06-4216-cv

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

MAHER ARAR,

Plaintiff-Appellant,

-v-

JOHN ASHCROFT, Attorney General of the United States,
LARRY D. THOMPSON, formerly Acting Deputy Attorney General,
TOM RIDGE, Secretary of State of Homeland Security,
J. SCOTT BLACKMAN, formerly Regional Director of the Regional Office of Immigration and Naturalization Services,
PAULA CORRIGAN, Regional Director of Immigration and Customs Enforcement,
EDWARD J.McELROY, formerly District Director of Immigration and Naturalization Services for New York District, and now Customs Enforcement,
ROBERT MUELLER, Director of the Federal Bureau of Investigation,
JOHN DOE 1-10, Federal Bureau of Investigation and/or Immigration and Naturalization Service Agents,
JAMES W. ZIGLAR, formerly Commissioner for Immigration and Naturalization Services,
UNITED STATES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE J. SCOTT BLACKMAN

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

1. Did the district court err by holding that Arar failed to specifically allege personal involvement by Blackman in the conditions of his domestic confinement and interrogation?
2. Did the district court err by requiring Arar to replead with greater specificity certain aspects of his Fifth Amendment substantive due process claim concerning his domestic confinement and interrogation?
3. Did the district court err by holding that Arar's claims concerning his domestic confinement and interrogation failed to meet this Circuit's "gross physical abuse" standard?

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiff Maher Arar appeals from the decision of the United States District Court for the Eastern District of New York, dismissing claims against various United States officials allegedly responsible for causing him to be unlawfully detained for thirteen days in New York in September, 2002 while en route to Canada, and then sending him to Syria to be detained and purportedly tortured by Syrian officials over the next twelve months. All of the individuals named as defendants herein were high-ranking officials with either the United States Department of Justice, including Attorney General John Ashcroft, Acting Attorney General Larry D. Thompson, and Robert Mueller, Director of the Federal Bureau of Investigation, and the United States Immigration and Naturalization Service ("INS"), including Commissioner James Ziglar, Regional Director J. Scott Blackman and District Director Edward J. McElroy.

B. Course of Proceedings

In his Complaint, Arar asserts four claims, three of which relate to his treatment in Syria and Jordan and only one of which relates to his confinement in the United States. In his First Claim for Relief, plaintiff claims that defendants violated the Torture Victim Protection Act ("TVPA") (codified in 28 U.S.C.

§1350, note), when they allegedly conspired with Jordanian and Syrian officials to bring about his torture. (A-38). In the Second and Third Claims for Relief, plaintiff claims that his substantive due process rights under the Fifth Amendment were violated when he was removed to Syria and allegedly subjected to "torture and coercive interrogation," (A-38,39,40) (Second Claim), and to "arbitrary, indefinite detention" in that country. (A-40,41)(Third Claim).

In his Fourth Claim for Relief, plaintiff claims that his due process rights were violated when, during his "domestic detention" in the United States, he was allegedly subjected to unconstitutional "conditions of confinement," "coercive and involuntary custodial interrogation," and interference with "his access to lawyers and the Court." (A-41,42).

On February 16, 2006, the district court granted defendant's motions to dismiss the Complaint. (SPA-1). On August 12, 2006, the district court issued a final judgment dismissing the action based on the Order. (SPA-12). Arar thereafter filed a Notice of Appeal. (A-470).

C. The Decision Below

The district court dismissed with prejudice Arar's first three claims for relief relating to his confinement and alleged torture in Jordan and Syria. It dismissed without prejudice Arar's fourth claim for relief, concerning his

confinement and mistreatment while detained for 13 days in the United States, granting him leave to replead the claim. In particular, the court required that Arar replead the fourth claim by naming those individual defendants who were personally involved in the alleged unconstitutional domestic confinement and treatment, and by identifying with particularity those injuries which he suffered as a result of his purported denial of access to the courts while in domestic custody. (SPA-83, 84-85, 87-88).

