For Opinion See 1997 WL 55472

United States District Court, E.D. New York.
Neil JEAN-BAPTISTE, et al., Plaintiffs,
v.
Janet RENO, et al., Defendants.
No. 96 CV 4077 (SJ).
October 30, 1996.

Plaintiffs' Memorandum in Opposition to Defendant' Motion to Dismiss Complaint

This memorandum is submitted by Plaintiffs in opposition to defendants' motion dismiss Plaintiffs' complaint. Defendants' claim, that the newly enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 divests the Court of subject matter jurisdiction over Plaintiffs' claim, is without merit. Likewise, defendants' motion to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ P. 12(b)(6) is without merit since Plaintiffs have stated a claim upon which relief may be granted.

I. ARGUMENT

A. *The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 did not divest the Court of subject matter jurisdiction over the present cause of action*

On September 30, 1996, President Clinton signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA"). The defendants assert that the IIRIRA divests the Court of subject matter jurisdiction of the present cause of action. However, such claim is misplaced. Defendants' cite § 306(a) of the IIRIRA, as divesting the Court of subject matter jurisdiction.[FN1] Section §306(a) amends §242(g) of the Immigration and Nationality Act (the "INA") by adding:

FN1. The text of § 306 is attached herein as Exhibit 1.

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 this Act.

Section 306(c)(1) of the IIRIRA provides:
IN GENERAL.-Subject to paragraph (2)[FN2], the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of enactment of this Act and subsection (g) of section 242 of the Immigration and Nationality (as added by subsection (a), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.[FN3] (emphasis added)

FN2. Paragraph (2) provides: “LIMITATION.- Paragraph (1) shall not be considered to invalidate or to require the reconsideration of any judgment or order entered under section 106 of the Immigration and Nationality Act, as amended by section 440 of Public Law 104-132.”

FN3. The IIRIRA was enacted on September 30, 1996, when President Clinton signed it into law.

Section 306(a) of the IIRIRA does not apply to the present cause of action. The addition to § 242(g) of the INA is part of subsection (a) of § 306 of the IIRIRA. As stated in § 306(c), “the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of enactment” of the IIRIRA. Section 242 of the INA, as amended by the IIRIRA, applies only to claims which arise from past, pending, or future exclusion, deportation, or removal proceedings and which claims are filed on or after the date of enactment of the IIRIRA. Section 306(c) of the IIRIRA makes it clear that “subsection (g) of section 242 of the [[INA] (as added by subsection (a) [of the IIRIRA]), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings [under the INA].” (emphasis added). Thus, § 305(a) of the IIRIRA divests the Court of subject matter jurisdiction only with respect to claims arising from past, pending, or future exclusion, deportation, or removal proceedings which are filed on or after the date of enactment of the IIRIRA, September 30, 1996. Congress did not intend to remove the Court's jurisdiction over claims which were already pending on the date of enactment of the IIRIRA. Had Congress intended to remove the Court's jurisdiction over claims which were already pending before the Court on the date of enactment of the IIRIRA, Congress would have made its intentions clear by using broader language in the statute. Congress could have stated that “subsection (g) of section 242 of the [INA] (as added by subsection (a) [of the IIRIRA]), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under” [the INA], notwithstanding the date of filing of such claims.

The IIRIRA does not apply to the present cause of action because plaintiffs claim was pending before the date of enactment of the IIRIRA. Defendants' contention that Congress intended the amended § 242(g) of the INA to apply to cases pending on the date of enactment of the IIRIRA is without merit. Defendants would have this Court believe that the language “claims *arising from* past, pending, or future exclusion, deportation, or removal proceedings” is equivalent to past claims, pending claims, or future claims arising from deportation, exclusion, or removal proceedings. (emphasis added). However, as stated above, the amendment to § 242 of the INA by §306(a) of the IIRIRA applies only to “claims, arising from all past, pending, or future exclusions, deportation, or removal proceedings under” the INA, which are filed on or after the date of enactment of the IIRIRA.

