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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

<p>AYMAN LATIF, et al.,</p> <p><i>Plaintiffs,</i></p> <p>v.</p> <p>LORETTA E. LYNCH, et al.,</p> <p><i>Defendants.</i></p>	<p>Case No. 3:10-cv-00750-BR</p>
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**PLAINTIFF MOHAMED SHEIKH ABDIRAHMAN KARIYE'S OPPOSITION TO
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN
SUPPORT OF HIS RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

Defendants admit that they have put Mr. Kariye on the No Fly List based only on their “predictive judgment” that he will engage in “violent acts of terrorism,” even though he has never been charged with, let alone convicted of, a violent crime. Defendants support their decision entirely by reference to their prediction about Mr. Kariye’s future behavior, but offer no evidence whatsoever of the accuracy of their prediction model, any scientific basis or methodology that might justify it, or any indication of the extent to which it might result in errors. In their consolidated brief, Plaintiffs have established the high risk of error that results from Defendants’ predictive model. That high error risk makes it imperative that Mr. Kariye be afforded stringent procedural protections so he can demonstrate to a neutral decision-maker his “innocence” of a crime he will never commit.

Defendants have refused to provide Mr. Kariye these basic due process safeguards: all the reasons for his placement on the No Fly List, the evidence that is the basis for those reasons—including exculpatory evidence—and a live hearing at which he can testify in his own defense and confront the hearsay accusations of his anonymous accusers. Defendants’ revised redress process violates Mr. Kariye’s Fifth Amendment right to procedural due process and the Administrative Procedure Act. Given that he has now been unable to fly anywhere for five years, including for two years since this Court granted the first of his three summary judgment motions, he respectfully asks the Court to order Defendants to provide him the procedural protections he seeks in a process overseen by the Court.

ARGUMENT

I. Defendants’ Revised Redress Process Guarantees a High Risk of Error.

Defendants have placed and retained Mr. Kariye on the No Fly List based on their prediction that he poses a threat of committing an act of violent terrorism. Mem. in Supp. of Defs.’ Cross-Mot. for Summ. J. (“Defs.’ Mem.”), ECF No. 251 at 6, 15, 17, 30; Defs.’ Unredacted Cross-Mot. for Summ. J.: Kariye (“Defs.’ Kariye Mem.”), ECF No. 239 at 2. But

Defendants’ “predictive judgments” are not based on science or any reasoned methodology. *See* Pls.’ Opp. to Defs.’ Cross-Mot. for Partial Summ. J. (“Pls.’ Opp. Mem.”), Section I. Ultimately, Defendants are doing little more than guessing at the possibility that Mr. Kariye might engage in terrorist violence at some point in the future based on alleged statements, associations, and other conduct from long ago. No judicial deference is due to such a guess in his case, for at least three reasons.¹

First, as Plaintiffs’ experts have established, no valid profile or model exists that can accurately and reliably predict the likelihood that a given individual will commit an act of terrorism. Pls.’ Opp. Mem., Section I.A. Thus, as an empirical matter, the “derogatory information” on which Mr. Kariye’s placement on the No Fly List is based—whether revealed to him or not—is not reliably predictive of terrorist violence. There is no dispute that Mr. Kariye has never been charged with, let alone convicted of, a violent act of terrorism, and he has submitted a sworn declaration stating that he does not pose a threat to aviation or national security.² Defendants make no attempt to show that the allegations in the DHS TRIP notification letter to Mr. Kariye—allegations which are incomplete, inaccurate, outdated, and shorn of context—can reliably serve as indicators of future terrorist violence, even if they were true. Nor have Defendants used a control group or taken any other steps to provide scientific rigor for their predictive judgments with respect to Mr. Kariye. Instead, the allegations against Mr. Kariye exemplify Defendants’ failure to utilize even rudimentary science in their predictions.

Second, Defendants’ predictive model necessarily lacks specificity; it cannot be used to predict future acts of terrorist violence without incurring numerous false positives—that is, without wrongly identifying people like Mr. Kariye as potential future terrorists. *See* Pls.’ Opp.

