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Judge: Elian Case a Power Fight

It's all About Separation of Powers, says 11th Circuit's Edmondson at Hearing

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Though some have called Elian Gonzalez's asylum case a struggle between Havana and Washington, between Cuban exiles and loyalists, the U.S. Court of Appeals sees it differently.

To 11th Circuit Judge J.L. Edmondson and his colleagues, it's a debate among the three branches of government over which has final say in immigration matters.

"I see this case chiefly as being about separation of powers," Edmondson said as he questioned the lawyer for the 6-year-old's Miami relatives, Coffey, Diaz & O'Naghten partner Kendall Coffey.

As the muffled chants of the demonstrators outside penetrated the courtroom walls, the panel comprised of judges Edmondson, Joel F. Dubina and Charles R. Wilson heard arguments over whether the U.S. Immigration and Naturalization Service had the right to reject consideration of Elian's application for asylum. *Gonzalez v. Reno*, No. 00-11424-D, 2000 U.S. App. (11th Cir. May 1, 2000).

The child, with the help of his Miami relatives, filed for asylum when he was in the custody of his great-uncle, Lazaro Gonzalez.

Prescreening Procedure

Waving his hands like an orchestra conductor, the attorney representing Lazaro Gonzalez told the panel the INS made up a new prescreening procedure after Elian filed for asylum and then applied it retroactively to his case. The agency did so, Coffey said, to avoid considering Elian's asylum claim on the merits.

The approach, he said, offends due process. Agencies do not have the right to make the rules up as they go along, he said.

"If an agency is going to be given the ball to run with, they have to stay within bounds of the field," he told the panel.

Wilson questioned Coffey at length and seemed interested in examining the extent of the INS' discretion in granting asylum. Coffey maintained that once an agency has announced its policies, it has little wiggle room in applying them.

After prolonged questioning from Wilson, Coffey conceded that immigration statutes grant nearly unfettered discretion to Attorney General Janet Reno in setting policy, but that discretion has limits, he

said.

"It doesn't mean that the courts don't define the law," he said.

For example, if a kidnapper applied for asylum on behalf of an infant, the asylum officer could rightly decide not to consider the application, Coffey said.

In this case, Coffey said, the INS should grant Elian an asylum hearing with his father present. The agency should give great weight to the father's interests but Elian's best interest should be paramount, Coffey said.

Arguing for the Justice Department, Deputy Solicitor General Edwin S. Kneeder told the panel it was entirely up to Reno to decide whether the child had capacity to claim asylum or whether his relatives in Miami should speak for his interests, rather than his father.

"What the attorney general has done is interpret the immigration laws in a manner consistent with constitutional principles," Kneeder said.

The INS' decision not to consider Elian's application was in line with the agency's principles, he said. There was no indication Elian had capacity to ask for asylum, no indication he had expressed a fear of persecution and no indication he could swear to the contents of his application for asylum, Kneeder said.

"Nothing in the [Immigration and Naturalization Act] requires that the attorney general proceed by regulation," he said.

'Prisoners of Procedure'

Gregory B. Craig, the lawyer representing Elian's father, Juan Miguel Gonzalez, referred to his client and Elian as "prisoners of administrative and appellant procedures surrounding asylum."

Gonzalez, he said, simply wants what is his right as a parent-to be with his son in whatever surroundings he decides are best for him. The judges could help him make that decision "free of manipulation from Miami and coercion from Havana," said Craig, a partner with Williams Connolly of Washington.

A decision from the panel is expected later this month.

Federalism and the separation of powers constitute an underlying issue to the case that started soon after Elian's rescue last November from a doomed bid for freedom by his mother, stepfather and 10 others.

Richard D. Freer, a professor of federal law and procedure at Emory University, says Congress passed some tricky laws and then left the Justice Department and its agency the INS alone to apply them.

"It's another case of those guys doing a half-baked job and then punting," he says. As a result, he says, the INS has almost limitless power over immigration concerns.

"This is the executive branch drafting its own rules and enforcing its own rules without oversight from

the judiciary," he says of the INS' application of immigration law.

