

## DHS Must Explain Family Split-Up In Border Suit, Judge Says

By **Nicole Rosenthal**

Law360 (June 6, 2022, 8:11 PM EDT) -- A lawsuit seeking compensation for a Honduran man's forced separation from his toddler after entering the U.S. can proceed for now, with a New York federal judge ruling that the government must first explain its decision to separate them.

U.S. District Judge Paul A. Engelmayer's **Friday order** rejected the government's push to have the case thrown out, saying the U.S. Department of Homeland Security must engage in discovery so the court can determine whether the separation in 2018 was due to the Trump-era's "zero tolerance" border crossing policy or the father's criminal past.

The zero-tolerance policy — which mandated the detention of migrants crossing the southern border unlawfully and resulted in children being separated from their parents because of court-ordered limits on detaining children — would give the court authority to hear the family's claims while the father's criminal history would not, Judge Engelmayer said.

"There is factual support for either version of events. Because the existence or not of subject matter jurisdiction turns on this question, jurisdictional discovery is necessary," he wrote.

The Honduran man and his son, referred to only by their initials G.C. and D.J.C.V. in their July 2020 lawsuit, have claimed emotional stress and negligence under the Federal Tort Claims Act as a result of being separated shortly after arriving in the U.S. in May 2018 to escape gang violence. They said they were using initials to protect the identity of the father and son from gang members who threatened them in Honduras.

The father was detained for about five months, and his son, who was 19 months old at the time of separation, remained in the government's custody for an additional five days, according to the complaint.

The U.S. government argued that the family's case had been brought to the wrong court and did not properly detail the claims of severe emotional distress or extreme conduct.

But Judge Engelmayer said further discovery is needed to determine if the government has sovereign immunity under the FTCA. He also denied the government's argument to dismiss the family's negligence claims during the five days from when G.C. was released and when he was reunited with his son, saying the government "has not met its burden to show that any exception to the waiver of sovereign immunity applies."

Under the doctrine of sovereign immunity, the government cannot be sued without its own consent. The FTCA makes exceptions for certain lawsuits against the federal government and its employees if a plaintiff claims harm.

G.C. and D.J.C.V. argued that their initial separation, before G.C. was released, was a result of the Trump administration's 'zero tolerance' policy, which they said was designed to inflict maximum pain and trauma on noncitizens crossing the border without authorization. They also said the policy was unconstitutional, as it resulted in families being separated without due process.

G.C. told U.S. border patrol agents near Hidalgo, Texas, that they were seeking protection from persecution, including threats to their lives, but border agents still separated the two based on G.C.'s

criminal history, according to the decision.

In 2010, G.C. was charged with a misdemeanor for swinging a machete at his wife in Louisiana, after which he was sentenced to 48 days in jail and was removed from the United States in January 2011, Engelmayer wrote. He entered the country a second time in October 2013 and was removed again shortly thereafter.

Despite G.C.'s previous conviction, U.S. Citizenship and Immigration Services found in 2018 that G.C. had a reasonable fear of persecution and torture should he be returned to Honduras. G.C. was detained until Oct. 10, 2018, and was reunited with his son on Oct. 15, 2018, after a successful habeas corpus petition, the opinion said.

In a similar but unrelated lawsuit over family separations, a California federal judge in 2018 **certified** a class of migrant parents separated from their children at the border, holding that the separations likely violated parents' due process rights. The court issued a preliminary injunction requiring the government to begin reuniting separated families and prohibited the government from separating families without a determination that the parent is a danger to the child. The ruling, however, excluded parents with a criminal history from the class.

G.C. and his son also claimed persecution and inhumane acts under the Alien Tort Statute based on the lengthy separation, but Judge Engelmayer dismissed those claims, saying ATS does not supersede the government's sovereign immunity.

The parties now have two weeks to submit a proposed discovery plan regarding both the months-long separation and subsequent gap between G.C.'s release and reunion with his son.

The U.S. Department of Justice declined comment on Monday.

Requests for comment from counsel for G.C. and D.J.C.V. were not immediately returned.

D.J.C.V. and G.C. are represented by Ghita Schwarz of LatinoJustice PRLDEF, Kathryn Ball Narla and Lily G. Becker of Morgan, Lewis & Bockius LLP and Baher Azmy of Seton Hall Law School Center For Social Justice.

The U.S. government is represented by Alexander James Hogan and Rebecca Ruth Friedman of the U.S. Attorney's Office.

The case is D.J.C.V. et al. v. United States of America, case number 1:20-cv-05747, in the U.S. District Court for the Southern District of New York.

--Editing by Peter Rozovsky.