Intl. Refugee Assistance v. Donald J. Trump Doc. 162

Nos. 17-2231(L), 17-2232, 17-2233, 17-2240 (Consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Plaintiffs-Appellees,

IRANIAN ALLIANCES ACROSS BORDERS, *et al.*,
Plaintiffs-Appellees,

EBLAL ZAKZOK, *et al.*,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland, Southern Division
(8:17-cv-00361-TDC)

IAAB PLAINTIFFS-APPELLEES' UNOPPOSED MOTION FOR JUDICIAL NOTICE AND TO SUPPLEMENT THE RECORD

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Plaintiffs in *Iranian Alliances Across Borders ("IAAB"), et al. v. Trump, et al.*, No. 17-2232, file this unopposed motion to request that the Court take judicial notice, and supplement the appellate record to add evidence, of the visa denial received by the mother-in-law of IAAB Plaintiff John Doe #6. The denial notice from the United States Consulate in Dubai informed John Doe #6's mother-in-law ("Mrs. Doe") that her application was denied based on Presidential Proclamation No. 9645 (the "Proclamation") and that a waiver would not be granted in her case.

The Court should consider this evidence because it is relevant to the issues on appeal. The government has argued that Plaintiffs' claims are not reviewable unless their relatives have been denied a waiver. U.S. Opening Br. 22-23. Plaintiffs disagree that a visa denial is necessary to make their claims reviewable (Pls. Opening Br. 17-19), but in any event, they have obtained such a denial. The Court should take judicial notice of the U.S. Consulate's decision and include the visa denial in the record. The government and the plaintiffs in the consolidated appeals do not oppose this motion.

BACKGROUND

John Doe #6 is a Lawful Permanent Resident of the United States who resides in Maryland with his wife. They are both of Iranian origin. J.A.

1174. He works as an engineer and she is a biochemistry researcher at the National Institutes of Health. *Id.* John Doe #6's mother-in-law and sister-in-law live in Iran. *Id.* They visited the United States to see their family in 2015. *Id.* In November 2016, they each applied for a non-immigrant visitor visa (B1/B2) to again visit the United States to see their family. J.A. 1174. They were interviewed in Dubai on January 5, 2017. J.A. 1175.

As Plaintiffs previously informed the Court, the visa application of John Doe #6's sister-in-law was processed while the district court's injunction of the Proclamation was in effect. *See* Pls.' Notice Regarding Plaintiffs (D.E. 160) (filed Dec. 6, 2017). The sister-in-law's visa application was granted. *Id.*

The processing of Mrs. Doe's visa application, however, had not been completed when the Proclamation went into effect on December 4, 2017. On December 19, 2017, she received a form letter from the U.S. Consulate, signed by the "Nonimmigrant Visa Unit," informing her (i) that "a consular official found [her] ineligible for a visa under Section 212(f) of Immigration and Nationality Act, pursuant to Presidential Proclamation 9645"; and (ii) that "[t]aking into account the provisions of the Proclamation, a waiver will not be granted in your case." *See* Ex. A. The decision not to grant a waiver was made before Mrs. Doe had an opportunity to apply for a waiver.

ARGUMENT

I. The Court Should Take Judicial Notice Of The Visa Denial.

This Court "may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

Judicial notice of the visa denial is appropriate because the fact that the U.S. Consulate denied Mrs. Doe's visa application and a waiver cannot be reasonably disputed, and the accuracy of the source—the United States Consulate in Dubai—cannot be questioned. *See Martin* v. *Duffy*, 858 F.3d 239, 253 n.4 (4th Cir. 2017) (the Court "may properly take judicial notice" of government policy). The Court may take judicial notice of the government action, notwithstanding the fact that it occurred following the district court's ruling. *See, e.g.*, *Romine v. Diversified Collection Servs., Inc.*, 155 F.3d 1142, 1146-47 (9th Cir. 1998) (taking judicial notice of an FTC letter that "was not published at the time of briefing and argument before the district court"); *In re Am. Biomaterials Corp.*, 954 F.2d 919, 922 (3d Cir. 1992) (noting that "an appellate court in a proper case" may "take judicial notice of new developments not considered by the lower court").

The Court should take judicial notice of the visa denial because it is relevant to the issues on appeal. In its First Cross-Appeal Brief, the government argued that "plaintiffs' statutory claims as well as their constitutional claims do not satisfy Article III and equitable ripeness requirements." Br. 23. But the government conceded that Plaintiffs' claims would be ripe if their relatives were denied a waiver: "If any alien in whose entry a U.S. plaintiff has a cognizable interest is found otherwise eligible for a visa and denied a waiver, then that plaintiff can bring suit at that time (if the plaintiff's claim is otherwise justiciable) and the Court can consider the challenge in a concrete dispute." *Id.* The government also argued that there was no agency action to support a claim under the Administrative Procedure Act because there "has been no 'final' agency decision denying a visa based on the Proclamation to any of the aliens abroad identified by plaintiffs." *Id.* at 22.

The government further relied on the possibility of a waiver to argue that Plaintiffs have not established the requisite irreparable harm to support an injunction. Br. 55. According to the Government, "[u]ntil aliens abroad meet otherwise-applicable visa requirements and seek and are denied a waiver, they have not received final agency action, and plaintiffs' claimed harms are too 'remote' and 'speculative' to merit injunctive relief." *Id.*

The Court rejected these arguments in the prior appeal, *IRAP v. Trump*, 857 F.3d at 587, and for the reasons stated in Plaintiffs' brief, they similarly lack merit in this appeal. Pls. Br. 17-19. But the Court may now reject the arguments for an additional reason: At least one of Plaintiffs' relatives has been denied consideration for a waiver based on the Proclamation.

Given that the government has argued that Plaintiffs' claims are not ripe until one of their relatives is denied a waiver, the Court should take judicial notice of the fact that this event has occurred.

II. The Court Should Supplement The Record To Include The Visa Denial.

This Court "has the power, either on motion or of its own accord, to require that the record be corrected or supplemented." 4th Cir. R. 10(d). An appellate court may supplement the record where new evidence informs the "appropriateness of injunctive relief," *In re Application of Adan*, 437 F.3d 381, 398 n.3 (3d Cir. 2006), and where "remanding the case to the district court for consideration of the additional material would be contrary to the interests of justice and the efficient use of judicial resources," *Acumed LLC v. Advanced Surgical Servs.*, 561 F.3d 199, 226 (3d Cir. 2009).

Supplementing the record with the visa denial is appropriate here. The denial of Mrs. Doe's visa was not before the district court solely because it was issued while the matter was on appeal before this Court. There

is no need for further fact-finding where, as here, the U.S. Consulate's denial of Mrs. Doe's visa application cannot be disputed. Remand to the district court is therefore unnecessary and highly inefficient. Nor could there be any conceivable prejudice to the government, which, having itself issued the denial, surely had contemporaneous notice of its contents.

Because Mrs. Doe's visa denial is probative of the questions at issue and may be useful to the Court, the record should be supplemented to include it.

Dated: December 22, 2017

Respectfully submitted,

/s/ Mark Mosier

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A). This motion contains 1,206 words, excluding the parts of the motion excluded by Federal Rules of Appellate Procedure 27(d)(2) and 32(f).

/s/ Mark Mosier
Mark Mosier

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2017, I filed the foregoing motion by use of the Fourth Circuit's CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Mark Mosier
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