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U.S. Court Issues Writ of Mandamus, Effectively Removing Organization from Terror List: *In Re* People's Mojahedin Organization of Iran

By Tom Syring

Introduction

On September 28, 2012, U.S. Secretary of State Hillary Clinton revoked the designation of the People's Mojahedin Organization of Iran ("PMOI")[1] and its aliases as a Foreign Terrorist Organization ("FTO") and delisted the PMOI as a Specially Designated Global Terrorist under Executive Order 13224.[2] The decision to delist came in the wake of a petition for writ of mandamus[3] filed by PMOI in response to the Secretary of State's failure to make a final (judicially) reviewable decision on the organization's FTO designation. In June 2012, the U.S. Court of Appeals for the District of Columbia Circuit had ordered the Secretary of State to make a decision on PMOI's petition to be delisted within four months from the issuance of the Court's opinion; otherwise, the Court warned that it would grant the writ to set aside the designation.

This *Insight* will discuss the Court's ruling and possible implications with respect to governments' terror designations.

Background to the Case

In the course of the late 1990s, the United Nations, acting under Chapter VII of its Charter, began mandating sanctions on certain terrorists and entities, leaving to its member states the modalities of nationally listing individual organizations and persons and implementing sanctions. Initially, FTO designations in the United States lasted for two years, after which time such designation had to be renewed. However, in the wake of 9/11, the number of organizations and persons designated as "terrorist" by the United States and other countries was significantly expanded and the means for clearing such designation aggravated, culminating in the reversal of the designation limits.

As originally enacted, the Antiterrorism and Effective Death Penalty Act ("AEDPA") enabled the Secretary of State to maintain an FTO designation for two years;[4] thereafter, the Secretary had to either renew the designation or allow it to lapse.[5] Today, the Secretary's designation no longer lapses; instead, every two years, an organization listed as an FTO can file a petition for delisting.[6]

Since designation as a terrorist organization is the predicate for material support liability

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under 18 U.S.C. 2339B (and related legislation overseas), and entails various constraints pertaining to refugee status and immigration rights, delisting procedures potentially reach beyond the unfreezing of funds, the lifting of travel restrictions, or the removal of other “dire consequences”[7] for the affected organization’s members. In the United States, apart from freezing of the organization’s assets[8] and barring individuals from entering the United States,[9] anyone who knowingly provides “material support or resources” to an FTO is subject to a fine and/or imprisonment of up to fifteen years.[10] The so-called material support bars have also had the negative consequence of preventing even refugees[11] from receiving asylum or protection from *refoulement*,[12] often in direct contravention of the provisions of the Refugee Convention and other applicable international law.

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The Secretary of State first designated PMOI as an FTO in 1997, making successive designations in 1999, 2001, and 2003. On July 15, 2008, PMOI filed a petition for revocation of the Secretary’s 2003 designation, arguing that whatever may have been the justification in the past for the designation, circumstances had dramatically changed, invalidating any previous grounds for keeping it on the blacklist.[13] In particular, PMOI maintained that it had ceased its military campaign against the Iranian regime (campaigns against the United States had never even been asserted), renounced violence, surrendered its arms to U.S. forces in Iraq, cooperated with U.S. officials at Camp Ashraf, Iraq (where its members operating in Iraq were consolidated) by sharing intelligence regarding Iran’s clandestine nuclear program, and its members received status as protected persons under the Fourth Geneva Convention.[14] Due to these changed circumstances, both the United Kingdom[15] and the European Union delisted PMOI in 2008 and 2009, respectively.

However, former Secretary of State Condoleezza Rice denied PMOI’s petition on January 7, 2009, finding that the petitioner “ha[d] not shown that the relevant circumstances [we]re sufficiently different from the circumstances that were the basis for the 2003 . . . designation.”[16] Rice did not provide information as to what sources she relied on in making that determination.

PMOI petitioned U.S. courts to review the Secretary’s decision, arguing that it lacked substantial support in the administrative record and that the Secretary’s procedures did not provide it due process. On July 16, 2010, the Court of Appeals held that “due process requires that the PMOI be notified of the unclassified material on which the Secretary proposes to rely and [be given] an opportunity to respond to that material before its re-designation.”[17] Concluding that the Secretary of State had violated the petitioner’s due process rights, the Court ordered the Secretary to provide PMOI access to the unclassified materials, instructing her to indicate which sources she regarded as sufficiently credible to maintain PMOI’s designation and to “explain to which part of section 1189(a)(1)(B) the information she relie[d] on relates.”[18]