In addition, the defendants' argument, regarding jurisdiction, must fail because contrary to defendants' contention, the Plaintiffs' cause of action does not arise from any “past, pending, or future exclusion, deportation, or removal proceedings” under the INA. The defendants are not correct in their contention that “[t]he in-

stant action arises 'from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders' against the Plaintiffs" under the INA. Instead, the instant action arises under the Constitution of the United States; specifically, under the Due Process Clause of the Fifth Amendment. See Complaint at ¶¶ 4,5,7,18,53,55,58,61, and 62.

The Plaintiffs here do not seek review, or determination, of the merits of any individual deportation order issued by the defendants, but challenge only the defendants' policies, practices, and procedures on constitutional grounds. Although, the IIRIRA may have removed the jurisdiction of the federal district courts 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, "that is not to say that a program, pattern or scheme by immigration officials to violate the constitutional rights of aliens is not a separate matter subject to examination by a district court and to the entry of at least declaratory and injunctive relief." *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1033 (5th Cir. 1982). Therefore, the lack of jurisdiction of the federal courts 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]," "does not apply to suits alleging a pattern and practice by immigration officials which violates the constitutional rights of a class of aliens." *Campos v. Nail,* 940 F.2d 495, 497 (9th Cir. 1991) *citing* *Montes v. Thornburg,* 919 F.2d 531, 535 (9th Cir. 1990). To the extent that the Plaintiffs herein "set forth matters alleged to be part of a pattern and practice by immigration officials to violate the constitutional rights of a class of aliens they constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction." *Smith,* at 1033; 28 U.S.C. § 1331(a).

"[I]n spite of the broad power of Congress '*to* exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country,' the executive is subject to the constraints of due process in implementing and enforcing congressional immigration policy." *Smith,* 676 F.2d at 1036-37. *citing* *Galvan v. Press,* 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (citations omitted). The Supreme Court has stated:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth amendment, as well as the Fourteenth, protects every one of these persons from deprivation of life, liberty, or property without due process of law ..... Even one whose presence in this country is unlawful, involuntary or transitory is entitled to that constitutional protection.

Smith, at 1036, *citing* *Mathews v. Diaz,* 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976). Consequently, the enactment of the IIRIRA does not affect nor limits "the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violation is alleged." *Smith,* at 1033. *See also* *Montes v. Thornburg,* 919 F.2d 531, 535 (9th Cir. 1990) *citing* *International Union. United Automobile Workers v. Brock,* 477 U.S. 274, 285, 106

S.Ct. 2523, 2530, 91 L.Ed.2d 228 (1986) (“claims that a program is being operated in contravention of a federal statute or Constitution may be brought in federal court even where statute bars review of individual eligibility determination”); *In re Thornburg,* 869 F.2d 1503, 1512 (D.C.Cir. 1989) (“District court may entertain a statutory or constitutional challenge to the manner in which an amnesty program is being administered”). Simply stated, “the Due Process Clause is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process ‘Fue Process of Law,’ by its mere will ....” *Rafeedee v. I.N.S.,* 880 F.2d 506 (D.C.Cir. 1989) *citing Murray's Lessee v. Hoboken Land and Improvement Co.,* 18 How. 272, 276, 15 L.Ed. 372 (1855). Congress does not have the power to declare, ipso facto, what procedural “due process” is due to a particular class of people and then, divest all the federal courts of jurisdiction to hear a constitutional challenge to said procedures. The IIRIRA is unconstitutional in so far as it stands for the proposition that the federal courts do not have jurisdiction to hear a cause of action, brought by legal permanent residents, alleging the deprivation of liberty and property interests without due process of law. Therefore, the Court has jurisdiction to adjudicate the present cause of action, and defendants' motion to dismiss the complaint for lack of jurisdiction must be denied.

