Eliasar Escamilla-Montoya v. Landon

United States District Court for the Northern District of Illinois Eastern Division
July 23, 1982
No. 79 C 3874

Reporter: 1982 U.S. Dist. LEXIS 13776
ELIASAR ESCAMILLA-MONTOYA, et al., Plaintiff, vs. MICHAEL J. LANDON, JR., Acting Director of the Immigration and Naturalization Service, Defendant.

Opinion by: [*1] LEIGHTON

Opinion

Memorandum

Before the Honorable George N. Leighton United States District Judge

Plaintiffs, five individuals of Mexican descent who are within the jurisdiction of this court, bring this class action seeking declaratory and injunctive relief against Chicago officials of the Immigration and Naturalization Service (INS). [1] They seek to have certain practices and procedures of INS which relate to post-custodial interrogation of detainees, and the administration of the I-274 Voluntary Departure Program, declared unlawful and enjoined. They allege that the INS practices complained of prevent plaintiffs and members of the class from meaningfully exercising their post-custodial rights under the *5th Amendment*, the Immigration and Nationality Act, *8 U.S.C. §§ 1101 et seq.*, and INS regulations promulgated thereunder.

Plaintiffs' motion for a preliminary injunction was [*2] referred to the Executive Committee for assignment to a Magistrate for the purpose of holding a hearing, making findings, reach conclusions of law, and recommend disposition of the motion. On February 22, 1982, Magistrate Jurco, after hearing evidence, issued her report in which she recommended that plaintiffs' motion for a preliminary injunction be denied. The cause is presently before this court on plaintiffs' objections to the report and recommendations. Consideration has been given to the written submissions of the parties, particularly plaintiffs' objections; and while not accepting all portions of the magistrate's report, the court under *28 U.S.C.§ 636(b)(1)*, has made "a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made", adopts Magistrate Jurco's recommendation, and denies plaintiffs' motion for a preliminary injunction.

I

A preliminary injunction should be granted only if the plaintiff shows that: (1) he or she had at least a reasonable likelihood of success on the merits; (2) there is no adequate remedy at law, and the plaintiff will otherwise be irreparably harmed; (3) the threatened [*3] injury to the plaintiff outweighs the threatened harm the preliminary injunction may cause the defendants; and (4) granting the preliminary injunction is not contrary to the public interest. E.g., Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d 795, 796-97 (7th Cir. 1981). The dispositive criterion in this case is the first enumerated by the Machlett court: the likelihood of success on the merits. Pratte v. National Labor Relations Board, F.2d (Slip Opinion 7th Cir. 82-64, July 8, 1982).

Plaintiff presented testimony of Rene Camargo and Alma Alvarado, paralegals employed by the Legal Assistance Foundation, Esquiel Tovar and Kalman David Resnick, attorneys with the Legal Assistance Foundation, deposition testimony of Penelope Seator, an attorney with Traveler's Aid, as well as testimony, including deposition testimony, of defendant Theodore Giorgetti and testimony of defendant Homer Geymer as adverse witnesses. Plaisntiff also submitted into evidence (with exception of plaintiff Guadalupe Gardenas-Castillo) designation portions of the deposition testimony of the named plaintiffs, after rulings were made on objections. Certified files of the INS on [*4] all plaintiffs, which had been retained by defendants for this litigation, were received from both plaintiff and defendants. (PX J, K, L, M, N; Certified Records of government of each of named plaintiffs.)

Each of the five named plaintiffs are representatives of a class certified by the District Court as including

All persons of Mexican descent within the Chicago District of the Immigration Service taken into custody and interrogated by officers of the Chicago District Office of

---

[1] By order dated May 26, 1982, the court certified a class consisting of "all persons of Mexican descent within the Chicago District of the Immigration Service taken into custody and interrogated by officers of the Chicago District without being properly advised of their post-custodial rights."

the Immigration Service without being properly advised of their post-custodial rights.

The defendants are all named in their official capacities with INS.

Defendants called as their witnesses Criminal Investigators Judy Campbell, Carol Krznaric, David Garcia, James Bailey, supervisory deportation officer, and defendants Theodore Giorgetti, Homer Geymer and introduced into evidence the deposition of criminal investigator James P. McIntyre.

Documentary exhibits included English and Spanish language Government Forms I-214, Warning as to Rights, Waiver, Certification and Interview Log, and I-274, a Request for Return to Mexico (PX A, B, C, D, E) and Government Form I-213, Record of Deportable Alien. [*5] Admitted into evidence for plaintiff were answers of George Pettit, Trial Attorney for INS to Requests for Admissions (PX Y).

Plaintiffs claim the Immigration and Naturalization Service officials and criminal investigators have secured waivers of I-214 rights, and consents on I-274 and signatures of undocumented aliens thereon for voluntary departure and to return to their country of origin in a manner constituting violation of fundamental due process rights secured by the *Fifth Amendment to the Constitution* and contrary to the statutory provisions and regulations of the Immigration and Nationality Act.

These violations consist of failure and omission of criminal investigators conducting interviews with detainees to inform arrested detainees of

(1) The reason for their arrest and the charges for the arrest, as is required under the *due process clause of the Fifth Amendment* and 8 C.F.R. 242.2(a) and 287.3;

(2) right to counsel representation as secured by *8 U.S.C. Sec. 1252(b)* and 1362 and advice of availability of free legal services. The Legal Assistance Foundation which represents plaintiffs in this litigation and Traveler's Aid are organizations which provide free legal [*6] services. The practice and procedure of denying access of counsel to an undocumented alien who has filed an appearance on this behalf. Plaintiffs assert the *Fifth Amendment* violation to due process but do not charge violation of *Sixth Amendment* right to counsel;

(3) right to remain silent as secured by the *Fifth Amendment*;

(4) availability of release on bond, opportunity for reduction of bond, that bond decision must be made in 24 hours, being made as provided by 8 C.F.R. Sec. 287.3, and the right to bond pending deportation provided by *8 U.S.C. Sec. 1252(a)*;

(5) right to a deportation hearing before expulsion of alien as set forth in *8 U.S.C. Sec. 1252* and required by the *Fifth Amendment*; and that voluntary departure relief exists even after deportation hearing.

