United States Courts
Southern District of Texas
FILED
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Michael N. Milby, Clerk

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

ABOLALA SOUDAVAR,	)	
	)	
Plaintiff,	)	Civil No. H-01-344
	)	
v.	)	
	)	
FEDERAL AVIATION ADMINISTRATION	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MOTION FOR RECONSIDERATION

INTRODUCTION

Defendant Federal Aviation Administration respectfully petitions this Court for reconsideration of its Order of July 6, 2001. The Order partially denied the FAA's Motion to Dismiss, allowing Soudavar's claims for injunctive relief to go forward under 5 U.S.C. § 702 of the Administrative Procedure Act (APA)(2000). The FAA submits that § 702 of the APA does not provide an independent ground of subject-matter jurisdiction in the federal district court. If, as this Court stated in its July 6th Order, sovereign immunity is not waived in this case, there is no other jurisdictional basis alleged for this Court to entertain Soudavar's claims for injunctive relief against the FAA; accordingly, the action must be dismissed in its entirety. However, to the extent that this Court would find that there is subject-matter jurisdiction under 28 U.S.C. §1331, (federal question jurisdiction), which has not been alleged in the Complaint, the FAA submits that this statute is inapplicable here. More specifically, the district court is deprived of subject-

matter jurisdiction to hear <u>any</u> of Soudavar's claims against the FAA, whether through a *Bivens* suit for constitutional damages or for injunctive relief. This is so because 49 U.S.C. § 46110(a) of the Federal Aviation Act mandates that jurisdiction to review final FAA decisions and procedures of the type alleged lie with the courts of appeals, and that jurisdiction to review such final agency action is exclusive. As a result, Soudavar's action for injunctive relief cannot proceed, and must be dismissed for want of jurisdiction in this Court.

Alternatively, if this Court denies the FAA's Motion for Reconsideration, the FAA respectfully requests that the Court stay proceedings in the district court and certify the issue of 49 U.S.C. § 46110(a) and this Court's subject-matter jurisdiction for an immediate appeal to the Court of Appeals for the Fifth Circuit, pursuant to 28 U.S.C. § 1292(b).

ARGUMENT

In its Memorandum and Order of July 6, 2001, this Court denied the FAA's motion to dismiss Soudavar's claims for injunctive relief, on the basis that 5 U.S.C. § 702 (2000), of the APA provided a waiver of sovereign immunity for non-monetary relief. (See, Order, p. 8). As the Court dismissed all other claims, holding that "it is of the opinion that the United States has not waived sovereign immunity in this case," (Order, p.10), the only conclusion to be drawn is that there is no other jurisdictional basis, save § 702, that allows this case to proceed. If such is a correct reading of the Court's Order, it is respectfully suggested that the Court's reliance on § 702 is misplaced. 5 U.S.C. § 702 of the APA does not afford an implied grant of subject matter jurisdiction permitting federal judicial review in the district court of agency action. *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Stockman v. FEC*, 138 F.3d 144, 151 (5th Cir. 1998). Rather, the APA only prescribes standards for reviewing agency action once jurisdiction is otherwise established. *Staacke v. United States Sec. of Labor*, 841 F.2d 278 (9th Cir. 1988). "If section 702

creates a cause of action then jurisdiction exists under the general federal question statute, not the APA." *Stockman*, 138 F.3d at 151. Here, the general federal question statute, 28 U.S.C. § 1331, has neither been pled by Soudavar nor raised by this Court in its Order as a basis for providing subject-matter jurisdiction. Because the purpose of § 702 is to provide judicial review of agency action rather than to confer jurisdiction, it cannot extend the jurisdiction of this Court to an action not otherwise within its competence. *International Federation of Professional & Technical Engineers v. Williams*, 389 F. Supp. 287, 291 (E.D.Va.), *aff'd without op.* 510 F.2d 966 (4th Cir. 1974). As there is no other basis for subject-matter jurisdiction alleged, and the Court has held that sovereign immunity has not been waived, there is no jurisdictional basis to proceed with Soudavar's claims for injunctive relief. Accordingly, the case must be dismissed. *See, e.g., Walker v. United States*, 1998 U.S.Dist. LEXIS 14929, at *12 (E.D. La., Sept. 16, 1998), *aff'd without op.*, 184 F.3d 816 (5th Cir. 1999)(holding, *inter alia*, that neither § 1331 nor the Fifth Amendment provided a jurisdictional basis for Plaintiff's monetary and equitable relief claims, because they did not waive sovereign immunity. "[U]nless sovereign immunity is explicitly waived, or is inapplicable, it bars legal as well as equitable remedies against the sovereign"(attached as Exhibit 1)(citing *Malone v. Bowdoin*, 369 U.S. 643, 647 (1962)).

