Journal of Civil & Legal Sciences
ISSN: 2169-0170

Kutty, J Civil Legal Sci 2016, 5:2
http://dx.doi.org/10.4172/2169-0170.1000176

Opinion Article Open Access

Canada's No-Fly List Needs Substantive Changes and Procedural Protections

Faisal Kutty*

Department of Law, Valparaiso University Law School, Indiana, USA

Introduction

In the wake of the high-profile story earlier this year of a 6-year-old, Syed Adam Ahmed, caught in Canada's no-fly web, twenty-one other children from the ages of six months to 17 years have also come forward with similar stories [1]. The details are contained in a letter sent to the federal government by Ahmed's mother, Khadija Cajee.

The federal government was quick to respond and promised to examine changes to the program. "[It's] no fault of their own," says Ralph Goodale, the minister of public safety. Having a name that is similar to one on the list "can present an awkward situation" and "a feeling of stigma [2]."

The reality for the 500 to 2,000 Canadians rumored to be on the list and those with similar names who get caught up from time to time goes far beyond awkwardness and stigma. The consequences have been all too real: jobs have been lost, family members separated at the airport, family members geographically separated, fear and anxiety over what will happen next and uncertainties about which other nations have their names [3]. The National Council of Canadian Muslims, [4] the International Civil Liberties Monitoring Group [5] and even our law firm [6] have witnessed a growing number of complaints about difficulties that go beyond delays and inconvenience.

The Specified Persons List

The cleverly named Passenger Protect Program, introduced in 2007, created the Specified Persons Advisory Group (SPAG) [7], which Public Safety Canada oversees and includes Transport Canada, the Canada Border Services Agency, the Canadian Security Intelligence Service, Justice Canada and the Royal Canadian Mounted Police. The group identifies individuals who pose an "immediate threat" for inclusion in the Specified Persons List, which airlines in Canada are mandated to screen against. Once a person is flagged, a Transport Canada official could authorize his or her boarding, request extra screening or issue an "emergency direction" to prevent boarding.

If a person is denied, he or she could apply to the Office of Reconsideration to petition to be removed from the list. But the office can only make recommendations to the transportation minister; its decision is never binding. This illusory power is evident in the Hani Ahmed Al Telbani's case [8]. The office had concluded that CSIS relied on "decidedly vague and incomplete" information, that "we have not been able to identify a discernible threat, immediate or otherwise" and CSIS, therefore, had no basis to add Telbani to the list. In the end, the SPAG ignored the recommendation and kept him on the list, affirming the view that "immediate is not black and white."

The incestuous nature of the SPAG and difficulty in getting recourse were just a few of the concerns that critics raised in 2007. They pointed out that the government had failed to establish the need and effectiveness of such a list and that it lacked authority to enact it without parliamentary debate and discussion [9].

Among the two dozen questions raised to Transport Canada [10] in 2005 by Privacy Commissioner Jennifer Stoddart was: "What studies, if any, has the department carried out to demonstrate that advance passenger information will be useful in identifying high-risk travelers?"

Transport Canada failed to give a satisfactory answer to this and virtually all the other questions Stoddart asked. Surely, if there was evidence to suggest that the no-fly list has prevented attacks, then the public is entitled to know (even if the details are redacted).

Commenting on the U.S. list, Jim Harper, director of information policy studies at the Cato Institute, wrote: "Easy to evade, it provides no protection against people who haven't yet done anything wrong, who haven't come to the attention of security officials, or who have adopted an alias. Terrorist planners are nothing more than inconvenienced by having to use people with 'clean' records [11]."

With respect to authority, the government pointed to provisions of the Aeronautics Act [12] to specify an individual as a threat to aviation security and to require airlines to provide information about the specified person. A number of critics, including the privacy commissioner [13], pointed out that this was an overly broad and liberal reading of the act. The act does indeed authorize the minister to designate and deal with threats, but a more precise reading of the provisions suggests that this refers to imminent threats and on-the-spot decisions for good cause and reason as they arise. The provision can also be reasonably read to include the right to suspend or exclude someone for short durations, but not a total denial or exclusion for any lengthy period without benefit of the principles of fundamental justice (akin to U.S. due process rights). Another analogy would be to a police officer's right to search a person without a warrant incident to an arrest. This does not grant police officers the power to randomly detain and search individuals without any justifiable reasons.