The Immigration Service administers voluntary departure programs denominated I-274 for Mexican aliens and I-274A for aliens of other countries which offer undocumented aliens departure and return to country of origin. Mr. Giorgetti, Assistant District Director of Investigations, testified that the nationality most frequently apprehended for illegal entry both nationally and in Chicago are persons of Mexican nationality [*7] (Dep. 22, PX W). Mr. Giorgetti testified that the advantages of this grant and privilege to the Mexican alien are

the fact that no permanent record is retained even though a viable record is created. They are not fingerprinted. They are not photographed. They spend far less time in detention. Their return to their country of origin is immediate or within a very short time indeed. They do not run the risk of formal deportation before an immigration judge, wherein they would thereafter have to seek and receive permission from the Attorney General to reapply for admission to the U.S., and if they did not receive such permission… if they reenterd the U.S…. they could be prosecuted pursuant to *8 U.S.C. Sec. 1326* which is a felony…. (Dep. 361)

He also said that the fact an alien departs voluntarily under I-274, at government expense does not in and of itself result in a bar to his reentry into the country even though prior permission of the Attorney General is not secured. He admitted that the alien who takes voluntary departure at government expense is not orally informed that such permission is required (Dep. 384-385). Such information does appear in the I-274 Form. [*8] The documents engendered under the I-274 Program are kept chronologically and not by the alien's name, and are kept for a period of three years.

It is important in this case that the procedure and manner by which the INS apprehends Mexican nationals reasonably suspected to be illegal aliens is not an issue for determination in this proceeding. At issue is the procedure which ensues after custody is taken in the course of interrogation by criminal investigators.

Under the Code of Federal Regulations, particularly Sec. 287.3, C.F.R., 32 Fed. Regs. 6260 (1967), it is provided in relevant part as follows:

An alien arrested without warrant shall be advised of the reason for his arrest and his right to be represented by counsel of his own choice at no expense to the government. He shall also be advised that any statement he makes may be used against him in a subsequent proceeding and that a decision will be made within 24 hours or less as to whether he will be continued in custody or released on bond or recognizance.

Neither Form I-214 nor I-274 provides information concerning the reason for arrest, or that bond decision must be made within 24 hours. Statements concerning [*9] the right to counsel, and that any statement may be used against an arrested illegal alien, are included in Form I-214. Plaintiffs' Ex. Y, Answers to Requests for Admissions made by Immigration Service Trial Attorney, admits that prior to being granted the opportunity under the I-274 Program, no written notice is given to the alien that a bond decision must be made within 24 hours. It is also admitted by such answers that no written notice is given notifying illegal aliens of the reason for their arrest, that the conditions of their custody can be reviewed at a bond re-determination hearing.

The INS Investigator's Handbook (PX F for 1973; DX 8 for 1980), sets forth the procedures to be followed. The 1973 Handbook states:

The Service, as a matter of policy, has determined that the rules announced by the United States Supreme Court in Miranda v. Arizona, applicable to criminal cases, shall also be applied to deportation proceedings with the one exception that the Service will not assign counsel to the alien. (Par. 1)

The 1980 I&NS Investigator's Handbook states:

(1) … The pertinent regulations relating to deportation and exclusion proceedings… require only that an alien… [*10] who is arrested without warrant be advised of the reason for arrest, of the right to be represented by counsel… at no expense to the government, and that any statement… may be used against him or her in a subsequent proceeding. It is Service policy also to advise a person against whom the Service has decided to institute deportation or exclusion proceeding of the availability of free legal service programs and of organizations recognized pursuant to 8 CFR 292.2… and to provide the person with a list of such programs.

However, in order not to preclude the possibility of a successful criminal prosecution, it is Service policy to give the complete Miranda warning before taking any statement from a person in custody, although some courts have held that this is not required when the arrestee is being held only for deportation proceedings. (Par. 1)

Form I-214 Warning as to Rights reads:

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions [*11] and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

There is a portion titled WAIVER with space for signature of the person who indicates understanding of these rights, willingness to make a statement and answer questions, that no lawyer is wanted at this time, and the person signed the waiver understands what he is doing and that it is not signed under pressure or coercion.

Criminal Investigators Campbell, Krznaric and McIntyre all testified as to the procedure used by them at appearance of a detainee before them. All testified that the first step is the advisement of rights appearing on Form I-214 and that in that connection they first determine whether the illegal alien can read or understand Spanish or English; that if the alien can read and so states, the I-214 is given to him; if the alien cannot read, then it is read to him by the investigator (Campbell 466-467, 469; Krznaric [*12] 491-492; McIntyre dep. 5-6, 16-19, 23-24). Following a waiver, the I-213, Record of Deportable Alien, is completed by the criminal investigator. The alien is told of the option of returning to Mexico voluntarily or to have a deportation hearing (Campbell 466-467; Krznaric 492; McIntyre dep.7). Mr. McIntyre informs the alien that no permanent files are created on a voluntary departure as there would be if there is a hearing before the Immigration Judge. All three testified that before the alien signs the I-274 Form, the processing officer finds out whether he understands the conditions of voluntary departure or whether he wants a deportation hearing (Campbell 467; Krznaric 492; McIntyre 7). All three testified that the illegal alien is told that in the event a hearing is elected he will appear before an Immigration Judge and bond may have to be posted but that the District Director makes bond decisions (Campbell 468; Krznaric 497; McIntyre dep 8). Criminal Investigator McIntyre testified that when asked

