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The Trump Executive Order Faces FET-Like Review

Luke Sobota (Three Crowns LLP) · Thursday, June 15th, 2017 · Three Crowns LLP

The U.S. Court of Appeals for the Fourth Circuit recently issued an *en banc* decision, in International Refugee Assistance Project IRAP v Trump, affirming the district court's injunction against President Trump's Executive Order temporarily suspending entry into the United States by individuals from six Muslim-majority countries. Although the case concerns the application of specialized U.S. constitutional law, it provides an interesting case study of how domestic courts analyze issues of pretext and proportionality similar to those raised in investment arbitrations under the fair and equitable treatment (FET) standard.

At issue in *IRAP* and parallel legal proceedings is Section 2(c) of the second Executive Order (the first Executive Order on this topic had been enjoined by the Ninth Circuit Court of Appeals), which imposes a 90-day suspension of entry for nationals of Iran, Libya, Somalia, Sudan, Syria, and Yemen. The Executive Order was issued under the broad grant of authority to the President under the Immigration and Nationality Act (INA), which authorizes the suspension of entry of "all aliens or any class of aliens as immigrants or non-immigrants" whenever the President finds that their entry "would be detrimental to the interests of the United States." The Executive Order states that these six countries present "heightened threats" because they support terrorism; have been compromised by terrorist organizations; have porous borders that facilitate the illicit flow of weapons and terrorists; or contain active conflict zones. Until existing screening and vetting procedures have been reviewed, the Executive Order continues, the risk of admitting a national from one of these countries intent on committing terrorist acts or otherwise harming the national security of the United States is "unacceptably high." The Executive Order allows consular officers to issue discretionary waivers on a case-by-case base.

The plaintiffs in *IRAP* argued, among other things, that the Executive Order violates the Establishment Clause of the First Amendment to the U.S. Constitution, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In assessing that claim, the *en banc* court considered prior Supreme Court precedents in this area. In 1972, the U.S. Supreme Court held in *Kleindienst v Mandel* that where the Executive exercises power granted to it by Congress over the admission of aliens "on the basis of a *facially legitimate and bona fide reason*," the Judiciary will "neither look behind the exercise of that discretion, nor test it by balancing its justification against the [plaintiffs'] First Amendment interests." (Emphasis added.) Subsequently, in 2001, the Supreme Court held in *Zadvydas v Davis* that the power of the political branches over immigration is "subject to important constitutional limitations" that must be enforced by the Judiciary. Reconciling these authorities, the majority on the Fourth Circuit determined that it would assess whether the Executive Order was facially

legitimate *and* bona fide under Mandel; only if the Executive Order failed this threshold test would the court engage in the constitutional inquiry noted in *Zadvydas*.

The court found the Executive Order to be facially legitimate because its stated purpose is to "protect the Nation from terrorist activities by foreign nationals admitted to the United States."

It then turned to the bona fides of the stated rationale. The majority pointed out that Justice Kennedy, joined by Justice Alito, had elaborated on this requirement in his controlling concurrence in *Kerry v Din* : where a plaintiff makes an "affirmative showing of bad faith" that is "plausibly alleged with sufficient particularity," the Judiciary may "look behind" the challenged action to assess its "facially legitimate justification." The court noted that it is "difficult" for a plaintiff to make an affirmative showing of bad faith with plausibility and particularity, and where it does not do so, courts must defer to the facially legitimate reason. But, the court continued, where a plaintiff has "seriously called into question whether the stated reason for the challenged action was provided in good faith," the Judiciary "must step away from [its] deferential posture and look behind the stated reason for the challenged action."

The plaintiffs in *IRAP* argued that the Executive Order invokes national security in bad faith "as a pretext for what really is an anti-Muslim religious purpose." The court found "ample" evidence to support this assertion, including:

***** Then-candidate Trump's numerous campaign statements expressing animus towards the Islamic faith;
***** His proposal to ban Muslims from entering the United States;
***** Is subsequent explanation that he would effectuate this proposal by targeting "territories" instead of Muslims directly;
***** The first Executive Order, which targeted certain majority-Muslim nations and included a preference for religious minorities;
***** Rudolph Giuliani's statement that the President had asked him to find a way to ban Muslims in a legal way; and
***** Statements by President Trump and his advisors that the second Executive Order had the same policy goals as the first.

The court also found "comparably weak evidence" that the Executive Order is meant to serve national security interests, including:

> The exclusion of national security agencies from the decision-making process;
> The post hoc nature of the national security rationale; and
> A report from the Department of Homeland Security that the Executive Order would not diminish the threat of terrorist activity.

Having found that the plaintiffs had made an affirmative showing of bad faith, the Fourth Circuit determined that *Mandel*'s deferential standard did not obtain and proceeded to address the merits of the Establishment Clause issue. This entailed, as set forth in the Supreme Court's decision in *Lemon v Kurtzman* , and other relevant precedents, consideration of whether the Executive Order had a "secular legislative purpose" – a purpose that is "genuine, not a sham," and that is not "secondary to a religious objective." The court explained that, in performing this inquiry, courts should attempt to discern the official objective from "readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts." This standard calls for an "objective," "reasonable,"

and "common sense" assessment of the text, legislative history, and implementation of the enactment, including attention to the "historical context" and the "specific sequence of events leading to [its] passage."

