

TRAVEL LAW: CHALLENGING THE "NO FLY LIST" AGAIN

REVISION #3

November 9, 2015

In this week's article we revisit the "No Fly List" and new constitutional challenges. Previously [see *Travel Law: Getting on and off the "No-Fly List"*, www.eturbonews.com (7/23/2014)] we discussed the case of *Latif v. Holder*, 2014 WL 2871346 (2014) wherein the Court addressed the constitutionality of the No Fly List and ordered that certain changes be implemented. This week we examine the case of *Tanvir v. Lynch*, No. 13-CV-6951 (RA), S.D.N.Y. Decision (9/3/2015), a new post-*Latif* challenge to the No Fly List.

Travel Law Update

Sinai Bomb Consensus

In Schmidt, *Consensus Grows for Bomb as Cause of Russian Jet Crash, Officials Say*, www.nytimes.com (11/8/2015) it was noted

that "there was a mounting consensus among American intelligence officials that a bomb brought down the Russian airliner jet that crashed last month in the Sinai Peninsula in Egypt, killing all 224 people aboard". See also: Castle, *Britain, Concerned About Russian Crash, Halts Sinai Flights*, www.nytimes.com (11/4/2014); 'Rescue flights' to fly stranded British tourists out of Sharm el Sheikh, www.eturbonews.com (11/5/2015); Russian halts all flights to Egypt, www.eturbonews.com (11/6/2015; About 70 thousand Russians stranded at Egyptian resorts at the moment, www.eturbonews.com (11/8/2015).

Airbnb Scores Big

In Montevago & Rosen, *Airbnb Scores Big in San Francisco*, www.travelmarketreport.com (11/4/2015) it was noted that "Airbnb's multi-million dollar investment in San Francisco lobbying paid off yesterday, as a proposal that would have curtailed its growth in the City by the Bay was defeated. Airbnb spent \$8 million to fight Proposition F, which would have limited the number of days people can rent out their apartments to 75 days a year, and put further limitation on the home-sharing economy. 'Tonight, in a decisive victory for the middle class, voters stood up for working families' right to share their homes and opposed an extreme, hotel industry-backed measure'...'This

victory was made possible by the 138,000 members of Airbnb community who had conversations with over 105,000 voters and knocked on 285,000 doors. The effort showed that home sharing is both a community and a movement'".

In Dougherty & Isaac, *Airbnb and Uber Mobilize Vast User Base to Sway Policy*, www.nytimes.com (11/4/2015) it was noted that "Over the last few years, so-called sharing companies like Airbnb and Uber-online platforms that allow strangers to pay one another for a room or a ride-have established footholds in thousands of communities well before local regulators have figured out how to deal with them. Now, as cities grapple with the growth of these services and try to pass rules for how they should operate, the companies are fighting back by turning their users into a vast political operation that can be mobilized at any sign of a threat. Airbnb offered the latest and vociferous example of this on Wednesday. Fresh off defeating a San Francisco measure that would have severely curtailed the company's business in its hometown, Airbnb staged a news conference that functioned as a warning shot to other cities thinking about proposing new regulations".

No Trains Today?

In Liveris & Rose, *No Train Today? Ask Congress Why*, www.nytimes.com (10/28/2015) it was noted that "Untreated drinking water, empty store shelves, manufacturing plants sitting idle, and a million more cars on the roads because America's rail network effectively comes to a halt. Sound unbelievable? Unless Congress acts quickly, this will begin to be reality in the United States as soon as January because of a law that many people have never heard of" a mandate that the rail industry install positive train control (PTC) by the end of 2015. PTC is a system of complex GPS and wireless technologies that make trains safer by automatically stopping them in dangerous situations, ultimately preventing accidents caused by human error. Following a commuter train accident that killed 25 people near Los Angeles in 2008, Congress passed a law requiring virtually all commuter lines and larger railroads that carry passengers and toxic materials to install PTC by the 2015 deadline". See also Nixon, *Rail Industry Had Safety Technology Decades Ago*, www.nytimes.com (11/3/2015).

E-Cigarettes Banned

In Fischer, *E-Cigarettes To Be Banned From Checked Airline Baggage*, www.law360.com (10/27/2015) it was noted that "In an interim final rule scheduled for publication in the Federal

Register on Friday, the DOT Pipeline and Hazardous Materials Safety Administration said portable electronic smoking devices like e-cigarettes, e-cigars, e-pipes or personal vaporizers will not be allowed in checked luggage beginning Nov. 6. Carrying e-cigarettes in carry-on bags will still be allowed, though using the devices and charging their batteries during flights is also prohibited”.

EU Travel Directive Adopted

In *MEPS adapt package travel rules to the digital age*, Press Release, www.europarl.europa.eu (10/27/2015) it was noted “Package holidays, consisting of a flight, hotel or car-hire and purchased online for an all-in price or through linked webpages, will get same protection as packages bought in travel agencies under rules voted by MEPs on Tuesday. MEPS ensured that travellers will have more options to cancel a contract and get clear advance information on who is ultimately responsible if something goes wrong”.