about bond, if there are no equities, he informs the detainee the bond may be $1000 and the minimum bond is $500, but the bond is set by the District Director. All testified that [*13] when the alien asks about counsel, he is asked whether he has an attorney and if not the alien is given the list of free legal service organizations (Campbell 468; Krznaric 492; McIntyre dep. 8). Criminal Investigators Campbell and Krznaric testified that such a list is also given when the alien chooses the option of appearing before an Immigration Judge and an Order to Show Cause has been prepared by INS. Mr. McIntyre testified he gives such a list to the alien if an individual requests information about legal services (Dep 8-9). Ms. Krznaric testified that when an alien asks for counsel after the I-214 rights are given, she stops all questioning and asks whether he has an attorney and if he has none the list of free legal service organizations is given to him (Krznaric 492).

The Certified INS files of these plaintiffs bear out that not all the data for which space is provided is supplied on Form I-214, particularly time of signing; and the interview log also fails, in some instances, to include time of beginning of interview and conclusion thereof. Form I-213, Record of Deportable Alien, includes a time at the bottom right hand where the criminal investigator signs. None [*14] of the Forms I-274, as presented in the INS files on the named plaintiffs have been checked to show whether departure of the alien is at his own expense or at the government's expense. None of the criminal investigators inform aliens that departure at government expense renders them excludable from the U.S. and bars reentry without prior permission of the Attorney General. Government counsel argues that the information is not available to the investigator; that this information is known only at the time of departure and made known to the deportation section. None of the three criminal investigators informed an arrestee of the right to a bond decision within 24 hours after the arrest.

From the totality of the testimony given by these three criminal investigators, it appears the procedure and formula of approach in processing illegal aliens is generally uniformly applied. Mr. Geymer testified that there is an additional advisement that is given to the arrested person which is not contained in I-214 or the Handbook, i.e., the right to contact their consulate (346). He also testified as to the procedure in advising of rights on I-214 and I-274 and that free legal services information [*15] is given when the alien is served with an Order to Show Cause or when an alien wants to speak to an attorney (332-334). Mr. Geymer also stated that the procedure set by I-214 is important; that the basic purpose of the form is for criminal proceedings, but that as a matter of policy in Chicago the form is tendered or read to all interviewed aliens. He also testified that I-214 provides for the exact time to be indicated when the rights are given, but it has not been consistently noted; that the INS investigators are instructed to properly and correctly fill out the forms (342-343) but that the time is also noted on the I-213 (345). He also testified it is Service policy to notify aliens on the charges against them or reasons for their arrest, but had no idea where such a policy is expressed (350).

Mr. Giorgetti's deposition testimony described the training program undergone by criminal investigators. (See also Dep. McIntyre 26-27). After completing academy and training programs, criminal investigators are required to take a second language examination at their duty station within five months and after ten months of total service during the first year (103-105). He testified [*16] that the investigator must pass that examination or be separated from service (104). He explained that when an INS agent approaches an individual whom he has reason to believe is an illegal alien, he first identifies himself as an officer of the Immigration Service, asks of what country the person is a citizen, if the answer is citizen of a country other than the U.S., he then inquires as to their right to be in this country, and if none is indicated, no further questions are asked and the person is transported to the office for processing (80-81). It is at this stage that Form I-214 and Form I-274 are available (Dep. 82-84). Criminal investigators may make recommendations as to the amount of bond to be set which are subject to Mr. Giorgetti's review. Such recommendations are not made known to the alien (Tr. 86-87).

It thus appears that the criminal investigators do provide a list of free legal services to a detainee after he exercises his right to counsel or elects not to depart in the I-274 program. This is not inconsistent with the I-214 Warning of Rights. It is also a part of the procedure routinely to inform the detainee of the I-274 program of the right to exercise his [*17] right to a deportation hearing. It is true that the detainee is not told that a decision as to bond must be made within 24 hours, that such bond decision is reviewable by an immigration judge, or that voluntary departure is available even after deportation hearing.

Against the testimony of defendant's witnesses, the plaintiffs present their deposition testimony. As representatives of the class, it is desirable as to each named plaintiff to set forth particulars which are contained in the Certified administrative files of the INS, which had been retained by INS for the purposes of this suit, and their testimony taken on deposition. In such review, it is noted that no deposition of the plaintiff Manuel Lopez Lupercio has been admitted or presented by plaintiff for admission into evidence. In the course of closing argument, the

government revealed that he could not be found by plaintiffs' counsel or the government for the purpose of taking his deposition. In the receipt of the deposition testimony of plaintiffs as part of the evidence in this hearing, the government opposed admission of the four depositions which had been taken on notice by the government for the reason they are [*18] hearsay and effectively deny right of cross-examination to it at this hearing in order to test the witness' credibility. Plaintiffs' counsel nevertheless elected to rely on a previous Order of the Court which permitted the procedure. After specific rulings on objections to portions of said depositions they were received into evidence (Tr. 370-377).