The district court characterized Arar's allegations relating to his domestic confinement as "borderline as to whether they constitute a due process violation of 'gross physical abuse ...'" (SPA-81,82). Because, in the district court's view, Arar's allegations on his fourth claim only set forth a "possible" or "potential" due process claim, it gave Arar the option of repleading, with greater factual specificity, that cause of action. (SPA-83,88).

Rather than repleading his Fourth Claim for Relief, Arar sought to certify his first three claims for immediate appeal. When the district court denied such request, Arar opted not to replead his Fourth Claim for Relief, relying instead on the pleadings which the district court deemed to be factually and legally insufficient. (A-467,468).

STATEMENT OF FACTS

Plaintiff, a native of Syria, is a dual citizen of Syria and Canada who presently resides in Ottawa. (A-22,23,88). On September 26, 2002, he arrived at John F. Kennedy Airport ("JKF") in New York, on a flight from Switzerland, for the alleged purpose of transiting to Montreal. (A-28,29,88). Plaintiff presented his Canadian passport to a federal immigration inspector and was identified as "the subject of a ... lookout as being a member of a known terrorist organization." (A-29,88). Plaintiff was detained and interrogated at JFK and then transferred the next day to the Metropolitan Detention Center ("MDC") in Brooklyn. (A-29 to A-31).

On October 1, 2002, the Immigration and Naturalization Service ("INS") served plaintiff with Form I-147 (Notice of Temporary Inadmissibility), initiating removal proceedings under 8 U.S.C. §1225(c).[1] Plaintiff was charged with being temporarily inadmissible on the ground that he was a member of al Qaeda, an organization designated by the Secretary of State as a foreign terrorist

[1]On March 1, 2003, the INS was abolished, and its service and enforcement functions were transferred to the new Department of Homeland Security ("DHS"). See 6 U.S.C. §§251, 291(a). Within the DHS, the Bureau of Immigration and Customs Enforcement now performs the immigration-enforcement function that was previously entrusted to the INS.

organization. (A-31,88). On October 4, 2002, federal officials asked plaintiff to designate the country to which he wished to be removed, and he designated Canada. (A-31, 32). Thereafter, plaintiff claims, federal officials questioned him as to why he opposed being removed to Syria (having allegedly "refused" an earlier request that he "'volunteer' to be sent" there). (A-30,31). Plaintiff allegedly responded that he feared he would be tortured if removed to Syria. (A-32).

On October 7, 2002, defendant Blackman, then the INS Regional Director, determined that plaintiff was inadmissible to the United States. (A-87). Based on classified and unclassified information, Blackman found that plaintiff "is clearly and unequivocally" a member of al Qaeda, a designated foreign terrorist organization, and was therefore "clearly and unequivocally inadmissible to the United States" under 8 U.S.C. §1182(a)(3)(B)(i)(V). (A-87,89,91). Blackman further determined "that there are reasonable grounds to believe that [plaintiff] is a danger to the security of the United States," and he ordered plaintiff "removed from the United States." (A-92,93). Blackman signed the I-148 form, which ordered plaintiff's removal "without further inquiry before an immigration judge"; advised plaintiff of the sanctions he would face if he entered the United States (or tried to do so) without prior authorization from the Attorney General; and advised him that the INS Commissioner had found that his "removal to Syria would be

consistent with Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment" ("CAT"). (A-86).

In his Complaint, plaintiff alleges, in a wholly conclusory fashion and with no factual specificity, that all of the individual defendants made the identical decision to remove him to Syria, or actually removed him to Syria. See (A-23,24) (Ashcroft); (A-24)(Thompson); (A-24,25)(Ziglar); (A-25,33) (Blackman); (A-25, 26)(Corrigan); (A-26)(McElroy); and (A-26) (Mueller).

