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GONZALEZ *EXREL.* GONZALEZ v. RENO. 212 F.3d 1338, *rehearing denied*, 215 F.3d 1243, *certiorari denied*, 120 S.Ct. 2737 (2000). U.S. Court of Appeals for the Eleventh Circuit, June 1, 2000.

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In the absence of such a rule, the argument supporting a tacit waiver of immunity[52] in such situations is weak.[53] All international instruments on the subject require the express consent of the interested party for submitting to the jurisdiction of the forum state. Attempts to find such implied consent in multilateral treaties have been summarily repulsed, even under the United States' Foreign Sovereign Immunities Act.[54] The adoption of this controversial waiver argument in *Voiotia* can be attributed only to an acute case of judicial activism.

The Court's decision to invest with its authority what can at best be described as an emerging rule of international law will undoubtedly have repercussions. Indeed, the final act of the drama has yet to be played out. Invoking the requirement for an effective remedy as a necessary component of a fair trial under Articles 6 and 13 of the European Convention on Human Rights, the claimants have already attempted to enforce this decision against such emanations of the German state as the Goethe Institut Athen and the German Archaeological School. Recourse to the European Court of Human Rights is also being discussed.[55]

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Asylum—right of parent to represent child—effect of parent's residence in Cuba—administrative law—judicial review of immigration decision

GONZALEZ *EX REL.* GONZALEZ V. RENO. 212 F.3d 1338, *rehearing denied*, 215 F.3d 1243, *certiorari denied*, 120 S.Ct. 2737 (2000).
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In a unanimous opinion, the Court of Appeals for the Eleventh Circuit (per Edmondson, J.) upheld a district court decision[1] dismissing the plaintiff Elián González's suit against the Immigration and Naturalization Service (INS), which had denied the validity of asylum applications filed for him and in his name. Elián González is a six-year-old boy whose father in Cuba—his sole surviving parent—opposed any such application. Relying primarily on the criteria for judicial review set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council,*

Germany, 16 MICH. J. INT'L L. 403 (1995); *see also* Jordan J. Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 193 (1983).

[51] The argument was, however, decisively rejected in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir., 1994), and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). *See also* Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position Under General International Law, in* STATE RESPONSIBILITY AND THE INDIVIDUAL 1, 16–18 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

[52] *See* Thora A. Johnson, *A Violation of Jus Cogens Norms as an Implicit Waiver of Immunity Under the Federal Sovereign Immunities Act*, 19 MD. J. INT'L L. & TRADE 259 (1995); Andrea Bianchi, *Overcoming the Hurdle of State Immunity in the Domestic Enforcement of International Human Rights, in* ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, *supra* note 44, at 405, 422–24.

[53] *See* Magdalini Karagiannakis, *State Immunity and Fundamental Human Rights*, 11 LEIDEN J. INT'L L. 9, 20–21 (1998); Juergen Bröhmer, *Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator*, 12 LEIDEN J. INT'L L. 361, 363–66 (1999).

[54] *See* Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370 (7th Cir. 1985); Von Dardel v. USSR, 736 F.Supp. 1 (D.C. Cir. 1990). The notion of implied consent was severely criticized by Chief Justice Rehnquist in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. at 442–43. For an overview, see JUERGEN BRÖHMER, STATE IMMUNITY AND THE VIOLATION OF HUMAN RIGHTS 190–96 (1997).

[55] Three similar cases are currently pending before the European Court of Human Rights. *See* McElhinney v. Ireland and United Kingdom, Admissibility, App. No. 31253/96 (Eur. Ct. H.R., Feb. 9, 2000), Al-Adsani v. United Kingdom, Admissibility, App. No. 35763/97 (Eur. Ct. H.R, Mar. 1, 2000); Fogarty v. United Kingdom, Admissibility, App. No. 37112/97 (Eur. Ct. H.R., Mar. 1, 2000). The decisions are obtainable from <http://www.echr.coe.int>.

[1] Gonzalez *ex rel.* Gonzalez v. Reno, 86 F.Supp.2d 1167 (S.D. Fla.), *aff'd*, 212 F.3d 1338 (2000) [hereinafter González district court decision]. The Elián González case is discussed in Sean D. Murphy, Contemporary Practice of the United States, 94 AJIL 516 (2000).