Eliasar Escamilla-Montoya

This plaintiff's deposition was taken March 25, 1981 and he testified that his signature on the I-214 and I-274 forms was not knowledgeably made, and he retracted his option of voluntary departure. He was arrested on April 9, 1979 at O'Hare. He was processed by Criminal Investigator Carol Krznaric. Form I-214 bears the time 9:35 a.m.; Form 213, Record of Deportable Alien, shows the time of 10:05 a.m. Form I-274 shows no time. All were executed on the date of arrest, April 9, 1979. He had three years of schooling in Mexico; had previously entered the United States in 1976, was apprehended by the INS and returned to Mexico; he again reentered in October 1977 and has been here since. He is presently waiting for a permanent residence status; his wife is a citizen of the U.S., but he was not married in April [*19] 1979. At time of apprehension he had a Social Security card in the name of Jose Aguilon. Escamilla testified he was not able to read and was given only one minute to review the documents given him and was told to sign. He testified that he was not advised he had a right to release on bond, a right to deportation hearing, and not told about free legal services. He signed the I-274. His file shows that at the El Paso, Texas Detention Center there was information that an attorney has filed a G-28 Appearance of Attorney on the basis of detainee's call from El Paso to said attorney on April 11, 1979. An Order to Show Cause was issued by the government on April 11, 1979 and Escamilla returned to Chicago. The District Director set a bond of $2000 on April 17, 1979. On April 24, 1979 an immigration judge found plaintiff deportable and granted voluntary departure. Considerable doubt is apparent as to the accuracy of Mr. Escamilla's power of recall in that he testified that the questions and documents were given to him by a 39-year-old male, not too tall, to whom he showed a picture of his girlfriend, now his wife, and the INS officer asked who it was; he also testified that he showed [*20] the Social Security card to this man. The INS file shows he was processed by Carol Krznaric, a female criminal investigator.

Everardo Gutierrez-Torrez

This plaintiff was deposed on March 19, 1981, and like Escamilla retracted his signatures on I-214 and I-274 because they were not knowledgeably given. He was processed by Criminal Investigator Judy Campbell. He was arrested on January 29, 1979 at O'Hare when returning from Los Angeles. He testified as to a previous entry in 1976, and a reentry in 1978 (or 1979). This was his first arrest by INS. There is no time indicated on his signing the I-214. The Record of Deportable Alien shows a time of 10:30 a.m. Ms. Campbell's notes on the I-213 indicate that he wished to post bond. She noted the fact he had no equities or family ties, had no address, was a recent arrival and recommended a bond of $1500. This plaintiff had six years of schooling in Mexico and can read and write. Attorney Resnick filed a G-28 on his behalf on the date of his arrest, January 29, 1979. An Order to Show Cause was prepared by the government the same day. The Acting District Director set a bond of $500 on January 31, 1979 which was posted the same [*21] day. He testified that he did not read the documents given him by Ms. Campbell but signed them; that Ms. did not speak Spanish very well; that he tried to tell her he had a citizen brother in the U.S.; that she told him he would have to return to Mexico. He further testified he asked about bond because his brother was a citizen and she said "[s]ign it. You must go." He testified he was not advised of his right to an attorney, right to a deportation hearing, right to remain silent, right to bond pending deportation. He stated he was told about voluntary departure, but was not told he could apply for the same relief at a deportation hearing. It is clear that Ms. Campbell did communicate with this plaintiff in Spanish. His testimony that on inquiry as to bond she told him "[s]ign it. You must go", is inconsistent with the bond recommendation which she made to the District Director the day of arrest.

Manuel Lopez-Lupercio

This plaintiff was deposed March 18, 1981 and, as did the others, retracted his I-274 option in that he did not knowledgeably sign the same. He was one of approximately 36 persons arrested on July 7, 1978 around 11:30 a.m. at Onarga, Illinois which is [*22] 100 to 120 miles south of Chicago. There is no Form I-214 Warning as to Rights in his file. The Record of Deportable Alien Form I-213 was prepared by Criminal Investigator Liva showing completion at 1:00 p.m. No testimony was presented from Mr. Liva. Government counsel advised that Mr. Liva had been subpoenaed by plaintiff, and the government, therefore, had made no arrangement for Mr. Liva to appear. The I-213 Record of Deportable Alien has Mr. Liva's notes that this plaintiff had been advised of his rights and also advised of his rights to speak with his counsel; that he had no family or equities in the United States. He recommended a $1000 bond to the District Director.

Mr. Lopez testified that this last entry was his fifth entry into the United States. He had entered in 1974, was arrested by INS and returned to Mexico; reentered in 1975; reentered in 1976; reentered on February 20, 1978 and after two months in Texas, came to Onarga a few months later where he was arrested on July 7, 1978. He had four years of schooling and can read and write Spanish. He testified that the criminal investigator was American who spoke Spanish; that he was asked if willing to go to Mexico [*23] or to go "by force" and was given a paper to sign and told that it was best to sign it. Opez said he did not read the paper, it was not explained to him, and he was told just to sign. He, Lopez, did not ask any questions or say anything. He attempted to tell the agent he was getting married that day and his fiancee was an American citizen and she was pregnant. He admitted that he had no marriage license for such marriage.

Deponent Lopez testified that they were placed on a bus around 3:00 p.m.; that an immigration agent who was Mexican got on the bus and asked if anyone wanted to go out on bond or talk to a lawyer, but that a lawyer would cost money. When the bus arrived at the El Paso Detention Center, they were told that for all those arrested at Onarga there was an attorney to see them. A G-28 appearance of Attorney had been filed in the Chicago office on the day of his arrest - July 7, 1978. He was returned to Chicago; there were about nine others returning with him; a $500 bond was set by the District Director. On September 19, 1978 the immigration judge granted right of voluntary departure by a certain date. He is presently waiting for permanent resident status.

