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United States District Court, D. Massachusetts.

Hortensia DE ALLENDE, et al., Plaintiffs,

v.

George P. SHULTZ, et al., Defendants.

Civ. A. No. 83-3984-C. | March 31, 1987.

Attorneys and Law Firms

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Opinion

MEMORANDUM

CAFFREY, Senior District Judge.

*1 This is a civil case brought by a group of plaintiffs, including religious leaders, scholars and Hortensia de Allende, widow of the former Chilean President, Salvadore Allende,¹ challenging the denial by defendants, including Secretary of State George P. Shultz,² of Mrs. Allende’s February, 1983 application for a nonimmigrant visa. The matter is now before the Court on the parties’ renewed cross motions for summary judgment. After a hearing and after lengthy consideration of the well-drafted pleadings in this case, and for the reasons discussed below, I rule that this matter should not be dismissed as moot; that defendants’ renewed motion for summary judgment should be denied; and that plaintiffs’ cross motion for summary judgment should be allowed. Before turning to the legal questions presented by these motions, a brief review of the factual and procedural history is helpful.

1. Background

A. Facts

Mrs. Allende is a member of the Women’s International Democratic Federation (WIDF) and is Honorary President of the World Peace Council (WPC) . Both groups are alleged to be affiliated with the Communist Party of the

Soviet Union. In January, 1983, the Northern California Ecumenical Council (NCEC) invited Mrs. Allende to speak in March, 1983, in connection with the planned celebration of International Women’s Week in the San Francisco Bay Area. Numerous other universities and individuals, including the Massachusetts plaintiffs, extended similar invitations to Mrs. Allende for the period of her planned visit. Mrs. Allende also scheduled several meetings with scholars engaged in research on Chilean and women’s political issues. In February, 1983, Mrs. Allende applied to the United States Embassy in Mexico City for a nonimmigrant tourist visa.³ March 3, 1983, the consular officer in Mexico City denied Mrs. Allende’s application for a visa under section 212(a)(28)(C) of the Immigration and Nationality Act (“the Act”), 28 U.S.C. §1182(a)(28)(C). This statutory provision, hereinafter referred to as “subsection 28,” prohibits the issuance of visas to “[a]liens who are members of or are affiliated with ... the Communist or any other totalitarian party ... of any foreign state ..., any section, subsidiary, branch, affiliate, or subdivision of any such party 8 U.S.C. §1182(a)(28)(C).

The Act also provides, however, that statutory ineligibility under subsection 28 does not automatically exclude an alien because the Secretary is authorized to recommend, at his discretion, a waiver of ineligibility. 8 U.S.C. § 1182(d)(3)(A). The McGovern Amendment, 22 U.S.C. §2691, enacted to implement the Helsinki Accords, reprinted in 14 I.L.M. 1292 (1975), which were drafted to “promote the free flow of people and ideas across national borders,” *Abourezk v. Reagan*, 785 F.2d 1043, 1058 (D.C. Cir. 1986), cert. granted, —U.S. —, 107 S. Ct. 666 (1986); see also 22 U.S.C. § 2691(a); S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977), encourages the grant of such waivers by calling on the Secretary to “grant the approval necessary” to admit aliens ineligible under subsection 28, unless the Secretary certifies to the Congress that he determines that “the admission of such alien would be contrary to the security interests of the United States....” 22 U.S.C. §2691(a).

*2 Following standard procedures, the consular officer in Mexico City requested an opinion from the Secretary of State regarding the availability of a waiver of Mrs. Allende’s subsection 28 ineligibility for a visa. In response to this request, the Under Secretary of State, Lawrence S. Eagleburger, determined that notwithstanding her statutory ineligibility under subsection 28, Mrs. Allende was also ineligible under subsection 27, an ineligibility status from which no waiver is available. 8 U.S.C. §1182(a)(27). Subsection 27 excludes from entry into the United States

[a]liens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United

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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.

8 U.S.C. §1182(a)(27). Based on the Under Secretary's judgment that Mrs. Allende's admission into the country would be prejudicial to the public interest, her visa application was denied.

Since this March, 1983 denial, Mrs. Allende's statutory ineligibility has been waived on two occasions, and her two applications for nonimmigrant visa have been approved. Mrs. Allende now holds a multiple entry visa valid through August 21, 1987.

