IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES,

Petitioners,

vs. CASE NO. 75,553

LUISA SOLIS,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

On Certified Question from the
District Court of Appeal, Third District

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STATEMENT OF THE CASE AND FACTS

A. Background.

The respondent, Luisa Solis, and her five minor children entered the United States in June 1985, having left their native Nicaragua. They were given I-94 identification cards and work authorization documents. Although the I-94 cards specified a departure date, the Immigration and Naturalization Service ("INS") has not moved to deport Ms. Solis and her children. Ms. Solis applied for asylum in the United States in September 1985. The INS has not acted on that application so far as is known to petitioner HRS.

In February 1988 Ms. Solis applied to the Florida Department of Health and Rehabilitative Services ("HRS") for both Medicaid assistance and Aid to Families with Dependent Children ("AFDC"). HRS granted medicaid assistance but denied AFDC in March 1988. Following an administrative hearing in July 1988, the hearing officer affirmed the denial based upon Ms. Solis's status as an alien, finding that applicants for asylum were not eligible for AFDC. (R. 8.)

On appeal, the District Court of Appeal, Third District, reversed the hearing officer and found that Ms. Solis was eligible for AFDC as an alien "permanently residing in the United States under color of law" ("PRUCOL"). Solis v. Department of Health and Rehabilitative Services, 546 So.2d 1073 (Fla. 3d DCA 1989). It certified the following question to this Court as one of great public importance:

Whether an alien residing in this country pending her application for political asylum is eligible for AFDC benefits as one "permanently residing in the United States under color of law" within the meaning of section 409.026, Florida Statutes.

B. Federal Policies.

As shown in the argument that follows, eligibility for AFDC benefits is determined according to federal law and policy.

The federal PRUCOL policy developed by the Family Support Administration in the federal Department of Health and Human Services ("HHS") and in effect at the time of the administrative hearing below is contained in Action Transmittal No. 88-4, dated March 3, 1988. (App. 1.) It does not appear that this Action Transmittal was considered in the July 7, 1988 administrative hearing below. The evidence in the record below would not establish that Ms. Solis was PRUCOL under the policies enunciated in No. 88-4.[1]

On September 8, 1989, the Family Support Administration in HHS issued another Action Transmittal, FSA-AT-89-42 (App. 5), which was followed by the Regional

[1] Ms. Solis did submit the deposition of Virgil Salois, an INS official, in an effort to prove she was PRUCOL under federal law. See Exhibit 10 (R. 115 et seq.). That deposition was taken in another case, Etilia Liberal et al. v. Coler, No. 86-246-CIV- HOEVELER, now pending in the United States District Court, Southern District of Florida. The testimony given in that deposition does not address Ms. Solis's PRUCOL status, her individual circumstances or, indeed, the PRUCOL status of any Nicaraguan alien who has applied for asylum. The Liberal plaintiffs are in a different class altogether, that of Cuban/Haitian entrants.

Administrator's Memorandum No. FA-90-17 (App. 8). These together establish a method for deciding an alien's PRUCOL status by submitting an inquiry on INS form G-845 to the INS. According to that memorandum, in cases in which the INS responds that "INS is not actively pursuing the expulsion of an alien in this class/category, at this time" the state must consider the applicant PRUCOL.

As stated in its motion for extension of time to file its brief in this appeal, HRS submitted the G-845 form to the INS to ascertain Ms. Solis's status. The response was not favorable to Ms. Solis. It stated that "INS actively pursues the expulsion of an alien in this class/category." (App. 10, 11.)

The district court of appeal did not consider the above Action Transmittals or the response to the G-845 inquiry to INS. We acknowledge that they are technically not part of the record. They are included in the appendix because HRS submits that this Court cannot make a fully informed decision in this case if it is not made aware of controlling federal policies. The documents simply establish how federal policy has developed over the years and how it has been applied to those in Ms. Solis's circumstances.

Because the district court of appeal did not have the benefit of the above information, this Court may wish to remand the case to that court for further consideration. HRS has no objection to such a remand.

