UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Transmittal Cover Sheet

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Number of Pages - including this transmittal page: 11

MESSAGE

Per your request.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ABOLALA SOUDAVAR, Plaintiff,	§	
vs.	§	Civil No. 01-344
FEDERAL AVIATION ADMINISTRATION Defendant.	§	

MEMORANDUM AND ORDER

I. INTRODUCTION

Pending before the Court is the defendant's Motion to Dismiss for Lack of Jurisdiction (Docket No. 5). Having carefully considered the motion, the response, the pleadings, the record and the applicable law, the Court is of the opinion that the defendant's motion should be partially DENIED.

II. STATEMENT OF FACTS

According to the plaintiff's pleadings and affidavit, the facts are as follows. Abolala Soudavar, a citizen of Iran, is a legal alien who frequently travels abroad on an Iranian passport. Despite the fact that he has resided in Houston, Texas since 1983, his trips abroad have been met with extensive – and onerous – security checks. Typically, his luggage is emptied, and his suitcases

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are x-rayed and scanned for explosives or other chemicals. In addition, the contents are checked by hand. Moreover, security officers abroad – and apparently here in the United States – have recently begun refusing to allow Soudavar to repack his own suitcases after inspection, citing FAA instructions.[1]

After speaking to travel agents and other Iranians, Soudavar attributes these intrusions to be based solely on his nationality – the mere sight of an Iranian passport was sufficient to trigger a search. In the past, he alleges that security officers abroad never made any pretense at conducting a random check. This behavior, Soudavar asserts, has recently spread to the United States as well.

On December 20, 2000, Soudavar handed his passport to a counter attendant for Continental Airlines. Without opening it, the attendant immediately informed him that his luggage needed to be checked by security. This encounter is significant. Whereas former checks had been justified as random, here, the attendant confirmed that the search was automatic and due to his passport.

This process was repeated on January 8, 2001 at the London Gatwick airport to Soudavar and another Iranian passenger. This intensive search took approximately an hour, and when it was completed, the Iranians' bags were required to be left with the security officers of the Gatwick airport with no guarantee that the luggage would be transported onto the plane on time. "The English inspector's zeal is only directed towards the checking of the luggage and not sending it to the plane," states Soudavar. Luggage may remain in the security area half an hour after inspection; luggage that does not make it to the plane on time may not arrive until a few days later. "Invariably,

[1] To the extent the Government asserts that the incidents abroad are irrelevant because they did not occur in the United States, these assertions miss Soudavar's point. They are relevant because Soudavar alleges that discriminatory security checks were made at the behest of the FAA. As such, if Soudavar can produce evidence of these events, they may be evidence of invidious discrimination by the FAA.

small items such as camera [sic] or eyeglass accessories are lost in these searches rendering useless the completed item," notes Soudavar.

In contrast, Soudavar has observed that relatively few non-Iranians were searched, and none of these searches required the intensive procedures described above. When the inspections were completed, non-Iranians were allowed to collect their bags and take them to the gate. Incensed at this dual standard, Soudavar brings this action *pro se*.

III. STANDARD OF REVIEW

In adjudicating the Government's Motion, the Court largely concerns itself with a single question: whether Soudavar's claims must be dismissed for lack of subject matter jurisdiction. In evaluating whether subject matter jurisdiction exists, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *See Scheuer v. Rhodes*, 416 U.S. 232 (1974), *overruled on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Accordingly, courts must construe the complaint liberally, accept all uncontroverted well-pleaded facts to be true, and view all reasonable inferences in favor of the Plaintiff. *Id.*

IV. CONTENTIONS OF THE PARTIES

Soudavar raises a number of contentions. He contends that he has suffered a violation of his due process and equal protection rights under the 5th and 14th Amendments. He argues that the FAA has violated the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 (1957) (hereinafter, the "Treaty of Amity"). He asserts that the FAA procedures waste taxpayer's money and constitute a "breach of duty" inasmuch as they target the wrong suspects and prevent the FAA from focusing on "real issues." Finally, he

argues that the FAA procedures show a lack of respect for human dignity, as well as basic rules of hygiene. As a result, he seeks $100,000 in damages as well as injunctive relief.

In response, the FAA erects a number of formidable barriers. First, the FAA argues that Soudavar's constitutional tort claims are barred by sovereign immunity, and do not fall within any exception. Second, it claims that pursuant to the FTCA, Soudavar's allegations fail to state a cause of action. Similarly, the FAA asserts that because Soudavar would have no cause of action under Texas state law, he would have none under the FTCA. Next, it contends that Soudavar has failed to exhaust his administrative remedies as required by the FTCA. In addition, the FAA argues that Soudavar has failed to plead any cognizable violation of the Treaty of Amity against the FAA. Finally, the FAA contends that Soudavar's has no other bases for invoking jurisdiction.

