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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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 :
 ALEXANDER P. KONANYKHINE, :
 et al, : CIVIL ACTION
 : NO. 97-449-A
 :
 Petitioners, :
 vs. : December 19, 2003
 :
 WILLIAM J. CARROLL, :
 :
 Respondent. :
 :
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TRANSCRIPT OF MOTION PROCEEDINGS
BEFORE THE HONORABLE T.S. ELLIS, III,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Petitioners: Szymkowicz & Szymkowicz, LLP
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THE COURT: All right, I have -- this is the -- what's the number on this? It doesn't have a new number, does it?

THE DEPUTY CLERK: Civil Action Number 97-449-A.

THE COURT: That isn't appropriate. It should have a new number. This is an entirely new case. You are seeking -- there is no order in this court in the 97-449 case, is there?

This is a settlement agreement that you reached with these folks.

MR. SZYMKOWICZ: That's correct, Your Honor.

I appreciate your taking this as an emergency matter, and I appreciate Ms. Pepper and Mr. Howard from the United States Attorney's Office for coming here and arguing today; and I apologize for calling your office yesterday.

THE COURT: All right. We are beyond all that now.

MR. SZYMKOWICZ: I was hired last night around 5:00 o'clock. I have represented Mr. Konanykhine and Ms. Gratcheva, who are husband and wife, on business matters. I'm not an immigration lawyer, and I'm not a criminal lawyer.

THE COURT: Whatever happened to Mr. -- (pause)

MR. SZYMKOWICZ: Mr. Maggio represents Mr. Konanykhine in the immigration matters, but he apparently is in Richmond arguing at the Court of Appeals, the Fourth Circuit, for a stay, and that was related to me by my client. I don't know if he actually made it down there.

1 THE COURT: Stay of what?

2 MR. SZYMKOWICZ: A stay of the deportation proceedings.
3 The case originated many years ago.

4 THE COURT: I know about that.

5 MR. SZYMKOWICZ: Yes, sir.

6 THE COURT: The only grounds you have raised here today
7 is that it's a violation of the order, or, I mean, of the
8 settlement agreement?

9 MR. SZYMKOWICZ: That's correct, or, in the alternative,
10 we are applying for an application for a writ of habeas corpus
11 both for Mrs. Konanykhine and Mr. Konanykhine.

12 THE COURT: On what grounds?

13 MR. SZYMKOWICZ: On the grounds that there is an illegal
14 detention and on the grounds that they be released from captivity
15 because, in the Konanykhine case, it violates -- his detention
16 violates the settlement agreement reached between the United
17 States and Mr. Konanykhine.

18 In the Gratcheva matter, she still has one --

19 THE COURT: (Interposing) She was allowed to depart
20 voluntarily.

21 MR. SZYMKOWICZ: Voluntarily.

22 THE COURT: I don't understand what's going on here.

23 Who is here for the Government? Is this Ms. Pepper?

24 MS. PEPPER: Yes, it is, Your Honor.

25 THE COURT: I have your pleading that says that they now

1 intend to put him on an airplane at 5:30.

2 MS. PEPPER: That is correct, Your Honor, and in the
3 interim here, I went back to the office to ascertain his status,
4 and he is still in transport to New York.

5 THE COURT: Well, while I'm having this hearing, they
6 had better not put him on the airplane. I'll enter an order right
7 now to stop that. Is that clear?

8 MS. PEPPER: Yes, it is, Your Honor.

9 THE COURT: All right. Now, let's move on with this
10 hearing. Do you need to call somebody and tell them don't let him
11 get on an airplane until I'm done?

12 MS. PEPPER: I would appreciate the opportunity to do
13 that, Your Honor, just to make sure it's crystal clear.

14 THE COURT: All right, I'll give you a chance to do
15 that, because he is not leaving this country until I have had this
16 hearing.

17 MS. PEPPER: I understand, Your Honor.

18 THE COURT: This has all the earmarks of something
19 strange. I don't understand what's happening with this man and
20 Russia and our country. I just don't understand it.

21 Now, my focus is going to be smaller, because all I have
22 is what his counsel has put before me, but I have clear memories
23 of the past agreements between the successors to K.G.B. and our
24 I.N.S., and I don't know whether you have read all of those
25 proceedings and whether you know of this Court's concern about Ms.

1 Rose's misrepresentations. Do you recall that?

2 MS. PEPPER: No, I don't, Your Honor.

3 THE COURT: And this gentleman doesn't either. He
4 wasn't here. I do want to hear from you about why this isn't a
5 violation of the settlement agreement, and why is the wife with
6 him? Why wasn't she allowed to go to Canada? Why were they
7 whisked back here? It's all quite strange, quite strange indeed.

8 I'll take a brief recess. You call them, and they can't
9 take him out of this country, and, if they do, they will be in
10 contempt of court until I rule on this matter.

