86-8010
86-8011

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

MOISES GARCIA-MIR, et al.,	RAFAEL FERNANDEZ-ROQUE, et al.,
Plaintiff-Appellees and Cross-Appellants,	Plaintiff-Appellees and Cross-Appellants,
vs.	vs.
EDWIN MEESE, III, et al.,	EDWIN MEESE, III, et al.,
Defendant-Appellants and Cross-Appellees.	Defendant-Appellants and Cross-Appellees.

APPEAL NOS. 86-8010 AND 86-8011

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

REPLY BRIEF FOR APPELLEES AND CROSS-APPELLANTS

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STATEMENT OF THE ISSUES

1. Was the district court correct in finding that a liberty interest in parole was created for Mariel Cubans who were not criminals or mental incompetents in Cuba?

2. Does international law apply to this case and does the Cubans' detention violate it?

3. Have the Cubans raised a claim to a "core" liberty interest under the United States Constitution and is their detention, absent fair hearings as required by due process, illegal thereunder?

ARGUMENT

I. INTRODUCTION

Plaintiffs, the class of Mariel Cubans detained in the federal penitentiary at Atlanta, Georgia, raised five issues in their initial brief. Having now received both the initial and response briefs of the government, Plaintiffs believe that two of the issues have been fully addressed. Consequently, in this reply brief Plaintiffs will not discuss the liberty interest issue regarding those Cubans who have been continuously detained since 1980 or the class decertification question.

Certain points raised in the government's "Cross-Appeal and Reply Brief" (hereinafter Goverment Reply Brief) do require a response. Therefore, in Section II below Plaintiffs will further discuss the invitation to the Mariel Cubans and the consequent creation of a liberty interest in parole for them. In Section III they will briefly reply to the government's arguments concerning international law [1/] and in Section IV they will address questions regarding their claim to a "core" liberty interest arising directly under the United States Constitution.

1/ However, as before, Plaintiffs have been informed that the Lawyers Committee for Human Rights, Amicus Curiae, will be filing a reply. Therefore, Plaintiffs will adopt that response as their own.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE MARIEL CUBANS WHO WERE NOT MENTALLY INCOMPETENT OR CRIMINALS IN CUBA HAVE A LIBERTY INTEREST IN PAROLE SUCH THAT THEIR CONTINUED DETENTION IS UNLAWFUL ABSENT HEARINGS PROVIDED AS REQUIRED UNDER DUE PROCESS.

A. An Invitation Was Extended To The Cubans.

The evidentiary basis on which Plaintiffs claim that an invitation was extended to them is fully set forth in the extensive documentation attached to their September 11, 1981, Memorandum Regarding President Carter's Invitation (R.20) and their November 30, 1984, Motion For Entry of Writ of Habeas Corpus (R.51). [2/] The district court discusses it at Fernandez-Rogue v. Smith, 622 F.Supp. 887, 896-97 (N.D. Ga. 1985), and this Court no doubt will examine it thoroughly. Therefore, Plaintiffs will not repeat their analysis of what the evidence demonstrates. However, they do wish to respond to one point the government makes regarding President Carter's "open heart and open arms speech", i.e. whether the President "limited" his invitation in some manner such that, in effect, no invitation at all was extended.

[2/] At the time Plaintiffs filed their initial brief, the record in the case had not been prepared. Plaintiffs were advised that the record would follow the designations of the parties' February 4, 1986, Stipulation of Record. Although they still have not received the official record, Plaintiffs have now been informed that certain changes in the numbers used in the Stipulation have been made. R.51 is Number 54 on the Stipulation. It was referred to as "R.54" in Plaintiffs' initial brief.

According to the government, President Carter's qualifying phrase "in accordance with the law" vitiated any invitation he may have been extending. Government Reply Brief, p. 5. The sentence in question reads,

> So, those 400 [hiding from mob violence] plus literally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. (emphasis supplied).

R.51, November 30, 1984, Habeas Corpus Motion, Exhibit 22; Fernandez-Roque v. Smith, 622 F.Supp. pp. 897-98 n. 16. In the context of that sentence alone, much less the entire speech, the phrase "processed in accordance with law" hardly connotes the idea that some or all of the "tens of thousands" are to be received into indefinite detention. Rather, the President suggests that all Cubans will be welcomed to this country subject only to INS screening and settlement.

The "open heart and open arms" statement was widely and properly understood to be an invitation to the Cubans. That is the only sensible interpretation one can give to it. See United States v. Frade, 709 F.2d 1387, 1395 (11th Cir. 1983).

Furthermore, the government made clear by subsequent pronouncements that its welcome extended to all Cubans except those who were criminals or suffered from mental impairments. Fernandez-Roque v. Smith, 622 F.Supp. at 898.

B. The Cuban/Haitian Entrant Status Did Enhance Plaintiffs' Legal Status Vis-a-vis Other Excludable Aliens.

According to the government, "The status of [the Mariel Cubans] under our immigration laws was not enhanced by virtue of placement [in "Cuban/Haitian Entrant Status"] ..." Government Reply Brief, p. 6. Plaintiffs suggest otherwise.