Contrary to the allegations relating to him, the only determination that defendant Blackman personally made was that Mr. Arar was inadmissible to the United States. (A-107,108). At no time in his Complaint or elsewhere does plaintiff contest the factual basis for defendant Blackman's finding that he was inadmissible to enter the United States. Blackman did not make the decision or determination to send Mr. Arar to Syria. Nor did he participate in that decision or determination in any way. (A-108). Blackman further did not make any decision or determination that Mr. Arar's removal to Syria would be consistent with Article 3 of CAT. Nor did he participate in any way in that decision or determination. (A-108,109).

Plaintiff alleges that, on the morning of October 8, 2002, he learned that he would be removed to Syria. (A-33). Plaintiff was served with Form I-148 and told "that he was barred from re-entering the United States for five years." (A-33,86). He claims that he was flown to Jordan, where he was allegedly turned over to Jordanian officials on October 9, 2002 (A-33, 34). After allegedly being interrogated and beaten by the Jordanians, plaintiff was turned over to Syrian officials later that day (A-34). Plaintiff then was detained in Syria and allegedly interrogated and tortured by Syrian officials. (A-23 to A-37). In October, 2003, plaintiff was released and returned to Canada. (A-36,37).

With respect to his thirteen days of domestic confinement, Arar alleges that he was strip searched upon entering the detention facility, was periodically "chained and shackled" while being transported to and from the facility and was placed in solitary confinement in a small cell. (A-30,31). He was periodically interrogated by officials who yelled and swore at him (A-29,30). In particular, the officials at one point called him a "fucking smart guy" with a "fucking selective memory." (A-29). He was forced to wear an orange jump suit, and once had to endure a "cold McDonalds meal." (A-30, 31). On one occasion, he was put in a cell with no bed and where the lights were on all night, making it difficult for him to sleep. (A-30). Arar's claim that he was denied access to the

courts and his attorney during his domestic confinement makes no reference to the manner in which he was prejudiced by such denial.(A-41,42).

SUMMARY OF THE ARGUMENT

A. The TVPA and Substantive Due Process Claims (Torture and Arbitrary Detention in Syria)

Defendant Blackman will rely on, and join in, the arguments made by his co-defendants, particularly those made by the official capacity defendants, the United States as amicus curiae, and individual capacity defendants Ashcroft and Thompson, with respect to Arar's first three claims for relief concerning his confinement and alleged torture in Syria.

B. Substantive Due Process Claims (Domestic Confinement)

Arar's allegations of abuse and denial of access to courts and counsel while detained in the United States are insufficient under the notice pleading requirements to state a violation of substantive due process under the Fifth Amendment. Because Arar's Complaint is wholly devoid of any facts which connect Blackman to his domestic confinement and interrogation allegations, the Fourth Claim for Relief must be dismissed as to him.

Moreover, under either this Circuit's "gross physical abuse" standard, or any other applicable standard, Arar's allegations relating to his domestic

confinement and interrogation do not constitute a violation of substantive due process under the Fifth Amendment as a matter of law.

Finally, because Arar has opted not to cure his domestic claims by repleading them with greater particularity, the district court's dismissal with prejudice should be affirmed.

STANDARD OF REVIEW

Arar's appeal of the district court's dismissal of his Complaint is reviewed de novo by this Court. Allaire Corp. v. Okumus, 433 F.3d 248, 249-250 (2d Cir. 2006). Under Rule 12(b)(6), a "court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). See Conley v. Gibson, 355 U.S. 41, 45-45 (1957). However, the Court need not give credence to conclusory allegations posing as factual assertions. Cantor Fitzgerald, Inc. v. Lutnick, 313 F.3d 704, 709 (2d Cir. 2002).

ARGUMENT

I.