11 MS. PEPPER: Understood clearly, Your Honor.

12 THE COURT: Now, do you know what's happening in
13 Richmond?

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

15 THE COURT: Is it over?

16 MS. PEPPER: No, that is not over, Your Honor.

17 Yesterday petitioner filed on his behalf and his wife's behalf
18 explicitly a motion to stay deportation, because they both have a
19 pending petition for review of the Board's November 20th order.

20 THE COURT: The asylum issue.

21 MS. PEPPER: Correct. And so the Government filed a
22 response to that stay request this afternoon, and so the Fourth
23 Circuit is considering that. The Government attorney in that case
24 has also been apprised of the fact that Immigration authorities
25 intend to deport at 5:30.

1 THE COURT: You see, all of that suggests they want to
2 avoid a court resolution, so it makes the courts suspicious, and
3 it makes courts want to say, Let me hear it first. Let me hear
4 what's happening. Why should they be in a rush to send them away?
5 They have been here for ten years now.

6 I'll take a brief recess while you make that call,
7 because until I rule on this, they are not to move him out of the
8 country.

9 MS. PEPPER: Thank you, Your Honor.

10 (Whereupon, at 4:00 o'clock p.m. a short recess was
11 taken.)

12 THE COURT: All right, Ms. Pepper, thank you for making
13 that call. I don't want this matter rendered moot while I'm
14 hearing it.

15 MS. PEPPER: Yes, I understand, Your Honor. As a
16 precaution, I had already had Bill Howard from our office stay at
17 his phone, so that when the plane lands in New York, and it has
18 not yet done so, they would call him immediately, as well as
19 calling the Government attorneys for the Fourth Circuit, to let us
20 know of their arrival. He will. Because they must call him, he's
21 going to tell them do not deport him.

22 And he is also calling all of their supervisors, who are
23 here in the district offices, that they will get a sort of
24 two-prong phone call.

25 THE COURT: All right. Thank you, Ms. Pepper.

1 Now, Mr. Szymkowicz, as I see it, you raised two
2 arguments. First, you say that the removal of Mr. Konanykine and
3 his wife is a violation of your settlement agreement, and the
4 second argument you make is really, you raise a habeas petition,
5 but you asked that it be treated as a habeas, as an alternative,
6 but the ground for the habeas is not set out. What is the grounds
7 for the habeas?

8 MR. SZYMKOWICZ: The grounds for the habeas, Your Honor,
9 is that, with regard to Mr. Konanykhine, his detention and
10 deportation violates the terms of the settlement agreement in the
11 '97 case.

12 With regard to Ms. Gratcheva, Mr. Konanykhine's wife,
13 her detention and deportation violates the terms of the Board of
14 Immigration Appeals' order dated 11-20-03, which stated in
15 conclusion -- (pause).

16 THE COURT: Yes. I read it, I read it. She gets to
17 depart voluntarily.

18 MR. SZYMKOWICZ: Voluntarily depart, and they then
19 basically --

20 THE COURT: (Interposing) Now, what typically happens,
21 Mr. Szymkowicz? I take it you are an immigration lawyer.

22 MR. SZYMKOWICZ: Not at all, Your Honor.

23 THE COURT: Oh, you are not?

24 MR. SZYMKOWICZ: No.

25 THE COURT: All right, let me ask Ms. Pepper, because

1 this is her area. Is that right, Ms. Pepper? You are a lawyer in
2 this area?

3 MS. PEPPER: Yes, I am, Your Honor.

4 THE COURT: What happens typically with an order to
5 remove or deport if there is an appeal to the Court of Appeals?
6 Is it automatically stayed, or what happens?

7 MS. PEPPER: No, it is not, Your Honor. Prior to 1996
8 any alien ordered deported who filed a petition for review with
9 the Court of Appeals got an automatic stay of deportation, but --

10 THE COURT: That's what I remembered, but not any
11 longer?

12 MS. PEPPER: No.

13 THE COURT: What do you have to do now?

14 MS. PEPPER: Now, the passage of the Illegal Immigration
15 Reform and Immigrant Responsibility Act in 1996 removed the
16 automatic stay provision.

17 THE COURT: Well, it didn't remove the opportunity for a
18 stay. What do you have to do now to get one?

19 MS. PEPPER: You have to file a stay, a motion for stay
20 with the Court Of Appeals, and go through the four-step process of
21 showing likelihood of harm to self, to government.

22 THE COURT: Right, and that's what Mr. Maggio is doing.

23 MS. PEPPER: That is correct, Your Honor.

24 THE COURT: Why should you all render that moot by
25 moving him before the Fourth Circuit can act? I mean, it's not

1 like Mr. Maggio has been slow. He has already filed the appeal,
2 and I take it he has moved with alacrity once he knew that you all
3 were going to move to deport his client, that he is now seeking to
4 have it stayed pending a hearing on the merits in the Fourth
5 Circuit. Now why should the -- is it I.C.E. that does this?

