In the United States Court of Federal Claims

BERNARD TALBERT, Plaintiff, v. THE UNITED STATES, Defendant.	)	No. 12-456C Filed January 24, 2013

ORDER

Before the Court is defendant's motion for summary dismissal of plaintiff's complaint for lack of subject matter jurisdiction, filed September 20, 2012 (docket entry 7).[1] Plaintiff, appearing *pro se*, filed an opposition on October 5, 2012 (docket entry 9), and defendant filed a reply on October 22, 2012 (docket entry 10).

I. Facts[2]

Plaintiff, Mr. Bernard Talbert, alleges in his complaint ("Compl.") (docket entry 1, July 23, 2012) numerous constitutional violations and that his imprisonment is wrongful. In August 2011, Mr. Talbert "went to the U.S. Border from Matamoros, Mexico," where he "made

[1] Also before the Court is plaintiff's second motion for the appointment of counsel (docket entry 11, Oct. 25, 2012). Plaintiff filed his first motion for appointment of counsel on July 23, 2012 (docket entry 4). Finding that plaintiff's case did not present the sort of "extreme circumstances" required for the Court to exercise its authority to appoint counsel in civil cases, the Court issued an order in August denying plaintiff's motion (docket entry 6, Aug. 15, 2012). As defendant notes in its response (docket entry 12, Nov. 13, 2012), since then "[n]othing has changed." The Court therefore **DENIES** plaintiff's second motion for the appointment of counsel. Plaintiff's case still does not involve the kind of "extreme circumstances" that might warrant appointment of counsel in this civil case. *See* August 15, 2012 Order; *see also Washington v. United States*, 93 Fed. Cl. 706, 708 (2010) ("[The Court's power to appoint counsel] should only be exercised in extreme circumstances. The Supreme Court has indicated that an appointment of counsel in civil cases may be appropriate when quasi-criminal penalties or severe civil remedies are at stake, such as those in a civil commitment proceeding or when an indigent risks losing his or her child in a custody case.").

[2] This recitation of facts is based upon the allegations in plaintiff's complaint.

inquiries to [sic] a U.S. Customs and Border Protection [("CPB")] Officer." Compl. 2, 3. During his interaction with Border Patrol, Mr. Talbert presented a "World Service Authority passport" and claimed to be a diplomat. *Id.* ("[P]laintiff informed [CBP agents] of his diplomatic status."). "When [plaintiff] present[ed] [him]self, [to the agents] and told them [of his "diplomatic"] status, [a CBP agent] . . . went on line to look into [plaintiff's] prior record." *Id.* at 6. Then, "about a minute later [the agent] came back and told [plaintiff] that her boss ordered her to arrest[] plaintiff." *Id.* From plaintiff's prior record, the agents concluded that plaintiff was a "Belizean national."[3] *Id.* CBP agents also determined that Mr. Talbert had previously been deported from the United States, most recently in connection with his 2008 conviction for committing an aggravated felony. *See United States v. Talbert*, No. B-11-764-1, slip op. at 2 (S.D. Tex., June 19, 2012) ("S.D. Tex. Order").[4] The CBP agents "arrested and charged [plaintiff] with unlawful attempted re-entry." Compl. 6.

Mr. Talbert was subsequently charged with illegal entry into the United States, in violation of 8 U.S.C. § 1326(a) and (b)(2). S.D. Tex. Order at 1. In February 2012, after a bench trial, the United States District Court for the Southern District of Texas convicted Mr. Talbert of being unlawfully in the United States after deportation, having been previously convicted of a felony. *Id.* at 9–10. On June 22, 2012, the district court sentenced Mr. Talbert to seventy-seven months' imprisonment. *United States v. Talbert*, No. B-11-814MJ, slip op. at 2 (S.D. Tex., Aug. 11, 2012) (sentencing papers). Mr. Talbert is confined at the Federal Correctional Institution in Big Spring, Texas. *See* Pl.'s Resp. [to] Def.['s] Mot. ("Resp.") at 2.

