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UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

RAHINAH IBRAHIM, Petitioner, v. DEPARTMENT OF HOMELAND SECURITY, et al., Respondents.	CASE NO. 06-70574 **PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

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INTRODUCTION AND STATEMENT OF FACTS

Petitioner, Rahinah Ibrahim, is a citizen of the country of Malaysia and has received her Doctorate Degree (PhD) in Construction Engineering and Management from Stanford University. She is currently a lecturer at the Faculty of Design and Architecture, Universiti Putra Malaysia, and is an officer of the Malaysian Government. (See Declaration of Rahinah Ibrahim In Support of

Opposition to Respondents' Motion To Dismiss, ("Ibrahim Decl."), served and filed herewith, ¶2.)

On January 2, 2005, Ibrahim was hand-cuffed and arrested at San Francisco International Airport ("SFO"), while attempting to board a flight to Hawaii, on her way to Malaysia. (See Declaration of Marwa Elzankaly In Support of Opposition to Respondents' Motion To Dismiss ("Elzankaly Decl."), served and filed herewith, Exhibit A.) Respondent was taken to the San Francisco police station and held there for some time, without any apparent reason, except that her arrest was related to the Transportation Security Administration's ("TSA") "no-fly list." *Ibid.*

On January 27, 2006, Ibrahim filed a petition for review in this Court, seeking review of the TSA's issuance of the security directives establishing the no-fly list, and more specifically, her apparent, although unclear, placement on the list. Respondents now seek to have this Court dismiss Ibrahim's petition, on the alleged grounds that Ibrahim's claim is untimely and on the grounds that she purportedly has no standing to bring her claims. Respondents base their motion on allegations made in an unverified complaint filed by Ibrahim in the United States District Court, in the Northern District of California, in an action entitled *Ibrahim v. Department of Homeland Security, et al.*, Case No. C 06-0545 (hereafter,

"Northern District complaint.") In the Northern District complaint, Ibrahim alleges the following:

Defendants began implementing the No-Fly List in November, 2001. Today, defendants maintain at least two watch lists of individuals perceived to be threats to aviation security. The "no-fly" list contains names of people which airlines are prohibited from transporting. The "selectee" list contains names of passengers who must go through additional security screening before boarding an aircraft. These two lists collectively are referred to as the "No-Fly List." (Northern District complaint, ¶¶ 32&33.)

Defendants do not inform individuals that they have been placed on the No-Fly List or why they are on the list. Moreover, individuals whose names are not on the list, but whose names are similar to names on the list may also be subjected to detention and/or additional screening. *Ibid.* Until November, 2002, defendants denied the existence of the No-Fly List and until today, defendants have refused to disclose important information regarding the No-Fly List, including the names of individuals on the list. (*Id.* at ¶34; Elzankaly Decl., ¶4, Exh. D.) Ibrahim also alleges on information and belief that defendants occasionally disseminate updated versions of the No-Fly List as attachments to security directives and emergency amendments to commercial airlines in the United States. *Id.* at ¶35.

To date, it has not been made clear to Ibrahim whether she is actually on the "no-fly" list, a "selectee" list, or whether her name simply matches another name on the list. The police report describing the incident states that United Airlines employee, David Nevins, informed the San Francisco Police Department Ibrahim is "on the federal government no-fly list." (Elzankaly Decl., Exh. A.) After being released from the police station, Ibrahim was told her name had been "removed" from the no-fly list. (Northern District complaint, ¶47.) The following day, however, Ibrahim was initially prevented from flying once again. Eventually, Ibrahim was allowed to fly to Malaysia, although with enhanced searches. *Ibid.*

Ibrahim is currently working on establishing a long term relationship with Stanford University in an effort to improve the construction industry in Malaysia, specifically in the architecture field. Ibrahim's work requires that she travel to attend conferences and to conduct study tours in various parts of the world. Her work also requires that she travel to the United States of America to Stanford University, at least once a year. (Ibrahim Decl., ¶3.)

