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United States District Court, District of Columbia.

James ABOUREZK, et al., Plaintiffs,
v.
Ronald REAGAN, et al., Defendants.
CITY OF NEW YORK, et al., Plaintiffs,
v.
George P. SHULTZ, et al., Defendants.
Bruce CRONIN, et al., Plaintiffs,
v.
George P. SCHULTZ, et al., Defendants.

CIV. A. Nos. 83–3739, 83–3741 and 83–3895. |
June 7, 1988.

Attorneys and Law Firms

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Opinion

OPINION

***1** These three cases are before this Court once again[1] following a remand by the Court of Appeals[2] and the affirmance of the Court of Appeals decision by an equally divided Supreme Court.[3] Presently pending are cross-motions for summary judgment.

I

Factual Background

The cases involve visa denials to three sets of aliens. The subject of the first case is a trip that Tomas Borge, Interior Minister of Nicaragua, wanted to make to the United States *inter alia* to speak to various groups in this country at their invitation.[4] *Abourezk v. Reagan,* C.A. No. 83–3739. The second case revolves around an invitation to speak at anti-nuclear rallies, extended by American citizens to Nino Pasti, a former Italian general and a former member of the Italian Senate, as well as an active participant in the World Peace Council, an organization the Executive Branch considers to be controlled by the Soviet government. *Cronin v. Schultz,* C.A. No. 83–3895. The third case was brought on behalf of two Cuban women, members of the Federation of Cuban Women, an instrumentality of the Cuban Communist Party, who were to come here to speak at various universities and other forums in this country at the invitation of United States sponsors. *City of New York v. Schultz,* C.A. No. 83–3741.

All of these persons were denied visas pursuant to section 212(a)(27) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1182(a)(27), hereinafter "subsection (27)," which provides that members of the following class of aliens are ineligible for entry visas:

Aliens who the consular officer ... knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States.

Upon being notified of the visa denials, the American sponsors of the aliens brought these actions in this Court. Following the filing of various pleadings, the Court was called upon to rule on the government's motion for summary judgment. As part of its consideration of that motion, and in order to determine the factual grounds for the denials of the requested visas, the Court viewed *in camera* highly classified affidavits[5] of Under Secretary of State for Political Affairs Lawrence Eagleburger, which provided the specific bases for these denials.

Ultimately the Court granted the government's motion, upon the following conclusions: (1) under Supreme Court law, the Department of State is empowered to deny entry to an alien on the basis of any facially legitimate and bona fide reason, and "the courts will not look behind the exercise of that doctrine, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant," *Kleindiest v. Mandel,* 408 U.S. 753, 770 (1972); (2) the statute covers an alien's injury to the public interest, welfare, safety, or security, whether that injury stems from his activities while in the United States or from his entry into this country or his presence here; (3) the McGovern Amendment[6] to subsection (28) of the Act does not detract from the authority of the Executive Branch to consider legitimate governmental policy interests under subsection (27); (4) the "public

interest[,] ... welfare, safety, or security" language is sufficiently broad to include foreign policy concerns;[7] and (5) aliens invited to impart information and ideas to American citizens may not, consistent with the First Amendment, be excluded under subsection (27) on account of the content of their proposed messages, but the Eagleburger affidavits indicated that the content of speech was not the basis for the exclusion here. *Abourezk v. Reagan,* 592 F.Supp. 880 (D.D.C.1984).

A divided Court of Appeals vacated the judgment and remanded for proceedings consistent with its opinion. *Abourezk v. Reagan,* 785 F.2d 1043 (D.C.Cir.1986). The Supreme Court affirmed the decision of the Court of Appeals on a 3–3 vote, 108 S.Ct. 252 (1987), and the cases are accordingly now again before this Court under the terms of the Court of Appeals remand. Both sides have moved for summary judgment, and the motions are now ripe for decision.

