1996 WL 897663
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United States District Court, W.D. Washington.

Maria WALTERS, et al., Plaintiffs,
v.
Janet RENO, Attorney General of the United States, et al., Defendant.

No. C94–1204C. | Oct. 2, 1996.

Opinion

ORDER AND PERMANENT

COUGHENOUR

***1** This matter comes before the Court on plaintiffs' proposal for a permanent injunction. Having reviewed the pleadings, memoranda, exhibits and other documents on file, the Court now finds and concludes as follows:

I. BACKGROUND

The Court on March 13, 1996 granted summary judgment in favor of plaintiffs. It ruled that defendants' standard procedures in document fraud cases under section 274C of the Immigration and Naturalization Act of 1990 violate due process by failing to inform class members of their rights and the immigration consequences of section 274C charges. The Court further ruled that plaintiffs were entitled to permanent injunctive relief. Plaintiffs have proposed a permanent injunction, to which defendants have objected. The Court will address the parties' primary areas of disagreement, and will enter a permanent injunction and final judgment in this matter.

II. ANALYSIS

A. Motions to Reopen Section 274C Proceedings and Deportation Proceedings.

The principal disagreement between the parties as to the proper form of injunction is whether the Court ruled that all individuals who received the deficient Notice of Intent to Fine ("NIF") form or the Notice of Rights/Waiver ("NOR/W") form are automatically entitled to reopen their section 274C proceedings when a final order has been entered against them, or whether such persons must make an additional factual showing that their particular notice was insufficient before those proceedings are reopened.

In ruling on the class certification and summary judgment motions the Court acknowledged that some aliens charged with the deficient forms may still have received constitutionally adequate notice. The Court explained that a "plaintiff who admits that he understood what the waiver form meant, refused to sign it, and simply failed to request a hearing in time is on different footing than a plaintiff who did not understand the waiver form and signed it believing it was inconsequential." Order of March 13, 1996 (hereafter "Order") at 12. Accordingly the Court defined the class as:

> All non-citizens who have or will become subject to a Final Order under § 274C of the INA *because* they received notice forms that did not adequately advise them of their rights, of the consequences of waiving their rights or of the consequences of failing to request a hearing.

Order at 18 (emphasis added). This definition limits the class to those who became subject to a final order through their failure to request a hearing, and who failed to request a hearing because their notice forms did not adequately advise them of their rights or the consequences of failing to exercise those rights.

The Court then found that in using the NIF and NORIW and following certain other standard procedures defendants acted on grounds generally applicable to class members. Order at 17. The Court concluded that defendants use of these forms and procedures "fail[ed] to adequately apprise the typical respondent of his or her rights." Order at 37. The Court fell short, however, of declaring that all aliens who received these forms or were subject to the prohibited procedures were denied due process.

***2** This ruling left open the possibility that, despite the use of the deficient forms and general procedures, some individuals may have received sufficient notice of their rights to make an informed decision about whether to request a hearing. This could happen, for instance, because an individual read and understood the forms, or because an individual was given an additional, easily understood explanation of his or her rights. In such a case the individual would not have been a class member, and

would not have been denied constitutional notice.

In so ruling, however, the Court did not intend to require each individual to reprove the inadequacy of his or her notice. That would eviscerate the Court's broader holding that the general forms and procedures used by defendants were constitutionally deficient. Rather, under the ruling aliens who were charged with the deficient forms and procedures and who did not understand their rights or the consequences of failing to exercise those rights, are class members who received constitutionally inadequate notice. Moreover, because the Court found that the deficient forms did "not adequately apprise respondents of their rights to hearings and of the consequences of failing to [exercise those rights]," it will be enough for an alien charged with those forms to attest to his or her lack of understanding to be eligible for relief. *See* Order at 31.

Unless the government can show that the deficiencies in the forms and procedures were somehow cured due to the unique circumstances surrounding the charging of such an alien, then each such alien consequently subjected to a section 274C final order is entitled to have his or her section 274C proceeding reopened. If the government wishes to challenge the alien's entitlement to reopening, it must prove by a preponderance of the evidence in a hearing before an administrative law judge that despite the use of the forms or procedures found to be deficient, the alien received constitutionally sufficient notice. The standard for reopening described herein is accordingly less demanding than the standard usually employed for immigration proceedings. *See Caruncho v. INS,* 68 F.3d 356, 360–61 (9th Cir.1995).

