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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF ARISLEDA DUARTE,

Respondent,

-against-

No. 54

THE CITY OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York 12207
February 14, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Duarte v.
2 City of New York.

3 MS. NG: Good afternoon, Your Honors, may
4 it please the court. My name is Fay Ng, representing
5 the appellant, the City of New York. I respectfully
6 request two minutes rebuttal time, please.

7 CHIEF JUDGE LIPPMAN: Sure, go ahead,
8 counselor.

9 MS. NG: The issue in this case involves
10 the application of Section 611(2) of the Correction
11 Law.

12 JUDGE READ: Well, but you sent us
13 something the other day, which is you've rather
14 substantially modified your procedures. Why - - -
15 why would we apply an exception to the mootness
16 doctrine?

17 MS. NG: On two grounds, Your Honor. This
18 case was rendered technically moot on April 18th when
19 the infant turned one and was released from the
20 facility, and we were arguing that we should - - -
21 the court should apply the exception to the mootness
22 doctrine. What we sent to you the other day was a
23 revised nursery order. I guess that could
24 theoretically make it doubly moot.

25 JUDGE SMITH: Yeah.

1 MS. NG: But we - - - we would argue that
2 the exception to the mootness doctrine - - -

3 CHIEF JUDGE LIPPMAN: If the old rule - - -

4 MS. NG: - - - should apply in this - - -

5 CHIEF JUDGE LIPPMAN: If the old rule
6 doesn't apply anymore, then this isn't going to come
7 up, right?

8 MS. NG: Well, the new - - - the difference
9 between the old rule and new rule is that under the
10 old rule there were automatic disqualifiers. If you
11 were convicted of a certain crime, you were
12 ineligible for the nursery.

13 JUDGE SMITH: And are you asking us to say
14 that's okay?

15 MS. NG: No, we're not asking you to
16 actually address that issue, because under the new
17 regulation that - - - under the revised regulation
18 there is no disqualifier, and in fact, in this case
19 it was our position that there was never - - -

20 JUDGE SMITH: Under the new regulation,
21 could Ms. Duarte have been admitted to the program?

22 MS. NG: No, Your Honor, because under the
23 old regulation, although there was an automatic
24 disqualifier, in this particular case she was not
25 automatically disqualified. In this case, what

1 happened was that her application was denied - - -

2 JUDGE SMITH: Yeah, that's why I'm asking;
3 could she have been admitted under the new
4 regulations?

5 MS. NG: Under the new regulation, no, for
6 the same reasons why she wasn't under the old
7 regulation. It's because - - -

8 JUDGE SMITH: How do we know that? Because
9 in this - - - under the new regulations, the warden
10 would have had some discretion, right?

11 MS. NG: Well, under the old regulation the
12 warden in this case exercised discretion.

13 JUDGE READ: Well, there's a lot of - - -

14 MS. NG: The warden in this case did not -
15 - - I'm sorry, Your Honor?

16 JUDGE READ: No, I was just going to say
17 there was a lot of discussion that - - - there are
18 other differences, aren't there, between the new
19 regulation and the old - - - the old one and the new
20 one? I mean, there's a lot more discussion about
21 best interests of the child in the new one.

22 MS. NG: Yes, Your Honor, and that was
23 partly in response - - -

24 JUDGE GRAFFEO: There's - - -

25 MS. NG: - - - to the Appellate Division's

1 decision.

2 JUDGE GRAFFEO: There's procedural
3 differences also. There's more stages, and at one
4 point there's a three-person review.

5 MS. NG: Yes, and that's to clarify the
6 process. But it's our position that the one thing
7 that did not change between the old and the new
8 revision is the agency's view of the application, not
9 only viewing the infant's best interests, but also
10 the security and institutional needs of - - -

11 CHIEF JUDGE LIPPMAN: Yeah, but - - -

12 MS. NG: - - - the department.

13 CHIEF JUDGE LIPPMAN: But those concerns
14 have to be credible, right, about the agency's
15 security?

16 MS. NG: Yes, Your Honor, they do have to
17 be credible, and that goes to a question of whether
18 in a particular case the application was proper.
19 Like in this particular case whether there was a
20 rational basis.

