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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*, v. LORETTA E. LYNCH, et al., *Defendants*.	Case 3:10-cv-00750-BR **PLAINTIFF STEPHEN PERSAUD'S OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND REPLY IN SUPPORT OF HIS RENEWED MOTION FOR PARTIAL SUMMARY JUDGMENT** **REDACTED VERSION**

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INTRODUCTION

Defendants admit that the focus of their No Fly List is on "violent acts of terrorism" and that they are relying on "predictive judgments" to place and keep Mr. Persaud – who has never been charged with, much less convicted of, a violent crime – on the List. Defendants support his placement on the No Fly List by reference to predictions about Mr. Persaud's future behavior, but offer no evidence 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 risk of error makes it imperative that Mr. Persaud be afforded stringent procedural protections so he can demonstrate to a neutral decision-maker his "innocence" of a crime he will never commit.

Defendants refuse to provide Mr. Persaud with these 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 witness hearsay. Defendants' revised redress process violates Mr. Persaud's Fifth Amendment right to procedural due process and the Administrative Procedure Act. Given that Mr. Persaud 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 requests the Court order Defendants to provide him the procedural protections he seeks in a process overseen by the Court.

ARGUMENT

I. Defendants' Revised Redress Process Creates a High Risk of Error.

Defendants have placed and retained Mr. Persaud 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 30; Defs.' Cross-Mot for Summ. J.: Persaud ("Defs' Persaud Mem."), ECF No. 244 at 2. But Defendants' "predictive judgments" are not based on science or any reasoned methodology. *See* Pl.s 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. Persaud might engage in terrorist violence at some point in the future based on alleged statements he made long ago, and statements of another. No judicial deference is due to such a guess 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. *See* Pls.' Opp. Mem., Section I. Thus, as an empirical matter, the "derogatory information" on which Mr. Persaud'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. Persaud 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. Persaud – allegations that 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. Persaud. Instead, the allegations against Mr. Persaud 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. Persaud as potential future terrorists. *See* Pls.' Opp. Mem., Section I.A.2(c). For example, even if the allegations in the notification letter to Mr. Persaud were true (and his response letter demonstrated why those allegations cannot be

[1] Defendants acknowledge that there may be other reasons and evidence that support their listing determination, *see* Persaud Notification Letter, ECF No. 180-0 at 2, ¶ 6, but they have refused to provide any additional information, so Mr. Persaud has no way of refuting those reasons and evidence. *See* Defs.' Persaud Mem., ECF No. 244 at 12 n.3.

[2] Declaration of Stephen Persaud in Support of Cross-Motion for Summary Judgment, ECF No. 91-13.

accepted, *see* Persaud Response Letter, ECF No. 183, Ex. B), it should be plain that [redacted] is not a predictor of future terrorist violence. That Mr. Persaud traveled overseas and provided medical care cannot reasonably be interpreted as a predictor of terrorist violence. Even assuming that the factual allegations against Mr. Persaud are accurate, this supposedly "derogatory information" regarding him cannot be used to predict something as rare as terrorist violence.

Finally Defendants' response to Mr. Persaud's anticipated testimony regarding the allegations in the notification letter illustrate what Plaintiff's 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. ¶ 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. Persaud must be blacklisted because [redacted][3] Defs.' Persaud Mem., ECF No. 244 at 5. But Defendants also never explain why they have ignored Mr. Persaud's 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." Response Letter, ECF No. 180-2 at 6.

II. Defendants' Revised Redress Process Violates Due Process.

Defendants assume that the revised redress process is constitutionally sufficient and assert that the only question as to Mr. Persaud's motion is whether the redress process was fairly applied to him. Defs.' Persaud Mem., ECF No. 244 at 4. Defendants then contend Mr. Persaud was afforded adequate process by making selective references to conclusory characterizations built on speculation that they argue Mr. Persaud did not challenge. *Id.* at 5. But Defendants' revised redress process is not constitutionally adequate, and Mr. Persaud's

[3] Contrary to Defendants' characterization of it, ECF No. 244 at 4, Mr. Persaud'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.

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. Persaud on the No Fly List.

In light of Plaintiffs' arguments and evidence in their main brief and Mr. Persaud's evidence in his response to Defendants, there can be no doubt that the revised redress process is wholly inadequate and Mr. Persaud 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 Defendants' placement and retention of Mr. Persaud on the No Fly List, the underlying evidence—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.

It is undisputed that Defendants' notification and determination letters to Mr. Persaud 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. 180-0 at 2, ¶ 6; Persaud Determination Letter, ECF No. 180-3 at 2, 3. Thus, even if Mr. Persaud 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 undisclosed reasons for keeping him on the No Fly List anyway. In essence, unless Mr. Persaud happens to *guess* the undisclosed reasons and submit information addressing them, Defendants' reliance on those reasons makes it impossible for him ever to clear his name and get off the List. In *Al Haramain Islamic Foundation v. U.S. 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, 986 (9th Cir. 2012). Although Defendants ignore the Ninth Circuit's holding, this Court should not.

Defendants also err in refusing to disclose evidence to Mr. Persaud. The summary information that Defendants provided in their 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. Persaud, without granting him any opportunity to review and contest that evidence, is neither fundamentally fair nor consistent with due process. *See* Pls.' Opp. Mem., Section II.C.2. It further increases the likelihood of error in Defendants' final determinations.