If a section 274C proceeding is reopened, defendants must provide new notice forms to the alien that comply with the Court's summary judgment ruling so that the alien may make an informed decision as to whether or not to request a document fraud hearing. A reopened section 274 proceeding must be conducted as if the charges were for the first time being brought against the alien.

If at the conclusion of a reopened proceeding the document fraud charges are not affirmed, then the final order under section 274C must be vacated. If that occurs, then the alien may be entitled to further relief from any deportation order he or she may be subject to, if that deportation order was based on or could have been affected by a vacated section 274C final order. If that is the case, the alien will at a minimum be entitled to have his or her deportation proceeding reopened.[1] This is necessary because if a deportation order was based on or affected by a vacated section 274C final order, it would have been obtained through an unconstitutional measure and so must be set aside. *Mendez v. INS,* 563 F.2d 956, 958–59 (9th Cir.1977); *Wiedersperg v. INS,* 896 F.2d 1179, 1183 (9th Cir.1990).

***3** Moreover, the INS will be required to join in any motion to reopen deportation proceedings so that no alien will be prevented from so moving as a result of new immigration regulations that limit aliens to one motion to reopen, and requires them to file such motions within 90 days of the decision or by September 30, 1996, whichever is later. 8 C.F.R. S § 3.2(c)(2) and 3.23(b)(4)(i). An exception to this rule exists when the motion to reopen is "agreed upon by all parties and jointly filed." 8 C.F.R. §§ 3.2(c)(3)(iii) and 3.23(b)(4)(ii). Because many affected aliens would be excluded from filing a motion to reopen by the new rules unless the INS joined in the motion, that is the remedy that must be provided. Even if it joins in the motion, the INS will still be able to contest the merits of the underlying issues in the reopened proceedings. 8 C.F.R. § 3.2(c)(3)(iii).

B. Parole of Aliens into United States.

The parties also disagree about whether any class members should be paroled into the United States to attend reopened proceedings that are held to remedy the deficient notice provided by the INS. When a person is paroled into the country, the person is not considered to have made a formal entry or to have been admitted. *Yuen Sang Low v. Attorney General,* 479 F.2d 820, 821–22 (9th Cir.), *cert. denied,* 414 U.S. 1039 (1973). In a situation similar to the present case, the Ninth Circuit ordered the INS to admit a deported alien into the United States to attend reopened deportation proceedings. *Mendez,* 563 F.2d at 959. The proceedings were reopened because the INS had violated its own rules in ordering the alien deported. *Id.* In addition, under 8 U.S.C. § 1182(d)(5) the INS may parole into the United States an alien applying for admission if the parole is "for emergent reasons or for reasons deemed strictly in the public interest."

In the present case, any alien who has been deported as a result of inadequate notice of section 274C charges is entitled to move to reopen those proceedings, and depending on the outcome of that motion may become entitled to move to reopen his or her deportation proceedings. If during this process an alien is entitled to attend a hearing, meaningful relief from the original, improper notice may be obtained only if such attendance is allowed. Thus, the INS must parole the alien or make other arrangements to allow the alien to attend. This approach is consistent with *Mendez* and the applicable regulations.

C. Enjoining Section 274C Proceedings Initiated with Deficient Notice Forms in Which No Final Order Has Been Entered.

Plaintiffs propose enjoining the issuance of final orders in section 274C proceedings that are still pending in which

an alien was charged with deficient notice forms and failed to request a hearing. They would require the INS to recharge such aliens before proceeding further. This would be a direct, effective remedy for those who received inadequate notice of their rights.

***4** The government objects to the burden of recharging, especially in cases where they are no longer able to locate the alien. However, plaintiffs persuasively argue that this burden is light because the INS would have to locate the alien to enforce a section 274C final order, even if they were not required to recharge them. Thus, when the INS next has contact with such aliens it can recharge them.

Accordingly, the INS will be required to recharge any alien who was charged with the deficient forms and failed to request a hearing, but has not yet been subjected to a final order. The Court recognizes that this requirement could result in the recharging of aliens who despite receiving the deficient forms still understood their rights or otherwise received sufficient notice. But the alternative to this approach would be to require the INS to serve all aliens with charges pending against them with notice that they could apply to have the INS recharge them, and then to permit such aliens to make the appropriate application. The Court concludes, however, that this two-step approach would be much more burdensome for both affected aliens and the INS. Moreover, if some aliens are recharged who received adequate notice despite originally being charged with the deficient forms, the INS will not be prejudiced because it will still have the opportunity to continue to prosecute them for document fraud.