Ordinarily, an excludable alien is placed in an immigration exclusion hearing which will ultimately lead to his deportation. However, the Mariel Cubans were not subject to this rule because they had been afforded a special status, "Cuban/Haitian Entrant." See R.51, Exhibit 1, Weglian Affidavit, pp. 6-7 and Exhibits 33-37, INS Telegrams Outlining Procedures and Parameters. [3/] The unique classification had been created because existing immigration laws in this county did not address the peculiar situation of the 1980 Freedom Flotilla. See June 20, 1980, Statement of Victor Palmieri, United States Coordinator for Refugee Affairs, attached as Exhibit 32 to R.51 (original pages numbered 79-80). As explained by Ambassador Palmieri,

> Cubans who have arrived in the United States during the period April 21 - June 19, 1980, and who are in [INS] proceedings as of June 19, 1980, [4/] will have their parole into the county renewed for a 6-month period as "Cuban-Haitian entrants (status pending)".

R.51, Exhibit 32 (original page Number 80).

While it is true that the Cuban/Haitian Entrant Status

[3/] Also, as a consequence of their status, the Mariel Cubans did not have their asylum claims processed as that is normally undertaken in the exclusion process.

[4/] Later extended to cover all who arrived between April 21 and October 10, 1980. R.51, Exhibit 36.

did afford the Cubans access to social services, Government Reply Brief p. 6, it is equally true that by virtue of this status the Attorney General was not free to treat the Mariel Cubans as he would any other group of excludable aliens. The district court correctly found this to be the situation. Fernandez-Roque v. Smith, 622 F.Supp. at 900. The Cuban/Haitian Entrant Status allowed Plaintiffs freedom on parole not as a matter of individual grace, cf. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 101 S.Ct. 2460, 69 L.Ed.2d 158 (1981), but rather by virtue of the unique immigration status granted to them as a matter of policy, which distinguishes Plaintiffs from other excludable aliens.

C. Expectation of Parole Versus Entitlement.

The government contends that to have a protected liberty interest "...there must be a legitimate claim of entitlement, not merely an expectation ..." Government Reply Brief, p. 8. Accordingly, because Plaintiffs base their claim that a liberty interest in parole exists on their legitimate expectations under the invitation extended to them, the government believes it to be deficient. Id., p. 9. The government's distinction between "expectations" and "entitlement" is without substance.

Significantly, the Supreme Court continues to use the language of "expectation" rather than of "right" to describe creation of liberty interest, Olim v. Wakinekona, 461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). A liberty interest depends not upon the existence of a cause of action

in state courts, but rather upon a presumption of releasability or freedom as expressed in controlling government directives. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). See also Johnson v. Parke, 642 F.2d 377, 379-80 (10th Cir. 1981) [Prisoner's expectation, based on regulations, that prison officials will provide copies of court documents is sufficient to create a liberty interest regardless of whether prisoner has independent right to such copies].

D. Paktorovics v. Murff.

The government seeks to distinguish the Cubans' case from United States ex rel. Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958), by arguing that "(t)he alien there was being excluded without the opportunity to show that the reasons leading to the proceedings were flawed." Government Reply Brief, 10. That is precisely what the Cubans seek, an opportunity to demonstrate that the reasons for their detention in the Atlanta penitentiary are "flawed". Paktorovics plainly supports Plaintiffs' contentions. 5/

5/ Moreover, the government's continued use of Moret-v. Karn, 746 F.2d 989 (3d Cir. 1984), to demonstrate the viability of the existing procedures for Plaintiffs who wish to challenge their detention is indeed curious. Government Initial Brief, p. 42; Reply Brief, p. 10. Judicial review is not a substitute for due process in administrative decision making. See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Moreover, despite winning his case and successfully contesting "the basis for [his] parole revocation", Julio Moret still is in jail at the Atlanta

E. What Process Is Due?

At page 11 of its reply brief, relying on United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 70 S.Ct. 309, 94 L.Ed. 307 (1950), the government contends that even if due process applies (i.e., a liberty interest exists), the only process which is due is that presently afforded by Congress. Shaughnessy is completely inapposite to this case. It addressed admission into this country. Plaintiffs challenge the legality of their continued, and indefinite, detention.

Moreover, the government deals at best with Plaintiffs' "core" liberty interest argument; Shaughnessy is no response to Plaintiffs' separate argument that by its own actions the government has created a liberty interest where none exists by virtue of the Constitution alone. Cf. Hewitt v. Helms, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

INS v. Lopez-Mendoza, ___ U.S. ___, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), is also not controlling of the issues in this case. The exclusionary rule was not extended to deportation hearings for a variety of reasons, 82 L.Ed.2d pp. 788-790, none of them relevant to this case. Most importantly,

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CON'T OF FOOTNOTE 5

penitentiary! Rather than releasing Mr. Moret, who is guilty only of what Defendants call "minor violations of half-way house rules", Government Reply Brief, p. 7, the government simply came up with a new reason to detain him, rendering the litigation leading to the Third Circuit's order a total waste of time.

the Supreme Court found the rule not significantly protective of fundamental fairness, 82 L.Ed.2d at 790. The procedures required by the district court, to the contrary, are aimed directly at the need for procedural fairness before continued imprisonment in a maximum security institution. Lopez-Mendoza does not stand as a bar to the imposition of these procedures.

