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

HAITIAN CENTERS COUNCIL, INC., National Coalition For Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, of New Haven Connecticut; Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on Behalf of Themselves and All Other Similarly Situated; A. Iris Vilnor on Behalf of Herself and All Others Similarly Situated; Mireille Berger, Yvrose Pierre and Mathieu Noel on Behalf of Themselves and All Others Similarly Situated, Plaintiffs,
v.
Gene McNARY, Commissioner, Immigration and Naturalization Service, William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay, Defendants.

No. 92 CV 1258. | April 6, 1992.

Attorneys and Law Firms

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Robert Begleiter, Scott Dunn, Michael J. Wildes, Harry Litman, Malcolm Stewart, Asst. U.S. Attys., Paul T. Cappuccio, Associate Deputy Atty. Gen., U.S. Dept. of Justice, Lauri Steven Filppu, Deputy Director, Washington, D.C., for defendants.

Opinion

MEMORANDUM AND ORDER

JOHNSON, District Judge.

I. FINDINGS OF FACT

***1** 1. The defendants in this action are Gene McNary, Commissioner, Immigration and Naturalization Service; William P. Barr, Attorney General; Immigration and Naturalization Service; James Baker, III, Secretary of State; Rear Admiral Robert Kramek and Admiral Kime, Commandants, United States Coast Guard; and Commander, U.S. Naval Base, Guantanamo Bay (the "Government").

2. The plaintiffs are the Haitian Centers Council, Inc., the National Coalition for Haitian Refugees, Inc., the Immigration Law Clinic of the Jerome N. Frank Legal Services Organization ("Haitian Service Organizations"); Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated ("Screened In Plaintiffs"); A. Iris Vilnor on behalf of herself and all others similarly situated ("Screened Out Plaintiffs"); and Mireille Berger, Yrose Pierre and Mathieu Noel on behalf of themselves and all others similarly situated ("Immediate Relative Plaintiffs").

3. The Haitian Service Organizations were neither parties to the *Haitian Refugee Center v. Baker* ("*Baker* ") litigation nor privies of the Haitian Refugee Center.[1] The Immediate Relative Plaintiffs were not parties to the *Baker* litigation.

4. On September 29, 1981, President Ronald Reagan ordered the Secretary of State "to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea." Executive Order No. 12324, 46 F.R. 48109 (1981) *reprinted in* 8 U.S.C.A. § 1182 note (1982) ("Executive Order").

5. Under the cooperative agreement (the "Agreement") entered into by the United States and Haiti, the United States may board Haitian flagged vessels on the high seas for the purpose of making inquiries relating to the condition and destination of the vessel and the status of those on board. Interdiction Agreement, Sept. 23, 1981, United States–Haiti, T.I.A.S. No. 10241. If a violation of United States or Haitian law is ascertained, the vessel and its passengers may be returned to Haiti. The Agreement also explicitly provides that it is "understood that ... the United States does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status."

6. On September 30, 1991, President Jean Bertrand Aristide was overthrown in a military coup. In the wake of the overthrow, hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to

violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding. Plaintiffs' Exhibit ("Pl. Ex.") 30.

7. To escape the country's political upheaval, thousands of Haitians began to flee onto the high seas. The United States Cost Guard began interdicting an increasing number of vessels carrying Haitian aliens.

***2** 8. As of March 19, 1992, the United States Coast Guard has interdicted 16,464 Haitians and has repatriated 9,542 Haitians to Port–au–Prince.

9. The United States Naval Base at Guantanamo Bay, Cuba is subject to a lease agreement between the United States and Cuba which states that:

> during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.

Agreement for the Lease to the United States of Lands in Cuba for Coaling and Naval Stations. February 16, 1903.

10. The U.S. Naval Base at Guantanamo is a "relatively open base" to which non-military personnel such as military dependents, foreign nationals, contractor employees providing support services, civilian government employees are allowed access. ("Pl.Ex.") 38 at 89–91. The facilities include schools, bars, restaurants, a McDonalds, and a Baskin–Robbins.