II

Activities of Aliens in the United States

Versus Their Mere Entry or Presence

***2** The Court of Appeals remanded the cases to this Court for the exploration of, and decision on, two issues. First, the Court is to determine whether the basis for the exclusion of an alien provided for by subsection (27) is limited to the activities he may be expected to engage in while in the United States, as distinguished from any prejudicial effect of his mere presence in this country; and second, the Court must explore the relationship between subsection (27) and subsection (28), particularly the McGovern Amendment to the latter provision. These questions[8] will now be examined in turn.

The majority of the Court of Appeals concluded that the language of the statute, because it refers only to an alien's "activities" in this country, supports plaintiffs' contention that the law does not permit the exclusion of persons on account of the allegedly prejudicial nature of their *entry* into or *presence* in this country, if no specific objectionable *activities* are anticipated.[9] The appellate court also noted that Congress had in other provisions of the Immigration and Nationality Act made careful distinctions between status-based and conduct-based categories. On the other side of the equation, the court observed that the legislative history "is not a prop upon which plaintiffs may rely" and that it is "inconclusive." 785 F.2d at 1054.

Given this state of the statutory language and the legislative history, the Court of Appeals considered that "evidence of congressional acquiescence (or lack thereof) in an administrative construction of the statutory language during the thirty-four years since the current act was passed could be telling." 785 F.2d at 1054–55. The court accordingly remanded the cases for the purpose of a finding, based upon evidence to be submitted by the parties, concerning the nature of the administrative practice under subsection (27) and the extent to which this practice was known to and acquiesced in by the Congress.

Subsequent to the remand, the government was afforded an opportunity to adduce evidence tending to demonstrate that administrative practice and congressional acquiescence supported an inference that the statute covered situations where the mere entry of an alien or his presence here was deemed prejudicial to the nation's security interests.[10] In the opinion of this Court, the government has failed in this task.[11]

When the case was before this Court initially, the government referred to four "entry" examples listed in the State Department Manual and three actual visa denials based on entry. As the Court of Appeals saw it, only two of these seven incidents or examples supported the claim that a practice existed to deny visas based not on activities or anticipated activities in the United States.[12] One of these was an example, cited in the Manual, of an official of a foreign nation who had engaged in physical brutality while in power in that nation, the other was the case of Otto Skorzeny, a notorious former Nazi SS officer. Said the Court of Appeals, "[t]his meager evidence does not demonstrate the kind of consistent administrative interpretation necessary to give rise to a presumption of congressional acquiescence." 785 F.2d at 1056.

The incidents of administrative practice and congressional acquiescence regarding the application of subsection (27) to mere entry into or presence in the United States were augmented after the remand as follows.

***3** First. The government cites the refusal during the 1950s to admit certain Nazis and Nazi sympathizers pursuant to subsection (27). An affidavit by Cornelius D. Scully, III, a senior officer in the State Department's Visa Office, refers to procedures or regulations adopted in March 1954 instructing consular officers to deny admission to such individuals, and it indicates that the entry of these persons into the United States would be "prejudicial to the public interest without regard to the activities in which the alien intended to engage after entry...." Scully Affidavit, ¶ 8. There are, however, several problems with these regulations as persuasive precedent.

It was the purpose of these regulations to implement the

Immigration and Nationality Act which the Congress had enacted in 1952. However, the original implementing regulations, those adopted in 1952, refer only to "activities" in this country,[13] not to the alien's entry or his presence here.[14] 17 Fed.Reg. 11590 (Dec. 19, 1952).[15] Moreover, as far as the 1954 regulations themselves are concerned, they were repealed within two years after their adoption. 21 Fed.Reg. 6861 (Sept. 11, 1956). It is the Court's conclusion that, while the 1954 regulations aimed at Nazis lend some support to the government's position, that support is slight.

