UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED, PLAINTIFF, v. ERIC H. HOLDER, *ET AL.*, DEFENDANTS.	Hon. Judge Trenga Case No. 1:11-CV-00050

PLAINTIFF'S MOTION TO RECONSIDER THE COURT'S JULY 16TH ORDER REGARDING 49 U.S.C. § 46110 AND ASPECTS OF ITS PROCEDURAL DUE PROCESS HOLDING

Plaintiff respectfully moves for reconsideration[1] of parts of the Court's Order dated July 16, 2015. *See* Dkt. 189 ("Order"). In its opinion, the Court held that, if Mohamed completed the newly revised DHS TRIP, the process would "allow the Court of Appeals for the Fourth Circuit to Consider whether it has appropriate subject matter jurisdiction pursuant to 49 U.S.C. § 46110" and that the jurisdictional reach of the statute should be determined, not by this Court, but "decided in the first instance by the Fourth Circuit upon review of a DHS TRIP decision." Dkt. 189, 27. Furthermore, Mohamed respectfully requests that this Court rule on the specific issue of whether

[1] In the alternative, Plaintiff respectfully requests clarification of the Court's Order insofar as the jurisdictional consequences of completing DHS TRIP remain ambiguous and are relevant to Mohamed's decision to utilize DHS TRIP. The Order appears to indicate that the completion of DHS TRIP would result in a TSA determination letter which would vest jurisdiction in the Fourth Circuit. Because the jurisdictional reach of 49 USC § 46110 is the issue for which the parties previously appeared before the Fourth Circuit, to the extent that this Court does not grant reconsideration, he respectfully requests clarification as to whether this Court's order held that the completion of DHS TRIP is an event that strips it of jurisdiction to hear either all or a subset of Mohamed's claims.

the No Fly List's inclusion standards[2]—a topic that has figured prominently in this Court's previous opinions—furnish an independent basis for Mohamed's procedural due process claim. As even Defendants noted, the constitutionality of the No Fly List's inclusion standards were "fully briefed on summary judgment" though this issue "did not figure into the Court's due process analysis." Dkt. 191, 10. Because of the complexity of this case and the inevitability of appellate review, Mohamed believes that this litigation would benefit from the Court articulating a specific holding that regards the No Fly List's inclusion standards.

Though reconsideration is generally an issue within the discretion of the district court, it is not intended to be a tool to "merely…reargue a previous claim." *United States. V. Smithfield Foods, Inc.*, 969 F. Supp. 975, 977 (E.D. Va. 1997). Rather, reconsideration may be appropriate when a court has "misapprehended a party's position or…applicable law." *Madison River Mgmt. Co. v. Business Mgmt. Software Corp.* 402 F. Supp. 2d 617, 619 (M.D.N.C. 2005). In this case, Mohamed respectfully believes that the Court's Order would have him, upon completing DHS TRIP, litigate in the Fourth Circuit the identical issues that were decided in 2013. Additionally, to the extent that the Court's Order did not address Mohamed's arguments regarding the constitutional adequacy of the No Fly List's inclusion standards, Plaintiff respectfully suggests the possibility that the Court may have misapprehended his procedural due process position. For these reasons, Mohamed requests reconsideration.

I. The Fourth Circuit's controlling interpretation of 46110 is textual and not based on the specific procedures of DHS TRIP or whether Mohamed has completed it.

When the Fourth Circuit granted Mohamed's Motion to Remand, it did so explicitly on the basis of its interpretation of the Congressional intent behind 49 USC § 46110. Citing the Supreme

[2] Because the government has not revised these inclusion standards, they provide a single basis to find both the original and the revised DHS TRIP process unconstitutional.

Court's decision in *Elgin v. Dep't of the Treasury,* the Fourth Circuit did not utilize the "inescapably intertwined" doctrine that this Court previously relied upon as the basis for its transfer of Mohamed's claims to the Circuit Court. Instead, the Fourth Circuit explained that when "Congress has arguably sought to limit the jurisdiction of the district courts" the inquiry courts must conduct is "whether Congress' intent to preclude district court review of an agency's actions is fairly discernible" from the "text, structure, and purpose of the relevant statute or statutes." Dkt. 86, 3-4, citing *Elgin v. Dep't of the Treasury,* 132 S. Ct. 2126, 2133 (2012). After citing the Congressional directive to TSA to create a redress process and the contents of 46110 itself, the Fourth Circuit held that "we do not fairly discern from either grant of authority a congressional intent to remove such claims from review in the district court." Dkt. 86, 5-6.

