

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF VIRGINIA
3 Alexandria Division

4 COPY

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6 ALEXANDER P. KONANYKHINE, et al., :
7 Petitioners, :
8 -vs- :
9 WILLIAM J. CARROLL, :
10 Respondent. :
11 ----- :

C.A. No. 97-449-A

12 HEARING ON MOTIONS

13 December 22, 2003

14 Before: T.S. Ellis, III, Judge

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23 APPEARANCES:

24 John Szymkowicz and Michael Maggio, Counsel for Petitioners
25 Kathleen Pepper and William Howard, Counsel for Respondent

1 THE CLERK: Civil action number 97-449-A, Alexander
2 P. Konanykhine versus William J. Carroll.

3 Would counsel please note your appearances.

4 MR. SZYMKOWICZ: My name is Jay P. Szymkowicz. I
5 represent the petitioners.

6 And I apologize for my appearance, Your Honor. I
7 was called early this morning about 45 minutes before--

8 THE COURT: I understand that.

9 MS. PEPPER: Kathleen Pepper for the respondent,
10 Your Honor. And with me is Bill Howard from our office.

11 THE COURT: All right. And who is here -- who else
12 is here? There is another--

13 MR. MAGGIO: Mike Maggio, Your Honor.

14 THE COURT: All right. Well, you should be over
15 here with your casually-dressed colleague.

16 All right. This matter was heard on an emergency
17 request for a temporary restraining order on Friday. I
18 entered the order.

19 At that time the petitioner or the plaintiff was
20 seeking a stay, as he was required to do under the new law,
21 pending full review of his appeal of denial of asylum. He
22 had won asylum before an Administrative Law Judge, lost it
23 before the Board of Immigration Appeals, and then appealed to
24 the Fourth Circuit.

25 And apparently Friday afternoon, as this matter was

1 being argued, so too was a request for an emergency stay of
2 the deportation or removal order. I now learn that that
3 effort failed.

4 I also remarked on Friday that it seemed unseemly,
5 to the point of being sinister, the haste with which both the
6 plaintiff and his wife were being shepherded or hustled out
7 of the country.

8 I also noted to Ms. Pepper that it may be none of
9 the Court's business why that may be the case, but I was
10 still nonetheless curious.

11 It seems to the Court that one basis for the
12 Court's order is no longer -- or is at least weakened. This
13 plaintiff entered into a settlement agreement, and I have
14 read that, but I have not read any supplement or modification
15 of it. And in that settlement agreement-- May I have it,
16 please? The INS, now the ICE, agreed that it would not
17 remove or seek to deport or remove him until-- That he would
18 be paroled.

19 In other words, he wouldn't be deported or removed
20 pending final resolution of immigration proceedings,
21 including any direct judicial appeals thereof. So, that is
22 still going on.

23 Now, it goes on to say: So long as petitioner
24 engages in no conduct or so long as no other circumstances
25 arise which warrant revocation of his parole under 8 C.F.R.

1 212.5. I don't think that's what the ICE is relying on; that
2 is, conduct that warrants revocation of parole. Although
3 they may. I think what they are relying on is the paragraph
4 that says that the agreement ends.

5 Well, they have to revoke the parole. And I think
6 what the ICE is now claiming is that he didn't meet the
7 requirements of his agreement.

8 I have to review with counsel-- I guess you are
9 really chief counsel now, aren't you, Mr. Maggio?

10 MR. MAGGIO: On immigration matters, Your Honor.
11 You may recall, I appeared before you first representing him
12 in the habeas proceedings in '96 in this courtroom.

13 THE COURT: That's right. But this young man to
14 your right, really doesn't have any-- I mean, he represents
15 him on corporate matters. None of those are relevant today.

16 Let me ask you a few questions.

17 MR. MAGGIO: Yes, Your Honor.

18 THE COURT: The threshold question has to be what
19 authority, what jurisdiction does this Court have to hear
20 what, in effect, is a dispute between your client and the ICE
21 over whether he has met the requirements of this settlement
22 agreement?

23 MR. MAGGIO: Your Honor, this Court has had
24 jurisdiction over this cases for many, many years. And I
25 would suggest to you that this is a continuation of what

1 brought us here originally. And what I am saying
2 specifically is this--

3 THE COURT: Well, I didn't explicitly retain
4 jurisdiction. The case ended, you settled it and it ended,
5 is that right?

6 MR. MAGGIO: Your Honor, on that point I must defer
7 to my, he may look like my client, but my co-counsel here
8 because that's a question of civil litigation. I can address
9 immigration questions to the Court, but I would say to Your
10 Honor--

11 THE COURT: It is very clear under the law that if
12 the parties enter into a settlement agreement in a case, the
13 Court has no jurisdiction unless it retains it. There has to
14 be independent jurisdiction thereafter-- I have written
15 opinions on it myself. There is simply no doubt about that
16 point, there has to be independent jurisdiction.

17 Now, there may be. This is an agreement between an
18 individual and the United States, and maybe that's a federal
19 question.

20 MR. MAGGIO: Well, there is a case cited here by my
21 co-counsel, I had no part in writing this.

22 THE COURT: All right.

23 MR. MAGGIO: I came to the speak to the immigration
24 issues, and I would like--

25 THE COURT: All right. Let me hear him on it. I

1 have made this point to him before on Saturday. What's the
2 case?

3 MR. SZYMKOWICZ: Your Honor, there is a case, it's
4 the Hensley case, and it was cited at 277 F.3d 535 at page
5 540. And that Court held that court facilitated settlements
6 are an important aspect of the judicial process--

7 THE COURT: That's right. But I didn't facilitate
8 that settlement. I had nothing to do with it. I didn't sign
9 on to it. I didn't retain jurisdiction. I didn't agree to
10 supervise it.

11 MR. SZYMKOWICZ: But that Court cited, it
12 continued: District Courts have inherent authority deriving
13 from their equity power to enforce settlement agreements.
14 The exercise of this authority has the practical effect of
15 entering a judgment by consent.

16 THE COURT: But I did not do that. Do you
17 understand the difference between that? The next time you do
18 this, what you do is you take this and you see if the Court
19 will add a So Ordered to it. Do you see? I didn't do that
20 now. That's the distinction.

21 But your argument ought to be that this is an
22 agreement between the government and an individual and it
23 ought to raise a federal question.

24 Otherwise, I didn't retain jurisdiction. I didn't
25 agree to supervise this. You want me to treat it like a

1 Court order.

2 MR. MAGGIO: I think that's--

3 THE COURT: In the future, get it endorsed. I
4 might not agree to endorse it because I may not want to do
5 precisely this.

6 MR. MAGGIO: May I suggest, Your Honor, that that's
7 why you asked Mr. Szymkowicz to file another pleading and
8 make a new habeas petition so the Court would have
9 jurisdiction.

