

United States showed that in order for a cause of action to exist pursuant to the NDAA, a case brought under Section 1083(c)(3) must be related to a case that was pending at the time of the NDAA's enactment. See Memorandum in Support of United States' Motion to Dismiss ("U.S. Dismiss Memo.") at 16. In other words, the new case brought under Section 1083(c)(3) is not itself required to have been pending at the time of the NDAA's enactment, but it must be "related" to a case that was (as described by the statute). Thus, in order for plaintiffs to have a cause of action under Section 1083, see 28 U.S.C. § 1605A(c), the potentially related case, Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002), aff'd, Roeder v. Islamic Republic of Iran, 333 F.3d 228 (D.C. Cir. 2003) (both referred to herein as "Roeder I"), must have been pending when the NDAA was enacted. It was not.

As the United States previously explained, 28 U.S.C. § 1605A(c) creates a cause of action only if the criteria of 28 U.S.C. § 1605A(a)(2)(A)(i) are met. See U.S. Dismiss Memo. at 14-16. The criteria of § 1605A(a)(2)(A)(i)(II)¹ are met "if . . . in the case of an action that . . . is filed under this section by reason of section 1083(c)(3) of [the NDAA], the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) . . . was filed . . ." Plaintiffs therefore have a cause of action only if Iran was a state sponsor of terrorism "when . . . the related action under section 1605(a)(7) . . . was filed . . ." Section 1083(a) (codified at 28 U.S.C. § 1605A(a)(2)(A)(i)(II)). To meet this criterion (in other words, for Iran to have been a state sponsor of terrorism "when . . . the related action under section 1605(a)(7) . . . was filed . . ."), this case and Roeder I must necessarily be "related." The structure and text of Section 1083 indicate that, in order for this case and Roeder I

¹ 29 U.S.C. § 1605A(2)(A)(i)(I) is not applicable.

to be considered “related,” Roeder I must have been “pending” when Section 1083 was enacted.

Contrary to plaintiffs’ contention, Pl. Supp. Memo. at 1, this conclusion is not simply based on a heading in the statute. Rather, the structure of Section 1083 and the decision in Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), point to the conclusion that to be considered “related” to this case (which “aris[es] out of” the related action, as described in section 1083(c)(3)), Roeder I must have been pending at the time of enactment of Section 1083. See U.S. Dismiss Memo. at 16-17. The phrase “related action” in Section 1083(a) (codified at 28 U.S.C. § 1605A(a)(2)(A)(i)(II)) refers back to its usage in Section 1083(c)(3), which is entitled “Related Actions” and is cited earlier in the same sentence (i.e., a state sponsor of terrorism as described in 28 U.S.C. § 1605A(a)(2)(A)(i)(II) is a foreign state that, “in the case of an action that . . . is filed under this section by reason of section 1083(c)(3) of [the National Defense Authorization Act for Fiscal Year 2008],” was designated as a state sponsor of terrorism “when . . . the related action under section 1605(a)(7) . . . was filed” 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (emphasis added)). Section 1083(c)(3) is a subsection of Section 1083(c), which is entitled “Application to Pending Cases” (emphasis added). These both fall under Section 1083, which bears the general heading “Terrorism Exception to Immunity.” This structure of the statute therefore indicates that the terrorism sovereign immunity exception for foreign states created by Section 1083 applies to a subset of “pending cases,” namely the “related cases” described in Section 1083(c)(3). Because Roeder I was dismissed in 2003, and therefore was not pending in January 2008 when Section 1083 was passed, Section 1083 does not offer plaintiffs a cause of action.

Moreover, the use of the present perfect tense in section 1083(c)(3) -- to the effect that

“[i]f an action arising out of an act or incident has been timely commenced” – indicates that a new action cannot be deemed “related” within the meaning of the statute unless the original action (Roeder I) was pending at the time of enactment of Section 1083. (Emphasis added). This understanding is reinforced by the decision in Simon v. Republic of Iraq, 529 F.3d 1187 (D.C. Cir. 2008), in which the Court construed Section 1083, 28 U.S.C. § 1605A(a)(2)(A)(i)(II), as signifying that a new action could be considered “‘filed . . . by reason of section 1083(c)(3)’ if a pending ‘related action’ had been timely commenced.” Simon, 529 F.3d at 1193 (emphasis added); see also id. at 1191 (“Plaintiffs with ‘pending cases’ may invoke new § 1605A in certain circumstances.”). Because Roeder I was dismissed in 2003 and was not pending when Section 1083 was enacted in January 2008, the present case is not “related” to Roeder I within the meaning of 28 U.S.C. § 1605A(2)(a)(i)(II). It is impossible for Iran to have been “designated as a state sponsor of terrorism when . . . the related action was filed” when, in fact, no “related action” even exists. Therefore, plaintiffs have no private right of action against Iran.²

