U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 7, 2000

The Honorable Dan Burton
Chairman
Committee On Government Reform
U.S. House of Representatives
Washington, DC 20515-6143

Dear Mr. Chairman:

Thank you for your January 12, 2000, letter to the Attorney General regarding the case of Elián González.

Elián González is inadmissible to the United States under Section 212(a)(7) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182(a)(7). When Elián first arrived in Florida on November 25, 1999, the Immigration and Naturalization Service (INS) deferred his inspection and paroled him until December 23, 1999, pursuant to 8 C.F.R. § 235.2. In order to permit a thorough evaluation of the issues in his case, the INS later deferred his inspection again until January 21, 2000, and has since extended again this inspection date. Elián thus remains in parole status pursuant to 8 C.F.R.§ 235.2.

On January 5, 2000, the INS determined that Juan González, Elián's father, had the sole authority under applicable law to speak for his son. Our decision that Elián's father and sole surviving parent, Juan González, has the legal authority to speak for him in immigration matters is consistent with INS practice and with the legal principle that the parent is the person most able to represent the child's best interests. When an unaccompanied minor alien, such as Elián, arrives in the United States without proper entry documents, the INS routinely attempts to contact a parent, either in the United States or in another country, regarding the child's whereabouts and inadmissibility. Here, after Elián's inspection was deferred, the INS met with his father who clearly articulated his desire that Elián withdraw his application for admission and return to Cuba.

United States law upholds the primacy of the parent-child relationship and the right of a parent to direct the management and care of a child. The United States Supreme Court has recognized that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); see also Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925). With this role as primary care-giver and protector comes the recognition of "the right of parents, not merely to be notified of their children's actions, but to speak and act on their behalf." Hodgson v. Minnesota, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring in part and dissenting in part) (citing J. Schouler, Law of Domestic Relations 337 (3d ed. 1882); 1 W. Blackstone, Commentaries 452-53; 2 J. Kent, Commentaries on American Law 203-06; G. Field, Legal Relations of Infants 63-80 (1888)).

It is not the case, however, that, without exception, INS will always send a child back to the surviving parent. In deciding whether to give effect to the father's wishes in this case, the INS carefully examined whether there was any reason that the father could not be relied upon to represent the child's interests. Specifically, the INS considered allegations that the father was under coercion such that he was not able to express his true wishes for the child or was not able to assess properly whether the child was at risk of persecution or torture upon his return to Cuba. On both counts, after interviewing the father on two occasions and the Miami relatives, as well as examining other available information, including the asylum application tendered on Elián's behalf, the INS found no reason to question the father's decision not to assert an asylum claim on behalf of Elián or his desire to be reunited with his son.

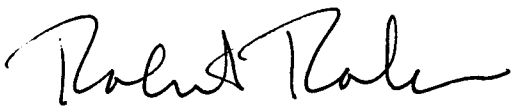
Therefore, the INS found no basis for disregarding the clearly stated decision of Elián's father to withdraw his son's application for asylum. Although it is possible for a minor to apply for asylum over the wishes of his parent, this is not such a case. A Federal appeals court, in considering this question, has determined that a 12-year-old child is "near the lower end of an age range in which a minor may be mature enough to assert

certain individual rights that equal or override those of his parents." Polovchak v. Meese, 774 F.2d 731, 736 (7th Cir. 1985). Therefore, in keeping with INS policy, the INS permitted Elián's father to withdraw his son's application for admission pursuant to INA § 235(a)(4), 8 U.S.C. § 1225(a)(4), and to decline to file an asylum application on his behalf.

We believe that resolution of the question who should speak for Elián in immigration matters is exclusively within the purview of the INS, as the Federal agency charged with implementing and enforcing the Nation's immigration laws. We further believe that the INS decision may only be challenged, if at all, in Federal court. As you may know, the attorneys representing the child's great uncle have filed such a challenge in the U.S. District Court in Miami.

In the event you have further questions regarding this matter, please do not hesitate to contact this office.

Sincerely,



Robert Raben
Assistant Attorney General

cc: Henry A. Waxman
Ranking Minority Member