IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Nawras Alkassab, Plaintiff, v. Leon Rodriguez, Director, United States Citizenship and Immigration Services Defendant.	Civil Action No. 2:16-cv-1267-RMG **ORDER and OPINION**

This matter is before the Court on Defendant's motion to dismiss Plaintiff's second amended complaint. (Dkt. No. 24.) For the reasons set forth below, the Court grants Defendant's motion to dismiss.

Plaintiff Nawras Alkassab, a South Carolina resident and citizen and national of Syria, brought this civil action on April 25, 2016, alleging that Defendant United States Citizenship and Immigration Services ("USCIS") unlawfully delayed adjudication of his Form I-589 Application for Asylum and Withholding of Removal ("asylum application") by subjecting him to its Controlled Application Review and Resolution Program ("CARRP"), in violation of the Administrative Procedure Act ("APA") and the Due Process Clause of the Fifth Amendment.

Plaintiff, whose asylum application has been pending since October 10, 2014 (approximately two years and six months), has asked this Court to (1) order USCIS to schedule an interview and adjudicate his pending asylum application; (2) pay him reasonable attorney's fees under the Equal Access to Justice Act; and (3) declare that CARRP violates the APA and the Due Process Clause of the Fifth Amendment. (Dkt. No. 23 at 13.)

I. Background

Plaintiff was a student at the University of Aleppo in Syria at the start of the Syrian Civil War in March 2011. (Dkt. No. 23 at 3.) From August 2011 through November 2013, Plaintiff organized and participated in anti-Assad protests in Syria. (*Id.* at 3-4.) Plaintiff alleges that he was tortured for his affiliation with and participation in anti-Assad activities and that he moved to Turkey in November 2013 in fear of further persecution. (*Id.* at 4-5.) While in Turkey, Plaintiff worked as an officer manager for the Syrian Interim Government in the health minister's office and lent his computer networking skills to "help online activists in the Syrian Revolution." (*Id.* at 5.)

On August 10, 2014, Plaintiff entered the United States on a student visa to pursue a master's degree in computer science at the University of Bridgeport in Connecticut. (*Id.*) Plaintiff was unable to pursue that degree program due to lack of funds so moved to Charleston, South Carolina within two months of his arrival in the United States to join his brother who was attending graduate school in Charleston.[1] (*Id.*)

Plaintiff filed his asylum application with USCIS on October 10, 2014. (*Id.*) He alleges that USCIS "affirmatively chose to subject [his] application to [CARRP]," a program that "requires USCIS adjudicators to delay adjudication of certain applications and to deny them for pre-textual reasons [and] disproportionately affects middle-eastern applicants and Muslim applicants." (*Id.* at 6.) In or around February 2015, officers from the Federal Bureau of Investigation and the Department of Homeland Security interviewed Plaintiff at his home. Plaintiff claims that this interview was part of the CARRP program. (*Id.*)

[1] In February 2015, Plaintiff applied to the master's program in computer science at the University of South Carolina. He was accepted and matriculated in August 2015. (Dkt. No. 23 at 6-7.)

On March 2, 2015, Plaintiff filed an application for Temporary Protected Status ("TPS") with USCIS along with his application for an employment authorization document ("EAD"). (*Id.* at 7.) In August 2015, USCIS granted Plaintiff an interim EAD, authorizing him to work until March 14, 2016. (*Id.*) In December 2015, the University of South Carolina offered Plaintiff admission into its Ph.D. program for computer science with a work/study contract, and Plaintiff applied that month for a new EAD. (*Id.*) Plaintiff filed this lawsuit on April 25, 2016, and his EAD application was approved the next day on April 26, 2016. (*Id.* at 8.) On November 29, 2016, USCIS granted Plaintiff's application for TPS. Plaintiff has protected status until March 2018. (*Id.*) The benefits of Temporary Protected Status are as follows[2]:

