A BRIEF SUMMARY OF THE DECISIONS BY THE UNITED STATES FEDERAL COURTS ON THE ELIAN GONZALEZ ASYLUM PETITION

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RESUMEN: La articulista formula un análisis jurídico del notorio caso del "balserito", que fue el calificativo que la prensa mundial otorgó al menor —de nacionalidad cubana— Elián González, como único sobreviviente del naufragio de la embarcación en la que su madre había salido subrepticiamente de Cuba. La significación que este caso tuvo en los medios mundiales de comunicación, permiten ahora al lector conocer la esencia jurídica que permitió al tribunal norteamericano desestimar la petición de asilo formulada por sus parientes maternos; contrariando el interés de su propio padre.

ABSTRACT: The author of this article makes a legal analysis of the well known case of "the little life raft boy" which is the way the world press classified the minor child —of Cuban citizenship— Elian Gonzalez, who was the sole survivor of the sinking of a vessel on which his mother had furtively departed from Cuba. The significance which this case had on the world's communications media now permits the reader to understand the legal essence which permitted the North American Court to reject the asylum petition filed by his maternal relatives; contrary to the interest of his own father.

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I. INTRODUCTION

For the last several months, the whole world has followed closely the Elian Gonzalez saga involving the United States federal government and the Cuban community in Miami, Florida. The media reports daily on what is happening among the Cuban community in Miami, the politicians, the United States Immigration and Naturalization Service ("INS"), the United States Department of Justice, the federal courts and the state courts. Every politician running for office has in some way or manner voiced his opinion on the matter; every teacher whether in a rural area or in a city has discussed in class Elian Gonzalez's tragedy or miracle; every mother and father has given their opinion as to what should be done with Elian. This article will briefly summarize the United States District Court for the Southern District of Florida's decision upholding the determination made by the Commissioner of the INS and the United States Attorney General that Elian Gonzalez's father's rights are superior to his great uncle's and Elian's individual rights as well as the appellate decisions rendered by the United States Court of Appeals for the Eleventh Circuit.

Part I of this article sets out the factual background presented to the United States District Court. Part II sets out the district court's decision as to the issues of jurisdiction and standing. Part III sets out a brief summary of the Complaint filed in the district court by Elian's relatives on his behalf. Part IV reports on the district court's decision while Part V reports on the decisions rendered by the United States Court of Appeals for the Eleventh Circuit.

II. FACTUAL BACKGROUND

The facts presented to the district court in the case styled, *Elian Gonzalez, a minor, by and through Lazaro Gonzalez, as next friend, or, alternatively, as temporary legal guardian v. Janet Reno, Attorney General of the United States, et al.*, Case No. 00-206-CIV-Moore, were as follows:[1]

1 See *Gonzalez v. Reno*, 86 F. Supp.2d 1167 (S.D. Fla. 2000). In addition to Attorney General Reno, the other named defendants are Doris Meissner, Commissioner, United States Immigration

On November 25, 1999, the United States Coast Guard picked-up five-year-old Elian Gonzalez from the fishermen who had rescued him off the coast of Florida. The Coast Guard took the boy, whose mother had died during their voyage in a makeshift boat from Cuba to the United States, to a Miami hospital.[2] The INS, due to the circumstances, temporarily deferred Elian's INS inspection (application process to obtain a visa), and placed Elian, temporarily, with his paternal great uncle, Lazaro Gonzalez, a resident of Miami, Florida.

On November 27, 1999, Elian's father, Juan Miguel Gonzalez, sent a letter to the Cuban government requesting the return of his son to him in Cuba. Juan Miguel Gonzalez alleged in his letter that Elian "was taken out of [Cuba] in an illegal manner and without [Juan Miguel Gonzalez's] consent".[3] Juan Miguel Gonzalez's letter was sent by the Cuban government to the Unites States Interests Section in Havana and then to the INS. On December 8, 1999, the INS answered Elian's father's letter and outlined the documentation required by the INS before ordering the release of Elian to his custody.[4]

On November 29, 1999, Elian's great uncle, Lazaro Gonzalez, filed an application for asylum on Elian's behalf with the INS. The political asylum petition was filed on the basis of membership in a particular social group and/or holding of a political opinion.[5] On December 1, 1999,

and Naturalization Service, Robert Wallis, District Director, United States Immigration and Naturalization Service, the United States Immigration and Naturalization Service, and the United States Department of Justice. As there are multiple defendants in this case, they will be referred to collectivly as the "INS".

2 On November 22, 1999, fourteen people left Cuba in a small motor boat in an attempt to reach the shore of Florida and the United States of America. The boat capsized and eleven of the people on the boat perished, including Elian's mother. Elian was alone in the ocean and survived by clinging to a floating tire.

3 *González v. Reno*, 86 F. Supp.2d at 1171 (*quoting* Letter from Juan Miguel Gonzalez to Felipe Perez Roque, Minister of Foreign Relations of November 27, 1999).

4 See *idem* at 1171 (Letter from Robert Wallis, INS District Director, to Juan Miguel Gonzalez of December 8, 1999).

5 Under United States law, there are five permitted grounds for the granting of an asylum application by the Attorney General: race, religion, nationality, membership in a particular group, and political opinion. 8 USC 1158(b)(1). A refugee is defined as:"any person... who is unable or unwilling to return to [his home country] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion". Immigration and Nationality Act, 8 USC 1101(a)(42)(A).

another identical asylum application was filed; it was submitted under Elian's own hand-written, printed name.

