For Opinion See 1997 WL 55472

United States District Court, E.D. New York.
Neil JEAN-BAPTISTE, et al., Plaintiffs,
v.
Janet RENO, Immigration & Naturalization Service, et al., Defendants.
Civil Action No. CV-96-4077.
October 15, 1996.

Defendants' Memorandum in Support of Their Motion to Dismiss Complaint
Zachary W. Carter, United States Attorney, Eastern District of New York, One Pierrepont Plaza, 14th Fl., Brooklyn, New York 11201.Mary Elizabeth Delli-Pizzi, Assistant U.S. Attorney, (Of Counsel).Quynh Vu, Office of Immigration Litigation, (Of Counsel).

(Johnson, J.)

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR *MOTION TO DISMISS COMPLAINT*

This memorandum is submitted in support of Defendants' Motion to Dismiss Complaint, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Defendants seek dismissal of this action on the grounds that the new Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("1996 Act") divests the Court of subject matter jurisdiction over plaintiffs' claims and that plaintiffs failed to state a claim upon which relief can be granted.[FN1]

FN1. On September 11, 1996, plaintiffs filed a Motion for Class Certification and Preliminary Injunction. Defendants file this Motion to Dismiss in lieu of a reply to the class certification and preliminary injunction motion, because if the Motion to Dismiss is granted, then plaintiffs' pending complaint and motions are rendered moot. The deportation of the named plaintiffs (Neil Jean-Baptiste, Gustavo Enrique Cepeda-Torres, and Victor Israel Santana) is not imminent. Nevertheless, the INS has agreed not to effectuate plaintiffs' deportation, pending resolution of the Motion to Dismiss.

I. *PRELIMINARY STATEMENT*

Plaintiffs are criminal aliens who are subject to deportation because they committed deportable criminal offenses. *See* Complaint at ¶ 1. The three named plaintiffs are Neil JeanBaptiste, Gustavo Enrique Cepeda-Torres, and Victor Israel Santana. *Id.* at ¶¶ 30, 34, 41. All three named plaintiffs are lawful permanent residents of the United States. *Id.* JeanBaptiste was convicted of criminal possession of a controlled substance and, following a deportation hearing on August 9, 1996, was ordered deported from the United States. *Id.* at ¶ 30. Cepeda-Torres was convicted of criminal sale of a controlled substance, and was ordered deported on July 3, 1996. *Id.* at ¶ 34. Santana was convicted of criminal sale of a controlled substance, and was ordered deported on August 13, *1996. Id.* at ¶ 41. In addition, plaintiffs identified

six other individuals as "non-party class members." *Id.* at ¶¶ 46, 47, 49, 50, 51, 52. A class has not been certified.

III. *ARGUMENT*

A. *Legal Standards for a Motion to Dismiss*

A complaint should be dismissed where it "appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief." Fed. R.Civ.R. P. 12(b); *Hughes v. Rowe,* 449 U.S. 5, 10 (1980); *Padavan v. United States,* 82 F.3d 23, 26 (2d Cir. 1996).

In this case, plaintiffs allege that their deportation would violate due process because they were not forewarned that committing crimes in the United States would subject them to deportation. Complaint at ¶ 5, 54. They charge that INS's failure to provide such notice is deficient under the immigration statute, regulations, and Constitution. This claim should be dismissed, because plaintiffs are unable to demonstrate any set of factual circumstances that would entitle them to avoid deportation.

B. The Complaint Should be Dismissed under Rule 12(b)(1) Because the 1996 Act Divests the Court of Subject *Matter Jurisdiction Over this Case*

On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Act"). Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208, 110 Stat. 3009 (1996) (Division C of Omnibus Consolidated Appropriations Act, 1997) (relevant provisions attached as Exhibit A). As explained below, effective September 30, 1996,[FN2] the 1996 Act divested this Court of jurisdiction over this litigation, and plaintiffs' case must therefore be dismissed.