V. DISCUSSION

Soudavar has alleged violations of the 5th and 14th Amendments.[2] Because Soudavar is a *pro se* plaintiff, the Court will construe his complaint broadly. *See Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993). The Supreme Court has applied a two-part framework for analyzing claims against the United States. *See FDIC v. Meyer*, 510 U.S. 471, 484 (1994). First, courts must inquire whether the Government has waived sovereign immunity. *Id.* Second, courts must ascertain whether a source of substantive law exists that provides an avenue of relief for the plaintiff. *Id.*

A. Soudavar's constitutional claims for damages

Although Soudavar's claims may be cast in tort – the area in which the FAA has expended

[2] At the outset, the Court notes that the FAA cannot be held liable under the 14th Amendment. The Constitution has two Due Process Clauses, a seeming redundancy that must prove confusing to non-practitioners. The 14th Amendment Due Process Clause applies to states; the 5th Amendment Due Process Clause applies to the federal government. Because Soudavar has brought suit against the FAA, an agency of the federal government, the 14th Amendment is simply inapplicable.

the bulk of its defense – the Court believes that they are better analyzed as constitutional claims, and are thus subject to *Bivens* and its progeny. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

1. Sovereign Immunity

Before a court may address the merits of any case, it must first deal with the question of jurisdiction, for without jurisdiction, this Court may proceed no further. *See Meyer*, 510 U.S. at 475. One bar to jurisdiction is sovereign immunity. *Id.* It is well held that the United States may not be sued unless it expressly waives its sovereign immunity. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued"). This immunity extends to agencies of the United States. *Shanbaum v. United States*, 32 F.3d 180, 182 (5th Cir. 1994). Any waiver must be "unequivocally expressed." *Id.* Thus, in order for Soudavar to recover monetary damages, he must first find some way by which the United States has waived its sovereign immunity.

a. The FTCA is inapplicable

In certain instances, the United States has waived its sovereign immunity via the Federal Tort Claims Act. 28 U.S.C. §§ 1346(b), 2671-80 (2000). However, as the Supreme Court explained in *Meyer*, torts arising under the Constitution are not actionable under section 1346(b). 510 U.S. at 477. In *Meyer*, the Supreme Court noted that under section 1346(b), the United States could only be liable to the same extent that a "private person" would be liable under "the law of the place where the act" occurred. *Id.* at 477 (quoting 28 U.S.C. § 1346(b)). Because the Supreme Court had long held that "law of the place" meant law of the State, the *Meyer* Court concluded that no liability could

arise for constitutional torts because they arose under *federal* law. *Id.* Thus, Soudavar's constitutional tort claims against the FAA are not actionable under section 1346(b).[3]

b. The FAA has not waived its sovereign immunity

Nor has the FAA directly waived its sovereign immunity. The Secretary of Transportation may sue and be sued with regard to all activities carrying out chapter 53 of Title 49. 49 U.S.C. § 5334(a)(2) (2000). Where Congress has permitted an agency to "sue and be sued," this constitutes a "broad" waiver of immunity, such that agencies are presumed to have fully waived immunity. *See Meyer*, 510 U.S. at 475, 480-81 (citations omitted). Arguably, the FAA may be sued if either Congress explicitly authorized it to be sued or "because the agency is the offspring of such a suable entity." *Blackmar v. Guerre*, 342 U.S. 512, 515 (1952).

Here, however, although Congress has authorized the Secretary of Transportation to sue and be sued, it has not authorized the FAA to be sued. *See Blackmar*, 342 U.S. at 515 (noting that because Congress did not authorize the Civil Service Commission to be sued in its own name, any suit was required to be brought against the *individual* Commissioners themselves). Nor may the FAA be considered the suable offspring of the Secretary of Transportation. *See Kundrat v. District of Columbia*, 106 F.Supp. 2d 1, 6 n.8 (D.D.C. 2000) (citing *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939) (because Congress permitted Reconstruction Finance Corporation to be sued, and because the RFC was also empowered it to create regional subsidiaries, these "offspring" were implicitly suable "offspring")). Thus, the FAA retains its sovereign

[3] For the same reason, the United States itself is not be liable under the FTCA. Section 2674 renders the United States liable "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674 (2000). Because Soudavar's claims are cast in constitutional terms, they do not arise under the "law of the place" as defined by the Supreme Court and thus, the FTCA is simply not implicated. *See Meyer*, 510 U.S. at 476-79.

immunity.

2. No basis in substantive law

Even if this were not the case, however, Soudavar's claim for monetary damages would still fail in the alternative for want of *Meyer*'s second requirement: a source of substantive law that provides an avenue for relief. *See Meyer*, 510 U.S. at 484.

Monetary damages may be recovered where an agent of the federal government has committed a constitutional violation. *See Bivens*, 403 U.S. 388; *see also Davis v. Passman*, 442 U.S. 228 (1979) (extending *Bivens*-type liability to 5th Amendment violations). However, it is well held that *Bivens* actions only apply to acts by *individuals*, not to agencies as a whole. *See Meyer*, 510 U.S. at 484. "We know of no Court of Appeals decision . . . that has implied a *Bivens*-type cause of action directly against a federal agency." *Id.* Nor have any arisen in the years since *Meyer*. *See Affiliated Professional Home Health Care Agency v. Shalala*, 164 F.3d 282, 286 (5th Cir. 1999).