Inc.,[2] the court of appeals ruled that the INS had not acted arbitrarily or capriciously and had not abused its discretion. "The Court neither approves nor disapproves of the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict" the statute.[3] Specifically, the court found that the INS, after intensive interviews with the boy's father, was properly "exercising its gap-filling discretion"[4] on the basis of governing law, procedures, and guidelines when it determined:

> (1) six-year-old children lack the capacity to sign and to submit personally an application for asylum;
> (2) . . . six-year-old children must be represented by an adult in immigration matters;
> (3) absent special circumstances,[5] the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and,
> (4) that the parent lives in a communist-totalitarian state (such as Cuba), in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative.[6]

In addition, the court gave short shrift to a constitutional due process claim, reaffirming the plenary powers of Congress and the executive branch in immigration matters and holding that aliens seeking admission had only the statutory rights given them by Congress.[7] The court also upheld the district court's refusal to appoint a guardian ad litem, finding that the child, as plaintiff, had been "ably represented in district court by his next friend"[8]—his paternal great-uncle, Lázaro González—"aided by a troop of seasoned lawyers."[9] In so ruling, the court of appeals, like the district court, dismissed the statutory asylum claim. So ended, with a relatively prosaic and uncomplicated ruling, a case that drew intense domestic and international attention and political comment.

Around November 22, 1999, Elizabeth González took her then five-year-old son Elián and joined her boyfriend—a professional smuggler—and eleven others on a rickety boat headed from Cuba to South Florida. She did so without the knowledge of the Juan Miguel González, the boy's father and her former husband. The members of the group intended, like so many thousands before them, to avail themselves of the Cuban Adjustment Act.[10] The act permits any Cuban arriving[11] in the United States legally or illegally to be admitted or paroled into

[2] 467 U.S. 837 (1984).

[3] Gonzalez *ex rel.* Gonzalez v. Reno, 212 F.3d 1338, 1356 (11th Cir. 2000) [hereinafter González appeal].

[4] *Id.* at 1349.

[5] [Author's note: the circuit court wrote:

> Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

Id. at 1352 n.21.]

[6] *Id.* at 1349–50 (footnote omitted).

[7] "Plaintiff's due process claim lacks merit and does not warrant extended discussion. *See* Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (en banc) ('Aliens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . . .')." *Id.* at 1346 (citation omitted).

[8] *Id.*

[9] *Id.* at 1346 n.7. Indeed.

[10] Cuban Refugees: Adjustment of Status, Pub. L. 89-732, 80 Stat 1161 (1966), *amended by* Pub. L. No. 94-571, 90 Stat. 2706 (1976) & Pub. L. No. 96-212, §203(i), 94 Stat. 108 (1980), *reprinted in* 8 U.S.C. §1255 note (1994) [hereinafter CAA].

[11] For most of the last 34 years, "arrival" under the CAA was understood to mean "reaching U.S. waters." Since 1994, however, when a loose set of U.S.-Cuba migration accords was reached, "arrival" has meant "arrival on shore." *See* Joint Communiqué Between U.S. and Republic of Cuba, Sept. 9, 1994, 71 *Interp. Rel.* 1236 (Sept. 12, 1994), 1994 WL 621517 (treaty). This move from a so-called wet-foot to a dry-foot requirement has led to violent encounters between U.S. Coast Guard vessels attempting to rescue (and possibly repatriate) U.S.-bound Cubans floundering at sea and the Cuban "rafters" (many of whom are seasoned professional smugglers) intent on reaching shore without being intercepted.

the country, to be authorized to work, and, after one year's presence, to apply for permanent resident status (and thereby to obtain a Green Card). The act thus exempts Cubans from those provisions of the Immigration and Naturalization Act (INA) that require an individualized claim of asylum based on a well-founded fear of persecution,[12] and that, unless such a claim is upheld, render excludable and deportable all aliens arriving in the United States illegally, be it surreptitiously, outside a designated port of entry, or without valid documentation such as a passport and entry visa.

After their boat sank, Elizabeth González and most of the others on board perished, but Elián survived and was rescued three miles out at sea on November 25, 1999.[13] Medical staff at the Florida hospital where Elián was taken phoned his father in Cuba and learned from him that the boy had distant relatives in Miami. Later that day, the INS deferred inspection of Elián—who, having not reached shore, was still in need of inspection—temporarily paroled him, instead, into the country, and released him to be lodged in Miami with Lázaro González and his immediate family. As in all parole situations, legal custody of the parolee remained exclusively in the hands of the U.S. attorney general.[14] The party providing the lodging and care of a parolee gains no custody rights whatsoever. This point sometimes eluded Lázaro's attorneys,[15] the press,[16] and even one local judge, whose ill-founded decision abetted the misrepresentation of Elián's custody status.[17]

Two days after Elián's arrival in Florida, Juan Miguel González sent a letter to the Cuban Foreign Ministry protesting that his son "was taken out of [Cuba] in an illegal manner and

[12] *See infra* note 21.