10 THE COURT: Yes. I want to be clear about the
11 jurisdiction is.

12 MR. MAGGIO: Yes.

13 THE COURT: What is it?

14 MR. MAGGIO: I think it is because of the new
15 habeas petition being filed and because of the settlement
16 agreement. Which is quite remarkable, Your Honor, because
17 here we have a case where someone was seeking to leave the
18 United States, which is what the Government says they wanted
19 Mr. Konanykhine to do since '96--

20 THE COURT: Yes. One of the things, Ms. Pepper,
21 that I have been curious about is I have never understood why
22 the United States won't let this person leave and go
23 somewhere. Why should the United States care where he goes?
24 There seems to be something strange.

25 MR. MAGGIO: Your Honor, they have--

1 THE COURT: Just a moment.

2 MR. MAGGIO: I apologize, Your Honor.

3 THE COURT: There seems to be something unusual
4 afoot here. Because the Government not only wants to get rid
5 of him, they don't want-- They want to give him to the
6 Russians. And I don't understand that. That may be none of
7 this Court's business. I don't know.

8 Go ahead, Mr. Maggio.

9 MR. MAGGIO: May I suggest what it is, Your Honor?
10 Because right from this podium it was represented by the
11 government that they did not want to turn him over to the
12 Russians.

13 THE COURT: But didn't I have some difficulty with
14 some representations made by Miss Rosis?

15 MR. MAGGIO: Exactly. But Mr. Konanykhine was in
16 jail for one year because of the misrepresentations, in my
17 view, that were made. He was released one year later when
18 Mr. Szymkowicz came before this Court in the second habeas.

19 This Federal Tort Claim action that gives rise to
20 this settlement, which is a direct consequence of his one-
21 year detention, and I have looked at the representations
22 made--

23 THE COURT: Now, the Federal Tort Claims action--

24 MR. MAGGIO: Excuse me, I am corrected.

25 THE COURT: That's the civil action 97-449?

1 MR. MAGGIO: The second habeas. Second habeas.

2 THE COURT: All right. Go on.

3 MR. MAGGIO: And I would suggest to Your Honor
4 that, with all due respect to my colleagues at the DHS, with
5 whom I work day in and day out and have the most respect for,
6 that in their representations about the revocation of parole,
7 there are falsehoods there.

8 They say he moved to New York without their
9 permission. Mr. Konanykhine had written permission. They
10 say he didn't report. I know for a fact that he reported
11 regularly to DHS. And they are claiming that they went to
12 his home and didn't find him there because he was leaving.

13 The whole point of notifying the DHS where you are
14 is so that they can have you leave at the time that it is for
15 you to leave.

16 He was in the process of leaving and they had, in a
17 sense, violated the agreement by going to grab him even
18 though he had a petition for review.

19 The reason why a stay was not filed, Your Honor,
20 and I have never filed a stay since the law changed in '96
21 with any Court of Appeal on any petition for review, because
22 the practice is they don't go after people generally. And
23 the practice is, you file for a stay if for some reason they
24 go after someone.

25 Plus, we have this agreement to rely upon. And,

1 plus, what we were trying to do was to get Mr. Konanykhine--

2 THE COURT: Did you have an opportunity to argue
3 the stay?

4 MR. MAGGIO: No, Your Honor.

5 THE COURT: So, it was all on the papers?

6 MR. MAGGIO: It was on papers. And by the way, we
7 are preparing now for a rehearing en banc. We are also
8 filing a motion with the Board of Immigration Appeals.

9 But what we would really like, Your Honor, from
10 you, if it is possible, is to put Mr. Konanykhine back where
11 he was when the agreement was in force, on the Peace Bridge
12 going to Canada. Because the Canadians have indicated that
13 they are interested in granting him asylum.

14 If the Canadians turn him down, they are obligated
15 to turn him back over to DHS and they will have him in their
16 custody and, I assume, will do with him what they will.

17 But here we have a case where literally a man's
18 life is in question. Now, I have lost deportation cases
19 before, but I have never had a case where I had to really
20 worry about someone dying. Oh, sure, people have lost asylum
21 and I have worried about them getting arrested and
22 persecuted, but this isn't a maybe. This is a for sure.

23 And the reason why Mr. Konanykhine entered into
24 that agreement and the reason why we have been before Your
25 Honor since 1996 is because this case is not your usual case.

1 There is something afoot here that is strange.

2 And the only thing that has been really important,
3 is the bottom line for him, is that he doesn't get tortured
4 and killed.

5 That's why he elected to go to Canada, because the
6 Canadians were open to him. He didn't want this hanging over
7 his head any longer. He has a successful business, an
8 Internet business, he can operate it from Canada.

9 He should be put back on that bridge so he can go
10 to his interview for asylum in Canada. If he gets asylum
11 there, end of story. If he is denied, DHS has him.

12 THE COURT: Why is this country, in your opinion,
13 so bent on making sure that he goes to Russia?

14 MR. MAGGIO: There is one of two explanations, Your
15 Honor. One is revenge. This is a case that has gone on
16 since '96. And I don't know whether Your Honor knows, but
17 the Board of Immigration Appeals has ruled that the original
18 DHS charge against Mr. Konanykhine, that he was not eligible
19 for a green card for fraud, was overruled by the Board of
20 Immigration Appeals.

21 But, unfortunately, that decision does not affect
22 the DHS', formerly INS, revocation of the visa petition upon
23 which his application for permanent resident status rests.

24 So, in other words, the whole pretext for arresting
25 him at the Watergate, the whole pretext for us being in an

1 asylum context and before Your Honor was just a pretext. The
2 DHS said, no fraud by Konanykhine.

3 Why are they doing this? It has been a long
4 battle. And I think there are people that want to prove
5 themselves to be right by turning him over to the Russians.
6 I think that's going to be their justification.

7 THE COURT: That doesn't explain why turning him
8 over to the Russians is important. It might explain why they
9 would like to see him removed, but why definitely to the
10 Russians?

11 MR. MAGGIO: Your Honor, I don't know whether--

12 THE COURT: The only possible explanation is that
13 there is some quid pro quo.

14 MR. MAGGIO: Well, that has been out there from the
15 beginning.

16 THE COURT: That was suggested in 1997, that the
17 FBI wanted an office in Moscow. And that was the deal made.

18 MR. MAGGIO: It could be, Your Honor, but--

19 THE COURT: You don't know?

20 MR. MAGGIO: You know, I am asked that question, as
21 you might imagine, with some frequency. And I think there is
22 one of two explanations, the one you suggested, and the other
23 one, which is just mean-spirited vindictiveness. Because the
24 way to really get to Mr. Konanykhine is to turn him over to
25 the Russians. It could be a quid pro quo, it could be

1 political or it could be just be mean-spiritedness. I don't
2 know.

3 THE COURT: All right. Now, tell me again
4 succinctly what you understand to be ICE's claims of a
5 violation of the agreement and why those claims are not well
6 founded.