SUMMARY OF ARGUMENT

The question of who is eligible for AFDC assistance is ultimately a matter of federal law. The term "permanently residing under color of law" has its origin in the Social Security Act, specifically 42 U.S.C. §602(a)(33). The term is not defined in the pertinent Florida statute. See §409.026(1), Florida Statutes. Since both AFDC eligibility and immigration status are determined by federal law and policy, the PRUCOL language of §409.026(1), Florida Statutes, should be construed consistent with those laws and policies. According to HHS policies and the federal case law that is closest on point, the mere fact that an alien has pending an application for asylum in the United States does not make that alien "PRUCOL." Because the term "PRUCOL" is federal in origin and application, the interpretation placed upon it by the administering federal agency is entitled to great weight. The Third District Court of Appeal erred in finding Ms. Solis to be PRUCOL and in disregarding controlling federal law.

The fact that Ms. Solis was granted Medicaid assistance does not mean that she is automatically entitled to AFDC. The record in this case does not establish that Ms. Solis was PRUCOL for purposes of either Medicaid or AFDC.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT RESPONDENT, LUISA SOLIS, WAS PERMANENTLY RESIDING IN THE UNITED STATES UNDER COLOR OF LAW.

A. AFDC Is a Cooperative Federal-State Program and Eligibility for Assistance Thereunder is Determined According to Federal Standards.

The statutory authority for the state's disbursement of AFDC benefits is found in §409.026(1), Florida Statutes.[2] That section authorizes expenditures but it does not create or define any assistance program. The AFDC program is created by federal law. The question of whether respondent Solis qualifies as an alien "permanently residing in the United States under color of law" therefore cannot be answered by consideration of §409.026(1) alone. Indeed, that section provides no guidance whatsoever on the meaning of PRUCOL because that term is borrowed from federal law, specifically

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[2] §409.026(1) provides:

(1) The department [HRS] shall conduct, supervise, and administer all social and economic services within the state which are or will be carried on by the use of federal or state funds or funds from any other source and receive and distribute food stamps and commodities donated by the United States or any agency thereof. The department shall determine the benefits each applicant or recipient of assistance is entitled to receive under this chapter, provided that each such applicant or recipient is a resident of this state and is a citizen of the United States or is an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law.

42 U.S.C. §602(a)(33). It is federal law - - not state law - - that determines eligibility for AFDC.

The AFDC has been termed a "cooperative federal-state effort established by Congress," Sudomir v. McMahon, 767 F.2d 1456, 1456 (9th Cir. 1985) (emphasis supplied). State discretion in this program is not unlimited but rather is defined and confined by federal policies. Doe v. Beal, 523 F.2d 611 (3rd Cir. 1975) (en banc), rev'd on other grounds, 423 U.S. 439. The state's program must be administered in accordance with federal policies and the federal government must approve the program. See 42 U.S.C. §602(a) and (b). In fact, the Supreme Court has unequivocally stated that "eligibility for AFDC assistance must be measured by federal standards." Carleson v. Remillard, 406 U.S. 598, 600 (1972).[3]

Although the issue in this case is clearly whether Ms. Solis is "PRUCOL," the answer to that question cannot be determined simply by construing in isolation §409.026(1) or other state statutes in which the PRUCOL language appears. PRUCOL is an AFDC eligibility criterion and it is also a status

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[3] State cases uniformly recognize the controlling nature of federal law and policies. See Tarver v. State, Dept. of Health and Rehabilitative Services, 371 So.2d 190, 192 (Fla. 4th DCA 1979) ("the question of whether a certain class of persons is eligible to receive assistance is to be determined by reference to federal law"); Herndon v. Colorado Bd. of Social Services, 528 P.2d 395 (Colo. App. 1974) (eligibility for AFDC is a matter of federal law); Lumpkin v. Dept. of Social Services, 408 N.Y.S.2d 421, 280 N.E.2d 249 (N.Y. 1978), appeal dismissed, 439 U.S. 1040 (federal statutes and regulations are controlling); Waits v. Carleson, 107 Cal. 117, 31 C.A.3d 153 (Cal. App. 1973) (California bound by Social Security Act and valid federal regulations in administration of AFDC).

which an alien who enters this country unlawfully may or may not achieve. Only by reference to federal law can a court determine this question.[4]