The Parties’ Submissions

On February 27, 2012, PMOI petitioned for a writ of mandamus to enforce the Court’s mandate, namely the Court’s previous instruction to the Secretary to produce and provide access to materials that demonstrate that the continued inclusion of the petitioner on the FTO list was justified. In the petition, supported by numerous *amici curiae*, including former high-level Department of State officials, the petitioner’s submissions may be summarized in four main points:

> (1) PMOI is not a terrorist organization and has neither the intent nor ability to engage in terrorism or terrorist activity;
>
> (2) The Department of State, as well as the Departments of Defense and Justice,

and the CIA, know that the PMOI is not a terrorist organization;

(3) The Secretary of State's failure to timely discharge her statutory obligations calls for judicial review of her designation by the Court, in line with statutory provisions for review;

(4) Judicial review of her designation, coupled with the possibility of a humanitarian disaster, renders immediate delisting necessary and appropriate.

In support of the first claim, the petitioner underlined that since 2001 not a single open source terrorism database had recorded any incident of violence by the PMOI, let alone one directed at the United States or its allies. Furthermore, prior to receiving non-combatant "protected persons" status under the Fourth Geneva Convention, all PMOI members were "thoroughly investigated by U.S. forces and not one was found to have had any linkage to criminal acts or to have violated U.S. law."[19]

Regarding the second claim, the petitioner submitted that the reasons for refusing to delist the PMOI had nothing to do with its being a terrorist organization; rather, amidst the war in Iraq, and Iranian meddling, there was fear that delisting the PMOI could have provoked a reaction from Iran. The continuing foot-dragging on the part of the State Department, despite the Court's unambiguous mandate, occurred precisely because there was no justification for keeping the PMOI on the FTO list.[20] Taking the statutory provisions for judicial review and the AEDPA's drafting history into account, the petitioner pointed out that Congress rejected proposals to insulate FTO designations from court scrutiny, instead providing for increasingly robust judicial review.[21] Hence, where, as here, a congressionally mandated right to judicial review existed, the Secretary's unexplained failure to act cannot be permitted to frustrate the review. In light of the evidence presented by the petitioner supporting the claim that circumstances have changed, the Secretary *shall* make a determination no later than 180 days after receiving such petition.[22] That period had long passed. Given the continued inaction on the part of the Secretary, the judiciary is under an equally mandatory obligation "to hold unlawful and set aside a designation . . . or determination in response to a petition for revocation," if any one of the circumstances listed in the statute exist.[23]

Finally, recalling previous mortal attacks by Iraqi soldiers on the residents of Camp Ashraf, the petitioner submitted that immediate delisting is appropriate and necessary as Iraq reportedly has used the FTO designation as a pretext to attack PMOI members, threatening to close Camp Ashraf and to expel its inhabitants, even to Iran, where they almost certainly would face execution. The continued listing of PMOI on the FTO list would interfere with efforts to resettle Camp Ashraf's residents in other countries and thus jeopardize their lives, notwithstanding their status as protected persons or their designation as refugees.

Based on the above, the petitioner asked the Court to direct the Secretary of State to delist the PMOI, or, at a minimum, to show cause why it should not be delisted, providing evidence upon which she relies.[24] The Secretary of State, while not disputing the testimony and evidence adduced by the petitioner, argued that because she "must make a decision in this matter while carrying out duties of the most paramount importance, addressing nearly constant emergencies," it would be "inappropriate" for the Court to rule that she "is not acting quickly enough on a single matter."[25]

The Court's Judgment

The Court on most points followed the petitioner's submissions, criticizing the Secretary's progress in responding to the initial petition for removal from the FTO list as "ha[ving] been – to say the least – slow going."[26] In particular, the Court noted that since the Court's July

2010 remand, the Secretary had not provided sufficient reason why, in the last 600 days, she failed to make a decision. Rebuking the Secretary's argument of time constraint, the Court noted that "Congress undoubtedly knew the enormous demands placed upon the Secretary and nonetheless limited her time to act on a petition for revocation to 180 days."[27] By failing to make a final decision on PMOI's petition, the Secretary was able to maintain PMOI's designation while precluding the petitioner from seeking judicial review, as an FTO may only seek such review within thirty days of the Secretary's denial of its petition for revocation. Hence, because of the Secretary's inaction, the petitioner was stuck in administrative limbo, enjoying neither a favorable ruling nor the opportunity to challenge an unfavorable one.

While acknowledging that the issuance of a writ of mandamus is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act, the Court concluded that the Secretary's delay in acting on PMOI's petition for revocation was "egregious."[28] However, decisive to the Court was not so much the excessiveness of time that had passed in inaction, but the fact that the Secretary had failed to heed to the Court's demands, thus effectively nullifying the Court's 2010 remand mandate.