7 MR. MAGGIO: First of all, I would suggest that
8 when they went to grab him, there weren't even any claims for
9 a violation of the agreement. They went to the last address
10 that they had for him. So, they were, in a sense, violating
11 the agreement already by grabbing him.

12 I was told, by the way, that an appeal to the
13 United States Court of Appeals, when I spoke with ICE about
14 this, that an appeal to the United States Court of Appeals
15 was not a direct appeal despite what the statute says and
16 despite what the agreement says. And despite the fact that I
17 do this with some frequency and manage to fool the federal
18 courts all the time and get them to accept these petitions
19 for review.

20 THE COURT: Let me suggest, by the way, in the
21 future, when you do this, to your colleague as well, it is
22 very unlikely that a District Judge is going to want to be a
23 superintendent of an agreement for a period of time.

24 But all you need to do is insert a provision that
25 says: In the event that there is an alleged breach of the

1 agreement, the parties agree that that breach will be
2 resolved in the United States District Court for the Eastern
3 District of Virginia with the party alleging the breach
4 having the burden of proving the breach by a preponderance of
5 the evidence. And that would help immeasurably.

6 But I think that this is an agreement between an
7 individual and the government of the United States. And if
8 there is an alleged breach, a District Court ought to have
9 jurisdiction probably under 1331 as a federal question.

10 But it is far from clear. It would be easier with
11 the provision.

12 So, number one, you say that--

13 MR. MAGGIO: They had violated themselves by going
14 to grab him -- going there that day. He had an appeal
15 pending--

16 THE COURT: The first point you make is that there
17 is a prior breach. But they say he wasn't at the address he
18 was supposed to be and he didn't notify them.

19 MR. MAGGIO: He was to notify them of permanent
20 addresses. He was on his way out of the country. He had--
21 They said he moved to New York--

22 THE COURT: Doesn't he have to tell them that he is
23 going to leave the country?

24 MR. MAGGIO: I don't know of any reason why someone
25 would want to tell the Immigration Service that they were

1 leaving the country, other than to get their bond back.

2 I mean, the Immigration Service --

3 THE COURT: Well, it says--

4 MR. MAGGIO: -- is in the business of throwing you
5 out.

6 THE COURT: Where is the provision about notifying?
7 That would be under the petitioner's undertaking.

8 Now, I have the old agreement. It says he will
9 remain in the Washington, D.C. metropolitan area. That was
10 changed at some point, wasn't it?

11 MR. MAGGIO: He got permission to move. And
12 apparently they are alleging that he didn't get permission,
13 but he had written permission to move.

14 THE COURT: Has that written permission been
15 submitted to the Court?

16 MR. MAGGIO: Your Honor, frankly, in my 15, 16
17 boxes, I could not find it crawling around over the weekend.
18 But I know it exists.

19 MR. SZYMKOWICZ: Your Honor, I couldn't find it
20 either. I looked through my two drawers.

21 THE COURT: All right.

22 MR. MAGGIO: I know it exists. And I know that Mr.
23 Konanykhine reported religiously. I assure you, if he
24 didn't, he would have been grabbed long ago.

25 And the other point is that the agreement says he

1 has to report any permanent addresses. He didn't have a
2 permanent address. His lease was up, he was in hotels, he
3 was with friends.

4 And for what it is worth--

5 THE COURT: It is important-- Just a moment. One
6 of us at a time.

7 MR. MAGGIO: Sorry, Your Honor.

8 THE COURT: It is important that the Court have the
9 terms of that modification because paragraph 3 of the
10 petitioner's undertaking says that he agrees, while he is
11 released on parole, he will reside at his present address,
12 which is known to the INS.

13 And it says: If petitioner changes his address,
14 his new address must be within Washington.

15 And we need to get this new document.

16 Ms. Pepper, do you have that document, the one that
17 gives him permission to go to New York?

18 MS. PEPPER: Yes, I do, Your Honor.

19 THE COURT: All right. Show it to Mr. Maggio and
20 see if that's what he had in mind and couldn't find in his
21 boxes.

22 MR. MAGGIO: I am embarrassed that it is addressed
23 to me and I couldn't find a copy, Your Honor.

24 THE COURT: Is that it, Mr. Maggio?

25 MR. MAGGIO: Yes, Your Honor. I would just, in a

1 last closing point, Your Honor--

2 THE COURT: Well, he has to keep, it says here,
3 consistent with paragraph 3-3, he has to keep the Arlington
4 District Director's Office apprised of his address.

5 And they say he didn't do that. And you are
6 drawing some distinction between permanent address and
7 temporary address.

8 MR. MAGGIO: He actually had no address, Your
9 Honor.

10 THE COURT: Well, he had a hotel, didn't he?

11 MR. MAGGIO: He apparently went from one to
12 another.

13 THE COURT: Well, those are all addresses.

14 You know, I don't understand why somebody who has
15 to watch his P's and Q's is careless like that.

16 And so, you are saying that he could go to Canada
17 without telling anybody? I find that pretty surprising.

18 How could he go to Canada without telling anybody
19 about it if he is supposed to stay in the New York
20 metropolitan area?

21 MR. MAGGIO: But, Your Honor, the reason there is a
22 reporting requirement, the reason you are supposed to know
23 where someone is when you are the Immigration Service, is
24 because you need that information to facilitate their
25 departure.

1 If they depart-- When I have a client that is
2 faced with deportation and they are supposed to report for
3 deportation on a specific day, I advise them to leave early.
4 Why? So they don't get incarcerated and wait for sometimes
5 weeks or months to be deported.

6 THE COURT: So, you think this agreement
7 effectively left open to Konanykhine to leave the country?

8 MR. MAGGIO: Well, I think that the whole purpose
9 of the Immigration Service's--

10 THE COURT: Is the answer yes or no?

11 MR. MAGGIO: It is yes, Your Honor, of course it
12 did. If it didn't, I wouldn't have suggested him to do that.

13 THE COURT: Well, how could he-- Did he have any
14 travel documents?

15 MR. MAGGIO: He had a passport that enabled him to
16 get to Canada, yes.

17 THE COURT: Is that the Uruguayan passport?

18 MR. MAGGIO: Yes. And the Canadians, the Canadians
19 had two asylum officers waiting there specifically for him.
20 When I called his lawyer, his Canadian lawyer--

21 THE COURT: Why wouldn't it be sensible for him to
22 tell ICE, look, I am going to Canada to be interviewed for
23 asylum. And I don't think that's a violation of the
24 agreement, but I want you to know anyway.

25 MR. MAGGIO: Why? I would suggest that Mr.

1 Konanykhine may have ample reasons to not trust them. That
2 Mr. Konanykhine may think that they would grab him anyway.
3 That that was his fear.

4 What has happened to Mr. Konanykhine was his fear.
5 When he lost his case at the Board of Immigration Appeals,
6 his nightmare was that they would not abide by the agreement.
7 Because we discussed that. We discussed his staying here and
8 my filing for a stay, whether to file for a stay. He said, I
9 don't trust these guys. I am afraid they are going--

10 THE COURT: I don't really much care whether Mr.
11 Konanykhine trusts people or not. I am telling you, it would
12 have been the prudent thing to do.

