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United States District Court, C.D. California.

Shamim DARCHINI et al,
v.
Michael R. POMPEO et al

Case No. SACV 19-1417 JVS (DFMx)
|
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Proceedings: [IN CHAMBERS] Order Regarding Motion for Preliminary Injunction

The Honorable James V. Selna, U.S. District Court Judge

***1** Pursuant to Federal Rule of Civil Procedure 65, Iranian-American families and couples (together—"Plaintiffs") moved for preliminary injunctive relief ordering the United States Department of Homeland Security, the Department of State, and their senior leaders and consular officials ("the Government") to adjudicate Plaintiffs' waiver applications. (Mot., Dkt. No. 8.) The Government opposed the motion. (Opp'n, Dkt. No. 28.) Plaintiffs replied. (Reply, Dkt. No. 31.)

For the following reasons, the Court **DENIES** the motion.

I. BACKGROUND

Plaintiffs in this action are U.S. citizens and lawful permanent residents ("Petitioner Plaintiffs") and their Iranian national relatives or fiancées who are visa applicants ("Beneficiary Plaintiffs"). (Complaint, Dkt. No. 1, ¶ 2.). Plaintiffs allege that the Government, through unreasonable delays, has denied them timely adjudication of their case-by-case waivers under Presidential Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats," which President Trump signed on September 24, 2017. 82 Fed. Reg. 45161 (2017) ("PP 9645") (Id. ¶ 1.)[1] Plaintiffs fulfilled all requirements to obtain family-based or fiancée-based visas, before their applications were refused pursuant to PP 9645. (Id. ¶ 3.) Plaintiffs allege that the Government has instituted patterns and policies causing these delays. (Id. ¶ 1.)

PP 9645 prohibits the entry of immigrants and non-immigrants from Iran. (Id. ¶ 4.) But, it contains a waiver adjudication scheme, which works as follows. An Iranian visa applicant applies for an immigrant or non-immigrant visa and then appears at a U.S. Embassy in Armenia, the United Arab Emirates, or Turkey for an interview. (Id. ¶ 146.) The visa is denied under PP 9645. (Id. ¶ 147.) Then, consular officers adjudicate waivers of PP 9645's entry restrictions based on information provided in the visa application and interview. (Id.) The adjudication is based upon whether the applicant would suffer "undue hardship if entry is denied," whether "entry would be in the national interest," and whether "entry would not pose a threat to national security or public safety." (Id.)

Plaintiffs allege that the Government has a "PP 9645 Brain Trust" team that has "secretly promulgated guidance on the waiver adjudication scheme" that is inconsistent with the text of the proclamation. (Id. ¶ 8.) Plaintiffs allege that the Government, through this "Brain Trust," has "unlawfully extended the authority and discretion - that PP 9645 granted only with individual consular officers - to consular managers, visa chiefs, consular section chiefs, and/or consular management and the Visa Office." (Id. ¶ 9.) Plaintiffs allege that if an applicant is "found eligible for a waiver of PP 9645's entry restrictions, the consular officer must seek to obtain concurrence from consular managers, visa chiefs, consular section chiefs, and/or consular management and the Visa Office." (Id. ¶ 148.) The Government requires this concurrence before the consular officer may issue the

applicant a visa, even though that usurpation of consular officer authority is unlawful under PP 9645. (Id.)

***2** As a result of this scheme, Plaintiffs allege, they "suffer a range of ongoing harms." (Id. ¶ 6.) They have had to wait an average of 447 days for a waiver since their applications were refused, pursuant to PP 9645. (Id. ¶ 12; Table A at 34.)