The Fourth Circuit's decision was a matter of statutory interpretation, and the revisions to DHS TRIP do not have any bearing on Congress' intent in directing the creation of a redress process. Likewise, if Mohamed were to complete DHS TRIP and receive a determination letter at the end of the process, neither the substantive contents of the letter nor the fact that there is a letter would warrant the Fourth Circuit's reconsideration of its views regarding the Congressional intent from which 46110 emerged.

In short, the Fourth Circuit made clear that 46110 "does not evidence Congress' intent to exclude Mohamed's challenge to past and future restrictions on his ability to travel from consideration in the district court." Dkt. 86, 6. To the extent that this Court's July 16th Order is inconsistent with the Fourth Circuit's holding, Mohamed requests that the Court reconsider its decision.

To the extent that this Court's 46110 holding is predicated on the Court construing Mohamed's procedural due process challenge as a challenge to the policies and procedures of DHS

TRIP that is not the aim of Mohamed's claim. Mohamed has argued and will continue to argue that any redress must come from and be administered by the agency that actually controls who is placed on watch lists. That agency is TSC, not TSA. To the extent that Congress directed TSA to create a redress process[3], it has asked an agency to do something that it cannot do: assess the propriety of No Fly List placements. Mohamed's position is that there is still no post-deprivation process, because a listee can still not ask for redress from the agency responsible for the listing.

II. This Court has previously described the determination letter DHS TRIP issues in a manner that indicates that such letters are not "orders" capable of vesting 46110 jurisdiction in the Fourth Circuit

To the extent that this Court determines that the Fourth Circuit's 46110 holding no longer applies to Mohamed's claims, this Court should consider whether the DHS TRIP determination letter fits the legal definition of an "order" under 46110. This Court previously concluded, in its opinion transferring the case to the Fourth Circuit that the letter TSA sends at the conclusion of DHS TRIP "does not affect a change in legal obligation, which, if at all, is accomplished by the TSC." Dkt. 31, 18. The Court's previous observation means that DHS TRIP determination letters, even under the revised process, do not qualify as "orders" subject to 46110. An agency decision is only a 46110 order if it "imposes an obligation, denies a right, or fixes some legal relationship." *Mace v. Skinner*, 34 F. 3d 854, 857 (9th Cir. 1994). If Mohamed proceeds through DHS TRIP, the

[3] The language Congress used to direct the creation of a redress process makes clear that TSA was only authorized to redress technical misidentification errors rather than substantive placement errors. *See* 49 U.S.C. § 44903(j)(2)(C)(iii). Congress limited the class of individuals who may file a complaint through the redress procedure it directed TSA to create to those whose travel was impacted because of a "determin[ation]" that was made by TSA's "advanced passenger prescreening system," which became known as Secure Flight. *Id.* Congress authorized TSA to provide redress only to these persons, allowing them "to appeal such [a] determination and correct information contained in the system". *Id.* The text, structure of the law, and the fact that Congress issued its directive to TSA, rather than the agency it knew decided who was on or off the No Fly List, demonstrate that the term "determination" is a reference to the matching order executed by TSA's boarding pass print result rather than TSC's placement order. Congress deliberately chose not to authorize the redress Defendants are attempting to embed in DHS TRIP's revisions. But the fact remains that the various courts reviewing the constitutionality of the No Fly List have failed to consider requiring TSC—which is, after all, the agency that imposes the injury on listees—to adhere to constitutionally adequate redress procedures.

legal effect—to the extent that one would result—would be accomplished when TSC conducts the review of his listing, affirming or reversing its prior placement decision. In other words, the substantive legal consequence of completing DHS TRIP is TSC's decision, and TSC makes that decision before it tells TSA what to type in the determination letter that TSA so graciously sends to complainants on TSA letterhead.

Defendants will undoubtedly emphasize that, in their determination letter, they type words that express their opinion that the letter is reviewable in Circuit Court pursuant to 46110. But the determination letter is not reviewable pursuant to 46110 because the government says that it is. It is reviewable only if it constitutes an order and is issued by a 46110 agency. TSA is a 46110 agency, but the determination letter is not an order. It is a stenographic courtesy TSA extends to TSC.