Citing *Hincapie-Nieto v. I.N.S.,* 92 F.3d 27 (2nd Cir. 1996), the defendants also assert that under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Pub.L. No. 104132, 110 Stat. 1214 (1996), the Court lacks jurisdiction to hear the present case. The defendants are not correct in their assertion. The case of *Hincapie-Nieto v. I.N.S.* involved only the repeal of the United States Court of Appeals' jurisdiction to entertain petitions for review of deportation orders. In that case, the alien filed a petition for review of “an order of the Board of Immigration Appeals finding him deportable because of a narcotics conviction, denying his request for discretionary relief, and ordering his deportation.” *Hincapie-Nieto v. I.N.S., 92 F.3d at 28.* In the present case, the Plaintiffs are not asking the court to review the merits of the orders of deportation issued against them, as was the case in *Hincapie-Nieto.* Here, the Plaintiffs mount a constitutional challenge to defendants procedures, practices, and policies which deprive the Plaintiffs of certain property and liberty interests without due process of law. In *Hincalie-Nieto,* the Second Circuit Court of Appeals held only that “the AEDPA has repealed the jurisdiction a court of appeals formerly had over petitions for review filed by aliens convicted of drug offenses like those committed by Hincapie-Nieto, and that the Act's removal of jurisdiction validly applies to petitions filed before the Act's effective date.” *Id.* at 28. (emphasis added). The Court found that “[t]he absence of an opportunity for some aliens to file a petition for review in a court of appeals does not necessarily mean, however, that the federal courts are closed to all claims by such aliens arising in the course of deportation proceedings.” *Id.* at 30. In the present case, the Plaintiffs are not asking the Court to review the individual orders of deportation issued against them, rather, they are asking the Court to determine whether those orders of deportation were issued in conformity with the requirements of the Due Process Clause of the Fifth Amendment. Thus, the AEDPA does not remove the district court jurisdiction to hear the present case, and the defend-

ants' motion to dismiss the complaint should be denied.

B. *Defendants' 12(b)(6) motion to dismiss Plaintiffs' complaint should be denied because the Plaintiffs have stated a claim upon which relief can be granted*

On motion to dismiss complaint for failure to state claim upon which relief can be granted, complaint is construed in light most favorable to the plaintiff, i.e., read with great generosity, and should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *U.S. v. Private Sanitation Industry Ass'n of Nassau/Suffolk, Inc.*, 793 F.Supp. 1114 (E.D.N.Y. 1992). To warrant dismissal of a case for failure to state cause of action, it must appear with certainty that nonmoving party is not entitled to relief under the facts presented in the pleadings. In the present case, it cannot be said, beyond doubt, that the Plaintiffs have not set forth facts which will entitled them at least to declaratory and injunctive relief. Accordingly, the defendants' motion to dismiss the complaint must be denied.

Due process is "the condition precedent to the deprivation of a life, liberty, or property interest." *Smith*, 676 F.2d at 1037 *citing* *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972) (citations omitted). Thus, "the due process guarantee is not applicable until some protected interest has been identified." *Smith* at 1039 n.39. In the present case, it is clear that the Plaintiffs have a liberty interest in their rights to be and remain in the United States. *Id.* at 1037-38. In addition, the Plaintiffs have a property interest in their legal permanent residence. Complaint at ¶ 2.

Even thought, the Plaintiffs have clearly shown that a protected interest is implicated in the present cause of action, the question remains what process is due. The defendants assert that the Due Process Clause of the Fifth Amendment does not impose a duty on the INS, or the government, to provide prior notice to the Plaintiffs that the commission of certain crimes could subject the Plaintiffs to the penalty of deportation.[FN4] However, adequate and sufficient notice is a fundamental requirement of due process, and the type of "notice required will vary with circumstances and conditions." *Walker v. City of Hutchinson*, 352 U.S. 112, 115, 77 S.Ct. 200, 202 (1956). *See also* *Landon v. Plasencia*, 459 U.S. 21, 34, 103 S.Ct. 321, 330 (1982) ("The constitutional sufficiency of procedures provided in any situation varies with circumstances"). Therefore, whether the Due Process Clause imposes a duty on the defendants to provide the plaintiffs with prior notice, that the commission of certain criminal acts would subject the Plaintiffs to deportation, depends on the circumstances of the case. Since, all of the circumstances which could affect the outcome of this case have not been brought to the Court's attention, it would not be improper for the Court to deny defendants' motion to dismiss the complaint. The defendants have not shown, beyond doubt, that the circumstances of this case do not entitle the Plaintiffs to any kind of relief.

