

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID P. JACOBSEN

Plaintiff,

v.

JAMES J. OLIVER, et al.

Defendants.

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Civil Action No. 01-1810 (RMC)

**BRIEF OF THE JEWISH INSTITUTE FOR NATIONAL SECURITY AFFAIRS
AND THE WASHINGTON LEGAL FOUNDATION
AMICI CURIAE IN OPPOSITION TO PART OF THE DEFENDANTS’
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The interests of *amici curiae* Jewish Institute for National Security Affairs and the Washington Legal Foundation are set forth in the attached motion for leave to file this brief.

Defendants ask this Court to hold, as a matter of law, that the Ministry of Information and Security or Ministry of Intelligence and Security of the Islamic Republic of Iran (“MOIS”) is not an agency or instrumentality of Iran. The Jewish Institute for National Security Affairs (“JINSA”) and the Washington Legal Foundation (“WLF”) urge this Court to reject this contention. Acceptance of Defendants’ contention would constitute an egregious misreading of the statute and would also contravene vital national anti-terrorist policies of the United States.

The controlling statutory language is found in the Flatow Amendment:

An official, employee, or agent of a foreign state
designated as a state sponsor of terrorism designated under

Section 6(j) of the Export Administration Act of 1979 [section 2405(j) of the Appendix to Title 50, War and National Defense] while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code [subsec. (a)(7) of this section] for money damages which may include economic damages, solatium, pain and suffering, and punitive damages if the acts were among those described in section 1605(a)(7) [subsec. (a)(7) of this section].

28 U.S.C. § 1605 note, P.L. 104-208, Div. A, Title I, § 101(c) (1996).

JINSA and WLF submit that the reasoning of Judge Lamberth in Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 24 (D.D.C. 1998), is correct and is precisely applicable to this case. Although the defendant did not appear, Judge Lamberth reached the result after presiding over the trial required by 28 U.S.C. § 1608(e) as well as a thorough review of the applicable law. Judge Lamberth set forth the legal framework for the analysis required under the Flatow Amendment:

The Flatow Amendment expressly provides that punitive damages are available against the agents of a foreign state, but does not limit the term "agent" to an individual, non-governmental actor. A governmental unit of a foreign state can act as an agent of a foreign state, if, for example, it acts with the authority of the government, but not within the scope of its dedicated function. This Court concludes that in order for a cause of action for punitive damages to lie against a governmental unit acting as the state's agent, the cause of action must be based not upon any alleged role as a policymaker, but rather upon its implementation of policy at the operational level.

The role of MOIS in connection with kidnapping Plaintiff David Jacobsen and holding him hostage is an act “not within the scope of [MOIS’s] dedicated function.”¹ Moreover, the actions of MOIS involved here were clearly committed “at the operating level,” not the policy-making level. Several other judges, after conducting trials required by the statute, have also found MOIS to be an “agency or instrumentality” of Iran which is liable for punitive damages. See Exhibit D to Memorandum of Points and Authorities in Opposition to Defendants’ Second Motion to Partial Summary Judgment.

As Judge Lamberth held in Cronin v. Islamic Republic of Iran, 238 F. Supp. 222, 235 (D.D.C. 2002):

Cronin also seeks punitive damages against the MOIS. Punitive damages are awarded to punish a defendant for particularly egregious conduct, and to serve as a deterrent to future conduct of the same type. Restatement (Second) Torts, § 908. The FSIA specifically provides courts with the power to award punitive damages against an agency or instrumentality of a foreign state in a case brought under section 1605(a)(7). 28 U.S.C. § 1606. In this case, the Court finds that both of these requirements are easily satisfied. Cronin brought this action pursuant to 28 U.S.C. § 1605(a)(7), and the Iranian Ministry of Information and Security is an agency or instrumentality of the Islamic Republic of Iran for purposes of the FSIA. Elahi, 124 F. Supp. 2d at 113; 28 U.S.C. § 1603(b) (defining an agent as an “organ of a foreign state or political subdivision thereof.”).

The recent decision of the Court of Appeals in Roeder v. Islamic Republic of Iran, No. 02-515, decided July 1, 2003, does not help Defendants’ argument. The Court held that, like the Bolivian Air Force in the Transaero case, “the Ministry of Foreign Affairs must be treated as the State of Iran itself rather than its agent.”² The decision is based on

¹ See Hosseinbor Affidavit, Par. 14, p. 4, stating that extra-judicial actions such as those perpetrated against Jacobsen are not sanctioned under Iranian law.

² Slip opinion, page 9

the proposition that maintaining armed forces and foreign ministries are core governmental functions. There is no basis in the record before this Court to allow a holding as a matter of law that MOIS conducts core governmental functions and can therefore be treated as the State of Iran itself.

To hold that MOIS, as a matter of law, must be treated as the State of Iran would be equivalent to holding that kidnapping and terrorism are core governmental functions. This would defeat the policy of the applicable exception from sovereign immunity which is to hold perpetrators of terrorism liable for punitive damages.

CONCLUSION

This court should reject Defendants' contention that, as a matter of law, MOIS is not an agency or instrumentality of Iran.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of July, 2003, I deposited copies of the foregoing brief in the U.S. Mail, First-Class postage prepaid, addressed as follows:

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