11. The United States Coast Guard take Haitian aliens who are interdicted on the high seas into custody and transport them to Guantanamo where they are held incommunicado. Approximately 3,300 Haitian aliens are currently in the custody of the United States at Guantanamo. The Haitians live in camps surrounded by razor barbed wire fences. Haitian detainees who are accused of committing an "infraction" are placed into a separate camp known as "Camp 7." No detainee in custody is free to go to any country other than Haiti even at their own expense. (Preliminary Injunction Hearing Transcript, "P.I." Transcript, at 165. Nor are they-permitted to make telephone calls. Although, the military has provided the Haitian aliens with various services including schools, medical care and religious services, it has denied them access to legal services.

12. Under the interdiction program, INS asylum officers at some point interview interdicted Haitians to determine whether they have a "credible" fear of political persecution if returned to Haiti. Those found to have a "credible" fear are screened in. Those found not to have a "credible" fear are screened out. Haitians who are screened in are to be brought to the United States so that they may pursue asylum claims. To date approximately 2,800 Haitians have been brought to the United States. Haitians who are screened out are repatriated to Haiti.

13. During the *Baker* litigation, the United States government represented that:

> Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under section 208.02 of the Immigration and Nationality Act (INA), 80 SL sec.ILJ8(a). These 'screened in' individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Compliant ¶ 34(f).

14. Five days after the Supreme Court denied certiorari in *Haitian Refugee Center v. Baker,* 60 U.S.L.W. 2513 (1992) the Government changed this practice. On February 29, 1992, the General Counsel of the INS, Grover Joseph Rees, circulated a memorandum setting forth policy to conduct second interviews of all screened in Haitians who have been found to have a communicable disease.

***3** 15. The Government requires that all Haitian aliens who have been screened in by INS asylum officers to undergo medical testing to determine whether they carry the HIV virus.

16. Approximately 200–400 Haitian aliens are suspected of carrying the HIV virus. Screened in Haitians who test positive for the HIV virus must undergo a second INS interview to determine whether they have a "well-founded" fear of political persecution if returned to Haiti. Approximately 200–400 Haitian aliens are suspected of carrying the HIV virus.

17. According to INS policy, the second interviews are intended to be "identical in form and substance, or as nearly so possible, to those conducted by asylum officers to determines whether asylum should be granted to an applicant already in the United States." Pl. Ex. 1.

18. The INS has directed asylum officers to use the usual standards and techniques for asylum interviews as set

forth in the INS procedures and operations manuals.

19. The "well-founded" fear standard used by INS asylum officers when conducting second interviews of screened in Haitians is identical to that required to grant asylum or refugee status to an individual physically present in the mainland United States.

20. While asylum applicants in the United States may have attorneys present during their asylum interviews, asylum applicants being held in custody on Guantanamo are not permitted to have access to an attorney during their second INS interview.

21. When INS began conducting second asylum interviews, the Haitian aliens including the Screened In Plaintiffs began seeking the assistance of counsel. P.I. Transcript at 159, 164–5.

22. By INS officials' own admission, the presence of attorneys during asylum interviews on Guantanamo would be useful, feasible, and would not interfere with the interview process. (Pl. Ex. 68 at 129–30; Pl. ex. 69 at 124–131).

23. INS asylum officers have conducted sixty-four second asylum interviews. Thirty-four Haitians who had established a credible fear of persecution, tested positive for the HIV virus and failed to establish a well founded fear of persecution if returned to Haiti during a second INS interview would have been repatriated absent the temporary restraining order ("TRO") issued by this court on March 27, 1992.

24. Repatriated Haitians face political persecution and even death on their return. Approximately forty repatriated Haitians (also known as "Double Backers") have fled Haiti for a second time and have been screened in by the INS.

25. The Government has managed to accommodate the requests of congressmen, clergymen, church groups, and members of the press seeking access to the Haitians being held in custody on Guantanamo.

26. The Government has denied attorneys, the Haitian Service Organizations, and the Immediate Relative Plaintiffs access to the Haitians detained at Guantanamo apart from the access ordered by the TRO issued by this court and the Florida district court in *Baker.*

***4** 27. INS officials on Guantanamo lost approximately 1,080 records of Haitian aliens who consequently had to be rescreened.