¹ Defendants suggest that there may be other evidence which also supports their listing determination, *see* Kariye Notification Letter, ECF No. 184, Ex. A at 2, but they have refused to provide any additional information, so Mr. Kariye has no way of refuting those reasons and evidence. Defs.’ Kariye Mem., ECF No. 239 at 11 n.5.

² Declaration of Mohamed Sheikh Abdurahman Kariye in Support of Cross-Motion for Summary Judgment, ECF No. 91-4 ¶ 11.

Mem., Section I.A.2(c). For example, even if the allegations in the notification letter as to Mr. Kariye were true (and his response letter demonstrated why those allegations cannot be accepted, *see* Kariye Response Letter, ECF No. 184, Ex. B), it should be plain that many people—

[REDACTED]

[REDACTED] Even assuming that the allegations against Mr. Kariye were accurate, this supposedly “derogatory information” regarding him cannot be used to predict something as rare as terrorist violence.

Finally, Defendants’ response to Mr. Kariye’s anticipated testimony regarding the allegations in the DHS TRIP notification letter illustrate what Plaintiffs’ expert, Dr. Sageman, describes as cognitive inertia—the process by which a label once assigned to a person becomes a default conception that is difficult to dislodge. Sageman Decl. at ¶ 42 (“Applied in the No Fly List context, this inertia would only exacerbate the failure to appreciate changing contextual circumstances.”). Defendants continue to insist that Mr. Kariye must be blacklisted because of

[REDACTED]

[REDACTED] And even that evidence appears to rest entirely on witnesses with obvious credibility problems. *See infra* Section II. If those allegations had a sufficient

factual basis, then the government could have charged Mr. Kariye with very serious criminal conduct many years ago; but it did not. *See* Kariye Response Letter, ECF No. 184, Ex. B at 7. Defendants never explain why they do not credit Mr. Kariye's refutation of those allegations. *See* Defs.' Kariye Mem., ECF No. 239 at 1, 4, 9-10.³ Nor do they explain why they have ignored his proffer of testimony that he "has no intention of engaging in or providing support for any violence against the United States or any U.S. personnel anywhere in the world." Kariye Response Letter, ECF No. 184, Ex. B at 6.

II. Defendants' Revised Redress Process Violates Due Process.

In their brief, Defendants assume that their revised redress process is constitutionally sufficient and assert that the only question as to Mr. Kariye's motion is whether the redress process was fairly applied to him. Defs.' Kariye Mem., ECF No. 239 at 3-4. Defendants then contend Mr. Kariye was afforded adequate process by making selective references to conclusory characterizations built on speculation that they argue Mr. Kariye did not challenge. *Id.* at 5. But Defendants' revised redress process is not constitutionally adequate, and Mr. Kariye's resulting inability to participate meaningfully in the process cannot be proof that it is fair. Contrary to Defendants' premise, the issue is not whether Defendants' revised redress process was fairly applied, but whether it is constitutionally adequate to allow Defendants to maintain Mr. Kariye on the No Fly List.

In light of Plaintiffs' arguments and evidence in their main brief and Mr. Kariye's evidence in his response to Defendants, there can be no doubt that the revised redress process is wholly inadequate, and Mr. Kariye is constitutionally entitled to the additional safeguards he seeks. For all the reasons set forth in Plaintiffs' main brief, Defendants must provide him with the full reasons for placing and retaining him on the No Fly List, the underlying evidence—

³ Contrary to Defendants' characterization of it, ECF No. 239 at 4, Mr. Kariye's objection is not solely to the *outcome* of the redress process, but to the process itself, which does not allow him adequately to challenge the government's predictions of future wrongdoing and present a full defense against them.

including exculpatory evidence—and a live adversarial hearing before a neutral decision maker in which the government bears the burden of proof under a “clear and convincing evidence” standard. *See* Pls.’ Opp. Mem., Section II.⁴

It is undisputed that Defendants’ notification and determination letters to Mr. Kariye did not include all of the *reasons* that Defendants relied upon for placing him on the No Fly List. J. Stmt. Agreed Facts, ECF No. 184 ¶ 6; Kariye Determination Letter, ECF No. 184, Ex. C at 2, 3. Thus, even if Mr. Kariye were able to respond meaningfully to all of the “reasons” in the notification letter—and he cannot do so because Defendants have withheld supporting evidence and exculpatory information, and have refused to grant him an in-person hearing—Defendants have relied on other undisclosed reasons for keeping him on the No Fly List anyway.