Second. In addition to individuals whose cases were before this Court and the Court of Appeals prior to the remand, only two small groups have been identified as having been denied visas on the basis of prejudice to the public interest stemming from their entry alone: several members of the family of former Dominican dictator Rafael Trujillo, and six Rhodesian farmers. With respect to the former group, an extended dispute ensued within the Department of State regarding the legality of the action, a dispute that was ultimately decided against the aliens. The issues concerning the Rhodesian farmers are discussed below in connection with the Court's consideration of the OLC Memorandum. Once again, these two incidents provide only limited support for the government's position, particularly in view of the lack of congressional acquiescence. *See infra.*

Third. The government relies most heavily upon an opinion issued in 1977 by Assistant Attorney General John Harmon of the Department of Justice's Office of Legal Counsel in connection with the applications of the Rhodesian farmers. OLC Memorandum Opinion No. 77–20, April 11, 1977. That Memorandum holds that subsection (27) authorizes the denial of visas to aliens whose entry or mere presence would prejudice American foreign policy. 1 Op. Office of Legal Counsel at 64 (1977). The Memorandum was published and was thus available to the general public as well as, more specifically, to the Congress. Indeed, according to the Scully affidavit, the then Secretary of State Vance informed Chairman Eastland of the Senate Committee on the Judiciary that the Department of State regarded the Memorandum as authoritative.

Reliance on the OLC Memorandum is fraught with considerable difficulties. Initially, insofar as this Court is concerned, there is the well-nigh insurmountable problem that the Memorandum was before the Court of Appeals when it ruled in these cases two years ago that the evidence of administrative construction was insufficient to support the government's position and remanded the cases for a determination whether and what additional evidence was available. This Court is of course bound by the determination implicit in the Court of Appeals holding that, even with the OLC Memorandum, the government had not demonstrated a consistent administrative practice known to the Congress.

***4** Furthermore, and most significantly from the point of view of the government's claim of congressional acquiescence, there is the fact that Senator Eastland, the then Chairman of the Senate Judiciary Committee, disputed the conclusions stated in the OLC Memorandum. Acquiescence cannot be implied when the only visible congressional reaction[16]—that of the Chairman of the Judiciary Committee—was non-acquiescence.

It may be that the Memorandum would have to be given controlling weight notwithstanding Chairman Eastland's opposition if it were an Opinion of the Attorney General, *see* 8 U.S.C. § 1103(a), but, contrary to the government's suggestion,[17] it was not such an Opinion, but a Memorandum issued by a lower level official.[18] The OLC Memorandum is also contradicted by the affidavit of Leonard C. Meeker, who served in the State Department's Legal Adviser's Office for twenty-three years (from 1965 to 1969 as the Legal Adviser) who stated in an affidavit that the statute was understood during his period of service as a basis for denying visas to aliens only with regard to their anticipated activities.

The Court finds that the evidence of administrative practice and congressional acquiescence is only imperceptibly more weighty than it was when these cases were before the Court in 1984.[19] On this basis it concludes that defendants are without authority to deny entry to the aliens involved in these cases upon the grounds specified; *i.e.,* that their mere presence in this country would be prejudicial to the interests of the United States.[20]

III

McGovern Amendment

The second issue before the Court concerns the relationship between subsection (27) and subsection (28) of the statute and the McGovern Amendment which modified the latter.[21] Subsection (28) authorizes the exclusion of aliens who are or have been members of the Communist Party of the United States or of a communist organization of a foreign state, but it then goes on to permit the Attorney General to waive the prohibition. The McGovern Amendment requires the Secretary of State to recommend to the Attorney General that he admit to the United States any alien who is excludable on account of such membership, unless the Secretary certifies to the Congress that "the admission of such alien would be contrary to the security interests of the United States."[22] 22 U.S.C. § 2691(a). No such certification was made here.

Under the terms of the Court of Appeals remand, the question now before this Court is whether the visa denials in these cases are based on a threat to the public interest, welfare, safety or security that "is independent of the fact of membership in or affiliation with the ... organization" proscribed by subsection (28). 785 F.2d at 1058. According to the appellate tribunal, the government cannot satisfy the burden upon it by demonstrating that there was a reason for exclusion *in addition to* the fact of membership of such an organization; it must be *independent* of such membership. 785 F.2d at 1057. This Court has examined the record regarding the visa denials at issue with that standard in mind.[23]

***5** First. There clearly is no ground independent of their affiliations with communist organizations[24] to support the visa denials of the two Cuban women in *City of New York v. Schultz.* The Court of Appeals so found with respect to Leonor Rodriguez Lezcano, 785 F.2d at 1060 n. 23, and, although Olga Finlay had in the past also served as the Cuban representative to the United Nations Commission on the Status of Women, she was considered by the Department of State to be in precisely the same category as Ms. Rodriguez Lezcano, and her visa was denied on the identical basis.[25] Thus, with respect to both women, there was no basis for the visa denials independent of membership in a communist organization, and the denials cannot stand.