[13] Two adults also survived. They have remained in the United States, been inspected, and become beneficiaries of the CAA.

[14] The statute makes clear that parole is not entry into the country—"shall not be regarded as an admission of the alien"—and provides that the attorney general may offer it "temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. §1182(d)(5). The alien is "still in theory of law at the boundary line and ha[s] gained no foothold in the United States." Kaplan v. Tod, 267 U.S. 228, 230 (1925). Thus, from the outset and throughout, the González family in Miami was no more than an innkeeper at the whim of attorney general.

[15] As early as December 15, 1999—well before the first Florida state court decision on the matter (*see infra* note 17)—the attorneys claiming to represent Elián submitted filings to the INS in which they claimed to represent Elián "by direct consent as well as through the consent of Lázaro González, Elián's custodian, who is currently his legal guardian in the United States." INS Form G-28, "Notice of Entry of Appearance as Attorney or Representative" (filed by attorneys of Lazaro González, Dec. 15, 1999), *quoted in* Memorandum from Bo Cooper, General Counsel, INS, to Doris Meissner, Commissioner (January 3, 2000) [hereinafter Cooper memorandum], *in* Defendants' Notice of Filing Record and Exhibits, González district court decision, *supra* note 1, at 5, 7 (No. 00-206-CIV-MOORE) [hereinafter Defendants' Notice of Filing]. For trained immigration and family lawyers to make such a claim in an official filing is inexplicable. In this connection, there may have been a potential conflict of interest between the attorneys' duties to Lázaro and those to Elián. *See* Cooper Memorandum, *in* Defendants' Notice of Filing at 7.

[16] *The Miami Herald*, for example—both in its editorials and in some of its news coverage—consistently referred to Elián throughout the entire seven-month period as being in the "custody" and not, for example, in the "care" of his great-uncle. Reporters for the *Herald* acknowledge that this editorial decision was made in order to bolster the cause of the Miami relatives. *See, e.g.*, Andres Viglucci & Jay Weaver, *Elian's Relatives Have One Chance to Stave Off His Repatriation to Cuba*, MIAMI HERALD, Mar. 29, 2000 (Miami relatives "on the brink of losing custody of the boy to U.S. immigration authorities").

[17] On Jan. 10, 2000, Judge Rosalie Rodriguez of the family division of the Florida circuit court in Miami granted a temporary protective order purporting to take custody from Elián's father, Juan Miguel González, and lodging it in the great-uncle, Lázaro, whom she incorrectly described as having been granted custody by the INS. *See* Temporary Protective Order, Gonzalez v. Gonzalez-Quintana, No. 00-00479-FC-29 (Fla. 11th Cir. Ct. Jan. 10, 2000) (granting "Petitioner's Verified Emergency Ex-Parte Petition for Interim Order"). That decision was roundly criticized by the family and immigration bar. Judge Bailey, chief judge of the family court, assumed the case after Judge Rodriguez was forced to withdraw because of the not unrelated campaign-finance indictment pending against her. Judge Bailey dismissed the custody case with prejudice and a stern rebuke, explaining that the state court was preempted and had no jurisdiction, and that the petitioner, Lázaro, in any event lacked standing to sue under the Florida statute upon which Judge Rodriguez had rested her faulty ruling. *See In re* Lazaro Gonzalez, No. 00-00479-FC-28 (Fla. 11th Cir. Ct. Apr. 13, 2000).

In the subsequent González district court decision, *supra* note 1, at 1171 (emphasis added), Judge Moore was careful to write that the INS had granted Elián "a temporary deferral of his inspection and *placed him in the care of* his paternal great uncle."

without [his] consent."[18] The letter was forwarded to the U.S. interests section[19] in Havana that same day. In a letter to the father dated December 8, 1999, INS District Director Robert Wallis "outlined the documentation required by the INS in order to release" Elián to his father.[20] The letter indicated, moreover, that the father would need to be interviewed by U.S. government officials.