28. The evidence presented by the Government is inconclusive as to any "magnet effect" resulting from the issuance of this court's TRO.

II. CONCLUSIONS OF LAW

A. RES JUDICATA

1. The doctrine of res judicata bars relitigation of any claim between two parties where a court has previously entered a final judgment on the merits. *Allen v. McCurry,* 449 U.S. 90 (1980); *Milltex Industries Corp. v. Jacguard Lace Co. Ltd.,* 922 F.2d 164 (2d Cir.1991). Where the subsequent litigation involves new parties and new claims, the action is not barred by *res judicata.*

2. The Government asserts that the outcome in the *Baker* litigation binds the Screened In Plaintiffs and bars them from litigating this action. If the Government's argument that the *Baker* class were taken to its logical conclusion, all Haitians who have been interdicted, or who will ever be interdicted by the United States Coast Guard are forever bound by *Baker.* I find it inconceivable that the Florida district court intended to bind *all interdicted Haitians forever* when it simply maintained the class for the purposes of issuing the preliminary injunction and permitting the action to proceed. The district court granted plaintiffs' motion for class certification without holding a hearing or amending the class definition in any way. The Haitians received neither notice nor an opportunity to opt out.

3. Where the class definition is so overbroad that it fails to satisfy due process, it cannot have a *res judicata* effect. *See Finnan v. L.F. Rothschild & Co., Inc.,* 726 F.Supp. 460 (S.D.N.Y.1989) (finding that the plaintiffs suggested an "overbroad time span" for class and modifying the class accordingly); *see generally* Wright, Miller & Cooper, 7B *Federal Practice and Procedure* § 1789 (West 1981). It seems particularly unfair to bind the Screened In Plaintiffs by the outcome in *Baker* when their cause of action arises from Government conduct occurring after the conclusion of the *Baker* litigation.

4. The class of Haitian plaintiffs in *Baker* were "screened out" according to plaintiffs' description in their Memorandum in Support of Motion for Class Action Certification ("HRC Mem.").[2] Therefore, plaintiff A. Iris Vilnor, who sues on behalf of herself and all others similarly situated and seeks relief for herself and other Haitians who were "screened out" is not a new plaintiff nor is the class that she purports to represent.

5. I find, however, that the Screened In Plaintiffs are a new class which is not bound by the outcome in *Baker.*

6. The immediate relatives of "screened in" Haitians and all those similarly situated also make up an entirely new

plaintiff class which was not a party to the *Baker* litigation.

7. Moreover, the Haitian Service organizations in this action differ from the plaintiff organization (Haitian Refugee Center) in *Baker.* After having the opportunity to take discovery on the existence of a privity relationship between the Haitian Service Organizations and the Haitian Refugee Center, the Government has conceded that the organizations are different.

***5** 8. Therefore, *res judicata* is inapplicable.to the Screened In Plaintiffs, Immediate Relative Plaintiffs, and the Haitian Service organizations.

9. Res judicata is also inapplicable where neither the conduct complained of nor the claim had not arisen at the time of the first suit. *Prime Management Co., Inc. v. Steinegger,* 904 F.2d 811 (2d Cir.1990); *N.L.R.B. v. United Technologies Corp.,* 706 F.2d 1254 (2d Cir.1983); *see generally* Wright, Miller & Cooper, 18 *Federal Practice and Procedure* § 4409 (West 1981). Plaintiffs' complaint is based upon new circumstances. The INS policy of conducting second interviews to determine whether Haitians carrying the HIV virus have a well founded fear of persecution was developed after the Baker litigation ended. only recently have the Haitian aliens sought the assistance of counsel. These new circumstances give rise to a new cause of action and make *res judicata* inapplicable.

10. The Screened In, Immediate Relatives and Haitian Service Organizations Plaintiffs' complaint raises new claims which were not litigated in *Baker.* For example, the Screened In Plaintiffs' statutory right of counsel, First Amendment and Fifth Amendment Due Process and Equal Protection claims are entirely new claims. As the Haitian Service organizations are new parties and their cause of action arises from the Government's post *Baker* subsequent conduct; the First Amendment claim is also new. Because the Immediate Relative Plaintiffs are a new class, all of their claims are new.