[*24] His file contains a letter of July 7, 1978 from an INS officer directed to Ms. Poplawski, counsel for plaintiff in this case, and Mr. Resnick, attorney for the Legal Service Center, which informs them that the 38 aliens enroute to Mexico under voluntary departure from Onarga would not be removed to Mexico until attorneys at their own expense could interview them at El Paso, Texas on Monday, July 10, or earlier; that any of the aliens who desired to withdraw their voluntary departure decision and return to Chicago for deportation hearing could be returned at government expense.

Mr. Geymer testified that prior to the departure of the bus from Onarga, he had received information from Richard Hugg in the Chicago office that there were attorneys in Chicago who stated they represented the persons arrested in Onarga, and that Geymer was to advise the aliens that there were attorneys retained to represent them (Geymer 319-320). Mr. Daid Carcia, a criminal investigator, testified that, at the instruction of Mr. Geymer, he advised those on the bus, in Spanish, at least three times, that a lawyer wished to represent them; that they could either remain on the bus or speak to a lawyer, because [*25] a lawyer who had an interest in the matter wished to represent them. Mr. Garcia testified questions were asked of him and he was asked how much are we expected to pay and how long will they be permitted to stay. He told them that attorneys usually charged fees, but that if they left the bus and talked to an attorney they could still exercise the option of voluntary departure under the I-274 Program (Garcia 460-461). None departed the bus. Mr. Geymer does not recall whether he had told Mr. Garcia that the services were free (321-322). On Mr. Geymer's return to Chicago that evening at 7:00 p.m., he, Mr. Hugg, Ms. Poplawski and Mr. Resnick discussed the Ashkum/Onarga bus departure to El Paso. After telephone calls to Washington, D.C., it was determined those detainees would not be removed to Mexico before the Chicago attorneys had an opportunity to interview them at El Paso at the attorney's own expense of travel; any detainee who wished to retract their I-274 would be returned at government expense (322-325). Mr. Hugg prepared a draft memo on July 25, 1978 regarding the meeting and discussions which he directed to Mr. Giorgetti. On Page 2 of this memorandum, he states that Mr. [*26] Giorgetti asked him to make another call to Mr. Geymer that "we would tell the aliens that these legal services would be free, according to a second request by Ms. Poplawski. The writer did so." (PX S)

Juan Diaz-Chaidez

This plaintiff's deposition was taken April 14, 1981. He also retracted his I-274 option because he did not knowledgeably sign the same. He was arrested around 9:30 to 10:00 a.m. in Chicago on August 24, 1979 at his factory employment. He had entered the U.S. on two prior occasions - in 1972 until 1974 when arrested by INS; he reentered in 1974, returning to Mexico for a visit in December 1977. He reentered February 1978. Mr. Paul McIntyre was the criminal investigator who processed him. Plaintiff testified he had eight years of school and could read and write Spanish. The Certified file for Mr. Diaz shows that the I-214 form was signed at 12:15 p.m., but that the I-213 record of Deportable Alien generally prepared after the I-214 is signed, was completed at 11:45 a.m. The I-213 has Mr. McIntyre's notes that the subject had been advised of his right to free legal counsel, right to contact the Mexican counsel; that the subject requested a hearing before an [*27] immigration judge. Mr. McIntyre included a recommendation that a $1000 bond be set. An Order to Show Cause issued and the District Director set the bond at $1000. Mr. Diaz stated he was hiding when the immigration officers came to the factory. He stated the INS officer who interviewed him spoke Spanish; that Mr. Diaz asked about bond of $1000, but was told it would be $2,000, $2500 or $3000; that he told the investigator he

did not have that much, but that he knew the normal bond was $1000 for two or three months; that he was told it couldn't be done and to sign the papers and if he didn't it was going to be worse for him. He recalls being told that if he went to deportation he would have pictures and fingerprints taken and that a permanent file could be made. Mr. Diaz testified he was threatened by INS agents and was told if a bond was posted for him they were going to keep an eye on him. His file shows no G-28, but he testified he spoke to Attorney Soliz on the afternoon of the day of his arrest (44). His testimony as to the represented bond amounts given by the criminal investigator must be weighed with the bond recommendation made by Mr. McIntyre that it be a $1000 bond.

[*28] Guadalupe Cardenas-Castillo

Certified INS file of this plaintiff shows arrest at 11:30 p.m. on February 13, 1979 at Chicago. The criminal investigator conducting the interview was J. Bernstien and the I-214 form was signed by this plaintiff at 3:00 a.m., February 14, 1979 and the interview was completed 3:45 a.m. The I-213 Record of Deportable Alien was completed at 3:30 a.m. with the recommended bond to District Director at $1000. Bond was posted and he was released. A G-28 was filed February 14, 1979 by a Legal Assistance Foundation attorney. Mr. Cardenas was not deposed and did not testify at this hearing. Plaintiffs' counsel did not dispute that he could not be located for his deposition.

The testimony of the three criminal investigators, Ms. Judy Campbell who processed Gutierrez, Carol Krznaric who processed Escamilla, and McIntyre who processed Juan Diaz-Chaidez, was they had no recollection of the specific processing of these plaintiffs.

From the evidence, plaintiffs have clearly shown that detainees are not advised that an I-274 grant of voluntary departure which is effected at government expense precludes later reentry except with permission of the Attorney [*29] General. Plaintiff has not shown that such omission prevented plaintiffs or members of the class from reentry without such permission. While the evidence does not show that three of the named plaintiffs who had previously been granted voluntary departure did so at government cost. Mr. Giorgetti's testimony was that such factor is not in and of itself a basis for future preclusion. Plaintiff's argument is also ingenuous in this regard because no alien can enter the United States without proper documentation and permission of the United States officials; that is the statutory mandate and purpose of the immigration laws. Therefore, an undocumented alien who is not advised that if he leaves voluntarily at government expense and cannot return unless permission is granted gives rise to no greater right than he possessed when the alien initially enters illegally.

