



U.S. Department of Justice
Immigration and Naturalization Service

Office of the General Counsel

425 I Street NW
Washington, DC 20536

J A N 3 2000

MEMORANDUM FOR DORIS MEISSNER
COMMISSIONER

FROM:

Bo Cooper
Bo Cooper
General Counsel

SUBJECT: Elian Gonzalez

QUESTIONS PRESENTED

1. Who has the legal authority to speak on behalf of the six-year old Cuban national, **Elian** Gonzalez-his father, his great uncle, or the attorneys claiming to represent **Elian**?
2. Given **Elian's** father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his asylum application?
 - A. Is the father able to represent adequately the immigration interests of the child?
 - B. May **Elian** apply for asylum in direct opposition to the expressed wishes of his father?

SUMMARY ANSWERS

1. The documents and other submitted material indicate that Juan Miguel Gonzalez-Quintana has the legal authority to speak for his son **Elian**.
2. The INS must determine whether the father has an interest that conflicts with his ability to represent the immigration interests of the child. Specifically, the INS must consider whether the possibility of coercion precludes **Elian's** father from making his true

intentions known and speaking on behalf of **Elían** and whether **Elían's** asylum application represents a **divergence** of interests between the father and child.

- A. After evaluating the testimony of the father and the uncle, we believe the father is able to convey to the INS his true intentions regarding **Elían** and to represent adequately the immigration interests of the child.
- B. At his tender age, **Elían** does not have the capacity to seek asylum on his own behalf. Since there is no objective basis to believe that **Elían** is at risk of persecution or torture, the INS should not accept his asylum application against the expressed wishes of his father.

DISCUSSION

1. Who has the legal authority to speak on behalf of the child -- his father, his great uncle, or the attorneys claiming to represent him?

Juan Miguel Gonzalez-Quintana has submitted numerous documents establishing that he is the father of **Elían** Gonzalez. **Elían's** great uncle, Lazaro Gonzalez, does not dispute this claim. Because the child was born out-of-wedlock, some have questioned whether this fact affects the father's legal rights. Under Cuban law, however, parental rights are unaffected by questions of legitimacy. Constitution of Cuba, Article 37.

In immigration matters, relationships are generally assessed under the law of the jurisdiction where the relationship arose. See e.g., Matter of Hosseinian, Int. Dec. 3030 (BIA 1987). Cuban law also reinforces the right of both parents to exercise parental authority. Articles 82 and 83 of the Family Code of Cuba provide that minor children shall be under the authority of their parents and that parental authority is shared jointly by both parents. Should one parent die, as in this case, the surviving parent becomes the sole individual authorized to speak for the child. The specific rights and duties of a parent, enumerated in Article 85 of the Family Code, include the obligation to represent the child in all legal transactions and acts in which they have an interest (Article 85, clause 5). While a person may lose the right to exercise such authority, the absence of any evidence showing that a court has deprived or suspended such authority would indicate that the parent's rights continue in force. (See attached Opinion from Library of Congress.)

Without the consent of the surviving parent, the great-uncle, Lazaro Gonzalez, has no legal basis to act on behalf of **Elían** in immigration matters. Although attorneys in this case have characterized him as **Elían's** legal guardian, he has submitted no evidence and made no claim that he is actually a court-appointed guardian. While INS has placed the child into Lazaro Gonzalez's care, the fact that **Elían** has been released to him does not authorize him to speak for the child in immigration matters. Instead, he has agreed to care for the child and ensure that he appears at all immigration proceedings. 8 CFR 236.3(b)(4). Given these factors, Lazaro Gonzalez has no legal basis at this time to represent **Elían** in immigration matters.

Three attorneys have submitted Form G-28, Notice of Entry and Appearance as Attorney or Representative, with **Elian's** signature. They assert that they represent **Elian**, and not Lazaro, though they have conceded that this representation is through the consent of Lazaro Gonzalez, as well as by the apparent direct consent of **Elian**. The **attorneys** have also indicated that **Elian** wishes to pursue his application for admission in the United States. Although the attorneys claim to have the authority to speak on **Elian's** behalf, the law does not appear to support this claim. While there is no absolute prohibition against a minor signing a Form **G-28**, the ability to do so must be evaluated against general questions of capacity. In the state of Florida, for instance, a minor under the age of **18** is not considered competent to enter into contracts. See Section 743.07, Florida Statutes (1973). Under INS regulations, the parent or legal guardian may sign the application or petition of someone under the age of fourteen. 8 CFR 103.2(a)(2). Thus, while it appears that **Elian** may sign the Form G-28, the INS generally assumes that someone under the age of 14 will not make representation or other immigration decisions without the assistance of a parent or legal guardian. Here, the father has expressly stated that he does not authorize the attorneys to represent **Elian**, and that he does not want **Elian** to seek asylum. Unless the INS has direct evidence of **Elian's** capacity, **Elian's** signature on the Forms G-28 does not bear much weight.