THE COMPLAINT FAILS TO ALLEGE ANY PERSONAL INVOLVEMENT BY BLACKMAN IN THE PURPORTED CONSTITUTIONAL VIOLATIONS CONCERNING ARAR'S DOMESTIC CONFINEMENT

Liability under Bivens is an individual rather than a collective concept. In this regard, numerous federal cases have held that Bivens liability is limited to those officials who have participated in, or contributed to, violations of the Constitution. See e.g., Rizzo v. Goode, 423 U.S. 362, 371, 376-77 (1976); Tallman v. Reagan, 846 F.2d 494, 495 (8th Cir. 1988). In the context of successfully opposing a motion to dismiss, plaintiff need allege with particularity that defendant was directly and personally responsible for the alleged unlawful act, Barbera v. Smith, 836 F.2d 96, 99 (2d Cir. 1987), cert. denied, 489 U.S. 1065 (1989); Black v. United States, 534 F.2d 524, 527-28 (2d Cir. 1976); Kaufman v. United States, 840 F.Supp. 641, 652-53 (E.D.Wis. 1993), and that a causal connection existed between that conduct and plaintiff's injuries. Washington Square Post No. 1212 American Legion v. City of New York, 720 F.Supp. 337, 348 (S.D.N.Y. 1989), rev'd. on other grounds, 907 F.2d 1288 (2d Cir. 1990).

In Rizzo v. Goode, 423 U.S. at 370-71, the Supreme Court emphasized that §1983 permits the imposition of liability "only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." In the circumstances of that case, the Court held that no liability under §1983 could be imposed on supervisory personnel because "[a]s the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners expressly or otherwise showing their authorization or approval of such misconduct." Id. at 371.

Moreover, it is well settled in the Second Circuit that personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under §1983. Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995); Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994); Moffitt v. Town of Brookfield, 950 F.2d 880, 885 (2d Cir. 1991). The personal involvement of a supervisory defendant may be shown by evidence that: (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the

defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring. Colon, 58 F.3d at 873 (quoting Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986)); see also Perez v. Hawk, 302 F.Supp.2d 9, 19 (E.D.N.Y. 2004).

In its opinion dismissing plaintiff's Fourth Claim for Relief, the district court recognized the complete absence of any allegations in the Complaint that would connect the individual defendants to the violations concerning Arar's domestic detention. In this regard, the district court correctly emphasized that "the allegations against the individually named defendants do not adequately detail which defendants directed, ordered and/or supervised the alleged violations of Arar's due process rights ... or whether any of the defendants were otherwise aware, but failed to take action, while Arar was in U.S. custody" (SPA-84, 85). Thus, the district court dismissed all claims against the individual defendants, but without prejudice and with leave to replead the Fourth Claim for Relief. (SPA-85). Plaintiff thereafter filed a Notice of Intent Not to Replead such claim, opting instead to rely upon the deficient factual assertions in his original Complaint. (A-467,468).

The district court was undoubtedly correct in this regard. Arar's Complaint is wholly devoid of any facts which would connect any of the individual defendants to any of the acts of which he complains relating to his domestic detention. Indeed, the only reference in the Complaint to the individual defendant's connection to these acts is a wholly conclusory statement, without any factual support, that defendants subjected plaintiff to arbitrary domestic detention. (A-41). In this Circuit, the bare fact that an individual defendant occupies a high position in a governmental hierarchy is insufficient to sustain a Bivens claim against him. Colon, supra, 58 F.3d at 873; see also Ayers v. Coughlin, 780 F.2d 205, 208 (2d Cir. 1985); McKinnon v. Patterson, 568 F.2d 920, 934 (2d Cir. 1977), cert. denied, 434 U.S. 1087 (1978).

Blackman is listed as a defendant in plaintiff's Fourth Claim for Relief solely because he occupied a high-level position with the INS, and not because he had any personal involvement in the conditions of Arar's domestic detention. In the absence of any facts which establish personal involvement by Blackman, the fourth claim must be dismissed as to him and, indeed, all other individual defendants.

II.