In addition, if the INS does not wish to recharge an alien who did receive sufficient notice the Court will, as it has with those aliens who have had final orders entered against them, permit the INS to avoid recharging if it can prove by a preponderance of the evidence in a hearing before an administrative law judge that despite the use of the forms or procedures found to be deficient, the alien received constitutionally sufficient notice.

D. Content of New Charging Forms.

Plaintiffs drafted new charging forms, which they suggest the INS be ordered to use. They would substitute a "Notice of Charges" for the NIF found deficient by the Court, and a "Request for Disposition" for the NORIW found deficient by the Court. The Court agrees with defendants, however, that the INS should be permitted to use its expertise to draft notice forms that comply with the Court's summary judgment ruling. This will allow them to more easily integrate the forms into their current procedures.

The Court will not at this time pass judgment on the new NIF proposed by the INS. However, the Court notes that the title "Notice of Intent to Fine" is not per se deficient so long as the form otherwise emphasizes the severe and permanent immigration consequences of a section 274C final order.

E. Obtaining Waivers.

Plaintiffs seek to prevent defendants from accepting any waiver of a section 274C hearing that is not knowing, informed and voluntary, and from accepting a waiver at the same time that a section 274C charging document is served. The first provision is unnecessary in that it merely directs defendants to follow the law, and the second provision goes beyond the scope of the Court's summary judgment ruling. The Court specifically denied the portion of plaintiffs' summary judgment motion that asked that defendants be prohibited from obtaining waivers at the same time as they charged aliens with section 274C document fraud. Order at 34, 37.

F. Non-Spanish Oral Translations of Notice Forms.

***5** When the INS serves section 274C charging documents at the same time as it serves deportation related forms, plaintiffs would require the INS to "explain" the importance and separate nature of the forms. In addition, plaintiffs propose that if the INS orally translates deportation related forms into any one language, that it also be required to orally translate the section 274C charging documents into that language. These provisions are based on the Courts finding that the risk that an alien may be confused and may not make an effective, knowing waiver are "greatly exacerbated" by the presentation of section 274 charging documents and deportation related forms at the same time. Order at 34.

But requiring defendants to explain and to make oral translations (in Spanish or any other language), goes beyond the Court's ruling. The Court specifically found that the problem caused by the contemporaneous service of the forms can be remedied by an injunction "requiring appropriate translation of plain-speaking forms that will adequately apprise a Spanish-speaking respondent of the nature of the section 274C charge." Order at 35. Nowhere did the Court require oral explanations or translations. The Court also specifically rejected the notion that defendants should be required to translate into languages other than Spanish. Order at 32–33.

G. Issues Remaining in Case.

The government argues that the Court improperly failed to rule on three issues that it raised on summary judgment. It requests that the Court partially grant its motion for summary judgment by dismissing these three claims: (1)

plaintiffs' assertion that they are entitled to a written translation of the NIF and NOR/W forms into languages other than Spanish, and to oral translation of the forms into all other languages,[2] (2) plaintiffs' assertion that INS agents were required to serve the NIFs on plaintiffs' attorneys and were prohibited from obtaining waivers without letting the aliens consult with counsel, and (3) plaintiffs' assertion that INS agents coerced plaintiffs into waiving their rights to a hearing on section 274C charges.

The Court's Summary Judgment Order and Permanent Injunction together grant or deny substantially all of the injunctive relief requested by plaintiffs in their complaint. The injunctive relief prayed for by plaintiffs was based on three separate legal theories, which were due process violations, statutory violations and Administrative Procedure Act violations. As such plaintiffs' complaint must be construed as a single claim for broad injunctive relief based on multiple legal theories. *Hasbrouck v. Sheet Metal Workers Local 232,* 586 F.2d 691, 694 (9th Cir.1978) (defining claim for purposes of Fed.R.Civ.P. 54). The relief provided by the Court is based on due process violations. But because the Court has granted or denied substantially all the relief requested by plaintiffs, there is no reason to rule on the alternate grounds for that relief represented by the three issues defendants ask the Court to decide. Rather, the Court will enter final judgment on the entire action.[3]

H. Permanent Injuntion.

***6** Therefore the Court ORDERS that defendants are permanently enjoined as follows:

1. Defendants are enjoined from using the versions of the Notice of Intent to Fine ("NIF") and Notice of Rights/Waiver ("NORIW") forms challenged in this action to give notice of proceedings under section 274C of the Immigration and Nationality Act ("INA")or to obtain waivers of the right to a section 274C hearing.