> During a designated period, individuals who are TPS beneficiaries or who are found preliminarily eligible for TPS upon initial review of their cases (*prima facie* eligible):
>
> - Are not removable from the United States
> - Can obtain an employment authorization document (EAD)
> - May be granted travel authorization
>
> Once granted TPS, an individual also cannot be detained by DHS on the basis of his or her immigration status in the United States.
>
> TPS is a temporary benefit that does not lead to lawful permanent resident status or give any other immigration status. However, registration for TPS does not prevent you from:
>
> - Applying for nonimmigrant status
> - Filing for adjustment of status based on an immigrant petition
> - Applying for any other immigration benefit or protection for which you may be eligible

[2] USCIS's "Temporary Protected Status" webpage, *available at* https://www.uscis.gov/humanitarian/temporary-protected-status/.

II. Legal Standard

a. Motion to Dismiss

i. Subject Matter Jurisdiction – 12(b)(1)

A Defendant may challenge subject matter jurisdiction by contending (1) that the complaint fails to allege facts sufficient to establish subject matter jurisdiction or (2) "that the jurisdictional allegations of the complaint [are] not true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). If the Defendant challenges the sufficiency of the jurisdictional allegations on the face of the complaint, Plaintiff receives the same procedural protections afforded under Rule 12(b)(6): "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Kerns v. United States*, 585 F.3d 187, 192 (2009). If, however "the defendant challenges the factual predicate of subject matter jurisdiction," a district court may hold an evidentiary hearing to consider the relevant facts. *Id.* In that case, Plaintiff's allegations are not presumed to be truthful, and the district court may "decide disputed issues of fact with respect to subject matter jurisdiction." *Id.*

ii. Failure to State a Claim– 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the dismissal of an action if the complaint fails "to state a claim upon which relief can be granted." Such a motion tests the legal sufficiency of the complaint and "does not resolve contests surrounding the facts, the merits of the claim, or the applicability of defenses. . . . Our inquiry then is limited to whether the allegations constitute 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (quotation marks and citation omitted). In a Rule 12(b)(6) motion, the Court is obligated to "assume the truth of all facts alleged in the complaint and the existence of any fact that can be

proved, consistent with the complaint's allegations." *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). However, while the Court must accept the facts in a light most favorable to the non-moving party, it "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Id.*

To survive a motion to dismiss, the complaint must state "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although the requirement of plausibility does not impose a probability requirement at this stage, the complaint must show more than a "sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint has "facial plausibility" where the pleading "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

b. Mandamus

The Mandamus Act gives district courts jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. A federal court will entertain a petition for writ of mandamus only when "(1) the petitioner has shown a clear right to the relief sought; (2) the respondent has a clear duty to do the particular act requested by the petitioner; and (3) no other adequate remedy is available. *In re First Fed. Sav. & Loan Ass'n of Durham*, 860 F.2d 135, 138 (4th Cir. 1988).

c. The Immigration and Nationality Act

The Immigration and Nationality Act ("INA") generally permits any alien "who is physically present in the United States" to apply for asylum in this country. 8 U.S.C. § 1158(a)(1). With limited exceptions, an alien must file an asylum application within one year after arriving in the United States. 8 U.S.C. § 1158(a)(2)(B). An alien may seek asylum either

affirmatively before USCIS or defensively during removal proceedings in immigration court. 8 C.F.R. §§ 208.2, 1208.2. Regulations vest the authority to process affirmative asylum applications with USCIS's Refugee, Asylum, and International Operations ("RAIO") Division. 8 C.F.R. § 208.2. Congress expressly afforded the Secretary of Homeland Security or the Attorney General discretion over whether to grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures the government has established. 8 U.S.C. § 1158(b)(1)(A).

d. Administrative Procedure Act

Section 555 of the APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b). With some exceptions, any person "adversely affected or aggrieved" by agency action, including a "failure to act," or "unreasonable delay," can seek judicial review of such action or inaction when the action is a "final agency action for which there is no other adequate remedy in a court," but judicial review is not available when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. §§ 701-706; *see Asheville Tobacco Bd. of Trade, Inc. v. Fed. Trade Com.*, 294 F.2d 619, 627 (4th Cir. 1961).