B. PRELIMINARY INJUNCTION

11. For a court to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Resolution Trust Corp. v. Elman,* 949 F.2d 624 (2d Cir.1991).

i. ***Irreparable Harm***

12. By a preponderance of the evidence, the Screened In Plaintiffs and Haitian Service Organizations have made a showing that irreparable harm is likely to result if this preliminary injunction were issued. Specifically, the Haitian Service Organizations have shown that they may suffer content-based denials of their First Amendment right to provicte counseling, advocacy and representation to their clients on Guantanamo. The Screened In Plaintiffs may face torture death if they lack access to counsel, fail in their bid to receive asylum, and are repatriated to Haiti.

ii. ***Serious Questions Going to the Merits***

(a) Haitian Service Organizations' First Amendment Claim

13. The Haitian Service Organizations claim that the Government has violated their first amendment right to free speech and to associate for the purpose of providing legal counsel by denying them access to the Screened In Plaintiffs being detained on Guantanamo.

***6** 14. According to the Government, the Haitian service organizations have no First Amendment right of access to an alien in the custody of the United States. As authority for this assertion, the Government cites *Ukrainian–American Bar Association v. Baker,* 893 F.2d 1374 (D.C.Cir.1990). This case however is distinguishable from the facts present in the instant litigation. In *Ukrainian–American Bar Association v. Baker,* the plaintiff brought suit alleging that the government violated their First Amendment right of access to a potential asylee in United States custody *who had neither retained the plaintiff as counsel nor asserted a right to speak with counsel.*

15. By contrast, the Screened In Plaintiffs have retained the Haitian Service Organizations as counsel and have asserted their right to speak with their attorneys. Even if the Haitian aliens lack the right to speak with an attorney, the Haitian Service organizations would have a right to impart information to them. *See Procunier v. Martinez,* 416 U.S. 396, 408–09 (1974).

16. I am also unpersuaded by the Government's argument that *Kliendienst v. Mandel,* 408 U.S. 753 (1972), is controlling. In *Mandel,* the Supreme Court held that 1) that an unadmitted alien had no constitutional right of entry into the United States and 2) when the executive branch exercised its power to determine the admittance of an alien into the country on the basis of a facially legitimate and bona fide reason, the courts will not test its discretion by balancing its justification against the First Amendment rights of citizens seeking to communicate with the alien.

17. Here, the Screened In Plaintiffs are not asserting that

they have a constitutional right to enter the United States. Instead, the Haitian Service organizations are merely asserting that *their* First Amendment rights are being violated by the Government's refusal to allow them to have access to their clients subject to reasonable time, place, and manner restrictions.

18. The Supreme Court has held that legal and political advocacy organizations, right to associate and to advise people of their legal rights are modes of expression protected by the First Amendment. *In re Primus,* 436 U.S. 412 (1978); *NAACP v. Button,* 371 U.S. 415 (1963).

19. Although Guantanamo Naval Base is located in Guantanamo Bay, Cuba, it is subject to the exclusive jurisdiction of the United States pursuant to a lease and treaty agreement. Therefore, the First Amendment is applicable to United States conduct on Guantanamo. *See generally, Flower v. U.S.,* 407 U.S. 197, 198–99 (1972) (First Amendment applicable to U.S. conduct on a military base); *Lamont v. Woods,* 948 F.2d 825 (2d. Cir.1991) (Establishment Clause of the First Amendment applies extraterritorially).

20. Despite the Government's extremely broad discretion to restrict access by civilians to military bases, it may not impose content-based restrictions upon speech. *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37 (1983). The Government may regulate speech in areas not traditionally designated as public forums so long as these restrictions are reasonable as to time, place and manner, and are not an effort to suppress expression merely because public officials oppose the speaker's views. *Id.* at 46.

***7** 21. In the context of the First Amendment, Guantanamo Naval Base appears to be a non-public forum. However, plaintiffs have presented evidence and the Government concedes that it is granting access to others—reporters, priests, doctors, congressmen—while denying access to lawyers. The only justification that the Government offers for its ban on lawyers is that they have an absolute right to determine the admittance of civilians. As the.

