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Racial Profiling Versus Right to Freedom from Discrimination: An Analysis from the Aviation Security Domain

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Abstract

Right to freedom from been discriminated against is a right not to place a person or group of persons above or downgrad below others irrespective of religion, colour, sex, or race in all aspects of human life. Racial profiling is an investigative tool adopted by the aviation security practitioners to detect a prospective aviation offender based on the individual's race. The opponent of racial profiling seriously argued against this tool as limiting the right to freedom from discrimination of man. The proponent, countering the opponent, opined that it is a means of countering terrorism against civil aviation. While this is the state of affairs across the world, many States have been reacting to these conflicting interests. The paper therefore examines the position of these interests under the aviation security domain and the balance of conflicting interests between this right and the interest of the aviation security practitioners. The paper relies on qualitative method of legal research including primary and secondary sources, and interview of passenger who is affected. The paper finds that the right to protect civil aviation safety and security has been whittling down the application of the right to freedom from discriminatory provisions. The paper concludes that, although the intention of the proponent is to protect civil aviation against any of the unlawful interference, this can only be the case where race is combined with other factor(s) to conduct profiling on passenger.

Introduction

Right to be treated equally is a fundamental right to the existence of human being. In other word, this right has been statutorily recognized in both national¹ and international laws.² Before September 11, 2001, 81 % of the respondent seriously condemned the

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¹ Constitution of the Federal Republic of Nigeria, 1999 as amended, section 36.

² See Universal Declaration of Human Rights, 1948 Charter of the United Nations, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153 Or G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948) Or GA Res 217A (III), Un GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/810 (10 December 1948); International Covenant on Civil and Political Rights adopted on 16 December 1966 enforced on 23 March 1976, GA res. 2200A (xxi), 21 UN GAOR Supp. (No 16) at 62, UN Doc. A/6316 (1966) Or 999 UNTS 171 and 1057 UNTS 407 [1980] ATS 23/6 ILM 368 (1967); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force on 4 January 1969, Distr. GEN CERD/C/35/Add.1 of 2000 Or Australian Treaty Series Number, [1975] ATS 40; Convention on the Elimination Of All Forms of Discrimination Against Women (CEDAW), 1979 adopted on 18 December 1979 and entered into force on 3 September 1981, GEN. ASS 34/180 of 18 December 1979 Or UNTS Vol. 1249, p.13; and African Charter on Human Rights, 1981, adopted on 27 June 1981 and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982).

adoption of racial profiling as a method of detecting criminals,³ this was probably based on the fact that the provisions of the laws on freedom from discrimination has been tampered with by the law enforcement agent of the United States of America through the application of racial profiling on African-American drivers on the pretext to promote national security.⁴ These profiling measures have been challenged in lawsuits alleging unlawful discrimination.⁵ Some also question the effectiveness of profiling strategies relative to random searches.⁶

Concepts of Racial Profiling, Freedom from Discrimination and Aviation Security

Right to freedom from discrimination

"Non-discrimination" is one of the most fundamental human rights under the international human rights law.⁷ Black's Law Dictionary defines discrimination to mean "differential treatment, especially a failure to treat persons equally when no reasonable distinction can be found between those favoured and those not favoured".⁸ It is also "the effect of a law or established practice that confers privileges on a certain class or that denies privilege to a certain class because of race, age, sex, nationality, religion, or handicap".⁹ Human Right Committee¹⁰ defines discrimination as:

*any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion political or other opinion, natural or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*¹¹

A combined reading of the definition and meaning of discrimination reveals that discrimination may be positive or negative. On one hand, a positive discrimination connotes taking advantage of a particular law or an established practice on any event, by placing a class of people over and above other class because of their race, colour, religion,

³ See Samuel R. Gross and Debra Livingston, *Racial Profiling under Attack*, Vol. 102, *Columbia Law Review* (2002) 1413.

⁴ Black's Law Dictionary, 8th edition, at p. 1286.

⁵ See *Green v. TSA*, Case No. C04-763 Z, (W.D. Wash., filed 2004); see also *Anderson v. Cornejo*, 355 F.3d 1021 (7th Cir. 2004).

⁶ Nicola Persico and Petra E. Todd, *Passenger Profiling, Imperfect Screening, and Airport Security*

⁷ See Ismail Mustapha Adua, *International law on aircraft hijacking: The practice in Malaysia and Nigeria*, (Ph.D Thesis, IIUM, Malaysia, 2014), p. 121.

⁸ Black's Law Dictionary, at p. 500.

⁹ Ibid.

¹⁰ Human Right Committee (HRC) is established under Article 28 of the International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly on December 16, 1966, entered into force on March 23, 1976. GA Res. 2200(XXI) UN Doc. A1 6316 (1966); 999 UNTS 171. See also Abdul Ghafur Hamid, *Public International Law: A Practical Approach*, (3rd edn.), (Malaysia: Sweet and Maxwell Asia, 2011), p.305. Note that HRC consist of 18 elected members who are persons of high moral character and recognized competent in the field of legal profession. AbdulGhafar, 308-309.

¹¹ HRC General comment No 18, paragraph 7. This definition shares the same features with that of International Convention on the Elimination of all Forms of Racial Discrimination (ICERD), 1966, Article 1 (1) and Convention on the Elimination of all Forms of Discrimination Against Women CEDAW, 1979, Article 1.

theoretical and procedural steps to secure civil aviation must also be with caution so as not to tamper with the individual's fundamental right to freedom from discrimination.

Conclusion

From all indications, Right to freedom from discrimination is a natural right. That was why the international community has attached importance to the implementation of various laws and regulations on this right. No doubt, in compliance with these laws and regulations, the International Civil Aviation Organization issued a directive to all aviation stakeholders to conduct aviation businesses in compliance with the various human rights laws. Thus, the adoption of racial profiling in aviation industry looked contravening the human right principle of non-discrimination.

However, it appears that strict compliance with this human right principle will jeopardize and defeat the human right to safety and security in aviation sector. Aviation sectors have been suffering from series of attacks from within and outside the airport. The effects of unlawful interference with civil aviation have not been unnoticed. The innocent passengers and those on ground loss their lives and properties and the international community were put in cold blooded morning. Some of these interferences have been traced to Arab race. For example, the recent hijacking EgyptAir and Al-Afriqiyah Airbus A320 respectively in March and December 2016 have been traced to Libyan. The one of March was traced to an Egyptian⁶⁰ and that of December was traced to Libyan nationals.⁶¹ The two countries have been classified as Arabian states. Then why would racial profiling not be an effective tool for the safety and security of civil aviation when it is obvious that some aviation offenders are from a particular race? The consequence of this gives credence and opportunity to the aviation security providers to adopt racial profiling as a means to detect criminal(s) from a particular race. It is the right to protect civil aviation safety and security that has restricted the application and whittled down the principle of right to freedom from discrimination.

However, although the intention of the proponent of racial profiling is to protect civil aviation against any of the unlawful interference, this can only be the case where race is combined with other factor(s) to conduct profiling on passenger as no particular method of screening of passengers is hundred percent full proofs.

⁶⁰ His name is Seif Eldin Mustafa. See James Rothwell, EgyptAir plane flying from Alexandria to Cairo hijacked > <http://www.telegraph.co.uk> > accessed on 3 January 2017.

⁶¹ Emma Graham-Harrison, Hijackers surrender after forcing Libyan plane to fly to Malta > <http://www.theguardian.com/world/2016/dec/23/Libyan-afriqiyah-airways-passenger-plane-hijacked-diverted-to-malta>>accessed 3 January 2017.