On March 10, 2005, Ibrahim went to the Kuala Lumpur International Airport ("KLIA"), in an attempt to fly back to the United States. (Ibrahim Decl., ¶4.) At that time, Ibrahim believed she had a student visa, valid until September, 2005. *Ibid.* At KLIA, however, Ibrahim was not allowed to board the flight. When she arrived at the ticket counter, the ticketing agent told her she had to wait for him to

get clearance from the United States Embassy. *Ibid.* While she waited, another ticketing agent told her there was a note by her name, instructing airport personnel to call the police and have her arrested. *Ibid.*

On March 24, 2005, Ibrahim submitted an Application for Passenger Identity Verification to the TSA, in an effort to clear her name from the No-Fly list, or at least verify her identity if her name simply matches another name on the list. (Ibrahim Decl., ¶5.) To date, Ibrahim has received no response to her application. *Ibid.* Finally, in April, 2005, Ibrahim received a letter from the United States Embassy in Kuala Lumpur, dated April 14, 2005, stating that Ibrahim's Visa was "revoked", "under Section 212(a)(3)(B) of the Immigration and Nationality Act", by the Department of State on January 31, 2005. (Ibrahim Decl., ¶6, Exh. A.) The letter made clear, however, that this revocation does not mean she may not be eligibile to receive another visa in the future. *Ibid.*

Respondents now seek to have this Court dismiss Ibrahim's petition on the grounds that her claim was not filed within 60 days of the date she had "notice" that her name appeared on the "no-fly list." Yet, Ibrahim has received no "notice" of her status as it relates to the no-fly list. The only thing Ibrahim has received are multiple contradictions of her status, which to date, is still unclear. Respondents further claim that Ibrahim has no standing to file this petition as she has not shown that she still has a visa to come to the United States. Ibrahim's injury, however, is

not limited to her inability to come to the United States. Ibrahim's harm includes her being subjected to physical arrest as a result of her apparent placement on the no-fly list. Such placement is likely to cause her harm in her attempts to fly out of other airports, such as her attempt to fly out of Kuala Lumpur, in March, 2005. Moreover, as will be discussed in detail below, the revocation of Ibrahim's visa appears to be connected to her status with respect to the no-fly list. Finally, the letter revoking Ibrahim's visa makes clear that she is not ineligible to receive a visa in the future and in fact, she is likely to attempt to return to the US in light of her ongoing work with Stanford University. For those reasons and for the reasons set forth below, this Court should deny respondent's motion to dismiss.

LEGAL ARGUMENT

I. IBRAHIM'S PETITION IS TIMELY UNDER 49 U.S.C. §46110(a).

Respondents seek to have this Court dismiss Ibrahim's petition on the grounds that her claim was not filed within 60 days of the date she had "notice" that her name appeared on the "no-fly list" pursuant to 49 U.S.C. §46110(a). That section provides, in part:

> [A] person disclosing a substantial interest in an order issued by the Secretary of Transportation...may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. **The court may allow the petition**

to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

49 U.S.C. 46110(a) (Emphasis added.)

Under this section, a petition for review of an "order" of the Secretary of Transportation must be made within 60 days "after the order is issued" unless there are reasonable grounds for not filing by the 60th day. Respondents argue that Ibrahim's deadline to file her petition began to run when she was arrested at SFO in January, 2005, when she had "notice" that she was on the no-fly list. Yet, respondents provide no evidence that she was given "notice" that was actually on the no-fly list. She has received no letter from the TSA or from any other government official. To the contrary, according to documents received by the Electronic Privacy Information Center ("EPCI"), pursuant to a Freedom of Information Act Request, members of the public are not told whether they are on the no-fly list "for national security reasons." (Elzankaly Decl., ¶5, Exh. D.) Although she was told she was on the no-fly list, she was also later told she was taken off the list. Moreover, she was later allowed to fly, although the documents received by EPIC indicate that an individual on the no-fly list will not be issued a boarding pass or allowed to fly. (Elzankaly Decl., ¶4, Exh. D.) A few months later, Ibrahim was again detained at an airport in Kuala Lumpur. Case law makes clear that in such a situation, a 60 day deadline cannot be properly imposed and