Second. Similar reasoning applies to Nino Pasti. The government argues, based on the affidavit of Under Secretary Eagleburger, that Mr. Pasti's visa application was rejected because he intended to use his visit to the United States to foster Soviet objectives inimical to the foreign policy interests of the United States.[26] However, the Eagleburger affidavit was before the Court of Appeals in 1986 when it in effect rejected the government's claim that Pasti was excludable, holding that his participation in the World Peace Council, an organization covered by subsection (28) of the statute, was not independent of other grounds of exclusion asserted by the Department of State. With respect to this alien, too, there is no material before this Court that was not also before the Court of Appeals, and the result forecast by that court is therefore inevitable.

Third. The situation is different with regard to Tomas Borge. That individual may well be, and he probably is, a member of a communist organization within the meaning of subsection (28). However, he is also the Interior Minister of Nicaragua, and Under Secretary Eagleburger stated in his affidavit that a principal basis for his decision to deny Borge's visa application was that he "intended to travel to the United States in his official capacity as a high ranking member of a [hostile] foreign government...." The Court of Appeals has ruled that

... if the State Department pinpoints the alien's official post or action as an official representative of a hostile government as *the* reason for the exclusion under subsection (27) on foreign policy grounds, then the 'independent of' organizational membership standard would be met (footnote omitted).

785 F.2d at 1059.

***6** To be sure, the Eagleburger affidavit speaks in terms of "one of the principal bases" for the exclusion while the Court of Appeals' test is framed in terms of "*the* reason" for that action, and the two thus do not mesh precisely. However, it is the view of this Court that the formulations are sufficiently similar and that the Eagleburger affidavit suffices to satisfy the standard laid down by the Court of Appeals.

For the reasons stated, it is the opinion of this Court that, under the McGovern Amendment issue considered in this part of the Opinion, and independently of the ground discussed in Part II, *supra,* Leonor Rodriguez Lezcano, Olga Finlay, and Nino Pasti, but not Tomas Borge, would be entitled to admission to the United States.[27]

IV

Conclusion

In accordance with the discussion *supra,*[28] the Court will grant plaintiffs' motion for summary judgment and deny the motion filed by the government. It is the effect of that ruling that the four aliens involved in the three cases—Leonor Rodriguez Lezcano, Olga Finlay, Nino Pasti, and Tomas Borge—will have to be admitted to the United States[29] for the purpose of making speeches or otherwise communicating with the plaintiffs in these actions. An order in implementation of this decision is being issued contemporaneously herewith.

ORDER

For the reasons stated in the Opinion issued contemporaneously herewith, it is this 7th day of June, 1988

ORDERED that plaintiffs' motion for summary judgment be and it is hereby granted; and it is further

ORDERED that defendants' motion for summary judgment be and it is hereby denied; and it is further

DECLARED that defendants' refusal to grant an entry visa to Mr. Borge, Senator Pasti, Ms. Finlay and Ms. Lezcano is not authorized by section 212(a)(27) of the Immigration Act, 8 U.S.C. § 1182(a)(27); and it is further

ORDERED that defendants issue an appropriate entry visa to Mr. Borge, Senator Pasti, Ms. Finlay and Ms. Lezcano so that they may accept the invitations proffered by plaintiffs and other groups in this country who wish to hear their views.

1 The cases were here in 1984. *Abourezk v. Reagan,* 592 F.Supp. 880 (D.D.C.1984).

2 *Abourezk v. Reagan,* 785 F.2d 1043 (D.C.Cir.1986).

3 *Reagan v. Abourezk,* 108 S.Ct. 252 (1987).