6 MS. PEPPER: That is correct, Your Honor.

7 THE COURT: Why should I.C.E. render that moot?

8 MS. PEPPER: Well, first, Your Honor, it does not render
9 it moot, because the Court still has jurisdiction over the
10 questions of law in much the same way that --

11 THE COURT: What good does that do Mr. Konanykhine?

12 MS. PEPPER: If it rules in his favor, then the
13 government must at its own expense bring him back.

14 THE COURT: If he's alive.

15 MS. PEPPER: True, Your Honor, but Congress' intent in
16 removing the automatic stay provisions from the Immigration Act
17 was to require aliens who had meritorious claims to get a stay.

18 THE COURT: All right, and that's what's going on right
19 now?

20 MS. PEPPER: Yes, it is, Your Honor.

21 THE COURT: Now, why is Mrs. Konanykhine, whatever her
22 name is, why is she being removed in apparent violation of the
23 order that says she can depart voluntarily?

24 MS. PEPPER: Well, Your Honor, I have primarily been
25 focusing on Mr. Konanykhine, because he is the only named

1 petitioner in the motion before us, so I have limited information
2 regarding her because I was not making inquiries. However, it
3 appears, and I say appears because I do not know this for a fact,
4 that her passport expired, and she doesn't have a valid passport.

5 Therefore, even though she does have until tomorrow in
6 which to voluntarily depart the United States, she has no valid
7 passport in which to do so, and she cannot travel to Canada or
8 Mexico to voluntarily depart, because she is not a native or
9 citizen of either country, and you cannot voluntarily depart to
10 either of those two countries under the law.

11 THE COURT: Why is there such an interest by the United
12 States to get this man back to Russia?

13 MS. PEPPER: I don't -- I do not know, Your Honor.

14 THE COURT: I accept that. You know, back a few years
15 ago, this was going on again, and I don't know whether you have
16 reviewed all of the past of this.

17 MS. PEPPER: Your Honor, the only information I know
18 about this case is the present motion.

19 THE COURT: You really need to look back at it, because
20 my recollection may be mistaken, but I recall that there was, in
21 effect, a sinister deal between the I.N.S. and the successors to
22 the K.G.B. There's no treaty between Russia and the U.S., and
23 they wanted this guy back for some reason, and the U.S. also
24 wanted an F.B.I. office in Moscow; and so they dealt. It was that
25 simple.

1 And there were misrepresentations made to this Court in
2 the course of it, too. I don't recall what they were, and I don't
3 recall specifically what happened, but I was quite upset with it,
4 and it seemed to me to be a sad spectacle.

5 Indeed, ultimately, the United States paid money to
6 Konanykhine in settlement of the suit he brought. Am I correct in
7 that regard?

8 MR. SZYMKOWICZ: That's correct, Your Honor. I believe
9 it was in the neighborhood of eighty-some-thousand-dollars, but it
10 was to the firm of Arent Fox, who had taken the case on apparently
11 pro bono at that point.

12 THE COURT: Well, I just find it hard to understand.
13 There is something more going on, obviously, than you know, Ms.
14 Pepper, and that I know, because there is a lot of erg being spent
15 on hustling somebody out of here who has been here for years and
16 years.

17 There is more to this than meets the eye, and I'm
18 unlikely to be very hospitable to doing nothing as long as there
19 appears to be an avenue of appeal that I don't want these people
20 to -- now, if the Fourth Circuit this afternoon says no stay, that
21 would be about the end of the matter as far as I was concerned.

22 But tell me this: Why is this not a violation of the
23 agreement? What is it that has arisen that means he can't stay,
24 because it says here, Pending final resolution of his immigration
25 proceedings, and they haven't ended yet?

1 MS. PEPPER: Your Honor, the Government argues that the
2 settlement agreement has expired on two different grounds.

3 First, the specific provision, which is paragraph (d) on
4 page two of the settlement agreement, says that the settlement
5 agreement will remain in force until there is a final, enforceable
6 order. When the Board of Immigration Appeals issued --

7 THE COURT: (Interposing) What does it say? Am I
8 reading something -- the settlement agreement says, Respondent,
9 that's the INS, agrees to parole petitioner -- that means let him
10 stay here -- pending final resolution of his immigration
11 proceedings.

12 MS. PEPPER: Your Honor, I'm looking at the prior page,
13 paragraph (d) on page 2, which says that this agreement will take
14 effect on the date it's entered, and this agreement will end when
15 there is a final and enforceable order of exclusion or deportation
16 entered against the petitioner, when the petitioner's immigration
17 proceedings are otherwise resolved, or, stated in the disjunctive,
18 when parole is revoked pursuant to the paragraph in the next
19 section that you are referring to.

20 THE COURT: Well, all of that I construe as meaning when
21 it's over, when his immigration matters are over.

22 MS. PEPPER: Well, the government's first argument on
23 this is when there's a final and enforceable order of exclusion or
24 deportation, the first of the three items listed, has occurred
25 when the Board of Immigration Appeals issued its order on November

1 20, 2003.

