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United States District Court, E.D. New York.

Neil JEAN–BAPTISTE, Gustavo Enrique Cepeda–Torres, and Victor Israel Santana, Plaintiffs,
v.
Janet RENO, Attorney General of the United States of America and the Immigration and Naturalization Service, Defendants,

No. 96 CV 4077(SJ). | Feb. 5, 1997.

Attorneys and Law Firms

Law Offices of Antonio C. Martinez, by Antonio C. Martinez, New York City, for plaintiffs.

Department of Justice, Office of Immigration Litigation, Civil Division, by Quynh Vu, Washington, D.C., for defendants.

Zachary W. Carter, U.S. Atty, by Mary Elizabeth Delli–Pizzi, Brooklyn, New York, for defendants.

Opinion

MEMORANDUM AND ORDER

JOHNSON, District Judge.

***1** Before this Court are plaintiffs' motion for a preliminary injunction pursuant to Fed.R.Civ.P. 65(a) and for class certification pursuant to Fed.R.Civ.P. 23 and defendants' motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) or for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons stated below, defendants' motion to dismiss the complaint for failure to state a claim is granted, and plaintiffs' motions are therefore dismissed.

BACKGROUND

The three named plaintiffs in this case, Neil Jean–Baptiste, Gustavo Enrique Cepeda–Torres, and Victor Israel Santana (collectively "plaintiffs"), resided until recently in this country as lawful permanent residents.[1] Mr. Jean–Baptiste arrived in the United States in 1972 at the age of two from the Republic of Haiti; Mr. Cepeda–Torres arrived in 1982 at the age of eight from Colombia; and Mr. Santana arrived in 1989 at the age of 28 from the Dominican Republic.

1 Plaintiffs' complaint also makes factual allegations regarding "non-plaintiff class members" Rafael Gregorio Morel, Jose Antonio Espinal, German Garcia–Handal, Martin De Jesus Then, Boydy Delano Beckford, and Manuel Jovino Duran. Because this Court dismisses this action for failure to state a claim, and therefore does not certify the proposed class, the specific allegations regarding these proposed members are omitted.

Because each of the named plaintiffs were convicted in New York State Supreme Court of crimes involving either the sale or possession of a controlled substance, deportation orders have been entered against them pursuant to Sections 241(a)(2)(B)(i) and 241(a)(2)(A)(iii) of the Immigration and Nationality Act ("INA").[2] Although Mr. Cepeda–Torres and Mr. Santana have appealed these orders to the Board of Immigration Appeals ("BIA"), Mr. Jean–Baptiste has waived his administrative appeal to the BIA.

2 INA § 241(a)(2)(B)(i) provides that any alien convicted of a violation of law relating to a controlled substance at any time after entry is deportable. 8 U.S.C. § 1251(a)(2)(B)(i).

INA § 241(a)(2)(A)(iii) provides that any alien convicted of an aggravated felony at any time after entry is deportable. 8 U.S.C. § 1251(a)(2)(A)(iii). INA § 101(a)(43)(B), in turn, defines the term "aggravated felony" as including "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B).

Plaintiffs filed this proposed class action on August 19, 1996, against Attorney General Janet Reno and the Immigration and Naturalization Service ("INS") (collectively "defendants") to challenge "the procedures employed by the defendant [INS] with respect to the deportation of ... lawful permanent resident aliens who have ... been convicted of certain criminal acts...." Complaint ¶ 1. Specifically, plaintiffs challenge the "procedures, practices, or policies" of the INS which systematically fail "to give the plaintiffs any actual notice that engaging in certain types of criminal behavior constitutes [a] ground for revocation of the license to reside permanently in the United States as well as [a] ground for deportation." Complaint ¶ 54. Plaintiffs argue that this failure is a violation of the minimum procedural requirements imposed on the defendants by the Due Process Clause of the Fifth Amendment and by the Administrative Procedure Act. 5 U.S.C. §§ 702–706

(“APA”).

Plaintiffs argue that the notice provided by the INS that deportation proceedings were being instituted against them was a “mere gesture” because it was provided only after state criminal convictions had been entered against them. Such notice, they contend, is empty because “it does not afford the Plaintiffs a meaningful opportunity to avoid the penalty [of revocation of legal permanent resident status and deportation] and to be heard at a meaningful time.” Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 9. In short, plaintiffs contend that by failing to notify immigrants at the outset of their legal permanent residence that certain criminal conduct will result in the revocation of what they term their “license” to stay here, and ultimately in their deportation, the INS violates the Constitution and the APA.

***2** Plaintiffs’ prayer for relief includes requests for both declaratory and injunctive relief. Specifically, plaintiffs ask this Court to declare that the acts and omissions of the defendants violate the Due Process Clause and the APA, and that the deportation orders that have already been entered against them are null and void. Plaintiffs also request that this Court enjoin defendants from depriving members of the class of their right to enter, reside, work, travel, and live permanently in the United States; from issuing orders of deportation against proposed class plaintiffs; from detaining, arresting, or incarcerating plaintiffs; and from requesting state or federal parole boards to deny plaintiffs release from prison. Plaintiffs have moved for a preliminary injunction and for class certification.

Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), or in the alternative, for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

DISCUSSION

I. *Subject Matter Jurisdiction.*

As an initial matter, defendants argue that this Court lacks subject matter jurisdiction to consider plaintiffs’ claims. Specifically, defendants assert that the Illegal Immigration Reform and Immigrant Responsibility Act, Pub.L.No. 104–208, 110 Stat. 3009 (1996) (Division C of Omnibus Consolidated Appropriations Act, 1997) (“IIRIRA”), which was signed into law on September 30, 1996, immediately divested this Court of jurisdiction over plaintiffs’ claims.

IIRIRA § 306 replaces the INA’s current judicial review section 106 with new section 242, entitled “Judicial Review of Orders of Removal.” *See* IIRIRA §§ 306(a)(2) (adding new Section 242) and 306(b) (repealing Section 106). Of the new provisions contained in section 242, defendants specifically point out subsection (g), which provides:

> 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.

INA § 242(g), 8 U.S.C. § 1252(g) (as amended by IIRIRA § 306(a)(2)) (“Section 242(g)”).

The IIRIRA’s general effective date is April 1, 1997, as provided by IIRIRA § 309(a).[3] That section, however, also provides for certain exceptions to the general effective date, including an exception expressed in IIRIRA § 306(c). Section 306(c), in turn, provides:

[3] IIRIRA § 309(a) provides, in part: “Except as provided in this section and section ... 306(c), ... this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act....”

> [T]he amendments made by subsections (a) [adding new section 242] and (b) [repealing section 106] shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (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.
>
> ***3** IIRIRA § 306(c) (as amended by the “Technical Correction to be added to the H–1A Nursing Bill,” set forth in the Act of October 11, 1996, Pub.L. No. 104–302, 100 Stat. 3656). Defendants argue that the language of IIRIRA § 306(c) plainly provides for the immediate effect of Section 242(g), which in turn divests this Court of jurisdiction over plaintiffs’ claims.

The Seventh Circuit, however, recently held that Section 242(g)’s effective date, like the rest of the IIRIRA, is April 1, 1997. The court explained its holding as follows:

> Section 309(a) clearly indicates that

> IIR[IR]A is to take effect on April 1, 1997, although it excepts certain sections from the general effective date, including section 306(c). Section 306(c), however, fails to specify an alternative effective date. Rather, it refers us back to section 309. Reexamining section 309, beyond the effective date provision in subsection (a), subsection (c) states that for aliens in exclusion or deportation proceedings before April 1, 1997, the IIR[IR]A amendments will not apply and judicial review will remain available.... Reading section 306(c) in light of section 309 as directed, we conclude that the reference to subsection (g) in section 306(c) is meant only to provide an exception to section 309(c)'s general principle of non-retroactivity, so that when IIR[IR]A comes into effect on April 1, 1997, subsection (g) will apply retroactively, unlike the other subsections. This interpretation gives meaning to each part of the statute.

Lalani v. Perryman, 105 F.3d 334, 1997 WL 24520 at *2 (7th Cir. Jan. 23, 1997). This Court adopts the reasoning set forth by the Seventh Circuit for finding that Section 242(g) is effective only on April 1, 1997, and therefore concludes that Section 242(g) does not apply to this case.

Despite the inapplicability of Section 242(g) to this action, this Court must still determine whether it otherwise has subject matter jurisdiction over plaintiffs' claims. Plaintiffs primarily argue that the Court has the power to consider their claims pursuant to its federal-question jurisdiction.[4] 28 U.S.C. § 1331. This Court agrees.

4 Plaintiffs also allege jurisdiction pursuant to 28 U.S.C. §§ 2201 and 2202; 8 U.S.C. § 1329; and 5 U.S.C. §§ 702–706. Complaint ¶ 7.

Judicial review of individual orders of deportation is generally provided by the appropriate court of appeals. *See* INA § 106(a), 8 U.S.C. § 1105a(a). Recently, Congress eliminated such review for individuals who are found deportable for having committed certain criminal offenses, including aggravated felonies and violations of controlled substance laws. Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104–132, 110 Stat. 1214 (1996) ("AEDPA") § 440(a).[5]

5 Although AEDPA § 440(a) has been challenged on both constitutional and retroactivity grounds, courts of appeals that have considered these challenges have upheld its elimination of their jurisdiction to review final orders of deportation. *See Arevalo–Lopez v. INS,* 104 F.3d 100, 1997 WL 1898 (7th Cir. Jan. 3, 1997); *Kolster v. INS,* 101 F.3d 785 (1st Cir.1996); *Salazar–Haro v. INS,* 95 F.3d 309 (3d Cir.1996); *Hincapie–Nieto v. INS,* 92 F.3d 27 (2d Cir.1996); *Qasguarigis v. INS,* 91 F.3d 788 (6th Cir.1996); *Duldulao v. INS,* 90 F.3d 396 (9th Cir.1996); *Mendez–Rosas v. INS,* 87 F.3d 672 (5th Cir.1996) (*per curiam*), *cert. denied,* 519 U.S. 1061, 117 S.Ct. 694 (1997). *But see Reyes–Hernandez v. INS,* 89 F.3d 490 (7th Cir.1996) (finding that AEDPA § 440(a) does not apply in cases where an alien conceded his deportability before the AEDPA became law and had a colorable defense to deportation).