22. As the Government's denial of access to the Haitian Service Organization appears to be a content based restriction on speech, I conclude that the Haitian service Organizations have made a showing of serious questions going to the merits of their claim under the First Amendment.

(B) Screened In Plaintiffs' Claims

(1) Statutory Claim

16. The standard for review of an applicant's asylum claim is whether the applicant has a well-founded fear of persecution if returned to his or her own country. *INS v. Cardoza Fonesca,* 480 U.S. 421, 107 S.Ct. 1207 (1987). Asylum officers on Guantanamo are using the same standard when conducting second interviews of Haitian aliens in United States custody. But these aliens are being the procedural protections such as the right to counsel that they would be afforded if they were being held in custody in the United States.

23. Under INS regulations, applicants for asylum have a right to counsel, to present witnesses, to submit affidavits, and to present any relevant evidence during an asylum interview conducted by an asylum officer. 8 C.F.R. § 208.9 (1991). Detained asylum applicants also have a right to receive a list of persons or private agencies that can assist them in their application for asylum. *Id.* at § 208.5.

24. If an alien's claim is rejected by an Asylum Officer, his "application for asylum or withholding of deportation may be renewed before an Immigration Judge in exclusion or deportation hearings." 8 C.F.R. § 208.18(b) (1991). In any such hearing, plaintiffs have the right to be represented by counsel. 8 U.S.C.A. § 1362.

25. Even though I believe that the Haitian aliens are de facto asylees,[3] I must find as a matter of law that their statutory claim fails because the Immigration and Naturalization Act ("INA") expressly states that "[t]he term 'United States, except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. 1101(a)(38). As the statute fails to specifically identify Guantanamo Bay Naval Base as being within the jurisdiction of the United States for the purposes of the INA and INS regulations, I must conclude that the statutory right to counsel under 8 U.S.C.A. § 1362 and 8 C.F.R. § 208.9 does not extend to the Haitian aliens currently in custody on Guantanamo.

(2) Constitutional Claims

26. Although the Screened In Plaintiffs' INA claim must fail, there are sufficiently serious questions going to the merits of their Due Process claim to make such claim fair ground for litigation. Congress may circumscribe the parameters of United States territory for purposes of the immigration laws, but such definition is not applicable to the U.S. Constitution unless the applicable provision of the Constitution itself limits the definition of "United States." *See Downes v. Bidwell,* 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901). And, just as the defendants aver that the question of whether certain domestic legislation covers activities at Guantanamo is separate from the issue of whether the criminal laws of the United

States are applicable thereto, so too, the question of whether the First and Fifth Amendments apply to the screened in plaintiffs is a distinct issue.

***8** 27. Neither the due process nor equal protection clauses of the Fifth Amendment provides a circumscribed definition of the United States. Guantanamo is within United States territory subject to the exclusive control and jurisdiction of the United States pursuant to a lease and treaty. *United States v. Verdugo–Urquidez,* 494 U.S. 259, 110 S.Ct. 1056 (1990) is therefore not dispositive of the rights of the screened in plaintiffs under the Fifth Amendment, even by way of analogy, because *Verducio Urquidez* holds that a nonresident alien may hot assert a violation of the Fourth Amendment where such violation occurred on *foreign* soil. The Court has expressly stated that it believes that the Fourth Amendment operates in a different manner than the Fifth Amendment. *Verdugo Urquidez,* 110 S.Ct. at 1060.

28. In terms of the viability of the Screened In Plaintiffs constitutional claims, this court recognizes that aliens are not necessarily afforded the same rights as citizens and that immigration laws are the province of the legislative and executive branches. The Supreme Court has stated, however, that aliens within the jurisdiction of the United States enjoy the protections of the Fifth Amendment from deprivation of life, liberty, or property without due process of law. *Mathews v. Diaz,* 426, U.S. 67, 78, 96 S.Ct. 1883, 1890, 48 L.Ed.2d 478 *citing Wong Yang Sung v. McGrath,* 339 U.S. 33, 48–51, 70 S.Ct. 445, 453–55, 94 L.Ed. 616, 627–29 (1950); *Wong Wing v. United States,* 163 U.S. 228, 16 S.Ct. 977, 41 L.Ed. 140 (1896). "Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection. *Id.* at 78, 96 S.Ct. at 1890 (*citing cases*).