21 But the question becomes, based on the
22 lower court decision and the Appellate Division
23 decision, they really - - - there's an issue of
24 whether or not, when you're determining the best
25 interests of a child, whether that is the sole and

1 controlling factor. And it's our position - - -

2 CHIEF JUDGE LIPPMAN: The primary, right?

3 You acknowledge that's the primary factor?

4 MS. NG: Well, we would acknowledge that it
5 certainly is a factor. We acknowledge that - - -

6 CHIEF JUDGE LIPPMAN: A factor or the
7 primary factor?

8 MS. NG: I would say a factor.

9 JUDGE RIVERA: You mean it's of equal
10 weight?

11 MS. NG: It could be of equal weight or it
12 could be of less weight or more weight - - -

13 JUDGE RIVERA: When is it - - -

14 MS. NG: - - - depending on the
15 circumstances.

16 JUDGE RIVERA: When is it of more weight?

17 MS. NG: I think the secur - - - of equal?
18 It depends - - -

19 JUDGE RIVERA: No, more? When is it more?

20 MS. NG: I would think that as equal weight
21 it would be the institutional needs, because here
22 we're dealing with - - -

23 CHIEF JUDGE LIPPMAN: Say that again; what
24 are you saying?

25 MS. NG: The needs of the institution, in

1 terms of security and the safety of the other infants
2 in the nursery - - -

3 CHIEF JUDGE LIPPMAN: Is what?

4 MS. NG: Is equal, if not as important - -
5 - equal or if not greater consideration that must be
6 balanced.

7 JUDGE SMITH: I guess I'm still troubled
8 with what you're asking us to decide. If we decide
9 that Ms. Duarte - - - you want us to decide that Ms.
10 Duarte was properly excluded from the program, but
11 she was excluded at a time when you had a set of
12 rules that seem, on their face, to bar her, which are
13 no longer in force. So if - - - when we've decided -
14 - - aren't we deciding a truly academic question, not
15 just academic as to Ms. Duarte, but academic as to
16 everybody?

17 MS. NG: Your Honor, with all due respect,
18 we're not requesting the court to rule on Ms.
19 Duarte's application. What we're asking this court
20 to do is determine what factors may be reviewed - - -

21 JUDGE SMITH: But wait a minute, isn't that
22 - - -

23 MS. NG: - - - under 611(2).

24 JUDGE SMITH: You're asking for an essay.
25 I mean, that's a purely abstract question. We

1 usually decide whether one party's right and another
2 wrong in a case.

3 MS. NG: Well, as I mentioned earlier, this
4 was - - - with respect to Ms. Duarte's rights, that
5 question is moot now - - -

6 JUDGE SMITH: Yes - - -

7 MS. NG: - - - it's technically moot.

8 JUDGE SMITH: Yes, but the reason - - - the
9 reason we would take it, even though it's moot, is
10 that there are a lot of other Ms. Duartes out there.

11 MS. NG: That's correct, Your Honor.

12 JUDGE SMITH: But now there aren't.

13 MS. NG: No, yes, there are, Your Honor,
14 because the one issue that's the same between the new
15 revised order and the old is a question of what
16 factors the Department of Corrections, not only the
17 New York City Department of Corrections, but all the
18 other statewide correction facilities - - -

19 JUDGE SMITH: Okay. Okay, So - - -

20 MS. NG: - - - may look at.

21 JUDGE SMITH: So you want us to know - - -
22 so let's say we sit down, we have a meeting and we
23 come up with six factors; who wins the case, you or
24 them?

25 MS. NG: Well, if you decide, Your Honor -

1 - -

2 JUDGE SMITH: How do we know?

3 MS. NG: - - - that under 611(2) that the
4 factor is not the best interests of the child. But I
5 think the issue under 611(2) is - - -

6 CHIEF JUDGE LIPPMAN: Do you want us to
7 find that the factor is not the best interests of the
8 child?

9 MS. NG: Well, we want you - - - yes, Your
10 Honor, that - - - that the corrections facilities may
11 consider the institutional needs, which include the
12 security and safety of the other infants.

13 JUDGE RIVERA: But you're saying under - -
14 -

15 MS. NG: That would mean that - - -

16 JUDGE RIVERA: But you're saying under your
17 new rule you're not really even clear how much weight
18 any of this is given. Going back to - - -

19 MS. NG: Well - - -

20 JUDGE RIVERA: - - - my colleague's
21 question, how are we going to decide something in
22 that kind of abstraction?

23 MS. NG: Well, I guess the first issue to
24 decide it is whether or not - - - who makes a
25 decision under 611(2) and what factors may be

1 considered.

2 CHIEF JUDGE LIPPMAN: Counselor, you're
3 almost asking us to develop a new set of rules to
4 replace the second set of rules that you put out.

5 MS. NG: No, Your Honor, we're not - - -
6 we're actually not - - -

7 CHIEF JUDGE LIPPMAN: As Judge Smith said
8 before, we really have to have something before us,
9 you know, and the only thing that's before us is your
10 new set of rules, because you're conceding it doesn't
11 matter as to the original application.