2 When the Board issues an order, it becomes the final
3 administrative order. The fact that there is a petition for
4 review pending with the Court of Appeals doesn't change the fact
5 that the board's order is a final, enforceable order under the
6 law.

7 THE COURT: All right.

8 MS. PEPPER: And, alternatively, the Government argues
9 that the third provision when parole is revoked has occurred. I
10 have a copy of the parole revocation for Your Honor and for
11 counsel if you would like, which is dated today.

12 THE COURT: Dated today. Isn't that interesting?
13 Something is going on here, and it's very very suspicious, that
14 there is some effort to try to do this so quickly. I don't
15 understand it. There must be -- what is the quid pro quo that
16 this Government gets in return for delivering this person? Hum.
17 I don't know. All right, his parole has been revoked, you say?

18 MS. PEPPER: His parole was revoked.

19 THE COURT: For what reason?

20 MS. PEPPER: He did not comply with three of the terms
21 of the settlement agreement.

22 THE COURT: Which were?

23 MS. PEPPER: Which was on paragraph three, page four, he
24 was required to notify them of any change of address, and,
25 according to the parole revocation letter, he had a change of

1 address and did not notify them within this past month. He was
2 supposed to consistently report into INS, now the Immigration --

3 THE COURT: When would he receive revocation of the
4 parole? Today, right?

5 MS. PEPPER: Right. The letter is dated today.

6 THE COURT: And when would he receive an opportunity to
7 say, hey, you all made a mistake? Today?

8 MS. PEPPER: Yes.

9 THE COURT: And in the meantime, they are going to put
10 him on a 5:30 airplane? Does any of this strike you as at all
11 unfair? How about that for a word that maybe the I.C.E should
12 consider? Unfair. Give him a chance, for gosh sakes, to at least
13 get his argument before the Fourth Circuit and to tell you whether
14 or not he did report.

15 This man may be a scoundrel, for all I know. I don't
16 remember all of the things in '97, but golly Pete, the way it's
17 being handled is fraught with -- it invites the inference that
18 something is going on here that's very odd indeed.

19 I understand his position. His position is he doesn't
20 want to go to Russia, because people there want to kill him, and I
21 understand that; and I understand his desire to try to get to
22 Canada, but he wasn't able to do that.

23 I find it strange, you know, if the U.S. wants him out
24 of here, what difference does it make to the U.S. where he goes?
25 That was my view in '97. Why do you care whether he goes to the

1 Caribbean or anywhere else? No, they wanted him to go to Russia.
2 Now why do we imagine that's the case? Because there's something
3 going on. Now it may be legitimate, or it may be illegitimate,
4 and even if it's illegitimate, it may not be the business of this
5 Court. I don't know.

6 But right now, Ms. Pepper, I don't see any reason why I
7 shouldn't enter an order that says that he doesn't get on that
8 5:30 airplane, and I'll consider the matter Monday morning after I
9 hear whether the Fourth Circuit has ruled on his petition for a
10 stay. That's seems to me to be the only fair way to go about it,
11 and in the meantime, I would have a number of other questions to
12 ask you; and we can litigate here the question about whether he
13 did indeed violate his order.

14 But then Mr. -- I'll tell you something, Mr.
15 Szymkowicz, he had better get himself an immigration lawyer here.
16 I'm not sure that the violation of his, of this settlement
17 agreement, is something you can raise by way of a petition in this
18 court.

19 Right now this has got a case number of a '97 case. I
20 don't think that's appropriate. I'm not sure what is, but
21 somebody is going to have to think about this pretty quickly. The
22 only thing I'm determined not to do is let events overtake us
23 before fairness can be considered.

24 One element of fairness is that the Fourth Circuit gets
25 a chance to say whether or not it is stayed.

1 I must tell you, Mr. Szymkowicz, if the Fourth Circuit
2 decides not to stay the removal order, then I think it's over.

3 MR. SZYMKOWICZ: Your Honor, I think there is a
4 difference between the Fourth Circuit not doing anything on a
5 motion and actually make a decision against the stay.

6 THE COURT: Well, it's going to issue something.

7 I would imagine Mr. Maggio has told them there -- he
8 should have the same information -- that it's an emergency.

9 MR. SZYMKOWICZ: I would imagine that he did that, Your
10 Honor.

11 THE COURT: So it's either going to be granted or
12 denied.

13 MR. SZYMKOWICZ: The only thing I have -- (pause)

14 THE COURT: If not, you had better tell him to do so.
15 Tell him that I told him he has to do so.

16 MR. SZYMKOWICZ: Yes, sir.

17 THE COURT: Now, none of this addresses her. I do
18 understand now a little bit more about her, and that is that her
19 passport expired; I take it her Russian passport expired.

20 MS. PEPPER: Right. So I understand.

21 THE COURT: Yes. Well, isn't that convenient? Because
22 she could have voluntarily departed anywhere she wanted to,
23 couldn't she? She could have gone to Canada.

24 MS. PEPPER: Your Honor, aliens who are granted
25 voluntary departure are allowed by law to voluntarily depart to

1 any country except Canada and Mexico, the two contiguous ones,
2 unless they are native citizens of those countries.

