

FILED: May 28, 2013

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-1924
(1:11-cv-00050-AJT-TRJ)

GULET MOHAMED,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General; JANET NAPOLITANO,
Secretary of Department of Homeland Security,

Respondents.

O R D E R

Presently before the court is the respondents' motion to dismiss Gulet Mohamed's petition for review. Mohamed filed a complaint in the district court that was transferred here pursuant to 28 U.S.C. § 1631 (2006) after the district court concluded that this Court has exclusive jurisdiction to consider several of Mohamed's claims.

The respondents assert that the district court correctly found that it lacked jurisdiction and argue that the petition should be dismissed because it fails to comply with Fed. R. App. P. 15(a), and because Mohamed has not exhausted his

available administrative remedies. In a cross motion seeking remand, Mohamed submits that the district court has jurisdiction. In short, the parties agree, albeit on different grounds, that Mohamed's petition for review is not properly before us. Because the district court erred in determining the limits of its jurisdiction, we conclude that transfer of Mohamed's claims to this court was improper. Accordingly, we vacate the district court's order to that effect, and remand the matter to the district court.

Mohamed, a United States citizen and resident of Virginia, initiated the relevant proceedings in January 2011, after he was allegedly barred from a United Airlines flight leaving Kuwait because he is included on the federal government's list of individuals who may not board commercial flights originating from or bound for destinations within the United States ("No-fly list"). Although Mohamed was eventually allowed to return to this country, he claims that he remains on the No-fly list.

Mohamed alleged that the respondents played some role in placing or maintaining him on the No-fly list, which burdens his right to travel and to return to the United States from

trips abroad. Mohamed further alleges that he has no meaningful opportunity to contest this classification.¹

Mohamed sought an injunction requiring the respondents to 1) remove him from federal government watch lists, 2) inform him of the grounds for his inclusion on the No-fly list, and 3) provide him an opportunity to rebut the "government's charges." Mohamed also sought unspecified monetary damages, and reimbursement for his litigation costs, as well as a declaration that the respondents violated his rights.

The district court held that it lacked jurisdiction to consider Mohamed's challenge to past or future restrictions on his ability to travel because such claims are "inescapably intertwined" with the review of TSA orders, over which this Court has exclusive jurisdiction under 49 U.S.C. § 46110 (2006). Blitz v. Napolitano, 700 F.3d 733, 735-36 (4th Cir. 2012); see e.g., Ligon v. LaHood, 614 F.3d 150, 154-57 (5th Cir. 2010) (discussing the "inescapably intertwined" doctrine in reference to 49 U.S.C. § 46110 and collecting cases), cert. denied, 131 S. Ct. 3063 (2011). In reaching this conclusion, however, the district court inappropriately truncated the analysis this Court

¹ We note that a copy of Mohamed's initial complaint has been transferred to this court as his petition for review. The district court, however, purported to transfer claims raised in Mohamed's second amended complaint. So as not to further delay the disposition of this matter, we consider Mohamed's claims as stated in the final version of his complaint.

has found appropriate in situations, such as this, in which Congress has arguably sought to limit the jurisdiction of the district courts by channeling review of an agency's actions to an administrative review process or the circuit courts.

The Supreme Court recently reiterated that the proper inquiry examines 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. Elgin v. Dep't of the Treasury, 132 S. Ct. 2126, 2133 (2012); see Blitz, 700 F.3d at 740 (applying Elgin and holding that § 46110 deprived district court of jurisdiction over constitutional challenge to TSA search procedures).

The statutory review scheme at issue here involves a general congressional directive that the DHS and the TSA establish a "timely and fair process" for aggrieved travelers to contest their identification as a threat to air travel and "correct any erroneous information." 49 U.S.C. §§ 44903(j)(2)(C)(iii),(G)(i) (2006); 49 U.S.C. § 44926(a) (2006). Additionally, 49 U.S.C. § 46110 gives this Court broad discretion to "affirm, amend, modify, or set aside any part" of a TSA or DHS order and direct further proceedings by either agency. Considering the unique character of Mohamed's claims, we do not fairly discern from either grant of authority a

congressional intent to remove such claims from review in the district court.

First, this is not a situation in which Congress has "painstaking[ly]" constructed an administrative process for resolving claims like Mohamed's, which challenge the inter-agency actions of the TSC and the TSA. See Elgin, 132 S. Ct. at 2133-34 (elaborate procedural and remedial framework indicates Congress' intent to limit district court jurisdiction); Nat'l Taxpayers Union v. United States Soc. Sec. Admin., 376 F.3d 239, 242 (4th Cir. 2004) (statutory provision of various procedural protections during administrative review process evidenced Congress' intent to preclude district court jurisdiction).

Further, as the Ninth Circuit determined when considering its jurisdiction under 49 U.S.C. § 46110 and claims indistinguishable from those at issue here, resolving substantive and procedural due process challenges to an individual's inclusion on the No-fly list necessarily requires scrutiny of both the TSC's and the TSA's actions, and, should a remedy be required, it will likely involve both agencies. Latif v. Holder, 686 F.3d 1122, 1127-29 (9th Cir. 2012). Although 49 U.S.C. § 46110 gives us broad powers of review over orders of the TSA, it does not give us similar independent authority over the TSC. Moreover, the efficacy of our review is limited by our inability to directly review the TSC's actions,

direct the agency to develop necessary facts or evidence, or compel its compliance with any remedy we might fashion. Elgin, 132 S. Ct. at 2138; Nat'l Taxpayers Union, 376 F.3d at 243-44. Thus, Mohamed's claims are readily distinguishable from those we recently considered in Blitz.

We therefore conclude 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 and, consequently, that transfer under 28 U.S.C. § 1631 was improper. We grant Mohamed's motion to remand, vacate the portion of the district court's order transferring the claims, and remand for proceedings consistent with this order.² We deny as moot the respondents' motion to dismiss.

Entered at the direction of the panel: Judge Gregory, Judge Davis, and Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

² By this disposition, we offer no opinion as to whether the district court's jurisdiction is otherwise proper or regarding the merits of Mohamed's claims, leaving those issues to be considered in the first instance on remand.