Gete v. INS

United States District Court for the Western District of Washington, Seattle Division
July 21, 1999, Decided ; July 21, 1999, Filed; July 22, 1999, Entered
NO. C94-881Z

Reporter: 1999 U.S. Dist. LEXIS 11806
ZENEBE GETE, et al., Plaintiffs, v. IMMIGRATION AND NATURALIZATION SERVICE, et al., Defendants.

Disposition: [*1] Plaintiffs' motions for class certification and for preliminary injunctive relief GRANTED in part and DENIED in part.

Counsel: For ZENEBE GETE, MICHAEL HUGHES, OLGA FROEHLICH, DALLAS JULIEN, VINAY GOUNDER, BIMAL CHAND, DALE RACINE, BALVINDER MAAN, RAVINDER MAAN, JOHN LACKNER, plaintiffs: Robert Pauw, GIBBS HOUSTON PAUW, SEATTLE, WA.

For U.S. IMMIGRATION AND NATURALIZATION SERVICE, STANLEY JOHNSON, UNITED STATES OF AMERICA, defendants: Christopher Lee Pickrell, U S ATTORNEY'S OFFICE, Dana C Laverty, SEATTLE, WA.

For U.S. IMMIGRATION AND NATURALIZATION SERVICE, STANLEY JOHNSON, UNITED STATES OF AMERICA, defendants: Stephen W Funk, US DEPARTMENT OF JUSTICE, OFFICE OF IMMAGRATION LITIGATION, WASHINGTON, DC.

Judges: THOMAS S. ZILLY, UNITED STATES DISTRICT JUDGE.

Opinion by: THOMAS S. ZILLY

Opinion

ORDER

This matter comes before the Court, after remand from the Ninth Circuit, on the plaintiffs' motions for class certification and for preliminary injunctive relief. (Docket nos. 64 and 66.) The Court, having reviewed the parties' pleadings and heard oral argument, now GRANTS in part and DENIES in part the plaintiffs' motions.

BACKGROUND

The named plaintiffs are ten persons whose cars were seized by the Immigration and Naturalization Service ("INS") after they entered the United States from Canada based on alleged violations of *8 U.S.C. § 1324(a)-(b)*. The plaintiffs did not pursue the return of their vehicles through judicial proceedings, instead opting for administrative proceedings under the INS's regulations. See 8 C.F.R. § 274.1-274.20. Nine of the plaintiffs' cars were ordered forfeited. The plaintiffs challenge the administrative proceedings on *Fourth*, *Fifth* and *Eighth Amendment* grounds, and seek to represent a nationwide class consisting of:

> All [*2] persons within the United States whose vehicles have, after June 10, 1989 (five years before the date this lawsuit was filed), been seized and subjected to forfeiture proceedings, or whose vehicles may in the future be seized and subjected to forfeiture proceedings, and who have filed or may file an administrative petition for relief from forfeiture that has not been or may not be granted in full.(Docket no. 65 at 1.)

Judge Dimmick previously denied class certification and granted summary judgment for the INS, concluding that (1) the court lacked subject matter jurisdiction and (2) the plaintiffs waived any challenge to the INS's proceedings because they chose to pursue administrative proceedings. The Ninth Circuit reversed both orders in Gete v. INS, 121 F.3d 1285 (9th Cir. 1997) (the "Gete opinion"). Subsequently, the case was remanded to this Court for further proceedings.

DISCUSSION

1. Motion for Class Certification

To certify a class, the plaintiffs must satisfy *Federal Rule of Civil Procedure 23(a)* and a provision in *Rule 23(b)*. [1]*Rule 23(a)* requires that (1) the putative class be numerous; (2) common questions of law or fact [*3] exist; (3) the claims or defenses of the named plaintiffs be typical of those of the class; and (4) the named plaintiffs be

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[1] As a threshold matter, the INS argues that the plaintiffs lack standing. It asserts that they suffered no injuries, and even if they did, that their injuries cannot be redressed because the court cannot review the merits of any forfeiture decision. This argument is without merit. The plaintiffs suffered procedural injuries which can be remedied in equity. See, e.g., Yesler Terrace Community

able to fairly and adequately protect the interests of the class. *Rule 23(b)(2)* permits certification if the INS has "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or declaratory relief with respect to the class as a whole," while subdivision (b)(3) permits certification if common questions of law or fact predominate "over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Fed. R. Civ. P. 23(b)(2)(3)*. "Although common questions must predominate for . . . certification under . . . (b)(3), no such requirement exists under . . . (b)(2). It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole." Walters v. Reno, 145 F.3d 1032, 1045 (9th Cir. 1998), cert. denied, *Reno v. Walters, 526 U.S. 1003, 143 L. Ed. 2d 208, 119 S. Ct. 1140 (1999)*.