12 MS. NG: Well, I think what's before the
13 court is not the rules themselves but it's the
14 statute. I think that it's clear that under 611(2)
15 the statute reads, a child may be returned to the
16 facility. And what the lower courts were doing is
17 they were reading that to mean "shall" unless certain
18 circumstances are applicable.

19 JUDGE RIVERA: But what is your
20 interpretation of it?

21 MS. NG: Our interpretation is that the
22 statute reads "may return", so the issue becomes who
23 makes that determination and what factors. And what
24 the lower courts in this case - - - what they seem -
25 - - well, particularly, the Supreme Court made it

1 clear that the fact - - - that the determination was
2 based on the best interests of the child. The Second
3 Department did not prohibit the Department of
4 Corrections, per se, from considering security needs,
5 but at another portion of the decision it did mention
6 that the determ - - - the factor was the best
7 interests of the child.

8 JUDGE SMITH: So you're - - -

9 JUDGE GRAFFEO: It's like you're asking for
10 a standard that the best interests of the child is
11 not the exclusive factor - - -

12 MS. NG: That's correct, Your Honor.

13 JUDGE GRAFFEO: - - - to be considered?

14 JUDGE READ: Or dispositive?

15 MS. NG: Or dispositive, Your Honor.

16 JUDGE GRAFFEO: It seems to me it requires
17 a case-by-case analysis, because you need to know
18 what the behavior of the mother was, the criminal
19 behavior that got her in the prison, as well as,
20 perhaps, what some behavior or disciplinary problems
21 are in the prison if they - - - if they pertain to -
22 - - if they pertain to children. So it's kind of
23 difficult to come up with something that's more
24 definite without a particular case in front of us.
25 And this child has aged out, correct?

1 MS. NG: That's correct, Your Honor.

2 JUDGE GRAFFEO: Is there something residual
3 about this particular case that we're not aware of?

4 MS. NG: It's not residual in this
5 particular case. And Your Honor, you're correct that
6 in balancing the interests of the child and the
7 institutional needs, that will be a case-by-case
8 determination. But what's not a case-by-case
9 determination, if I could just finish my sentence - -
10 -

11 CHIEF JUDGE LIPPMAN: Finish your answer,
12 sure, counselor.

13 MS. NG: What is not on a case-by-case
14 determination is the question whether or not the
15 institution may consider the safety and security of
16 the other infants in the nursery and to making the
17 611(2) - - -

18 JUDGE SMITH: So you - - -

19 JUDGE RIVERA: Right, but let's - - -

20 MS. NG: - - - determination.

21 JUDGE RIVERA: - - - let's say we agree
22 with you that it has - - - it is a factor. You've
23 said that it's case-by-case, or I don't know what
24 you've said, exactly. You couldn't give us a firm
25 answer as to the weight that that particular factor

1 would be given in comparison to any other factor, or
2 even isolated.

3 MS. NG: Well, we would suggest that it
4 would be equal, at least equal - - -

5 JUDGE RIVERA: Equal - - -

6 MS. NG: - - - because that's what the
7 balancing test - - -

8 JUDGE RIVERA: Equal to?

9 MS. NG: - - - does.

10 JUDGE RIVERA: Equal to?

11 MS. NG: Equal to the interests of the
12 child.

13 JUDGE RIVERA: Okay - - -

14 CHIEF JUDGE LIPPMAN: Okay, couns - - - I'm
15 sorry, Judge Rivera - - -

16 JUDGE RIVERA: No, no.

17 CHIEF JUDGE LIPPMAN: - - - go ahead.

18 JUDGE RIVERA: No, no.

19 JUDGE SMITH: I guess, I mean, which rules
20 apply to - - - we - - - yeah, in deciding whether you
21 acted properly or not, are we to decide whether you
22 were enforcing the old rules? Are we assuming you're
23 enforcing the old rules or the new ones?

24 MS. NG: Well, you would be - - - the old
25 ones, under a rational basis test, Your Honor.

1 JUDGE SMITH: Okay.

2 CHIEF JUDGE LIPPMAN: Okay, counselor.

3 We'll - - - you'll have your rebuttal.

4 MS. MORALES: May it please the court, my
5 name is Valentina Morales, and together with Morgan
6 Nighan I represent Arisleda Duarte in this - - -

7 CHIEF JUDGE LIPPMAN: Counselor, is this
8 case moot?

9 MS. MORALES: Your Honor, we have always
10 held that this case is moot, or we had always
11 proposed that this case is moot and that the People
12 have failed to - - -

13 JUDGE SMITH: Now even the mootness is
14 moot?

15 MS. MORALES: Well, I mean, to the extent
16 that the People have conceded one of our primary
17 arguments, which is the governing criteria under
18 Section 611 is a best interests of the child
19 standard, and that within a best interests of the
20 child analysis you can appropriately consider
21 security in terms of the other women in the nursery
22 and the other children, in fact - - -