Uber As Designated Driver

In Fitzsimmons, *In Push to Expand, Uber Highlights Its Role as Designated Driver*, www.nytimes.com (10/26/2015) it was noted

that "As part of the ride-hailing service Uber's push to expand to upstate New York, it has a specific message for college students: We want to help you get home safely after a night of drinking. The company's app is popular among millennials, but it is not available in upstate college towns. Uber officials hope that (the New York) State Legislature will pass new rules allowing the service to move beyond New York City next year".

Uber's Dilemma

In Mintzer, *Uber's Dilemma: Are Workers Employees or Not?*, www.law.com (10/27/2015) it was noted that "According to Uber, as of 2014 there were more than 160,000 active drivers working for the company around the U.S. But some, such as Douglas O'Connor, a driver living in South San Francisco, do not like the way Uber treats them. In August 2013, O'Connor...filed a class action in (California asserting violations of California labor codes. The class action was certified by Judge Edward Chen and his decision is on appeal before the 9th Circuit Court of Appeals) ...The employment law framework in California puts the burden on Uber to show that drivers are not bona fide employees. To do so, the company will need to demonstrate that it lacks sufficient 'control' over drivers in the course of their jobs...A business model in which everyone is an employee is probably not going to

work for a company like Uber. It would be far too costly to provide a full slate of benefits plus possible reimbursements for gas and other auto expenses to all of its 160,000-plus active drivers. Employees are significantly more expensive than contractors. In addition, the freewheeling, do-it-yourself ethos at many on-demand companies, including Uber, doesn't necessarily jibe well with the highly structured world of W2 employment".

Fake Hotels Posted On TripAdvisor

In *Which? Travel exposes TripAdvisor flaws*, www.which.co.uk (10/19/2015) it was noted that "Undercover researchers from Which? Successfully posted a series of fake listings and reviews in a test of the popular site TripAdvisor. Having heard claims that companies listed on the site paying for fake reviews, bribing guests for good feedback and even writing negative reviews of competitors, Which? Travel decided to put TripAdvisor to the test. Researchers submitted three hoax listings to the site, and wrote 54 fake reviews about them. Every one of our listings was published along with 18 of our 54 reviews...In a survey of early 900 Which? Subscribers, 85% said they trusted reviews on TripAdvisor. But because the site doesn't verify the identity of its reviewers, and its reviews aren't validated or routinely checked by a real person, it's possible to post fake

ones". See also Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for \$5*, www.nytimes.com (8/19/2011); *Fake Online Reviews: Here Are Some Tips for Detecting The*, www.nbcnews.com (10/20/2015).

Travel Law Article: The Latif Case

Afer discussing several alleged inadequacies of the No Fly List the Court in *Latif* ordered that new procedures be implemented which meet constitutional muster. "Defendants must provide a new process that satisfies the constitutional requirements of due process (and) Defendants (and not the Court) must fashion new procedures that provide Plaintiffs with the requisite due process described herein without jeopardizing national security...due process requires Defendants to provide Plaintiffs...with notice regarding their status on the No-Fly List and the reasons for placement of that List...such notice must be reasonably calculated to permit each Plaintiff to submit evidence relevant to the reasons for their respective inclusions on the No-Fly List...Defendants may choose to provide Plaintiffs with unclassified summaries of the reasons for their respective placement on the No-Fly List or disclose the classified reasons to properly-cleared counsel".

Changes Made

And as noted in *Tanvir*, supra, "the Government...revised the redress procedures available through TRIP as a result of the decision in *Latif*...which held various aspects of the TRIP process inadequate under the Fifth Amendment's Due Process Clause...See also *Mohamed v. Holder*, 2015 WL 4394958 (E.D. Va. July 16, 2015) (same)".

The Tanvir Case

In *Tanvir*, supra, the Court noted that "Plaintiffs...bring suit to remedy alleged violations of their constitutional and statutory rights. Each is either a lawful permanent resident or citizen of the United States, and each is Muslim. They claim that as part of the U.S. Government's efforts to bolster its intelligence gathering in the aftermath of the terrorist attacks of September 11, 2001, they were asked to become informants by agents of the (FBI). When they refused, because, among other things, serving as informants would contradict their sincerely held religious beliefs, they say the Government retaliated against them by placing or maintaining their names on its 'No Fly List' even though they posed no threat to aviation security. Since then, each Plaintiff claims to have been denied a boarding

pass on at least one occasion, leaving him unable to visit loved ones who live abroad”.

The Relief Sought

“Plaintiffs seek relief on two bases. First, they seek injunctive and declaratory relief against all of the defendants in their official capacities...Plaintiffs assert that (certain) constitutional and statutory provisions entitle them to an order from this Court requiring the Government to halt its alleged investigative tactics and to create fair procedures governing who is placed on the No Fly List and how such individuals may contest their inclusion. Second, Plaintiffs also seek compensatory and punitive damages from each of the individual (unnamed FBI and Homeland Security agents) defendants in their personal capacities.