III. INTERNATIONAL LAW APPLIES TO THIS CASE AND PROHIBITS PLAINTIFFS' DETENTION.

As was the situation during the initial briefing in this appeal, Plaintiffs adopt and will rely on the reply brief that will be filed by Amicus Curiae. There are two points, though, to which Plaintiffs will make specific response.

The first is that the district court did in fact commit a fundamental error by concluding that acts of subordinate cabinet officials can be "controlling executive act(s)" sufficient to override established international law. Fernandez-Roque v. Smith, 622 F.Supp. 903. Such a result is contrary to the holding in The Paquete Habana, 175 U.S. 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900), and would have the effect of purging international law from the law of the United States. Every government action is at the direction of some official. To hold that anyone but the President can determine when and where the United States will choose to ignore international law is to render that body of law impotent within the United States. Compare Brief of Amicus Curiae, pp. 11-16 with Government Reply Brief, pp. 18-20.

The second point concerns the government's suggestion that prolonged arbitrary detention may not violate the customary international law of human rights. Government Reply Brief, pp. 24-32. It is not clear to Plaintiffs whether the government argues that there is no such prohibition, or if it simply is saying that the specific facts of the Plaintiffs' detention do not amount to a violation of the rule. Plaintiffs disagree with both contentions but they wish to underscore the former by reference to the Tenth Circuit's holding that,

> No principle of international law is more fundamental than the concept that human beings should be freed from arbitrary imprisonment.

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981).

IV. PLAINTIFFS HAVE RAISED A CLAIM TO A "CORE" LIBERTY INTEREST UNDER THE CONSTITUTION AND THEIR DETENTION IS ILLEGAL THEREUNDER.

For the reasons set forth in Eleventh Circuit appeal 83-8628 (consolidated with 83-8065) the Plaintiffs believe that they have a liberty interest which arises directly under the United States Constitution. Their position was rejected in Fernandez-Roque v. Smith, 734 F.2d 576, 581-82 (11th Cir. 1984). Plaintiffs have asserted their position on this point again in this appeal. The government's response is that Plaintiffs did not raise the issue below and that this court cannot reconsider the earlier ruling. Government Reply Brief, pp. 12-13.

Plaintiffs do not agree that they were under a requirement to petition the court below in the manner the government implies, but, in any event, they did so. Shortly after the issuance of Fernandez-Roque v. Smith, id., Plaintiffs addressed the district court by means of the July 5, 1984, letter in the record at R. 49. At page two of the letter Plaintiffs state,

> To the extent a final reservation or re-assertion of their claim to a core liberty interest, stemming directly from the Constitution, entitling them to Fifth Amendment Due Process rights in their release hearings is required, Plaintiffs do so now.

Thus, the district court was specifically asked to again rule for the Plaintiffs on this point. It did not do so because, among other reasons, a lower court is not free to ignore the decision of an appellate court in the same case. See, e.g., Taylor v. Nelson, 615 F.Supp. 533,535 (W.D. Vir. 1985).

However, while the district court was bound by the law of the case, this Court is not.

> We have made it clear that the [law of the case] doctrine is not an inexorable command that rigidly binds the court to its former decisions, but rather is an expression of good sense and judicial practice.

Terrell v. Household Goods Carriers Bureau, 494 F.2d 16 (5th Cir. 1974), cert. dismissed, 419 U.S. 687 (1974). The rationale for exempting circuit courts from an inflexible law of the case doctrine was explained by the First Circuit in White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940). The White court points out that when a circuit court affirms a decision on the basis that an earlier appeal in the same case

resolved the dispute, the United States Supreme Court is not bound by that ruling. 6/ Instead, the Supreme Court's ultimate review will depend on the substantive merits of the case. Accordingly, if the circuit court determines on the second appeal that its first decision was in error, it can change the decision. See also Devines v. Maier, 728 F.2d 876, 879-81 (7th Cir. 1984).

Therefore, while circuit courts do not often reconsider earlier decisions made in the same case, they clearly have the power to do so. Plaintiffs submit that in light of the Supreme Court's decision in Jean v. Nelson, ___ U.S. ___, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985), that the ruling as to the constitutional rights of excludable aliens need not have been made in Jean v. Nelson, 927 F.2d 957 (11th Cir. 1984) (en banc), and the fact that the Eleventh Circuit Jean decision afforded the primary basis for the 1984 Fernandez-Roque ruling, it would not be inappropriate for this court to reconsider its earlier decision.

CONCLUSION

For the above reasons, Plaintiffs pray that this Court grant them the relief which they outlined in their initial brief.

6/ See Diaz v. Patterson, 263 U.S. 399, 402, 44 S.Ct. 151,68 L.Ed. 356 (1923).

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of Reply Brief for Appellees and Cross Appellants by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon addressed to:

Lauri Steven Filppu
Office of Immigration Litigation
Civil Division
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This 12th day of March, 1986.

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