> FN2. The provisions of Sections 242(g) and 306(c) became effective on September 30, 1996, when President Clinton signed the 1996 Act into law. *See United States v. Shaffer,* 789 F.2d 682, 686 (9th Cir. 1986) (" 'In the absence of an express provision in the statute itself, an act takes effect on the date of its enactment.' ") (citations omitted). *See also United States v. Bafia,* 949 F.2d 1465, 1480 (7th Cir. 1991), *cert. denied,* 504 U.S. 928 (1992); *United States v. King,* 948 F.2d 1227, 1228-29 (11th Cir. 1991), *cert. denied,* 503 U.S. 966 (1992); *Demars v. First Serv. Bank for Sav.,* 907 F.2d 1237, 123839 (1st Cir. 1990).

Section 306(a) of the 1996 Act amends Section 242 of the Immigration and Nationality Act ("INA") by adding the following provision:
EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

INA § 242(g), 8 U.S.C. § 1252(g) (as amended by the 1996 Act § 306(a)). The instant action arises "from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders" against the plaintiffs. Therefore, it falls squarely within the terms of the amended statute.

Section 306(c) of the Act makes clear that Congress intended the amended Section 242(g) to apply to pending cases. That section expressly states that the new Section 242(g) is applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." 1996 Act § 306(c). Thus, according to the plain language of Section 242(g), this Court is divested of jurisdiction over plaintiffs' claims.

Where dismissal is sought based on statutory repeal of a court's jurisdiction, the basic inquiry is "whether Congress has expressly prescribed the statute's proper reach." *Landgraf v. USI Film Products,* 114 S. Ct. 1483, 1505 (1994). "If Congress has done so, of course, there is no need to resort to judicial default rules." *Id.* In this case, Congress could not have been more explicit as to the "proper reach" of the new Section 242(g). Congress plainly provided that Section 242(g) should apply "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [[the INA]." The 1996 Act § 306(c). Accordingly, the Court should apply the terms of Section 242(g), and dismiss this case for lack of jurisdiction. *See id.*

In addition, dismissal is warranted under the Second Circuit's recent decision in *Hincapie-Nieto v. INS,* 92 F.3d 27 (2d Cir. 1996). In *Hincapie-Nieto,* the court heard a challenge to a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") that precludes the circuit courts from reviewing appeals from final orders of deportation entered against certain criminal aliens. *See* § 440(a) of the AEDPA, Pub. L. No. 104-132, 110 Stat. 1214 (1996). The court found that the AEDPA provision is jurisdictional and, as such, it " 'takes away no substantive right but simply changes the tribunal that is to hear the case.' "[FN3] *Hincapie-Nieto,* 92 F.3d at 29 (quoting *Landgraf,* 114 S. Ct. at 1502) (internal citation omitted)). The court noted that in ??, 239 U.S. 506, 508 (1916) (cited in *Langraf,* 114 S. Ct. at 1502), a statute enacted after commencement of the suit deprived the district court of jurisdiction it formerly had and left resolution of the disputes to the administrative agency or department. *Hincapie-Nieto,* 92 F.3d at 29. In light of that analysis, the court concluded that the intervening AEDPA statute removed its pre-existing jurisdiction to review petitions of certain criminal aliens. *See id.*

> FN3. The Third, Fifth, Sixth, Ninth, and Eleventh circuits have also heard challenges to the AEDPA provision and, like the Second Circuit, have concluded that it removes their jurisdiction over all cases brought by certain criminal aliens, including cases pending on the date of the AEDPA's enactment. *See Salazar-Haro v. INS,* ____ F.3d ____, No. 96-3007, 1996 WL 518261 (3d Cir. Sept. 13, 1996); *Mendez-Rosas v. INS,* 87 F.3d 672 (5th Cir. 1996) (per curiam); *Salmo v. INS,* No. 96-3404 (6th Cir. Aug. 5, 1996), *Oasguargis v. INS,* 91 F.3d 788 (6th Cir. 1996), *pet. for reh'g denied* (Aug. 21, 1996); *Duldulao v. INS,* 90 F.3d 396 (9th Cir. 1996); *Rolle v. INS,* No. 96-4560 (11th Cir. July

15, 1996). *See also Sanchez-Rodriquez v. INS,* No. 96-9518 (10th Cir. July 12, 1996) (holding that AEDPA provision divests court of jurisdiction over petition for review filed after AEDPA's effective date) *Compare* Reves-Hernandez v. INS, 89 F.3d 490 (7th Cir. 1996), *pet. for reh'g denied* (Sept. 27, 1996) (finding that AEDPA provision does not divest court of jurisdiction where alien admitted deportability but may have had defense thereto).