Critics also highlighted negative repercussions on the right to liberty, fundamental justice, freedom of movement, privacy rights and raised potential discrimination avenues. In fact, civil society groups [14], legal groups and even Canada's Privacy Commissioners [15] all expressed opposition, but it fell on largely deaf ears. Instead of government pushing for the issue to be thoroughly debated and investigated in parliament, at the time, officials only offered a fig leaf process of canvassing regulatory comment, *ex post facto*, largely in an attempt to score PR points.

***Corresponding author:** Faisal Kutty, Associate Professor of Law, Valparaiso University Law School, Indiana, USA, Tel: 219-465-7813; E-mail: faisal.kutty@valpo.edu

Received February 25, 2016; **Accepted** February 29, 2016; **Published** March 01, 2016

Citation: Kutty F (2016) Canada's No-Fly List Needs Substantive Changes and Procedural Protections. J Civil Legal Sci 5: 176. doi:10.4172/2169-0170.1000176

A Bad Program Gets Worse

Over the years many people on the list have been caught in limbo without any recourse. Interestingly, Laureen Kinney, currently the assistant deputy minister for safety and security at Transport Canada, testified in 2010 to a parliamentary committee that there were about 850 false positives within the first three years of the program [15].

Despite a poor track record, a bad program has gotten worse with a firmer footing through anti-terror legislation (C-51), which former Prime Minister Stephen Harper's government passed last year. Rather than addressing earlier concerns, the Secure Air Travel Act [16] (SATA) made the program worse in many respects. Amendments authorized the minister of public safety and emergency preparedness to establish a list of persons who the minister has reasonable suspicion to believe poses a threat. The Canadian Civil Liberties Association, among others, has pointed out that the term "reasonable grounds to suspect" is left undefined while the concept of a "threat" is overbroad. The threat could be to transportation security, or it may be that the minister has "reasonable grounds to suspect" that the person will commit a terrorist offence, or participate or contribute directly or indirectly to a terrorist group or activity (as set out in the Criminal Code). The offence is committed regardless of whether the group engages in such an act, the person actually contributes to the group or realizes he or she is doing so. There is no guidance provided as to how the minister or designate can come to such a conclusion. Moreover, the standard of "reasonable suspicion" may not pass constitutional muster given that inclusion on the no-fly list would mean deprivation of mobility rights and other guarantees contained in the Canadian Charter of Rights and Freedoms [17].

Other changes include extending the time to review the list to every 90 days from every 30 days; authorizing the minister of transport to demand information from carriers and reservation systems and to share these with other entities, including foreign; and adds the minister of citizenship and immigration to the SPAG (though unclear if it will continue).

The no-fly list is certainly not going to shrink thanks to these provisions. It is also unclear whether the Office of Reconsideration will continue its work. The SATA says that a denied person (whose name may have already been provided to foreign entities) now must apply directly to the minister within 60 days of being denied transportation to challenge a listing. This is akin to having the fox guard the henhouse. Moreover, SATA suggests that a person on the list may not be informed that he or she is on the no-fly list, raising the question of how people will come to know they are on the list so they can attempt to seek redress. If a person is in fact advised or somehow learns that he or she is on the list, he or she applies to the minister and if the minister's decision is not forthcoming within 90 days, it is deemed a non-removal. An appeal flows to a federal judge, who must be convinced that the minister was not only wrong, but acted "unreasonably." The kicker is that this will most likely be done in a private hearing with secret (unchallenged and unchallengeable) evidence presented in the absence of the individual and counsel. This Kafkaesque process was held unconstitutional by the Supreme Court of Canada in the context of security certificates used to detain non-citizens as national security threats.