B. Procedural History

In December, 1983, plaintiffs filed their complaint in the United States District Court for the District of Massachusetts. Plaintiffs seek declaratory and injunctive relief on the grounds that the Secretary unlawfully applied subsection 27 to deny Mrs. Allende a visa. This Court properly exercises jurisdiction over the controversy pursuant to 28 U.S.C. §§1331 and 1361, and the First and Fifth Amendments to the Constitution.

In April, 1985, this Court denied defendants' motion to dismiss, or, in the alternative, for summary judgment. *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985). In summary, this Court ruled that plaintiffs had standing to bring this action based on their right, guaranteed by the First Amendment, to listen to the information and ideas about which Mrs. Allende intended to speak. *Id.* at 1223, citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972).

This Court further ruled that it properly exercised jurisdiction over the subject matter of plaintiffs' claim on the grounds that, despite the "narrow standard of review" accorded Executive decisions regarding immigration policy, limited judicial review is appropriate where, as here, fundamental rights of American citizens are involved. *Id.*, citing *Fiallo v. Bell*, 430 U.S. 787, 793 n.5, 795-96 n.6 (1977). In ruling on defendants' motion, this Court refused, based on well-established precedent, to consider, in camera, classified affidavits offered by defendants in support of their motion for summary judgment. *Allende*, 605 F. Supp. at 1226. This Court held that defendants' unclassified affidavits, which set forth two reasons for denying Mrs. Allende's visa, provided an insufficient basis for the denial. *Id.*

*3 In *Allende*, defendants contended that Mrs. Allende's visa application was denied (1) because she is a member of the WPC and the WIDF, two organizations that are affiliated with the Communist Party, and (2) because admission into the United States in March, 1983, would

have been prejudicial to the conduct of the foreign affairs of the United States. *Id.* at 1224. This Court ruled that under subsection 27, Mrs. Allende's mere membership in the WPC and the WIDF was an insufficient reason for the denial of her visa application. *Id.* at 1225. Moreover, if, as alleged by defendants, the grant of a visa to Mrs. Allende would have been prejudicial to the conduct of the foreign affairs of the United States, then this Court ruled that defendants must bring forward additional factual material to establish a "facially legitimate and bona fide reason" to support their contention. *Id.* at 1226-27. Defendants now renew their motion for summary judgment on the grounds that the newly declassified Eagleburger Affidavit sets forth information sufficient to establish a "legitimate and bona fide reason" for the denial of Mrs. Allende's visa application.

In December, 1985, this Court denied defendants' motion to dismiss for mootness. *Allende v. Shultz*, 624 F. Supp. 1063 (D. Mass. 1985). Defendants argued that, since Mrs. Allende had sought, and received, nonimmigrant visas since the time of plaintiffs' complaint, their claim was moot. This Court ruled to the contrary on the grounds that defendants' alleged unlawful policy of reliance on subsection 27 to deny Mrs. Allende's visa application was "capable of repetition, yet evading review." *Id.* at 1066, citing *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733, 736 (1st Cir. 1979).

During the November, 1986 hearing on the cross motions now before the Court, the parties were invited to submit memoranda on the issue of whether recent developments in this case now render it moot. Both parties submitted memoranda which set forth essentially the same arguments addressed in this Court's prior ruling. *Allende*, 624 F. Supp. at 1065-67. For the reasons discussed therein, plaintiffs' complaint should not be dismissed for mootness.

II. The Motions for Summary Judgment

Summary judgment is appropriate when the moving party persuades the court that based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any ..., show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Either moving party here is therefore entitled to summary judgment if the record, when considered in the light most favorable to the opposing party, fails to reveal questions of fact that are both "genuine" and "material." *Hahn v. Sargeant*, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976).

Turning to the motions now before the Court, the question presented is whether the explanation proffered by defendants in the newly declassified affidavit of

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Lawrence S. Eagleburger is sufficient to establish a “facially legitimate and bona fide reason” for defendants’ March, 1983 denial of Mrs. Allende’s visa application.

