SILVA v. BELL

IN The United States District Court for the Northern District of Illinois Eastern Division
October 10, 1978
76 C 4268

Reporter: 1978 U.S. Dist. LEXIS 15038
REFUGIO SILVA, et al., Plaintiffs, v. GRIFFIN BELL, et al., Defendants.

Subsequent History: Reversed by, Remanded by Silva v. Bell, 605 F.2d 978, 1979 U.S. App. LEXIS 12290 (7th Cir. Ill., 1979)

Opinion by: [*1] GRADY

Opinion

FINAL JUDGMENT ORDER

This is a Rule 23(b)(2) certified class action by natives of independant countries of the Western Hemisphere who have priority dates for the issuance of immigrant visas between July 1, 1968 and December 31, 1976, whose priority dates have not yet been reached for processing or who have not been called for final immigrant visa interviews.

Plaintiffs sue Griffin Bell, Attorney General of the United States; the U.S. Department of Justice; Leonel Castillo, Commissioner of the Immigration and Naturalization Service; John P. Wentling, Acting District Director, Chicago District Office, Immigration and Naturalization Service; Cyrus Vance, Secretary of State; and the United States Department of State.

Plaintiffs seek declaratory, injunctive, and mandatory relief pursuant to *28 U.S.C. §§ 2201* and 2202, 28 U.S.C. § 1361, and the Immigration and Nationality Act, as amended, *8 U.S.C. §§ 1101 et seq.* Plaintiffs claim rights, privileges and immunities established by the Immigration and Nationality Act and the *Fifth Amendment to the United States Constitution*.

Plaintiffs seek a declaratory judgment that the Defendants' policy of including Cuban refugees [*2] granted adjustment of status pursuant to Public Law 89-732, November 2, 1966, 80 Stat. 1161, (hereinafter "Cuban Adjustment Act") within the annual Western Hemisphere numerical limitation on special immigrant visas of 120,000 established by § 21(e) of Public Law 89-236, 79 Stat. 920, October 3, 1965 (hereinafter "1965 Amendments") is unlawful. Plaintiffs contend this conduct is arbitrary, capricious and an abuse of discretion, otherwise not in accordance with law, and in excess of statutory authority, and in violation of the *Due Process Clause of the Fifth Amendment to the United States Constitution*.

Jurisdiction of this Court is invoked pursuant to *28 U.S.C. §§ 1331* and 1361, and the Immigration and Nationality Act, 8 U.S.C. § 1105(a). It is alleged that the matter in controversy exceeds the sum or value of $10,000.00, exclusive of costs and interest, and arises under the Constitution and laws of the United States.

Upon a showing that Plaintiffs had a reasonable probability of success on the merits, and the Plaintiffs would be irreparably injured if expelled from the United States by the Defendants pending the outcome of this lawsuit, this Court entered temporary restraining [*3] orders on March 10, 1977, March 21, 1977, and April 1, 1977.The order of April 1, 1977 has remained in effect by agreement of the parties. Subject to certain specified exceptions, this order enjoined the Defendant Immigration and Naturalization Service from taking any expulsion action against Plaintiffs and their class members who entered the United States before March 11, 1977, and authorized their employment in the United States.

This matter is now before the Court on Plaintiffs' motion for summary judgment and Defendants' motion to dismiss for mootness. On the basis of the affidavits, deposition testimony, exhibits, memoranda, and arguments submitted by the parties, and the stipulated order entered June 21, 1977 in the related case of Zambrano v. Levi, 76 C 1456 (U.S. District Court for the Northern District of Illinois, Eastern Division), this Court grants summary judgment to the Plaintiffs and denies Defendants' motion to dismiss for mootness, and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Prior to July 1, 1968, Defendant Immigration and Naturalization Service considered implementing a policy of charging Cuban refugees granted adjustment [*4] of status under the Cuban Adjustment Act to the annual Western Hemisphere numerical limitation.

2. On February 20, 1968, in a legal opinion requested by the Commissioner of the Immigration and Naturalization Service on the issue of the chargeability of Cuban refugees

granted adjustment of status under the Cuban Adjustment Act, General Counsel of the Immigration and Naturalization Service Charles Gordon concluded: "It is my opinion, therefore, that under the present statute Cuban refugees granted adjustment of status after June 30, 1968 will not be governed by or chargeable to any numerical limitations."

3. On June 27, 1968, General Counsel Charles Gordon issued a legal opinion on a proposed operations instruction designed to carry out the charging policy disapproving as to its legality.

4. Nonetheless, the Defendant Immigration and Naturalization Service adopted this charging policy.

5. The Defendant Department of State acquiesced in this charging policy, and implemented it on July 1, 1968.

6. Between July 1, 1968 and October 1, 1976, the Department of State charged against the annual Western Hemisphere numerical limitation established by Section 21(e) of the 1965 [*5] Amendments, 144,999 visa numbers issued to Cuban refugees and their spouses and children who were granted adjustment of status under the Cuban Adjustment Act.

7. There is no evidence that the Defendant Department of State or Defendant Immigration and Naturalization Service ever secured a legal opinion in support of the adopted charging policy.