ARAR'S DOMESTIC DETENTION AND INTERROGATION DID NOT VIOLATE HIS SUBSTANTIVE DUE PROCESS RIGHTS

This Court has held that "[o]ther than protection against gross physical abuse, the alien seeking initial entry appears to have little or no constitutional due process protection." Correa v. Thornburgh, 901 F.2d 1166, 1171 n.5 (2d Cir. 1990)(citing Lynch v. Cannatella, 810 F.2d 1363, 1374 (5th Cir. 1987)). Among the cases cited in Correa was Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953). In Mezei, the Supreme Court held that an alien "stopped at the border" has a status that "deprives him of any statutory or constitutional right." Id. at 215; see also id. at 212. This Court has even held that "[i]ndefinite detention of excludable aliens does not violate due process." Guzman v. Tippy, 130 F.3d 64, 66 (2d Cir. 1997).

In Lynch, the Fifth Circuit evaluated the due process claims of 16 stowaway aliens who had been held for several days by harbor police at the Port of New Orleans in cells with no beds, mattresses, pillows or heaters, and were doused with water hoses, threatened and drugged. Lynch, 810 F.2d at 1367-68. In evaluating their treatment, the court held that a plaintiff can satisfy the "gross physical abuse" standard only by showing severe physical injury. Id. at 1376.

Verbal threats and forced participation in menial tasks, however, were "patently inadequate to state a claim of constitutional dimension." Id.; see also Adras v. Nelson, 917 F.2d 1552, 1559 (11th Cir. 1990)(unadmitted Haitian refugees did not experience "gross physical abuse" such as to support a due process claim where they complained of overcrowding, insufficient nourishment, and inadequate medical care while in INS detention).

The standard for fifth amendment claims concerning the conditions by which pre-trial detainees are held is incredibly rigorous, requiring that the detainee be denied "the minimal civilized measure of life's necessities," Kost v. Kozakiewicz, 1 F.3d 176, 188 (3d Cir. 1993), or that the conditions complained of pose an "excessive risk" to the detainee's health or safety. Brown v. Bargery, 207 F.3d 863, 867 (6th Cir. 2000). In Adras, supra, the Eleventh Circuit emphasized that even "harsh" conditions of confinement do not meet the "gross physical abuse" standard. 917 F.2d at 1559.

In Smith v. Half Hollow Hills Cent. School, 298 F.3d 168, 173 (2d Cir. 2002), this Circuit expounded on the level of egregiousness of conduct necessary to trigger the protections of substantive due process:

> The protections of substantive due process are available only against egregious conduct which goes beyond merely offend[ing] some

> fastidious squeamishness or private sentimentalism' and can fairly be viewed as so 'brutal' and 'offensive to human dignity' as to shock the conscience. Johnson v. Glick, 481 F.2d 1028, 1033 & n.6 (2d Cir. 1973)(Friendly, J.)(quoting Rochin v. California, 342 U.S. 165, 172, 174, 72 S.Ct. 205, 96 L.Ed. 183 (1952)), partially abrogated on other grounds by Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); see County of Sacramento v. Lewis, 523 U.S. 833, 847, 117 S.Ct. 1708, 140 L.Ed. 2d 1043 (1998)(finding it established that "conduct that shock[s] the conscience and [i]s so brutal and offensive that it d[oes] not comport with traditional ideas of fair play and decency...violate[s] substantive due process" (quotation marks omitted)). 298 F.3d at 173.

In its opinion, the district court suggested that the substantive due process rights of an alien, like Arar, who was not attempting to effect entry into the United States might somehow be different from those aliens who actually sought entry into this country. (SPA-81). As a preliminary matter, logically, an alien not seeking entry into the United States would appear to have even a weaker claim on substantive due process protections than one who does. Moreover, by operation of law, Arar was deemed an applicant for admission when he presented himself at the border. See 8.U.S.C. §1225(a)(1); 8 C.F.R. §1.1(q).