3 THE COURT: I see. Well, I didn't know that. All
4 right, that's useful. That's important to know. That's by
5 statute, I take it.

6 MS. PEPPER: Yes, it is, Your Honor.

7 THE COURT: But she could, for example, have departed to
8 the Caribbean or somewhere?

9 MS. PEPPER: Yes, she could have, Your Honor. In fact,
10 another alternative that was available to them, though to what
11 success obviously I don't know, is they could have requested, in
12 light of the information from Canadian authorities that asylum
13 might be possible, is to have immigration authorities here be part
14 of the discussion with Canada, so that if Canada would agree to
15 grant them asylum, as opposed to just let them apply for it, then
16 they could have been deported to Canada where they could have
17 received asylum status.

18 THE COURT: What difference does it make, as long as
19 they are gone from here, what difference does it make to the
20 United States? That's what I have always found strange.

21 MS. PEPPER: I -- I have no way to respond to that, Your
22 Honor.

23 THE COURT: Well, the only possible answer is that
24 Russia really wants him back. I can only shudder to think what
25 reasons there may be for that, either because he's done some very

1 bad things, or because they want to do -- he may deserve whatever
2 punishment, aside from being killed, of course, he may deserve
3 punishment. I don't know what he's done or hasn't done. But I
4 know that in his asylum claim he fears being killed there; is that
5 right?

6 MR. SZYMKOWICZ: That's correct, Your Honor. The only
7 allegations --

8 THE COURT: (Interposing) I recall that from '97.

9 MR. SZYMKOWICZ: The only allegations that are levied
10 against my client are business-related.

11 THE COURT: Oh, I understand that.

12 MR. SZYMKOWICZ: They are not considered to be death-
13 penalty offenses such as murder or treason or things like that.
14 The other thing I would like the Court to be aware of, and I do
15 know this, because I did represent Alexander during this time,
16 he's been living in New York City for at least four years.

17 The part of the settlement agreement that says that he
18 cannot depart from the Washington, D.C. metropolitan area was
19 superceded by this agreement that he entered into with the I.N.S.
20 back, presumably in 1999, that allowed him to live in New York,
21 and since that time he has informed me that he has maintained
22 contact with the I.N.S.

23 THE COURT: That would at least be disputed?

24 MR. SZYMKOWICZ: Certainly, and he's informed me, and
25 again I'm not an immigration lawyer, and I didn't give him any

1 immigration advice, and I'm not comfortable doing so, he's
2 informed me that he has maintained a contact with I.N.S, as was
3 required, the entire time, including these last months.

4 THE COURT: Well, there are obviously two sides to that
5 issue, or there wouldn't have been a revocation of his parole
6 issued.

7 I think what needs to happen -- I take it you are in
8 touch with counsel in Richmond as well?

9 MS. PEPPER: Yes, I am, Your Honor.

10 THE COURT: And nothing has been heard in that regard?

11 MS. PEPPER: No, Your Honor. The Government attorney is
12 in Washington, D.C., but the Fourth Circuit, in recognition of the
13 fact that deportation was imminent, allowed the Government to fax
14 its response in opposition to the stay motion so that they could
15 receive it quickly and then deliberate on it.

16 I haven't heard from that attorney whether they have set
17 any kind of timeframe for resolution on the motion. I do have a
18 copy of the petitioner's motion for stay that was presented to the
19 Fourth Circuit.

20 THE COURT: Does it indicate that's an emergency motion?

21 MS. PEPPER: Yes, it does. It's entitled Emergency
22 Motion for Stay of Removal and indicates that they fear that
23 deportation is imminent. This was filed yesterday before there
24 were travel documents, and it was as imminent as it is this
25 moment.

1 THE COURT: I see.

2 MR. SZYMKOWICZ: Your Honor, if I may be heard on that.

3 THE COURT: Before you are, is there anything else that
4 I should know about this case that you know, Ms. Pepper?

5 MS. PEPPER: As to the facts of the case, those are the
6 facts as I know them. I was unaware that he was living in New
7 York. I was unaware that there appears to be any modification of
8 the settlement agreement, because the only information I have is
9 what's provided here.

10 THE COURT: Yes.

11 MS. PEPPER: And there is no modification with that,
12 because the Government's information was that he hadn't sought
13 permission to travel outside of this area to go to Canada. I
14 don't know any conditions that are on any modifications and have
15 no way to know that or respond to you on that.

16 THE COURT: All right.

17 MR. SZYMKOWICZ: Mr. Maggio may have some of those
18 documents or all of those documents, and I will be getting in
19 touch with him later tonight.

20 With regard to giving some background on what I know
21 from having spoken to my client last night and this morning around
22 between midnight and 2:00 in the morning, I received a frantic
23 call, and Mr. Konanykhine is not a histrionic person. He was the
24 most emotional, in fact, I have ever heard him.

