

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

GULET MOHAMED,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:11-CV-0050
)	
ERIC H. HOLDER, JR., in his official capacity as)	
Attorney General of the United States, <i>et al.</i> ,)	
)	
Defendants.)	

JOINT STATUS REPORT

In accordance with the Court’s July 16, 2015 order, ECF No. 190, the parties hereby submit this Joint Status Report.

PLAINTIFF’S POSITION

I. Introduction

Plaintiff proposes that this Court allows him to now litigate his (1) facial and broad as-applied substantive due process claims and (2) his procedural due process damages claim. Because Mohamed seeks a reconsideration of this Court’s holding that the applicability of 46110 “should be decided in the first instance by the Fourth Circuit upon review of a DHS TRIP decision,” he proposes that the Court stay his procedural due process claim against the revised DHS TRIP process, or in the alternative, allow him 10 days after this Court resolves Plaintiff’s Motion to Reconsider to determine whether he will file a DHS TRIP complaint. Dkt. 189, 27. Regardless, in light of the unique jurisdictional issues that only regard Mohamed’s procedural due process challenge against the revised DHS TRIP process, Mohamed proposes that this Court bifurcate these claims into two groups: (1) his facial and broad as-applied substantive due

process claims and his procedural due process damages claim and (2) his procedural due process challenge against the revised DHS TRIP process. By bifurcating these claims—which, though they all regard the No Fly List, present legal issues that do not meaningfully overlap—the Court puts the parties in the best position to expeditiously move forward this almost half-decade old proceeding. Additionally, to the extent that Mohamed does ultimately complete DHS TRIP, this bifurcation will allow the parties to make progress in resolving this case during the four months Defendants estimate it will take to get a determination letter. Indeed, if Mohamed succeeds on his substantive due process claim, it may no longer be necessary to litigate his procedural due process claim against the revised DHS TRIP process.

II. Mohamed's Claims

Mohamed's remaining claims can be conceptually sorted into three buckets. The first bucket consists of one claim that requires additional discovery. The second bucket consists of claims that would benefit additional discovery, though Plaintiff could try to litigate them based on the facts currently available if dismissal as a result of the state secrets privilege was the consequence of further discovery. And the third bucket's claims require Mohamed to complete DHS TRIP. Mohamed proposes that he litigate the claims in Bucket One and Bucket Two now in this Court. With regards to Bucket Three, Mohamed requests that this claim be bifurcated, or in the alternative, stayed pending the resolution of the Bucket One and Bucket Two claims.

A. Bucket One: Claims Requiring Additional Discovery

Mohamed's procedural due process damages claim is not now directed against served defendants, who would be, if their identities were known to Plaintiff, government agents who placed Mohamed on the No Fly List and/or the government agents who had official authority to fashion a redress process. In preparation for this status report, Plaintiff's counsel requested a

conversation with an attorney representing the government agents who fit the above description so that Plaintiff's counsel could propose serving them through their attorneys with a Fifth Amended Complaint that names the agents as defendants via pseudonym. Counsel for Defendants did not facilitate this proposal. Thus, Mohamed must seek discovery to identify the government agents who caused Mohamed's procedural due process injuries. Because this Court has already determined that the old DHS TRIP process was a violation of Mohamed's constitutional rights, Plaintiff would like to file for summary judgment on this damages claim once the appropriate defendants have been served with a complaint naming them as defendants. Though this Court would likely be able to determine liability on summary judgment, if the served defendants are liable, the amount of damages may require a trial.