In the instant case, however, plaintiffs do not request this Court to review administrative determinations that individual plaintiffs are actually deportable. *See* INA § 101(47)(A), as amended by AEDPA § 440(b) (defining "order of deportation"). Rather, plaintiffs' complaint is correctly characterized by both defendants and plaintiffs as primarily a collateral attack on the manner in which defendants administer the deportation process against legal permanent residents.[6] Specifically, plaintiffs ask this Court to determine whether the general practices and policies which defendants employ violate the minimum process which is due to legal permanent residents under the Constitution. Because plaintiffs' claims are not based solely on "alleged procedural irregularities in an *individual* deportation hearing," they remain "independently cognizable in the district court under its federal question jurisdiction." *Haitian Refugee Center v. Smith,* 676 F.2d 1023, 1033 (5th Cir.1982) (emphasis added). *See also McNary v. Haitian Refugee Center, Inc.,* 498 U.S. 479, 484, 492 (1991) (holding that INA § 210(e)(1), 8 U.S.C. § 1160(e)(1) does not preclude district court jurisdiction to entertain collateral challenges to unconstitutional practices and policies generally used by the INS in processing Special Agricultural Worker applications); *Malik v. Meissner,* 82 F.3d 560, 562 (2d Cir.1996) (recognizing that the *McNary* exception allows district courts to entertain collateral challenges to unconstitutional INS practices and policies); *Montes v. Thornburgh,* 919 F.2d 531, 535 (9th Cir.1990) (stating that INA § 106(a) "does not apply to suits alleging a pattern and practice by immigration officials which violates the constitutional rights of a class of aliens.").

6 Defendants describe plaintiffs' claims as a "collateral attack on the Attorney General's decision[s]...." Defendants' Reply Memorandum at 10. Plaintiffs describe their claims as a general challenge to the "policies and practices" defendants use in implementing the INA. Complaint ¶¶ 53–57.

***4** Because this Court has subject matter jurisdiction to consider plaintiffs' claims pursuant to 28 U.S.C. § 1331, the Court now turns to defendants' alternative motion to dismiss the complaint for failure to state a claim.[7]

7 Even if federal-question jurisdiction were not a proper basis for finding subject matter jurisdiction, this Court would find that plaintiffs present a colorable claim to jurisdiction upon which it could then appropriately assume jurisdiction arguendo. *See Browning–Ferris Industries of South Jersey, Inc. v. Muszynski,* 899 F.2d 151, 154–160 (2d Cir.1990).

II. *Failure to State a Claim Upon Which Relief Can be Granted.*

Plaintiffs allege that defendants' failure to notify them at the outset of their legal permanent resident status that certain criminal convictions will make them deportable violates the requirements imposed on defendants by the APA and the Due Process Clause of the Fifth Amendment.

This Court agrees with defendants' position that plaintiffs fail to state a claim upon which relief can be granted. Although it may be unfortunate that legal permanent residents are not informed that certain criminal convictions may cause their deportation—particularly when such residents decide to plead guilty to those crimes—that circumstance is not a violation of the Constitution or the APA.[8]

8 The Supreme Court has stated that immigration *proceedings* are not governed by the APA. *Ardestani v. INS,* 502 U.S. 129, 133–34 (1991). Even if this Court accepts plaintiffs' argument that their claims do not regard immigration proceedings, however, they still fail to state a claim upon which relief can be granted.

Defendants broadly assert that neither the APA nor the Constitution imposes *any* duty on them to inform legal permanent residents that deportation may be a consequence of certain criminal convictions. This Court finds that even if the law did impose such a duty, it was satisfied by the provisions of the INA itself which clearly state that aliens convicted of certain crimes are deportable. *See* INA § 241(a)(2), 8 U.S.C. § 1251(a)(2). Because "everyone is charged with knowledge of the United States Statutes at Large," *Federal Crop Ins. Corp. v. Merrill, et al.,* 332 U.S. 380, 384 (1947), plaintiffs cannot now argue that their ignorance of the law forms a basis for challenging defendants' decisions and actions to deport them.

Additionally, while "[i]t is well-settled that the Fifth Amendment entitles an alien to due process of law in deportation proceedings[,]" *Felzcerek v. INS,* 75 F.3d 112, 115 (2d Cir.1996) (citing *Reno v. Flores,* 507 U.S. 292, 305–07 (1993)), plaintiffs themselves concede that notice of the initiation of deportation proceedings was provided to them by the INS' "Order to Show Cause" form. Accordingly, plaintiffs' complaint fails to state a claim upon which relief can be granted.

CONCLUSION

For the reasons stated above, defendants' motion to dismiss plaintiffs' complaint pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

SO ORDERED.