

OCT 26 2001

For The Northern Mariana Islands
By JA (Deputy Clerk)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

JUYEL AHMED, *et al.*,)

Plaintiffs)

v.)

ROBERT GOLDBERG, in his)
personal capacity, UNITED)
STATES OF AMERICA,)
COMMONWEALTH OF THE)
NORTHERN MARIANA)
ISLANDS, and DOES 1 - 25,)

Defendants)

Civil Action No. 00-0005

ORDER GRANTING IN PART
AND DENYING IN PART THE
MOTIONS TO DISMISS OF
DEFENDANTS GOLDBERG
AND COMMONWEALTH OF
THE NORTHERN MARIANA
ISLANDS, HOLDING IN
ABEYANCE THE FILING OF A
FOURTH AMENDED
COMPLAINT, and DIRECTING
THAT PLAINTIFFS DESIG-
NATE LOCAL COUNSEL

RUI LIANG, *et al.*,)

Plaintiffs)

v.)

ROBERT GOLDBERG, in his)
personal capacity, UNITED)

Civil Action No. 99-0046

1 STATES OF AMERICA,)
2 COMMONWEALTH OF THE)
3 NORTHERN MARIANA)
4 ISLANDS, and DOES 1 - 25,)
5 Defendants)
6 _____)

7 THIS MATTER came before the court on Thursday, October 11, 2001,
8 for hearing of the separate motions to dismiss of defendants Goldberg and
9 Commonwealth of the Northern Mariana Islands (“CNMI”), and the CNMI’s
10 motion to require plaintiffs to designate local counsel in accordance with Local
11 Rule 83.5.b.3 and 85.5.f. Plaintiffs failed to file an opposition to the motions
12 and the court denied plaintiffs’ counsel’s *ex parte* emergency motion to
13 continue the hearing date or allow him to argue. Defendant Goldberg
14 appeared by and through his attorney, Rexford C. Kosack; defendant
15 Commonwealth appeared by and through its attorney, Commonwealth
16 Assistant Attorney General L. David Sosebee.

17 THE COURT, having considered defendant Goldberg’s and defendant
18 CNMI’s motions to dismiss, rules as follows:
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1 Federal Rule of Civil Procedure 8 requires only a “short and plain
2 statement of the claim showing that the pleader is entitled to relief.” A motion
3 to dismiss for failure to state a claim upon which relief can be granted will
4 succeed only if from the complaint it appears beyond doubt that plaintiffs can
5 prove *no* set of facts in support of their claim that would entitle them to relief.
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7 Morley v. Walker, 175 F.3d 756, 759 (9th Cir. 1999) (emphasis added). All
8 allegations of material fact are taken as true and construed in the light most
9 favorable to the non-moving party. Enesco Corp. v. Price/Costco, Inc., 146
10 F.3d 1083, 1085 (9th Cir. 1998). In reviewing the sufficiency of the complaint,
11 the “issue is not whether a plaintiff will ultimately prevail but whether the
12 claimant is entitled to offer evidence to support the claims.” Scheuer v.
13 Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974). “[I]t may appear on the
14 face of the pleadings that recovery is very remote and unlikely but that is not
15 the test.” *Id.*

1 Defendant Goldberg's Motion to Dismiss

2 Defendant Goldberg's motion to dismiss with prejudice counts 1, 3, 4, 5,
3 6, and 11 is granted. These causes of action were dismissed with prejudice as to
4 defendant Goldberg in the court's November 20, 2000, "Amended Order
5 Granting in Part and Denying in Part Defendant Goldberg's Motion to
6 Dismiss." Plaintiffs' attorney is cautioned that any future amended complaint
7 must exclude any mention of potential liability of defendant Goldberg on these
8 causes of action. An award of sanctions against plaintiffs, including dismissal
9 with prejudice of their complaint, may be appropriate if plaintiffs fail to abide
10 by the court's orders.
11