B. Bucket Two: Claims Warranting Additional Discovery

The still-living aspects of Mohamed's substantive due process claim include parts that regard the specific reasons why Defendants placed Mohamed on the No Fly List as well as parts that do not. Additional discovery would illuminate the issues for the Court with respect to both aspects of the substantive due process claim. At this point, however, Plaintiff proposes forgoing any discovery regarding the specific reasons why Defendants placed Mohamed on the No Fly List. Instead, Mohamed seeks to litigate his facial challenge to the No Fly List as well as his broad as-applied challenge that seeks to prevent the application of the No Fly List against innocent, uncharged US persons at least inside the United States if not globally.¹ If Mohamed's broader substantive due process challenge is sustained, this Court and the parties will not have to wrestle with the complicated privilege issues that would arise if Mohamed were to litigate his

¹ Out of an abundance of caution, Mohamed will file a Motion for Leave to File a Fifth Amended Complaint that makes clear his claim is a facial challenge as well as a broad as-applied challenge. Additionally, Plaintiff is assessing whether to add a non-delegation claim, which if he includes, would be articulated in the Proposed Fifth Amended Complaint.

substantive due process challenge based on the specific reasons why Defendants placed Mohamed on the No Fly List.

The additional discovery Mohamed would seek with respect to his broad substantive due process challenges include the following: (1) information regarding alternatives to the No Fly List, the No Fly List's efficacy, and other evidence that would shed light on whether the No Fly List is the least restrictive means available to the government to pursue its purpose, (2) information regarding whether the No Fly List's purpose—which, as this Court noted, is aimed in part at restricting “the ability of suspected terrorists to move freely in furtherance of terrorist activities within the United States and internationally”—is compelling, and (3) information regarding less restrictive alternatives to constraining the movement of innocent US persons domestically and internationally. In essence, Mohamed would seek the same evidence this Court sought via its August 6, 2014 Order, which requested “all documents, and a summary of any testimony, expert or otherwise, that the United States would present at an evidentiary hearing or trial to establish that inclusion on the No Fly List, as applied to United States citizens who are not under indictment or otherwise charged with a crime and who have not been previously convicted of a crime of violence, is necessary, and the least restrict method available.” Doc 125, 1.

While Mohamed strongly believes that the current record—primarily, the startling over breadth of the No Fly List and obvious alternatives that are more effective—would allow this Court to grant Mohamed summary judgment on his broad substantive due process claims, the inevitability of appeals in this case and the benefits of a full evidentiary record justify undertaking the difficulties additional discovery would present.

C. Bucket Three: The Claim Requiring the Completion of DHS TRIP

The third bucket of claims includes just one which requires completion of DHS TRIP. This Court has made clear that, with regards to the constitutionality of the revised DHS TRIP process, it cannot grant either party summary judgment without Mohamed going through the process.² The Court explained that, by going through DHS TRIP, the facts of this case would be developed in a manner that allow a “reviewing court” to determine whether the revised process provides a “constitutionally adequate opportunity to challenge any placement on the No Fly List.” Doc. 189, 27. Thus, unless this Court grants Mohamed’s Motion to Reconsider and finds that the No Fly List’s standards themselves create a constitutional violation, Mohamed must complete DHS TRIP to challenge in any manner the revised process.

This Court’s order indicates that the DHS TRIP determination letter that concludes the process may be a jurisdictional event that triggers 46110. In the Motion to Reconsider Mohamed will file, Plaintiff will argue that because Mohamed has not utilized DHS TRIP and the Fourth Circuit declined to extend 46110’s jurisdiction via the inescapably intertwined jurisdiction to Mohamed’s claims, there is no basis for Fourth Circuit subject matter jurisdiction at this time. Regardless of how this Court resolves this issue, 46110 would not vest the Fourth Circuit with jurisdiction over any of Plaintiff’s other claims. Mohamed’s damages and substantive due process claims regard the actions of TSC, which is not—as the Fourth Circuit held—subject to the Fourth Circuit’s jurisdiction because 46110 “does not give [circuit courts] independent authority over the TSC” nor provide circuit courts a basis to “compel [TSC’s] compliance with any remedy we might fashion.” Doc 86, 5-6. Indeed, because Mohamed’s substantive due process claim regards fundamental rights, it must be litigated in district court insofar as the

² Mohamed anticipates that his Motion to Reconsider will ask this Court to determine whether the No Fly List’s inclusion standards, by themselves, constitute a procedural due process violation. Because the revised DHS TRIP inclusion standards are known now and would not be altered by the process that applies those standards, this Court could declare the revised DHS TRIP process unconstitutional because of inadequate standards without Mohamed going through DHS TRIP.

government-friendly standards and presumptions enshrined in 46110 would decimate the strong protections the Constitution requires be given to fundamental rights.