On January 10, 2000, a Florida state court granted Lazaro Gonzalez "limited legal authority... to assert and protect such rights as the child may have under the United States immigration law".[6] Immediately thereafter, believing he had the requisite standing, Lazaro Gonzalez filed another asylum application with the INS on Elian's behalf.

At the same time, the INS obtained documentation from Elian's father on his request that the INS return Elian to Cuba. Juan Miguel Gonzalez specifically requested the withdrawal of any application for admission to the United States filed by Lazaro Gonzalez on Elian's behalf.[7] Juan Miguel Gonzalez wanted his son back in Cuba.

On December 31, 1999, INS officials in Cuba met with Juan Miguel Gonzalez and requested that he complete a written questionnaire. Juan Miguel Gonzalez's answers to the questionnaire indicated that he was not acting as a result of pressure from the Cuban government, and that he was adamant that his son not stay in the United States.[8]

On January 3, 2000, the General Counsel for the INS prepared a Memorandum citing pertinent cases from the United States, as well as provisions of Cuban law, dealing with the legal issues presented. The Memorandum examined the following question: "May Plaintiff apply for asylum in direct opposition to the expressed wishes of his father?".[9] The Memorandum discussed Florida law on the competency of a minor to enter into a contract. The Memorandum stated that the INS generally assumes that "someone under the age of 14 will not make [legal] representation or other immigration decisions without the assistance of a parent or legal guardian".[10]

While the INS was not sure if Juan Miguel Gonzalez's wishes were his own or those of the Castro regime, after the INS carefully examined all of the information and evidence presented by the father, it concluded

6 See *Gonzalez v. Gonzalez-Quintana*, 2000 WL 419688 (Fla. Cir. Ct. 2000) (emergency ex-parte action filed on January 7, 2000, seeking temporary custody and a protective order prohibiting action by the INS).

7 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1172.

8 See *idem* at 1173.

9 *Idem* (*quoting* Memorandum from Bo Cooper, General Counsel for Doris Meissner, Commissioner of INS, January 3, 2000).

10 *Idem*.

that "the father is able to represent adequately the child's immigration interests," and that if the father were to come to the United States, the INS "would be required to recognize Elian's father's interests... [and] would necessarily change the custody arrangement...".[11] The General Counsel's Memorandum concluded that the INS was not going to process the asylum application because Elian "lacks the capacity to raise an asylum claim".[12]

On January 6, 2000, the INS wrote a letter to two of Elian's Miami attorneys stating that after careful consideration, the INS had determined there was no conflict of interest between Juan Miguel Gonzalez and his son, or any other reason, that would warrant an INS decision not to recognize the authority of the father to speak on behalf of his son in immigration matters. The INS repeated its position that Elian did not have the capacity to apply for asylum without the assistance of his father. Further, the letter stated that neither the applications submitted by the attorneys nor any other information available indicated that Elian would be at risk of harm if returned to Cuba. Therefore, the INS did not accept the asylum applications submitted on Elian's behalf and against his father's wishes.[13] The INS granted Juan Miguel Gonzalez's request to withdraw Elian's application for admission to the United States.[14]

The Miami attorneys hired by Lazaro Gonzalez requested reconsideration of the INS's decision to reject the asylum applications. And, on January 12, 2000, Attorney General Janet Reno issued a decision upholding the INS's determination to reject the applications.[15] Attorney General Reno's January 12, 2000 letter stated that there was no new information to reverse the decision of the INS to recognize only the father as having sole authority to speak on behalf of his son in immigration matters; that as a general matter, when dealing with a child this young, the immigration law, like other areas of the law, looks to the wishes of the surviving parent; and that Elian's father had the legal authority

11 *Idem*.

12 *Idem*.

13 See *idem* (Letter from Michael A. Pearson, Executive Associate Commissioner for Field Operations, to Roger Bernstein and Spencer Eig of January 5, 2000).

14 See *idem* at 1174.

15 The US Attorney General is charged by Congress with the executive responsibility for immigration matters. See 8 USC 1103(a); US Const. art. I, 8, cl. 4 ("The Congress shall have Power... To establish an uniform Rule of Naturalization..."); *Jean v. Nelson*, 727 F.2d 957, 965 (11th Cir. 1984).

to speak for him in immigration matters. The INS found no just basis for not taking into consideration the father's wishes for his son's prompt return. In particular, Attorney General Reno stated that "the INS found no credible information indicating that the child would be at risk of torture or persecution if returned to his father...".[16] The Attorney General concluded by stating that Elian's father's decision not to assert an asylum claim should be respected.[17]

Finally, on January 19, 2000, Elian's Miami attorneys filed a federal action against the Attorney General of the United States, the Commissioner of the United States Immigration and Naturalization Service, the United States Immigration and Naturalization Service, and the United States Department of Justice, alleging that the INS lacked the authority to reject Elian's asylum applications and was required by federal statutes and regulations to accept and adjudicate Elian's applications.[18]

III. JURISDICTION AND STANDING

On March 21, 2000, the district court granted the INS's Motion to Dismiss or Alternative Motion for Summary Judgment (the "Motion") and dismissed the suit. In doing so, the district court had to analyze three preliminary issues before it could decide the case on its merits. The first issue before the district court was whether it had subject matter jurisdiction to allow the Complaint to go forward; the second issue was whether Elian had standing to bring the Complaint; and the third issue was whether Elian was a real party in interest for purposes of the action.

