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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Appellants,

v.

JANET RENO, Attorney General of the
United States, *et al.*,

Appellees.

No. 00-11424-D

[District Court Case
No. 00-0206-CIV-MOORE]

APPELLEES' OPPOSITION TO
APPELLANT'S EMERGENCY
MOTION FOR AN
INJUNCTION PENDING
APPEAL OR ALTERNATIVELY
FOR STAY OF
ADMINISTRATIVE ACTION

Appellees, Janet Reno, *et al.* ("the government"), hereby oppose the motion by Lazaro Gonzalez, filed in his asserted capacity as next friend of Elian Gonzalez, for an injunction prohibiting the government from transferring Elian Gonzalez to the care and custody of his father, Juan Gonzalez and preventing Elian's return to Cuba or to any place under Cuban government control during the pendency of this appeal. The Court should deny the motion. There is no basis in law under the Immigration and Nationality Act or in the principles of equity governing injunctive relief for this Court to prevent the reunion of a father and son at the behest of a mere distant relative into whose care Elian was only temporarily placed under federal law.

As we explain below, appellant Lazaro Gonzalez has failed to make the showing

required to obtain the extraordinary remedy of injunction pending appeal. First, appellant has failed to establish a substantial likelihood of success on the only issue on appeal, which is whether the Commissioner of the INS, ratified by the Attorney General and sustained by the district court, permissibly decided to give effect to the determination of Juan Gonzalez, Elian's sole surviving parent, not to file an application for asylum for Elian in the United States. That decision respects the bond parent and child that is sacred in human history and experience, protected by the Constitution of the United States, given expression in the laws and practices of this Nation since its founding, and recognized as a fundamental principle in the international community — including the goal of family reunification under both U.S. immigration laws and international conventions.

Second, the balance of equities weighs heavily against the granting of an injunction pending appeal. Juan Gonzalez, who has had a major role in raising Elian for the first six years of his life, is now in the United States. He wants to be with his son again. Elian has lost his mother at sea. His father is his sole surviving parent, and he has a close extended family in Cuba who have also cared for him. The Attorney General, in whom Congress has vested responsibility for interpreting and implementing the immigration laws, has concluded that Juan Gonzalez properly speaks for his son under the immigration laws, and Juan and Elian therefore should be reunited. It is, moreover,

~~essential to the United States' place in the world community that the requirement of~~

prompt reunification of parent and child be respected by this Nation, in order to promote

reciprocal respect for that requirement by other countries to which U.S. children travel or are taken.

We recognize the relationship that has developed between Elian and his Miami relatives, their love for him, and the care they have given him. But Elian has a father who also loves him, and an extended family that does as well, and they have been with Elian for the first six years of his life. It is not uncommon for more distant relatives, like Lazaro Gonzalez and his family in Miami, to form a strong emotional attachment to a child at a particular time. But under the Constitution, laws and human experience of this country, that attachment does not give the relatives a right to keep the child from his parent, or allow a court to impose such a separation. Elian Gonzalez has been in the care of Lazaro Gonzalez and his family since his arrival in the United States only because he was temporarily paroled into Lazaro Gonzalez's care by the INS under federal law. That parole was subject from the outset to such conditions and instructions as the INS might impose, and it was subject to revocation at any time. Governing regulations provide that the first priority in releasing a juvenile alien from INS custody in the United States is to the juvenile's parent. Now that Elian's father is in the United States, the purposes of his temporary parole into the care of Lazaro Gonzalez and his family have ended, and federal law requires that Elian be transferred to his father.

The expert psychiatrists and psychologists who have advised the Commissioner and the Attorney General in this matter have all concluded that, now that Juan Gonzalez is in

the United States, it is very important to Elian's long-term well being that Elian be transferred to his father's care as soon as possible, that the transfer be unambiguous, that his care-givers since his arrival in the United States prepare him for and participate in the transfer in a supportive manner, and that the transfer occur at a neutral location. The Commissioner and the Attorney General have gone to extraordinary lengths to bring about that result in a cooperative manner over the past week. But Elian's Miami relatives have refused to agree to those simple, clear undertakings. That refusal was most striking on April 13, when, after efforts at a cooperative arrangement failed, Lazaro Gonzalez defied an INS directive to present Elian to the INS at an airport in Miami so he could be transferred to his father's care. The temporary parole of Elian into Lazaro's care under federal law has therefore been revoked. In these circumstances, Lazaro Gonzalez comes to this Court with very unclean hands in seeking the extraordinary equitable relief of injunction pending appeal.

For the foregoing reasons, and as more fully explained below, we believe there is no basis for granting an injunction pending appeal. The principle concern reflected in the motion appears to be that if Elian and Juan are reunited, Juan Gonzalez might leave the United States with Elian during the pendency of the appeal. But aliens normally have the right to leave the United States and return home, and there is no reason under our laws

~~why Juan Gonzalez should not be free to do so — especially given the decision by the~~

Commissioner and the Attorney General, which is unchallenged by Lazaro Gonzalez in

this case, to allow Juan to withdraw the application for Elian's admission to the United States for the very purpose of allowing his return to Cuba to be with his father and extended family there. In a parallel situation involving a U.S. child abroad, the U.S. Government would object to any requirement imposed by a foreign government that the U.S. parent travel to the foreign country as a condition to having his child returned to him, much less that the parent remain in the other country with his child during the pendency of legal proceedings brought by more distant relatives to keep the child there. Freedom from such a requirement is a basic human right that the United States seeks both to honor and protect around the world. And here, because there is no merit to Lazaro Gonzalez' underlying appeal on the narrow issue of the asylum applications submitted by Lazaro Gonzalez, it is especially clear that Juan Gonzalez and Elian Gonzalez should not be compelled to remain in the United States, away from extended family, friends, and a familiar life, during the pendency of an appeal.

However, if the Court nevertheless believes that an assurance that Juan Gonzalez will remain in the United States pending the decision of this Court on the appeal is necessary and justified in these proceedings, that assurance is at hand. In a letter to the Attorney General dated April 13, 2000, counsel for Juan Gonzalez has formally notified the Attorney General that his client is willing to remain in the United States during the pendency of the appeal, so long as he has custody of his son, Elian. He further states that once Elian is turned over to him, Juan Gonzalez would not oppose and would not

challenge the imposition of a departure control order issued by the INS requiring Elian to remain in the United States until the appeal is decided. The INS is authorized to issue such an order under Immigration and Nationality Act Section 215, 8 U.S.C. § 1185. If restrictions are to be placed on the travel of Juan and Elian Gonzalez once Elian is placed in Juan's care, those restrictions should be imposed by the Executive Branch, not the courts, pursuant to the statutory provision Congress has enacted for that purpose. But the United States would impose such an order only with substantial reluctance, because of serious concerns that other nations might impose similar restrictions on U.S. parents and children.

The fundamental and most pressing requirement in this matter is that Elian be reunited with his father in the United States. Indeed, as a response to Lazaro Gonzalez' concerns, a departure control order would be called for as a means of assuring that Elian will remain in the United States pending appeal only if Elian is in Juan Gonzalez' custody. Moreover, as noted above, Lazaro Gonzalez comes to this Court with very unclean hands in seeking the extraordinary equitable relief of an injunction pending appeal after refusing to agree to reasonable conditions for a cooperative transfer, then defied a specific INS directive that he present Elian to the INS at the Opa-Locka Airport on April 13, for transfer to Elian's father, and now continues to keep Elian with him despite the revocation

of parents of Elian in the INS custody. Our principal submission is that there is no basis for an injunction pending appeal at all. At the very least, however, there is no

basis for imposing restrictions on the departure of Elian with his father unless Lazaro Gonzalez first cleanses his unclean hands by presenting Elian Gonzalez to the INS, as directed by the INS, for re-parole into the care of his father.

Accordingly, if the Court concludes that some greater assurance that Elian will remain in the United States is necessary and justified, then due to the particular circumstances of this case, the appellees consent to the entry by the Court of an order requiring the appellees to issue a departure control order barring the departure of Elian Gonzalez from the United States (and barring the departure of Juan Gonzalez with Elian Gonzalez) pending the issuance of a decision by this Court on the instant appeal, conditioned upon the Court's entry of an order directing Lazaro Gonzalez to present Elian Gonzalez to the INS, as directed by the INS, for transfer of care to Juan Gonzalez. The departure control order shall be effective upon the presentment of Elian Gonzalez by Lazaro Gonzalez, as directed by the INS.

I. BACKGROUND

Lazaro Gonzalez, asserting next friend status on behalf of appellant six-year-old Elian Gonzalez, comes to this Court seeking an injunction pending this Court's consideration of the appeal. The government hereby opposes Lazaro Gonzalez' motion for an injunction pending appeal or in the alternative for stay of administrative action.

~~Lazaro Gonzalez seeks to enjoin defendants from revoking Elian Gonzalez's parole and~~
reuniting him with his father, Juan Gonzalez, by re-paroling Elian into his father's care in

Maryland and further to prevent Elian Gonzalez from leaving the United States during this appeal.

As the Supreme Court made clear in Reno v. Flores, 507 U.S. 292, 310 (1993), however, INS regulations governing the release of juvenile aliens from INS custody pending immigration proceedings require that such juveniles be released to their parents, see 8 C.F.R. § 236.3(b)(1) (1999), “whom our society and this Court’s jurisprudence have always presumed to be the preferred and primary custodians of their minor children.” 507 U.S. at 310. By contrast, Lazaro Gonzalez falls in the last category of adults to whom juveniles may be released from INS custody, and release to such adults is entirely discretionary with the INS. See 8 C.F.R. § 236.3(b)(4) (1999). Elian Gonzalez has been in the temporary care of Lazaro Gonzalez only because he was paroled by the INS, and that parole has at all times been subject to such conditions as the INS might require — including the requirement that Lazaro present Elian to the INS as directed by the INS for transfer of care. Thus, quite aside from the issue on this appeal of whether the Commissioner of the Immigration and Naturalization Service and the Attorney General permissibly determined that Juan Gonzalez properly speaks for his son with respect to asylum, the regulations governing the release of juvenile aliens from INS custody while they are in the United States unambiguously authorize the Attorney General to revoke the temporary parole of Elian into Lazaro Gonzalez’s care in Florida, require that Lazaro present Elian to the INS in Florida, and re-parole him into the care of his father in

Maryland.

Lazaro seeks this injunction pending his appeal of the district court's March 21, 2000, decision in this matter granting appellees' motion to dismiss or alternative motion for summary judgment. *See Gonzalez v. Reno, et al.*, 86 F. Supp. 2d 1167 (S.D. Fla. 2000). He had brought suit, challenging the decision of the Commissioner, a decision the Attorney General ratified, to honor Juan Gonzalez' decision not to pursue the asylum applications submitted on Elian's behalf by Lazaro Gonzalez. *See* Exhibit One, Memorandum for INS Commissioner Meissner, January 3, 2000; Exhibit Two, Letter from the Attorney General to appellant's counsel, January 12, 2000. Lazaro Gonzalez did *not*, however, challenge the Commissioner's separate decision, under 8 U.S.C. § 1225(a)(4) (Supp. IV, 1998), ratified by the Attorney General, to allow Juan Gonzalez to withdraw the application for the admission of Elian to the United States in order to give effect to Juan's desire that Elian be returned to him in Cuba. A decision allowing the withdrawal of an application for admission is, in any event, discretionary, and judicial review of such decisions therefore is barred by 8 U.S.C. § 1252(a)(2)(B)(ii) (Supp. IV, 1998). Thus, insofar as appellant seeks an order from this Court barring Juan Gonzalez from returning to Cuba with his son, that relief is barred by appellant's failure to challenge the decision of the INS Commissioner and the Attorney General allowing the withdrawal of the application for admission for that very purpose, and by the statutory prohibition of review of that decision in any event. This appeal is directed instead to the distinct and

narrow issue of the disposition of the asylum applications submitted by Lazaro Gonzalez for as long as Elian remains in the United States.

The Commissioner refused to accept the asylum applications because she concluded that only Juan Gonzalez could speak for Elian on immigration matters, and he had refused to assert Elian's statutory right to apply for asylum. The Commissioner also determined that there was not an objective basis for adjudicating those asylum applications notwithstanding his father's decision. In sustaining the Commissioner's decision, the district court observed:

In light of the Attorney General's clearly articulated views on the matter of whether Elian Gonzalez should return home, as well as the reality that each passing day is another day lost between Juan Gonzalez and his son, the Court can only hope that those on each side of this litigation place the interests of Elian Gonzalez above all others.

86 F. Supp. 2d at 1194.

Since the district court's decision on March 21, 2000, appellees have exercised patient restraint, and made extraordinary efforts to resolve this matter in a prompt, fair, and orderly manner. Their efforts have been repeatedly and aggressively rebuffed. On March 23, 2000, before Juan Gonzalez arrived in the United States, the government proposed an agreement wherein it would withhold enforcement action and continue the present temporary parole arrangement during the instant appeal, and Lazaro Gonzalez

would agree to turn his care of Elian over to the INS (for the return of Elian to Cuba) in a prompt and orderly manner if this Court affirmed the district court's decision (and barring

any stay from the Supreme Court). The agreement failed, however, because Lazaro Gonzalez refused to provide even this basic assurance to produce Elian as directed by the INS, which is a long-standing requirement of federal law with respect to any alien who is paroled into the United States and any adult to whom a juvenile alien is released pending immigration proceedings. See 8 C.F.R. §§ 212.5, 236.3(b)(4) (1999).

Although INS was willing to leave the temporary care of Elian with Lazaro Gonzalez pending appeal if Lazaro made that basic commitment, The INS made it clear at the same time that if a material change occurred in the circumstances surrounding the temporary parole -- most particularly, if Juan Gonzalez came to the United States for his son -- the temporary parole would change. This is what occurred when, on April 6, 2000, Juan Gonzalez, his wife, and their infant son, Elian's half-brother, came to the United States.

The Attorney General personally met with Juan Gonzalez and his wife and son without the presence of any Cuban officials on April 7, 2000. Juan Gonzalez reiterated that he wanted his son back and wanted to return to Cuba. After that meeting, the Attorney General expressed her intent to move forward with the reunification of father and son in the United States. Also on April 7, 2000, the INS informed Lazaro Gonzalez that it was moving forward with steps to transfer Elian's parole to Juan Gonzalez; that it

had sought the advice of two eminent psychiatrists and a prominent psychologist to assess, based on facilitate the transfer; and that these experts were to meet separately with Juan Gonzalez

and Lazaro Gonzalez and his family. See Exhibit Three, April 7, 2000 letter. These experts met with Juan Gonzalez on April 9, 2000, and with Lazaro Gonzalez on April 10, 2000.

On Wednesday, April 12, the Attorney General and the INS Commissioner flew to Miami to meet with Lazaro Gonzalez. The Attorney General and the Commissioner sought to "work out a cooperative agreement" to "resolve this matter in a way least damaging to the child." See Statement of Attorney General Janet Reno, April 12, 2000. She met with Lazaro Gonzalez and his family for two and a half hours, but was unable to reach an agreement. Shortly thereafter, the INS transmitted a letter by facsimile to Lazaro Gonzalez that directed him to bring Elian to the Opa-Locka Airport at 2:00 p.m., April 13, 2000, at which time he had two alternatives: he could either (a) travel to Washington, D.C. with Elian, his daughter Marisleyxis, and members of his family, in the company of an INS officer experienced in immigration matters involving children for a meeting with Juan Gonzalez, after which parole of Elian would be transferred to Juan Gonzalez; or (b) if he did not want to meet with Juan Gonzalez, present Elian at the Airport at the same time, at which point Elian's care would transfer to the INS officer who would then escort Elian to Washington, D.C., and thereafter parole would transfer to Juan Gonzalez. See Exhibit Four, April 12, 2000 letter.

In the aftermath of the unsuccessful meeting, Lazaro Gonzalez spoke to the news media. He characterized appellees' lawful directive as "a traitorous act," and he

challenged appellees to send federal officers to his home to take Elian "by force," stating "Our position is that we will not turn over the child — anywhere." See Andres Viglucci, Jay Weaver and Ana Acle, *Reno Wants Elian Today, Great-Uncle Challenges U.S. to Take Boy 'By Force,'* Miami Herald, April 13, 2000 (available on the World Wide Web at <http://herald/archive/news/rafters99/docs/087403.htm>).

Lazaro Gonzalez has now sought an injunction from this Court preventing appellees from enforcing the INS's lawful directive and preventing Elian from returning to Cuba once he is reunited with his father. Notwithstanding the March 21, 2000, decision of the district court that sustained the Attorney General's decision and left her free to order the revocation of temporary parole even before Juan Gonzalez had arrived in the United States — and notwithstanding the Attorney General's clear pronouncement on April 7, 2000, that Elian would be promptly reunited with his father now that he is in the United States — Lazaro Gonzalez waited until less than one hour before the scheduled time at which he was required to present Elian to the INS at Opa-Locka Airport on April 13, 2000, to seek relief from this Court. The Court should deny Lazaro Gonzalez's last-minute request to delay once again the reunion of Elian with his father, after he refused to comply with the clear requirement of federal law that he both agree to present Elian to the INS as directed and then, at 2:00 p.m. yesterday, actually present Elian when ordered to

do so.

¹⁴ Approximately two hours before appellant filed his emergency application in this Court, the state family court dismissed the action appellant filed in that court in an effort to mount a

II. THE COURT SHOULD DENY APPELLANT'S REQUEST FOR AN INJUNCTION PENDING APPEAL

A. STANDARD OF REVIEW FOR GRANTING INJUNCTION PENDING APPEAL

An injunction pending appeal, like a stay pending appeal, is considered "extraordinary relief" for which the moving party bears a "heavy burden." *Winston-Salem/Forsyth County Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). "Such relief should be sparingly granted." *Atlantic Richfield Company v. Federal Trade Commission*, 398 F. Supp. 1 (S.D. Texas 1975) (citing *F.M.C. v. New York Terminal Conference*, 373 F.2d 424, 426 (2d Cir. 1967)). "The burden on those seeking an injunction pending appeal is a heavy one, much heavier than when an interlocutory injunction is sought in the trial court before the trial court has entered judgment." *Overbrook Egg Nog Corporation v. Miller, Secretary of Treasury*, 488 F. Supp. 156, 176 (D. Md. 1980) (citing *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co.*, 550 F.2d 189, 194 (4th Cir. 1977)).

In determining whether to grant an injunction pending appeal, a court must

collateral attack on the Attorney General's decision to give effect to Juan Gonzalez's desire to be reunited with his son in Cuba. The family court held that the state court action was preempted by federal law, which gives the federal government exclusive authority to determine when an alien will return to another country. See In Re: Lazaro Gonzalez, as Custodian of Elian Gonzalez, a Minor, Petitioner, and Juan Miguel Gonzalez Quintana, Case No. 00-05479-HQ-28 (Circuit Court, 11th Judicial Circuit in and for Miami-Dade County, Florida) (Order and Opinion attached). Although that case had been pending in family court for more than three months after the court issued a temporary custody order on January 10, 2000, appellant sought to revive the case on an emergency basis on the evening of Saturday, April 8, by filing a motion for a full trial on the question of whether Elian should be with his father in Cuba. *Id.* at 5-6.

examine the following factors: (1) whether the movant has made a strong showing that he is likely to prevail on appeal; (2) whether the movant will suffer irreparable injury; (3) whether granting the injunction will substantially injure the nonmoving parties; and (4) where the public interest lies. See *Hilton v. Braunskill*, 481 U.S. 770 (1987); *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986), *cert. denied*, 479 U.S. 889 (1986); *Belcher v. Birmingham Trust National Bank*, 395 F.2d 685 (5th Cir. 1968); *Johnson v. Mortham*, 926 F. Supp. 1540, 1541 (N.D. Fla 1996). An injunction may be issued on a lesser showing of a "substantial case on the merits" when "the balance of the equities weighs heavily in favor of" the moving party. *Isaly Co. v. Kraft, Inc.*, 622 F. Supp. 62, 63 (M.D. Fla. 1985) (quoting *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981));² see also *Garcia-Mir*, 781 F.2d at 1453.

**B. LAZARO GONZALEZ HAS NOT DEMONSTRATED THAT HE IS
LIKELY TO PREVAIL ON THE MERITS OF HIS APPEAL**

**(1) Appellant Must Make A "Strong Showing" That The Agency Decision
Is Not "Facially Legitimate And Bona Fide" or An Abuse of Discretion**

Lazaro Gonzalez has fallen far short of making the required "strong showing,"

Hilton, 481 U.S. at 776, that he is likely to succeed on the merits. In order to consider the question of likelihood of success on the merits, it is important to bear firmly in mind both what the narrow issue on appeal is and the narrow standard of review that applies to that

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), this circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered before October 1, 1981.

issue.

(a) The appeal of the district court's decision concerns the permissibility of the Attorney General's determination that the asylum provisions of the Immigration and Nationality Act, 8 U.S.C. § 1158, permit her to conclude that a sole surviving parent speaks for his or her child with respect to an asylum application when the child is too young to comprehend the significance of those matters.

In order even to be eligible for asylum, an alien must make a specific type of showing: the alien must show that he is a "refugee," *see* 8 U.S.C. § 1158(b)(1) — i.e., that he is unable or unwilling to return to his country of nationality, and to avail himself of the protection of that country, because of past persecution or a well-founded fear of future persecution based on one of five factors, including political opinion. *See* 8 U.S.C. § 1101(a)(42)(A).³ Lazaro Gonzalez' arguments concerning whether it would be in the best interests of Elian to return to Cuba with his father, general standards of living in Cuba, and Elian's relationship with Lazaro or Marisleysis Gonzalez are simply not relevant to the narrow issue on this appeal concerning the Commissioner's and Attorney General's disposition of the asylum applications submitted by Lazaro Gonzalez.

Furthermore, this appeal furnishes no basis for the Court to enjoin INS's transfer of temporary parole and care of Elian from Lazaro Gonzalez to Elian's father, Juan Gonzalez, as is required by INS regulations governing the transfer of parolee aliens in the

³The other criteria are race, religion, nationality, or membership in a particular social group.

United States. And the pendency of this appeal furnishes no basis whatever for Lazaro Gonzalez to defy a directive of the INS that he present Elian to the INS for that purpose. Again, the question on this appeal concerns the disposition of the asylum applications submitted by Lazaro Gonzalez in Elian's name; the pendency of that issue in this Court in no way affects whose care Elian will be in while he is in the United States. Lazaro's submission of an asylum application in Elian's name has no bearing on the responsibility of the Commissioner and the Attorney General under the governing regulation to place Elian in his father's care now that Juan Gonzalez is in the United States, no bearing on Juan Gonzalez' compelling claim to receive Elian into his care under that regulation, and no bearing on Lazaro Gonzalez' duty under federal law to present Elian to the INS as required by the INS, so that he can be transferred to his father.

For the foregoing reasons, the likelihood-of-success prong of the showing Lazaro Gonzalez must make in order to obtain the extraordinary relief of an injunction pending appeal can be satisfied only if he establishes a substantial likelihood that this Court will reverse the district court's judgment sustaining the Commissioner's and the Attorney General's decisions on the asylum application issue.

(b) The standards governing judicial review of the decision of the Commissioner, ratified by the Attorney General, concerning the asylum applications are well established.

Under *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court of Appeals can set aside

the Commissioner's decision only if it is not "facially legitimate and bona fide."⁴ Reliance on the *Kleindienst* standard is appropriate because both that case and this case involve agency decisions relating to aliens seeking admission to the United States.

However, even under the more exacting (but still highly deferential) standard of review that is generally applicable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706, the INS decision at issue before the Eleventh Circuit should be upheld. As the district court observed regarding APA review, "courts hold agency findings and decisions unlawful only if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Gonzalez*, 2000 WL 289604, at *25 (quoting 5 U.S.C. § 706(2)(A)) (citation omitted). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Company v. Lorion*, 470 U.S. 729, 743-44 (1985).

The record this Court will review in considering the district court's entry of

⁴ Although the district court did not apply the *Kleindienst* standard to Count 2 because it found that *Kleindienst* applies only when a plaintiff "asserts a constitutional challenge to agency action," *Gonzalez*, 2000 WL 289604, at *31 n.32, the government respectfully points out that Eleventh Circuit case law is to the contrary. See, e.g., *Perez-Perez v. Hanberry*, 781 F.2d 1477 (11th Cir. 1986) (applying *Kleindienst* standard, in absence of constitutional challenge, to INS parole denial), *Sidney v. Howerton*, 777 F.2d 1490, 1491 (11th Cir. 1985) (same).

summary judgment on Count 2 depends on whether that court reviews the decision under the *Kleindienst* standard or the APA standard. If the Court applies the *Kleindienst* standard, it should review only the three letters from the INS to Juan Gonzalez, to Lazaro Gonzalez, and to Lazaro's attorneys; the Commissioner-approved INS memorandum, at pages one through twenty-three of the administrative record; the Attorney General's letter responding to the request by counsel that she review the Commissioner's decision, at pages twenty-four through twenty-eight; and the asylum applications filed under seal. See Defendant's Motion to Dismiss or Alternative Motion for Summary Judgment, Administrative Record and Exhibits. Again, all that is necessary to sustain an agency decision reviewed under the *Kleindienst* standard is "a facially legitimate and bona fide reason." 408 U.S. at 770.

If, on the other hand, the Court applies the APA standard, review of the 318-page record the government submitted with its dispositive motion, minus the declarations the government asked the district court to consider only in connection with the equitable bases of plaintiff's motion for preliminary injunctive relief,² is appropriate. A *de novo* review of the facts underlying the Commissioner's decision is not appropriate, although the Court may "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicles*,

² The government asked the district court not to consider any declarations it had submitted, except in connection with the equitable bases of appellant's motion for injunctive relief. See Defendants' (appellants') Concise Summary Of Position On Pending Motions And Review Of Administrative Record, at 1-3.

463 U.S. at 43 (citing *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974); *Cooperative Services, Inc. v. HUD*, 562 F.2d 1292, 1295 (D.C. Cir. 1977)).

To the extent the Commissioner's decision involves questions of statutory interpretation, "[c]onclusions of law rendered by summary judgment are subject to the same standard of review as any other question of law raised on appeal." *Lipscomb v. United States*, 906 F.2d 545, 548 (11th Cir. 1990) (citing *Erwin v. Westfall*, 785 F.2d 1551, 1552 (11th Cir. 1986), *aff'd*, 484 U.S. 292 (1988)). Because what is involved here is the interpretation of an asylum statute the INS administers, the applicable principles of statutory interpretation are described in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), and *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). See also 8 U.S.C. § 1103(a) (stating that the Attorney General's determinations of all questions of law under the INA "shall be controlling").

Under *Chevron*, where Congress has not addressed the issue, a court must defer to the agency's interpretation if it is permissible or reasonable. *Lipscomb*, 906 F.2d at 545 (citing *Chevron*, 467 U.S. at 843-44). "A finding of reasonableness does not require a finding that the agency interpretation was the only possible construction, or that the agency made the same finding the court would have made." *Id.* (citing *Curse v. Director,*

Office of Workers' Compensation Programs, 843 F.2d 456, 460 (11th Cir. 1988) (quoting *Chevron*, 467 U.S. at 843 n.11)). Moreover, the Supreme Court observed in *Aguirre-*

: ;
: ;

Aguirre that "judicial deference to the Executive Branch is especially appropriate in the immigration context where officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'" *Aguirre-Aguirre*, 119 S. Ct. at 1445 (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

The Supreme Court's recognition of immigration law as occupying a unique status for judicial review dates back more than a hundred years. "Our cases 'have recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952)) (collecting cases). "The judiciary is not well positioned to shoulder primary responsibility for assessing the likelihood and importance of such diplomatic repercussions." *Aguirre-Aguirre*, 119 S. Ct. at 1445; *see also Fiallo v. Bell*, 430 U.S. at 792 (Supreme Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens"); *Mathews v. Diaz*, 426 U.S. 67, 79-82 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens"); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) ("any policy toward aliens is vitally and intricately interwoven with

~~contemporaneous policies in regard to the conduct of foreign relations"). Thus, the~~

Commissioner's interpretations of the Immigration and Nationality Act are entitled to

more deference than what is accorded other agencies in their interpretations of laws not occupying a similar status.