4 The complaint also asserts that other Americans wanted to meet with Borge privately and that journalists wished to interview him.

5 The Court conducted the *in camera* inspection because, although acknowledging that "consideration of documents outside the usual adversary process is certainly not desirable," it regarded such inspection as the least objectionable course, considering the alternatives—a disregard of the highly classified and sensitive nature of the documents, on the one hand, and unchecked reliance on broad governmental claims of damage to foreign policy objectives, on the other. *Abourezk v. Reagan, supra,* 592 F.Supp. at 887–88. Notwithstanding ample precedent of *in camera* inspection under the Freedom of Information Act and otherwise, the Court of Appeals admonished this Court on the "hallmark of our adversary system" and the need for "openness in judicial proceedings," and it held that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions. *Abourezk v. Reagan, supra,* 785 F.2d at 1060. Under that ruling (assuming that the state secrets privilege cannot be invoked) if, for example, the Executive Branch learned from a highly confidential and vulnerable source in a foreign country that a visa applicant intends to enter the United States to kidnap, injure, or kill an American official, a trial court may have only two options in a lawsuit regarding the visa question; to require open revelation of the source or to order issuance of the visa.
It may be noted that portions of one Eagleburger affidavit are still classified.

6 Pub.L. 95–105, 91 Stat. 848 (1977), 22 U.S.C. § 2691.

7 This principle is now settled, by agreement of all the parties, for purposes of this case. *Abourezk v. Reagan, supra,* 785 F.2d at 1053; Plaintiffs' Memorandum in Response to Defendants' Motion for Summary Judgment at 3.

8 Plaintiffs also ask the Court to reaffirm its prior First Amendment holding. Memorandum in Support of Motion for Summary Judgment at 1. It is still obvious to the Court, as it was previously, that "an alien invited to impart information and ideas to American citizens in circumstances such as these may not be excluded under subsection (27) solely on account of his proposed message." 592 F.Supp. at 887.

9 Judge Bork's dissent appears to acknowledge the correctness of the conclusion to be drawn from the statutory language alone. 785 F.2d at 1066.

10 The Court of Appeals indicated that this Court should have asked the government initially to come forward with additional examples of the exercise or assertion of power to exclude on the basis of presence alone, and it should then have allowed plaintiffs sufficient discovery to contest those examples and provide counterexamples. 785 F.2d at 1056. Although the court did not specifically say so, presumably this Court was to perform those tasks, in that fashion, upon remand.

11 The Court of Appeals did not state in so many words that, should the government fail to come up with additional examples of a consistent administrative practice, judgment was to be entered in favor of plaintiffs. In fact, the court stated only that, without such additional examples, this Court's decision in favor of the government's interpretation was "premature"; it could not make a "secure finding" concerning the administrative practice; and this Court "may find" the evidence of congressional acquiescence in the administrative practice insufficient after development of a fuller record. 785 F.2d at 1056, and note 14. *See also* Judge Bork's dissent, 785 F.2d at 1067–68. However, in view of the rejection by the majority of the arguments advanced in the dissent, and unless the majority intended this Court to engage in a mere academic exercise, the Court of Appeals opinion must be read as a mandate to this Court to enter judgment for plaintiffs unless the government came forward with an administrative practice and congressional acquiescence more consistent and more certain than those that were adduced initially.

12 The Court of Appeals concluded that the other five cited matters could be explained in terms of the alien's probable activity in the United States.

13 Section 42.42(j) of the regulations directed that the provisions of subsection (27) shall relate to the "ineligibility of aliens to receive visas because of their purpose, plan, intention, or design ... to engage in activities after arrival in the United States" which would be prejudicial to the public interest or endanger the welfare, safety, or security of the United States.

14 Also excludable under other portions of the regulations were criminals and voluntary members in totalitarian organizations.

15 *See INS v. Cardoza–Fonseca,* 107 S.Ct. 1207, 1221 n. 30 (1987) (inconsistent agency interpretation of statutory provision entitled to lesser deference).