Under the APA, an agency must provide public notice of any proposed rule and an opportunity to comment, but there is no notice-and-comment requirement for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b), (c).

e. Due Process

Plaintiff also alleges violations of the Due Process Clause. The Fifth Amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of

law." U.S. Const, amend. V. When an alien seeks initial admission into the United States, he has no constitutional rights regarding his application. *Landon v. Plasencia*, 459 U.S. 21, 32 (1982); *see also Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) ("Aliens have no independent constitutional rights in an asylum procedure."). Later, once an alien has entered the country, "the legal circumstance changes, for the Due Process Clause applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 679 (2001).

III. Discussion

a. Mandamus

Plaintiff, whose asylum application has been pending since October 10, 2014 (approximately two years and six months), argues that this Court can and should compel USCIS to schedule his interview and adjudicate his asylum application. Plaintiff says he is entitled to have his application adjudicated within 180 days because "in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed." 8 U.S.C. § 1158(d)(5)(A)(iii).

The Mandamus Act authorizes this Court to compel agency action "to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. A federal court will entertain a petition for writ of mandamus only when "the petitioner has shown a clear right to the relief sought." *In re First Fed. Sav. & Loan Ass'n of Durham*, 860 F.2d 135, 138 (4th Cir. 1988). Although Congress has established procedures for processing asylum applications, the statute explicitly states that it does not create a private right of action. 8 U.S.C. § 1158(d)(7) ("Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by

any party against the United States . . ."); *see also Ivantchouk v. Attorney General*, 417 F. App'x 918, 921 (11th Cir. 2011) (per curiam) ("Nothing in § 1158(d) creates a private right of action against the government.") Further, "[t]he lack of specific statutory consequences combined with the plain language of Section 1158(d)(7) indicate that Congress did not intend for asylum applicants to utilize a civil action in federal court to seek the Government's compliance with the INA's 45- and 180-day timeframes." *L.M. v. Johnson*, 150 F. Supp. 3d 202, 212 (E.D.N.Y. 2015).

Plaintiff has argued that Congress did not intend § 1158(d)(7) to be a jurisdiction-stripping provision. This Court agrees with Judge Garaufis of the Eastern District of New York's analysis of this point:

> Plaintiffs are correct that unlike other sections of the INA, which specifically preclude judicial review of a determination made by the Attorney General, see, e.g., 8 U.S.C. § 1158(a)(3) ("No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2)."), Section 1158(d)(7) merely states that the asylum-related timeframes contained within the INA are not legally enforceable rights. In other words, while Section 1158(d)(7) does not strip this court of subject matter jurisdiction or preclude judicial review, it does make clear that Plaintiffs do not have a private right of action under the INA itself. Accordingly, Plaintiffs are permitted to raise their claim in this court, but the INA provides them no relief, since it does not provide them with rights enforceable via mandamus. And for the reasons discussed elsewhere in this Memorandum and Order, nor do the APA (with respect to Plaintiffs' unreasonable delay claims) or the Constitution itself.

Id. at 210. For these reasons, the INA does provide Plaintiff with any right in mandamus that this Court can enforce.

b. Administrative Procedure Act

Plaintiff has argued that "strictly speaking," he is bringing a cause of action under the APA for unreasonably delayed agency action, not under the asylum application procedures outlined in 8 U.S.C. § 1158(d)(7). (Dkt. No. 26 at 2.) Section 555 of the APA provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5

U.S.C. § 555(b). Agency actions are not subject to judicial review when (1) the controlling statute precludes judicial review, or (2) Congress has delegated discretion over the agency action at issue. 5 U.S.C. § 701(a). When an agency action is subject to review, a reviewing Court may "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706. Plaintiff says this Court "can compel USCIS to adjudicate [his] asylum application because such decision has been unreasonably withheld and delayed." (Dkt. No. 23 at 10-11.)