Appellant's third and fourth claims in the complaint to the district court allege violations of INS asylum regulations at 8 C.F.R. §§ 208.9 and 208.14(b). The district court dismissed these Counts based on its analysis of Count 2 and its "determination that the decision of the Attorney General is controlling both on the issue of Plaintiff's capacity to file an application for asylum and on the question of who may speak for Plaintiff in the face of Plaintiff's incompetence," and conclusion that in light of Elian's lack of capacity to apply for asylum, "no asylum applications are pending." *Gonzalez*, 2000 WL 289604, at **21, 30. Judicial review of the district court's dismissal of Counts 3 and 4 is *de novo*, as is judicial review of the district court's conclusion that the Count 5, the mandamus count, fails as a matter of law.

(2) Lazaro Gonzalez Has Not Made The Required "Strong Showing" With Respect to His Appeal of The District Court's Dismissal of His Due Process Count

The district court dismissed Count 1 of the complaint for failure to state a claim. In dismissing this Count for failure to state a claim, the district court found that plaintiff lacked a "constitutionally protected liberty interest"; that he is an unadmitted alien, standing, as it were, "on the threshold of initial entry"; and that his status as an alien who

has been paroled into the United States makes no difference from the standpoint of his inability to assert constitutional rights with respect to his admission to the United States.

Gonzalez, 2000 WL 289604, at **21-22 (citations omitted). In this regard, the district court relied primarily on *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*) (affirmed on other grounds, 472 U.S. 846 (1985)), noting, among other things, that there the Eleventh Circuit had held that unadmitted aliens cannot challenge INS decisions on their "applications for admission, asylum, or parole on the basis of rights guaranteed by the United States Constitution." *Gonzalez*, 2000 WL 289604, at *22. In light of Elian's status as an unadmitted alien, the district court concluded, "no set of facts will support Plaintiff's claim for a denial of constitutional due process under Count 1, and this Count must be dismissed." *Id.*

In *Jean v. Nelson*, a class action brought on behalf of Haitian aliens being held in INS detention pending adjudication of their asylum claims, the Eleventh Circuit, sitting *en banc*, had occasion to examine whether unadmitted aliens have constitutional rights with respect to their applications for admission. *See, e.g., Leng May Ma v. Barber*, 357 U.S. 185, 186 (1958) (although physically present within this country's borders, unadmitted and excludable alien not "within the United States"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953) (inadmissible aliens are "treated as if stopped at the border" and as being merely "on the threshold of initial entry").

This Court concluded that, "As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law." *Jean*, 727 F.2d at 967 (quoting *Nishimura Ekiu v. United States*, 142

U.S. 651, 660 (1892)) (collecting cases).⁹ The Eleventh Circuit's holding in this regard is settled law. Aliens "on the threshold of initial entry" have no more constitutional rights in connection with their applications for admission than would an alien physically located in another country. See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (An alien on the threshold of entry "has no constitutional rights regarding his application [for admission], for the power to admit or exclude aliens is a sovereign prerogative."); *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953) (Bill of Rights a futile authority for applicant for admission); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned")¹⁰; *id.* at 600 (denial of removal hearing "raises no constitutional conflict if limited to 'excludable' aliens who," again by virtue of their status, "are not within the protection of the Fifth Amendment"); *Gisbert v. U.S. Attorney*

⁹ This Court has made clear, however, that "aliens can raise constitutional challenges to deprivations of liberty or property outside the context of entry or admission, when the plenary authority of the political branches is not implicated." *Jean*, 727 F.2d at 972. See also *Amanullah v. Nelson*, 811 F.2d 1, 9 (1st Cir. 1987) ("outside the context of admission and exclusion procedures, excludable aliens do have due process rights.") (emphasis added).

¹⁰ The Supreme Court further stated,

[A]n alien who seeks admission to this country may not do so under any claim of right. . . . Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides. . . . [I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the government to exclude a given alien.

Knauff, 338 U.S. at 542.

General, 988 F.2d 1437, 1442 (5th Cir. 1993) (excludable aliens entitled only to those due process rights as are provided by law); *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987) ("'entry fiction' that excludable aliens are to be treated as if detained at the border . . . determines the aliens' rights with regard to immigration and deportation proceedings").

As for the specific question of whether unadmitted aliens may assert a right to asylum based on the Fifth Amendment's Due Process Clause, the Eleventh Circuit was explicit. "[E]xcludable aliens . . . have no constitutional rights with respect to their applications for . . . asylum" 727 F.2d at 984. Rejecting an argument that the Refugee Act created a constitutionally protected "liberty" or "property" interest in asylum, it found that it is "clear that the Refugee Act does not create an entitlement to asylum" but only provides that asylum may be granted in the Attorney General's discretion. *Id.* Therefore, the Eleventh Circuit concluded, "[t]he grant of asylum does not . . . create an interest protected by the due process clause." *Id.* at 981-82.⁹ Other circuits also have found that the INA's asylum provisions do not create a constitutionally protected liberty or property interest. *See, e.g., Garcia v. INS*, 7 F.3d 1320, 1326 (7th Cir. 1993); *Ramirez-*

⁹ In affirming the *en banc* decision in *Jean*, the Supreme Court stated that the Eleventh Circuit should not have reached constitutional issues because the issues on appeal could have been resolved on statutory and regulatory grounds. *Jean*, 172 U.S. at 854-55. Nevertheless, the Eleventh Circuit later found that "our *en banc* holding in [*Jean*] regarding the constitutional issue remains viable as the Supreme Court did not vacate the opinion but affirmed and remanded on alternative grounds." *Cuban American Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 n.20 (11th Cir. (1995)).

Osorio v. INS, 745 F.2d 937, 942-43 (5th Cir. 1984).

Appellants base their first count on an assertion that Elian's parole entitles him to the constitutional protections afforded "all persons within the territorial jurisdiction of the United States." Complaint at ¶ 36. The Eleventh Circuit in *Jean* expressly rejected this contention, saying, "The Supreme Court has consistently rejected claims that the parole or detention of an excludable alien has an effect on his status under the law." 727 F.2d at 969 (citing *Leng May Ma*, 357 U.S. at 188; *Mezei*, 345 U.S. at 215; *Kaplan*, 267 U.S. 228, 230-31 (1925); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *Nishimura Ekiu*, 142 U.S. at 661; *Ahrens v. Rojas*, 292 F.2d 406, 410-11 (5th Cir. 1961)). "The parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status." *Id.* (quoting *Leng May Ma*, 357 U.S. at 190).⁹ Clearly, Lazaro Gonzalez' motion for an injunction pending appeal prohibiting enforcement of the INS parole revocation and reparole of Elian into his father's care — as is expressly provided for in regulations governing the release of alien juveniles — lacks the required "strong showing" as to Count 1.

⁹ In any event, even if the Due Process Clause were applicable, the Attorney General has afforded more than whatever process or hearing is due with respect to the application for asylum or admission. The Commissioner of the INS did not arbitrarily deny or extinguish any interest or ability to submit such applications. The only effect to Juan Gonzalez' decision to withdraw those applications only after providing for two interviews of him in Cuba and after affording Lazaro Gonzalez an opportunity to be heard, and she personally met with Juan Gonzalez on April 7 and Lazaro Gonzalez and his family on April 12.

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Nor has Lazaro made the required showing to obtain an injunction based on Counts 2 through 5. At issue in these counts is the question of whether the Commissioner and Attorney General reasonably construed Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, not to require a full adjudication of an asylum application filed on behalf of a six-year-old child by a distant relative where (1) the child's own father (whom the Commissioner has found to enjoy a close and loving relationship with his son (*see* Exhibit One at 4, 5-6, 7)) has decided not to file such an application, *and* (2) the Commissioner and the Attorney General have not found an objective basis for asylum in any event after reviewing the applications and other evidence submitted. *Id.* at 10-11. Elian has a right under the statute or regulations to apply for asylum.

Lazaro Gonzalez, of course, disputes the district court's reliance on *Chevron* deference, arguing that the language of 8 U.S.C. § 1158(a) is plain and affords Elian the right to apply for asylum. But Lazaro continues to miss the point. Section 1158(a)(1) provides that "any alien" in the United States may apply for asylum. But the question here is not whether Elian *may* apply for asylum: the INS has always acknowledged that he may. See Defendant's Motion to Dismiss, Administrative Record and Exhibits at 16

(agreed decision recognizing that "asylum statute clearly invests a child with the right to apply for asylum from all children -- who are not..."). Rather, the question is whether Elian has applied for asylum: the INS

concluded that because of his tender years he cannot do so for himself, and that the person

through whom Elian could apply — his father — expressly declined to do so. The INS apprised Lazaro Gonzalez of that conclusion before Lazaro filed his lawsuit. *See, e.g.,* Administrative Record and Exhibits at 4-5 (Jan. 5, 2000, INS letter to Lazaro Gonzalez, refusing to accept Lazaro's asylum applications for Elian because "Elian does not have the capacity to apply for asylum without the assistance of his parent," and Elian's father "has repeatedly informed us of his decision not to assert Elian's right to apply for asylum"); *id.* at 6 (Jan. 5, 2000, INS letter to Lazaro's attorneys) (same); *id.* at 15 (agency decision analyzing, "[i]s Elian truly seeking asylum?"). Lazaro's plain meaning arguments overlook this point. As the INS decision put it, "While the asylum statute clearly invests a child with the right to seek asylum, the question of capacity to assert that right is unresolved." *Id.* at 16.

Finding that the capacity of a six-year-old to apply for asylum is a question of law, the district court upheld the INS conclusion that Elian lacked sufficient capacity. Section 1103(a)(1) of Title 8 supports this because there Congress directed that the Attorney General's determinations and rulings on all questions of law "shall be controlling." And Section 1158 of Title 8 supports this, for, as the district court aptly observed, to accept Lazaro's argument that all children have a right to apply for asylum independent of what their parents may want for them "requires the Attorney General to adjudicate asylum

applications from all children — no matter how young in age, no matter who claims to speak for them, and no matter what their mental condition." *Reno v. Gonzalez*, 86 F.

Supp. 2d at 1192. Lazaro's brief to the Eleventh Circuit challenges the Court's conclusion regarding the competency issue, insisting that "if a young child is medically qualified to speak . . . his words should at least be considered." Appellant's Opening Brief at 27. But as the Seventh Circuit observed in *Polovchak v. Meese*, 774 F.2d 731, 736 (7th Cir. 1985), where the INS had granted asylum to a twelve-year-old Soviet boy against his parents' wishes, Polovchak "was presumably near the lower end of the age range in which a minor may be mature enough to assert certain individual rights that equal or override those of his parents." Polovchak was twelve. Elian is half that age.

Because the Commissioner, ratified by the Attorney General, permissibly concluded that Elian lacks the legal capacity to apply for asylum on his own, the question then is which of two adults -- his father, who has raised him for six years in a close and loving relationship and who is his sole surviving parent with full legal authority to act on his behalf -- or a distant relative in whose care Elian was only temporarily paroled, pending completion of immigration matters and reunion with his father. The decision of the Commissioner and the Attorney General that the parent properly speaks for the child in these circumstances is consistent with longstanding legal principles and practices in this country and is firmly grounded in the Constitution, as the Supreme Court recognized in Reno v. Flores. The sacred bond between parent and child is also a universally shared principle in the international community. Respecting that bond also furthers the family-reunification principles of the immigration laws and international agreements,

including those governing refugees. And, finally, adherence to that rule of law in this case is of central importance to the United States in the world community, in order to ensure that other nations to which U.S. children travel will return U.S. children to this country promptly under comparable circumstances. *See the 1980 Hague Convention on Civil Aspects of International Child Abduction.*

To the extent that Lazaro's motion for injunctive relief and Eleventh Circuit brief go beyond questions of law to other aspects of the agency decision, he must make a strong showing that the decision is not facially legitimate and bona fide or at most that it is arbitrary and capricious. He claims the INS did not assess Elian's interests or whether those interests may diverge from his father's. Opening Brief at 25-34. But the agency's decision clearly reflects that it considered the question of whether Elian's interests diverge from his father's. *See* Administrative Record and Exhibits at 7 ("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 Elian and whether Elian's asylum application represents a divergence of interests between the father and child"). The INS reasoning on that issue satisfies both the *Kleindienst* and the APA standard.

Moreover, the Commissioner and the Attorney General did not rest their decisions solely on Juan Gonzalez's decision not to file an asylum claim on behalf of Elian. Before

giving effect to that decision, the Commissioner and the Attorney General specifically considered whether, notwithstanding Juan Gonzalez's decision not to file an asylum application on Elian's behalf, there nevertheless was an objective basis for such an asylum claim. After reviewing the applications and other information submitted by Lazaro Gonzalez, they concluded that there was not. *See* Administrative Record at 10-11. In taking that approach, the Commissioner relied on the practice in analogous situations where an accompanied minor arrives in the United States. *Id.* at 8-11.

In addition, through its investigation and two interviews of Juan Gonzalez, the INS developed a significant administrative record demonstrating that Juan Gonzalez had a long-standing, affectionate, parental relationship with Elian throughout the boy's life. *See* Defendant's Motion to Dismiss, Administrative Record and Exhibits at 48-55, 72-107, 118-99, 228-43. Juan Gonzalez has been an involved and caring father whether it came to parental participation in a child's education and activities (*Id.* at 72-107); his medical treatment and care — Juan Gonzalez was the listed parental point of contact in Elian's hospital records (*Id.*); or whether it involved the simpler and happier activities like teaching a boy to swim, ride a bike, do karate, or get a haircut (*Id.* at 51). Beyond the fact of his parents' divorce and the problems attendant on that for any family, Elian enjoyed a happily normal life in the nurturing bosom of his Cuban family. This record further supported the conclusions by the Commissioner and the Attorney General that Juan Gonzalez is a proper representative of Elian in immigration matters.

The implementation of Immigration and Nationality Act Section 208 by the Commissioner in these unusual circumstances is fully consistent with the statutory text and plainly satisfies both the Kleindienst and APA standards. As we have said, the fundamental question on this appeal is not whether Elian can apply for asylum, but whether he has done so. The Commissioner concluded that a juvenile of such tender years as Elian lacks the legal capacity to apply for asylum. The question then, in determining whether Elian has filed an application for asylum, is which of two adults speaks for Elian -- his father, or a far more distant relative. The decision of the Commissioner and the Attorney General that Elian's father speaks for him, and that therefore Elian should not be regarded as having filed an asylum application, was consistent with background principles governing the parent-child relationship -- principles that in this country are rooted in the Constitution as well as universally accepted norms. Section 208(b)(1) of the Immigration and Nationality Act, 8 U.S.C. 1158(b)(1), specifically provides that the Attorney General "may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General." Here, the Commissioner, affirmed by the Attorney General, adopted the reasonable "requirement" that when an asylum application is sought to be submitted on behalf of a minor of tender years, who lacks the legal capacity to file an application on his own behalf, the application must be filed by the person who lawfully and properly speaks for the child and that, in the present circumstances, that person is Elian's father.

Furthermore, Section 208(d)(1) provides for the Attorney General to establish a procedure for the consideration of asylum applications that are filed under subsection (a). Even if Lazaro Gonzalez were correct that the applications he submitted on behalf of Elian should in some sense be deemed to have been "filed," the Commissioner and the Attorney General adopted a sensible and permissible procedure for "consideration" of those applications. As stated above, the Commissioner provided for two interviews of Juan Gonzalez in Cuba and one of Lazaro Gonzalez in Miami, and the Commissioner also considered the allegations made in the applications themselves as well as numerous declarations and other materials that were submitted. The Commissioner also drew from practices in analogous circumstances in fashioning her approach to considering the applications that had been submitted in Elian's behalf by someone other than his father. Those procedures, involving full and repeated consideration by the Commissioner and the Attorney General of the United States, were far more than ample as a basis for concluding that the applications Lazaro Gonzalez sought to file against the wishes of Elian's father would not be regarded as having been filed by Elian and did not in any event furnish an objective basis for asylum independent of his father's wishes. Section 208(d)(7) of the Immigration and Nationality Act provides that nothing in subsection (d) creates any procedural or substantive right that is legally enforceable against the United States or any of its officers. Section 208(d)(7) thereby bars judicial review of the adoption or implementation of procedures by the Attorney General for the consideration of asylum

applications in these circumstances. But to the extent judicial review is available, the Attorney General's approach plainly satisfies Kleindienst and the APA.

Finally, relying on *Johns v. INS*, 624 F.2d 522 (5th Cir. 1980), Lazaro seeks reversal of the district court's decision because the Court did not appoint a guardian ad litem. Opening Brief at 53-55. He has not made the required "strong showing" here either. *Johns* did not require the appointment of a guardian ad litem for Elian. The analysis of the guardian ad litem issue in *Johns* rested on application of the Fifth Amendment Due Process Clause, a constitutional protection, as the district court recognized in its analysis of Count 1, that does not apply here on account of Elian's status as an unadmitted alien. 86 F. Supp.2d at 1187. In any event, the district court recognized Lazaro as Elian's "next friend." 86 F. Supp. 2d at 1186. Whatever the precise differences were between a next friend and a guardian ad litem before Congress adopted Rule 17(c), the distinction has been eliminated.¹⁹ See Wright & Miller, *Federal Practice and Procedure* § 1572; see also Fed. R. Civ. P. 17(c) (infant may sue by next friend or by a guardian ad litem).

C. THE BALANCE OF EQUITIES WEIGHS HEAVILY AGAINST AN INJUNCTION

¹⁹ If Lazaro's complaint is that the district court did not appoint a guardian with expansive powers as an advisor, such an appointment would have exceeded Rule 17(c)'s authority, and would have circumvented legal restrictions on the proper use of the Court's review of the Attorney General's decisions in this area. See Defendants' Motion To Dismiss at 67-80; Defendants' Concise Summary Of Position On Pending Motions And Review Of Administrative Record at 1-3.

(1) **The Equities of Juan Gonzalez and Elian in Prompt Reunification Far Outweigh Those of Lazaro Gonzalez in Preventing Reunification**

In assessing the balance of equities in this case, it is essential to recognize that this is not a suit brought by Elian, who is a six-year-old child lacking the legal capacity to sue. Rather, it is, fundamentally, a suit arising out of a disagreement between two adults over who should speak for and have custody of Elian. Specifically, it is a suit by Lazaro Gonzalez — who has had Elian in his care since November only because the INS temporarily paroled Elian into his care under federal law during the pendency of immigration proceedings — that seeks to keep Elian with Lazaro Gonzalez in the United States against the express wishes of the boy's father and against the express determination of the Commissioner and the Attorney General (sustained by the district court) that Elian's father properly speaks for him in immigration matters. Although we recognize the affection for and attachment to Elian that Lazaro and his family feel, that affection and attachment do not constitute equities that can outweigh the constitutionally and historically protected interests of Juan Gonzalez in being reunited with his son and returning with him to their home among extended family and friends.

Furthermore, the interest in reuniting father and son, and the equities weighing heavily in favor of allowing the Attorney General to bring it about in accordance with her

considered judgment, alone stand alone. The respect for the special privileges and

responsibilities of parenthood under our constitutional heritage derive as well from the

recognition that children benefit from the special bond, nurturing, guidance, and learning

that they experience with their parents from the moment of birth. It is a fundamental premise of society that the entrusting of children to the care of their parents will result in the most fitting course of their development and decisions about their lives, even if others might disagree with a parent's choices. In this case, Elian's father and extended family in Cuba raised him for the first six years of his life. The relief Lazaro Gonzalez seeks would deprive Elian of the most basic opportunity to experience that relationship with his father and extended family once again. that is decidedly an equity weighing strongly in favor of immediate effectuation of the Attorney General's decision that Elian should be reunited with his father.

Finally, it is essential to the freedom and autonomy of both parent and child that society honor their shared relationship and sacred bond. the very foundation of society in turn rests on those basic relationships and a broadly shared affirmation of their importance. Respect for the bond between parent and child therefore is still another equity weighing against an injunction barring effectuation of the Attorney General's decision.

(2) Elian Will Be Harmed If Reunification Is Delayed

The district court, in fact, trenchantly noted that "Even this well-intended litigation has the capacity to bring about unintended harm." *Gonzalez*, 2000 WL 289604, at *30.

The district court's observations respecting the Attorney General's clearly articulated views on the matter of whether Elian should return home, [and] the reality that each

passing day is another day lost between Juan Gonzalez and his son" (*id.*) go to the heart of this question. Since November 22, 1999, over 140 days have been lost between Elian and Juan Gonzalez. It is time to staunch that loss.

Elian will suffer irreparable harm if the Court grants an injunction pending appeal. Dr. Paulina Kernberg, who together with Dr. Jerry M. Weiner and Dr. Lourdes Rigual-Lynch, interviewed Juan Gonzalez and his wife, as well as Lazaro Gonzalez (on April 9 and April 10, 2000, respectively), advised the INS Commissioner Meissner concerning the "impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez." See Exhibit Five, Declaration of Dr. Paulina Kernberg ; concurrences of Dr. Jerry M. Weiner, Exhibit Six, and Dr. Lourdes Rigual-Lynch, Exhibit Seven. It was Dr. Kernberg's opinion that "it is crucial for Elian to clear about who has authority for him, namely his father." She continued, "Not to return to his father as soon as possible may make him feel that he has lost not only one parent, but two parents." See Exhibit Three, page 2. She stated, "It is my opinion that the immediate, definitive, and unambiguous transfer of Elian into the custody of his father, Juan Gonzalez, preferably in a neutral setting, would make an essential contribution to Elian's mental and emotional well-being. This is especially so given that Elian is aware that his father has been in the United States for nearly one week . . . Any further delay in reuniting Elian with his father or any action that would create a sense of ambiguity or uncertainty as to who will be responsible for Elian's care and well-being could be expected to cause

increasing stress and psychological harm to Elian." *Id.* at page 3. She opines that "a transfer in a neutral setting would be preferable," but "the most important consideration at this time is Elian's immediate and unambiguous reunion with his father." *Id.*

Finally, as Judge Bailey of the Florida family court so eloquently observed in her opinion dismissing Lazaro Gonzalez' state court action, the equities must take into account the broader social context and intense media scrutiny in which this young child finds himself during every day that his return to his father is delayed. See In Re: Matter of Lazaro Gonzalez, at 18-21. It is time for that delay to end.

This is not an appeal by Elian, but an appeal by Lazaro Gonzalez, who insists on vindicating his own asserted rights through full appeals and collateral attacks. All parents would be greatly upset by the prospect of a distant relative asserting rights on behalf of their child despite the parent's contrary desires and the considered judgment of the officials responsible for administering those laws by which their decisions must be given legal effect. Ultimately, the purpose of the injunction Lazaro Gonzalez seeks is to prevent the defendants from reuniting Elian with his father. The expert medical opinions obtained by the government clearly confirm that a definitive and unambiguous transfer of Elian's custody to his father works to Elian's benefit, not to his irreparable harm. Those same experts have opined that any actions taken to delay the reunion between Juan Gonzalez and Elian, particularly now that Juan Gonzalez is in the United States and Elian is aware of that fact, will signal continued conflict among the adults in Elian's life, and

will complicate the child's psychological situation. *See* Exhibits Five, Six, and Seven.

3. Lazaro Gonzalez Has Failed to Show That Appellees Will Not Suffer Substantial Harm From The Issuance of The Injunction

Lazaro Gonzalez has failed to show that the issuance of an injunction will not substantially harm appellees' interests. To the contrary, an injunction would harm appellees' interests at multiple levels: it would substantially interfere with appellee's ability to honor Juan Gonzalez' legitimate demand that his son Elian be immediately returned to him, and Elian's interests in being reunited with his father. Concomitantly, it harms Elian's psychological condition. *See* discussion above. It substantially interferes with the Attorney General's ability to implement the immigration parole regulations that expressly require that the parole of an unaccompanied minor be to the minor's parent if that parent is in the United States. *See* 8 C.F.R. §§ 212.5, 236.3(b)(1) (1999); *Reno v. Flores*, 507 U.S. 292, 310 (1993). In addition, an injunction would harm the INS' interest in adhering to the family reunification policy that is reflected throughout the Immigration and Nationality Act and its regulations. *See* Government's Administrative Record and Exhibits at 284 (Declaration of Michael D. Cronin, Acting INS Associate Commissioner for Programs). Moreover, an injunction would harm the INS' interest in being able to give effect to immigration decisions made by parents on their children's behalf. *Id.* Last fiscal year, INS inspectors inspected a total of 345,000,000 nonimmigrant aliens at our points of entry. *Id.* at 283. A large percentage of these aliens were children, many them children of tender years like Elian. *Id.*

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4. **Lazaro Gonzalez Has Not Shown That The Injunction Will Serve The Public Interest**

The United States would suffer substantial harm in its international standing in protecting parental rights in cases involving American children wrongfully removed from this country if the Attorney General were prevented from effecting her decision that Elian should be reunited with his father. *See Id.* at 286 (Declaration of Assistant Secretary of State for Consular Affairs Mary A. Ryan). It would disserve the public interest to undermine the principle that parents should decide what is best for their children. It would disserve the public interest to undermine the ability of immigration inspectors to look to parents or other responsible adults to make immigration decisions for minors. *Id.* at 283. And it would disserve the public interest to ignore accepted international practice in cases involving a sole surviving parent located in the United States, where we would expect a foreign country to return the child to the surviving American parent immediately. *Id.* at 287.

The admission of aliens is a sovereign power reserved to the political branches of the government. *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11 (1893); *Jean v. Nelson*, 727 F.2d at 964. The immigration laws, regulations, and policies of the United States all entail consequences that may extend beyond a particular alien to touch upon such vital government interests as international relations. *See INS v. Aguirre-Aguirre*, 119 S. Ct. at 1449 ("in the immigration context . . . officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS v. Abudu*,

485 U.S. 94, 110 (1988)). The interests of this Nation and of the international community thus are firmly aligned with those of Juan Gonzalez and Elian in being reunited with one another.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for an injunction pending appeal or in the alternative for a stay of administrative action pending appeal, because appellant has not demonstrated a substantial likelihood of success on the narrow asylum issue that is presented on appeal and the balance of equities weighs heavily against that extraordinary relief.

If the Court nevertheless concludes that some assurance that Elian will not leave the country while the appeal is pending is necessary, the appellees consent to the entry by this Court of an injunction requiring the appellees to issue a departure control order barring the departure of Elian Gonzalez from the United States pending the issuance of a decision by this Court on the instant appeal, conditioned upon the Court also entering an order directing Lazaro Gonzalez to present Elian Gonzalez to the Immigration and Naturalization Service (INS), as directed by the INS, for transfer of care to Juan Gonzalez. The departure control order shall become effective upon the presentment of Elian Gonzalez to the INS by Lazaro Gonzalez, as directed by the INS. The departure control order that would be applicable in that event is attached.

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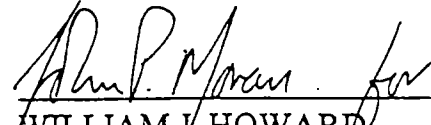
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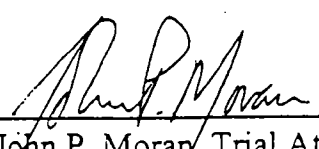
CERTIFICATE OF SERVICE

I certify that on this 14TH day of April 2000, I served a copy of APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL OR ALTERNATIVELY FOR STAY OF ADMINISTRATIVE ACTION upon plaintiffs and intervenor-applicant by facsimile transmission and first-class mail to the following:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants.

No. 00-

DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING
ORDER

Defendants Janet Reno, *et al.* by and through their undersigned counsel, hereby
oppose Lazaro Gonzalez's motion for a temporary restraining order prohibiting the
government from transferring Elian Gonzalez to his father's care and custody and
preventing Elian's return to Cuba. The Court should deny plaintiff's motion.

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I. BACKGROUND

Elian Gonzalez is a six-year-old Cuban national whose mother perished after setting out from Cuba in a small boat headed for the United States. *See* Exhibit A, "*How It Happened*." He was found floating on an inner tube in the Atlantic Ocean, taken to a hospital, and then given an Immigration and Naturalization Service ("INS") parole into the temporary care of his great uncle Lazaro Gonzalez.