The plaintiffs' evidence also establishes that undocumented aliens are not informed by the criminal investigators that the bond decision must be made within 24 hours, is subject to review by an immigration judge, and that a deportation hearing may provide for the same relief of voluntary departure. the evidence shows, however, [*30] that when an alien exercises his right to a deportation hearing, that information is given to an alien. In any event, these omissions do not rise to that degree of deprivation of rights so as to constitute a violation of constitutional rights or a denial of due process.

No testimony was adduced from the testifying criminal investigators whether they advised the detainee of the nature of the charge resulting in their arrest. This must be considered with the fact that when a detainee is stopped by an immigration officer preliminary interrogation shows whether the alien is a citizen of another country or whether that alien has a right to be in the United States. Three of the plaintiffs had, on prior occasions, been detained by immigration officers and returned to their country of origin; they thereafter reentered the United States. Their deposition testimony describes the mode of their reentry - that is, without documentation and entry at places where no immigration official was stationed. In fact, one plaintiff testified he was hiding from the immigration officers who entered his place of employment. None of the plaintiffs testified they did not know the reason for their arrest. [*31] Further, during the criminal investigator's processing of these plaintiffs they were informed of their right to a deportation hearing. At this juncture, the alien is informed civil procedure of deportation is for the purpose of determining his right to remain in this country. In this connection, cases hold that detention and deportation of illegal aliens is not a criminal enforcement activity and is an enforcement of the Congressional mandate expressed in the immigration laws. Deportation proceedings have been held to be civil and not criminal proceedings and the full panoply of constitutional rights under the criminal law do not apply. Abel v. United States, 362 U.S. 217, 237 (1960); Woodby v. INS, 385 U.S. 276, 285 (1966).

There remains the important aspect of evidence presented by plaintiffs bearing on their right to counsel; particularly to counsel who have filed a G-28 Notice of Appearance on that alien's behalf. Plaintiffs emphasize that Immigration Service officers' conduct effectively deprived the alien of legal representation through a refusal to inform the G-28 counsel whether their clients are in custody and a deliberate delay in access to the represented alien until [*32] such detainee-client has signed the waiver of rights and voluntary departure forms.

Mr. Giorgetti testified that when a G-28 Notice of Appearance is filed for a named alien, an attorney is given

opportunity to speak to his client (Dep. 114). He further testified that an alien, prior to return to Mexico, may freely retract his option of voluntary departure (Dep. 117, 8 C.F.R. 242). Form I-274, which is read to, or by, the undocumented alien expressly states that at any time before the alien returns to Mexico he has the right to consult a lawyer and has a separate right to ask for a hearing to determine whether he may remain in or be deported from the United States.

In support of their claim, plaintiffs presented the testimony of two paralegals with the Legal Service Center for immigrants who interviewed persons in detention -Mr. Rene Camargo and Ms. Alma Alvarado. Both testified they interviewed from five to ten detainees a week; that about 80% of the persons they interviewed retracted their I-274 consents to voluntary departure. Mr. Camargo testified among the most common reasons given for such retractions are that they did not understand what Form I-274 meant (154). Ms. [*33] Alvarado testified that the most common reasons for retractions are "they have not been advised that they could be released on bond and appear for deportation hearing at a later date; that if bond information is requested by the alien, they are advised it would be somewhere between $3000-$5000, and if deported would not be allowed to return to the United States" (237-238). Both witnesses followed the procedure of filing a G-28 with the INS and both completed a Bond Reduction questionnaire Form used by the Legal Service Center Association which are kept in the files of the Legal Assistance Foundation (PX P). During these interviews the alien is informed of the "right" to free legal service, representation by an attorney, rights on bond and the Bond Reduction Questionnaire Form is completed. Mr. Camargo testified that he was effectively denied access to certain clients for whom he had filed G-28 appearances. On April 8, 1981 he had filed such appearances at 9:30 a.m. for six or seven detainees, but was not allowed to speak to them (PX Q). At 12:30 he filed additional G-28's and was allowed to speak to one around 3:00 p.m. and said detainee had already signed an I-274 which after [*34] interview with Mr. Camargo she retracted (154).

Plaintiffs stress the significance of this testimony in that the large percentage of I-274 retractions after interview by paralegals show that signatures were obtained without the alien understanding the documents they signed and that access to counsel interview after filing an appearance is delayed until the signatures are obtained. In the light of the credibility weight given to the criminal investigators' testimony that each investigator determines that an alien understands this document, the large number of retractions does not appear to be due to a lack of understanding. In any event, retraction of the I-274 voluntary departure is consistent with the advice contained in Form I-274 itself.

In weighing these retractions as being due to denial of access of counsel to see the client before the signing of the document, plaintiffs have presented no credible evidence that the persons for whom Mr. Camargo filed G-28's were among the persons being interviewed.