23 JUDGE SMITH: I don't think your adversary
24 quite said that in her argument, although I can see
25 how you can - - -

1 MS. MORALES: My adversary didn't - - -

2 JUDGE SMITH: - - - the new rules do seem -

3 - -

4 MS. MORALES: My adversary didn't say that
5 in her argument, but - - -

6 CHIEF JUDGE LIPPMAN: So counselor - - -

7 MS. MORALES: - - - but it's clear from the
8 rules, on several occasions - - -

9 CHIEF JUDGE LIPPMAN: - - - are you in
10 agreement, then, basically, as to what the standards
11 are? You agree, too, that it's the best interests of
12 the child, and then there are other issues that may
13 come into play in determining that?

14 MS. MORALES: Your Honor, under Section
15 611, we believe that the sole criterion for deciding
16 whether or not an inmate mother and her child may be
17 separated during the first year of that child's life
18 are dictated by the best interests of the child.

19 CHIEF JUDGE LIPPMAN: Yeah, but you agree
20 that - - -

21 MS. MORALES: We agree - - -

22 CHIEF JUDGE LIPPMAN: - - - these other
23 issues - - - these other issues might relate to that
24 issue, right?

25 MS. MORALES: We agree - - -

1 CHIEF JUDGE LIPPMAN: That's your argument?

2 MS. MORALES: We agree that the best-
3 interests analysis consists of reviewing all relevant
4 factors with - - -

5 CHIEF JUDGE LIPPMAN: Including the
6 charges, counselor?

7 MS. MORALES: Including the charges? No,
8 Your Honor. What the - - - I would argue that - - -
9 and what we are arguing is that charges alone are not
10 de facto indicators of risk, either to an infant
11 child or to other mothers in the nursery - - -

12 JUDGE READ: But they can be - - -

13 MS. MORALES: - - - especially - - -

14 JUDGE READ: Well, being de facto is - - -

15 JUDGE SMITH: You mean a - - - a murderer
16 is no more a problem than a marijuana smoker?

17 MS. MORALES: No, Your Honor, I mean that
18 if someone is accused of murder, it doesn't
19 automatically establish - - -

20 JUDGE SMITH: I - - -

21 MS. MORALES: - - - that they are not a fit
22 mother and that they should not - - -

23 JUDGE SMITH: So - - -

24 MS. MORALES: - - - remain with their child
25 or that that child should be taken from them.

1 JUDGE SMITH: "Automatically" - - - I
2 think, basically, the City seems to have caved on
3 "automatically", but if you're - - - I mean, in
4 common sense, you're the warden of a prison, you're
5 trying to decide whether to let a woman into this
6 program; wouldn't you want to know if she'd killed
7 five people?

8 MS. MORALES: Your Honor, I - - -

9 JUDGE SMITH: If you killed five children,
10 say?

11 MS. MORALES: Absolutely. It's something
12 that should be taken into consideration; it's a
13 factor that should be reviewed in the analysis, and
14 then it is a factor that should be weighed.

15 CHIEF JUDGE LIPPMAN: So where's the disa -
16 - -

17 MS. MORALES: And it should be weighed - -
18 -

19 CHIEF JUDGE LIPPMAN: Where's the
20 disagreement? That's what I'm trying to - - -

21 MS. MORALES: The disagreements, I believe,
22 and it's very difficult for me, actually, in light of
23 this new order to figure out where the two disagree -
24 - -

25 CHIEF JUDGE LIPPMAN: Do you disagree with

1 the new - - - the new stat - - -

2 MS. MORALES: I disagree - - -

3 CHIEF JUDGE LIPPMAN: Counselor, do you - -

4 -

5 MS. MORALES: I'm sorry, Your Honor.

6 CHIEF JUDGE LIPPMAN: - - - disagree with

7 the new policy the way they laid it out?