The Supreme Court's most recent pronouncement on an alien's entitlement to substantive due process rights left the holdings of Correa and Mezei intact. In Zadvydas v. Davis, 533 U.S. 678 (2001), the Court recognized that long term permanent resident aliens enjoyed substantive due process rights that protected them from indefinite detention pending removal. The Court was careful to limit its decision and left undecided whether such rights extended to arriving aliens, noting: "The distinction between an alien who has effected entry into the United States and one who has never entered runs throughout immigration law." Id. at 693. see also Landon v. Plasencia, 459 U.S. 21, 32 (1982). The Court also left undecided whether the claim to substantive due process, even for a lawful permanent resident alien like Zadvydas, would have a different answer where "terrorism or other special circumstances" might argue for "heightened deference to the judgment of the political branches with respect to matters of national security." Zadvydas, 533 U.S. at 696.

Although the district court suggests that Correa and Mezei are of questionable relevance to Arar's situation, it nonetheless gave him the option of repleading his fourth claim to comply with the "gross physical abuse" standard enunciated in these cases. (SPA-81,82). That ambivalence by the district court alone should result in dismissal of Arar's fourth claim based upon qualified

immunity. For, even if the district court were correct in its belief that an alien who does not seek entry has greater constitutional protection that one who does, such constitutional right could hardly be considered "clearly established" at the time Arar was detained in the United States. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). In Mitchell v. Forsyth, supra, the Supreme Court held that as long as there is a "legitimate question" whether the conduct that forms the basis for the Bivens claim is constitutional, qualified immunity requires dismissal. Id. at 535 n.12.

In order to determine whether Arar has successfully met the standard of "gross physical abuse," courts must closely examine his particular factual allegations of mistreatment while in domestic custody. Although plaintiff makes the conclusory allegations that he was subjected to "outrageous, excessive, cruel, inhuman and degrading conditions of confinement" (A-41), this Court need not give them credence where the facts pleaded do not support such conclusion. See Cantor Fitzgerald, Inc. v. Lutnick, 313 F.3d 704, 709 (2d Cir. 2002).

Taken either individually or in the aggregate, none of Arar's allegations rise to the level of a violation of constitutional dimension, let alone meet the "gross physical abuse" standard articulated by this Circuit. Arar makes no claim in his Complaint that anyone tortured or physically abused him in any way while in domestic detention. Needless to say, the use of handcuffs and

shackles are an entirely appropriate and routine security measure in prisons and detention facilities. See Keenan v. Hall, 83 F.3d 1083, 1092 (9th Cir. 1996), amended on other grounds, 135 F.3d 1318 (9th Cir. 1998); LeMaire v. Maass, 12 F.3d 1444, 1457 (9th Cir. 1993); Jackson v. Cain, 864 F.2d 1235, 1244 (5th Cir. 1989)(holding that "[t]he use of shackles and handcuffs are ... commonly used on inmates"). Moreover, in Bell v. Wolfish, 441 U.S. 520, 558, 560 (1979), a case heavily relied upon by Arar, the Supreme Court approved the use of visual body cavity searches of pretrial detainees. See also Hay v. Waldron, 834 F.2d 481, 485-86 (5th Cir. 1987)(strip search of pretrial detainees permitted after each contact visit with person from outside of the institution).

Arar's claim that his substantive due process rights were violated because he was subjected to coercive and involuntary interrogation also fails as a matter of law. The Complaint merely alleges that during the interrogations, unnamed federal officials "yelled and swore" at him. (A-29,30). Clearly, the use of disrespectful and vulgar comments during an interrogation does not rise to the level of a constitutional violation. See Smith v. Half Hollow Hills Cent. Sch. Dist., supra, 298 F.3d at 173 (a single slap to detainee insufficient to violate substantive due process); Keenan v. Hall, supra, 83 F.3d at 1092; Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987).