12 Defendant Goldberg's motion to dismiss count 2 is granted. The court
13 agrees that plaintiffs' Alien Tort Claims Act ("ATCA") is premised on the
14 "prolonged arbitrary detention" clause of *Restatement (Third) of the Law of the*
15 *Foreign Relations Law of the United States* § 702, "Customary International Law
16 of Human Rights." A fair reading of § 702 and the Comments thereto makes
17 it clear that only "states," and not individuals, may be held liable under § 702.
18 Accordingly, defendant Goldberg's motion to dismiss count 2 is granted, with
19 prejudice.
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Defendant Goldberg’s motion to dismiss counts 7, 8, and 9 is granted. As defendant Goldberg correctly observes, the infirmities identified in the order of November 20, 2000, have not been rectified in these counts in plaintiffs’ third amended complaint. Plaintiffs are given leave to amend, but are cautioned that failure to abide by this court’s orders may result in sanctions, including dismissal with prejudice of their complaint.

Defendant CNMI’s Motion to Dismiss

Defendant CNMI argues that count 1, alleging unlawful imprisonment, should be dismissed because it is too vague and makes no showing that the CNMI has violated any U.S. treaty or the law of nations, thus depriving the court of jurisdiction under the ATCA. The court has reviewed the allegations in count 1 and concludes that they make out an unlawful imprisonment claim, based on the “prolonged arbitrary detention” clause of § 702 of the *Restatement (Third) of the Law of the Foreign Relations Law of the United States*, “Customary International Law of Human Rights.” Defendant’s motion to dismiss count 1 is denied; any vagueness can be ameliorated by discovery.

Defendant CNMI argues for the dismissal of count 2 on the grounds that the pleading itself shows that the CNMI had no policy or practice of detaining