8 MS. MORALES: The new policy - - - and I
9 have not - - - I've gone through the new policy in
10 the time that I could in the past two days, and I'm
11 not prepared to comment on every single element of it
12 because it doesn't apply to my client - - -

13 CHIEF JUDGE LIPPMAN: Right; go ahead.

14 MS. MORALES: - - - and it doesn't apply to
15 the circumstances of our case.

16 CHIEF JUDGE LIPPMAN: So you agree with the
17 general approach?

18 MS. MORALES: To the extent that they
19 acknowledge that the best interests of the child is
20 the governing criterion and the sole governing
21 criterion under the statute and allows them, within
22 that analysis, to consider security concerns, which
23 definitely relate to the best interests of a child,
24 because it's illogical, I would admit, to conclude
25 that a woman that is so incredibly volatile and so -

1 - -

2 JUDGE PIGOTT: Bedford Hills - - -

3 MS. MORALES: - - - and so violent - - -

4 JUDGE PIGOTT: - - - is very large - - -

5 MS. MORALES: - - - that she cannot - - -

6 JUDGE PIGOTT: - - - you know, it's bigger
7 than Rikers or - - - it has a lot of women, they have
8 a lot of people there that don't have kids. They've
9 got a lot of people that have got mental health
10 issues. They've got all kinds of things. The warden
11 in these places is not a child psychologist, I don't
12 think. They're trying to run a prison, where they've
13 got a lot of bad people who are in there for various
14 reasons and various things. You want to say that, if
15 I - - - that the sole governing criteria of whether
16 or not one of these people, who may be in solitary
17 confinement, who may be under other restrictions,
18 that all of those are subordinate to the fact that
19 she says I want to sit with my kid from 2 to 4 this
20 afternoon?

21 MS. MORALES: No, I don't think that
22 they're subordinate, I think that it's they are
23 factors to be weighed in a best-interests analysis.
24 I think that the State of New York has, for a very
25 long time - - -

1 JUDGE PIGOTT: Why wouldn't it be the best-
2 interests analysis with respect to what's best for
3 the correctional facility, because that's what
4 they're supposed to be running? They're not running
5 a daycare center with a prison attached; they're
6 running a prison with a daycare center attached, and
7 they're trying to balance those two. And it would
8 seem to me that since we call it a prison, or a
9 correctional facility, that's what it is, and that's
10 what the primary purpose is. It should not be the
11 sole governing criteria, the best interests of the
12 child.

13 MS. MORALES: That's correct, but I think
14 it's important to look at the context here, Your
15 Honor. The legislature knew that it was legislating
16 for inmate mothers. It was very well aware that this
17 was a nursery program within a jail facility. If you
18 look at Section 1 - - -

19 JUDGE PIGOTT: Yes, that's why - - -

20 MS. MORALES: - - - of this - - -

21 JUDGE PIGOTT: That's why it says "may". I
22 mean, there's - - -

23 MS. MORALES: Well - - -

24 JUDGE PIGOTT: - - - there's a lot of
25 discretion for the people that are running the

1 facility, it seems to me. And the question then, is
2 did what they do or what they do have a rational
3 basis.

4 MS. MORALES: We don't agree that there is
5 the same level of discretion that the City is
6 alleging in their arguments. The "may" - - - and
7 this is the way that courts have interpreted before -
8 - - in the first sentence, clearly, to us, refers to
9 discretion on the part of the mother, because the
10 state is not in a position to mandate that a mother
11 who is in a correctional facility when she gives
12 birth - - -

13 JUDGE SMITH: Well, I mean - - -

14 MS. MORALES: - - - return to that
15 correctional facility - - -

16 JUDGE SMITH: - - - let me - - -

17 MS. MORALES: - - - with the child.

18 JUDGE SMITH: I think what may be bothering
19 some of us is that maybe it's a theoretical problem,
20 but can you imagine a case in which it's in the best
21 interests of the child for the mother to be in the
22 program but it's a real danger to everybody else in
23 sight. Are you saying that the - - -

24 MS. MORALES: I cannot imagine a case. I
25 cannot imagine - - -

1 JUDGE SMITH: You're saying it just won't
2 happen.

3 JUDGE GRAFFEO: I'll give you an example.
4 You could have a female inmate who has three or four
5 assaults while in the prison, that's a particularly
6 violent propensity and she's attacking other women in
7 the prison. Now, it may be in the child's best
8 interests to have that mother-child bond, but it may
9 be dangerous to the other mothers that are visiting
10 their children during the 2 to 4 afternoons, to have
11 this woman with these other inmates.

12 MS. MORALES: I believe that under a best-
13 interests analysis, when you're weighing all of the
14 factors, Your Honor, you could look to that and say
15 that when you're talking about what's best for an
16 individual baby, being in the presence of constant
17 violence isn't something that would dictate - - -

18 JUDGE SMITH: You're saying - - -

19 MS. MORALES: - - - that the best interests
20 - - -

21 JUDGE SMITH: - - - it's never in the
22 child's best interests for the mother to be attacking
23 the other inmates?

24 MS. MORALES: Exactly.

25 JUDGE GRAFFEO: I guess what we're having

1 difficulty with is does it always have to be phrased
2 and determined in the context of the best interests
3 of the child?