The district court of appeal thus erred in taking as controlling law its own prior decision in Alfred v. Florida Dept. of Labor and Employment Security, 487 So.2d 355 (Fla. 3d DCA 1986), a decision that construed PRUCOL language in another Florida statute. The Alfred decision ruled that state law, specifically §443.101(7), Florida Statutes, was all that the court need construe in determining PRUCOL status. 487 So.2d at 359. Moreover, to the extent the district court of appeal considered federal case law, it rejected the federal case that is virtually on all fours with this one, Sudomir, supra, in favor of another, Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied sub nom. Shang v. Holley, 435 U.S. 947 (1978), that is readily distinguishable.

B. This Case is Controlled by Sudomir v. McMahon and HHS's Construction of PRUCOL.

In the decision below the district court of appeal relied exclusively on its previous decision in Alfred v. Florida Department of Labor and Employment Security, 487 So.2d 355 (Fla. 3d DCA 1986). There is no indication that Alfred even considered Sudomir v. McMahon, 767 F.2d 1456 (9th Cir.

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[4] Ms. Solis recognized this when she submitted as evidence the deposition of INS official Virgil Salois (see p. 2, n.1 ante) and argued that federal law controlled her right to AFDC. (R. 115, 132.)

1985). Alfred relied on a much earlier federal case, Holley v. Lavine, 553 F.2d 845 (2d Cir. 1977), cert. denied sub nom. Shang v. Holley, 435 U.S. 947 (1978), to which HHS was not a party and which is factually inapposite. Thus, in offhandedly rejecting Sudomir because it had already decided Alfred, the district court of appeal refused to consider, much less give any weight to, the most recently stated position of the federal agency charged with administering the AFDC program and interpreting its provisions, including the PRUCOL requirement.

Holley v. Lavine concerned a Canadian woman who was unlawfully residing in the United States. She had resided continuously in the United States, however, since age twelve when she had first entered lawfully as a student. She married an American citizen and gave birth to six children, all American citizens and all minors, who were living with her when New York terminated her individual AFDC benefits. In addition, the woman was covered by a letter from INS stating that the "[INS] does not contemplate enforcing her departure from the United States at this time." The court noted that "plaintiff is in what is almost certainly a minuscule subclass of aliens who, although unlawfully residing in the United States, are each individually covered by a letter from the Department of Justice . . . ." 553 F.2d 849.

For the Court of Appeals for the Second Circuit the Holley case posed this narrow question:

> [W]hether, in the unusual situation where an alien parent has an official assurance

> that the parent will not be deported at least until the children are no longer dependent on that parent, such parent is "permanently residing in the United States under color of law."

553 F.2d at 849 (emphasis added). The Court answered this question in the affirmative, reasoning that plaintiff's status could be considered permanent at least until her children became adults and that her enforced departure would be highly unlikely even then given her close ties to her children, who were all American citizens.

Unlike Holley, Ms. Solis unlawfully entered the United States, had resided here less than three years when she sought AFDC benefits, and has produced nothing from the INS giving any assurance that it will not enforce her departure. (To the contrary, the recent INS response underscores the inapplicability of Holley.) Moreover, none of her children was born in the United States. All Solis has done is file an application for asylum.

On these facts, Sudomir clearly controls. Sudomir concerned three aliens who had applied to the state for AFDC benefits. Upon denial, they sued the state agency as well as HHS, contending that they were PRUCOL because they had filed applications for asylum and the INS had stayed deportation proceedings pending disposition of the applications. To the Ninth Circuit, the question presented was whether "the Secretary's denial of AFDC benefits rests on a permissible construction of the statute." 767 F.2d 1459. If so, the court

was obligated to defer to that construction. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 2782 and n. 11 (1984). A court cannot reject a reasonable interpretation because, had it considered the statute initially, it would have preferred another. Id.[5]