In order to address these issues, the district court determined that for immigration purposes, Elian was an unaccompanied, minor alien who had "arrived" in the United States because he was brought to the United States after having been interdicted in international or United States waters.[19] As such, he had the right to request lawful admission to the United States.[20]

16 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1174 (*quoting* Letter from Attorney General Janet Reno to Spencer Eig, Roger Bernstein, and Linda Osberg-Braun of January 12, 2000).

17 See *idem* at 1175.

18 See *Gonzalez v. Reno*, 86 F. Supp.2d 1167 (S.D. Fla. 2000).

19 See *idem* at 1176; see also 8 USC 1225(a)(1).

20 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1176.

The district court found that while in the United States, Elian had not been placed in removal proceedings, but had been temporarily "paroled" into the United States, and the INS had deferred his inspection.[21] The district court also found that Elian's deferral of processing for removal, originally issued on November 25, 1999, had been extended until January 21, 2000, and, according to the INS's counsel, had subsequently been extended indefinitely.[22]

The district court further found that Elian's three asylum applications had been returned by the INS without adjudication. Therefore, the district court reasoned, Elian was an unaccompanied, unadmitted alien, subject to removal from the United States at the end of his period of temporary parole.[23]

1. *Subject Matter Jurisdiction*

The United States federal courts are courts of limited jurisdiction. Federal courts derive their authority from both Article III of the United States Constitution and from federal statutes.[24]

In determining whether the district court had subject matter jurisdiction, the district court examined the federal statutes that formed the basis of Elian's Complaint.[25] After reviewing the applicable statutes, the district court concluded there was no "clear statement of congressional in-

21 See *idem* (INS has the discretion to grant parole in lieu of detention pending removal); see also 8 USC 1182(d)(5).

22 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1176 n.7.

23 See *idem* at 1176; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No. 104-208, 110 Stat. 3009, 3009-546 (1996) ("IIRIRA"). Pursuant to the terminology used in the IIRIRA, "unadmitted alien" is used instead of the term "excludable alien" used in the Immigration and Nationality Act, 8 USC 1101 et seq. Each term refers to any alien who has reached the borders of the United States, but has not been admitted.

24 See US Const. art. III, II; 28 USC 1331; see also *Keene Corp. v. United States*, 508 US 200, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993).

25 See 8 USC 1103, 1158. These federal statutes grant to the United States Attorney General broad discretion to implement the immigration laws as well as to grant or deny asylum. Section 1158 deals with procedural aspects of asylum applications. Specifically, it provides that the Attorney General can exercise discretion in granting or denying asylum to eligible aliens. Section 1158(a), however, is clear that the Attorney General's decision to permit an alien to apply for asylum relief is subject to judicial review. See also 8 USC 1252(b)(4)(D) (providing that the decision whether to "grant relief under 1158(a)" is "conclusive unless manifestly contrary to law and an abuse of discretion").

tent regarding judicial review for the processing of asylum applications by the INS".[26]

In response to the INS's Motion, Elian's attorneys argued that the district court had subject matter jurisdiction over his claim and that the INS must accept and adjudicate his applications for asylum pursuant to the applicable constitutional, statutory, and regulatory provisions.[27] The INS had asserted that the district court lacked jurisdiction over the INS action because the denial to accept the asylum applications is clearly subject to administrative discretion. The INS further asserted that the Attorney General's decision not to commence removal proceedings is unreviewable under section 8 USC 1252(g). The rationale for this argument was that the issue before the district court was similar to an INS decision to commence a removal proceeding.[28] Therefore, the INS concluded, the district court lacked subject matter jurisdiction to consider the case.[29]

The district court rejected the INS's position that *Chaney* was controlling in this instance. The district court reasoned that this matter did not involve a matter of enforcement, but the refusal to accept an application for asylum.[30]

The INS, relying on 8 USC 1252(g), also argued that this statute barred judicial review of "any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien".[31] The district court rejected this argument stating that this statute was inapplicable, as Elian was not seeking the initiation of a removal proceeding, but rather was seeking for the INS to accept and consider his application for asylum.[32]

The INS further argued that the issues presented to the district court were not restricted to the application for asylum but also included the question of an application for admission to the United States.[33] The INS

26 *González v. Reno*, 86 F. Supp.2d at 1177.

27 See *idem*; see also 28 USC 1331, 28 USC 1346, 28 USC 1361, and 28 USC 2201.

28 See 28 USC 1252(g); see also *Heckler v. Chaney*, 470 US 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (agency decision not to institute enforcement proceedings generally are not subject to judicial review under the Administrative Procedure Act, 5 USC 101 *et seq*.).

29 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1177.

30 See *idem*.

31 *Idem*; see 8 USC 1252(g).

32 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1177.

decision to permit withdrawal of an application for admission was not subject to judicial review. The INS argued that 8 USC 1252(a)(2)(B) bars review of any claim made against the Attorney General's decision to grant the withdrawal of Elian's application for admission. Specifically, the INS argued that 8 USC 1225(a)(4) provides that an alien applying for admission has the right to withdraw his asylum application at any time, in the discretion of the Attorney General, and depart immediately from the United States. Thus, the INS argued that the discretionary decision made by the INS to allow the withdrawal of an application for admission may not be reviewed.