[*4] A. *Rules 23(a)*

The plaintiffs have satisfied *Rule 23(a)*. The class is numerous, likely consisting of over forty members, even if limited to vehicles seized in the INS's Western Region, and is geographically diverse, rendering joinder impracticable. Common issues of fact and questions of law also exist. The common issues of fact include that each member of the class (1) had his/her vehicle seized by the INS; (2) received the same forfeiture notice forms; and (3) elected to forego judicial forfeiture proceedings. The common questions of law include whether (1) under the Due Process Clause, (a) the INS's forms adequately advise a person that election of administrative proceedings will result in a waiver of the right to judicial forfeiture, (b) the INS's forms meaningfully advise a person of the nature of the administrative proceedings, (c) the INS is required to disclose adverse evidence prior to the proceedings, (d) the INS is required to explain its reasons for forfeiture, and for denying mitigation or remission; (2) under the *Fourth Amendment*, the INS complies with probable cause requirements; (3) under the *Eighth Amendment*, the proceedings are subject to and violate the Excessive [*5] Fines Clause. In addition, the plaintiffs' constitutional challenges are "reasonably coextensive with those of absent class members," and are therefore typical. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). Finally, the plaintiffs are adequate representatives because their claims are not inconsistent with those of the absent class, and their attorneys are competent and labor under no apparent conflict that would inhibit their zealousness. Id.

B. *Rule 23(b)(2)*

The plaintiffs have also satisfied *Rule 23(b)(2)*. They allege that the INS acted towards the class in the same general fashion and request declaratory and injunctive relief. See 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1775, at 470 (2d ed. 1995) ("If the *Rule 23(a)* prerequisites have been met and injunctive and declaratory relief has been requested, the action should usually be allowed to proceed under subdivision (b)(2)."). If their allegations are true, a final order declaring the administrative proceedings void and requiring the INS to either reopen the proceedings or return the plaintiffs' property or money may be appropriate. [*6] Although the plaintiffs also request money damages, this is incidental to their request for injunctive relief and is a form of equitable relief. See Probe v. State Teachers' Retirement System, 780 F.2d 776, 780 (9th Cir. 1986) (holding that (b)(2) certification was appropriate in discrimination action despite request for money damages); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir. 1982) (noting in discrimination case that request for back pay did not defeat (b)(2) certification because it "was properly viewed as either equitable or as a legal remedy incidental to an equitable cause of action"); see also Polanco v. DEA, 158 F.3d 647, 652 (2d Cir. 1998) (noting that a request for a return of money or money in lieu of forfeited, converted property is equitable in nature.)

Walters v. Reno, 145 F.3d 1032 (9th Cir. 1998) also supports certification. The district court there certified a nationwide class of plaintiffs under *Rule 23(b)(2)* who were deported or subject to deportation due to alleged document fraud. The plaintiffs alleged that the INS's forms notifying the class of possible deportation and their [*7] eligibility for a hearing violated the Due Process Clause. The INS argued that certification was inappropriate because some of the plaintiffs admitted that they committed document fraud. The Ninth Circuit rejected this argument. It stated that the differences "among the class members with respect to the merits of their actual document fraud cases [was] insufficient to defeat the propriety of class certification [because what made] the plaintiffs' claims suitable for a class action [was] the common allegation that the INS's procedures provide insufficient notice." Id. at 1046. It concluded:

> While the government correctly observes that numerous individual administrative proceedings may flow from the district court's decision, it fails to acknowledge that the district court's decision eliminates the need for individual litigation regarding the constitutionality of INS's official forms and

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Council v. Cisneros. 37 F.3d 442. 446 (9th Cir. 1994) ("There is no question that a 'procedural injury' can constitute an injury in fact for the purpose of establishing standing.").

> procedures. Absent a class action decision, individual aliens . . . could file complaints against the INS in federal court, each of them raising the same legal challenge to . . . the forms . . . . Class certification . . . is entirely proper in light of the general purposes [*8] of *Rule 23*, avoiding duplicative litigation."Id. at 1047.

C. Scope of Class

Plaintiffs seek the certification of a nationwide class. The INS argues that the class should be limited to the INS's Western Region [2] because (1) the complaint limits the class to that area and (2) nationwide certification is disfavored.