The Ninth Circuit, easily distinguishing Holley v. Lavine, found the Secretary's construction of the PRUCOL language to exclude aliens applying for asylum permissible. Although such aliens reside in the United States "under color of law," their residence is not "permanent." The word "permanent" did not embrace transitory, inchoate or temporary relationships. 767 F.2d at 1462. A residence may be permanent where the INS has permitted an alien to remain as long as he is in a particular condition, as in Holley, but residence is temporary when the alien's continued presence is solely dependent upon the possibility of having an application for asylum acted upon favorably. Thus, the court stated:

> Aliens who have official authorization to remain indefinitely until their status changes reside permanently; asylum applicants who merely participate in a

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[5] See also Environmental Protection Agency v. National Crushed Stone Ass'n, 449 U.S. 64, 83 (1980) ("It is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration'"), citing Udall v. Tallman, 380 U.S. 1, 16 (1965) (footnote omitted); American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402, 422-23 (1983) (agency's interpretation does not have to be the only reasonable one and it is not important that the result differs from the result which the court would have reached had it been initially presented with the question).

> process that gives rise to the possibility of such an authorization reside temporarily. This is, to repeat, a permissible construction of the statute.

767 F.2d 1462 (emphasis in original).

The record in this case establishes no more than that the INS has not acted to deport Ms. Solis during the pendency of her application for asylum. She has established nothing more than did the applicants in Sudomir. A holding contrary to Sudomir poses the potential for massive and even uncontrollable claims by aliens. It would allow any alien to enter the United States illegally, make his or her presence known to INS by filing an application for asylum, and claim AFDC or other benefits on the basis that he or she is permanently residing in the United States.

HHS's interpretation of PRUCOL is explicitly stated and analyzed in Sudomir. Although that interpretation has since undergone some elaboration, even the most recent developments clearly show that Ms. Solis is not PRUCOL under HHS guidelines. HHS's interpretation is reasonable, and therefore both the district court of appeal and this Court are without authority to substitute any other interpretation. See Chevron v. U.S.A., Inc., supra; Daniel v. Florida State Turnpike Authority, 213 So.2d 585, 587 (Fla. 1968).

Because §409.026(1), Florida Statutes, does not purport to define PRUCOL but merely authorizes payment of benefits in implementation of a federally created program, this

Court must defer to the federal agency's reasonable construction of eligibility requirements and answer the certified question in the negative. Congress has not provided that all aliens who file applications for asylum are, as a class, entitled to AFDC or other federal benefits. Perhaps it should, especially when one state becomes the involuntary host of tens of thousands of aliens to whom the immigration laws accord no particular status, such as Nicaraguans like Ms. Solis. Nevertheless, Congress has not done so, and Florida is therefore not authorized to expend AFDC funds on mere asylum applicants. HRS has properly deferred to the federal agency's construction of the law and, under controlling principles of statutory construction, this Court should too.

C. There is No Evidence of Record that HRS's Medicaid Decision Was Correct, and therefore that Decision Does Not Prove Solis's AFDC Eligibility.

In the opinion below, the district court of appeal stated in dicta that because Solis was granted Medicaid assistance under the PRUCOL language of §409.026(1), Florida Statutes, any denial of AFDC could only be based upon a "political distinction" that the court could not consider. 546 So.2d 1075, n. 8. Because Medicaid was not at issue in the administrative proceedings, there is no explanation in the record of the reasons underlying that determination. In retrospect, it is impossible to say that HRS was correct in that decision. Under relevant federal case law and guidelines

applicable to Medicaid, Ms. Solis was not PRUCOL for either Medicaid or AFDC on the record before this court.

Exhibit 8 in the record (R. 112), submitted by Ms. Solis, consists of three pages of excerpts from the HRS manual pertaining to PRUCOL eligibility for Medicaid and AFDC. (See App. 12-14.) The third page concerns Medicaid and lists a number of statuses that automatically qualify an alien for Medicaid. There is no proof, nor has it been contended, that Ms. Solis qualifies on the basis of any of these statuses. The third page also states at the top that:

> Eligibility under PRUCOL is much broader for AFDC-related Medicaid cases (except RAP). Aliens qualify for Medicaid if they are living in the U.S. with the knowledge and permission of the INS and the INS does not contemplate enforcing their departure.
>
> (App. 14.)