Elian's attorneys countered this argument by asserting that the basis for his Complaint was the INS's decision not to accept his application for asylum filed under 8 USC 1158, not any purported withdrawal of his application for admission. Elian's attorneys further argued that since 8 USC 1225(a)(2)(B)(ii) specifically exempted certain decisions under 8 USC 1158(a) from the general elimination of judicial review, the district court had subject matter jurisdiction.[34]

The district court disagreed with the INS's argument, finding that the statutes did not prohibit judicial review over claims brought under 8 USC 1158(a).[35] The district court, in analyzing the relevant statutes, acknowledged its difficulties in interpreting the provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The court noted that the statutory language created "an apparent anomaly in Congress's decision to permit judicial review on the one hand, while foreclosing private rights on the other hand, within the same section".[36] The district court also noted that "such anomalies in the area of immigration law were by no means unusual".[37]

The district court concluded that the legislative history and the applicable case law were such that the court had "substantial doubt" that Congress intended to set jurisdictional limitations to judicial review of

33 Elián, as an alien arriving in the United States, is deemed to be an applicant for admission. See 8 USC 1225(a)(1).

34 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1178.

35 See *idem*.

36 *Idem*. at n.11.

37 *Idem*; see *Kwon v. INS*, 646 F.2d 909, 919 (5th Cir. 1981) ("Whatever guidance the regulations furnish to those cognoscenti familiar with INS procedures, this court, despite many years of legal experience, finds that morsels of comprehension must be pried from mollusks of jargon").

the administrative decision at issue. Thus, the district court concluded it had subject matter jurisdiction.[38]

The next question before the district court was if Elian could bring an action "by and through Lazaro Gonzalez as next friend, or alternatively as temporary legal custodian of Elian Gonzalez".[39] In order to decide this issue, the district court was required to determine whether or not Elian had standing under Article III of the United States Constitution. After determining this issue, the district court could then evaluate Lazaro Gonzalez's status as next friend, or, alternatively, as temporary legal custodian.[40]

2. *Standing*

A federal court's power to hear a case is constitutionally limited by Article III, section 2 of the United States Constitution to "cases" and "controversies".[41] The standing requirement set out in Article III[42] is intended to preserve the separation of powers doctrine, conserve limited judicial resources, improve judicial decision making, and foster fairness in the courts.[43]

The district court noted that to establish standing, "an irreducible constitutional minimum of three elements must be present".[44] First, there must be an "injury in fact," i. e., an injury to a legally protected interest which is both concrete and particularized and actual or imminent, and not a conjectural or hypothetical injury. Second, there must be a causal

38 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1180.

39 *Idem*.

40 See *idem* at n.15 (after determining that Lazaro Gonzalez was a proper next friend, the district court found it unnecessary to determine whether Lazaro could institute suit as Elian's temporary legal guardian).

41 US Const. art. III, 2 states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects".

42 See *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1346 (11th Cir. 1999) (one of the most important limits on a federal court's ability to hear a case is the requirement that the litigant have "standing" to invoke the power of the federal court).

43 See Erwin Chemerinsky, Federal Jurisdiction 57-59 (3d ed. 1999).

44 *González v. Reno*, 86 F. Supp.2d at 1180.

connection between the plaintiff's alleged injury and the defendant's alleged behavior. Third, there must exist the likelihood that the alleged injury will be redressed by a decision in the plaintiff's favor.[45]

A plaintiff's age is not determinative of his ability to establish standing.[46] The federal courts enforce the personal rights of children.[47] With regard to a civil action instituted by a child, it is important to distinguish between the child's standing to sue and the child's capacity to sue on his own behalf.[48] In this case, Elian, a six-year-old child, alleged that he wanted the INS to process his application seeking political asylum for him in the United States despite his father's protestations. To accomplish this, Elian brought suit by and through a purported next friend, his great uncle, Lazaro Gonzalez, pursuant to rule 17(c) of the Federal Rules of Civil Procedure. Therefore, Elian's standing before the district court was a distinct inquiry from Lazaro Gonzalez's capacity to act as Elian's next friend.

In his Complaint, Elian alleged that the INS did not evaluate his application for asylum under the required INS procedures in violation of his constitutional, statutory, and regulatory rights to due process. In Count I of the Complaint, Elian asserted a constitutional right to due process. In Counts II-IV, he claimed statutory and regulatory rights to due process. Elian alleged injury related not to the ultimate denial of asylum by the INS, but to the procedure the INS followed in failing to even decide the question of whether Elian's request for asylum should be granted.[49]

The INS argued that Elian had suffered no injury because the INS determined that the right to submit and have adjudicated an asylum application belonged solely to his father. And, as a consequence of Elian's father's withdrawal of the application, "no asylum application existed upon which [Elian] can premise his claim of due process violations".[50]

The INS further argued against a finding of standing on the grounds that the INS determination that Juan Miguel Gonzalez alone spoke for

45 See *idem*.

46 See *idem*.

47 See *Travelers Indemnity Co. v. Bengtson*, 231 F.2d 263, 265 (5th Cir. 1956).

48 Rule 17(c) of the Federal Rules of Civil Procedure provides the method by which a minor who has standing, but who is too young to have capacity to sue, can bring a lawsuit through a designated representative.

49 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1181.

