

# POLOVCHAK v. SMITH

United States District Court for the Northern District of Illinois Eastern Division

December 27, 1984

No. 80 C 5595

**Reporter:** 1984 U.S. Dist. LEXIS 20922

ANNA POLOVCHAK and MICHAEL POLOVCHAK, Plaintiffs, v. WILLIAM FRENCH SMITH, etc., et al., Defendants.

Immigration and Naturalization Service. He did not "participate personally" in the *amicus* brief filed in the Illinois Appellate Court on the issue of custody.

**Opinion by:** [\*1] McMILLEN

## Opinion

### DECISION

Defendants have filed a motion for judgment on the pleadings or for summary judgment. The three defendants are Attorney General William French Smith, Ted Giorgetti as Acting Director of Immigration and Naturalization Service, and the District Director of I.N.S. By minute order entered September 28, 1984 we granted the motion for summary judgment of the defendants Smith and Giorgetti as individuals. The District Director of I.N.S. is not sued individually but only in his official capacity. We also denied the motion of all defendants for summary judgment with respect to the question of their official liability because we found that plaintiffs' rights to due process may have been violated by one or more of the three defendants.

This decision is in further elucidation of our decision of September 28, 1984 and does not change it. We hope that this procedure may simplify and expedite the conclusion of this case which has already been delayed too long. There do not appear to be any genuine issues of material fact.

The complaint filed by the parents of Walter Polovchak, seeks damages for violation of various alleged intangible rights. However, defendant [\*2] Smith has filed an affidavit dated March 2, 1984 that he was not in office when the minor, Walter Polovchak, was granted asylum. He also stated that he had no previous knowledge about or participation in the departure control order of the

Assuming that Smith participated in some other way in the custody or departure question, he further contends that he is clothed with immunity as a high-ranking government official vested with discretionary powers. Although he may have been acting in the nature of a prosecutor, the record is not complete on this point. Clearly he does not exercise the judicial functions which were discussed in *Butz v. Economou*, 438 U.S. 478 (1978). Nor do plaintiffs have the rights which litigants have in court proceedings and which gave rise in part to the immunity available to certain judicial officers in that case.

However, we find that Attorney General Smith is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In that case, the Supreme [\*3] Court held that government officials performing discretionary functions are shielded from liability for damages if their conduct does not violate clearly-established rights of which a reasonable person should have known. This is a question of law to be decided by the Court, and we find that the right of plaintiffs and of their ward to due process is not a clearly-established rule of law even to this date. \* As the Supreme Court said at 457 U.S. 818,

If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

[\*4] If the Attorney General was not aware of a clearly-established rule of law which was violated in the asylum or nondeparture proceedings, then the same result applies to release from personal liability as to Ted Giorgetti, the Acting Director of I.N.S. who granted the

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\* Our Court of Appeals has recently said, in *Bell v. City of Milwaukee, et al.*, #82-2101 (Sept. 4, 1984):

The Supreme Court has yet to address whether a parent or sibling has a liberty interest in the continued association of a sibling or child, protected from unlawful state interference by the due process clause of the Fourteenth Amendment, in the context of a Section 1983 death action. The issue might have been addressed, but certiorari was dismissed as improvidently granted in *Jones v. Hildebrandt*, 550 P.2d 339 (Colo. 1976), certiorari dismissed, 432 U.S. 183, and *Espinoza v. O'Dell*, 633 P.2d 455 (Colo. 1981), certiorari dismissed, U.S. , 102 S.Ct. 1865, both mentioned in Part V *supra*.

[fn. omitted]

asylum. Since he allegedly had the right to grant or refuse asylum (Complaint, P5), he was a government official exercising discretionary powers. For the same reason therefore that Attorney General Smith's motion for summary judgment must be granted, Ted Giorgetti's motion must also be granted, as to individual liability for damages.

The remaining motion is for summary judgment on the part of Attorney General Smith and the District Director of I.N.S. in their official capacities. Plaintiffs seek an injunction against both of these defendants ordering them to vacate the grant of asylum to Walter Polovchak and against interfering with the plaintiffs' right to the care and training of their minor child. One of these rights is to determine where Walter will live during his minority and of what country he will be a citizen while he lives there. Wisconsin v. Yoder, 406 U.S. 205 (1972). It is an illusory [\*5] defense for defendants to contend that the parents can come to the United States to supervise and have custody over their child.

Plaintiffs also seek the right to participate in the immigration proceedings granting asylum to their minor son, which may or may not be a right of due process. *See*

Bellotti v. Baird, 443 U.S. 622, 643-44 (1979). Possibly plaintiffs could have participated in a motion for reconsideration under 8 C.F.R. P103.5, or they may have been entitled to a hearing within 15 days of the issuance of the departure control order under 8 C.F.R. P215.4. On the other hand, the minor child may have a competing constitutional right. *See In re Gault*, 387 U.S. 1 (1967). These questions need not be resolved on defendants' motions.

Therefore, as we have said before, plaintiffs have stated a claim against the defendants in their official capacity, upon which relief might be granted (see our decision dated August 27, 1984). The motion of defendants Attorney General Smith and the District Director of INS for summary judgment in their official capacities is therefore denied. The motion of Attorney General Smith and Giorgetti, Acting Director [\*6] of I.N.S., individually, is granted.

This case will be called for a report on status by which time all discovery should be completed and the controversy be ready for disposition on Monday, January 21, 1985 at 11:00 o'clock a.m.