Like the AEDPA provision, Section 242(g) of the 1996 Act is a jurisdictional statute affecting only the power of the Court to hear the case, and not the substantive rights of any party. As such, there is no presumption against retroactive application in this case. *See* Duldulao v. INS, 90 F.3d 396, 399 (9th Cir. 1996) (quoting *In re Arrowhead Estates Dev. Co.,* 42 F.3d 1306, 1311 (9th Cir. 1994)). The Court's jurisdiction is removed according to the long-standing principle that "when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law." *Id.* (quoting *United States,* 343 U.S. 112, 116-17, 72 S. Ct. 581, 584 (1952)).

Congress has explicitly provided that the district courts do not have jurisdiction in cases of this kind. Accordingly, this case should be dismissed.

C. Alternatively, the Complaint Should be Dismissed under Rule 12(b)(6) Because Plaintiffs Failed to State a *Claim Upon Which Relief Can Be Granted*

In the unlikely event that the Court finds that Section 242(g) does not eliminate its subject matter jurisdiction over this case, the defendants moves for dismissal under Rule 12(b)(6).

At the outset, the Court should note that the scope of judicial inquiry is severely limited in the realm of immigration matters. "It is unchallenged that the federal government has plenary power over immigration." *Padavan,* 82 F.3d at 26 (citing *Truax v. Raich,* 239 U.S. 33, 42 (1915)); *see also Fiallo v. Bell,* 430 U.S. 787. The formulation of "[p]olicies pertaining to the entry of aliens and their right to remain here ... is entrusted exclusively to Congress." *Pavadan,* 82 F.3d at 26 (quoting *Galvan v. Press,* 347 U.S. 522, 531 (1954)); *see also Harisiades v. Shaughnessy,* 342 U.S. 580, 596-97 (1952)).

In exercising its plenary powers, Congress enacted the Immigration and Nationality Act, which provides the procedure through which aliens are admitted to the United States and are removed from the United States. *See* 8 U.S.C. §§ 1101, *et seq.* The statute specifies the grounds on which criminal aliens are rendered excludable and deportable. *See* 8 U.S.C. §§ 1182(a), 1151(a), (b).[FN4] By enacting these provisions, Congress clearly signaled its intolerance for those who would abuse the hospitality of this country by engaging in criminal activity.

FN4. The 1996 Act amended these sections and combined them into one provision -- section 237, to become effective April 1, 1997. *See* the 1996 Act §§ 301(d), 309(a).

The named plaintiffs in this case were each given an opportunity to reside in the

United States lawfully, and were admitted under an admission procedure that conformed with the statute, regulations, and Constitution. Their main contention in this lawsuit is that they were not informed, prior to admission or adjustment of status, as to the deportation or exclusion consequences of their criminal activity in the United States. Given that Congress has not seen fit to enact legislation that would provide incoming aliens such notice, plaintiffs have no actionable claim against deportation.[FN5]

> FN5. Plaintiffs' reliance on the APA is misplaced, since it does not provide a basis for recovery or equitable relief. Section 702 of the APA provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Nevertheless, Congress has eliminated actions under the APA that challenge immigration procedures. *Ardestani v. INS*, 502 U.S. 129, 133-34. (1991) (INA supersedes APA with respect to administrative procedures). A cause of action against the INS is withdrawn to the extent the relevant statute "preclude[s] judicial review." *See* *Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984) [citations omitted).

Similarly, there is no support for the proposition that the Fifth Amendment creates a duty in the INS to give plaintiffs notice of the collateral consequence of deportation. Plaintiffs' argument that their deportation would deprive them of the "right" to live in the United States without due process is flawed in two respects. First, an alien's stay in this country is a privilege, not a right. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952). Aliens, therefore, are not immune from deportation. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). The Supreme Court has held that " 'deportation' is the removal of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, without any punishment being imposed or contemplated ..." *Id.* at 709. "[It is] but a method of enforcing the return to his own country of an alien who has not complied with the conditions ... [upon which] his continuing to reside here shall depend." *Id.* at 730.