50 *Idem*.

his son on immigration matters foreclosed Elian's ability to suffer any injuries related to the INS's decision. The district court disregarded these allegations because it was precisely the propriety of the INS's determination on Elian's asylum claim that was the basis of the challenge before the district court.[51] Thus, the district court rejected the INS's contention that there was a lack of standing because the INS wanted to treat as interchangeable the merits of the underlying INS determination and the challenge to that decision in the district court. In doing so the court stated that "[t]o close the courthouse doors to a plaintiff seeking to bring a federal challenge to the very governmental decision invoked to keep him out of federal court violates common sense and this Court's duty to do justice, and is tantamount to an argument that this Court should abdicate its independent duty to determine standing".[52]

Thus, the district court was satisfied that Elian had met the first element of the three-part test for standing, an injury in fact. As to the second and third elements, the district court determined that there was a causal connection between Elian's allegation that he had suffered a due process violation as a result of the INS's inaction in processing his asylum application. Accordingly, the district court found that Elian had standing to sue the INS.[53]

3. *Real Party in Interest*

The district court next determined whether Elian was the "real party in interest". A "real party in interest" is the party in whose name a federal action is to be prosecuted.[54] Moreover, the district court held, that party must be "'the party who, by the substantive law, has the right sought to be enforced'",[55] and who "'possesses a significant interest in the action to entitle him to be heard on the merits'".[56]

51 See *idem* at 1182 (the INS's "argument against standing is a paradigmatic catch-22, which is unsupportable...").

52 *Idem*.

53 See *idem*.

54 See Fed. R. Civ. P. 17(a).

55 *González v. Reno*, 86 F. Supp.2d at 1182 (*quoting Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc*., 630 F.2d 250, 257 (5th Cir. 1980)).

56 *Idem*. (*quoting* 6A Charles Alan Wright, Arthur R. MIller & Mary Kay Kane, Federal Practice and Procedure 1542, at 58 (Supp. 1999)).

The district court found that Elian is a real party in interest for the limited purpose of proceeding with the suit to determine whether or not the INS had violated his rights to procedural due process by not accepting his asylum application. The district court based its ruling on the long-standing American common law rule that "'the parent stands in court [on his child's behalf] as the real party in interest upon his natural right of parent'".[57] The district court also noted that the case was brought in Elian's own name, and that despite his age, Elian possessed a "significant interest" in demanding that the INS follows its own procedures since the INS's decision would likely have "enduring consequences".[58]

A. *Capacity to Sue*

Having determined that Elian has standing and is a real party in interest, the district court next answered the question: "Does [Elian] possess the requisite capacity to sue?".[59] In answering this question, the district court noted that the Eleventh Circuit has interpreted the phrase "capacity to sue" to mean "'a party's personal right to litigate in a federal court'".[60] The district court looked to rule 17(b) of the Federal Rules of Civil Procedure to resolve this issue. "The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile".[61]

In reaching its conclusion, the district court opined it was not required to decide whether Elian was a domiciliary of Cuba or Florida, because according to the laws of either jurisdiction, he did not have the capacity to file a lawsuit.[62] As interpreted by the district court, Cuba's Family Code clearly provided that children "are under the *patria potestas* of

57 *Idem*. at 1183 (*quoting Lehman v Lycoming County Children's Servs. Agency*, 458 U.S. 502, 524, 102 S.Ct. 3231, 73 L.Ed.2d 928 (1982) (Blackmun, J., dissenting)); see *Martin v. Barbour*, 140 US 634, 647, 11 S.Ct. 944, 35 L.Ed. 546 (1981) (minor children may be real parties in interest when they possess rights reserved to them).

58 *González v. Reno*, 86 F. Supp.2d at 1183.

59 *Idem*.

60 *Idem*. (*quoting Glickstein v. Sun Bank/Miami, N.A.*, 922 F.2d 666, 670 (11th Cir.1991)); see Black's Law Dictionary (7th ed. 1999) (capacity defined as a party's "legal qualification, such as legal age, that determines one's ability to sued or be sued...").

61 Fed. R. Civ. P. 17(b); see *Gonzalez v. Reno*, 86 F. Supp.2d at 1184 ("domicile" is the place where a person takes up residence with the intention to remain in that place); see also *Mas v. Perry*, 489 F.2d 1396, 1399 (5th Cir. 1974); *Melian v. INS*, 987 F.2d 1521, 1524 (11th Cir. 1993).

62 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1184.

their parents".[63] Article 82 of the Cuban Family Code bestows upon parents the right and duty of "'representing their children in every judicial action... in which they are involve[d]'".[64] The district court further found that Cuban law clearly provides that a six-year-old child lacks the capacity to bring a lawsuit.[65] Thus, under both Cuban and Florida law, a six-year-old child lacks the capacity to bring a lawsuit.[66]

B. *Lazaro Gonzalez as Next Friend*

Given Elian's lack of capacity to bring suit, the district court looked to rule 17(c) of the Federal Rules of Civil Procedure.[67] Lazaro Gonzalez, the self-appointed "next friend", was the individual representative through whom Elian filed his Complaint. As such, Lazaro Gonzalez had the burden to establish the propriety to proceed as Elian's next friend in the suit.[68] In the Eleventh Circuit, a next friend must prove: (1) that the real party in interest cannot pursue his own cause due to some disability; and (2) show some relationship or other evidence that demonstrates the next friend is truly dedicated to the interests of the real party in interest.[69] The district court, expressing its concern with the participation of a non-parent next friend quoted the following comment by Chief Justice Marshall: "It is not error, but it is calculated to awaken attention that, in this case, though the infants, as the record shows, had

63 *Idem*; see Codigo de Familia, art. 82. Ley 1,289 of 14 Feb. 1975 in Gaceta Oficial 15 Feb. 1975. Translated in Family Code [Havana], Ministry of Justice, 1975.