*4 Defendants argue that the newly declassified⁴ Eagleburger affidavit supplies information sufficient to justify the denial of Mrs. Allende’s visa. Defendants further argue that the information now available is more than sufficient to meet the explanatory obligation imposed on the Executive by the Court’s decision in *Kleindienst*. *Kleindienst*, 408 U.S. at 770. As grounds for his decision, the Under Secretary testifies in his now declassified affidavit that:

(i) Mrs. Allende is an active supporter of the World Peace Council;

(ii) the WPC is an instrument of the foreign policy of the Soviet Union;

(iii) to the end of unilateral Western disarmament, the USSR seeks covertly to manipulate public opinion in the United States through the WPC;

(iv) in light of the delicate relations between the United States and the USSR, this activity by the WPC is directly contrary to United States interests;

(v) based on such concerns, the Administration since 1982 has determined to deny entry to aliens who are members of the WPC; therefore, (vi) pursuant to such policy, the Under Secretary concluded that approval of Mrs. Allende’s February, 1983 application was contrary to United States foreign policy interests. Eagleburger (Declassified) Affidavit, ¶¶3–8. The Under Secretary also testifies that “[a]lthough intelligence estimates vary as to the extent of her active participation in WPC activities, it is clear that she lends her name to that organization for whatever value it may have in furthering its objectives, [material redacted].” Eagleburger (Declassified) Affidavit at 2.

In his testimony, the Under Secretary concludes that Mrs. Allende’s entry into the United States would have been “prejudicial to the foreign policy interests of the United States....” *Id.* at 4. The Under Secretary further testifies that this conclusion was not based solely on her membership in the WPC and the WIDF, but also on her attendance at three international conferences between 1977 and 1981. In 1977, Mrs. Allende attended the World Assembly Builders of Peace Conference, sponsored by the WPC, where she “assailed the U.S. in her speech.” *Id.* In 1978, Mrs. Allende attended the WPC-sponsored World Conference of Solidarity in Madrid, Spain. *Id.* In 1981, Mrs. Allende attended and addressed the WIDF-sponsored World Congress of Women where she spoke on “women’s issues and the need for nuclear disarmament.” *Id.* Thus, according to defendants, the

judgment to exclude Mrs. Allende was based on legitimate and bona fide reasons separate from her membership in the WPC and the WIDF.

Defendants rely primarily on *Kleindienst*, 408 U.S. at 770, to support their argument. In *Kleindienst*, the Secretary refused to grant a visa to Ernest Mandel, a Belgian journalist and self-described “revolutionary Marxist,” to visit the United States for a series of speaking engagements. *Id.* at 756. The United States Supreme Court ruled that the Secretary’s refusal to waive Mr. Mandel’s subsection 28 ineligibility was properly within the Secretary’s discretion, so long as the exercise of his authority was based on a “facially legitimate and bona fide reason.” *Kleindienst*, 408 U.S. at 770. The Court also ruled that where such a reason is evident, courts should neither “look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.” *Id.*

*5 Defendants here argue that in *Kleindienst*, the Court upheld the sufficiency of a minimal explanation offered by the Secretary for his decision to deny the waiver. The Secretary’s decision was explained to Mr. Mandel in a letter stating that his visa was denied because on a prior visit to the United States he had “engaged in activities beyond the stated purposes” of his visa.⁵ *Kleindienst*, 408 U.S. at 758. Defendants argue that here, Under Secretary Eagleburger’s declassified, sworn affidavit provides a more detailed justification than the letter in *Kleindienst*. Accordingly, defendants argue it should be considered facially legitimate and bona fide, thereby limiting this Court’s scope of review.

Plaintiffs argue first that Mrs. Allende was impermissibly excluded under subsection 27 solely on the basis of her membership in the WPC and the WIDF. Plaintiffs further argue that the declassified Eagleburger affidavit is conclusory and fails to establish what this Court in its earlier opinion called for: a “facially legitimate and bona fide reason” for denying Mrs. Allende’s visa application. Plaintiffs maintain that nothing in Under Secretary Eagleburger’s declassified affidavit reveals such a reason.