If this Court is of the opinion that 28 U.S.C. § 1331 does provide subject-matter jurisdiction to hear Soudavar's injunctive relief claims under § 702 of the APA, then the FAA contends that review of such claims in the district court is nonetheless precluded.[1] This is so

[1] Moreover, "§ 1331 does not automatically confer jurisdiction in all cases involving federal statutes." *Staacke*, 841 F.2d 278 at 280. "[T]he Supreme Court held that federal question jurisdiction was "subject . . . to preclusion-of-review statutes created or retained by Congress." (citing *Califano* 430 U.S. at 105). As discussed *infra*, 49 U.S.C. § 46110(a) of the Federal Aviation Act is just such a preclusion-of-review statute.

because § 702 of the APA is inapplicable "if any other statute that grants consent to suit "expressly or impliedly forbids the relief which is sought."[2] 49 U.S.C. § 46110(a) is such a statute, and it provides that the courts of appeals have exclusive jurisdiction over claims challenging an FAA order:

> [A] person disclosing a substantial interest in an order issued by the. . . Administrator of the Federal Aviation Administration may apply for review of the order by filing a petition for review. . . in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.

49 U.S.C. § 46110(a)[3]

49 U.S.C. § 46110(c) further provides that the courts of appeals jurisdiction to review such orders is exclusive:[4]

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[2] 5 U.S.C. § 702 of the APA, states, in relevant part, that:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.. . . [N]othing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) *confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.* (emphasis added)

[3] 49 U.S.C. § 46110(a)(2001) of the Aviation Act was previously codified as § 1006, 49 U.S.C. app. 1486(a). *See, Crist v. Lieppe*, 138 F.3d 801, 803 (9th Cir. 1998)(discussing previous codifications of the FAA Act).

[4] It is axiomatic that "where Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive." *Oling v. Air Line Pilots Ass'n*, 346 F.2d 270, 276 (7th Cir.), *cert. denied*, 382 U.S. 926 (1965).

> (c) Authority of Court-. . . the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary or Administrator to conduct further proceedings. After reasonable notice to the Secretary or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. . .
>
> 49 U.S.C. § 46110(c)

The term "order" under § 46110(a) "has been given expansive construction." *Atorie Air v. FAA*, 942 F.2d 954, 960 (5th Cir. 1991); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir.), *cert. denied*, 479 U.S. 847 (1986)(analyzing the definition of an FAA order under §1486(a)). A final FAA order, "need not be the culmination of lengthy administrative proceedings. It need only be an agency decision which imposes an obligation, denies a right, or fixes some legal relationship." *Atorie Air*, 942 F.2d at 960, citing *Nevada Airlines v. Bond*, 622 F.2d F.2d 1017, 1020, n. 5 (9th Cir. 1980).

The exclusiveness of the appellate courts jurisdiction in this regard precludes the district courts from exercising jurisdiction over any *Bivens* or other action that arises out of the issuance of an FAA order.[5] Where the acts complained of are "inescapably intertwined with the procedures and merits surrounding an FAA order," the district court's jurisdiction is preempted. *Green v. Brantley*, 981 F.2d 514, 520 (11th Cir. 1993) (holding that district court lacked subject-matter jurisdiction to hear plaintiff's *Bivens* action against FAA officials, as it constituted an "impermissible collateral challenge to the FAA order"); *Gaunce v. DeVicentis*, 708 F.2d 1290, 1292-93 (7th Cir.) (district court lacked jurisdiction over *Bivens*, FOIA and FTCA actions, because all such claims were "inextricably intertwined" with the procedures and merits of the

[5] This conclusion is based upon the well settled principle that collateral attacks upon administrative orders are not permissible. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938).