Because the number of plaintiffs is sizable, the Court highlights just one representative account of their experiences with this waiver. Plaintiff Shamim Darchini is a United States citizen of Iranian origin who lives in Irvine, California. (Id. ¶ 19, 21.) Her husband, Amin Sirati, resides in Iran. (Id. ¶ 21.) Darchini petitioned for an "alien relative" visa for Sirati in 2015. (Id. ¶ 23.) Sirati had his visa interview in July 2017. (Id. ¶ 25.) Consideration of Sirati's waiver has been pending for 592 days, since December 8, 2017, when PP 9645 took effect. (Id. ¶ 35.) Darchini suffers from stress, anxiety, and depression as a result of living apart from her husband. (Id. ¶ 30.)

On the basis of these factual allegations, Plaintiffs assert three legal claims: violation of the Administrative Procedure Act, 5 U.S.C. §§ 555 and 706; violation of the Due Process Clause of the Fifth Amendment to the United States Constitution; and for a writ of mandamus. (Id. ¶ 166-199.)

Plaintiff's motion for a preliminary injunction asks the Court to order the Government to complete its adjudication of the waivers within 15 days of the Court's decision. (Mot. at 1-2.)

II. LEGAL STANDARD

On an application for a preliminary injunction, the plaintiff has the burden to establish that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm if the preliminary relief is not granted, (3) the balance of equities favors the plaintiff, and (4) the injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 5, 20 (2008).

In the Ninth Circuit, the Winter factors may be evaluated on a sliding scale: "serious questions going to the merits, and a balance of hardships that tips sharply toward the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

Moreover, in the Ninth Circuit, the plaintiff may meet this burden if it "demonstrates either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." Johnson v. California State Bd. of Accountancy, 72 F.3d 1427, 1429 (9th Cir. 1995) (internal quotations and citation omitted). "To reach this sliding scale analysis, however, a moving party must, at an 'irreducible minimum,' demonstrate some chance of success on the merits." Global Horizons, Inc. v. U.S. Dep't of Labor, 510 F.3d 1054, 1058 (9th Cir. 2007) (citing Arcamuzi v. Cont'l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987)).

III. DISCUSSION

A. Mandatory Injunction

Plaintiffs seek a mandatory injunction. A mandatory injunction "orders a responsible party to take action." Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996). In general, mandatory injunctions "are not granted unless extreme or very serious damage will result" and are not issued in "doubtful cases." Anderson v. United States, 612 F.2d 1112, 1115 (9th Cir. 1980). A mandatory injunction "goes well beyond simply maintaining the status quo [p]endente lite [and] is particularly disfavored." Id. at 1114.

B. Joinder

***3** The Government argues that Plaintiffs are misjoined and should be severed before this case proceeds. (Opp'n at 9.) The Government suggests that Plaintiffs do not assert any right to joint or several relief and that their claims do not arise out of the same transaction or occurrence, or series thereof, nor do they present a common question of law or fact. (Id.) For this proposition, the Government cites Coughlin v. Rogers, 130 F. 3d

1348, 1351 (9th Cir. 1997), where the Ninth Circuit upheld the severance of plaintiffs who challenged delays in the adjudication of their visa petitions. In that case, "the mere allegation of general delay [wa]s not enough to create a common transaction or occurrence." Id. at 1350. Here too, the Government argues that Plaintiffs "have all filed individual visa applications and waiver requests at different times and have suffered different lengths of alleged delay," including delays pre-dating PP 9645, "and so any reason for delay hinges at least in part on additional legal circumstances." (Opp'n at 10-11.)

Plaintiffs point out that in Coughlin, the plaintiffs "d[id] not allege that their claims ar[ose] out of a systematic pattern of events," and "d[id] not allege a pattern or policy of delay in dealing with all applications." 130 F. 3d at 1350. Here, in contrast, Plaintiffs allege that the Government is "designating the authority and discretion to approve case-by-case waivers to consular managers, visa chiefs, consular section chiefs, consular management and Visa Office, which is unlawful under PP 9645." (See, e.g., Complaint ¶ 1.) Thus, they allege that the delays they are experiencing arise from a "pattern or policy of delay" in dealing with their waiver adjudications, which meets the same transaction or occurrence prong of the test for permissive joiner. See Coughlin, 130 F. 3d at 1350.