II. Plaintiff's Claims

In his complaint, Mr. Talbert alleges (1) CBP officers unlawfully detained him on August 10, 2011 when he attempted to inquire about obtaining a non-immigrant visa; (2) at the time of his arrest, he "experienced a high[] level of racial profiling"; and (3) that several of his constitutional rights have been violated, including the Fourth Amendment's prohibition of unreasonable searches and seizures, the Fifth Amendment's guarantee of due process, and the

[3] Plaintiff maintains, however, that he is not a Belizean national. *Id.* ("They told plaintiff that he is a Belizean national, which plaintiff is not, or not a property of the Belizean government.").

[4] The United States District Court for the Southern District of Texas included in its Order facts stipulated by the parties in the criminal case against Mr. Talbert. S.D. Tex. Order at 2 ("Bernard Talbert was deported and removed from the United States on or about February 3, 1998, January 18, 2000, and October 24, 2008. On June 18, 2004, . . . [plaintiff] was convicted of Illegal Reentry by a Deported Alien after an aggravated felony conviction in violation of 8 U.S.C. § 1326(a) and (b)(2)."). Of what the agents learned from his prior record (other than his Belizean roots), Mr. Talbert says only, "I am not that person anymore." Compl. 6.

Eighth Amendment's prohibition against cruel and unusual punishment.[5] Compl. 2, 8. Mr. Talbert also collaterally attacks his district court conviction.

III. Discussion

A. Standard of Review

Jurisdiction is a threshold matter and the case cannot proceed unless this Court has jurisdiction to hear it. *Webster v. United States*, 90 Fed. Cl. 107, 113 (2009) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). A plaintiff bears the burden of establishing the Court's jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). In reviewing a motion to dismiss for lack of subject matter jurisdiction, the Court takes as true all undisputed factual allegations stated in the complaint, and decides jurisdiction on the face of the pleadings. *Shearin v. United States*, 992 F.2d 1195, 1195–96 (Fed. Cir. 1993). Complaints filed by *pro se* litigants, like Mr. Talbert, are held "to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). However, despite warranting a less exacting standard of pleading, *pro se* status does not relieve a plaintiff from meeting jurisdictional requirements. *See, e.g.*, *Sanders v. United States*, 252 F.3d 1329, 1336 (Fed. Cir. 2001) (affirming *sua sponte* dismissal of *pro se* breach of contract complaint for lack of jurisdiction).

The Tucker Act, 28 U.S.C. § 1491 (2006), "confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States, and . . . it waives the Government's sovereign immunity for those actions." *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc). Under the Tucker Act, the Court is authorized to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages *in cases not sounding in tort*." 28 U.S.C. § 1491(a)(1) (emphasis added). This jurisdiction extends only to claims for money damages. *See United States v. Testan*, 424 U.S. 392, 398 (1976). "[J]urisdiction under the Tucker Act requires the litigant to identify a substantive right for money damages against the United States separate from the Tucker Act . . . ." *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004).

---

[5] Additionally, Mr. Talbert appears to allege that he owns a copyright (No. "X-7000-050-09") in his "World Service Authority passport." Compl. 1. He states that "pursuant to Title 28 U.S.C. § 1338(c)," as a "privat [sic] person" he has "exclusive rights" because "my self is my property." Compl. 4. Mr. Talbert makes a threadbare (and all but unintelligible) assertion that "[n]ame, which is the plaintiff, [sic] trademark [was] violated by the U.S. gov't. [sic] CBP agents, and its agencys [sic], who was [sic] under color of the authority of the United States." *Id.* at 9. Mr. Talbert does not, however, allege any facts to support this supposed violation by the government, nor does he seek compensation from the United States in connection with his "copyright" or "trademark." *Id.* Thus, these claims likewise do not support jurisdiction.