To the extent that this Court treats the completion of DHS TRIP as a jurisdictional event, Plaintiff would request that his procedural due process challenge to the revised DHS TRIP be bifurcated from his other claims.³ This will allow the distinct claims to be litigated on their own timelines, and it would allow this Court to resolve the claims 46110 does not regard now. This is efficient, because the resolution of Mohamed's substantive due process claim, for example, may obviate the need for him to pursue his procedural due process challenge to the revised DHS TRIP.

In any case, to the extent that the Court does not agree with Mohamed's proposal for handling his procedural due process challenge to the revised DHS TRIP, he requests that this Court give him 10 days from the date this Court resolves his Motion to Reconsider to decide whether or not to complete DHS TRIP.

DEFENDANTS' POSITION

Introduction

Any further proceedings in this case depend a great deal on whether Plaintiff decides to seek redress under the revised DHS TRIP procedures. Plaintiff, however, has not yet made that decision. If Plaintiff avails himself of DHS TRIP, the outcome of that process would then serve as the basis for any continued litigation of his procedural due process claim and any litigation of an as-applied substantive due process claim. If, on the other hand, Plaintiff declines to go through DHS TRIP, litigation of his procedural due process claim would be complete, and the

³ In the alternative, Mohamed requests that his challenge to the procedural due process be stayed pending the resolution of the other claims in this Court.

claims left to be resolved—as Plaintiff proposes to set forth in a fifth amended complaint—would be a “facial” substantive due process challenge and a damages claim premised on the Court’s procedural due process order. Either way, Defendants intend to move to dismiss Plaintiff’s proposed substantive due process claim (however formulated) and his damages claim.

However, insofar as Plaintiff proposes to reserve his right to decide whether he should avail himself of DHS TRIP, the Court should require Plaintiff to make that decision before litigating any other aspect of this case for reasons of efficiency and judicial economy. Allowing Plaintiff to proceed with certain parts of certain claims now, while reserving other parts of those claims for later, after he goes through DHS TRIP, would mean unnecessarily bifurcating the proceeding. In other words, the parties would be required to litigate, and the Court required to decide, certain aspects of procedural due process and substantive due process now, only to then litigate and decide similar aspects of those same claims again if and when Plaintiff decides to go through DHS TRIP. Such piecemeal litigation is inefficient and does not serve the Court’s or the parties’ interests in judicial economy. The Court should decline Plaintiff’s invitation to move forward with any additional claims – including any related discovery requests – until Plaintiff has clarified the proper scope of this litigation by deciding whether to go through DHS TRIP.

Remaining Claims

Procedural Due Process (Counts II & III)

The Court granted summary judgment in Plaintiff’s favor with respect to Plaintiff’s claims regarding the previous version of DHS TRIP, which is no longer available, and the APA claim insofar as it was coextensive with this constitutional claim. *See* Dkt. No. 189. The Court explained that the process currently available appeared facially adequate but, because the record with regard to the revised redress process is incomplete, Plaintiff must avail himself of that

process in order to challenge it. Accordingly, unless Plaintiff goes through DHS TRIP, district court resolution of this claim is complete.

Plaintiff's position on procedural due process claim is difficult to decipher. He appears to be seeking guidance from the Court as to whether the completion of DHS TRIP is a "jurisdictional event" requiring the case to be transferred to the Court of Appeals. Depending on the Court's answer, Plaintiff requests that his procedural due process claim be either bifurcated or stayed. In other words, Plaintiff would be willing to ripen his procedural due process claim by going through DHS TRIP, but only if the Court can assure him that doing so would not result in a transfer of his claim to the Court of Appeals. Whatever the jurisdictional consequences of completing DHS TRIP, it is inconceivable that bifurcating the litigation on these terms could serve the interests of judicial economy. Rather, such jurisdictional consequences should be addressed only if and when Plaintiff goes through DHS TRIP. Of course, if the Court would like additional briefing on the matter now, the Government stands ready to assist.