4 MS. MORALES: Under the statute I would
5 argue that yes, it does. It's the sole criterion
6 that's articulated by the legislature.

7 JUDGE GRAFFEO: You think that was the
8 legislature's intent?

9 MS. MORALES: I think that the legislature
10 intended to preserve the mother and child's
11 relationship. I think that when it's shown that it's
12 not in the best interests of the child and the
13 Department of Corrections has the discretions (sic) -
14 - - excuse me, the discretion to review the factors,
15 to weigh them, but what they cannot do is say, it's
16 totally in the best interests of your child to be
17 with you, which I think wouldn't occur if, in fact,
18 you were dealing with someone that was so volatile
19 that they couldn't function in a secure facility.
20 This is a secure facility. This is a much more
21 secure environment than a woman who is at home with
22 her baby alone. There are corrections officers there
23 twenty-four hours a day. There are doctors. There
24 are nurses.

25 On the particular facts of our case and in

1 our record, you have conflicting accounts. You have
2 the warden basing, we would argue, on the automatic
3 disqualifiers in the last nursery order, or later on
4 concluding something different or articulating
5 something different in her affidavit saying that
6 these particular charges indicate that she poses a
7 security threat, while you have other people who are
8 working day-to-day in the prenatal clinic saying this
9 woman is a model patient, saying - - - and getting
10 support and putting in letters of support for an
11 inmate that they know has this kind of a record. And
12 so you have a conflicting issue there - - -

13 CHIEF JUDGE LIPPMAN: Counselor, can there
14 - - -

15 MS. MORALES: - - - and it needs to be
16 weighed - - -

17 CHIEF JUDGE LIPPMAN: - - - there ever be -
18 - -

19 MS. MORALES: - - - which is why - - -

20 CHIEF JUDGE LIPPMAN: Can there ever be
21 that it clearly is in the best interests of the child
22 for the child to be with the mother, you know, no
23 doubt about it, and then at the same time it could
24 not be in the interests of the institution to allow
25 that? Can there be a situation like that? And if

1 so, going back to your adversary's argument, what's
2 the weight? Is that a possible hypothetical?

3 MS. MORALES: I can't imagine a
4 hypothetical where it would not be - - - I don't want
5 to use the interests of the institution, but where it
6 would prohibit or somehow prevent the Department of
7 Corrections from keeping people safe in their - - -

8 JUDGE SMITH: You - - -

9 MS. MORALES: - - - secure institution - -
10 -

11 JUDGE SMITH: You would say, though - - -

12 MS. MORALES: - - - and also - - -

13 JUDGE SMITH: - - - if the problem - - - if
14 the problem is only a significant burden on the
15 institution, you'd say that's a burden that flows
16 from the statute?

17 MS. MORALES: Absolutely.

18 JUDGE SMITH: If they have to put another
19 guard in there, they've got to put another guard in
20 there?

21 MS. MORALES: Absolutely. I think - - -

22 JUDGE RIVERA: Are you also - - - if I'm
23 hearing you right, are you also saying that, in part,
24 if the institution can accommodate and address these
25 security concerns, that the overriding factor is then

1 the best interests of the child?

2 MS. MORALES: Yes.

3 JUDGE SMITH: My question is - - - and
4 maybe it's implicit in what you said before - - - in
5 your view, in light of the new rules, should we now
6 dismiss this appeal?

7 MS. MORALES: It's our position that the
8 appeal is totally moot, and yes, it should be
9 dismissed.

10 JUDGE SMITH: Is that a yes?

11 MS. MORALES: That is a yes.

12 CHIEF JUDGE LIPPMAN: And are you convinced
13 if we did that that these - - - new policy that they
14 put out is at least something that we would see
15 whether in practice it does serve the - - - the
16 primary interests or the best interests of the child?

17 MS. MORALES: I believe so. I mean - - -

18 CHIEF JUDGE LIPPMAN: Are you comfortable
19 with it?

20 MS. MORALES: There are certain - - - there
21 are certain terms that are employed; for instance,
22 the good working order of the facility and the new
23 nursery order, and I, frankly, just don't know what
24 that is. I mean, if that means - - -

25 JUDGE SMITH: But would you say - - -

1 MS. MORALES: - - - if that means you show
2 up late to breakfast and we decide that you - - -

3 JUDGE SMITH: Without - - -

4 MS. MORALES: - - - cannot be with child, I
5 think that's not - - -

6 JUDGE SMITH: You're not going to sign off
7 on every word in the new rules; would you agree that
8 they are significant progress over the old rules?