Further, the attorneys appear to have a potential conflict of interest. In **their** letter of December 15, 1999, they stated that they represent **Elian**, "by direct consent, as well as through the consent of Lazaro Gonzalez, **Elian's** custodian, who is currently his legal guardian in the United States." As stated above, Lazaro Gonzalez has no legal basis to represent the immigration interests of **Elian**. Thus, his personal interests in this matter are separate and apart from **Elian's** immigration interests. Since Lazaro Gonzalez appears to have retained the services of the attorneys on **Elian's** behalf, any fiduciary duty they owe to Lazaro presents a potential conflict of interest.

The INS has no basis to reject the father's parental authority. Therefore, we presume that he has the legal authority to speak on behalf of the child in immigration matters.

2. Given the father's apparent legal authority to speak for the child on immigration matters, under what circumstances should the child's interests be considered apart from the expressed wishes of the parent regarding disposition of the child's application for admission and his claim for asylum?

On December 14, 1999, attorneys retained on behalf of **Elian** Gonzalez by Lazaro Gonzalez submitted an asylum application, under **Elian's** signature, claiming that **Elian** would be persecuted on the basis of his social group if he were returned to Cuba. The attorneys assert that the child is raising the asylum claim independently, rather than through a guardian or representative. The father has expressly stated that he does not want **Elian** to seek asylum. The attorneys have also indicated that **Elian** wishes to pursue his application for admission in the United States while **Elian's** father has stated he wants **Elian** returned to Cuba.

The attorneys have asserted that **Elian's** father cannot speak for him in immigration matters because he is under the control and jurisdiction of the country from which **Elian** fears

persecution. Because the father outwardly supports the regime, the attorneys claim that he cannot represent the **child's** best interests. They also claim that the Cuban government has prevented the father from expressing his actual wishes for his son.

While we do not regard the attorneys as authorized to represent the immigration interests of **Elian**, their assertions call into question the father's ability to represent adequately the immigration interests of the child. The underlying question goes to whether the father's personal interests conflict with his representation of the immigration interests of the child to a degree sufficient to justify interference with his parental authority. In this case, the possibility of a conflict has been raised based on allegations that the father is not free to express his wishes and the assertion that the child is **free** to raise an asylum claim regardless of the father's wishes.

A. Father's ability to represent the immigration interests of the child

Immigration law presents little guidance on the resolution of a parent's ability to adequately represent the interest of the child. In *Johns v. DOJ*, 624 F.2d 522 (5th Cir. 1980), the Fifth Circuit held that the government violated the due process rights of a five-year old Mexican national when it issued a deportation order against her, because the attorney retained to represent her spoke for her alleged parents, rather than the child. In that case, the court found a clear divergence between the interests of the child and those of the "parents," who had no legal authority over the child. The court further found that the Mexican birth mother, who claimed her child had been kidnapped, did not necessarily represent the interests of the child given that she had not seen the child since the day she was born. In making its finding, the court noted that the child had been raised in a different culture, spoke a different language, and would, if deported, be returned to her natural mother's home to reside with two older siblings who had never seen her and with whom she could not communicate. *Id.*, at p. 524. The Fifth Circuit remanded the case to the district court with instructions to appoint a **guardian ad litem** to represent the child in all further proceedings. *Id.*

In this case, the alleged inability of the father to adequately represent the interests of the child rests not on any estrangement between father and child or the father's inability to adequately assess the best interests of his child. To the contrary, evidence in the record, including the interview of the father and the numerous affidavits he provided, establish that the father and child share a close relationship, and that the father has exercised parental responsibility and control for example, in the education and health care of the child. Instead, the alleged inability of the father to adequately represent the interests of the child is based on the possibility that the father has been coerced. If coerced, the father's representation of the immigration interests of the child may conflict with the father's interest in his own personal safety, rendering him unable to adequately represent the child in immigration matters. Following *Johns*, this inability would require the appointment of a **guardian ad litem** to represent **Elian's** immigration interests. Accordingly, it is necessary to evaluate the possibility of coercion and to determine whether the father's ability to adequately represent the interests of the child in immigration matters is impeded to such a degree as to justify an interference with the father's assertion of parental authority.