The INS has handled this case in a cautious, deliberate, and humane manner from the outset. After a thorough investigation, it determined that only Juan Gonzalez could speak for Elian concerning his immigration status. Accordingly, it honored Juan's requests that Elian's application for admission and the asylum applications submitted in his behalf by Lazaro be withdrawn. *See* Exhibit B, Memorandum of the INS Office of General Counsel. Based on those careful determinations, the INS sought Lazaro's cooperation in bringing about Elian's transfer to his family in Cuba. *See* Exhibit C, Letter of Michael Pearson. Rather than cooperating with the INS, Lazaro sought intervention by a state family court which granted a Temporary Protective Order directing that the status quo be preserved, and that Elian could not be removed from its jurisdiction. *See* Exhibit D, Temporary Protective Order.

After the Attorney General determined both that the INS had correctly determined that Juan spoke for Elian and that the family court's order had no bearing on the federal immigration matter (*see* Exhibit E, Letter of the Attorney General), Lazaro filed suit in

the United States District Court for the Southern District of Florida seeking an order that the INS accept and adjudicate the asylum applications Lazaro submitted on Elian's behalf. After hearing argument on the case, the District Court for the Southern District of Florida dismissed the lawsuit and cautioned that "each passing day is another day lost between Juan Gonzalez and his son" *See Gonzalez v. Reno, et al.*, 86 F. Supp.2d 1167, 1194 (S.D. Fla. 2000).

When plaintiff appealed that decision to the United States Court of Appeals for the Eleventh Circuit, the government offered to forego exercising its authority to remove Elian from plaintiff's care on the condition he provide written assurance that Elian promptly would be surrendered once the appeals process was exhausted. Under the pertinent regulations, the INS normally seeks similar assurances from any person into whose care a juvenile alien is paroled. *See* 8 C.F.R. §§ 212.5(c); 236.3. However, Lazaro Gonzalez once again refused to cooperate with the government.

After a four-and-a-half month separation from his son, Juan Gonzalez traveled to the United States to reunite with Elian and return to Cuba. His arrival brought about the INS's decision to transfer Elian's parole from plaintiff to Juan Gonzalez. *See* Exhibit F, Letter of Michael Pearson. Seeking a smooth and peaceful transfer of Elian into Juan's care, the INS consulted two eminent psychiatrists and an eminent child psychologist, each of whom recommended that the reunion between father and son should occur sooner rather than later. *See* Exhibit G, Declaration of Dr. Paulina Kernberg;

concurrences of Dr. Jerry M. Weiner; Exhibit H, and Dr. Lourdes Rigual-Lynch, Exhibit I. The INS's further efforts to reach an agreement with Lazaro for a prompt and orderly transfer of Elian into his father's care were rebuffed. Instead, Lazaro returned to the family court and sought an emergency hearing and order blocking the INS's efforts to bring about a reunion of father and son. Lazaro's efforts failed when the family court dismissed plaintiff's petition for temporary custody, finding that the suit was defective both because Lazaro lacked standing to sue and because the suit was federally preempted. *See* Exhibit J, *Gonzalez v. Gonzalez*, No. 00-00479-FC-28 (Apr. 13, 2000). In dismissing Lazaro's suit, the Circuit Judge commented that Elian

has survived the heart-wrenching loss of a mother and is enmeshed in the terror of a custody fight, and no matter how well-intentioned everyone in the this case is, his days are filled with uncertainty.

* * *

At this point, this child has become a joke on Letterman and Leno, a skit on Saturday Night Live, and an hourly update on daytime tv. We are losing sight of him as a child and starting to treat him as a thing. We need to stop.

Id. at 21.

In an effort to bring a final and peaceful reunion between father and son, the Attorney General herself traveled to Miami for face-to-face negotiations. Lazaro Gonzalez still refused to transfer Elian into the care of his father. Accordingly, the INS ordered Lazaro Gonzalez to deliver Elian to its officials in Miami so that he could be brought to Washington, D.C. and reunited with his father. *See* Exhibit K, Letter of

Michael Pearson. Lazaro Gonzalez refused to comply with that order.

Now, having lost in both his home state and federal courts, Lazaro Gonzalez comes to Washington, D.C., searching for a forum which he hopes will authorize his continued refusal to reunite a son with his father. This Court too should refuse to sanction Lazaro's efforts to separate father from son. Not only should his motion for a temporary restraining order be denied because of simple notions of humanity, but it should be denied because Lazaro (1) lacks standing to sue on Elian's behalf; (2) his case is not justiciable; (3) the present action is barred by the doctrine of *res judicata*; and (4) the decisions of the INS in this matter comport with the obligations of the United States under international law.¹⁷

ARGUMENT

THIS COURT SHOULD DENY PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

A. STANDARD FOR ISSUANCE OF TEMPORARY RESTRAINING ORDERS

In the District of Columbia Circuit, when a party moves for a temporary restraining order, the standard to be applied is the same as if the party had moved for preliminary injunction. To demonstrate entitlement to a preliminary injunction, the

¹⁷ On April 13, 2000, the Eleventh Circuit Court of Appeals granted a temporary injunction pending appeal which precluded Elian's leaving the United States until further order of the Court. It also ordered the government to respond to Lazaro Gonzalez's motion for injunction pending appeal no later than 9:30am, April 14, 2000.

moving party must show: (1) a substantial likelihood of success on the merits; (2) that he would suffer irreparable injury if the injunction is not granted; (3) that an injunction would not substantially injure other interested parties; and (4) that the public interest would be furthered by the injunction. *See, e.g., Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998); *City Fed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995). In deciding whether to grant an injunction, the court must balance the moving party's showings in all four areas. *City Fed Financial Corps*, 58 F.3d at 747.

**B. PLAINTIFF HAS FAILED TO ESTABLISH A SUBSTANTIAL
LIKELIHOOD OF SUCCESS ON THE MERITS**

**1. PLAINTIFF LACKS STANDING TO RAISE ANY CLAIM ON
ELIAN'S BEHALF**

Generally, a litigant may only assert his or her own rights and cannot pursue a claim for relief based upon the legal rights or interests of a third party. *Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *Singleton v. Wulff*, 428 U.S. 106, 112-13 (1975). However, the courts have long permitted a "next friend" to proceed on behalf of a person who is unable to seek relief himself. *Donnelly v. Parker*, 482 F.2d 402, 406-07 (D.C. Cir. 1972); *Lonchar v. Zant*, 978 F.2d 637, 640 (11th Cir. 1993). A next friend does not himself become a party to the action in which he participates, but rather, merely presses forward with the cause action on behalf of the allegedly injured person, who remains the real party in interest. *Morgan v. Potter*, 157 U.S. 195, 198 (1895). Yet this

is not say that next friend standing is automatically granted or is without limits.

In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), the Supreme Court stressed that a next friend must first prove that the real party in interest cannot pursue his own cause due to some disability such as mental incompetence or lacking access to the courts. 495 U.S. at 163-65; *see also Lonchar*, 978 F.2d at 641. Second, the next friend must demonstrate some relationship or bring forth some other evidence that establishes the next friend is truly dedicated to the "best interests" of the person on whose behalf he seeks to litigate. *Whitmore*, 495 U.S. at 163-64; *Lonchar*, 978 F.2d at 641; *Morris v. United States*, 399 F. Supp. 720, 722 (ED Va.1975). Ultimately, "[t]he burden is on the 'next friend' clearly to establish the propriety of [their] status, and thereby justify the jurisdiction of the court." *Whitmore*, 495 U.S. at 164.

Noting that the Supreme Court did not define the bounds of the relationship between the real party in interest and the putative next friend, the United States Court of Appeals for the Seventh Circuit cautioned that an action filed by a person claiming to be a next friend of the real party in interest should not be accepted on blind faith. *T. W. & M.W. v. Brophy*, 124 F.3d 893, 895 (7th Cir. 1997). "[A]ppointed or not, . . . [the putative next friend] can be challenged as not being a suitable representative, just as a guardian ad litem can be." *Id.*; *see also Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989).

Fed. R. Civ. Pro. 17(c) begins by with a primary proposition that whenever an

infant "has a representative, such as a general guardian" the representative may sue on the behalf of the infant. The United States Court of Appeals for the Eleventh Circuit has determined that in the context of Rule 17(c), the term "representative" includes a child's parents. *See Devine v. Indian River County School Board*, 121 F.3d 576, 581(11th Cir. 1997); *Croce v. Bromley Corp.*, 623 F.2d 1084, 1093 (5th Cir. 1980) (same). The notion that parents are the natural choice to represent infants in court proceedings was stated by the Supreme Court more than one-hundred fifty years ago in *Bank of United States v. Ritchie*, 33 U.S. 128 (1834).²⁷

Rule 17(c) then goes on to provide a subordinate proposition that in the event a duly appointed representative is lacking, an infant may then "sue by a next friend" Fed. R. Civ. Pro 17(c); *Brophy*, 124 F.3d at 894.²⁸ Recognizing that a suit by a next friend occurs only in the absence of a qualified representative, the Seventh Circuit determined that a general representative should not be "bypassed by appointing [or allowing] a special representative to litigate on behalf of a ward." *Brophy*, 124 F.3d at

²⁷ While the *Ritchie* court did not find error in the lower court's appointment of non-parental guardian for an infant litigant, the Court did comment that such actions were "calculated to awaken attention . . . [when] the record shows . . . [the child has] parents living" 33 U.S. at 144.

²⁸ *See, e.g., United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986); *Developmental Disabilities Advocacy Center, Inc. v. Mellon*, 689 F.2d 281 (1st Cir. 1982); *Hafford v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981), *cert. denied*, 456 U.S. 961 (1982).

895.⁴ Similarly, the United States Court of Appeals for the Second Circuit has held that when an infant's representative "is unable, unwilling or refuses to act, or has interests which conflicts with that of the infant, a court may appoint a 'next friend' to ensure that the infant's rights are protected in a court of law." *Ad Hoc Committee of Concerned Teachers on Behalf of Minor and Under-Age Students Attending Greenburgh Eleven Union Free School Dist. v. Greenburgh No. 11 Union Free School District*, 873 F.2d 25, 30 (2d Cir. 1989). In short, a next friend may neither be appointed nor unilaterally act for a minor who is already adequately represented. *See Susan R.M. v. Northeast Independent School District*, 818 F.2d 455, 457 (5th Cir. 1987).

As Elian's surviving parent, Juan Gonzalez is the natural choice to serve as the boy's general representative. *See Ritchie*, 33 U.S. at 144. Under Fed. R. Civ. P. 17(c), Lazaro Gonzalez cannot act as Elian's next friend unless Juan Gonzalez is unable, unwilling or refuses to act, or has interests which conflicts with those of the Elian. Juan Gonzalez has made it very clear that he does not want Elian to seek any immigration benefits. Moreover, has even traveled to the United States so that he can be reunited with Elian. Through his travel to the United States and his efforts at reuniting with his son, Juan Gonzalez has demonstrated his willingness to represent Elian and take actions

⁴ The *Brophy* court also considered who would be best suited to represent an infant as a next friend. The Court stated that the "proper rule is that the next friend must be an appropriate alter ego for a plaintiff who is not able to litigation in his own right" *T. Brophy*, 124 F.3d at 897. The Court further opined that eligible next friends should be limited to the "plaintiff's parents, older siblings (if there are no parents), or a conservator or other guardian" *Id.*

on the child's behalf. Finally, there is no evidence that Juan Gonzalez's interests conflict with Elian's. Juan Gonzalez is adequately representing Elian's and, thus, Fed. R. Civ. P. 17(c) does not authorize Lazaro Gonzalez to act as Elian's next friend.⁵⁷

Additionally, the Florida family court has determined that Lazaro Gonzalez lacked standing under Florida law to maintain his petition for temporary custody and other relief. *See*, Exhibit H, *Gonzalez v. Gonzalez*, No. 00-000479 FC 28 at 12-18. Based on that ruling, the Temporary Protective Order, which purported to authorize Lazaro Gonzalez to assert and protect whatever rights Elian may have under the immigration laws of the United States, has been terminated. *Id.* at 21-22. Contrary to his assertions before this Court, Lazaro Gonzalez has no legal authority to act as Elian's temporary legal custodian and, thus, he lacks standing to maintain the present action.

**2. PLAINTIFF'S REQUEST FOR A TEMPORARY
RESTRAINING ORDER IS NOT JUSTICIABLE**

Plaintiff asks this Court to issue a temporary restraining order precluding the government from "deporting and/or returning Elian Gonzalez and/or from taking any steps to participate in and/or aid in the deportation of Elian Gonzalez and further, requiring that deportation proceedings against Elian be enjoined" Motion at 2, 18.⁵⁸

⁵⁷ It should also be noted that the INS has revoked Elian's parole to Lazaro Gonzalez and, therefore, he is wholly without authority to speak for Elian before this Court.

⁵⁸ The Immigration and Nationality Act has been amended so that immigration proceedings begun after April 1, 1997, are not *deportation* proceedings. *See* Sections 304(a)(3) & 309(a) of the Illegal Immigration Reform and Immigrant Responsibility Act

The government's current activities are not directed at returning Elian to Cuba, but directed at reuniting Elian with his father, while at the same time ensuring the conditions of his immigration parole comply with INS regulations. Once Juan Gonzalez has custody of Elian, the decision as to when, if ever, Elian leaves the United States will be his to make. Thus, plaintiff is wrongly attempting to enjoin the government from performing an action which is not its own but the father's.

In addition to Lazaro's suing the wrong party relating to any decision relating to Elian's return to Cuba, he sues to prohibit the transfer of parole to the father.. This is a discretionary decision, and one which is barred to this Court's review.

a. Plaintiff's Request for a Restraining Order Is Not Ripe

There are at present no removal, deportation, or exclusion proceedings pending or anticipated against Elian Gonzalez. Nevertheless, plaintiffs request an order from this Court enjoining the defendants from "deporting and/or returning Elian Gonzalez and/or taking any steps to participate in and/or aid in the deportation of Elian Gonzalez and/or continue with the deportation proceedings of Elian Gonzalez . . ." Plaintiff's [Proposed] Order at 1-2. Because the INS has not commenced a removal proceeding against Elian Gonzalez (and has no intention of doing so), plaintiff's request is not justiciable. It is not ripe.

of 1996 ("ARERE"), Pub. L. No. 104-208, 110 Stat. 3009-626 (Sept. 30, 1996). The proceedings by which aliens may be repatriated to their homelands are now referred to as removal proceedings. ARERE § 304(a)(3).

The Supreme Court has stated that the "basic rationale [of the ripeness doctrine] is to prevent the courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Furthermore, "[a] claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985)). In assessing whether a claim is ripe "the court must 'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Pfizer Inc. v. Shalala*, 182 F.3d 975, 978 (D.C. Cir. 1999) (quoting *Texas*, 523 U.S. at 301). This case is neither fit for judicial decision nor is there a hardship to the parties if the court withholds consideration.

Simply because a case presents a legal issue does not make it fit for judicial decision. On the contrary, the Court of Appeals for the District of Columbia has concluded that "[e]ven where the issue presented is a purely legal one and presumptively fit for review . . . the Supreme Court has observed that such an issue may be deemed unfit for review, . . . for example, 'further administrative action is needed to clarify the agency's position.'" *Aulenback, Inc. v. Federal Highway Administration*, 103 F.3d 156, 167 (D.C. Cir. 1997) (citations omitted).

In this case further administrative action is necessary before Elian could be "deported" by the INS from the United States. Under the Immigration and Nationality Act (INA), the INS may only "deport" a person like Elian by commencing removal proceedings under INA § 240, 8 U.S.C. § 1229a. The INS commences removal proceedings through the issuance of a Notice To Appear under INA § 239, 8 U.S.C. § 1229. As a matter of law, the Notice To Appear must include specific information including, but not limited to, the legal authority for conducting the proceedings, the alleged violation of law, and notice that the person may be represented by counsel. 8 U.S.C. § 1229(a)(1)(A-G). In addition, a person charged as removable must appear before an immigration judge who determines inadmissibility and deportability. 8 U.S.C. § 1229(a)(1). Furthermore, a person may appeal an immigration judge's determination to the Board of Immigration Appeals which has appellate jurisdiction over such decisions. 8 C.F.R. § 3.1(b)(1). Decisions of the Board of Immigration Appeals (which are final administrative decisions) are reviewable in the courts of appeal. 8 U.S.C. § 1252.

The point is that there is an administrative process that the government must abide by when it wants to "deport" someone from the United States, and plaintiff is asking for an injunction regarding a process that has not yet begun and that the government does not intend to commence. Accordingly, this case falls squarely within the admonition in *Abbott Laboratories* that courts should refrain from "entangling themselves in abstract disagreements over administrative policies" at least until "an administrative decision has

formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories*, 387 U.S. at 148. Because the INS has not commenced proceedings against Elian Gonzalez this case "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.

Plaintiff also fails to meet the second part of the standard since there will be no hardship for plaintiffs if the court withholds decision. This case is limited to whether the government should be enjoined from "deporting" Elian from the United States. As stated at the outset, the government has no intention of placing Elian in removal proceedings.

On the other hand, once Juan Gonzalez has custody of Elian, he will be able to decide when, if ever, Elian is to leave the United States for Cuba. Since Elian's application for admission to the United States has been withdrawn, no further administrative action on the government's part would be necessary for Elian to return to Cuba in the company of his father. Hence, if Lazaro Gonzalez is here seeking relief from the wrong parties. His motion for a temporary restraining order should be denied for that reason alone.

b. Recent Amendments To The INA Preclude Judicial Review Of The Commissioner's Discretionary Decisions

By enacting IIRIRA § 306(b), Congress repealed the judicial review provisions outlined in former Section 106 of the INA, 8 U.S.C. § 1105a (1994). To fill the void left by this repeal, Congress also enacted Section 306(a) of IIRIRA which established a new judicial review procedure in the form of new INA § 242, 8 U.S.C. § 1252.

Section 242 begins simply enough by directing that "[j]udicial review of a final order of removal . . . is governed only by chapter 158 of title 28 to the United States Code." INA § 242(a)(1). Commonly known as the Hobbs Act, and titled "Orders of Federal Agencies; Review," Chapter 158 plainly states that jurisdiction to "enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . " final orders issued by federal authorities rests with the courts of appeal. 28 U.S.C. § 2342. This statute makes no provision for the review of administrative orders by federal district courts.

Additionally, INA § 242 provides that "[n]otwithstanding any other provision of law, *no court* shall have jurisdiction to review any . . . decision or action of the Attorney General the authority for which is specified under . . . [TitleII of the INA] to be in the *discretion of the Attorney General* . . ." (emphasis added). INA § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

c. Section 242(a)(2)(B)(ii) Of The INA Precludes Judicial Review Of The Commissioner's Decision To Transfer Elian's Parole To Juan Gonzalez

When an arriving alien is suffering from a disability that renders it impractical to proceed with an inspection, the inspection is deferred for such a time and under such conditions as the district director may prescribe. 8 C.F.R. § 235.2(e). In addition, the deferral of an inspection is to be accomplished pursuant to the provisions of INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). 8 C.F.R. § 235.2(c). Section 212(d)(5)(A) in

turn permits the Attorney General to parole an alien into the United States for humanitarian reasons "*under such conditions as [s]he may prescribe . . . on a case by case basis . . .*" 8 U.S.C. § 1182(d)(5)(A) (emphasis added).

When the INS encountered Elian at the hospital, he was in no condition to undergo an immigration examination. 8 C.F.R. § 235.2(e). Consequently, Elian's inspection was deferred and he was paroled into the United States pursuant to Section 212(d)(5)(A). Because Elian is a juvenile (*see* 8 C.F.R. § 236.3(a)), his care-giver is determined by reference to 8 C.F.R. § 236.3(b)(1). Under this regulation, a juvenile alien who is paroled into the United States, will be released, in order of preference, to: (i) a parent; (ii) a legal guardian; or (iii) an adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention. 8 C.F.R. § 236.3(b)(1)(i)-(iii).

When Elian arrived in the United States, his sole surviving parent, Juan Gonzalez, was in Cuba. As he had no legal guardian in America, Elian was released to his great-uncle, Lazaro Gonzalez. 8 C.F.R. § 236.3(b)(1)(iii). However, Elian's father, Juan Gonzalez, has entered the United States. This turn of events naturally led to a reevaluation of Elian's parole status. Applying the standards in 8 C.F.R. § 236.3(b)(1), the INS has revoked Elian's parole and ordered him delivered to its officials at a neutral site so that he can be placed into the care of his father.

INA § 212(d)(5)(A) clearly grants the Attorney General the "discretion" to parole aliens into the United States under conditions she "may prescribe" on a case by case

basis. Hence the INS Commissioner, as the Attorney General's designee, has the discretion to modify the conditions of Elian's parole by transferring him into Juan Gonzalez's care. Since INA § 212(d)(5)(A) appears in Title II of the INA, the discretionary decisions made with regard to the conditions of Elian's parole are protected from judicial review by Section 242(a)(2)(B)(ii). It follows that the Court lacks jurisdiction to review the INS's decision to parole Elian into the care of his own father.

**3. PLAINTIFF'S CAUSE OF ACTION IS BARRED BY THE
DOCTRINE OF RES JUDICATA**

This Court is precluded from hearing plaintiff's lawsuit, including his motion for a temporary restraining order, by the doctrine of *res judicata*. As long recognized by the Supreme Court, honoring the prior judgment of a competent court ensures

the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination [E]nforcement [of a prior decision] is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgments of such tribunals.

Southern Pacific Railroad v. United States, 168 U.S. 1, 49 (1897). The doctrine of *res judicata* provides that when judgment has been rendered in a case,

[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Cromwell v. County of Sacramento, 94 U.S. 351, 352 (1876). The final "judgment puts an end to the cause of action, which cannot again be brought into litigation between the

parties upon any ground whatever." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 375 (1940).

The inquiry as to whether a particular case is barred by the doctrine of *res judicata* turns on two factors. First, it must be determined whether the instant lawsuit is the same cause of action previously asserted before another tribunal. *Nevada v. United States*, 463 U.S. 110, 130 (1983). Second, this Court must decide whether the parties in the instant proceeding are identical to or in privity with the parties to the previous action. *Id.*

Under the first Restatement of Judgments § 61 (1942), two causes of action were deemed the same "if the evidence needed to sustain the second action would have sustained the first action." However, the Restatement (Second) of Judgments (1982) took a more pragmatic approach where causes of action were considered the same if they arose from the same "transaction." Restatement (Second) of Judgments § 24 (1982). Whether the two proceedings were products of the same "transaction" was to be determined by "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* While the Supreme Court has applied the former "same evidence" test (see *United States v. The Haytian Republic*, 154 U.S. 118, 125 (1894)), it is not the only standard by which the "same cause of action" question has been measured. See *Nevada v. United States*, 463 U.S. at 131 n.12. For example, the Court has held that

[a] cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. 'The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The thing, therefore, which in contemplation of law as its cause, becomes a ground for action, is not the group of facts alleged in the declaration, bill, or indictment, but the result of these in a legal wrong, the existence of which, if true, they conclusively evince."

Baltimore Steamship Co. v. Phillips, 274 U.S. 316, 320 (1927) (quoting *Chobanian v. Washburn Wire Company*, 33 R.I. 289, 302, 80 A. 394, 400 (Ann. Cas. 1913D, 730)).

Once a matter is raised and determined by a court of competent jurisdiction, "it is the entire issue that is precluded, not just the particular arguments raised in support of it in the first case." See *Yamaha Corp. of America, v. United States*, 295 961 F.2d 245, 254-55 (D.C. Cir. 1992) (citing *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C. Cir.1990) (plaintiff may not raise new argument in second proceeding even though it was never made in first proceeding; so long as argument could have been made, it is precluded); Restatement (Second) of Judgments § 27 at 253 (1982) (if previously litigated "issue was one of law, new arguments may not be presented to obtain a different determination of that issue"))).

"A fundamental requisite of [*res judicata* or claim] preclusion is an identity of the . . . [claim] decided in the earlier action and that sought to be precluded in a later action."

See Clark-Cowlitz Joint Operating Agency v. F.E.R.C., 826 F.2d 1074, 1079 (D.C. Cir. 1987). Next, "it must be shown that the claim was (or could have been) raised in a prior proceeding." *Id.* (citing *Gould v. Mossinghoff*, 711 F.2d 396, 398-99 (D.C. Cir.1983). These related issues are important because "[t]he principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so." *Clark-Cowlitz*, 826 F.2d at 1079 (quoting Restatement (Second) of Judgments at 6).

In the action he filed before the Southern District of Florida, plaintiff sought to challenge the INS Commissioner's determination that the Service did not have to accept and adjudicate an asylum application filed by a third party on behalf of an incompetent minor alien over the objections of the child's surviving parent. After rejecting plaintiff's constitutional challenges to the INS Commissioner's decision, Judge Moore held that plaintiff's statutory and regulatory claims failed because the INS Commissioner's interpretation of the immigration laws warranted *Chevron* deference. *See Gonzalez*, 86 F. Supp.2d at 1193. In essence, plaintiff's claim before the Southern District of Florida was that the INS Commissioner's decision was wrong as a matter of law. In that action, plaintiff's position was that the Commissioner's decision violates domestic law. The only manner in which plaintiff's action before this Court differs from the lawsuit he presented to the Florida court, is that he now contends the Commissioner's decision violates international law.

Plaintiff's current action is, for *res judicata* purposes, not materially different from his prior action in the Southern District of Florida. In both lawsuits he claims that the INS Commissioner's decision was incorrect as a matter of law. Moreover, plaintiff could have challenged the Commissioner's decision based on international law while before the Southern District of Florida, but, for some unexplained reason, he failed to do so. It follows that plaintiff has presented this Court with the "same cause of action" he filed before the Florida court and, thus, the first prong of the *res judicata* inquiry has been satisfied. *See Nevada v. United States*, 463 U.S. at 130.

As for the second prong of the *res judicata* inquiry, Lazaro has brought this action against the Attorney General, the INS Commissioner, the Miami INS District Director, the Department of Justice, and the INS. The parties to the instant case are identical to the parties in the action dismissed by the Southern District of Florida. Plaintiff has filed the same cause of action against the same parties before successive tribunals. Lazaro's motion for a temporary restraining order should be denied because his entire suit is defective and barred by the *res judicata* doctrine.

**4. THE COMMISSIONER'S DECISIONS ARE IN KEEPING
WITH THE OBLIGATIONS OF THE UNITED STATES
UNDER INTERNATIONAL LAW**

Even if the Court had jurisdiction over Lazaro's suit, it would have to deny his motion for temporary restraining order. This is so because the INS's actions in attempting to reunite Elian with his father comply with the international obligations of

the United States. In his motion for a temporary restraining order, plaintiff argues that the United States' "obligations arising under international agreements" provide a basis for the requested injunctive relief. TRO Motion at 2. He claims that the United States will violate its international obligations by "deporting" Elian to Cuba because Cuba has a record of serious human rights violations, as documented by State Department Reports. *Id.* Plaintiffs ask this Court for an order enjoining Elian's deportation until such time that the State Department amends its country reports and/or certifies to Congress and/or provides an advisory opinion to the INS that Cuba is in compliance with the Universal Declaration of Human Rights, that the government of Cuba is no longer engaging in human rights violations and that Elian may return to Cuba "with the assurance that his human rights will be respected." *Id.* at 3.

As a preliminary matter, it is noted that Lazaro's international law claims are unpersuasive because there is no likelihood that Elian will be deported or removed to Cuba. As discussed above, the INS had not placed Elian in removal proceedings and has not indicated any intention to do so. Moreover, since Elian's application for admission to the United States has been withdrawn, he is free to leave the United States without undergoing any form of removal proceedings. *See* INA § 235(a)(4), 8 U.S.C. § 1225(a)(4). Under these circumstances, there can be no violation of international law. Furthermore, as demonstrated below, Lazaro is simply incorrect in arguing that the United States' international agreements preclude it from deporting Elian to Cuba, even if

it had any intention of doing so.

Plaintiff asserts rights under the Protocol Relating to the Status of Refugees (Protocol), *entered into force for the United States*, Nov. 1, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), *entered into force for the United States*, Nov. 20, 1994, S. Treaty Doc. No. 100-20 (1988); and the Universal Declaration of Human Rights. The relevant provisions of these treaties cannot form the basis for a claim because they are not self-executing.