Mr. Tovar, an attorney employed by the Legal Assistance Foundation, testified that relatives of detained persons usually call the office for legal assistance for them. He [*35] generally calls the Immigration Service to advise they have been retained, giving the name of the person whom he represents. He files a G-28 when he comes to the INS for the purpose of interviewing his client. On July 13, 1981 he called the Chicago INS office asking whether Adolfo Santoya or Miguel Gonzalez had arrived in the Chicago office. Mr. Tovar knew these arrests had occurred in Onarga, Illinois, having previously called Onarga. He was informed neither of these persons were in the Chicago office. He called again at 11:30 a.m. and was again told they were not in the Chicago office. At 12:30 he filed a G-28 for each of these men in the Chicago office and left. He called at 2:30 p.m. and was again informed they were not there. At 3:00 p.m. he called and spoke to INS Officer Kenny who told him he did not know whether they would be brought to Chicago at all, but would call Mr. Tovar.Officer Kenny called Mr. Tovar about 4:00 p.m. stating the two persons would not be brought to Chicago and were at the LaSalle, Illinois jail; that Mr. Santoya was to be released on a $500 bond, but that Mr. Gonzalez had a warrant of deportation and was going to be deported to Mexico. Government [*36] Ex. 6 is a G-29 filed for Miguel Gonzalez August 23, 1978 by Ms. Poplawski of the Legal Assistance Foundation. His 1981 arrest at Onarga was after entry of an earlier deportation order. It corroborates Officer Kenny's information to Mr. Tovar. Mr. Tovar testified that Mr. Santoya was returned to Mexico. However, the testimony establishes he was not returned to Mexico. Mr. Tovar was of the view that Mr. Santoya's bond should have been an own recognizance bond (294). Mr. Tovar did not talk to either Mr. Santoya or Mr. Gonzalez on either July 13th, the day of arrest, on July 14th or July 15th, and made no effort to call the LaSalle, Illinois jail on any of these days.

Again, with regard to availability of attorney access to detainees in Chicago, the deposition of Ms. Streator of Traveler's Aid and the testimony of Mr. Bailey have been received into evidence. On September 23, 1980 the INS conducted an area control operation at the Arlington Heights racetrack; there were 40 to 45 persons detained and arrested. Ms. Streator's deposition testimony was that she filed some 30 G-28 Notices of Appearance for named persons that morning; in the afternoon, only two were available for [*37] interview by Ms. Hess, a paralegal. She testified at deposition that the G-28's were prepared

from a list of names obtained in a telephone call from the person heading the Backstretch Program for Traveler's Aid. She waited and made inquiries throughout the day regarding the persons for whom G-29's were filed. Mr. Bailey testified that he sought to match the G-28 names with those held in detention by checking cards and also calling these names in the detention room. None were found or responded to the call. Around 5:00 p.m. Mr. Bailey told Ms. Streator there were some detainees remaining and asked whether she wanted to speak to them; Ms. Streator said "[y]es." Mr. Bailey had five or six detainees brought into an office. Ms. Streator, on deposition, testified it was her general recollection that Mr. Bailey made certain statement to these detainees; such as this is an attorney, but if you go to a hearing you face the possibility of deportation which will remain in a permanent file record; that if you don't see an attorney and leave today there is no record. Mr. Bailey testified from the witness stand that in Ms. Streator's presence he told these persons that while they had voluntarily [*38] agreed to return to Mexico and that on such return no permanent record is kept, they had the right to a hearing but a permanent record would be made and they would be photographed and fingerprinted. He then inquired whether any of the detainees wished to speak to the attorney; one did. After an interview with Ms. Streator in an interview room, that person persisted in a voluntary departure. Mr. Bailey testified that detainees brought to the Chicago office were spoken to by Mrs. Garcia of the Mexican Consulate as soon as they arrived; she addressed the entire group. The INS officer's efforts, combined with the final effort to give Ms. Streator and opportunity to speak to any detainee who desired to speak to an attorney even though no appearance was filed for them, leads to a finding that Mr. Bailey did not deliberately curtail or deny Ms. Streator's access to clients for whom she had filed appearances. The statements of Mr. Bailey to these detainees regarding the avoidance of a permanent file if a voluntary departure is chosen and if a deportation hearing is chosen a permanent file must be made, is not coercive but advises of the advantage to the alien of the grant of voluntary [*39] departure.

Additional evidence exists in the record with regard to the availability of access of counsel to detainees. This consists or the testimony of Mr. Resnick, called by plaintiffs, and Mr. Geymeyer and Mr. Garcia called by defendants. This evidence relates to the 1978 Onarga, Illinois area control operation which involved the plaintiff Lopez and others. That evidence establishes there was a failure by the Immigration Service to communicate the filing in Chicago by Ms. Poplawski and Mr. Resnick of G-28 appearances for named detainees. These were filed prior to the departure of the detainees who signed the I-274 form to the El Paso Detention Center. Mr. Bailey testified to a 1977 meeting with officers of the Immigration and Naturalization Attorneys Association regarding filing of G-28's in the Chicago office of INS, not only with the deportation section, but also with the investigations section in order to facilitate transmittal of the G-28 information to criminal investigators processing detainees (522). The 1970 Onarga area control operation and the 1981 arrests of Mr. Santoya and Mr. Gonzalez at Onarga indicate that at least with regard to out-of-Chicago detentions [*40] and processing the information, transmittal of attorneys filing appearances in Chicago is not functioning effectively. Government counsel argues that experienced legal counsel for the Legal Assistance Foundation are aware and know from experience that not all processing of detainees takes place in the Chicago office. Onarga, Illinois is approximately 100 to 120 miles sough of Chicago. The Onarga arrests and departure of aliens to the El Paso Detention Center after the G-28's were filed, and the aftermath of non-arrival of these aliens in Chicago is contained in PX-S. The ultimate action, testified to by Mr. Geymer was that detainees were held at the El Paso Detention Center until counsel had the opportunity to interview them. Those who wished a deportation hearing and to retract their I-274 were returned to Chicago at government expense. Mr. Lopez testified at deposition that some 30 to 40 persons arrested at Onarga left the detention cell to speak with Ms. Poplawski; he also testified that on the day he was returned there were about nine who returned with him (Lopez dep. 44, 47-48, 50).