On December 13, 1999, the Officer in Charge for the INS Havana sub office (accompanied by the First Secretary and Chief of the Political/Economic Section of the US Interests Section) interviewed Juan Miguel Gonzalez-Quintana at his home. Mr. Gonzalez-Quintana described in great detail his close relationship with his son. He submitted affidavits from several neighbors, family friends, physicians, and **Elian's** teacher attesting to the affection between the father and son as well as the responsibility the father has taken in his son's life. He expressed his wishes that **Elian** be returned to him, that **Elian** not be allowed to apply for asylum, and that **Elian** not be represented by the attorneys purporting to represent him in the United States, Mr. Gonzalez- Quintana was also asked to express his wishes without speaking (in writing) in order to protect against the possibility of auditory monitoring of the interview by Cuban officials. Mr. Gonzalez- Quintana again expressed, in writing, his wish for the child to return to Cuba. The **Officer** in Charge found that "the honesty, concern and truthfulness on the part of Mr. Gonzalez-Quintana was palpable " Thus, Mr. Gonzalez-Quintana's demeanor, as assessed in person by the Officer in Charge, supports the conclusion that the father's expressed wishes are not motivated by outside influences. The numerous affidavits attesting to the close relationship between the father and son lend further credence to the father's request that his son be returned to him.

On December 20, **Elian's** great uncle, Lazaro Gonzalez, was interviewed at the INS District Office in Miami. Lazaro Gonzalez expressed his opinion that the father's statements were coerced. He based this conclusion on four factors. First, Lazaro Gonzalez stated that Mr. Gonzalez-Quintana, in two phone calls, asked that Lazaro Gonzalez and his family take care of **Elian**. The first of these conversations occurred prior to **Elian's** arrival in the United States', and the second occurred on the day **Elian** was found at sea and brought to a hospital in Ft. Lauderdale. In subsequent conversations, **Elian's** father demanded the boy's return. The father never mentioned to INS a conversation prior to **Elian's** arrival in the United States and never, acknowledged that he had ever asked his uncle to care for the child. Next, Lazaro Gonzalez, as well as his daughter, noted the tone of the subsequent telephone conversations with the father, and opined that he did not appear to be speaking freely. Third, Lazaro Gonzalez stated that, according to family members living in Cuba with whom he has spoken, Cuban officials are present at the father's home and have prevented him from leaving. Fourth, one of the attorneys stated that he was told by a reporter in Cuba that, according to sources in Mr. Gonzalez Quintana's neighborhood, the father had applied with the U.S. Interest Section for the lottery program to come to the United States. Because of the manner in which the DOS and the INS record applications for various immigration programs, it would be impossible to use government records to rule out completely that possibility.

In order to ensure that we have examined fully the question of coercion, **the INS sought a** second interview with Juan Miguel Gonzalez-Quintana. At the request of both the US and Cuban governments, a neutral site was selected, the home of the representative of the United Nations International Children's Emergency Fund (UNICEF). The INS officer in charge who had conducted the first interview also conducted this interview which was held on December 31, 1999. As was the case at the December 13, 1999 interview, Mr. Gonzalez was accompanied by **his** parents who **were** present for the interview, was asked a number of questions by the OIC, and

¹ It should be noted here that we have found no evidence that the father consented to **Elian's** travel to the United States prior to his departure.

was also given a set of written questions. The OIC concluded that Mr. Gonzalez “spoke truthfully.” The OIC was convinced that Mr. Gonzalez “appeared honest and concerned for the well being of the child and in wanting the child with them [the Gonzalez family] in Cuba immediately.”