B. The Court Lacks Jurisdiction Over Mr. Talbert's Claims

None of Mr. Talbert's claims allege a violation for which money damages are mandated.[6] The Court therefore lacks jurisdiction over them. *See Testan*, 424 U.S. at 398; *see also Tasby v. United States*, 91 Fed. Cl. 344, 346 (2010) ("In order for [the Court of Federal Claims] to have jurisdiction over constitutional . . . claims, the claim must be money mandating."). The United States Court of Appeals for the Federal Circuit has expressly held that the Court of Federal Claims does not have jurisdiction over claims arising under the Fifth Amendment Due Process Clause or the Eighth Amendment because they do not mandate the payment of money. *See Trafny v. United States*, 503 F.3d 1339, 1340 (Fed. Cir. 2007) ("The Court of Federal Claims does not have jurisdiction over claims arising under the Eighth Amendment, as the Eighth Amendment 'is not a money-mandating provision.'" (quoting *Edelmann v. United States*, 76 Fed. Cl. 376, 383 (2007))); *Crocker v. United States*, 125 F.3d 1475, 1476 (Fed. Cir. 1997) ("The Court of Federal Claims correctly concluded that it does not have jurisdiction to hear . . . due process or seizure claims under the Fifth Amendment . . . ."). Likewise the Fourth Amendment is not money mandating. *Tasby*, 91 Fed. Cl. at 346 ("[T]he Fourth Amendment prohibition of unreasonable searches and seizures is not money-mandating."). Since none of Mr. Talbert's constitutional claims involve money-mandating provisions, the Court lacks jurisdiction to hear them.[7]

Furthermore, this Court does not have jurisdiction over criminal matters. *Cooper v. United States*, 104 Fed. Cl. 306, 311–12 (2012) (citing *Kania v. United States*, 650 F.2d 264, 268 (Ct. Cl. 1981) ("[T]he role of the judiciary in the high function of enforcing and policing the criminal law is assigned to the courts of general jurisdiction and not to [the Court of Claims].") (alteration in original)). Also, to the extent that plaintiff is challenging his criminal trial, conviction, and imprisonment, and the conduct of the government and its officers in connection with the prosecution of plaintiff in district court, this Court does not have jurisdiction over his claims because the Court may not review the decisions of district courts. *Id.* (citing *Joshua v.*

---

[6] Nor do any of Mr. Talbert's various references to international treaties, laws, or rights, *see, e.g.*, Compl. 8, allege such a violation.

[7] Only one of Mr. Talbert's many allegations even mentions a money-mandating provision, but it too falls short. On the eighth page of his complaint, Mr. Talbert states, "The arbitrary confiscation of the WSA documents of Mr. Bernard Talbert[], is a violation of his right to own property," and quotes the Due Process and Takings Clauses of the Fifth Amendment. Compl. 8. This does not suffice for two reasons. First, Mr. Talbert has not established that he has a property interest in his WSA "passport"; a United States passport, for instance, "belongs to the U.S. government, not plaintiff, and is not his 'private property.'" *Belazi v. Meisenheimer*, No. 03–1746, 2004 WL 1535727, at *3 (D. Or. July 8, 2004) (citing 22 C.F.R. § 51.9 ("A passport shall at all times remain the property of the United States and shall be returned to the Government upon demand[.]")). Second, Mr. Talbert's WSA documents, even if his private property, were not "taken for public use" as required by the Fifth Amendment. *Zhao v. United States*, 91 Fed. Cl. 95, 99 n.5 (2010) (citing U.S. Const. amend. V. and finding that any "taking" of plaintiff's Chinese passport was not "for public use").

United States, 17 F.3d 378, 380 (Fed. Cir. 1994) ("[T]he Court of Federal Claims does not have jurisdiction to review the decisions of district courts . . . relating to proceedings before those courts.")). Additionally, this Court does not have jurisdiction insofar as plaintiff alleges that the wrongful and unauthorized actions of the government and its agents were criminal in nature.[8] *Joshua*, 17 F.3d at 379 ("The [C]ourt [of Federal Claims] has no jurisdiction to adjudicate any claims whatsoever under the federal criminal code . . . ."). Therefore, the Court may not review plaintiff's claims relating to his conviction in district court, nor may it review the acts of the government and its agents to the extent plaintiff claims that they are criminal in nature.[9] Because the Court does not possess jurisdiction to hear any of Mr. Talbert's claims, it must dismiss his case. *See* Rule 12(h)(3) of the Rules of the United States Court of Federal Claims ("RCFC") ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").[10]