The INS's second argument is persuasive. The Supreme Court in Califano v. Yamasaki, 442 U.S. 682, 702, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979) cautioned against permitting a nationwide class because of the value of allowing other courts [*9] to speak on the issues raised. This is also true here. It therefore appears prudent to limit the class to those persons whose vehicles were seized in the INS's Western Region because that region is an administrative designation, includes states only in the Ninth Circuit, and encompasses the Washington/Canadian border, which is primarily at issue. See Shvartsman v. Apfel, 138 F.3d 1196, 1201 (7th Cir. 1998) (upholding limitation of class to plaintiffs in the Seventh Circuit and stating that "given the fact that all the named plaintiffs reside in the Seventh Circuit, the range in INS processing delays across different geographic regions, and the plaintiffs' reliance on Seventh Circuit case law, we believe that the district court's certification of a geographically limited class was within its discretion, particularly given the Supreme Court's admonition [against] certification of a nationwide class. . . .").

II. Motion for Preliminary Injunction

The plaintiffs request a preliminary injunction on behalf of the class of future claimants to require the INS to (1) provide owners the factual and statutory bases for its decision to seize vehicles; (2) provide owners [*10] copies of adverse evidence relied on "in connection with the forfeiture proceedings"; (3) provide written explanations for the bases for its remission and mitigation decisions; and (4) adopt written guidelines to ensure that the penalties are not excessive in violation of the *Eighth Amendment*. "At this point, plaintiffs are seeking certification principally as a foundation for obtaining injunctive relief that would require INS prospectively to provide a statement of reasons to persons whose vehicles are seized, copies of adverse evidence, and a statement of reasons for the determination on mitigation." (Docket no. 75 at 13.)

The plaintiffs are entitled to a preliminary injunction if they have demonstrated "either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor." American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1062 (9th Cir. 1995), vacated on other grounds,119 S. Ct. 936 (1999). A "preliminary injunction is not a preliminary adjudication on the merits, but a device for preserving the [*11] status quo and preventing the irreparable loss of rights before judgment." See Barahona-Gomez v. Reno, 167 F.3d 1228, 1234 (9th Cir. 1999). Because the plaintiffs request a mandatory injunction, they must make a heightened showing of the necessity of such relief. See Stanley v. University of Cal., 13 F.3d 1313, 1320 (9th Cir. 1994).

A. Due Process Claim

The Circuit held that the plaintiffs' due process claim is substantial, and that due process requires certain of the procedures requested by them:

> Clearly, requiring the disclosure of the factual bases for seizures would go a long way toward preventing some of the erroneous and fundamentally unfair forfeiture decisions that inevitably flow from so haphazard a process. So, too, would requiring the giving of notice of the specific statutory provision allegedly violated, rather than allowing the mere provision, without explanation, of copies of the entire statute and regulations. Similarly, furnishing owners with copies of evidence to be used against them, such as officers' reports detailing the facts upon which the claim of probable cause is based, would permit them to understand the true nature [*12] of the INS' charges and afford them a fair opportunity to prepare a proper defense to the threatened forfeiture. Finally, requiring the INS to provide statements of the reasons for its

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[2] Most of the states that comprised the Northern Region, including Washington, were redesignated the Western Region after the case was filed. The Western Region has jurisdiction over the districts for the states of Alaska, Arizona, California, Hawaii, portions of Idaho, Oregon, Nevada and Washington, and the Territory of Guam and the Commonwealth of the Northern Mariana Islands. See8 C.F.R. § 100.4(a) (1999).

> denials of relief would enable persons whose vehicles have been declared forfeited to determine whether the agency based its decision on erroneous facts, to discover whether there is evidence not previously considered that might be submitted, and to prepare reasonably informed petitions for remission, mitigation, and reconsideration.
>
> Complying with its constitutional obligations to give adequate notice would not be unduly burdensome to the INS . . . . All that it would be required to do is provide to vehicle owners information that is already in its possession. If, contrary to the INS's view, the Due Process Clause affords more than a right to a timely decision in administrative forfeiture proceedings -- as the courts have long held it does -- **it guarantees at least the important procedural safeguards that we have discussed herein.**
>
> **We do not purport to treat all of the plaintiffs' due process claims,** and the failure to discuss particular claims in our opinion is not intended to suggest [*13] that they are less meritorious. Rather, we have selected for discussion those claims that the district court addresses and that, at this stage of the proceedings, are the most is vigorously contested by the parties. **We leave it to the district court to examine the remaining**
> **claims *ab initio***, including those claims relating to the presentation of witnesses and the conduct of the "hearing" or "personal interview" in general.Gete, 121 F.3d 1285 at 1298-99 (emphasis added).