The statements of Lazaro Gonzalez, as well as a general understanding of the practices of the Castro regime, make it essential that the INS closely examine the voluntariness of the father’s statements. The evidence of coercion, however, is far from compelling when weighed against the personal interviews of the father and the interpretation of those interviews by the INS officer. Equally important, the existence of political pressure does not necessarily mean that the father’s expression of his wishes is not genuine. If the father’s statements truly reflect his belief as to the best interests of his child, then there is no divergence of interests. His statements would reflect his assessment of his child’s best interests and should generally be given effect, notwithstanding any political pressure he may feel. Accordingly, it is important to evaluate all available evidence with an eye toward determining not merely whether the father is subject to political pressure or even coercion, but whether he is acting against his true belief as to the best interests of his child.

First, the opinions of Lazaro Gonzalez and his daughter, based on the tone of telephone conversations, conflict with the INS officer’s interpretation of her interview with the father. Because the INS officer interviewed the father in person and was convinced that the father is speaking truthfully and freely, we believe that her interpretation carries more weight than the opinions of Lazaro Gonzalez and his daughter.

Second, the telephone conversations, recounted by Lazaro Gonzalez, wherein the father asked him to take care of the child do not establish a belief on the part of the father that the child should remain in the United States permanently. If true, the first of these conversations occurred prior to Elian’s arrival in the United States and prior to any knowledge on the part of the father that Elian’s mother had perished at sea. Her tragic death fundamentally changed the circumstances such that any prior statements of the father create no inference as to his true beliefs after the event. The second conversation with the father occurred while Elian was being examined and treated at a hospital in Ft. Lauderdale. The father’s alleged request that Lazaro Gonzalez take care of the child is subject to varying interpretations. At the second interview, the OIC asked the father to discuss his earlier conversations with Lazaro Gonzalez. He disputed Lazaro’s version. Elian’s father stated “At all times I asked that Elian be returned to me.” Elian’s grandfather interjected and the OIC summarized his view “At no time during his conversation with his brother did he ask him to take care of Elian. As a family they did not have to say such a thing. It’s humane and as family, it is an obligation.” Assuming Elian’s father made the statement, we believe the most reasonable interpretation is that it was a normal reaction of a father to the circumstances of his five year-old son’s lone arrival and medical treatment in a foreign country following the tragic death of his mother, rather than a request that the child remain with Lazaro Gonzalez indefinitely.

Third, the statements of the attorney concerning the father’s alleged applications under the United States lottery program carry little weight. We asked Elian’s father in the written questions whether he had applied either in person or by mail to the US Interests Section for permission to go to the United States. He indicated in writing that he had not. The statements

that he had applied for an immigrant visa are based on hearsay and cannot be confirmed or denied by the U.S. Interests Section or the INS. Even if we assume the father had applied under the lottery program, there is no information concerning the circumstances of those applications, including his intentions concerning **Elian**.² Moreover, the circumstances faced by the father and his child have drastically changed from the time of any such application.

Fourth, **Elian**'s great uncle and the attorneys argued that father's freedom of movement has been restricted by his government. We questioned Mr. Gonzalez-Quintana at the second written submission about this allegation and he indicated that his movements are not restricted by the Cuban government. We recognize that Cubans do not enjoy the freedom of movement we have in our own country and that Mr. Gonzalez-Quintana is certainly under a lot of scrutiny by the press and by the Cuban government. We have not, however, found evidence that he is unable to move as freely as other Cuban citizens or that his movements are restricted in order to punish or intimidate him or **to influence** his parental decisions. We have assumed for purposes of this recommendation that there are limitations on the father's freedom and that he is being monitored both by the Cuban government and by the Cuban press, but we do not believe that leads to an inference that the father's request for his child's return is not genuine.

Finally, the father's loving and active relationship with his child, as established by his interview and numerous affidavits, coupled with the circumstances under which he now finds his six year-old son, separated from his only surviving parent in a foreign country immediately following the tragic death of his mother, strongly **suggests** that the father's request for his child's return is genuine. After considering the totality of the information currently before the INS, we believe that the most reasonable inference is that the father is able to represent adequately the child's interests in immigration matters.

