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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al.,	Case 3:10-cv-00750-BR
Plaintiffs, v. LORETTA E. LYNCH, et al., *Defendants*.	**DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF PERSAUD'S MOTION FOR SUMMARY JUDGMENT** **UNREDACTED VERSION AUTHORIZED TO BE FILED UNDER SEAL**

DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF PERSAUD'S MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Defendants respectfully submit this reply memorandum in support of their motion for partial summary judgment with respect to Plaintiff Stephen Persaud. As explained in the Government's opening brief, the key inquiry for the Court is whether the revised DHS TRIP process that was applied to Mr. Persaud is, "in the generality of cases," reasonably calculated to provide covered U.S. persons with a meaningful opportunity to contest their inclusion on the No Fly List. Assuming the Court concludes that it is, the only question remaining with respect to Mr. Persaud is whether he in fact received the benefit of that process.

With respect to that question, the Government has provided Mr. Persaud with his status on the No Fly List, the reason for which he was listed, and an unclassified summary of information supporting his No Fly List status, to the extent feasible without unduly harming national security. The Government has concluded that Mr. Persaud poses a continuing threat to civil aviation or national security, and that he satisfies the applicable criteria, in part because [redacted] Although Mr. Persaud may take issue with the Government's substantive determination to place him on the No Fly List, he has no plausible argument that he received anything short of the complete process when he sought redress with DHS TRIP. The Government's redress procedures provided him sufficient notice regarding the reasons for his placement on the No Fly List, and he had a meaningful opportunity to be heard and to rebut those reasons if he so desired. DHS TRIP, as

applied to Mr. Persaud, fully satisfies the requirements of due process. The Court should grant Defendants' motion for summary judgment.

ARGUMENT

I. Plaintiffs' Arguments About Error Rates Are Misplaced

Echoing arguments made in Plaintiffs' consolidated brief, Mr. Persaud faults the Government for not incorporating scientific methods in its decision-making process and contends that the predictive judgments underlying his placement on the No Fly List amount to little more than "guessing" at the possibility that he may one day commit an act of terrorism. Persaud Opp. at 2. As a preliminary matter, this line of argument is best reserved for resolution on the parties' consolidated briefs. As the Government has argued, the watchlisting system is reliable and consistent with due process without the benefit of a scientific model, and Mr. Persaud has no claim for special treatment. The Court is referred to the Government's consolidated reply brief for further discussion of this issue. *See* Defs.' Summ. J. Reply at Parts I and II.

Plaintiff otherwise tries to bootstrap the putative expert analysis into his substantive arguments about the merits of his listing by claiming that Defendants "ignored [his] statements that he would also testify that he 'has no intention of engaging in, or providing support for, violent unlawful activity anywhere in the world.'" Persaud Opp. at 3 (quoting Persaud Response Letter, ECF No. 183 at 6). But this argument is both irrelevant and wrong. Mr. Persaud's arguments about how Defendants considered a self-serving statement disavowing "violent unlawful activity" do not support a claim that he has not received inadequate process. Mr. Persaud's challenge to the reason for his placement on the No Fly List does not address or support his due process claim. The possibility of alternative interpretations of facts, many of which Mr. Persaud does not fully engage, does not mean that the Government acted

unreasonably or that the process was unfair. Indeed, it does not suggest anything at all about the process, which is the only question currently before the Court.

The notice letter provided to Mr. Persaud provided him notice of the subject matter of the agency's concerns. *See Al Haramain Islamic Found. Inc. v. Dep't of Treasury,* 686 F.3d 965, 982-83 (9th Cir. 2012) ("*AHIF*") (discussing the utility of describing the "subject matter" of the agency's concerns). Accordingly, Mr. Persaud need not "guess" as to the basis for his listing and could respond, for example, by refuting the Government's information that [REDACTED] It is plain that Mr. Persaud understands the allegations against him and had a meaningful opportunity to submit a response.

The examples of "error" Plaintiff cites are not procedural error and are not tied to the problems alleged by the Plaintiffs' declarants. For example, Mr. Persaud argues that [REDACTED] determination that Mr. Persaud may be an "individual who represents a threat of engaging in or conducting a violent act of terrorism and who is operationally capable of doing so."[1]

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[1] [REDACTED]

This particular factor also does not illustrate the so-called "high risk of error" described by Plaintiffs' putative experts, who have not opined on any of the specific listing determinations. For example, Plaintiffs' declarants do not address or show how statistical modeling would impact the Government's assessment of the particular facts and circumstances concerning Mr. Persaud. Moreover, there is no reason to believe that Plaintiffs' alleged "errors" show any "cognitive bias." Indeed, the record shows that Defendants are in fact aware of Mr. Persaud's disagreement with the Government's conclusion, because the Government specifically considered the submissions of Mr. Persaud which made these contentions. *See* Final Decision and Order Regarding Persaud, dated Jan. 28, 2015 at 2.[2] Plaintiff's disagreement with the substantive conclusions of the Government does not demonstrate substantive or procedural error.