> FN4. It is important to note that the defendants give nonimmigrant prior notice, at the time of entry to the U.S., that accepting unauthorized employment would subject them to deportation. (See Exhibit 2). Consequently, there is no

> reason why the defendants should not be required to give a similar notice, to persons admitted for permanent residence, that engaging in criminal behavior would subject them to deportation.

The defendants contend that the complaint should be dismissed because "ignorance of the law is no excuse".[FN5] The Plaintiffs are cognizant of the existence of said principle and did not fail in bringing it to the attention of the Court.[FN6] As the Plaintiffs have already pointed out, in their memorandum in support of motion for preliminary injunction, "ignorance of the law excuses no one" is a principle which was generally applied in common law cases when mistake or ignorance of the existence of a criminal prohibition was advance as a defense. *See* *United States v. Mancuso,* 420 F.2d 556, n.5 (2d Cir. 1970). The present case is a civil action involving the denial of due process to the Plaintiffs by the defendants. Further, during their deportation proceedings the Plaintiffs did not claim, nor are they claiming now, a "mistake or ignorance" of the existence of a criminal prohibition as a defense.[FN7] In *Lambert v. People of the State of California,* 335 U.S. 225, 228, 78 S.Ct. 240, 243 (1957), the Supreme Court, after examining the circumstances and conditions in that case, rejected the rule that "ignorance of the law excuses no one". The Court stated, "[e]ngrained in our concept of due process is the requirement of notice." *Id. See also* *United States v. Mancuso,* 420 F.2d 556, n.5 (2d Cir. 1970). Thus, "ignorance of the law is no excuse" is a legal principle that is subordinate, and subject to, the requirements of due process of law. The Plaintiffs are confident that this Court, after it examines the circumstances and conditions in this case, would hold that the principle "ignorance of the law is no excuse" does not apply to the present cause of action; and therefore, the defendants' motion to dismiss the complaint must be denied.

> FN5. *See* Defendants' Memorandum in Support of their Motion to Dismiss Complaint, p.10 (October 15, 1996).
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> FN6. *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, p.14-17 (September 19, 1996).
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> FN7. *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, p.15 (September 19, 1996).

Another of defendants' contentions is that "[t]he publication of the grounds of deportation and exclusion in the INA clearly placed Plaintiffs on notice that committing drug offenses ... and other serious crimes would subject them to deportation." In support of this contention, the defendants cite *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 385 (1947). However, that case is not analogous to the Plaintiffs' cause of action herein. The present case relates to a civil penalty sought to be imposed on the Plaintiffs by the defendants on the basis of the Plaintiffs' criminal conviction. The *Merrill* case was a contract case, and it did not involved any allegations of denial of due process in connection with a civil penalty sought to be imposed on the basis of any of the parties' criminal conviction. The defendants state that the court, in *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 385 (1947), held 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'."[FN8] However, it is important to note that the court in *Merrill* reached that particular holding only after finding that the regulations, involved in that case, were published in the Federal Register.[FN9] In the present case, defendants point to no regulation, published in the Federal Register, which gives the Plaintiffs notice that the commission of certain criminal acts would subject the Plaintiffs to the civil penalty of deportation, in addition to any criminal penalties that might be imposed. Whether the INA constitutes adequate "notice", so as to satisfy the requirements of due process of law, depends on the circumstances. Under the circumstances of the present case, the publication of the INA did not give the Plaintiffs notice, as required by the due process clause, that committing drug offenses and other serious crimes would subject them to deportation. *See* *Lambert v. People of the State of California*, 335 U.S. 225, 78 S.Ct. 240 (1957); *United States v. Mancuso*, 420 F.2d 556 (2d Cir. 1970); *Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301 (2d Cir. 1976) (the Government's improper actions may preclude it from deporting aliens, even if the language of the Immigration and Nationality Act, read in vacuo, might suggest a different result).

FN8. See Defendants' Memorandum in Support of their Motion to Dismiss Complaint, p.11 (October 15, 1996).