13 I am not sure how I read this agreement, but it
14 seems to me that his leaving the country would require-- It
15 says he may change his place of residence to the New York
16 metropolitan area, but must still, consistent with paragraph
17 3 of the settlement agreement, keep the Arlington District
18 Director's Office apprised of his address.

19 Your continuing statements that he had no addresses
20 doesn't move me. Everyone has an address unless you are
21 homeless. He is not homeless.

22 MR. MAGGIO: I accept that, Your Honor.

23 THE COURT: He had an address. And if he is going
24 to leave the country, I think prudence would have required
25 that he say something.

1 Now, whether that is-- Because he intended not to
2 come back. He intended to go to Canada and stay.

3 MR. MAGGIO: Exactly. When people leave the
4 country without notifying the Immigration authorities, which
5 happens quite often, if they have a bond or there is some
6 benefit for notifying that they left--

7 THE COURT: They are not going to get that.

8 MR. MAGGIO: What they do though is they-- If they
9 have to leave by a specific date to keep a bond, what they do
10 is they then go to the U.S. consulate and confirm that they
11 have left. They don't go to the Immigration authorities,
12 because we don't have exit controls in this country, and say,
13 I am leaving or I have left. They do it with the consulate
14 officials to prove that they have left.

15 So, my point is this, Your Honor. The reason why
16 Mr. Konanykhine had a reporting requirement was so that they
17 could be sure that he would leave. There was no other reason
18 to have a reporting requirement to the Immigration
19 authorities.

20 It is not just that-- They want to make sure you
21 are going to go. And he was leaving and left. And he was
22 stopped, if I may suggest, in a fashion that gives life to
23 the old joke that when they took down the Berlin Wall, they
24 hired the East German border guards to work here to keep
25 people from leaving. It is ridiculous.

1 I mean, this whole image of Mr. Konanykhine going
2 across the Peace Bridge is reminiscent of a movie about the
3 Cold War with freedom right in sight and he gets grabbed.
4 Not being allowed to leave the United States? It doesn't
5 sound like this country, where they stop people from leaving.

6 THE COURT: Well, I have already suggested, Ms.
7 Pepper, the whole incident is bizarre, taking him to the
8 Soviets-- Soviets. To the Russian embassy for travel
9 documents.

10 MR. MAGGIO: It was repeated before, Your Honor,
11 many times, that it was not the mission of the INS to deport
12 Mr. Konanykhine to Russia. They just wanted him out. And it
13 was represented to this Court that they would send him to
14 Antigua or somewhere else, they didn't care. They do not
15 want to send him to Russia, they didn't care about that, they
16 just wanted him deport him. Because of an immigration fraud
17 that the Board of Immigration Appeals has found didn't exist.
18 That's why he was put in deportation proceedings.

19 THE COURT: But distilled to its essence, your
20 position with respect to Mr. Konanykhine is that the attempt
21 to-- Or that they are in breach and that he is not in
22 breach. And that under the agreement, he ought to be on
23 parole pending the resolution of his appeal to the Fourth
24 Circuit because under the agreement, the agreement says that
25 they agree to parole him pending final resolution of his

1 immigration proceedings, including any direct judicial
2 appeals. And that is a direct judicial appeal that is not
3 final yet.

4 MR. MAGGIO: One last thing, Your Honor. Notice of
5 change in address to the Immigration authorities, you have
6 got ten days to do it.

7 So, if he left on the 5th and they were there on
8 the 8th, they were clearly in breach.

9 THE COURT: Now, let me understand one further
10 thing. This agreement applies only to Mr. Konanykhine.

11 MR. MAGGIO: That's right.

12 THE COURT: Other than the fact that she is his
13 wife and that she generally accompanies him, her immigration
14 status is what?

15 MR. MAGGIO: Your Honor, this is another one of
16 these bizarre things that I have never heard of yet seen.
17 She had voluntary departure. She had authorization from the
18 Board of Immigration Appeals to leave voluntarily. And they
19 stopped her from leaving voluntarily on the bridge.

20 Now, she is in breach of her voluntary departure
21 because she got 30 days, and the 30 days are up. I have
22 receipt for her bond in my office, I think it is \$5,000, that
23 she is entitled to get back if she complies with her
24 voluntarily departure. And I am scratching my head about how
25 I am going to say to my friends here at the Detention Removal

1 Section how they ought to refund the bond because she is in
2 breach of the voluntary departure because she haven't let her
3 go. I have never seen anyone denied permission to leave
4 voluntarily.

5 THE COURT: I don't understand why she couldn't
6 leave. I mean--

7 MR. MAGGIO: She was called, by the way--

8 THE COURT: I can't imagine what deal they might
9 have had that requires them to return her to Russia.

10 This is very strange, Ms. Pepper. I will be-- Let
11 me hear from Ms. Pepper.

12 MR. MAGGIO: Thank you, Your Honor.

13 THE COURT: This whole thing is quite unusual. I
14 have flashbacks to 1997.

15 MS. PEPPER: Yes, Your Honor. As to the question
16 about whether there is jurisdiction under the settlement
17 agreement. In Subsection F on page 3 of the settlement
18 agreement it specifically says that there is nothing in this
19 agreement shall be understood to confer on any court an
20 independent basis for jurisdiction to review the District
21 Director's decision to revoke parole under this agreement or
22 to limit respondent's rights to defend in any way any effort
23 of the petitioner to seek--

24 THE COURT: So, in your view, what happens if there
25 is a dispute between the parties as to whether this agreement

1 is breached or not?

2 MS. PEPPER: Then they have to assert the
3 independent source of jurisdiction --

4 THE COURT: Why isn't there--

5 MS. PEPPER: -- that does not include this.

6 THE COURT: Why isn't there a federal question
7 since there is a breach of an agreement between an individual
8 and the government?

9 MS. PEPPER: Because that would be a strict
10 contractual arrangement that doesn't involve a federal
11 question, although it does involve one of the parties that is
12 a federal agency.

13 THE COURT: So, if it doesn't involve a federal
14 question, in your view, why isn't there diversity? I think
15 it clearly-- You don't have diversity with the government.
16 If you have a contract dispute with the government, it is a
17 federal question, it is that simple.

18 MS. PEPPER: And not withstanding that, Your Honor,
19 the petitioner in this case, Mr. Konanykhine, is the only
20 subject of the settlement agreement. By his very admissions
21 made in the filing that he made this morning on page 8, he
22 claims that he did change his residence without notifying or
23 requesting permission from the Service this past month.

24 In fact, in that same paragraph, paragraph 5 on
25 page 8 of that pleading, he indicates that the lease on his

1 apartment expired at the end of the month. But given the
2 fact that the Board's November 20, 2003, order ordered him
3 excluded, that it made it impractical for him to sign a
4 long-term lease. He says that he has then been staying in a
5 variety of places.