16 Except for this occurrence, there is no specific evidence that Congress was aware of any of the administrative decisions or construction relied on by the government. *See Haig v. Agee,* 453 U.S. 280, 299 (1981); *Bob Jones University v. United States,* 461 U.S. 574, 601–02 (1983); and *see also* Judge Bork's dissent from the Court of Appeals opinion in these cases, 785 F.2d at 1068.

17 Government Brief at 17.

18 In fact, the OLC Memorandum recognizes that the Department of State issued memoranda and correspondence between 1959 and 1962 to the effect that an alien could not be excluded solely on the basis that the circumstances surrounding his entry render subsequent activities prejudicial to the public interest. 1 Op. Office of Legal Counsel at 72.

19 The Scully affidavit also refers in a general way and without specific identification to (1) instructions to consular officers regarding the prejudicial nature of the entry of former Nazis, Fascists, Falangists, and of other aliens who were notorious for having engaged in excesses, and (2) purges or destructions of State Department files. These events do not constitute evidence of the quality required by the Court of Appeals opinion.

20 Additional support for this conclusion is provided by the only other decision directly in point. The Court of Appeals for the First Circuit held in April of this year that "mere entry or presence of an alien does not constitute an activity within the meaning of subsection (27)." *Allende v. Schultz,* No. 87–1469 (1st Cir. April 13, 1988), slip op. at 10. The court in that case relied only on the "plain language of subsection 27, as confirmed and clarified by the statutory context," slip op. at 18, finding unnecessary an inquiry into legislative history or administrative practice.

21 In view of the Court's conclusion that defendants are without authority to deny visas to the aliens whose entry is at issue here because the attempted denials are not based on their expected activities in the United States, it is technically unnecessary to discuss the questions revolving around subsection (28) and the McGovern Amendment. However, in view of the terms of the remand from the Court of Appeals, the prior history of this case, and the desirability of obviating the need for another possible remand (depending upon the views ultimately adopted by the Court of Appeals and the Supreme Court), these additional questions are briefly considered herein.

22 *See also* Foreign Relations Authorization Act for Fiscal Years 1988 and 1989, Pub.L. No. 100–204, section 901(a), which provides that ''no alien may be ... excluded ... because of any past, current, or expected beliefs, statements, or associations...." The Senate Report on the bill which became this Act states, however, that the statute was not to be construed as taking a position on the issues in litigation in these cases. S.Rep. No. 100–75, 100th Cong., 1st Sess. (1987) at 41.

23 Oddly, the juxtaposition of subsections (27) and (28) has the effect, in this context, of raising what amounts in essence to a presumption of admissibility with respect to those aliens who are members of communist organizations but not with respect to others who might be entering this country for purposes which the Department of State regards as threats to the public interest, welfare, safety, or security.

24 The Federation of Cuban Women, according to the Court of Appeals, is a subsection (28) organization.

[25] The denials were based on the relationship of the two women with the Federation of Cuban Women and the Department's view that individuals like them are employed by the Cuban government to promote a positive image of Cuban society. The Court of Appeals, as noted, did not regard this as an "independent" basis for a visa denial pursuant to subsection (27), at least not with respect to Leonor Rodriguez Lezcano.

[26] Memorandum in Support of Motion for Summary Judgment at 31–32.

[27] This ruling would of course be of significance only if an appellate tribunal should reverse the decision of this Court discussed in Part II, *supra.*

[28] The government raises also a number of other issues that, in view of the decision of the Court of Appeals, are now beyond the jurisdiction of this Court, and which accordingly need not be discussed here on their merits. These include reiteration of the views expressed in Judge Bork's dissent to the effect that there is no reason to engraft an "independent basis" standard on subsection (27); the argument that under *Kleindienst v. Mandel, supra,* nothing more needs to be considered than that the visa denials are supported by facially legitimate and bona fide reasons; the claim that the Supreme Court's decision in *Chevron v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), forecloses most of the inquiries required by the Court of Appeals; and that an alien who enters and visits the United States is *per se* engaged in "activities" within the meaning of subsection (27).

[29] The plaintiffs are said to be still anxious to have the four aliens come to the United States, and the aliens themselves are still willing to come. Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 3.