29. Courts have also recognized that, under certain circumstances,, a non-resident, non-hostile alien may enjoy the benefits of certain constitutional limitations imposed on United States actions. *See Cardenas v. Smith,* 733 F.2d 909, 915 (D.C.Cir.1984); *United States v. Toscanino,* 500 F.2d 267 *reh'g denied,* 504 F.2d 1380 (2d Cir.1974); *Porter v. United States,* 496 F.2d 583, 591 (Ct.Cl.1974), *cert denied,* 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 761 (1975); *compare Johnson v. Eisenstrager,* 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (holding that an alien enemy had no right to writ of habeas corpus to challenge their detention by the United States military in Germany).

30. Whatever their status under the immigration laws, the Screened In Plaintiffs certainly are "persons," and therefore entitled to the protections of the Fifth Amendment. *Compare Plyler v. Doe,* 457 U.S. 189, 211, 102 S.Ct. 2382, 2391, 72 L.Ed.2d 786 (1982) (holding that an alien is a "person" with.in the meaning of the equal protection clause of the Fourteenth Amendment).

31. In the instant case, the screened in plaintiffs were forcibly taken from the high seas and they have been held in custody for roughly five month. Their access to the outside world, whether by telephone, mail or otherwise has been completely restricted. They are confined in a camp surrounded by razor wire and are not free to leave, even if they have the financial capability to do so, to go to another part of the world (that is, to any country but Haiti from which they flee for fear of political persecution" torture and even death). With respect to any complaints of mistreatment or otherwise, the only recourse that the screened in plaintiffs have is to military officials on Guantanamo who apparently have complete discretion as to whether and how to respond to any such complaints. Although it is formal governmental policy to treat such aliens in a humanitarian way, if the government's argument is taken to its logical conclusion, it would, of necessity, provide the aliens with no recourse even if the conduct of a U.S. official is arbitrary, capricious, and perhaps even cruel. (*See* TRO Hearing Transcript at 39). That argument is simply untenable.

***9** 32. Admittedly, Congress and the Executive branch may restrict immigration, but that is not the issue herein. Instead, the issue before this court is whether the screened in plaintiffs may challenge the U.S. government's conduct insofar as such governmental conduct has deprived them of their liberty. The screened in plaintiffs are non-hostile individuals who were brought to Guantanamo forcibly, and who are "in custody," and incommunicado. They are unable to move about freely and choose to leave Guantanamo at their own risk to non-United States territory (*see* P.I. Hearing Transcript at 165), and cannot even make a telephone call at their own expense. They are isolated from the world and treated in a manner worse than the treatment that which would be afforded to a criminal defendant. They are defenseless against any abuse, exploitation or neglect to which the officials at Guantanamo may subject them. Given this scenario, such individuals, albeit aliens, are entitled, at the very least, to challenge such restrictions and the related conduct of U.S. officials. Indeed, the nature and circumstances surrounding the connection between the Screened In Plaintiffs and the United States warrants a finding that they are entitled to cloak themselves in the protections of the due process clause. *See Mathews v. Diaz, supra.* Based on the foregoing, I conclude that there are serious questions going to the merits of the Screened Plaintiffs due process claim. *See Mathews v. Diaz, supra.*

(c) Other Claims

33. In light of the importance of the issues raised and the need for further consideration, I will reserve judgment on all other claims not addressed herein and I will issue a decision with respect thereto at a later date and, if appropriate after argument is heard on Defendants'

Motion to Dismiss under 12(b)(6).

iii. ***Balance of the Hardships***

34. The Government argues that the issuance of a preliminary injunction will create a "magnet effect" drawing more Haitians to the high seas and will increase the Government's financial burden. After' carefully weighing the hardships, I find that the balance tips decidedly in favor of the Plaintiffs. Moreover, I find that the any burden placed on the Government in permitting attorneys access to their clients for the purpose of interviewing would be minimal.