Moreover, Plaintiffs meet the second prong of the test for permissive joinder because their Complaint presents common questions of law or fact. In Coughlin, the plaintiffs "d[id] not allege that Defendants ha[d] engaged in a policy of delay." Id. at 1351. Here, Plaintiffs allege that the Government's implementation of PP 9645 is "a common pattern or policy" affecting Plaintiffs who filed visa applications before and after the proclamation went into effect. (Reply at 2.) As Plaintiffs note, "their applications could only have made it to post-PP 9645 refusal administrative processing once consular officers determined that" they were otherwise eligible for a visa, so no "additional legal circumstances" are causing unreasonable delays, as the Government argues. (Id.)

The Court finds that joinder of the Plaintiffs is appropriate.

C. The Winter Factors

1. Likelihood of Success on the Merits

a. Availability of Judicial Review

The APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). Thus, the APA authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." Id. § 706(1). But, the APA does not apply if a statute precludes judicial review or "agency action is committed to agency discretion by law." Id. § 701.

Plaintiffs argue that they are likely to succeed on the merits of their APA claim because it authorizes legal actions like the instant one challenging unreasonable delays in agency actions. Plaintiffs claim that to state such a cause of action, they merely need to point to an agency's failure to take discrete action that it is required to take. (Mot. At 18; see Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004)). Plaintiffs claim that PP 9645 mandates that the Government adjudicate waiver considerations, but has failed to do so within a reasonable time. (Mot. at 19.) In addition, Plaintiffs argue that the Government "do[es] not have the discretion to refuse to process, withhold decisions, or unreasonably delay Plaintiffs' waiver consideration pursuant to PP 9645." (Id.). Plaintiffs allege that the Government has failed to act within a reasonable time because it has "failed to adjudicate Beneficiary Plaintiffs visa waivers within 90 days," although Plaintiffs offer no explanation for this particular deadline. (Complaint ¶ 166.)

***4** For this argument, Plaintiffs rely on *Nine Iraqi Allies*, 168 F. Supp. 3d at 293 n. 22, 295-96 (D.D.C. 2016), where the court held that plaintiffs had stated a claim for unreasonable delay in processing their immigrant visa applications. But, in that case, the relevant statutes required government agencies to process the visa applications at issue within nine months. Id. at 293. Thus, the court had "manageable standards" by which it could "assess the Government's compliance." Id. This case is unhelpful to Plaintiffs' argument because there is no similar statutory directive here.

The Government argues that the President's actions are not subject to APA review. (Opp'n at 12.) Because the waiver program "is governed by the Proclamation, a Presidential action," the Government argues that PP 9645 may not be challenged under the APA. (Id.) The Government points out that PP 9645 states that it does not

create "any right or benefit, substantive or procedural" against the United States or its agencies and that "as a general rule, private parties may not privately enforce compliance with a Presidential Proclamation." (Id. at 12-13.)

But, Plaintiffs are pursuing APA claims based on the theory that the Government is flouting its guidance regarding consideration of waivers and usurping consular officers' authority to grant them. Thus, the Government's argument is not relevant here. See Emami v. Nielsen, 365 F. Supp. 3d 1009, 1019 (N.D. Cal. 2019).

Further, the Government argues that the APA "does not permit review of waiver determinations" under 5 U.S.C. § 701, because the APA does not apply to agency action "committed to agency discretion by law." (Opp'n at 13.) As the Government notes, PP 9645 commits the grant or denial of waivers to the "discretion" of consular and Customs and Border Protection officers. (Id., see 82 Fed. Reg. at 45168.) Thus, the Government argues, "[e]ven if the delegation of discretion were not expressly committed to another branch, there is no standard for a reviewing court to impose a timing requirement on this exercise of discretion." (Id.) PP 9645 "provides no right for an individual to receive a decision on waiver application within any set period of time, nor does it expressly impose a duty that the waiver application be adjudicated at all." (Id.)