Treaties are agreements between sovereign nations and do not generally create privately enforceable rights. *Head Money Cases*, 112 U.S. 580 (1884). Privately enforceable rights arise *only if* the underlying treaty is self-executing. *Committee of U.S. Citizens v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988). Self-executing treaties are those international agreements which "require no legislation to make them operative" and therefore "have the force and effect of legislative enactment." *British Caledonian Airways Limited v. Bond*, 665 F.2d 1153, 1160 (D.C. Cir. 1981) (citation omitted). Treaties that are not self-executing do not give rise to privately enforceable rights. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985); *see also Head Money Cases*, 112 U.S. 580, 598-99. When a treaty is not self-executing, its provisions cannot be enforced in the courts of the United States except "pursuant to legislation to carry [those terms] into effect." *British Caledonian*, 665 F.2d at 1160.

Courts have found that the pertinent provisions of the Protocol are not self-executing. *Haitian Refugee Center v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991), *cert. denied*, 502 U.S. 1122 (1992); *Bertrand v. Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982). Indeed, the treaty itself demonstrates that they are not self-executing. It states that "the signatories were to communicate to the United Nations the 'laws and regulations which they adopt to ensure the application of the present Protocol.'" *Haitian Refugee Center v. Gracey*, 600 F. Supp. 1396, 1406 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987). This provision in the treaty makes clear that implementing action by signatory states was necessary before the treaty could become effective in those states.

Likewise, the Torture Convention is not a self-executing treaty. See S. Treaty Doc. No. 100-20 (1988) (reservations and declarations of the United States Senate in ratifying the Torture Convention: "The Senate's advise and consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing."); *see also* 136 Cong. Rec. S17486-01, 1990 WL 168442 (daily ed. Oct. 27, 1990). This is a clear manifestation of the Senate's intent in ratifying the Convention, and this Court should defer to the Senate's express announcement. See *Restatement (Third) of Foreign Relations Law*, § 111(h) (1987). As such this Court has no jurisdiction to consider an individual's claim for protection under the treaty and no individual is provided with a right of action. *Khourassany v. INS*, ___ F.3d ___, 2000 WL 347167 (9th Cir. April 5, 2000); *Diakite v.*

INS, 179 F.3d 553, 554 (7th Cir. 1999); *see Head Money Cases*, 112 U.S. at 598-99.

Because the Protocol and Torture Convention are not self-executing, they do not confer any rights upon persons beyond those granted by the implementing domestic legislation. The United States has implemented its obligation under the Protocol by providing aliens with an opportunity to apply for withholding of removal under INA § 241(b)(3), 8 U.S.C. § 1231(b)(3). That provision prohibits the removal of an alien to a country where the alien's life or freedom would be threatened. An application for asylum is also deemed to be an application for withholding of removal and for relief under the Torture Convention. 8 C.F.R. § 208.13 (1999).

In this case, the INS Commissioner has already made a determination that Elian is not competent to demonstrate an "intention to apply for asylum," and therefore not competent to submit an application for withholding of removal or for relief under the Torture Convention. *Gonzalez v. Reno*, 86 F. Supp.2d 1167, 1189 (S.D. Fla. 2000). The INS has concluded that "under universally accepted legal norms," Elian's father should speak for Elian. *Id.* Before reaching her decision, the Commissioner considered several factors including the fact that the INS had conducted two in-person interviews with the father and found no evidence of abuse. *Id.* at 1989. The INS does not rule out the possibility of a case in which it would accept an asylum application of a young child against the wishes of a parent. *See*

Exhibit K, Letter of the Attorney General at 3. The Attorney General indicated that the INS would provide for a review of "objective circumstances relating to possible torture or persecution in the child's home country" if the child is too young to express a view on this matter. *Id.* In fact, as the Attorney General stated in her decision, the INS reviewed the asylum application filed on Elian's behalf and all other relevant available information and "found no credible information indicating that the [Elian] would be at risk of torture or persecution if returned to his father." *Id.*

The Attorney General's decision has been upheld by a district court in Miami which determined that her conclusion is "controlling, conclusive, not manifestly contrary to law, and not an abuse [of] other congressionally delegated discretion." *Id.* at 1188. Plaintiff, in essence, seeks to circumvent the adverse district court decision in Miami by raising Elian's persecution claim in this Court. As argued earlier, Lazaro should have raised this claim in the Miami district court and on appeal to the Eleventh Circuit, which appeal currently is pending.

Similar to the Protocol, the only enforceable rights that an alien has with regard to the Torture Convention are those afforded under this nation's domestic law. In 1998, Congress passed the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, 112 Stat. 2681-822 (appearing as a note to 8 U.S.C. § 1231), authorizing the promulgation of regulations implementing the Torture

Convention and expressly limiting the jurisdiction of any court to review decisions on claims for protection under those rules. *See* FARRA § 2242. Specifically, in FARRA § 2242(d), Congress provided that federal courts could review claims under the Torture Convention only as permitted by INA § 242, 8 U.S.C. § 1252, IIRIRA's permanent provision governing the jurisdiction of federal courts over cases arising under the immigration laws. Under FARRA's limited grant of jurisdiction, the Court may not consider any claim regarding Elian's application for relief under the Torture Convention. Instead, a torture claim must be considered administratively through the filing of an asylum application. *See* 8 C.F.R. § 208.13. As discussed above, the Attorney General already has made a determination that Elian is not competent to demonstrate an "intention to apply for asylum." *Gonzalez*, 86 F. Supp.2d at 189. Accordingly, the Attorney General has already concluded that Elian is not competent to submit an application for relief under the torture convention. Petitioners may not collaterally attack that determination in these proceedings.

Finally, petitioners arguments based on the Declaration Of Human Rights are without merit. Petitioners argue that the return of Elian to Cuba would violate the United States' "obligations" under the Declaration of Human Rights, G.A. Res. 217(III) (A) (Dec. 10, 1948). Motion. at 12. The Declaration of Human Rights, however, is not even a treaty but rather is a "non-binding resolution" adopted by the

United Nations General Assembly in 1948, *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 816 n. 17 (D.C. Cir. 1987), and therefore cannot support the petitioners' argument.

C. PLAINTIFF HAS NOT SHOWN HE WILL SUFFER IRREPARABLE DAMAGE

Lazaro Gonzalez cannot meet the burden of proving that Elian will suffer irreparable damage if the Court denies his request for a temporary restraining order. The District Court for the Southern District of Florida noted that "Even this well-intended litigation has the capacity to bring about unintended harm. *Gonzalez*, 86 F. Supp.2d at 1194. The Miami District Court's observations respecting "the Attorney General's clearly articulated views on the matter of whether Elian should return home, [and] the reality that each passing day is another day lost between Juan Gonzalez and his son" (*id.*) go to the heart of this question. Since November 22, 1999, over 140 days have been lost between Elian and Juan Gonzalez. It is time to staunch that loss.

The Court should deny Lazaro Gonzalez' request for a temporary restraining order because Elian will suffer irreparable harm if the Court grants it. Dr. Paulina Kernberg, who together with Dr. Jerry M. Weiner and Dr. Lourdes Rigual-Lynch, interviewed Juan Gonzalez and his wife, as well as Lazaro Gonzalez (on April 9 and

April 10, 2000, respectively), opined to INS Commissioner Meissner concerning the "impact of a continued delay in the transfer of Elian Gonzalez into the custody of his father, Juan Gonzalez." See Exhibits G, H, and I. It was Dr. Kernberg's opinion that it was important for Elian to be clear about who has authority for him. She continued, "Not to return to his father as soon as possible may make him feel that he has lost not only one parent, but two parents." See Exhibit G at 2. She stated, " It is my opinion that the immediate, definitive, and unambiguous transfer of Elian into the custody of his father, Juan Gonzalez, preferably in a neutral setting, would make an essential contribution to Elian's mental and emotional well-being. This is especially so given that Elian is aware that his father has been in the United States for nearly one week Any further delay in reuniting Elian with his father or any action that would create a sense of ambiguity or uncertainty as to who will be responsible for Elian's care and well-being could be expected to cause increasing stress and psychological harm to Elian." *Id.* at 3. She opines that "a transfer in a neutral setting would be preferable," but "the most important consideration at this time is Elian's immediate and unambiguous reunion with his father." *Id.*

This is not an action filed by Elian, but rather, a lawsuit filed by Lazaro, who insists on vindicating his own asserted rights through collateral attacks. All parents would be greatly upset by the prospect of a distant relative asserting rights on behalf of their child despite that the parents made known their contrary desires. Ultimately, the

purpose of the temporary restraining order is to prevent the defendants from reuniting Elian with his father. The expert medical opinions obtained by the defendants clearly indicate that a definitive and unambiguous transfer of Elian's custody to his father works to Elian's benefit, not to his irreparable harm. Those same experts opine that any actions taken to delay the reunion between Juan Gonzalez and Elian, particularly because Juan Gonzalez is in the United States and Elian is aware of that fact, will signal continued conflict among the adults in Elian's life, and will complicate the child's psychological situation. *See Exhibits G, H, and I.*

Additionally, it must be kept in mind that Lazaro Gonzalez is ultimately seeking to have the INS accept and adjudicate an asylum application he file on Elian's behalf. Motion at 18. If this Court were to deny Lazaro Gonzalez the order he seeks, Elian would suffer no harm because in the event Lazaro Gonzalez's ultimately prevails either on appeal or before this Court, there is little possibility, if any, that Elian's eligibility for political asylum will change. Stated another way, when it comes to the asylum application filed on Elian's behalf, time is not of the essence and, thus, an order precluding the government from simply transferring Elian's parole to his father will no way harm Elian.

D. THE GOVERNMENT WILL SUFFER SUBSTANTIAL HARM FROM THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER

Lazaro Gonzalez has not shown that the issuance of a temporary restraining order will not the government's interests. To the contrary, a temporary restraining order would

harm the government's interests at multiple levels: it would substantially interfere with government's ability to honor Juan Gonzalez' legitimate demand that his son Elian be immediately returned to him, and Elian's interests in being reunited with his father. Concomitantly, it harms Elian's psychological condition. *See* discussion above. It substantially interferes with the Attorney General's ability to implement the immigration parole regulations that expressly require that the parole of an unaccompanied minor be to the minor's parent if that parent is in the United States. *See* 8 C.F.R. §§ 212.5, 236.3(b)(1) (1999); *Reno v. Flores*, 507 U.S. 292, 310 (1993). In addition, an injunction would harm the INS's interest in adhering to the family reunification policy that is reflected throughout the Immigration and Nationality Act and its regulations. *See* Exhibit L, Declaration of Michael D. Cronin. Moreover, a temporary restraining order would harm the INS's interest in being able to give effect to immigration decisions made by parents on their children's behalf. *Id.* Last fiscal year, INS inspectors inspected a total of 345,000,000 nonimmigrant aliens at our points of entry. *Id.* A large percentage of these aliens were children, many them children of tender years like Elian. *Id.*

E. A TEMPORARY RESTRAINING ORDER WILL NOT SERVE THE PUBLIC INTEREST

If this Court were to issue a temporary restraining order, the government would suffer harm from the standpoint of its international standing in protecting parental rights in cases involving American children wrongfully removed from this country. *See* Exhibit M, Declaration of Assistant Secretary of State for Consular Affairs Mary A.

Ryan. A restraining order would disserve the public interest by undermining the principle that parents should decide what is best for their children. It would disserve the public interest by undermining the ability of immigration inspectors to look to parents or other responsible adults to make immigration decisions for minors. And it would disserve the public interest to ignore accepted international practice in cases involving a sole surviving parent located in the United States, where we would expect the foreign country to return the child to the surviving American parent immediately. *Id.*

The admission of aliens is a sovereign power reserved to the political branches of the government. *Fong Yue Ting v. United States*, 149 U.S. 698, 707-11 (1893); *Jean v. Nelson*, 727 F.2d 957, 964 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). The immigration laws, regulations, and policies of the United States all entail consequences that may extend beyond a particular alien to touch upon such vital government interests as international relations. *See INS v. Aguirre-Aguirre*, 119 S. Ct. at 1449 ("in the immigration context . . . officials 'exercise especially sensitive political functions that implicate questions of foreign relations.'") (quoting *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

CONCLUSION

Based on the foregoing reasons, Lazaro Gonzalez's motion for a temporary restraining order should be denied.

Respectfully Submitted,

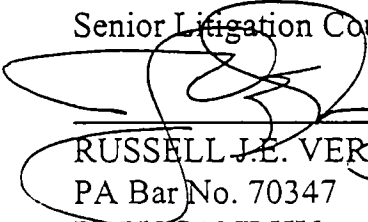
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I certify that on this 14th day of April, 2000, I caused one copy of the foregoing
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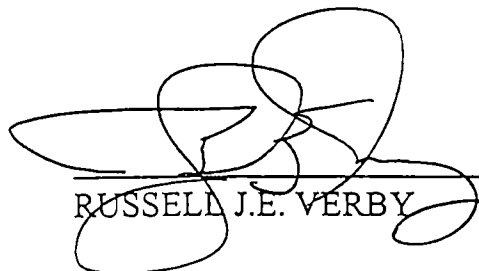
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RUSSELL J.E. VERBY

MAGISTRATE JUDGE
O'SULLIVANUNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CV-KING

CASE NO.:

00-0206

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

Petitioners/Plaintiffs,

v.

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

Respondents/Defendants. /CLERK OF DISTRICT COURT
S.D. OF FLA. - MIA

DO JAN 19 PM 3:43

**MOTION FOR PRELIMINARY AND PERMANENT
INJUNCTION AND PETITION FOR WRIT OF MANDAMUS
AND SUPPORTING MEMORANDUM OF LAW**

Elian Gonzalez, individually, and Lazaro Gonzalez, as next friend or alternatively temporary legal custodian of Elian Gonzalez, a minor, through undersigned counsel, respectfully request a preliminary and permanent injunction preventing the Immigration and Naturalization Service (INS) from returning Elian to Cuba against his will and in jeopardy of his life and freedom. Additionally, petitioners/plaintiffs request a mandatory injunction and/or issuance of a writ of mandamus directing the INS to abide by its own rules and regulations and provide Elian with the opportunity to be heard on his right to apply for political asylum as mandated by 8

U.S.C. §1158, 8 U.S.C. §1231(b)(3), and the Fifth Amendment to the Constitution's guarantee of due process.

Introduction

Elian Gonzalez, a 6-year old Cuban boy, was rescued from an inner tube floating off the Florida coast on November 25, 1999. Elian, like all aliens regardless of their immigration status, has a protected right to apply for asylum and to an adjudication on the merits of his application. Congress and the INS have established mandatory procedures governing children's asylum applications, and those procedures specifically envision situations where a child's right to seek asylum may be in conflict with or otherwise contrary to a custodial parent's desires or interests. In such instances, INS regulations and procedures require an adjudication on the merits of the child's claim. Additionally, INS regulations and procedures require the INS to provide Elian with a hearing on his removal from the United States to Cuba. By refusing to follow its mandatory obligation to provide Elian "the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" Matthews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976), the INS has violated Elian's constitutionally protected rights to seek asylum and to have the government play by its own rules.

Before addressing the factual and legal support for this motion, it is important to keep in mind what this case does not ask this Court to do. This case does not ask the Court to reach a substantive decision on whether Elian's asylum petition should be granted or whether Elian should be returned to Cuba. Instead, this case asks the Court to ensure that the INS provides Elian with the minimum due process guaranteed to him by the law.

Statement of Facts

Elian Gonzalez ("Elian") is a 6-year-old Cuban child who was discovered alone at sea off the East Coast of Florida on November 25, 1999. Elian's rescue occurred following a harrowing two day ordeal during which he watched his mother, his stepfather and 8 others (the "Group") die at sea as they attempted to escape Cuba in a small boat, which ultimately capsized.

The Group's tragic journey was precipitated by the oppression Elian's family endured while in Cuba.¹ Elian's stepfather had recently been twice imprisoned, beaten, held incommunicado and deprived of food. Elian's mother had also recently been interrogated by Communist Party officials, who questioned her loyalty to the Cuban government.

Elian was in a state of physical and emotional trauma upon his rescue by a Florida fisherman. Elian was initially treated at the Joe DiMaggio Hospital in Hollywood, Florida, but is now in the custody and care of his natural father's uncle, Lazaro Gonzalez, in Miami-Dade County, Florida. Lazaro Gonzalez (along with his immediate family) was prompted to visit the hospital to verify Elian's identity by an earlier telephone call from Elian's biological father in Cuba advising that Elian and his mother had left Cuba on a small boat and requesting that the child be well taken care of in the United States.

¹ The current Cuban government has a long and infamous history of human rights violations. As reported by Human Rights Watch in its July 23, 1999 report:

Forty years after the revolution, Cuba's Fidel Castro maintains control through intimidation, repressive laws, and by imprisoning dissidents Cuba stands alone in this hemisphere for this kind of human rights abuse: criminalizing free speech and association, imprisoning dissidents, and denying access to international human rights monitors. ... Cubans are tried for crimes such as 'enemy propaganda' and 'contempt for authority,' and ... the government also use[s] an ill-defined provision against 'dangerousness' to detain even Cubans who have not committed any crime.

Among the Cuban laws which violate international human rights norms are those for "contempt for authority, clandestine printing, illegal exit, defamation of institutions and mass organizations, and failure to comply with the duty to denounce."

Elian's family in Florida has provided Elian with love and support. Elian spends a great deal of time with his many caring relatives in Florida, attends church and school, and receives professional psychological therapy. Elian has also been in regular telephone communication with his biological father, Juan Miguel Gonzalez, who resides in Cuba.

Elian's father, Juan Miguel Gonzalez, has purportedly expressed a desire that Elian be returned to Cuba. Juan Miguel's true preference, however, remains unclear in light of the likelihood of retaliation against him by the Cuban government should he state publicly a preference that Elian remain in the United States.² Indeed, there is credible evidence that Juan Miguel is subject to pressure from the Cuban government to demand Elian's return to Cuba.³

Apart from the deprivation of basic civil rights that most Cubans suffer, Elian would bear the additional burden of being a political symbol of a totalitarian regime if he were to be returned to Cuba. Elian would likely be compelled to demonstrate complete loyalty and militancy on behalf of the Cuban government. He would be politically indoctrinated to a much larger extent than others. He would also be compelled to believe that his deceased mother and stepfather, not

² Elian's father in Cuba cannot speak freely. The U.S. Department of State recognizes that Cuba continues "systematically to violate fundamental civil and political rights of its citizens. . . . The government denied citizens the freedoms of speech, press, assembly and association." See, U.S. Department of State, Cuba country Report on Human Rights Practices for 1998, Exhibit A at page 2. Inexplicably, the U.S. government dismisses its own report and the political realities of Cuba in concluding that Elian's father is truly free to speak his mind.

³ For example, Juan Miguel's neighbors and family in Cardenas, Cuba have reported that Juan Miguel's movements have been restricted and his actions monitored by the Cuban government, that a speaker-phone has been installed in Juan Miguel's home so that all of his telephone calls can be monitored by government observers, and Juan Miguel is being kept isolated from the rest of his family in Cuba.

Additionally, an independent Cuban journalist has reported that Juan Miguel has twice applied for a visa to the United States. As with many visa applications sent via the Cuban mail system, it is doubtful whether this request reached the U.S. Interest Section. The same journalist has also reported that Juan Miguel knew about and consented to Elian's departure from Cuba.

Further, the Cuban government has unleashed its propaganda machine, including state-sponsored rallies of over 75,000 people in Cardenas and visits to Juan Miguel by Fidel Castro with Elian's photo laminated on his lapel pin.

to mention his relatives in Miami, were traitors to the Revolution. Accordingly, a return to Cuba under such circumstances would be detrimental to Elian.

On December 13, 1999, Lazaro Gonzalez filed a petition for asylum on behalf of Elian Gonzalez. On December 15, 1999, Elian himself filed a Petition for Asylum with the INS. On December 22, 1999, the INS deferred the inspection interview regarding Elian until January 21, 2000. The INS has not held an interview or hearing regarding Elian's asylum application. Instead, on January 5, 2000, the INS sent Elian's attorneys letters stating, in pertinent part, that INS has been in "direct contact" with Juan Miguel and that the INS has:

determined that Elian does not have the capacity to apply for asylum without the assistance of his parent. Further, neither [of] the applications you have submitted nor any other information available indicates that Elian would be at risk of harm in Cuba such that his interests might so diverge from those of his father that his father could not adequately represent him in this matter. Therefore, given [Juan Miguel's] decision not to assert Elian's right to apply for asylum, we cannot accept the asylum applications as having been submitted on Elian's behalf. [Juan Miguel] has also repeatedly requested that Elian be returned immediately to his custody in Cuba. ... Therefore, we have granted [Juan Miguel's] request to withdraw Elian's application for admission to the United States.

On January 10, 2000, the State of Florida ordered Lazaro Gonzalez to be Elian's temporary legal custodian. Pursuant to this order, Lazaro Gonzalez filed for asylum again on Elian's behalf. INS refused to consider the application for asylum. In summary, INS denied Elian's right to apply for political asylum and permitted Elian's father in Cuba to withdraw Elian's application for admission to the United States.

Legal Argument

I. **Elian Gonzalez has the Capacity to Seek Political Asylum and to Seek Redress of Violations of his Constitutional Right to Procedural Due Process.**

As discussed in section II *infra*, Elian has a constitutional right to seek asylum, to obtain the assistance of counsel, to have the INS follow its own rules, regulations, and policies, and to receive an adjudication on the merits of his claim.⁴ In its January 5, 2000 letter, the INS claims that Elian does not have the capacity to exercise his constitutional rights independent of his father. INS uses this argument as the basis to withdraw Elian's application for admission to the United States and claim that Elian's asylum application has been withdrawn by his father. The INS's "position" is nothing more than a transparent attempt to avoid having to provide Elian with his right to an adjudication on the merits of his asylum application. It lacks legal support, directly violates the INS's own policies regarding children's asylum applications, and provides Elian's father with more rights than those afforded to a parent residing in the United States. Simply put, the INS has violated the "fundamental fairness, which is the essence of due process" by "creat[ing] a right to petition and then mak[ing] the exercise of that right utterly impossible." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1039 (5th Cir. Unit B 1982).⁵ Due process of law, however, is the primary and indispensable foundation of individual freedom. Indeed, "[t]he history of American freedom is, in no small measure, the history of procedure." Malinski v. People of State of New York, 324 U.S. 401, 414 (1945) (Frankfurter, J.) (separate opinion). In this case, Elian, although a minor, possesses the constitutional rights of due process.

⁴ An overview of the INS's own rules, regulations, and policies is attached as Exhibit B.

⁵ "Decisions by Unit B of the former Fifth Circuit issued after September 30, 1981 are binding in this Circuit." U.S. v. Repister, 182 F.3d 820, 842, fn. 35 (11th Cir. 1999) (citing Stein v. Reynolds Sec. Inc., 667 F.2d 33, 34 (11th Cir. 1982)).

Indeed, there can be no dispute that children are protected by the Constitution, and that children have standing to protect their rights and interests in many kinds of cases.^{6, 7} The Supreme Court has concluded that:

Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976).

The Supreme Court has further held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." In re Gault, 387 U.S. 1, 13 (1967) (held that the Fourteenth Amendment's guarantee against the deprivation of liberty without due process of law is applicable to children in juvenile delinquency proceedings). Similarly, in Goss v. Lopez, 419 U.S. 565 (1975), the Supreme Court held that children may not be deprived of certain property interests without due process.

Moreover, in case after case, minor aliens have sued the INS based on the agency's due process violations.⁸ Indeed, neither Congress nor the INS has placed an age restriction on an alien's right or ability to seek asylum. Instead, the INS has issued guidelines for handling children's asylum claims that tailor the immigration official's approach to the child's age and stage of development. See INS Guidelines for Children's Asylum Claims, Exhibit C.

⁶ A party has standing whenever he or she has a sufficient stake in a justiciable controversy. Sierra Club v. Morton, 405 U.S. 727, 731, 92 S.Ct. 1361, 1364 (1972).

⁷ See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729 (1975) (children bringing due process challenge to public school suspension policy); Ortiz v. Mesa County Valley Sch. Dist. No. 51, 568 F.2d 1312 (10th Cir. 1977) (challenging alleged discriminatory hiring practices involving Mexican-American teachers and support personnel); Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir.), cert. denied, 388 U.S. 911, 87 S.Ct. 2116 (1967) (school children can sue under Title VI); Hernandez v. Ruiz, 812 F. Supp. 734 (S.D. Tex. 1993) (children can sue under Migrant and Seasonal Agricultural Worker Protection Act).

⁸ See, e.g., Reno v. Flores, 507 U.S. 292, 113 S.Ct. 1439 (1993) (class of unaccompanied juvenile aliens challenging INS regulations regarding release pending deportation); Perez-Funez v. District Director, I.N.S., 619 F.

Second, as detailed in section III(B) *infra*, the INS's own regulations and policies recognize and encourage a child's right to independently seek asylum - even when the child's parent may not have a claim for asylum or when the child's claim may be adverse to the parent's interests. Indeed, it is clear from the INS's own policies that the INS contemplates that very young children will have and will bring valid, independent asylum claims.^{9, 10}

Moreover, the INS's actions in contacting Juan Miguel and soliciting his opinions regarding Elian's application violate the INS's regulations and procedures governing parental notification regarding a child's asylum petition. See 8 C.F.R. § 208.6(a) and INS Guidelines for Children's Asylum Claims, Exhibit C at 5 n.11 ("It may be in the child's best interest for the Asylum Officer to notify the parents that their child has applied for asylum, provided that the child requests such parental notification in writing.") (emphasis added). This policy, which the INS is choosing not to follow, recognizes that children often seek asylum from the governmental or social system of which their parents are a part and that parents may therefore oppose their child's asylum application.

Third, constitutional rights are individual - the rights at issue here belong to Elian, not to his father. Nor is this a situation where the Court must balance the constitutional rights of a parent with those of his child: Elian's father is not a citizen of the United State nor is he an alien

Supp. 655 (C.D.Cal. 1985) (class of unaccompanied juvenile aliens challenging INS implementation of voluntary departure procedure.)

⁹ For example, the INS Guidelines for Children's Asylum Claims recognize that some child applicants may have a limited ability to count when explaining how many times something happened. Through this, INS clearly contemplates hearing asylum claims for very young children because it is internationally recognized that children learn to count at a very young age, even at an earlier age than six. Exhibit C at 12. Clearly Elian is not "too young" for the INS's normal asylum procedures.

¹⁰ In fact, because a young child may have difficulty expressing his subjective fear of persecution, the INS Guidelines requires the adjudicator to also take into account objective factors regarding the oppressive nature of the system from which the child has come. Exhibit C, INS Guidelines for Children's Asylum Claim at 19 ("Although there are no bright line tests, the UNHCR Handbook suggests that children under the age of 16 may lack the

physically present within United States territory; he therefore has no recognizable rights under the United States Constitution. INS provides no legal authority for the remarkable proposition that an individual (no matter who or where he or she is) without any constitutionally recognized rights can unilaterally extinguish another's protected right to due process. Nor, despite suggestion in the news media, does "international law" compel the INS to grant Juan Miguel such sweeping power over Elian's asylum application.¹¹ The extremity of INS's position becomes even more apparent when, as discussed in Section III(B)(2), the Court realizes that the INS has provided Juan Miguel with more rights than those afforded to similarly situated alien parents who live in the United States and who therefore enjoy a range of constitutional rights that Juan Miguel does not.

Finally, INS has made its "determination" that there is no conflict between Elian's exercise of his constitutional rights and his father's desires based solely on statements from Juan Miguel. Not only has INS's approach denied Elian the opportunity to be heard on the issue, but, by basing a decision on statements from an individual living within and subject to repercussions from the very government from which Elian is seeking asylum, it impermissibly places the cart

maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors.")