64 *González v. Reno*, 86 F. Supp.2d at 1184 (*quoting* Codigo de Familia, art. 85(5)).

65 See *idem* at 1184; see also Codigo de Familia, arts. 29.1, 31(a).

66 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1184 (nothing that under Florida law, a "minor" is any person under age eighteen and, as such, is incapable of bringing a lawsuit); see also, *e. g.*, *Kingsley v. Kingsley*, 623 So.2d 780 (Fla. 5th DCA 1993) (holding that a minor did not have the capacity to sue for termination of his parents' parental rights).

67 Fed. R. Civ. P. 17(c) provides as follows: "Infants and incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person".

68 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1184.

69 See *idem* at 1185; see also *Ford v. Haley*, 195 F.3d 603, 624 (11th Cir. 1999).

parents living; a person not appearing from his name, or shown on the record to be connected with them, was appointed their guardian ad litem".[70]

Having expressed its concern, the district court acknowledged that it was troubled that Elian's father, Juan Miguel Gonzalez, had not participated in the filing of the suit.[71] The district court was thus required to address the question as to whether Lazaro Gonzalez was "truly dedicated" to Elian's interests.[72] The district court answered this question by noting that "Lazaro Gonzalez is not [Elian's] father, [but] neither is he a stranger who has thrust himself into this lawsuit".[73]

The district court stated that under a different set of circumstances, it could envision different representatives or next friends for Elian's interests.[74] The district court concluded, however, that Lazaro Gonzalez had shown to the court, "that he had at heart [Elian's] interest as an unadmitted alien applying for asylum".[75] Accordingly, the district court held that Lazaro Gonzalez was Elian's proper next friend.

IV. SUMMARY OF THE COMPLAINT

The district court next turned to the claims set forth in the Complaint. Count I of the Complaint sought relief for violations of Elian's constitutionally protected due process rights.[76] Count II of the Complaint alle-

70 *González v. Reno*, 86 F. Supp.2d at 1185 (*quoting Bank of the United States v. Ritchie*, 33 US (8 Pet.) 128, 144, 8 L.Ed. 890 (1834)).

71 *Idem* at 1185 ("...it appears that the interests of Juan Gonzalez and those asserted in the complaint ase sharply at odds with one another").

72 *Idem*.

73 *Idem* at 1186.

74 See *Johns v. Department of Justice*, 624 F.2d 522, 523-24 (5th Cir. 1980) (This case involved a one-day-old child taken from her birth mother in Mexico and brought to the United States where the baby lived with an American couple, the Johns. The INS ordered the child to be deported to Mexico and the Johns filed for an injunction against the deportation proceedings and a writ of habeas corpus. The district court dismissed the case with prejudice, and the Johns appealed. The case was remanded to the district court for the appointment of a guardian ad litem because the Fifth Circuit held, "neither the birth mother nor the Johns necessarily represented the interests of the child").

75 *González v. Reno*, 86 F. Supp.2d at 1186.

76 The Fifth Amendment to the United States Constitution, known as the due process clause, protects against the deprivation of life, liberty, or property without "due process of law." US Const. amd. V.

ged violations of 8 USC 1103(a)[77] and 8 USC 1158(a).[78] Count III and IV of the Complaint alleged violations of 8 CFR 208.9[79] and 8 CFR 208.14(b).[80] Count V of the Complaint sought relief in the form of a writ of mandamus[81] to compel the INS to comply with their procedures for adjudicating asylum applications.[82]

V. THE DISTRICT COURT'S DECISION

Count I of the Complaint sought relief for the INS's denial of Elian's due process which deprived him of the right to petition for asylum, declined to adjudicate his petitions for asylum and withholding of removal, and refused to recognize his right to counsel.[83]

In order to evaluate Elian's due process claim, the district court first determined if a constitutionally protected interest had been implicated.[84]

77 8 USC 1103(a), in pertinent part, provides: "The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, That determination and ruling by the Attorney General with respect to all questions of law shall be controlling".

78 8 USC 1158(a), in pertinent part, provides: "Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such aliens's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title".

79 8 CFR 208.9(a), in pertinent part, provides: "The Service shall adjudicate the claim of each asylum applicant whose application is complete within the meaning of 208.3(c)(3) and is within the jurisdiction of the Service".

80 8 CFR 208.14(b), in pertinent part, provides: "By an asylum officer. Unless otherwise prohibited in 208.13(c): (1) An asylum officer may grant asylum in the exercise of discretion to an applicant who qualifies as a refugee under section 101(a)(42) of the Act. (2) If the alien appears to be deportable, excludable or removable under section 240 of the Act, the asylum officer shall either grant asylum or refer the application to an immigration judge for adjudication in deportation, exclusion, or removal proceedings. An asylum officer may refer such an application after an interview conducted in accordance with 208.9, or if, in accordance with 208.10, the applicant is deemed to have waived his or her right to an interview or an adjudication by an asylum officer".

81 Pursuant to 28 USC 1361, a federal district court shall issue a writ of mandamus "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff".