Personal Capacity Claims

“As explained...below, the official capacity claims were stayed at the request of the parties on June 10, 2015, two days after the Government advised Plaintiffs that it knew of ‘no reason’ why they would be unable to fly in the future. The personal capacity claims, however, remain active. This opinion

concerns only those claims and, more specifically, resolves a motion brought by (the agents) who seek to dismiss the personal capacity claims...The agents argue...that the remedy Plaintiffs seek from them-money damages from each of the agents personally-is unavailable as a matter of law...The Court agrees and will grant the Agents' motion".

Plaintiffs' Factual Allegations

"Plaintiffs claims that they are 'among the many innocent people' who have been 'swept up' in the years since 9/11 by the U.S. Government's 'secretive watch list dragnet'...Plaintiffs argue that the process for placing individuals on the No Fly List is 'shrouded in secrecy and [thus] ripe for abuse'...The No Fly List is a database compiled and maintained by the Terrorist Screening Center (TSC), an agency within the FBI. Federal agencies may 'nominate' individuals for inclusion in the Government's various terrorist databases, including the No Fly List, if there is a 'reasonable suspicion' that they are 'known or suspected terrorist[s]'. An individual should only be placed on the No Fly List if there is additional 'derogatory information' showing that he 'pose[s] a threat of committing a terrorist act with respect to an aircraft'. Anyone whose name is on the list is barred from boarding a flight that starts or ends in the United

States, or flies over any part of the country. Beyond this, however, little is known about the No Fly List. Although they do not have information about its exact size, Plaintiffs assert that the List has grown more than six times over from roughly 3,400 names in 2009 to over 21,000 in 2012. The TSC itself has found that 'many' of these thousands of individuals were placed on the No Fly List even though they did not qualify".

Recruiting Informants

"Plaintiffs claim that each of the federal agents named in this suit, instead of utilizing the No Fly List based on legitimate information for legitimate purposes, have 'exploited the significant burdens imposed by the No Fly List, its opaque nature and ill-defined standards, as well as its lack of procedural safeguards, in an attempt to coerce Plaintiffs into serving as informants within their American Muslim communities and places of worship".

Plaintiffs' Experiences

"Although the details of each of the four Plaintiffs' experiences with the No Fly List are different, they follow the same broad contours. Each man was born into the Islamic faith in

a foreign country where at least some of his family members remain. Each legally immigrated to this country and is now lawfully present here, either as a citizen or permanent resident. Each claims he was asked to become an informant for the FBI and to share what he learned by, for example, traveling abroad to Pakistan or Afghanistan, participating in online Islamic forums, or attending certain mosques. Each declined to do so. Each was placed or kept on the No Fly List and thus unable to fly for sustained periods over several years, unable to see loved ones. Yet each asserts that he does not-and has never-posed a threat to aviation security. Rather, each maintains that the Agents worked together to add or keep his name on the No Fly List because he refused to serve as an informant for the FBI".

Existing Remedial System Sufficient

The Court found no common law cause of action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognition "for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights") relying upon *Turkmen v. Hasty*, 789 F. 3d 218, 234 (2d Cir. 2015) as "instructive and, indeed, dispositive" and held that "The existence of a system of administrative and judicial remedies for individuals who have

been improperly included on the No Fly List—the precise mechanism of injury in this case—is sufficient to conclude that Bivens should not be extended to this context. Specifically, Congress had directed the TSA to ‘establish a timely and fair process for individuals identified [under the TSA’s passenger prescreening function] to appeal to the [TSA] and correct any erroneous information’...The bottom line, then, is that Congress has crafted a remedial scheme for individuals to challenge their inclusion on the No Fly List and to judicially appeal an adverse determination”.

For Another Day

“In concluding that the remedial scheme crafted by Congress forecloses the recognition of a Bivens action, the Court does not overlook the fact that Plaintiffs in their official capacity claims challenge the procedural adequacy of that scheme. This Court does not today consider whether the TRIP process is constitutionally or otherwise deficient. Because the official capacity claims are now stayed, the procedural adequacy of that scheme, including the TRIP process, is a question for another day. For purposes of assessing the viability of a Bivens claim, however, it is enough to recognize that an alternative remedial process is available. Indeed, Plaintiffs have availed themselves

of that process and how have assurances from the Government that they are not presently on the No Fly List”.

Conclusion

“Although federal law imposes limits on the investigative tactics federal officials may employ in seeking to keep this nation safe, it also establishes limits on the manner in which an individual may vindicate his rights should those tactics cross the line. For the reasons stated, the law does not permit Plaintiffs to seek damages against the Agents in their personal capacities with under *Bivens* or (the Religious Freedom Restoration Act (RFRA))”.

Justice Dickerson been writing about **Travel Law** for 39 years including his annually updated law books, *Travel Law*, Law Journal Press (2015) and ***Litigating International Torts in U.S. Courts***, Thomson Reuters WestLaw (2015), and over **400** legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml. For additional travel law news and developments, especially, in the member states of the EU see www.IFTTA.org