After weighing the information we have gathered, we believe the father is able to represent adequately the child's immigration interests. Accordingly, we believe the INS should give effect to the father's request for the return of his child by treating it as a request for a withdrawal of **Elian**'s application for admission. Since we believe **Elian**'s father is able to speak on behalf of his son, we should add that were **Elian**'s father to come to the United States to assert his parental authority, we believe that the INS would be required to recognize **Elian**'s father's interests with respect to all immigration matters involving **Elian**. **Elian**'s father's arrival would necessarily change the **custody** arrangement we sought with his uncle in his absence. Under the INS regulations, a child is released in order of preference to 1) a parent; 2) legal guardian; or 3) an adult relative. 8 CFR 236.3 In the December 13th interview, our officer in charge indicated to Mr. Gonzalez-Quintana that visas to visit the United States are generally granted for persons in his situation. Mr. Gonzalez-Quintana indicated he was uninterested in applying for such a visa.

² No one has claimed and we have no indication in INS records that **Elian**'s father ever applied under the refugee program. Therefore we must **assume** that the father did not base any **such** immigration application on a fear of persecution **for himself** or his family.

B. Elian's asylum application

While an application for asylum and a request for withdrawal of an application for admission are inherently contradictory requests, the acceptance of a parent's request for the withdrawal of his child's application for admission does not necessarily preclude a child from applying for asylum independent of his parent. INS must determine whether it will accept an asylum application prepared by one of the attorneys claiming to represent **Elián** and tiled under **Elián's** signature. The INS has instructed its Texas Service Center to hold the application until this determination is made.

A child's right to seek asylum independent of his parents is well established. Section 208(a)(1) of the INA permits any individual physically present in the United States or who arrives in the United States-including any alien who has been brought to the United States after having been interdicted in international or United States waters-to apply for asylum. While Section 208(a)(2) of the MA describes certain exceptions to this right, those exceptions are not applicable to this case. There are no age-based restrictions on applying for asylum. Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances even a very young child may be considered for a grant of asylum. The INS need not, however, process such applications if they reflect that the purported applicants are so young that they necessarily lack the capacity to understand what they are applying for or, failing that, that the applications do not present an objective basis for ignoring the parents' wishes. Further, the United Nations Convention on the Rights of the Child requires state parties to:

take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights.

United Nations Convention on the Rights of the Child, Article 22, 28 I.L.M. 1448, 1464 (1989).³

Neither section 208 of the INA, nor the Convention on the Rights of the Child, however, addresses whether a child may assert a claim for asylum contrary to the express wishes of a parent. We believe, in keeping with the United States' obligation of *nonrefoulement* under the 1967 Protocol Relating to the Status of Refugees, certain circumstances require the United States to accept and adjudicate a child's asylum application, and provide necessary protection, despite the express opposition of the child's parents.

The Seventh Circuit helped define those circumstances in Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985). The Court held that the significant rights of parents to direct the life of their child did not preclude the child from raising an asylum claim, despite the parents' opposition. The parents' significant interests entitled them, however, to participate in all immigration matters regarding their child. In that case, the INS accepted an asylum application by a twelve-year old

³ The United States is a signatory to the United Nations Convention on the Rights of the Child, not a party.

boy and granted asylum without notice to the parents. The Seventh Circuit held that the government had erred because it failed to ensure that both parties received an adequate opportunity to assert their interests. The Court found it persuasive that the boy, who was twelve, was sufficiently mature to articulate a desire for asylum apart from his parents' wishes.

In assessing the parents' rights, the Court applied the balancing test established by Matthews v. Eldridge, 424 U.S. 319 (1976), which provides a mechanism for assessing the level of procedural due process necessary in a given proceeding. Under that test, the government must assess the private interest affected by the proceeding, the risk of error inherent in the chosen proceeding, and the interest of the government in using a particular proceeding. Based on that analysis, the Polovchak court found that the involvement of the parents must be weighed against any competing procedural interests, ultimately concluding that the parents' risk -- the loss of their ability to direct their child's interests -- significantly outweighed the burdens imposed on the government by providing the parents with notice and opportunity to participate in the procedure.

The Supreme Court has applied the same balancing test in assessing the standard of proof necessary to permit the termination of parental rights. Recognizing "that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," the Court held that parental rights could not be severed absent clear and convincing evidence of a **basis** to terminate. Santosky v. Kramer, 455 U.S. 745,753 (1982). The Court noted that the child and the parents "share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Consequently, applying the Eldridge factors, the Court determined that the private interest affected by proceedings to terminate parental rights is commanding, the risk of error in using a preponderance of the evidence standard is substantial, and the countervailing government interest in using the preponderance of the evidence standard, rather than the clear and convincing evidence standard, was slight.