82 See *Einhom v. DeWitt*, 618 F.2d 347, 349 (5th Cir. 1980) (a writ of mandamus is inappropriate when there is an exercise of discretionary authority).

83 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1187.

84 See *Economic Dev. Corp. v. Stierheim*, 782 F.2d 952, 954-55 (11th Cir. 1986) ("In assessing a claim based on an alleged denial of procedural due process a court must first decide whether

Thus, if Elian had not been denied a constitutionally protected property or liberty interest, the INS could not have denied him due process.

Elian's attorneys argued that because the INS had paroled Elian, he was "entitled to the same constitutional protections as all persons in the territorial jurisdiction of the United States".[85] The district court found that Elian was an unadmitted alien, and, as such, was "on the threshold of initial entry" into the United States.[86] The district court, relying on Eleventh Circuit precedent,[87] rejected Elian's argument and held that "excludable (or unadmitted) aliens seeking parole pending determination of their claims for admission" are not within the protection of the Fifth Amendment.[88] The district court further held that the asylum provisions established by Congress do not create any constitutionally protected interests.[89]

Accordingly, the district court concluded that due to the fact that Elian was an "unadmitted alien", he could not claim that his right to constitutional due process had been denied. The district court found that as to Count I, Elian had failed to state a claim and thus granted the INS's Motion.

Count II of the Complaint alleged violations of 8 USC 1103(a) and 8 USC 1158(a). In order to determine whether the INS's Motion was appropriate on this count, the district court framed the INS's argument as follows: "Did the Attorney General have the authority to determine that, in light of the express contrary wishes of [Elian's] father, an application filed by someone else on six-year-old [Elian's] behalf did not require adjudication on its merits?".[90]

the complaining party has been deprived of a constitutionally protected liberty or property interest. Absent such a deprivation, there can be no denial of due process").

85 *González v. Reno*, 86 F. Supp.2d at 1187.

86 See *idem*; see also *Shaughnessy v. United States ex rel. Mezei*, 345 US 206, 212, 73 S.Ct. 625, 97 L.Ed. 956 (1953).

87 See *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) (an excludable alien cannot challenge the decisions of executive officials with regard to their applications for admission, asylum, or parole on the basis of the rights guaranteed by the United States Constitution).

88 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1188.

89 See *idem*; see also *Landon v. Plascencia*, 459 US 21, 32, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982) ("[A]n alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application....").

90 *González v. Reno*, 86 F. Supp.2d at 1188.

To answer this question, the district court looked to 8 USC 1252(b)(4)(D), which, in pertinent part, provides: "the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion".[91]

The district court, acknowledging the extraordinary circumstances of this case, determined that the Attorney General's assertion that the INS Commissioner had correctly concluded that the wishes of Elian's father opposing the application for asylum had to be respected was proper. The district court further found that the Attorney General's finding as to Elian's competency was best characterized as a question of law,[92] and the Attorney General's decision was thus controlling and dispositive of Count II. Therefore, the district court granted the INS's Motion as to Count II.[93]

Counts III and IV of the Complaint alleged violations of 8 CFR 208.9 and 8 CFR 208.14(b). These regulatory provisions were promulgated pursuant to the authority of the Attorney General to administer and enforce all laws relating to the immigration and naturalization of aliens.[94]

The district court concluded that the Attorney General's determination as to Elian's capacity to file an application for asylum was controlling and, as such, no applications were pending. Thus, the district court found the INS had properly applied these regulations to Elian's applications for asylum and dismissed Counts III and IV. The district court dismissed Count V of the Complaint finding that the issuance of a writ of mandamus was inappropriate since the INS's duty to consider Elian's applications for asylum was discretionary.[95]

91 *Idem* at 1189 n.30 (pursuant to 8 USC 1103(a)(1), the primary responsibility for enforcing and administering immigration law is vested in the United States Attorney General).

92 See *idem* at 1190 (competency is a threshold issue to be decided prior to processing Elian's application).

93 See *idem* (As an alternative basis for the grant of the INS's dispositive motion, the district court considered and accepted the INS's argument that judicial deference should be made to the Attorney General's interpretation of 8 USC 1158(a).); see also *Chevron USA, Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

94 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1194; see 8 USC 1158(d)(1) (directing the Attorney General to "establish a procedure for the consideration of asylum applications").

95 See *Gonzalez v. Reno*, 86 F. Supp.2d at 1194.

Therefore, the district court granted the INS's Motion as to Counts I, II, III, IV, and V of the Complaint, and sustained the decision of the Commissioner of the INS and the United States Attorney General.

VI. THE ELEVENTH CIRCUIT COURT OF APPEALS

Immediately after the district court rejected Elian's claims, his attorneys filed an expedited appeal of the district court's decision with the United States Court of Appeals for the Eleventh Circuit, in Atlanta, Georgia.[96] Concurrently, with the filing of the appeal, Elian's attorneys moved the Eleventh Circuit for an injunction "to preclude [Elian's] physical removal from the jurisdiction of the United States during the pendency of this appeal".[97] The Eleventh Circuit granted the motion holding that "the balance of the equities weighs heavily in favor of enjoining the removal of [Elian] from the United States pending appeal".[98]

The appellate court further noted that this case was primarily about "statutory construction and the proper exercise of executive discretion".[99] Among the issues to be decided by the appellate court was the proper statutory construction of 8 USC 1158(a).[100] Elian's appeal was based, in part, on the INS's interpretation of this statute and its refusal to consider his application for asylum.