The notification letter to Mr. Persaud makes clear the government does possess evidence it refuses to disclose. *See, e.g.,* Notification Letter, ECF No. 183, Ex. A at 1-2 (referring to Mr. Persaud's alleged statements and alleged statements of a witness. *See id.* Thus, Mr. Persaud is not "conceiv[ing] of additional disclosures," as Defendants contest, Defs.' Mem., ECF No. 244 at 7, 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. Persaud disputes. If the government has this information, it must disclose it.

According to Defendants, the fact that Mr. Persaud's response included "general denials and explanations that go to the reasons for the No Fly List determination" demonstrates that the adequacy of Defendants' disclosures. Defs.' Mem., ECF No. 244 at 5. But again, even if Mr. Persaud is correct about his *guesses* as to some of the government's reasons and evidence, the very fact that Mr. Persaud has to *guess* means that Defendants' process is fundamentally inadequate. And just as the government is relying on reasons not disclosed to Mr. Persaud, it presumably is relying on evidence not referred to in the notification letter to him. Mr. Persaud can no more meaningfully contest hearsay and secret evidence than he can contest undisclosed reasons. *See* Pls.' Mem., Section II.C.2; Pls.' Summ. J. Mem., ECF No. 207 at 28-29.

As Plaintiffs explain in their main brief, to the extent that Defendants seek to invoke any applicable privilege against disclosure of information to Mr. Persaud, 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., Section 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. Persaud additional process on the ground that the government's interest in secrecy forecloses it.

Due process also requires that Mr. Persaud receive a live hearing before a neutral decision-maker. The fundamental dispute in Mr. Persaud'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. Persaud's responses but concluded that the "information available" nonetheless supported Mr. Persaud's placement on the No Fly List. *See* Persaud Determination Letter, ECF No. 180-3 at 2. Similarly, Defendants' repeated assertions regarding Mr. Persaud's [redacted] betrays their refusal to credit or even acknowledge Mr. Persaud's responses to those allegations. These determinations—assessments of Mr. Persaud'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. Pls.' Opp. Mem., Section II.D; Pls.' Summ. J. Mem., ECF No. 207 at 28-31.

Nor can Defendants realistically assert that the revised redress process provides Mr. Persaud with a neutral decision-maker. Indeed, Defendants state that "[t]here is no reason to believe that [Mr. Persaud'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.' Mem., ECF No. 244 at 13. Mr. Persaud'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. Persaud violates his due process rights.

III. Defendants Overstate the Government's Interest.

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. Persaud. *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 September 23, 2010, ECF No. 28. Mr. Persaud has stated that he is willing to undergo these additional measures, Persaud Decl., ECF No. 91-13 ¶ 14, 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. Persaud is unconstitutionally vague.[4] *See* Pls.' Opp. Mem., Section V. The letter demonstrates that the criterion implicates, and penalizes him for, First Amendment-protected associations. *See* Notification Letter, ECF No. 183, Ex. A at 1. Because the criterion implicates all manner of First Amended protected conduct it is clear that the criterion must meet a heightened standard of clarity. *See* Pls.' Mem., Section V. The criterion cannot meet that standard. It provides no notice whatsoever of required or proscribed speech, associations, or conduct, so none of the allegations that served as the basis for placing Mr. Persaud 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. Persaud has never committed—the criterion lacks

[4] The notification letter to Mr. Persaud stated that "it has been determined that you posed a threat of committing an act of domestic terrorism (as defined in 18 U.S.C. § 2331(5)) with respect to the homeland." J. Stmt., ECF No. 180 ¶ 4.

any meaningful limitation. The fact that Defendants used Mr. Persaud's alleged 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 criterion nor the notification letter to Mr. Persaud explains how Defendants measured the "threat" that Mr. Persaud allegedly poses, how much of a "threat" Mr. Persaud had to "pose" 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. Persaud'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.' Mem., ECF No. 244 at 11. 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. Persaud 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. Persaud's case, and even if it were, the prejudice to Mr. Persaud from Defendants' constitutional violations is clear and substantial. *See* 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 harmlessness analysis. Moreover, Defendants' refusal to provide Mr. Persaud with adequate notice, evidence, and a live hearing deprives the Court of the very record material on which a determination of harmlessness could be made. *Id.* No basis exists for determining that adequate notice to Mr. Persaud would not have altered the outcome.

Likewise, the Court cannot conclude that Defendants' adverse credibility finding regarding Mr. Persaud was harmless when 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. Persaud plainly harmed him. Defendants not only denied Mr. Persaud 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. Persaud should prevail on both grounds of his APA claims, for the reasons set forth in Plaintiffs' consolidated memorandum. *See* Pls.' Opp. Mem., Section VII.

CONCLUSION

For the reasons stated above and in Plaintiffs' consolidated brief, Plaintiff Stephen Persaud respectfully requests the Court grant his renewed motion for partial summary judgment and deny Defendants' cross-motion for partial summary judgment.

Respectfully submitted,

Dated: August 7, 2015

/s/ William Genego

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CERTIFICATE OF SERVICE

I certify that a copy of the redacted version of foregoing memorandum was delivered to all counsel of record via the Court's ECF notification system and that a copy of the unredacted version of the memorandum was served on counsel for Defendants, Amy Powell, Brigham J. Bowen, Adam Kirschner, and Sam Singer, by email on August 7, 2015.

/s/ William Genego