The INS asserts that the Circuit's analysis is not controlling in light of the Supreme Court's intervening opinion in City of West Covina v. Perkins, 525 U.S. 234, 142 L. Ed. 2d 636, 119 S. Ct. 678 (1999), and that the plaintiffs are therefore "entitled to no relief on their claim relating to the adequacy of notice." (Docket no. 77 at 3.) The plaintiffs in Perkins were owners of a house whose belongings were seized by the police pursuant to a search warrant based on a homicide investigation involving a boarder. They were given notice of the search warrant and the items seized, but were not provided notice of how to secure the return of their property. The Ninth Circuit held that the [*14] statute authorizing seizure and providing for notice comported with due process. See Perkins v. City of West Covina, 113 F.3d 1004 (9th Cir. 1997), withdrawn in part,167 F.3d 1286 (1999). It also held, however, that the plaintiffs' due process rights were violated because they were not given detailed notice of how to secure the return of their property. The Supreme Court reversed the latter holding, and held that a state entity need not provide a citizen with detailed notice of the availability of post-seizure remedies to enable him or her to secure the return of property lawfully seized as part of a government investigation on the basis of a probable cause finding, as long as those procedures are published. See Perkins, 119 S. Ct. at 681.

Perkins is inapplicable because the plaintiffs here challenge the adequacy of the seizure notice as to the bases for the seizure, the lawfulness of the seizure, and the constitutionality of the regulations providing for seizure. The Court in Perkins did not address, nor decide, what notice must be given at the point of seizure regarding the bases of the seizure or whether the remedies provided [*15] were constitutional:

> We need not decide how detailed the notice of the seizure must be or when the notice must be given. [The plaintiffs] raise no independent challenge to the Court of Appeals' conclusion that California law provides adequate remedies for return of their property . . . . Rather, they contend the City deprived them of due process by failing to provide them notice of their remedies and the factual information necessary to invoke the remedies under California law. When the police seize property for a criminal investigation, however, due process does not require them to provide the owner with notice of state law remedies.Perkins, 119 S. Ct. at 681.

Perkins also does not lend guidance on the issues raised by the plaintiffs. Notice of the bases for the seizure, or of the reasons for not returning seized property, serves a different purpose than notice of available remedies to return lawfully seized property. Notice in the former instance helps ensure that a meaningful hearing is held on the vital matter of whether the seizure was lawful. The administrative hearings challenged by the plaintiffs are intended to allow the plaintiffs to secure [*16] a return of their property if they make a showing of lawfulness. They are not routine hearings like those addressed in Perkins, held simply to force a ministerial act, i.e. a return of lawfully seized property that the state no longer has an interest in retaining. See, e.g., Perkins, 113 F.3d at 1010 (noting that state law provided a summary procedure for an owner to retrieve seized property at the end of an investigation).

The INS also argues that the plaintiffs have not shown prejudice because they concede that probable cause

existed for each forfeiture. However, the plaintiffs are still permitted to attack how the forfeiture was imposed. If the INS had given detailed notice and discussed the factors that it considered in ordering forfeiture, it is (1) probable that the plaintiffs would have been able to advance more forceful arguments in favor of mitigation or remission and (2) plausible that the INS may have weighed the equities differently in light of those arguments See, e.g., Walters, 145 F.3d at 1045 ("It is sufficient for purposes of showing prejudice that the plaintiffs have demonstrated plausible grounds for relief.").

Due process [*17] requires that the INS (1) provide notice of the factual and legal bases for a forfeiture to the owner upon seizure of a vehicle; [3] (2) permit access to any adverse evidence that it intends to rely on at the personal interview or any subsequent hearing; and (3) provide written rulings and explanations in those rulings of the evidence it relied on and the factors it considered in reaching its decision. The plaintiffs have shown a clear likelihood of success on their procedural due process claim and that, coupled with the irreparable harm that presumably flows from any constitutional violation, justifies a preliminary injunction. See Walters, 145 F.3d at 1048; Goldie's Bookstore, Inc. v. Superior Court of the State of Cal., 739 F.2d 466, 472 (9th Cir. 1984) ("Generally, irreparable harm is presumed if a violation of the constitution is shown.").