While the father's request became captive to a strained U.S.-Cuba foreign relations process, Elián's relatives in Miami and the organizations backing them became active in the legal and public-relations arenas. Hearing of the exchange of letters, Elián's great-uncle Lázaro signed and filed an asylum application for Elián on December 10. The application alleged that the boy, now turned six, would be persecuted in Cuba on the basis of a political opinion or his membership in a particular social group.[21] Shortly thereafter, an identical petition was filed bearing Elián's block-print "signature."[22] On January 12, 2000, following a local family court judge's ruling—subsequently vacated with prejudice—that purported to remove custody from the father and to give temporary custody of Elián to Lázaro,[23] Lázaro filed a third asylum application on Elián's behalf.[24]

Elián's father was interviewed extensively by INS and State Department officials at safe locations in Cuba beginning on December 13, 1999. He expressed the view, later quoted by both the district court and court of appeals, that: "I'm very grateful that [Elián] received immediate medical assistance, but he should be returned to me and my family. . . . As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me."[25] Despite the INS's conclusion that the father was sincere, was speaking free of coercion, and enjoyed a close and responsible relationship with his son, further interviews were undertaken on December 31 in response to concerns expressed by Lázaro's attorneys and by supporters in Miami that the father's statements were coerced, not credible, and not fatherly. In the view of the INS, these additional interviews confirmed the father's free volition, sincerity, and fatherliness.[26]

The INS concluded its investigations with a lengthy memorandum dated January 3, 2000, from its general counsel, Bo Cooper, to INS Commissioner Doris Meissner, who incorporated the memorandum's findings into her announcement of January 5 that Elián's father had the exclusive right to speak for him in immigration matters and that the INS would be

[18] González district court decision, *supra* note 1, at 1171.

[19] The United States and Cuba, which do not have diplomatic relations with one another, maintain communication through interests sections that are organized under the auspices of the Swiss Embassies in Havana and Washington, D.C.

[20] The timing of the father's letter is explained more clearly in the González district court decision, *supra* note 1, at 1171, than in the González appeal, *supra* note 3, at 1345.

[21] González district court decision, *supra* note 1, at 1171. Consistent with international agreements—in particular, Article 33 of the 1951 UN Convention on the Status of Refugees, July 28, 1951, 189 UNTS 150—U.S. law defines an asylee as a refugee who has landed in or at the border of the United States and who can document *personally* entertaining a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. §1101(a)(42)(A). The seminal case remains INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).

[22] *See* González district court decision, *supra* note 1, at 1171.

[23] *See supra* note 17. In a letter to the parties dated January 12, Attorney General Janet Reno made clear that Elián, as a parolee, was in her exclusive custody, that neither she nor the INS was, or could be, a party to a local family court decision such as the one just issued, and that the decision had absolutely no effect on the process under way. This same letter also effectively invited the family in Miami to litigate the issues in federal court. In part, this letter served to reiterate the federal monopoly over immigration matters, but it was obviously construed by the family as an offer to litigate what was, in fact, a closed matter. *See* Letter from Janet Reno, U.S. Attorney General, to Spencer Eig, Roger Bernstein, and Linda Osberg-Braun (Jan. 12, 2000), *in* Defendants' Notice of Filing, *supra* note 15, at 25 [hereinafter Reno letter], *excerpted in* González district court decision, *supra* note 1, at 1174–75. *See infra* note 26 and accompanying text.

[24] *See* González district court decision, *supra* note 1, at 1175.

[25] González appeal, *supra* note 3, at 1345; González district court decision, *supra* note 1, at 1172.

[26] *See* Declaration of Silma L. Dimmel [lead INS interviewer], *in* Defendants' Notice of Filing, *supra* note 15, at 229; González district court decision, *supra* note 1, at 1172–73.

returning the boy to Cuba, pursuant to his father's wishes.[27] In the INS's view, which was subsequently endorsed by both the district court and court of appeals, there was "no divergence of interest between the father and the child with respect to Elián's asylum application which warrants interference with the father's parental authority." In addition, "there appear[ed] to be no objective basis for a valid claim for asylum or protection"[28] under either the INA or the Convention Against Torture, which would bar refoulement even without a grant of asylum.[29]

In its conclusions of fact and law, both American and Cuban, the INS determined that only Elián's father had legal authority to speak for him on immigration matters and that Lázaro González and his attorneys had no legal basis for doing so.[30] With regard to the question of the circumstances under which the child's admission and asylum interests ought to be considered apart from the wishes of his sole surviving parent, it determined both that Elián's father had no interest or vulnerability that conflicted with his ability to represent the child's immigration interests,[31] and that, after a close evaluation of all available testimony, the father was able to convey his own true desires and intentions. Finally, the INS concluded that although Elián certainly had the right, he did not have the capacity at his tender age to seek asylum on his own behalf, and that "[s]ince there is no objective basis to believe that Elián is at risk for persecution or torture, the INS should not accept his asylum application against the express wishes of his father."[32]