---

[8] Mr. Talbert alleges, "A crime has been committed upon plaintiff, by the U.S. governmental representatives. in [sic] the Southrn [sic] district of Texas, by the powers of they [sic] in controlled. [sic] who has [sic] convicted plaintiff, basis [sic] on their racial profiling, gross mismanagement of the law, and massive corruption in the area of the justice system." Compl. 3 (emphasis omitted). Insofar as this alleged conduct could be considered tortious, it is well settled that "the Court of Federal Claims lacks jurisdiction over any and every kind of tort claim." *Cottrell v. United States*, 42 Fed. Cl. 144, 149 (1998). Likewise, this Court "does not have jurisdiction over claims that defendant engaged in negligent, fraudulent, or other wrongful conduct when discharging its official duties." *Edelmann*, 76 Fed. Cl. at 380 (citing *Cottrell*, 42 Fed. Cl. at 149); *see also* 28 U.S.C. § 1346(b)(1) ("[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States [arising out of] the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment . . . ."); *McCauley v. United States*, 38 Fed. Cl. 250, 265 (1997).

[9] In his response to the government's motion, plaintiff insists that his various claims of wrongful government action are actually takings claims "about private property." Resp. 3; *see, e.g.*, Resp. at 1 ("Plaintiff, claim is his self, which is his private property."); *id.* at 2 ("[The Takings Clause] was violated by U.S. gov't agent, and its agency CBP, with the assistance of U.S. prosecutor, who impose a malicious prosecution."); *id.* ("Plaintiff was abduct[ed] under coercion and duress . . . by U.S. agent and its agency CBP . . . ."). It is well-established, however, that a plaintiff cannot assert that government action was wrongful and, at the same time, bring a takings claim based on the alleged action. *Kalos v. United States*, 87 Fed. Cl. 230, 237 (2009) *aff'd*, 368 F. App'x 127 (Fed. Cir. 2010) ("Tucker Act jurisdiction over Fifth Amendment takings claims is premised on the requirement that the government action was legitimate."); *see also Klump v. United States*, 38 Fed. Cl. 243, 247 (1997) ("To the extent that federal agents acted in a manner inconsistent with their authority under federal law, plaintiff may not seek redress under the Fifth Amendment's takings clause because the takings clause applies only to authorized government actions."). Therefore, plaintiff's attempt to salvage his action by quoting the takings clause and repeating the phrase "private property," is not successful.

[10] It appears that RCFC 12(h)(3), which requires dismissal, is at odds with 28 U.S.C. § 1631 (2006). Section 1631 does not require dismissal, but instead provides that when a court

C. Transfer of the Case to Another Court is Not Appropriate

Although not requested to do so by plaintiff, the Court considers *sua sponte* whether "it is in the interest of justice" to transfer plaintiff's complaint to another court under 28 U.S.C. § 1631. *Tex. Peanut Farmers v. United States*, 409 F.3d 1370, 1374–75 (Fed. Cir. 2005) (stating that the U.S. Court of Federal Claims should have considered whether transfer was appropriate once the court determined that it lacked jurisdiction and noting that the court may "order[ ] transfer without being asked to do so by either party"). When the Court lacks jurisdiction over a particular action, it has the authority to transfer that action to a court "in which the action . . . could have been brought at the time it was filed," but only if such a transfer "is in the interest of justice." 28 U.S.C. § 1631; *accord Tex. Peanut Farmers*, 409 F.3d at 1375. "The court will transfer a case when a plaintiff articulates a clearly stated and nonfrivolous complaint." *Schrader v. United States*, 103 Fed. Cl. 92, 101 (2012) (citing *Phang v. United States*, 87 Fed. Cl. 321, 330–31 (2009) (determining that it was not in the interest of justice to transfer plaintiff's claims because those claims were "unlikely to be meritorious in another court of the United States"), *aff'd*, 388 F. App'x 961 (Fed. Cir. 2010) (unpublished))). Mr. Talbert's claims, to the degree they can be understood, border on the frivolous. *See Young v. United States*, 88 Fed. Cl. 283, 291–92 (2009). The Court therefore concludes that it is not in the interest of justice to transfer plaintiff's action.

CONCLUSION

For the reasons stated above, the Court **GRANTS** defendant's motion to dismiss for lack of subject matter jurisdiction, pursuant to RCFC 12(b)(1). The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

GEORGE W. MILLER
Judge

---

determines that it lacks subject matter jurisdiction over an action, the court shall "transfer [the] action . . . to any other . . . court in which the action . . . could have been brought," provided that transfer "is in the interest of justice."