

**BEFORE THE
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

Petition of)
)
)
KUWAIT AIRWAYS CORPORATION)
) Undocketed
for review of staff action pursuant to 14 C.F.R. § 385.30)
(Violation of 49 U.S.C. § 41310(a) and)
Order to Cease and Desist))

**PETITION OF KUWAIT AIRWAYS CORPORATION
FOR REVIEW OF STAFF ACTION**

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November 2, 2015

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**PETITION OF KUWAIT AIRWAYS CORPORATION
FOR REVIEW OF STAFF ACTION**

Pursuant to 14 C.F.R. § 385.30 *et seq.*, Kuwait Airways Corporation (KAC) hereby petitions for review of the action taken by staff of the U.S. Department of Transportation (DOT or the Department) Office of Aviation Enforcement and Proceedings in reversing its prior determination of February 20, 2014¹ that correctly concluded that KAC’s actions with respect to Israeli passport holders were *not* discriminatory. Specifically, KAC petitions for review of Department staff action taken on September 30, 2015 and October 22, 2015² which changed its prior determination and now holds that KAC’s actions are unreasonable discrimination in violation of 49 U.S.C. § 41310(a) and directs KAC to cease and desist from refusing to transport such passengers. DOT’s decision in this regard is arbitrary and capricious, an abuse of discretion, made without observance of procedure required by law,³ and otherwise not in accordance with law.

¹ The Department also issued a clarification to this determination on March 25, 2014.

² This Petition for Review of Staff Action is timely filed in accordance with 14 C.F.R. §§ 385.31 and 302.8.

³ The letters of September 30, 2015 and October 22, 2015 sent by the Assistant General Counsel of the Office of Aviation Enforcement and Proceedings, though purporting to be final agency actions, did not state that they were issued under delegated authority. The General Counsel has been delegated authority “to issue appropriate orders, including cease and desist orders, under 49 U.S.C. § 46101 (complaints and investigations).” *See* 49 C.F.R. § 1.27. KAC requests that the General Counsel, pursuant to 14 C.F.R. § 385.1, review the staff action at issue as described in this petition.

KAC petitions for review, pursuant to 14 C.F.R. § 385.31, because the action (1) is founded on a legal conclusion that is contrary to law; and (2) raises substantial and important issues of public policy.⁴

Factual and Procedural Background

Upon receipt of a complaint, DOT opened an investigation into the policies and practices of KAC regarding its inability to transport passengers travelling on an Israeli passport.⁵ KAC provided a comprehensive response to numerous questions posed by Department staff, advising that its policy is solely based on the dictates of Kuwaiti law, which prohibits Kuwaiti companies from conducting business with Israeli citizens. KAC does, however, transport passengers, regardless of race, color, national origin, religion, sex, or ancestry, if they hold a valid passport of a nation recognized by Kuwait. Following a review of KAC's response, Department staff issued a detailed determination on February 20, 2014 and subsequent clarification on March 25, 2014 that correctly concluded KAC's actions were *not* discriminatory under either 49 U.S.C. § 40127(a) (§ 40127(a)) or 49 U.S.C. § 41310(a) (§ 41310(a)). The Department staff's determination of February 20, 2014 was subsequently challenged by the complainant in the U.S. Court of Appeals for the D.C. Circuit. Rather than responding to this challenge, the Department's Enforcement Office, *sua sponte*, chose to re-open its investigation concerning the transportation of Israeli passport holders.

The Department staff's decision to re-open its investigation prompted several additional information requests to KAC, to which KAC timely and comprehensively responded, all of which noted that KAC's policy regarding the transportation of Israeli passport holders is solely based on citizenship and is required under Kuwaiti law. After considering KAC's submissions, the Department staff, more than a year and a half after re-opening the matter, reversed its prior determination of no unlawful

⁴ KAC relies on the provisions of 14 C.F.R. § 385.32. Specifically, "[a] timely petition for review filed in accordance with the provisions of this section...shall stay the staff action pending disposition by the Department." Thus, until a ruling by the General Counsel, KAC considers the October 22, 2015 action to be stayed.