Arar's challenge to the fact or length of his domestic detention must also fail. The challenge to the length of that detention – 13 days – is foreclosed by Zadvydas, supra, where the Supreme Court established a presumptively reasonable six-month period in which aliens who have been admitted to the United may be detained after a final removal order. 533 U.S. at 700-01. Even indefinite detentions of excludable aliens fail to raise constitutional concerns in this Circuit. See Guzman v. Tippy, supra, 130 F.3d at 66.

In this case, because Arar does not challenge the basis for his exclusion from the United States, his detention cannot possibly be considered "arbitrary." Indeed, his detention was mandated because upon his arrival he was suspected of being a member of al Queda, a foreign terrorist organization. That association was later confirmed when he was finally excluded from this country. As an alien determined to be inadmissible under §1182(a)(3)(B)(V) as a threat to the security of the United States, federal law simply required that he be detained pending removal. 8 U.S.C. §1231(a)(2).

Arar finally asserts that his substantive due process rights were violated by a "communication blackout" and other measures that interfered with his "right to obtain access to legal counsel and to petition the courts for the redress of his grievances." (A-42). Arar concedes, however, that he was visited by a

representative from the Canadian Consulate within a week of being detained (A-31), and that he also was visited by his attorney two days later. (A-32). Arar alleges that he was denied access to an attorney specifically during his interrogations by federal officials. (A-32,33).

These claims fail simply because Arar does not challenge his exclusion from the United States, or even the underlying basis for that exclusion. Under these circumstances, his denial of access to the courts is irrelevant. In Christopher v. Harbury, 536 U.S. 403 (2002), the Supreme Court held that the right of access to courts is "ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." Id. at 415. If an access claim looks backward, as Arar's does, "the complaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought." Id.

Arar's Complaint fails to identify any lost cause of action. Indeed, with his admission that his exclusion from the United States was lawful, logically he has no cause of action for his removal. Thus, the district court was entirely correct when it found that Arar's right-to-access claim must concern more than his removal because he is not asserting any challenge to his removal. (SPA-82). Since the district court concluded that, given the serious national security and foreign

policy issues at stake, Bivens did not afford Arar a remedy for his deportation to Syria and any torture that occurred there (SPA-82, 83), Christopher bars his denial-of-access claim.

Acknowledging that Arar failed to identify in his Complaint a "separate and distinct right to seek judicial relief" against defendants, the district court stated that it would deny such claim "unless plaintiff in repleading Count 4 can articulate more precisely the judicial relief he was denied." (SPA-83,88). Again, Arar declined the opportunity to replead, instead opting to rely on the Complaint which the district court found fatally defective. (A-467).

The right to counsel claim fails for essentially the same reason. If Arar's exclusion from the United States was lawful, and if there is no Bivens remedy for the remainder of his claims, then there would have been little that an attorney could have done for him. Again, Arar's Complaint has failed to identify precisely what cause of action would have been enhanced by greater access to counsel prior to his removal from the United States.

In his Complaint, Arar appears to seek a remedy not because he was removed without the benefit of counsel but rather because he did not have counsel present when he was interrogated by federal authorities. Thus, Arar suggests that either his Sixth Amendment right to counsel, and his Fifth Amendment privilege

against self-incrimination, were somehow violated due to the absence of his counsel when he was questioned by the authorities. However, because a deportation proceeding is civil, not criminal, in nature, these constitutional protections simply do not apply. INS v. Lopes-Mendoza, 468 U.S. 1032, 1038-39 (1984); Montilla v. INS, 926 F.2d 162, 166 (2d Cir. 1991); Michelson v. INS, 897 F.2d 465, 467 (10th Cir. 1990)(no sixth amendment right to counsel in a deportation proceeding). Put another way, the constitutional right to counsel guarantee does not apply in the absence of formal criminal proceedings against the individual in question, even when that individual was subjected to extensive periods of interrogation prior to the commencement of those formal criminal proceedings. See e.g., United States v. Gouveia, 467 U.S. 180, 183 (1984); United States v. Mapp, 170 F.3d 328, 334 (2d Cir. 1999).