25 He informed me that he was deported -- that he was

1 stopped at the Canadian border. He was attempting to cross the
2 Peace Bridge into Canada from New York to Ontario. His car was
3 swarmed by at least 12 immigration officers.

4 He was immediately put on a plane from Buffalo and
5 brought to Reagan National, where he was taken right away to the
6 Russian Embassy, inside the Embassy.

7 THE COURT: For what purpose?

8 MR. SZYMKOWICZ: I don't know, presumably to get a
9 travel document. The travel document, the Russian Embassy was not
10 able to physically produce the travel document. I don't what the
11 travel document is, what it looks like, or how hard it is to
12 create one, but apparently they had a hard time, which is why he
13 was transferred to the I.N.S. office on Fairfax Drive in
14 Arlington. That's where I first talked to Mr. Konanykhine.

15 And, if it hadn't been for the Immigration officer, she
16 was very nice, at that office, I probably would not have been able
17 to talk to him; but they were very helpful, and that's when I
18 called your chambers. When Mr. Konanykhine was on the other line,
19 I had your office on the other line trying to get an emergency
20 stay.

21 After that, he was transferred to the Arlington County
22 Detention Center, and that's when I had more substantive
23 conversations with him; and it was his opinion that it was just a
24 matter of time, probably early in the morning, that the travel
25 documents would be issued, and he would be on a plane. He was

1 surprised, if he knew that he was leaving on a 5:30 plane, he
2 would have been surprised; he thought it would have been earlier
3 than that. So you are up to the minute right now as to my
4 knowledge of the case.

5 THE COURT: All right. I think it is important to be
6 clear what the Court's jurisdiction is. It seems to me that the
7 papers filed can be construed to be a petition for a writ of
8 habeas corpus, in which the petitioner contends that his due
9 process rights are being violated because he's being deported
10 before the Court can act on his request for a petition for a stay
11 of the Immigration Board's order; in other words, to permit him
12 even to act on the motion for an emergency motion to stay. It
13 appears to be an effort to prevent even that.

14 When did Mr. Maggio go down there?

15 MR. SZYMKOWICZ: I haven't spoken to Mr. Maggio since
16 last night, but he was in Washington last night. I presume, based
17 on conversations with my client, Mr. Konanykhine, that he was
18 going down today. I don't know whether he actually made that trip
19 or he was doing it by telephone. So I really can't comment on
20 that just because I don't know.

21 THE COURT: Well, Mr. Szymkowicz, what jurisdictional
22 basis would be furnished by an alleged violation of this
23 settlement agreement?

24 Come to the podium. What is the jurisdictional basis?

25 MR. SZYMKOWICZ: As I informed Your Honor, I primarily

1 practice in civil matters, and last month I had a violation of a
2 settlement agreement in Montgomery County, Maryland, in the
3 Circuit Court, and the case law in that case was that the Court
4 had continuing jurisdiction to -- and this was a civil matter --
5 had continuing jurisdiction to effectuate the terms of the
6 settlement agreement.

7 THE COURT: This settlement agreement doesn't have
8 anything to do -- didn't come out of -- did it come out of the
9 case that I held? No, it came out of a civil action, didn't it?
10 Wasn't this part of a civil action that he filed?

11 MR. SZYMKOWICZ: I was before Your Honor on the Federal
12 Tort Claim Act, I believe it was in 1998. I was actually the
13 attorney in that case, '98 or '99.

14 THE COURT: And that was settled?

15 MR. SZYMKOWICZ: That was put on a stay by Your Honor
16 pending the outcome of all this.

17 The settlement agreement that is referenced in this
18 petition today is the resolution of the habeas corpus proceeding.
19 And remember you had two proceedings, Your Honor, and this was
20 before my time, so if I'm misquoting, I apologize; but there
21 apparently were two habeas corpus proceedings before Your Honor.

22 You granted the writ of habeas corpus, and Mr.
23 Konanykhine was released from captivity. That same day, the INS
24 rearrested him. I don't even know if he even left the jail, and
25 that necessitated a second habeas corpus petition.

1 THE COURT: Yes, I recall that.

2 MR. SZYMKOWICZ: Which was filed by the Arent Fox law
3 firm. That was the proceeding in which there was testimony taken
4 where Your Honor found strange things afoot with the INS and its
5 activities with Mr. Konanykhine.

6 There were apparently two days of hearings in that
7 second habeas corpus action. And to resolve that second habeas
8 corpus action, the INS and Mr. Konanykhine, acting through the
9 Arent Fox attorneys, entered into the settlement agreement with
10 the language that we are relying upon, on page three: Respondent
11 agrees to parole petitioner pending final resolution of his
12 immigration proceedings, including any direct judicial appeals
13 thereof.

14 THE COURT: So long as.

15 MR. SZYMKOWICZ: So long as petitioner engages in --
16 and I can't read what that word is. That was the copy that was
17 faxed to me last night by the helpful people in INS, which they
18 certainly didn't have a duty to do that. And they faxed it to me,
19 and it looks like it had been previously faxed to Mr. Maggio, and
20 before that previously faxed by Alexander at his office at KMG
21 Studios. So, it's not a very clear copy.