In light of national security and foreign policy concerns underlying FTO designations, the Court declined to immediately issue an order directing the Secretary to revoke the petitioner's FTO designation, recalling that the Court's "review – in [this] area at the intersection of national security, foreign policy, and administrative law – is extremely deferential."[29] But the Court ordered the Secretary to either deny or grant the PMOI's petition not later than four months from the date of the issuance of its opinion. Failing to take action within that period of time, the petition for a writ of mandamus setting aside the FTO designation would be granted.

On September 21, 2012, ten days before the court-imposed deadline, the Secretary of State announced that she would delist the PMOI. The FTO designation has now been effectively revoked.[30]

Comments and Conclusion

Decisive for the Court was not so much the Secretary's delay in responding, but the denial of judicial review implicit in keeping the petitioner in an administrative limbo and, by extension, preventing the Court from reviewing the Secretary's designation decision. While the petitioner had urged the Court to impose a thirty-day deadline, the Court noted that obtaining *a* deadline was its foremost concern,[31] as only a set date ultimately triggered the possibility of judicial review. Judged by the final outcome of the petition, the Court has been right it that assumption.

What seems less readily given—and with a different final outcome likely would have been much more in focus—is the Court's underlining of the "extremely deferential" character of its judicial review where national security concerns are at issue, regarding those as belonging to the "unreviewable" realm of political questions.[32] In fact, as the petition also pointed out, in contrast to other laws relating to national security that leave decisions largely or entirely to the executive,[33] Congress quite consciously included judicial review as a cornerstone in the legislation pertaining to FTO designations. Thus, taking the anti-terror legislation's drafting history into account, national security may not validly be regarded as an exclusively political question trumping (any) judicial review or reducing the trigger points of such review to the failure of replying to a request in a timely manner. Had such a narrow road to relief been intended, the congressionally mandated right to judicial review would presumably have been circumscribed accordingly.

While being more concerned with the wrongfulness of an FTO designation rather than the

consequences of a wrongful inclusion in a terror list, the PMOI petition for writ of mandamus also shares some common features with a recent case before the Grand Chamber of the European Court of Human Rights—*Nada v. Switzerland*.[34] In *Nada*, the applicant challenged his inclusion in a Swiss terror list, drawn up following a 2001 UN Sanctions Committee blacklist, and the ensuing infringements on his right to liberty and respect for his private, professional, and family life guaranteed by the European Convention on Human Rights. The Grand Chamber held that while UN member states should implement UN Sanctions Committee lists based on UN Security Council resolutions, states a free to choose among various models of transposing those resolutions into their domestic order. Furthermore, member states have a responsibility for taking into account a person's particular circumstances. Where a government fails to assess individually the validity of a person's terrorist designation, as in the present case, it would be in breach of the European Convention, irrespective of the UN resolution initially giving rise to inclusion in the national blacklist. Thus, *Nada* also focuses on the procedures underlying a terror designation and holds that neither a government nor a national court may defer responsibility for an individual assessment by simply pointing to pre-existing or internationally drawn-up blacklists.

Considering what is at stake, the D.C. Court's ruling (and the related Grand Chamber judgment), may start a trend of closer scrutiny and judicial review of governments' terrorist designations. The "unreviewable political realm" may be justiciable after all.

About the Author:

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Endnotes:

[1] The PMOI, including the National Council of Resistance of Iran, is an Iranian opposition group whose members, in part, have been based in Ashraf City, Iraq.

[2] Press Release, U.S. Dep't of State, Delisting of the Mujahedin-e Khalq, *available at* http://www.state.gov/r/pa/prs/ps/2012/09/198443.htm (last visited Nov. 14, 2012).

[3] The common law writ is "issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly" and is an "an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." See Black's Law Dictionary 980 (8th ed. 2004).

[4] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (amends § 219 of the Immigration and Nationality Act (P.L. 82-414; 8 U.S.C. 1101 *et. seq.*) [hereinafter AEDPA].

[5] *See* AEDPA, "Designation of foreign terrorist organizations," 8 U.S.C. § 1189(a)(4)(B) (2003).

[6] Under the AEDPA, the Secretary may designate an entity an FTO if (1) "the organization is a foreign organization;" (2) "engages in terrorist activity . . . or terrorism . . . or retains the capability and intent to [do so];" and (3) "the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States." *Id.* 8 U.S.C. § 1189(a)(1).