1 aliens arbitrarily (because only three of the 22 named plaintiffs had ever been
2 “imprisoned” by the CNMI) and because plaintiff Ahmed was arrested because
3 he had failed to depart the Commonwealth after his tourist visa had expired.
4 Because the court cannot at this juncture say that plaintiffs can prove *no* set of
5 facts in support of their claim, defendant’s motion to dismiss count 2 is denied.
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8 Next, defendant CNMI argues that the court lacks jurisdiction to
9 consider plaintiffs’ count 3, seeking asylum and protection from torture
10 pursuant to the 1985 Torture Convention, because there has not yet been a
11 final order of removal under § 242 of the Immigration and Naturalization Act,
12 *codified at* 8 U.S.C. § 1252. The court agrees and count 3 is dismissed, with
13 leave to amend only upon receipt by plaintiffs of a final order of removal by
14 the Immigration and Naturalization Service. *See* P.L. 105-277, § 2242(d), 112
15 Stat. 2681-822 (“Review and Construction--Notwithstanding any other
16 provision of law...no court shall have jurisdiction...to consider or review claims
17 raised under the [Torture] Convention...(a) except as part of the review of a
18 final order of removal pursuant to...(8 U.S.C. § 1252).”
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24 For the same reasons given in the paragraph above, defendant
25 Commonwealth’s motion to dismiss count 4 for lack of jurisdiction in this
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1 court is also granted. Plaintiffs are given leave to amend only upon receipt by
2 plaintiffs of a final order of removal by the Immigration and Naturalization
3 Service.
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5 Count 5 seeks establishment and implementation of procedural
6 safeguards to prevent plaintiffs from being deprived of certain constitutional
7 rights without due process. To the extent the count 5 is unclear as to what
8 relief is sought from what defendant, the motion to dismiss is granted, and
9 plaintiffs are given leave to amend to clarify the relief they seek and from
10 which defendant it is sought. All allegations referring to "others similarly
11 situated" are stricken as this is not a class action.
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15 Generally, dismissal is without prejudice to amend unless otherwise
16 stated. Plaintiffs allege in count 6 that defendant Commonwealth's *pro hac vice*
17 rules are unconstitutional. In the court's November 20, 2000, order, this claim
18 was dismissed for lack of an actual controversy. In the third amended
19 complaint, plaintiffs allege that the Commonwealth's *pro hac vice* rule has
20 deprived and continues to deprive plaintiff of his right to counsel of his choice
21 and deprives attorneys whose *pro hac vice* standing was terminated by the
22 Commonwealth Supreme Court's General Order 99-900 of their constitutional
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1 rights. There is as yet no actual controversy before the court, for two reasons.
2 First, plaintiffs have not alleged that they have applied for and been denied *pro*
3 *hac vice* status in the Commonwealth courts. The Commonwealth Supreme
4 Court's August 23, 1999, General Order 99-900 provides a waiver of the *pro hac*
5 *vice* requirements "for good cause shown." The indigency of one's clients may
6 be sufficient good cause under the Supreme Court's order to allow a waiver of
7 the *pro hac vice* requirements. Courts will not consider constitutional
8 questions prematurely, and at this juncture plaintiffs' claim is premature.
9 Additionally, there is no actual case or controversy before the court because no
10 attorneys are parties plaintiff. The motion to dismiss this aspect of count 6 is
11 granted, without prejudice.
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17 Count 8 is dismissed without prejudice to plaintiffs amending their
18 complaint, if it can be so amended, to allege that the court has jurisdiction of
19 their "concealment of knowledge" claim by virtue of *Restatement (Second) of*
20 *Torts* § 536, 551, and 557A, and the ATCA, 28 U.S.C. § 1350. As defendant
21 CNMI correctly notes, only 1 N.Mar.I. Code § 9917 makes any provision for
22 disclosure of information or records. As to the portion of the claim brought
23 pursuant to 1 N.Mar.I. Code § 9917, it is dismissed with prejudice. As this
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1 court noted at page 28 in its November 20, 2000, order, only the Common-
2 wealth Superior Court has jurisdiction to consider Open Government Act
3 claims.
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5 Defendants CNMI's motion to dismiss count 9 is granted with prejudice
6 as to any allegations that the emotional distress arose out of plaintiffs' alleged
7 false imprisonment or any intentional and/or negligent misrepresentations or
8 deceitful statements made to them. The Commonwealth has not waived its
9 sovereign immunity for "any claim arising out of false imprisonment,...
10 misrepresentation, deceit." 7 N.Mar.I. Code § 2204(b).
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12 Defendant CNMI's motion to dismiss count 10, Estoppel, is denied.
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14 Count 10 complies with the pleading requirements of Fed.R.Civ.P. 8 and,
15 further, the court cannot at this time say that plaintiffs can prove no set of
16 facts upon which relief may be granted.
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18 Defendant CNMI's motion to dismiss count 11, based on
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20 Commonwealth Constitution art. X, § 9, "Taxpayer's Right of Action" is
21 granted, and plaintiffs are given leave to amend. As pleaded, count 11 does not
22 sufficiently allege "the expenditure of public funds for other than public
23 purposes or for a breach of fiduciary duty," as it must do under art. X, § 9.
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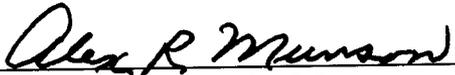
1 FOR THE FOREGOING REASONS, the motions to dismiss of
2 defendants Goldberg and Commonwealth of the Northern Mariana Islands are
3 granted in part and denied in part, as set forth above.
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5 Because the motion to dismiss of defendant United States remains to be
6 heard, in the interests of conserving the resources of the court and the parties,
7 plaintiffs need not amend their complaint until the court has issued its decision
8 on the United States' motion to dismiss.
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11 The Commonwealth's motion that plaintiffs be required to designate
12 local co-counsel in accordance with Local Rules 83.5.b.3 and 85.3.f is granted.
13 Plaintiffs' attorneys shall have ten business days to notify the court and
14 opposing counsel of designated counsel's name, address, and contact numbers.
15 Although plaintiffs' counsel is a member of this court's bar, he neither resides
16 in nor maintains a full-time office in the Commonwealth.
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20 IT IS SO ORDERED.

21 DATED this 26TH day of October, 2001.
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25 ALEX R. MUNSON
26 Judge