FAA's order), *cert. denied*, 464 U.S. 978 (1983); *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992)("the district court's federal question jurisdiction is preempted. . . as to those classes of claims reviewable under section 1006" (now § 46110(a)); *Gibson v. FAA*, 714 F. Supp. 233, 234 (E.D.Tex. 1989)(holding, *inter alia*, that courts of appeals have exclusive jurisdiction to review "orders" of the FAA). *See also*, *Tur v. FAA*, 104 F.3d 290 (9th Cir. 1997)(district court lacked jurisdiction over collateral attack [via FTCA action], of FAA order suspending airmen's certificate); *Sea Air Shuttle v. United States*, 112 F.3d 532, 534 (1st Cir. 1997)(stating, *in dicta*, that it is "unlikely" that the FTCA could ever be used as a means of attacking FAA decisions involving agency delay or inaction); *Roundtree v. United States*, 40 F.3d 1036, 1038 (9th Cir. 1994)("[Plaintiff] cannot use the FTCA as a means of obtaining review of the particular [FAA] orders of suspension. . . the exclusive jurisdiction to review those orders lay in the . . . Courts of Appeals"); *Kabeller v. Busey*, 999 F.2d 1417, 1421 (11th Cir. 1993)(district court lacked jurisdiction to render judgment on propriety of mandamus in skydiving business suit seeking to compel action by FAA on its claim of discrimination by city); *compare*, *Crist v. Lieppe*, 138 F.3d 801, 804 (9th Cir. 1998)(holding that both appellate and district courts may review broad constitutional challenges), citing *Foster v. Skinner*, 70 F.3d 1084, 1089 (9th Cir. 1995); *Mace v. Skinner*, 34 F.3d 854, 857-58(9th Cir. 1994).

To the extent that Soudavar's allegations against the FAA are cognizable at all, i.e., the "illegal FAA procedure which designates all Iranians as a suspect class" (Complt, p. 13); such procedure must be considered an order, for which he seeks judicial review and injunctive relief. Moreover, since Soudavar alleges specific, individualized incidents involving the search of his person and his baggage, incidents which he attributes to the FAA procedure, (*see*, Complt., "Facts of the Case," pp. 1-4), his allegations are "inescapably intertwined with the review of the

procedures and merits surrounding the FAA action" (*Green*, 981 F.2d at 521), and are not "broad constitutional challenges to FAA practices" (*Foster*, 70 F.3d at 1089).

Accordingly, Soudavar's claims for injunctive relief can only go forward, if at all, in the court of appeals, for to do otherwise would create "an impermissible collateral challenge" to agency action, particularly where, as here, Congress has mandated that such review should be entrusted to the court of appeals. *See*, *Dole*, 787 F.2d at 193 (noting the broad construction to be given § 1486 of the FAA statute, "if there is any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals we must resolve that ambiguity in favor of review by a court of appeals"); *Adams v. FAA*, 1995 U.S. Dist. LEXIS 13728 *6 (E.D. Tex. September 1, 1995)(holding that, in the context of FAA orders, Plaintiff's claims of Fifth Amendment violations, questions of the agency acting "ultra vires," and equitable relief claims "are heard at the circuit level in this circuit")(attached as Exhibit 2); *accord*, *Gibson v. FAA*, 714 F. Supp. at 233 (E.D. Tex. 1989)(Plaintiff's constitutional and injunctive relief claims against FAA for revoking his aviation medical examiner certificate could only be heard in the court of appeals).