even if the deadline is 60 days from January 2, 2005, Ibrahim has reasonable grounds for not filing her petition within that time period. In *Greater Orlando Aviation Authority v. Federal Aviation Administration* (11th Cir. 1991) 939 F.2d 954, the Court held that the FAA's confusing and contradictory orders regarding whether certain proposed towers constitute an obstruction provided reasonable grounds for petitioner's failure to file its petition within the 60 day time period. *Id.* at 960. Moreover, the Court held that it was not clear whether the Order was even reviewable. *Ibid.* In this case, the Federal Appellate Court's jurisdiction over claims related to the TSA's security directives is currently being litigated before the Courts. In fact, it was not until January, 2006, that this Court stated in *Gilmore v. Gonzales* (9th Cir. 2006) 435 F.3d 1125, that security directives of the TSA requiring airline operators to enforce identification policies are an "order" within the meaning of section 46110(a) and within the jurisdiction of this Court. *Id.* at 1133.

Moreover, Ibrahim filed an application for passenger verification identification to clarify her status, her only administrative remedy. According to the EPIC documents, the TSA is supposed to provide a response to the application, yet Ibrahim has received no such response to date. Ibrahim, having received no notice of her actual status as it relates to the no-fly list, filed this application to clarify her status before seeking relief from this Court. Having received no

response from the TSA, Ibrahim now brings this petition. This is reasonable grounds under *Reder v. Administrator of Federal Aviation Administration* (8th Cir. 1997) 116 F.3d 1261. In that case, petitioner sought review of the denial of his application for a special issue medical certificate to allow him to retain his pilot's license. Petitioner filed his application over a year and a half after the FAA's order was issued, denying his application. The Court held that "Reder's unsuccessful attempt to exhaust administrative remedies...was a reasonable ground for not filing his appeal with this Court by the sixtieth day." *Id.* at 1263. Reder had improperly attempted to seek review of the FAA's order by the National Transportation Safety Board.

Essentially, this is not a case where petitioner received a hearing before the TSA and an Order on that hearing and is now seeking review of that Order. Ibrahim's claim is based, in part, on a violation of her right to Due Process, in part, because the TSA has given her no notice of her placement on the list or her current status with respect to the No-Fly list. Respondents acknowledge that no such notice is given because of national security reasons, yet they claim Ibrahim's claim is untimely as she purportedly has not filed her petition within 60 days of receiving "notice" she is on the No-Fly list. The fact of the matter is that, to date, Ibrahim's status is unclear. Ibrahim has attempted to clarify her status but has received no response from respondents. Ibrahim cannot reasonably be expected to file her

petition for review immediately after being arrested at SFO, with no clear explanation of why she was arrested or what her status is on the No-Fly list. This Court should find reasonable grounds for not filing within 60 days of the date Ibrahim was arrested at SFO.

II. IBRAHIM HAS STANDING TO SEEK REVIEW OF THE SECURITY DIRECTIVES OF THE TRANSPORTATION SECURITY ADMINISTRATION.

To establish Article III standing, Ibrahim must show "(1) she has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Wilbur v. Locke*, 423 F.3d 1101, 1107 (9th Cir. 2005); *see also International Broth. of Teamsters v. Transportation Sec. Admin.*, 429 F.3d 1130, 1133 (D.C. Cir. 2005) (Plaintiff must show "three elements: (1) injury-in-fact, (2) causation, and (3) redressability."). Ibrahim meets each criterion.

Despite what respondents "assume," Ibrahim's inclusion on the "No-Fly" list, and respondents' refusal to provide a mechanism to safeguard her Due Process rights, have caused and continue to cause Ibrahim particularized, redressible injury. By placing Ibrahim on the "No-Fly" list without informing her, and without providing any due process either before or after she learned of her inclusion on the

list, respondents have subjected Ibrahim to unnecessary and undeserved arrest, incarceration, stigma, embarrassment, harassment, and delay. The threat of each of these harms recurring remains unabated to this day, should Ibrahim, a scholar associated with Stanford University, attempt to board a United States airline. Indeed, as recently as March 10, 2005, a ticket agent in Malaysia informed Ibrahim that next to her name on the No-Fly list was the instruction to arrest her at once. Ibrahim Dec. ¶ 4. Such harm is constitutionally cognizable and distinct from the overly-generalized "travel" harm alleged by respondents.