Plaintiffs argue that the Government "d[oes] not have the discretion to refuse to process, withhold decisions, or unreasonably delay Plaintiffs' waiver consideration pursuant to PP 9645." (Mot. at 19.) In support of this argument, they point to the State Department's "Operational Q&As on PP. 9645," which states that "every applicant who is subject to the restrictions of the P.P., otherwise eligible for a visa, and to which an exception does not apply" "*must* be considered for a waiver." (Mot., Docket No. 8, Ex. DDDD) (emphasis added).

The "must be considered for a waiver" wording in the State Department's "Operational Q&A's" suggests that the Government does not have discretion to never act on Plaintiffs' waiver applications. Thus, the Court disagrees with the Government that there is "no law to apply" and that the doctrine of consular non-reviewability precludes judicial scrutiny. (Opp'n at 14-15.) Plaintiffs are challenging systemic practices with respect to the waiver program, not individualized determinations for any one of their specific applications. (See, e.g., Complaint ¶¶ 138, 170.) The Complaint alleges the Government is not abiding by its own guidelines and statements about case-by-case determinations of waiver applications, but instead implementing a policy of blanket denials, by depriving consular officers of the ability to issue waiver decisions. (See id). Thus, no review of any individual consular officer decisions is required; what is at stake is "the authority of the consul to take or fail to take an action as opposed to a decision taken within the consul's discretion." See Patel v. Reno, 134 F.3d 929, 931-32 (9th Cir. 1997). Accordingly, judicial review of Plaintiffs' APA claims is not precluded.

b. Unreasonable Delay

***5** Plaintiffs argue that the factors laid out in Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984) ("TRAC v. FCC"), warrant a finding that the administrative delays they have experienced in receiving a waiver determination have been "unreasonably delayed." (Mot. at 19-20.) To do so, this Court must balance factors including whether the time the agency takes to make its decision must be governed by a "rule of reason," whether Congress has provided a timetable or other indication of the speed with which it expects to proceed in the enabling statute, whether "human health and welfare" is at stake, the "effect of expediting delayed action on agency activities of a higher or competing priority," and the "nature and extent of the interests prejudiced by delay." TRAC v. FCC, 750 F.2d at 80.

Plaintiffs likely cannot succeed with their argument that the Government has violated the APA by subjecting their waiver adjudications to unreasonable delay, thus allowing the Court to compel review of their applications. The lack of a "rule of reason" to govern the timing of the waiver adjudication is the most relevant factor to this analysis.

"The reasonableness determination is a fact-specific inquiry," and "length of delay alone is not dispositive." Mugomoke v. Curda, 2012 WL 113800 at *8 (E.D. Cal. Jan. 13, 2012). "Thus, courts have "look[ed] to the source of the delay-e.g., the complexity of the investigation as well as the extent to which the defendant[s] participated in delaying the proceeding." Qureshi v. Napolitano, 2012 WL 2503828 at *4 (N.D. Cal. Jun. 28, 2012) (internal citations omitted).

Plaintiffs stated that a 90-day period should be the metric by which to judge the reasonableness of the delay in the Government's adjudication of their waiver applications, with no justification for this time-frame. (Complaint ¶ 166.) They argue that they "have already successfully passed security checks" and that "an order by this Court mandating adjudication of [their waiver applications] within 15 days gives the Defendants more than ample time to complete its security determinations." (Mot. at 21.) Plaintiffs also repeatedly assert that the Government can execute waiver considerations within "one business day," but fail to support this allegation with evidence that would apply to their cases. (See, e.g., Mot. at 21.)

The Court is persuaded by the Government's argument that this vetting process "is more difficult and time consuming for Iranian nationals because, the Presidential Proclamation explains, Iran does not adequately provide public-safety and terrorism-related information." (Id. at 18.) As the Government argues, "any delay alleged is not unreasonable under the circumstances and certainly nowhere close to what would amount to an excessive delay under even domestic immigration processing standards." (Opp'n at 17.)