22 THE COURT: And what is this other arrangement that you
23 referred to in '97 or '98 that allowed him to live in New York?
24 Is that here?

25 MR. SZYMKOWICZ: No. That's not included in any of the

1 materials that I have, to my knowledge. We may have had a copy in
2 relation to the civil cases that I had represented Mr. Konanykhine
3 on, but if those files exist, they are probably with Mr. Maggio.
4 I know Alexander was living in the Watergate apartment complex
5 back in '96 and '97.

6 He was then -- he wanted to go to New York to open up an
7 Internet graphics production house, and he did so in -- he was
8 living there definitely in 1999, and has lived there continuously
9 since. So the language in the revocation of parole document
10 today, dated December 19, 2003, where it says, You failed to
11 request permission from your authorized residence to another state
12 is strange considering that he's been living in New York for at
13 least four years.

14 THE COURT: The time is late. Was it 5:30 that they
15 were going to put him on a plane or 5:30 that he was to arrive?

16 MS. PEPPER: The plane was supposed to have departed at
17 5:30, Your Honor.

18 THE COURT: Then they might well be boarding at the
19 moment.

20 MS. PEPPER: If so, it would be without the petitioner,
21 given the strong phone calls that were made.

22 THE COURT: All right. I hope so. All right.

23 MR. SZYMKOWICZ: Your Honor, we ask that this matter, we
24 maintain the status quo until a time when we can hear this in
25 full, and hopefully I can bring Mr. Maggio and at least one of the

1 Arent Fox attorneys here.

2 THE COURT: Well, you are going to have to do it very
3 quickly.

4 MR. SZYMKOWICZ: I think that that won't be a problem.

5 THE COURT: This matter is before the Court on an
6 emergency basis, and it must be considered as a temporary
7 restraining order. The Blackwelder and its progeny are the cases
8 that guide the Court's analysis.

9 Before we even get to Blackwelder, the Court has to
10 determine whether there is jurisdiction, and here the Court sees
11 two bases for jurisdiction.

12 First, it would appear that the settlement agreement on
13 which the petitioner relies is a settlement agreement that
14 resolved a habeas petition⁰ that was pending in this court and
15 that led to a dismissal order.

16 The Court did not retain jurisdiction, however, but I
17 think it is fair to say that a claim of a breach of the agreement
18 could be said to furnish a basis for jurisdiction, but more
19 importantly is an alleged violation of his due process rights.

20 This petitioner has a right to file a petition for a
21 stay of the Immigration Board's order. That could be mooted by
22 his removal.

23 Now, Ms. Pepper correctly points out that it doesn't
24 really moot it. She correctly points out that all of the issues
25 of law remain active and that if the Court were to rule in

1 Konanykhine's favor, he could be returned. That's not very
2 comforting, given the claim that Mr. Konanykhine makes about why
3 and what may occur to him in Russia.

4 So, it is the Court's view that we then proceed to the
5 Blackwelder analysis. The first step in the Blackwelder analysis
6 is to assess whether there is immediate irreparable harm to the
7 petitioner. Of that, there can be no doubt. His removal to
8 Russia would unquestionably be irreparable and immediate, if it
9 happens today.

10 The next step in the analysis is to consider whether
11 there is harm to the respondent, and, if so, a balance of that
12 harm. I don't see any significant or substantial harm to the
13 Government in failing to carry out this order today. Even if
14 there were some harm articulable, and I don't think there is, the
15 balance of harms is decidedly in favor of the petitioner.

16 Now when the balance of harms is decidedly or decisively
17 in favor of the petition, then in that event, the petitioner must,
18 or need only show that there is a significant issue to litigate
19 and need not show a likelihood of success on the merits. And
20 that, I think, is clearly shown here.

21 There is a dispute about whether there is a violation of
22 the settlement agreement. I haven't been provided all copies of
23 the settlement agreement. I don't know what the settlement
24 agreement says about how disputes under it are to be resolved.
25 But that matter needs to be probed.

1 As far as due process is concerned, it seems just
2 straightforward and fundamental that if a petitioner moves for a
3 stay, an emergency stay, of the removal order, that that
4 petitioner, that order -- I beg your pardon -- that Court should
5 have an opportunity to have that order considered before it's
6 rendered moot.

7 So I think there's a clear likelihood of success in that
8 case, and certainly an issue to be litigated on the settlement
9 agreement.

10 The public interest is not easy to discern here, except
11 that people's rights ought to be vindicated, and that's in the
12 public interest. And it seems to the Court that a stay
13 maintaining the status quo, namely, Konanykhine's presence here in
14 the United States, and it seems to me his wife's, too, although
15 she is not even a named party to this, Mr. Szymkowicz. Why not?