More Headaches from Secrecy

Ironically, as the U.S. begins to ease up on its own lists in response to civil rights lawsuits, the Canadian list is becoming more secretive, sweeping and less accountable. Those on the list and sometimes even those with similar names not only face delays and inconvenience, but also life-altering consequences as the list cross-fertilizes with other lists, domestic and foreign [18].

Canadians may be targeted not only by the Canadian list but, consistent with the cross-fertilization thesis, they may also be subject to the American no-fly list. In fact, a Sarnia, Ontario radiologist filed suit in January against the Canadian Human Rights Commission (CHRC) after it dismissed his U.S. no-fly list complaint. He was reportedly prevented from boarding an Etihad flight from Toronto to the United Arab Emirates in 2012 [19]. The Federal Court application alleges that Dr. Youssef Almalki filed a complaint with CHRC alleging discriminatory treatment by the airline based on the American list. The commission dismissed the complaint. The Federal Court filing raises issues of Canadian sovereignty and whether the U.S. no-fly list should have authority over air carriers operating from Canada and that do not fly over the U.S. SATA is only going to make the situation even more complicated.

Watch lists may serve a limited legitimate and useful function, such as separating individuals deserving of increased investigative attention. But these lists will never be complete or totally accurate, and as such, should never be the basis for serious restrictions on liberty, freedom of movement, violation of privacy or other rights without the benefit of the principles of fundamental justice.

The government's appeal to national security should not exempt it from rigorous accountability and oversight. As many critics have argued, the system envisaged by the Passenger Protect Program and as amended by SATA has proven neither necessary nor effective. It is unconstitutional, as it is over inclusive with high likelihood of false positives, and poses a serious potential for rights violations and completely lacks any meaningful redress mechanism or process.

As Harper wrote in his book *Identity Crisis* [20]: "Watch listing and identification checking [are] like posting a most-wanted list at a post office and then waiting for criminals to come to the post office."

If the Canadian government wants to really make a difference, then cosmetic changes need to give way to substantive and procedural protections. Otherwise Syed Adam Ahmed and the 21 others like him may not be the last kids or innocent Canadians caught in the web.

References

1. Ahmed S (2016) Airlines told they don't need to vet children against no-fly list. The Canadian Press.
2. (2016) Syed Adam Ahmed's mother encouraged by government response to son, 6, on no-fly list. CBC news.
3. (2016) Whitby, Ont., man separated from wife, kids in Pakistan due to no-fly list. CBC news.
4. (2016) Organization puts callout for Canadians affected by no-fly lists.
5. (2016) Canada's no-fly list is 'very mysterious' and leaves targets little recourse, say critics. CBC news.
6. http://ksmlaw.ca/
7. (2015) Specified Persons Advisory Group. Public Safety Canada.
8. Friscolanti M (2015) Canada's evolving no-fly list-and why changes to it were inevitable.
9. Barret T (2007) Grounding the No-Fly List.
10. Harper J (2006) The Weaknesses of Watch-Listing. Cato at Liberty.
11. Aeronautics Act (R.S.C., 1985, c. A-2).
12. (2007) The Privacy Implications of Aviation Security Measures.

13. Kutty F (2007) Canada's Passenger Protect Program: Too Guilty to Fly, Too Innocent to Charge?
14. (2007) Resolution of Canada's Privacy Commissioners and Privacy Enforcement Officials. Passenger Protect Program-Canada's Aviation No-fly List.
15. (2010) Proceedings of the Standing Joint Committee for the Scrutiny of Regulations.
16. (2015) Secure Air Travel Act, S.C. 2015, c. 20, s. 11.
17. (1982) Constitution Act.
18. Shamsi H (2015) Until the No Fly List Is Fixed, It Shouldn't Be Used to Restrict People's Freedoms.
19. McGregor G (2016) Almalki's brother takes rights commission to court over no-fly list ruling.
20. Harper J (2006) Identity Crisis. How Identification Is Overused and Misunderstood.

Citation: Kutty F (2016) Canada's No-Fly List Needs Substantive Changes and Procedural Protections. J Civil Legal Sci 5: 176. doi:10.4172/2169-0170.1000176