[*18] B. Excessive Fines Claim

Plaintiffs contend that the INS's procedures violate the Excessive Fines Clause of the *Eighth Amendment*. A punitive forfeiture is excessive when it is "grossly disproportional to the gravity of a defendant's offense." United States v. Bajakajian, 524 U.S. 321, 118 S. Ct. 2028, 2036, 141 L. Ed. 2d 314 (1998). The proportionality test requires the court to determine whether the amount of the forfeiture clearly exceeds the harm to the government.

Although the Gete opinion impliedly concludes that administrative forfeitures are subject to an excessive fines analysis, the plaintiffs have not proven the propriety of prospective injunctive relief on these grounds on the existing record. There is no clear basis for finding that the INS has failed or will likely fail to apply the Excessive Fines Clause in its forfeiture decisions. The INS's regulations already require an officer to consider factors relevant to determining the gravity of a claimant's offense. See8 C.F.R. § 274.15(a)(1)-(5) (discussing the culpability of the owner as a remission factor); 8 C.F.R. § 274.16 (discussing "the interests of justice" mitigation factor).

[*19] Moreover, the Gete opinion informs the agency of the applicability of the Excessive Fines Clause to administrative forfeitures. Thus, any relief on this claim must await a determination on a well-developed record that the INS has failed to apply, or to correctly apply, the proper constitutional standard.

C. Cost Bond

The INS requests that the court require the plaintiffs to post a cast bond under *Fed. R. Civ. P. 65(c)* in case injunctive relief is improvidently granted. Although *Rule 65(c)* speaks in mandatory terms, the "court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." People of California ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325, amended on other grounds,775 F.2d 998 (9th Cir. 1985). Because an injunction appears to be required by the Gete opinion, and the INS has not made a showing of its likely costs in complying with the injunction, only a nominal bond in the amount of $ 500 appears warranted. See, e.g., Barahona-Gomez, 167 F.3d at 1237 (upholding $ 1,000 [*20] nominal bond).

CONCLUSION

The court therefore orders as follows:

(1) The plaintiffs' motion for class certification is GRANTED, in part. The class shall consist of:

> All persons, from June 10, 1989 until the date the INS certifies its compliance with this order, (1) who own vehicles that were seized within the INS's Western Region for a violation of the immigration laws, *8 U.S.C. § 1324(a)-(b)*; (2) whose vehicles were subjected to administrative forfeiture proceedings by the INS; and (3) who requested a personal interview, and filed a petition for mitigation or remission of forfeiture that was not granted in full.

The class claims shall be limited to the general procedural constitutional challenges advanced by the plaintiffs.

(2) The plaintiffs' motion for a preliminary injunction is GRANTED, in part. Within 30 days from the date of this order, the INS shall comply with the following procedures when it seizes vehicles within its Western Region pursuant to *8 U.S.C. § 1324(a)-(b)*:

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[3] The INS argues that it revised its notice form in October 1998 to satisfy the Circuit's requirements, and is using that form. The plaintiffs, however, contest whether the form is being used, and given the INS's position regarding the Perkins case, the court deems it appropriate to order the INS to provide the notice pursuant to this order.

(a) Upon seizure of the vehicle, the INS shall provide notice to the owner of the vehicle, including (i) a statement of the provisions [*21] of law alleged to have been violated and (ii) a description of the specific acts or omissions forming the basis of the alleged violations (including any facts of probable cause to believe that the driver or operator knew or acted in reckless disregard of such violation). The INS may use the October 1998 revised notice form that was submitted to the Court, as long as the above factual material is included in the form;

(b) At least 10 days prior to any personal interview, the INS shall provide to a petitioner either a summary of the adverse evidence that the INS may rely on during the forfeiture proceedings, or copies of that evidence. The INS shall also provide the petitioner the opportunity to obtain copies of the adverse evidence, and shall notify him or her of this opportunity at the time of the seizure; and

(c) In making a decision after a contested personal interview, or on a petition for remission and/or mitigation, the INS shall render its decision in writing, and shall state the evidence it relied upon, and the reason(s) for its decision.

(4) The INS shall certify to the Court its compliance with these procedures within 60 days of this order.

(5) The plaintiffs shall post [*22] a cost bond in the amount of $ 500.

(6) The Clerk shall send a copy of this order to all counsel of record.

DATED this 21st day of July, 1999.

THOMAS S. ZILLY

UNITED STATES DISTRICT JUDGE