Based on these determinations, the INS on January 5 rejected and returned the two asylum applications to the attorneys hired through Lázaro González and purporting to represent Elián.[33] Those attorneys then asked Attorney General Reno to overturn the decision of the INS commissioner. On January 12, the attorney general issued a letter ruling upholding the INS. That letter, which rejected any role for the state family court, also invited Lázaro González to litigate the issue in federal court.[34] On January 19, the plaintiffs

[27] *See* Doris Meissner, *INS Decision in the Elian Gonzalez Case* (Jan. 5, 2000) <http://www.ins.usdoj.gov/graphics/publicaffairs/statements/Elian.htm>.

[28] Cooper memorandum *supra* note 15, *in* Defendants' Notice of Filing, *supra* note 15, at 17.

[29] *Id.*; *see* González district court decision, *supra* note 1, at 1173.

[30] *See* González district court decision, *supra* note 1, at 1173–75.

[31] *See id.* at 1174–75.

[32] Cooper memorandum, *supra* note 15, *in* Defendants' Notice of Filing, *supra* note 15, at 17. The INS found both Cuban and Florida law clear on the question of assessing a father's authority to speak for a young child, even one born out of wedlock. *In re Hosseinian,* Interim Decision 3030 (B.I.A. 1987), confirmed that each relationship is to be assessed under the law of the jurisdiction where it arose.

Among the INS concerns was the potential harm being done to Juan Miguel by the protracted separation from his son. Since the INS found no basis to question the father's parental rights, prolonged separation of father and son might well constitute the kind of interference with parental rights that may not be undertaken absent clear and convincing evidence of a basis to terminate those rights. *See* Cooper memorandum, *supra* note 15, *in* Defendants' Notice of Filing, *supra* note 15, at 13 (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("family life is a fundamental liberty interest protected by the Fourteenth Amendment")).

All aliens present in the United States enjoy the right to apply for asylum. Yet, in the case of children, parents have the right to "participate in all immigration matters regarding their child." *Id.* at 12 (quoting Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985)). At age six, Elián was well below the minimum age at which he might be "competent to affirm" the contents of his asylum application. *Id.* at 14. Therefore, following its long-standing *INS Children's Guidelines,* as well as the guidelines set forth by the Office of the United Nations High Commissioner for Refugees in its Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (2d ed. 1992), INS adjudicators "will have to evaluate the claim based on all objective evidence available," *id.* at para. 219. *See* Cooper memorandum, *supra* note 15, *in* Defendants' Notice of Filing, *supra* note 15, at 14. In this case the INS found no objective evidence to support the claim that Elián would face persecution in Cuba.

[33] On January 5, 2000, a detailed letter explaining its process and decision was sent by INS Executive Associate Commissioner for Field Operations Michael Pearson to attorneys Roger Bernstein and Spencer Eig. On January 6, James Burzynski, Director of the INS's Texas Service Center, returned the actual applications to lead attorney Roger Bernstein together with a summary letter and a copy of Pearson's letter. *See* Complaint, González district court decision, *supra* note 1, Ex. A (No. 00-206-CIV-MOORE); González district court decision, *supra* note 1, at 1173–74.

[34] *See* Reno letter, *supra* note 23. Also on January 12, the third asylum application, signed by Lázaro alone, was submitted. According to the Miami attorneys, this new application was justified on the basis of Judge Rodriguez's "temporary protective order" giving Lázaro custody over Elián. *See supra* notes 17, 23. This third and last

filed suit in the federal district court in Miami, "alleging that the INS lacked the authority to reject the asylum applications and was required—by federal statutes and regulations—to accept and adjudicate" them.[35] The INS responded with a motion to dismiss or an alternative motion for summary judgment.

As an initial matter, the district court determined, contrary to the argument of the INS, that it did have limited subject matter jurisdiction to consider the complaint and that the plaintiff enjoyed standing to bring the complaint and was a real party in interest for the purpose of this action.[36] Although Elián himself did not have the requisite capacity to sue, Lázaro was "a sufficient next friend exclusively for the purposes of bringing the instant action" on his behalf.[37] The district court found that there was no "'clear and convincing evidence' that Congress intended to preclude [judicial] review" of the processing of asylum applications.[38] Likewise, Elián was found to meet the minimum requirements for standing to sue. And though Elián did not, because of his age, have the capacity to bring suit himself, his great-uncle Lázaro, his "self-appointed 'next friend,'"[39] did meet the Eleventh Circuit's requirements for "next friend" status—under Rule 17(c) of the Federal Rules of Civil Procedure—to pursue this action.[40] Notwithstanding the Miami relatives' victory on those issues, the court went on to reject the substance of their complaint.