FN9. Having been published in the Federal Register, the Wheat Crop Insurance Regulations are binding on all who seek to come within the Federal Insurance Act, regardless of lack of actual knowledge of the regulations. *See* *Merrill*, 332 U.S. at 385.

The defendants argue that 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.[FN10] However, the plaintiffs herein are not advancing any claim in defense of their criminal conduct.[FN11] Further, contrary to defendants contention, all aliens are not, per se, charged with knowledge of the immigration laws so as to relief the defendants from providing the Plaintiffs with "notice" within the meaning of the Due Process Clause. *See* *Corniel-Rodriguez v. I.N.S.*, 532 F.2d 301 (2nd Cir. 1976) (Failure of American consul in Santo Domingo to warn alien, who was issued visa as unmarried minor child of special immigrant, that she would forfeit her exemption from labor certification requirement for entry if she married before admission to the United States, precluded deportation of alien who married her childhood sweetheart three days before her departure from the Dominican Republic). Here, one of the Plaintiffs entered the United States at the age of two, and another when he was just 8 years old. Complaint at ¶ 27,34. Thus, it is absurd to suggest that these Plaintiffs had notice, at the time they entered the U.S., that engaging in criminal behavior would subject them to deportation. In fact, they grew up not knowing that they could be deported.

FN10. *See* Defendants' Memorandum in Support of their Motion to Dismiss Complaint, p.10 (October 15, 1996).

FN11. *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, p.9-10 (September 19, 1996).

Other legal authorities set forth by the defendants, to support their motion to dismiss the complaint, are not applicable to the present cause of action. Defendants cite *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).[FN12] However, those cases dealt with the imposition of criminal penalties within the context of a criminal prosecution for illegal reentry to the United States. In those cases, the criminal defendants claimed "ignorance or lack of knowledge" as a defense to a criminal prohibition. Unlike the Plaintiffs in the present cause of action, the criminal defendants in *Arzate-Nunez* and *Meraz-Valeta* were actually given prior notice by INS officials of the criminal penalties for illegal reentry into the United States after deportation. *See* *United States v. Meraz-Valeta,* 26 F.3d 992, 996 (10th Cir. 1994); *United States v. Arzate-Nunez,* 18 F.3d 730, 737 (9th Cir. 1994) ("The INS's warning letter correctly informed Arzate-Nunez that he could be subject to criminal penalties for reentering the country; it misinformed him only as to the magnitude of these penalties") (emphasis added). The present cause of action involves neither a criminal prosecution nor criminal penalties.

FN12. It is worth noting that defendants are not correct in their assertion that they have no duty to inform of the penalties which might attach to illegal reentry. Section 438 of the Antiterrorism and Effective Death Penalty Act of 1996, which amended § 242(h) of the Immigration and Nationality Act, provides that "Any alien deported pursuant to this subsection shall be notified of the penalties under the laws of the United States relating to the reentry of deported aliens, particularly the expanded penalties for aliens deported under paragraph (2)". (emphasis added).

The defendants also assert that the Alien Registration Card issued by the government to the Plaintiffs is not a license which entitles the Plaintiffs to reenter, reside, work, travel, and live permanently with their families in the United States. Defendants claim that a "green card" is only an identity document which does not confer any right on the Plaintiffs apart from their status as legal residents. The defendants' statement: "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," is unfounded. The Plaintiffs have cited, and there is, authority for the proposition that an Alien Registration Card is a federal license which entitles the Plaintiffs to reenter, reside, work, travel, and live permanently with their families in the United States. Complaint at ¶ 2. *See also* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, p.3-4 (September 19, 1996) *citing* *Hamava v. McElroy,* 797 F. Supp. 186 (E.D.N.Y. 1992) (Legal permanent residents have the freedom to reside, work, and travel within the United States, rights which they were formerly granted when they became resident aliens); Administrative Procedure Act[FN13], 5 U.S.C. § 551 ("license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission) (emphasis added). It is

almost impossible to find that an Alien Registration Card does not fall within the meaning of “permit”, “certificate”, “registration” or other form of permission. In fact, the stamp which the defendants use to issue temporary Alien Registration Card reads as follows:

> FN13. In their motion to dismiss complaint, the defendants state that Congress has eliminated actions under the Administrative Procedure Act (“APA”) that challenge immigration procedures. However, the Immigration and Naturalization Service is subject to the APA. The APA is not applicable only to deportation proceedings, and then only with respect to the procedure governing deportation hearings. *See* Kaczmarczyk v. INS, 933 F.2d 588 (7th Cir. 1991). The present case is not challenging the procedures governing deportation hearings. Thus, the Plaintiffs are not precluded from seeking relief under relevant provisions of the APA.