USCIS's compliance with the APA is not immune from judicial review. Courts have found that the Government's failure to take any action on an immigration application could run afoul of the requirement that an agency conclude the matters presented to it within a reasonable time. For example, in *Kim v. Ashcroft*, a case involving an adjustment of status application, a court in the Southern District of New York explained that "although there is no statutory or regulatory deadline by which the CIS *must* adjudicate an application, at some point, defendants' failure to take any action runs afoul of section 555(b). Were it otherwise, the CIS could hold adjustment applications in abeyance for decades without providing any reasoned basis for doing so." 340 F. Supp. 2d 384, 393 (S.D.N.Y. 2004) (noting that the Government "simply does not possess unfettered discretion to relegate aliens to a state of 'limbo,' leaving them to languish there indefinitely").

Even so, construing all facts in favor of the Plaintiff, this Court finds that USCIS's adjudication of Plaintiff's asylum application is not unreasonably delayed. Federal courts "look to the source of delay - e.g., the complexity of the investigation as well as the extent to which the defendant participated in delaying the proceeding" to determine whether the delay is unreasonable. *Reddy v. CFTC*, 191 F.3d 109, 120 (2d Cir. 1999). Courts also regularly apply the six factors set forth in *Telecomm. Research & Action Ctr. v. FCC* (the "TRAC factors"), which are: (1) "the time an agency takes to make a decision should be governed by a 'rule of reason'"; (2) "[t]he content of a rule of reason can sometimes be supplied by a congressional indication of

the speed at which the agency should act"; (3) "the reasonableness of a delay will differ based on the nature of the regulation; that is, an unreasonable delay on a matter affecting human health and welfare might be reasonable in the sphere of economic regulation"; (4) "the effect of expediting delayed actions on agency activity of a higher or competing priority . . . [and] the extent of the interests prejudiced by the delay"; and (5) "a finding of unreasonableness does not require a finding of impropriety by the agency." 750 F.2d 70, 80 (D.C. Cir. 1984); *see also Hyatt v. U.S. Patent & Trademark Office*, 146 F. Supp. 3d 771, 780 (E.D. Va. 2015).

To begin with, while asylum applications often involve matters that affect human health and welfare, USCIS's delay processing Plaintiff's asylum application does not, under these particular circumstances, have any significant impact on his health or welfare. Plaintiff has temporary protected status until March 2018. Until that time, Plaintiff is not removable from the United States, is eligible for employment authorization, and may be granted travel authorization. Plaintiff is currently enrolled in a Ph.D. program in South Carolina and resides near his brother.

The effect of compelling USCIS to adjudicate Plaintiff's asylum application would be simply to bump him to the front of the queue, thwarting the Government's efforts to prioritize certain groups of applicants (applications filed by children are, for example, currently prioritized).[3] The Fourth Circuit has recognized that in dealing with a "backlog of tens of thousands of cases," the agency charged with handling asylum applications "operates in an environment of limited resources, and how it allocates these resources to address the burden of increasing claims is a calculation that courts should be loathe to second guess." *Blanco de Belbruno v. Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004). This Court will not compel USCIS to

[3] USCIS's Affirmative Asylum Scheduling Bulletin, *available at* https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin.

act "even though all the other factors considered in TRAC favor[ ] it, where a judicial order putting the petitioner at the head of the queue would simply move all others back one space and produce no net gain." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003) (citation and internal quotation marks omitted).

c. CARRP

Plaintiff has alleged that CARRP is unlawful under the APA because it did not go through the notice and comment rulemaking procedures required under 5 U.S.C. § 706(2)(D).[4] This Court does not have jurisdiction over Plaintiff's claims because Plaintiff does not have standing to challenge CARRP.