As stated above, Congress deemed the commission of crimes so reprehensible that aliens who have committed controlled substance violations, aggravated felonies, crimes involving moral turpitude, and other serious offenses may be removed from the United States. 8 U.S.C. §§ 1182(a), 1251(a) (as amended by the 1996 Act § 301(d)). Further reflecting its intolerance of aliens who abuse the hospitality of the United States by engaging in criminal activity, Congress provided few waivers of excludability or deportability and recently amended the INA to completely preclude criminal aliens, effective April 1, 1997, from seeking previously available forms of relief. *See* the 1996 Act §§ 304, 375, 309(a).

Second, contrary to plaintiffs' assertions, an Alien Registration Card ("green card") is only an identity document that identifies them as lawful permanent residents. *Etuk v. INS, Blackman*, 973 F.2d 60, 63 (2d Cir. 1992). It does not confer upon plaintiffs any special privileges separate and apart from their status as legal resident aliens. Plaintiffs have not cited any authority, and there is none, to support the proposition that a green card is a "federal license" conferring the right to

live, work, and travel permanently. *See* Complaint ¶¶ 2, 28, 32, 35. Similarly, there is no authority that the green card is a license that falls within the purview of the Administrative Procedure Act. *See* Complaint at ¶ 25.

Plaintiffs argue that, as "federally licensed" aliens, they were entitled to receive actual notice prior to their admission, entry, or admission that committing crimes in the United States would render them deportable. *Id.* at ¶ 4. The INS, however, had no duty to warn plaintiffs of the "precise penalties" which might occur if they violate the immigration laws. *See* *United States v. Arzate-Nunez*, 18 F.3d 730, 737 (9th Cir. 1994) (INS has no obligation to inform of precise penalties which might attach to illegal reentry); *United States v. Meraz-Valeta*, 26 F.3d 992, 996 (10th Cir. 1994) (same). It is well-settled that "ignorance of the law is no excuse." *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957); *Arzate-Nunez*, 18 F.3d 730, 737 (9th Cir. 1994) (aliens are charged with knowledge of the immigration laws, and a mistake as to the law's requirements is generally no defense to criminal conduct). There is nothing in our judicial system that allows aliens to shirk the responsibility of learning and abiding by the laws of this country that is normally expected of citizens. To accord plaintiffs the type of notice contemplated would place aliens in the untenable position of receiving more procedural due process than citizens.

Furthermore, plaintiffs were in fact given legal notice of the collateral deportation consequences of their criminal activity. The publication of the grounds of deportation and exclusion in the INA clearly placed plaintiffs on notice that committing drug offenses, crimes involving moral turpitude, and other serious offenses would subject them to deportation. *See* INA, §§ 212(a), 241(a); *Federal Crop Ins. Corp v. Merrill*, 332 U.S. 380, 385 (1947) (holding that government regulations were binding on all who sought to benefit therefrom, regardless of their actual knowledge of what is in the regulations or of the hardship resulting from their "innocent ignorance"); *Wei V. Robinson*, 246 F.2d 739, 743 (7th Cir. 1957) (holding that proper publication of an immigration regulation in the Federal Register gives "notice of the contents ... to any person subject thereto or affected thereby"). Therefore, the same laws which entitled plaintiffs to immigrate to the United States also gave them proper notice that they must remain law-abiding in order to retain their lawful status. Because plaintiffs failed to state a cognizable legal claim, their Complaint should be dismissed.

IV. *CONCLUSION*

For the reasons set forth above, the Court should dismiss this action in its entirety. In the unlikely event that the motion to dismiss is denied, defendants respectfully request ten days from the receipt of the Court's order to file their answer to the Complaint and their reply to the motion for class certification and preliminary injunction.

Neil JEAN-BAPTISTE, et al., Plaintiffs, v. Janet RENO, Immigration & Naturalization Service, et al., Defendants.
1996 WL 33670191 (E.D.N.Y.)

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