⁵ See October 31, 2013 Letter of inquiry regarding potential discrimination against Israelis and Jewish and Israeli Americans.

discrimination and determined that KAC's actions with respect to Israeli passport holders constituted "unreasonable discrimination." The new determination relies on § 41310(a).⁶ This statute was not alleged by the complainant to have been violated, was previously evaluated by Department staff and determined to be non-applicable to KAC's actions, and clearly does not apply to the situation here.

The Department staff requested that KAC provide a response within 15 days of its September 30, 2015 letter outlining the steps the carrier planned to take to comply with § 41310(a) with regard to its route between New York (JFK) and London (LHR). Upon receipt of this determination, KAC, through counsel, sought reconsideration and again explained that it is prohibited by Kuwaiti law from transporting Israeli passport holders. In essence, the Department is ordering KAC to violate Kuwaiti law. KAC's request for reconsideration was summarily denied via letter dated October 22, 2015, in which Department staff determined that KAC's actions with respect to Israeli passport holders constituted unreasonable discrimination in violation of § 41310(a) and directed the airline to cease and desist from refusing to transport such passengers or face undefined "further administrative and/or judicial action".⁷ The Department staff also asserted that its September 30, 2015 letter constituted final agency action for purposes of appellate review.

The decision made by the Office of Aviation Enforcement and Proceedings to re-open an investigation that had previously been concluded and its subsequent reversal of a correct decision is arbitrary and capricious.⁸ For the reasons noted below, KAC respectfully requests the findings made by the Assistant General Counsel of the Office of Aviation Enforcement and Proceedings be reversed, withdrawn and vacated.

⁶ See September 30, 2015 letter from Office of Aviation Enforcement and Proceedings.

⁷ See October 22, 2015 letter from Office of Aviation Enforcement and Proceedings.

⁸ See *Republic Airline Inc. v. U.S. Dept. of Transp.*, 669 F.3d 296, 300-02 (D.C. Cir. 2012); *CSI Aviation Services, Inc. v. U.S. Dept. of Transp. And Raymond L. LaHood, Secretary*, 637 F.3d 408 (D.C. Cir. 2011).

Reasons for Review

1. The Action is Based on a Legal Conclusion that is Contrary to Law

The staff's position is predicated upon the legal conclusion that KAC's action (*i.e.*, not transporting Israeli passport holders) is discriminatory. In its original investigation, which concluded that no discrimination had occurred, the Department correctly based its analysis on § 40127(a).⁹ This statute is the primary anti-discrimination provision in the federal transportation code which states, in relevant part, that "an air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of *race, color, national origin, religion, sex, or ancestry*".¹⁰ Conspicuously absent from this list is the classification at issue in the present case: *citizenship*. Courts have consistently held that distinctions based upon citizenship are allowed¹¹ and the Department has affirmatively agreed.¹²

As noted in KAC's prior responses, pursuant to Kuwaiti law,¹³ KAC cannot accept passengers traveling on an Israeli passport. This policy does not violate § 40127(a) as it is based on citizenship and passport status and not on race, color, sex, religion, ancestry, or national origin. The Department agreed with this analysis when it originally and correctly determined KAC's actions with respect to travel by Israeli citizens was not discriminatory.

⁹ The Department also failed to find discrimination under § 41310(a).

¹⁰ 49 U.S.C. § 40127(a). *See also* Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e *et seq.* (1964), as amended.

¹¹ The U.S. Supreme Court has ruled that the government may bar foreign citizens from voting, serving as jurors, working as police or probation officers, or working as public school teachers. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S. Ct. 735, 70 L. Ed. 2d 677 (1982); *Ambach v. Norwick*, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979); *Foley v. Connelie*, 435 U.S. 291, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978); *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd* 426 U.S. 913, 96 S. Ct. 2616, 49 L. Ed. 2d 368 (1976); *Sugarman v. Dougall*, 413 U.S. 634, 641-42 (1973). The Court has further indicated that aliens' First Amendment rights might be less robust than those of citizens in certain discrete areas. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92, 72 S. Ct. 512, 96 L. Ed. 586 (1952).

¹² *See* Letters from Samuel Podberesky, Assistant General Counsel of the Office of Aviation Enforcement and Proceedings, to Senators Murphy and Schumer, dated November 6, 2013 (stating that "U.S. courts have recognized that the U.S. may discriminate based on citizenship in at least certain contexts").