From that evidence, plaintiff has shown that where arrests are made outside of the Chicago [*41] area, counsel filing appearances in Chicago are not notified that processing will be done where the arrests are made. The facts do not support a conclusion at this time that such failure was due to a deliberate effort or intent to coerce or induce a detainee to sign an I-274 voluntary departure or to deny right of counsel representation to the person for whom an appearance has been filed.

One other item with regard to the right to an attorney is raised by the plaintiffs. Mr. Tovar and Ms. Alvarado testified that the list of free legal service organizations given by INS to a detainee does not correctly list the telephone number of the Legal Assistance Foundation. Ms. Alvarado testified she noted that about a month before the giving of her testimony at this hearing; she did not inform everyone at INS that it was incorrectly listed (247). Mr. Tovar, on the day he appeared to give his testimony at this hearing, testified he had picked up the list of free legal service organizations and that the telephone number of the Legal Assistance Foundation contained thereon was incorrect. He did not advise anyone at INS of the error. It must be concluded that the plaintiff has failed to [*42] show that INS was informed of this and that there was a

deliberate or knowledgeable intention to continue an incorrect listing of the Legal Assistance Foundation in order to make such attorneys unavailable to detainees or to discourage detainees from attorney representation.

II

From the foregoing evidence, the court finds that:

(1) The testimony of criminal investigators who have performed their duties and responsibilities of a number of years (Krznaric - 5 years; Campbell - 3 1/2 years; McIntyre - 6 years) is more credible than the deposition testimony of named plaintiffs.

(2) Defendant criminal investigators follow procedures which assure that undocumented alien detainees understand the contents of Forms I-214 and I-274 before they are signed by such aliens.

(3) Defendants in informing plaintiffs of the privilege and grant of voluntary departure do so only after they have been advised of rights as contained in I-214.

(4) Defendants in informing plaintiffs of the privilege and grant of voluntary departure do so only after advising the alien of the right to a deportation hearing and that at such hearing there is the right to counsel at no expense to the government as [*43] contained in Form I-274.

(5) Defendants do not conduct further interrogation after the undocumented alien detainee exercises his right to counsel.

(6) Defendants do advise of the availability of, and tender to the undocumented alien, a list of free legal service organizations when the alien exercises the right to counsel and in any event when the alien exercises the right to have a deportation hearing.

(7) Defendants do not coerce or threaten undocumented alien detainees by informing them that bonds will be set high in order to compel excise of the option and privilege of voluntary departure.

(8) Defendants have not denied to documented alien detainees who are processed in the Chicago office the opportunity to meet with counsel who have filed appearances on their behalf.

(9) Undocumented alien detainees processed out of the Chicago office have not been denied right of access to counsel who filed appearances on their behalf. The 1978 Onarga, Illinois procedure shows that undocumented aliens had been informed that counsel in Chicago had filed appearances for them and none chose to return to Chicago. They were not advised as per Mr. Giorgetti's direction that such legal [*44] services were to be free legal services. Such failure was due to the logistics of the operation and not because the defendants sought to coerce or intended to procure alien signatures on the I-274 form before counsel interviewed them.

(10) Defendants have not denied to undocumented aliens the right to retract their option to voluntary departure at any time prior to leaving the United States and to exercise their right to a deportation hearing.

(11) The failure to inform undocumented aliens prior to exercise of their right to a deportation hearing of the right to a bond decision within 24 hours, and that bond decision is subject to review by an immigration judge does not constitute violation of a constitutional right.

(12) Plaintiffs have not charged that after they have exercised a right to a deportation proceeding defendants have acted in any way to deprive them of the rights expressed in *Section 1252(b), 8 U.S.C.* and Regulation 287.3, 8 C.F.R.

(13) The failure to inform undocumented aliens that departure under the I-274 Program at government expense precludes reentry except with permission of the Attorney General does not constitute violation of a constitutional right.

[*45] (14) Undocumented aliens are informed they may voluntarily depart the United States and no permanent record will be kept and that they have a right to a deportation hearing. They are informed that if they elect a deportation hearing they will be photographed and fingerprinted, and a permanent file opened and that deportation will prevent later reentry. Such information does not constitute coercion or compulsion and is an accurate statement of the laws of the United States.

III

From these facts, the court, from the record as a whole of the hearing before the magistrate, reaches the following conclusions of law.

(a) This court has jurisdiction of the subject matter and of the parties under *28 U.S.C. § 1331* and *8 U.S.C. §§ 1252* and 1329.

(b) No one factor is decisive in determining the grant or denial of the preliminary injunctive relief sought by plaintiffs; the likelihood of success on the merits often service as a threshold requirement of a grant of a preliminary injunction. A preliminary injunction hearing cannot be converted into a trial on the merits; and in this

case, the reasonable likelihood of success on the merits has not been shown by plaintiffs so as to [*46] warrant this court's issuance of a preliminary injunction.

(c) Plaintiffs have not shown that any constitutional right to theirs, or of a class member, has been violated by defendants; nor have they shown that defendants are committing illegal acts.

(d) The evidence fails to show that constitutional rights of plaintiffs or members of the class are being violated. It is clear that the balancing of any hardship to plaintiffs and their interests cannot outweigh that of the public in the enforcement of its laws.

(e) The court denies plaintiffs' request for a preliminary injunction because neither denial of due process nor the violation of any provision of the Constitution, statutes or regulations of the United States has been shown to have occurred or to be occurring.

So ordered