Perhaps the clearest example of the need for actual reasons arises from the government’s new denaturalization case against Mr. Kariye, in which it makes factual allegations (in greater detail) that overlap with those in the notification letter, as well as altogether new allegations. *See U.S. v. Kariye*, Case No. 3:15-cv-1343 (D. Or. filed July 20, 2015). Mr. Kariye has no way of knowing whether those additional allegations—or even the additional details provided regarding the allegations in the notification letter—have been relevant to Defendants’ decisions to place and keep him on the No Fly List, and he is left to *guess* at whether he should respond to them in this proceeding. In *Al Haramain Islamic Foundation, Inc. v. United States Dep’t of the Treasury*, the Ninth Circuit explicitly held that the government violated due process when it provided notice of only one of three reasons for designating an organization as a “specially designated global terrorist.” 686 F.3d 965, 985-87 (9th Cir. 2012). Although Defendants ignore

⁴ It is worth noting that Defendants, in their brief, describe a number of the allegations against Mr. Kariye in overstated terms that are unsupported by the disputed facts alleged in the notification letter.

the Ninth Circuit's holding, this Court should not.

Defendants also err in refusing to disclose evidence to Mr. Kariye. The summary information that Defendants provided in the notification letter to him manifestly is not *evidence*, see Pls.' Opp. Mem., Section II.C.2, nor does it enable a meaningful response to, or judicial review of, their determinations. Defendants' use of evidence against Mr. Kariye, without granting him any opportunity to review and contest that evidence, is neither fundamentally fair nor consistent with due process. *See id.*; Pls.' Summ. J. Mem., ECF No. 207 at 11, 17, 18. It further increases the likelihood of error in Defendants' final determinations. Additionally, Mr. Kariye either disputes or does not recall many of the statements and other conduct Defendants accuse him of, and their refusal to allow him to challenge the credibility of the informants on whom their allegations are based, or even to listen to the recordings on which they have relied, speaks volumes about the quality of the evidence against him. *See* Kariye Response Letter, ECF No. 184, Ex. B.

The notification letter to Mr. Kariye makes clear the government does possess evidence it refuses to disclose. *See e.g.*, Kariye Notification Letter, ECF No. 184, Ex. A at 2 [REDACTED]

[REDACTED]. Moreover, the public filing of the denaturalization complaint, which contains more information than the DHS letter, makes it hard to take seriously Defendants' assertion that they could provide no more information than that contained in the DHS letter. There can be no legitimate reason why information disclosed publicly in that context cannot be provided in these proceedings. The government's demonstrated willingness to disclose additional information in service of its own interests casts doubt on Defendants' stated reasons for resisting additional disclosures in all of these proceedings.⁵ Thus, Mr. Kariye is not "conceiv[ing] of additional disclosures," as Defendants

⁵ It also contradicts Mr. Steinbach's statement that the provision of any "additional information beyond that contemplated by the Government's revised procedures . . . would risk significant harm . . . to the overall national security interests of the United States." Steinbach Decl., ECF No. 254 ¶ 4.

contest, Defs.’ Kariye Mem., ECF No. 239 at 8, but rather seeking access to the investigative information on which Defendants plainly rely in making predictive judgments about his future conduct—predictive judgments that Mr. Kariye disputes. If the government has this information, it must disclose it.

According to Defendants, the fact that Mr. Kariye’s response included “general denials and explanations concerning the basis for his listing” demonstrates the adequacy of Defendants’ disclosures. Defs.’ Kariye Mem., ECF No. 239 at 5. But again, even if Mr. Kariye is correct about his *guesses* as to some of the government’s reasons and evidence, the very fact that Mr. Kariye has to *guess* means Defendants’ process is fundamentally inadequate. And just as the government is relying on reasons not disclosed to Mr. Kariye, it presumably is relying on evidence not referred to in the notification letter to him. Mr. Kariye can no more meaningfully contest hearsay and secret evidence than he can contest undisclosed reasons. *See* Pls.’ Opp. Mem., Section II.C.1-2; Pls.’ Summ. J. Mem., ECF No. 207 at 15-19.