The other TRAC factors do not tilt this analysis in the Plaintiffs' favor. Although "human health and welfare" may be at stake for Plaintiffs who remain separated from their relatives and/or loved ones and Plaintiffs may have familial "interests prejudiced by delay," they have not shown that "extreme or very serious damage will result" if a mandatory injunction is not granted. See Anderson, 612 F.2d at 1115.

Further, the Government has compellingly argued that the "effect of expediting delayed action on agency activities of a higher or competing priority," counsels against issuing an injunction, given that it has thousands of other waiver applications pending and sensitive national security and public safety determinations to make. (Opp'n at 20.)

2. Irreparable Harm

Plaintiffs must demonstrate that irreparable injury is "likely" in the absence of an injunction; merely showing a "possibility" of irreparable harm is insufficient. See Winter, 555 U.S. at 22. Mandatory injunctions are not granted unless extreme or very serious damage will result. Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009).

***6** Plaintiffs argue that they will be irreparably harmed in the absence of a preliminary injunction as a result of the unreasonable delay in the adjudication of their mandatory consideration for a waiver of PP 9645's suspension of entry clause. (Mot. at 16.) First, Plaintiffs argue they suffer from trauma caused by family separation. (Id. at 16-17.) Second, Plaintiffs argue that "although adjudication of Plaintiffs' pending waiver applications does not guarantee that a waiver will be granted, the indefinite delay of a decision prevents Plaintiffs' ability to make appropriately informed life decisions like whether they should be pursuing third countries to legally reside and work, and escape the wrath of a U.S.-Iran military conflict, or to bring legal challenges to the Defendants' final decisions." (Id. at 17.) Finally, Plaintiffs argue that delay in receiving an adjudication of waivers "caus[es] a domino effect" to other waiver considerations, including causing criminal, medical, and security checks to expire, "creating an infinity loop of administrative processing." (Id. at 17-18.)

The Government argues that Plaintiffs fail to show they will suffer irreparable injury absent injunctive relief. (Opp'n at 23.) As the Government points out, and Plaintiffs have admitted, "it is entirely speculative whether the Court's entry of the preliminary injunctive relief that Plaintiffs seek would result in their admission to the United States," and "Plaintiffs acknowledge they have no guarantee a waiver would be granted, and that denial is also a possibility." (Id. at 24.) Thus, Plaintiffs have not demonstrated a likelihood of irreparable harm if the Court does not provide injunctive relief.

3. Balance of Hardships

Plaintiffs argue that the balance of equities and the public interest favor a preliminary injunction because it would "serve the public's interest in maintaining a system of laws where the Government must comply with its legal obligations." (Mot. at 24.) Plaintiffs suggest that their requested injunctive relief — that the Government complete adjudication of their pending waiver considerations within 15 days – constitutes a minimal burden on the Government. (Id.)

The Court is not convinced that requiring the Government

to act on Plaintiffs' waiver applications within 15 days would be a minimal burden, given the national security and public safety concerns at issue. At this stage in the proceedings, Plaintiffs have not shown that the balance of equities tips in its favor sharply enough to overcome the deficiencies in the other Winter factors.

IV. CONCLUSION

Plaintiffs have not demonstrated that "serious questions going to the merits, and a balance of hardships that tips sharply toward" their case support issuance of a preliminary injunction, given that they have not also demonstrated a likelihood of irreparable injury. See Alliance for the Wild Rockies, 632 F.3d at 1134-35.

For the foregoing reasons, the Court **DENIES** the motion.

IT IS SO ORDERED.

All Citations

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Footnotes

1 The claims of Plaintiffs John and Jane Doe, Siavash Koohmaraie, and Anahita Mehrani were rendered moot as they received decisions on their requests for a determination of their eligibility for a waiver of PP 9645's entry restrictions. (Docket No. 35, Ex. A, Decl. Of Chloe Dybdahl.)