II. Plaintiff's Vagueness Argument Is Baseless.

As discussed in Defendants' main brief, Mr. Persaud cannot demonstrate that the No Fly List criteria are impermissibly vague because risk-based criteria are not inherently vague. *See* Defs.' Summ. J. Reply at Part II. The Government has found that there is a reasonable basis to believe that Mr. Persaud is a known or suspected terrorist who represents a threat to civil aviation or national security. The Government made that determination by applying a clear and specific No Fly List criterion to Mr. Persaud's conduct and after considering his response to the reasons the Government provided. *See* Dkt. No. 244, Defs' Persaud Mem. at 10-11. Indeed, his conduct as described in the notice letter fits within the plainest possible interpretation of the criterion applied to him – that he represents a threat of engaging in or conducting a violent act of terrorism and is operationally capable of doing so. The Government has a reasonable basis to

[2] Plaintiff improperly relies on the absence of criminal charges as evidence that there is no "factual basis" for the Government's conclusions. The exercise of prosecutorial discretion, however, depends on numerous factors.

believe that [redacted]

[redacted] Moreover, because Mr. Persaud engaged in conduct that is "clearly proscribed" by the No Fly List criteria, he cannot sustain a vagueness challenge to the criteria based on its hypothetical applications. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010).

And it cannot reasonably be maintained that the Government's No Fly List determinations are based merely on Mr. Persaud's "associations" or other First Amendment activity. [redacted]

[redacted]

[redacted] And in any event, the mere fact that speech related activities might be considered does not render the criteria impermissible. *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 489 (1993) (finding that even protected speech can appropriately be evidence of proscribed actions); *Virginia v. Hicks*, 539 U.S. 113, 124 (2003) ("[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech."); *Reichle v. Howards*, 132 S. Ct. 2088, 2095 (2012) (an officer "may decide to arrest the suspect because his speech … suggests a potential threat"); *cf. Wayte v. United States*, 470 U.S. 598, 612-613 (1985) (recognizing that letter of protest written to Secret Service can be relevant "evidence of the nonregistrant's intent not to comply," an element of the crime).

III. The Revised DHS TRIP Process Provides Meaningful Notice And An Opportunity To Be Heard.

As described in Defendants' consolidated reply brief, the revised DHS TRIP process comports with the requirements of due process as set forth in the Court's order of June 24, 2014, and the procedures were properly applied to Mr. Persaud. *See* Defs. Summ. J. Reply at Part III. Because Mr. Persaud received the benefit of this process, the Court need not entertain his

arguments that he is entitled to additional procedures. Mr. Persaud received sufficient notice of the reasons for his placement on the No Fly List, and was given ample opportunity to challenge the basis for his listing. Mr. Persaud's attempt to seek additional information about sensitive sources and methods should fail.[3] *Id.*; Dkt. No. 244. The Government should not be required to provide sensitive or classified information, the disclosure of which would endanger national security. Defs. Summ. J. Reply at Part III.A; Dkt. No. 244.[4] Moreover, the Government meaningfully considered his response. Dkt. No. 179-3.

Plaintiff also demands a particular form of evidentiary hearing to rebut the agency's prediction of future threats to national security, including a live hearing with the right to cross-examine witnesses and a particularly high burden of proof. But such a hearing is not required by law, would add little value to the process, and reasonably would be expected to harm national security. *See* Defs.' Summ. J. Mem. Part V.C.; Defs.' Summ. J. Reply Part III.

IV. The Harmless Error Doctrine Warrants Judgment For Defendants.

To the extent that the Court finds any error at all in the process provided to Mr. Persaud, he must then show substantial prejudice as a result of the specific error found. *See* Defs.' Summ. J. Reply at V; *see AHIF*, 686 F.3d at 998–90 (conducting a harmless error analysis and finding

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[3] Mr. Persaud also states that he is willing to undergo additional screening. This appears to be related to Plaintiffs' substantive argument that the Government imposed an incorrect security measure on the Plaintiffs because more intrusive screening would account for the Government's interests. As described in Defendants' main brief, the appropriateness of TSA's security screening measures is irrelevant to the due process consideration and beyond the jurisdiction of the Court. *See* Defs.' Summ. J. Reply at Part IV.

[4] Even if the Court agreed that the Government were required to disclose investigative information, this is also a good example of how Plaintiffs' demands for disclosure or a privilege assertion during the administrative process are meritless. *See* Defs.' Summ. J. Reply at Part III.C. Defendants are not required to surrender their privileges during the administrative process. Defendants, of course, object to the disclosure of privileged information in the context of a No Fly List determination, but the Court would need to consider that issue only when and how it became necessary in the context of a substantive review of the decision.

that the failure to consider additional summaries or clear counsel was harmless in that case). Plaintiff has failed to submit any meaningful evidence in the administrative proceeding that could have influenced the outcome, relying instead on general denials about his motives. He had a chance to submit specific information to support these general denials and instead sent only a short letter via counsel, [redacted]

In the absence of any meaningful support for Plaintiff's contention that his inclusion on the No Fly List is in error, there is no basis to infer that the additional procedures sought by Plaintiff would have reduced the risk of erroneous deprivation, and there is no reason to believe that his proposed testimony would alter the Government's reasonable suspicion that he poses a threat of committing a violent act of terrorism.

V. Plaintiff's Claims Under The Administrative Procedure Act Should Be Rejected.

Judgment should also be entered for Defendants on Plaintiff's Administrative Procedure Act Claims for the same reasons set forth in Defendants' consolidated reply brief.

CONCLUSION

For all of the reasons discussed above, and in the Government's opening brief and consolidated reply brief the Court should deny Mr. Persaud's Motion for Summary Judgment and grant Defendants' Motion for Summary Judgment on Plaintiffs' procedural due process and APA claims.

Dated: October 19, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing filing was delivered to all counsel of record via the Court's ECF notification system.

s/ Brigham J. Bowen
Brigham J. Bowen

CERTIFICATE OF COMPLIANCE

This brief complies with the Court's order concerning page length, as it comprises fewer than seven pages, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

s/ Brigham J. Bowen
Brigham J. Bowen