¹¹ Significantly, INS has not identified any international treaty or other law that would apply to this case, much less an international "law" that would compel the INS to ignore its well-established asylum procedures or to return a child who has filed an asylum application to a parent in another country. As discussed *supra*, 8 C.F.R. § 208.6(a) and the INS Guidelines for Children's Asylum Claims are explicitly to the contrary. Moreover, Article 14(1) of the Universal Declaration of Human Rights provides, "Everyone has the right to seek and to enjoy in other countries asylum from persecution." Both domestic and international law therefore recognize the inherent right of every person, including defenseless children, to seek asylum. (See Exhibit D at 2.)

Some commentators, however, have incorrectly assumed that the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention") might apply to this case. The United States ratified the Convention in 1986 and enacted enabling legislation titled the International Child Abduction Remedies Act (the "Act"). 42 U.S.C. §§ 11601-10. The Convention does not apply to this situation because Elian was not abducted. But the Court need not reach that issue, as Cuba is not a signatory to the Convention (nor could it be given its systematic human rights violations) and Juan Miguel therefore has no rights under either the Convention or the Act. Mezo v. Elmerawi, 855 F. Supp. 59 (E.D.N.Y. 1994) (Convention and Act apply only to those countries who

before the horse and effectively rejects the merits of Elian's asylum claim without providing him an opportunity for a hearing and adjudication. At a minimum, the INS regulations discussed in section III(B) *infra* give Elian the right to be heard on the merits of his claim and the issues INS has raised relating to Elian's capacity must be determined at a hearing. Moreover, as discussed above, INS regulations and policy recognize that a child may assert a valid asylum claim, irrespective of the wishes of the parent.

II. Elian Gonzalez has the Constitutional Right to Petition for Asylum and to Have the Attorney General and the INS Follow Their Own Rules and Regulations.

There can be no dispute that Elian Gonzalez has a constitutional right to petition for asylum and to receive a hearing on his petition. Aliens physically present in the United States, whether legally admitted or not, are "persons" for the purposes of the Fifth and Fourteenth Amendments to the United States Constitution. See Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886). While aliens seeking admission like Elian (*i.e.*, aliens apprehended prior to entry into the United States and who may be later released or paroled into another's custody) are not entitled to the full range of constitutional protections provided to "resident" aliens, the Eleventh Circuit and its predecessor have repeatedly affirmed all aliens' rights to petition the government for asylum.

In Jean v. Nelson, 727 F.2d 957, 982 (11th Cir. 1984), judgment aff'd, 472 U.S. 846, 105 S.Ct. 2952 (1985), the Eleventh Circuit reaffirmed that the asylum "statute and its accompanying regulations reflect Congress' 'clear intent to grant aliens the right to submit and the opportunity

signed Convention); In re Mohsen, 715 F. Supp. 1063 (D.Wyo. 1989) (parent residing in nonsignatory country could not seek redress under Convention or Act).

to substantiate their claim for asylum."¹² The court went on to state that the INS "is required to comply with applicable statutory provisions and its own regulations and policy statements," *id.* at 982, and that "the existence of this protected right to apply for asylum bars government officials from adopting policies that conflict with the terms of the statute, applicable regulations, and their own announced operating procedures." *Id.* at 983.¹³

III. The Attorney General and the INS Have not Complied With the Statutes, Regulations, and Procedures Governing Asylum Petitions in General and Children's Asylum Petitions in Particular.

A. Defendants Refuse to Give Elian Gonzalez a Hearing on the Merits of his Asylum Petition - the Minimum Amount of Due Process Required by the Procedures Governing All Asylum Petitions.

The statutes and regulations governing all asylum applications are straightforward. Title 8 U.S.C. § 1158 provides that any alien, including those interdicted in international or United States waters, can choose to apply for asylum. An arriving alien who fears return to his home country has the right to apply for three asylum-related forms of relief. First, he has a right to

¹² This right was first recognized by this Circuit in Haitian Refugee Center v. Smith, 676 F.2d 1023, 1039 (5th Cir. Unit B 1982):

... Congress, through a designated agency, chose to ... [create] in the alien the right to submit and substantiate a claim of risk of persecution should he be deported to his country.

We concede that the right we find is but a fragile one. There is no constitutionally protected right to political asylum itself. Although fragile, the right to petition is nevertheless a valuable one to its possessor. By it he may at least send his message and be assured of the ear of the recipient.

While the Court's reasoning in Jean v. Nelson "differs somewhat from that employed by the court in HRC v. Smith," the Court in Jean v. Nelson reaffirmed HRC v. Smith's conclusion that all aliens possess the right to petition the government for asylum. Moreover, as in Jean v. Nelson, the court in HRC v. Smith reprimanded the government for failing to follow its own regulations governing asylum: "... the government violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right unreasonably impossible." *Id.* at 1039.

¹³ The actual decision to grant or deny asylum lies within the Attorney General's discretion, as opposed to the mandatory right that a petitioner has to a hearing. Nonetheless, the right to have the government play by its own rules is so important that it applies to both mandatory actions and discretionary decisions, and "[e]ven when a decision is committed to agency discretion, a court may consider allegations that an agency failed to follow its own binding regulations." Florida Dep't of Business Regulation v. U.S. Dep't of the Interior, 766 F.2d 1248, 1257 n.11 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186 (1986).

request asylum by claiming that he is a "refugee"¹⁴ for whom removal to a particular country may threaten his life or freedom. When an alien proves that he is a "refugee," the Attorney General has discretion to grant him asylum pursuant to 8 U.S.C. §1158. Second, if the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country, the Attorney General may not remove him and must grant "withholding of removal" pursuant to 8 U.S.C. §1231(b)(3)¹⁵. And, third, the arriving alien may pursue relief from removal through the United Nations Convention Against Torture.

The Attorney General and the INS must establish procedures in order to adjudicate asylum applications. See 8 U.S.C. §1158(a) and (d)(1); 8 C.F.R. §208.9, attached as Composite Exhibit E. Moreover, Congress has established certain minimum procedural requirements that the Attorney General and the INS must follow in considering asylum applications, including the right to an initial interview or hearing, the right to a final adjudication on the merits of the application, and the right to an administrative appeal of a decision granting or denying asylum. See 8 U.S.C. §1158(d)(5), attached in Composite Exhibit E. If the applicant is denied asylum, then he or she is referred to an immigration judge for a determination on whether the applicant should be subject to removal. See 8 C.F.R. 208.14(b), attached in Composite Exhibit E. There is no dispute that the Attorney General and the INS have not provided Elian with the interview,

¹⁴ The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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. ... 8 U.S.C. §1101(a)(42).

¹⁵ The alien's protected interest in petitioning for withholding of removal is greater than asylum because withholding is mandatory by statute, as opposed to a discretionary statute, and creates a protectable liberty and property interest with constitutional implications. See Jean v Nelson, 727 F.2d. 957, 981 n.33 (11th Cir. 1984) (en banc).

hearing, and appellate remedies guaranteed to all other asylum applicants by Congress and the INS' own regulations.

B. The INS has Refused to Follow its own Regulations and Policies Governing Children's Asylum Applications.

As already discussed in section I *supra*, the INS has improperly attempted to avoid providing Elian with the constitutionally guaranteed due process available to all asylum applicants. Defendants' position directly contradicts the United States Constitution, Congressional legislation, the INS's regulations, internal guidelines and procedures, and the United States' treaty obligations. The INS's systematic refusal to apply its own regulations and policies is the type of unconstitutional denial of due process that courts have consistently rejected.

1. The INS Guidelines for Children's Asylum Claims Require INS to Recognize Elian Gonzalez's Right to Submit an Independent Application for Asylum.

The INS Guidelines for Children's Asylum Claims, attached as Exhibit C, establish INS policy regarding asylum applications by children. Under the Guidelines, the INS recognizes the ability of and encourages children to apply for political asylum independently of their parents¹⁶, and to this end the INS has implemented child-sensitive procedures to train officers to handle children's asylum claims with sensitivity and special care to interact more meaningfully with the children who may not present testimony with the same degree of precision as adults.

In contravention of its own procedures, the INS now takes the position that Elian lacks the capacity to submit an asylum application. This is ironic, given the fact that the INS Guidelines expressly caution:

The UNHCR¹⁷ Senior Coordinator for Refugee Children has noted that there is a tendency in some countries to think of children simply or only as dependents of adults. The UNHCR believes that "invisibility" is a common problem for refugee children. In recognition of this problem, Asylum Officers should not assume that a child cannot have an asylum claim independent of the parents. When a parent or parents do not appear to have an approvable claim, an Asylum Officer should routinely make an inquiry into the child's case even though the child may be listed merely as a derivative on a parent's application and may not have filed a separate Form I-589 asylum application.

Exhibit C at 15. By summarily refusing to consider Elian's asylum claim, the INS has ignored its own published policies and procedures governing a child's asylum application.

Moreover, the INS' own Guidelines expressly reject its claim in the January 5, 2000, letters that counsel and other individuals cannot represent Elian in connection with his asylum application. The Guidelines state that "the child may be accompanied to the [initial asylum] interview by a support person in addition to an attorney or representative." Exhibit C at 6. The Guidelines further provide that "the special considerations associated with adjudicating a child's claim may require a closer working relationship with the child's representative and support person, if any, to ensure that the child's claim is fully explored." Exhibit C at 17 (emphasis added).

Indeed, INS policy recognizes that, given the fact that children may find it difficult to express the basis for their asylum claims, attorneys or other representatives are crucial components of the child's asylum application. Moreover, the regulations governing affirmative asylum applications, like Elian's, expressly recognize the applicant's right to counsel. 8 C.F.R. § 208.9(b). Although Elian is not currently in deportation or removal proceedings, INS regulations

¹⁶ For example, the Guidelines state that they apply "to children under the age of 18 who apply for asylum independently rather than as a derivative applicant by submitting a Form I-589 asylum application in their own

governing those proceedings in general recognize an individual's right to counsel in that context as well. 8 C.F.R. § 292.1.

2. INS Regulations Recognize a Child's Right to Receive an Adjudication on the Merits of his Asylum Petition Even Where a Parent Objects.

Not only has the INS recognized a child's right to file an independent asylum application with the assistance of counsel, but the INS, in the context of a removal proceeding, has also recognized a child's right to have an adjudication on the merits of the asylum application even when the application may adversely affect the child's parent. Title 8 C.F.R. § 236.3(f) provides:

If a juvenile seeks ... any form of relief from removal [e.g., asylum], where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director or immigration judge before a determination is made as to the merits of the request for relief.

Exhibit F.¹⁶ Even though Juan Miguel is in Cuba, not the United States, Section 236.3(f) is the INS regulation most analogous to the case before the Court. In such cases, the INS has determined that the remedy is not to permit the parent to withdraw the child's application (which, as discussed in section I above, would not withstand constitutional analysis), but instead to allow the parent an opportunity to present his or her views as a factor to be considered regarding the merits of the child's request.

name." Exhibit C at 1.

¹⁷ United Nations High Commissioner on Refugees

¹⁸ Section 236.3(f) applies to any form of relief from removal and is therefore encompasses forms of relief other than merely asylum applications. To the extent that 236.3(f)'s policy of soliciting the parent's views before reaching a decision on the merits, it is in tension with the INS's own regulations and policy that a parent be notified

The irony here is palpable. The INS has granted Juan Miguel - a parent living outside of the United States under the direct influence of the oppressive regime from which Elian seeks asylum and without any rights under our constitution - more authority than that given to a parent living in the United States. While §236.3(f) grants the parent the right to present his or her views at a hearing, it does not deprive Elian of that same right. Rather, the parent's opinion is merely a factor to be weighed in reaching a determination. Those parental views do not trump the legal standard governing a determination of whether the child is entitled to asylum. In this case, however, the INS has refused to even consider Elian's claim on the merits.

In Polovchak v. Meese, 774 F.2d 731 (7th Cir. 1985), the United States Court of Appeals for the Seventh Circuit held that the government violated the due process rights of Russian resident alien's parents by granting asylum to a twelve-year old minor child without affording parents notice and hearing. This holding is consistent with 8 C.F.R. § 236.3(f), which contemplates that petitions for substantive relief for a minor child, which may adversely impact parental interest, should include parental notification. Clearly, however, the regulation and the Seventh Circuit both contemplate a substantive hearing on the merits of the relief requested.¹⁹ In this regard the only due process right that a parent has is to be notified of the substantive hearing so he may be included; he is not afforded the right to unilaterally withdraw his child's right to petition in and of itself.

of a child's asylum application only upon written notification by the child. See 8 C.F.R. 208.9 and INS Guidelines for Children's Asylum Claims at 5 n.11.

¹⁹ In *dicta*, the Court stated that at the age of twelve, the minor was presumably 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. The INS Guidelines on Children's Asylum Claim, however, contemplate that a child of any age may apply for asylum.

3. The INS's Policy Regarding Withdrawal of Application for Admission by Minors Requires the INS to Place Elian in Standard Removal Proceedings.

The INS has taken the position that Elian, via his father in Cuba, has withdrawn his application for admission to the United States. In making this decision, the INS has failed to follow its own policies regarding this issue. Prior to August 21, 1997, unaccompanied minor aliens were subject to expedited removal from the United States. On August 21, 1997, the INS issued Policy Guideline for Unaccompanied Minors Subject to Expedited Removal that "sets forth new policy for ... procedures to be taken when permitting an unaccompanied minor to withdraw an application for admission." Exhibit G at 1. The INS Policy Guideline provides:

When deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human right abuses or where turmoil exists, the minor should be placed in removal proceedings under section 240 of the Act.

Exhibit G at 2 (emphasis added). INS has not made any effort to make this mandatory determination. Instead, INS has decided not to follow its own Policy Guideline and intends, without any procedure whatsoever, to return Elian to the country from which he fled.

Moreover, INS' regulations require that a withdrawal of an application for admission must be made voluntarily. 8 C.F.R. § 235.4 provides:

The Attorney General may, in his or her discretion, permit any alien applicant for admission to withdraw his or her application for admission in lieu of removal proceedings under § 240 of the Act or expedited removal and § 235(b)(1) of the Act. The alien's decision to withdraw his or her application for admission must be made voluntarily...

The mandatory language of the regulation states that an alien's withdrawal must be made voluntarily. INS has made no effort to determine whether Elian voluntarily desires to withdraw his application for admission and return to Cuba.

4. The INS has Refused to Comply with the United Nations Protocol Relating to the Status for Refugees Despite the Fact that Congress Incorporated the Protocol into Domestic Law.

Article 33 of the UN Convention²⁰ contains an absolute prohibition against the return of a person whose life or freedom would be threatened in the country he or she fled. (See Exhibit H.) Elian's mother and stepfather fled Cuba to escape persecution. Elian should not be returned to the country from which they fled and where his freedom will be threatened.

The UN Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva 1979), (hereinafter "Handbook") serves as an important source for interpreting the meaning of terms and procedural matters under our own domestic refugee law. See Chang v. INS, 119 F.3d 1055, 1061-62 (3d. Cir. 1997), INS v. Cardoza - Fonseca, 480 U.S. 421, 437-439 and 439 n.22 (1987). Copies of the relevant portions are attached as Exhibit J. The Handbook provides specific instruction for cases of unaccompanied minors, and for ascertaining the well foundedness of their fear. The Handbook, acknowledges an unaccompanied minor's right to apply for asylum and to

²⁰ The Refugee Act of 1980 conforms domestic law "with our international treaty obligations under the United Nations Protocol Relating to the Status of Refugees which the United States ratified in November 1968, and the United Nations Convention Relating to the Status of Refugees which is incorporated by reference into the United States law through the Protocol." S.Rep. No. 256, 96th Cong., 2nd Sess. 4 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 141, 144. (See Exhibit I.)

be heard when the will of the parents are in doubt²¹ or are in conflict with that of the child. See Handbook paragraphs 213-219. Specially paragraph 219 of the Handbook states:

If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well foundedness of the minors fear on the basis of all known circumstances. . . .

IV. To the Extent that the INS has Exercised Adjudicative Power, the INS has Failed to Provide Elian with the Requirements of Due Process.

In its January 5, 2000 letters, the INS purports to make certain findings "based on the facts and the law.", i.e., that Elian lacks the legal capacity to apply for asylum or admission to the United States, that Juan Miguel Gonzalez "is expressing his true wishes with regard to having Elian returned to Cuba; and that Juan Miguel has the ability to withdraw Elian's asylum application and his application for admission to the United States. The actions taken by the INS certainly purport to be an adjudication of the rights of Elian, Juan Miguel, Lazaro Gonzalez, and the INS itself, albeit an adjudication that purports not to reach the merits of Elian's asylum claim.

Further, in a letter dated January 12, 2000, Attorney General Janet Reno relied on INS' determination that there is no objective basis for a valid asylum claim, and that there was therefore no conflict between Elian and his father. INS made this determination, without affording Elian an opportunity to be heard or to present evidence or witnesses on his behalf, clearly contravening its normal practice and procedure as required by statute and regulation. See January 12, 2000 letter from Attorney General Janet Reno, Exhibit K, p. 4.

The exercise of adjudicative power by an administrative agency like the INS is analogous to the exercise of the judicial power by a court of law in which particular facts are measured

²¹ The will of Elian's mother, who raised Elian is clear. She wanted him to live in the United States. As noted in footnotes 2 and 3 *supra*, the will of Elian's father is in doubt.

against standards of uniform applicability. Adjudication by an administrative agency is distinct from rule making, and due process requires differing procedures when administrative agencies undertake a quasi-judicial role. The Supreme Court recognized this in Goldberg v. Kelly, 397 U.S. 254, 268, 90 S.Ct. 1011, 1020 (1970), when it stated that due process "rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."

Yet in this case the INS has performed an adjudicative action, made findings of fact, and drawn conclusions of law without the benefit of procedures even remotely resembling those of a court or administrative tribunal. Indeed, at no time has the INS referred this matter to a decision-maker that could plausibly be considered neutral or independent. At all times, the INS has acted as law enforcement agent, prosecutor, and judge in this case, finally determining not to consider Elian's petitions to remain in the United States and his family's petition to speak on Elian's behalf.

In the adjudicative setting, the due process rights to notice and a meaningful opportunity to be heard require more procedural protections than Elian Gonzalez and Lazaro Gonzalez have been afforded. As the Supreme Court has written repeatedly,

Although "many controversies have raged about the cryptic and abstract words of the Due Process Clause. . . there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Boddie v. Connecticut, 401 U.S. 371, 377-78, 91 S.Ct. 780, 786 (1971) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656 (1950)).

As discussed in section II *supra*, in the asylum context, the government is, at a minimum, required to provide an applicant with the opportunity to be heard and the expectation that the government will follow its own procedures. Elian Gonzalez has not been afforded those procedures. Instead, INS intends to return Elian to Cuba without a meaningful opportunity to be heard on all the "questions involving his right to be and remain in the United States." Thus Elian stands before this Court facing an imminent deprivation of the due process rights he possesses without the benefit of the hearing before a neutral decision-maker, as well as the other procedural protections attendant to the adjudicative process, to which he is entitled.

V. Issuance of a Temporary Restraining Order, Writ of Mandamus, or Other Form of Injunctive Relief is Appropriate.

In order to grant injunctive relief, Elian Gonzalez must establish that 1) there is substantial likelihood of success on the merits; 2) there is a substantial threat of irreparable injury if the injunction is not granted; 3) the threatened injury outweighs the threatened harm to the respondent; and 4) the granting of the preliminary injunction will not disserve the public interest.

Haitian Refugee Ctr., Inc. v. Baker 949 F.2d 1109 (11th Cir. 1991). Elian meets all four criteria.

A. Elian Gonzalez has Demonstrated a Likelihood of Success on the Merits of his Claim that Defendants have and are Continuing to Violate his Right to Due Process.

As discussed in detail in sections II and III *supra*, Elian has the constitutional right to apply for asylum and to have the government follow its own regulations, policies, and procedures governing his application. The government's obligations to provide Elian due process are mandatory, and there can be no dispute that the government has not provided Elian an adjudication on the merits of his application. Although the INS attempts to sidestep this issue by claiming that Elian does not have the "capacity" to apply for asylum, the INS's position is

contradicted by its own regulations and operating guidelines and procedures. See sections I and III(B) *supra*. Elian Gonzalez has therefore demonstrated the likelihood that he will succeed on the merits of his claim that his due process rights have been violated.²²

Second, Elian Gonzalez will suffer irreparable harm if the INS is permitted to return Elian to Cuba without first adjudicating his claim for political asylum. Once he is removed to Cuba, Elian will have no way to seek remedy for the INS's violation of his due process rights. Elian will certainly not be able to pursue a claim (whether for damages or injunctive relief) to redress the INS's violation of his due process rights. And even if he were able to pursue such a claim and ultimately prevail, there is no possibility that the Cuban government would permit him to return to the United States for a hearing on his asylum claim. Indeed, once removed to Cuba, Elian will not have any due process rights. The loss of something so fundamental as the right to

²² Although this issue is not before the Court, it may be helpful for the Court to understand that Elian also has a substantial likelihood of success on the merits of his asylum claim. The evidence presented at the asylum hearing will prove that Elian and his family have suffered severe persecution. See 8 C.F.R. 208.13(b)(1)(ii). His stepfather was recently twice imprisoned in Cuba, beaten, held incommunicado, and deprived of food. The Communist Party interrogated his mother and her loyalty was questioned. Consequently, she feared being deprived of earning a living, and being able to provide for her son. These actions by the Cuban government drove Elian's mother and stepfather to flee Cuba with Elian, and resulted in Elian witnessing his mother and stepfather's deaths, and the deaths of eight others, at sea. This horrible suffering caused by the Cuban government's actions against Elian's family makes it inhumane for Elian to be returned to Cuba, and the severe persecution he and his family have endured forms a basis for an asylum grant. See Matter of Chen, 20 I&N Dec.16 (BIA 1989), 8 C.F.R. 208.13(b)(1)(ii).

Elian will also be able to demonstrate, through objective evidence and expert testimony, that his fear of returning to Cuba is on account of a political opinion imputed to him by the Cuban government, that there is a reasonable possibility of suffering harm if returned to Cuba, and that he is unwilling to avail himself of the protection of Cuba because of such fear. See 8 C.F.R. 208.13(2). If returned to Cuba, Elian will be politically exploited, and his freedom will be severely restricted. Fidel Castro has already begun the use of Elian as a human propaganda tool. It is undisputed that Elian will be politically indoctrinated to a much larger extent than the average Cuban citizen, and that he will most certainly be taught that his mother and stepfather were traitors to the revolution.

Finally, Elian will introduce evidence from a child psychiatrist and specialist for children suffering post-traumatic distress syndrome that establishes that returning Elian to Cuba will be devastating to him and cause him irreparable psychological harm. These are but some of the facts that demonstrate compelling reasons why Elian has a substantial likelihood of prevailing on the merits of his asylum claim itself.

have a government play fairly - for the first and, if the INS's strategy succeeds, perhaps for the last time in his life²³ - can only be termed irreparable.

The third and fourth elements require balancing the irreparable harm to Elian with any harm to the United States government and any disservice to the public interest. The government cannot allege any harm and cannot show adverse implications to the public interest. Rather, adjudicating a claim using a regulation that is designed and intended to protect refugees who flee persecution can only serve the public interest.

WHEREFORE, Elian Gonzalez respectfully requests that this court issue a preliminary injunction, writ of mandamus, and or other appropriate injunctive relief precluding the Defendants from returning Elian to Cuba and to hold an individualized asylum interview determination in compliance with 8 C.F.R. § 208.2 *et. seq.*, and thereby enjoining Defendants from violating Elian's due process rights. Elian Gonzalez respectfully requests an opportunity to be heard on his application for admission and for asylum in order to prevent irreparable harm. Elian Gonzalez requests the Court accept and maintain continuing jurisdiction of this action, take

²³ As already discussed in footnotes 1, 2, and 21, Elian's human rights will be constantly violated if he is returned to Cuba. He will be immediately processed, brainwashed, desensitized, deprogrammed, and required to make a public showing of revolutionary convictions, zealous allegiance to the revolution and exemplary militancy in the revolution and communism in general. Elian will have to renounce the memory of his dead mother and stepfather. He will be humiliated and the reprisals will be forthcoming if he expresses empathy, solidarity or love for his mother or stepfather.

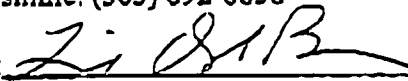
He will have not opportunity to leave Cuba for the rest of his life because he will have been repatriated as a national symbol. He will be constantly monitored, more than other citizens of Cuba, and he will be indoctrinated after he is "deprogrammed" from his journey to freedom in the United States. He will be indoctrinated and given an "education" permeated by a total disregard for human rights and basic freedoms. All his civil and political rights will be violated.

any action deemed fair and just, and award plaintiff the costs of this action, including fair and reasonable attorney's fees as provided in the Equal Access to Justice Act under Title 28 U.S.C. §2412.

Dated this 19th day of January, 2000.

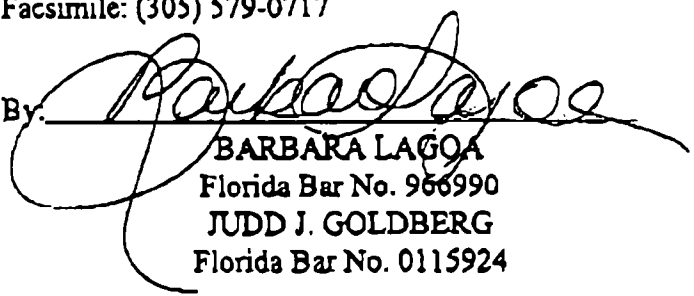
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U.S. Department of State

Cuba Country Report on Human Rights Practices for 1998

Released by the Bureau of Democracy, Human Rights, and Labor, February 26, 1999.

CUBA

Cuba is a totalitarian state controlled by President Fidel Castro, who is Chief of State, Head of Government, First Secretary of the Communist Party, and commander in chief of the armed forces. President Castro exercises control over all aspects of Cuban life through the Communist Party and its affiliated mass organizations, the government bureaucracy, and the state security apparatus. The Communist Party is the only legal political entity, and President Castro personally chooses the membership of the Politburo, the select group that heads the party. There are no contested elections for the 601-member National Assembly of People's Power (ANPP), which meets twice a year for a few days to rubber stamp decisions and policies already decided by the Government. The Party controls all government positions, including judicial offices. The judiciary is completely subordinate to the Government and to the Communist Party.

The Ministry of Interior is the principal organ of state security and totalitarian control. Officers of the Revolutionary Armed Forces (FAR), which are led by President Castro's brother Raul, have been assigned to the majority of key positions in the Ministry of Interior in recent years. In addition to the routine law enforcement functions of regulating migration and controlling the Border Guard and the regular police forces, the Interior Ministry's Department of State Security investigates and actively suppresses opposition and dissent. It maintains a pervasive system of vigilance through undercover agents, informers, the rapid response brigades, and the Committees for the Defense of the Revolution (CDR's). While the Government traditionally used the CDR's to mobilize citizens against dissenters, impose ideological conformity, and root out "counter-revolutionary" behavior, severe economic problems have reduced the Government's ability to reward participation in the CDR's and hence the willingness of citizens to participate in them, thereby lessening the CDR's effectiveness. Other mass organizations also inject government and Communist Party control into citizens' daily activities at home, work, and school. Members of the security forces committed serious human rights abuses.

The Government continued to control all significant means of production and remained the predominant employer, despite permitting some carefully controlled foreign investment in joint ventures with the Government. In most cases, foreign employers are allowed to contract workers only through state agencies, which receive large hard currency payments for the workers' labor but in turn pay the workers a small fraction of this, usually 5 percent, in local currency. In May the Government continued its retractions of changes that had led to the rise of legal nongovernmental business activity when it further tightened restrictions on the self-employed sector by reducing the number of categories allowed and by exacting relatively high taxes on self-employed persons. According to the Government's official press, the number of self-employed persons dropped by almost one-fourth to less than 150,000. The Government admits that the economic growth rate fell to about 1 percent, despite forecasts that it would be some 2.5 to 3.5 percent. The economy remained depressed due to the inefficiencies of the centrally controlled economic system; the collapse of trade with the former Soviet bloc; the loss of billions of dollars of annual Soviet subsidies; the ongoing deterioration of

plant, equipment, and the transportation system; and the continued poor performance of the important sugar sector. The 1997-98 sugar harvest appears to have been the worst in more than 50 years. For the eighth straight year, the Government continued its austerity measures known euphemistically as the "special period in peacetime." Agricultural markets, legalized in 1994, gave consumers wider access to meat and produce, although at prices beyond the reach of most citizens living on peso-only incomes or pensions. Given these conditions, the flow of hundreds of millions of dollars in remittances from the exile community significantly helps those who receive dollars to survive. Tourism remained a key source of revenue for the Government. The system of "tourist apartheid" continued, with foreign visitors who pay in hard currency receiving preference over citizens for food, consumer products, and medical services. Citizens remain barred from tourist hotels, beaches, and resorts.