2. Defendants are enjoined from issuing section 274C final orders against any alien who received the section 274C notice forms that the Court has found defective and who have in the past waived or failed to request, or do hereafter waive or fail to request, a hearing within sixty (60) days of receipt of the NIF, unless defendants recharge such a person with revised notice forms as required herein, or unless defendants demonstrate by a preponderance of the evidence in a hearing before an administrative law judge that such an individual received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective.

3. Defendants are enjoined from using section 274C notice forms that are not written in English and Spanish, or that do not simply and plainly communicate the nature and consequences of the section 274C charges and the procedures for contesting them.

4. Where defendants serve section 274C forms on a respondent on the same day that the respondent has or will be served with any form or advisal relating to deportation proceedings, defendants are enjoined from using any forms that do not simply and plainly communicate in English and Spanish the importance and separate nature of the section 274C proceedings.

5. The following provisions apply to the cases of individuals who received section 274C final orders without a hearing based on the notice forms that the Court has found to be constitutionally deficient:

(a) Defendants shall identify all such individuals, and shall mail notice of their opportunity to apply to reopen their section 274C proceedings, and the potential consequences of such an application, to these individuals at their last known address. Defendants shall also mount a publicity campaign reasonably designed to afford notice to such individuals. Such a publicity campaign shall include, but not be limited to:

(i) issuance of a news release to every news organization in the United States and in Central and South America via the news wire;

(ii) distribution of the notice to the approximately 800 non-profit immigration assistance providers with whom the INS has established contact;

(iii) distribution of the notice to appropriate international organizations and community outreach networks; and

(iv) publication of the notice in the Federal Register.

(b) Such notice must be written in English and Spanish and must simply and plainly explain the Courts' ruling and the consequences of that ruling. It must simply and plainly communicate the opportunity for class members to file a motion to reopen their section 274C proceedings, and the potential opportunity for class members to reopen their deportation proceedings. The notice must provide a form class members may submit or follow to file a motion to reopen their section 274C proceedings. The form shall include, but not be limited to, a statement to which a class member may attest indicating that he or she did not understand the procedure to request a civil document fraud hearing, or did not understand the nature and immigration consequences of the charges. The form may also require the alien to state that he or she will accept service and other communications relating to the section 274C proceedings by mail at the address listed on the motion to reopen, or at any updated address the individual may supply during the course of the proceedings.

***7** (c) Defendants are enjoined from enforcing or taking any action in reliance on section 274C final orders issued without a hearing based on the notice forms that the Court has found to be constitutionally defective, or from deporting class members, until they first provide the notice required in sections (a) and (b) above, and 120 days elapses from the mailing of the notice, or initiation of the publicity campaign, whichever occurs last. Defendants may enforce or rely upon the section 274C final order if the respondent fails to move to reopen the section 274C proceedings within the specified 120 day period. When a motion to reopen is timely filed, defendants may not enforce or rely on the section 274C final order until the motion to reopen or any reopened proceedings are fully adjudicated.

(d) Section 274C proceedings in which the respondent was charged with the forms found to be defective by the Court and a final order has been issued shall be reopened if the respondent makes a timely application to reopen and declares therein that he or she did not understand the procedure to request a civil document fraud hearing, or did not understand the nature and immigration consequences of the charges, unless defendants demonstrate by a preponderance of the evidence in a hearing before an administrative law judge that the individual received constitutionally adequate notice despite having received the section 274C notice forms that the Court has found defective. A timely application may be filed between the date of this Order and the expiration of the 120 day period described in paragraph 5(b). Upon the reopening of any section 274C proceeding the defendants may reinitiate the charges against these individuals by using the revised notice forms and procedures required herein, and by serving those forms by mail if the INS has required the alien to state that he or she will accept service and other communications relating to the section 274C proceedings by mail at the address listed on the alien's motion to reopen, or by personal service of those forms on the alien.

(e) If defendants do not reinitiate charges within 30 days of the reopening of a section 274C proceeding, the section 274C final order must be vacated. If defendants do reinitiate the charges within 30 days of the reopening of a section 274C proceeding, the proceeding must thereafter be conducted in accordance with standard procedure as if the charges were being brought against the respondent for the first time.[4] At the conclusion of these proceedings the section 274C final order will either be affirmed or vacated.

