April 19, 2000

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-11424-D

ELIAN GONZALES, a minor, by and through
LAZARO GONZALEZ, as next best friend, or,
alternatively, as temporary legal custodian,

Plaintiff,

v.

JANET RENO, Attorney General of the United States;
DORIS MEISSNER, Commissioner, United States
Immigration and Naturalization Service;
ROBERT WALLIS, District Director,
United States Immigration and Naturalization Service;
UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; and
UNITED STATES DEPARTMENT OF JUSTICE

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

Before EDMONDSON, DUBINA and WILSON, Circuit Judges

BY THE COURT:

Elian Gonzalez ("Plaintiff"), a six-year-old child from Cuba, has made his way to the United States. Plaintiff, as an alien, submitted on application for asylum, pursuant to 8 U-S-C § 1159(a), to the Immigration and Naturalization Service ("INS").[1] His father asked, in effect, that the application be withdrawn. After an investigation, the INS – deciding that Plaintiff could not apply for asylum himself and that, under the circumstances, only his father could seek asylum on Plaintiff's behalf – concluded that there was no reason not to honor the father's request and, accordingly, refused to consider Plaintiff's application. Plaintiff then brought suit in federal district court challenging on several grounds the INS's refusal to consider his application.[2] The district court rejected Plaintiffs claims.

Plaintiff has appealed the district court's decision to this Court.[3] His appeal is scheduled to be argued orally next month. Plaintiff, however, now moves for an injunction "to preclude (Plaintiff's) physical removal from the jurisdiction of the United States during the pendency of this appeal."[4] We conclude that Plaintiff is entitled to such an injunction and grant the motion.

In considering a motion for injunction pending appeal, we examine four factors: (1)whether the movant is likely to prevail on the merits of his appeal; (2) whether, if we do not issue an injunction, the movant will suffer irreparable harm; (3) whether, if we issue an injunction, any other party will suffer substantial harm; and (4) whether an injunction would serve the public interest. See in re Grand Jury Proceedings, 975 F.2d 1488, 1492 (11th Cir. 1992). Although the first factor is generally the most important, the movant need not always show that he probably will succeed an the merits of his appeal. Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986). Instead, where the "balance of the equities weighs heavily in favor of granting the [injunction]," the movant need only show a "substantial case on the merits." Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981); see also Hilton v. Braunskil, 107 S. Ct. 2113, 2120 (1987); United States v. Hamilton, 963 F.2d 322, 323 (11th Cir. 1992); Garcia-Mir, 781 F.2d at 1453.

In this case, the balance of the equities weighs heavily in favor of enjoining the removal of Plaintiff from the United States pending appeal. And Plaintiff has made a "substantial case on the merits" of his appeal.

1. "Balance of the Equities"

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. See Michael v. INS, 48 F.3d 657, 664 (2d Cir. 1995).

In addition, we doubt that an injunction would harm the INS.[5] Plaintiff has been in the United States for nearly five months. The INS refused to consider Plaintiff's application for asylum more than three months ago. The INS, however, has not sought to remove Plaintiff in the meantime from the United States. The suggestion that an injunction pending appeal, prohibiting the removal of Plaintiff from the United States until Plaintiff's expedited appeal is decided on the merits, will harm the INS is not compelling.

Nor do we believe that an injunction pending appeal in this case would offend the public interest. The INS, in opposition to Plaintiff's motion, invokes the well-established authority of the political branches of government in immigration affairs. We fully recognize the plenary power of Congress over immigration matters. See Jean v. Nelson, 727 F.2d 957, 965 (11th Cir. 1984) (en banc). But 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. We, therefore, conclude that the equities weigh heavily in favor of granting an injunction pending appeal.[6]

2. "Substantial Case on the Merits"

This case is mainly about statutory construction and the proper exercise of executive discretion. Among other things, we must ultimately decide what Congress meant when it said:

Any alien who is physically present in the United States or who arrives in the United States . . . irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1159(a)(1). Plaintiff argues that the INS's refusal even to consider his application violates 9 U.S.C § 1158(a). The INS contends that, because plaintiff is a six-year-old child, he is incompetent to submit an application on his own behalf and that, on the facts of this case, he must have his father submit the application for him.[7] Because his father did not do so, the INS contends that Plaintiff never actually applied for asylum and that, therefore, no application exists for its consideration. Even accepting as we do the principles of deference set out in Chevron v. Natural Resources Defense Council Inc., 104 S. Ct. 2778 (1994), we at this time have doubt, in the light of the record and Plaintiff's arguments on appeal, about the correctness of the INS's interpretation of section 1158.

In considering an agency's interpretation of a statute, we first must examine the plain meaning of the pertinent statutory language: "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." Chevron, 104 S. Ct at 2781 (1984). The statute in this case seems pretty clear. Section 1158(a)(1) provides that "[a]ny alien . . . irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of "[a]ny alien."[8] See 8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." 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.

Congress's provision for "any alien" is not uncertain in meaning just because it is broad. See Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 211 (1998). If Congress had meant to include only some aliens, perhaps Congress would not have used the words "any alien."[9] In addition, although the INS has the authority to issue regulations and procedures governing the submission of asylum applications, see 8 U.S.C. § 1158(d), the INS cannot property infringe on the plain language of the statute or the clear congressional purpose underlying it. See Shoemaker v. Bowen, 853 F.2d 858, 861 (11th Cir. 1988). Nor can the INS properly narrow the scope of a statute through regulation. See Ellis v. General Motors Acceptance Corp., 160 F.3d 708--09 & n.5 (11th Cir. 1998). At this time, we cannot say that "any alien" excludes Plaintiff: given the plain language of the statute, he might be entitled to apply personally for asylum. Furthermore, it seems unclear that an INS decision to treat Plaintiff's application as a nullity without an adjudication on the merits is a "procedure for the consideration of [Plaintiff's] asylum application." See 8 U.S.C. § 1158(d)(1).

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.[10] Moreover, the regulations contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents.[11] Also, the INS Guidelines for Children's Asylum Claims (Dept. of Justice, December 1998), ("Guidelines") envision that young children will be active and independent participants in the asylum adjudication process.[12]

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.[13]

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 young child – has expressed a wish that he not be returned to Cuba.[14] He personally signed an application for asylum.[15]

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.

Even if the INS is correct that Plaintiff needs an adult, legal representative for his asylum application, it is not clear that the INS, in finding Plaintiff's father to be the only proper representative, considered all of the relevant factors – particularly the child's separate and independent interests in seeking asylum. Cf. Polovchak v. Meese, 774 F.2d 731, 736-7 (7th Cir. 1985); Johns v. Dept. of Justice, 624 F.2d 522, 524 (5th Cir. 1980) (recognizing in the context of deportation hearing that the mother's interests are no necessarily the same as her four-year-old child's). It does not appear that the INS ever spoke to or interviewed Plaintiff before making this determination. And Lazaro Gonzalez, Plaintiff's great-uncle, is no stranger to Plaintiff. The INS placed Plaintiff in Lazaro's care upon Plaintiff's arrival in this country, and Lazaro is a blood relative. When Lazaro submitted applications for asylum on Plaintiff's behalf, Lazaro was the INS's designated representative to take care of Plaintiff and to ensure his well-being. See 8 C.F.R. § 236.3(b)(4) (stating that where a minor is paroled to someone other than the parent or legal guardian, "such person must execute an agreement to care for the juvenile"). Lazaro's interests, to say the least, are not obviously hostile to Plaintiff's interests. So, for now, we remain unconvinced that the asylum application submitted by Lazaro on behalf of Plaintiff necessarily was ineffectual under the law.

For these reasons and in these circumstances, we believe that Plaintiff has presented a substantial case on the merits.

CONCLUSION

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.

