

WEDNESDAY, APRIL 23, 2014

COVER STORY

## Small firm prevails in secretive 'no-fly' case



Kevin Lee / Daily Journal Journal photo

From left: McManis Faulkner partner Elizabeth Pipkin, associate Ruby Kazi, partner James McManis and partner Christine Peek in the firm's downtown San Jose office.

By Hadley Robinson / Daily Journal Staff Writer

When a federal judge unsealed an order clearing one Malaysian woman's name from a terrorist watch list last week, a long-fought legal battle came to a rare end: The plaintiff, represented for eight years by a small firm in San Jose, prevailed against the government. U.S. District Judge William Alsup's order revealed that an FBI agent made a clerical error in 2005, checking the wrong boxes on a government form regarding Rahinah Ibrahim, at the time an accomplished Muslim doctoral student at Stanford University. The agent inadvertently nominated her to the no-fly list, but the error percolated through the government's extensive network of watchlists. Ibrahim has been barred from the U.S. ever since.

The government admitted Ibrahim was not a threat to national security and Alsup ordered the disclosure that she was no longer on the no-fly list. McManis Faulkner, the 23-lawyer firm that took on Ibrahim's case, won two precedential victories at the 9th U.S. Circuit Court of Appeals and prevailed after a five-day bench trial.

To gain information, her attorneys fought through the tightly locked vault of state secret privileges, protected by even the highest-level Justice Department officials, Attorney General Eric Holder and Director of National Intelligence James Clapper, who both filed declarations in the case to keep information classified.

"There are not a lot of firms of our size that could have sustained this case all these years, but we're extremely proud we did," said Elizabeth Pipkin, a partner at McManis Faulkner and lead

attorney with partner Christine Peek. "This is what it's about. Being a lawyer is about protecting the Constitution, and that's what we did."

After the 9th Circuit twice reversed Alsup and found Ibrahim could bring the claims, the government began invoking state secrets privileges, saying that litigating the case would harm national security.

The Justice Department was so protective of information that the public was forced to clear out of the courtroom more than 10 times when the case went to trial in December.

"The government acted like this was a cloak and dagger operation and that something horrible was going to happen if they admitted that an innocent woman was actually innocent," Pipkin said.

A Justice Department spokeswoman declined comment.

Though the results mean just one

person is cleared off the watchlists, legal experts said the larger impact of the case is that others — including noncitizens — are entitled to judicial review when they are wronged, even if the situation involves secret antiterrorism policies.

"Throughout this litigation, the government has been asserting that there is no access to judicial review for people in Dr. Ibrahim's position," said Sudha Setty, a professor at Western New England University School of Law. "Repeatedly, the courts have stood firm that access to courts must exist for meaningful due process to occur. Judge Alsup's opinion reflects this position on judicial review, and in the long term, that has tremendous value."

In January 2005, Ibrahim, in the U.S. on a student visa, was stopped and handcuffed on her way to Hawaii from San Francisco because she was on the federal no-fly list, a program created after 9/11 to prevent suspected terrorists from getting on airplanes.

Eventually she was allowed to fly, but her student visa was revoked when she was in Malaysia.

Ibrahim had no information about why she could not fly and why her visa was revoked, and filed a civil lawsuit. James McManis, the firm's name partner, was moved by Ibrahim's story and decided to take the case pro bono, with former partner Marwa Elzankaly initially taking the lead. *Ibrahim v. Department of Homeland Security et al.*, CV06-545 (N.D. Cal., filed Jan. 27, 2006).

Elzankaly, who argued both 9th Circuit appeals successfully, left McManis Faulkner in 2012. The litigation team at trial included Pipkin, Peek, associates Ruby Kazi and Jennifer Murakami, with strong support from McManis.

The government won an early procedural dismissal, claiming trial judges are not allowed to scrutinize the agency that administers the no-fly list, the Transportation Security Administration.

After a panel reversed and remanded the decision in 2008, Alsup granted another dismissal to the government, finding that Ibrahim "left her constitutional rights at the water's edge" and

could not make these claims since she was a noncitizen living in Malaysia.

In 2012, the 9th Circuit agreed with Ibrahim's lawyers at McManis Faulkner again, finding she had a significant enough connection to the United States to assert constitutional rights.

Pipkin said the government then got more serious about the classified nature of the materials at issue.

"Once they realized they would have to respond to discovery like any other civil litigant, they started to invoke state secrets for the first time and really began to fight and force us to move to compel every scrap of information that we needed to prove our case," she said.

The Justice Department finally revealed to Ibrahim's attorneys in 2013 that their client was no longer on the no-fly list, but they could not reveal that information, even to her.

"It has been difficult because we as her lawyers had information about her status, but we could not share it with her," Pipkin said. "In a lot of ways, our hands were tied."

The attorneys and even the FBI agent who put Ibrahim on the list did not learn of the clerical error until last year.

Pipkin and other legal observers remain puzzled about why the government took so long and put up such a fight to admit the agent's error and that Ibrahim was no longer on the no-fly list and not a terrorist.

"This looks like a mistake," said Paul Rosenzweig, a Washington, D.C.-based lawyer at Red Branch Law and Consulting and former deputy assistant secretary at the Department of Homeland Security. "The very interesting question to me is why the government didn't fess up a long time ago."

McManis Faulkner is now battling for attorney fees and costs. Last week Alsup significantly trimmed their request for nearly \$4 million, and ordered details to be worked out by a special master. Ibrahim's attorneys filed a motion for reconsideration.

"We sacrificed a lot to do this case with no expectation we would recover anything from it in terms of monetary value," Pipkin said. "This has not been an easy case."