There is likewise nothing in this record that would establish for purposes of either Medicaid or AFDC that the INS is not contemplating enforcing the departure of Ms. Solis and her children.

The language concerning whether INS contemplates enforcing an alien's departure derives from Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985). This decision came out two weeks after Sudomir, supra, and it relies on the Second Circuit's earlier decision in Holley v. Lavine in interpreting PRUCOL language in 42 U.S.C. §1382c(a)(1)(B)(ii), concerning eligibility for certain Social Security benefits. The Second

Circuit approved the lower court's modification of a consent decree to include within PRUCOL an alien "whose departure the INS does not contemplate enforcing." 771 F.2d 1577. In a footnote, the Court set out a non-exclusive list of eleven categories that would be considered PRUCOL. 771 F.2d 1576, n. 33.[6] Ms. Solis has never contended that she falls into any of these categories. If anything, it is apparent that Ms. Solis is an alien whose departure the INS does contemplate enforcing.

Berger is not inconsistent with Sudomir. See Berger at 771 F.2d 1577, n. 34. There it is stated that the Secretary of HEW (now HHS) objected to four of the eleven categories on the ground that they would confer Social Security eligibility on aliens who were "mere applicants for various types of relief or review." The Second Circuit answered this by stating "[the] argument is not persuasive since the categories are, in all four instances, limited to those aliens 'whose departure the INS does not contemplate enforcing.'" Id. (Emphasis in original.) Sudomir, construing this language in Berger, concluded it did not apply to asylum applicants. See 767 F.2d at 1460, n. 6. An alien who merely files an application for asylum is not PRUCOL under Berger anymore than he or she is under Sudomir, or even Holley for that matter.

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[6] The Health Care Financing Administration in HHS subsequently applied the decision in Berger v. Heckler to Medicaid eligibility requirements by adoption of appropriate guidelines implemented through the states.

What Ms. Solis has shown is that she had an application for asylum pending when she sought AFDC and Medicaid. She presented no evidence below to show that the INS did not contemplate enforcing her departure.[7] Even assuming that the PRUCOL standard for AFDC is the same as for Medicaid, Ms. Solis cannot argue that the grant of Medicaid assistance necessarily entitles her to AFDC when she did not prove that the INS does not contemplate enforcing her departure. If she never showed that, she cannot claim the Medicaid decision was correct and therefore in some way "controls" the AFDC decision. The fact that HRS may have made one mistake does not mean that it should be ordered to make another.

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[7] Ms. Solis did submit a Department of Justice press release (Exhibit 9) (App. 15) that purports to assure that Nicaraguans who have a "well-founded fear of persecution" will not be deported in the absence of a finding that he or she has engaged in serious criminal activity or is a threat to national security. (R. 115.) This simply states the current law, that an alien can seek asylum as a refugee if he or she has a well-founded fear of persecution. I.N.S. v. Cardoza-Fonseca, ____U.S.____, 107 S.Ct. 1207, 1211 (1987). The press release, to the extent it is even evidence, does not place Nicaraguans in any new class or category. Solis also placed in evidence a deposition taken in another case that in no way addresses her individual circumstances. See Exhibit 10. Her argument thus amounts to the proposition that all Nicaraguan aliens who apply for asylum are PRUCOL. There was nothing from the INS placed before the hearing officer that spoke to Ms. Solis's individual circumstances.

CONCLUSION

The certified question should be answered in the negative. The decision of the Third District Court of Appeal should be quashed, and the administrative final order reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing **PETITIONER'S INITIAL BRIEF** has been furnished by U. S. Mail to Carmen D. Frick, Esquire, District 11 Legal Counsel, Department of Health and Rehabilitative Services, 401 Northwest 2nd Avenue, Suite S424, Miami, Florida 33128; Scott LaRue, Esquire, Office of General Counsel, Department of Health and Rehabilitative Services, 1317 Winewood Blvd., Tallahassee, Florida 32399-0700; Paulette Ettachild, Esquire, 225 Northeast 34th Street, Suite 300, Miami, Florida 33137; and, Valory Greenfield, Esquire, 225 Northeast 34th Street, Suite 300, Miami, Florida 33137, this 5th day of April, 1990.

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