Applying this standard, and citing the same evidence that led it to reject application of *Mandel*'s deferential standard, the Fourth Circuit majority determined that the Executive Order's "primary purpose is religious." The court wrote that the Executive Order "cannot be read in isolation from the statements of planning and purpose that accompanied it, particularly in light of the sheer number of statements, their singular source, and the close connection they draw between the proposed Muslim ban and [the Executive Order] itself." The court further noted that the national security rationale is "belied" by evidence that President Trump issued the first Executive Order without consulting the relevant national security agencies. Although it did not "discount that there may be a national security concern motivating" the Executive Order, the Fourth Circuit held that such purpose was "secondary" to the Executive Order's religious purpose. The fact that the Executive Order was both "underinclusive" in targeting only a small percentage of the world's majority-Muslim nations and "overinclusive" in targeting all citizens in the designated countries (including non-Muslims) was, according to the court, "not responsive to the purpose inquiry." The court thus held that there was a likelihood that the plaintiffs would succeed on their constitutional challenge to the Executive Order.

In a concurring opinion, Judge Keenan, joined by Judge Thacker, further opined that the Executive Order did not comply with the INA because there is no "finding" by the President that the entry of the aliens in question "would be detrimental to the interests of the United States." (This was the same rationale adopted by the Ninth Circuit in a subsequent decision enjoining the Executive Order.) Judge Keenen wrote that the stated reasoning in the Executive Order is a "non sequitur" because it does not, among other things, "articulate a relationship between the unstable conditions in these countries and any supposed propensity of the nationals of those countries to commit terrorist acts or otherwise endanger the national security of the United States." In his concurring opinion, Judge Wynn found the apparent rationale for the Executive Order – viz., that "*as a matter of statistical fact*, Muslims, and therefore nationals of the six predominantly Muslim countries covered by the Executive Order, disproportionately engage in acts of terrorism, giving rise to a factual inference that admitting such individuals would be detrimental to the interests of the United States" – to be "highly debatable." (Emphasis in original.) Judge Wynn did not find it necessary to resolve that "factual" question, however, because in his view the Constitution forbids "classifying individuals based solely on their race, nationality, or religion … and then relying on those classifications to discriminate against certain races, nationalities, or religions[.]"

Three of the 13 Fourth Circuit judges hearing *IRAP* dissented. They took the view that, under *Din* and other Supreme Court precedents, the absence of a bona fide reason must appear on the face of the enactment, and they therefore eschewed any consideration of the broader context in which the Executive Order was issued. Judge Niemeyer wrote that "[i]n looking behind the face of the government's action for facts to show the alleged bad faith, rather than looking for bad faith on the face of the executive action itself, the majority grants itself the power to conduct an extratextual search for evidence suggesting bad faith, which is exactly what three Supreme Court opinions have prohibited." Finding that the Executive Order's "supposed ills are nowhere present on its face," the dissenting judges concluded that the Executive Order survives the limited review prescribed in Mandel. The dissenters were also critical of the majority's consideration of statements made during the presidential campaign, a view shared by Judge Thacker, who, in his own concurring opinion, wrote that because the Establishment Clause only concerns governmental action, conduct occurring

before the President "takes office" cannot be considered. The majority, however, refused to impose a "bright-line rule against considering campaign statements" and found that they were probative in this case because "they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action."

As this *précis* show, the Fourth Circuit's *en banc* decision grapples with issues similar to those that investment tribunals often face in applying the FET standard to sovereign actions affecting foreign investors. Although applying U.S. law pertaining to the Establishment Clause, the Fourth Circuit's assessment of the Executive Order included a detailed assessment of its bona fides, its primary purpose, and its underlying rationale. The dissenting judges believed that the constitutional analysis should begin and end with the text of the Executive Order, but the majority went on to consider the context and history of its issuance. In doing so, the majority applied the following standard of review: an objective, reasonable, and common sense assessment of readily discoverable facts. Notwithstanding the substantial deference afforded the political branches in areas of immigration and national security – which was the specific focus of Judge Shedd's dissenting opinion – the majority found that the plaintiffs had plausibly demonstrated that the Executive Order's "stated" national security interest "was provided in bad faith, as a pretext for its religious purpose." Compare *Gold Reserve Inc. v Venezuela*, Award, ¶¶ 600, 607 (22 September 2014) (inferring, on the basis of public statements by government officials, that the claimant's mistreatment "was in breach of the FET standard as it was driven by political reasons") and *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, Award, ¶ 165 (29 May 2003) (viewing agency's stated reason for refusing to renew a permit in "the wider framework of the general conduct taken by [the agency]").

Three concurring judges further looked to the rationale of the Executive Order, either rejecting or questioning the notion that nationals from the designated countries are more likely to engage in terrorism because of conditions found there. Their analysis – balancing the harm alleged by the plaintiffs against the stated security benefits of the Executive Order – is not dissimilar to considerations of proportionality that are often considered in FET analysis. See, e.g., *Occidental Petroleum Corp. v Republic of Ecuador*, Award, ¶¶ 442-452 (5 October 2012) (considering the claimant's harm "out of proportion to the . . . 'deterrence message' which the Respondent might have wished to send"); *Saluka Investments BV v Czech Republic*, Partial Award, ¶¶ 304-308 (17 March 2006) (stating that "any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies").

The review of sovereign decisions in areas of core competence is a sensitive and complex undertaking, whatever the applicable law. The decision in *IRAP* was not unanimous, and the final word on the constitutionality of the Executive Order remains with the Supreme Court, which is currently taking briefing on these issues. Come what may, the majority, concurring, and dissenting opinions in the Fourth Circuit's *en banc* decision may shed some comparative light for those addressing similar issues under the FET standard in investment arbitration.

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