PROCESSED FOR I-551. TEMPORARY EVIDENCE OF LAWFUL ADMISSION FOR PERMANENT RESIDENCE VALID UNTIL _____. EMPLOYMENT AUTHORIZED. (emphasis added).[FN14]

> FN14. See *Etuk v. Slattery*, 936 F.2d 1433, 1445 (2nd Cir. 1991)

Finally, it seems that the defendants have misconstrued the Plaintiffs' cause of action. It appears that the defendants view the present action as a challenge to the power of Congress to enact legislation concerning the deportation of non-citizens who have been convicted of crimes.[FN15] However, the Plaintiffs are not challenging the power of the government to deport non-citizens from the United States. Plaintiffs mount only a constitutional attack on the procedures, or lack of procedures, devised for the deportation of lawful residents who have been convicted of criminal offenses. As the court stated in *Hamaya v. McElroy*, 797 F. Supp. 186 (E.D.N.Y. 1992), “[a]lthough Congress enjoys enormous power in framing statutes (and authorizing regulations) concerning [the admission and retention] of aliens, those statutes and regulations cannot be enforced in a manner inconsistent with the requirements of due process.” The Plaintiffs' cause of action is entirely separate from their substantive claim to the right to reside, work, travel, and live permanently with their families in the United States. The Plaintiffs' claim is simply that they cannot be deprived of a liberty and property interest in a manner inconsistent with the requirements of due process of law. The term used to define those entitled to protection under the due process clause, i.e., “person, does not differentiate between criminals and noncriminals or between citizens and non-citizens. Thus, the Plaintiffs' right to due process of law is not, by any means, diminished just because they have been convicted of a criminal offense, and have deportation orders pending against them. *See* *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 (1976).

> FN15. Among other things defendants state that “Congress deemed the commission of crimes so reprehensible that aliens who have committed controlled substance violations ... may be removed from the United States”; “Congress provided few waivers of excludability or deportability and recently amended the INA to completely preclude criminal aliens ... from seeking previously available forms

> of relief.” *See* Defendants' Memorandum in Support of their Motion to Dismiss Complaint, p.6-9 (October 15, 1996).

Giving the type of interests involved herein, and the high value which the Plaintiffs place on those interests, the court should refrain from making a determination, at this stage, of “what process is due”. The Court should make such determination only after a full and extensive consideration of the circumstances of this case. The Plaintiffs would also like to point out that, as far as the Plaintiffs are able to determine, the present cause of action presents a question of first impression to the Court. Although this action presents a question of first impression, that is not to say that the Plaintiffs have failed to state a claim upon which relief can be granted. In a cause of action presenting a question of first impression, a party need not cite legal authority which is “on all fours” with the party's claim. It is sufficient to set forth the legal principles, and analogous case authorities, by which the Court should be guided in adjudicating the cause of action. The Plaintiffs have provided the Court with sufficient legal authority to subject the present cause of action to a full examination by the Court, and to the consideration of the entry of at least declaratory and injunctive relief.

II. *CONCLUSION*

It cannot be said, and the defendants have shown, that the Plaintiffs' complaint fails to state a claim upon which relief can be granted. It is simply not true that it “appears beyond doubt that the Plaintiffs can prove no set of facts which would entitle them to relief. The Court has jurisdiction to hear the present cause of action. WHEREFORE, the defendants' motion to dismiss complaint must be denied.

Neil JEAN-BAPTISTE, et al., Plaintiffs, v. Janet RENO, et al., Defendants.
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