The Government's human rights record remained poor. It continued systematically to violate fundamental civil and political rights of its citizens. Citizens do not have the right to change their government peacefully. There were several credible reports of death due to excessive use of force by the police. Members of the security forces and prison officials continued to beat and otherwise abuse detainees and prisoners. The Government failed to prosecute or sanction adequately members of the security forces and prison guards who committed such abuses. Prison conditions remained harsh. The authorities routinely continued to harass, threaten, arbitrarily arrest, detain, imprison, and defame human rights advocates and members of independent professional associations, including journalists, economists, doctors, and lawyers, often with the goal of coercing them into leaving the country. The Government used internal and external exile against such persons, and political prisoners were offered the choice of exile or continued imprisonment. The Government denied political dissidents and human rights advocates due process and subjected them to unfair trials. The Government infringed on citizens' rights to privacy. The Government denied citizens the freedoms of speech, press, assembly, and association. It limited the distribution of foreign publications and news to selected party faithful and maintained strict censorship of news and information to the public. The Government restricts some religious activities but permits others. It allowed a visit by Pope John Paul II, permitted some public processions on feast days, and reinstated Christmas as an official holiday, but has not responded to the Papal appeal that the Church be allowed to play a greater role in Cuban society. In November the Government allowed some new priests and religious workers to enter the country, but the applications of many other priests and religious workers remained pending. The Government kept tight restrictions on freedom of movement, including foreign travel. The Government was sharply and publicly antagonistic to all criticism of its human rights practices and sought to discourage and thwart foreign contacts with human rights activists. Racial discrimination often occurs. The Government severely restricted worker rights, including the right to form independent unions. The Government employs forced labor, including that by children.

RESPECT FOR HUMAN RIGHTS

Section 1 Respect for the Integrity of the Person, Including Freedom From:

a. Political and Other Extrajudicial Killing

There were no reports of politically motivated killings. However, there were several credible reports of deaths due to the excessive use of force by the national police; government sanctions against perpetrators were nonexistent or light.

On March 30, police detained Wilfredo Martinez Perez, a member of a human rights organization, for disorderly conduct at a public festival near his home in Havana. Martinez's body was delivered to a funeral home in Guines the next day where his family and other witnesses claimed that his body showed contusions and bruises, which suggested that he died as a result of a beating while in police custody. Human rights groups did not attach a political motive to the death, but as of year's end there were no reports of an investigation into the matter.

On May 26, police engaged in a foot chase of a suspect entered the home of Yuset Ochotereno in Havana and mistakenly shot and killed him. At his funeral 2 days later in central Havana's Plaza of the Revolution, over 1,000 persons participated in a spontaneous demonstration against police excesses. At year's end, there were no reports that the shooting had been investigated properly.

Human Rights Watch reported that on June 30 Havana police arrested Reinery Marrera Toledo on a charge of accessory to illegal sacrifice of livestock. On July 9, the authorities told his family that he had committed suicide by hanging himself with a sheet. However, a family member who viewed the body noted heavy bruising, raising questions about the police account of Marrera's death.

In October 1996, the Inter-American Commission on Human Rights (IACHR) issued its final report on the Government's July 13, 1994, sinking of the "13th of March" tugboat, which killed 41 persons, including women and children. The IACHR concluded that the Government violated the American Declaration on the Rights and Duties of Man and found the Government legally obligated to indemnify the survivors and the relatives of the victims for the damages caused. At year's end, the Government had not done so. The Government actively sought to intimidate family members and human rights activists to prevent them from commemorating the killings (see Section 2.b.).

There were no developments in the case of El Salvadoran citizen Raul Ernesto Cruz Leon, who was arrested in September 1997 and charged with being the "material author" of the killing of an Italian tourist that month with a bomb, one of a series of explosions in Havana. Four other suspects remained in custody; no trials had been scheduled as of year's end.

b. Disappearance

There were no reports of politically motivated disappearances.

c. Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Constitution prohibits abusive treatment of detainees and prisoners; however, there were instances in which members of the security forces beat and otherwise abused human rights advocates, detainees, and prisoners. There have been numerous reports of disproportionate police harassment of black youths (see Section 5).

In April guards reportedly beat Fidel Basulto Garcia, a prisoner at the Combinado del Este prison outside Havana, because he refused to give them a ring he was wearing. In the same month, inmates convicted of common crimes at a prison in Sancti Spiritus beat political prisoner Adiane Jordan Contreras, reportedly at the instigation of prison officials who had been unable to force Jordan to shout progovernment slogans.

On April 16, a prison guard and one of the prison's state security officers beat independent journalist Bernardo Arevalo Padron, who was jailed at Ariza prison in Cienfuegos. Although the authorities reportedly forced the prison guard to retire, they only transferred the state security officer to similar duties at another prison after a brief suspension.

On June 5, authorities at Combinado de Guantanamo prison severely beat political prisoner Nestor Rodriguez Lobaina, president of the Youth for Democracy movement. The authorities then aggressively harassed Rolando Mazo Perez, an inmate who witnessed the beating, to intimidate Mazo and prevent him from providing testimony about the incident. Human rights monitors reported that the pressure on Mazo caused him to attempt suicide on June 25. A month later, a large group of prison guards again reportedly beat Rodriguez and another prisoner, Francisco Diaz, who tried to help Rodriguez. In November the authorities released Rodriguez from prison; in December he requested an exit permit to attend a ceremony in Paris but they ignored his request (see Section 2.d.).

When Rodriguez attempted to stage a hunger strike outside the Foreign Ministry, the authorities detained him and his father, who was accompanying him. They forcibly returned Rodriguez to Santiago de Cuba under guard and warned him not to return to Havana.

State security officials on two separate occasions told the elderly, pensioned mother of political prisoner Jesus Chamber Ramirez to travel 700 miles from her home in Santiago de Cuba to Havana because, they claimed, her son was being taken to a diplomatic mission to process his departure from the country. Chamber was not brought to Havana; the ploy was a state security ruse to bring pressure on Chamber by making his mother undertake the expensive and arduous journey. Chamber, who was sentenced to 10 years in prison for "enemy propaganda" and "disrespect for government authority," regularly was denied family visits because of his insistence on treatment as a political rather than a common prisoner. Chamber held numerous hunger strikes of short duration to protest poor prison conditions. Human rights activists reported that while in prison, he continued to be beaten and punished for demanding better treatment. On November 20, the authorities released Chamber and another political prisoner at the request of the Spanish Foreign Minister, on the condition that both men leave the country for Spain (see Section 1.d.).

According to eyewitnesses, on November 27 special brigade riot police repeatedly punched and kicked a number of prodemocracy advocates, including Milagros Cruz, who is blind. Those assaulted were participating in a demonstration outside Havana's provincial courthouse in support of independent journalist Mario Viera. Viera was scheduled to go on trial that day for allegedly defaming a government official (see Section 2.a.). Police moved against the dissidents after a group of about 100 progovernment rapid response brigade members appeared on the scene and began to taunt, shove, and hit the somewhat smaller group of Viera supporters (see Section 2.b.). In Havana police chased, beat, and detained 10 activists outside a church (see Section 2.c.).

The Government continued to subject those who disagree with it to "acts of repudiation." At government instigation, members of state-controlled mass organizations, fellow workers, or neighbors of intended victims are obliged to stage public protests against those who dissent with the Government's policies, shouting obscenities and often causing damage to the homes and property of those targeted; physical attacks on the victims sometimes occur. Police and state security agents are often present but take no action to prevent or end the attacks. Those who refuse to participate in these actions face disciplinary action, including loss of employment.

On September 18, local CDR, state security, and Communist Party officials staged an act of repudiation outside the home of Miriam Garcia Chavez, president of the independent teachers association in Havana. Some 60 primary school students in school uniform were compelled to line up and join adult leaders in chants of "Viva la revolucion" and "Viva Fidel," as well as other chants that disparaged prodemocracy activists for half an hour during a rainstorm. On the same day, insulting leaflets were thrown in front of the home of Dr. Augustin Madrigal, leader of an independent medical association. In the days following these incidents, garbage was piled outside the home of independent labor activist Jose Orlando Bridon, which also was painted with graffiti.

On October 2, Communist Party, local government, and state security personnel staged an act of repudiation against the family of independent journalist Manuel Antonio Gonzalez in San German, Holguin province. This action followed Gonzalez's detention on October 1 at a local police station on charges of disrespect for allegedly insulting Fidel Castro. On October 2, Gonzalez family members, reportedly angered by the treatment they received when they inquired at the police station about Gonzalez's situation, wrote antigovernment graffiti on their home. Local party and government officials then assembled workers from two local enterprises, as well as primary and secondary students from nearby schools, at the Gonzalez house and led the crowd in chanting insults and progovernment slogans. According to eyewitnesses, men in plainclothes battered in the door and beat several of the persons inside. The police arrested four of the victims, while officials ordered the crowd to paint over the graffiti. Human rights activists characterized the attack as the largest and most violent such incident in over 10 years.

Prison conditions continued to be harsh, and conditions in detention facilities also are harsh. The Government claims that prisoners have rights, such as family visitation, adequate nutrition, pay for work, the right to request parole, and the right to petition the prison director. However, police and prison officials often denied these rights and used beatings, neglect, isolation, and denial of medical attention against detainees and prisoners, including those convicted of political crimes or those who persisted in expressing their views. There are separate prison facilities for women and for minors.

Prison officials regularly denied prisoners other rights, such as the right of correspondence, and continued to confiscate medications and food brought by family members for political prisoners. State security officials in Havana's Villa Marista facility took medications brought by family members for inmates and then refused to give the detainees the medicine, despite repeated assurances that they would. Prison authorities also routinely denied religious workers access to detainees and prisoners.

The rights to adequate nutrition and medical attention while in prison also were violated regularly. In 1997 the IACHR described the nutritional and hygienic situation in the prisons, together with the deficiencies in medical care, as "alarming." Both the IACHR and the former U.N. Special Rapporteur on Cuba, as well as other human rights monitoring organizations, reported the widespread incidence in prisons of tuberculosis, scabies, hepatitis, parasitic infections, and malnutrition.

Prison guards and state security officials also subjected human rights and prodemocracy activists to threats of physical violence; systematic psychological intimidation; and with detention or imprisonment in cells with common and violent criminals, aggressive homosexuals, or state security agents posing as prisoners. Political prisoners are required to comply with the rules for common criminals and often are punished severely if they refuse. Detainees and prisoners often are subjected to repeated, vigorous interrogations designed to coerce them into signing incriminating statements, to force collaboration with authorities, or to intimidate victims.

The four members of the internal dissident working group (economist Martha Beatriz Roque, economist and former military officer Vladimiro Roca, professor Felix Bonne, and lawyer Renee Gomez Munzano) were allowed access to a priest only after frequent requests and letters to prison, civil, and religious authorities. Roca's request for baptism was granted only after direct appeals to Cuban Cardinal Jaime Ortega and the Vatican. The authorities in Manto Negro women's prison placed Roque in a cell with other prisoners convicted of violent crimes. These inmates, in collusion with the authorities, repeatedly threatened Roque with violence and sought to provoke her. After nearly a year of requesting medical attention, Roque was transferred temporarily in July to the Carlos Finlay hospital for examination and treatment, but was placed in a room with a suicide-prone, mentally disturbed, convicted prisoner. Prison authorities also encouraged other prisoners to threaten Roque with violence.

On May 25, political prisoner Jorge Luis Garcia Perez, also known as "Antunez," reportedly began a 23-day hunger strike at the Guantanamo provincial prison to press his demands for medical attention and access to religious counsel as well as a transfer to a prison closer to his family in Villa Clara, over 300 miles away. Garcia Perez ended the strike after prison officials agreed to allow a priest to visit him. In October the authorities transferred Garcia Perez to the Nieves Morejon prison in Sancti Spiritus province. While this prison is closer to his family, the authorities at the new prison continued to harass him severely and also beat him. In 1995 Garcia Perez had founded the Pedro Luis Boitel political prisoner organization, named for a political prisoner who died as a result of a hunger strike in 1972.

In Cienfuegos prison, the authorities repeatedly refused to allow priests access to political prisoners, such as Benito Fojaco, even though the priests occasionally were allowed to enter the prison.

The Government does not permit independent monitoring of prison conditions by international or

national human rights monitoring groups. The Government has refused prison visits by the International Commission of the Red Cross since 1989 and continued to refuse requests to renew such visits. Nonetheless, human rights activists continued to seek information on conditions inside jails despite the risks to themselves and to their prison sources. There were reports of a confidential visit to prisons by a delegation from the Latin American Parliament in September. One detainee reported being moved from cell to cell during the visit, apparently in order to keep the detainee from speaking with the visitors.

d. Arbitrary Arrest, Detention, or Exile

Arbitrary arrest and detention continued to be problems. The Law of Penal Procedures requires police to file formal charges and either release a detainee or bring the case before a prosecutor within 96 hours of arrest. It also requires the authorities to provide suspects with access to a lawyer within 7 days of arrest. However, the Constitution states that all legally recognized civil liberties can be denied to anyone who actively opposes the "decision of the Cuban people to build socialism." The authorities invoke this sweeping authority to deny due process to those detained on purported state security grounds.

The authorities routinely engage in arbitrary arrest and detention of human rights advocates, subjecting them to interrogations, threats, and degrading treatment and conditions for hours or days at a time.

In June state security agents detained human rights activist Juan Francisco Fernandez Gomez and held him for 57 days (see Section 1.f.). On October 1, police detained independent journalist Manuel Antonio Gonzales on charges of disrespect for allegedly insulting Fidel Castro. His family was subjected to a violent act of repudiation (see Section 1.c.).

The Government also arbitrarily arrested and detained independent journalists (see Section 2.a.) and demonstrators. In April the authorities temporarily detained the president of an independent farmers' association (see Section 2.b.). The Government also placed under preventive detention activists who attempted to celebrate religious events (see Section 2.c.).

The four members of the internal dissident working group remained detained without trial since July 1997, when they were arrested for expressing peacefully their disagreement with the Government. In September prosecutors issued their provisional conclusions in the State's 14-month investigation of the four dissidents, and recommended that they be charged with "other acts against the security of the State in relation to the crime of sedition." They recommended sentences of 6 years for Roca and 5 years for Roque, Gomez Manzano, and Bonne. In 1997 the group had sought support from the international community for its concept of peaceful dissent from the Government's policies. It publicly distributed a paper, "The Homeland Belongs to All," which presented a moderate response to the platform released by the Communist Party for its Fifth Party Congress. The working group also made a public appeal to citizens to abstain from participating in national elections. It is legal for Cubans to refrain from voting.

The Penal Code includes the concept of "dangerousness," defined as the "special proclivity of a person to commit crimes, demonstrated by his conduct in manifest contradiction of socialist norms." If the police decide that a person exhibits signs of dangerousness, they may bring the offender before a court or subject him to "therapy" or "political reeducation." Government authorities regularly threaten prosecution under this article. Both the United Nations Human Rights Commission (UNHRC) and the IACHR have criticized this concept for its subjectivity, the summary nature of the judicial proceedings employed, the lack of legal safeguards, and the political considerations behind its application. According to the IACHR, "the special inclination to commit crimes referred to in the Cuban Criminal Code amounts to a subjective criterion used by the Government to justify violations of the rights to individual freedom and due process of persons whose sole crime has been an inclination to hold a view different from the official view." In December a Havana municipal court

lawyer. The authorities regularly deny defendants access to their lawyers until the day of the trial. Several dissidents who have served prison terms reported that they were tried and sentenced without counsel and were not allowed to speak on their own behalf. Amnesty International has concluded that "trials in all cases fall far short of international standards for a fair trial."

The law provides the accused with the right to an attorney, but the control that the Government exerts over the livelihood of members of the state-controlled lawyers collectives--especially when they defend persons accused of state security crimes--compromises their ability to represent clients. Attorneys have reported reluctance to defend those charged in political cases due to fear of jeopardizing their own careers.

Human rights monitoring groups inside the country estimate that the number of political prisoners in Havana stands at 350 to 400 persons. The authorities have imprisoned such persons on charges such as disseminating enemy propaganda, illicit association, contempt for the authorities (usually for criticizing Fidel Castro), clandestine printing, or the broad charge of rebellion, often brought against advocates of peaceful democratic change. Other estimates by human rights activists inside and outside the country put the number as high as 1,600 persons. Among those convicted on political charges were independent journalist and prodemocracy activist Reinaldo Alfaro Garcia on August 28 for "dissemination of false news;" Democratic Solidarity Party (PSD) vice delegate Cecilio Monteagudo Sanchez on February 13 for enemy propaganda; independent journalist Juan Carlos Recio Martinez, also on February 13, for failing to denounce Monteagudo to the authorities; and Julio Cesar Coizeau Rizo, member of the Geraldo Gonzalez Ex-Political Prisoners Club, for disrespect (see Section 2.a.). Also, in March a Cienfuegos court convicted five members of the Pro Human Rights Party of Cuba--Israel Garcia Hidalgo, Benito Fojaca Iser, Angel Nicolas Gonzalo, Jose Ramon Lopez Filgueira, and Reynaldo Sardinas Delgado--of "other acts against state security." Garcia and Fojaca each were sentenced to two years in prison, Filgueira to 1 year, and Gonzalo and Sardinas to 1 year in a labor camp. In December dissident Lazaro Constantin was sentenced for dangerousness and public disorder (see Section 1.d.).

In 1997, the Government tried and sentenced a group of human rights activists who had held a prolonged fast to protest the jailing of Daula Carpio Matas. The court handed out sentences ranging from 18 months in prison to 1 year of house arrest. Daula Carpio, Ileana Penalver, and Lilian Meneses were serving terms in Guajamal women's prison and reported continued health problems associated with their prolonged fast and also constant harassment from inmates acting on behalf of the prison authorities. Ivan Lemas was held at the Pre prison in Santa Clara where he also reported being harassed by inmates. Prison authorities reportedly moved him from the hospital ward where he was being treated for inflammation of internal organs before his medical condition had been fully treated. Jose Antonio Alvarada was in Guajamal men's prison, where he claimed that he had been subjected to blackmail attempts and attempts to suggest that he is a homosexual. Jose Manuel Yera was held at the Pendiente prison in Santa Clara and also claimed harassment for his dissident views by prison inmates and officials. Rosana Carpio was sentenced to 18 months in jail but placed under house arrest because she was pregnant.

The number of political prisoners fell in 1998, particularly after the release of 99 of these prisoners beginning in February as part of the Government's response to an appeal by Pope John Paul II for clemency. The Government, in a rare public statement following the Pope's visit, implicitly admitted that Cuba held political prisoners, saying that there were 70 counterrevolutionary prisoners that it would never release. The Government also would not release some 19 prisoners unless they went into exile; 17 were accepted by Canada (see Section 1.d.). On November 20, the Government released Jesus Chamber Ramirez, who was serving a 10-year sentence for enemy propaganda and disrespect against authority, and Dr. Dessy Mendoza, who received an 8-year sentence in 1997 for enemy propaganda, after an appeal on their behalf by the Spanish Government. The authorities effectively conditioned the release of Chamber and Mendoza on their departure from the country, and by year's end both had left for Spain.

f. Arbitrary Interference With Privacy, Family, Home, or Correspondence

Although the Constitution provides for the inviolability of a citizen's home and correspondence, official surveillance of private and family affairs by government-controlled mass organizations, such as the CDR's, remains one of the most pervasive and repressive features of Cuban life. The State has assumed the right to interfere in the lives of citizens, even those who do not actively oppose the Government and its practices. The mass organizations' ostensible purpose is to "improve the citizenry," but in fact their goal is to discover and discourage nonconformity. Citizen participation in these mass organizations has declined; the economic crisis has both reduced the Government's ability to provide material incentives for their participation and forced many persons to engage in black market activities, which the mass organizations are supposed to report to the authorities.

The authorities utilize a wide range of social controls. The Interior Ministry employs an intricate system of informants and block committees (the CDR's) to monitor and control public opinion. While less capable than in the past, CDR's continue to report on suspicious activity, including conspicuous consumption; unauthorized meetings, including those with foreigners; and defiant attitudes toward the Government and the revolution.

The Department of State Security often reads international correspondence and monitors overseas telephone calls and conversations with foreigners. The Government controls all access to the Internet, and all electronic mail messages are subject to censorship. Citizens do not have the right to receive publications from abroad, although newsstands in foreigners-only hotels and outside certain hard currency stores sell foreign newspapers and magazines. The Government continued to jam the U.S.-operated Radio Marti and Television Marti. Radio Marti broadcasts generally overcame the jamming attempts on shortwave bands, but its medium wave transmissions are blocked completely in Havana. The Government generally succeeded in jamming Television Marti transmissions. Security agents subjected dissidents, foreign diplomats, and journalists to harassment and surveillance, including electronic surveillance.

On June 10, state security agents detained veteran human rights activist Juan Francisco Fernandez Gomez at his home in Villa Clara and held him without charges for 57 days at the state security facility of Villa Marista in Havana after he received an overseas telephone call. They also questioned the 63-year-old activist about persons with whom he met during an earlier trip to the United States. At year's end, Fernandez was under house arrest pending further investigations.

The authorities regularly search people and their homes, without probable cause, to intimidate and harass them. State security agents searched the homes of hundreds of human rights advocates and independent journalists, seizing typewriters, personal and organizational documents, books, and foreign newspapers. The authorities harass and target acts of repudiation at both dissidents and their family members. At times those taking part in such acts of repudiation invade and damage homes, as well as physically attack occupants (see Section 1.c.). Friends and relatives of independent journalists also are subjected to harassment (see Sections 1.c. and 2.a.).

The authorities regularly detained human rights advocates after they visited foreign diplomatic missions, confiscated their written reports of human rights abuses, and seized copies of foreign newspapers and other informational material, including copies of the Universal Declaration of Human Rights (UDHR). In September antiabortion activist Dr. Elias Biscet was harassed during a Mass in Havana and briefly detained by state security personnel, who confiscated copies of the UDHR he had been carrying. Also in September, independent journalist Efren Martinez was evicted from his rented rooms (see Section 2.a.).

There were numerous credible reports of forced evictions of squatters and residents who lacked official permission to reside in Havana (see Section 5).

Section 2 Respect for Civil Liberties, Including:

a. Freedom of Speech and Press

The Government does not allow criticism of the revolution or its leaders. Laws against antigovernment propaganda, graffiti, and disrespect of officials carry penalties of from 3 months to 1 year in prison. If President Castro or members of the National Assembly or Council of State are the objects of criticism, the sentence can be extended to 3 years. Charges of disseminating enemy propaganda (which includes merely expressing opinions at odds with those of the Government) can bring sentences of up to 14 years. Local CDR's inhibit freedom of speech by monitoring and reporting dissent or criticism. Police and state security officials regularly harassed, threatened, and otherwise abused human rights advocates in public and private as a means of intimidation and control.

On February 13, a Santa Clara court sentenced Cecilio Monteagudo Sanchez, a PSD vice delegate, to 4 years' imprisonment for dissemination of enemy propaganda. Monteagudo was prosecuted for writing a document calling on citizens to abstain from voting. The court also sentenced Juan Carlos Recio Martinez, an independent journalist with the Cuba Press Agency who had been asked to type the document, to 1 year in a labor camp for failing to denounce Monteagudo. Recio unsuccessfully appealed the sentence. On April 24, a Santiago court found Julio Cesar Coizeau Rizo, a member of the Geraldo Gonzalez ex-Political Prisoners Club, guilty of disrespect for authority for posting antigovernment flyers and sentenced him to 3 years' imprisonment.

The Constitution states that print and electronic media are state property and "cannot become in any case private property." The Communist Party controls all media--except a few small church-run publications that nevertheless are watched closely and denied access to mass printing equipment--as a means to indoctrinate the public. All media must operate under party guidelines and reflect government views. The Government attempts to shape media coverage to such a degree that it not only exerted increased pressure on domestic journalists, but also sought to pressure groups nominally outside the official realm of control, such as visiting international correspondents.

The Inter-American Press Association (IAPA) reported that the Government denied visas to about 80 foreign newsmen before the Pope's visit on the grounds that they earlier had been critical of the Government in their news coverage. A foreign freelance journalist who met with two independent journalists in their home in Santiago de Cuba was warned against contact with his hosts, who state security agents claimed were "terrorists" and "murderers." Security officials then visited his hosts, Mirna Riveron and Manuel del Rio, told them that the reporter was an intelligence agent, and warned them that they could be put in jail for 20 years for talking to him. Foreign journalists claimed that surveillance by the Government has become more intense and overt outside of Havana.

On December 10 in a Havana park, members of a group of Communist Party supporters grabbed the camera of a foreign journalist and destroyed it. The journalist was among foreign camera crews that had arrived at the park and tried to interview an unidentified dissident who was trying to commemorate the Fiftieth Anniversary of the Universal Declaration of Human Rights. The dissident then was assaulted and dragged away by the party supporters (see Section 2.b.). State security officers moved in to stop the party supporters from attacking the journalist further. The crowd then surrounded the other photojournalists and insisted on being filmed chanting slogans in support of President Castro and against the foreign media presence.

The Government continued to jam the U.S.-operated Radio Marti and Television Marti (see Section 1.f.).

On November 13, the Associated Press announced that the Government had authorized it to open a bureau in Havana.

The temporary suspensions of official media representatives highlighted the difficult ideological

tightrope that government reporters and editors must walk. According to the IAPA, newscaster Raquel Mayedo and his crew on the show "Contacto" were sanctioned in February for "actions contrary to revolutionary principles." Local independent journalists reported that in June, television journalist Guillermo Morales of Havana City Television reportedly was given a 15-day suspension and forced to recant publicly before his fellow workers on-air criticisms that he made of President Castro.

The Government continued to subject independent journalists to internal travel bans, arbitrary and periodic (overnight or longer) detentions, acts of repudiation (see Section 1.c.), harassment of friends and relatives, seizures of written manuals, computers, office and photographic equipment, and repeated threats of prolonged imprisonment. Several independent journalists were expelled from the country or harassed during the first half of the year, while there nevertheless was general talk of a lull in harassment after the Pope's visit in January. This came to an abrupt end with the sentencing of Reinaldo Alfaro Garcia in August, and the detentions of many independent journalists, along with dissidents, that followed (see Section 1.d.). The independent journalists appeared to be a particular focus of Government repression.

On August 28, the State sentenced independent journalist and prodemocracy activist Reinaldo Alfaro Garcia to 3 years in prison for "dissemination of false news against international peace." The Government alleged that Alfaro had misreported stories regarding the suspicious death of a soldier in 1994 and a separate incident involving the beating of a woman by authorities. With the exception of Alfaro's immediate family, neither international journalists, foreign diplomats, nor members of the public were allowed into the courtroom, which the Government had packed with its own personnel. Alfaro had been held for 16 months prior to the 5-hour trial. At the end of the trial, Alfaro's family members were asked to leave the courtroom and were told that they could wait to see him leave for prison at a side door to the courthouse. State security personnel then spirited Alfaro out another door and deliberately drove him in a car behind where his family was standing. On discovering the Government's effort to deceive the Alfaro family, some 40 prodemocracy activists chased after the vehicle and staged an impromptu public demonstration to protest the situation. The Government later attempted to blame the disturbance on agitation by a foreign diplomat, despite the presence of other diplomats and journalists who witnessed the incident.