¹³ The State of Kuwait's Law No. 21 of 1964 provides that "every natural or legal person is prohibited to enter [*sic*] into an agreement, personally or indirectly, with entities or persons residing in Israel, or Israeli citizenship, or working for or in the interest of Israel, regardless of their domicile, whenever the object of the agreement is to conduct commercial deals, financial transactions or any other dealings, regardless of nature". *See* Law No. 21 of 1964, Article 1. Violations of this prohibition are punishable by imprisonment with hard labor for between three and ten years and monetary fines. *See* Law No. 21 of 1964, Article 6.

In re-opening its investigation, however, the Department has apparently chosen to ignore both administrative and judicial legal precedent. Instead, it located an obscure and inapplicable statute, § 41310(a), which was clearly enacted to prohibit rate discrimination by common carriers. DOT nevertheless inexplicably evaluated KAC's practices and policies for transporting Israeli passport holders under this statute and, without citing any legal precedent to support a finding that § 41310(a) prohibits citizenship-based distinctions, determined that the airline's actions with respect to Israeli passport holders constituted "unreasonable discrimination".¹⁴ In fact, the only case law available are judicial (not administrative or DOT) interpretations of predecessor statutes to § 41310(a) concerning a carrier's purported discrimination based upon a protected class (race) or based upon safety and security considerations.¹⁵ Not only do these cases fail to show that § 41310(a) applies to distinctions based on citizenship, they are also contrary to the position DOT has previously taken when evaluating § 41310(a): that unreasonable discrimination under § 41310(a) is limited to protected classes (*i.e.*, race, color, national origin, religion, sex, or ancestry *but not citizenship*).¹⁶ Absent relevant support (which does not exist) that citizenship-based distinctions are prohibited by § 41310(a), the determination is unsupported, arbitrary and capricious, and should be reversed.

Although the legal precedent cited in the determination clearly does not apply to citizenship-based distinctions, it does raise one notable issue: carriers may refuse passage if "the carrier decides [a passenger] is, or might be inimical to safety," and carriers can exercise their discretion to refuse passage to passengers deemed to be a safety risk so long as the carrier's decision is "rational and reasonable" and

¹⁴ See September 30, 2015 letter, *supra* note 5, at 1.

¹⁵ See, e.g., *Mitchell v. U.S.*, 3131 U.S. 80 (1941) (racial classifications constituted unlawful discrimination under the I.C.A.); *Fitzgerald v. Pan Am. World Airways*, 299 F.2d 499 (2d Cir. 1956); *Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975); *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669 (9th Cir 1982).

¹⁶ See Answer of the Office of Aviation Enforcement and Proceedings in Opposition to American Airlines' Motion to Dismiss, Docket DOT-OST-2003-15046, July 22, 2003 ("an interpretation of § 41310(a)'s language as prohibiting [only] *protected class* discrimination is...inescapable.") (emphasis added).

that any such requirement of reasonableness is “for the benefit and protection of persons using the facilities of the air carrier.”

Notwithstanding the fact that KAC’s policy of not transporting Israeli passport holders is grounded in an express legal prohibition from its home country, the policy is also based on a legitimate concern for the well-being of its passengers, crew, and the safety of its aircraft. Because of long-standing tensions between Israel and certain countries in the Middle East, it is reasonable for KAC to conclude that transporting Israeli passport holders on KAC aircraft under circumstances where the two countries do not have diplomatic relations could impact its ability to safely operate its aircraft. Middle Eastern carriers must comply with strict security and safety requirements, and citizenship can be a factor that impacts safety and security. The decision fails to acknowledge and confer deference to the minimization of such risk by KAC and the carrier’s safety considerations. The fact that the Department’s decision does not directly, or indirectly for that matter, address KAC’s contention that its policies and practices are also based on safety concerns – which is permissible under § 41310(a) – should be considered by the Reviewing Official alone as grounds for reversal. The decisions reached in the September 30, 2015 and October 22, 2015 final agency actions are predicated on a faulty legal premise that is contrary to law and must therefore be vacated and reversed.

