

'IT APPEARS THAT HE DID' APPLY FOR ASYLUM

The Philadelphia Inquirer

APRIL 20, 2000 Thursday SF EDITION

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The Philadelphia Inquirer

Found on Philly.com

Section: NATIONAL; Pg. A26

Length: 780 words

Byline: ASSOCIATED PRESS

Body

Excerpts from yesterday's federal appeals court order in the Elian Gonzalez case:

On balancing the equities - which party has the greater right - of the case:

The equities, in this case, weigh heavily in favor of issuing an injunction pending appeal. Apart from concerns about what might happen to this child if he is returned to Cuba (which we do not address), if plaintiff leaves the United States during the pendency of his appeal, his case will likely become moot.

Our failure to issue an injunction pending appeal, therefore, could strip the court of jurisdiction over this case and deprive plaintiff forever of something of great value: his day in a court of law. That circumstance alone presents a significant risk of irreparable harm to plaintiff.

On the Immigration and Naturalization Service's arguments that courts have no part in the boy's immigration case:

. . . We fail to see how an injunction in this case infringes upon the congressional power; after all, the heart of plaintiff's appeal is that the INS - by refusing to consider plaintiff's asylum application - has disregarded the command of Congress. And we doubt that protecting a party's day in court, when he has an appeal of arguable merit, is contrary to the public interest.

On the merits of the boy's case:

The statute in this case seems pretty clear. . . . 'Any alien . . . may apply for asylum.' Plaintiff appears to come within the meaning of 'any alien.' . . . We, therefore, question the proposition that, as a matter of law, plaintiff (unless his father consents) cannot exercise the statutory right to apply for asylum. . . . If Congress had meant to include only some aliens, perhaps Congress would not have used the words 'any alien.'

. . . Not only does the plain language of the statute seem to support plaintiff's argument that he, despite his age, is entitled to apply personally for asylum, the present regulatory scheme created by the INS also seems to strengthen plaintiff's position. The existing INS regulations do envision situations where a minor may act on his own behalf in immigration matters. Moreover, the regulations contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents.

(In a footnote, the court said: To some people, the idea that a 6-year-old child may file for asylum in the United States, contrary to the express wishes of his parents, may seem a strange or even foolish policy. But this court

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does not make immigration policy, and we cannot review the wisdom of statutes duly enacted by Congress. If Congress intended . . . that a school-age child [such as plaintiff] be able to file personally an application for asylum, this court and the INS are bound to honor the policy decision made by Congress.)

In discussing INS "Guidelines for Children's Asylum Claims," the court said:

The INS has not pointed to (nor have we found) statutory, regulatory or guideline provisions which place an age-based restriction on an alien's ability to apply for asylum. And we have found no preexisting requirement that a minor, in submitting an asylum application, must act through the representative selected by the INS.

Not only does it appear that plaintiff might be entitled to apply personally for asylum, it appears that he did so. According to the record, plaintiff - although a child - has expressed a wish that he not be returned to Cuba. He personally signed an application for asylum. Plaintiff's cousin, Marisleysis Gonzalez, notified the INS that plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview plaintiff about his own wishes.

In concluding, the court wrote:

By its nature, this order sets out more questions than answers. We have not attempted to address every point advanced by both sides, but we have attempted to explain our decision to grant the injunction. No one should feel confident in predicting the eventual result in this case...

Therefore, it is ordered that:

- (1) Plaintiff, Elian Gonzalez, is ENJOINED from departing or attempting to depart from the United States.
- (2) Any and all persons acting for, on behalf of, or in concert with plaintiff, Elian Gonzalez, are ENJOINED from aiding or assisting, or attempting to aid or assist, in the removal of plaintiff from the United States.
- (3) All officers, agents, and employees of the United States, including but limited to officers, agents, and employees of the United States Department of Justice, are ENJOINED to take such reasonable and lawful measures as necessary to prevent the removal of plaintiff, Elian Gonzalez, from the United States.

Classification

Language: ENGLISH

Subject: IMMIGRATION (90%); APPEALS (90%); PUBLIC POLICY (89%); POLITICAL ASYLUM (89%); LAW COURTS & TRIBUNALS (78%); US FEDERAL GOVERNMENT (78%); APPELLATE DECISIONS (78%); APPEALS COURTS (78%); CITIZENSHIP (76%)

Organization: IMMIGRATION & NATURALIZATION SERVICE (83%); IMMIGRATION & NATURALIZATION SERVICE (56%)

Geographic: UNITED STATES (92%)

Load-Date: January 30, 2002