Nothing in In re Islamic Republic of Iran Terrorism Litigation, ___ F. Supp. 2d ___, 2009 WL 3112136 (D.D.C. Sept. 30, 2009), is inconsistent with these conclusions. As plaintiffs point out, the court in that case “concluded that subsection 1083(c)(3) authorized plaintiffs to bring

² Plaintiffs suggest that they have a cause of action because there allegedly is an “explicit statutory reference in § 1605A(c) to all of Section 1605A’s jurisdictional provisions, which would include § 1605A(a)(2)(B) identifying these plaintiffs.” See Pl. Supp. Memo. at 7 n.11 (emphasis in original). This assertion is erroneous. Section 1605A(c) does not refer to all of Section 1605A’s jurisdictional provisions, but rather, refers only to “subsection (a)(2)(A)(i).” This subsection, 28 U.S.C. § 1605A(a)(2)(A)(i), does not cross-reference or otherwise mention or include § 1605A(a)(2)(A)(iii), the provision conferring jurisdiction over Roeder I. Whether a cause of action exists therefore depends on whether the criteria in 28 U.S.C. § 1605A(a)(2)(A)(i) are met. Accordingly, there is no basis for concluding that because Section 1083 explicitly confers jurisdiction for acts related to Roeder I in 28 U.S.C. § 1605A(a)(2)(B), a cause of action thereby exists for these plaintiffs under 28 U.S.C. § 1605A(c).

related actions even if they did not have a case pending before a court at the time of the NDAA's enactment." Pl. Supp. Memo. at 2; see also Pl. Supp. Memo. at 3 (noting the Court's statement that subsection 1083(c)(3) reaches cases "that simply were not pending with the courts in any form at the time the 2008 NDAA became law"); Pl. Supp. Memo. at 3 (quoting the Court's conclusion that "§ 1083(c) may encompass cases that are not pending at all"). This is accurate. Cases for which subsection 1083(c)(3) allows a cause of action are in fact new cases that are not pending before the courts in any form, and the United States has never argued otherwise. However, the statute specifies that such new cases must "aris[e] out of the same act or incident" as (i.e., they must be "related" to) an action that is pending. Section 1083(c)(3).

Plaintiffs' arguments confuse Section 1083(c)(3), which is at issue here, with Section 1083(c)(2).³ For cases that are pending, i.e., for "prior actions" that are before the courts in any form," Section 1083(c)(2) (entitled "Prior Actions") allows for a cause of action if the prior case was previously brought under 28 U.S.C. § 1605(a)(7), but was "adversely affected" on grounds

³ Plaintiffs' citation to Bodoff v. Islamic Republic of Iran, 567 F. Supp. 2d 141, 143 n.1 (D.D.C. 2008), and Haim v. Islamic Republic of Iran, 567 F. Supp. 2d 146, 147 n.1 (D.D.C. 2008), for the notion that a cause of action exists under Section 1083(c)(3) as long as the complaint is filed within 60 days of NDAA enactment is both unavailing and misleading. See Pl. Supp. Memo. at 3 n.2. Contrary to plaintiffs' representation that these cases were brought under Section 1083(c)(3), they were in fact filed exclusively pursuant to Section 1083(c)(2), and they were dismissed because the "prior action" failed to meet the requirement that it be "before the courts in any form" as of January 28, 2008. Bodoff, 567 F. Supp. 2d at 142; Haim, 567 F. Supp. 2d at 147. The court noted that the dismissal under Section 1083(c)(2) should not be construed to have any effect on the new (and completely separate) actions filed by the plaintiffs in each case pursuant to Section 1083(c)(3). But unlike the present case, those new Section 1083(c)(3) actions were related to pending cases, as indicated by the fact that the plaintiffs in each case filed a Notice of Designation of Related Cases Pending in This or Any Other United States Court at the same time they filed the complaint. See Bodoff v. Islamic Republic of Iran, Civ. No. 08-547 (RCL), 2008 WL 2062474, Docket #2; Ben Haim v. Islamic Republic of Iran, Civ. No. 08-520 (RCL), 2008 WL 2150318, Docket #2.

that section 1605(a)(7) “failed to create a cause of action against the state.” Section 1083(c)(2)(i), (iii). Such a prior action can “be given effect as if it had originally been filed under [28 U.S.C. § 1605A(c)]. Section 1083(c)(2).