8. With minor exceptions not relevant here, it was the Defendant Department of State's policy between July 1, 1968 and December 31, 1976 to issue the full 120,000 visa numbers chargeable to the Western Hemisphere annual numerical limitation, given sufficient demand by immigrant visa applicants.

9. Plaintiffs and their class members are all natives of independent countries of the Western Hemisphere who have priority dates for the issuance of immigrant visas between July 1, 1968 and December 31, 1976, whose priority dates have not yet been reached for processing or who have not been called for final immigrant visa interviews.

10. Between July 1, 1968 and December 31, 1976, there was sufficient demand by Western Hemisphere immigrant visa applicants, other than Cuban refugees granted adjustment of status under the Cuban Adjustment [*6] Act, to utilize all the visa numbers authorized to be issued under the annual Western Hemisphere numerical limitation.

11. But for the charging of the 144,999 visa numbers issued to Cuban refugees granted adjustment of status
pursuant to the Cuban Adjustment Act, other Western Hemisphere visa applicants would have been considered for these 144,999 visa numbers and all such numbers would have been issued to them. Instead, those visa applicants were displaced from consideration. This displacement has affected and continues to affect the ability of Plaintiffs and their class members to be considered for visa numbers authorized under the 1965 Amendments.

12. Between July 1, 1968 and December 31, 1976, it was the policy of Defendant Department of State to process immigrant visa applicants under the annual Western Hemisphere numerical limitation in strict chronological order of priority date, without regard to country of origin.

13. During 1975 and 1976, several lawsuits were filed challenging the Cuban charging policy. Munoz v. Levi, 75 C 2127, filed in 1975; Guerra v. Levi, 75 C 3293, filed in 1975; Campbell v. Levi, 76 C 1455, filed in 1976; and Zambrano v. Levi, 76 C 1456, [*7] filed in 1976. However, the Defendants continued with the Cuban charging policy until September 30, 1976.

14. On August 30, 1976, the Office of Legal Counsel of the Department of Justice issued a legal opinion to Attorney General Levi concluding that the Cuban charging policy was unlawful.

15. On August 31, 1976, Attorney General Levi ordered the Commissionr of the Immigration and Naturalization Service to end the Cuban charging policy. The policy officially ended on September 30, 1976. However, no action was then taken to recapture the 144,999 visa numbers unlawfully charged against the Western Hemisphere numerical limitation or to make these visa nubers available to Western Hemisphere visa applicants.

16. This class action was filed on November 18, 1976, challenging the Cuban charging policy and requesting that the 144,999 visa numbers be recaptured and Plaintiffs and their class members be processed for those numbers.

17. On June 21, 1977, Defendants stipulated to the entry of a final judgment order in the related case of Zambrano v. Levi (76 C 1456), which found that the policy of charging Cuban refugees granted adjustment of status pursuant to the Cuban Adjustment [*8] Act to the annual Western Hemisphere numerical limitation was contrary to law and which recaptured visa numbers for the Zambrano plaintiffs.

18. On August 1, 1977, the Defendant Department of State effected the recapture of the 144,999 immigrant visa numbers previously issued to persons granted adjustment of status pursuant to the Cuban Adjustment Act and

charged to the annual Western Hemisphere numerical limitation during the period of July 1, 1968 to September 30, 1976, and made them available to Plaintiffs and their class members. However, the Defendants subsequently implemented procedures to process visa applicants in non-chronological order and restricted the availability of those recaptured visa numbers based in part upon country of origin.

19. It is unlikely that there will be sufficient recaptured visa numbers to process all Plaintiffs and class members.

20. But for the provisions of the temporary restraining order of April 1, 1977, Plaintiffs and many class members would be subject to the institution of proceedings directed toward their deportation by the Defendant Immigration and Naturalization Service.

21. Due to the Defendants' failure to make all 144,999 [*9] visa numbers available and process Plaintiffs and their class members for these recaptured numbers at final visa interviews in strict chronological order, and without regard to country of origin, Plaintiffs and their class members have been injured in that they have lost opportunities: (a) to be considered for recaptured visa numbers, and (b) to enjoy the rights and privileges of lawful permanent residency in the United States; and they will be irreparably injured in the future unless this court grants the injunctive relief hereinafter specified.

CONCLUSIONS OF LAW

1. This court has jurisdiction over this cause under *28 U.S.C. § 1331* and 8 U.S.C. § 1329. For the purposes of *§ 1331* jurisdiction, the value of the deprivation of Plaintiffs' constitutional and statutory rights exceeds $10,000, exclusive of interests and costs.

2. There is a case and controversy.

3. The Defendants' policy of charging Cuban refugees who were granted adjustment of status under the Cuban Adjustment Act to the annual Western Hemisphere numerical limitation was contrary to the provisions of the 1965 Amendments to the Immigration and Nationality Act and the Cuban Adjustment Act.

4. With [*10] possible exceptions conceded by the government to not be applicable to this case, the 1965 Amendments to the Immigration and Nationality Act and regulations promulgated thereunder required that Defendants make available all the visa numbers authorized under the annual Western Hemisphere numerical limitation between July 1, 1968 and December 31, 1976, given sufficient demand by Western Hemisphere immigrant visa applicants for these visa numbers.