III. Even if this Court finds that completing DHS TRIP would vest the Fourth Circuit with jurisdiction over Mohamed's procedural due process claim, this Court should retain jurisdiction over his substantive due process claim

While the Court's Order does not make specific findings regarding whether the preclusive effect of a DHS TRIP determination letter would be shared by all of Mohamed's claims, because Mohamed's substantive due process claim regards fundamental rights, 46110's standards would be unconstitutional if applied to that claim. This is because the government can only interfere with a fundamental right if the interference is narrowly tailored to a compelling interest. Indeed, administrative remedies for fundamental rights are—as a matter of law—insufficient "no matter what process is provided." *Reno v. Flores*, 507 U.S. 292, 302 (S.Ct. 1993). 46110, however, requires a reviewing court to apply a standard that would transform fundamental rights into something less than a liberty interest. Under 46110, a reviewing court must treat TSA "[f]indings of fact" as "conclusive" so long as those findings are supported "by substantial evidence." 49 USC

§ 46110(c). This standard is inconsistent with the strict scrutiny that distinguishes fundamental rights from lesser liberties.

For this reason, to the extent that the Court's Order regards all of Mohamed's claims, the Court should reconsider to account for the special nature of the fundamental rights implicated by Mohamed's substantive due process claim. And in the event that the Court determines that completing DHS TRIP would trigger 46110 jurisdiction, this Court should hold that the Fourth Circuit's jurisdiction would not extend to Mohamed's substantive due process claims.

IV. This Court should hold that the No Fly List's inclusion standards, which have not been revised, constitute a procedural due process violation.

The Court's Order did not issue a holding that regarded the No Fly List's inclusion standards. Mohamed does not want to waste the Court's time by rehashing what the parties have already briefed. Mohamed does note, however, that this Court has previously focused on the problems posed by the No Fly List's inclusion standards. In its January 22, 2014 Order, the Court assessed the inclusion standards over several pages, noting that there were "substantial issues [] concerning the standards used, or required to be used, to determine whether an American citizen can be banned from flying." Dkt. 70, 17. The Court expressed concern that a "showing of past or ongoing unlawful conduct does not seem to be required, and the level of proof required for inclusion on the No Fly List appears to be far less than that required to obtain" access to other law enforcement tools such as warrants and wiretaps. *Id.* at 19.

Certainly, the No Fly List's standards are relevant to determining whether procedural due process has been provided. For an exaggerated example, the government could not, regardless of the fairness of the procedures deployed and their availability to affected persons, utilize a "leather shoes" standard for No Fly List inclusion—placing everyone with leather shoes on the No Fly List.

Such a standard, by itself, would preclude the fairness that procedural due process is intended to protect. Here, Defendants contentless No Fly List standards allow them to do whatever they would like to do. As this Court has previously explained, "an American citizen can find himself labeled a suspected terrorist because of a "reasonable suspicion" based on a "reasonable suspicion." Dkt. 70, 18. The degree of attenuation from actual criminal conduct allows the government to put whoever they chose on the No Fly List, which explains the nearly 100% approval rate of watch list nominations. For these reasons as well as those articulated in the summary judgment briefing, the Court should find that the inclusion standards, irrespective of the procedures used, create a procedural due process violation.

CONCLUSION

For the reasons articulated above, this Court should grant Mohamed's Motion for Reconsideration and revise its holding regarding 46110 and issue an opinion that resolves the portion of Mohamed's procedural due process claim that is based on the inadequacy of the No Fly List's inclusion standards.

Respectfully submitted,

/s/
GADEIR I. ABBAS
The Law Office of Gadeir Abbas
1155 F Street NW, Suite 1050
Washington, D.C. 20004
Telephone: (720) 251-0425
Fax: (720) 251-0425
Email: gadeir.abbas@gmail.com
Licensed in VA; not in DC –
practice limited to federal matters

Attorney for Plaintiff Gulet Mohamed

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2015, a true and correct copy of the foregoing was served electronically on all parties of record through the U.S. District Court for the Eastern District of Virginia's Electronic Case Filing System (ECF) and that the documents are available on the ECF system.

By:

*/s/*_____

GADEIR I. ABBAS
The Law Office of Gadeir Abbas
1155 F Street NW, Suite 1050
Washington, D.C. 20004
Telephone: (720) 251-0425
Fax: (720) 251-0425
Email: gadeir.abbas@gmail.com
Licensed in VA; not in DC –
practice limited to federal matters