The issue here -- whether the INS should accept and adjudicate Eliau's asylum application in direct opposition to his surviving parent and legal guardian -- does not result in the termination of parental rights. It carries the potential, however, of significantly prolonging, perhaps indefinitely, Eliau's separation from his father, resulting in a substantial interference with the father's parental rights. So, while Santosky is not directly applicable to this case, the INS must keep in mind the potential interference with the father's parental rights when determining whether to accept and adjudicate Eliau's application for asylum. In Polovchak, the Seventh Circuit addressed the competing interests of the twelve-year old boy who had clearly expressed his desire to apply for asylum and of the parents in asserting their parental rights by requiring the government to allow the parents to participate in their child's immigration matters. Here, the father may not have an opportunity, in a meaningful way, to participate in the adjudication of Eliau's asylum application because his residence in Cuba may preclude him from travelling to the United States or because he is unwilling to do so. In order to respect the parental rights of the father, the INS must first determine whether a true divergence of interests exists with respect to Eliau's asylum application. Is Eliau truly seeking asylum? If not, would his return violate United States' international obligations? If the answer to either question is yes, the INS must adjudicate the application, but in a way that provides the father with a meaningful opportunity to participate.

(i) **Elian's capacity to assert a claim for asylum on his own behalf**

While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved. The Polovchak case recognized that a twelve-year-old boy was sufficiently mature to be able to articulate a claim in express contradiction to the wishes of his parents. It did not specifically reach issues relating to the capacity of a younger child, but opined that a twelve-year old was probably at the low-end of maturity necessary to sufficiently distinguish his asylum interests from those of his parents. **Elian's** tender age is clearly one of the factors that must be considered in assessing whether he can assert an asylum claim. At age six, well below the lower end of necessary maturity described by the Seventh Circuit in Polovchak, we have serious doubts as to **Elian's** capacity to possess or articulate a subjective fear of persecution on account of a protected ground. There is no indication from the information INS has received that **Elian** possesses or has articulated a subjective fear of persecution on a protected ground, or that he has the ability to do so. Moreover, we do not believe that **Elian**, at age six, is competent to affirm that the contents of his asylum application accurately **reflect** his fear of returning to Cuba, if any. We believe, therefore, that despite his signature on his application for asylum, **Elian** lacks the capacity to raise an asylum claim. Thus, we do not consider **Elian** to be seeking asylum or refugee status on his own behalf.

(ii) **Objective basis for a valid asylum claim**

Capacity is only one of the issues that must be assessed, however. In cases involving unaccompanied minors who may be eligible for asylum, the INS Children's Guidelines, following the recommendations of the UNHCR, advise adjudicators to assess an asylum claim keeping in mind that very young children may be incapable of expressing fear to the degree of an adult. In recommending a course of action for evaluating a child's fear, the Children's Guidelines note that the adjudicator must take the child's statements into account, but it is far more likely that the adjudicator will have to evaluate the claim based on all objective evidence available. The UNHCR notes that the need for objective evidence is particularly compelling where there appears to be a conflict of interest between the child and the parent. UNHCR Guidelines, **para. 2 19**.

Thus, while **Elian** appears to be too young to raise an asylum claim on his own behalf, if objective information demonstrates that there is an independent basis for asylum, notwithstanding the father's stated interests, the INS would be obliged to consider the claim. In evaluating whether such information exists, the INS should first consider the allegations contained in his asylum application.

Elian's application for asylum bases his claim on two grounds. First, the application describes past persecution to members of **Elian's** family, including detention of **Elian's** stepfather, imprisonment of his great-uncle, and harassment of his mother by the communist party. Second, the application describes the potential for political exploitation of **Elian**, based on a political opinion imputed to him by the Castro regime, resulting in severe mental anguish and suffering tantamount to torture. The application includes a request for protection under the

Convention Against Torture. When attorney Roger Bernstein first submitted the application on December 10, he reserved the right, in his cover letter, to supplement the application with supporting documentation. In a meeting prior to the interview of Lazaro Gonzalez, Mr. Bernstein stated that he has spoken to witnesses who could attest to the allegations of past persecution and the likelihood of political exploitation.