Article III of the U.S. Constitution limits the jurisdiction of this Court to "Cases" and "Controversies." U.S. Const. art. III, § 2. Plaintiff must establish three "irreducible minimum requirements" of Article III standing to meet the case and controversy requirement:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Beck v. McDonald, 848 F.3d 262, 269 (4th Cir. 2017) (quoting *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). Threatened injury may confer Article III standing, but the threat must be "certainly impending to constitute injury in fact." *Id.* at 270-72 (4th Cir. 2017) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1140 (2013)). Plaintiff has not clearly alleged that he has or will suffer an injury in fact due to CARRP. As explained above in the Court's discussion of his APA challenge, Plaintiff does have a legally protected interest in having his asylum

[4] In connection with this claim, Plaintiff also alleges that CARRP is "ultra vires because it adds substantive criteria for eligibility unauthorized and unmoored from the statute or regulations" and that USCIS's continued use of CARRP is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." (*Id.* at 11-12.)

application adjudicated within a reasonable amount of time, but Plaintiff has failed to show that his alleged inclusion in the CARRP program has actually unreasonably delayed or will unreasonably delay the adjudication of his application. Plaintiff's allegation that "USCIS's decision to apply CARRP to [his application] has aggrieved him because it has delayed adjudication of his asylum application" is conclusory. (Dkt. No. 23 at 11.) Plaintiff filed his asylum application in October 2014. As of February 2017, USCIS was scheduling interviews for asylum applicants[5] who filed their applications in January 2014.[6] Asylum applicants who submitted their applications approximately nine months before Plaintiff did, many or most of whom are presumably not subject to CARRP, are still awaiting final decisions on their applications. Because Plaintiff has failed to show that he has suffered or will suffer an injury in fact from his inclusion in CARRP, his claim that CARRP is unlawful under the APA because it did not go through the notice-and-comment rulemaking period is dismissed without prejudice for lack of standing.

d. Due Process

Plaintiff has also alleged that his interest in the adjudication of his asylum application within a reasonable amount of time is "so significant that the Due Process clause requires notice and an opportunity to be heard before USCIS subjects an asylum application to CARRP and delays adjudication" because doing so "deprives individuals of their property interest in a timely decision on an asylum application without due process of law." (Dkt. No. 23 at 12-13.) "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire"

[5] Applicants, like Plaintiff, whose applications are under the jurisdiction of the Arlington, VA office.

[6] USCIS's Affirmative Asylum Scheduling Bulletin, available at https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-scheduling-bulletin.

and "more than a unilateral expectation of it. [A plaintiff] must, instead, have a legitimate claim of entitlement to it." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *see also Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) ("a benefit is not a protected entitlement if government officials may grant or deny it in their discretion."). Plaintiff's assertion that he has a property interest in receiving a decision on his asylum application within a reasonable amount of time is unfounded. Congress has explicitly stated that the asylum application procedures, including the 180 day advisory timeline, do not "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1158(d)(7)). Procedural delays in adjudication "do not deprive aliens of a substantive liberty or property interest unless the aliens have a 'legitimate claim of entitlement' to have their applications adjudicated within a specified time." *Mendez-Garcia v. Lynch*, 840 F.3d 655, 666 (9th Cir. 2016). Other federal district courts have dismissed due process claims based on delays in the asylum application process. *Vang v. Gonzales*, 237 F. App'x 24, 31 (6th Cir. 2007) (fourteen-year delay in completing asylum proceedings did not deprive plaintiffs of due process); *L.M.*, 150 F. Supp. 3d at 216-17 (adjudicatory delay of an asylum application where plaintiff alleged CARRP was the basis of the delay did not violate plaintiff's Due Process rights).

IV. Conclusion

For the foregoing reasons, Defendant's motion to dismiss Plaintiff's second amended complaint (Dkt. No. 24) is **GRANTED WITHOUT PREJUDICE.**

AND IT IS SO ORDERED.

Richard M. Gergel
United States District Judge

April 3, 2017
Charleston, South Carolina