6 Therefore, he has not provided ICE with an address
7 that is effective following the terms of his lease. So, he
8 has had no address since November 30 of 2003 at which ICE
9 could communicate with him should it choose to do so.

10 THE COURT: Did it?

11 MS. PEPPER: Did it?

12 THE COURT: Choose to communicate with him.

13 MS. PEPPER: Yes. Your Honor, the New York City
14 office of ICE went to verify the address that they had in the
15 computer system for Mr. Konanykhine. It sent an officer and
16 two of his subordinates to the address--

17 THE COURT: For what purpose?

18 MS. PEPPER: To the best of my knowledge, to
19 verify--

20 THE COURT: Well, your knowledge is ICE now. Don't
21 equivocate behind what you personally know.

22 MS. PEPPER: I have been told that they went there
23 to verify--

24 THE COURT: Told by whom?

25 MS. PEPPER: I was told by Mr. Cyril Lopez, who

1 is -- I believe his title is Supervisory Detention Officer,
2 but I am not certain of his job title, with the New York City
3 ICE office, that because there was a final order of exclusion
4 for him, they were to go and make sure that the address there
5 was good for him. He did not say--

6 THE COURT: You are telling me that three people
7 went there just to verify an address? That's not plausible.
8 Three people went there to verify an address? Not to collect
9 him? Not to put him in custody?

10 MS. PEPPER: I am-- I am sorry, Your Honor, I
11 can't speak as to whether it is plausible or not.

12 THE COURT: All right. Well, it plainly isn't
13 plausible. But so far as you know, based upon what you have
14 been told by the New York people, they only went to verify
15 his address?

16 MS. PEPPER: Right. And my understanding is that
17 when they found he was not at that address, and this was
18 approximately December 12 that this occurred, that they then
19 went back and, yes, operations were made in place to pick up
20 Mr. Konanykhine and his wife.

21 Separately and independently--

22 THE COURT: Did you notify his lawyer of that?

23 MS. PEPPER: I don't know. I don't believe so.

24 THE COURT: All right. And why does the United
25 States care if this couple goes to Canada?

1 MS. PEPPER: Lawfully, Your Honor, they cannot.
2 Because Mr. Konanykhine has a final order of exclusion and
3 Mrs. Konanykhine has a final order of deportation, they
4 cannot by law self-deport or self--

5 THE COURT: She was given that express permission
6 in the order.

7 MS. PEPPER: Yes. But she cannot go to, by law, to
8 an area defined as being contiguous to the United States.

9 THE COURT: I see, yes, you told me that on Friday.
10 I did not know that.

11 MS. PEPPER: That includes, Canada, Mexico and
12 the--

13 THE COURT: When I speak, please stop. He can only
14 get one of us at a time.

15 You told me that on Friday. What statute is that?
16 I would think that voluntary departure means you can go
17 anyplace you please, as long as it is out of this country.

18 MS. PEPPER: Okay. Your Honor, for excludable
19 aliens--

20 THE COURT: She wasn't excludable. She was only
21 removable or deportable.

22 MS. PEPPER: Okay. That's Section 241(b)(2) of the
23 Immigration Act.

24 THE COURT: 8 U.S.C.

25 MS. PEPPER: 8 U.S.C.--

1 THE COURT: All right, bring me 8 U.S.C.

2 Do you have the statute there, Mr. Maggio?

3 MR. MAGGIO: Your Honor, I ran out without it, but
4 I am familiar with the statute. It says he can't be deported
5 there, but it doesn't say he can't go. It would be
6 disingenuous to suggest that people who have final orders of
7 deportation don't show up at the Canadian border to apply for
8 asylum every day.

9 In fact, there are articles in the New York Times
10 about thousands of Pakistanis doing exactly that who had
11 final orders of deportation, going to Canada after the
12 special registration program was put into place.

13 THE COURT: All right, thank you.

14 What is the provision, Ms. Pepper?

15 MS. PEPPER: Okay. I had it down in my copy of the
16 Act, which is, unfortunately, in my office, Your Honor, at
17 1251(b)(2), which is usually 8 U.S.C. 1251.

18 THE COURT: All right. Just a moment.

19 MS. PEPPER: I am sorry, it is 1231 of 8 U.S.C.,
20 Your Honor.

21 THE COURT: All right. 1231(b)(2)?

22 MS. PEPPER: Correct, Your Honor.

23 1231(b) does cover countries to which aliens may be
24 excluded, deported, removed.

25 Mr. Maggio is correct that it does not explicitly

1 reference voluntary departure.

2 MR. MAGGIO: That's not what I said. I said it
3 doesn't specifically reference people going there on their
4 own. They can't be deported by the government.

5 When you are in a deportation proceeding, Your
6 Honor, the judge asks you to designate a country for
7 deportation. If you are a Russian, you cannot designate
8 under the statute Mexico or Canada. Only Canadians and
9 Mexicans can designate those countries and, therefore, can
10 only be deported by the United States to those countries.

11 But anybody can go to Canada who has been ordered
12 deported to anywhere else in the world if the Canadians will
13 take them. There is no statutory bar to the person going
14 into another country.

15 And this happens every day at that Peace Bridge.
16 And the Immigration Service, or now DHS, is well aware of the
17 fact that people with final orders go to Canada.

18 THE COURT: Nor can I understand how the government
19 would ever have an interest in doing that.

20 All right. Well, I am puzzled, Ms. Pepper, by why
21 Ms. Konanykhine was dealt with in the fashion that she was
22 given that she could voluntarily depart and did. And I take
23 it she is currently incarcerated too?

24 MS. PEPPER: She and Mr. Konanykhine are being
25 prepared for transport or are in transport down here because

1 they expressed a desire to testify at their hearing, Your
2 Honor.

3 THE COURT: Oh, I see.

4 MS. PEPPER: But, Your Honor--

5 THE COURT: But your understanding is that she was
6 prevented from going to Canada because of 1231(b)(2)?

7 MS. PEPPER: Your Honor, no. I was expressing my
8 belief that she could not choose a contiguous country to
9 voluntarily depart to.

10 However, as to why she was picked up on the Peace
11 Bridge, Your Honor, I do have a witness to testify as to why
12 she was picked up along with Mr. Konanykhine.

13 THE COURT: All right. Tell me why. Give me a
14 proffer of what the witness would say.

15 MS. PEPPER: Okay. The witness will testify that
16 where you have family groups where one person has voluntarily
17 departure and another does not, that when you pick up the one
18 who does not, for deportation, that to keep families
19 together, since most families prefer to travel together, that
20 they will pick up the person with voluntary departure and
21 they will call it voluntary departure under safeguards. And
22 they will transport them together.

23 THE COURT: How about asking the person whether
24 they want to keep going or not? I don't know.

25 I was one of those who celebrated the arrival of

1 the Department of Homeland Security and the change because I
2 don't think, over the 17 or nearly 18 years that I have been
3 on the bench, that the INS frequently covered itself with
4 glory in what it did. And this was one of those experiences.