Respondents next argue that Ibrahim has not established that she holds a visa to enter this country and further claims that the absence of such a showing vitiates the redressability prong of the Article III standing analysis. But Ibrahim "need not demonstrate that there is a 'guarantee' that (her) injuries will be redressed by a favorable decision.... [P]laintiffs 'must show only that a favorable decision is *likely* to redress [their injuries], not that a favorable decision *will inevitably* redress [their injuries].' *Wilbur v. Locke*, 423 F.3d 1101, 1108 (9th Cir. 2005) (emphasis original); *Graham v. Federal Emergency Management Agency*, 149 F.3d 997, 1003 (9th Cir.1998). Instead, "plaintiffs lack standing primarily when the ... agency is not before the court, or when redressability 'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or

predict.'" *Graham*, 149 F.3d at 1003 (citation omitted). Respondents, the ones that has caused Ibrahim cognizable harm, are before this court. To Ibrahim's knowledge, no other government agency controls the No-Fly list. Respondents have not demonstrated otherwise.

As respondents are no doubt aware, the United States Embassy in Malaysia revoked Ibrahim's visa on Aril 14, 2005. In a two-paragraph letter, the Consul stated that Ibrahim's visa was revoked under "Section 212(a)(3)(B) of the Immigration and Nationality Act" and that the "revocation of [her] visa does not necessarily indicate that [she] is ineligible to receive a U.S. visa in future [sic]." Thus, the only reason given Ibrahim for the revocation of her visa was a citation to Section 212, entitled "Terrorist Activities." 8 U.S.C. § 1182(a)(3)(B). Given the nebulous reference to terrorism in the letter, and secretive nature of the proceedings that lead to the revocation, it is likely that Ibrahim's visa revocation was a direct result of respondents' apparent placement of her name on the No-Fly list. Respondents should not now be allowed to benefit from its failure to provide Ibrahim with notice and an opportunity to be heard by claiming that its continuing wrongful acts should deny Ibrahim a forum to redress her grievances.

In any event, the revocation does not affect the redressability of Ibrahim's claims. While the lack of a visa impedes Ibrahim's access to the United States, it does not subject her to the same types of harm – unwarranted arrest, incarceration,

stigma, embarrassment, harassment, and delay – that placing her name on the No-Fly list has caused. Each of these harms would be redressed by a favorable result in these proceedings. Moreover, as the Consul has stated, the revocation of Ibrahim's visa does not indicate that she is ineligible to receive a U.S. visa in the future. Thus, while the revocation of Ibrahim's visa constitutes an additional harm, it does not render her wrongful placement on the No-Fly list non-redressible. Ibrahim's petition should be heard.

III. IF THE COURT FINDS THAT VENUE IS IMPROPER, THIS COURT MAY TRANSFER THIS PETITION TO THE DISTRICT OF COLUMBIA

Respondents argue this Court should dismiss this action because venue is not proper under 49 U.S.C. 46110(a) because Ibrahim does not reside in this district. This section provides that venue is proper either in the "United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business." 49 U.S.C. 46110(a). Respondents argue that because Ibrahim currently lives in Malaysia, venue is improper in the 9th Circuit.

Under 28 U.S.C. 1631, this Court may transfer this action to the proper Court, where the Court finds that it is "in the interest of justice" to do so. If the Court finds that venue is proper in the District of Columbia, this Court should transfer this action to the District of Columbia pursuant to 28 U.S.C. section 1631.