Journalists Maria de los Angeles Gonzalez and Luis Lopez Prendes were detained in September, ostensibly to prevent them from starting a demonstration at the procession of the Virgin of Charity on September 8 in Havana. The authorities detained Juan Antonio Sanchez in Havana in connection with the same event and took him to Pinar del Rio province where they held him for 6 days. Raul Rivero's telephone service was cut after he was named Cuban vice-president of the IAPA Committee on Freedom of the Press. State security officials threatened Lopez Prendes with detention because of an article he wrote on corruption of the local government in the Havana municipality of Guanabo; Lopez Prendes' photographer was beaten in his own front yard, reportedly by a state security member, and his camera was taken.

Independent journalist Mario Viera was scheduled to go on trial on November 27 for allegedly defaming Jose Dionisio Peraza Chapeau, head of the Ministry of Foreign Affairs Legal Department, in a commentary Viera wrote that appeared on the Internet in June. The court was asked to sentence Viera to 1 year in prison for defamation and an additional 6 months for refusing to retract his article. However, following a disturbance outside the court building in which progovernment rapid response brigade members assaulted a group of prodemocracy activists who had gathered to show support for Viera (see Sections 1.b. and 2.b.), the trial was postponed until further notice.

Family members have been the object of harassment by state security agents when pressure on independent journalists has not been successful in making them abandon their work or leave the country. Manzanillo journalist Mirta Leyva accepted refugee status from Spain and departed with her family in September, after her husband was jailed and lost his job. This occurred after stones and animal blood had been thrown at their house for months at night, which began to have a serious, noticeable effect on the health and well-being of her two small children. Journalist Isaura Ortega has

been fighting battles in court against her former husband for custody of her 5-year-old son; her ex-husband charged that her antirevolutionary articles proved that she is insane.

In October the family of independent journalist Manuel Antonio Gonzalez was the target of an act of repudiation staged by local authorities in San German, Holguin province (see Section 1.c.).

In September independent journalist Efrén Martínez Pulgarón was evicted from his rented rooms after his landlord was approached by state security members. Several subsequent attempts to find a rental home for himself and his elderly mother were unsuccessful, again, after security service personnel visited the would-be landlords.

Amnesty International, Human Rights Watch, IAPA, Reporters without Borders, and the Committee to Protect Journalists repeatedly called international attention to the Government's continued practice of detaining independent journalists and others simply for exercising their right to free speech.

The Government rigorously monitored other forms of expression and often arrested persons for the crimes of disseminating enemy propaganda and false news. In the Government's view, enemy propaganda includes materials such as the Universal Declaration of Human Rights, international reports of human rights violations, and mainstream foreign newspapers and magazines.

The Government prohibits all diplomatic missions in Havana from printing or distributing publications, particularly newspapers and newspaper clippings, unless those publications deal exclusively with conditions in the mission's home country and receive prior government approval. Many missions do not accept the validity of this requirement, but the Government's threats to expel embassy officers who provide published materials to Cubans have had a chilling effect on many missions.

In 1996, the Government passed the "Cuban Dignity and Sovereignty Law," which proscribes citizens from providing any information to any representatives of the U.S. Government, or seeking any information from them, that might be used directly or indirectly in the application of U.S. legislation. This includes accepting or distributing any publications, documents, or other material, from any origin, which the authorities might interpret as facilitating implementation of such legislation. Although no one has been charged with violating this law, it has raised concern among many independent journalists.

Distribution of information continues to be tightly controlled. During the Pope's visit, the Church's ability to distribute even approved information pamphlets was constricted by its lack of access to printing presses. Access to the Internet largely is limited to certain government offices and foreigners. A few citizens can maintain accounts to some limited electronic message services, strictly controlled by the Interior Ministry.

The Government circumscribes artistic, literary, and academic freedoms, and repeatedly has emphasized the importance of reinforcing revolutionary ideology and discipline over any freedom of expression. The educational system teaches that the State's interests have precedence over all other commitments. Academics and other government officials are prohibited from meeting with some diplomats in Havana without prior approval from the Ministry of Foreign Affairs. The Ministry of Education requires teachers to evaluate students' ideological character and that of the students' parents, and note it in records that students carry throughout their schooling. These reports directly affect the students' future educational and career prospects. As a matter of policy, the Government demands that teaching materials for courses such as mathematics or literature have an ideological content.

Government efforts to undermine dissidents included denying them advanced education and professional opportunities. Officials at the University of Havana expelled prodemocracy activist Leonardo Ramon Calvo in June for "holding political ideas different from those of the State." Calvo

was expelled in accordance with the 1984 Disciplinary Regulations for Students in Higher Education, which allow for a student to be expelled for "very serious violations, including 'maintaining an attitude manifestly contrary to our revolutionary process.'" The same measure was used to expel another student for not voting in national elections (see Section 3.). President Castro has stated publicly that the universities are available only for those who share his revolutionary beliefs.

b. Freedom of Peaceful Assembly and Association

Although the Constitution grants limited rights of assembly and association, these rights are subject to the requirement that they may not be "exercised against the existence and objectives of the socialist State." The law punishes any unauthorized assembly of more than three persons, including those for private religious services in a private home, by up to 3 months in prison and a fine. The authorities selectively enforce this prohibition and often use it as a legal pretext to harass and imprison human rights advocates.

The Government selectively continued to authorize the Catholic Church to hold outdoor processions at specific locations on important feast days during the year. It also authorized other denominations to hold a few public events. The Seventh Day Adventists held a mass baptism in February and the Eastern Baptist Convention was permitted to rent a government-owned theater for an annual meeting (see Section 2.c.). However, requests for other processions and events were routinely and arbitrarily denied. The Government permitted a procession in connection with masses in celebration of the feast day on September 8 of Our Lady of Charity in Havana for the first time in more than 3 decades.

On February 8, officials detained 10 members of the Martiana Civic League outside a church following Mass when they attempted to walk to the Havana waterfront to commemorate the victims of the February 24, 1996 shootdown of 2 civilian aircraft over international airspace by the Cuban air force. The 10 were harassed, threatened, and subsequently released. On November 27, approximately 100 progovernment rapid response brigade members provoked and then assaulted a slightly smaller group of prodemocracy activists who had assembled peacefully outside Havana's provincial tribunal building to show support for independent journalist Mario Viera (see Section 2.a.). The progovernment group began taunting and shoving Viera supporters as well as some foreign journalists who were present to cover Viera's scheduled trial. As the confrontation escalated, riot police moved against the Viera supporters, in some cases beating and kicking them (see Section 1.c.). Dissidents reported that at least seven persons were arrested.

The authorities have never approved a public meeting by a human rights group. The Government briefly detained about a dozen prodemocracy activists in different parts of the country in order to prevent public events that marked the anniversary of the Universal Declaration of Human Rights. Human rights monitors reported that in December, state security officers went to the homes of at least 10 dissidents known to have participated in previous public demonstrations and warned them against taking part in any public events on December 10 to mark the 50th anniversary of the UDHR. In Havana officials threatened dissidents planning a related event at the home of a prodemocracy activist with preventive arrest. State security officers took activist Milagros Cruz to a Havana mental hospital for observation on December 4, after she made known her intention to participate in a reading of the UDHR at a Havana park (see Section 1.c.). The hospital released her on December 14. State security agents detained antiabortion activist Dr. Elias Biscet several times in early December and warned him to cancel a planned public reading of the UDHR on December 10 at a park in his neighborhood. A group of several hundred Communist Party members assembled at the same park on December 10, ostensibly in support of the Congress of the Young Communist Union. Eyewitnesses reported that a person in the crowd, who was said to be holding copies of the UDHR, began shouting human rights slogans and was attacked by the Party supporters, who knocked him down and dragged him to a neighboring street. According to the witnesses, the progovernment demonstrators also assaulted foreign journalists who tried to follow the group (see Section 2.a.).

In April State Security officials temporarily detained the president of an independent farmers'

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Declaration of Human Rights inside his church, allowing parishioners to elect the church board members, and maintaining contacts with foreign diplomats. Father Sullivan publicly stated that he did not leave of his own volition. In August the authorities at Havana's international airport briefly questioned two Italian members of a Catholic religious order who had traveled to Cuba to participate in a religious event and warned them not to return to the country.

The Government continued to enforce a resolution that prevented any Cuban or joint enterprise (except those with specific authorization) from selling computers, facsimile machines, photocopiers, or other equipment to any church at other than the official--and exorbitant--retail prices.

Students who profess a belief in religion continue to be stigmatized by other students and teachers and have been disciplined formally for bringing Bibles or other religious materials to school.

The Government requires churches and other religious groups to register with the provincial Registry of Associations to obtain official recognition. The Government prohibits, with occasional exceptions, the construction of new churches, forcing many growing congregations to violate the law and meet in private homes. Government harassment of private houses of worship continued, with evangelical denominations reporting evictions from houses used for these purposes. Officials of the Cuban Council of Churches (CCC) reported that in 1997 the local government authorities had demolished two homes used as churches in the eastern provinces. In one case, provincial government authorities provided a replacement edifice.

In September independent journalists reported that the Evenecer church in a home in Caibarien, Villa Clara province, was confiscated by local officials of the Communist Party's office of religious affairs and the Ministry of Interior. The authorities also have threatened to demolish homes used as churches in Havana province and have evicted congregations from other informal chapels.

On October 22, the Government expelled a congregation affiliated with the Western Baptist Convention from a home used as a church in Encrucijada, Villa Clara province. The authorities confiscated the house and turned it over to the local branch of the Union of Young Communists. Church leaders reported that this was the first such action taken against Baptists since the 1960's.

The Government relaxed restrictions on some religious denominations. In February the president of the world association of Seventh Day Adventists was permitted to visit the country, where he celebrated an open air mass baptism in Matanzas province, presided over the reopening of a church in Havana, and met with government officials. Jehovah's Witnesses, once considered "active religious enemies of the revolution," were allowed quietly to proselytize door-to-door, and they generally were not subjected to overt government harassment.

CCC officials reported in June that the Council had received the Government's permission to broadcast a monthly 15-minute program on a national classical music radio station, with the understanding that the program would not include material of a political character. The head of the CCC is a member of the government-controlled ANPP.

State security officials visited some priests and pastors, prior to significant religious events, ostensibly to warn them about dissidents, in an effort to sow discord and mistrust between the churches and peaceful prodemocracy activists. State security officers also regularly harassed human rights advocates who sought to attend religious services commemorating special feast days or before significant national days, including inside churches and during religious ceremonies.

State security agents in Santiago de Cuba, Havana, and Pinar del Rio visited the homes of activists the night before and the morning of July 13--the fourth anniversary of the Cuban Coast Guard's sinking of the "13th of March" tugboat in which 41 persons, including 21 children, died--to warn them against commemorating the incident. In Havana the police chased, beat, and detained 10 activists outside a church. State security officials also visited the homes of some of the family

members of the victims of the incident and warned them against commemorating the tragedy. In connection with the September 8 celebration in honor of Our Lady of Charity, state security agents placed 16 activists under preventive detention for up to 72 hours. State security and uniformed police also detained for about 5 hours some 20 other dissidents who had gathered in the home of activist Isabel del Pino to prevent them from taking part in the religious event. Similar government harassment of human rights and opposition activists occurred during other religious anniversaries. Nevertheless, church attendance has grown in recent years in all denominations, and has substantially increased at Catholic Church services in the wake of the Pope's visit.

d. Freedom of Movement Within the Country, Foreign Travel, Emigration, and Repatriation

The Government kept tight restrictions on freedom of movement. The Government generally has not imposed legal restrictions on domestic travel, except for persons found to be HIV-positive, whom it initially restricts to sanatoriums for treatment and therapy before conditionally releasing them into the community. However, in recent years state security officials have forbidden human rights advocates and independent journalists from traveling outside their home provinces, and the Government also has sentenced others to internal exile. In April state security agents followed two dissident leaders, Leonel Morejon Almagro and Osvaldo Alfonso Maceo, from Havana to Santiago de Cuba, forced them to return to Havana, and told them that they could no longer travel outside of the capital. In April state security agents prevented members of an independent farmers' association in Santiago from traveling to the site of a planned association meeting (see Section 2.b.). In December agents detained prodemocracy activist Nestor Rodriguez Lobaina in Havana, forcibly took him to Santiago de Cuba under guard, and told him that he could not return to the capital.

In 1997, the Council of Ministers approved Decree 217, aimed at stemming the flow of migration from the provinces to the capital city. Human rights observers noted that while the decree affected migration countrywide, the decree was targeted at individuals and families from the poor, predominantly black and mulatto eastern provinces. In March the government newspaper reported that Decree 217 had succeeded in reducing the flow of persons to the capital city.

The Government imposed some restrictions on both emigration and temporary foreign travel. In October the Government denied exit permits to dissidents Elizardo Sanchez Cruz and Oswaldo Paya to attend conferences in Europe. The authorities later permitted Sanchez to travel outside the country in December to attend an event in Paris commemorating Human Rights Day, but refused to acknowledge Rodriguez Lobaina's requests to attend the same event. The Government allows the majority of persons who qualify for immigrant or refugee status in other countries to depart. However, in certain cases the authorities delay or deny exit permits, usually without explanation. Some denials involve professionals who have tried to emigrate and whom the Government subsequently banned from working in their occupational field. The Government refused permission to others because it considers their cases sensitive for political or state security reasons. The Government also routinely denies exit permits to young men approaching the age of military service, and until they reach the age of 27, even when it has authorized the rest of the family to leave. However, in most of those cases approved for migration to the United States under the September 1, 1994, U.S.-Cuban migration agreement, the applicants eventually receive exemption from obligatory service and are granted exit permits. The Government has a policy of denying exit permission for several years to relatives of individuals who successfully have migrated illegally (e.g., merchant seamen who have jumped ship overseas; sports figures who have defected while on tour abroad).

Migrants who travel to the United States must pay \$500 per adult, and \$400 per child, plus airfare. These government fees for medical exam, passport, and exit visa--which must be paid in dollars--are equivalent to about 5 years of a professional person's accumulated peso salary and represent a significant hardship, particularly for political refugees who usually are marginalized and have no income. In 1996, the Government agreed to allow 1,000 needy refugees to leave each year with reduced exit fees. However, after the first group of 1,000 in 1996, no further refugees have been accorded reduced fees. At the end of 1998, 306 approved refugees remained in Cuba because they were unable to pay government exit fees for themselves and their families.

Although not a formal requirement, Communist Party membership is in fact a prerequisite for high-level official positions and professional advancement.

In March the Government formally expelled Juan Francisco Pulido, a student at the university in Cienfuegos, for exercising his legal right not to vote in the National Assembly elections. A university employee officiating at a voting station noted that Pulido did not vote and confronted him in his home that evening. Pulido was informed that he was expelled in accordance with the 1984 Disciplinary Regulations for Students in Higher Education for "maintaining an attitude manifestly contrary to our revolutionary process."

The Government rejects any change judged incompatible with the revolution and ignored calls for democratic reform. Although President Castro signed the Declaration of Vina del Mar at the VI Ibero-American Summit in 1996, in which government leaders reaffirmed their commitment to democracy and political pluralism, the Government continued to oppose independent political activity on the ground that the Cuban system provides a "perfected" form of democracy and that pluralism exists within the one-party structure.

In 1996, the European Union (EU) suspended negotiations toward a cooperation agreement because of lack of progress toward political or economic reform. In December of that year, the EU adopted the Common Position on Cuba, which is binding on all member states and which is aimed at bringing about respect for political rights. On June 29, the EU General Affairs Council issued a public statement on Cuba's request to participate as an observer in negotiations on the Lome Convention. The Council noted that observership could contribute to the EU's objectives set out in the Common Position and recalled that "full cooperation with Cuba," including Cuban participation in the Lome Convention, would depend on "substantial progress on human rights, good governance, and political freedoms." The Council also explicitly called on the Government to release the four members of the internal dissident working group.

Government leadership positions continue to be dominated by men. There are very few women or minorities in policymaking positions in the Government or the party. There are 2 women on the 24-member Politburo, 18 in the 150-member Central Committee, and 166 in the 601-seat ANPP. Although blacks and mulattos make up over half the population, they hold only six seats in the politburo.

Section 4 Governmental Attitude Regarding International and Nongovernmental Investigation of Alleged Violations of Human Rights

The Government does not recognize any domestic human rights groups, or permit them to function legally. The Government subjects domestic human rights advocates to intense intimidation, harassment, and repression. In violation of its own statutes, the Government refuses to consider applications for legal recognition submitted by human rights monitoring groups.

In its 1997 report the IACHR examined recent measures taken by the Government and found that they did not "comprise the bedrock of a substantive reform in the present political system" that would permit "the ideological and partisan pluralism implicit in the wellspring from which a democratic system of government develops." The IACHR recommended that the Government provide reasonable safeguards to prevent violations of human rights, unconditionally release political prisoners and those jailed for trying to leave the country, abolish the concept of dangerousness in the Penal Code, eliminate other legal restriction on basic freedoms, cease harassing human rights groups, and establish a separation of powers so that the judiciary would no longer be "subordinate to political power."

The Government has steadfastly rejected international human rights monitoring. In 1992 Cuba's U.N. Representative stated that Cuba would not recognize the UNHRC mandate on Cuba and would not

cooperate with the Special Rapporteur on Cuba, despite being a UNHRC member. This policy remained unchanged and the Government refused even to acknowledge requests by the Special Rapporteur to visit Cuba. In April the UNHRC did not renew the mandate of the Special Rapporteur, following as yet unfulfilled assertions by the Government that it would improve human rights practices if it was not under formal sanction from the UNHRC.

In September the Government invited the U.N. Special Rapporteurs on Violence Against Women and on Mercenaries to visit. At year's end, these visits had not occurred.

Section 5 Discrimination Based on Race, Sex, Religion, Disability, Language, or Social Status

Cuba is a multiracial society with a black and mixed race majority. The Constitution forbids discrimination based on race, sex, or national origin, although evidence suggests that racial discrimination occurs often.

Women

Violent crime rarely is reported in the press, and there are no publicly available data regarding the incidence of domestic violence. The law establishes strict penalties for rape, and the Government appears to enforce the rape law. In October a female religious worker was abused sexually and murdered. The Government quickly ordered an investigation and arrested one suspect. Prostitution has increased greatly in the last few years; press reports indicate that tourists from various countries visit specifically to patronize inexpensive prostitutes. Despite the Government's tight control over society in general, periodic government statements and efforts to crack down on prostitution seem to have had little lasting effect. Prostitution is not illegal. Most observers believe that the Government tolerated or tacitly encouraged prostitution to boost its tourist industry; however, later in the year, the Government began to pursue more active interdiction of prostitution.

The Family Code states that women and men have equal rights and responsibilities regarding marriage, divorce, raising children, maintaining the home, and pursuing a career. Women are subject to the same restrictions on property ownership as men. The maternity law provides 18 weeks of maternity leave and grants working women preferential access to goods and services. About 40 percent of all women work, and they are well represented in the professions.

Children

The Constitution provides that the Government protect "family, maternity, and matrimony." It also states that children, legitimate or not, have the same rights under the law and notes the duties of parents to protect them. Education is free and is grounded in Marxist ideology. State organizations and schools are charged with the "integral formation of children and youth." The national health care system covers all citizens.

There is no societal pattern of abuse of children, other than in the area of prostitution, where young girls form the bulk of the large number of prostitutes catering to foreign tourists. It is illegal for a child under 17 years of age to engage in prostitution, but the police do not actively enforce this law.

People With Disabilities

The law prohibits discrimination based on disability, and there have been few complaints of such discrimination. There are no laws that mandate accessibility to buildings for the disabled.

National/Racial/Ethnic Minorities

Many blacks have benefited from access to basic education and medical care since the revolution, and

much of the police force and army enlisted personnel is black. Nevertheless, there have been numerous reports of disproportionate police harassment of black youths. In 1997 there were numerous credible reports of forced evictions of squatters and residents lacking official permission to reside in Havana. The evictions, exacerbated by Decree 217 (see Section 2.d.), primarily targeted individuals and families from the eastern provinces, which are traditionally areas of black or mixed-race populations.

Section 6 Worker Rights

a. The Right of Association

The Constitution gives priority to state or collective needs over individual choices regarding free association or provision of employment. The "demands of the economy and society" take precedence over individual workers' preferences. The law prohibits strikes; none are known to have occurred. Established official labor organizations have a mobilization function and do not act as trade unions, promote worker rights, or protect the right to strike. Such organizations are under the control of the State and the party, which are also the managers of the enterprises for which the laborers work.

The Communist Party selects the leaders of the sole legal labor confederation, the Confederation of Cuban Workers, whose principal responsibility is to ensure that government production goals are met. Despite disclaimers in international forums, the Government explicitly prohibits independent unions and none are recognized. There has been no change since the 1992 International Labor Organization (ILO) finding that Cuba violated ILO norms on freedom of association and the right to organize. Those who attempt to engage in union activities face government persecution. Workers can and have lost their jobs for their political beliefs, including their refusal to join the official union. Several small independent labor organizations have been created, but function without legal recognition and are unable to represent workers effectively and work on their behalf. The Government actively harasses these organizations. Human Rights Watch reported the detention of several leaders of independent labor organizations for periods ranging from several hours to 2 days. In September graffiti was painted on the home of independent labor activist Jose Orlando Bridon and garbage was piled outside his front door (see Section 1.c.).

The CTC is a member of the Communist, formerly Soviet-dominated, World Federation of Trade Unions.

b. The Right to Organize and Bargain Collectively

Collective bargaining does not exist. The State Committee for Work and Social Security (CETSS) sets wages and salaries for the state sector, which is almost the only employer in the country. Since all legal unions are government entities, antiunion discrimination by definition does not exist.

There are no functioning export processing zones in Cuba, although the 1995 Foreign Investment Law (Law 77) authorizes the establishment of free trade zones and industrial parks. Law 77 continued to deny workers the right to contract directly with foreign companies investing in Cuba without special government permission. Although a few firms have managed to negotiate exceptions, the Government requires foreign investors to contract workers through state employment agencies, which are paid in foreign currency and, in turn, pay workers very low wages in pesos. Workers subcontracted by state employment agencies must meet certain political qualifications. According to Minister of Basic Industry Marcos Portal, the state employment agencies consult with the party, the CTC, and the Union of Communist Youth to ensure that the workers chosen deserve to work in a joint enterprise.

c. Prohibition of Forced or Compulsory Labor

Neither the Constitution nor the Labor Code prohibit forced labor. The Government maintains

correctional centers where it sends persons for crimes such as dangerousness. They are forced to work on farms or building sites, usually with no pay and inadequate food. The authorities often imprison internees who do not cooperate.

The Government employs special groups of workers, known as "microbrigades," on loan from other jobs, on special building projects. These microbrigades have increased importance in the Government's efforts to complete tourist and other priority projects. Workers who refuse to volunteer for these jobs often risk discrimination or job loss. However, microbrigade workers reportedly receive priority consideration for apartments. The military channels some conscripts to the Youth Labor Army, where they serve their 2-year military service requirement working on farms that supply both the armed forces and the civilian population.

The Government prohibits forced and bonded labor by children; however, the Government requires children to work without compensation. All students over age 11 are expected to devote 30 to 45 days of their summer vacation to farm work, laboring up to 8 hours per day. The Ministry of Agriculture uses "voluntary labor" by student work brigades extensively in the farming sector.

d. Status of Child Labor Practices and Minimum Age for Employment

The legal minimum working age is 17 years. However, the Labor Code permits the employment of 15- and 16-year-olds to obtain training or fill labor shortages. The law requires school attendance until the ninth grade, and this law generally is respected. The Government prohibits forced and bonded child labor; however, it requires children to work without compensation (see Section 6.c.).

e. Acceptable Conditions of Work

The minimum wage varies by occupation and is set by the CETSS. The minimum monthly wage for a maid, for example, is \$8.25 (165 pesos); for a bilingual office clerk, \$9.50 (190 pesos); and for a gardener \$10.75 (216 pesos). The Government supplements the minimum wage with free education and subsidized medical care (but reduces daily pay by 40 percent after the third day of being admitted to a hospital), housing, and some food—subsidized food is enough for about 1 week per month. However, even with these subsidies, the minimum wage does not provide a decent standard of living for a worker and family. Corruption and black market activities are pervasive. The Government rations most basic necessities such as food, medicine, clothing, and cooking gas, which are in very short supply.

The Government requires foreign companies in joint ventures with state entities to hire and pay workers through the State. Pax Christi and other NGO's have criticized these exploitative labor practices, which force foreign companies to pay the Government as much as \$500 to \$600 per month for workers, with the workers in turn receiving only a small peso wage from the Government.

The standard workweek is 44 hours, with shorter workdays in hazardous occupations, such as mining. The Government also reduced the workday in some government offices and state enterprises to save energy.

Workplace environmental and safety controls are usually inadequate, and the Government lacks effective enforcement mechanisms. Industrial accidents apparently are frequent, but the Government suppresses such reports. The Labor Code establishes that a worker who considers his life in danger because of hazardous conditions has the right not to work in his position or not to engage in specific activities until such risks are eliminated. According to the Labor Code, the worker remains obligated to work temporarily in whatever other position may be assigned him at a salary prescribed by law.

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IMMIGRATION LAW AND PROCEDURE

I. Introduction

Foreign nationals who have reached the border but have not formally been admitted into the United States are not legally considered to be within the country and are described as arriving aliens or applicants for admission. Those who have succeeded in effecting an entry after being admitted and inspected by an INS official at the appropriate port-of-entry, such as the airport, seaport or border crossing station, are described as legally present within the United States and "deportable" aliens. At the inspection station, to be admitted into the United States, an individual must have the appropriate identification and entry documents such as proof of lawful permanent residency (a green card) or a specific immigrant or non-immigrant visa.

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), two separate and distinct proceedings to expel an individual existed and hinged upon whether an alien made an entry into the United States or simply arrived at the border. Aliens arriving at the border who were not clearly admissible into the United States would be placed in exclusion proceedings. Aliens already present in the United States would be placed in deportation proceedings.

IIRIRA, however, eliminated exclusion and deportation proceedings altogether and streamlined immigration proceedings into a combined hearing process called removal proceedings. INA § 240, 8 U.S.C. § 1229. Within removal proceedings, aliens are defined as either inadmissible or deportable. IIRIRA renumbered the Immigration and Nationality Act so that classes of deportable aliens are now found at section 237(a) of the

Act (8 U.S.C. § 1227). Grounds of inadmissability continue to be found at section 212(a), (8 U.S.C. §1182).

Section 240 of the INA, as amended by IIRIRA § 304(a), provides for a single proceeding to remove an alien from the United States instead of the separate exclusion and deportation proceedings that existed under the old law. With some exceptions, the removal proceeding shall be the sole and exclusive procedure for determining whether an alien is inadmissible under INA § 212 or deportable under INA § 237(formerly INA § 241), and whether the foreign national qualifies for any relief from removal such as political asylum.

II Arriving Alien – Application for Admission

The term "arriving alien" means an alien who seeks admission to or transit through the United States, as provided in 8 C.F.R. part 235, at a port-of-entry, or an alien who is interdicted in international or United States waters and brought into the United States by any means, whether or not to a designated port-of-entry, and regardless of the means of transport. An arriving alien remains such even if paroled pursuant to section 212(d)(5). 8 C.F.R. § 1.1(q).

An alien present in the United States who has not been admitted or who arrives in the United States shall be deemed for purposes of this Act an applicant for admission. INA § 235(a)(1), 8 U.S.C. § 1225. An alien who is brought to the United States after having been interdicted in international or United States waters, by definition for purposes of the INA, is also considered to be an arriving alien applying for admission.

Id.

III. Withdrawal of Application for Admission

An alien applying for admission may, in the discretion of the Attorney General and at any time, be permitted to withdraw the application for admission in lieu of removal proceedings under section 240 of the Act and depart immediately from the United States. INA § 235(a)(4), 8 U.S.C. § 1225(a)(4). The alien's decision to withdraw his or her application for admission must be made voluntarily. 8 C.F.R. § 235.4. Further, "[w]hen deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human rights abuses or where turmoil exists, the minor should be placed in removal proceedings under section 240 of the Act." See Mem. From Paul Virtue, Acting Executive Associate Commissioner for Programs, "Unaccompanied Minors Subject to Expedited Removal," Aug. 21, 1997 (attached). Only if there is no possibility of a fear of persecution or return, may the INS permit a minor to withdraw his application for admission. Id.