There are reasons for this. *Bivens* liability is intended to provide a deterrent in the form of a financial disincentive against wayward behavior of individual officers. *Id.* Depleting the funds of an entire agency would not deter individual misbehavior. Rather, *Bivens* has determined that an officer may be best deterred from constitutional violations by threatening his pocketbook. Moreover, if "we were to recognize a direct action for damages against federal agencies, we would be creating a potentially enormous financial burden for the Federal Government." *Id.* at 486.

In this case, Soudavar has sued the FAA as a whole. In order to succeed, he must identify an individual member of the FAA who has violated his constitutional rights. Failing that, his suit for monetary damages cannot proceed.

B. Soudavar's constitutional claims for injunctive relief

Soudavar's claims in equity, however, are another matter. The United States has waived sovereign immunity for constitutional torts seeking injunctive relief. 5 U.S.C. § 702 (2000) states, in pertinent part that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .

Section 702 has been held to waive sovereign immunity for claims seeking non-monetary relief.[4] *See Warner v. Cox*, 487 F.2d 1301, 1304-05 (5th Cir. 1973) (*dictum* suggesting that 5th Circuit views section 702 to have waived sovereign immunity for non-monetary actions); *Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation*, 792 F.2d 782, 786 (9th Cir. 1986) (holding that "section 702 does waive sovereign immunity in non-statutory review actions for non-monetary relief brought under 28 U.S.C. § 1331").

Indeed, even without explicitly resorting to section 702, courts have traditionally presumed that injunctive relief is available against federal actors who commit constitutional violations. *See Richmond Tenants Organization, Inc. v. Kemp*, 956 F.2d 1300, 1306 (4th Cir. 1992); *Reuber v. United States*, 750 F.2d 1039, 1061 (D.C. Cir. 1984), *overruled on other grounds by Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223 (D.C. Cir. 1994). Accordingly, the court denies the defendant's motion to dismiss Soudavar's claims for injunctive relief.

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[4] Contrary to the FAA's contention, *Malone v. Bowdoin*, bars only suits "specifically affecting property in which the United States claimed an interest." 369 U.S. 643 (1962) (action in ejectment)

C. Soudavar's claims arising from the Treaty of Amity

Like any other claim against the United States or its agencies, Soudavar must overcome the United States' sovereign immunity in order to raise a treaty claim. *See Meyer*, 510 U.S. at 474; *see also Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438 (D.C. Cir. 1990) (applying doctrine of sovereign immunity to Treaty of Amity claim).

The FTCA does not waive sovereign immunity for this claim. Section 2674 of the FTCA renders the United States liable "*in the same manner* . . . as a *private* individual under like circumstances." 28 U.S.C. § 2674 (emphasis added). As discussed above, the Supreme Court in *Meyer* declined to apply the FTCA's waiver of sovereign immunity to a constitutional claim because the FTCA only permitted liability to the extent the federal government was liable under state law. *See Meyer*, 510 U.S. at 477-78. Similarly, in this case, because a treaty violation would not incur liability under state law, the FTCA does not waive sovereign immunity for an alleged violation of the Treaty of Amity.

Nor does the Treaty of Amity itself waive sovereign immunity. Although paragraph 4 of Article XI provides a limited waiver, it is inapplicable to the facts of this case.[5] Article XI's waiver extends to enterprises of Iran that are "doing business" in the United States. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 452 (D.C. Cir. 1990) (citations omitted). Although this waiver might, in theory, apply to the United States – or its agency, the FAA –

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[5] Article XI, para. 4 of the Treaty of Amity provides in pertinent part:

> No enterprise of either High Contracting Party, including . . . government agencies . . . which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from . . . suit . . . .

Soudavar must allege that his claims arise out of some action that the FAA has done while (1) "doing business" (2) in *Iran*. *Id.*; *see also Soudavar v. Islamic Republic of Iran*, 186 F.3d 671, 674-75 (5th Cir. 1999). Because Soudavar's complaint alleges acts done in the United States, sovereign immunity is not waived by this mechanism, either.

In the end, the Court is of the opinion that the United States has not waived sovereign immunity in this case; accordingly, Soudavar's claims based on the Treaty of Amity are barred by sovereign immunity.

D. Soudavar's remaining claims

Finally, Soudavar asserts that FAA procedures waste taxpayer's money and constitute a "breach of duty" inasmuch as they target the wrong suspects and prevent the FAA from focusing on "real issues," he has failed to state a claim for which relief may be granted. Similarly, he argues that the FAA procedures show a lack of respect for human dignity, not to mention the basic rules of hygiene. Although evidence of these facts may be relevant to Soudavar's constitutional claims, to the extent he alleges them as separate claims, they are dismissed pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) for failing to state a claim for which relief may be granted.

VI. CONCLUSION

For the foregoing reasons, the Court partially DENIES the defendant's Motion to Dismiss.

It is so ORDERED.

Signed this 5th day of July, 2001.

KENNETH M. HOYT
United States District Judge