Respondents argue that this Court should not transfer the action because "no court has jurisdiction" as Ibrahim's claim is allegedly untimely and she has no standing to bring her claim. As detailed above, however, Ibrahim's claim is timely and she has Article III standing to bring this petition. Moreover, it is "in the interest of justice" to transfer Ibrahim's petition. In *Gilmore v. Gonzales, supra,* this Court held that it was in the interest of justice to transfer Gilmore's action from the Federal Northern District to the 9th Circuit Court of Appeals. The Court reasoned that "Gilmore's claims call into question the propriety of the Government's airline passenger identification policy and implicate the rights of millions of travelers who are affected by the policy. In these unique circumstances, it is of the utmost importance that we resolve Gilmore's claims without further delay." *Gilmore v. Gonzales, supra,* 435 F.3d at 1134. Similarly, Ibrahim's claim not only deals with her constitutional right to due process and freedom from unreasonable searches and seizures, her petition calls into question the propriety of the Government's adoption and implementation of the No-Fly list, which has affected thousands of passengers and can implicate the rights of millions of travelers affected by this policy. For those reasons, this Court should transfer this action to the District of Columbia should it find that venue is improper in the 9th Circuit.

IV. RESPONDENTS' MOTION TO DISMISS IS PREMATURE AS IT IS BASED ON INADMISSIBLE HEARSAY EVIDENCE THAT IS NOT PROPERLY BEFORE THE COURT.

In support of respondents' arguments that this Court lacks jurisdiction and petitioner lacks standing, respondents rely almost entirely upon allegations made in the unverified Northern District complaint. (See Motion to Dismiss for Lack of Jurisdiction and to Stay Briefing Schedule (hereafter, "Motion to Dismiss"), pp.2-7 and Attachment 2 filed therewith.) Respondents' reliance on the allegations in the Northern District complaint is improper.

First, allegations in a complaint are not admissible evidence unless verified by the pleader, and even then, only facts within the pleader's personal knowledge are admissible. *See, e.g., Schroeder v. McDonald*, 55 F.3d 454, 460 (9th Cir. 1995) (concluding that plaintiff's verified complaint constituted an opposing affidavit on a Rule 56 motion, because it was based on personal knowledge of admissible evidence). Ibrahim's Northern District complaint has not been verified, as verification is generally not required in federal court. (See Attachment 2 to Motion to Dismiss; Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial (The Rutter Group 2006) ¶¶ 8:174-75.) Accordingly, it cannot function as an affidavit, and the allegations contained therein are

inadmissible hearsay. Respondents themselves acknowledge that the Northern District complaint is not currently before this Court. (Motion to Dismiss, p. 2.)

Moreover, the Northern District complaint is by no means a complete rendition of the facts surrounding petitioner's claims in that action. The Federal Rules of Civil Procedure allow for "notice pleadings" which does not require Ibrahim to set forth a detailed factual basis of her claims. *Conley v. Gibson* (1957) 355 U.S. 41, 47-48.

Respondents have presented no other evidence in support of their motion to dismiss. The record in this case has not been filed, and therefore may not support respondents' motion.[1] Because respondents' motion is not based upon admissible evidence, it is premature, and should be denied. At the very least, this Court should allow the parties to fully brief these issues in their Opening and Responding briefs, after a complete record has been filed with the Court.

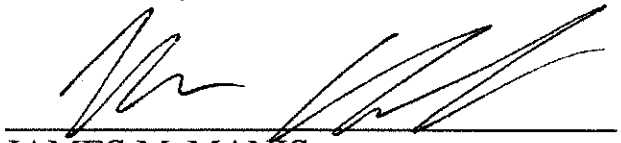
[1] In addition, respondents have failed to comply with Federal Rules of Appellate Procedure, Rule 27(a)(2)(B)(iii), which requires that a motion seeking substantive relief include a copy of the agency's decision as a separate exhibit. Because respondents' motion seeks substantive relief—the dismissal of the petition—the relevant Security Directives should have been provided.

CONCLUSION

For the reasons set forth herein, this Court should deny respondents' motion to dismiss.

Dated: April 11, 2006

McMANIS, FAULKNER & MORGAN



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