None of the information provides an objective basis to conclude that any of the experiences of **Elian's** relatives in Cuba bear upon the possibility that **Elian** would be persecuted on account of a protected ground. Further, while we are troubled about the possibility of political exploitation and resulting mental anguish, it does not appear to form the basis of a valid claim for asylum. There is no objective basis to conclude that the Castro regime would impute to this six-year old boy a political opinion (or any other protected characteristic), which it seeks to overcome through persecution. See *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S.Ct. 812 (1992) (holding that an applicant for asylum based on political opinion must show that the alleged persecutors are motivated by the applicant's political opinion).

Finally, the allegation that any political exploitation of **Elian** requires protection under the Convention Against Torture is without objective basis. The assertion that the mental anguish **Elian** might face would be sufficiently severe to constitute torture under the Convention is purely speculative. Additionally, to merit protection under the Convention, the applicant must demonstrate that the torture would be inflicted intentionally. Even if the Castro regime seeks to exploit **Elian** for political gain, there is no reason to believe that it has any intention of inflicting severe mental anguish or any other form of harm recognized by the United States as torture upon **Elian**. Further, under U.S. law, the definition of mental suffering that can constitute torture is very narrow: it must be prolonged mental harm caused by the intentional infliction of severe physical pain or suffering, the administration or threatened administration of mind altering substances, or the threat of imminent death to the victim or another person. 8 CFR 208.18(a) Again, there is no indication that any political exploitation of **Elian** by the Castro regime would involve such tactics.

We do not believe **Elian** has the capacity to form a subjective fear of persecution on account of a protected ground. Further, there appears to be no objective basis for a valid claim for asylum or protection under the Convention Against Torture. Therefore, we believe that there is no divergence of interest between the father and child with respect to **Elian's** asylum application which warrants interference with the father's parental authority. **Elian's** return to Cuba would not violate the United States' obligations under the 1967 Protocol Relating to the Status of Refugees, the Convention Against Torture, or the Convention on the Rights of the Child. The INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under **Elian's** signature.

Disapproved _____

Approved for the reasons stated in the memorandum


1/5/2000

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PARENTAL AUTHORITY **IN** CUBA

The requester, the **Immigration** and Naturalization Services (INS), asks for an opinion on provisions of **Cuban** family law relating to custody and legitimation. Briefly, the facts of the case are as follows: A **child** was born out of wedlock and, **when** his mother died, the minor was under her **de facto** custodianship. According to the requester, **the** child's custody was not assigned by the court, but the parents had a friendly, informal **shared** custody arrangement. The requester states that the child used to spend at least 50% of his **time** with his father.¹

Specifically, INS **seeks** to **ascertain** the following: (1) if the custodial parent dies, whether the non-custodial parent automatically gets custody; (2) whether it matters that the parents were not married when the child was born.

The MS has not furnished the Law Library **with the** birth certificate of the child nor **with** any other legal document pertaining to the minor.

The inquiry raises the following issues under the laws of Cuba:

- . Paternity and **filiation**
- . Parental authority

Paternity and **filiation**

The INS asks for an opinion on the law pertaining to legitimation. **The Constitution of Cuba**² provides as follows:

Article 37. All children have equal rights, whether they were born in or out of wedlock. Any classification of the nature of the relationship is abolished.

No statement shall be put on record making any distinction regarding births, or the civil **status of parents**, in the certificates registering children, nor in any other document pertaining to the relationship.

¹ Telephonic interview with Janice Podolny, Chief Examination Officer at the Immigration and Naturalization Services (Dec. 16, 1999)

² CONSTITUTION OF CUBA, as amended, Gaceta Oficial (G.O.), August 1, 1992, translated by Foreign Broadcast Information Service, FBIS-LAT-92-226-S.

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The State guarantees the **determination** and recognition of paternity through suitable legal procedures.⁷

In view of the above article and **based** on the principle of constitutional supremacy, **the** old categories of **legitimacy** and illegitimacy are no longer operative and, **therefore**, have no effect **in the** reciprocal rights and obligations between parents and children.