2. The Action Raises Substantial and Important Issues of Public Policy

The action raises substantial and important questions of policy and is more properly handled through diplomatic channels and/or under the consultation provisions of the U.S.-Kuwait Open-Skies Air Transport Agreement. The action is also contrary to principles of international sovereignty to the detriment of U.S. interests abroad and inevitably will result in undue harm to KAC and this country’s long-standing relationship with the State of Kuwait.¹⁷

¹⁷ The United States established diplomatic relations with Kuwait in 1961 and, according to the Department of State, “supports Kuwait’s sovereignty, security, and independence....” From 2003, Kuwait has provided a primary platform for U.S. operations

Kuwait and Israel are in a state of war, lack diplomatic relations and the State of Kuwait does not and cannot recognize Israeli passports as legal documents.¹⁸ KAC is wholly owned by the Government of Kuwait and, as such, can be viewed as an instrument of the government in its international commerce and foreign policy. KAC therefore has procedures in place to ensure compliance with all applicable restrictions for doing business with Israeli passport holders, including those at issue in this proceeding. Comparably, U.S. statutes grant the President extraordinary powers to control transactions and interactions with designated countries (and citizens of those countries), with which U.S. companies must comply.¹⁹ These restrictions typically apply within the United States and also abroad, in a manner similar to how Kuwait Law No. 21 of 1964 is applied to KAC. A long-standing American law is illustrative. The Trading with the Enemy Act of 1917 prohibits vessels of American registry from “transport[ing] or attempt[ing] to transport from any place to any other place, any subject or citizen of an enemy or ally of enemy nation, with knowledge or reasonable cause to believe that the person transported or attempted to be transported is such subject or citizen.”²⁰ Given the above, KAC’s actions – which are mandated under Kuwait Law No. 21 – should be given deference by the Reviewing Official.

Another clear parallel exists between Kuwait Law No. 21 of 1964 and the economic sanctions regime imposed by the U.S. Department of Treasury’s Office of Foreign Assets Control, which generally prohibits U.S. companies from importing, exporting, or transacting with certain countries or individuals

in Iraq and is an important partner in the region, assisting the United States in both counterterrorism and military initiatives. Kuwait and the United States also enjoy a robust trade and investment framework agreement, and Kuwait is one of the United States’ largest markets in the Middle East. *See* U.S. Dep’t of State, U.S. Relations with Kuwait, available at <http://www.state.gov/r/pa/ei/bgn/35876.htm>.

¹⁸ In times of war, the laws and customs that prevail during peacetime are terminated or suspended, and the existence of a state of war typically terminates diplomatic and commercial relations between the parties. *See* Congressional Research Service, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, April 18, 2014 at 20 (citing Cushman K. Davis, *A Treatise on International Law* (1901)).

¹⁹ *See, e.g.*, Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.*; International Emergency Economic Powers Act, 50 U.S.C. §§ 1701 *et seq.*

²⁰ *See* 50 U.S.C. App. §3(b).

unless specific permissions are first obtained from the government.²¹ For example, with respect to North Korea, prior to 1995, U.S. travel service providers, including U.S. travel agents, U.S. tour operators and U.S. air carriers, wherever they were doing business, could only book passage to North Korea aboard third-country carriers.²² Furthermore, no person subject to U.S. jurisdiction could arrange, promote, or facilitate group or individual tours or travel to North Korea.²³ These similarities have been previously acknowledged by the Department in correspondence to Senators Schumer and Murphy, in which the Assistant General Counsel for Aviation Enforcement and Proceedings advised both Senators that similar actions taken by a U.S. air carrier in compliance with the OFAC sanctions regime would not violate anti-discrimination protections.

If left unchecked, this action is also inconsistent with the 2006 U.S.-Kuwait Open-Skies Agreement. The United States and Kuwait enjoy a broad and liberalized relationship under that Agreement which includes the free flow of both passenger and cargo traffic²⁴ as well as support for innovative service options that benefit the travelling public, such as 5th-freedom traffic rights. U.S. carriers have exercised their 5th-freedom rights under the Agreement and the State of Kuwait is entitled to reciprocal rights for its carriers. A prohibition of KAC's right to conduct such operations could lead to a complicated consultations process and ultimately restrict air transportation rights between the United States and Kuwait to the detriment of U.S. air carriers.

The determination will have broad implications as KAC is not in a unique position among Middle Eastern carriers. Sixteen nations including Malaysia, Pakistan, Saudi Arabia, and the United Arab Emirates currently participate in the Arab League Boycott of Israel, which generally prohibits doing

²¹ See generally, Cuban Assets Control Regulations, 31 C.F.R § 515 (prohibiting many transactions between U.S. and Cuban entities); Iranian Assets Control Regulations, 31 C.F.R. § 535 (prohibiting most transactions between U.S. and Iranian entities).