Right to Re-Enter and the APA (Counts I & II)

The Court previously dismissed Count I of the Complaint, the "right to re-enter" claim, insofar as it applied to a past denial of boarding. *See* ECF No. 70 at 27. The Court also found that Plaintiff's "APA claims" are coextensive with his constitutional claims. *Id.* at 31.

To the extent that Plaintiff wishes to pursue a substantive due process claim—either on the basis of the current complaint or a newly amended complaint—Defendants intend to file a motion to dismiss any such claim on several grounds. Among other arguments for dismissal, as Defendants previously explained, Plaintiff has not pled a "substantive due process" claim, let alone a facial substantive due process claim, in any of his previous five complaints. *See* Dkt. No. 129 at 8-16. Also, Plaintiff has not alleged the deprivation of a "fundamental right" or any other

cognizable violation of “substantive due process,” *see* Dkt. No. 129, at 14-16, and such a defect would apply regardless of whether his claim was facial or as-applied. If Mr. Mohamed were permitted to amend his complaint to make a “facial” substantive due process claim, *i.e.*, to argue that the mere *existence* of the No Fly List is unconstitutional, Defendants would also move to dismiss that claim. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (“[A] facial challenge must fail where the statute has a ‘plainly legitimate sweep.’”); *United States v. Moore*, 666 F.3d 313, 318-319 (4th Cir. 2012) (“Under the well-recognized standard for assessing a facial challenge to the constitutionality of a statute, the Supreme Court has long declared that a statute cannot be held unconstitutional if it has constitutional application.”).⁴ Moreover, insofar as Mr. Mohamed currently has a “right to re-enter” claim at all, he lacks standing to pursue that claim because he has never been denied a right to reenter and has not alleged or established that such a denial is imminent.

Moreover, whatever Plaintiff decides with regard to DHS TRIP, it remains the case that, if Plaintiff brings a claim regarding the specific reasons why he may be on the No Fly List, litigation of a such a claim could still risk or require the disclosure of information subject to the state secrets privilege and be subject to dismissal on that ground as well. It is also possible that litigation of this claim may necessitate a broader invocation of the state secrets privilege to cover additional categories of information, especially if Plaintiff seeks discovery on this claim.

Damages Claim

⁴ In light of how Plaintiff frames his substantive due process claim above and in the proposed amended complaint, the Court may wish to revisit its prior ruling on whether Plaintiff should exhaust the revised DHS administrative process before proceeding with such a claim, as completion of DHS TRIP may bear on the framing and litigation of a substantive due process claim.

Plaintiff has wholly neglected to pursue these claims for over four years. The claims against unnamed TSC agents were first asserted in Plaintiff's second amended complaint, dated May 24, 2011. Dkt No. 21. To date, Plaintiff has served no unnamed TSC agents (and the deadline for doing so has long passed, Fed. R. Civ. P. 4(m)), and they are not before this Court and not represented by undersigned counsel for Defendants sued in their official capacity. Identifying and serving defendants sued in their individual capacity is Plaintiff's responsibility. It also remains unclear exactly what claims Plaintiff is purporting to make against the unnamed TSC agents and what the legal basis for a damages claim could be. For these reasons and likely others, the individual-capacity Defendants would separately move to dismiss any claims against them if Plaintiff were permitted to proceed on these now-stale claims and properly served them.

Motion to Reconsider

Defendants expect to oppose Plaintiff's proposed motion to reconsider the Court's procedural due process ruling. Plaintiff appears to be arguing that the Court somehow neglected to adjudicate his due process challenge to the criteria for inclusion on the No Fly List. But this issue was fully briefed on summary judgment, and the fact that it did not figure into the Court's due process analysis is hardly reason to assume it was overlooked. Any motion to reconsider this argument would be baseless. Moreover, as explained, it would not serve judicial economy to hold the case in abeyance while the Court reconsiders the jurisdictional consequences of Plaintiff's completing DHS TRIP. That issue should be addressed if and when Plaintiff avails himself of the redress process.

