

UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

GULET MOHAMED, )  
 )  
 Plaintiff, )  
 )  
 v. ) No. 1:11-cv-50 (AJT)  
 )  
 ERIC H. HOLDER, JR., *et al.*, )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

**ORDER**

This matter is before the Court on defendants’ Motion to Dismiss [Doc. No. 10] (the “Motion”). Upon consideration of the Motion, the memoranda and exhibits in support thereof and in opposition thereto, and the arguments of counsel at a hearing on April 29, 2011, and for the reasons stated during that hearing and contained in this Order, the Court finds that the Amended Complaint fails to state a claim. The Court will therefore dismiss plaintiff’s Amended Complaint, but with leave to file a revised amended complaint within twenty-one (21) days.

Plaintiff filed his initial Complaint on January 18, 2011, along with an Emergency Motion for Temporary Restraining Order and Preliminary Injunction [Doc. No. 3] (the “Application”). Plaintiff filed his operative Amended Complaint on January 20, 2011, asserting claims pursuant 42 U.S.C. § 1983 for violation of his Fourteenth Amendment rights, and for “Unlawful Agency Action” under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* and 701 *et seq.* (the “APA”). The gravamen of plaintiff’s Amended Complaint is that the defendants placed plaintiff, a United States citizen, on a No-Fly List, which made it impossible for him to return to the United States from a Kuwaiti detention

facility because Kuwaiti authorities would not return plaintiff to the United States by any means other than air travel.

Plaintiff's Amended Complaint seeks three types of injunctive relief: (1) that plaintiff be removed from any watch list or database that prevents him from flying; (2) that defendants provide plaintiff with meaningful notice of the grounds for his inclusion on a government watch list, and an opportunity to rebut the government's charges and clear his name; and (3) that defendants permit plaintiff to return to the United States, subject to suitable screening procedures. Plaintiff's Amended Complaint also seeks attorney's fees, costs and expenses associated with this litigation, but does not request monetary damages.

This Court held hearings on plaintiff's Application on January 18, 2011, and January 20, 2011. During the latter of these hearings, the United States represented that plaintiff was scheduled to arrive in the United States the following morning, after which the Court adjourned the hearing. The parties agree that plaintiff has returned to the United States, and no further hearings were held.

On March 21, 2011, the defendants filed the instant Motion. Defendants contend that: (1) plaintiff's claims are moot now that plaintiff has returned to the United States; (2) plaintiff does not have standing to seek prospective injunctive relief; (3) he has failed to exhaust his administrative remedies; and (4) this Court lacks jurisdiction to review the decisions and proceedings of which he complains since those matters involve orders of the Transportation Security Administration ("TSA") which may be reviewed only by the Court of Appeals under 49 U.S.C § 46110(a). Plaintiff, however, contends that he has standing with respect to the relief sought, that he remains entitled to prospective injunctive relief, that he is entitled to damages for the defendants' prior actions, that this Court has jurisdiction

with respect to his claims since they are not directed against the TSA, or any orders of the TSA, but rather against the Terrorist Screening Center (“TSC”) operated by the Federal Bureau of Investigation, and that he is not required to exhaust any administrative process established by the TSA.

The Amended Complaint must set forth “a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 556. In this case, plaintiff’s Amended Complaint, filed on an emergency basis in response to the plaintiff’s then situation in Kuwait, is less than clear concerning the scope of the challenges that he is making, particularly now that he has re-entered the United States. In this connection, the Amended Complaint does not identify within the overall process that implicates the plaintiff the precise conduct he challenges or the facts and legal basis upon which he challenges the conduct. For example, it is unclear under what cause of action plaintiff is contending that the alleged act of placing him initially on the No Fly List deprived him of a specific constitutional or statutory right. More specific to his claims under the APA, it is unclear whether and to what extent plaintiff is claiming that agency action was arbitrary and capricious or otherwise statutorily inadequate, or whether he is asserting as applied or facial constitutional challenges, and if so, on what basis.

Given the lack of factual and legal specificity in the Amended Complaint, the Court cannot properly assess the United States’ challenges to the plaintiff’s claims based on standing, mootness, jurisdiction and exhaustion. For these reasons, plaintiff will be required

to plead specifically as to these issues with respect to any of the following aspects of the No-Fly program that the plaintiff challenges and on the basis of which he seeks relief:

1. Plaintiff's alleged placement initially on the No-Fly List by the TSC, and the absence or adequacy of procedures pertaining to the TSC's decision;
2. The implementation of the No-Fly List through the airlines, through TSA Security Directives or otherwise; and/or
3. The Department of Homeland Security Traveler Redress Inquiry Program.

The Court also concludes that the Amended Complaint fails to state a claim for damages. The Amended Complaint does not allege a claim, or the proper defendants, pursuant to *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), or a claim pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (the "FTCA") or some other basis that would allow the recovery of damages against those federal officers allegedly involved in this case. In this regard, plaintiff's claim in Count I pursuant to 42 U.S.C. § 1983 does allow for the recovery of damages but only against those acting under color of state law; and there are no allegations that such individuals were involved in the alleged conduct pertaining to the plaintiff. Likewise, damages are not recoverable under the APA, asserted as the sole basis for relief in Count II of the Amended Complaint.

For the above reasons, the Court will dismiss the Amended Complaint, but will grant plaintiff leave to file a further amended complaint, which should, as to each asserted cause of action, plead with specificity: (1) the facts plaintiff contends establish standing and jurisdiction; (2) the legal rights that plaintiff contends were violated and the source of those rights; (3) the specific cause of action, whether it be pursuant to the APA, *Bivens*, the FTCA,

or otherwise; (4) the facts that state a plausible claim to relief; and (5) the relief that plaintiff seeks.

Accordingly, it is hereby

ORDERED that defendants' Motion to Dismiss [Doc. No. 10] be, and the same hereby is, GRANTED, with leave to file a revised amended complaint, with additional parties to be joined as required, within twenty-one (21) days, consistent with the requirements set forth in this Order, if he be so advised; and the Court reserves with respect to the issues of standing, mootness, jurisdiction pursuant to 49 U.S.C. § 46110(a), and exhaustion, as well as the merits of the underlying substantive issues raised by the Amended Complaint, pending the filing of any revised amended complaint.

The Clerk is directed to forward copies of this Order to all counsel of record.

  
\_\_\_\_\_  
Anthony J. Trenga  
United States District Judge

Alexandria, Virginia  
April 29, 2011