As Plaintiffs explain in their main brief, to the extent that Defendants seek to invoke any applicable privilege against disclosure of information to Mr. Kariye, they must do so by reference to specific information and according to the procedures courts have devised for the adjudication of such privileges. Pls.’ Opp. Mem., Sections II.B, II.C.2. Given the availability of strong protective measures, *id.*; *Latif v. Holder*, 686 F.3d 1122, 1130 9th Cir. 2012 (suggesting use of Classified Information Procedures Act on remand), the Court must not deny Mr. Kariye additional process on the ground that the government’s interest in secrecy forecloses it.

Due process also requires that Mr. Kariye receive a live hearing before a neutral decision-maker. The fundamental dispute in Mr. Kariye’s case turns at least in part on his credibility, which cannot be assessed solely on paper. *See* Pls.’ Opp. Mem., Section II.D. The TSA Administrator plainly made an adverse credibility finding when he stated that he considered Mr. Kariye’s responses but concluded that the “information available” nonetheless supported Mr. Kariye’s placement on the No Fly List. *See* Kariye Determination Letter, ECF No. 184, Ex. C at

2, 3. Similarly, Defendants' repeated assertions regarding [REDACTED]

[REDACTED] betray their refusal to credit or even acknowledge Mr. Kariye's responses to those allegations and their extensive reliance on witnesses whose veracity Mr. Kariye could effectively challenge at a hearing, but not otherwise. These determinations—assessments of Mr. Kariye's credibility—cannot validly be made absent a live hearing, nor can the hearsay testimony of government witnesses be accepted wholesale without the opportunity for confrontation and cross-examination—particularly where, as here, the statements appear to be double and even triple hearsay from sources whose credibility is highly suspect. Pls.' Opp. Mem., Section II.D; Pls.' Summ. J. Mem., ECF No. 207 at 28-31; Pls.' Kariye Mem., ECF No. 221 at 6.

Nor can Defendants realistically assert that the revised redress process provides Mr. Kariye with a neutral decision-maker. Indeed, Defendants state that “[t]here is no reason to believe that [Mr. Kariye’s] testimony would alter the Government’s reasonable suspicion that he poses a threat”—a statement that reflects the bias and futility that is built into the revised redress process. *See* Defs.’ Kariye Mem., ECF No. 239 at 11. Mr. Kariye’s ability to submit statements through the DHS TRIP process is not an adequate substitute for a hearing at which his credibility, and that of the government’s evidence and witnesses, can be assessed by a neutral decision-maker.

Defendants’ refusal to provide these necessary procedural safeguards to Mr. Kariye violates his due process rights.

III. Defendants Overstate the Government’s Interests.

Defendants emphasize the weight of their aviation and national security interests without accounting for the additional, rigorous protocols for heightened screening and other security options that the Court has recognized are at Defendants’ disposal, and that would mitigate

Defendants' concerns with respect to Mr. Kariye. *See* Pls.' Opp. Mem., Section IV. When faced with litigation at an earlier stage in this case concerning Plaintiffs trapped overseas as a result of placement on the No Fly List, Defendants put these procedures in place to permit Plaintiffs to fly home. *See* J. Status Rep. dated Sept. 23, 2010, ECF No. 28. Mr. Kariye has stated that he is willing to undergo these additional measures, Kariye Decl., ECF No. 91-4 ¶ 11, and Defendants do not explain why they are not willing to provide these measures to him rather than imposing a complete flight ban.

IV. The No Fly List Criteria Are Unconstitutionally Vague.

The criterion that Defendants identified in their notification letter to Mr. Kariye is unconstitutionally vague.⁶ *See* Pls.' Opp. Mem., Section V. The letter demonstrates that the criterion implicates, and penalizes him for, First Amendment-protected speech, beliefs, or associations. *See* Kariye Notification Letter, ECF No. 184, Ex. A at 1-2. Indeed, all of the statements that Defendants attribute to Mr. Kariye, even if accurate, [REDACTED] [REDACTED] were protected under the First Amendment, making it clear that the criterion must meet a heightened standard of clarity. *See* Pls.' Opp. Mem., Section V. The criterion cannot meet that standard. It provides no notice whatsoever of required or proscribed conduct, so none of the allegations that served as the basis for placing Mr. Kariye on the No Fly List clearly falls within the criterion. Aside from the violent acts of terrorism that the criterion does not require—acts which, of course, Mr. Kariye has never committed—the criterion lacks any meaningful limitation.