²² 31 C.F.R. § 500.563(d)(1) (1988).

²³ 31 C.F.R. § 500.563(d)(2) (1988).

²⁴ While not eligible for membership in the General Services Administration's City Pair Program, KAC does transport a significant number of U.S. military personnel and contractors (as well as cargo) throughout its network.

business with Israeli citizens. Airlines from at least one of those countries, Pakistan, exercise 5th-freedom traffic rights to the United States and those operations could potentially be affected by the Department's determination. When evaluating this petition, the Reviewing Official should consider these additional circumstances and diplomatic concerns and the fact that carriers not party to the underlying complaint will be impacted by the Department's determination.

The Reviewing Official should further note that KAC's policies and practices regarding the transportation of Israeli passport holders should be recognized and affirmed by the Department under the general principle of Customary International Law, which refers to international obligations that arise from *established state practice*, as opposed to those arising from formal written laws or treaties.²⁵ KAC has operated the subject route since it began operating to the United States in 1980 and has had its current passport restriction in place for the last 35 years. The Department's long-standing acceptance of KAC's policy regarding the transportation of Israeli passport holders between JFK and LHR, constitutes an accepted international practice and should therefore be given deference pursuant to the well-accepted principles of Customary International Law.

Finally, the legal precedent that a sovereign nation can enact and enforce its own laws without interference from foreign government entities is well-settled internationally and also within the U.S. judicial system.²⁶ The principle of international sovereignty has also long been supported by the Department. For instance, when faced with a unilateral imposition of the EU's Emissions Trading Scheme (ETS) on foreign operators, including U.S. air carriers, Assistant Secretary for Aviation and International

²⁵ The International Law Association has defined a "rule of customary international law" as one that is "created and sustained by the constant and uniform practice of states in circumstances that give rise to the legitimate expectation of similar conduct in the future."

²⁶ See, e.g., International Civil Aviation Organization (ICAO), Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994); see also, *S. African Airways v. N.Y. State Div. of Human Rights*, 315 N.Y. Supp.2d 651 (S. Ct. N.Y. Co. 1970); *British Caledonian Airways Ltd. v. Bond Admin. FAA*, 655 F.2d 1153 (D.C. Cir. 1981); *Frazier v. Foreign Bondholders Protective Council*, 283 App.Div. 44, 125 N.Y.S.2d 900 (1953); *The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

Affairs Susan L. Kurland stated that “inclusion in the ETS of foreign operators is inconsistent with international aviation law and practice” and, “as a legal matter, [the U.S. government and, specifically, DOT] consider the EU ETS Directive to be inconsistent with both the Chicago Convention and the U.S.-EU Air Transport Agreement.”²⁷ The current decision to disregard international and U.S. legal precedent is arbitrary and capricious, inconsistent with well-established Departmental policy and could result in foreign jurisdictions imposing analogous restrictions against U.S. carrier interests abroad.

Allowing KAC to continue implementing its current policy with respect to Israeli passport holders will result in little, if any, quantifiable harm to the travelling public. Numerous other travel options between New York and London exist. In addition, Israeli citizens can choose to book on KAC with a U.S. or other jurisdiction’s passport. KAC has operated the subject route for more than three decades, without issue. The Department’s decision to institute an investigation and subsequent final agency action against KAC in this case, after 35 years, is unprecedented, unsupported by law and policy, likely based on political motives and should be reversed.

Conclusion

Each of these reasons alone requires review of the staff’s action by the General Counsel. Based on the above, the September 30, 2015 and October 22 2015 letters by the Assistant General Counsel of the Office of Aviation Enforcement and Proceedings should be promptly reversed, withdrawn and vacated.

Respectfully submitted,



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November 2, 2015

²⁷ See Written Testimony of Susan Kurland before the U.S. House of Representatives Subcommittee on Aviation, July 27, 2011, <http://testimony.ost.dot.gov/test/pasttest/11test/kurland1.htm>.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition of Review of Staff Action was served by electronic mail this 2nd day of November 2015 on the following:

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