5 But I am still very puzzled by it. I think I
6 understand that you picked up Konanykhine because in the
7 ICE's view he violated the agreement, is that right?

8 MS. PEPPER: At the time he was picked up it was
9 known that he had no address. Some of the people involved
10 were unaware of the settlement agreement. Some of the other
11 people were aware of the settlement agreement.

12 THE COURT: Oh, I see. Well, do you now care? Do
13 you, ICE, Department of Homeland Security, do you care
14 whether this couple goes to Canada or not?

15 MS. PEPPER: Your Honor, ICE is acting in
16 accordance with the Board's order of November 20, 2003, which
17 specifically states that Mr. Konanykhine should be excluded
18 to Russia and Mrs. Konanykhine, should she not voluntarily
19 depart, be deported to Russia.

20 THE COURT: Well, yes, you can certainly--

21 MS. PEPPER: So, they are acting--

22 THE COURT: Just a moment. I understand that. And
23 they can-- Certainly that's an appropriate position for ICE
24 to take. But ICE has the power, the United States government
25 has the power to say, we don't care whether these people

1 ultimately go to Russia or go to Canada.

2 In other words, I want to know whether the
3 government will let these people go or whether they are
4 intent on sending them back to Russia?

5 Because if you don't care if they go to Canada, Mr.
6 Maggio has made arrangements for them to do that. And that
7 would resolve this whole matter?

8 MS. PEPPER: ICE would not want them to go to
9 Canada where the Canadian authorities have not guaranteed
10 that they will be offered some sort of way to live there
11 permanently.

12 The Canadian authorities, pursuant to the letter
13 attached to the pleadings on Friday, indicated only an
14 opportunity to apply for asylum. If that is denied, then
15 they would, both Mr. and Mrs. Konanykhine would be sent back
16 to the United States --

17 THE COURT: All right.

18 MS. PEPPER: -- and we would be back in this
19 position because then--

20 THE COURT: But you might not be.

21 MR. MAGGIO: They wouldn't, it would be over.

22 MS. PEPPER: Yes, because then ICE would still be
23 trying to effectuate their exclusion and deportation
24 respectively to Russian pursuant to the Board's order.

25 THE COURT: All right. Let me pursue this for a

1 moment with Mr. Maggio.

2 She is correct, Canada hasn't said, we will give
3 these people asylum.

4 MR. MAGGIO: That's true.

5 THE COURT: She is correct when she says that all
6 Canada has said is that we will let them apply. And while
7 they apply, they can live here.

8 MR. MAGGIO: That's true. And she has admitted
9 that they get them back guaranteed and they get to throw them
10 out, just like they would now.

11 And we are happy to represent to Your Honor that we
12 will not come back here if that happens. You will not see me
13 and the Konanykhine matter again if that happens.

14 We think it is highly unlikely. Canadian counsel
15 has told me that there is a very high probability of this
16 case being approved. And indeed, it was the second in charge
17 of all of Immigration in Ontario that arranged for this
18 interview.

19 When I heard that Mr. Konanykhine had been
20 arrested, I called John Samgin in Toronto. And he said, I
21 don't know what you are talking about, they are still waiting
22 for him. He called the Canadian asylum--

23 THE COURT: I am not interested in that sort of
24 thing.

25 MR. MAGGIO: Your Honor, can I bring some factual

1 thing to your attention that is important?

2 THE COURT: Yes.

3 MR. MAGGIO: It was represented that people were
4 aware of the agreement. When Mr. Konanykhine was arrested
5 and I got ahold of ICE and started referencing the agreement,
6 they had no idea as to what I was speaking of. And I faxed
7 the agreement to them.

8 So, I think-- I am not saying counsel for the
9 government is being disingenuous. Perhaps misinformed. But
10 my understanding is that they became aware of the agreement
11 after Mr. Konanykhine was in the Russian consulate because I
12 was speaking with them on the telephone.

13 The other thing I would bring to Your Honor's
14 attention is this agreement doesn't say when Mr. Konanykhine
15 had to notify them of a change in address. He was due to
16 report in January.

17 I believe that my colleagues here from the
18 Department of Homeland Security would tell Your Honor that
19 when persons report under an order of supervision, which this
20 basically is, and they have changed their address and they go
21 in and report and say-- They ask, have you changed your
22 address? And if they say, oh, yes, I have, they don't go
23 say, oh, you breached by not telling us before and take them
24 in.

25 The standard practice is people notify them of a

1 change of address when they report.

2 Mr. Konanykhine was going to be and hopefully will
3 be in Canada by his next reporting date, January of 2004.

4 And again, the agreement doesn't say he has to do
5 it at a specific time. That's when people normally do it,
6 when they report in by phone or in person with the office in
7 question.

8 And I believe that would be confirmed by the agents
9 from the DHS who are here in the courtroom.

10 THE COURT: Well, I am going to take a brief
11 recess. Let me tell you where-- Yes, Ms. Pepper, did you
12 have something else you wanted to add before I--

13 MS. PEPPER: Yes, Your Honor.

14 THE COURT: All right, go ahead.

15 MS. PEPPER: I just wanted to clarify one of my
16 remarks so that you would understand what I meant by that.

17 THE COURT: Yes, ma'am.

18 MS. PEPPER: When I said that some of the people
19 within ICE knew of the settlement agreement and others did
20 not, that is factually true, Your Honor. Some of the
21 people--

22 THE COURT: Yes, I am sure. What Mr. Maggio is
23 saying is that some people who actually were doing things to
24 Mr. Konanykhine were not aware of it. I think that is all he
25 is saying. Obviously there were people in ICE who were aware

1 of it.

2 I am not sure any of that really matters very much
3 to me. But I certainly did not view your representation as
4 false.

5 MS. PEPPER: Thank you, Your Honor. And then the
6 second point is the settlement agreement itself specifically
7 states on paragraph 3 of Subsection 3 regarding the address
8 notification --

9 THE COURT: Yes.

10 MS. PEPPER: -- that petitioner will notify them
11 one week in advance of an address change.

12 And there is nothing in Phyllis Howard's letter
13 authorizing his change of address to New York that changed or
14 modified that provision at all.

15 THE COURT: Yes, all right. Thank you.

16 At the moment this appears to be, if we look at it
17 as innocently as -- as an innocent situation; that is, there
18 aren't any sinister things going on, as a dispute between
19 parties to an agreement. A dispute which this Court could
20 hear witnesses on and reach a conclusion fairly promptly.

21 There are, of course, nonmaterial breaches, which
22 would not end the agreement. And there are also-- Because
23 there is a provision saying what does end the agreement. And
24 it is a little more dire than other things that might have
25 occurred.

1 There is also a claim by the plaintiff that the ICE
2 was the first to breach. That is a hard argument to make,
3 Mr. Maggio, but you might have an opportunity to make it.