In support of their argument, plaintiffs rely primarily on the decision by the District of Columbia Circuit Court of Appeals in *Abourezk*, 785 F.2d at 1062. In *Abourezk*, the Court of Appeals vacated and remanded the district court’s ruling, inter alia, that the Secretary could properly apply subsection 27 to deny visa applications filed by aliens who were members of subsection 28 organizations. *Id.* The factual situation here is similar to the one in *Abourezk*, thus the test used by the court there is relevant here for determining the validity of defendants’ reason for excluding Mrs. Allende under subsection 27. In *Abourezk*, the court held that

[w]hen an alien is a member of a proscribed organization, so that subsection (28) applies, the government may bypass that provision and proceed under subsection (27) only if the reason for the threat to the “public interest [,] ... welfare, safety, or security” is independent of the fact of membership in ... the proscribed organization

Abourezk, 785 F.2d at 1058. The question here, therefore, is whether the declassified Eagleburger affidavit provides an explanation for her exclusion that is “independent of” Mrs. Allende’s membership in the WPC and WIDF.

Defendants’ proffered explanation of the decision to exclude Mrs. Allende, as set forth in the declassified Eagleburger affidavit, can essentially be reduced to three reasons: (1) she is a member of two Communist organizations, (2) at international meetings sponsored by those organizations she has criticized United States foreign policy and spoken in favor of nuclear disarmament; and (3) her admission into the United States would therefore be prejudicial to United States foreign policy interests.

To evaluate the sufficiency of this explanation it is helpful first to look at the statutory framework. First, by virtue of Mrs. Allende’s membership in two organizations affiliated with the Communist party, she fits squarely within the subsection 28 definition excludable aliens. 8 U.S.C. § 1182(a)(28)(C). Where, as here, an alien-applicant fits within the statutory limits of subsection 28, in order to bypass it and exclude the alien under subsection 27, defendants bear the burden of establishing a reason that is separate and independent of the alien’s membership in the subsection 28 organization. Abourezk, 785 F.2d at 1058. Defendants argue that Mrs. Allende’s attendance at, and delivery of speeches to, international conferences sponsored by the WPC and WIDF provides such a reason and is therefore a facially legitimate and bona fide reason for excluding her under subsection 27. I disagree. Such activities are merely incidental to Mrs. Allende’s membership in those organizations and are not therefore a reason separate and independent of her membership. Id.

*6 There is thus no lawful basis for defendants’ proceeding under subsection 27. I rule that defendants have also failed to establish a facially legitimate and bona fide reason for refusing to waive her subsection 28 ineligibility. 8 U.S.C. § 1182(d)(3)(A); 22 U.S.C. § 2691; Kleindienst, 408 U.S. at 770. The plaintiffs claim is not moot, and, as the parties assert no dispute as to genuine issues of material fact, I rule that plaintiffs are entitled to judgment in their favor as a matter of law. Fed. R. Civ. P. 56(c). Accordingly, defendants’ renewed motion for summary judgment should be denied and plaintiffs’ motion for summary judgment should be allowed.

Order accordingly.

ORDER

In accordance with memorandum filed this date, it is ORDERED:

1. Plaintiffs’ motion for summary judgment is allowed; 2. Defendants’ motion for summary judgment is denied;

and

3. Plaintiffs re entitled to a declaration that defendants’ March, 1983 refusal to grant Mrs. Allende a nonimmigrant visa is not authorized by § 212 (a) (27) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(27).

¹ In addition to Hortensia de Allende, plaintiffs are John . Womack, Jr., Chairman of the Department of History at Harvard University; Duncan Kennedy, Professor of Law at Harvard Law School, Jack Spence, Professor of Political Science at the University of Massachusetts, Boston; Brian Smith, Professor of Political Science at the Massachusetts Institute of Technology; the Boston Area Council on Latin America; and the Northern California Ecumenical Council.

² The defendants are George P. Schultz, Secretary of State; William French Smith, Attorney General of the United States; and Alan C. Nelson, Commissioner of the Immigration and Naturalization Service. Each is sued In his official capacity.

³ Mrs. Allende, a Chilean national, lives in exile in Mexico . City, Mexico. .

⁴ As noted by plaintiffs, the defendants only partially . declassified the Eagleburger Affidavit. Defendants charactersze the affidavit as “a sanitized copy of the original,” noting that the “unexpurgated original” remai.ns classified. Defendants’ Memorandum at 4, n.1.

⁵ Apparently, during his prior visit in the United States, Mr. Mandel spoke at more universities than his visa application had indicated. Kleindienst, 408 U.S. at 758 n.5. .