The registration in the **Office** of the Civil Registry of acts concerning the civil status of individuals-i.e., **birth, marriage, death**, aquisition **and loss of Cuban nationality--is** governed by the Law on the Civil Registry.⁸

Article 55 of the Law on **the** Civil Registry provides as follows:

Article 55. Parentage of children **shall be** proved with the certification of **the birth** registration issued with the formalities established by law.⁹

The **lack** of a birth certificate limits the Law **Library's** ability to ascertain **the** parentage relationship of the father **and child in the case at hand**. **The MS states**, however, that it has the child's birth certificate wherein the alleged father is named as the child's **father**.⁶

Parent81 **Authority**

Parental **authority** in Cuba is governed by the Family Code of **Cuba**.⁷ **The provisions of the** Code relevant to this inquiry provide the following:

Artiele 82. Minor **children** shall be under the parental authority of their parents.⁵

Article 83. The parental authority belongs to both parents jointly.

³ *Id.* art. 37.

⁴ Ley Nn. 51 de Julio, IS. 1985, Del Registro del Estado Civil (G.O. Aug. 22, 1985), art. 3.

⁵ *Id.* art 82.

⁶ *Supra* note 1.

⁷ Código de la Familia, Anotado y Concordado (Divulgación Ministerio de Justicia, Cuba. 1987).

⁸ *Id.* art. 82.

LAW LIBRARY OF CONGRESS 3

[Parental authority] **belongs** to only one **parent** on the death of the other, or due to the fact that the exercise of such right has been suspended or deprived from **him/her** [by the pertinent authority]?

Article 85. The parental authority comprises the following rights and duties of the parents:

- 1) to have their children under their custody and care; to make an effort to provide them a stable dwelling and **adequate** nourishment; to care for their health and personal hygiene;...
- 2) to care for the education of their children;.
- 3) to direct the formation of their children for social life;....
- 4) to administer and care for the personal and real property [**bienes**] of their children in the most industrious way;....
- 5) to represent **their** children in all legal transactions and **acts** in which **they** have an **interest**;...¹⁰

Extinction **and** suspension of the parental authority

Article 92. The parental authority is extinguished:

- 3) due to the death of the parents or the child;
- 4) due to the child's arrival at legal age;
- 5) due to the marriage of the child who **has** not **arrived** at the legal age;
- 6) due to the adoption of the child."

Article 93. Both **parents**, or one of them, shall loss the paternal authority over **their children**

⁹ *Id.* art. 83.

¹⁰ *Id.* art. 85.

¹¹ *Id.* art. 92.

LAW LIBRARY OF CONGRESS 4

- 1) when it is imposed as a sanction upon them by a final **court** decision in a criminal process;
- 2) when it is assigned to one. of them or when both are deprived of the paternal authority by a final court decision issued in a divorce or nullity **of** marriage proceeding.*

Article 94. Parental authority is suspended by incapacity or absence of the parents when **declared by the court.**"

Article 95. The courts, taking in consideration the circumstances of the **case**, may deprive both parents, or one **of them**, of parental authority, or **suspend them** from its exercise in the cases of articles 93 and 94. or by a judgment issued in a trial **brought** about by the other [parent] or the government attorney [*fiscal*], when one or **both** parents:

- 1) **gravely fail[s]** to comply with the duties provided in article 85;
- 2) **induce[s]** the child to perform an act which constitutes a crime;
- 3) **abandon[s]** the national **territory and**, thus, their children;
- 4) **engage[s]** in a behavior which is antisocial [*conducta viciosa*], corruptive, criminal or dangerous, which is not compatible with the exercise of parental authority;
- 5) **commit[s]** a crime against the person of the child."

Conclusion:

- Articles **82 and 83 of the Family Code of Cuba grant the parental authority of children** to both parents jointly.
- Article 83 grants parental **authority** to only one **parent** on the death **of the other**, or when such right has been suspended or deprived to one of the parents by the pertinent authority.
- In the case at hand, as stated above, the Law Library does not have the **birth** certificate of the minor. Assuming that the parentage relationship between the father and child has been legally

¹² *Id.* art. 93.

¹³ *Id.* art. 94

¹⁴ *i d .* art. 95.

LAW LIBRARY OF CONGRESS 5

established, and assuming that no prior ruling has been issued by a Cuban court under Articles 94 and 95 of the Family Code depriving *or* suspending **the** right of the child's father to exercise **the** parental authority granted to **him by** articles 82 and **83 of the** Code, the **father** has never lost it. Furthermore, if the above two assumptions are correct, under article 83 of the Family Code, such parental authority right belongs entirely to the father from the moment that the child's mother died.

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