4 But that does seem to me what this is about. It is
5 about construing this agreement, ascertaining the facts, and
6 then determining whether either party is in breach of the
7 agreement, when the breaches occurred and whether those
8 breaches are material.

9 As far as jurisdiction is concerned, it would
10 appear at this time that there is federal question
11 jurisdiction.

12 So, this does not present constitutional habeas
13 questions that I see, although their detention is a different
14 matter. The detention, of course, is something that could
15 raise constitutional issues. I don't know that it does. But
16 before you could ever reach those, there would have to be a
17 determination as to whether there is a breach of the
18 agreement relating to parole.

19 As their appeared to be in 1997, so justice clearly
20 appears to me today, an easy, practical way to dispose of
21 this matter. And that is to let these people go to Canada.
22 Certainly Ms. Konanykhine should have been allowed to go to
23 Canada.

24 By the way, is she a petitioner for asylum as well
25 in the United States?

1 MR. MAGGIO: Yes, Your Honor, she was granted
2 asylum as well.

3 THE COURT: Well, by the ALJ.

4 MR. MAGGIO: By the ALJ. Reversed. And she is
5 part of the petition for review at the Fourth Circuit.

6 THE COURT: And they both, of course, are
7 petitioners in Canada. Has anything been filed in Canada?

8 MR. MAGGIO: Your Honor, all I know is what's in
9 the letter that was quoted in Mr. Szymkowicz' proceeding.

10 THE COURT: All right. So, in other words, they
11 have to go and be interviewed first?

12 MR. MAGGIO: They have to be interviewed. And
13 again, it has been represented to me that there is a high
14 probability of it being granted. And--

15 THE COURT: Where is their counsel? He is in
16 Toronto.

17 MR. MAGGIO: He is in Toronto, Samgin.

18 THE COURT: Issues of foreign law tend to be issues
19 of fact in an American court. I don't know that any of that
20 would be relevant to a breach of the agreement. But there is
21 a certain suspicion on both sides here about each other.

22 I think-- I am going to take a recess now. I
23 think the first thing for the ICE to do is to decide, as a
24 matter of the United States -- whether the United States
25 wants to let these people go to Canada and try asylum there.

1 If not, then they would come back here and then be deported
2 or removed. And maybe that could be agreed upon in an
3 agreement.

4 In other words, that they would be bound by the
5 agreement that if they fail to succeed in Canada, that on
6 being returned, they would agree to be deported and removed
7 forcibly to Russia right away. That could be a part of the
8 agreement. And then they could try to succeed on asylum.

9 Now, oddly enough, that would not moot the Fourth
10 Circuit appeal, I don't think. If they got asylum, it would
11 moot the Fourth Circuit appeal. But I don't know. That's
12 for the Fourth Circuit to determine.

13 MR. MAGGIO: I am not sure.

14 THE COURT: It could moot-- Maybe you could agree
15 to moot the Fourth Circuit appeal for that purpose.

16 So, in other words, there is something in this for
17 the ICE too.

18 What I see is a possibility of practically
19 resolving this matter short of a plenary hearing on whether
20 this agreement has been breached. Which seems to me to be
21 the appropriate way to proceed.

22 And in that event, the analysis I went through on
23 Blackwelder is perfectly appropriate for breaches of contract
24 for which there is no adequate remedy at law and for which
25 there is immediate irreparable harm. That's the appropriate

1 analysis to go through.

2 Now, of course, Ms. Pepper, you know, and I don't
3 need to advise you of this, that any order that the Court
4 entered restraining the ICE is immediately appealable to the
5 Fourth Circuit as well. They can vacate it in a flash.

6 But what I would have in mind doing, and I am going
7 to give you each a chance to address it, is to schedule a
8 plenary hearing very promptly on the breach of the contract,
9 give the parties the opportunity to have their witnesses
10 appear, and also give you a very brief opportunity to see if
11 this matter can be practically resolved in the fashion that I
12 have indicated.

13 Namely, let these people go to Canada, provided
14 that these arrangements are clearly made. And I would think
15 that those folks from the Canadian side who were at the
16 border to meet these people ought to be willing to talk
17 directly to the ICE director here, director to director, so
18 that it is very clear.

19 And then the agreement would be they go to Canada,
20 they try their asylum. If they fail that, they come back
21 here and they are sent immediately to Russia and there is no
22 appeal to the Fourth Circuit, no appeal here, nothing. Over.

23 On the other hand, if they succeed in their asylum
24 claim in Canada, they can stay in Canada. It is not any
25 concern of the United States any further.

1 That seems to me to be a sensible, practical way to
2 resolve this matter. It would eliminate any appeal in the
3 Fourth Circuit. It would eliminate any necessity for the
4 Fourth Circuit to grapple with whether the ALJ or the Board
5 of Immigration Appeals was right. It would end this
6 agreement. And it would put Mr. Konanykhine and his wife on
7 foreign soil, which I think has long been a goal.

8 Now, if the goal is to put Mr. Konanykhine and his
9 wife on Russian soil, the ICE may well get the opportunity to
10 do that fairly promptly. We will have to see.

11 But that-- I am not going to allow it to be done,
12 at least I don't think I will. I am going to hear further
13 from Ms. Pepper in a few moments. I am telling you what I am
14 thinking so you can address what I am thinking. That I am
15 inclined to have a hearing, a plenary hearing on whether or
16 not this agreement has been breached by either the ICE or the
17 plaintiff.

18 And at that time I would also hear any
19 constitutional claim based on detention, but I don't know
20 that I see a whole lot in that at the moment.

21 So, really, I think I have distilled it to what I
22 think is really at issue here. And while I take this recess,
23 you may also consult about a prompt hearing date.

24 I am not a religious person, but I don't hear
25 things on Christmas. So, I would be unlikely to do it, but I

1 can accommodate you the week after Christmas on any day.

2 All right. I will recess at this time. And I have
3 made a lot of-- Two things I want to say.

4 Of course, I have made a number of remarks that
5 really reflect my consternation about the INS, not so much
6 the ICE because I don't have any experience with the ICE in
7 this case yet, but the INS-- I was completely bewildered at
8 the strong intent to have this person go back to Russia. It
9 seemed to me something--

10 I want to underscore that those suspicions do not
11 play a role in the disposition of this case. I have said
12 several times, Ms. Pepper, some things are just none of the
13 Court's business.

14 I can hypothesize reasons that would make it this
15 Court's business if there were really sinister and nefarious
16 things going on by the government because that's the
17 obligation of the third branch, to hold the Executive Branch
18 in check if it does things that are unlawful.

19 But by and large I want you to know, Ms. Pepper,
20 that I am sensitive to the boundaries as to the Court's
21 reasonable curiosity.

22 The second thing I just want to say briefly is that
23 I appreciate everyone coming on such short notice. I had set
24 the hearing for 3 o'clock. I had to change it to 11. And I
25 appreciate everyone coming, however clothed, earlier.