Citing the classic plenary power cases, the district court found that there had been no constitutional due process violations in the INS's refusal to process an admission or asylum application on Elián's behalf. "An alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application," only those rights given by the statute in question.[41] The only remaining question, therefore, was whether the INS had exceeded its authority in interpreting the statute as it did in Elián's case.

For the district court, the dispositive question, as it would be for the court of appeals,[42] was:

> Did the Attorney General have the authority to determine that, in light of the express contrary wishes of Plaintiff's father, an application filed by someone else on six-year-old Plaintiff's behalf did not require adjudication on its merits? After careful consideration, the Court finds that the Attorney General's determination is controlling, conclusive, not manifestly contrary to law, and not an abuse of her congressionally delegated discretion.[43]

application was rejected and returned upon receipt. *See* Letter from James Burzynski, Director of INS Texas Service Center, to Spencer Eig, Roger Bernstein, and Linda Osberg-Braun (Jan. 13, 2000), *in* Defendants' Notice of Filing, *supra* note 15, at 317; González district court decision, *supra* note 1, at 1175.

[35] González district court decision, *supra* note 1, at 1175. The case was initially assigned randomly to Senior Judge James King, who recused himself because of a conflict involving his son and the plaintiffs. The case was then randomly reassigned to Senior Judge William Hoeveler, who suffered a stroke shortly after a second preliminary hearing. The chief judge of the district then held the case for one additional hearing, after which it was assigned to Judge K. Michael Moore, who rendered the judgment in the case. *Id.* at 1170 n.1. The assignment of judges in the state court had, in the interim, come under skeptical scrutiny locally.

[36] *See id.* at 1175–76.

[37] *Id.* at 1176.

[38] *See id.* at 1176–79 (citing and quoting (at 1176) Board of Governors of the Fed. Reserve Sys. v. McCorp Fin., Inc., 502 U.S. 32, 44 (1991), and also (at 1177–78) Reno v. Arab-American Anti-Discrimination Comm., 525 U.S. 471 (1999)).

[39] *Id.* at 1184.

[40] The Eleventh Circuit's interpretation of Fed.R.Civ.P. 17(c) "next friend" status is found in Ford v. Haley, 195 F.3d 603, 624 (11th Cir. 1999). The district court was strained to find justification for a next friend when a competent parent opposed such recognition, and reached back to Bank of the United States v. Ritchie, 33 U.S. 128, 144 (1834). *See* González district court decision, *supra* note 1, at 1185.

[41] González district court decision, *supra* note 1, at 1188 (quoting Landon v. Plasencia, 459 U.S. 21, 32 (1982)). The Eleventh Circuit has been one of the most adamant that "a constitutionally protected interest cannot arise from relief that the executive exercises" on a discretionary basis, Tefel v. Reno, 180 F.3d 1286, 1300 (11th Cir. 1999), and that admission issues "are not within the protection of the Fifth Amendment," Jean v. Nelson, 727 F.2d 957, 968 (11th Cir. 1984) (quoting Bridges v. Wixon, 326 U.S. 135 (1945)).

[42] *See* González appeal, *supra* note 3, at 1346–47.

[43] González district court decision, *supra* note 1, at 1188. The court seemed to draw its particular formulation from 8 U.S.C. §1252(b)(4)(D), which provides that "the Attorney General's discretionary judgment whether to grant relief under [Section 1158(a), the asylum provisions in Section 208 of the Immigration and Naturalization Act] shall be conclusive unless manifestly contrary to law and an abuse of discretion." *Id.* at 1189.

The attorney general's finding, as communicated in her January letters, that Elián was incompetent or lacked capacity to exercise the right to apply for asylum against his father's wishes was a controlling legal determination that, under the given facts, ought to enjoy a presumption of judicial deference.