5. By issuing 144,999 visa numbers to Cuban refugees who were granted adjustment of status under the Cuban Adjustment Act, and charging them to the annual Western Hemisphere numerical limitation, the Defendants failed to make available 144,999 visa numbers authorized by the 1965 Amendments between July 1, 1968 and December 31, 1976.

6. Between July 1, 1968 and December 31, 1976, the Plaintiffs and class members were issued priority dates by United States consular officials, evidencing their entitlement to immigrant classification, pursuant to 22 C.F.R. §§ 42.61 et seq. This established the ability of Plaintiffs and class members to be considered for visa numbers authorized by the 1965 Amendments. However, due to the displacement of [*11] visa applicants caused by Defendants' charging policy, some Plaintiffs and some class members have been denied opportunities for consideration for the 144,999 visa numbers unlawfully charged to the Western Hemisphere numerical limitation.

7. The Defendants' unlawful charging policy, by depriving Plaintiffs and their class members of an opportunity to be considered for visa numbers authorized under the 1965 Amendments, has violated their rights under the 1965 Amendments.

8. The Defendants unlawful charging policy, by depriving Plaintiffs and their class members of an opprtunity to be considered for visa numbers authorized under the 1965 Amendments, is arbitrary, capricious, and an abuse of discretion, and is without basis in law, thereby violating Plaintiffs' rights under the *Due Process Clause of the Fifth Amendment to the United States Constitution*.

9. The 1965 Amendments and regulations promulgated thereunder, 22 C.F.R. § 42.63(1976), require that these recaptured visa numbers be issued in strict chronological order by priority date, without regard to country of origin.

10. Based on the 1965 Amendments and the regulations promulgated thereunder, and in view of the [*12] fact that it is unlikely that these are sufficient recaptured visa numbers to satisfy demand by the entire class, Plaintiffs and their class members are entitled to have the 144,999 visa numbers recaptured and made available to them as they would have been under the 1965 Amendments in strict chronological order of priority date and without regard to country of origin, in order to protect the rights of all Plaintiffs and class members.

11. Plaintiffs have no adequate remedy at law.

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that:

1. The Defendant Secretary of State shall recapture the 144,999 visa numbers unlawfully issued to persons

granted adjustment of status under the Cuban Adjustment Act and charged to the annual Western Hemisphere numerical limitation between July 1, 1968 and December 31, 1976.

2. The Defendant Secretary of State shall make available to Plaintiffs and Plaintiffs' class members all of the 144,999 recaptured visa numbers which remain unissued.

3. The Defendant Secretary of State shall immediately implement a program of recapture and redistribution of those visa numbers previously issued to persons granted adjustment of status under the Cuban [*13] Adjustment Act to those principal alien immigrant visa applicants who registered with U.S. consulates between July 1, 1968 and December 31, 1976, inclusive, and their spouses and children who are accompanying or following to join pursuant to 8 U.S.C. § 1153(a)(9).

4. The Defendant Secretary of State shall process all Plaintiffs and class members for the recaptured visa numbers in strict chronological order by priority date and without regard to country of origin.

5. The Order of this Court of April 1, 1977 is hereby made a permanent injunction. This injunction shall dissolve with the issuance of the last recaptured visa number or the processing of the last class member, or upon further order of this Court.

6. The Defendants Secretary of State and Immigration and Naturalization Service shall complete the program of recapture and redistribution of the 144,999 recaptured visa numbers within three (3) years of August 1, 1977, the date of implementation of the recapture program.

7. For the duration of the recapture program, the Defendant Secretary of State shall provide Plaintiffs' attorneys with copies of all Department of State Forms FS 258 (Immigrant Visa and Visa [*14] Workload Monthly Report), FS 469 (Monthly Report of Qualified Visa Applicants), and Annual Reports on Form FS 469 received by the Defendant Department of State from U.S. Consulates which relate to demand for immigrant visas by Western Hemisphere natives or issuance of visas under the recapture program and all other non-privileged reports, telegrams, memoranda, instructions, and other official documents prepared by the Defendants relating to the recapture program. Each month the Defendant Department of State will also make available to Plaintiffs' attorneys for all consular posts and INS offices which grant recaptured visas, statistics concerning the range of the priority dates of the persons granted recaptured visa numbers at each such consular post and INS office during the previous month.

8.Nothing in this order shall diminish or otherwise adversely affect the rights Plaintiffs or their class members may have or acquire under the Immigration and Nationality Act, as amended, regulations and operations instructions promulgated pursuant thereto, and the Department of State Foreign Service Manual.

9. Nothing in this order shall relieve Defendant Secretary of State from any obligations [*15] he may have relating to issuance of immigrant visas pursuant to the 1976 Amendments to the Immigration and Naturalization Act, Pub. L. 94-571, 90 Stat. 2703 et seq. and regulations promulgated pursuant thereto.

10. No class member shall be eligible for a recaptured visa number unless he/she satisfies the current eligibility criteria for the issuance of an immigrant visa.

ENTER ORDER