havana, Cuba, to Juan Miguel and Elizabeth Gonzalez, who separated when Elián was three years old. Elizabeth retained custody of the boy; but Juan Miguel had regular and substantial contact with him. On November 22, 1999, Elizabeth, with Elián by her side, and with twelve other nationals, fled Cuba for the United States. The small boat capsized off the Florida coast in stormy seas killing everyone aboard except Elián and two others. Two days later local fishermen found Elián clinging to an inner tube. After treating Elián for dehydration at a Fort Lauderdale hospital, the INS paroled Elián into the custody of his great-uncle Lazaro, a Miami resident.⁴

Lazaro filed two asylum applications in behalf of Elián and had the boy sign a third application himself.⁵ When the INS contacted Elián's father, Juan Miguel, he denied Lazaro's authority to speak for his son and demanded Elián immediate return to Cuba. As time went on and Juan Miguel's demand went unmet, the media accumulated outside the Elián's relatives' home in droves turning what should have been a small family squabble into an international press war. The nation suddenly had quite a problem on its hands: Do we return this boy to his father as basic laws of custody would dictate, or do we grant him asylum because of his mother's sacrifice to help him escape communist Cuba? This question would be decided in the courtroom.

Lazaro's attorneys first went in front of Judge Rosa Rodriguez of the Miami-Dade County Circuit Court, who ruled that Elián's application

for asylum must be considered. However, because Lazaro's attorneys had helped Judge Rodriguez in her election campaign, many considered this ruling dubious. The INS appealed to Attorney General Janet Reno, who sidestepped Judge Rodriguez's ruling. Meanwhile, Juan Miguel felt that his demands were not being met and arrived in the United States to pick up Elián, all the while under the watchful eye of Castro.⁶

Attorney General Reno set several deadlines by which the Miami family was ordered to render Elián, all of which were ignored. As a result of mass media coverage, a small army of demonstrators had convened around Lazaro Gonzalez's Miami residence threatening to not allow the boy to be taken. Early in the morning of April 22, 2000, federal agents in SWAT uniforms, armed with automatic weapons, and a warrant from a federal magistrate judge, raided the Gonzalez house and retrieved Elián. He was subsequently reunited with his father and returned to Cuba.⁷

Opposition: Free Elián!

The Gonzalez family's lawyers sought to establish a distinct reason by which asylum would be necessary. As defined earlier in 8 USC 1158(a), asylum is granted if there is a "well-founded fear" of persecution in the applicant's home country. Gonzalez's lawyers were quick to point out that it was Fidel Castro and not Juan Miguel who first demanded the boy's return.⁸ Castro, they pointed out, was already wearing a lapel pin with Elián's picture on it, turning him into a symbol for communism. He was watching Elián more closely than other Cubans, which further restricted Elián's freedom. The lawyers claimed that the Cuban Communist Party's scrutiny constituted persecution. Elián would be denied the freedoms he would enjoy as an American, especially due to the high visibility and symbolic importance he had attained in Cuba. In a terrible twist of fate, America would send the son back to the regime his mother died trying to escape.

Lawyers for the Miami relatives also pointed out the various procedural illegalities committed by the INS in the Gonzalez case. The INS was criticized for failing to assign a guardian *ad litem* to the under-age plaintiff as required by recent federal law. The legality of the raid and the warrant were also attacked. While a minor's parole to relatives living in the U.S. is legal, "immigration officials failed to realize the

potential legal and political implications when they released Elián to a great-uncle living in Miami.”⁹ The subsequent raid on the Gonzalez home in April was based on a warrant issued by a federal judge, but the legality of the warrant was somewhat suspicious. It had been issued pursuant to Rule 41 of the Federal Rules of Criminal Procedure, and neither Elián nor his Miami relatives had ever been charged with any federal crime necessitating such a warrant. As demonstrated by *Blackie’s House of Beef v. Castillo* (1981), the INS could not legally perform a search under criminal law unless a federal crime had been committed. However, INS had the authority to do so under their general jurisdiction over illegal aliens. Had this justification been used to obtain the warrant, the raid would have been entirely legal.¹⁰ The question of the legality of Elián’s ensuing return to Cuba is of primary importance here.

To criticize the raid, lawyers based arguments on the fundamental right of privacy, exclaiming things like, “Imagine the government having enough power to forcefully break into the home of a private citizen who is guilty of no crime!” The INS was also criticized for implementing a hastily formed new policy, written in the week between January 3 and 12, 2000, that was considered in court under the auspices of *Chevron USA v. Natural Resources Defense Council*. This case required the court to first inquire as to whether Congress has directly spoken about the issue at hand; if not, the court must respect the agency’s interpretation of the statute. In the Elián case, the hastily written INS interpretation was given Chevron deference.¹¹

The INS: In Its Own Defense

The INS repeatedly indicated that there was nothing on the books even resembling the Elián case. Since they could not depend on the law to tell them how to proceed, the INS used government-given authority to create a new policy. The Circuit Court ruled that “because the pre-existing law compelled no particular policy, the INS was entitled to make a policy decision. . . . As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute [here the INS] to choose how to fill such gaps.”¹² They also claimed that the basic law of parental custody held precedence over things like politics and ideology. In response to the charge of failing to supply a guardian

ad litem, the INS responded that such a counsel is unnecessary when the child has a "next friend" or guardian. This is how Lazaro Gonzalez described himself in the case presented to the courts.