C. BOND

35. The Government has repeatedly asked the court to impose a bond on the Plaintiffs. Under particular circumstances, a court may exercise its discretion and waive the bond required under F.R.C.P. 65(c). *See United States v. Bedford Associates,* 618 F.2d 904, 916–17 n. 23 (2d Cir.1980). After considering the nonprofit status of the Haitian Service organizations and the indigence of the Screened In Plaintiffs, the Plaintiffs are ordered to post a bond in the amount of $5,000.

D. Plaintiffs' Application for an Order Preventing Harassment

36. Plaintiffs have failed to put forth sufficient evidence to support their claim that the Government is harassing them because of their involvement in this lawsuit. Therefore, this court will not exercise its authority to issue an order.

E. Class Certification

***10** F.R.Civ.P. 23 is given liberal construction and the court must take the allegations of the merits of the case, as set forth in the complaint, to be true. It is the party who seeks to utilize Rule 23 that bears the burden of establishing that the requirements of that rule are satisfied. *Cruz v. Robert Abbey, Inc.,* 778 F.Supp. 605, 612 (E.D.N.Y.1991). The Screened in Plaintiff's have satisfied the basis requirements of Rule 23(b)(2) and, as such, they are entitled to maintain this action as a class action. Although the Screened In Plaintiff's motion for class certification is granted at this time, because the defendant challenges ceratin of plaintiff's factual allegations, I will permit them to conduct discovery and then this court will hold a hearing to ascertain whether the class certification herein granted should be modified. The court has chosen not to address the certification of the Immediate Relative Plaintiff's motion for class certification in this Memorandum and Order.

III. RELIEF

For the reasons stated above, it is hereby:

ORDERED, that the defendants are preliminarily enjoined pursuant to F.R.C.P. 65 from:

a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation when scheduled for interviews;

b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian citizen currently being detained on Guantanamo (I) who has been screened in and (II) who is being detained or has been denied an opportunity to communicate with counsel; and

c) repatriating any Haitian alien being detained on Guantanamo (I) who had been screened in and (II) who has been denied the opportunity to communicate with counsel.

So ordered.

ORDER ON CLARIFICATION

(April 15, 1992)

Due to the misunderstanding that has arisen among the parties to this action, the court hereby issues this Order to clarify the interii & relief afforded to the Haitian Service Organizations and to the class of Screened In Plaintiffs in the Memorandum and Order issued by this court on April 6, 1992. This Order is intended solely to clarify the relief granted in the Memorandum And Order dated April 6, 1992 and is not to be construed as a modification, alteration or a change of such relief.

To clarify, it is hereby ordered that the Government is enjoined from:

(a) denying the Haitian Service Organizations immediate access, on Guantanamo, to any member of the class of Screened In Plaintiffs subject to reasonable time, place and manner limitations (regardless of whether any such Screened In Plaintiff has been furnished with an exact date and time for interview) for the purpose of providing them legal counsel, advocacy and representation;

(b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Screened In Plaintiff who has been denied an opportunity to communicate with counsel; and

(c) repatriating any member of class of Screened In Plaintiffs who was subjected to a second interview at which time s/he was screened out, until such time as such individual is afforded an opportunity to communicate with the Haitian Service Organizations and given another interview thereafter.

***11** Notwithstanding paragraphs (b) and (c) above, the Government may, at any time, transport members of the Screened In Plaintiff class to the mainland United States in accordance with the Government's representations to this court.

So ordered.

MEMORANDUM AND ORDER

(June 5, 1992)

Plaintiffs have moved on order to Show Cause for a temporary restraining order pursuant to Fed.R.Civ.P. 65 restraining the Government from repatriating, under the May 24th Executive Order, any interdicted Haitian to Haiti whose life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. For the reasons stated below, the court declines to grant the relief sought.

BACKGROUND[1]

On May 24, 1992, the United States dramatically altered its policy toward Haitian refugees fleeing the political upheaval in Haiti. The President issued an Executive order under which any Haitian interdicted beyond the territorial waters of the United States must be returned directly to Haiti without being afforded the opportunity to undergo INS refugee screening. Plaintiffs quickly moved on Order to Show Cause for a temporary restraining order pursuant to Fed.R.Civ.P. 65 restraining the Government from acting pursuant to the May 24th Executive Order.