9 MS. MORALES: They are significant
10 progress.

11 CHIEF JUDGE LIPPMAN: Okay. Thanks,
12 counselor.

13 MS. NG: Just - - -

14 CHIEF JUDGE LIPPMAN: Counselor, what's
15 wrong, in light of the statute, with viewing it that
16 the issues, some of which you raise in the policy,
17 can be considered within the context of what's the
18 overall best interests of the child, even recognizing
19 that you're running a penal institution. Why isn't
20 the way your adversary is framing what your policy is
21 or should be, is that something that you object to,
22 that you could consider the factors that you're
23 considering while recognizing that the best interests
24 of the child are really the predominant factor?

25 MS. NG: Well, I think the problem with

1 that, Your Honor, is - - - is we go back and forth, I
2 mean, as Judge Read pointed out, I mean, at one point
3 counselor did note that it was the sole criterion in
4 the best interests. And that's our position, that it
5 is not the sole criterion, although - - -

6 CHIEF JUDGE LIPPMAN: Do you agree - - -

7 MS. NG: - - - the welfare of the child - -
8 - I'm sorry.

9 CHIEF JUDGE LIPPMAN: Do you - - - what
10 about the hypothetical I gave to your adversary before?
11 Is there a situation that clearly something is in the
12 best interests of the child, in allowing the mother
13 into the program, and that in terms of running the
14 penal institution, it's not in the best interests of
15 running the penal institution? And I think it was
16 Judge Smith said could you make an argument, at that
17 point, that well, the best interests of the child is
18 to be with the mother, then the penal institution has
19 to figure out, you know, how to deal with that within
20 that con - - - put on an extra guard or whatever.

21 MS. NG: Um-hum.

22 CHIEF JUDGE LIPPMAN: Why isn't that a
23 reasonable way to look at this?

24 MS. NG: Well, Your Honor, it's our - - -

25 CHIEF JUDGE LIPPMAN: In light of the

1 statute, which clearly the legislature recognized it
2 was dealing with a penal institution when they - - -
3 so what do you think?

4 MS. NG: Well, Your Honor, it's our
5 position that there is such circumstances where it
6 may be in the best interests of the child because of
7 nurturing the relationship. We recognize that
8 relationship, and that's why we have - - - part of
9 the reason we have a nursery. But on the other hand,
10 you know, it can't be second - - - it can't be
11 primary to the need and the security of the other
12 infants; we have a nondelegable duty to the other
13 infants.

14 And yes, theoretically we could hire more
15 guards, we could pull more guards, but it's not a
16 question of just resources, because if you make that
17 resource argument, then, you know - - - then the
18 theory is that, you know, somebody who is a detainee
19 or an inmate should have no curtailments of any of
20 their rights because theoretically throwing resources
21 at something - - -

22 CHIEF JUDGE LIPPMAN: No, but you're not
23 dealing - - -

24 MS. NG: - - - could always take care of
25 something.

1 CHIEF JUDGE LIPPMAN: But you're not
2 dealing with it in the abstract; you're dealing with
3 this in the context of a statute where there is a
4 legislative intention, clearly, at the very least,
5 that this relationship should be nurtured between the
6 mother and the child.

7 MS. NG: But also in that piece of
8 legislation, again, I would bring it back to the fact
9 that the legislation says "may", does not say
10 "shall", and more than that, the legislation provides
11 the warden with discretion to remove the child at any
12 point before the child reaches one year of age - - -

13 JUDGE SMITH: So you said - - - the statute
14 says the child may be returned with its mother to the
15 correctional institution in which the mother is
16 confined. You say "may", that means "may be" if the
17 person says okay?

18 MS. NG: I think that that gives the
19 discretion to the warden. That language, in addition
20 to the language a few lines below, that gives the
21 power to the warden to remove the child at any point.

22 JUDGE SMITH: There's a case, pretty well
23 written case, from Tioga County Supreme Court, that
24 says that, in context, that the "may" has to be
25 giving permission to the mother, not to the

1 correctional facility.

2 MS. NG: Well - - -

3 JUDGE SMITH: Is he wrong?

4 MS. NG: - - - with all due respect, Your
5 Honor, we believe that that case is wrong, and that
6 the discretion can't be placed with the mother
7 because that would just give the mother carte
8 blanche. It would also be contrary and inconsistent
9 with the lines further below where the warden has the
10 discretion to remove that child at any point before
11 the child is one, without any limitation as to a
12 determination as to the - - -

13 JUDGE PIGOTT: How many children do you
14 have there?

15 MS. NG: - - - welfare of the child. I'm
16 sorry?

17 JUDGE PIGOTT: How many children do you
18 have there?

19 MS. NG: How many children do we have in
20 the nursery? At the time that petitioner applied,
21 there were three infants in the nursery. The nursery
22 has a capacity of fifteen mothers and sixteen
23 infants, because there could be a twin.