[7] *See* Nat'l Council of Resistance of Iran v. U.S. Dep't of State, 251 F.3d 192, 200 (D.C. Cir. 2001).

[8] 8 U.S.C. § 1189(a)(2)(C).

[9] *Id*. § 1182(a)(3)(B)(i)(IV).

[10] 18 U.S.C. § 2339B(a)(1).

[11] Refugees, as defined by Article 1 A (2) of the 1951 Refugee Convention, are individuals with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion. *See* Convention Relating to the Status of Refugees art. (1)(A)(2), July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954). For a discussion of the negative repercussions of anti-terrorism provisions in the United States and Europe, with a particular view to exclusion from refugee status based on so-called material support bars, *see*, *e.g.*, Tom Syring, *Protecting the Protectors or Victimizing the Victims Anew? "Material Support of Terrorism" and Exclusion from Refugee Status in US and European Courts*, ILSA J. Int'l & Comp. L. 597-614 (2012).

[12] *Refoulement* is the right not to be sent back to the frontiers of territories where one's life would be threatened. *See* Refugee Convention, *supra*, art. 33(1).

[13] *See In Re* People's Mojahedin Org. of Iran v. Dep't of State, 613 F.3d 220, 225 (D.C. Cir. 2010).

[14] Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

[15] The United Kingdom removed PMOI from the blacklist in 2008 after legal proceedings in the course of which the competent Proscribed Organizations Appeal Commission had characterized the initial decision of the UK Home Secretary to keep the PMOI on that list as ''perverse.'' *See* Proscribed Org. Appeal Comm'n [POAC], Appeal No. PC/02/2006, Judgment, ¶ 19 (Nov. 30, 2007).

[16] *See PMOI*, 613 F.3d 220, 226.

[17] *Id.* at 228 (emphasis in the original).

[18] *Id.* at 230 (i.e., whether, in her opinion, the information supposedly indicates the petitioner engages in terrorism or terrorist activity, or merely retains the capability and intent to do so).

[19] *See* Brief for PMOI as Amicus Curiae Supporting Petitioner at 12, Petition for a Writ of Mandamus to Enforce Court's Mandate, *In Re* People's Mojahedin Org. of Iran v. Dep't of State, 613 F.3d 220, 225 (D.C. Cir. Feb. 29, 2012) [hereinafter Amicus Brief].

[20] *Id.* at 18.

[21] *Id.* 19-20. *See also* Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong., § 401(a) (1995) (authorizing the President to designate FTOs but including a new subsection entitled "Judicial Review" as opposed to the initial proposal (Omnibus Counterterrorism Act of 1995, S. 390, 104th Cong., § 301(a) (1995) (original proposal authorizing the President to designate a group as a terrorist organization and providing that a presidential finding that a group engages in terrorism "shall be conclusive"). In ensuing Acts, Congress included two additional bases for invalidating FTO designations. According to Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1997), courts were to set aside FTO designations found to be "lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court" or "not in accord with the procedures required by law."

[22] *See* 8 U.S.C. § 1189(a)(4)(B)(iv)(I) (emphasis added).

[23] *Id.* § 1189(c)(3). Those include a finding by the court that a designation was "arbitrary . . . or otherwise not in accordance with law; . . . lacking substantial support in the administrative record taken as a whole or in classified information submitted to the court . . . or not in accordance with the procedures required by law."

[24] *See* Amicus Brief, *supra* note 19, 23-24.

[25] *In Re* People's Mojahedin Org. of Iran, Petition for a Writ of Mandamus to Enforce this Court's Mandate, at 10 (D.C. Cir. June 1, 2012) [hereinafter PMOI Petition].

[26] *Id.* 7.

[27] *Id.* 10.

[28] *Id.* 9.

[29] Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137 (9th Cir. 2000).

[30] *See* Letter from Robert M. Loeb, U.S. Dep't of Justice, to D.C. Cir. (Sep. 28, 2012).

[31] *See* PMOI Petition, *supra* note 25, at 12.

[32] *Id*. at 5.

[33] *See*, *e.g*., 8 U.S.C. § 1226(e) (precluding review of Attorney General's decision to arrest and detain aliens pending removal); and 31 U.S.C. § 5318A(f) (requiring ex parte and in camera review of classified information used in designating a foreign entity as a "primary money laundering concern," yet providing that such requirement "does not confer or imply any right to judicial review of any finding made or any requirement imposed under this section").

[34] Nada v. Switzerland, App. No. 10593/08 (Eur. Ct. H.R. Sept. 12, 2012), *available at* http://hudoc.echr.coe.int/sites/fra-press/pages/search.aspx?i=001-113118.