Atlanta immigration lawyer Socheat Chea, a sole practitioner, says the 1996 Illegal Immigration Reform and Immigrant Responsibility Act, which passed as part of an omnibus spending bill after the government shutdown, greatly weakened due process protections for aliens.

"The legislature gave almost unfettered power to the executive branch," he says. "It was like giving the executive branch a blank check when it comes to immigration."

Long Process of Asylum

Aliens applying for asylum on arrival in the United States sometimes face a long process to obtain it.

First the applicant might meet with an immigration officer, who may deny the application or refer the application to an asylum officer for consideration. The asylum officer may deny the claim or pass it on to an immigration judge. That judge may grant or deny the claim. The alien has the right to appeal to the Board of Immigration Appeals.

If the board denies the claim, the alien may appeal to the local circuit court of appeals and ultimately to the U. S. Supreme Court.

Sole practitioner Jan J. Bejar, who practices immigration law in San Diego, says that generally speaking, applicants for asylum must show they are members of a persecuted social group, based on political opinion, national origin, race or religion. Without it, the applicant may be heading home, he says.

"If you don't fall into one of those groups, you are not eligible for asylum no matter how miserable your life is in Timbuktu or Canada," he says.

Susan H. Colussy, a lawyer for Catholic Social Services in Atlanta, says that although the INS has been making it more difficult recently, asylum hearings traditionally have been very easy to get.

"It's always been the situation that, no matter what your situation, you can always get an asylum hearing," she says.

Though some have questioned the wisdom of letting a 6-year-old apply for asylum, using age as a limit might prove tricky, she says.

"If it's 6, why not 8? Or 10? Or 12?" she says.

Bejar says that much of the political debate surrounding Elian's asylum petition amounts to little more than elected officials pounding their chests. If they cared about the plight immigrants face, he says, Congress would look into restoring the due process rights stripped from immigrants in 1996, he says.

"If they really wanted to make things better for immigrants, they would take a hard look at [the law] and see how unjust and filthy and truly sickening it is," he says.

Demonstration for Elian

That went ignored by some of the three dozen demonstrators outside the federal courthouse Thursday morning.

During the arguments, shouts of "Free Elian" reverberated in the street in front of the courthouse. Police and the media easily outnumbered the demonstrators.

Demonstrators, a number of whom associated with an ad hoc organization called Americans to Keep Elian Free, paraded in the barricaded streets carrying placards with slogans such as "It is anti-American to send a free child back to Communism" and "In Cuba, the real parent is the state."

Among them were Cuban-Americans who fled Castro in the early '60s or in the Mariel boatlift two decades later. Luis Lahera, a Hialeah, Fla., police officer who took a vacation day to drive to Atlanta to demonstrate, says he and his family were Marielitos who crossed the Gulf of Mexico from Cuba to America when he was 11.

Lahera says the family fled Cuba because his father had spent years in a Cuban jail as a political prisoner after being arrested trying to flee Cuba on a raft "just like Elian."

Holding an American flag, Lahera says he believes Elian's father "is not acting of his own will" and is being pressured by Cuban authorities to reclaim his son and return with him to Cuba. Elian has stayed with his father in the Washington area since an INS raid on Miami relatives' home Easter Weekend.

Juan Miguel Gonzalez initially was willing to allow his son to remain in the United States after the boy's rescue, Lahera says, "but Castro wanted the kid back as a trophy.

"If [Juan Miguel Gonzalez] really wanted the kid," Lahera says, "he would have said so at the beginning."

Edmondson's Teachings

Such passionate public interest and intense media attention in the case may have prompted a departure from usual court procedure.

Before the panel took the bench, Edmondson entered the courtroom robeless and shook hands with the lawyers from both sides.

He then welcomed the members of the courtroom's capacity crowd of about 130 people and gave an impromptu five-minute primer on the procedures of the appeals court.

The arguments, Edmondson said, would seem short, and he asked audience members not to signal approval or disappointment in any way during oral arguments.

Edmondson added that he does not know when the court will issue a ruling, but says he suspects it might be a matter of weeks rather than months. The issues, he said, are knotty but the court is accustomed to that.

"It is the business of the U.S. Court of Appeals to decide hard cases," he said. "We believe we know how to do that." [end]

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