(f) In cases where a section 274C order is vacated defendants must join in a motion by a class member to reopen deportation proceedings, where the deportation order was based on the section 274C final order, or where the class member seeks to apply for any relief from deportation that could have been available absent the existence of the defective section 274C final order. Defendants are enjoined from deporting a class member for a further 30 days following the vacating of the section 274C final order, to allow time for the submission of a motion to reopen deportation proceedings pursuant to this paragraph. If a joint motion to reopen the deportation proceedings is made, the proceeding shall be reopened and the respondent will be afforded the opportunity to request whatever relief is appropriate in light of the vacating of his or her section 274C final order. Any such reopened deportation proceeding shall be conducted in accordance with standard procedure as if the section 274C final order had never been entered.

***8** (g) In any case where pursuant to this Order a class member is entitled to participate in a hearing relating to a motion to reopen a section 274C proceeding, a reopened section 274C proceeding, a motion to reopen a deportation proceeding, or reopened deportation proceeding, defendants are enjoined from refusing to parole or make alternative arrangements to allow class members outside the United States to return to the United States in order to attend such a hearing. This Order shall not be construed to require the government to pay for any travel or living expenses for any such person.

6. Defendants shall provide plaintiffs' counsel with the names, last known addresses and A-numbers of all class members identified pursuant to paragraph 5(a), and shall inform plaintiffs' counsel of all cases in which class members apply to reopen section 274C proceedings.

7. If any class member wishes to challenge a determination of an administrative law judge that he or she received adequate notice as provided for in paragraphs 2 or 5(d) of this Permanent Injunction, or to challenge a determination of the INS that it will not join in a motion to reopen deportation proceedings under paragraph 5(f) of this Permanent Injunction, the class member may within 20 days of the determination move the Court to review it. Defendants must provide class members with notice of this right whenever such a determination is made.

8. Defendants must file any proposed form or notice required by this Permanent Injunction with the Court and plaintiffs' counsel at least thirty (30) days prior to the date defendants intend to use such form or notice. Plaintiffs may submit objections to the proposed forms within ten (10) days of the filing of a form or notice, and defendants may respond within five (5) days of the filing of any such objection. This monitoring procedure will remain in effect for one (1) year from the date of this Order, unless plaintiffs prior to the expiration of this period move for an extension of this monitoring period.

9. The provisions of this Permanent Injunction are

effective immediately, except that the provisions of paragraphs 1, 3, and 4 shall be effective forty-five (45) days from the date of this Order. In addition, defendants must begin providing the notice required in paragraph 5, processing motions to reopen as required in paragraph 5, and providing the information required in paragraph 6 within ninety (90) days from the date of this Order.

III. CONCLUSION

The Clerk of the Court is directed to enter final judgment in favor of plaintiffs pursuant to the terms of this Order and Permanent Injunction.

SO ORDERED this 2nd day of October, 1996.

[1] As with section 274C proceedings, this standard is less demanding than the usual standard for reopening. *See Caruncho,* 68 F.3d at 360–61.

[2] The translation issues raised by the government are addressed in section F of this Order, and in the Court's Summary Judgment Order at 32–33, and 35.

[3] Alternatively, the Court could grant plaintiffs' request that the remaining issues identified by defendants be dismissed without prejudice. This request should be construed as a motion for voluntary dismissal under Fed.R.Civ.P. 41(a)(2). The decision to grant a motion for voluntary dismissal is in the discretion of the district court. *Hyde & Drath v. Baker,* 24 F.3d 1162, 1169 (9th Cir.1994). In making the decision, the court must consider whether the defendant will suffer some plain legal prejudice. *Id.* The inconvenience of defending another lawsuit or the fact that defendants have already begun trial preparations does not constitute prejudice. *Id.* In this case, defendants could potentially face these three issues in a future lawsuit, but that would not be enough to prevent dismissal with prejudice. Moreover, that is unlikely because plaintiffs have been substantially afforded the relief they requested. And although defendants have invested substantial time and effort into litigating, this trial preparation would not be a reason to deny voluntary dismissal without prejudice. Moreover, most of that time would have been spent to defend against the theories upon which the Court chose to base its rulings.

[4] Because plaintiffs raise no objection, defendants may choose to automatically schedule a hearing on the document fraud charges when an alien successfully moves to reopen his or her section 274C document fraud proceedings.