16 MR. SZYMKOWICZ: She is, Your Honor. If you read the
17 first paragraph, it says --

18 THE COURT: (Interposing) You just didn't put her in the
19 caption?

20 MR. SZYMKOWICZ: No, she wasn't a part --

21 THE COURT: (Interposing) You made her a third-party
22 beneficiary of the order, of the settlement?

23 MR. SZYMKOWICZ: I suppose, if you want to use that
24 term, yes.

25 THE COURT: You have a lot of thinking to do about this

1 case over the weekend, because I'm going to set it for hearing at
2 3:00 o'clock on Monday. Do we have another matter at 3:00 -- we
3 have an arraignment at 2:00 -- at 3:00 o'clock on Monday. And you
4 and Arent Fox and everybody else in the world better turn up, and
5 we had better see what there is.

6 You can file anything you wish beforehand, and Ms.
7 Pepper, you can take this opportunity to become more involved.
8 But the stay is entered.

9 He is not to be removed from the United States until
10 further order of this Court, and I expect to issue that. By
11 Monday, perhaps the Fourth Circuit will have ruled.

12 I tell you if the Fourth Circuit denies a stay, I'm
13 going to be -- I will listen to the parties' positions on why the
14 settlement agreement is or is not violated, but it seems to me
15 that that, in essence, might be the end of the matter.

16 I find it hard to believe that the full -- maybe Mr.
17 Maggio remembers the full taste of this -- but what I am going to
18 do is enter the stay now.

19 I'm going to direct that the Clerk of this Court, the
20 Deputy Clerk, while I'm entering this order, call the Clerk of the
21 Court of Appeals for the Fourth Circuit and tell the Clerk of the
22 Court of Appeals for the Fourth Circuit that I have entered a
23 stay, or TRO, preventing the removal or deportation of these
24 people pending the hearing on Monday and pending the Fourth
25 Circuit's disposition of the emergency motion that has been filed

1 there. And the motion there is likely to be dispositive of this
2 TRO.

3 What you have to do over this weekend is you have to be
4 prepared to file early on Monday, reasonably early on Monday,
5 amended papers that make clear the causes of action you allege,
6 the bases for jurisdiction, and why you think you are entitled to
7 whatever relief there is. And all this stuff about how many
8 agreements are there and what the allegations are or the proof is
9 relating to the violations of the parole agreement, all of that
10 will need to be set out.

11 Ms. Pepper, I would suggest that you become fully
12 familiar with this case and be able to tell me Monday afternoon,
13 what was the big rush? What happened? What's going on here?
14 This doesn't seem to me -- this fellow is not a member of al Qaeda
15 or anything of that sort, at least so far as I am aware. But this
16 seems passing strange that they would hustle him out of the
17 country so quickly.

18 Now I know that that's what they tried to do in 1996 and
19 '97 as well, and there was a sinister reason then, and I thought
20 that had passed by now. I don't know what's going on, and you
21 might be able to fill me in on -- maybe it isn't the least bit
22 sinister, and to some extent I'm open to your telling me that it's
23 none of this Court's business. It may well not be.

24 But here it is Friday afternoon. They are going to put
25 him on an airplane to Russia, which is forever. And I have

1 memories -- I don't know whether you have been to Russia or not,
2 Ms. Pepper, but I was in what was then the Soviet Union for a
3 month and a few days in 1969. Returning him now could be forever.

4 I think it will take the folks there a few generations
5 to change that society completely. The notion that he could
6 somehow come back if the Fourth Circuit decided that the ALJ was
7 right and the board was wrong is fantasy. He isn't going
8 anywhere.

9 But I am perfectly open to understanding that the
10 Government has a full right to deport him and to remove him. I
11 think that's probably true, although I want to hear about this
12 parole agreement, why they think it was violated, and maybe there
13 isn't anything sinister; and I will be very interested in that.

14 But one way or the other, Mr. Szymkowicz, I want to
15 dispose of this matter. I anticipate this temporary restraining
16 order to last no more than Monday.

17 MR. SZYMKOWICZ: Yes, sir.

18 THE COURT: I don't see any reason why it should. I
19 would expect the Fourth Circuit not to delay its consideration, or
20 if it does, to enter the stay; and if it enters the stay, then
21 this Court has no more interest or jurisdiction in the matter.

22 MR. SZYMKOWICZ: Thank you, Your Honor.

23 THE COURT: All right. Court stands in recess, and I
24 thank counsel for your cooperation.

25 And I thank you, Ms. Pepper, for advising the Court

1 promptly, as I think you should have, as to what was happening.

2 MS. PEPPER: Yes, sir.

3 THE COURT: I think that was appropriate, and I expect
4 you to do appropriate things, but I also appreciate it.

5 MS. PEPPER: Thank you, Your Honor.

6 THE COURT: As far as I'm concerned, nothing you have
7 done is sinister.

8 MS. PEPPER: Thank you.

9 THE COURT: Court stands in recess.

10 (Whereupon, at 5:22 o'clock p.m., the hearing in the
11 above-captioned matter was concluded, and court stood in recess.)
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