24 I see my time is up. If you have - - -

25 JUDGE GRAFFEO: Can I - - - can I just ask

1 - - -

2 CHIEF JUDGE LIPPMAN: Go ahead, Judge
3 Graffeo.

4 JUDGE GRAFFEO: - - - one more question?
5 At a real practical level, what's the difficulty in
6 saying that the best interests of a child is the
7 primary factor to consider but that the correctional
8 facility, this - - - you know, whatever the
9 administrative structure is that reviews this can
10 consider other security concerns.

11 MS. NG: I'm sorry, the question is - - - I
12 mean, that would be - - - that would be fine with us,
13 because we believe that, you know, it's a balancing
14 test, so long as the corrections facilities has the
15 ability to consider the institutional needs.

16 CHIEF JUDGE LIPPMAN: Counselor, but that's
17 exactly what your adversary is saying.

18 MS. NG: Except that my adversary later on
19 says that the sole criterion is the best interests.
20 And - - -

21 JUDGE READ: Yeah, well, she's defining
22 best interests differently. She's defining it and
23 saying within the best interests, that can encompass
24 security concerns.

25 MS. NG: And I mean, if it's defined, if

1 the best-interest analysis is defined as the ability
2 for the Department of Corrections to consider the
3 security and safety, and that's an equal weight, then
4 that would be fine with us.

5 JUDGE RIVERA: Counselor, can I just follow
6 up? But if I - - -

7 MS. NG: That's not what it is.

8 JUDGE RIVERA: If I've not misunderstood
9 you, though, you want it to be in equipoise, but you
10 are not taking the position that regardless of how
11 slight the burden may be, you will not accommodate
12 and you're not required to accommodate under the
13 statute or under the regulation. Am I understanding
14 you correctly?

15 MS. NG: No, that's not our position,
16 because, in fact, we have a nursery. In fact, at the
17 time petitioner applied we had infants and mothers in
18 the nursery.

19 JUDGE RIVERA: No, no, no, I'm not talking
20 about that.

21 MS. NG: So that is not our position.

22 JUDGE RIVERA: I'm talking about in this
23 determination about the best interests of the child.
24 Your opponent suggested that, you know, maybe you
25 just need to do one or two things to address your

1 institutional concern. So I just want to know is it
2 your position that you will never address
3 institutional concerns to accommodate the mother and
4 the child?

5 MS. NG: Well, no, Your Honor, that's not
6 our position, because in fact, you know, we do have -
7 - - you know, as petitioner pointed out, we have
8 historically run this nursery and we have
9 historically had, you know, mothers who had, you
10 know, serious criminal charges that they were
11 previously convicted of or charged with. And yes, we
12 accommodate them and we have this nursery set up, we
13 have the security, but at a certain point there's a
14 risk involved. And I think this particular case - -
15 -

16 JUDGE RIVERA: What's an example of an
17 accommodation? I promise it'll be the last question.

18 MS. NG: Well, an example of accommodation
19 is separate housing for the - - - you know, I can't
20 tell you individually, like, I mean, if you're asking
21 me if we have a high-risk prisoner whether we're
22 going to put on an extra guard, I mean, I can't
23 answer that because, you know, we can't - - - we
24 can't make those kind of resource allocations on a
25 case - - - you know, I can't make that kind of - - -

1 CHIEF JUDGE LIPPMAN: Okay.

2 JUDGE SMITH: Judge Rivera only meant that
3 it would be her last question.

4 CHIEF JUDGE LIPPMAN: Oh, go ahead, Judge.

5 JUDGE SMITH: Sorry. But I mean, I'm
6 having some difficulty, and I think some of us are,
7 figuring out whether, and in what ways, you and your
8 adversary really disagree. Doesn't that suggest to
9 you that maybe we should save this whole issue for a
10 case in which there's a real - - - a live person
11 presenting a conflict?

12 MS. NG: Well, we would urge this court not
13 to do that because this is a recurring issue. This
14 comes up every time somebody's going to apply - - -
15 apply for an admission to the nursery. I think that
16 the problem is the timing, particularly for a violent
17 - - -

18 CHIEF JUDGE LIPPMAN: Counselor, but I
19 think the point that Judge Smith is making, you
20 really sound pretty close to each other in terms of
21 your position, and maybe there won't be a hell of a
22 lot of cases that are coming up after your new policy
23 is now in place.

24 But that was a comment, not a question.

25 Thank you both.

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MS. NG: Thank you, Your Honors.

CHIEF JUDGE LIPPMAN: Appreciate it.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF ARISLEDA DUARTE v. THE CITY OF NEW YORK, No. 54 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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