On April 26, 2000, Elian's father, Juan Miguel Gonzalez, filed an emergency motion with the appellate court seeking leave to intervene to assert his own interests as a parent and to represent the interests of Elian as next friend.[101]

96 Oral argument was heard May 11, 2000.

97 *González v. Reno*, 2000 WL 381901, *1 (11th Cir. April 19, 2000).

98 *Idem*. The Order granting an injunction provided: "(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 the 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". *Idem* at *4.

99 *González v. Reno*, 2000 WL 381901, *2 (11th Cir. April 19, 2000).

100 See *idem* ("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'. [Elian] appears to come within the meaning of '[a]ny alien'").

101 See *Gonzalez v. Reno*, 2000 WL 502118 (11th Cir. April 27, 2000).

On April 27, 2000, the appellate court granted the motion to intervene and decided to defer ruling on the motion to remove Lazaro Gonzalez and to substitute the father Juan Miguel Gonzalez as Elian's next friend. The appellate court determined that it would be premature for it to decide this issue prior to its hearing of the appeal.[102]

On June 1, 2000, the Eleventh Circuit Court of Appeals affirmed the district court's dismissal of Elian's suit.[103] On appeal, Elian argued that the district court erred by: (1) dismissing Elian's statutory claim under 8 USC 1158;[104] (2) dismissing Elians's due process claim under the Fifth Amendment to the United States Constitution; and (3) failing to appoint a guardian ad litem to represent Elian's interests.[105]

The Eleventh Circuit upheld the district court's dismissal of Elian's statutory claim on the basis that: (1) the policies upon which the INS relied in determining that Elian lacked capacity to file personally for asylum were entitled to some deference;[106] (2) the INS policy under which ordinarily a parent, and only a parent, even one outside of the United States, could act with respect to the issue of asylum for his or her six-year-old child who was in the United States was a reasonable interpretation of the asylum statute;[107] (3) the INS policy under which Elian's parent's residence in Cuba, a communist-totalitarian state, was no special circumstance, sufficient in and of itself, to justify consideration of the asylum claim presented by Elian's great uncle, Lazaro Gonzalez, in the United States, against the wishes of Elian's father in Cuba, was a reasonable interpretation of the asylum statute;[108] and (4) the INS did not act arbitrarily or abuse its discretion in rejecting Elian's application as void.[109]

The appellate court further held that Elian's due process claim lacked merit in that the INS did not violate Elian's due process rights.[110] Similarly, the appellate court held that Elian's ad litem claim lacked merit

102 See *idem* at *2.

103 See *Gonzalez v. Reno*, 2000 WL 701613 (11th Cir. June 1, 2000).

104 See *infra* note 78.

105 See *Gonzalez v. Reno*, 2000 WL 701613, *3 (11th Cir. June 1, 2000).

106 See *idem* at *6-7.

107 See *idem* at *7.

108 See *idem* at *8.

109 See *idem* at *11.

110 See *idem* at *3 —*quoting Jean v. Nelson*, 727 F.2d at 968 ("Aliens seeking admission to the United States... have no constitutional rights with regard to their applications...")—.

in that he was ably represented in the district court by his next friend, his great uncle, Lazaro Gonzalez.[111]

On June 23, 2000, the Eleventh Circuit denied Elian's petition for rehearing and petition for rehearing en banc and ordered that all injunctions previously granted[112] be dissolved on June 28, 2000, and that all further requests for stays or for injunctive relief be directed to the United States Supreme Court.[113]

Lazaro Gonzalez, faced with the imminent removal of Elian to Cuba, exercised his one remaining procedural right and filed a petition for writ of certiorari in the Supreme Court of the United States.[114] On June 28, 2000, the United States Supreme Court denied Elian's great uncle's petition for writ of certiorari.[115] The same day, Juan Miguel Gonzalez and Elian boarded a plane provided by the Cuban government and departed the United States for Havana, Cuba.

VII. CONCLUSION

The Elian Gonzalez saga was a gripping, human drama. Along with many people throughout the world, this writer has watched in fascination the struggle between a Cuban immigrant family fighting for Elian's freedom and a father fighting to be reunited with his son. The news organizations will continue to report the whereabouts and welfare of the participants, as they did during Elian's seven month stay in the United States. The immense costs incurred by the parties, both financially and emotionally, have been well publicized. With Elian's return to Cuba, the merits of the decisions rendered by the United States courts will be subject to intense analysis. As in any controversy affecting the United States and Cuba, it is inevitable that there will be a certain level of posturing and attempts at manipulation of public opinion.

Now with the outcome of Elian's saga determined, it is important to remember that to many people the fact that Elian's mother decided

111 See *idem* at *3 (noting that a guardian ad litem may be unnecessary where child already adequately represented by next friend); see also *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958).

112 See *infra* notes 97 y 98.

113 See 2000 WL 802918, *2 (11th Cir. June 23, 2000).

114 See 28 USC 1254.

115 See 2000 WL 827762 (U.S. June 28, 2000).

to risk her and her son's lives in making a perilous journey to the United States in an effort to flee Cuba, a too-often-repeated human tragedy, and the events which have transpired since that ill-fated journey, are compelling. Such desperate actions and the international consequences have justifiably influenced, and will continue to influence, the United States and Cuba's relations.