Thus, the exclusive jurisdiction provisions under § 46110(a) preclude the application of the APA statute (§ 702 or any other section of the APA), to this case. *See*, *Dole*, 787 F.2d 186 at 193 ("the APA is clearly not applicable to FAA action under Section 1486" (now § 46110(a)); *Gibson*, 714 F. Supp. at 233(allegations of APA violations must be heard by the court of appeals); *Promptair, Inc. v. Hinson*, 1996 U.S. Dist. LEXIS 17366 *8 (N.D. Ill.)(holding that 5 U.S.C. §§ 702, 703 do not provide district court subject-matter jurisdiction to hear challenged FAA action; such "special review" statutes as § 46110 are best served if courts of appeals exercise their exclusive jurisdiction over final agency actions)(attached as Exhibit 3).

As a final point, the Court's July 6th Order noted that, to succeed in the context of a *Bivens* action, Soudavar "must identify an individual member of the FAA who has violated his constitutional rights" (Order, p. 7). Failing that, the Court states, "his suit for monetary damages cannot proceed." As the cases cited *infra* make clear, such a suit cannot go forward in the district court, as it would constitute an impermissible collateral attack on an FAA decision, contravening the court of appeals jurisdiction under § 46110(a). The Fifth Circuit, in *Zephyr Aviation v. Dailey, et.al*, 247 F.3d 565 (5th Cir. 2001), recently addressed the issue of constitutional tort actions in the context of a challenged FAA action, stating that ". . . parties may not avoid administrative review [in the court of appeals] simply by fashioning their attack on an FAA decision as a constitutional tort claim against individual FAA officers. . . " *Id.* at 571 (insert added).

The *Zephyr* decision is instructive, for it is factually distinguished from the case at bar. In *Zephyr*, the Court held that, because there was no FAA order at issue, no "collateral attack" on an FAA order was implicated, thus holding the door open for certain *Bivens* actions to go forward in district court which did not implicate existing FAA orders." [W]e decline to impose a judicial exhaustion requirement on *Bivens* actions against FAA officials when the *Bivens* suit does not implicate *existing* FAA enforcement actions." *Id.* at 572 (emphasis added). Here, the opposite scenario obtains, as it is precisely those "existing" FAA security procedures which form the gravamen of Soudavar's Complaint. Accordingly, the *Zephyr* decision supports the case at bar, as it reiterates the point that final FAA decisions cannot be challenged via a *Bivens* action in district court, for to do so would be to undermine the prospective, and exclusive, jurisdiction of the court of appeals. *See e.g., Adams*, 1995 U.S. Dist. LEXIS 13728 at *10 (E.D. Tex.)(following the decisions of *Green*, *Gaunce*, (cited *supra*), and holding that "the interests of

judicial economy mandate" that Plaintiff's *Bivens* claims against FAA officials be heard in the court of appeals).

CONCLUSION

The import of the above decisions is that where an FAA action is encompassed within 49 U.S.C. § 46110(a), review of that action is available only by petition for review in the court of appeals, and the district court lacks subject matter jurisdiction to entertain a collateral challenge to such action, whether through a claim for injunctive relief, through a *Bivens* suit or otherwise. Accordingly, this Court should dismiss Soudavar's action, as there is no jurisdictional basis on which his case may proceed in the district court, under § 702 of the APA or any other statute. Soudavar's claims are "inescapably intertwined with the procedures and merits surrounding the FAA order," *Green,* 981 F.2d at 521; and therefore, the caselaw, including the *Zephyr Aviation* case in this Circuit, mandates that review of such claims lies with the court of appeals. Particularly where as here, the claim seeks non-monetary relief, "Congress has provided in the courts of appeals an exclusive forum for the correction of procedural and substantive errors, and a Plaintiff may not bypass that forum by suing . . . in the district court." *Green,* 981 F.2d at 521.

9

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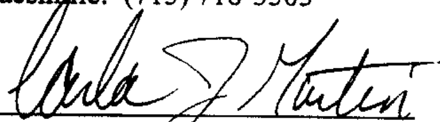

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