Arar's constitutional infirmities are not cured by the decision in Bell v. Wolfish, 441 U.S. 520 (1979), where the Supreme Court held that the conditions of pre-trial detention for criminal defendants may offend the Constitution if they constitute "punishment." Arar cites no cases which suggest that Bell has any applicability to the substantive due process rights of non-admitted aliens who are detained pending removal or exclusion proceedings.

In Bell, the Supreme Court noted that in the absence of an expressed intent to punish, if a particular condition or restriction is reasonably related to a legitimate non-punitive governmental objective, it does not, without more, amount to "punishment." If, on the other hand, a condition or restriction is arbitrary or purposeless, a court may permissibly infer that the purpose of such action is "punishment." Id. at 538-39.

Significantly, the Court cautioned that "in addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention and dispel any inference that such restrictions are intended as punishment." Id. at 540. The Court further cautioned that such considerations are peculiarly within the province and professional expertise of correctional officials, and, in the absence of substantial evidence that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. Id. at 540 n.23; Pell v. Procunier, 417 U.S. 817, 827 (1974).

Here, even if Bell were applicable, Arar has pleaded no facts which would amount to "punishment" under the Bell standard. As demonstrated above, much of which Arar complains here, such as handcuffing, shackling, strip

searching and solitary confinement, are normal and customary conditions and restrictions imposed on all detainees to ensure their presence at trial or hearing, and also to ensure that the detention facility is effectively and safely managed.

Clearly, the most colorable allegation which Arar makes is that he was strip searched, an undeniable intrusion on his person and privacy. However, the Court in Bell dealt squarely with that issue, holding that visual stip searches do not violate the fourth amendment. Id. at 558. In its opinion, the Court, [b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates," held that strip searches pass constitutional muster if they are conducted in a reasonable manner. Id. at 560. Since Arar has made no claim that his strip searches were conducted in an unreasonable manner, he has asserted no valid constitutional claim. Because Arar's remaining domestic confinement complaints are substantially less significant or intrusive than his strip search claim, they, too, do not amount to "punishment" under Bell.

Finally, Blackman would in any event be entitled to qualified immunity because at the time of the domestic violations alleged in the Complaint, "gross physical abuse" was the standard applicable in the Second Circuit. Thus, it would have been reasonable under that standard to believe that Arar's domestic detention and conditions of confinement were entirely lawful.

The district court confirmed as much when it found Arar's allegations to be "borderline" under the "gross physical abuse" standard. Qualified immunity clearly protects conduct that falls within that "hazy border between" lawful and unlawful behavior. Saucier v. Katz, 533 U.S. 194, 206 (2001) . If the district court determined the conduct to be "borderline" lawful, then a government official, like Blackman, could also have reasonably come to the same determination. Wilson v. Layne, 526 U.S. 602, 618 (1999).

III.

DEFENDANT BLACKMAN JOINS IN THE ARGUMENTS OF HIS CO-DEFENDANTS CONCERNING ARAR'S FIRST THREE CLAIMS FOR RELIEF.

On the issues raised by Arar in his first three claims for relief concerning his confinement and alleged torture in Jordan and Syria, defendant Blackman hereby relies on, and joins in, the arguments made in the various briefs submitted by his co-defendants. In particular, Blackman relies on the arguments made by the official capacity defendants, the United States as amicus curiae and individual capacity defendants Ashcroft and Thompson in their respective briefs.

Conclusion

For the reasons stated herein, as well as in the briefs of his co-defendants in which he has joined, Blackman respectfully requests that this Court affirm the district court's Order dismissing the Complaint.

Dated: February 15, 2007

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32

I, Thomas G. Roth, hereby certify that the foregoing appellee brief complies with the requirements of F.R.A.P. 32(a)(7) and contains 5,766 words including footnotes according to the word count of the word processing system used to prepare it.

_____

Thomas G. Roth

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