While remaining silent about the warrant, the INS held that the raid was a necessity to end a situation that was becoming increasingly detrimental to the child. The situation was not only harmful because Elián was being kept from his nuclear family, but also because the intrusion into Elián's life due to the intense media coverage. The Attorney General had tried to negotiate with Elián's Miami relatives on numerous occasions by setting several deadlines to hand over the boy; however, each deadline was ignored. The INS claims the Miami relatives left them no choice. They also explain that the raid was not nearly as horrifying as the media portrayed it. They were merely retrieving a child from a home where he was being held in order to reunite him with his father.

The Court also ruled in favor of the INS decision to deny asylum. Judge J. L. Edmonson wrote the opinion that the Court could not state that "the foundation of the policy—the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim—is unreasonable."¹³ When the Miami relatives claimed due process rights, the Court referred to one of its own opinions from 1984: "Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications."¹⁴ Their ruling as to the Chevron deference was, while contested, entirely legal. Although the Court did not seem to agree with the INS, it did agree that the decision and consequently the action taken by the INS was "within the outside border of reasonable choices."¹⁵

The distinction was made between Elián's legal ability to file for asylum and the question of whether he had actually done so.

The important legal question in this case, therefore, is not whether the Plaintiff may apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six-year-old child has applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent.¹⁶

In the opinion of the Court, Elián did not actually file for asylum because he was an extremely young and easily influenced minor. He also did not have the mental capacity to comprehend his situation and was therefore unable to decide on his own. This deferred the decision to his legal guardian, his father. His father had expressed wishes to the contrary. As for the qualifications for asylum, the Court ruled that political conditions “which affect the populace as a whole or in large part are generally insufficient to establish [persecution]. We cannot say that the INS had to treat education and indoctrination as synonymous with ‘persecution.’” The Court ruled in favor of the INS and sent little Elián home.¹⁷

Conclusion

Although the INS was sharply criticized for the way that it handled the Elián Gonzalez case, its actions were legal. Under the auspices of the authority accorded it by the Executive Branch, the INS could create a new policy to deal with a situation where the existing statute did not apply. Though the media spun and hyped this story as much as a summer blockbuster, the Eleventh Circuit Court validated the judgment of the INS in the Gonzalez case and reunited Elián with his father.

Appropriately, the INS did not allow public sentiment on Cuba's politics or ideologies to cloud its judgment. Legally, Elián must be permitted him to live with his nearest legal guardian, his father, wherever that may be. The support and normalcy Elián will receive in his family will make up for any rights lost by becoming a citizen of the United States. The INS decision to return to his father may not have been an easy one, but it is the right decision.

Notes

1. “Asylum,” Black’s Law Dictionary. 6th ed. 1990.

2. 8 U.S. Code. Sec. 1158a. 1996.

3. *U.S Interests Section, Havana*, Cuban Adjustment Act. 11 Nov.. 00
<www.usembassy.state.gov/posts/cu1/wwwbhact.html>. visited 2 Nov. 00.

4. Mike Meior and John R. Schmerts, *International Law Update: Immigration*, vol. 6, no. 6. n.p. (June 2000).

5. One application was written with the help of a lawyer, while Lazaro himself wrote the other application.
6. Siobhan Morrissey, "Afloat on legal seas," *American Bar Association Journal* 86 (2000): 20-21.
7. Matthew M. Hoffman, "Justifying warrant for Elián raid," *Fulton County Daily Report*, May 9, 2000.
8. Morrissey, "Afloat on legal seas," 20-21.
9. Hoffman, "Justifying warrant," for Elián Raid."
10. Morrissey, "Afloat on legal seas," 20-21.
11. Randolph J. May, "Ignoring law, losing Elián," *Fulton County Daily Report*, Aug. 9, 2000.
12. *Gonzalez v. Reno*. 212 F.3d 1338. 11th U.S. Cir. Ct. No. 00-11424, June 1, 2000.
13. *Gonzalez v. Reno*. 212 F.3d 1338. (2000).
14. Evan P. Schultz, "Elián case shows laws need reforming," *Fulton County Daily Report*, June 23, 2000.
15. *Gonzalez v. Reno*, 212 F. 3d 1338. (2000).
16. *Gonzalez v. Reno*,. 212 F.3d 1338. (2000).
17. *Gonzalez v. Reno*,. 212 F.3d 1338. (2000).