The true legal merits of this case will be finally decided in the future. More briefing is expected. We intend to hear oral argument. We need to think more and hard about this case for which no sure and clear answers shine out today. Still, because of the arguments presented as well as the potential inconsistencies of the INS's present position with the plain language of the statute and with the INS's own earlier interpretations of the statute in INS regulations and guidelines, and because of the equities in this case, we conclude that Plaintiff is entitled to an injunction pending appeal.[16]

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 not 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.[17]

MOTION GRANTED.

IT IS SO ORDERED.

NOTES

[1] Several applications for asylum were actually submitted on Plaintiff's behalf. One was signed by Plaintiff himself. The others were signed by Plaintiff's great uncle and temporary. custodian (selected by the INS), Lazaro Gonzalez.

[2] Plaintiff is a minor; Plaintiff's suit was brought by and through Lazaro, Gonzalez as next friend. See generally Fed. R. Civ. P. 17(c).

[3] This Court, on 27 March 2000, expedited Plaintiff's appeal and scheduled oral argument for the week of 8 May 2000.

[4] A party must ordinarily first move in the district court for an injunction pending appeal. In this case, Plaintiff came directly to the appellate court. A motion for an injunction pending appeal may be made directly to the court of appeals when a partyshows that moving first in the district court would be impracticable. See Fed. R. App. P. 8(a)(2). In this case, we are satisfied that Plaintiff has sufficiently shown that it would have been impracticable to move first in the district court; the time-sensitive nature of the proceedings and the possibility that we could have lost jurisdiction in the absence of an injunction support our exercise of discretion in this case. See also Michael v. INS 48 F.3d 657, 663 (2d Cir. 1995).

On 13 April 2000, a single-judge emergency order, enjoining Plaintiff's removal from the United States, was issued until a three-judge panel had considered fully Plaintiff s motion for injunction pending appeal. We now have considered fully Plaintiff's motion, and the single-judge emergency order has served its purpose. The single-judge order, accordingly, is replaced by this Order.

[5] Multiple Defendants are in this case. But we refer to Defendants collectively as the "INS."

[6] The INS also asserts that, under the equitable doctrine of "unclean hands," Plaintiff is unentitled to seek the equitable remedy of an injunction pending appeal. The INS urges that Lazaro Gonzalez's alleged failure to comply with an INS order, directing that he surrender Elian Gonzalez to the INS at a Miami airport, renders Plaintiff's hands unclean. Whether Lazaro Gonzalez failed to comply with a lawful order of the INS

and whether such failure would justify invocation of the unclean hands doctrine in some cases are issues that we need not decide today. Lazaro Gonzalez is not the plaintiff in this case; plaintiff is Elian Gonzalez. However unclean Lazaro Gonalez's hands may be, the INS has suggested no misconduct on the part of Plaintiff, Elian Gonzalez, that would justify application of the unclean hands doctrine in this case to him.

[7] Although the INS determined that Plaintiff was incompetent to make immigration decisions, it bears repeating that the INS made this determination without having met with Plaintiff or having any evaluations done on his capacity.

[8] Congress specifically and expressly excluded three groups of aliens from the meaning of "[a]ny alien." See 8 U.S.C. § 1158(a)(2). School-age children are not among the excluded groups, however. See id.

[9] To some people, the idea that a six-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 does not make immigration policy, and we cannot review the wisdom of statutes duly enacted by Congress. If Congress intended – as evidenced by the plain meaning of section 1158 – 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.

[10] See 8 C.F.R. § 103.2(a)(2) ("An applicant or petitioner must sign his or her application or petition. However, a parent or legal guardian may sign for a person who is less than 14 years old.") (emphasis added); 8 C.F.R. § 236.3(h) ("When a juvenile alien is apprehended, he or she must be given a [Notice of Rigbts and Disposition Form]. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language be or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new [form] shall be given to and signed by the juvenile.")