1 Mr. Szymkowicz, I think you were reluctant to do
2 it. Another lesson that you will learn, now that you have
3 got some litigation experience, is that when I say 11
4 o'clock, come at 11 o'clock. Don't engage my clerk in any
5 conversation, just be there.

6 You will tell him all about that, right, Mr.
7 Maggio?

8 MR. MAGGIO: I will, Your Honor.

9 THE COURT: And thank you and your people, Ms.
10 Pepper.

11 MS. PEPPER: Thank you, Your Honor.

12 THE COURT: Court stands in recess. And I will
13 take a 15-minute recess, unless you need to take longer to
14 discuss this.

15 Court stands in recess.

16 NOTE: At this point a recess is taken; at the
17 conclusion of which the case continues as follows:

18 THE COURT: All right, Mr. Maggio, Ms. Pepper, any
19 prospect for resolving this matter?

20 MR. MAGGIO: We have agreed that we need to discuss
21 settlement.

22 THE COURT: All right.

23 MR. MAGGIO: We have agreed that the matter ought
24 to be set down for a hearing to move us along. And if it
25 pleases the Court, we have agreed that we would like to have

1 the hearing scheduled for January.

2 Mr. Howard expressed interest in the second week in
3 January, from any time after the 5th, the 5th forward.

4 And I think we need that time, frankly, Your Honor,
5 also to flesh out the settlement issue.

6 THE COURT: All right.

7 MR. MAGGIO: We have agreed to give this matter a
8 rest until the 29th between us so that we can enjoy the
9 holiday break, and then we will discuss where we are going
10 thereafter.

11 So, sometime in early January would be best.

12 Am I stating it correctly, Ms. Pepper and Mr.
13 Howard?

14 MR. HOWARD: Yes.

15 MR. MAGGIO: Thank you.

16 THE COURT: Let's try the 14th of January at 10:00
17 a.m.

18 MR. MAGGIO: What day of the week is that, Your
19 Honor?

20 THE COURT: That's the Wednesday.

21 MR. MAGGIO: Very good. Thank you.

22 THE COURT: All right. And the order the Court
23 entered will continue. I am going to add one thing, to it,
24 Mr. Maggio.

25 MR. MAGGIO: Yes, Your Honor.

1 THE COURT: Your client already has filed a bond,
2 hasn't he?

3 MR. MAGGIO: I am sorry, Your Honor?

4 THE COURT: Your client already has a bond filed?

5 MR. MAGGIO: Ms. Gratcheba has a bond. I believe
6 Mr. Konanykhine was out on his own recognizance. Was.

7 THE COURT: Well, he is incarcerated now.

8 MR. MAGGIO: Yes, Your Honor.

9 THE COURT: I am not going to deal with his
10 incarceration. I am dealing with whether he stays in the
11 United States.

12 MR. MAGGIO: I understand, Your Honor.

13 THE COURT: I am maintaining that order. But so
14 that we comply with all of the procedures under Rule 65, I
15 think it is appropriate for him to file a nominal bond.

16 MR. MAGGIO: Okay, Your Honor.

17 THE COURT: Any reason why he couldn't file a bond
18 of \$1,000?

19 MR. MAGGIO: Your Honor, I don't believe that he
20 has access to--

21 THE COURT: To his funds.

22 MR. MAGGIO: Yeah.

23 THE COURT: All right. So, he is really indigent
24 at the moment?

25 MR. MAGGIO: I can attest to that, Your Honor.

1 THE COURT: All right. Then we will leave it as it
2 is. And we will have this hearing then on the 14th. And I
3 hope the parties can resolve it.

4 Now, a big part of the resolution, it seems to me,
5 Mr. Maggio, is for you to establish contact between the
6 directors here and the directors in Canada so that they are
7 clear. And then the ICE, what the ICE gets out of it is that
8 they don't have to fiddle with the appeal in the Fourth
9 Circuit anymore.

10 And that if he isn't given asylum in Canada, then
11 he must agree to go promptly -- or he will be returned here
12 and then he will be removed to Russia. And that he agrees
13 there won't be any further appeals or claims of any kind.

14 MR. MAGGIO: Yes, Your Honor.

15 THE COURT: All right. Court stands in--

16 MS. PEPPER: Your Honor--

17 THE COURT: Yes, Ms. Pepper.

18 MS. PEPPER: There is just a couple points, Your
19 Honor. First, I would like to clarify part of what I said
20 earlier. I apparently misspoke. I was busy interviewing my
21 witnesses this morning when the scheduling was moved up.

22 So, apparently when the New York City detention
23 officers went to Mr. Konanykhine's address in New York, it
24 was because of a parole violation for failing to report. And
25 they did intend to detain him at that time.

1 THE COURT: Well, of course.

2 MS. PEPPER: And it is when they did that that they
3 discovered that he had moved and was in violation of that.

4 THE COURT: All right.

5 MS. PEPPER: So, my witness clarified that to me
6 during the interim.

7 THE COURT: Can you tell me succinctly, so that it
8 will be clear if we have to have this hearing and there won't
9 be any discovery, we will just have the hearing, what are the
10 violations that the ICE contends Konanykhine--

11 MS. PEPPER: Failure to provide change of address
12 and failure to report as required.

13 THE COURT: All right.

14 MS. PEPPER: And being on the Peace Bridge area
15 without authorization. Because he was outside of the New
16 York City metropolitan area.

17 THE COURT: All right. So, it is the position of
18 the ICE that he didn't report his addresses, that he didn't
19 report that he was leaving the metropolitan area of New York,
20 and he certainly didn't tell them that he was going to go to
21 Canada, and all of that you contend is a violation?

22 MS. PEPPER: Right. And he didn't report in every
23 60 days as required.

24 THE COURT: All right. Yes.

25 MR. SZYMKOWICZ: Your Honor, if I may be heard,

1 Our amended motion to enforce settlement agreement doesn't
2 specifically address a breach of contract.

3 THE COURT: I understand that. And what I am going
4 to do, now that I've set the 14th of January, the parties can
5 file simultaneously their briefs for the Court to consider on
6 the-- I think the 12th of January is a Monday. File it on
7 the Monday.

8 MR. SZYMKOWICZ: Our amended, our second amended--

9 THE COURT: Yes.

10 MR. SZYMKOWICZ: Okay. And may we--

11 THE COURT: And any brief. And the Government will
12 do the same.

13 MR. SZYMKOWICZ: Okay. Thank you, Your Honor.

14 MS. PEPPER: And, Your Honor, there is one other
15 matter. There is a separate habeas filed today by
16 petitioners. And that appears to have been assigned to Judge
17 Hilton.

18 So, we would request that it be consolidated with
19 this.

20 THE COURT: Yes, we will do that. That is
21 automatically done, but thank you for calling that to my
22 attention.

23 MR. SZYMKOWICZ: Thank you, Your Honor.

24 THE COURT: All right. I thank counsel for your
25 cooperation.

