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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

HICHAM MESNAOUI,
Plaintiff,

vs.

No. CIV. S-10-1129 GEB GGH PS

BERGAUST CHRISTOPHER, et al.,
Defendants.

ORDER AND FINDINGS AND
RECOMMENDATIONS

_____ /

Plaintiff, proceeding in this action pro se, has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 72-302(21), pursuant to 28 U.S.C. § 636(b)(1).

Plaintiff has now submitted an affidavit making the showing required by 28 U.S.C. § 1915(a)(1). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff was advised in this court’s previous order of the defects in his complaint. Plaintiff has not cured those defects against the consular defendants with his amended complaint. Plaintiff has also added Maryam Abdrahman, his wife and mother of his allegedly kidnaped child, as a defendant in his amended complaint.

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28

1 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
2 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
3 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
4 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
5 Cir. 1989); Franklin, 745 F.2d at 1227.

6 A complaint must contain more than a “formulaic recitation of the elements of a
7 cause of action;” it must contain factual allegations sufficient to “raise a right to relief above the
8 speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007).
9 “The pleading must contain something more...than...a statement of facts that merely creates a
10 suspicion [of] a legally cognizable right of action.” Id., quoting 5 C. Wright & A. Miller, Federal
11 Practice and Procedure 1216, pp. 235-235 (3d ed. 2004). “[A] complaint must contain sufficient
12 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft
13 v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949 (2009) (quoting Twombly, 550 U.S. at 570, 127
14 S.Ct. 1955). “A claim has facial plausibility when the plaintiff pleads factual content that allows
15 the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged.” Id.

17 Pro se pleadings are liberally construed. See Haines v. Kerner, 404 U.S. 519,
18 520-21, 92 S. Ct. 594, 595-96 (1972); Balistreri v. Pacifica Police Dep’t., 901 F.2d 696, 699 (9th
19 Cir. 1988). Unless it is clear that no amendment can cure the defects of a complaint, a pro se
20 plaintiff proceeding in forma pauperis is entitled to notice and an opportunity to amend before
21 dismissal. See Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987); Franklin, 745 F.2d at 1230.

22 Plaintiff was previously informed of the defects in his complaint, which have not
23 been cured in his amended complaint. Federal district courts are courts of limited jurisdiction.
24 U.S. Const. Art. III, § 1 provides that the judicial power of the United States is vested in the
25 Supreme Court, “and in such inferior Courts as the Congress may from time to time ordain and
26 establish.” Congress therefore confers jurisdiction upon federal district courts, as limited by U.S.

1 Const. Art. III, § 2. See Ankenbrandt v. Richards, 504 U.S. 689, 697-99, 112 S. Ct. 2206, 2212
2 (1992). Since federal courts are courts of limited jurisdiction, a case presumably lies outside the
3 jurisdiction of the federal courts unless proven otherwise. Kokkonen v. Guardian Life Ins. Co. of
4 America, 511 U.S. 375, 376-78, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994). Lack of
5 subject matter jurisdiction may be raised at any time by either party or by the court. See
6 Attorneys Trust v. Videotape Computer Products, Inc., 93 F.3d 593, 594-95 (9th Cir. 1996).

7 Fed. R. Civ. P. 8 sets forth general rules of pleading in the Federal Courts.
8 Complaints are required to set a forth (1) the grounds upon which the court’s jurisdiction rests,
9 (2) a short and plain statement of the claim showing entitlement to relief; and (3) a demand for
10 the relief plaintiff seeks. Rule 8 requires “sufficient allegations to put defendants fairly on notice
11 of the claims against them.” McKeever v. Block, 932 F.2d 795, 798 (9th Cir. 1991). The
12 complaint does not meet the first two requirements.

13 Plaintiff alleges that two U.S. Consulate officials in Morocco committed fraud in
14 issuing a passport with a falsified identification of his minor daughter, so that his wife could
15 abduct her and transport her from Morocco to the United States. There is no allegation of a basis
16 for this court’s jurisdiction. Although the court may have personal jurisdiction over both
17 defendant consulate employees if they are citizens of the United States and employed by the U.S.
18 government; see U.S. for Use of Garcia v. McAninch, 435 F. Supp. 240, 244 (D.C. N.Y. 1977);
19 plaintiff must allege the federal basis for the court’s subject matter jurisdiction. The complaint
20 alleges only negligence, fraud in the falsification of identification with respect to a passport,
21 conspiracy to kidnap, and “verbal assault,” all state law claims, but makes no claim against
22 defendants under the U.S. Constitution or federal laws.¹

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24 ¹ The statutes cited by plaintiff do not provide for remedies in this instance. 18 U.S.C. §
25 956 does not provide for a private right of action, but only for criminal prosecution by the
26 government. See, e.g., Ellis v. City of San Diego, 176 F.3d 1183, 1189 (9th Cir.1999) (district
court properly dismissed claims brought under the California Penal Code because the statutes do
not create enforceable individual rights). 22 U.S.C. § 4807 only establishes a visa and passport
security program in the Department of State. 28 U.S.C. § 137 addresses division of business

1 Plaintiff does not, for example, state a claim under the Federal Tort Claims Act,
2 20 U.S.C. § 2675, against the United States government;² nor does he demonstrate entitlement to
3 a recognized Bivens-type remedy (Bivens v. Six Unknown Named Agents of Federal Bureau of
4 Narcotics, 403 U.S. 388, 91 S.Ct. 1999 (1971), authorizing a limited range of suits against
5 federal officials for violation of an individual’s federal constitutional rights). It is difficult to
6 understand how plaintiff, a resident of Morocco at the time of the allege tortious acts of consular
7 officials would be able to state claim under the Constitution of the United States. Rasul v.
8 Myers, 563 F.3d 527, 532 (n.5.) (D.D.C. 2009).

9 Plaintiff makes no possible claim against the United States under the Alien Tort
10 Statute, 28 U.S.C. § 1350, as the United States would be immune from suit. See Goldstar
11 (Panama) S.A. v. United States, 967 F.2d 965 (4th Cir. 1992).

12 In regard to plaintiffs’ wife who allegedly abducted their child, plaintiff claims
13 that she used fraud to obtain a United States passport under a false name in order to take their
14 child out of Morocco. Plaintiff has not stated a federal basis for subject matter jurisdiction
15 against this defendant. The Hague Convention and the International Child Abduction Remedies
16 Act (“ICARA”) would normally grant jurisdiction to a federal court sitting where the child is
17 physically located, in this case Carmichael. (Compl., Attach.) Nevertheless, ICARA can only be
18 implemented where both involved countries are signatories. 42 U.S.C. § 11601(b)(1); Sullivan
19 v. Sullivan, 2010 WL 227924 at *3 (D. Idaho Jan. 13, 2010). Morocco is not a signatory to the
20 Hague Convention. www.visaus.com/hague.html. Therefore, this court has no jurisdiction.

21 Taveras v. Taveras, 397 F.Supp.2d 908, 910 (S.D. Ohio 2005) (when a child is taken from a non-
22 _____
23 among district judges.

24 ² “Section 2675(a) establishes explicit prerequisites to the filing of suit against the
25 Government in district court. It admits of no exceptions. . . . We are not allowed to proceed in
26 the absence of fulfillment of the conditions merely because dismissal would visit a harsh result
upon the plaintiff.” Vacek v. United States Postal Service, 447 F.3d 1248, 1250 (9th Cir. 2006)
(internal citations omitted). Moreover, claims arising in a foreign country are expressly
excluded from an FTCA action. 28 U.S.C. § 2680 (k).