[11] "See 8 C.F.R. § 236.3(f) ("If a juvenile seeks . . . any form of relief from removal, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief"); Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985); cf. Johns v. Dept. of Justice 624 F.2d 522

[12] The Guidelines provide asylum officers with information about how to talk to and interview a young child about his asylum application. The Guidelines repeatedly stress that the kind of questions which should be asked and the kind of answers which should be expected varies according to the age of the applicant and that special care should be taken when interviewing young children. The Guidelines also say that "Asylum Officers should not assume that a child cannot have an asylum claim independent of the parents,"and that "[w]hen a parent or parents do not appear to have an approvable claim, an Asylum Officer should routinely make an inquiry into the child's case even though the child may be listed merely as a derivative on a parent's application and may not have filed a separate asylum application." See Guidelines at 15. The Guidelines also say that "the age, relative maturity, ability to recall events, and psychological make-up of the child will affect the quality of the answers an Asylum Officer is able to elicit from that child. While the burden of proof remains on the child to establish his or her claim for asylum, an Asylum Officer must take these and other factors into account when assessing the credibility of a claim and must also attempt to gather as much objective evidence as possible to evaluate the child's claim." See Guidelines at 17. Above all, the INS Guidelines say that "[w]hen . . . it appears that the will of the parents and that of the child are in conflict, the adjudicator "will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt." See Guidelines at 20 (citations omitted).

An additional point of interest is that the INS Asylum Officer Corps Training Guidelines for Children's Asylum Claims (INS January 1999) discuss the three age-based developmental stages of children (0-5, 6-12, 13-18 years old) and provide guidance for asylum officers in dealing with children in each category.

Notably, the training guidelines provide an example of a statement from a six-year-old child and provide information which can be used to assess statements by children of that age. See id. at 10-18.

[13] The INS Guidelines cite to a number of studies and articles dealing with the ability of children to testify as witnesses in judicial proceedings. See Guidelines, at 13 n.21. At the least, this reference supports the inference that the INS envisioned that the kind of competency required for a minor to apply for asylum is competency to testify, see Maryland v. Craig, 497 U.S. 836 (1990), not legal competency to contract and so on, which is a much different standard.

Caselaw supports the inference that complete legal competency has not been the determinative circumstance for whether a minor way apply for asylum. See Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985) (allowing a 12-year-old minor to apply for asylum).

[14] We do not now suggest that the stated intentions of a six-year-old child are dispositive or even entitled to substantial weight in deciding whether the child ultimately receives a grant of asylum. Still, a colorable argument exists that a school-age child's expressed wishes about where he wants to live can trigger the requirement that Plaintiff's claim for asylum be given full and fair consideration. This conclusion may be particularly true where, as here, Plaintiff has indicated to mental health professionals that he does not want to return to Cuba, and where those mental health professionals have said that he understands what he is saying. These statements might ultimately not be of great weight in determining Plaintiff's application for asylum, but we are not sure that they may be summarily dismissed as having no weight at all.

[15] Plaintiff's application was complete. To date, none of Plaintiff's applications were returned by the INS for being incomplete. According to its own regulations, the INS "shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of § 208.3(c)(3)." 8 C.F.R. § 208.9(a) (emphasis added).

[16] The INS, in its response to Plaintiff's motion, said it would consent to an injunction requiring the INS to bar Plaintiff's departure from the United States if this Court also entered an order directing Lazaro Gonzalez to present Plaintiff to the INS, as directed by the INS, for transfer of care to Plaintiff's father. We decline to proceed in that manner.

To decide Plaintiff's motion and to preserve his right to a day in court, we need only address the issue of Plaintiff's removal from the country. We need not decide where or in whose custody Plaintiff should remain while this appeal is pending. This Order only prevents Plaintiff's removal from this country.

[17] Plaintiff, in his reply brief, requested that this Court order mediation in this case. Although we may direct the parties to participate in mediation, see Fed. R. App. P. 33, we choose not to do so at this time. Nevertheless, we encourage the parties to avail themselves voluntarily of this Court's mediation services.