As an alternative basis for considering the attorney general's interpretation of Section 208,[44] the district court turned to the jurisprudence of deference to administrative agency decision making—the chief basis on which the court of appeals rested its later affirmance. Both the trial court and the appeals court adverted to the now well known *Chevron* process and standard:[45]

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[46]

Since the various provisions and paragraphs relevant to the Section 208 asylum provisions must be read together, it cannot be the case that Congress would provide a standard of review for the INS's discretionary judgment if it did not intend for the agency to exercise discretion where Congress itself did not mandate exceptions or exclusions—as, in fact, it had chosen to do elsewhere in Section 208.[47]

The court of appeals agreed with the above analysis and found that the INS had not abused its discretion in making a series of judgments and determinations, each one of which was reasonable and within its purview. To begin with, "we cannot say that the foundation of the [INS] policy—the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim—is unreasonable."[48] That the person ordinarily representing such children is a parent "also comes within the range of reasonable choices," particularly since "INS officials seem to have taken account of the relevant, competing policy interests."[49] Hence, the court wrote that "we cannot conclude that the policy's stress on the parent-child relationship is unreasonable."[50]

At the same time, INS policies do recognize that conflicts of interest or "special circumstances may exist that render a parent an inappropriate representative for the child" and that in such instances those policies "permit other persons, besides a parent, to speak for the child in immigration matters."[51] For the court, this particular policy neither frustrated nor undermined congressional intent. Unlike the district court, which had left the particularly disfavored status of Cuba aside, the court of appeals did worry that the INS had found that a parent's living "in a communist-totalitarian state is no special circumstance, sufficient

[44] *See supra* note 43.

[45] *See* González district court decision, *supra* note 1, at 1190; González appeal, *supra* note 3, at 1348–49 (quoting Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984)). Both courts also cited and quoted INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), with the district court, *supra* note 1, at 1191, quoting the position that "judicial deference to the Executive Branch is especially appropriate in the immigration context [']where officials exercise especially sensitive political functions that implicate questions of foreign relations,[']" *Aguirre-Aguirre*, 526 U.S. at 425.

[46] González district court decision, *supra* note 1, at 1190 (quoting *Chevron*, 467 U.S. at 842–43).

[47] *See supra* notes 43–46 and accompanying text.

[48] González appeal, *supra* note 3, at 1351. The court added in a footnote, *id.* at n.18, that, "we do not think that the INS, as a matter of law, must individually assess each child's mental capacity" rather than looking at his or her age.

[49] *Id.* at 1351.

[50] *Id.* at 1352.

[51] *Id.* Sample circumstances that would bring about this state of affairs are noted in the court's footnote 21, *supra* note 5.

in and of itself, to justify the consideration of a six-year-old's asylum claim (presented by a relative in this country) against the wishes of a non-resident parent."[52]

Judge Edmondson went on to aver that "some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent—even when he is not coerced—demands that the child leave this country to return . . . ."[53] Nonetheless, the INS did not ignore the issue and had an established policy, and "we cannot properly conclude that the INS policy is totally unreasonable," particularly since it does take "account of the possibility of government coercion," such as that which could be "directed at an individual parent."[54] The court also briefly observed that the policy touches upon foreign affairs where the executive branch, acting pursuant to a congressional grant of authority, is entitled to maximum deference.[55]

Finally, the court of appeals concluded that the application of the INS's policy to this plaintiff was, like the policy itself, reasonable and not arbitrary or an abuse of discretion.[56] The handling of Elián's case comported with the rules and policies adopted by the INS generally, including both the treatment of Elián's purported asylum application as void and the refusal to accept the applications filed by Lázaro. The INS's investigation, including the interviews of Juan Miguel and determinations of his veracity, had been thorough.[57] Likewise, the court found that the INS's negative "preliminary assessment of the merits" of Elián's asylum claim, while perhaps (or perhaps not) a "consideration" of that claim within the meaning of the statute, was a "rough look at the potential merits" that constituted "a legitimate part of deciding whether [Juan Miguel] had a substantial conflict of interest with [Elián] about asylum that would disqualify the father from representing" his son.[58]

In sum, the choices and decisions "that the INS made in this case are choices about which reasonable people," including a court persuaded of Cuba's "totalitarian" nature, "can disagree. Still, the choices were not unreasonable, not capricious, and not arbitrary, but were reasoned and reasonable."[59]

* * * *

The prosaic, if not mundane, opinion of the Eleventh Circuit—well known for being consistently conservative in immigration matters—contrasted sharply with the high-intensity politics surrounding the case. Some members of Congress rarely associated with liberal immigration policies sought to make a citizen, or at least permanent resident, of an anti-Castro poster boy. Some conservative publicists and thinkers—usually adamant in defense of the family and parental rights—felt it essential that Elián be taken from his father and raised in the United States. For the ancien régime exiles from pre-Castro Cuba, as well as

[52] González appeal, *supra* note 3, at 1353. The increasingly antique phrase "communist-totalitarian" was the court's own. The court cited U.S. Dept. of State's COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999 (Joint Comm. Print 2000), *obtainable from* <http://www.state.gov/www/global/human_rights/99hrp_index.html>, to the effect that the Cuban government in 1999 continued "to violate fundamental civil and political rights of its citizens." González appeal, *supra* note 3, at 1353.