The fact that Defendants used Mr. Kariye's alleged speech and associations—which even if true, are not unlawful—as the basis for making a “predictive judgment” about him only renders their application of the criterion more indeterminate and ambiguous. Neither the

⁶ The notification letter to Mr. Kariye stated that “it has been determined that you represent a threat of committing an act of international terrorism against any U.S. Government facility abroad and associated or supporting personnel, including U.S. embassies, consulates and missions, military installments, U.S. ships, U.S. aircraft, or other auxiliary craft owned or leased by the U.S. Government.” J. Stmt., ECF No. 184 at ¶ 4.

criterion nor the notification letter to Mr. Kariye explains how Defendants measured the “threat” that Mr. Kariye allegedly represents, how much of a “threat” Mr. Kariye had to “represent” in order to satisfy the criterion, or how his alleged conduct demonstrates that he meets that threshold. The criterion is utterly and irretrievably vague.

Rather than attempt to defend a formless, standardless criterion, Defendants merely state that “a reasonable person in Mr. Kariye’s position would know that the conduct described . . . both satisfies the applicable criterion and is conduct that the Government would inherently consider in making No Fly determinations.” Defs.’ Kariye Mem., ECF No. 239 at 10. But conclusory, subjective interpretation of this kind—essentially, when the government says, “we know it when we see it”—is precisely what leads to arbitrary and discriminatory application of the criterion, and is what the void-for-vagueness doctrine is intended to preclude. *See* Pls.’ Opp. Mem., Section V. Thus, the criterion Defendants applied to Mr. Kariye is unconstitutionally vague, and the predictive judgments Defendants used in applying that criterion significantly increased the likelihood of error in the resulting determination.

V. Defendants’ Constitutional Violations Cannot Be Deemed Harmless.

Defendants’ argument that the numerous deficiencies permeating their revised redress process are harmless is not properly before the Court at this stage in Mr. Kariye’s case, and even if it were, the prejudice to Mr. Kariye from Defendants’ constitutional violations is clear and substantial. Pls.’ Opp. Mem., Section VI. Defendants’ use of an unconstitutionally vague criterion and an unacceptably low evidentiary standard taints the entire redress process and places it beyond harmless analysis. Moreover, Defendants’ refusal to provide Mr. Kariye with adequate notice, evidence, and a live hearing deprives the Court of the very record material on which a determination of harmless could be made. *Id.* No basis exists for determining that adequate notice to Mr. Kariye would not have altered the outcome. Likewise, the Court cannot conclude that Defendants’ adverse credibility finding regarding Mr. Kariye was harmless where Defendants have refused to permit live testimony, and it cannot conclude that sufficient

evidence supports Defendants' listing determination when it does not know the strength of any exculpatory evidence that may be in Defendants' possession. *See id.*

In any event, Defendants' failure to provide constitutionally required process to Mr. Kariye plainly harmed him. Defendants not only denied Mr. Kariye the ability or opportunity to rebut reasons on which they relied in placing him on the No Fly List, but they also placed their own witnesses, evidence, and exculpatory information beyond his reach and rejected his proffered explanations summarily, without taking any testimony from him or other witnesses. Deficiencies as profound as these cannot be labeled harmless.

VI. Defendants' Revised Redress Process Violates the Administrative Procedure Act.

Mr. Kariye should also prevail on both grounds of his APA claims, for the reasons set forth in Plaintiffs' consolidated memorandum and here. *See* Pls.' Opp. Mem., Section VII.

CONCLUSION

For the reasons set forth above and in Plaintiffs' consolidated brief, Plaintiff Mohamed Sheikh Abdirahman Kariye respectfully requests that the Court grant his motion for partial summary judgment, and deny Defendants' cross-motion for summary judgment.

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CERTIFICATE OF SERVICE

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

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