Motion for Leave to Amend

Defendants cannot take a firm position on Plaintiff's proposed motion for leave to amend his complaint at this time without seeing the proposed amended complaint. Defendants note,

however, that this would be the sixth iteration of Plaintiff's complaint over the course of more than four years. Although Rule 15 instructs the Court to "freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), this generally liberal standard is not "without limits." *See, e.g., Gavin v. AT&T Corp.*, 543 F. Supp. 885, 898-99 (N.D. Ill. 2008). At some point, if he has still not articulated a claim, this exercise should come to an end.

The Fourth Circuit has held that leave to amend may be denied "for reasons 'such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to opposing party by virtue of the allowance of the amendment, futility of amendment, etc.'" *Glaxer v. Enzo Biochem, Inc.*, 464 F.3d 474, 480 (4th Cir. 2006) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Here, Plaintiff has repeatedly delayed in amending his complaint to cure purported deficiencies. With regard to his proposed amendments concerning a substantive due process claim, in September 2014, Plaintiff promised to amend his complaint "to clarify the scope of his challenge" and "the legal theory that [he] is pursuing," ECF No. 137 at 5, yet he filed nothing. With regard to his proposed amendments concerning the unnamed TSC agents, Plaintiff first asserted these claims in his May 2011 second amended complaint (Dkt. No. 21); made no attempt to amend these claims in either his August 2013 third amended complaint (Dkt. No. 54) or his March 2014 fourth amended complaint (Dkt. No. 85); and has not pursued or otherwise taken action to advance these claims. For these reasons, among others, Defendants expect to oppose this motion.

Discovery

Discovery in this matter is long since closed, and Plaintiff should not be permitted to pursue additional discovery. Alternatively, Defendants propose that the Court resolve Plaintiff's

proposed motion for leave to amend his complaint first, and, if granted, that the Court then allow Defendants to file their motion to dismiss the amended complaint. Plaintiff's motion for discovery would be appropriate only if any claim survives a motion to dismiss, and only on the basis of whatever claims are remaining. This is especially so where Plaintiff intends to seek far-reaching discovery on broad policy questions, which may include information subject to the state secrets privilege. Such a course risks unnecessary litigation over discovery.

Rule 54(b) Partial Final Judgement

Neither party seeks a partial final judgment of the Court's decision and Order of July 16, 2015 pursuant to Fed. R. Civ. P. 54(b).

Next Steps:

The parties jointly propose the following schedule for briefing Plaintiff's proposed motions.

Plaintiff will file the following by August 12, 2015:

- (1) Motion for Leave to Conduct Discovery - regarding the procedural due process damages claim and the portions of the substantive due process claim that do not regard why Gulet was placed on the No Fly List.
- (2) Motion to Reconsider – regarding the applicability of 46110, the jurisdictional implications of a DHS TRIP determination letter, and whether the No Fly List's inclusion standards provide an independent basis for finding a procedural due process violation.
- (3) Motion for Leave to File Fifth Amended Complaint – clarifying the legal theory guiding Mohamed's substantive due process claim.

Defendants will respond by September 11, 2015.

Plaintiff will submit any reply memorandum by September 18, 2015.

The parties will agree to waive oral argument on the motion to amend.

The parties disagree about appropriate next steps after a motion to amend is resolved.

Regardless of whether there is another amended complaint, Defendants (sued in their official capacities) propose to move to dismiss the remaining claims prior to completion of any additional discovery, and request 30 days after resolution of Plaintiff's motion to amend the complaint to file a motion to dismiss. This proposal is without prejudice to any defendants sued in their individual capacities, if ultimately named and served, requesting alternative procedures.

Dated: August 7, 2015

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which has sent notification of such filing to all counsel of record.

Dated: August 11, 2015

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