[53] González appeal, *supra* note 3, at 1353. It is not clear whether this comment was framed to emphasize that the case is about judicial deference or whether it reflects, instead, the court's or Judge Edmondson's own view.

[54] *Id.*

[55] *See id.* (citing United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936)). In this connection, the court seemed to worry that a per se rule that "no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United States"—exactly the position of the plaintiffs and the Cuban-American exile leadership—would cause chaos in the area of foreign affairs. *Id.* at 1353–54.

[56] *See id.* at 1354.

[57] *See id.* at 1354–55.

[58] *Id.* at 1355 n.24. Though Elián might face "education and indoctrination" in Cuba, those things were not "synonymous with 'persecution,'" *id.* at 1355, *see id.* at 1355–56. "The INS's estimate" of the asylum applications—as "not strong on their merits—is not clearly inaccurate." *Id.*

[59] *Id.* at 1356.

for parts of a younger generation of Cuban-American politicians, the Elián case became a cause célèbre. It remains to be seen whether the case also proves to be a watershed, marking the waning power of an influential interest group.

At the very least, the opponents of Elián's return, while insistent on the lack of a free legal order in Cuba, proved less than committed to the "rule of law" in Florida. As noted,[60] Elián's temporary parole into the country in November left him, as is always the case for "parolees," in the exclusive custody of the U.S. attorney general, who chose for her own emergent and freely revocable reasons, to lodge the boy with local relatives. Rebuffing the attorney general's various efforts throughout the spring to arrange reunification of Elián with his father, the plaintiffs and their supporters—after months of creating a heated atmosphere—forced a showdown with the INS by ignoring its demands that Elián be turned over. Acting on the basis of a federal search warrant and on the quite plausible theory that Elián's relatives, by refusing to adhere to the conditions of his parole, had become kidnappers involved in an ongoing crime,[61] the INS in the early morning of April 22 raided the home of Lázaro González and removed Elián.

Elián was quickly reunited with his father and the rest of his family in Washington pending the outcome of the litigation[62] while the seizure of Elián ignited a deep sense of outrage and betrayal among those committed to the cause of his asylum. Elián and his father, along with his new mother and baby brother, left for Cuba within hours after the U.S. Supreme Court denied the petition for a writ of certiorari. It is quite likely that this case will be best remembered, not for the evolution of asylum or administrative discretion doctrine, but rather for the political passions and brazen local disrespect for the rule of law that it unloosened.[63]

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[60] *See supra* note 14 and accompanying text.

[61] In successfully applying for a search and seizure warrant under Rule 41(b) of the Federal Rules of Criminal Procedure, Mary Rodriguez, an INS senior special agent, affirmed on behalf of the government that Elián, his parole having been revoked, was now also being "unlawfully restrained" at Lázaro's home. Specifically, her affidavit swore that:

> 11. On April 14, 2000 Michael Pearson, INS Executive Associate Commissioner for Field Operations sent a letter to Lazaro Gonzalez to make clear that Elian's parole into his care was revoked at 2:00 pm, Thursday April 13, 2000 . . . .
>
> 12. . . . Lazaro Gonzalez has refused to return physical custody of Elian to the INS, as ordered by the INS. . . . Lazaro Gonzalez has no claim of right to custody based on the now-dismissed state court proceeding. In the absence of legal authority from the INS to retain custody of Elian, or the consent of Elian's father[,] . . . Lazaro Gonzalez is unlawfully restraining Elian Gonzalez.
>
> . . . .
>
> 15. Based on this information, I have probable cause to believe that Elian Gonzalez is being unlawfully restrained . . . at the Lazaro Gonzalez family residence.

Affidavit of Mary A. Rodriguez 5–7, App. to Robert L. Dubé (Magis. J., S.D. Fla.) for Search and Seizure Warrant (Apr. 21, 2000).

[62] After his arrival in the United States, Juan Miguel had been permitted to become an intervenor in the litigation then before the circuit court.

[63] *See, e.g.*, Rick Bragg, "Stand over Cuban Highlights a Virtual Secession of Miami," N.Y. TIMES, Apr. 1, 2000, at A1.