Sections 1083(c)(2) and (c)(3) therefore permit the filing of two different categories of cases. Section 1083(c)(2) permits the refiling, by virtue of its waiver of the defenses of res judicata, collateral estoppel, and statute of limitations, § 1083(c)(2)(B), of prior cases that are still pending in some form as of the date of enactment but that have been unsuccessful. On the other hand, Section 1083(c)(3) permits the filing of new cases that are separate from, but related to, pending actions. The portions of In re Islamic Republic of Iran Terrorism Litigation quoted by plaintiffs correctly acknowledge this difference, and the United States agrees with them.⁴

The decision in In re Islamic Republic of Iran Terrorism Litigation supports what the United States has shown, *i.e.*, that plaintiffs lack a cause of action under 28 U.S.C. § 1605A(c) because their case is not “related” within the meaning of the statute – that is, plaintiffs’ case is not related to any case arising out of the 1979 hostage taking that was pending when the NDAA was enacted. For example, the court states as follows:

§ 1083(c) allows plaintiffs in a prior action under § 1605(a)(7) to file an action under the new law, § 1605A, as a related case to any other pending action that was timely commenced under § 1605(a)(7) and based on the same terrorist act or incident. In other words, plaintiffs’ right to proceed under the new section is not tied exclusively to their prior action; plaintiffs may identify other cases that are pending under § 1605(c)(7) that are based on the same act or incident.

⁴ The language of Section 1083(c)(3), and its “disjointed” requirement and conditions with respect to “pending cases,” *see* 2009 WL 3112136, at *67, were not directly at issue in In re Islamic Republic of Iran Terrorism Litigation, *see* 2009 WL 3112136, at *47. Acknowledging this, the court was particularly careful not to “run[] the risk of presenting an advisory opinion and one that might interfere with a case pending before another Article III judge in this courthouse.” *Id.*, 2009 WL 3112136, at *48.

In re: Islamic Republic of Iran Terrorism Litigation, 2009 WL 3112136, at *26 (emphases added). This illustrates that the court construes Section 1083(c)(3) as requiring that a new case filed under that provision be related to a pending case.

Regarding new cases before it that had been filed pursuant to Section 1083(c)(3) as “related actions,” the court further explained that such new cases were required to be associated with a pending related action: “Consistent with § 1083(c)(3) the new action must be related . . . to some other currently pending action that is based on the same underlying terrorist incident.”

In re: Islamic Republic of Iran Terrorism Litigation, 2009 WL 3112136, at *57 (emphasis added).

Of those new cases which had been filed as “related” to some other action pursuant to Section 1083(c)(3), the Court noted in each instance that the cases to which the new cases were related were, in fact, currently “pending” against Iran. See, e.g., In re: Islamic Republic of Iran Terrorism Litigation, 2009 WL 3112136, at *58 (noting that Bonk was related to several other cases, “all of which are open cases pending against Iran”) (emphasis added); id. at *59 (finding that the amended complaint in Valore adding new claims was sufficiently related to a similar, “open case” as to comport with the related case filing procedures of § 1083(c)(3)) (emphasis added).

Importantly, in its September 30, 2009 opinion, the court in In re: Islamic Republic of Iran Terrorism Litigation noted the “inviolability of the Algiers Accords,” 2009 WL 3112136, at *88 (citing Dames & Moore v. Regan, 453 U.S. 654 (1981)), and observed that while both Congress and the President have the authority to abrogate the Algiers Accords if they so desire, “[t]o date . . . neither branch has taken such action” 2009 WL 3112136, at *48. The United States has demonstrated that Congress has not -- through Section 1083 or otherwise -- abrogated

the Algiers Accords either by explicitly abrogating them, or by creating a specific, unambiguous cause of action for plaintiffs against Iran. See Roeder I, 195 F. Supp. 2d at 184.

CONCLUSION

For the foregoing reasons, in addition to those stated in the United States' motion to dismiss, plaintiffs have failed to state a claim upon which relief can be granted, and their complaint should be dismissed.

Respectfully submitted,

TONY WEST
Assistant Attorney General

CHANNING D. PHILLIPS
Acting United States Attorney

VINCENT M. GARVEY
Deputy Branch Director

/s/ Lisa A. Olson
LISA A. OLSON (D.C. Bar #38266)
U.S. Department of Justice
20 Mass. Ave., N.W., Room 7300
Washington, D.C. 20530
Telephone: (202) 514-5633
Telefacsimile: (202) 616-8470
E-mail: lisa.olson@usdoj.gov
Counsel for United States

Dated: Nov. 12, 2009