

## 2nd Circ. RFRA Damages Ruling Doesn't Erase Controversy

By **Shayna Posses**

Law360 (May 17, 2018, 9:40 PM EDT) -- The Second Circuit this month demonstrated the Religious Freedom Restoration Act's power to hold federal officials accountable in ruling that several Muslim immigrants can seek damages for allegedly being placed on the no-fly list after refusing to be informants. But experts say the decision doesn't ease concerns that companies and other powerful groups are co-opting the statute to justify discriminatory behavior.

A three-judge panel held in a **published decision** that Muhammad Tanvir, Jameel Algibhah and Naveed Shinwari can sue 24 FBI agents in their individual capacities for monetary damages based on claims that they retaliated against the immigrants for declining to serve as informants, reversing and remanding a New York federal court's decision to the contrary.

However, by focusing on the narrow question of whether money is a remedy Congress intended to provide under RFRA — which allows claimants to seek "appropriate relief" when the government has unduly burdened their religious exercise without furthering a compelling interest — the appeals court's decision doesn't confront criticism that the statute has been applied too broadly to protect entities lawmakers didn't intend to cover, experts say.

Challengers claim that though RFRA was enacted to protect the rights of people, particularly religious minorities, to freely exercise their beliefs without undue government interference, powerful companies and organizations have exploited the statute, using it to argue that their religious beliefs exempt them from anti-discrimination and health laws.

Alex Luchenitser, associate legal director at Americans United for Separation of Church and State, said the concern is that RFRA is being used as a sword instead of a shield, and though the Tanvir decision is a great development for men who were put in a disturbing situation, it doesn't quell those fears.

"It doesn't address the concerns that our organization has about RFRA, which is misuse of RFRA to allow religious objectors to impose their religious beliefs on others by either denying benefits or discriminating against people who don't share the same religious beliefs that the objector holds," he said, adding that companies and organizations are using the statute to "justify violating the civil rights of third parties, especially women and LGBT people and religious minorities."

He pointed to the U.S. Supreme Court's **landmark ruling** in Hobby Lobby as an example of the sort of decision that has prompted debate over the statute's scope. In the 2014 ruling, the justices found that closely held, for-profit corporations could claim religious exemptions to the Affordable Care Act's contraception mandate.

In the years since, a number of companies and religious organizations have tried to invoke the statute in ways that have been criticized as discriminatory, including by a medical group that said Catholic hospitals can't be required to provide emergency abortions and a funeral home that claimed the right to fire an employee because she is transgender.

Critics argue that these applications are a far cry from what Congress set out to accomplish when it passed RFRA in response to the high court's 1990 decision in Employment Division, Department of

Human Resources of Oregon v. Smith, which changed the legal landscape regarding claims under the Constitution's Free Exercise Clause by holding that generally applicable and neutrally worded laws were permissible, even if they burdened religious conduct.

With RFRA, Congress sought to restore the strict scrutiny used to evaluate government actions that purportedly threatened the free exercise of religion prior to Smith, and the 1993 law initially enjoyed broad support.

But courts have taken the statute much farther than Congress intended, Georgetown University associate law professor Martin S. Lederman said. In the Tanvir decision, he said, "the court quotes [Justice Samuel] Alito's opinion from Hobby Lobby to the effect that RFRA is way more protective on the merits than the court's jurisprudence was before 1990, and I've written at length that I think that's wrong and dangerous."

The Supreme Court did place limits on the statute with its 1997 decision in City of Boerne v. Flores, which held that RFRA didn't apply to state and local governments. However, more than 20 states have their own equivalents, including a version in Indiana that faced a wave of criticism and was subsequently amended to prevent it from being used to discriminate against LGBTQ individuals.

Americans United and other advocacy groups — including the American Civil Liberties Union, the NAACP, the Human Rights Campaign and the Interfaith Alliance — have said the federal law needs a legislative fix, as well, supporting a bill called the Do Not Harm Act.

The measure, which Reps. Joe Kennedy III, D-Mass., and Robert C. Scott, D-Va., first floated in 2016 and reintroduced last year, would amend RFRA to clarify that no one can seek religious exemption from laws guaranteeing fundamental civil and legal rights.

Meanwhile, the Trump administration has stood by RFRA, with Attorney General Jeff Sessions issuing guidance in October calling for sweeping, governmentwide religious liberty protections.

Attempts to reach several religious freedom-focused organizations that have expressed support for RFRA were unsuccessful.

Ultimately, the problem of lacking remedies for government discriminatory action is "an extremely broad one and an old one," University of Chicago law professor Aziz Huq noted, saying he thinks it'll be rare cases where members of faith groups without much political clout, like the men in Tanvir, will benefit from RFRA. Successful plaintiffs are more likely to be an entity like Hobby Lobby seeking religious exemptions, he said.

Huq explained that it's difficult to show that an individual's faith or religious identity affected the government's decision-making, and even if a plaintiff can make that showing, they still have to demonstrate that the government's action wasn't justified under RFRA. The government's rationale will often be something like national security, which outweighs the burden imposed on a religious minority, he said.

Though Huq said he is skeptical about the likelihood of success in cases like Tanvir, he still believes they should be brought and deserve to win. Victims of government discrimination are too often out of luck, and "it's wonderful that these plaintiffs have a pathway toward a remedy for something that happened to them that, in all likelihood, was morally and legally wrong," he said.

Whether the men leading Tanvir will actually obtain the remedy they seek remains to be seen. The Second Circuit remanded the case with instructions for the district court to consider whether the FBI agents are shielded by qualified immunity.

Regardless of how it pans out, the fact that the panel said RFRA provides a path for damages against individual federal officials is important, said Duke University Appellate Litigation Clinic Director Sean E. Andrussier, who helped persuade the Third Circuit to reach the same conclusion in a 2016 case called Mack v. Warden Loretto FCI.

Injunctive relief often isn't available or isn't a sufficient remedy in these situations, Andrussier said, explaining that the immigrants in the Tanvir case eventually were removed from the no-fly list, so

enjoining the agents wouldn't have been a meaningful remedy.

"[The panel's decision] will help folks vindicate their rights under the statute," Andrussier said.

Center for Constitutional Rights Legal Director Baher Azmy, one of the attorneys representing the Tanvir plaintiffs, echoed Andrussier's sentiments, saying the Second Circuit has provided an opportunity to hold federal officials accountable for intentional religious discrimination.

"I think some people have been concerned about majoritarian religions seeking exemptions from neutral government practices based on RFRA, but at the same time, this decision recognizes that religious minorities should be protected and have a remedy from discriminatory government practices," he said. "That, I think, should be the classic application of civil rights laws: to protect religious and other ethnic minorities."

Chief U.S. Circuit Judge Robert A. Katzmann and Circuit Judges Rosemary S. Pooler and Gerard E. Lynch sat on the panel for the Second Circuit.

The immigrants are represented by Ramzi Kassem, Naz Ahmad and Tarek Z. Ismail of the CLEAR Project, Shayana D. Kadidal and Baher Azmy of the Center for Constitutional Rights and Jennifer R. Cowan and Erol Gulay of Debevoise & Plimpton LLP.

The agents are represented by acting U.S. Attorney Joon H. Kim and Assistant U.S. Attorneys Ellen Blain, Sarah S. Normand and Benjamin H. Torrance.

The case is *Tanvir et al. v. Tanzin et al.*, case number 16-1176, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Pamela Wilkinson and Breda Lund.