At a hearing on May 29, 1992, the Plaintiffs asserted that the Government's actions violate 1) the United States' obligations under Article 33 of U.N. Protocol Relating to the Status of Refugees; and 2) Section 243(h) of the Immigration and Nationality Act ("INA"). At the close of the hearing, the court reserved decision in order to consider the briefs submitted by the parties and to give careful attention to the weighty issues presented.

DISCUSSION

The Government contends that the relief sought by the Plaintiffs is tantamount to a request for a mandatory injunction. The court agrees that the relief sought is closer to a request for more permanent injunctive relief and construes Plaintiffs' application as a request for a preliminary injunction. For a court to issue a preliminary injunction, the moving party must demonstrate (1) irreparable harm should the injunction not be granted, and (2) either (a) a likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Resolution Trust Corp. v. Elman,* 949 F.2d 624 (2d Cir.1991). Although the Plaintiffs undeniably makes a substantial showing of irreparable harm, the court finds that the Plaintiffs are unlikely to succeed on the merits.

Article 33 of the U.N. Protocol Relating to the Status of Refugees provides that "no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion." On its face, Article 33 imposes a mandatory duty upon contracting states such as the United States not to return refugees to countries in which they face political persecution. Notwithstanding the explicit language of the Protocol and dicta in Supreme Court cases such as *INS v. Cardoza Fonseca,* 480 U.S. 421 (1987) and *INS v. Stevic,* 467 U.S. 407 (1984), the controlling precedent in the Second Circuit is *Bertrand* v. Sava which indicates that the Protocol's provisions are not self-executing. *See* 684 F.2d 204, 218 (2d Cir.1982).

***12** It is unconscionable that the United States should accede to the Protocol and later claim that it is not bound by it. This court is astonished that the United States would return Haitians refugees to the jaws of political persecution, terror, death and uncertainty when it has contracted not to do so. The Government's conduct is particularly hypocritical given its condemnation of other countries who have refused to abide by the principle of non-refoulement.[2] As it stands now, Article 33 is a cruel hoax and not worth the paper it is printed on unless Congress enacts legislation implementing its provisions or a higher court reconsiders *Bertrand.* Until that time, however, this court feels constrained by the rationale of *Bertrand* and cannot grant the Plaintiffs relief on this claim.

Finally, this court concluded in an earlier decision in this case that the right to counsel under the INA did not extend to Haitian aliens who were located outside the United States as defined by the statute. *See* Memorandum and order dated April 6, 1992, ¶ 26. This issue is currently on appeal before the Second Circuit. Unless the Court of Appeals rules otherwise, the court must again conclude that the Section 243(h) is similarly unavailable as a source relief for Haitian aliens in international waters.

CONCLUSION

Accordingly, the relief requested by the Plaintiffs is hereby denied.

So ordered.

[1] For a detailed discussion of the *Baker* litigation, *see Haitian Centers Council, Inc. v. McNary, et. al.,* No. 92–1258, Memorandum and Order dated March 27, 1992.

[2] The memorandum states:

> The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction" that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been '*screened out* '....
>
> HRC Mem. at 2 (emphasis added).

[3] The Government suggests that the Haitians on Guantanamo are like refugees seeking asylum at the United States embassy in Moscow. However, the record in this case belies this analogy. A Russian refugee is free to walk out of the embassy if denied asylum. The Haitian aliens on Guantanamo are held in custody behind barbed wired fences.

[1] The court assumes familiarity with the facts and issues in this case. For a more detailed discussion of the history of this litigation *see* Memorandum and order dated March 27, 1992 and Memorandum and Order dated April 61 1992.

[2] Only recently, the United States criticized Great Britain for its forcible repatriation of Vietnamese boat people, whom Great Britain have classified as 'economic migrants'. *See* Daniela Deane, *Britain to Ignore U.S. Pleas on Return of Boat People,* Washington Post, January 26, 1990, at A18.