III. Asylum

"An 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 alien's status, may apply for asylum...." INA § 208(a)(1), 8 U.S.C. § 1158, (emphasis added).

An arriving alien who fears return to his home country has the right to apply for three asylum-related forms of relief from removal. First, he has a right to request asylum by claiming that he is a "refugee"¹ for whom removal to a particular country may threaten his life or freedom. When an alien proves that he is a "refugee," the Attorney General has discretion to grant him asylum pursuant to §208 of the Immigration and Nationality Act (INA), (8 U.S.C. §1158). Second, if the proof shows that it is more likely than not that the alien's life or freedom would be threatened in a particular country, the Attorney General may not remove him and must grant "withholding of removal" pursuant to 8 U.S.C. §1231(b)(3)². And, third, the arriving alien may pursue relief from removal through the United Nations Convention Against Torture.

Usually the above-referenced asylum-related claims are raised at a removal proceeding initiated under INA § 240 (8 U.S.C. § 1229) by the issuance of INS' charging document called the Notice to Appear, which is filed before the Immigration Judge.³ An individual who is not in immigration proceedings, however, may affirmatively file an asylum application with the INS' Office of International Affairs for adjudication by an asylum officer. "The Office of International Affairs shall have initial jurisdiction over an

¹ The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that 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.... 8 U.S.C. §1101(a)(42).

² The alien's protected interest in petitioning for withholding of removal is greater than asylum because withholding is mandatory by statute, as opposed to a discretionary statute, and creates a protectable liberty and property interest with constitutional implications. See *Jean v Nelson*, 727 F.2d. 957, 981 n.33 (11th Cir. 1984)(en banc).

³ Note that even an arriving alien who can be processed through expedited removal, a procedure that authorizes an immigration officer to order a foreign national removed from the United States without a hearing or review, is entitled to apply for asylum. 8 U.S.C. § 1225(b)(1)(A)(i). Placing an unaccompanied

asylum application filed by, or a credible fear determination pertaining to, an alien physically present in the United States or seeking admission at a port-of-entry." 8 C.F.R. §208.2(a). Once affirmatively filed and complete, an asylum officer must adjudicate the claim and either grant asylum in the exercise of discretion or refer the application to an immigration judge for adjudication in removal proceedings. 8 C.F.R. §§208.2, 208.9, 208.14(b)(2).⁴

If a juvenile seeks any form of relief from removal such as political asylum, where it appears that the grant of such relief may effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director or immigration judge before a determination is made as to the merits of the request for relief. 8 C.F.R. § 236.2(f). Therefore, the adverse parental wishes may be considered and weighed within the merits of the asylum claim itself, but cannot be used to terminate the Attorney General's obligations to adjudicate the claim.

minor in expedited removal, however, is contrary to INS policy and guidelines. See, INS headquarter policy guidelines to HQINS Memorandum 50/5.12 96Act 054 of August 21, 1997 (attached).

⁴ Only an immigration judge, not an asylum officer, has authority to adjudicate requests for withholding of removal. 8 CFR §208.16(a)



**U.S. Department of Justice
Immigration and Naturalization Service**

425 I Street N.W.
Washington, D.C. 20536

File: 120/11.26

December 10, 1998
Human Rights Day

MEMORANDUM FOR: Asylum Officers
Immigration Officers
Headquarters Coordinators (Asylum and Refugees)

FROM: Jeff Weiss 
Acting Director
Office of International Affairs

SUBJECT: Guidelines For Children's Asylum Claims

This memorandum is written to provide the Asylum Officer Corps (AOC) with background and guidance on adjudicating children's asylum claims. This guidance applies primarily to children under the age of 18 who apply for asylum independently rather than as a derivative applicant by submitting a Form I-589 asylum application in their own name. Many of these issues will also be relevant to overseas Immigration Officers in processing the refugee applications of children.

It should be noted that the United Nations and generally accepted international definition of "child" is every person under the age of 18. These Guidelines take the same approach, except (as noted below) that they also apply to those individuals between 18 and 21 for purposes of scheduling and derivative determinations for asylum claims only.

During the last 10 years, the topic of child asylum seekers has received increasing attention from the international community. Human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish age 15 as the minimum age for participation in armed conflicts, children under age 15 in some countries are forcibly recruited by regular or irregular armies to participate directly in military conflicts. Children who have had such experiences are referred to as "child soldiers" throughout this text. The protection needs of these and other children have commanded much international and domestic attention.

EXHIBIT C

Guidelines For Children's Asylum Claims

2

Because of the unique vulnerability and circumstances of children, the Immigration and Naturalization Service (INS) considers it appropriate to issue guidance relating to our youngest asylum seekers. These "Guidelines For Children's Asylum Claims" provide Asylum Officers with child-sensitive interview procedures and analysis regarding the most common issues that may arise in these cases. This guidance is similar in approach to the "Considerations For Asylum Officers Adjudicating Asylum Claims From Women" (the "*Gender Guidelines*") memorandum issued on May 26, 1995. Like the *Gender Guidelines*, these Guidelines are designed to enhance the ability of INS Asylum Officers to address more responsively the substantive and procedural aspects of claims, irrespective of the child's country of origin. Increasing the understanding of and sensitivity to children's issues will improve U.S. asylum adjudications. In-Service training at all Offices will be critical to using this guidance effectively.

Background and International Guidance

Children and women represent approximately 80 percent of the world's refugee population. This section reviews the historical and human rights context in which guidance on children's refugee issues has evolved internationally.

Asylum and refugee status determinations are governed by United States law and regulations. Certain international instruments can provide helpful guidance and context on human rights norms.¹ For example, the internationally recognized "best interests of the child" principle is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition.

The following international instruments and documents contain provisions specifically relating to children. They recognize and promote the principle that children's rights are human rights, and that children's rights are universal:

- **UDHR:** The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948. The Declaration is an authoritative statement by the U.N. General Assembly, reflecting a collective understanding of the rights which are fundamental to the dignity and development of every human being. Article 14 of the UDHR provides for the right to apply for asylum, and Article 25(2) refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.²

¹ These instruments need not be ratified by the United States to provide guidance as a source of human rights norms. See, Asylum Officer Basic Training Course (AOBTC, August, 1998), Lesson: International Human Rights Law.

² Many of the components of international policy regarding refugee children also derive from the United Nations *Convention on the Rights of the Child* (CRC). Adopted by the United Nations in November 1989, the CRC codifies standards for the rights of all children, including those who are refugees. Article 3(1) of the CRC provides that the "best interests of the child" should be the primary consideration in decisions involving children. Because the United States has signed but not ratified the CRC, its provisions, as noted above, provide guidance only and are not binding on adjudicators. Having signed the CRC, however, the United States is obliged under international treaty law to refrain from acts which would defeat the object and purpose of the Convention.

Guidelines For Children's Asylum Claims

3

- **UNHCR ExComm Conclusion No. 47:** Over the years, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has adopted a number of conclusions concerning refugee children. Safeguarding the well-being of refugee children has long been a high priority of the UNHCR Executive Committee and the United States. The Executive Committee issued its first conclusion in 1987 devoted exclusively to young people (Conclusion No. 47).³ This Conclusion urged action aimed at addressing the human rights and needs of children who are refugees, and highlighted the particular vulnerability of unaccompanied and disabled refugee children, as well as the need for action by UNHCR to protect and assist them. Conclusion No. 47 condemned the exposure of refugee children to physical violence and other violations of their basic rights, including sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, or arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims. It emphasized that all action taken on behalf of refugee children must be guided by the principle of the "best interests of the child."
- **UNHCR ExComm Conclusion No. 59:** In 1989, in Conclusion No. 59,⁴ the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children; gave examples of how these needs could be assessed, monitored, and met; drew special attention to the UNHCR's particular need to endeavor to ensure the right of refugee children to education, as well as their protection from forced recruitment into armed forces and irregular adoption.⁵
- **UNHCR Policies and Guidelines:** The UNHCR issued several sets of child-related guidelines in recent years.
 - ▶ The UNHCR "Policy on Refugee Children"⁶ issued in 1993 points out that governmental actions relating to children must be "tailored to the different needs and potentials of refugee children," to avoid the tendency to think of refugees as a uniform group. The UNHCR stated that children and adolescents are entitled to special attention because their needs, and their legal and social status, can be

The internationally recognized standard principle for refugee children, best interests of the child. It is a central measure in determining appropriate immigration procedure for child asylum seekers, and does not play a role in determining substantive eligibility under the U.S. refugee definition.

³ Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 47 (XXXVIII) on Refugee Children (1987).

⁴ Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 59 (XL) on Refugee Children (1989). See also, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 84 (XLVIII) on Refugee Children And Adolescents (1997) reaffirming the "best interests of the child" principle and Conclusions Nos. 47 and 59.

⁵ Reflecting a more concerted effort to ensure the well-being of refugee children, the UNHCR established the position of a Senior Coordinator for Refugee Children in 1992. This was seen as a significant step toward improving UNHCR's protection of and assistance to minors.

⁶ UNHCR Policy on Refugee Children. EC/SCP/82 (August 6, 1993).

8 CFR § 208.14
8 C.F.R. § 208.14

**CODE OF FEDERAL REGULATIONS
TITLE 8—ALIENS AND NATIONALITY
CHAPTER I—IMMIGRATION AND
NATURALIZATION SERVICE, DEPARTMENT
OF JUSTICE**

**SUBCHAPTER B—IMMIGRATION
REGULATIONS
PART 208—PROCEDURES FOR ASYLUM AND
WITHHOLDING OF REMOVAL
SUBPART A—ASYLUM AND WITHHOLDING
OF REMOVAL**

Current through December 7, 1999; 64 FR
68573

§ 208.14 Approval, denial, referral, or dismissal of
application.

(a) By an immigration judge. Unless otherwise
prohibited in § 208.13(c), an immigration judge may
grant or deny asylum in the exercise of discretion to an
applicant who qualifies as a refugee under section
101(a)(42) of the Act.

(b) 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.

(3) If the applicant is maintaining valid nonimmigrant
status at the time the application is decided, the asylum
officer may grant or deny asylum, except in the case of
an applicant described in § 208.2(b)(1).

(c) Applicability of § 103.2(b) of this chapter. No
application for asylum or withholding of deportation
shall be subject to denial pursuant to § 103.2(b) of this
chapter.

(d) Duration. If the alien's asylum application is
granted, the grant will be effective for an indefinite
period, subject to termination as provided in § 208.22.

(e) Effect of denial of principal's application on
separate applications by dependents. The denial of an
asylum application filed by a principal applicant for
asylum shall also result in the denial of asylum status
to any dependents of that principal applicant who are
included in that same application. Such denial shall
not preclude a grant of asylum for an otherwise
eligible dependent who has filed a separate asylum
application, nor shall such denial result in an otherwise
eligible dependent becoming ineligible to apply for
asylum due to the provisions of section 208(a)(2)(C)
of the Act.

(f) If an asylum applicant is granted adjustment of
status to lawful permanent resident, the Service may
provide written notice to the applicant that his or her
asylum application will be presumed abandoned and
dismissed without prejudice, unless the applicant
submits a written request within 30 days of the notice,
that the asylum application be adjudicated. If an
applicant does not respond within 30 days of the date
the written notice was sent or served, the Service may
presume the asylum application abandoned and
dismiss it without prejudice.

[63 FR 12986, March 17, 1998; 64 FR 27875, May
21, 1999]

<General Materials (GM) - References, Annotations,
or Tables>

8 C.F.R. § 208.14

8 CFR § 208.14

END OF DOCUMENT

8 CFR § 236.3
8 C.F.R. § 236.3

CODE OF FEDERAL REGULATIONS
TITLE 8—ALIENS AND NATIONALITY
CHAPTER I—IMMIGRATION AND
NATURALIZATION SERVICE, DEPARTMENT
OF JUSTICE
SUBCHAPTER B—IMMIGRATION
REGULATIONS
PART 236—APPREHENSION AND DETENTION
OF INADMISSIBLE AND DEPORTABLE
ALIENS;
REMOVAL OF ALIENS ORDERED REMOVED
SUBPART A—DETENTION OF ALIENS PRIOR
TO ORDER OF REMOVAL
Current through December 7, 1999; 64 FR
68573

§ 236.3 Detention and release of juveniles.

(a) Juveniles. A juvenile is defined as an alien under the age of 18 years.

(b) Release. Juveniles for whom bond has been posted, for whom parole has been authorized, or who have been ordered released on recognizance, shall be released pursuant to the following guidelines:

(1) Juveniles shall be released, in order of preference, to:

(i) A parent

(ii) Legal guardian; or

(iii) An adult relative (brother, sister, aunt, uncle, grandparent) who is not presently in Service detention, unless a determination is made that the detention of such juvenile is required to secure his or her timely appearance before the Service or the Immigration Court or to ensure the juvenile's safety or that of others. In cases where the parent, legal guardian, or adult relative resides at a location distant from where the juvenile is detained, he or she may secure release at a Service office located near the parent, legal guardian, or adult relative.

(2) If an individual specified in paragraphs (b)(1)(i) through (iii) of this section cannot be located to accept custody of a juvenile, and the juvenile has identified a parent, legal guardian, or adult relative in Service detention, simultaneous release of the juvenile and the parent, legal guardian, or adult relative shall be evaluated on a discretionary case-by-case basis.

(3) In cases where the parent or legal guardian is in

Service detention or outside the United States, the juvenile may be released to such person as is designated by the parent or legal guardian in a sworn affidavit, executed before an immigration officer or consular officer, as capable and willing to care for the juvenile's well-being. Such person must execute an agreement to care for the juvenile and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(4) In unusual and compelling circumstances and in the discretion of the district director or chief patrol agent, a juvenile may be released to an adult, other than those identified in paragraphs (b)(1)(i) through (iii) of this section, who executes an agreement to care for the juvenile's well-being and to ensure the juvenile's presence at all future proceedings before the Service or an immigration judge.

(e) Juvenile coordinator. The case of a juvenile for whom detention is determined to be necessary should be referred to the "Juvenile Coordinator," whose responsibilities should include, but not be limited to, finding suitable placement of the juvenile in a facility designated for the occupancy of juveniles. These may include juvenile facilities contracted by the Service, state or local juvenile facilities, or other appropriate agencies authorized to accommodate juveniles by the laws of the state or locality.

(d) Detention. In the case of a juvenile for whom detention is determined to be necessary, for such interim period of time as is required to locate suitable placement for the juvenile, whether such placement is under paragraph (b) or (c) of this section, the juvenile may be temporarily held by Service authorities or placed in any Service detention facility having separate accommodations for juveniles.

(e) Refusal of release. If a parent of a juvenile detained by the Service can be located, and is otherwise suitable to receive custody of the juvenile, and the juvenile indicates a refusal to be released to his or her parent, the parent(s) shall be notified of the juvenile's refusal to be released to the parent(s), and shall be afforded an opportunity to present their views to the district director, chief patrol agent, or immigration judge before a custody determination is made.

(f) Notice to parent of application for relief. If a juvenile seeks release from detention, voluntary departure, parole, or any form of relief from removal, where it appears that the grant of such relief may

8 CFR § 236.3

effectively terminate some interest inherent in the parent-child relationship and/or the juvenile's rights and interests are adverse with those of the parent, and the parent is presently residing in the United States, the parent shall be given notice of the juvenile's application for relief, and shall be afforded an opportunity to present his or her views and assert his or her interest to the district director or immigration judge before a determination is made as to the merits of the request for relief.

(g) Voluntary departure. Each juvenile, apprehended in the immediate vicinity of the border, who resides permanently in Mexico or Canada, shall be informed, prior to presentation of the voluntary departure form or being allowed to withdraw his or her application for admission, that he or she may make a telephone call to a parent, close relative, a friend, or to an organization found on the free legal services list. A juvenile who does not reside in Mexico or Canada who is apprehended shall be provided access to a telephone and must in fact communicate either with a parent, adult relative, friend, or with an organization found on the free legal services list prior to presentation of the voluntary departure form. If such juvenile, of his or

her own volition, asks to contact a consular officer, and does in fact make such contact, the requirements of this section are satisfied.

(h) Notice and request for disposition. When a juvenile alien is apprehended, he or she must be given a Form I-770, Notice of Rights and Disposition. If the juvenile is less than 14 years of age or unable to understand the notice, the notice shall be read and explained to the juvenile in a language he or she understands. In the event a juvenile who has requested a hearing pursuant to the notice subsequently decides to accept voluntary departure or is allowed to withdraw his or her application for admission, a new Form I-770 shall be given to, and signed by the juvenile.

<General Materials (GM) - References, Annotations,
or Tables>

8 C. F. R. § 236.3

8 CFR § 236.3

END OF DOCUMENT

Memorandum

*cc: Management
1st E/E*



HQNS 50/5.12' 96 Act 054

Subject:

Date:

Unaccompanied Minors Subject to
Expedited Removal

AUG 21 1997

To:

From:

Office of Programs

Management Team
Regional Directors
District Directors
Officers-in-Charge
Chief Patrol Agents
Asylum Office Directors
Port Directors
Director, Policy Directives and Instructions
ODTF Glynn
ODTF Artesia

The expedited removal and mandatory detention provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) have generated concerns about the treatment of minors subject to expedited removal. This memorandum sets forth new policy for the charging of minors during inspection, procedures to be taken when permitting an unaccompanied minor to withdraw an application for admission, and detention of minors in expedited removal proceedings.

This policy guidance supersedes the previous direction concerning unaccompanied juveniles contained in the memorandum entitled Implementation of Expedited Removal issued March 31, 1997, by the Deputy Commissioner. Further instructions for processing, treatment, and placement of minors are contained in a memorandum dated July 18, 1997, entitled Settlement of Jenny Lisette Flores et al. v. Janet Reno. All Service officers must comply with the terms of the settlement agreement in Flores v. Reno, as outlined in the July 18 memorandum and its attachments. The following adds a new paragraph (2) to Chapter 17.15 of the Inspector's Field Manual, and conforming revisions will be made in the next release of the Immigration and Naturalization Service Easy Research and Transmittal System (INSERTS).

Chapter 17.15(2) is added to read as follows:

(f) Special Treatment of Minors.

(1) General Policy. When an unaccompanied minor (a person under the age of eighteen) appears to be inadmissible under section 212(a)(6)(C) or (7) of the Act, officers should first try to resolve the case under existing guidelines. Existing guidelines permit granting a waiver, deferring the inspection, or employing other discretionary means, if applicable, including withdrawal of an application for admission.

(2) Withdrawal of Application for Admission by Minors. Whenever appropriate, the INS should permit unaccompanied minors to withdraw their application for admission rather than placing them in formal removal proceedings. In deciding whether to permit an unaccompanied minor to withdraw his or her application for admission, every precaution should be taken to ensure the minor's safety and well-being. Factors to be considered include the seriousness of the offense in seeking admission, previous findings of inadmissibility against the minor, and any intent by the minor to knowingly violate the law.

Before permitting a minor to withdraw his or her application for admission, the INS officer must be satisfied either that the minor is capable of understanding the withdrawal process, or that a responsible adult (relative, guardian, or in cases where a relative or guardian is not available, a consular officer) is aware of the actions taken and the minor's impending return. Officers must attempt to contact a relative or guardian either in the United States or in another country regarding the minor's inadmissibility whenever possible. A minor brought to the United States by a smuggler is to be considered an unaccompanied minor, unless the smuggler is an adult relative (parent, brother, sister, aunt, uncle, or grandparent) or legal guardian. If the smuggler is not a relative or guardian, he or she should not be consulted concerning the disposition of the minor's case.

The true nationality of the minor must be ascertained before permitting the minor to withdraw. Another factor to consider is whether the port of embarkation to which the minor will be returned is the country of citizenship of the minor. A minor may not be returned to or be required to transit through a country which may not be willing or obligated to accept him or her. If the minor is being returned to a third country through a transit point, officers must ensure that an immediate and continuous transit will be permitted.

When deciding whether to permit the minor to withdraw his or her application for admission, officers must also make every effort to determine whether the minor has a fear of persecution or return to his or her country. If the minor indicates a fear of persecution or intention to apply for asylum, or if there is any doubt, especially in the case of countries with known human rights abuses or where turmoil exists, the minor should be placed in removal proceedings under section 240 of the Act. If there is no possibility of a fear of persecution or return and the INS permits the minor to withdraw his or her application for admission, the consular or diplomatic officials of the country to which the minor is being returned must be notified. Safe passage can then be arranged, and after

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notifications to family members and government officials have been made, the minor may be permitted to withdraw.

(3) Minors Referred for Section 240 Proceedings. Except as noted below, if a decision is made to pursue formal removal charges against the unaccompanied minor, the minor will normally be placed in removal proceedings under section 240 of the Act rather than expedited removal. The unaccompanied minor will be charged under both section 212(a)(7)(A)(i)(I) of the Act as an alien not in possession of proper entry documents and section 212(a)(4) of the Act as an alien likely to become a public charge. This additional charge renders the minor subject to removal proceedings under section 240 of the Act. Other charges may also be lodged, as appropriate. As a general rule, minors should not be charged with section 212(a)(6)(C) of the Act, unless circumstances indicate that the alien clearly understood that he or she was committing fraud or that the minor is knowingly involved in criminal activity relating to fraud.

Minors who are placed in section 240 proceedings and who are not in expedited removal may either be released in accordance with the parole provisions, or placed in a Service-approved juvenile facility, shelter, or foster care in accordance with existing juvenile detention policies and the Flores v. Reno settlement. At all stages of the inspection and removal process, officers should take every precaution to ensure that the minor's rights are protected and that he or she is treated with respect and concern. [See Appendix 17-4, policy memorandum discussing the Flores settlement.]

(4) Expedited Removal of Minors. Under limited circumstances, an unaccompanied minor may be placed in expedited removal proceedings. The minor may be removed under the expedited removal provisions only if the minor:

- has, in the presence of an INS officer, engaged in criminal activity that would qualify as an aggravated felony if committed by an adult;
- has been convicted or adjudicated delinquent of an aggravated felony within the United States or another country, and the inspecting officer has confirmation of that order; or
- has previously been formally removed, excluded, or deported from the United States.

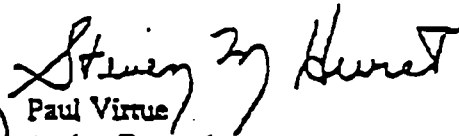
If an unaccompanied minor is placed in expedited removal proceedings, the removal order must be reviewed and approved by the district director or deputy district director, or person officially acting in that capacity, before the minor is removed from the United States. This is in addition to the normal supervisory approval required of all expedited removal cases.

(5) Treatment of Minors during Processing. Officers should treat all minors with dignity and sensitivity to their age and vulnerability. Processing of minors should be accomplished as quickly as possible. As with all persons being detained at ports-of-entry, officers must provide the minor access to toilets and sinks, drinking water and food, and

medical assistance if needed. Minors may not be placed in short-term hold rooms, nor may they be restrained, unless they have shown or threatened violent behavior, they have a history of criminal activity, or there is a likelihood the juvenile will attempt to escape. Unaccompanied minors should not be held with unrelated adults. Any detention following processing at the port-of-entry must be in accordance with the Flores v. Reno settlement.

(6) Minors Accompanied by Relatives or Guardians. If formal proceedings are initiated against an accompanying adult relative or legal guardian, the minor should be placed in the same type of proceeding (i.e. expedited removal or 240 proceedings) as the adult. However, withdrawal of application for admission by the minor should be considered whenever appropriate, even though the relative or guardian may remain subject to formal removal proceedings.

Issues concerning minors, both accompanied and unaccompanied, will continue to arise as the expedited removal program proceeds. Questions concerning treatment and detention of minors may be directed to John Pogash, Office of Detention and Deportation, at (202) 307-6007, or Linda Loveless, Office of Inspections, at (202) 616-7489.


(for) Paul Virtue
Acting Executive Associate
Commissioner, Programs

Convention relating to the Status of Refugees of 28 July 1951

Page 1 of 14

REFWORLD

International Instruments - Asylum

Convention relating to the Status of Refugees of 28 July 1951

States Parties

United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Geneva, 2-25 July 1951

22 April 1954

Preamble

The High Contracting Parties

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

Chapter I, General Provisions

Article 1

Definition of the term "Refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any

EXHIBIT H

Convention relating to the Status of Refugees of 28 July 1951

Page 2 of 14

person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in Article 1, Section A, shall be understood to mean either

(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of Section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily re-acquired it, or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of

Convention relating to the Status of Refugees of 28 July 1951

Page 3 of 14

this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Article 2**General obligations**

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3**Non-discrimination**

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4**Religion**

The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

Article 5**Rights granted apart from this Convention**

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

• Convention relating to the Status of Refugees of 28 July 1951

Page 4 of 14

Article 6**The term "In the same circumstances"**

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7**Exemption from reciprocity**

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in Articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8**Exemption from exceptional measures**

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this Article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9**Provisional measures**

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Convention relating to the Status of Refugees of 28 July 1951

Page 5 of 14

Article 10

Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11

Refugee Seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

Chapter II, Juridical Status

Article 12

Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13

Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14

Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or

Convention relating to the Status of Refugees of 28 July 1951

Page 6 of 14

models, trade marks, trade names, and of rights in literary, artistic, and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15

Right of association

As regards non-political and non-profit making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16

Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

Chapter III, Gainful Employment

Article 17

Wage-earning employment

1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.
2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions: (a) He has completed three years' residence in the country, (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse, (c) He has one or more children possessing the nationality of the country of residence.
3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Article 18

• Convention relating to the Status of Refugees of 28 July 1951

Page 7 of 14

Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19

Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

Chapter IV, Welfare

Article 20

Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21

Housing.

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22

Public education.

(1) The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

(2) The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Convention relating to the Status of Refugees of 28 July 1951

Page 8 of 14

Article 23

Public relief.

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24

Labour legislation and social security.

(1) The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(2) The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

(3) The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

(4) The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

Chapter V, Administrative measures

Article 25

Administrative assistance.

(1) When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

(2) The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

(3) Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

(4) Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

(5) The provisions of this Article shall be without prejudice to Articles 27 and 28.

Article 26

Convention relating to the Status of Refugees of 28 July 1951

Page 9 of 14

Freedom of movement.

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 27**Identity papers.**

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28**Travel documents.**

(1) The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

(2) Travel documents issued to refugees under previous international agreements by parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29**Fiscal charges.**

(1) The Contracting States shall not impose upon refugee duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

(2) Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30**Transfer of assets.**

(1) A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

(2) A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31

Convention relating to the Status of Refugees of 28 July 1951

Page 10 of 14

Refugees unlawfully in the country of refuge.

(1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

(2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32

Expulsion.

(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

(3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of expulsion or return ("refoulement")

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Article 34

Naturalization.

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Convention relating to the Status of Refugees of 28 July 1951

Page 11 of 14

Article 35

Co-operation of the national authorities with the United Nations.

(1) The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

(2) In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

Article 36

Information on national legislation.

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37

Relation to previous Conventions.

Without prejudice to Article 28, paragraph 2, of this Convention, this Convention replaces, as between parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 and the Agreement of 15 October 1946.

Chapter VII, Final clauses**Article 38**

Settlement of disputes.

Any dispute between parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39

Signature, ratification and accession.

(1) This Convention shall be opened for signature at Geneva on 28 July 1951 and shall hereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

(2) This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or

Convention relating to the Status of Refugees of 28 July 1951

to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

(3) This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this Article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40

Territorial application clause.

(1) Any state may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

(2) At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

(3) With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the governments of such territories.

Article 41

Federal clause.

In the case of a Federal or non-unitary State, the following provisions shall apply:

1. With respect to those Articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such Articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment.
2. A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42

Reservations.

(1) At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

(2) Any State making a reservation in accordance with paragraph 1 of this article may

Convention relating to the Status of Refugees of 28 July 1951**Page 13 of 14**

at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43**Entry into force.**

(1) This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

(2) For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44**Denunciation.**

(1) Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

(2) Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

(3) Any State which has made a declaration or notification under Article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45**Revision.**

(1) Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

(2) The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46**Notifications by the Secretary-General of the United Nations.**

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in Article 39:

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments,

DONE at GENEVA, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in Article 39.

* Convention relating to the Status of Refugees of 28 July 1951

Page 14 of 14

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